No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JERRY BOHANNON, Petitioner,

v.

STATE OF ALABAMA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE ALABAMA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

In this capital case, petitioner Jerry Bohannon was sentenced to death after a trial judge, and not a unanimous jury, made the findings necessary to impose the death penalty. At the penalty phase of Mr. Bohannon's trial, the jury, which had been instructed that its role was solely advisory, returned a non-unanimous, non-binding recommendation of death. On appeal, the Alabama Supreme Court rejected Mr. Bohannon's claims that his death sentence had been imposed in violation of the Sixth, Eighth, and Fourteenth Amendments, particularly in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016). In this respect, the Alabama courts are in direct conflict with the highest courts of both Delaware and Florida, the only two other states that, prior to *Hurst*, had required a judge to make independently the necessary findings authorizing imposition of a death sentence and relegated the jury's sentencing verdict to a non-binding recommendation.

Given that Alabama law specifies that, before a death sentence may be imposed in a capital case, the sentencer must find both (1) that an aggravating circumstance exists and (2) that the existing aggravating circumstances outweigh any mitigating circumstances, the questions presented are the following:

1. Does the Constitution require – in a state where each aggravating circumstance is critical to the determination of sentence – that every aggravating circumstance on which a death sentence is premised be found by a unanimous jury?

2. Does the Constitution require – in a state where a sentencer is required to find that the aggravating circumstances outweigh the mitigating circumstances to impose death – that this finding be made by a unanimous jury?

3. Does the imposition of a death sentence in the absence of a unanimous jury verdict in support of death – a result that, today, can occur only in Montana and Alabama in their standard sentencing procedures, and in extremely rare circumstances in Indiana and Missouri – violate the Constitution?

4. Does the Constitution prohibit imposition of a death sentence in a case where the jury was instructed that its sentencing determination would be advisory or a recommendation?

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PETITION FOR WRIT OF CERTIORARI

Jerry Bohannon respectfully petitions for a writ of certiorari to review the judgment of the Alabama Supreme Court.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals affirming in part and remanding in part, *Bohannon v. State*, No. CR-13-0498, 2015 WL 6443170 (Ala. Crim. App. Oct. 23, 2015), is attached as Appendix A. The opinion of the Alabama Court of Criminal Appeals on return to remand, *Bohannon v. State*, No. CR-13-0498, 2015 WL 9263842 (Ala. Crim. App. Dec. 18, 2015), is attached as Appendix B. The Alabama Court of Criminal Appeals's order denying Mr. Bohannon's application for rehearing is attached as Appendix C. The opinion of the Alabama Supreme Court, *Ex parte Bohannon*, No. 1150640, 2016 WL 5817692 (Ala. Sept. 30, 2016), is attached as Appendix D. The Alabama Supreme Court's certificate of judgment is attached as Appendix E.

JURISDICTION

The initial judgment of the Alabama Court of Criminal Appeals, affirming in part and remanding in part, was issued on October 23, 2015. *See* Appendix A. That court issued an opinion on return to remand on December 18, 2015, *see* Appendix B, and overruled a timely application for rehearing on March 11, 2016, *see* Appendix C. Mr. Bohannon timely petitioned the Alabama Supreme Court for a writ of certiorari,

and that court affirmed the judgment of the Alabama Court of Criminal Appeals on September 30, 2016. *See* Appendix C. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

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

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

The Eighth Amendment to the United States Constitution provides:

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

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

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

STATEMENT OF THE CASE

This case presents important – and unresolved – questions regarding the scope of a capital defendant's Sixth, Eighth, and Fourteenth Amendment rights to have any death sentence that might be imposed in his case be premised on a jury's verdict rather than a judge's factfinding. Mr. Bohannon was sentenced to death by a trial judge, who independently made the necessary findings that an aggravating circumstance existed and that the aggravating circumstance outweighed the mitigation, after Mr.

Bohannon's jury had returned only a non-unanimous, non-binding recommendation of death. In its opinion below, the Alabama Supreme Court held that Mr. Bohannon was sentenced in compliance with this Court's Sixth Amendment jurisprudence, putting that court in direct conflict with the supreme courts of the only two other states with similar schemes – Delaware and Florida – both of which recently held their own laws unconstitutional under *Hurst v. Florida*, 136 S. Ct. 616 (2016).

A. Alabama's Death Penalty Sentencing Scheme

Under Alabama law, if a criminal defendant is convicted of a capital offense at trial, the proceedings move on to a separate penalty phase, *see* Ala. Code § 13A-5-43(d), where additional evidence may be presented regarding alleged aggravating and mitigating circumstances, *see* Ala. Code §§ 13A-5-45 to -52. Afterward, the trial court is not authorized to impose a sentence of death unless there has been a finding (1) of the existence of a statutory aggravating circumstance and (2) that all of the existing aggravation outweighs all of the existing mitigation. Ala. Code §§ 13A-5-46(e), -47(e); *Ex parte Woodard*, 631 So. 2d 1065, 1071 (Ala. Crim. App. 1993) ("A greater punishment – death – *may* be imposed on a defendant convicted of a capital offense, but *only* if one or more of the aggravating circumstances enumerated in § 13A-5-49 is found to exist *and* that aggravating circumstance(s) outweighs any mitigating circumstance(s) that may exist."). Unless both findings are made in the affirmative, the punishment "shall" be life without parole. *See* Ala. Code § 13A-5-46(e).

Alabama law makes clear, however, that the *trial judge*, not the jury, must make the penalty-phase findings necessary for the imposition of a death sentence. Ala. Code

§§ 13A-5-46, -47. Though the jury is instructed to make non-binding findings on the specified questions, it only reports "an advisory verdict recommending a sentence" of either life without parole or death, Ala. Code § 13A-5-46(e)-(f), which need not be unanimous, Ala. Code § 13A-5-46(f) ("The decision of the jury to recommend a sentence of death must be based on a vote of at least 10 jurors."). By statute, that sentencing recommendation (and, therefore, any of the jury's penalty-phase findings on which it is premised) "is not binding upon the court." Ala. Code § 13A-5-47(e).

B. Legal Background

Until recently, Alabama was one of only three states – along with Florida and Delaware – with this form of "hybrid system[], in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations." *Ring v. Arizona*, 536 U.S. 584, 608 n.6 (2002).[1] Earlier this year, however, this Court struck down Florida's death penalty sentencing scheme as unconstitutional in *Hurst v. Florida*, 136 S. Ct. 616 (2016), because it gave the trial judge the final authority to make the "findings necessary to impose the death penalty." 136 S. Ct. at 621-22; *see also id.* at 619. Under *Ring*, capital defendants have a Sixth Amendment right to "a jury determination of any fact on which the legislature conditions an increase in their

[1]This Court also identified Indiana's scheme as a "hybrid system," but that state has since eliminated its provision allowing for judicial override in capital sentencing proceedings. The relevant statute now specifies that "[f]or a defendant sentenced after June 30, 2002 . . . , if the hearing is by jury, the jury shall recommend to the court whether the death penalty or life imprisonment without parole, or neither, should be imposed. . . . If the jury reaches a sentencing recommendation, the court shall sentence the defendant accordingly." Ind. Code § 35-50-2-9(e).

maximum punishment." 536 U.S. at 589 (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)). Applying that principle to Florida's law in *Hurst*, this Court found that the Sixth Amendment "required Florida to base [the imposition of a] death sentence on a jury's verdict, not a judge's factfinding." 136 S. Ct. at 624.

Given the similarities between Florida's laws and those of Delaware, the *Hurst* decision prompted the Delaware Supreme Court to reevaluate its own death penalty sentencing scheme. In *Rauf v. State*, 145 A.3d 430 (Del. 2016) (per curiam), the Delaware Supreme Court struck down its law, finding that it "violates the Sixth Amendment role of the jury as set forth in *Hurst*." 145 A.3d at 433. Given the structure of its death penalty sentencing scheme, the Delaware Supreme Court held that the Sixth Amendment requires that there be a unanimous jury finding, beyond a reasonable doubt, regarding both the existence of any aggravating circumstance relied on for imposition of a death sentence and that those aggravating circumstances found to exist outweigh the mitigating circumstances in the case. *Id.* at 432-34. Because the Delaware law did not require those findings to be made by a jury, unanimously and beyond a reasonable doubt, the Delaware Supreme Court concluded, it was unconstitutional. *Id.*

Further, after this Court's decision in *Hurst*, that case was remanded to the Florida Supreme Court, which found its own capital sentencing scheme to violate the United States Constitution, the Florida Constitution, and Florida law in *Hurst v. State*, No. SC12-1947, 2016 WL 6036978 (Fla. Oct. 14, 2016) (per curiam) ["*Hurst II*"]. Noting that this Court's decision in *Hurst* "requires that all the critical findings

necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury," the Florida court held that "[i]n capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances." *Hurst II*, 2016 WL 6036978, at *2. Relying on Florida law and the Eighth Amendment, the Florida Supreme Court further held that "in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous." *Id.* at *2.

Moreover, in the time since its decision in *Hurst*, this Court has granted certiorari, vacated the state court's judgment, and remanded the proceedings "for further consideration in light of *Hurst*" in four capital cases out of Alabama: *Johnson v. Alabama*, 136 S. Ct. 1837 (2016) (mem.); *Wimbley v. Alabama*, 136 S. Ct. 2387 (2016) (mem.); *Kirksey v. Alabama*, 136 S. Ct. 2409 (2016) (mem.); *Russell v. Alabama*, No. 15-9918, 2016 WL 3486659 (U.S. Oct. 3, 2016) (mem.).

C. Factual and Procedural Background

Jerry Bohannon was a 48-year-old man with no criminal history when he was arrested on December 11, 2010, in Mobile County, Alabama, on charges that he had killed two people, Anthony Harvey and Jerry DuBoise, during an exchange of gunfire in the parking lot of the Paradise Lounge bar. (C. 68, 70, 72-74.)[2] Mr. Bohannon was

[2]"R." refers to the court reporter's transcript on appeal; "C." refers to the clerk's record on appeal.

later indicted on two separate capital murder charges for intentional murder of two or more persons pursuant to one scheme or course of conduct, pursuant to Alabama Code section 13A-5-40(a)(10). (C. 84-85.)

At trial, the evidence showed that Mr. Bohannon had gotten into an argument with Mr. Harvey and Mr. Duboise in the parking lot of the bar around 7:30 a.m.[3] (R. 1127-28.) Mr. Harvey and Mr. Duboise had spent the night playing pool and using methamphetamine, and all three men were armed. (C. 69-72; R. 1177, 1219.) Mr. Duboise first shoved Mr. Bohannon in the chest; then, as the other two men were walking away, Mr. Bohannon drew his firearm. (C. 72; R. 1128.) The evidence as to who fired the first shot was disputed at trial, but there was no dispute that Mr. Bohannon shot the decedents, nor that Mr. Harvey and Mr. DuBoise also shot at Mr. Bohannon. (C. 72.) Rather, the dispute at trial was about whether Mr. Bohannon was guilty of capital murder in killing the decedents, or, alternatively, had acted in self-defense, or killed the decedents in a sudden heat of passion upon legal provocation, which would mitigate the killings to manslaughter. (R. 1463, 1471, 1480-84, 1491.) The State's argument prevailed, and Mr. Bohannon was convicted of two counts of capital murder on November 6, 2013. (C. 86, 88.)

At the penalty phase, the State incorporated its guilt-phase evidence and offered six victim-impact witnesses. (R. 1565-86.) Though the State's opening statement

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[3]The primary evidence concerning the argument and the ensuing violence came from silent video surveillance footage. (State's Ex. 16.) Mr. Bohannon did not testify. (R. 1517.)

mentioned three aggravating circumstances (R. 1549-50), only one was ultimately submitted to the jury: the killing of two or more persons in one scheme or course of conduct, pursuant to Alabama Code section 13A-5-49(9) (*see* R. 1629-30). The defense presented evidence in support of the statutory mitigating circumstance that Mr. Bohannon had no prior criminal record, per Alabama Code section 13A-5-51(1), as well as non-statutory mitigation that he had worked hard his entire life, provided for his family, and made a positive impact on his community outside of the acts charged in this case. (R. 1590-626, 1647, 1652.)

As permitted by Alabama law, prior to beginning its penalty-phase deliberations, Mr. Bohannon's jury was informed that its sentencing decision would be advisory or a recommendation. (C. 87, 89; R. 270, 1656-57, 1664-66); *see, e.g.*, *Martin v. State*, 548 So. 2d 488, 494 (Ala. Crim. App. 1988) ("[T]he instructions of the trial court accurately inform[ed] [the] jury of the extent of its sentencing authority and that its sentence verdict was 'advisory' and a 'recommendation' . . . ."). On November 7, 2013, the jury returned an eleven-to-one recommendation of death for each count of the indictment and was dismissed. (C. 87, 89; R. 1671.) On January 9, 2014, the trial judge independently considered the evidence, found the existence of one aggravating circumstance, weighed the aggravating and mitigating factors, and sentenced Mr. Bohannon to death. (C. 67-82; R. 1685.)

Mr. Bohannon filed a timely appeal from his conviction and sentence in the Alabama Court of Criminal Appeals. There, he argued that he had been sentenced to death in violation of his Sixth Amendment right to a jury trial, under *Ring v. Arizona*,

and in violation of the Eighth and Fourteenth Amendments. Mr. Bohannon further claimed that his jury's penalty-phase verdict was invalid under this Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The Court of Criminal Appeals remanded Mr. Bohannon's conviction in part on double jeopardy grounds, but otherwise determined that there were no errors in either the guilt/innocence or penalty phase of his trial. *Bohannon v. State*, No. CR-13-0498, 2015 WL 6443170 (Ala. Crim. App. Oct. 23, 2015). After the circuit court vacated one of Mr. Bohannon's convictions and the corresponding death sentence, the Court of Criminal Appeals affirmed the remaining conviction and death sentence on return to remand. *Bohannon v. State*, No. CR-13-0498, 2015 WL 9263842 (Ala. Crim. App. Dec. 18, 2015).

With respect to Mr. Bohannon's claim that he was sentenced in violation of *Ring*, the Court of Criminal Appeals relied on the Alabama Supreme Court's opinion in *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002), to find that there had been no violation of the Sixth Amendment because Mr. Bohannon's jury had found the existence of one aggravating circumstance by virtue of its guilt/innocence-phase verdict. *Bohannon*, 2015 WL 6443170, at *48-49. The court further held that Mr. Bohannon's claim that he had been sentenced in violation of *Caldwell* was meritless because the trial judge had accurately described the jury's role as advisory. *Id.* at *52-53. Mr. Bohannon filed a timely application for rehearing, which was denied.

Mr. Bohannon then petitioned the Alabama Supreme Court for a writ of certiorari to review the decision of the Court of Criminal Appeals, again raising both challenges to his sentence – with the additional grounding of *Hurst v. Florida*, which

this Court had decided in the intervening time. The Alabama Supreme Court granted the writ to consider, among other grounds, "[w]hether Bohannon's death sentence must be vacated in light of *Hurst*," and "[w]hether the circuit court's characterization of the jury's penalty-phase determination as a recommendation and as advisory conflicts with *Hurst*." *See Ex parte Bohannon*, No. 1150640, 2016 WL 5817692, at *1 (Ala. Sept. 30, 2016).

The Alabama Supreme Court affirmed the opinion of the Court of Criminal Appeals, finding that because this Court's "holding in *Hurst* was based on an application, not an expansion, of *Apprendi* and *Ring* . . . , no reason exists to disturb our decision in *Waldrop*." *Bohannon*, 2016 WL 5817692, at *6. The Alabama Supreme Court further held that Mr. Bohannon had not been sentenced to death in violation of *Hurst* because "'[o]nly one aggravating circumstance must exist in order to impose a sentence of death'" and Mr. Bohannon's jury had made that finding by virtue of its guilt/innocence-phase verdict. *Id.* at *3 (quoting *Waldrop*, 859 So. 2d at 1187-90); *see also id.* at *6. With respect to Mr. Bohannon's claim that it violated the Sixth Amendment to require that the necessary weighing finding be made by the trial judge, rather than the jury, the court further affirmed its holding in *Waldrop* that the weighing finding "'is a moral or legal judgment'" rather than a "'factual determination,'" and that therefore it need not be made by a jury. *Id.* at *3-4 (quoting *Waldrop*, 859 So. 2d at 1189); *see also id.* at *6. Finally, the court dismissed Mr. Bohannon's *Caldwell* claim by asserting that, under *Hurst*, *Ring*, and *Apprendi*, juries may play an advisory role once they have made the "find[ing of] the existence of the

aggravating circumstance that establishes the range of punishment to include death." *Id.* at *7. The Alabama Supreme Court did not address Mr. Bohannon's Eighth Amendment arguments. This petition follows.

REASONS FOR GRANTING THE WRIT

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), this Court held that the Sixth Amendment right to an impartial jury requires states "to base [a capital defendant's] death sentence on a jury's verdict, not a judge's factfinding." 136 S. Ct. at 624. In three recent decisions, the highest courts of Alabama, Delaware, and Florida assessed the constitutionality of their respective death penalty sentencing schemes in light of *Hurst*; both the Delaware Supreme Court and the Florida Supreme Court found that it violates the Constitution to allow a criminal defendant to be sentenced to death based on findings made solely by a judge, rather than a jury, while the Alabama Supreme Court, in this case, found that as long as the jury has unanimously found the existence of a single aggravating circumstance, a death sentence may later be imposed based on findings made independently by a judge. These discrepancies must be resolved in order to ensure the constitutional imposition of death sentences in Delaware, Florida, and Alabama, as well as other states across the country. Moreover, the Alabama Supreme Court's opinion in Mr. Bohannon's case was wrong, and as a result his death sentence – imposed in violation of the Sixth, Eighth, and Fourteenth Amendments – should not stand.

I. This Court Should Clarify Whether the Constitution Requires That Every Aggravating Circumstance Used to Justify a Death Sentence Must Be Found to Exist by a Unanimous Jury.

This Court should grant certiorari to resolve the conflict between the state courts regarding whether the Sixth, Eighth, and Fourteenth Amendments require, in a state where each aggravating circumstance is critical to the determination of sentence, that each aggravating circumstance be found to exist by a unanimous jury before a death sentence may be imposed. After this Court issued its decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), both the Delaware Supreme Court, in *Rauf v. State*, 145 A.3d 430 (Del. 2016) (per curiam), and the Florida Supreme Court, in *Hurst v. State*, No. SC12-1947, 2016 WL 6036978 (Fla. Oct. 14, 2016) (per curiam) ["*Hurst II*"], interpreted *Hurst* as requiring that each and every aggravating circumstance found to exist in a capital sentencing proceeding, and relied on for the imposition of a death sentence, must be found beyond a reasonable doubt by a unanimous jury. *See Rauf*, 145 A.3d at 433-34; *Hurst II*, 2016 WL 6036978, at *13. The Alabama Supreme Court, by contrast, found that the sole "finding[] necessary to impose the death penalty," *Hurst*, 136 S. Ct. at 622, in Alabama is the existence of "[o]nly one aggravating circumstance," *Ex parte Bohannon*, No. 1150640, 2016 WL 5817692, at *3 (Ala. Sept. 30, 2016).

In *Rauf*, the Delaware Supreme Court found that the Sixth Amendment prohibits a sentencing judge in a capital proceeding from finding, "independent of the jury," "the existence of 'any aggravating circumstance,' statutory or non-statutory, that has been alleged by the State for weighing in the selection phase of a capital sentencing

proceeding." 145 A.3d at 433. It further held that the Sixth Amendment requires that those findings be made beyond a reasonable doubt by a unanimous jury. *Id.* at 433-34. Moreover, because Delaware's capital sentencing scheme required a judge, and not a unanimous jury, to find the existence of aggravating circumstances, the Delaware Supreme Court found that law unconstitutional. *Id.*

In *Hurst II*, the Florida Supreme Court similarly found that, in light of *Hurst*, the Sixth Amendment compels that all "findings necessary for the jury to essentially convict a defendant of capital murder – thus allowing imposition of the death penalty – are also elements that must be found unanimously by the jury." 2016 WL 6036978, at *10. After conducting "[a] close review of Florida's sentencing statutes" as they existed at the time of Mr. Hurst's sentencing[4] in order "to identify those critical findings that underlie imposition of a death sentence," *id.* at *8, the court concluded:

> [W]e reject the State's argument that *Hurst* only requires that the jury unanimously find the existence of one aggravating factor and nothing more. The Supreme Court in *Hurst* made clear that the jury must find "each fact necessary to impose a sentence of death," 136 S. Ct. at 619, "any fact that expose[s] the defendant to a greater punishment," *id.* at 621, "the facts necessary to sentence a defendant to death," *id.*, "the facts behind" the punishment, *id.*, and "the *critical findings* necessary to impose the death penalty," *id.* at 622 (emphasis added). Florida law has long required findings beyond the existence of a single aggravator before the sentence of death may be recommended or imposed. *See* Fla. Stat. § 921.141(3).

Hurst II, 2016 WL 6036978, at *10 n.17. Accordingly, the Florida Supreme Court held that the Sixth Amendment requires a jury to "unanimously find[] the existence of *any*

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[4]The Florida Legislature revised its death penalty sentencing statute after this Court decided *Hurst*. *See* H.B. 7101, 2016 Leg. (Fla. 2016).

aggravating factor" relied on for the imposition of a death sentence. *Id.* at *10 (emphasis omitted and added).

In its opinion below, by contrast, the Alabama Supreme Court declined to conduct a new analysis of the state's death penalty sentencing scheme in light of *Hurst*. Concluding that the "holding in *Hurst* was based on an application, not an expansion, of *Apprendi*[*v. New Jersey*, 530 U.S. 466 (2000),] and *Ring*[*v. Arizona*, 536 U.S. 584 (2002)]," *Bohannon*, 2016 WL 5817692, at *6, the court dispensed with Mr. Bohannon's *Hurst* arguments with an extended quotation of *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002), the opinion wherein it first found Alabama's law constitutional under *Ring*, *see* 2016 WL 5817692, at *2-4 (quoting *Waldrop*, 859 So. 2d at 1187-90). In *Bohannon*, the Alabama Supreme Court reaffirmed its finding that, under Alabama's death penalty sentencing scheme, "'[o]nly one aggravating circumstance must exist in order to impose a sentence of death,'" *id.* at *3 (quoting 859 So. 2d at 1188), and, as a result, the Sixth Amendment only requires that an Alabama jury determine the existence of a single aggravating circumstance before the death penalty may be imposed, *id.* at *4. The court then found that the jury in Mr. Bohannon's case, through its guilt/innocence-phase verdict

> finding Bohannon guilty of murder made capital because "two or more persons [we]re murdered by the defendant by one act or pursuant to one scheme or course of conduct," *see* Ala. Code § 13A-5-40(a)(10), also found the existence of the aggravating circumstance, provided in Ala. Code § 13A-5-49(9), that "[t]he defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme of course of conduct,"

and therefore had made the only finding necessary to render Mr. Bohannon death-

eligible. *Id.* at *6. Accordingly, it concluded, "Bohannon's Sixth Amendment rights were not violated." *Id.*

The Alabama Supreme Court's divergence on this point cannot be traced to differences between the laws of Alabama, Florida, and Delaware. Indeed, Alabama's law was patterned after the Florida statute that this Court struck down in *Hurst*. *See Harris v. Alabama*, 513 U.S. 504, 508 (1995) ("Alabama's death penalty statute is based on Florida's sentencing scheme . . . ."); *Knotts v. State*, 686 So. 2d 431, 448 (Ala. Crim. App. 1995) ("[W]e find persuasive those cases interpreting the Florida statutes because Alabama's death penalty statute is based on Florida's sentencing scheme."). The resulting similarities between the two laws have been noted by this Court as well as by the courts of Alabama. *See Ring*, 536 U.S. at 608 n.6 (categorizing Florida, Alabama, and Delaware laws as "hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations"); *Waldrop*, 859 So. 2d at 1189-90 (treating Florida's statute as analogous to Alabama's for purposes of Sixth Amendment analysis); *Ex parte Harrell*, 470 So. 2d 1309, 1317 (Ala. 1985) ("Alabama's procedure permitting judicial override is almost identical to the scheme used in Florida.").

In Florida, prior to *Hurst*, a capital jury was required to determine, first, "'[w]hether sufficient aggravating circumstances exist[ed]'" and, second, whether the existing aggravating circumstances outweighed, or equaled in weight, the mitigating circumstances. *Hurst II*, 2016 WL 6036978, at *8-9 (quoting now-superseded Fla. Stat. § 921.141(2)). Similarly, in Delaware, a capital jury was required to answer two

questions at the sentencing phase:

> 1. Whether the evidence show[ed] beyond a reasonable doubt the existence of at least 1 aggravating circumstance as enumerated in subsection (e) of this section; and
>
> 2. Whether, by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bear upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, the aggravating circumstances found to exist outweigh[ed] the mitigating circumstances found to exist.

11 Del. C. § 4209(c)(3)(a); *see also* § 4209(d)(1) ("A sentence of death shall not be imposed unless the jury, if a jury is impaneled, first finds unanimously and beyond a reasonable doubt the existence of at least 1 statutory aggravating circumstance."). Further, in both states, the trial judge was required to make parallel findings, answering both questions in the affirmative, before he could impose a sentence of death. 11 Del. C. § 4209(d)(1); *Hurst II*, 2016 WL 6036978, at *8-9 (quoting now-superseded Fla. Stat. § 921.141(1)-(3)).

Alabama's death penalty sentencing scheme requires essentially identical findings. Here, a trial judge is not authorized to impose the death penalty until he has found one or more aggravating circumstances, and also that those aggravating circumstances outweigh the mitigation. *See* Ala. Code §§ 13A-5-46(e), -47(e); *Ex parte Woodard*, 631 So. 2d 1065, 1071 (Ala. Crim. App. 1993) ("A greater punishment – death – *may* be imposed on a defendant convicted of a capital offense, but *only* if one or more of the aggravating circumstances enumerated in § 13A-5-49 is found to exist *and* that aggravating circumstance(s) outweighs any mitigating circumstance(s) that may

exist."). Because Alabama law specifies that the sentence "shall" be life without parole unless the existing aggravating circumstances are found to outweigh the mitigating circumstances, *see* Ala. Code §§ 13A-5-46(e), -47(e), "the critical findings necessary to impose the death penalty," *Hurst*, 136 S. Ct. at 622, include *all* of the existing aggravating circumstances, each of which must be weighed. *See also Rauf*, 145 A.3d at 432-34 (finding that "any aggravating circumstance, statutory or non-statutory, that has been alleged by the State for weighing" is a "'fact necessary to impose a sentence of death'" that must be found by the jury (quoting *Hurst*, 136 S. Ct. at 619)); *Hurst II*, 2016 WL 6036978, at *10 (emphasizing importance of finding that aggravating circumstances are not only "proven beyond a reasonable doubt" but also are collectively "sufficient to impose death").

Yet, despite addressing nearly identical questions to those considered in both Delaware and Florida, in a nearly identical statutory landscape, the Alabama Supreme Court alone guards its conclusion that the sole finding necessary to impose the death penalty is the existence of "'[o]nly one aggravating circumstance.'" *Bohannon*, No. 1150640, 2016 WL 5817692, at *3 (quoting *Waldrop*, 859 So. 2d at 1188). As a result, it reaffirmed its holding that a jury need not find the existence of any other aggravating circumstance on which a death sentence is premised in Alabama. *Id.* This Court should grant certiorari to clarify whether that holding is consistent with the protections of the Sixth, Eighth, and Fourteenth Amendments.

II. This Court Should Clarify Whether the Constitution Requires That the Finding That Existing Aggravating Circumstances Are Sufficiently Weighty to Justify a Death Sentence Must Be Made by a Unanimous Jury.

This Court should grant certiorari to clarify whether, in states where a defendant is barred from receiving a death sentence unless there has been a finding that aggravating circumstances outweigh mitigating circumstances, the Sixth, Eighth, and Fourteenth Amendments require that the jury make that finding unanimously and beyond a reasonable doubt. Here, in order to sentence Mr. Bohannon to death, the trial judge was required, by statute, to make the finding that the existing aggravating circumstances outweighed the mitigating circumstances. Ala. Code § 13A-5-47(e); *see also* § 13A-5-46(e). On appeal, Mr. Bohannon argued that the weighing finding was one of "the critical findings necessary to impose the death penalty" in his case, *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016), and therefore had to have been made by a jury. *See Ex parte Bohannon*, No. 1150640, 2016 WL 5817692, at *5 (Ala. Sept. 30, 2016). The Alabama Supreme Court again relied on its decision in *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002), however, to dismiss that claim. *Bohannon*, 2016 WL 5817692, at *5-6. "This Court rejected that argument in *Waldrop*," the court noted, "holding that that [sic] the Sixth Amendment 'do[es] not require that a jury weigh the aggravating circumstances and the mitigating circumstances' because, rather than being 'a factual determination,' the weighing process is 'a moral or legal judgment that takes into account a theoretically limitless set of facts.'" *Id.* at *6 (quoting 859 So. 2d at 1189-90).

On this point, the Alabama Supreme Court is again directly in conflict with the highest courts of both Delaware and Florida. In *Rauf v. State*, 145 A.3d 430 (Del. 2016)

(per curiam), the Delaware Supreme Court held that, after *Hurst*, the Sixth Amendment "require[s] a jury, not a sentencing judge, to find that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist because, under 11 Del. C. § 4209, this is the critical finding upon which the sentencing judge 'shall impose a sentence of death.'" 145 A.3d at 434. Moreover, it found that the weighing finding must be made beyond a reasonable doubt by a unanimous jury. *Id.* Because the Delaware statute failed to ensure such a jury finding, the *Rauf*court again found its law unconstitutional. *Id.*

Similarly, in *Hurst v. State*, No. SC12-1947, 2016 WL 6036978 (Fla. Oct. 14, 2016) (per curiam), the Florida Supreme Court held that the weighing finding required by that state's law in fact functioned as one of the "elements" "allowing imposition of the death penalty." 2016 WL 6036978, at *10. That court noted that *Hurst* had correctly observed that "under Florida law, before the sentence of death may be imposed, 'the trial court alone must *find "the facts* . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances."'" *Id.* (quoting *Hurst*, 136 S. Ct. at 622 (quoting Fla. Stat. § 921.141(3))) (emphasis added). Accordingly, the Florida Supreme Court held that "in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge." *Id.*; *see also*

id. at *2, *13.[5]

Again, the split among these courts is not a reflection of difference in their respective death penalty sentencing schemes. As in Delaware and Florida, Alabama's law requires a finding that the existing aggravating circumstances "outweigh the mitigating circumstances;" otherwise, the designated sentence "shall" be life without parole. Ala. Code §§ 13A-5-46(e), -47(e); *see also Ex parte Woodard*, 631 So. 2d 1065, 1071 (Ala. Crim. App. 1993). Yet, while the jury is instructed to conduct its own non-binding weighing process, per Alabama Code Section 13A-5-46(e), the ultimate determination of whether the aggravating circumstances outweigh the mitigating circumstances is subject to the trial judge's independent judgment. Ala. Code § 13A-5-47(b)-(e). In Mr. Bohannon's case, the trial judge independently made this necessary finding that the aggravating circumstances outweighed the mitigating circumstances. 2016 WL 5817692, at *6. The Alabama Supreme Court disregarded this Court's holding that the Sixth Amendment requires that a jury, and not a judge, make the "findings necessary to impose the death penalty," *Hurst*, 136 S. Ct. at 622,

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[5]A range of additional courts, both federal and state, have also held that analogous weighing determinations are factual findings that must be made by a jury in the capital sentencing context. *See McLaughlin v. Steele*, 173 F. Supp. 3d 855, 896 (E.D. Mo. 2016) (finding Sixth Amendment violation where death sentence imposed after "finding of fact" by judge, not jury, regarding "the weighing of mitigating and aggravating circumstances"); *State v. Ring*, 65 P.3d 915, 942-43 (Ariz. 2003) (en banc) (on remand from this Court, finding Sixth Amendment required that jury "find[] mitigating circumstances and balanc[e] them against the aggravator"); *Woldt v. People*, 64 P.3d 256, 265-66 (Colo. 2003) (en banc) (finding Colorado requirement that sentencer decide "whether the mitigating factors outweighed the aggravating factors" was "fact-finding" that rendered defendant eligible for death sentence and must be made by jury).

affirming Mr. Bohannon's sentence by repeating its finding that "'the weighing process is not a factual determination or an element of an offense'" and therefore need not be made by a jury, *Bohannon*, 2016 WL 5817692, at *4 (quoting *Waldrop*, 859 So. 2d at 1189).

Nothing about Delaware's or Florida's laws made their required weighing finding any less of "'a moral or legal judgment that takes into account a theoretically limitless set of facts,'" *Bohannon*, 2016 WL 5817692 at *6 (quoting *Waldrop*, 859 So. 2d at 1189), than Alabama's weighing finding. In its treatment of this subject, the Alabama Supreme Court has consistently failed to acknowledge this Court's repeated observation that the Sixth Amendment significance of a finding depends on its role in the sentencing process, not how courts, or the State, opt to label it. *See Ring v. Arizona*, 536 U.S. 584, 602 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000). In *Ring*, after considering and then dismissing the distinction between "elements" and "sentencing considerations" earlier found credible in *Walton v. Arizona*, 497 U.S. 639 (1990), 536 U.S. at 598, this Court explained: "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." 536 U.S. at 602; *see also id.* ("The dispositive question . . . 'is one not of form, but of effect.'" (quoting *Apprendi*, 530 U.S. at 494)). By that same logic, regardless of whether Alabama's weighing process is deemed "a moral or legal judgment" or an "element of an offense," *Waldrop*, 859 So. 2d at 1189, because it results in a finding that is required for imposition of a death sentence, Ala. Code §§ 13A-5-46, -47, it must be made by a

jury, *Hurst*, 136 S. Ct. at 622; *Ring*, 536 U.S. at 602.

This Court should grant certiorari to determine whether it violates the Sixth, Eighth, and Fourteenth Amendments for a state that requires a specific weighing finding prior to imposition of the death penalty to allow that finding to be made by the trial judge alone, rather than the jury.

III. This Court Should Clarify Whether a Death Sentence May Be Constitutionally Imposed in the Absence of a Unanimous Jury Verdict in Favor of Death.

This Court should also resolve the question of whether the Sixth, Eighth, and Fourteenth Amendments prohibit imposition of a death sentence in a case where the jury has not returned a unanimous verdict in favor of death. Mr. Bohannon was sentenced to death after his jury returned a non-unanimous eleven-to-one recommendation of death. *Ex parte Bohannon*, No. 1150640, 2016 WL 5817692, at *1 (Ala. Sept. 30, 2016); *see also* Ala. Code § 13A-5-46(f) ("The decision of the jury to recommend a sentence of death must be based on a vote of at least 10 jurors."). On appeal, Mr. Bohannon argued that the imposition of a death sentence in his case, after the jury returned a non-unanimous verdict, violated the Sixth and Eighth Amendments. In its decision below, however, the Alabama Supreme Court failed to address that claim, instead finding that the only constitutional prerequisite for a death sentence in Alabama is a jury finding of the existence of a single aggravating circumstance, either on its own at the penalty phase or derivatively through the guilt/innocence phase verdict. *Bohannon*, 2016 WL 5817692, at *5-7 (citing *Ex parte Waldrop*, 859 So. 2d. 1181, 1187-90 (2002)). Because the jury had found an

aggravating circumstance in Mr. Bohannon's case by virtue of its guilt/innocence phase verdict, the court held, no further finding or verdict returned by the jury need be regarded as constitutionally significant. *Id.* at *5-6.

When revisiting its own statute after *Hurst v. Florida*, 136 S. Ct. 616 (2016), the Florida Supreme Court came to a very different conclusion. After finding that the Sixth Amendment, in light of *Hurst*, requires a unanimous jury finding with respect to both the existence of aggravating circumstances and the sufficiency of the weight of those circumstances, the court continued: "We also hold, based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous." *Hurst v. State*, No. SC12-1947, 2016 WL 6036978, at *2 (Fla. Oct. 14, 2016) (per curiam) ["*Hurst II*"]. Relying in part on social science data showing that "'behavior in juries asked to reach a unanimous verdict is more thorough and grave than in majority-rule juries, and that the former were more likely than the latter jurors to agree on the issues underlying their verdict,'" *id.* at *14-15 (quoting Elizabeth F. Loftus & Edith Greene, *Twelve Angry People: The Collective Mind of the Jury*, 84 Colum. L. Rev. 1425, 1428 (1984)), the Florida Supreme Court concluded that "[i]f death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process," *id.* at *15.

The question of jury unanimity in capital cases is currently unresolved in this Court's jurisprudence. A plurality of this Court has found that the Sixth Amendment does not require jury unanimity in a *non-capital* case involving a twelve-person jury. *Apodaca v. Oregon*, 406 U.S. 404, 406 (1972). Yet, this Court has also found that non-unanimity in a six-person jury does violate the Sixth Amendment, *Burch v. Louisiana*, 441 U.S. 130, 137-38 (1979), and that a unanimous verdict is a legitimate requirement for a death case given "the severity of the punishment," *Johnson v. Louisiana*, 406 U.S. 356, 364-65 (1972).

Much of this Court's Eighth Amendment jurisprudence counsels in favor of creating a unanimity requirement for capital cases. This Court has consistently held that "there is a significant constitutional difference between the death penalty and lesser punishments." *Beck v. Alabama*, 447 U.S. 625, 637 (1980). In particular, the Eighth Amendment demands that administration of the death penalty reflect "'the evolving standards of decency that mark the progress of a maturing society.'" *Kennedy v. Louisiana*, 554 U.S. 407, 446 (2008) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)). "[T]his principle requires that use of the death penalty be restrained," this Court has explained, and "must be reserved for the worst of crimes and limited in its instances of application." *Id.* at 446-47. These restraints include "heightened reliability . . . in the determination whether the death penalty is appropriate," *Sumner v. Shuman*, 483 U.S. 66, 72 (1987), and a requirement that the class of people sentenced to death is narrowed to include only the most culpable individuals, *Zant v. Stephens*, 462 U.S. 862, 876-77 (1983). To hold that the death

penalty may be imposed where the jury has returned anything less than a unanimous verdict in favor of death violates these Eighth Amendment principles.

Moreover, when assessing the constitutionality of a particular criminal punishment practice under the Eighth Amendment, this Court has consistently looked to whether state legislative and sentencing trends evince a national consensus against it. *See, e.g., Kennedy*, 554 U.S. at 422-26; *Roper v. Simmons*, 543 U.S. 551, 564-67 (2005); *Atkins v. Virginia*, 536 U.S. 304, 312-17 (2002). Accordingly, it must be noted that Alabama's failure to require a unanimous jury verdict in support of death is highly unusual. Following the recent decisions out of Delaware and Florida, Alabama is one of only two states nation-wide – out of 30 death penalty states and the federal and military justice systems – where the standard sentencing procedure has no requirement that a jury return a unanimous verdict in support of death before that sentence may be imposed. The only other state to permit such a result is Montana; there, in a capital trial, the jury is tasked with unanimously finding the existence of an aggravating circumstance, but the ultimate sentence is imposed by the judge according to his independent judgment. *See* Mont. Code § 46-18-305. Significantly, only two people are under sentence of death in Montana, and both were sentenced over two decades ago – years before this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002). *See State v. Smith*, 931 P.2d 1272, 1276 (Mont. 1996); *State v. Gollehon*, 864 P.2d 249, 254 (Mont. 1993).

Two other states allow imposition of a death sentence without a unanimous jury verdict in a narrow category of cases. Both Missouri and Indiana initially require a

unanimous jury verdict in favor of death or life without parole but, in cases where the jury is deadlocked, the judge proceeds on his own and can impose a death sentence without a unanimous verdict. *See* Ind. Code § 35-50-2-9(e)-(f); Mo. Stat. § 565.030(4). Only three people are currently on death row in Indiana or Missouri as a result of those provisions. *See State v. Shockley*, 410 S.W.3d 179, 185-86 (Mo. 2013) (en banc); *State v. McLaughlin*, 265 S.W.3d 257, 261-62 (Mo. 2008) (en banc);[6] *Holmes v. State*, 671 N.E.2d 841, 845 (Ind. 1996).

Given that the "'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures,'" *Atkins*, 536 U.S. at 312 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) *abrogated on other grounds by Atkins*, 536 U.S. at 321), Alabama's outlier status in this respect is evidence that its unusual practices are contrary to a national consensus. *See also Burch*, 441 U.S. at 138 (in Sixth Amendment context, noting that only two states allowed non-unanimous jury verdicts in six-person jury cases and finding that "this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not"). Through this lens, the fact that today only three other states allow a capital defendant to be sentenced to

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[6]Further, Mr. McLaughlin's death sentence was recently vacated by the United States District Court for the Eastern District of Missouri, in part on the grounds that it was imposed in violation of his Sixth Amendment right to a jury trial because it was based on a finding of fact – specifically, that the aggravating circumstances in the case were not outweighed by the mitigating circumstances – that was made by the trial judge rather than the jury. *McLaughlin v. Steele*, 173 F. Supp. 3d 855, 890, 896-97 (E.D. Mo. 2016).

death without a unanimous jury verdict in favor of death, under any circumstance, and that those states have taken that step only rarely, evinces a clear trend away from this practice. Under this Court's Sixth and Eighth Amendment jurisprudence, this is powerful evidence that Alabama's practices in this respect are indeed outside the line "delimiting . . . between those jury practices that are constitutionally permissible and those that are not." *Burch*, 441 U.S. at 138.

Accordingly, this Court should grant certiorari to determine whether it violates the Sixth, Eighth, and Fourteenth Amendments for a state to allow the imposition of a death sentence in cases, such as Mr. Bohannon's, where the jury did not return a unanimous verdict in favor of death.

IV. This Court Should Determine Whether a Capital Defendant May Be Sentenced to Death in a Case Where the Sentencing Jury Has Been Instructed That Its Verdict Is Advisory.

This Court should further clarify whether it violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence after the sentencing jury has been instructed that its sentencing verdict will be advisory or a recommendation. In this case, Mr. Bohannon's jury was repeatedly informed that its sentencing decision was advisory or a recommendation. *See Ex parte Bohannon*, No. 1150640, 2016 WL 5817692, at *7 (Ala. Sept. 30, 2016). Yet this Court has held 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 v. Mississippi*, 472 U.S. 320, 328-29 (1985). Jury involvement in capital sentencing, this Court noted in *Caldwell*, is

premised on a belief that "'that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision.'" *Id.* at 329-30 (quoting *McGautha v. California*, 402 U.S. 183, 208 (1971)). Where the significance of that responsibility has been undermined, "there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences," *id.* at 330, including a concern that "a sentencing jury [that] is unconvinced that death is the appropriate punishment . . . might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts" through a non-final verdict in favor of death, *id.* at 331-32.

Moreover, even in jurisdictions such as Alabama, where an instruction characterizing a capital jury's sentencing verdict as advisory may be an accurate description of state law, that instruction further violates the defendant's Sixth Amendment right to a jury trial. As this Court noted in *Hurst v. Florida*, 136 S. Ct. 616 (2016), a capital jury's "mere recommendation" as to sentence is insufficient to meet the Sixth Amendment's requirement that a court base the imposition of a "death sentence on a jury's verdict, not a judge's factfinding." 136 S. Ct. at 619, 624. Rather, before a death sentence can be constitutionally imposed, a jury must "find every fact necessary to render [the defendant] eligible for the death penalty." *Id.* at 622; *see also Ring v. Arizona*, 536 U.S. 584, 589 (2002). A jury instructed that its role is advisory cannot fulfill that responsibility. *Hurst*, 136 S. Ct. 619; *Caldwell*, 472 U.S. at 328-29.

In Alabama, capital juries are routinely instructed that their sentencing verdicts are merely advisory, *see, e.g.*, *Martin v. State*, 548 So. 2d 488, 494 (Ala. Crim. App.

1988) ("[T]he instructions of the trial court accurately inform[ed] [the] jury of the extent of its sentencing authority and that its sentence verdict was 'advisory' and a 'recommendation' . . . ."), and Mr. Bohannon's case was no exception, *Bohannon*, 2016 WL 5817692, at *7. In affirming his death sentence, the Alabama Supreme Court declined to address Mr. Bohannon's argument that those instructions are unconstitutional pursuant to the concerns set forth by this Court in *Caldwell*. *Bohannon*, 2016 WL 5817692, at *7. Instead, the *Bohannon* court simply repeated its conclusion that "[n]othing in *Apprendi*[*v. New Jersey*, 530 U.S. 466 (2000),] *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." *Id.*

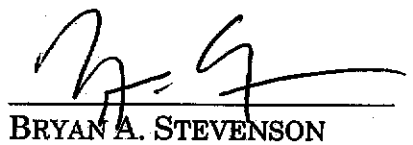
In so ruling, the Alabama Supreme Court failed to address the serious concern that a sentencing jury whose "sense of responsibility for determining the appropriateness of death" has been minimized, *Caldwell*, 472 U.S. at 341, will return a sentencing verdict compromised by "substantial unreliability as well as bias in favor of death sentences," *id.* at 330. Instructions such as those received by Mr. Bohannon's jury precisely lead that jury "to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere," and thereby render it incapable of producing findings or a verdict sufficiently reliable to support a sentence of death. *Caldwell*, 472 U.S. at 328-29; *see also Hurst*, 136 S. Ct. at 622. This Court should grant certiorari to resolve the question of whether it violates the Sixth, Eighth,

and Fourteenth Amendments to sentence a defendant to death after his jury was instructed that its sentencing verdict would be merely advisory or a recommendation.

CONCLUSION

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

Respectfully submitted,



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APPENDIX A

2015 WL 6443170
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NOT YET RELEASED FOR PUBLICATION.

Court of Criminal Appeals of Alabama.

Jerry BOHANNON
v.
STATE of Alabama.

CR–13–0498.

Oct. 23, 2015.

Synopsis

Background: Defendant was convicted in the Circuit Court, Mobile County, Nos. CC–11–2989 and CC–11–2990, of two counts of murder and was sentenced to death. Defendant appealed.

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

[1] Confrontation Clause error in prohibiting cross-examination of witness was harmless beyond a reasonable doubt;

[2] any error in admitting evidence of post-*Miranda* silence was invited error;

[3] evidence that defendant attempted to purchase drugs in hours before shootings was admissible other crimes evidence;

[4] any Confrontation Clause error in admitting toxicology reports was not plain error;

[5] evidence that victims were illegally carrying guns was inadmissible;

[6] probative value of recorded 911 call outweighed danger of unfair prejudice;

[7] defendant was not entitled to jury instruction on heat-of-passion manslaughter; but

[8] multiplicitous indictments violated Double Jeopardy Clause.

Affirmed in part; remanded with directions.

Welch and Kellum, JJ., concurred in the result.

Opinion

BURKE, Judge.

*1 The appellant, Jerry Bohannon, appeals his convictions for two counts of murder defined as capital by § 13A–5–40(a)(10), Ala.Code 1975, because Anthony Harvey and Jerry DuBoise were murdered by one act or pursuant to one scheme or course of conduct. The jury recommended, by a vote of 11 to 1, that Bohannon be sentenced to death. The circuit court followed the jury's recommendation and sentenced Bohannon to death. This appeal, which is automatic in a case involving the death penalty, followed. *See* § 13A–5–53, Ala.Code 1975.

The State's evidence tended to show the following. On December 11, 2010, police were dispatched to the Paradise Lounge nightclub in Mobile in response to an emergency 911 telephone call informing the dispatcher that a shooting was in progress. Officer John Deputy, a former officer with the Prichard Police Department, testified that when he arrived at the lounge he saw Bohannon standing in the parking lot with a weapon in his hand and his arm down at his side. A woman, later identified as Bohannon's wife, was standing in front of him and yelled: "Don't shoot." Officer Deputy testified that two bodies were on the ground in the parking lot and that two guns, a .22 caliber derringer pistol and a .32 caliber semiautomatic pistol, were near the bodies. One victim, he said, had a gunshot wound to his chest and multiple gunshot wounds to his head. The second victim had what appeared to be a single gunshot wound to his chest and what appeared to be "footprints on his face." (R. 1093.) Dr. John Krolikowski, a forensic pathologist, testified that Harvey died from a combination of a single gunshot wound to his chest and blunt-head trauma from multiple injuries and that DuBoise died from three gunshot wounds.

The owner of the lounge, William Graves, testified that there was an extensive security system in the lounge and that 8 cameras recorded the outside of the lounge and its parking lot and 14 or 15 cameras recorded the inside of the lounge. A customer sitting at the bar could watch a live video of the parking lot. Three recordings of the shootings from three different angles were introduced into evidence and played

for the jury. Transcripts of several 911 emergency telephone calls, as the shootings were in progress, were also introduced and played to the jury.

The circuit court in its sentencing order gave the following account of the shootings as observed from the three videotapes:

"At around 7:30 a.m., according to one of the waitresses, a text came in to either DuBoise or Harvey stating that one of their girlfriends needed the car so the girlfriend could go to work. DuBoise packed up his pool cue into a carrying case and began to leave the Lounge. Bohannon's friend, Wade Brown, had gone outside to use his cell phone and came back into the Lounge to get his things because everyone was beginning to leave. DuBoise and Harvey came out into the parking lot in front of the Lounge and Harvey went over to their car and began examining the tire well. Bohannon, dressed in a plaid shirt and cowboy hat, came out into the parking lot and had a conversation with DuBoise. All of this was captured on video without audio. There were a total of three cameras that picked up the altercation.

***2** "After a short conversation between Bohannon and DuBoise, DuBoise moved away from Bohannon and pushed him slightly, while gesturing to him to leave. Harvey left the car over by the side of the Lounge and walked back toward Bohannon and DuBoise and there was some additional conversation. DuBoise and Harvey turned to leave and had walked several feet away when Bohannon reached under his shirt to his back and produced a .357 Ruger revolver pistol. To fire the Ruger pistol the user must manually cock the hammer each time before pulling the trigger. After walking away several steps, both DuBoise and Harvey turned suddenly to look at Bohannon. Apparently, the hammer had been cocked. Both men then began running and Bohannon began running after them. There were no shots fired at this time. Both men ran around the corner of the Lounge to an area that was fenced in by an 8 foot privacy fence. There was a cutout in the building and both men wedged into that cutout. DuBoise and Harvey produced guns. One of the deceased had a .32 automatic and the other a 2–shot .22 caliber derringer. Both of these guns were later found to have been fired and there was at least one misfire of the .22 derringer and one unfired cartridge from the .32 which had been ejected.

"A gunfight ensued with Bohannon firing and hitting the concrete block building and at or near the same time a shot being fired toward Bohannon. Harvey ran from the hiding place and received a single gunshot wound to the upper left chest and there was skull trauma including what appeared to be a shoe print on Harvey's face. DuBoise also ran from the hiding place and received multiple gunshot wounds. One bullet entered the anterior chest striking his liver; one bullet entered in the ribs striking the stomach and the kidney, the entry being from the posterior lower back close to the kidney and the spleen; and another entered on the left side which involved the lung and the heart. Forensics could not determine the sequence of bullets entering, but the video of DuBoise would indicate that the posterior back entry was first and that Bohannon was over DuBoise when the next two bullets entered. The police investigation team collected spent cartridges around the deceased and they were later confirmed to have been fired from a .357 Ruger which caused the deaths of DuBoise and Harvey. Spent cartridges from the other two guns were recovered as well.

"Additional crime scene collections included two small bags of methamphetamine found on DuBoise inside a magnetic key holder such as could be placed in the tire well of a car. In addition to DuBoise having been shot 3 times, according to witnesses, Bohannon then pistol whipped DuBoise with the butt-end of the Ruger, which ultimately broke. DuBoise's teeth were dislodged from his mouth and he suffered a skull fracture....

"After Bohannon had killed DuBoise and Harvey, Bohannon removed his own cowboy hat and put on a baseball cap belonging to one of the victims."

***3** (C.R. 71–74.)

Wade Brown, a friend and employee of Bohannon's, testified that on the evening of December 10, 2010, he, Bohannon, and Bohannon's wife, Donna, went out for the evening. They went to the lounge early in the evening and played pool and left and went to several other bars, drank alcohol, and played pool. In the early morning hours of December 11, 2010, the three returned to the lounge. Brown did not know what happened until after the first shots had been fired, and he did not see Bohannon have any altercation with either Harvey or DuBoise before the first shots were fired.

Robert Hoss, a regular at the lounge, testified that he was at the lounge when the shootings occurred. He said that the victims had been in the lounge playing pool before the shootings and that around 7:00 a.m. he heard a "big bang" and went to the door of the lounge to see what was happening. He testified that he saw DuBoise lying on the ground, that

he telephoned emergency 911, that he saw Harvey running and saw Bohannon shoot Harvey, that Bohannon went to the victims and started beating one of them with his pistol and kicking him, and that Bohannon then searched DuBoise's pockets and took money from his pockets. (R. 1180.) A transcript of Hoss's 911 telephone call was introduced during his testimony and played to the jury. During the emergency call, Hoss screamed: "He's just shooting people like they were nothing."

Melissa Weaver testified that she had worked at the lounge off and on for 10 years, that she was a bartender, that DuBoise and Harvey were regulars at the lounge, that they played pool, that on the morning of the shootings she started work at 12:00 a.m., that Bohannon and two others came in the lounge around 12:00 a.m. left and came back around 2:00 a.m. or 3:00 a.m., that when Bohannon came back he asked her for "an ounce of meth," that she told Bohannon that she could not get him any methamphetamine, that she did not observe any altercation between Bohannon and the victims, that after the first shots were fired she locked the door to the lounge, and that she and the other patrons watched what was happening on the video monitors. Weaver said that sometime before the shootings, Bohannon had called her over and said to her: "[I]f something happens in here tonight, I want you to know that it's not your fault ." (R. 1198.)

Sharon Thompson testified that she had worked at the lounge for six years and was at the Lounge on the morning of the shootings but was not working. Thompson said that she came to the lounge with Harvey and DuBoise and that the three of them shot pool all night. When the shooting started she looked out the door and saw DuBoise on the ground. Someone pulled her back into the lounge. Thompson testified that, before the shootings, Weaver asked her to watch the bar while she went to the restroom. At that time, she said, Bohannon approached her and asked her if she could get him some "meth." (R. 1213.) She told Bohannon no and walked off.

***4** Officer Victor Myles of the Prichard Police Department testified that Bohannon made a spontaneous statement as another officer placed Bohannon in his patrol car after Bohannon had been read his *Miranda*[1] rights. Bohannon said: "It should be self-defense, because he owed me money." (R. 1290.)

Bohannon's defense was that he acted in self-defense. He presented three witnesses who testified that he had a good reputation and that he did not use drugs.

The jury convicted Bohannon of capital murder. A sentencing hearing was held, and the jury recommended, by a vote of 11 to 1, that Bohannon be sentenced to death. The circuit court held a separate sentencing hearing pursuant to § 13A–5–47, Ala.Code 1975, and sentenced Bohannon to death. This appeal followed.

Standard of Review

Because Bohannon has been sentenced to death, this Court must review the circuit court proceedings for "plain error." *See* Rule 45A, Ala. R.App. P. Rule 45A states:

> "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."

(Emphasis added.)

In discussing the scope of the plain-error rule, this Court has stated:

> "The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal. As the United States Supreme Court stated in *United States v. Young*, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), the plain-error doctrine applies only if the error is 'particularly egregious' and if it 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' See *Ex parte Price*, 725 So.2d 1063 (Ala.1998), cert. denied, 526 U.S. 1133, 119 S.Ct. 1809, 143 L.Ed.2d 1012 (1999); *Burgess v. State*, 723 So.2d 742 (Ala.Cr.App.1997), aff'd, 723 So.2d 770 (Ala.1998), cert. denied, 526 U.S. 1052, 119 S.Ct. 1360, 143 L.Ed.2d 521 (1999); *Johnson v. State*, 620 So.2d 679, 701 (Ala.Cr.App.1992), rev'd on other grounds, 620 So.2d 709 (Ala.1993), on remand, 620 So.2d 714 (Ala.Cr.App.), cert. denied, 510 U.S. 905, 114 S.Ct. 285, 126 L.Ed.2d 235 (1993)."

Hall v. State, 820 So.2d 113, 121–22 (Ala.Crim.App.1999). " '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. Young*, 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), quoting *United States v. Frady*, 456 U.S. 152, 163 n. 14, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982).

With these principles in mind, we review the issues raised by Bohannon in his brief to this Court.

Guilt–Phase Issues

I.

Bohannon argues that the circuit court erred in allowing the prospective jurors to be death-qualified because, he says, it created a conviction-prone jury.[2] Specifically, he argues that death-qualifying the jurors violated his constitutional rights to due process, equal protection, a fair trial, and a reliable sentencing determination. Bohannon relies on a concurring opinion in the United State Supreme Court case of *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008), and a dissenting opinion in *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986).

***5** **[1]** **[2]** Bohannon did not object to the circuit court's method of handling the voir dire examination concerning the juror's views on the death penalty; therefore, we review this claim for plain error. *See* Rule 45A, Ala. R.App. P.

> "A jury composed exclusively of jurors who have been death-qualified in accordance with the [*Wainwright v.] Witt*, [469 U.S. 412 (1985),] test is considered to be impartial even though it may be more conviction prone than a non-death qualified jury. *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986). The Constitution does not prohibit the state from death qualifying juries in capital cases. *Id.*"

Haney v. State, 603 So.2d 368, 392 (Ala.Crim.App.1991). Other states that have considered this issue agree. *See State v. Addison*, 165 N.H. 381, 624, 87 A.3d 1, 201 (2013) ("Since [*Lockhart v.] McCree* [, 476 U.S. 162 (1986)] was decided, 'no court that has considered the issue has found death qualification to violate the federal, or respective state constitution,' ... and the defendant has not cited any state or federal case that supports his argument."); *State v. Maestas*, 299 P.3d 892, 986 (Utah 2012) ("[W]e reject [the appellant's] federal and state constitutional challenges to the death qualification process."); *State v. Odenbaugh*, 82 So.3d 215, 48–49 (La.2011) ("[T]his Court has repeatedly rejected the claim that the *Witherspoon [v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968),] qualification process results in a death-prone jury."); *State v. Fry*, 138 N.M. 700, 709, 126 P.3d 516, 525 (2005) ("[W]e believe that the [*Wainwright v.] Witt* [, 469 U.S. 412 (1985),]/*Witherspoon* standard strikes the proper balance and assures a jury composed of individuals capable of applying the law to the facts and following the instructions of the court, without being predisposed in favor of either party."); *State v. Wright*, 160 N.C.App. 251, 584 S.E.2d 109 (2003) (unpublished disposition) ("The North Carolina Supreme Court has consistently held that ' "death-qualifying" a jury is constitutional under both the federal and state Constitutions.' "); *State v. Jones*, 197 Ariz. 290, 302, 4 P.3d 345, 357 (2000)("We have recognized that death-qualification is appropriate in Arizona, even though juries do not sentence....").

The circuit court did not err in allowing the jurors to be death-qualified. Bohannon is due no relief on this claim.

II.

[3] **[4]** **[5]** **[6]** **[7]** **[8]** **[9]** **[10]** **[11]** **[12]** Bohannon next argues that the circuit court erred in failing to remove five prospective jurors for cause because, he says, they were biased.

> "To justify a challenge for cause, there must be a proper statutory ground or ' "some matter which imports absolute bias or favor, and leaves nothing to the discretion of the trial court." ' *Clark v. State*, 621 So.2d 309, 321 (Ala.Cr.App.1992) (quoting *Nettles v. State*, 435 So.2d 146, 149 (Ala.Cr.App.1983)). This Court has held that 'once a juror indicates initially that he or she is biased or prejudiced or has deep-seated impressions' about a case, the juror should be removed for cause. *Knop v. McCain*, 561 So.2d 229, 234 (Ala.1989). The test to be applied in determining whether a juror should be removed for cause is whether the juror can eliminate the influence of his

previous feelings and render a verdict according to the evidence and the law. *Ex parte Taylor,* 666 So.2d 73, 82 (Ala.1995). A juror 'need not be excused merely because [the juror] knows something of the case to be tried or because [the juror] has formed some opinions regarding it.' *Kinder v. State,* 515 So.2d 55, 61 (Ala.Cr.App.1986). Even in cases where a potential juror has expressed some preconceived opinion as to the guilt of the accused, the juror is sufficiently impartial if he or she can set aside that opinion and render a verdict based upon the evidence in the case. *Kinder,* at 60–61. In order to justify disqualification, a juror ' "must have more than a bias, or fixed opinion, as to the guilt or innocence of the accused" '; ' "[s]uch opinion must be so fixed ... that it would bias the verdict a juror would be required to render." ' *Oryang v. State,* 642 So.2d 979, 987 (Ala.Cr.App.1993) (quoting *Siebert v. State,* 562 So.2d 586, 595 (Ala.Cr.App.1989))."

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

" 'The qualification of prospective jurors rests within the sound discretion of the trial judge.' *Morrison v. State,* 601 So.2d 165, 168 (Ala.Crim.App.1992); *Ex parte Cochran,* 500 So.2d 1179, 1183 (Ala.1985). This Court will not disturb the trial court's decision 'unless there is a clear showing of an abuse of discretion.' *Ex parte Rutledge,* 523 So.2d 1118, 1120 (Ala.1988). 'This court must look to the questions propounded to, and the answers given by, the prospective juror to see if this discretion was properly exercised.' *Knop [v. McCain*], 561 So.2d [229] at 232 [(Ala.1989)]. We must consider the entire voir dire examination of the juror "in full context and as a whole." *Ex parte Beam,* 512 So.2d 723, 724 (Ala.1987); *Ex parte Rutledge,* 523 So.2d at 1120."

Ex parte Burgess, 827 So.2d 193, 198 (Ala.2000).

> "Even though a prospective juror may initially admit to a potential for bias, the trial court's denial of a motion to strike that person for cause will not be considered error by an appellate court if, upon further questioning, it is ultimately determined that the person can set aside his or her opinions and try the case fairly and impartially, based on the evidence and the law."

Ex parte Land, 678 So.2d 224, 240 (Ala.1996).

> "A trial judge is in a decidedly better position than an appellate court to assess the credibility of the jurors during voir dire questioning. See *Ford v. State,* 628 So.2d 1068 (Ala.Crim.App.1993). For that reason, we give great deference to a trial judge's ruling on challenges for cause. *Baker v. State,* 906 So.2d 210 (Ala.Crim.App.2001)."

Turner v. State, 924 So.2d 737, 754 (Ala.Crim.App.2002).

We now review the five challenged prospective jurors who Bohannon challenges on appeal.

A.

[13] First, Bohannon argues that prospective juror Z.S.[3] should have been removed for cause because of his connection to one of the victims and his views on the death penalty. Specifically he argues that Z.S. was a friend of DuBoise's sister, Darla Stevens and that Stevens was also his fiancée's boss. Additionally, Z.S. also wrote on his questionnaire: "I believe if someone kills someone, they deserve the [death] penalty." (R. 492.)[4]

Bohannon moved that Z.S. be removed for cause. The circuit court denied that motion. However, Z.S. did not serve on Bohannon's jury. Although Z.S. was originally on Bohannon's jury, at the defense's request and with the agreement of the State, the defense substituted its last strike to remove Z.S. (R. 1029.)

The record shows that prospective juror Z.S. stated during voir dire that his association with one of the victim's sisters would not affect his ability to be impartial. (R. 246.) Z.S. also stated that the fact that Stevens was his fiancée's boss would not affect his ability to be impartial. Z.S. also stated: "I mean, I'm not just going to say death penalty right away. I mean I'm going to give it—I mean I'm going to be reasonable about it." (R. 494.) Z.S. said that he would follow the law and not automatically vote for the death penalty. (R. 498.)

*7 **[14]** A juror is to be removed for cause if he or she has a "fixed opinion as to the guilt or innocence of the defendant

which would bias his [or her] verdict." Section 12–16–150(7), Ala.Code 1975.

> " '[T]he mere fact that a prospective juror is personally acquainted with the victim [or his family] does not automatically disqualify a person from sitting on a criminal jury.' *Brownlee v. State,* 545 So.2d 151, 164 (Ala.Cr.App.1988), affirmed, 545 So.2d 166 (Ala.), cert. denied, 493 U.S. 874, 110 S.Ct. 208, 107 L.Ed.2d 161 (1989)...."

Morrison v. State, 601 So.2d 165, 168 (Ala.Cr.App.1992). *See also Lee v. State,* 898 So.2d 790 (Ala.Crim.App.2001); *Taylor v. State,* 808 So.2d 1148 (Ala.Crim.App.2000); *Ford v. State,* 628 So.2d 1068 (Ala.Crim.App.1993).

Prospective juror Z.S. unequivocally stated, several times, that his connection with one of the victim's families would have no affect on his ability to be impartial. "Unless a prospective juror indicates that his relationship with the victim would prevent him from being fair and impartial, a challenge for cause should be denied." *Ray v. State,* 809 So.2d 875, 885 (Ala.Crim.App.2001).

[15] Also, "[i]t is well settled that ' "jurors who give responses that would support a challenge for cause may be rehabilitated by subsequent questioning by the prosecutor or the Court." *Johnson v. State,* 820 So.2d 842, 855 (Ala.Crim.App.2000).' " *Albarran v. State,* 96 So.3d 131, 162 (Ala.Crim.App.2011). Z.S. explained his remarks about the death penalty and stated that he would not automatically vote for death. The circuit court committed no error in declining to remove Z.S. for cause.

Moreover, the Alabama Supreme Court in *Bethea v. Springhill Memorial Hospital,* 833 So.2d 1 (Ala.2002), adopted the harmless-error analysis in a challenge based on the failure to remove a juror for cause:

> "The application of a 'harmless-error' analysis to a trial court's refusal to strike a juror for cause is not new to this Court; in fact, such an analysis was adopted as early as 1909:
>
> > " 'The appellant was convicted of the crime of murder in the second degree. While it was error to refuse to allow the defendant to challenge the juror C.S. Rhodes for cause, because of his having been on the jury which had tried another person jointly indicted with the defendant, yet it was error without injury, as the record shows that the defendant challenged said juror peremptorily, and that, when the jury was formed the defendant had not exhausted his right to peremptory challenges.'
>
> "*Turner v. State,* 160 Ala. 55, 57, 49 So. 304, 305 (1909). However, in *Swain v. Alabama,* 380 U.S. 202, 219, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), overruled on other grounds, *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the United States Supreme Court stated, in dicta, that '[t]he denial or impairment of the right is reversible error *without a showing of prejudice.*' (Emphasis added.) Some decisions of this Court as well as of the Alabama Court of Criminal Appeals reflect an adoption of this reasoning. See *Dixon v. Hardey,* 591 So.2d 3 (Ala.1991); *Knop v. McCain,* 561 So.2d 229 (Ala.1989); *Ex parte Rutledge,* 523 So.2d 1118 (Ala.1988); *Ex parte Beam,* 512 So.2d 723 (Ala.1987); *Uptain v. State,* 534 So.2d 686, 688 (Ala.Crim.App.1988) (quoting *Swain* and citing *Beam* and *Rutledge*); *Mason v. State,* 536 So.2d 127, 129 (Ala.Crim.App.1988) (quoting *Uptain*).
>
> ***8** "... [T]his Court has returned to the 'harmless-error' analysis articulated in the *Ross v. Oklahoma,* 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988), and [*United States v.] Martinez–Salazar,* 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000), decisions. Because a defendant has no right to a perfect jury or a jury of his or her choice, but rather only to an 'impartial' jury, see Ala. Const.1901 § 6, we find the harmless-error analysis to be the proper method of assuring the recognition of that right.
>
> "In this instance, even if the Betheas could demonstrate that the trial court erred in not granting their request that L.A.C. be removed from the venire for cause (an issue we do not reach), they would need to show that its ruling somehow injured them by leaving them with a less-than-impartial jury. The Betheas do not proffer any evidence indicating that the jury that was eventually impaneled to hear this action was biased or partial. Therefore, the Betheas are not entitled to a new trial on this basis."

833 So.2d at 6–7. *Cf. General Motors Corp. v. Jernigan,* 883 So.2d 646 (Ala.2003) (revisiting *Bethea* and holding that erroneous failure to remove five prospective jurors for cause constituted reversible error).

[16] As stated above, Z.S. did not serve on Bohannon's jury; therefore, any error that did occur was harmless. *See Bethea.* Bohannon is due no relief on this claim.

B.

[17] Next, Bohannon argues that the circuit court erred in failing to sua sponte remove prospective juror J.L. for cause because, he says, J.L. could not be impartial. Specifically, he argues that J.L.'s son had clerked for the Mobile County District Attorney's office and his son's supervisor was one of the two attorneys prosecuting Bohannon's case.

Bohannon did not move that J.L. be removed for cause. Therefore, we review this claim for plain error. *See* Rule 45A, Ala. R.App. P. J.L. did not serve on Bohannon's jury; Bohannon used his ninth peremptory strike to remove J.L.

J.L. stated that the fact that his son had interned for the district attorney's office would not affect his ability to be impartial. Later during voir dire, the following occurred:

"[Prosecutor]: I think you had mentioned Mr. Simpson was your son's supervisor; is that right?

"[J.L.]: Right.

"[Prosecutor]: Anything about the stories that he would come home from or—

"[J.L.]: No. I mean he would tell me they had a good working relationship and he had a lot of—he had a lot of respect for [Simpson] and he would always speak highly of him, so.

"[Prosecutor]: Anything about that that you wouldn't be able to put aside those comments from your son and be fair in this case to both the State and defense because of that?

"[J.L.]: The Judge asked me that earlier. And, at the time, I said, no, it would be fine. Subconsciously, I don't know if it would alter some of the way in which I looked at motions that were being made and rulings that the Judge would make. I'm just not sure.

***9** "[Prosecutor]: But you know that if you were selected to serve as a juror in this case, you would have to base your verdict solely on the law and the evidence, right?

"[J.L.]: Uh-huh, right.

"[Prosecutor]: And would you feel like, oh, I—

"[J.L.]: I would not be swayed simply because you were or [Simpson] was trying the case."

(R. 601–02.) As stated above, no motion to remove J.L. was made after the above discussion.

> "[The appellant] seems to imply that [a juror] should have been removed for cause because one of his cousins was an assistant district attorney. The record does not establish that the cousin to whom [the juror] referred was involved in prosecuting [the appellant]. Therefore, circuit court did not commit error, plain or otherwise, in leaving [the juror] on the venire."

Wimbley v. State, [Ms. CR–11–0076, December 19, 2014] —— So.3d ——, —— (Ala.Crim.App.2014). *See also Commonwealth v. Stamm,* 286 Pa.Super. 409, 416, 429 A.2d 4, 7 (1981) ("[O]ur Supreme Court has held that relatives of county detectives, even if the officer is the active prosecutor in the case, are not to be disqualified on that basis alone.").

Here, the record does not reflect that J.L.'s son had any connection to Bohannon's case. The circuit court did not err in failing to sua sponte remove juror J.L. for cause. *See Morrison v. State,* supra. Bohannon is due no relief on this claim.

C.

[18] Bohannon next argues that the circuit court erred in failing to sua sponte remove prospective juror J.B. for cause because, he says, J.B. was biased in favor of the death penalty.

Because Bohannon did not move that prospective juror J.B. be struck for cause we review this claim for plain error. *See* Rule 45A, Ala. R.App. P. J.B. did not sit on Bohannon's jury; Bohannon used his second peremptory strike to remove J.B.

> " '[A] proper challenge for cause exists only when a prospective juror's opinion or bias is so fixed that he or she could not ignore it and try the case fairly and impartially according to the law and the evidence.' *Ex parte Rutledge,* 523 So.2d 1118, 1120 (Ala.1988). '[A] trial court's ruling on a challenge for cause based on bias is entitled to great weight and will not be disturbed on appeal unless there is a clear showing of an abuse of discretion by the trial court.' *Rutledge,* 523 So.2d at 1120."

Parker v. State, 587 So.2d 1072, 1082 (Ala.Crim.App.1991).

The record shows that J.B. stated on his questionnaire: "I believe [the death penalty] is needed. I don't want murderers to be alive." When questioned during voir dire J.B. said: "If you get away with murder, then there's something wrong." However, J.B. indicated after several minutes of questioning that he would not automatically vote for the death penalty but would follow the law and weigh the circumstances as instructed by the court. (R. 372.)

The circuit court did not err in failing to sua sponte remove J.B. Bohannon is due no relief on this claim.

D.

*10 [19] Bohannon argues that the circuit court erred in failing to sua sponte remove prospective juror A.N. for cause because, he says, A.N ., was a retired sheriff's deputy, and had a connection to the district attorney's office and to State witnesses.

Neither side moved to remove A.N. for cause; therefore, we review this claim for plain error. *See* Rule 45A, Ala. R.App. P. Bohannon used his third peremptory strike to remove this juror.

"There is no statutory ground for eliminating a police officer from a jury. The courts in this state have long held that a prospective juror may not be struck for cause based solely on the fact he is a deputy sheriff or involved in law enforcement." *Humphrey v. State,* 591 So.2d 583, 585 (Ala.Crim.App.1991). *See Sockwell v. State,* 675 So.2d 4 (Ala.Crim.App.1993). Other states agree. *See State v. Hernandez,* 82 So.3d 327, 334 (La.Ct.App.2011) ("[T]he Louisiana Supreme Court has held that a person is not automatically disqualified to serve as a juror simply because of his status as a police officer."); *Commonwealth v. Moreno,* 64 Mass.App.Ct. 1107, 833 N.E.2d 693 (2005) (unpublished opinion) ("A challenge for cause based solely on the prospective juror's profession as a police officer would have failed."); *State v. Cho,* 108 Wash.App. 315, 324, 30 P.3d 496, 501 (2001) ("[T]here is nothing inherent in the experience or status of being a police officer that would support a finding of bias [for a challenge for cause]."); *Sholler v. Commonwealth,* 969 S.W.2d 706, 708 (Ky.1998) ("We have held that police officers are not disqualified to serve as jurors in criminal cases.").

Prospective juror A.N. indicated that he could be impartial and that his prior occupation would not affect his ability to be impartial in Bohannon's case. The circuit court committed no error in failing to sua sponte remove prospective juror A.N. for cause. Bohannon is due no relief on this claim.

E.

[20] Bohannon next argues that the circuit court erred in failing to remove prospective juror L.M. for cause because, he says, L.M. had known the prosecutor's mother and father for 30 years and at one time had been good friends with the prosecutor's parents. (R. 252.)

Before voir dire began the prosecutor moved that prospective juror L.M. be removed for cause because of his relationship with the prosecutor. The circuit court denied that motion. (R. 921.) L.M. did not serve on Bohannon's jury. Bohannon used his fifth peremptory strike to remove L.M.

The record shows that prospective juror L.M. stated that his friendship with the prosecutor's parents had been about 30 years ago and that he had only seem them once or twice in the last 15 years. (R. 921.) He stated that his friendship would have no affect on his ability to be impartial in the case.

> "[The juror's] testimony revealed that he had been friends with one of the prosecutors for a long time. Nevertheless, the mere fact of acquaintance is not sufficient to disqualify a prospective juror if the panel member asserts that the acquaintance will not affect his judgment in the case."

*11 *Carrasquillo v. State,* 742 S.W.2d 104, 111 (Tex.App.1987). *See also* J.H.B., *Relationship to Prosecutor or Witness for Prosecution as Disqualifying Juror in Criminal Case,* 18 A.L.R. 375 (1922).

The circuit court did not err in failing to sua sponte remove prospective juror L.M. for cause. Bohannon is due no relief on this claim.

III.

[21] Bohannon next argues that the circuit court erred in erroneously removing prospective jurors for cause based on their views on the death penalty because, he argues, they indicated that they could be fair and impartial. Specifically, he challenges the removal of three prospective jurors: M.R., A.M., and S.P.

> "In *Taylor v. State*, 666 So.2d 36, 47 (Ala.Cr.App.1994), this Court outlined the guidelines for determining whether a potential juror should be excluded for cause based on his or her feelings concerning capital punishment:
>
> > " ' "The proper standard for determining whether a prospective juror may be excluded for cause because of his or her views on capital punishment is 'whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." ' *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985); *Gray v. Mississippi*, 481 U.S. 648 [at 657–58], 107 S.Ct. 2045, 2051, 95 L.Ed.2d 622 (1987). 'The crucial inquiry is whether the venireman could follow the court's instructions and obey his oath, notwithstanding his views on capital punishment.' *Dutton v. Brown*, 812 F.2d 593, 595 (10th Cir.), cert. denied, *Dutton v. Maynard*, 484 U.S. 836, 108 S.Ct. 116, 98 L.Ed.2d 74 (1987). A juror's bias need not be proved with 'unmistakable clarity' because 'juror bias cannot be reduced to question and answer sessions which obtain results in the manner of a catechism.' *Id.*' "
>
> *Dallas v. State*, 711 So.2d 1101, 1107 (Ala.Crim.App.1997).
>
> "[T]here are occasions where a juror's claim of freedom from prejudice and impartiality cannot be accepted and should not be believed. See *Patton v. Yount*, 467 U.S. 1025, 1031, 104 S.Ct. 2885, 2889, 81 L.Ed.2d 847 (1984). '[T]he simple extraction of an affirmative response from a potential juror does not necessarily absolve that juror of probable prejudice.' [*Wood v.*] *Woodham*, 561 So.2d [224] at 228 [(Ala.1989)]."
>
> *Parker v. State*, 587 So.2d at 1083.

With these legal principles in mind we review the three challenged jurors who Bohannon argues were erroneously removed for cause.

A.

[22] Prospective juror M.R. indicated on his juror questionnaire that he could never return a verdict recommending a death sentence. During voir dire, he said that voting for death would be a problem and that nothing the prosecutor could say or do would make him vote for the death penalty.

The record shows that the voir dire of prospective juror M.R. consisted of 16 pages and that M.R. repeatedly said that he would have problems imposing a death sentence. Although M.R. did say at one point that he could follow the law, it was clear that he had strong feelings against the death penalty. At the conclusion of the voir dire of M.R., the State moved that M.R. be removed for cause based on his views against capital punishment. The prosecutor stated:

> ***12** "Judge, challenge for cause on [M.R.]. Not only is his questionnaire consistent, but before I even finished explaining what the process is, he started making faces and cringing and saying I can't do that, I can't do that."

(R. 997.) The circuit court then observed:

> "Well, the Court observed [M.R.] and the difficult time he had getting through these questions, more so than most of our jurors have. While he seemed like he wanted to try to please everybody, he couldn't answer my questions that he could really consider a situation where the death penalty might be imposed. It seemed like it was just too hard for him to get there.
>
> "....
>
> "The Court is under the definite impression that this juror would have such a difficult time to faithfully and impartially apply the law that he would not be competent to sit on this jury, and the Court will grant the State's challenge for cause."

(R. 998–99.)

Section 12–16–152, Ala.Code 1975, specifically provides:

> "On the trial for any offense which may be punished capitally or by imprisonment in the penitentiary, it

> is a good cause of challenge by the state that the person would refuse to impose the death penalty regardless of the evidence produced or has a fixed opinion against penitentiary punishment or thinks that a conviction should not be had on circumstantial evidence, which cause of challenge may be proved by the oath of the person or by other evidence."

[23] As this Court stated in *Boyle v. State,* 154 So.3d 171 (Ala.Crim.App.2013):

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

154 So.3d at 196–97, quoting *Parr v. Thaler,* 481 Fed.Appx. 872, 876 (5th Cir.2012).

Our review of the record clearly supports the circuit court's decision to grant the State's motion to remove prospective juror M.R. for cause based on his views against the death penalty. Bohannon is due no relief on this claim.

B.

[24] Bohannon next argues that the circuit court erred in granting the State's motion to remove prospective juror A.M. for cause based on his views on the death penalty.

A.M. wrote on his questionnaire that he did not think he could vote for the death penalty. The individual voir dire of A.M. consisted of 20 pages, and at its conclusion the State moved that A.M. be struck for cause. The circuit court stated:

***13** "Well, I think my responsibility is, if I come off with a definite impression that he is going to have trouble following faithfully and impartially applying the law, then I have a problem with it. And I believe—a very sincere gentleman—but I believe that he would have a substantial problem faithfully and impartially applying the law that I would give, based upon my observations of him and how he responded.

"I understand what he said. But I also understand what he wrote. And I understand how he went through this very difficult questioning period. But I'm going to grant the challenge for cause by the State."

(R. 642–43.)

Our review of the voir dire examination of prospective juror A.M. supports the circuit court's removal of A.M. based on his views in opposition to the death penalty. Bohannon is due no relief on this claim.

C.

[25] Bohannon next argues that the circuit court erred in granting the State's challenge for cause of prospective juror S.P. During voir dire, S.P. stated: "I'm not in favor of the death penalty. I think that a person should be punished for their wrong doing instead of dying, you know, for it." (R. 968.) She did indicate that she would do what the judge told her to do but, after that, she indicated that she did not know that if there was a situation where the State could convince her to vote for the death penalty. (R. 976.)

Again, the record clearly supports the circuit court's removal of prospective juror S.P. for cause based on her views against capital punishment. *See Boyle v. State,* supra. Bohannon is due no relief on this claim.

IV.

[26] Bohannon next argues that the State violated *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), by using five of its peremptory strikes to remove black prospective jurors solely on the basis of their race. In *Batson,* the United States Supreme Court held that it was a violation of the Equal Protection Clause to strike a black prospective juror from a black defendant's jury based solely on the juror's race.

[27] [28] Neither party made a *Batson* objection after the jury was struck; therefore, we review this claim for plain error. *See* Rule 45A, Ala. R.App. P.

> " 'To find plain error in the context of a *Batson* ... violation, the record must supply an inference that the prosecutor was "engaged in the practice of purposeful discrimination." ' *Blackmon v. State,* 7 So.3d 397, 425 (Ala.Crim.App.2005) (quoting *Ex parte Watkins,* 509 So.2d 1074, 1076 (Ala.1987)). See also *Saunders v. State,* 10 So.3d 53, 78 (Ala.Crim.App.2007) ('For an appellate court to find plain error in the *Batson* [or *J.E.B.*] context, the court must find that the record raises an inference of purposeful discrimination by the State in the exercise of peremptory challenges.')."

Kelley v. State, [Ms. CR–10–0642, September 5, 2014] —— So.3d ——, —— (Ala.Crim.App.2014).

> " 'A party making a *Batson* or *J.E.B.* challenge bears the burden of proving a prima facie case of discrimination and, in the absence of such proof, the prosecution is not required to state its reasons for its peremptory challenges. *Ex parte Branch,* 526 So.2d 609 (Ala.1987); *Ex parte Bird,* 594 So.2d 676 (Ala.1991). In *Branch,* this Court discussed a number of relevant factors a defendant could submit in attempting to establish a prima facie case of racial discrimination; those factors are likewise applicable in the case of a defendant seeking to establish gender discrimination in the jury selection process. Those factors, stated in a manner applicable to gender discrimination, are as follows: (1) evidence that the jurors in question shared only the characteristic of gender and were in all other respects as heterogenous as the community as a whole; (2) a pattern of strikes against jurors of one gender on the particular venire; (3) the past conduct of the state's attorney in using peremptory challenges to strike members of one gender; (4) the type and manner of the state's questions and statements during voir dire; (5) the type and manner of questions directed to the challenged juror, including a lack of questions; (6) disparate treatment of members of the jury venire who had the same characteristics or who answered a question in the same manner or in a similar manner; and (7) separate examination of members of the venire. Additionally, the court may consider whether the State used all or most of its strikes against members of one gender.' "

*14 *Gobble v. State,* 104 So.3d 920, 948 (Ala.Crim.App.2010), quoting *Ex Parte Trawick,* 698 So.2d 162, 167–68 (Ala.1997).

[29] After prospective jurors were removed for cause, the venire consisted of 32 white jurors, 9 black jurors, and 1 juror who indicated "other" for race. The prosecutor had 15 peremptory strikes and used 5 of those strikes to remove black prospective jurors. The defense struck two black perspective jurors and two served on the jury. " '[S]tatistics and opinion alone do not prove a prima facie case of discrimination.' *Banks v. State,* 919 So.2d 1223, 1230 (Ala.Crim.App.2005) (citing *Johnson v. State,* 823 So.2d 1 (Ala.Crim.App.2001)). See also *Stanley v. State,* 143 So.3d 230, 254 (Ala.Crim.App.2011) ('this Court has held that numbers or percentages alone will not substantiate a case of discrimination in this context')." *Scheuing v. State,* 161 So.3d 245, 260 (Ala.Crim.App.2013).

In the present case, as in *McMillan v. State,* 139 So.3d 184, 202–03 (Ala.Crim.App.2010), "[a]lthough the African–American potential jurors struck by the State may appear to be homogeneous on first blush, the information provided by them during voir dire examination is pertinent here, as well as in evaluating whether they were treated differently from potential white jurors. Moreover, their answers establish that there were race-neutral reasons for striking these potential jurors." The record indicates the following circumstances concerning the potential jurors who were struck by the prosecutor.

> C.C.—C.C. stated that she had a son who had been in prison for three years and she visited him frequently. She also wrote on her questionnaire that she could not vote for the death penalty because it would be on her conscience. She further stated during voir dire that she had a prior charge for assault or harassing communications. (R. 873–88.)
>
> C.J.—C.J. stated that she had a stepson who had been convicted of theft and stated that she was not in favor of the death penalty. (R. 894–903.)
>
> J.R.—J.R. stated that her brother had been convicted of murder and she had visited him frequently before he died in prison. Also, J .R. stated that she had mixed feelings about the death penalty. (R. 670–83.)
>
> M.P.—M.P. stated that he had a "lot of religious beliefs" but was vague about his views on capital punishment. M.P. also stated that he had reservations about serving as a

juror because of his medical condition and the extensive medication that he was required to take. (R. 460–68.)

E.D.—E.D. stated that he had a criminal history and admitted during voir dire that he did not write all of his prior charges on his juror questionnaire. (R. 757–69.)

[30] **[31]** The above reasons, which are readily discernible from the record, were all race-neutral reasons. "The fact that a family member of the prospective juror has been prosecuted for a crime is a valid race-neutral reason." *Yelder v. State,* 596 So.2d 596, 598 (Ala.Crim.App.1991). "[A] veniremember's connection with or involvement in criminal activity may serve as a race-neutral reason for striking that veniremember." *Wilsher v. State,* 611 So.2d 1175, 1183 (Ala.Crim.App.1992). " 'That a veniremember has reservations about the death penalty, though not sufficient for a challenge for cause, may constitute a race-neutral and reasonable explanation for the exercise of a peremptory strike.' " *Fisher v. State,* 587 So.2d 1027, 1036 (Ala.Crim.App.1991).

***15** **[32]** **[33]** **[34]** **[35]** **[36]** Moreover, the record includes extensive questioning of the venire and indicates no lack of meaningful questioning. Bohannon was not limited in his questioning of potential jurors. "The record indicates that the entire panel was questioned at length by both parties and that neither party was deprived from asking any potential juror any submitted question." *Brown v. State,* 982 So.2d 565, 586 (Ala.Crim.App.2006).

> " 'While disparate treatment is strong evidence of discriminatory intent, it is not necessarily dispositive of discriminatory treatment. *Lynch [v. State*], 877 So.2d [1254] at 1274 [(Miss.2004)] (citing *Berry v. State,* 802 So.2d 1033, 1039 (Miss.2001)); see also *Chamberlin v. State,* 55 So.3d 1046, 1050–51 (Miss.2011). 'Where multiple reasons lead to a peremptory strike, the fact that other jurors may have some of the individual characteristics of the challenged juror does not demonstrate that the reasons assigned are pretextual.' *Lynch,* 877 So.2d at 1274 (quoting *Berry [v. State*], 802 So.2d [1033] at 1040 [(Miss.2001)]).'
>
> "*Hughes v. State,* 90 So.3d 613, 626 (Miss.2012).
>
> " ' "As recently noted by the Court of Criminal Appeals, 'disparate treatment' cannot automatically be imputed in every situation where one of the State's bases for striking a venireperson would technically apply to another venireperson whom the State found acceptable. *Cantu v. State,* 842 S.W.2d 667, 689 (Tex.Crim.App.1992). The State's use of its peremptory challenges is not subject to rigid quantification. *Id.* Potential jurors may possess the same objectionable characteristics, yet in varying degrees. *Id.* The fact that jurors remaining on the panel possess one of more of the same characteristics as a juror that was stricken, does not establish disparate treatment."
>
> " '*Barnes v. State,* 855 S.W.2d 173, 174 (Tex.App.1993).
>
> " ' "[W]e must also look to the entire record to determine if, despite a similarity, there are any significant differences between the characteristics and responses of the veniremembers that would, under the facts of this case, justify the prosecutor treating them differently as potential members of the jury. See *Miller–El [v. Dretke*], 545 U.S. [231] at 247, 125 S.Ct. [2317] at 2329 [162 L.Ed.2d 196 (2005)]."
>
> " '*Leadon v. State,* 332 S.W.3d 600, 612 (Tex.App.2010).
>
> " ' "Potential jurors may possess the same objectionable characteristics, but in varying degrees. Additionally, prospective jurors may share a negative feature, but that feature may be outweighed by characteristics that are favorable from the State's perspective. Such distinctions may not another."
>
> " '*Johnson v. State,* 959 S.W.2d 284, 292 (Tex.App.1997). "This Court has recognized that for disparate treatment to exist, the persons being compared must be 'otherwise similarly situated.' " *Sharp v. State,* 151 So.3d 308, 342 (Ala.Crim.App.2013) (on rehearing).
>
> ***16** " ' "The prosecutor's failure to strike similarly situated jurors is not pretextual ... 'where there are relevant differences between the struck jurors and the comparator jurors.' *United States v. Novaton,* 271 F.3d 968, 1004 (11th Cir.2001). The prosecutor's explanation 'does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices.' *Rice v. Collins,* 546 U.S. 333, 338, 126 S.Ct. 969, 973–74, 163 L.Ed.2d 824 (2006) (quotation marks and citation omitted)."

" '*Parker v. Allen*, 565 F.3d 1258, 1271 (11th Cir.2009).'

"*Wiggins v. State*, [Ms. CR–08–1165, May 2, 2014] —— So.3d ——, —— (Ala.Crim.App.2014)."

Luong v. State, [Ms. CR–08–1219, April 17, 2015] —— So.3d ——, —— (Ala.Crim.App.2015).

Although Bohannon contends that there is a long history of racial discrimination by the Mobile County District Attorney's Office in striking juries, the most recent case cited by Bohannon in his brief in making this claim is a 1999 case.[5] Despite Bohannon's contention that the district attorney's office has a long history of striking jurors based on race, "this was not reflected in, or indicated by, the record. See *Sharifi v. State*, 993 So.2d 907, 928 (Ala.Crim.App.2008) (no inference from the record of discriminatory use of peremptory challenges by the prosecutor despite Sharifi's argument that Madison County has a long history of violating *Batson* and that the number of strikes used by the State indicated prejudice)." *Dotch v. State*, 67 So.3d 936, 982 (Ala.Crim.App.2010). *See also McMillan v. State*, 139 So.3d at 205.

Therefore, the record fails to raise an inference of purposeful discrimination in the selection of Bohannon's jury. Accordingly, we find no plain error in regard to Bohannon's *Batson* claim, and Bohannon is due no relief. *See Kelley v. State*, supra.

V.

[37] Bohannon next argues that the circuit court deprived him of his constitutional right to thoroughly cross-examine a State's witness, Melissa Weaver, regarding her pending criminal charges.

The record shows that Weaver testified that she was working on the day of the murders and that at around 2:00 a.m. that morning Bohannon asked her if he could buy an ounce of "meth." (R. 1193.) When she replied that she could not get any methamphetamine, Bohannon asked her where he could get some. At another point that morning, Weaver testified that "[Bohannon] called me from around my side of the bar to where he was sitting and he said, if something happens in here tonight, I want you to know that it's not your fault ." (R. 1198.) After direct examination and before Bohannon cross-examined Weaver, the following occurred:

"[Defense counsel]: Judge, this lady had three distribution cases. Arrested in 2012. She got into drug court.

"Now, drug court has a policy from the very beginning, agreed to by the District Attorney—the former one and the one now—they don't let anybody in drug court for distribution or manufacturing.

***17** "She got in drug court in 2012. A year after this. And my inference is they let her in drug court—well, it can be argued they let her into drug court in order to testify on behalf of the State.

"[Prosecutor]: I have caselaw on that. That is not a permissible form of cross-examination. There's been absolutely—first of all, I will say there was no agreement with her whatsoever. And to suggest one, when she is not a—it's not a situation—she is not in a situation such as testifying against a codefendant where there will be an exchange. Statements she made in this case were prior to 2012. And that case is still in drug court, to my understanding, and it's not a conviction. It is a deferred prosecution. And it's completely irrelevant to her testimony today.

"The Court: Couldn't it show bias?

"[Prosecutor]: And there is caselaw, if the Court will permit me, in the very last case that I tried. Only if there is some showing that—of the connection. And I would offer that.

"And because there is no—and if the Court permits me to provide the caselaw. But I was excluded in the last case I tried. It's been excluded in other cases. And to do it, is to suggest something that is absolutely not true. And there is no proof of that. And I challenge anybody to—and had I done anything like that, I would certainly have to give that over to them, especially a capital murder case.

"[Defense counsel]: I didn't say you did.

"[Prosecutor]: It's a suggestion to be argued to the jury. And I have no way to refute that other than to stand up to say it would be unethical of me to do that and not turn it over.

"The Court: Let's forget about the particulars. But if the defense has a right to cross-examine as to bias or prejudice, or regardless of what she's doing, I'm just talking about her —because the question's come up. She brought out that he had asked for drugs and asked her.

"[Defense counsel]: Right.

"The Court: And the best I can tell from her answer, she didn't say—she just said, I didn't know him.

"[Prosecutor]: Correct.

"[Defense counsel]: There was three instances of and she pled guilty but was not sentenced. So that prevents it from being a conviction. But she had three distribution cases in 2012. I don't know whether she was arrested there. And I think all three of them are inside the Paradise [Lounge].

"The Court: Before or after this?

"[Defense counsel]: 2012.

"[Prosecutor]: After.

"The Court: This was after?

"....

"The Court: You can cross-examine her up to that point, but I'm not going to allow you to go into what happened, that she now has potential criminal problems after this is not connected with this. I mean if it had happened before and you can show that she was—."

(R. 1199–1203.)

Section 12–21–137, Ala.Code 1975, provides, in part: "The right of cross-examination, thorough and sifting, belongs to every party as to the witnesses called against him." Rule 611(b), Ala. R. Evid., provides: "The right to cross-examine a witness extends to any matter relevant to any issue and to matters affecting the credibility of the witness...."

***18** **[38]** As this Court stated in *Grimsley v. State,* 632 So.2d 547 (Ala.Crim.App.1993):

> " 'Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing, the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight in his testimony.' 3A J. Wigmore, *Evidence* § 940, p. 775 (Chadbourn rev.1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. *Greene v. McElroy,* 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959).
>
> " 'In the instant case, defense counsel sought to show the existence of possible bias and prejudice of Green, causing him to make a faulty initial identification of petitioner, which in turn could have affected his later in-court identification of petitioner.
>
> " 'We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided "a crucial link in the proof ... of petitioner's act." *Douglas v. Alabama,* 380 U.S. [415, 419, 85 S.Ct. 1074, 1077, 13 L.Ed.2d 934 (1965)]. The accuracy and truthfulness of Green's testimony were key elements in the State's case against petitioner. The claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer, ... as well as of Green's possible concern that he might be a suspect in the investigation.'

"*Davis v. Alaska,* 415 U.S. 308, 316–18, 94 S.Ct. 1105, 1110–11, 39 L.Ed.2d 347 (1974) (emphasis added) (footnotes omitted).

***19** "Here, the 'probation' evidence was offered to show the witness's possible bias, and it 'raised the possibility that it gave [the witness] an incentive to cooperate with the prosecutor.' *Commonwealth v. Cox,* 837 S.W.2d 898, 901 (Ky.1992).

> " '[W]henever a prosecution witness may be biased in favor of the prosecution because of outstanding criminal charges or because of any non-final disposition against him within the same jurisdiction, that possible bias, in fairness, must be made known to the jury.... [T]he witness may hope for favorable treatment from the prosecutor if the witness presently testifies in a way that is helpful to the prosecution. And if that possibility exists, the jury should know about it.' "

"*Commonwealth v. Ocasio,* 394 Pa.Super. 100, 574 A.2d 1165, 1167 (1990), quoting *Commonwealth v. Evans,* 511 Pa. 214, 512 A.2d 626, 631–32 (1986). See also *State v. Bennett,* 550 So.2d 201, 204–05 (La.App.1989) ('[w]e have no doubt in this case that the maximum sentence the witness could have received and the revocation of probation were particular facts which tended to show the bias or interest of this witness'), cert. denied, 554 So.2d 1236 (La.1990)."

632 So.2d at 552–53.

[39] [40] [41] [42] The circuit court erred in not allowing defense counsel to cross-examine Weaver about any pending charges against her—irrespective of when those charges occurred or whether she had been convicted of those charges. However, our analysis does not end there. "Violations of the confrontation clause of the Sixth Amendment are subject to harmless error analysis." *Huff v. State,* 639 So.2d 539, 542 (Ala.Crim.App.1993). *See also Delaware v. Van Arsdall,* 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). As the United States Supreme Court stated:

> " '[W]e hold that the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman [v. California,* 386 U.S. 18, 87 S.Ct. 824 (1967)], harmless-error analysis. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. Those factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case."

475 U.S. at 684, 106 S.Ct. 1431.

As this Court has recognized:

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

***20** *James v. State,* 723 So.2d 776, 782 (Ala.Crim.App.1998). "[T]he focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial." *Delaware v. Van Arsdall,* 475 U.S. at 680, 106 S.Ct. 1431.

Here, another witness, Sharon Thompson, testified that Bohannon asked in the hours before the shootings if he could buy drugs from her. That aspect of Weaver's testimony was cumulative to Thompson's testimony. Only Weaver testified that Bohannon made the following statement: "[I]f something happens in here tonight, I want you to know that it's not your fault." However, this statement did not directly implicate Bohannon in the murders. Indeed, the shootings were captured on three video cameras and played to the jury. These videos clearly show Bohannon's culpability in the shootings. Defense counsel also vigorously cross-examined Weaver. Weaver admitted that she had used and

sold methamphetamines and that she had used those drugs with the two victims on multiple occasions. One main aspect of Weaver's testimony was corroborated by another State witness. Last, the State's evidence against Bohannon was overwhelming. Based on the record in this case, we hold that the circuit court's ruling prohibiting Bohannon from cross-examining Weaver concerning any pending charges was harmless beyond a reasonable doubt. *See James*, supra. Bohannon is due no relief on this claim.

VI.

[43] Bohannon next argues that the circuit court erred in admitting testimony regarding his post-*Miranda* assertion of his right to remain silent in violation of *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

Here, the following occurred during Officer Victor Myles's testimony:

"[Prosecutor]: And at any point did you attempt to question [Bohannon]?

"[Officer Myles]: Yes, I did. When I arrived back to the station after leaving the scene, Mr. Bohannon was already at our station. And I approached him and I advised him of his *Miranda* rights. And I questioned—I was in the process of questioning him, at which time he told me he did not want to give me a statement.

"....

"[Prosecutor]: Okay. And I think you already alluded to the fact that, after you advised him of his rights, did you ask him if he wished to make a statement?

"[Officer Myles]: I did, and he answered no.

"[Prosecutor]: At that point in time, did you attempt to ask him any questions?

"[Officer Myles]: No, I did not.

"[Prosecutor]: All right. Now, what were you doing after he refused to make a statement as far as where he went next and that kind of thing?

"[Officer Myles]: After he refused to make a statement, I go ahead and I go ahead, you know, had the other officer place handcuffs on him. At which time, I explained to him that he was being charged with two counts of murder and that he would be transported to Mobile Metro jail."

(R. 1286–90.) Officer Myles then testified that, as another officer was placing Bohannon in the patrol car, Bohannon said: "[H]e owed me money. It should be self-defense, because he owed me money." (R. 1290.)

***21** The record shows that the following discussion occurred before Officer Myles testified:

"[Prosecutor]: Judge, the next witness is going to be Victor Myles. And he's going to testify as to the arrest of the defendant and a spontaneous statement that was made by the defendant. The spontaneous statement was made after [Bohannon] had been advised of his *Miranda* rights and invoked his rights.

"And, typically, I would not comment on that or would not ask that, except for, in this case, there was a spontaneous statement that followed it. So I think it's relevant for the purposes of voluntariness of the subsequent spontaneous statement. I don't plan to argue that or anything of that nature. But, typically, I wouldn't even ask the question. But the spontaneous statement followed the invocation. So I will be happy to proceed as the Court desires. I can just ask about a spontaneous statement or I can go through the *Miranda* predicate and then ask about it, so.

"[Defense counsel]: Judge, I really don't care one way or the other. What I do care about, you know, there's no use in fighting a losing battle. I just—however she wants to handle it. As far as we're concerned, if she wants to put him up there and say did he tell you—did he say this to you, that's fine with me.

"The Court: Lay your predicate that you did *Miranda* and the rules, and after that, there was a spontaneous statement."

(R. 1276–77.)

[44] Bohannon did not object to Officer Myles's testimony and, in fact, said that he did not care what method was used to provide the predicate for the admission of Bohannon's spontaneous statement. Thus, Bohannon invited any error in the prosecutor questioning Officer Myles about his post-arrest silence. "The doctrine of invited error applies to death-penalty cases and operates to waive any error unless the error rises to the level of plain error." *See Snyder v. State*, 893 So.2d 488, 518 (Ala.Crim.App.2003).

[45] It is true that

> "[t]he receipt into evidence of testimony concerning an accused's post-*Miranda* exercise of the constitutional right to remain silent is itself a violation of the accused's constitutional right to remain silent. *Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); *Houston v. State,* 354 So.2d 825 (Ala.Cr.App.1977), cert. denied, 354 So.2d 829 (Ala.1978)."

Harris v. State, 611 So.2d 1159, 1160–61 (Ala.Crim.App.1992).

Bohannon did not remain totally silent but, instead, made a spontaneous statement. Some courts have found under similar circumstances that *Doyle* did not apply: *United States v. Garcia,* 496 Fed.Appx. 749, 750 (2012) (not selected for publication in the *Federal Reporter*) ("Garcia's spontaneous and volunteered post-arrest statements were admissible because he did not remain silent after being arrested."); *State v. Alas,* 622 So.2d 836, 837 (La.Ct.App.1993) ("The defendant did make a spontaneous statement. Since [the appellant] made a statement after being read his *Miranda* warning *Doyle* does not apply."); *United States v. Turner,* 551 F.2d 780 (8th Cir.1977) (holding that *Doyle* did not apply because defendant did respond that he had no knowledge of the incident). *See also* John W. Auchincloss, II, *Protecting* Doyle *Rights After Anderson v. Charles: The Problem of Partial Silence,* 69 Va. L.Rev. 155 (1983). Thus, we question whether *Doyle* applies, given the facts presented in this case.

***22** Regardless of the application of *Doyle* to the facts in this case, the United States Supreme Court in *Brecht v. Abrahamson,* 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), held that a *Doyle* violation is subject to a harmless-error analysis under *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). This Court has applied the harmless-error analysis to a *Doyle* violation in the following death-penalty cases: *Kelley v. State,* [Ms. CR–10–0642, September 5, 2014] —— So.3d —— (Ala.Crim.App.2014); *Shaw v. State,* [Ms. CR–10–1502, July 18, 2014] —— So.3d —— (Ala.Crim.App.2014); *Wilson v. State,* 777 So.2d 856 (Ala.Crim.App.1999); *Arthur v. State,* 575 So.2d 1165 (Ala.Crim.App.1990).

[46] "The determination of whether a *Doyle* violation is harmless should be made on a case-by-case basis under the specific facts of each case." *Qualls v. State,* 927 So.2d 852, 856 (Ala.Crim.App.2005). *See also Kelley v. State,* [Ms. CR–10–0642, September 5, 2014] —— So.3d —— (Ala.Crim.App.2014); *Shaw v. State,* [Ms. CR–10–1502, July 18, 2014] —— So.3d —— (Ala.Crim.App.2014).

Based on the evidence in this case, we can unequivocally say that if any *Doyle* violation did occur, the error was harmless beyond a reasonable doubt. Bohannon is due no relief on this claim.

VII.

[47] Bohannon next argues that the circuit court erred in allowing the admission of evidence that he tried to purchase methamphetamine in the hours before the shootings. Specifically, he argues that this evidence was irrelevant to the crimes for which he was charged, that it constituted improper prior-bad-act evidence, that the State failed to give him notice pursuant to Rule 404(b), Ala. R. Evid., of its intent to introduce the evidence, and that no limiting instruction was given to the jury on the use of that evidence. The record shows that two state witnesses, Melissa Weaver and Sharon Thompson, testified that Bohannon asked them several hours before the shootings, if they would sell him drugs. Bohannon made no objection to the introduction of this evidence either when Weaver testified or when Thompson testified; therefore, we review this claim for plain error. *See* Rule 45A, Ala. R.App. P.

Rule 404(b), Ala. R. Evid, provides:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause

> shown, of the general nature of any such evidence it intends to introduce at trial."

The Alabama Supreme Court in *Ex parte Jackson,* 33 So.3d 1279 (Ala.2009), stated:

> " 'The well-established exceptions to the exclusionary rule include: (1) relevancy to prove identity; (2) relevancy to prove res gestae; (3) relevancy to prove scienter; (4) relevancy to prove intent; (5) relevancy to show motive; (6) relevancy to prove system; (7) relevancy to prove malice; (8) relevancy to rebut special defenses; and (9) relevancy in various particular crimes. *Willis v. State,* 449 So.2d 1258, 1260 (Ala.Crim.App.1984); *Scott v. State,* 353 So.2d 36 (Ala.Crim.App.1977). However, the fact that evidence of a prior bad act may fit into one of these exceptions will not alone justify its admission. " 'Judicial inquiry does not end with a determination that the evidence of another crime is relevant and probative of a necessary element of the charged offense. It does not suffice simply to see if the evidence is capable of being fitted within an exception to the rule. Rather, a balancing test must be applied. The evidence of another similar crime must not only be relevant, it must also be reasonably necessary to the government's case, and it must be plain, clear, and conclusive, before its probative value will be held to outweigh its potential prejudicial effects.' " *Averette v. State,* 469 So.2d 1371, 1374 (Ala.Crim.App.1985), quoting *United States v. Turquitt,* [557 F.2d 464] at 468–69 [(5th Cir.1977)].' "

***23** 33 So.3d at 1285.

In regard to the res gestae exception, this Court has stated:

> "As Professor Charles Gamble explained:
>
> " 'Evidence of the accused's commission of another crime or act is admissible if such other incident is inseparably connected with the now-charged crime. Such collateral misconduct has historically been admitted as falling within the res gestae of the crime for which the accused is being prosecuted. Most modern courts avoid use of the term "res gestae" because of the difficulty in measuring its boundaries. The better descriptive expression is perhaps found in the requirement that the collateral act be contemporaneous with the charged crime. This rule is often expressed in terms of the other crime and the now-charged crime being parts of one continuous transaction or one continuous criminal occurrence. This is believed to be the ground of admission intended when the courts speak in terms of admitting other acts to show the "complete story" of the charged crime. The collateral acts must be viewed as an integral and natural part of the circumstances surrounding the commission of the charged crime.
>
> " 'Two theories have been adopted for justifying the admission of collateral misconduct under the present principle. Some courts hold that such contemporaneous acts are part of the charged crime and, therefore, do not constitute "other crimes, wrongs, or acts" as is generally excluded under Rule 404(b). Other courts hold that Rule 404(b) is applicable to these collateral acts but that they are offered for a permissible purpose under that rule—i.e., that such acts are merely offered, rather than to prove bad character and conformity therewith, to show all the circumstances surrounding the charged crime.'
>
> "C. Gamble, *McElroy's Alabama Evidence* § 69.01(3)(5th ed.1996) (footnotes omitted).
>
> " '[One such] "special circumstance" where evidence of other crimes may be relevant and admissible is where such evidence was part of the chain or sequence of events which became part of the history of the case and formed part of the natural development of the facts. *Commonwealth v. Murphy,* 346 Pa.Super. 438, 499 A.2d 1080, 1082 (1985), quoting *Commonwealth v. Williams,* 307 Pa. 134, 148, 160 A. 602, 607 (1932). This special circumstance, sometimes referred to as the "res gestae" exception to the general proscription against evidence of other crimes, is also known as the complete story rationale, i.e., evidence of other criminal acts is admissible "to complete the story of the crime on trial by proving its immediate context of happenings near in time and place." '
>
> "*Commonwealth v. Lark,* 518 Pa. 290, 303, 543 A.2d 491, 497 (1988). Evidence of a defendant's criminal actions during the course of a crime spree is admissible. See *Phinizee v. State,* 983 So.2d 322, 330 (Miss.App.2007) ('Evidence of prior bad acts is admissible to "[t]ell the complete story so as not to confuse the jury." '); *Commonwealth v. Robinson,* 581 Pa. 154, 216, 864 A.2d 460, 497 (2004) ('The initial assault on Sam–Cali took place approximately two weeks before the Fortney homicide and Sam–Cali's testimony provided the jury with

a "complete story" of Appellant's criminal spree from the Burghardt homicide in August of 1992 to Appellant's capture in July of 1993.'); *St. Clair v. Commonwealth,* 140 S.W.3d 510, 535 (Ky.2004) ('Here, the trial court properly permitted the Commonwealth to introduce evidence of Appellant's prior crimes and bad acts that were part of a continuous course of conduct in the form of a "crime spree" that began with Appellant's escape from an Oklahoma jail and ended with his flight from Trooper Bennett.'); *People v. Sholl,* 453 Mich. 730, 556 N.W.2d 851 (1996) (' "Evidence of other acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime." '); *State v. Charo,* 156 Ariz. 561, 565, 754 P.2d 288, 292 (1988) (' "The 'complete story' exception to the rule excluding evidence of prior bad acts holds that evidence of other criminal acts is admissible when so connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime." '); *State v. Long,* 195 Or. 81, 112, 244 P.2d 1033, 1047 (1952) ('It is fundamental that the state is entitled to the benefit of any evidence which is relevant to the issue, even though it concerns the commission of the collateral crimes. If evidence of a collateral crime tends to prove the commission of the crime charged in the indictment, the general rule of exclusion has no application.'); *State v. Schoen,* 34 Or.App. 105, 109, 578 P.2d 420, 422 (1978) ('The evidence, therefore, was relevant to complete the story of the crime charged.... The state is not required to "sanitize" its evidence by deleting background information to the point that the evidence actually presented seems improbable or incredible.')."

***24** *Doster v. State,* 72 So.3d 50, 87–89 (Ala.Crim.App.2010).

Here, evidence that Bohannon asked Weaver and Thompson to sell him methamphetamine was part of the res gestae of the double homicide. Both waitresses testified that they told Bohannon they could not sell him drugs. Minutes before the shootings one of the victims walked to a car and reached inside one of the tire wells. At the time of his death, DuBoise was in possession of a magnetic key holder that contained "two very small zip bags with a semi-white clear substance in it." (R. 1237.) Officer Charles Bailey testified that this substance appeared to be methamphetamine. Also, the video shows Bohannon searching DuBoise pockets after the shootings. It is reasonable to conclude that drugs had some role in the shootings. Thus, evidence indicating that Bohannon attempted to buy drugs in the hours immediately before the shootings was part of the sequence of events leading to the murders and was admissible to establish the complete story surrounding the murders. *See Revis v. State,* 101 So.3d 247, 278 (Ala.Crim.App.2011)("[T]he reference during the interview to Revis's drug usage was made to determine Revis's connection to the victim and as a possible motive for the offense. Thus, it was evidence of part of the res gestae of the offense as Revis was accused of murdering Stidham during a robbery in which he stole pills from Stidham, and the evidence indicates that acquisition of the pills was the reason for the offense. The statements concerning Revis's drug usage were therefore introduced as an exception to the exclusionary rule.").

[48] Also, no notice was required here because the evidence was admissible as part of the res gestae.

"While the prosecution must 'provide the defendant with notice and a hearing before trial if it intends to offer such evidence' of other crimes, no such notice is required when the 'other crimes' evidence is part of the res gestae. See [*State v.] Falkins,* 12–1654, p. 20, 146 So.3d [838] at 851 [(La.Ct.App.2014)] ('Evidence admissible under the res gestae exception is not subject to any advance notice requirements by the State.')."

State v. Rapp, 161 So.3d 103, 111 (La.Ct.App.2015).[6] See *United States v. Dougherty,* 321 Fed.Appx. 762, 766 (10th Cir.2009) (not selected for publication in the *Federal Reporter*) ("The district court concluded that the presence of the ammunition in [the defendant's] luggage had evidentiary value and was 'inextricably intertwined with the facts and circumstances of this case, the res gestae.' Thus, it was intrinsic to the charged crime and not subject to the notice requirement of Rule 404(b)."); *Goldsby v. State,* 273 Ga.App. 523, 528, 615 S.E.2d 592, 598 (2005) ("[T]he evidence was admitted as part of the res gestae, and thus does not require such notice."); *People v. Young,* 987 P.2d 889, 893 (Colo.App.1999) ("Res gestae evidence need not meet the procedural requirements of evidence introduced pursuant to CRE 404(b)."); *People v. Fox,* 178 Misc.2d 1018, 1026, 683 N.Y.S.2d 805, 811 (1998)("[T]he law is well settled that res gestae statement, i.e., declarations accompanying and elucidating the criminal transaction, are not subject to the notice requirement."); *United States v. Metz,* 34 M.J. 349, 351 (C.M.A.1992) ("[P]roviding a notice requirement does not apply to what is commonly referred to as res gestae or intrinsic evidence.").

***25** Moreover, no limiting instruction was required in this case for the reasons set out by the Alabama Supreme Court in *Johnson v. State,* 120 So.3d 1119 (Ala.2006):

> "It is contradictory and inconsistent to allow, on the one hand, evidence of Johnson's prior bigamy conviction and prior bad acts as substantive evidence of the offense with which she was charged, yet, on the other hand, to require a limiting instruction instructing the jury that it cannot consider the evidence as substantive evidence that Johnson committed the charged offense. Other jurisdictions that have considered this issue have concluded that a limiting instruction is not required when evidence of other crimes or prior bad acts is properly admitted as part of the res gestae of the crime with which the defendant is charged. See *People v. Coney,* 98 P.3d 930 (Colo.Ct.App.2004) (holding that evidence of other offenses or acts that are part and parcel of the charged offense is admissible as res gestae and may be admitted without a limiting instruction); *State v. Long,* 173 N.J. 138, 171, 801 A.2d 221, 242 (2002) (evidence of the defendant's actions 'served to paint a complete picture of the relevant criminal transaction' and therefore was admissible, and limiting instruction was unnecessary because the evidence was admitted under the res gestae exception); and *Camacho v. State,* 864 S.W.2d 524, 535 (Tex.Crim.App.1993) (holding the evidence of the extraneous offenses showed the context in which the criminal act occurred, i.e., the res gestae, and was therefore admissible and not subject to the requirement of a limiting instruction)."

120 So.3d at 1129–30. *See also Boyle v. State,* 154 So.3d 171 (Ala.Crim.App.2013); *Revis v. State,* 101 So.3d 247 (Ala.Crim.App.2011).

For the reasons stated above, the circuit court did not err in allowing evidence indicating that in the hours immediately before the murders, Bohannon tried to purchase methamphetamine from two waitresses at the Lounge. Bohannon is due no relief on this claim.

VIII.

[49] Bohannon next argues that the circuit court erred in allowing the security videotape footage of the shootings to be admitted into evidence. Specifically, he argues that the videotape was not admissible because, he says, there was no testimony from an expert who was familiar with the surveillance system installed at the lounge. (Bohannon's brief at p. 58.)

Here, William Graves, the owner of the Paradise Lounge at the time of the shootings, testified that in 2010 he installed an elaborate surveillance system in and outside the lounge. His sister, Diane Perry Meyer, managed the property. Graves testified:

> "[Graves]: In the lounge—in the back side of the lounge, we have an office area back there. And that office area stayed locked where no one could get there but me or my sister. And I had Southern Alarms put security cameras in. It was PC based. And you had to be in the office to do anything with it. It had about 8 cameras on the outside of the building and 14 or 15 cameras on the inside of the building.
>
> ***26** "And, inside, there was also a TV out in the bar area that showed several of the outside cameras, that it would rotate from one to the other so if people were sitting there, they could mostly see their cars and things like that outside.
>
> "[Prosecutor]: And was there any other monitor attached to that system?
>
> "[Graves]: There was a monitor in the office. So you either had to be in the office or watching the outside ones from out there. But the only way to go back and look at anything backwards or do anything with the computer, you had to be in the office where it was locked up.
>
> "[Prosecutor]: Okay. And who had access to that office?
>
> "[Graves]: Ma'am?
>
> "[Prosecutor]: Who had access to that office?
>
> "[Graves]: Me and my sister.
>
> "[Prosecutor]: Anybody else?
>
> "[Graves]: No.
>
> "[Prosecutor]: Okay. Was it locked with just a regular key?
>
> "[Graves]: Regular doorknob key.
>
> "[Prosecutor]: All right. And what about security on the actual [personal computer] that you mentioned; was there security there?

"[Graves]: Yes. You did have an administrator code on it. I'm the only one that had the administrator code. And so if you wanted to change anything or record anything, like that, you had to put it in administrative mode.

"....

"[Prosecutor]: Okay. Was there a date time stamp on the security footage system?

"[Graves]: Yeah"

(R. 1107–09.)

[50] **[51]** When the videotape was first offered into evidence defense counsel specifically stated: "We have no objection to it." (R. 1115). Thus, we consider this issue only for plain error. *See* Rule 45A, Ala. R.App. P.

"The proper foundation required for admission into evidence of a sound recording or other medium by which a scene or event is recorded (e.g., a photograph, motion picture, videotape, etc.) depends upon the particular circumstances. If there is *no* qualified and competent witness who can testify that the sound recording or other medium accurately and reliably represents what he or she sensed at the time in question, then the 'silent witness' foundation must be laid. Under the 'silent witness' theory, a witness must explain how the process or mechanism that created the item works and how the process or mechanism ensures reliability. When the 'silent witness' theory is used, the party seeking to have the sound recording or other medium admitted into evidence must meet the seven-prong *Voudrie [v. State,* 387 So.2d 248 (Ala.Crim.App.1980)] test. Rewritten to have more general application, the *Voudrie* standard requires:

"(1) a showing that the device or process or mechanism that produced the item being offered as evidence was capable of recording what a witness would have seen or heard had a witness been present at the scene or event recorded,

"(2) a showing that the operator of the device or process or mechanism was competent,

"(3) establishment of the authenticity and correctness of the resulting recording, photograph, videotape, etc.,

***27** "(4) a showing that no changes, additions, or deletions have been made,

"(5) a showing of the manner in which the recording, photograph, videotape, etc., was preserved,

"(6) identification of the speakers, or persons pictured, and

"(7) for criminal cases only, a showing that any statement made in the recor ding, tape, etc., was voluntarily made without any kind of coercion or improper inducement."

Ex parte Fuller, 620 So.2d 675, 678 (Ala.1993).

Surveillance footage is admissible under the silent-witness theory, and Alabama has not required the testimony of an expert in order for that footage to be admitted under that theory. As this Court stated in *Spradley v. State,* 128 So.3d 774 (Ala.Crim.App.2011):

"In *Pressley v. State,* 770 So.2d 115 (Ala.Crim.App.1999), this Court applied the requirements necessary for introducing a video under the silent-witness theory:

" '[The police officer] then identified the exhibit as the videotape he had removed from the surveillance VCR at the pawnshop, testified that it was kept in his sole custody, except for a day when it was released to the FBI, and testified that it was in the same condition at trial, and that there had been no changes on the videotape, as when he first viewed the videotape. It was after this testimony that the trial court admitted the surveillance videotape into evidence.

" 'By calling a witness with expertise in surveillance camera systems, the State properly established that the pawnshop's surveillance system was in proper working order and capable of recording accurately what was happening in the area of the pawnshop it was focused on. [The police officer's] testimony indicated that the videotape recording was correct and authentic. Therefore, the State properly satisfied the elements of the *Voudrie [v. State,* 387 So.2d 248 (Ala.Crim.App.1980)] test as articulated by the Alabama Supreme Court in *Ex parte Rieber,* [663 So.2d 999 (Ala.1995)].'

"770 So.2d at 132–33. See also *Washington v. State,* 406 Md. 642, 653, 961 A.2d 1110, 1116 (2008) ('Courts have admitted surveillance tapes and photographs made by surveillance equipment that operates automatically when

"a witness testifies to the type of equipment or camera used, its general reliability, the quality of the recorded product, the process by which it was focused, or the general reliability of the entire system." '); *Logue v. State*, 529 So.2d 1064, 1068 (Ala.Crim.App.1988) ('The purpose of laying a proper foundation for the admission of a tape recording is to show that the [depiction on the tape] was accurately recorded and preserved.')"

128 So.3d at 782.

In this case, Graves testified that when police arrived at the lounge they asked him for camera footage of the parking lot where the shootings occurred, that he took an officer to the camera room where they watched three different recordings of the shootings, that he telephoned the individual who had serviced the system and asked him to come to the lounge, and that, when the technician arrived, the technician copied the three different videos of the shootings. (R. 1114.) Graves testified that all of this was done in his presence.

***28** "Here, defendant does not challenge the chain of custody of the copy of the surveillance video footage. Instead, defendant suggests that the authentication of the surveillance video footage was deficient in a manner similar to the deficiencies identified by this Court in *State v. Mason*, 144 N.C.App. 20, 550 S.E.2d 10 (2001). In *Mason*, although the store's employee and general manager testified at trial that the surveillance system 'was in working order' at the time that their store was robbed, 'neither one knew anything about the maintenance or operation of the camera system'; one testified that she 'could not even operate her home VCR,' and the other 'admitted that he did not know "how the doggone thing works," ' and none of the State's witnesses testified that there was 'any routine maintenance or testing of the ... security system.' *Mason*, 144 N.C.App. at 26, 550 S.E.2d at 15. In the present case, defendant directs us to Mr. McDonald's similar response to a question about how one of the surveillance cameras 'work[s],' where Mr. McDonald answered, 'Exactly—I mean it's on all the time. I don't know anything about how this works.' However, defendant neglects to mention Mr. McDonald's response immediately following this statement to an almost identical question about how the camera 'operate[s],' where Mr. McDonald answered: 'It's a live streaming recording device that sends the imagine [sic] back to a server that records.' Moreover, Mr. McDonald testified that he viewed the surveillance video as the technician made a copy of the footage immediately following the incident, and further testified that the footage presented in court was the same as that which he viewed when the copy was being made from the surveillance system's server a few days after the theft. See, e.g., *State v. Mewborn*, 131 N.C.App. 495, 499, 507 S.E.2d 906, 909 (1998) ('At trial, during voir dire ..., Lieutenant Boyd stated that the images on the tape had not been altered and were in the same condition as when she had first viewed them on the day of the robbery. Because Lieutenant Boyd viewed the tape on both the day of the robbery and at trial and testified that it was in the same condition and had not been edited, there is little or no doubt as to the videotape's authenticity.'). Taken together, we are not persuaded that the trial court abused its discretion by admitting the surveillance video footage in the present case."

State v. Cook, 218 N.C.App. 245, 252–53, 721 S.E.2d 741, 747 (2012). *See State v. Powers*, 148 S.W.3d 830, 832 (Mo.Ct.App.2004). *See also* Hon. James G. Carr And Patricia L. Bellia, 2 Law of Electronic Surveillance § 7.59 (2009).

Graves's testimony was sufficient to satisfy the silent-witness theory for admission of the videotapes of the shootings. The circuit court did not err in allowing the footage to be admitted and played to the jury. Bohannon is due no relief on this claim.

IX.

Bohannon next argues that the circuit court erred in allowing the admission into evidence of the toxicology reports on the blood analysis of the two victims.

***29** At the time that the two toxicology reports were offered into evidence, defense counsel said that he had no objection. (R. 1352.) Accordingly, we review this claim for plain error. *See* Rule 45A, Ala. R.App. P.

Dr. Curt Harper, chief of the toxicology department with the Alabama Department of Forensic Sciences, testified that blood from the bodies of the two victims was drawn during the autopsies and submitted to his department for analysis. He testified that the chain of custody for the evidence filed by the department is electronic, that the samples are all assigned specific case numbers, that when a sample is transferred within the department, the bar code is scanned, and that he was in possession of the electronic chain of custody for the blood samples from the two victims. (R. 1351.) Harper further testified that a multitude of scientists worked on the two blood

samples and that Rebecca Boswell reported the results. (R. 1353.) Dr. Harper testified that DuBoise had high levels of methamphetamine and amphetamine in his blood, that the concentration was evidence of drug abuse, and that Harvey had methamphetamine and marijuana in his blood and that his levels were an indication of abuse of those substances.

Relying on *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), *Melendez–Diaz v. Massachusetts,* 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), and *Bullcoming v. New Mexico,* —— U.S. ——, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011), Bohannon argues that the reports were out-of-court statements that were testimonial in nature and that his right to confront his accusers was violated when the scientist who performed the blood tests failed to testify at trial.

[52] **[53]** **[54]** In this case, defense counsel made the following argument in his opening statement in the guilt phase of Bohannon's trial:

> "And then Jerry DuBoise comes out and they—there's some conversation. And DuBoise turns around and pushes Bohannon. And then they start to walk off again and he pushes him again.
>
> "Now, it's kind of odd conduct on the part of DuBoise. But then you realize that he had 1500 nanograms of methamphetamine in his system per milliliter of blood. That is extraordinarily high. It makes somebody aggressive. It makes them not really care. They've just—it's an upper. Methamphetamine is.
>
> "....
>
> "These guys have—the two guys that got killed had illegal guns. They had methamphetamine—both of them had methamphetamine in their system, and both of them were regulars at this night spot."

(R. 1075.)[7] Thus, any possible error was invited by defense counsel's argument.

> " 'Under the doctrine of invited error, a defendant cannot by his own voluntary conduct invite error and then seek to profit thereby.' *Phillips v. State,* 527 So.2d 154, 156 (Ala.1988). 'The doctrine of invited error applies to death-penalty cases and operates to waive any error unless the error rises to the level of plain error.' *Snyder v. State,* 893 So.2d 488, 518 (Ala.Crim.App.2003)."

***30** *Robitaille v. State,* 971 So.2d 43, 59 (Ala.Crim.App.2005). The toxicology results corroborated a great portion of Bohannon's defense. Thus, their admission did not adversely affect Bohannon's substantial rights. Indeed, this testimony was helpful to Bohannon's defense. Accordingly, Bohannon can show no error that "adversely affected his substantial rights." Rule 45A, Ala. R.App. P. Bohannon can show no plain error in regard to this claim.

Moreover, confrontation violations are subject to a harmless-error analysis. *See Bullcoming v. New Mexico,* —— U.S. at —— n. 11, 131 S.Ct. at 2719, n.11 (2011). *See also State v. VanDyke,* 361 Wis.2d 738, 863 N.W.2d 626 (Wis.Ct.App.2015); *Staples v. Commonwealth,* 454 S.W.3d 803 (Ky.2014); *Littlejohn v. Trammell,* 704 F.3d 817 (10th Cir.2013). Melissa Weaver testified that on numerous occasions she had used methamphetamine with Harvey and DuBoise. (R. 1204.) Sharon Thompson also testified that she had frequently used methamphetamine with the two victims. (R. 1218.) If any error did occur in the admission of the toxicology reports, it was also harmless beyond a reasonable doubt. *See Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Bohannon is due no relief on this claim.

X.

[55] Bohannon next argues that the circuit court erred in excluding evidence that the two victims were each carrying a gun at the time of the shootings although they had no permits to carry concealed weapons. Specifically, he argues that this evidence was relevant to the issue of whether Bohannon acted in self-defense. He asserts that Alabama follows a liberal view of relevancy, which, he says, was satisfied in this case.

The record shows that the State moved in limine that the circuit court exclude any evidence indicating that the two victims were carrying weapons illegally. (R. 1078.) The circuit court took the matter under advisement. (R. 1081.) Bohannon was allowed to present evidence that he had a permit to carry his weapon, and evidence was introduced that the victims were armed. The circuit court did not allow evidence indicating that the two victims had no permits to carry their weapons.

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence." Rule 401, Ala. R. Evid.

In allowing a defendant to present evidence of prior bad acts committed by a victim, this Court has stated:

> " 'Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> " '....
>
> " '(2) Character of Victim.
>
> " '(A) In Criminal Cases. (i) Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same....'

"Rule 404(a), Ala. R. Evid. The Advisory Committee's Notes with regard to this Rule provide, in pertinent part:

> ***31** " 'Generally, the evidence of a victim's character allowed by this subsubsection must be in the form of testimony regarding reputation or testimony stating an opinion, in accordance with Rule 405(a). See *Government of the Virgin Islands v. Carino,* 631 F.2d 226 (3d Cir.1980); *United States v. Kills Ree,* 691 F.2d 412 (8th Cir.1982); E. Cleary, *McCormick on Evidence* § 193 (3d ed.1984). Compare *Higginbotham v. State,* 262 Ala. 236, 78 So.2d 637 (1955) (holding that the accused in a homicide case may not prove the victim's bad character via specific prior acts of misconduct); C. Gamble, *McElroy's Alabama Evidence* § 26.01(1) (4th ed.1991). Such proof would come through the testimony of a character witness for the defense who relates either the victim's general reputation for a pertinent trait or the witness's own opinion of the victim's character for the pertinent trait.

Peraita v. State, 897 So.2d 1161, 1186 (Ala.Crim.App.2003).

According to Rule 404(a), Ala. R. Evid., Bohannon was prohibited from presenting evidence of specific bad acts committed by the two victims. Evidence indicating that the victims did not have licenses to carry concealed weapons was not admissible under Rule 404(a), Ala. R. Evid. The circuit court did not err in excluding this evidence. Bohannon is due no relief on this claim.

XI.

[56] Bohannon next argues that the circuit court erred in allowing the State to introduce improper victim-impact evidence in the guilt phase of Bohannon's trial.

Specifically, the record shows that Sandra Harvey, Anthony Harvey's wife, testified that she called him "Andy" and that he was 45 years of age when he was killed. She identified a photograph of him as he appeared several years before the shootings. Also, Jerry DuBoise, Sr., Jerry DuBoise's father, testified that DuBoise was 24 years old when he was killed, that his friends called him "Little Jerry," and that when he learned that his son had died he went to the bar and got into "trouble." Last, Melissa Weaver testified that the two victims were her friends and that she loved them. Bohannon made no objection to any of the now challenged testimony; therefore, we review this claim for plain error. *See* Rule 45A, Ala. R.App. P.

> "It is presumed that jurors do not leave their common sense at the courthouse door. It would elevate form over substance for us to hold, based on the record before us, that [the defendant] did not receive a fair trial simply because the jurors were told what they probably had already suspected—that [the victim] was not a 'human island,' but a unique individual whose murder had inevitably had a profound impact on her children, spouse, parents, friends, or dependents (paraphrasing a portion of Justice Souter's opinion concurring in the judgment in *Payne v. Tennessee,* 501 U.S. 808, 838, 111 S.Ct. 2597, 2615, 115 L.Ed.2d 720 (1991))."

***32** *Ex parte Rieber,* 663 So.2d 999, 1005–06 (Ala.1995).

Subsequently, the Alabama Supreme Court in *Ex parte Crymes,* 630 So.2d 125 (Ala.1993), found that the admission of improper victim-impact evidence in the guilt phase of a capital-murder trial may be harmless.

> "In determining whether the admission of improper testimony is reversible error, this Court has stated that the reviewing court must determine the 'improper admission

> of the evidence ... might have adversely affected the defendant's right to a fair trial,' and before the reviewing court can affirm a judgment based upon the 'harmless error' rule, that court must find conclusively that the trial court's error did not affect the outcome of the trial or otherwise prejudice a substantial right of the defendant."

630 So.2d at 126.

This Court has repeatedly refused to find reversible error in the admission of limited victim-impact evidence in the guilt phase of a capital-murder trial. *See Russell v. State,* [Ms. CR–10–1910, May 29, 2015] —— So.3d ——, —— (Ala.Crim.App.2015) (the prosecutor made the following statements in the guilt phase: "Eleven year old Katherine Helen Gillespie, a beautiful, bright, precious little girl with a future full of promise, loved by everyone, young and old alike."); *Shanklin v. State,* [Ms. CR–11–1441, December 19, 2014] —— So.3d —— (Ala.Crim.App.2014) (allowing victim's wife's testifimony about how she and the victim met and about their lives together); *Lane v. State,* 169 So.3d 1076 (Ala.Crim.App.2013) (allowing victim's wife's testifimony concerning victim's son's feelings when he learned that his father had been killed); *McCray v. State,* 88 So.3d 1 (Ala.Crim.App.2010) (allowing victim's mother's testifimony that victim had two children and gave the children's names and ages); and *Wilson v. State,* 142 So.3d 732 (Ala.Crim.App.2010) (allowing testimony that victim had cancer and that his wife had died).

We likewise find no reversible error in the admission of the above-cited victim-impact evidence in the guilt phase of Bohannon's trial. Bohannon is due no relief on this claim.

XII.

[57] Bohannon next argues that the circuit court erred in allowing the audio of the emergency 911 telephone calls to be admitted into evidence. Specifically, he asserts that these 911 calls were more prejudicial than probative and served only to inflame the jurors because the individual who called 911 was screaming hysterically and also testified at trial to what he observed.

The record shows that Robert Hoss testified that he was at the lounge when the shootings occurred and that he made a 911 call to report the shootings. During his testimony, the audio recordings of his calls, identified as State's exhibits 13 and 100, were admitted into evidence. A certificate of authenticity was also admitted. Those exhibits were admitted without objection from defense counsel. (R. 1181.) Accordingly, we review this claim for plain error. *See* Rule 45A, Ala. R.App. P.

***33 [58]** "[Emergency] 911 telephone calls can be relevant to corroborate witnesses' testimony and to illustrate what actually took place." *Lewis v. State,* 970 P.2d 1158, 1172 (Okla.Crim.App.1998). "The court ... properly exercised its discretion in admitting a tape of a 911 call made during this incident, in which screams are heard. The tape was relevant to corroborate some of the testimony, and it was not so inflammatory that its prejudicial effect exceeded its probative value." *People v. Harris,* 952 N.Y.S.2d 552, 554, 99 A.D.3d 608, 608–09 (2012). *See also* Stuart D. Murray, *Admissibility of Tape Recording or Transcript of "911" Emergency Telephone Call,* 3 A.L.R.5th 784 (1992).

> "Appellant further alleges that the trial court erred in admitting into evidence the 911 tape made of Mr. Butler's call for help during the robbery of the 61st and Union store. In the approximately forty-five (45) second tape, Mr. Butler is heard calling for help immediately after being shot the first time by Appellant. The phone lines remained open as the Appellant re-entered the store and continued his assault on Mr. Butler. While the screams emanating from Mr. Butler as Appellant re-entered the store are admittedly disturbing, this does not render the tape inadmissible. The probative value of the tape; specifically, its corroboration of Mr. Butler's testimony, and its illustration of what actually took place during the commission of the offense, far outweighed any prejudice to the Appellant."

Pickens v. State, 850 P.2d 328, 335 (Okla.Crim.App.1993).

The 911 telephone call was correctly admitted into evidence because its probative value outweighed any prejudice to Bohannon. Bohannon is due no relief on this claim.

XIII.

[59] **[60]** **[61]** **[62]** **[63]** Bohannon next argues that numerous instances of prosecutorial misconduct denied him a fair trial and require that his conviction and sentence be reversed.

> " 'In judging a prosecutor's closing argument, the standard is whether the argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ' *Bankhead* [*v. State*], 585 So.2d [97,] 107 [(Ala.Crim.App.1989),] quoting *Darden v. Wainwright,* 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986) (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). 'A prosecutor's statement must be viewed in the context of all of the evidence presented and in the context of the complete closing arguments to the jury.' *Roberts v. State,* 735 So.2d 1244, 1253 (Ala.Crim.App.1997), aff'd, 735 So.2d 1270 (Ala.), cert. denied, 538[528] U.S. 939, 120 S.Ct. 346, 145 L.Ed.2d 271 (1999). Moreover, 'statements of counsel in argument to the jury must be viewed as delivered in the heat of debate; such statements are usually valued by the jury at their true worth and are not expected to become factors in the formation of the verdict.' *Bankhead,* 585 So.2d at 106. 'Questions of the propriety of argument of counsel are largely within the trial court's discretion, *McCullough v. State,* 357 So.2d 397, 399 (Ala.Crim.App.1978), and that court is given broad discretion in determining what is permissible argument.' *Bankhead,* 585 So.2d at 105. We will not reverse the judgment of the trial court unless there has been an abuse of that discretion. *Id.*"

***34** *Ferguson v. State,* 814 So.2d 925, 945–46 (Ala.Crim.App.2000). "A prosecutor may argue every legitimate inference from the evidence 'and may examine, collate, shift and treat the evidence in his own way.' " *Woodward v. State,* 123 So.3d 989, 1028 (Ala.Crim.App.2011).

[64] Bohannon did not object to any of the now challenged instances of prosecutorial misconduct.

> " 'While this failure to object does not preclude review in a capital case, it does weigh against any claim of prejudice.' *Ex parte Kennedy,* 472 So.2d [1106,] at 1111 [(Ala.1985)] (emphasis in original). 'This court has concluded that the failure to object to improper prosecutorial arguments ... should be weighed as part of our evaluation of the claim on the merits because of its suggestion that the defense did not consider the comments in question to be particularly harmful.' *Johnson v. Wainwright,* 778 F.2d 623, 629 n. 6 (11th Cir.1985), cert. denied, 484 U.S. 872, 108 S.Ct. 201, 98 L.Ed.2d 152 (1987)."

Kuenzel v. State, 577 So.2d 474, 489 (Ala.Crim.App.1990).

With these principles in mind, we review the challenged arguments.

A.

[65] First, Bohannon argues that the prosecutor urged the jury to disregard the law on self-defense when he made the following argument:

> "Now, the defense in this case, what they've put on is self-defense. And here's the deal. No matter how hard we try to do the legal jargon and how many words they try to trip you up on, and how much—you know, well, I'm—you know, lawyers know this. And you guys just listen to the law. Use your common every day sense when you hear this. What is self-defense?
>
> "Now, I'm going to tell you what I expect the Judge will instruct you on the law of self-defense is. But, at all times, I want you guys to remember to *use your common every day sense in determining self-defense.*"

(R. 1457)(emphasis added). [8]

There is no plain error in urging the jurors to use common sense in their deliberations. "The prosecutor merely urged the jury to use common sense in determining whether Wilson was guilty. The comments were certainly not outside the wide latitude a prosecutor is allowed when discussing the evidence." *State v. Wilson,* 93 P.3d 745, 745 (Kan.App.2004). *See also State v. Morgan,* 14 N.E.3d 452, 464 (Ohio Ct.App.2014) ("The [defendants] also take exception to the state asking the jury to use its common sense when the case focused primarily on expert testimony. Yet, contrary to the Morgans' claim otherwise, the request for the jury to use its common sense has been determined to be neither prosecutorial misconduct nor plain error.").

The prosecutor's argument did not constitute error, much less plain error. Bohannon is due no relief on this claim.

B.

[66] **[67]** Bohannon argues that the prosecutor erred in making the following argument:

> "After they were shot, he beat them and stomped on them and kicked them, and to the point he broke a .357 magnum over Anthony Harvey's head, broke the handle off because he was hitting so hard, fractured his skull.
>
> ***35** "At what point in that kicking and that beating is he so afraid for his life, that he's so in peril of eminent danger that he decided to kick and stomp on his dead body."

(R. 1466.)

> "A prosecutor is entitled to argue forcefully for the defendant's conviction. '[E]nthusiatic rhetoric, strong advocacy, and excusable hyperbole' are not grounds for reversal. The jury are presumed to have a certain measure of sophistication in sorting out excessive claims on both sides."

Commonwealth v. Wilson, 427 Mass. 336, 350, 693 N.E.2d 158, 171 (1998).

The prosecutor's argument did not constitute error, much less plain error. Nor did it so infect Bohannon's trial with unfairness that he was denied due process. *See Darden v. Wainwright,* 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). Bohannon is due no relief on this claim.

C.

Bohannon next argues that the prosecutor erred in making the following argument:

> "Now, manslaughter is another charge—another lesser included offense. It's capital murder, intentional murder, and the next charge is manslaughter.
>
> "In order to prove—in order for you to convict him of manslaughter, you have to believe that the defendant was lawfully provoked to do the act which caused the death of the deceased by a sudden heat of passion before reasonable time for the passion to cool and for reason to assert [itself].
>
> "You have to believe that a push would drive someone so over the edge that they would commit that murder just because of a push and that that's reasonable for him to do so. Because it says the defendant was lawfully provoked.
>
> "And I'm going to ask you—that's the same highlight—lawfully provoked. And lawfully provoked is, must have been provoked at the time he did the act, must have been deprived of self-control by the provocation which he received. The state of mind must be that such a suddenly excited passion suspends the exercise of judgment. But it's not required that the passion be so overpowering as to destroy violation [sic].
>
> "Again, deprived of self control and suspended the exercise of judgment that would make it lawful.
>
> "If you think it's lawful for somebody to push you, so that means you can kill them and their friend? That's what they're asking for is manslaughter."

(R. 1470–71.)

As the State argues in brief, the definitions set out by the prosecutor are contained in the pattern jury instructions for heat-of-passion manslaughter.

> " ' "Manslaughter is the unlawful killing of a human being without malice; that is, the unpremeditated result of passion-heated blood-caused by a sudden, sufficient provocation. And such provocation can, in no case, be less than assault, either actually committed, or menaced under such pending circumstances as reasonable to convince the mind that the accused has cause for believing, and did believe, he would be presently assaulted, and that he struck, not in consequence of a previously formed design, general or special, but in consequence of the passion suddenly aroused by the blow given, or apparently about to be given...." '

***36** *Easley v. State,* 246 Ala. 359, 362, 20 So.2d 519, 522 (1944), quoting *Reeves v. State,* 186 Ala. 14, 16–17, 65 So. 160 (1914).

The prosecutor's arguments were consistent with the law and did not constitute error, much less plain error. Bohannon is due no relief on this claim.

D.

[68] **[69]** **[70]** **[71]** Bohannon next argues that the prosecutor shifted the burden of proof by making the following argument:

> "And when you use deadly force for self-defense, a person may use deadly force in order to defend himself if he reasonably believes that the other person is using or about to use unlawful deadly physical force, or committing or about to commit either an assault first or second degree.
>
> "Assault first or second degree is either with serious physical injury or with a weapon. And there is no evidence —no evidence put to you—none that Jerry Bohannon thought that there was a weapon coming out, that they had a weapon, that they were about to commit an assault in the first degree or second degree. None."

(R. 1460.)

> " 'The test of a prosecutor's legitimate argument is that whatever is based on facts and evidence is within the scope of proper comment and argument. *Kirkland v. State,* 340 So.2d 1139 (Ala.Crim.App.), cert. denied, 340 So.2d 1140 (Ala.1976 [1977]). Statements based on facts admissible in evidence are proper. *Henley v. State,* 361 So.2d 1148 (Ala.Crim.App.), cert. denied, 361 So.2d 1152 (Ala.1978). A prosecutor as well as defense counsel has a right to present his impressions from the evidence. He may argue every legitimate inference from the evidence and may examine, collate, sift, and treat the evidence in his own way. *Williams v. State,* 377 So.2d 634 (Ala.Crim.App.1979); *McQueen v. State,* 355 So.2d 407 (Ala.Crim.App.1978).' "

Ballard v. State, 767 So.2d 1123, 1135 (Ala.Crim.App.1999), quoting *Watson v. State,* 398 So.2d 320, 328 (Ala.Crim.App.1980).

The prosecutor's arguments did not so infect Bohannon's trial with unfairness that he was denied due process. *See Darden v. Wainwright,* supra.

E.

[72] Bohannon next challenges the following arguments:

> "In order to prove—in order for you to convict him of manslaughter, you have to believe that the defendant was lawfully provoked to do the act which caused the death of the deceased by a sudden heat of passion before reasonable time for the passion to cool and for reason to assert itself."

(R. 1470.) The State admits that the prosecutor did misstate the law and that the correct definition would be that the "State must prove the absence of lawful provocation beyond a reasonable doubt." (State's brief at p. 77.)

However, "[s]tatements of counsel in argument must be viewed as in the heat of debate and must be valued at their true worth rather than as factors in the information of the verdict." *Orr v. State,* 462 So.2d 1013, 1016 (Ala.Crim.App.1984).

The circuit court gave the following instruction: "You have heard the lawyers make their closing arguments. I will tell you again, as I've told you several times, that what the attorneys have told you is not the evidence." (R. 1509.) Later in the court's instructions, the court again stated:

> ***37** "The attorney are officers of this Court. It is their duty to present evidence on behalf of their client, to make such objections as they deem proper, and to fully argue their client's cause.
>
> "An attorney's statements and arguments are intended to help you understand the evidence and apply the law. However, they are not the evidence. And you should disregard any remark, statement or argument which is not supported by the evidence or by the law as given to you by this Court."

(R. 1514–15.) Also, the circuit court properly instructed the jury that the State had the burden to prove the absence of legal provocation. *See United States v. Davis*, 491 Fed.Appx. 48, 51–52 (11th Cir.2012)(not selected for publication in the *Federal Reporter*)(holding that prosecutor's misstatement concerning the burden of proof of defendant's intent to defraud was not reversible error; "the district court correctly instructed the jury before closing argument began that the government bore the burden of proving Davis's guilt beyond a reasonable doubt, that the burden never shifted to the defendant and that the attorney's arguments were not evidence or instructions of law. Again, just prior to the jury's deliberations, the district court correctly instructed the jury, inter alia, that good faith was a complete defense, and that the defendant did not have to prove good faith. Instead, the government was required to prove the defendant's intent to defraud beyond a reasonable doubt."). *See also Windsor v. State*, 89 So.3d 805, 814 (Ala.Crim.App.2009)(prosecutor's comment in closing argument in capital-murder prosecution, that if defendant "is not guilty of capital murder, he ain't guilty of nothing," did not misstate the law concerning the jury's choices of lesser-included offenses; prosecutor had the right to argue that the jury should convict defendant of the offense charged in the indictment).

We hold that the prosecutor's argument did not so infect the trial with unfairness that Bohannon was denied due process. *See Darden v. Wainwright*, supra.

F.

[73] Bohannon next challenges the following argument that the prosecutor made in rebuttal closing argument:

> "The only two people who are acting in self-defense on that day were Jerry DuBoise, Jr., and Anthony Harvey. And they did more than what the law required of them. They were both armed with guns. And under the law, when the defendant pulled his gun, and whatever it was he did that startled them—two grown men so much that they turned and ran—whatever it was at that moment, they, Andy and Little Jerry, could have stood their ground and lawfully pulled their guns and lawfully used their guns to defend themselves. But they didn't."

(R. 1505–06.)

The prosecutor's arguments did not constitute error, much less plain error. Bohannon is due no relief on this claim.

G.

[74] Bohannon next argues that the prosecutor repeatedly made disparaging remarks about Bohannon by stating that Bohannon was a "cold blooded killer," that Bohannon's "mind was bent on taking their lives," and that Bohannon was hunting down his prey.

***38** "The digest abounds with instances where the prosecutor has commented on the defendant's character or appearance. *Hall v. United States*, 419 F.2d 582 (5th Cir.1969) ('hoodlum'); *Wright v. State*, 279 Ala. 543, 188 So.2d 272 (1966) ('Judas'); *Rogers v. State*, 275 Ala. 588, 157 So.2d 13 (1963) ('a slick and slimy crow'); *Watson v. State*, 266 Ala. 41, 93 So.2d 750 (1957) ('a maniac'); *Weaver v. State*, 142 Ala. 33, 39 So. 341 (1905) ('beast'); *Liner v. State*, 350 So.2d 760 (Ala.Cr.App.1977) ('a rattlesnake' and 'a viper'); *Jones v. State*, 348 So.2d 1116 (Ala.Cr.App.), cert. denied, *Ex parte Jones*, 348 So.2d 1120 (Ala.1977) ('a purveyor of drugs'); *Kirkland v. State*, 340 So.2d 1139 (Ala.Cr.App.), cert. denied, *Ex parte Kirkland*, 340 So.2d 1140 (Ala.1977) ('slippery'); *Jeter v. State*, 339 So.2d 91 (Ala.Cr.App.), cert. denied, 339 So.2d 95 (Ala.1976), cert. denied, 430 U.S. 973, 97 S.Ct. 1661, 52 L.Ed.2d 366 (1977)('a flim flam artist'); *Cassady v. State*, 51 Ala.App. 544, 287 So.2d 254 (1973) ('a demon'); *Reed v. State*, 32 Ala.App. 338, 27 So.2d 22, cert. denied, 248 Ala. 196, 27 So.2d 25 (1946) ('lied like a dog running on hot sand'); *Williams v. State*, 22 Ala.App. 489, 117 So. 281 (1928) ('a chicken thief'); *Ferguson v. State*, 21 Ala.App. 519, 109 So. 764 (1926) ('a smart aleck'); *Quinn v. State*, 21 Ala.App. 459, 109 So. 368 (1926) ('a wild catter'); *Thomas v. State*, 19 Ala.App. 187, 96 So. 182, cert. denied, *Ex parte Thomas*, 209 Ala. 289, 96 So. 184 (1923) ('a moral pervert'); *Beard v. State*, 19 Ala.App. 102, 95 So. 333 (1923) ('seducer')."

Barbee v. State, 395 So.2d 1128, 1134 (Ala.Crim.App.1981).

"We do not think that the mere characterization of the defendant as a [cold-blooded killer whose mind was set on

taking lives was] especially likely to stick in the minds of the jurors and influence their deliberations." *Barbee,* 395 So.2d at 1135. The prosecutor's argument did not constitute error, much less plain error. Neither did the argument so infect the trial with unfairness that Bohannon was denied due process. *See Darden v. Wainwright,* 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). Bohannon is due no relief on this claim.

XIV.

[75] **[76]** Bohannon next challenges several of the circuit court's jury instructions in the guilt phase of Bohannon's trial.

> "A trial court has broad discretion when formulating its jury instructions. See *Williams v. State,* 611 So.2d 1119, 1123 (Ala.Cr.App.1992). When reviewing a trial court's instructions, ' "the court's charge must be taken as a whole, and the portions challenged are not to be isolated therefrom or taken out of context, but rather considered together." ' *Self v. State,* 620 So.2d 110, 113 (Ala.Cr.App.1992) (quoting *Porter v. State,* 520 So.2d 235, 237 (Ala.Cr.App.1987)); see also *Beard v. State,* 612 So.2d 1335 (Ala.Cr.App.1992); *Alexander v. State,* 601 So.2d 1130 (Ala.Cr.App.1992)."

***39** *Williams v. State,* 795 So.2d 753, 780 (Ala.Crim.App.1999).

> "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."

Boyde v. California, 494 U.S. 370, 380–81, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990).

[77] The instructions that Bohannon complains of were not objected in the circuit court.

> "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). We now review the challenged arguments.

A.

[78] First, Bohannon argues that the circuit court's jury instruction on self-defense was erroneous because, he says, the instruction imposed a greater duty to retreat than does the current law on self-defense. He further asserts that the circuit court "conflated self-defense and provocation manslaughter."

The record shows that the circuit court gave the following instruction:

> "For the purpose of the defendant's use of deadly physical force against another person to be justified, the deadly physical force must have been under the following circumstances:
>
> "The defendant must have reasonably believed that Jerry DuBoise and/or Anthony Harvey were using or about to use unlawful deadly physical force against him; or the defendant must have reasonably believed that Jerry DuBoise and/or Anthony Harvey were committing or about to commit either an assault in the 1st or 2nd degree.
>
> "Deadly physical force is force which under the circumstances in which it is used is readily capable of causing death or serious physical injury.
>
> "A reasonable belief is a belief formed in reliance upon reasonable appearances. It is a belief not formed recklessly or negligently. The test of reasonableness is not whether the defendant was correct in his belief, but whether the belief was reasonable under the circumstances existing at the time.
>
> "Now, a person who is justified in using physical force, including deadly physical force, and who is not engaged in an unlawful activity and is any place where he has a right to be, *has no duty to retreat and has the right to stand his ground.*"

(R. 1529) (emphasis added). At the conclusion of the instructions, the prosecutor stated that he did not hear the circuit court instruct the jury about "imminent peril and urgent necessity." The circuit court agreed and then gave the following instruction:

> ***40** "But I need to tell you that, in the area of *manslaughter,* that the law requires that a belief of [imm]inent peril and urgent necessity to kill in self-defense, though it may be based on appearance, must be well-founded and there must be evidence that a reasonable person under the circumstances would have honestly entertained that action.
>
> "I charged you on murder, intentional murder, and I charged you on lawful provocation.
>
> "I will admit to you that when I turned my page, I turned to the wrong page and I didn't complete all of my charge. So I'm going to charge you again on lawful provocation.
>
> "Lawful provocation means that the defendant was moved to do the act which caused the death of the deceased by a sudden heat of passion and before there had been reasonable time for the passion to cool and reason to reassert itself.
>
> "The defendant must have been provoked at the time he did the act; that is, he must have been deprived of self-control by provocation which he received. The state of mind must be such that the suddenly excited passion suspends the exercise of judgment. But it is not required that the passion be so overpowering as to destroy volition.
>
> "A kill in sudden passion excited by sufficient lawful provocation is manslaughter only.
>
> "The law presumes that the passion disturbed the defendant's reasoning and led him to act regardless of the admonition of law.
>
> "*Now, that should be considered in the charge on murder and manslaughter.* But it should only be taken as the whole charge I've given you, everything from the beginning to the end, and is not intended to be highlighted by the fact that I'm having to additionally charge you at this time."

(R. 1539–40) (emphasis added). Both the State and defense counsel indicated that they had no exceptions to the circuit court's instructions; therefore, we review this claim for plain error. *See* Rule 45A, Ala. R.App. P. [9]

It appears that the circuit court misspoke when it gave the additional instructions to the jury and said "manslaughter" rather than "self-defense." However, in the circuit court's second instruction, the court limited the application the second instruction to the lesser-included offenses of manslaughter and murder. The circuit court charged the jury on capital murder, murder, and manslaughter. (R. 1520–26.) The circuit court's instructions on capital murder and self-defense were consistent with current law.

Section 13A–3–23, Ala.Code 1975, as amended effective June 1, 2006, states:

> "(a) A person is justified in using physical force upon another person in order to defend himself or herself or a third person from what he or she reasonable believes to be the use or imminent use of unlawful physical force by that other person, and he or she may use a degree of force which he or she reasonably believe to be necessary for the purpose. A person may use deadly physical force, and is legally presumed to be justified in using deadly physical force in self-defense or the defense of another person ... if the person reasonably believes that another person is:
>
> ***41** "(1) Using or about to use unlawful deadly physical force.
>
> "....
>
> "(b) A person who is justified under subsection (a) in using physical force, including deadly physical force, and who is not engaged in an unlawful activity and is in any place where he or she has the right to be has no duty to retreat and has the right to stand his or her ground.
>
> "(c) Notwithstanding the provisions of subsection (a), a person is not justified in using physical force if:
>
> > "(1) With intent to cause physical injury or death to another person, he or she provoked the use of unlawful physical force by such other person.
> >
> > "(2) He or she was the initial aggressor, except that his or her use of physical force upon another person under the circumstances is justifiable if he or she withdraws from the encounter and effectively communicates to the other person his or her intent to do so, but the latter person nevertheless continues or threatens the use of unlawful physical force...."

The 2006 amendment eliminated from § 13A–3–23(b), Ala.Code 1975, the duty to retreat. Now an individual has a right to stand his ground as long as that person is not engaged in illegal activity.

Subsequent to the 2006 amendment, this Court has had occasion to consider the validity of a circuit court's instructions on self-defense. In *George v. State*, 159 So.3d 90 (Ala.Crim.App.2014), this Court found reversible error in an instruction that stated: "The defendant is not justified in using deadly physical force upon another person and cannot prevail on the issue of self-defense if it reasonably appears or the defendant knows that he can avoid the necessity of using such force with complete safety by retreating." 159 So.3d at 92. In *Blake v. State*, 61 So.3d 1107 (Ala.Crim.App.2010), this Court found that the circuit court's instructions on self-defense were erroneous because the instruction read that a person could not rely on self-defense unless "there [was] no convenient mode of escape by retreat or declining to combat." 61 So.3d at 1108. In *Williams v. State*, 46 So.3d 970 (Ala.Crim.App.2010), this Court found error in the following instruction: " 'The defendant is not justified in using deadly physical force upon another person, and cannot prevail on the issue of self-defense if it reasonably appears or the Defendant knows that he can avoid the necessity of using such force with complete safety by retreating....' " 46 So.3d at 970. *See also* Jason W. Bobo, *Following the Trend: Alabama Abandons the Duty to Retreat and Encourages Citizens to Stand Their Ground*, 38 Cumb. L.Rev. 339, 362–63 (2008). [10]

Our neighboring State of Florida, the State that served as the basis for Alabama's adoption of our current "stand your ground law," has adopted a pattern jury instruction on this issue. The instruction reads as follows:

> "If the defendant was not engaged in an unlawful activity and was attacked in any place where he had a right to be, he had no duty to retreat and had the right to stand his ground and meet force with force, including deadly force, if he reasonably believed that it was necessary to do so to prevent [ ] death or great bodily harm to himself or to prevent the commission of a forcible felony."

***42** Fla. Std. Jury Instr. (Crim.) 3.6(f) (2011).

[79] Assuming that error did occur in the circuit court's second instruction, we hold that any error was harmless beyond a reasonable doubt. The United States Supreme Court in *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), addressed harmless error in regard to jury instructions and stated:

> "We have recognized that 'most constitutional errors can be harmless.' [*Arizona v.] Fulminante*, [499 U.S. 279, at 306, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)]. '[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis.' *Rose v. Clark*, 478 U.S. 570 [106 S.Ct. 3101, 92 L.Ed.2d 460] (1986). Indeed, we have found an error to be 'structural,' and thus subject to automatic reversal, only in a 'very limited class of cases.' *Johnson v. United States*, 520 U.S. 461, 468 [117 S.Ct. 1544, 137 L.Ed.2d 718] (1997) (citing *Gideon v. Wainwright*, 372 U.S. 335 [83 S.Ct. 792, 9 L.Ed.2d 799] (1963) (complete denial of counsel); *Tumey v. Ohio*, 273 U.S. 510 [47 S.Ct. 437, 71 L.Ed. 749] (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254 [106 S.Ct. 617, 88 L.Ed.2d 598] (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins*, 465 U.S. 168 [104 S.Ct. 944, 79 L.Ed.2d 122] (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39 [104 S.Ct. 2210, 81 L.Ed.2d 31] (1984) (denial of public trial); *Sullivan v. Louisiana*, 508 U.S. 275 [113 S.Ct. 2078, 124 L.Ed.2d 182] (1993) (defective reasonable-doubt instruction)).
>
> "The error at issue here—a jury instruction that omits an element of the offense—differs markedly from the constitutional violations we have found to defy harmless-error review. Those cases, we have explained, contain a 'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.' *Fulminante*, supra, at 310. Such errors 'infect the entire trial process,' *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993), and 'necessarily render a trial fundamentally unfair,' *Rose*, 478 U.S., at 577. Put another way, these errors deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair.' *Id.*, at 577–578.
>
> "Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not necessarily

render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. Our decision in *Johnson v. United States,* supra, is instructive. Johnson was a perjury prosecution in which, as here, the element of materiality was decided by the judge rather than submitted to the jury. The defendant failed to object at trial, and we thus reviewed her claim for 'plain error.' Although reserving the question whether the omission of an element ipso facto ' "affect[s] substantial rights," ' 520 U.S., at 468–469, we concluded that the error did not warrant correction in light of the ' "overwhelming" ' and 'uncontroverted' evidence supporting materiality, *id.,* at 470. Based on this evidence, we explained, the error did not ' "seriously affec[t] the fairness, integrity or public reputation of judicial proceedings." ' *Id.,* at 469 (quoting *United States v. Olano,* 507 U.S. 725, 736 [113 S.Ct. 1770, 123 L.Ed.2d 508] (1993))."

***43** 527 U.S. at 8–9, 119 S.Ct. 1827. *See also Hedgpeth v. Pulido,* 555 U.S. 57, 129 S.Ct. 530, 172 L.Ed.2d 388 (2008).

"[W]e acknowledged that faulty jury instructions are subject to harmless error review. *Id.,* 24 (citing *Hedgpeth v. Pulido,* 555 U.S. 57, 61, 129 S.Ct. 530, 172 L.Ed.2d 388 (2008); *Neder v. United States,* 527 U.S. 1, 11, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). Harmless error review applies both to jury instructions that have omissions and to jury instructions that place an additional burden on the State. *Id.,* 24–25. 'Therefore, where a jury instruction erroneously states the applicable statute, we must determine whether, under the totality of the circumstances, the erroneous instruction constituted harmless error.' *Id.,* 27 (citing [*State v.*] *Harvey,* 254 Wis.2d 442, ¶ 46, 647 N.W.2d 189 [(2002)])."

State v. Williams, [No. 2014AP1099–CR, July 10, 2015] —— N.W.2d ——, —— (Wis.2015).

[80] Here, there was no rational basis that would support a jury instruction on heat-of-passion manslaughter. Three cameras recorded the shootings. Rarely does a reviewing court have the means to review this issue with such clarity. It is clear from the videotapes that one victim did initially gently shove Bohannon; however, that act is not sufficient to constitute legal provocation for heat-of-passion manslaughter. After one victim shoved Bohannon, both victims turned their backs to Bohannon and started to walk toward their vehicle when Bohannon grabbed his gun from the back waistband of his pants and rushed after the two victims with his gun pointed at them. The victims then ran away from Bohannon and attempted to hide.

" ' "Manslaughter is the unlawful killing of a human being without malice; that is, the unpremeditated result of passion-heated-blood caused by a sudden, sufficient provocation. And such provocation can, in no case, be less than assault, either actually committed, or menaced under such pending circumstances as reasonable to convince the mind that the accused has cause for believing, and did believe, he would be presently assaulted, and that he struck, not in consequence of a previously formed design, general or special, but in consequence of the passion suddenly aroused by the blow given, or apparently about to be given...." '

Easley v. State, 246 Ala. 359, 362, 20 So.2d 519, 522 (1944), quoting *Reeves v. State,* 186 Ala. 14, 16–17, 65 So. 160 (1914).

"Alabama courts have, in fact, recognized three legal provocations sufficient to reduce murder to manslaughter: (1) when the accused witnesses his or her spouse in the act of adultery; (2) when the accused is assaulted or faced with an imminent assault on himself; and (3) when the accused witnesses an assault on a family member or close relative."

Spencer v. State, 58 So.3d 215, 245 (Ala.Crim.App.2008).

"A minor or technical assault or battery is insufficient, but a blow inflicting considerable pain or injury ordinarily is sufficient *Easley v. State,* 246 Ala. 359, 20 So.2d 519 (1945); *Buffalow v. State,* 219 Ala. 407, 122 So. 633 (1929). Mere abusive or opprobrious words or insulting gestures are insufficient. *Cates v. State,* 50 Ala. 166 (1874); *Easley v. State,* supra; *Weaver v. State,* 1 Ala.App. 48, 55 So. 956, rehearing

> denied, 2 Ala.App. 98, 56 So. 749 (1911). In a mutual fight where no more than ordinary battery was intended, the blows may constitute provocation, but use of deadly weapon or undue advantage is usually murder. *Diamond v. State,* 219 Ala. 674, 123 So. 55 (1929); *Lanier v. State,* 31 Ala.App. 242, 15 So.2d 278 (1943)."

***44** Commentary to § 13A–6–3, Ala.Code 1975.

In *Living v. State,* 796 So.2d 1121 (Ala.Crim.App.2000), this Court found that the circuit court did not err in refusing to give a jury on heat-of-passion manslaughter after the victim had shoved the defendant. We stated:

> " '[A]n extreme emotional or mental disturbance, without legally recognized provocation, will not reduce murder to manslaughter.' *MacEwan v. State,* 701 So.2d [66] at 70 [(Ala.Crim.App.1997)]. (quoting *Gray v. State,* 482 So.2d 1318, 1319 (Ala.Crim.App.1985)). Moreover, [the victim] shoving [the defendant] during an argument does not constitute legal provocation for heat-of-passion manslaughter. 'A minor technical assault which did not endanger life or inflict serious physical injury or inflict substantial and considerable pain would not amount to sufficient provocation.' *Shultz v. State,* 480 So.2d 73, 76 (Ala.Crim.App.1985). Because no evidence of adequate legal provocation was presented at trial, the trial court did not err in refusing to instruct the jury on heat-of-passion manslaughter."

796 So.2d at 1130. *See also Woolf v. State,* [Ms. CR–10–1082, May 2, 2014] —— So.3d —— (Ala.Crim.App.2014).

Furthermore, the videotapes clearly established that the murders occurred as part of one act or course of conduct. Thus, there was no rational basis from the evidence, as clearly established by the videotapes, for a jury instruction on two separate murders as defined in § 13A–6–2, Ala.Code 1975.

We have stated the following concerning plain error:

> " ' " 'Plain error' arises only 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.1983) (quoting *United States v. Chaney,* 662 F.2d 1148, 1152 (5th Cir.1981)). See also *Ex parte Woodall,* 730 So.2d 652 (Ala.1998). ' "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.' " ' *Ex parte Land,* 678 So.2d 224, 232 (Ala.1996) (quoting *United States v. Young,* 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) (quoting in turn *United States v. Frady,* 456 U.S. 152, 163 n. 14, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982))). 'To rise to the level of plain error, the claimed error must not only seriously affect a defendant's "substantial rights," but it must also have an unfair prejudicial impact on the jury's deliberations.' *Hyde v. State,* 778 So.2d 199, 209 (Ala.Crim.App.1998), aff'd, 778 So.2d 237 (Ala.2000), cert. denied, 532 U.S. 907, 121 S.Ct. 1233, 149 L.Ed.2d 142 (2001). This Court may take appropriate action when the error 'has or probably has adversely affected the substantial rights of the appellant.' Rule 45A, Ala. R.App. P. '[A] failure to object at trial, while not precluding our review, will weigh against any claim of prejudice.' *Ex parte Woodall,* 730 So.2d at 657 (citing *Kuenzel v. State,* 577 So.2d 474 (Ala.Crim.App.1990), aff'd, 577 So.2d 531 (Ala.1991))."

***45** *Ex parte Bryant,* 951 So.2d 724, 727 (Ala.2002).

Given that the facts did not support an instruction on heat-of-passion manslaughter or murder as clearly shown by the videos of the events leading up to the double homicide, we cannot say that the circuit court's second instruction constituted plain error or that it "adversely affected the appellant's substantial rights." Because Bohannon was not entitled to a jury instruction on heat-of-passion manslaughter or murder, "any mistakes by the trial court in its instructions ... were, at worst, harmless error not necessitating a new trial." *State v. Reid,* 335 N.C. 647, 672, 440 S.E.2d 776, 790 (1994). *See also State v. Blanks,* 313 N.J.Super. 55, 64, 712 A.2d 698, 702 (1998) ("[I]f the evidence does not support the charge, then any error in the charge is harmless.").

For the above stated reasons, we find no plain error in the circuit court's second or supplemental jury instructions. Bohannon is due no relief on this claim. [11]

B.

[81] Bohannon next argues that the circuit court erred in failing to sua sponte give the jury an instruction on intoxication as a defense.

Neither Bohannon nor the State moved the circuit court to instruct the jury on intoxication. Therefore, we review this claim for plain error. *See* Rule 45A, Ala. R.App. P.

In *Gurley v. State,* 639 So.2d 557 (Ala.Crim.App.1993), this Court addressed whether the circuit court erred in failing sua sponte to give an instruction on voluntary intoxication and reckless manslaughter. Refusing to find plain error, this Court stated:

> "The trial court's failure to charge on reckless manslaughter does not, however, constitute plain error in this case. The appellant's decision to rely on self-defense, which constitutes an admission of intentional conduct, necessarily means that there was no obvious and egregious error in the court's failing to instruct the jury on the principles of reckless conduct.
>
> " '*It is a well accepted principle of law that a claim of self-defense necessarily serves as an admission that one's conduct was intentional.... [A] person simply cannot ... recklessly defend himself.* The decision to defend one's self, whether justified or not, is by its very nature a conscious and intentional decision. If a jury decides that a person is justified in using deadly force to defend himself then he or she is not guilty of any crime, and the defense is perfect. Conversely, if a jury determines that a person is not justified in using deadly force to defend himself then that person is guilty of either murder or simple manslaughter. Our legislature has specifically rejected the notion that any other result can attach where self-defense is concerned.'
>
> "*Lacy v. State,* 629 So.2d 688, 689 (Ala.Cr.App.) (on rehearing) (emphasis added), cert. denied, 629 So.2d 691 (Ala.1993).
>
> " ' " '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, 464 U.S. 986, 104 S.Ct. 436, 78 L.Ed.2d 367 (1983). The appellant did not request an instruction on reckless manslaughter. His defense strategy was to convince the jury that his intentional decision to defend himself by killing Bentley was justified, rather than to persuade the jury that he was unable to form the intent to kill because he was intoxicated. The trial court's failure to give a reckless manslaughter instruction was not a ' "particularly egregious error" and would not result in a miscarriage of justice if a reversal [on this issue] was denied.' *Ex parte Womack,* 435 So.2d at 769 (accused 'never indicated any reliance on such a defense [that mere presence was insufficient for complicity]; that is, instead of defending on the basis that he had no intent to kill but only to rob, his defense was alibi'). See also *Ex parte Harrell,* 470 So.2d 1309, 1314 (Ala.), cert. denied, 474 U.S. 935, 106 S.Ct. 269, 88 L.Ed.2d 276 (1985) (because 'the defendant's defense was substantially based upon the claim that the killing [of a police officer] was accidental, the defendant raised no objection to the instruction to the jury, and he did not request the court to instruct the jury on the element of [the accused's] knowledge [that the victim was a police officer], this case is distinguishable from [*Ex parte] Murry,* [455 So.2d 72 (Ala.1984)],' wherein the court held that the trial judge erred in failing to give a requested instruction that the accused, at the time of the murder, must have known that the victim was an on-duty police officer)."

***46** 639 So.2d at 560–61 (emphasis in original).

In *Hunt v. State,* 659 So.2d 933 (Ala.Crim.App.1994), this Court stated:

> "The appellant contends that the trial court erred in failing to instruct the jury on voluntary intoxication.
>
> "In his oral instructions to the jury, the trial judge instructed the jury on intentional murder and felony murder as lesser included offenses of the capital crimes charged in the indictment. Defense counsel raised no objection to those particular portions of the oral charge and, on one occasion, announced 'satisfied.' R. 881, 882, 888. The trial judge repeatedly instructed the jury on the definition of intent and the requirement that the killing have been intentionally committed. Although there was evidence that the appellant had consumed alcohol and drugs shortly before the murder, the trial judge was not requested to and did not instruct the jury on the legal principles of intoxication in connection with criminal liability. No objection was made at trial to the court's failure to give such an instruction.
>
> "In *Fletcher v. State,* 621 So.2d 1010 (Ala.Cr.App.1993), the trial court did not instruct the jury on the legal principles of intoxication and this Court found that that omission constituted plain error. In *Fletcher* however, the trial judge, sua sponte, stated at the close of the State's case that he would not give a charge on intoxication because he ' "did not get the impression from the evidence that [the

defendant] was so intoxicated that he didn't know what he was doing." ' 621 So.2d at 1018. We held that this determination by the trial court ' "invaded the exclusive province of the jury," ' *id.* at 1021, and, under the particular facts involved, amounted to plain error.

"In contrast, in the instant case, the matter of an intoxication charge was not raised by anyone at the guilt phase of the trial. In fact, defense counsel objected to the references during the trial to the appellant's drug use and, in addition to the appellant's defense that he did not commit the murder, defense counsel suggested during closing argument that, at most, the evidence supported a conviction of intentional murder only. Thus, it appears that the appellant's defense strategy was to convince the jury either that he did not commit the murder or that the killing was intentionally done, but without sexual overtones. There was no claim that he was unable to form the intent to kill because he was intoxicated. Where, as in this case, an intoxication instruction would conflict with defense strategy, there is no plain error in the trial court's failure to give such an instruction. *Gurley v. State,* 639 So.2d 557, 560–61 (Ala.Cr.App.1993)."

659 So.2d at 957–58.

For the reasons stated in *Gurley* and *Hunt,* we likewise find no plain error in the circuit court's failure to sua sponte charge the jury on intoxication when Bohannon relied on the theory of self-defense. Bohannon is due no relief on this claim.

XV.

***47 [82]** Bohannon next argues that the multiplicitous indictments and convictions for the same murders violated the Double Jeopardy Clause. The State concedes that Bohannon is correct and that one of his capital-murder convictions must be vacated.

Two indictments were issued against Bohannon for violating § 13A–5–40(a)(10), Ala.Code 1975, by murdering Anthony Harvey and Jerry DuBoise pursuant to act or pursuant to one course of conduct.

The first indictment read as follows:

> "The Grand Jury of said County charges, that, before the finding of this indictment Jerry Dwayne Bohannon whose name is to the Grand jury otherwise unknown than as stated, did intentionally cause the death of another person, to-wit: *Anthony Harvey,* by shooting him with a gun, and did intentionally cause the death of another person, to-wit: *Jerry DuBoise,* by shooting him with a gun, pursuant to one scheme or course of conduct, in violation of § 13A–5–40(a)(10), of the Code of Alabama."

(R. 84) (emphasis added). The second indictment read as follows:

> "The Grand Jury of said County charges, that, before the finding of this indictment Jerry Dwayne Bohannon whose name is to the Grand jury otherwise unknown than as stated, did intentionally cause the death of another person, to-wit: *Jerry DuBoise,* by shooting him with a gun, and did intentionally cause the death of another person, to-wit: *Anthony Harvey,* by shooting him with a gun, pursuant to one scheme or course of conduct, in violation of § 13A–5–40(a)(10), of the Code of Alabama."

(R. 85) (emphasis added). The only difference in the two indictments is that the names of the victims are transposed.

This Court has held that similar charges are alternative methods of proving the same offense and that convicting and sentencing a defendant for both offenses violates the Double Jeopardy Clause.

> "[Parks] alleges that his constitutional protection against double jeopardy was violated when he was tried and convicted of counts one and two of his indictment for murder wherein two or more persons are murdered by one act or pursuant to one course or scheme of conduct when both counts reflect the murder of the same two people. We agree with his argument that counts one and two of his indictment represented the death of two persons

> committed by one act or course of conduct and merely reversed the order of the victim's names in each count.... See, e.g., *Hardy v. State*, 920 So.2d 1117, 1121–22 (Ala.Crim.App.2005); *Perkins v. State*, 897 So.2d 457, 461–62 (Ala.Crim.App.2004)."

Parks v. State, 989 So.2d 626, 634 (Ala.Crim.App.2007). *See also Wynn v. State*, 804 So.2d 1122 (Ala.Crim.App.2000); *Living v. State*, 796 So.2d 1121 (Ala.Crim.App.2000); *Stewart v. State*, 601 So.2d 491 (Ala.Crim.App.1992), aff'd in part, rev'd in part on other grounds, 659 So.2d 122 (Ala.1993).

Accordingly, this case is due to be remanded to the Mobile Circuit Court for that court to set aside one of Bohannon's capital-murder convictions and the sentence imposed for that conviction.

Penalty–Phase Issues

XVI.

***48** **[83]** Bohannon argues that it was error to use the murder of two or more persons both as an element of the capital-murder offense and as an aggravating circumstance that supports the death penalty.

Bohannon was indicted for violating § 13A–5–40(a)(10), Ala.Code 1975, which makes killing two or more person pursuant to one act or course of conduct a capital offense. Section 13A–5–49(9), Ala.Code 1975, provides that it is an aggravating circumstance to murder two or more person by one act or pursuant to one scheme or course of conduct.

> "[T]here is no constitutional or statutory prohibition against double counting certain circumstances as both an element of the offense and an aggravating circumstance. See § 13A–5–45(e), Ala.Code 1975 (providing that 'any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing'). The United States Supreme Court, the Alabama Supreme Court, and this court have all upheld the practice of double counting. See *Lowenfield v. Phelps*, 484 U.S. 231, 241–46, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) ('The fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm.'); *Tuilaepa v. California*, 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994) ('The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both).'); *Ex parte Kennedy*, 472 So.2d 1106, 1108 (Ala.1985) (rejecting a constitutional challenge to double counting); *Brown v. State*, 11 So.3d 866 (Ala.Crim.App.2007); *Harris v. State*, 2 So.3d 880 (Ala.Crim.App.2007); *Jones v. State*, 946 So.2d 903, 928 (Ala.Crim.App.2006); *Peraita v. State*, 897 So.2d 1161, 1220–21 (Ala.Crim.App.2003); *Coral v. State*, 628 So.2d 954 (Ala.Crim.App.1992); *Haney v. State*, 603 So.2d 368 (Ala.Crim.App.1991). Because double counting is constitutionally permitted and statutorily required, Vanpelt is not entitled to any relief on this issue. § 13A–5–45(e), Ala.Code 1975."

Vanpelt v. State, 74 So.3d 32, 89 (Ala.Crim.App.2009).

There was no error in double counting an element of the capital-murder offense both as an element of the crime and an aggravating circumstance. Bohannon is due no relief on this claim.

XVII.

[84] Bohannon next argues that his sentence of death violates the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and should be vacated because, he argues, the jury did not unanimously conclude that the aggravating circumstance existed and that the aggravating circumstance outweighed the mitigating circumstances. He acknowledges that the Alabama Supreme Court's decision in *Ex parte Waldrop*, 859 So.2d 1181 (Ala.2002), is contrary to his position on appeal.

The United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), held that any fact that increases a penalty above the statutory maximum must be presented to a jury and proven beyond a reasonable doubt. This holding was extended to death-penalty cases in *Ring v. Arizona*.

***49** In *Ex parte Waldrop*, the Alabama Supreme Court addressed the claim Bohannon raises and stated:

> "*Ring [v. Arizona*, 536 U.S. 584 (2002)] and *Apprendi [v. New Jersey*, 530 U.S. 466 (2000)] do not require that the jury make every factual determination; instead, those

> cases require the jury to find beyond a reasonable doubt only those facts that result in 'an increase in a defendant's authorized punishment ...' or " 'expose[ ] [a defendant] to a greater punishment....' " *Ring,* 536 U.S. at 602, 604, 122 S.Ct. at 2439, 2440 (quoting *Apprendi,* 530 U.S. at 494, 120 S.Ct. 2348). Alabama law requires the existence of only one aggravating circumstance in order for a defendant to be sentenced to death. Ala.Code 1975, § 13A–5–45(f). The jury in this case found the existence of that one aggravating circumstance.... At that point, [the defendant] became 'exposed' to, or eligible for, the death penalty."

859 So.2d at 1188. The court further stated:

> "[T]he weighing process is not a factual determination or an element of an offense; instead, it is a moral or legal judgment that takes into account a theoretically limitless set of facts and that cannot be reduced to a scientific formula or the discovery of a discrete, observable datum. See *California v. Ramos,* 463 U.S. 992, 1008, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983) ('Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, ... the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment.'); *Zant v. Stephens,* 462 U.S. 862, 902, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (Rehnquist, J., concurring in the judgment) ('sentencing decisions rest on a far-reaching inquiry into countless facts and circumstances and not on the type of proof of particular elements that returning a conviction does')."

859 So.2d at 1189.

Here, the jury's verdict in the guilt phase that Bohannon was guilty of murdering two people by one act or pursuant to one scheme or course of conduct made Bohannon eligible for the death penalty, the maximum punishment. Therefore, there was no *Ring* violation in this case. Bohannon is due no relief on this claim.

XVIII.

[85] Bohannon next argues that the circuit court erred in allowing the prosecutor to present victim-impact evidence at the penalty phase. Specifically, he argues that Mark Harvey, Anthony Harvey's son, was allowed to testify that his father's death caused his mother to have a stroke; that Roxanne Weaver, Harvey's sister, testified that his family celebrated Anthony's birthday every year by singing Happy Birthday at his grave and releasing balloons; and that Emily Buxton, Jerry DuBoise's girlfriend, testified that she was three weeks pregnant when Jerry was killed and that his son would grow up without a father. (R. 1585; 1580; 1572.) Bohannon asserts that this evidence was not admissible because it was not relevant to any aggravating circumstance.

***50** The United States Supreme Court stated the following concerning victim-impact evidence:

> "As a general matter ... victim impact evidence is not offered to encourage comparative judgments of this kind —for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead each victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be."

Payne v. Tennessee, 501 U.S. 808, 823, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).

Although some states have limited the admission of victim-impact evidence at a penalty phase to instances where that evidence is relevant to an aggravating circumstance, Alabama is not one of those states. *See Laux v. State,* 985 N.E.2d 739, 749 (Ind.App.2013) ("Victim impact testimony is not admissible in the sentencing phase of a capital trial if that testimony is irrelevant to the alleged aggravating factor."); *See also* Joan T. Buckley, J.D., *Victim Impact Evidence in Capital Sentencing Hearings—Post–Payne v. Tennessee,* 79 A.L.R.5th 33 (2000).

> "[W]e have repeatedly held that victim-impact evidence is admissible at the penalty phase of a capital trial. See *Smith v. State,* [Ms. CR–97–1258, January 16, 2009] —— So.3d ——, —— (Ala.Crim.App.2009); *Gissendanner v. State,* 949 So.2d 956 (Ala.Crim.App.2006); *Miller v. State,* 913 So.2d 1148 (Ala.Crim.App.2004); *Stallworth v. State,* 868 So.2d 1128 (Ala.Crim.App.2001); *Smith v. State,* 797 So.2d 503 (Ala.Crim.App.2000); *Williams v. State,* 795 So.2d 753 (Ala.Crim.App.1999).' *Lee v. State,* 44 So.3d 1145, 1174 (Ala.Crim.App.2009)."

Revis v. State, 101 So.3d 247, 295 (Ala.Crim.App.2011).

[86] Alabama, like Florida, allows the admission of victim-impact evidence at the penalty phase, irrespective of whether that evidence is relevant to any aggravating or mitigating circumstance.

"Windom attacks the admissibility of testimony by a police officer during the sentencing phase of the trial. The police officer was assigned by her police department to teach an anti-drug program in an elementary school in the community in which the defendant and the three victims of the murders lived, and where the murders occurred. Two of the sons of one of the victims were students in the program. The police officer testified concerning her observation about one of these sons following the murder. Her testimony involved a discussion concerning an essay which the child wrote. She quoted the essay from memory: 'Some terrible things happened in my family this year because of drugs. If it hadn't been for DARE, I would have killed myself.' The police officer also described the effect of the shootings on the other children in the elementary school. She testified that a lot of the children were afraid.

"Defendant asserts, first, that this evidence was in essence nonstatutory aggravation, relying upon *Grossman v. State,* 525 So.2d 833 (Fla.1988), cert. denied, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989). Defendant does concede that subsequent to *Payne v. Tennessee,* 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), this Court has held victim impact testimony to be admissible as long as it comes within the parameters of the *Payne* decision. See *Stein v. State,* 632 So.2d 1361 (Fla.), cert. denied, 513 U.S. 834, 115 S.Ct. 111, 130 L.Ed.2d 58 (1994); *Hodges v. State,* 595 So.2d 929 (Fla.), vacated on other grounds, 506 U.S. 803, 113 S.Ct. 33, 121 L.Ed.2d 6 (1992). Both the Florida Constitution in Article I, Section 16, and the Florida Legislature in section 921.141(7), Florida Statutes (1993), instruct that in our state, victim impact evidence is to be heard in considering capital felony sentences. We do not believe that the procedure for addressing victim impact evidence, as set forth in the statute, impermissibly affects the weighing of the aggravators and mitigators which we approved in *State v. Dixon,* 283 So.2d 1 (Fla.1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), or otherwise interferes with the constitutional rights of the defendant. Therefore, we reject the argument which classifies victim impact evidence as a nonstatutory aggravator in an attempt to exclude it during the sentencing phase of a capital case."

***51** *Windom v. State,* 656 So.2d 432, 438 (Fla.1995).

The circuit court committed no error in allowing victim-impact evidence to be presented at the penalty phase of Bohannon's trial. Bohannon is due no relief on this claim.

XIX.

[87] Bohannon next argues that the circuit court improperly excluded mitigating evidence by not allowing him to present evidence at his sentencing hearing that "sentencing someone to the death penalty is more expensive than sentencing him to life without parole." (Bohannon's brief at p. 63.)

During the penalty phase, Bohannon presented the testimony of Janann McInnis, a capital-mitigation specialist. During her testimony, the following occurred:

"[Defense counsel]: Are you familiar with the costs and surrounding expenses in executing somebody versus housing somebody?

"[McInnis]: Yes.

"[Defense counsel]: What would you say it would cost to execute somebody?

"[Prosecutor]: Judge, I'm going to object. I don't think this is an appropriate mitigating circumstance.

"The Court: I agree."

(R. 1623.) After some discussion, the circuit court did not allow McInnis to testify about the cost of a life imprisonment without parole sentence versus a death sentence. (R. 1625.)

Many states that have considered this issue have found that evidence of the cost of the death penalty is not relevant to sentencing. *See State v. Davis,* 139 Ohio St.3d 122, 9 N.E.3d 1031 (2014) (" 'Evidence of cost effectiveness of the death sentence does not bear on a defendant's character, prior record or the circumstances of the offense.' *Al–Mosawi v. State,* 929 P.2d 270, 287 (Okla.Crim.App.1996). Moreover, '[o]nce the legislature has resolved to create a death penalty that has survived constitutional challenge, it is not the place of this or any court to permit counsel to question the ... economic wisdom of the enactment.' "); *State v. Clark,* 851 So.2d 1055, 1083 (La.2003) ("Testimony concerning the costs associated with incarceration and the imposition of the death penalty do not relate to the circumstances of the offense, the character of the defendant, or the impact on the victims."); *Smallwood v. State,* 907 P.2d 217, 233 (Okla.Crim.App.1995) ("Appellant ... claims ... that he should have been allowed to present evidence of the cost effectiveness of the death penalty in mitigation of the imposition of that punishment.

Appellant's request was properly denied by the trial court as such evidence is irrelevant, and does not qualify as mitigating evidence, having no bearing on Appellant's character, prior record, circumstances of the offense committed or Appellant's future conduct."); *State v. Kayer,* 194 Ariz. 423, 440, 984 P.2d 31, 48 (1999) ("[T]he cost of execution cannot be considered a mitigating factor. The death penalty represents a legislative policy choice by the people's representatives regarding the level of punishment for Arizona's most serious criminal offenders, and it transcends a financial cost/benefit analysis.").

***52** In Alabama, § 13A–5–45(c), Ala.Code 1975, provides: "At the sentencing hearing evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to the aggravating and mitigating circumstances referred to in Sections 13A–5–49, 13A–5–51 and 13A–5–52." We agree with the cases cited above that the cost of imposing the death penalty on a defendant is not relevant to sentencing. The circuit court correctly excluded this evidence. Bohannon is due no relief on this claim.

XX.

[88] Bohannon next argues that the circuit court erred in characterizing the jury's penalty-phase determination as a "recommendation." Specifically, he asserts that this terminology undermined the jury's sense of responsibility for the sentence and conflicted with *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). The United States Supreme Court in *Caldwell* held: "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. 2633.

[89] Subsequent to *Caldwell,* the United States Supreme Court has stated:

> "[W]e have since read *Caldwell* as relevant only to certain types of comment-those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision. Thus, to 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."

Romano v. Oklahoma, 512 U.S. 1, 9, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994).

> " ' "It is constitutionally impermissible to rest a death sentence on a determination by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the accused's death rests elsewhere. *Caldwell [v. Mississippi,* 472 U.S. 320 (1985)]. However, comments that accurately explain the respective functions of the judge and jury are permissible under *Caldwell* as long as the significance of the jury's recommendation is adequately stressed. *Harich v. Wainwright,* 813 F.2d 1082, 1101 (11th Cir.1987); *Martin v. State,* 548 So.2d 488 (Ala.Crim.App.1988), aff'd, 548 So.2d 496 (Ala.1989). In the instant 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."

Smith v. State, [Ms. CR–97–1258, December 22, 2000] —— So.3d ——, —— (Ala.Crim.App.2000), reversed in part on other grounds, *Ex parte Smith,* [Ms. 1010267, March 14, 2003] —— So.3d —— (Ala.2003). *See Treadway v. State,* 924 N.E.2d 621, 639 (Ind.2010) ("[M]erely referring to the jury's determination as a 'recommendation'—the term used in the statute—did not run afoul of *Caldwell* because there was no intimation to the jury that its recommendation was 'only a preliminary step' and no suggestion that the jury was 'not responsible' for the ultimate sentence.").

***53** There was no error in referring to the jury's verdict in the penalty phase as a recommendation. Bohannon is due no relief on this claim.

XXI.

[90] **[91]** Bohannon next argues that the prosecutor's arguments in the penalty phase were improper and erroneous and undermined the reliability of the sentencing determination. He makes three different arguments in support of this conclusion.

> " 'In reviewing allegedly improper prosecutorial comments, conduct, and questioning of witnesses, the task of this Court is to consider their impact in the context of the particular trial, and not to view the allegedly improper acts in the abstract.' *Bankhead v. State,* 585 So.2d 97, 106 (Ala.Crim.App.1989), remanded on other grounds, 585 So.2d 112 (Ala.1991), aff'd on return to remand, 625 So.2d 1141 (Ala.Crim.App.1992), rev'd on other grounds, 625 So.2d 1146 (Ala.1993). ' "Prosecutorial misconduct is a basis for reversing an appellant's conviction only if, in the context of the entire trial and in light of any curative instruction, the misconduct may have prejudiced the substantial rights of the accused." ' *Carroll v. State,* 599 So.2d 1253, 1268 (Ala.Crim.App.1992), aff'd, 627 So.2d 874 (Ala.1993), quoting *United States v. Reed,* 887 F.2d 1398, 1402 (11th Cir.1989). The relevant question is whether the prosecutor's conduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' *Donnelly v. DeChristoforo,* 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)."

Minor v. State, 914 So.2d 372, 415 (Ala.Crim.App.2004).

Bohannon did not object to any of the now challenged instances of prosecutorial misconduct. Therefore, we review these claims for plain error. *See* Rule 45A, Ala. R.App. P. "Although the failure to object will not preclude [plain-error] review, it will weigh against any claim of prejudice." *Sale v. State,* 8 So.3d 330, 345 (Ala.Crim.App.2008). We now review the claims of prosecutorial misconduct.

A.

[92] **[93]** **[94]** First, Bohannon argues that the prosecutor erred in making the following argument in closing at the penalty phase:

> "And this is the portion of the trial where we are asking you, based on everything that you have heard, in the guilt phase, all of the evidence, all of the testimony, and in the penalty phase, to take all of this into consideration and to return a verdict of death.
>
> "And we don't do that lightly. We are submitting to you that the aggravating factors in this case do outweigh the mitigating factors in this case."

(R. 1637.) Bohannon argues that the prosecutor implied that this case was particularly deserving of the death penalty and "improperly invok[ed] the prosecutorial mantle of authority." (Bohannon's brief, at p. 92.)

> "A prosecutor's comment about the number of times he or she has sought the death penalty is improper if it may be construed to be 'similar to a prosecutorial argument at trial to the effect that "we only prosecute the guilty." ' *Brooks v. Kemp,* 762 F.2d 1383, 1410 (11th Cir.1985), judgment vacated by *Kemp v. Brooks,* 478 U.S. 1016, 106 S.Ct. 3325, 92 L.Ed.2d 732 (1986), reinstated on return to remand by *Brooks v. Kemp,* 809 F.2d 700 (11th Cir.1987). Viewing the above-quoted comments in context, we cannot conclude that those comments conveyed the argument that the prosecutor 'only prosecutes the guilty,' especially when the above-quoted comments reference the jury's 'duty.' Thus, we cannot conclude that those comments rise to the level of plain error."

***54** *Shanklin v. State,* [Ms. CR–11–1441, December 19, 2014] —— So.3d ——, —— (Ala.Crim.App.2014). "In our adversarial system of criminal justice, a prosecutor seeking a sentence of death may properly argue to the jury that a death sentence is appropriate." *Vanpelt v. State,* 74 So.3d 32, 91 (Ala.Crim.App.2009). The prosecutor's argument was permissible and did not constitute error, much less plain error. Bohannon is due no relief on this claim.

B.

[95] Second, Bohannon argues that the following argument that was made in the prosecutor's rebuttal closing argument was improper:

> "You saw it and you heard it. That man right there showed absolutely no mercy to his victims as he hunted them down like animals, shot them, and treated them worse than animals when he beat them and kicked them

> and went through their pockets. That's not mercy. And he doesn't deserve it in return."

(R. 1654–55.) Bohannon asserts that the above argument improperly compared the rights of the victims to the rights of the defendant.

[96] During closing, defense counsel asked that the jury show Bohannon mercy and not "continue the cycle of killing." (R. 1649.) Clearly, the prosecutor's argument was a reply to defense counsel's argument.

> "The rule in Alabama is that remarks or comments of the prosecuting attorney, including those which might otherwise be improper, are not grounds for reversal when they are invited, provoked, or occasioned by accused's counsel and are in reply to or retaliation for his acts and statements."

Minor v. State, 914 So.2d 372, 424–25 (Ala.Crim.App.2004).

The prosecutor's argument was within the wide range of argument permissible in rebuttal. Bohannon is due no relief on this claim.

C.

[97] Third, Bohannon argues that the following argument by the prosecutor was erroneous:

> "And as far as the deterrent effect of incarceration, well, there are people —other people in prison. There are guards, there are other inmates, there are nurses, there are doctors, and there are other people who are potential victims. Locking somebody up is not necessarily preventing a future crime from happening."

(R. 1653–54.) Bohannon argues that the above argument was an improper argument concerning Bohannon's future dangerousness.

[98] This argument was made in the prosecutor's rebuttal closing argument and was a reply-in-kind to an argument made by defense counsel in closing. Defense counsel had stated: "Life without the possibility of parole will make sure that nothing ever happens at the hands of Mr. Bohannon again ... it will be a deterrent as well." (R. 1652.)

> "It is well settled that '[a] prosecutor has the right to "reply in kind" to statements made by defense counsel in the defense's closing argument.' *Newton v. State,* [78 So.3d 458, 478] (Ala.Crim.App.2009) (citations and quotations omitted). ' "When the door is opened by defense counsel's argument, it swings wide, and a number of areas barred to prosecutorial comment will suddenly be subject to reply." ' *Davis v. State,* 494 So.2d 851, 855 (Ala.Crim.App.1986) (quoting DeFoor, *Prosecutorial Misconduct in Closing Argument,* 7 Nova L.J. 443, 469–70 (1982–83))."

***55** *Vanpelt,* 74 So.3d at 82.

The prosecutor's argument did not constitute error, much less plain error. Bohannon is due no relief on this claim.

XXII.

Bohannon argues that the circuit court's instructions in the penalty phase of his trial were improper. He raises two arguments in support of this contention.

A.

First, Bohannon argues that the circuit court failed to properly instruct the jury concerning the aggravating circumstances.

Specifically, Bohannon attacks the following instruction:

> "The law of this state provides that punishment of the capital offense of two people dying under one scheme or course of conduct satisfies the aggravating feature of capital punishment.
>
> "....
>
> "An aggravating circumstance, as you have heard, which has already been proved in this case, is a circumstance specified by law that indicates or tends to indicate that the defendant should be sentenced to death."

(R. 1656–57.) Bohannon did not object to the circuit court's instructions on aggravating circumstances; therefore we review this claim for plain error. *See* Rule 45A, Ala. R.App. P.

As this Court stated in *Reynolds v. State,* 114 So.3d 61 (Ala.Crim.App.2010):

> "During its charge, the circuit court instructed the jury that the aggravating circumstance that the murder was committed during a robbery and that two or more persons were murdered by one act or pursuant to one scheme or course of conduct had been proven beyond a reasonable doubt by the jury's guilty verdicts for those offenses during the guilt phase of the trial. Section § 13A–5–45(e), Ala.Code 1975, provides: '[A]ny aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing.' The circuit court's instructions in this regard were a correct statement of law. See *Calhoun v. State,* 932 So.2d 923, 973–74 (Ala.Crim.App.2005)."

114 So.3d at 151.

[99] The circuit court's charge made clear that only one aggravating circumstance was to be considered by the jury and that that aggravating circumstance had been proven by the jury's verdict in the guilt phase. Moreover, an aggravating circumstance is necessary to invoke the death penalty. § 13A–45(e), Ala.Code 1975. When an aggravating circumstance is found to exist, the death penalty becomes a possibility, and the aggravating circumstance must be weighed against any mitigating circumstances in making a sentencing determination. The circuit court's instruction did not constitute error, much less plain error. Bohannon is due no relief on this claim.

B.

Bohannon argues that the circuit court's instructions and the prosecutor's argument encouraged the jury to consider the absence of statutory mitigation circumstances as an aggravating circumstance. Specifically, he argues that the court did not instruct the jury not to consider any other aggravating circumstance.

***56** However, the circuit court did give the following instruction:

> "[I]f, after a full and fair consideration of all of the evidence, you are not convinced beyond a reasonable doubt that at least one aggravating circumstance exists—and here the aggravating circumstance has already been proved by a reasonable doubt —or that that *one* aggravating circumstance does not outweigh the mitigating circumstances...."

(R. 1666) (emphasis added).

The jury was clearly instructed to consider only one aggravating circumstance—that two or more people were killed during one act or course of conduct. There was no plain error in the circuit court's instructions on the aggravating circumstance that applied in this case. Bohannon is due no relief on this claim.

Sentencing Order

XXIII.

Bohannon next argues that the circuit court failed to make the statutory determination as required by § 13A–5–47(e), Ala.Code 1975, that the aggravating circumstance outweighed the mitigating circumstances. Specifically, he argues that the circuit court never made the required finding but, instead, stated: "This Court, after weighing the aggravating and the mitigating circumstances as set out above, does not disagree with the jury's determination." (C.R. 82.)

The circuit court's order states:

> "This Court has considered and weighed all applicable aggravating and mitigating circumstances. In recommending a sentence of death, the jury determined the aggravating circumstances in this case outweighed the mitigating circumstances. This Court, after weighing the aggravating and mitigating circumstances as set out above, does not disagree with the jury's determination."

(C.R. 82.)

It is clear that the circuit court correctly made its own determination that the aggravating circumstance outweighed the mitigating circumstances and accordingly sentenced Bohannon to death. Bohannon is due no relief on this claim.

For the reasons stated in Part XV of this opinion, this case is remanded to the Mobile Circuit Court for that court to vacate one of Bohannon's capital-murder convictions. Due return should be filed in this Court within 42 days from the date of this opinion.

AFFIRMED IN PART; REMANDED WITH DIRECTIONS.

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

All Citations

--- So.3d ----, 2015 WL 6443170

Footnotes

1 *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

2 "The term 'death qualified' jury has been used to refer to a jury from which prospective jurors have been excluded for cause on the basis of their opposition to the death penalty." *State v. Griffin,* 251 Conn. 671, 673, n. 2, 741 A.2d 913, 917 n. 2 (1999).

3 To protect the anonymity of the jurors, we are using their initials.

4 Pursuant to Rule 18.2(b), Ala. R.Crim. P., this Court requested that the Mobile County circuit clerk forward the juror questionnaires to this Court.

5 More recently, this Court has found no merit to an appellant's claim that the Mobile District Attorney's Office had a history of discriminatory jury striking. *See Dotch v. State,* 67 So.3d 936, 982 (Ala.Crim.App.2010)("none of the cases cited by Dotch as indicating a history of discrimination occurred within the last decade or involved the prosecutor in Dotch's case.").

6 Res gestae is not one of the grounds listed in Rule 404(b), Ala. R. Evid.

7 In fact, defense counsel relied on the results of the toxicology report to such an extent that during closing statements, the prosecutor stated: "As far as the methamphetamine use of these two individuals. The defense attorney exaggerated the significance of the toxicology results and ignored what Dr. Harper, an expert in forensic toxicology, told you...." (R. 1493.)

8 In fact, the circuit court instructed the jury that: "You're not required to leave your common sense out here when you retire to deliberate. On the contrary. The law calls upon jurors to use all of your combined wisdom, experience and common sense in shifting through the evidence, accepting the true and rejecting the false." (R. 1512.)

9 The record also shows that defense counsel requested the following jury charge be given to the jury:

> "I charge you, members of the jury, that a person is justified in using deadly physical force upon another person in order to defend himself from what he reasonably believes to be the use of imminent use of unlawful deadly physical force by such other person, and he knows or it reasonably appears that he cannot avoid the necessity of using such force with complete safety by retreating, and, he was free from all fault in bringing on the difficulty."

(C.R. 147.)

10 Bobo described the 2006 amendment to Alabama's self-defense law as follows: "Instead of the defendant carrying the initial burden to produce evidence showing that a reasonable person would have believed his or her life was in danger, the burden now rests on the prosecution to rebut the presumption that the defendant was justified in using deadly force in self-defense." 38 Cumb. L.Rev. at 361.

11 Bohannon also argues that the circuit court's instructions on the verdict forms were erroneous. Bohannon did not object to the circuit court's instructions on the verdict forms or the verdict forms themselves. For the reasons stated in this part of the opinion we likewise find no plain error in the court's instructions on the verdict forms.

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APPENDIX B

2015 WL 9263842
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Court of Criminal Appeals of Alabama.

Jerry Dewayne BOHANNON.

v.

STATE of Alabama.

CR–13–0498.

Dec. 18, 2015.

Synopsis

Background: Defendant was convicted in the Circuit Court, Mobile County, Nos. CC-11-2989 and CC-11-2990, of two counts of murder and was sentenced to death. Defendant appealed. The Court of Criminal Appeals, 2015 WL 6443170, affirmed in part and remanded with directions. On remand, the Circuit Court set aside one conviction, but left standing the other conviction and sentence of death. Defendant appealed.

Holding: The Court of Criminal Appeals, Burke, J., held that death sentence was appropriate.

Affirmed.

Appeal from Mobile Circuit Court (CC–11–2989 and CC–11–2990).

On Return to Remand

BURKE, Judge.

***1** On October 23, 2015, this Court affirmed the Mobile Circuit Court's judgment as to one of Jerry Dewayne Bohannon's two convictions for capital murder, pursuant to § 13A–5–40(a)(10), Ala.Code 1975, because Bohannon murdered Anthony Harvey and Jerry DuBoise by one act or pursuant to one scheme or course of conduct. The case was remanded, however, with directions for the circuit court to vacate one of Bohannon's convictions, and sentence, because of a violation of the Double Jeopardy Clause. On remand, the circuit court held a hearing at which Bohannon, his counsel, and the prosecutor were present. Bohannon's conviction in case no. CC–11–2990 and the sentence imposed in that case were set aside, and the conviction and sentence in CC–11–2989 were left standing. Therefore, the circuit court properly complied with this Court's directions.

Because we were remanding this case, this Court, on original submission, pretermitted a plain-error review of Bohannon's sentencing proceedings as well as a review pursuant to § 13A–5–53, Ala.Code 1975, of the propriety of his capital-murder conviction and his sentence of death. Bohannon was indicted for, and was convicted of, murdering Harvey and DuBoise by one act or pursuant to one scheme or course of conduct, a violation of § 13A–5–40(a)(10). The jury recommended, by a vote of 11 to 1, that Bohannon be sentenced to death. The circuit court followed the jury's recommendation and sentenced Bohannon to death.

The record shows that Bohannon's sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. *See* § 13A–5–53(b)(1), Ala.Code 1975.

The only aggravating circumstance established in this case was that two or more persons were killed pursuant to one act or pursuant to one scheme or course of conduct, § 13A–5–49(9), Ala.Code 1975. The circuit court found the existence of one statutory mitigating circumstance—namely, that Bohannon had no significant history of prior criminal activity. § 13A–5–51(1), Ala.Code 1975. The circuit court found the following nonstatutory mitigating circumstances:

> "a. Defendant's character, life, and record: This Court charged the jury that the jury could consider in the penalty phase, as mitigators, that the defendant Bohannon was a good skilled worker who contributed to society, who had done nice things for his family and other people, and had been good to his stepson. The mitigation specialist who testified stated that she had interviewed twenty-five to thirty-five people and that all the witnesses had nothing but good things to say and she didn't find anything bad in Bohannon's background. The Court heard from character witnesses including two retired policemen who believed that the defendant was a good worker and helpful person. The Court also heard from the defendant's teenage stepson who said he considered the defendant to be a good person and a better parent than his real father. The Court finds that the defendant's character, life and record are nonstatutory mitigators which exist and the Court gives them some weight.

> ***2** "b. Mercy: While mercy has been considered because of the human condition and a life at risk, there has been nothing other than a generalized request for mercy put before this Court, which has been considered and given some weight."

(C. 80–81.) The circuit court found that the aggravating circumstance outweighed the mitigating circumstances and sentenced Bohannon to death.

This Court has independently weighed the aggravating circumstance and the mitigating circumstances, as required by § 13A–5–53(b)(2), Ala.Code 1975, and is convinced, as was the circuit court, that death was the appropriate sentence for the double homicide of Harvey and DuBoise.

Additionally, Bohannon's death sentence is neither disproportionate nor excessive as compared to the penalties imposed in similar cases. *See Harris v. State,* 2 So.3d 880 (Ala.Crim.App.2007); *Snyder v. State,* 893 So.2d 488 (Ala.Crim.App.2003).

Last, as required by Rule 45A, Ala. R.App. P., this Court has searched the record for any error that might have affected Bohannon's substantial rights, and we have found none.

Accordingly, Bohannon's sentence as to his conviction in case no. CC–11–2989 is hereby affirmed.

AFFIRMED.

WINDOM, P.J., and WELCH, KELLUM, and JOINER, JJ., concur.

All Citations

--- So.3d ----, 2015 WL 9263842

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APPENDIX C

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk

P. O. Box 301555
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March 11, 2016

CR-13-0498 **Death Penalty**

Jerry Bohannon v. State of Alabama (Appeal from Mobile Circuit Court: CC11-2989; CC11-2990)

NOTICE

You are hereby notified that on March 11, 2016, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell

D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. Robert H. Smith, Circuit Judge
Hon. JoJo Schwarzauer, Circuit Clerk
John William Dalton, Attorney
Glenn L. Davidson, Attorney
Randall S. Susskind, Attorney
James Clayton Crenshaw, Asst. Atty. Gen.
Lauren A. Simpson, Asst. Attorney General

APPENDIX D

2016 WL 5817692
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Supreme Court of Alabama.

Ex parte Jerry Bohannon
(In re Jerry Bohannon
v.
State of Alabama)

1150640
|
Sept. 30, 2016

Synopsis

Background: Defendant was convicted in the Mobile Circuit Court, Nos. CC-11-2989 and CC-11-2990, of two counts of capital murder, and was sentenced to death. Defendant appealed. The Court of Criminal Appeals affirmed one conviction, but remanded case. On remand, the Circuit Court vacated one conviction and sentence. On return to remand, the Court of Criminal Appeals, 2015 WL 6443170, affirmed. Petition for certiorari review was granted.

Holdings: The Supreme Court, Stuart, J., held that:

[1] defendant was not entitled to jury determination whether aggravating circumstances outweighed mitigating circumstances;

[2] trial court could use jury's sentencing recommendation finding aggravating circumstance;

[3] allowing cross-examination of defendant's character witnesses about whether beating by defendant was consistent with purported reputation for being law-abiding, peaceful person was not plain error; and

[4] trial court's failure to sua sponte instruct jury on victims' intoxication was not plain error.

Affirmed.

Murdock, J., concurred in result.

Petition for Writ of Certiorari to the Court of Criminal Appeals (Mobile Circuit Court, CC-11-2989 and CC-11-2990; Court of Criminal Appeals, CR-13-0498)

Opinion

STUART, Justice.

***1** This Court granted certiorari review of the judgment of the Court of Criminal Appeals affirming Jerry Bohannon's conviction for capital murder and his sentence of death. We affirm.

Facts and Procedural History

The evidence presented at trial established the following. Around 7:30 a.m. on December 11, 2010, Jerry Bohannon, Anthony Harvey, and Jerry DuBoise were in the parking lot of the Paradise Lounge, a nightclub in Mobile. The security cameras in the parking lot recorded DuBoise and Harvey talking with Bohannon. After DuBoise and Harvey had turned and walked several feet away from him, Bohannon reached for a pistol. Apparently, when they heard Bohannon cock the hammer of the pistol, DuBoise and Harvey turned to look at Bohannon. DuBoise and Harvey then ran; Bohannon pursued them, shooting several times. DuBoise and Harvey ran around the corner of the building and when the reappeared they had guns. A gunfight ensued. Harvey was shot in the upper left chest; DuBoise was shot three times in the abdomen. The testimony indicated that, in addition to shooting DuBoise and Harvey, Bohannon pistol-whipped them. Both DuBoise and Harvey died of injuries inflicted by Bohannon.

In June 2011, Bohannon was charged with two counts of capital murder in connection with the deaths. The murders were made capital because two or more persons were killed "by one act or pursuant to one scheme or course of conduct." § 13A–5–40(a)(1), Ala. Code 1975. Following a jury trial, Bohannon was convicted of two counts of capital murder. During the penalty phase, the jury recommended by a vote of 11-1 that Bohannon be sentenced to death; the circuit court sentenced Bohannon to death for each capital-murder conviction. Bohannon appealed. The Court of Criminal Appeals affirmed one of Bohannon's capital-murder convictions but remanded

the case, in light of a double-jeopardy violation, for the circuit court to set aside one of Bohannon's capital-murder convictions and its sentence. Bohannon v. State, [CR–13–0498, October 23, 2015] —— So.3d —— (Ala.2015). The circuit court vacated one conviction and sentence, and, on return to remand, the Court of Criminal Appeals affirmed Bohannon's death sentence. Bohannon v. State, [CR–13–0498, December 18, 2015] —— So.3d —— (Ala.2015). Bohannon petitioned this Court for certiorari review of the judgment of the Court of Criminal Appeals. This Court granted Bohannon's petition to consider four grounds:

> —Whether Bohannon's death sentence must be vacated in light of Hurst v. Florida, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016);
>
> —Whether the circuit court's characterization of the jury's penalty-phase determination as a recommendation and as advisory conflicts with Hurst;
>
> —Whether the circuit court committed plain error by allowing the State to question defense character witnesses about Bohannon's alleged acts on the night of the shooting; and
>
> —Whether the circuit court committed plain error by failing to sua sponte instruct the jury on the victims' intoxication?

Standard of Review

*2 **[1]** Bohannon's case involves only issues of law and the application of the law to the undisputed facts; therefore, our review is de novo. Ex parte Key, 890 So.2d 1056, 1059 (Ala.2003)("This Court reviews pure questions of law in criminal cases de novo."), and State v. Hill, 690 So.2d 1201, 1203–04 (Ala.1996).

Discussion

[2] First, Bohannon contends that his death sentence must be vacated in light of the United States Supreme Court's decision in Hurst.

In 2000, in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the United States Supreme Court held that the United States Constitution requires that any fact that increases the penalty for a crime above the statutory maximum must be presented to a jury and proven beyond a reasonable doubt. I n Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the United States Supreme Court, applying its decision in Apprendi to a capital-murder case, stated that a defendant has a Sixth Amendment right to a "jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589, 122 S.Ct. 2428. Specifically, the Court held that the right to a jury trial guaranteed by the Sixth Amendment required that a jury "find an aggravating circumstance necessary for imposition of the death penalty." Ring, 536 U.S. at 585, 122 S.Ct. 2428. Thus, Ring held that, in a capital case, the Sixth Amendment right to a jury trial requires that the jury unanimously find beyond a reasonable doubt the existence of at least one aggravating circumstance that would make the defendant eligible for a death sentence.

In Ex parte Waldrop, 859 So.2d 1181 (Ala.2002), this Court considered the constitutionality of Alabama's capital-sentencing scheme in light of Apprendi and Ring, stating:

> "Waldrop argues that under Alabama law a defendant cannot be sentenced to death unless, after an initial finding that the defendant is guilty of a capital offense, there is a second finding: (1) that at least one statutory aggravating circumstance exists, see Ala. Code 1975, § 13A–5–45(f), and (2) that the aggravating circumstances outweigh the mitigating circumstances, see Ala. Code 1975, § 13A–5–46(e)(3). Those determinations, Waldrop argues, are factual findings that under Ring must be made by the jury and not the trial court. Because, Waldrop argues, the trial judge in his case, and not the jury, found that two aggravating circumstances existed and that those aggravating circumstances outweighed the mitigating circumstances, Waldrop claims that his Sixth Amendment right to a jury trial was violated. We disagree.
>
> "It is true that under Alabama law at least one statutory aggravating circumstance under Ala. Code 1975, § 13A–4–49, must exist in order for a defendant convicted of a capital offense to be sentenced to death. See Ala. Code 1975, § 13A–5–45(f)('Unless at least one aggravating circumstance as defined in Section 13A–5–49 exists, the sentence shall be life

imprisonment without parole.'); Johnson v. State, 823 So.2d 1, 52 (Ala.Crim.App.2001)(holding that in order to sentence a capital defendant to death, the sentencer ' "must determine the existence of at least one of the aggravating circumstances listed in [Ala. Code 1975,] § 13A–5–49" ' (quoting Ex parte Woodard, 631 So.2d 1065, 1070 (Ala.Crim.App.1993))). Many capital offenses listed in Ala. Code 1975, § 13A–5–40, include conduct that clearly corresponds to certain aggravating circumstances found in § 13A–5–49:

*3 " 'For example, the capital offenses of intentional murder during a rape, § 13A–5–40(a)(3), intentional murder during a robbery, § 13A–5–40(a)(2), intentional murder during a burglary, § 13A–5–40(a)(4), and intentional murder during a kidnapping, § 13A–5–40(a)(1), parallel the aggravating circumstance that "[t]he capital offense was committed while the defendant was engaged ... [in a] rape, robbery, burglary or kidnapping," § 13A–5–49(4).'

"Ex parte Woodard, 631 So.2d at 1070–71 (alterations and omission in original).

"Furthermore, when a defendant is found guilty of a capital offense, 'any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentencing hearing.' Ala. Code 1975, § 13A–5–45(e); see also Ala. Code 1975, § 13A–5–50 ('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.'). This is known as 'double-counting' or 'overlap,' and Alabama courts 'have repeatedly upheld death sentences where the only aggravating circumstance supporting the death sentence overlaps with an element of the capital offense.' Ex parte Trawick, 698 So.2d 162, 178 (Ala.1997); see also Coral v. State, 628 So.2d 954, 965 (Ala.Crim.App.1992).

"Because the jury convicted Waldrop of two counts of murder during a robbery in the first degree, a violation of Ala. Code 1975, § 13A–5–40(a)(2), the statutory aggravating circumstance of committing a capital offense while engaged in the commission of a robbery, Ala. Code 1975, § 13A–5–49(4), was 'proven beyond a reasonable doubt.' Ala. Code 1975, § 13A–5–45(e); Ala. Code 1975, § 13A–5–50. Only one aggravating circumstance must exist in order to impose a sentence of death. Ala. Code 1975, § 13A–5–45(f). Thus, in Waldrop's case, the jury, and not the trial judge, determined the existence of the 'aggravating circumstance necessary for imposition of the death penalty.' Ring, 536 U.S. at 609, 122 S.Ct. at 2443. Therefore, the findings reflected in the jury's verdict alone exposed Waldrop to a range of punishment that had as its maximum the death penalty. This is all Ring and Apprendi require.

"....

"Waldrop also claims that Ring and Apprendi require that the jury, and not the trial court, determine whether the aggravating circumstances outweigh the mitigating circumstances. See Ala. Code 1975, §§ 13A–5–46(e), 13A–5–47(e), and 13A–5–48. Specifically, Waldrop claims that the weighing process is a 'finding of fact' that raises the authorized maximum punishment to the death penalty. Waldrop and several of the amici curiae claim that, after Ring, this determination must be found by the jury to exist beyond a reasonable doubt. Because in the instant case the trial judge, and not the jury, made this determination, Waldrop claims his Sixth Amendment rights were violated.

"Contrary to Waldrop's argument, the weighing process is not a factual determination. In fact, the relative 'weight' of aggravating circumstances and mitigating circumstances is not susceptible to any quantum of proof. As the United States Court of Appeals for the Eleventh Circuit noted, 'While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard ... the relative weight is not.' Ford v. Strickland, 696 F.2d 804, 818 (11th Cir.1983). This is because weighing the aggravating circumstances and the mitigating circumstances is a process in which 'the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence.' Tuilaepa v. California, 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994). Moreover, the Supreme Court has held that the sentencer in a capital case need not even be instructed as to how to weigh particular facts when making a sentencing decision.

See Harris v. Alabama, 513 U.S. 504, 512, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995)(rejecting 'the notion that "a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required" ' (quoting Franklin v. Lynaugh, 487 U.S. 164, 179, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988)) and holding that 'the Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer').

*4 "Thus, the weighing process is not a factual determination or an element of an offense; instead, it is a moral or legal judgment that takes into account a theoretically limitless set of facts and that cannot be reduced to a scientific formula or the discovery of a discrete, observable datum. See California v. Ramos, 463 U.S. 992, 1008, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983)('Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, ... the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment.'); Zant v. Stephens, 462 U.S. 862, 902, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)(Rehnquist, J., concurring in the judgment) ('sentencing decisions rest on a far-reaching inquiry into countless facts and circumstances and not on the type of proof of particular elements that returning a conviction does').

"In Ford v. Strickland, supra, the defendant claimed that 'the crime of capital murder in Florida includes the element of mitigating circumstances not outweighing aggravating circumstances and that the capital sentencing proceeding in Florida involves new findings of fact significantly affecting punishment.' Ford, 696 F.2d at 817. The United States Court of Appeals for the Eleventh Circuit rejected this argument, holding that 'aggravating and mitigating circumstances are not facts or elements of the crime. Rather, they channel and restrict the sentencer's discretion in a structured way after guilt has been fixed.' 696 F.2d at 818. Furthermore, in addressing the defendant's claim that the State must prove beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances, the court stated that the defendant's argument

> " 'seriously confuses proof of facts and the weighing of facts in sentencing. While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard, see State v. Dixon, 283 So.2d 1, 9 (Fla.1973), cert. denied, 416 U.S. 943, 94 S.Ct. [1950], 40 L.Ed.2d 295 (1974), and State v. Johnson, 298 N.C. 47, 257 S.E.2d 597, 617–18 (1979), the relative weight is not. The process of weighing circumstances is a matter for judge and jury, and, unlike facts, is not susceptible to proof by either party.'

"696 F.2d at 818. Alabama courts have adopted the Eleventh Circuit's rationale. See Lawhorn v. State, 581 So.2d 1159, 1171 (Ala.Crim.App.1990)('while the existence of an aggravating or mitigating circumstance is a fact susceptible to proof, the relative weight of each is not; the process of weighing, unlike facts, is not susceptible to proof by either party'); see also Melson v. State, 775 So.2d 857, 900–901 (Ala.Crim.App.1999); Morrison v. State, 500 So.2d 36, 45 (Ala.Crim.App.1985).

"Thus, the determination whether the aggravating circumstances outweigh the mitigating circumstances is not a finding of fact or an element of the offense. Consequently, Ring and Apprendi do not require that a jury weigh the aggravating circumstances and the mitigating circumstances."

Ex parte Waldrop, 859 So.2d at 1187–90 (footnotes omitted). This Court concluded that "all [that] Ring and Apprendi require" is that "the jury ... determine[ ] the existence of the 'aggravating circumstance necessary for imposition of the death penalty.' " 859 So.2d at 1188 (quoting Ring, 536 U.S. at 609, 122 S.Ct. 2428), and upheld Alabama's capital-sentencing scheme as constitutional when a defendant's capital-murder conviction included a finding by the jury of an aggravating circumstance making the defendant eligible for the death sentence.

In Ex parte McNabb, 887 So.2d 998 (Ala.2004), this Court further held that the Sixth Amendment right to a trial by jury is satisfied and a death sentence may be imposed if a jury unanimously finds an aggravating circumstance during the penalty phase or by special-verdict form. McNabb emphasized that a jury, not the judge, must find the existence of at least one aggravating factor for a resulting death sentence to comport with the Sixth Amendment.

*5 The United States Supreme Court in its recent decision in Hurst applied its holding in Ring to Florida's capital-sentencing scheme and held that Florida's capital-sentencing scheme was unconstitutional because, under that scheme, the trial judge, not the jury, made the "findings necessary to impose the death penalty." — U.S. ——, 136 S.Ct. at 622. Specifically, the Court held that Florida's capital-sentencing scheme violated the Sixth Amendment right to a trial by jury because the judge, not the jury, found the existence of the aggravating circumstance that made Hurst death eligible. The Court emphasized that the Sixth Amendment requires that the specific findings authorizing a sentence of death must be made by a jury, stating:

> "Florida concedes that Ring required a jury to find every fact necessary to render Hurst eligible for the death penalty. But Florida argues that when Hurst's sentencing jury recommended a death sentence, it 'necessarily included a finding of an aggravating circumstance.' ... The State contends that this finding qualified Hurst for the death penalty under Florida law, thus satisfying Ring. '[T]he additional requirement that a judge also find an aggravator,' Florida concludes, 'only provides the defendant additional protection.' ...
>
> "The State fails to appreciate the central and singular role the judge plays under Florida law. ... [T]he Florida sentencing statute does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death.' Fla. Stat. § 775.082(1) (emphasis added). The trial court alone must find 'the facts ... [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.' § 921.141(3) .... '[T]he jury's function under the Florida death penalty statute is advisory only.' Spaziano v. State, 433 So.2d 508, 512 (Fla.1983). The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that Ring requires.
>
> "....
>
> "The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional."

Hurst, — U.S. ——, 136 S.Ct. at 622–24 (final emphasis added).

Bohannon contends that, in light of Hurst, Alabama's capital-sentencing scheme, like Florida's, is unconstitutional because, he says, in Alabama a jury does not make "the critical findings necessary to impose the death penalty." — U.S. ——, 136 S.Ct. at 622. He maintains that Hurst requires that the jury not only determine the existence of the aggravating circumstance that makes a defendant death-eligible but also determine that the existing aggravating circumstance outweighs any existing mitigating circumstances before a death sentence is constitutional. Bohannon reasons that because in Alabama the judge, when imposing a sentence of death, makes a finding of the existence of an aggravating circumstance independent of the jury's fact-finding and makes an independent determination that the aggravating circumstance or circumstances outweigh the mitigating circumstance or circumstances found to exist, the resulting death sentence is unconstitutional. We disagree.

[3] [4] [5] [6] Our reading of Apprendi, Ring, and Hurst leads us to the conclusion that Alabama's capital-sentencing scheme is consistent with the Sixth Amendment. As previously recognized, Apprendi holds that any fact that elevates a defendant's sentence above the range established by a jury's verdict must be determined by the jury. Ring holds that the Sixth Amendment right to a jury trial requires that a jury "find an aggravating circumstance necessary for imposition of the death penalty." Ring, 536 U.S. at 585, 122 S.Ct. 2428. Hurst applies Ring and reiterates that a jury, not a judge, must find the existence of an aggravating factor to make a defendant death-eligible. Ring and Hurst require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty—the plain language in those cases requires nothing more and nothing less. Accordingly, because in Alabama a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-eligible, Alabama's capital-sentencing scheme does not violate the Sixth Amendment.

*6 Moreover, Hurst does not address the process of weighing the aggravating and mitigating circumstances or

suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. This Court rejected that argument in Ex parte Waldrop, holding that that the Sixth Amendment "do[es] not require that a jury weigh the aggravating circumstances and the mitigating circumstances" because, rather than being "a factual determination," the weighing process is "a moral or legal judgment that takes into account a theoretically limitless set of facts." 859 So.2d at 1190, 1189. Hurst focuses on the jury's factual finding of the existence of a aggravating circumstance to make a defendant death-eligible; it does not mention the jury's weighing of the aggravating and mitigating circumstances. The United States Supreme Court's holding in Hurst was based on an application, not an expansion, of Apprendi and Ring; consequently, no reason exists to disturb our decision in Ex parte Waldrop with regard to the weighing process. Furthermore, nothing in our review of Apprendi, Ring, and Hurst leads us to conclude that in Hurst the United States Supreme Court held that the Sixth Amendment requires that a jury impose a capital sentence. Apprendi expressly stated that trial courts may "exercise discretion —taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute." 530 U.S. at 481, 120 S.Ct. 2348. Hurst does not disturb this holding.

Bohannon's 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 is not persuasive. In Hurst, the United States Supreme Court specifically stated: "The decisions [in Spaziano and Hildwin] are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." Hurst, —— U.S. ——, 136 S.Ct. at 624 (emphasis added). Because in Alabama a jury, not a judge, makes the finding of the existence of an aggravating circumstance that makes a capital defendant eligible for a sentence of death, Alabama's capital-sentencing scheme is not unconstitutional on this basis.

Bohannon's death sentence is consistent with Apprendi, Ring, and Hurst and does not violate the Sixth Amendment. The jury, by its verdict finding Bohannon guilty of murder made capital because "two or more persons [we]re murdered by the defendant by one act or pursuant to one scheme or course of conduct," see § 13A–5–40(a)(10), Ala. Code 1975, also found the existence of the aggravating circumstance, provided in § 13A–5–49(9), Ala. Code 1975, that "[t]he defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme of course of conduct," which made Bohannon eligible for a sentence of death. See also § 13A–5–45(e), Ala. Code 1975 ("[A]ny aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing."). Because the jury, not the judge, unanimously found the existence of an aggravating factor—the intentional causing of the death of two or more persons by one act or pursuant to one scheme of course of conduct—making Bohannon death-eligible, Bohannon's Sixth Amendment rights were not violated.

Bohannon's argument that the jury's finding of the existence of the aggravating circumstance during the guilt phase of his trial was not an "appropriate finding" for use during the penalty phase is not persuasive. Bohannon reasons that because, he says, the jury was not informed during the guilt phase that a finding of the existence of the aggravating circumstance during the guilt phase would make him eligible for the death penalty, the jury did not know the consequences of its decision and appreciate its seriousness and gravity.

A review of the record establishes that the members of the venire were "death-qualified" during voir dire. Specifically, the trial court instructed:

> "THE COURT: The defendant was indicted by the Grand Jury of Mobile County during its term in June of 2011....
>
> *7 "....
>
> "THE COURT: The case—and by that I mean the Grand Jury indictment—is indicted for what is known as capital murder.
>
> "Capital murder is an offense which, if the defendant is convicted, is punishable either by death or by life imprisonment without the possibility of parole.

"The first part of this case that will be presented to the jury is what is known as the guilt phase. The jury will be called upon to determine whether the State has proved that the defendant is guilty beyond a reasonable doubt of the offense, or whether the State has proved the guilt of the defendant beyond a reasonable doubt of anything at all.

"If the jury finds the defendant not guilty, that, of course, ends the matter.

"If the jury finds the defendant guilty of some offense less than capital murder, then it will be incumbent upon the Court—or me—to impose the appropriate punishment.

"If, however, the jury finds the defendant guilty of the offense of capital murder, the jury would be brought back for a second phase, or what we know as the penalty phase of this case. And, at that time, the jury may hear more evidence, will hear legal instructions and argument of counsel. The jury would then make a recommendation as to whether the appropriate punishment is death or life imprisonment without the possibility of parole."

Bohannon's jury was informed during voir dire that, if it returned a verdict of guilty of capital murder, Bohannon was eligible for a sentence of death. Therefore, Bohannon's argument that his jury was not impressed with the seriousness and gravity of its finding of the aggravating circumstance during the guilt phase of his trial is not supported by the record.

[7] Next, 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, —— 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.

[8] [9] [10] Bohannon further contends that the circuit court erred when it failed to limit the State's questioning of defense character witnesses about his alleged acts on the night of the shooting. Because Bohannon made no objection on this basis at trial, we review the issue for plain error.

*8 "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)].

Ex parte Walker, 972 So.2d 737, 742 (Ala.2007). See also Ex parte Womack, 435 So.2d 766, 769 (Ala.1983).

According to Bohannon, the State's questioning was highly prejudicial in light of the facts that his state of mind was a central issue for the jury's determination and that his defense depended on persuading the jury that it should view the surveillance tape and other evidence through the lens of his law-abiding character. He further argues that the prejudice was compounded by the State's argument that each of his character witnesses admitted that a person who beats and shoots somebody is not a law-abiding, peaceful person. Accordingly, he maintains that his conviction should be reversed as a result of the circuit court's failure to limit the State's cross-examination of his character witnesses.

Our review of the record establishes that the State's questioning of Bohannon's character witnesses about his conduct immediately before and during the offense as reflected in the surveillance tape " 'did not seriously affect the fairness or integrity of the judicial proceedings.' " Ex

parte Walker, 972 So.2d at 742 (quoting Ex parte Trawick, 698 So.2d 162, 167 (Ala.1997)). The record establishes that the State asked three of Bohannon's witnesses whether the content of the tape was consistent with Bohannon's reputation for good behavior. For example, the State asked a witness: "[Y]ou saw what happened out there at the Paradise Lounge ... [T]hat's not consistent with having a good reputation." The State's questions were about a surveillance tape that had already been admitted into evidence and had been viewed by the jury. Because the jury was free to draw its own conclusions about Bohannon's state of mind from its viewing of the tape, no probability exists that the alleged improper questioning substantially prejudiced Bohannon or affected the integrity of his trial. Plain error does not exist in this regard.

[11] Lastly, Bohannon contends that the circuit court also committed plain error by failing sua sponte to instruct the jury on the victims' intoxication. Specifically, he argues that because the evidence supported a reasonable inference of self-defense, the circuit court should have instructed the jury that the victims' intoxication at the time of the offense may have made them aggressive. See Stevenson v. State, 794 So.2d 453, 455 (Ala.Crim.App.2001)(recognizing that " '[a] defendant is permitted to demonstrate, under a theory of self-defense, that the victim was under the influence of alcohol at the time of the fatal altercation' " and that "a defendant should be allowed a jury instruction [when requested] regarding the intoxication of the deceased, to show tendencies towards aggression, when the evidence would support a reasonable inference of self-defense" (quoting Quinlivan v. State, 555 So.2d 802, 805 (Ala.Crim.App.1989))).

***9** In Ex parte Martin, 931 So.2d 759 (Ala.2004), this Court, when addressing whether the trial court's failure to give, sua sponte, instructions to the jury explaining the scope of the victim's statements constituted plain error, recognized:

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

931 So.2d at 767–68.

This Court has required a trial court to instruct the jury sua sponte "only [in] those instances where evidence of prior convictions [were] offered for impeachment purposes." Johnson v. State, 120 So.3d 1119, 1128 (Ala.2006)(citing Ex parte Martin, 931 So.2d at 769). In such cases, the trial court has been required to issue a sua sponte instruction because, in light of the facts in those particular cases, an instruction was considered necessary to protect the defendant from the misuse of "presumptively prejudicial" information that could be considered by the jury for a limited purpose. Ex parte Minor, 780 So.2d 796, 804 (Ala.2000).

The record in this case simply does not support a conclusion that the circuit court's failure to issue a sua sponte instruction on the victims' intoxication constituted plain error. The evidence at issue is not "presumptively prejudicial" to Bohannon, and, because the jury was instructed to consider all the evidence, Bohannon was not substantially prejudiced by the circuit court's failure to issue such an instruction. The record establishes that Bohannon's counsel argued in his opening statement that one of the victims pushed Bohannon a couple of times during the altercation and that the victims were high on

methamphetamine and that that drug makes individuals aggressive. The record also establishes that evidence was admitted indicating that the victims were intoxicated and that the jury, when it viewed the surveillance tape, was able to observe the confrontation between Bohannon and the victims. Therefore, the jury was free to consider all the evidence Bohannon presented, which included evidence of the victims' intoxication and Bohannon's argument that the victims' intoxication made them act aggressively. Because the jury was instructed to consider all the evidence, the failure to sua sponte give an instruction on the victims' intoxication did not seriously affect the fairness or integrity of Bohannon's trial or substantially prejudice Bohannon. Ex parte Martin, supra; and Ex parte Henderson, 583 So.2d 305, 306 (Ala.1991). After considering the evidence and the totality of the circuit court's jury instruction, we conclude that the circuit court's failure to give sua sponte an instruction about the proper use of the victims' intoxication did not constitute plain error.

Conclusion

***10** Based on the foregoing, the judgment of the Court of Criminal Appeals is affirmed.

AFFIRMED.

Bolin, Parker, Shaw, Main, Wise, and Bryan, JJ., concur.

Murdock, J., concurs in the result.

All Citations

--- So.3d ----, 2016 WL 5817692

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APPENDIX E

IN THE SUPREME COURT OF ALABAMA

October 18, 2016

1150640 Ex parte Jerry Bohannon. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Jerry Bohannon v. State of Alabama) (Mobile Circuit Court: CC-11-2989; CC-11-2990; Criminal Appeals : CR-13-0498).

CERTIFICATE OF JUDGMENT

WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on September 30, 2016:

Affirmed. Stuart, J. - Bolin, Parker, Shaw, Main, Wise, and Bryan, JJ., concur. Murdock, J., concurs in the result.

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

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

Witness my hand this 18th day of October, 2016.

Julia Jordan Weller

Clerk, Supreme Court of Alabama