EXHIBIT 1

213 So.3d 214
Supreme Court of Alabama.

Ex parte Jerry Jerome SMITH.
(In re Jerry Jerome Smith
v.
State of Alabama).

1010267.
|
March 14, 2003.
|
Rehearing Denied May 23, 2003.

Synopsis
Background: Defendant was convicted following jury trial in the Houston Circuit Court, No. CC–97–270, Charles L. Little, J., of murder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct and was sentenced to death. Defendant appealed. The Court of Criminal Appeals affirmed conviction and, following two remands to address deficiencies in sentencing order, affirmed death sentence, 213 So.3d 108.

Holdings: On petition for writ of certiorari, the Supreme Court, Stuart, J., held that: (1) evidentiary rulings improperly barred certain evidence relating to impact of defendant's dysfunctional family on his development; (2) those erroneous rulings were not harmless; (3) aggravating circumstance of a prior felony conviction did not have to be submitted to jury and proved beyond a reasonable doubt; and (4) evidence did not establish that defendant was mentally retarded, for purposes of Eighth Amendment prohibition against execution of a mentally retarded person.

Affirmed as to conviction, reversed as to sentence; and remanded.

Moore, C.J., filed an opinion concurring in part and dissenting in part.

On remand, Ala.Crim.App., 213 So.3d 226.

Reversed and remanded, Ala., 213 So.3d 239.

On remand, Ala.Crim.App., 213 So.3d 255.

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Reversed and remanded, Ala., 213 So.3d 313.

On remand, Ala.Crim.App., 213 So. 3d 327.

Attorneys and Law Firms

***216** Kathleen Nemish and Chris Capps, Dothan, for petitioner.

William H. Pryor, Jr., atty. gen., and George Martin and Tracy M. Daniel, asst. attys. gen., for respondent.

Opinion

STUART, Justice.

Jerry Jerome Smith was convicted of "[m]urder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct." § 13A–5–40(a)(10), Ala.Code 1975. The jury recommended, by a vote of 11 to 1, that Smith be sentenced to death. After a sentencing hearing, the trial court sentenced Smith to death.

The Court of Criminal Appeals affirmed Smith's conviction, but remanded the case for the trial court to address deficiencies and errors in the sentencing order. *Smith v. State,* 213 So.3d 108 (Ala.Crim.App.2000). The trial court amended its sentencing order on remand. The Court of Criminal Appeals reviewed the amended order and held that the amendment did not remedy the errors because the trial court had not addressed all of the court's concerns; it again remanded the case. 213 So.3d 108, 203 (opinion on return to remand). On return to second remand, the trial court submitted a new sentencing order, which the Court of Criminal Appeals determined was adequate. The Court of Criminal Appeals completed its ***217** review and affirmed Smith's death sentence. 213 So.3d 108, 209 (opinion on return to second remand).

The Court of Criminal Appeals presented a detailed synopsis of the facts of the offense and a thorough analysis of the issues presented during the guilt phase of Smith's trial. We have reviewed the issues raised by Smith regarding the guilt phase of his trial as to which we granted certiorari review, [1] and we agree with the Court of Criminal Appeals that there was no reversible error during the guilt phase; therefore, Smith's conviction is due to be affirmed. This Court, however, does not wish to be understood as approving all the language, reasons, or statements of law in the Court of Criminal Appeals' December 22, 2000, opinion addressing the allegations of error in the guilt phase. See *Horsley v. Horsley,* 291 Ala. 782, 280 So.2d 155 (1973). We conclude, however, that

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reversible error did occur during the penalty phase of Smith's trial, and we remand the case for a new penalty-phase proceeding.

I.

According to Smith, the trial court prevented him from introducing relevant and persuasive mitigating evidence in violation of *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and Alabama law. Specifically, he maintains in his brief to this Court that he was denied the opportunity to present evidence to show that

> "[h]is family's role models and caretakers—his mother and father—were an alcoholic and a convict. They were unavailable to protect their children from predators or to provide them with a healthy home environment. Because Jerry Smith's brothers and sisters also suffered from neglect and trauma, they were unable to offer the sustenance that a sibling can sometimes provide to assist a flailing youngster."

According to Smith, because the trial court ruled that he could introduce evidence only of things that happened to him and no one else, he was precluded from presenting a complete picture of his childhood.

> "We begin by recognizing that the concept of individualized sentencing in criminal cases generally, although not constitutionally required, has long been accepted in this country.... [W]here sentencing discretion is granted, it generally has been agreed that the sentencing judge's 'possession of the fullest information possible concerning the defendant's life and characteristics' is '[h]ighly relevant—*if not essential*—[to the] selection of an appropriate sentence....' *Williams v. New York,* [337 U.S. 241], 247 [(1949)](emphasis added [in *Lockett*]).
>
> "....
>
> "... [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.... Given that the imposition of ***218** death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.... The nonavailability of corrective or

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> modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.
>
> "There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments."

Lockett v. Ohio, 438 U.S. at 602–05 (footnotes omitted). Likewise, a ruling that has not given "independent mitigating weight to aspects of the defendant's character" creates the same risk.

To determine the appropriate sentence, the sentencer must engage in a "broad inquiry into all relevant mitigating evidence to allow an individualized determination." *Buchanan v. Angelone,* 522 U.S. 269, 276, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998). Alabama's sentencing scheme broadly allows the accused to present evidence in mitigation. *Jacobs v. State,* 361 So.2d 640, 652–53 (Ala.1978). See 13A–5–45(g), Ala.Code 1975 ("The defendant shall be allowed to offer any mitigating circumstance defined in Sections 13A–5–51 and 13A–5–52."). "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown,* 479 U.S. 538, 545, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring specially).

At the charge conference before the penalty phase of Smith's trial, Smith's counsel indicated that Smith would testify that his family was dysfunctional and the effect that his dysfunctional family had on his development. At the charge conference, the following occurred:

> "[Prosecutor]: I want to say this evidence about at age 12 the client—I presume the client is Jerry Jerome Smith—[Smith's siblings] were at home, and [E.L.M.] came in and raped [Smith's sister], hit [Smith's brother] in the head with the pliers. Mr. Smith was angry about that incident. That is clearly not admissible. They can't elicit that.... They can't get into that. They can't get into his brother is mentally retarded. They can't get into his sister tried to commit suicide. They can't get in that his sister had an alcohol problem or attempted suicide. Mr. Smith's cousin ... was in a mental institution. That is not relevant at all. They can put up this defendant and his conditions, but not the family....
>
> "....

"[Smith's counsel]: Your Honor, mental retardation is a hereditary factor, certainly, certain aspects of it, without doubt. To show that someone is in [special education] classes, that he has the ***219** education ability of a 12 year old, he's borderline mentally retarded, he has a mild mental deficiency, all of those are weighting factors to substantiate the possibility of him having that problem, which [Smith's expert witness] testified [during the guilt phase] that he has....

"[Smith's cocounsel]: Judge, let me refer the Court to *Jackson v. Thigpen* [752 F.Supp. 1551 (1990)]. This is [a] Northern District [of] Alabama 1990 case. Let me read you this, 'Petitioner's alcoholism, the abuse that she suffered as a child, her limited intelligence, and the circumstances surrounding the killing of her boyfriend all bore upon the mitigating factors of whether petitioner was substantially impaired in her capacity to appreciate the criminality of her conduct.' ...

"....

"[Prosecutor]: They can put in things about him, that he has got a drinking problem, he's got a mental problem, he tried to kill himself, ... but things about the family are not relevant to mitigating circumstances. That's what these cases say. Once that gets in, it's too late to try to change it on behalf of the State.

"....

"THE COURT: Okay. I'm going to exclude anything that happened to anybody other than the defendant. And you have y'all's objection to that.

"....

"[Smith's counsel]: What about were your siblings abusive or neglectful to you? Yes, I had a sister in prison. She wasn't home with me to bond with me. All of that, Judge, I think is relevant.

"THE COURT: No. No."

During Smith's direct testimony in the penalty phase, the following occurred:

"[Smith's counsel]: How many brothers and sisters did you have?

"[Smith]: Well, there is five boys and two girls, and two of them—the oldest one was in prison at the time—

"[Prosecutor]: I object. This was not the question. If the defendant would answer the questions and not ad lib or volunteer stuff, Judge.

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"[Smith's counsel]: We are talking about his family unit here, in other words, his environment as a child.

"THE COURT: Okay. I think we talked about that before this hearing, and that is sustained.

"....

"[Smith's counsel]: How old were your other brothers and sisters at home?

"[Smith]: I think my sister was 14, either 13, at the time. And she was pregnant also when she was 13 years old.... My oldest brother was molested, and he's the mentally retarded one.

"[Prosecutor]: Judge, once again, would you instruct this defendant to answer the question, not volunteer information. He didn't ask him about those things. He's rambling off. And we've already taken up these matters.

"[Smith's counsel]: We are not offering these as specific examples of mitigation. We are offering this as the totality of his family unit, which I think is admissible.

"THE COURT: Okay. [Smith's counsel], we've already discussed this. And that is sustained. And the jury is to disregard the testimony in regards to—I forgot what it was now—the sister —

"[Smith's counsel]: The sister being retarded and the brother being in jail.

"THE COURT: You are not to consider that at this time."

***220** A little later when his counsel questioned Smith about his biological father, the prosecutor again objected. Smith's counsel indicated that he thought the evidence was relevant. Before the court could sustain the objection, the prosecutor withdrew his objection. Smith responded, "My role model dad I was supposed to have had was an alcoholic also. And he stayed in jail most of the time and basically couldn't hold a job down. So it was hard." In light of the objection and the trial court's previous rulings, Smith's counsel did not develop this line of examination to include the effect Smith's relationship with his father, or the lack of one, had on Smith. The trial court's ruling during the charge conference and its subsequent ruling during Smith's testimony were erroneous. A sentencer may not, as a matter of law, preclude or refuse to consider any relevant mitigating factor offered by the defendant. *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); and *Lockett,* supra. In *Price v. State,* 725 So.2d 1003, 1062 (Ala.Crim.App.1997), aff'd, 725 So.2d 1063 (Ala.1998), the Court of Criminal Appeals upheld as proper the trial court's finding as a nonstatutory mitigating circumstance that the defendant's father was murdered when he was a child and its consideration of "the instability of [the defendant's] home life and the traumatic events during his early years." The trial court's ruling here improperly restricted Smith's presentation

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and development of mitigation evidence; consequently, it prevented the jury from determining an individualized sentence recommendation for Smith.

We must now decide whether that error warrants a reversal of the sentence and necessitates a new penalty-phase proceeding. The Court of Criminal Appeals held that despite the trial court's ruling, Smith was permitted to present evidence regarding his dysfunctional family; therefore, the error, if any, was harmless. The Court of Criminal Appeals noted that Smith presented evidence indicating that Smith's mother and sister suffered from alcoholism; that his father had been incarcerated while Smith was a child; that his parents were unable to provide a safe home environment; that his brothers and sisters were unable to provide sustenance; that one of his brothers was mentally retarded; that some of his siblings were incarcerated; and that his parents did not visit him while he was incarcerated. We agree with the Court of Criminal Appeals that mitigating evidence was presented. It is clear from the record, however, that Smith was prevented from expanding the evidence to show how his childhood was impacted by the fact that his family was dysfunctional. While he was able to present some evidence about certain members of his family, that evidence was limited and not well developed. As Smith maintains, "At no point was the jury able to learn the key information: what it was like for [him] to grow up in an abusive, neglectful home where no one was able to look after him." Additionally, the trial court specifically instructed the jury to ignore some of the evidence presented, which, if developed and allowed to be considered by the jury, may have been relevant in the jury's sentencing recommendation.

> "The harmless error rule is to be applied with extreme caution in capital cases. *Seibold v. State,* 287 Ala. 549, 253 So.2d 302 (1970). We hold that caution must also be observed when reviewing error committed at the penalty phase of the trial. After all, it is the penalty phase which distinguishes these cases from all other cases."

Ex parte Whisenhant, 482 So.2d 1247, 1249 (Ala.1984).

Smith was prevented from presenting a complete picture of the impact his ***221** dysfunctional family had on his development. We cannot maintain judicial integrity and conclude that the error —not allowing that evidence to be developed as nonstatutory mitigating evidence—was harmless. We are not reasonably certain that the outcome of the penalty phase of Smith's trial would have been the same had the mitigating evidence been developed. As Justice Marshall reminded us in his special writing concurring in the judgment in *Lockett,* "Where life itself is what hangs in the balance, a fine precision in the process must be insisted upon." 438 U.S. at 620. Smith did not receive the "fine precision" in the penalty phase of his trial necessary to ensure due process. Therefore, we remand this case for a new penalty-phase proceeding.

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In concluding that the error here was not harmless, we have considered the role of the jury during the penalty phase of a capital case. We will not undermine the responsibilities and duties of the jury during the penalty phase. § 13A–5–46, Ala.Code 1975. Although the trial court is not bound by the jury's sentencing recommendation, it is a factor in the trial court's determination. § 13A–5–47(e). See also *Ex parte Taylor,* 808 So.2d 1215 (Ala.2001).

Additionally, we note that while the trial court found Smith's evidence significant in its determination of mitigating circumstances and considered those mitigating circumstances in the weighing process, this fact alone does not render the error harmless; in fact, it indicates that the jury's advisory verdict, if the evidence had been developed and the jury allowed to consider it, may have been different.

> " 'The legislatively mandated role of the jury in returning an advisory verdict, based upon its consideration of aggravating and mitigating circumstances, can not be abrogated by the trial court's errorless exercise of its equally mandated role as the ultimate sentencing authority. Each part of the sentencing process is equally mandated by the statute (§§ 13A–5–46, –47(e)); and the errorless application by the court of its part does not cure the erroneous application by the jury of its part. For a case consistent with our holding, see *Johnson v. State,* 502 So.2d 877 (Ala.Cr.App.1987). To hold otherwise is to hold that the sentencing role of the jury, as required by statute, counts for nothing so long as the court's exercise of its role is without error.' "

Ex parte Stewart, 659 So.2d 122, 128 (Ala.1993)(quoting *Ex parte Williams,* 556 So.2d 744, 745 (Ala.1987)). This case does not present a circumstance where the aggravating circumstances were so numerous and overwhelming that when the aggravating circumstances are weighed against the mitigating circumstances, the error could be considered harmless. Cf. *Broadnax v. State,* 825 So.2d 134 (Ala.Crim.App.2000), aff'd, 825 So.2d 233 (Ala.2001).

We further note that the prosecutor apparently believed that the development of the mitigating evidence would have some impact on the jury or he would not have so strenuously objected to its admission. Because we do not know, based on the record, how Smith would have developed the evidence, we cannot determine with certainty that it would have had no impact on the jury.

We also reject the contention that because Smith's counsel indicated at the charge conference that Smith was to be the only witness, the evidence to be offered in mitigation was minimal and the error in not allowing that evidence therefore harmless. We cannot conclude with certainty, especially in

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light of the prosecutor's objections, that Smith was able to develop the evidence fully. The record ***222** indicates that during the penalty phase, Smith's mother was present in the courtroom and that defense counsel indicated that she would probably testify. Smith's mother, however, did not testify. We acknowledge that the trial court did not refuse to allow her to testify and that numerous possible reasons exist for her not testifying. However, we cannot exclude the possibility that her testimony was not elicited because of the trial court's ruling that what had happened to family members, other than Smith, was not relevant.

Our holding today in no way indicates this Court's view on the propriety of the sentence of death in this case. "What is important ... is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens,* 462 U.S. 862, 879, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). The penalty phase of a capital-murder case is a " 'due process hearing of the highest magnitude.' *Richardson v. State,* 376 So.2d 205, 224 (Ala.Crim.App.1978), aff'd, 376 So.2d 228 (Ala.1979)." *Ex parte Stewart,* 659 So.2d at 127. Smith was not afforded due process at the penalty phase of his trial; therefore, we must remand this case.

In light of our remand for a new penalty-phase proceeding, we pretermit any discussion of other errors Smith alleges occurred during the penalty phase.[2] Our pretermission of any discussion of the additional penalty-phase issues upon which we granted certiorari review is not to be understood as approval of all the language, reasons, or statements of law in the Court of Criminal Appeals' opinion. *Horsley,* supra.

II.

After the United States Supreme Court issued its holding in *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), this Court ordered supplemental briefing to allow the parties to discuss the impact of *Ring* on Smith's case. We need not, however, address the implications of the holding in *Ring* on the Alabama capital-sentencing statutes. Even if *Ring* draws into question the constitutionality of Alabama's capital-sentencing scheme, and we are not prepared to say that it does, a *Ring* violation did not occur in this case.

In his special writing in *Bottoson v. Moore,* 833 So.2d 693, 719 (Fla.2002), Justice Pariente eloquently explained:

> "[T]he presence of a prior violent felony conviction meets the threshold requirement of *Apprendi [v. New Jersey,* 530 U.S. 466 (2000),] as extended to capital sentencing by *Ring [v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428 (2002)]. In *Almendarez-Torres v. United States,* 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), the United States Supreme Court approved an enhanced sentence for the crime of returning to the United States after being deported, based on the judge's

finding that the deportation was pursuant to three prior convictions of aggravated felonies. The Court rejected a claim that the enhancement ***223** was improper because the indictment had not alleged that the deportation was pursuant to the prior convictions. As explained in *Apprendi,* 'our conclusion in *Almendarez-Torres* turned heavily upon the fact that the additional sentence to which defendant was subject was "the prior commission of a serious crime." ' 530 U.S. at 488, 120 S.Ct. 2348. In *Apprendi,* the Court held:

> " '[T]here is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.'

"*Id.* at 496, 120 S.Ct. 2348. Accordingly, the Court held: '*Other than the fact of a prior conviction,* any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' *Id.* at 490, 120 S.Ct. 2348 (emphasis supplied [in *Bottoson*]).

"In extending *Apprendi* to capital sentencing, the Court in *Ring* did not eliminate the 'prior conviction' exception arising in *Almendarez-Torres.* The Court noted in *Ring* that '[n]o aggravating circumstance related to past convictions in his case; Ring therefore does not challenge *Almendarez-Torres.*' 536 U.S. at 597 n. 4, 122 S.Ct. at 2437 n. 4."

833 So.2d at 722–23 (footnote omitted). As was the circumstance in *Bottoson,* one of the aggravating circumstances presented by the State in the penalty phase of this trial involved a prior felony conviction; therefore, Smith is not entitled to relief pursuant to *Ring.* See *Almendarez-Torres v. United States,* 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998).

III.

Smith further maintains that this Court must remand his case for a determination as to whether his sentence violates the United States Supreme Court's recent holding in *Atkins v. Virginia,* 536 U.S. 304, 317, 122 S.Ct. 2242, 2250, 153 L.Ed.2d 335 (2002), that executing a mentally retarded individual violates the ban on cruel and unusual punishments found in the Eighth Amendment to the United States Constitution. This issue was raised in the supplemental briefing ordered by this Court.

Although this issue was brought to our attention on certiorari review, because Smith did not contend at trial that mental retardation barred the imposition of a death sentence upon him we apply the plain-error standard of review. See Rule 39(a)(2)(D), Ala.R.App.P.

> " '[T]his Court's review of a death-penalty case allows us to address any plain error or defect found in the proceeding under review, even if the error was not brought to the attention of the trial court. Rule 39(a)(2)(D) and (k), Ala. R.App. P. " ' "Plain error" only arises if the error is so obvious that the failure to notice it would seriously affect the fairness or integrity of the judicial proceedings.' " *Ex parte Womack,* 435 So.2d 766, 769 (Ala.), cert. denied, *Womack v. Alabama,* 464 U.S. 986, 104 S.Ct. 436, 78 L.Ed.2d 367 (1983), quoting *United States v. Chaney,* 662 F.2d 1148, 1152 (5th Cir.1981). The plain-error standard applies only where a particularly egregious error occurs at trial. *Ex parte Harrell,* 470 So.2d 1309, 1313 (Ala.), cert. denied, 474 U.S. 935, 106 S.Ct. 269, 88 L.Ed.2d 276 (1985). When the error "has or probably has" ***224** substantially prejudiced the defendant, this Court may take appropriate action. Rule 39(a)(2)(D) and (k), Ala. R.App. P.; *Ex parte Henderson,* 583 So.2d 305, 306 (Ala.1991), cert. denied, *Henderson v. Alabama,* 503 U.S. 908, 112 S.Ct. 1268, 117 L.Ed.2d 496 (1992).'

"*Ex parte Minor,* 780 So.2d 796, 799–800 (Ala.2000)(footnote omitted)."

Ex parte Perkins, 851 So.2d 453, 454–55 (Ala.2002).

We reject Smith's contention that in light of the holding in *Atkins,* we must remand this cause for the trial court to conduct a hearing to determine if he is mentally retarded and therefore not subject to the death penalty. Plain error did not occur in that regard in this case.

Because the Legislature has not had an occasion to address this State's policy regarding mentally retarded capital defendants and establish a procedure for determining whether a capital defendant is mentally retarded and therefore not subject to the death penalty, we have conducted our review in light of the most liberal definitions considered by the United States Supreme Court in reaching its holding in *Atkins* and as defined by statutes in those states that prohibit the imposition of the death sentence on a mentally retarded defendant. [3]

Based on the facts presented at Smith's trial, under even the broadest definition of mental retardation Smith is not mentally retarded. Those states that have statutes prohibiting the execution of a mentally retarded defendant require that to be considered mentally retarded a defendant must have significantly subaverage intellectual functioning (an IQ score of 70 or below) *and* significant or substantial deficits in adaptive behavior. Additionally, those problems must have manifested themselves before the defendant reached age 18.

The record establishes that during the guilt phase of trial, the State and Smith presented expert testimony regarding Smith's intellectual functioning and adaptive behavior. Dr. Don Crook, a licensed professional counselor, testified as a witness for the defense. Dr. Crook interviewed Smith and administered the Wechsler Adult Intelligence Scale—Revised when Smith was 26 years old.

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Dr. Crook testified that Smith was "very cooperative, very pleasant and social." Dr. Crook testified that Smith was mildly mentally retarded with a full-scale IQ score of 72. (Smith's verbal IQ score was 76; his performance IQ score was 69.) Dr. Crook further maintained that his testing indicated that Smith had an "adjustment disorder with mixed disturbance of emotions" and that Smith suffered from "poly-substance dependence." The record indicates that according to the results of a Stanford–Binet Intelligence Scale administered to Smith when he was 12 years old, his full-scale IQ score at that time was 66. Dr. Crook concluded that Smith read and spelled on a first-grade level, that his math ***225** skills were on a third-grade level, and that his ability to form intent was at the level of a 10– to 12–year–old. Dr. Crook further testified that Smith knew that it was against the law and wrong to shoot and kill someone and that it was against the law to sell drugs.

Dr. Crook admitted that his conclusions did not take into consideration Smith's articulate statement made to the police after he was arrested for the murders; the facts surrounding the murders, which indicate intentional, goal-oriented behavior; Smith's relationship with his girlfriend; or Smith's statements while he was in jail awaiting trial to the effect that he had committed the murders and that he would "get off" on a plea of mental disease or defect.

Dr. Michael D'Errico, a forensic psychologist, testified for the State. Dr. D'Errico concluded that Smith was mildly mentally deficient. Dr. D'Errico explained:

> "When I reviewed Mr. Smith's case, I found that he was living independently at a level, probably, higher than a mentally retarded individual would be living. Therefore, I was at a loss to come up with a diagnosis of mental retardation. However, his score on the intelligence test placed him in the mild range of mental deficiency."

According to Dr. D'Errico, Smith was "street-wise" or "street-smart."

The testimony with regard to Smith's intellectual functioning indicates that he falls within the borderline to mildly mentally retarded range with an overall IQ score of 72 a year after the murders, which seriously undermines any conclusion that Smith suffers from significantly subaverage intellectual functioning as contemplated under even the broadest definitions.

Likewise, with regard to evidence of "significant" or "substantial" deficits in adaptive behavior, our review of the record indicates little, if any, deficit. At the time of the murders, Smith had had an ongoing year-long relationship with his girlfriend. His articulate testimony indicates that he loved his girlfriend, maintaining that she had been his "common-law wife" for a year, and that they had

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planned on having children. Additionally, we note that the evidence indicates that before Smith shot the first victim, he told his girlfriend to move out of harm's way.

Moreover, the record indicates that before the murders Smith was able to hold various jobs. At the time of the murders, Smith was working a construction job. More insightful into Smith's adaptive behavior is the fact that Smith was involved in an interstate illegal-drug enterprise. Smith testified that at the time of the murders he was under stress because he owed a Jamaican drug supplier in Jacksonville, Florida, $27,000. Smith admitted that at the time of the murders he was addicted to cocaine and that he was using $400 worth of crack cocaine per day; he said that in order to maintain that habit he “distributed” drugs.

Furthermore, the fact that Smith gave a police officer a false name two days before the murders when he was stopped for a traffic violation, the circumstances surrounding the murders, Smith's actions after the murder—enlisting the help of a friend to dispose of the gun and to hide from the police—his bragging about the murders, his statement about “getting off” using a mental-disease-or-defect defense, and his statement that he shot two of the individuals in the house to eliminate witnesses indicate that Smith does not suffer from deficits in his adaptive behavior.

Lastly, because the evidence does not support Smith's contention that he manifested ***226** subaverage intellectual functioning and significant deficits in adaptive behavior, we need not address the third factor—whether those problems evinced themselves before Smith was 18 years old.

Because the record does not support Smith's contention that he falls within the parameters of the most liberal requirements to support a finding of mental retardation, we reject his contention that we must remand this cause for resentencing on this ground. Applying the plain-error standard of review, we hold that no reversible error occurred in this regard and a death sentence may be imposed in this case if such a sentence is deemed proper after the new penalty-phase proceeding.

For the foregoing reasons, the judgment of conviction for capital murder is affirmed, but the sentence of death is reversed, and the cause is remanded for the Court of Criminal Appeals to remand the cause to the trial court for a new penalty-phase proceeding before a jury.

AFFIRMED AS TO CONVICTION; REVERSED AS TO SENTENCE; AND REMANDED.

HOUSTON, SEE, LYONS, BROWN, JOHNSTONE, HARWOOD, and WOODALL, JJ., concur.

MOORE, C.J., concurs in part and dissents in part.

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MOORE, Chief Justice (concurring in part and dissenting in part).
I concur in affirming the conviction in this case, but I respectfully dissent from the reversal of the death sentence.

When Smith tried to introduce evidence in the penalty phase of the trial about his brothers and sister, the trial court excluded any evidence regarding Smith's siblings. The trial judge also instructed the jury to not consider anything that may have been introduced about his siblings, like the fact that his sister became pregnant at a young age or that his brother was retarded and had served time in jail. I agree with the trial judge that such evidence was irrelevant.

If any negative event in a defendant's family can become relevant mitigation evidence in the penalty phase of a capital-murder trial, I do not see where such reasoning will stop. Why stop at the family environment? Why not consider every other negative event that ever happened to the defendant? There is a limit to what a trial court should have to consider when determining the appropriate penalty for someone who has been found guilty of capital murder. The trial court set a reasonable limit for the introduction of such mitigation evidence, and I am unwilling to disturb its ruling in that regard.

I agree with the trial judge that in the penalty phase of a capital-murder trial events that happened to a defendant's siblings are irrelevant as mitigation evidence. Therefore, I respectfully dissent.

All Citations

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Footnotes

1 This Court issued a writ of certiorari to the Court of Criminal Appeals to review the following guilt-phase issues:

1. Whether the trial court erred in removing certain potential jurors from the venire.

2. Whether the prosecutor's statements about Smith's confession, the trial court's admission of testimony regarding his suppression hearing, and the trial court's failure to instruct the jury on how to consider his confession were reversible error.

3. Whether the prosecutor engaged in misconduct, resulting in reversible error.

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2 In addition to the error already addressed, this Court granted certiorari review of the following penalty-phase issues:

1. Whether the trial court erred in failing to instruct the jury that Smith's capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." See § 13A–5–51(6), Ala.Code 1975.

2. Whether the evidence supported the aggravating circumstance that Smith "knowingly created a great risk of death to many persons." See § 13A–5–49(3), Ala.Code 1975.

3. Whether the trial court erred in admitting evidence of his prior convictions.

4. Whether there was prosecutorial misconduct, and, if so, whether that misconduct resulted in reversible error.

3 See Ariz.Rev.Stat. § 13–703.02(J)(2) (2001); Ark.Code Ann. § 5–4–618 (Michie 1993); Colo.Rev.Stat. § 18–1.3–1101(2) (2002); Conn. Gen.Stat. § 1–1g (2001); Fla. Stat. Ann. § 921.137(1) (West 2002); Ga.Code Ann. § 17–7–131(a)(3) (1997); Ind.Code. § 35–36–9–2 (1998); Kan. Stat. Ann. § 21–4623(e) (1995); Ky.Rev.Stat. Ann. § 532.130(2) (Michie 1999); Md.Code Ann., Crim. Law § 2–202 (2002); Mo.Rev.Stat. § 565.030(6) (2001); Neb.Rev.Stat. § 28–105.01(3) (2000); N.M. Stat. Ann. § 31–20A–2.1(A) (Michie 2000); N.Y.Crim. Proc. Law § 400.27(12)(e) (McKinney 2002); N.C. Gen.Stat. § 15A–2005(a)(1)(a)(2001); S.D. Codified Laws § 23A–27A–26.2 (Michie 2002); Tenn.Code. Ann. § 39–13–203(a) (1997); Wash. Rev.Code § 10.95.030(2)(a)(2002).

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EXHIBIT 2

2022 WL 4007496
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NOT YET RELEASED FOR PUBLICATION.

Court of Criminal Appeals of Alabama.

Jerry Jerome SMITH
v.
STATE of Alabama

CR-17-1014
|
September 2, 2022

Synopsis
Background: After conducting an *Atkins* hearing on remand, the circuit court concluded that defendant, whose conviction for capital murder was affirmed on appeal, 213 So.3d 108, was not “mentally retarded” and was thus eligible for the death penalty that had been imposed. The Court of Criminal Appeals affirmed, 213 So.3d 255. The Supreme Court reversed and remanded for a third penalty-phase proceeding, 213 So.3d 313, finding that defendant was inherently prejudiced during second penalty phase by the contact between the jury venire and murder victim's relatives. After the third sentencing hearing, the Circuit Court, Houston County, No. CC–97–270, Charles L. Little, J., accepted jury's recommendation and sentenced defendant to death. On return to remand, the Court of Criminal Appeals, 213 So.3d 327, reversed sentence and remanded. On remand, after conducting the fourth sentencing hearing, the Circuit Court sentenced defendant to death and defendant appealed. The Court of Criminal Appeals reversed and remanded. On remand, after conducting a fifth sentencing hearing, the Circuit Court had a hung jury, declined to impose sentence, and set the case for sentencing. After conducting the sixth sentencing hearing, the Circuit Court sentenced defendant to death. Defendant moved for a new trial, which was denied. Defendant appealed.

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

law of the case doctrine applied to preclude the circuit court from conducting *Atkins* hearing before defendant's sixth penalty-phase proceeding to determine defendant's eligibility for the death penalty;

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trial court's determination that the state provided valid race-neutral reasons for striking four Black jurors, and denying defendant's *Batson* challenge, was not plain error;

trial court's admission, during penalty phase of capital murder trial, of testimony about prior bad acts that defendant committed several days before murders did not constitute plain error;

although the state used 14 of its 22 peremptory strikes to remove women from the jury venire, that fact did not establish a prima facie case of gender discrimination; and

trial court did not commit plain error when it did not list in its sentencing order defendant's “horrific poverty” as a nonstatutory mitigating circumstance.

Affirmed.

Procedural Posture(s): Appellate Review; Jury Selection Challenge or Motion; Trial or Guilt Phase Motion or Objection; Sentencing or Penalty Phase Motion or Objection.

Appeal from Houston Circuit Court (CC-97-270); M. John Steensland, Judge

Attorneys and Law Firms

Randall S. Suss kind and John W. Dalton of Equal Justice Initiative, Montgomery, and Aaron Gartlan and David Kenneth Hogg, Dothan, for appellant.

Steve Marshall, att'y gen., and Henry M. Johnson, asst. att'y gen., for appellee.

Opinion

COLE, Judge.

***1** Jerry Jerome Smith appeals his death sentence resulting from his sixth penalty-phase proceeding.

Facts and Procedural History

In 1998, Smith was convicted of capital murder for killing Willie (“Flint”) Flournoy, Theresa Helms, and David Bennett by one act or pursuant to one scheme or course of conduct. See § 13A-5-40(a)(10), Ala. Code 1975. Because this Court affirmed Smith's capital-murder conviction in an opinion issued on December 22, 2000, see Smith v. State, 213 So. 3d 108 (Ala. Crim. App.

2000), a lengthy recitation of the facts underlying Smith's conviction is unnecessary. Briefly, the State's evidence showed that

> “Smith, a drug dealer, went to Flournoy's residence to collect $1,500, which Flournoy owed Smith for crack cocaine. When Flournoy told Smith that he did not have the money, Smith shot and killed him with a sawed-off .22 caliber rifle. Smith then shot and killed Helms and Bennett, who were also at Flournoy's residence. The jury convicted Smith of capital murder for intentionally killing two or more people pursuant to one act or pursuant to one scheme or course of conduct, see § 13A-5-40(a)(10), Ala. Code 1975. The circuit court sentenced Smith to death, and he appealed his conviction and sentence.”

Smith v. State, 213 So. 3d 327, 334 (Ala. Crim. App. 2016) (opinion on return to sixth remand). Although this Court affirmed Smith's capital-murder conviction, it

> “ ‘remanded the cause for the circuit court to correct its sentencing order. See Smith v. State, 213 So. 3d 108 (Ala. Crim. App. 2000). After remanding the cause a second time for the circuit court to correct its sentencing order, this Court affirmed Smith's death sentence. See Smith v. State, 213 So. 3d 108, 209 (Ala. Crim. App. 2000) (opinion on return to second remand). Thereafter, the Alabama Supreme Court reversed Smith's death sentence and ordered a new penalty-phase hearing. See Ex parte Smith, 213 So. 3d 214 (Ala. 2003).
>
> “ ‘After a second penalty-phase hearing, the jury recommended by a vote of 10-2 that Smith be sentenced to death. The circuit court followed the jury's recommendation and again sentenced Smith to death. On return to remand, this Court “concluded that Smith is mentally retarded and, therefore, ... ineligible for the death penalty and directed the trial court to set aside Smith's death sentence and to sentence him to life imprisonment without the possibility of parole.” Ex parte Smith, 213 So. 3d 313, 314 (Ala. 2010) (citing Smith v. State, 213 So. 3d 226, 228 (Ala. Crim. App. 2003) (opinion on return to third remand)). The Alabama Supreme Court reversed this Court's judgment and remanded the cause for the circuit court to conduct [a hearing pursuant to Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002),] to determine whether Smith is mentally retarded and to make specific findings of fact pursuant to Ex parte Perkins, 851 So. 2d 453 (Ala. 2002). Smith v. State, 213 So. 3d 239, 254 (Ala. 2007). After conducting the Atkins hearing, the circuit court concluded that Smith is not mentally retarded. This Court affirmed the circuit court's determination, and the Alabama Supreme Court granted certiorari review.
>
> ***2** “ ‘On October 22, 2010, the Alabama Supreme Court again reversed Smith's sentence of death and remanded the cause for the circuit court to conduct a new penalty-phase proceeding before a jury. Ex parte Smith, 213 So. 3d 313, 326 (Ala. 2010). Specifically, after detailing why the circuit court correctly determined that Smith is not mentally retarded, the Alabama

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> > Supreme Court held that improper, prejudicial contact between the victim's mother and the jury venire entitled Smith to a new penalty-phase proceeding. Id. at 320-26.'
>
> "Smith v. State, 213 So. 3d 327, 328-29 (Ala. Crim. App. 2011). In accordance with the Alabama Supreme Court's opinion in Ex parte Smith, 213 So. 3d 313, 326 (Ala. 2010), this Court remanded the cause to 'the circuit court with instructions for that court to conduct a third penalty-phase hearing.' Smith, 213 So. 3d at 329.
>
> "On January 23, 2012, the circuit court began Smith's third penalty-phase proceeding before a jury. At the conclusion of the [third] penalty phase, the jury, by a vote of 12 to 0, recommended that Smith be sentenced to death. The circuit court followed the jury's recommendation and sentenced Smith to death. On return to remand, this Court determined that the circuit court erroneously allowed the jury to consider an aggravating circumstance that did not exist at the time of Smith's offense. Smith v. State, 213 So. 3d 327, 329 (Ala. Crim. App. 2011). Thus, this Court reversed Smith's sentence of death and remanded the cause with instructions for the circuit court to conduct a fourth penalty-phase proceeding. Id. at 334.
>
> "On September 8, 2014, the circuit court began Smith's fourth penalty phase. Before beginning the jury-selection process, the circuit court completely excluded the public and the press from its general qualification of the veniremembers. ...
>
> "....
>
> > "At the conclusion of the [fourth] penalty-phase proceeding, the jury recommended, by a vote of 10 to 2, that Smith be sentenced to death. The circuit court followed the jury's recommendation and sentenced Smith to death."

Smith v. State, 213 So. 3d 327, 334-36 (Ala. Crim. App. 2011) (opinion on return to sixth remand). After his fourth penalty-phase proceeding, Smith appealed his death sentence.

In that appeal, this Court found that "the circuit court violated Smith's Sixth Amendment right to a public trial." Smith, 213 So. 3d at 338. Consequently, this Court reversed Smith's death sentence and remanded his case to the circuit court for that court to conduct a fifth penalty-phase proceeding. Id.

Smith's fifth penalty-phase proceeding began on November 14, 2016. (C. 167.) At the conclusion of that proceeding, the jury unanimously found the existence of two aggravating circumstances -- that Smith had been previously convicted of a felony involving the use or threat of violence to the person, namely first-degree assault, and that he knowingly created a great risk of death to

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many persons. (C. 207-08.) But only eight jurors voted to impose a death sentence on Smith. (C. 206.) So the trial court set Smith's case for a sixth penalty-phase proceeding. See § 13A-5-46(f) and (g), Ala. Code 1975 (providing that a "decision of the jury to return a verdict recommending a sentence of life imprisonment without parole must be based on a vote of a majority of the jurors" and a decision "to recommend a sentence of death must be based on a vote of at least 10 jurors," and explaining that, "if the jury is unable to reach a verdict recommending a sentence, ... the trial court may declare a mistrial of the sentence hearing").

***3** Smith's sixth penalty-phase proceeding began on May 14, 2018. At the conclusion of that proceeding, the jury unanimously found the existence of one aggravating circumstance -- that Smith had been "previously convicted of a felony involving the use or threat of violence to the person, namely Assault I" (C. 412) -- and, by a vote of 10 to 2, recommended that the trial court sentence Smith to death.[1] (C. 411; R. 1138-41.)

On June 5, 2018, the trial court held a judicial-sentencing hearing. At that hearing, the trial court accepted the jury's recommendation and sentenced Smith to death. (Sentencing Hearing, R. 14-15.) The trial court memorialized its decision in a written sentencing order issued on June 7, 2018. (C. 423-32.)

In its order, the trial court detailed the history of Smith's case; found the existence of two aggravating circumstances (that Smith created a great risk of death to many persons and that Smith had been previously convicted of another felony involving the use or threat of violence to the person), the existence of one statutory mitigating circumstance (the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired), and the existence of the following eight nonstatutory mitigating circumstances: (1) Smith did not resist arrest, (2) Smith was on drugs and alcohol when this crime was committed, (3) Smith's mother was an alcoholic when Smith was a child, (4) Smith's mother and father and all his siblings had criminal histories, (5) Smith was in special-education classes all of his life and only finished the eighth grade, (6) Smith had a history of excessive alcohol and drug abuse, (7) Smith cannot read or write, and (8) Smith's siblings "were dysfunctional." (C. 431-32.) The trial court then "weighed the aggravating circumstances against the mitigating circumstances, ... [found] that the aggravating circumstances outweigh the mitigating circumstances" and sentenced Smith to death. (C. 432.)

On June 28, 2018, Smith moved for a new trial. (C. 444-48.) The trial court denied Smith's motion the next day. (C. 449.) This appeal follows.

Standard of Review

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Because Smith was sentenced to death, this Court must search the record of the current lower-court proceedings for plain error.[2] See Rule 45A, Ala. R. App. P.

> " ' " '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:
>
>> ***4** " ' "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)).'
>
> "Ex parte Brown, 11 So. 3d 933, 938 (Ala. 2008).
>
> " ' "The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal." Hall v. State, 820 So. 2d 113, 121 (Ala. Crim. App. 1999), aff'd, 820 So. 2d 152 (Ala. 2001). Although [the appellant's] failure to object at trial will not bar this Court from reviewing any issue, it will weigh against any claim of prejudice. See Dill v. State, 600 So. 2d 343 (Ala. Crim. App. 1991), aff'd, 600 So. 2d 372 (Ala. 1992).'
>
> "Knight v. State, 300 So. 3d 76, 90 (Ala. Crim. App. 2018)."

Jackson v. State, 305 So. 3d 440, 456 (Ala. Crim. App. 2019).

Discussion

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I.

Smith first argues that he is not eligible for the death penalty under Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), and that the trial court erred when it did not conduct an Atkins hearing before his sixth penalty-phase proceeding. But, as Smith correctly recognizes, the Alabama Supreme Court has already held that, under the standard established in Atkins, and Ex parte Perkins, 851 So. 2d 453 (Ala. 2002), Smith is not intellectually disabled[3] and is eligible for the death penalty. See Ex parte Smith, 213 So. 3d 313, 315-20 (Ala. 2010). Despite the Alabama Supreme Court's decision, Smith argues that his death sentence violates Atkins and recent cases that interpret Atkins -- specifically, Moore v. Texas, 581 U.S. 1, 137 S. Ct. 1039, 197 L.Ed. 2d 416 (2017) ("Moore I"), Moore v. Texas, 586 U.S. ——, 139 S. Ct. 666, 203 L.Ed.2d 1 (2019) ("Moore II"), and Ex parte Lane, 286 So. 3d 61 (Ala. 2018). (See Smith's brief, p. 9.)

***5** According to Smith, "[s]ignificant developments in the caselaw following this decision, applying relevant medical standards, make clear that [the Alabama Supreme Court's] focus on adaptive strengths was erroneous, that under the established record [he] is intellectually disabled, and that reversal is required." (Smith's brief, pp. 9-10 (emphasis added).) In other words, Smith urges this Court to revisit the Alabama Supreme Court's holding, to conclude that the Alabama Supreme Court's decision was erroneous, and to reverse the trial court's decision not to conduct another Atkins hearing before his sixth penalty-phase proceeding.

The State argues that this Court cannot change the Alabama Supreme Court's decision because it "is the law of this case" and this Court is bound by that decision. (State's brief, p. 11.)

> " 'Under the "law of the case" doctrine, "a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." Thomas v. Bible, 983 F.2d 152, 154 (9th cir) (cert. denied, 508 U.S. 951, 113 S. Ct. 2443, 124 L.Ed. 2d 661 (1993)). The doctrine is not a limitation on a tribunal's power, but rather a guide to discretion. Arizona v. California, 460 U.S. 605, 618, 103 S. Ct. 1382, 1391, 75 L.Ed. 2d 318 (1983). A court may have discretion to depart from the law of the case where ... the evidence on remand is substantially different....' "

Callahan v. State, 767 So. 2d 380, 387 (Ala. Crim. App. 1999) (quoting United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997)) (emphasis added). Courts may also depart from the law-of-the-case doctrine if the prior decision is "obiter dictum (commonly referred to as dictum or dicta)," Clemons v. State, 123 So. 3d 1, 6 (Ala. Crim. App. 2012); " ' "if the [deciding] court is convinced its prior decision was clearly erroneous[;] or [if] there has been an intervening change in the law." ' " Ex parte City of Birmingham, 161 So. 3d 1195, 1200 (Ala. 2014) (quoting Martin v. Cash

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Express, Inc., 60 So. 3d 236, 249 (Ala. 2010), quoting in turn Belcher v. Queen, 39 So. 3d 1023, 1038 (Ala. 2009)) (emphasis omitted).

Smith does not argue that this Court can apply the substantially-different-evidence exception. In fact, he expressly states that he is "not arguing that the facts in his case have changed." (Smith's reply brief, p. 6). Nor does Smith argue that the Alabama Supreme Court's decision finding him death-eligible under Atkins is "obiter dictum" or that this Court can apply the clearly-erroneous-prior-decision exception. Instead, it appears that Smith wants this Court to apply the intervening-change-in-the-law exception to this case. We decline to do so.

> " '[T]he general rule is that a case pending on appeal will be subject to any change in the substantive law. The United States Supreme Court has stated, in regard to federal courts that are applying state law: "[T]he dominant principle is that nisi prius and appellate tribunals alike should conform their orders to the state law as of the time of the entry. Intervening and conflicting decisions will thus cause the reversal of judgments which were correct when entered." Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 543, 61 S. Ct. 347, 85 L.Ed. 327 (1941). See also United States v. Schooner Peggy, 5 U.S. 103, 1 Cranch 103, 2 L.Ed. 49 (1801). Thus, courts are required to apply in a particular case the law as it exists at the time it enters its final judgment:
>
> > " ' "[I]t has long been held that if there is a change in either the statutory or decisional law before final judgment is entered, the appellate court must 'dispose of [the] case according to the law as it exists at the time of final judgment, and not as it existed at the time of the appeal.' This rule is usually regarded as being founded upon the conceptual inability of a court to enforce that which is no longer the law, even though it may have been the law at the time of trial, or at the time of the prior appellate proceedings."
>
> ***6** " 'Note, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L.J. 907, 912 (1962) (quoting Montague v. Maryland, 54 Md. 481, 483 (1880)).'
>
> "Alabama State Docks Terminal Ry. v. Lyles, 797 So. 2d 432, 438 (Ala. 2001).
>
> "Finally, in Norandal U.S.A., Inc. v. Graben, 133 So. 3d 386, 390 (Ala. Civ. App. 2010), the Court of Civil Appeals stated:
>
> > " 'Although we recognize that an intervening change in the law may warrant deviation from the law-of-the-case doctrine, see Ex parte Discount Foods, Inc., 789 So. 2d 842, 846 n.4 (Ala. 2001) [Discount Foods II], the change generally must be such that the original decision is now clearly erroneous due to reliance on the old law. See Wright et al., Federal Practice & Procedure; Jurisdiction 2d § 4478 n.59 (2002).' "

Ex parte City of Birmingham, 161 So. 3d 1195, 1200-01 (Ala. 2014) (emphasis added).

Smith argues that, because Moore I, Moore II, and Lane were decided while his case was pending on direct review, those decisions must be applied to his case. According to Smith, those cases alter the Alabama Supreme Court's holding that he is eligible for the death penalty under Atkins. Specifically, Smith says:

> "In 2010, the Alabama Supreme Court affirmed the trial court's reliance on Mr. Smith's few strengths to outweigh the substantial evidence of his deficits and on the 'external influences.' Smith, 213 So. 3d at 319-20. The Alabama Supreme Court further relied on Mr. 'Smith's behavior during the commission of these murders' as 'especially persuasive' to conclude that Mr. Smith is not intellectually disabled. Id. at 320. However, as set forth in detail above, the United States Supreme Court's decisions in Moore I and Moore II, combined with the Alabama Supreme Court's decision in Lane, completely undermine this rationale for determining Mr. Smith is not intellectually disabled.
>
> "Much like here, in Moore I and Moore II, the lower court relied on the defendant's strengths, like the fact that he 'lived on the streets, mowed lawns, and played pool for money' and that he 'committ[ed] the crime in a sophisticated way and then fle[d]' to conclude that the defendant did not have significant limitations in adaptive behavior. Moore I, 137 S. Ct. at 1047, 1050; Moore II, 139 S. Ct. at 670-71. The United States Supreme Court reversed, holding that this analysis 'overemphasized Moore's perceived adaptive strengths' and was erroneous, as the 'focus[ ] [of] the adaptive-functioning inquiry [is] on adaptive deficits' rather than the defendant's strengths. See Moore I, 137 S. Ct. at 1050; see also Moore II, 139 S. Ct. at 670-72."

(Smith's brief, pp. 19-20.) Smith further argues that "the trial court's order finding [that he] was not intellectually disabled, as well as the Alabama Supreme Court's decision affirming that order, [was] based on a focus on [his] few 'perceived adaptive strengths,' rather than 'focus[ing] the adaptive-functioning inquiry on adaptive deficits.' Moore II, 139 S. Ct. at 668-69 ." (Smith's brief, p. 20.)

Smith also counters the State's law-of-the-case argument by asserting that the State's argument "ignores decades of precedent establishing that if a change in the law occurs while a case is pending on direct appeal, 'the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review.' " (Smith's reply brief, p. 5 (quoting Griffith v. Kentucky, 479 U.S. 314, 323, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987).) Smith further argues that "while his case has been pending on direct appeal, the law has changed and that applying this law to the 'established record' here requires this Court to impose [a sentence of] life without parole." (Smith's reply brief, p. 6.) Simply put, Smith argues that Moore I and Moore II changed Atkins in a way that renders the Alabama Supreme Court's 2010 decision finding him death eligible under Atkins incorrect and requires this Court to find him intellectually disabled under Atkins.

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***7** Clearly, Moore I and Moore II apply to Smith's case.[4] What is not clear, however, is precisely what impact those cases have on the Alabama Supreme Court's holding that Smith is not intellectually disabled under Atkins. Indeed, neither Moore I nor Moore II overrule either Atkins or the Alabama Supreme Court's decision in Smith's case. Rather, those cases merely inform courts as to how to conduct an Atkins analysis. See, e.g., Carroll v. State, 300 So. 3d 59, 62 (Ala. 2019), cert. denied, ––– U.S. ––––, 140 S. Ct. 2809, 207 L.Ed. 2d 145 (2020) (explaining the effect of Moore I on an Atkins analysis).

But whether those cases alter the Alabama Supreme Court's analysis of Smith's Atkins claim is a question we cannot answer. As an intermediate appellate court, "[w]e are bound by the decisions of the Alabama Supreme Court, and this court 'is without authority to overrule the decisions of [that] court.' " Harris v. State, 2 So. 3d 880, 902 (Ala. Crim. App. 2007) (quoting Jones v. City of Huntsville, 288 Ala. 242, 244, 259 So. 2d 288, 290 (1972), and citing § 12-3-16, Ala. Code 1975). As it stands, the Alabama Supreme Court has held that Smith is eligible for the death penalty under Atkins. And, although Moore I and Moore II inform a court's Atkins analysis, those cases did not overrule either Atkins or the Alabama Supreme Court's decision holding that Smith is not intellectually disabled. Whether Moore I and Moore II impact the Alabama Supreme Court's decision in Smith's case is a question that only the Alabama Supreme Court can answer.

Moreover, although Smith argues that the trial court erred by not conducting a new Atkins hearing and reaching a determination on that issue based upon caselaw that was decided after this case was remanded in 2016, Smith fails to recognize that the remand order did not authorize the trial court to conduct a new Atkins hearing. Not only had the Alabama Supreme Court already upheld the decision that Smith was not intellectually disabled and, therefore, was eligible for the death penalty, but this Court instructed the trial court only to conduct a "jury penalty-phase proceeding" on remand. Smith, 213 So. 3d 327, 338 (Ala. Crim. App. 2016) (opinion on return to sixth remand). Clearly, the scope of the remand was limited in nature. The law is clear that a "circuit court ha[s] no authority to go beyond this Court's remand order and to consider additional factual allegations or new claims ... because 'any act by a trial court beyond the scope of an appellate court's remand order is void for lack of jurisdiction.' " Bryant v. State, 181 So. 3d 1087, 1136 (Ala. Crim. App. 2011) (quoting Anderson v. State, 796 So. 2d 1151, 1156 (Ala. Crim. App. 2000) (opinion on return to remand)).

In Hicks v. State, [Ms. CR-15-0747, May 28, 2021] ––– So. 3d ––––, ––––, 2021 WL 2177671 (Ala. Crim. App. 2021) (opinion on return to second remand), the same issue was addressed following this Court's remand with limited instructions for the trial court to clarify its sentencing order regarding the "heinous, atrocious, or cruel" aggravating circumstance. On remand, the trial court in Hicks amended the sentencing order in a manner not authorized by this Court's remand order. On return to remand, this Court held that the trial court erred by going "beyond the scope of our remand order" and omitting the trial court's previous discussion of certain nonstatutory

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mitigating circumstances in the revised sentencing order enter on remand. Likewise, any actions by the trial court in Smith's case beyond this Court's instructions to conduct a new “penalty-phase proceeding” would have been error and such action would have been void for a lack of jurisdiction.

***8** Thus, the trial court did not err when it did not revisit Smith's request to find him intellectually disabled under Atkins after the Alabama Supreme Court has already held that Smith is death-eligible under Atkins. Further, the trial court correctly complied with the scope of this Court's order reversing Smith's sentence of death and remanding the case for a new “jury penalty-phase proceeding.”

II.

Next, Smith argues that the circuit court improperly instructed the jury that he is not “mentally retarded.” (Smith's brief, p. 23.) Specifically, Smith takes issue with the following instruction:

> “In this case there has been some testimony regarding the intellectual and developmental disabilities of the defendant. Under the law a mentally retarded person is not eligible to be considered for the death penalty. This was decided by the United States Supreme Court in the case of Atkins versus Virginia in a 2002 decision. In this case an Atkins hearing was conducted to determine whether the defendant was mentally retarded and the defendant was found not to be mentally retarded, thus, is subject to the death penalty. This does not mean that you can disregard the testimony of the defendant's witnesses or any evidence offered as a mitigating circumstance on aspects of the defendant's life or any intellectual and developmental difficulties or disabilities of the defendant.”

(R. 1119.) Smith claims that this instruction “undermined [his] mitigation case, contradicted prior rulings in this case from the trial court, this Court, and the Alabama Supreme Court, removed a question of fact from the jury, and is in direct conflict with Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and Alabama law.”[5] (Smith's brief, p. 24.) “In Lockett, the Supreme Court ... concluded that the sentencing authority in a capital case could not be precluded from considering as a mitigating factor any aspect of the defendant's character or any of the circumstances of the offense that the defendant proffers as a basis for a sentence of less than death. 438 U.S. at 604, 98 S.Ct. 2954.” Hinton v. State, 548 So. 2d 547, 561 (Ala. Crim. App. 1988).

It is well settled that

> “ ‘[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

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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).' "

Capote v. State, 323 So. 3d 104, 129 (Ala. Crim. App. 2020) (quoting Williams v. State, 795 So. 2d 753, 780 (Ala. Crim. App. 1999), aff'd, 795 So. 2d 785 (Ala. 2001)). Here, the complained-of instruction, when read in context with the trial court's other penalty-phase instructions and with the evidence presented during the penalty phase of Smith's trial, was both legally and factually correct, cleared up possible confusion from the evidence presented during the penalty phase, was not misleading, and properly informed the jury of its role in the penalty-phase process.

***9** During the testimony presented at the penalty phase, Smith made clear that his being intellectually disabled, among other things, was going to be a part of his mitigation case to the jury. (See R. 243-58.) To present that mitigating circumstance, Smith called Dr. Michael D'Erricco and Dr. John Goff to testify during the penalty phase. (R. 585-620; 719-68.)

Dr. D'Erricco testified about the standard for determining whether a person is intellectually disabled and testified that, when he assessed Smith before the guilty-phase of his trial, he "determined that [Smith] was likely functioning at a level of intellectual disability at the time of the offense" (R. 599-601, 604-05).

Dr. Goff explained that he first evaluated Smith at Holman Prison in March 2008 to determine whether "he was intellectually disabled," and Dr. Goff, like Dr. D'Erricco, concluded that Smith was. (R. 726.) Dr. Goff then explained to the jury the standard for determining whether someone is intellectually disabled (i.e., an IQ "score of 70 or less," "adaptive functioning deficits," and that "the condition has to have manifested during what they call the developmental period"). He also explained to the jury how he had applied those standards to Smith. (R. 726-40.) Thereafter, the following exchange occurred:

> "[Smith's counsel]: And in your evaluation of Jerry Jerome Smith, how did the finding that you make, how are they related to the case that we are here on today?
>
> > "[Dr. Goff]: Well, the fact that he was intellectually disabled would seem to me to be a mitigating factor. It's a mental defect and it has an impact on his life and the judgments that he makes. The original issue was an Atkins issue."

(R. 743-44 (emphasis added).) On cross-examination, Dr. Goff said that he had concluded that Smith had an IQ of 67. (R. 748.) Thereafter, Dr, Goff engaged in the following exchange with the State:

"[Prosecutor]: ... I know you may have answered this. But I've got three things. And tell me if I am wrong. But is it subaverage intellectual functioning?

"[Dr. Goff]: Right.

"[Prosecutor]: And then it manifests itself during the developmental period, which is before the age of 19?

"[Dr. Goff]: Right.

"[Prosecutor]: And really what we are dealing with here are the deficits, are we not?

"[Dr. Goff]: That is what we always deal with.

"[Prosecutor: And the deficits are in the adaptive skills?

"[Dr. Goff]: No, the deficits are in the IQ score too. The IQ score -- all the IQ scores are essentially two standard of deviation below the mean, so in the lowest three percent of the population. And that is the requirement for the diagnosis.

"[Prosecutor]: Let me ask you this, Dr. Goff, if Mr. Smith would have scored a 72 IQ, would you even have looked into his adaptive skills?

"[Dr. Goff]: Absolutely, I would.

"[Prosecutor]: Well, you just said that part of that threshold, if I may, is that the IQ score is either 70 or below before you look at the adaptive skills. If it's not, it's my understanding that you don't even look at that?

"[Dr. Goff]: I think if you'll look back, I said traditionally that is the case. I know what you are referring to. You are referring to an evaluation that was done by a counselor at the time of the original trial. That counselor used a test that was obsolete and had been obsolete for years. The fact of the matter is [ ] that score is probably not valid because the actual test was so obsolete that the scores aren't valid and had been inflated by something we call the Flynn Effect.

***10** "But even at that, there has always been an area of clinical judgment between 70 and 75 primarily because of what you just pointed out because of the standard error of measurement. So in my practice in Mississippi when there was a bright line in Mississippi to determine IQ

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scores as far as these things were concerned, it was 75, not 70. The line was set at 70 in Alabama and that is overturned by my understanding by Hall versus Florida. And it should be, because it's not a number that is tattooed on your forehead. But in his case every one of those scores, including the one by the counselor, would certainly qualify for additional scrutiny.

"[Prosecutor]: Now, adaptive skills, you can have a low IQ and still when you look at the adaptive skills of that person depending on how many and what type, I mean, you may not be mentally retarded or intellectually disabled; correct?

"[Dr. Goff]: Well, if you don't have any adaptive skills deficits, then you don't meet the diagnostic criteria.

"[Prosecutor]: But you can have a deficit and still be found not mentally retarded; correct?

"[Dr. Goff]: Oh, yeah, sure."

(R. 750-53 (emphasis added).) On re-direct examination, Dr. Goff continued explaining the legal standard for determining whether a person is intellectually disabled as follows:

"[Smith's counsel]: And you mentioned when he asked you if Mr. Smith had an IQ score of 72 would you even bother doing tests for adaptive deficits, and you mentioned the case Hall versus Florida.

"[Dr. Goff]: Correct.

"[Smith's counsel]: And Hall versus Florida, you are familiar with that case?

"[Dr. Goff]: I am.

"[Smith's counsel]: In that case did Florida have a bright line?

"[Dr. Goff]: They did, just like Alabama did and I guess still does.

"[Smith's counsel]: And by a bright line, you are referring to a cutoff for the IQ score; is that right?

"[Dr. Goff]: That's right.

"[Smith's counsel]: What was Florida's cutoff?

"[Dr. Goff]: 70.

"[Smith's counsel]: They said if you have anything above a 70, it stops there and you don't do anything else as far as trying to see if somebody is intellectually disabled; right?

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“[Dr. Goff]: Right. That's correct.

“[Smith's counsel]: And in Hall, the U. S. Supreme Court said that is wrong; correct?

“[Dr. Goff]: That is wrong and they were right by saying that.

“[Smith's counsel]: Because the five point deviation that you referred to means that the actual true IQ could be less than 70 or could be 70?

“[Dr. Goff]: Well, the reasoning is just like we just got through talking about, you don't make the determination just on the basis of an individual's score. And whoever came up with the idea that this was somehow or another should be a bright line or something wasn't really familiar with the procedures or what IQ scores really are. It's just somebody who said, well, we think we are going to put it there. And you can't be arbitrary like that about this kind of issue.

“[Smith's counsel]: And last year the U. S. Supreme Court decided the case of Moore versus Texas?

“[Dr. Goff]: Correct.

“[Prosecutor]: Judge, I object.

“The Court: I sustain the objection. Do you have another question, [Smith's counsel]?

“[Smith's counsel]: Can I make an offer of proof, Judge?

“The Court: You may.

“(Whereupon, the following occurred at the bench out of the hearing of the jury.)

“....

“(Whereupon, the following occurred in the hearing of the jury.)

“[Smith's counsel]: Dr. Goff, have you read the opinion in Moore versus Texas?

“[Dr. Goff]: I have.

“[Smith's counsel]: And your purpose for reading it?

“[Dr. Goff]: I have to testify about these things all the time and it has to do specifically with how adaptive skills are viewed by State governments and such including this one.

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***11** "[Smith's counsel]: Okay. And is the language in Moore versus Texas, does it address in terms that you as a neuropsychologist understand with respect to your practice and your function in testifying here what the standards are, the legal standards, of your testimony in court?

"[Prosecutor]: I object again.

"The Court: I sustain. You may rephrase your question or ask another question.

"[Smith's counsel]: You've said that Moore informs you of standards that you are to apply in Court; is that right?

> "[Dr. Goff]: Well, in the case -- the professional community informed the Court. And the Court referred specifically to that, that the standards of the profession are the standards that are used for the determination of intellectual disability, something that is the province of the medical professional community. And that is what they referred to in that particular case. What they are saying is that you can't say --"

(R. 759-63.)

In short, Dr. D'Erricco and Dr. Goff testified that Smith is intellectually disabled. Dr. Goff's testimony about Smith's being intellectually disabled blurred the line between his professional opinion and the legal question whether he is intellectually disabled under Atkins. When the trial court instructed the jury that it had resolved the legal question about whether Smith is intellectually disabled under Atkins, it merely provided the jury the correct context for considering the expert testimony it had heard during the penalty phase.

What is more, in providing that context, the trial court did not "remove a question of fact" from the jury, nor did it violate Lockett. Indeed, the trial court, immediately after it told the jury that it had resolved the Atkins question, expressly instructed the jury that its legal finding did not mean that the jury could disregard the "testimony of [Smith's] witnesses or any evidence offered as a mitigating circumstance on aspects of [Smith's] life or any intellectual and developmental difficulties or disabilities of the defendant." (R. 1119 (emphasis added.) The trial court also instructed the jury on mitigation evidence as follows:

"The defendant is allowed to offer any evidence in mitigation. That is evidence that indicates or tends to indicate that the defendant should be sentenced to life in prison without the possibility of parole instead of death.

"The defendant does not bear a burden of proof in this regard. All he must do is simply present the evidence. The law of this state provides that mitigating circumstance shall include but not be limited to the following enumerated mitigating circumstances: That the defendant has a significant history of prior criminal activity; that the capital offense was committed while the defendant was under the influence of extreme mental or emotional circumstance; that the victim was a participant in the defendant's conduct or consented to it; that the defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor; that the defendant acted under extreme duress or under substantial domination of another person. Duress means subjecting a person to improper pressure until it overcomes his will and coerces him to comply with the demands to which he would not have yield[ed] if he were acting as a free agent; the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law are substantially impaired.

***12** "A person's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law is not the same as his ability to know right from wrong, generally, to know what he is doing at a given time, or to know that what he is doing is wrong. A person may indeed know that doing the act that constitutes a criminal offense is wrong and shall not appreciate the wrongfulness because he does not fully comprehend or is not fully sensible as to what he is doing or how wrong it is. Further, for this mitigating circumstance to exist, the defendant's capacity to appreciate does not have to be substantially obliterated. It is enough and it would substantially lessen or substantially diminish.

"Finally, the mitigating circumstance should exist even if the defendant did appreciate the criminality of his conduct if his capacity to conform to the law was substantially impaired. Because a person may appreciate that his actions are wrong and will lack the capacity to refrain from doing them.

"Finally, the age of the defendant at the time of the crime. Mitigating circumstances shall also include any aspect of a defendant's character or record or any of the circumstances of the offense that the defendant offers as a basis for a sentence of life without parole instead of death, and any other relevant mitigating circumstance that the defendant offers as a basis for a sentence of life in prison without parole instead of death, such as the mitigating evidence that the defendant has offered in this case, the intellectual capacity of the defendant, any aspect of his character or background, any circumstances surrounding the offense or any other relevant mitigating circumstance that the defendant offers to support for a sentence of life imprisonment without parole instead of death.

> "If the factual existence of any evidence offered by the defendant in mitigation is at dispute, the State has the burden of disproving the actual evidence upon

> the disputed mitigation evidence by a preponderance of the evidence. The preponderance of evidence standard requires the State in order to negate the existence of the dispute any mitigating evidence to offer evidence of greater weight or evidence that is more convincing than that offered by the defendant."

(R. 1124-27 (emphasis added).)

In short, although the jury was instructed that it could not make the legal determination that Smith's intellectual disability rendered him ineligible for the death penalty, the jury was instructed that it was free to consider Smith's intellectual disability as a mitigating circumstance and ascribe whatever weight it deemed necessary to that circumstance in deciding whether to recommend to the court that Smith be sentenced to death or to life imprisonment without the possibility of parole.

The trial court's instructions in this case recognize what the Alabama Supreme Court explained in one of Smith's previous appeals:

> "Smith maintains, and the Court of Criminal Appeals appears to agree, that the trial court's finding as a mitigating circumstance that he is mildly mentally retarded is necessarily the same as finding that Smith is mentally retarded in the Atkins context. However, the two findings are not the same. A finding of mild mental retardation in the context of a mitigating circumstance does not necessitate a finding that a person fits the definition of mental retardation in the context of an Atkins claim. At least one reason for this conclusion is that the burden of proof in each context is completely different. The burden of proof on the defendant in proving the existence of a mitigating circumstance is much lower than the burden the defendant faces when attempting to prove that he is mentally retarded for purposes of Atkins. The burden of proof to establish a mitigating circumstance is as follows:
>
> > ***13** " 'The defendant shall be allowed to offer any mitigating circumstance defined in Sections 13A-5-51 and 13A-5-52. When the factual existence of an offered mitigating circumstance is in dispute, the defendant shall have the burden of interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence.'
>
> "§ 13A-5-45(g), Ala. Code 1975.
>
> "In the context of an Atkins claim, the defendant has the burden of proving by a preponderance of the evidence that he or she is mentally retarded and thus ineligible for the death penalty. See Morrow v. State, 928 So. 2d 315, 323 (Ala. Crim. App. 2004); see also Holladay v. Campbell, 463 F. Supp. 2d 1324, 1341 n. 21 (N.D. Ala. 2006) (interpreting Alabama law to require that the defendant prove mental retardation by a preponderance of the evidence). Therefore, it is

> certainly possible for a court to conclude that a defendant has met his burden of proving mild mental retardation as a mitigating circumstance but, at the same time, to conclude that the defendant has not carried the burden of proving mental retardation for purposes of an Atkins claim. ....
>
> > "The trial court appears to have correctly concluded that a finding of mild mental retardation in the context of a mitigating circumstance does not necessitate a finding of mental retardation on an Atkins claim."

Smith v. State, 213 So. 3d 239, 252 (Ala. 2007) (emphasis added).

Simply put, the trial court's instructions concerning the effect of its Atkins decision on the jury's (and, ultimately, the trial court's) ability to find that Smith was intellectually disabled as a mitigating circumstance was a correct statement of the law, did not remove from the jury its ability to make a factual determination about a mitigating circumstance, and did not violate Lockett. Accordingly, the circuit court did not abuse its discretion, and Smith is due no relief on this claim.

III.

Smith next argues that the circuit court's denial of his counsels' request for funding for a "prison expert" violated state and federal law. (Smith's brief, p. 30.)

It is well settled that "[d]efendants may be eligible to receive funds to hire certain experts to facilitate the formulation and presentation of a defense. Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L.Ed. 2d 53 (1985)." Beckworth v. State, 946 So. 2d 490, 503 (Ala. Crim. App. 2005). But those "funds ... are not to be granted automatically upon request." Id. "Rather, the grant or denial of such funds is a matter for the trial court's discretion and is based on the allegations in the request for funds to hire the expert." Id.

In Ex parte Moody, 684 So. 2d 114, 119 (Ala. 1996), the Alabama Supreme Court explained:

> "[F]or an indigent defendant to be entitled to expert assistance at public expense, he must show a reasonable probability that the expert would be of assistance in the defense and that the denial of expert assistance would result in a fundamentally unfair trial. To meet this standard, the indigent defendant must show, with reasonable specificity, that the expert is absolutely necessary to answer a substantial issue or question raised by the state or to support a critical element of

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> the defense. If the indigent defendant meets this standard, then the trial court can authorize the hiring of an expert at public expense."

(Emphasis added.) Under this burden, a defendant "must show more than a mere possibility that he or she will receive useful assistance from the expert." Ex parte Dobyne, 672 So. 2d 1354, 1357 (Ala. 1995). Smith did not satisfy his burden.

***14** Before his fourth penalty-phase proceeding,[6] Smith filed an ex parte motion with the trial court requesting funds "for expenses for a duly qualified prison expert." (Record on Return to Sixth Remand in CR-97-1258, C. 151-57.) Smith explained that this expert,

> "upon reasonable review of relevant files and documents as well as other activities necessary to establish an expert opinion, will opine that certain factors to include, age, criminal history, institutional adjustment, involvement in security threat groups (if applicable), mental status, medical status, social history and other factors germane to assessing actual and potential behavior of the Defendant is conducted."

(Record on Return to Sixth Remand in CR-97-1258, C. 152.) Smith claimed that the prison expert "is able to render an expert opinion, in an operational context, regarding future danger and adaptability of inmates as well as issues pertaining to prison/jail safety, operations, administration and security." (Record on Return to Sixth Remand in CR-97-1258, C. 152.) Smith further explained that, "from a prison perspective, the prison expert will explain to the Court and jury information relative to long-term incarceration of the Defendant in institutional specific terms." (Record on Return to Sixth Remand in CR-97-1258, C. 152.)

In response to Smith's request, the trial court issued an order, finding that Smith's request was "unique" and did "not provide the Court with enough information to grant the application in its present form." (Record on Return to Sixth Remand in CR-97-1258, C. 163.) So the trial court ordered Smith "to show cause why the data requested in ... the motion is not already available without costs through the Department of Corrections," as the "Department has been involved in numerous studies and this type of data could be furnished without costs." (Record on Return to Sixth Remand in CR-97-1258, C. 163.)

Smith responded to the trial court's show-cause order in an "Amended Ex parte Application for Expenses for a Duly Qualified Prison Expert." (Record on Return to Sixth Remand in CR-97-1258, C. 165-70.) Smith explained that he wanted the court to grant him $7,500 to hire James Aiken, "a duly qualified prison expert." (Record on Return to Sixth Remand in CR-97-1258, C. 165.) Smith said that he needed Aiken because he cannot rely on the "wardens, guards and other prison and jail administrators and employees ... to undertake to investigate and develop [his] period of incarceration for mitigation evidence and review approximately twenty years of records and be available to consult with the Defense in an effort to further investigate, develop and present this

information quite possibly in the form of testimony in a light most favorable to Mr. Smith for mitigation purposes." (Record on Return to Sixth Remand in CR-97-1258, C. 165.) Smith said that Aiken would undertake the following work:

> "The work performed by Mr. Aiken includes conducting: review of actual documents related to the Defendant's social history, criminal history, prison and jail records (to include medical records while in confinement status); an overview of the current criminal charges; preparation for interviews and consultations with Counsel; preparation for interviews and consultations with the Defendant; testimony preparation (direct and cross testimony) and actual testimony."

***15** (Record on Return to Sixth Remand in CR-97-1258, C. 165.)

The trial court denied Smith's request finding as follows:

> "Upon Consideration of the [ex parte application for expenses for a duly qualified prison expert,] the Court finds that it [ ] previously approved and entered an ex parte order authorizing employment of a qualified investigator to assist in mitigation and investigation of all aspects of Mr. Smith's case. Counsel can also secure all correctional records including historical records from the Alabama Department of Corrections pursuant to Order from this Court."

(Record on Return to Sixth Remand in CR-97-1258, C. 171.)

Before his sixth penalty-phase proceeding, the trial court gave Smith $5,000 to hire a mitigation expert and an investigator, $4,000 for "expert psychological assistance," $7,500 for "an expert on psychopharmacology and drug addiction," and $2,500 for an "expert regarding mental retardation." (C. 605-08.) Smith again moved the trial court for $7,500 to hire a "prison expert," which mirrors the motion filed before his fourth penalty-phase proceeding. (C. 609-16.) The trial court again denied Smith's request. (C. 617.)

Although Smith argues that the circuit court erred when it denied his request for funds to hire a "prison expert," Smith did not meet his burden of showing that the proposed expert was "absolutely necessary to answer a substantial issue or question raised by the state or to support a critical element of the defense," Ex parte Moody, 684 So. 2d at 119 (emphasis added), and he failed to "show more than a mere possibility that he ... will receive useful assistance from the [prison] expert." Ex parte Dobyne, 672 So. 2d at 1357. This is especially true given the fact that the trial court's granted Smith funds to hire an investigator and mitigation expert and granted him access to Smith's records from the Alabama Department of Corrections ("ADOC"). Smith's stated scope of work for the "prison expert" was limited to reviewing the records from the ADOC, preparing for interviews and consultations with Smith and Smith's counsel, and preparing for testifying at Smith's trial, which are all things that a qualified investigator and mitigation expert could assist Smith's trial counsel in doing.

Because Smith did not satisfy his burden of showing how a prison expert was "necessary" to his case, the circuit court did not err when it denied his request for funds to hire such an expert. Accordingly, Smith is due no relief on this claim.

IV.

Smith argues that the trial court "improperly prohibited [him] from introducing a victim's family member's request for leniency" during the sentencing phase. (Smith's brief, p. 36.) Specifically, Smith argues that the trial court erred when it prevented Bobby Bennett, the brother of David Bennett, from testifying that he was in favor of Smith's being sentenced to life imprisonment without the possibility of parole. (Smith's brief, p. 36.) According to Smith, "victim requests for leniency are admissible" and the trial court erred in not allowing the jury to consider Bobby's testimony as a mitigating circumstance. Thus, Smith says the trial court denied him "his right to present mitigating evidence and receive an individualized sentencing determination under Lockett[v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)], Tennard[v. Dretke, 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004)], and [Ex parte] Carroll[, 852 So. 2d 833 (Ala. 2002)], and his rights to have mitigation found and considered, a complete defense, due process, a fair trial, and a reliable sentence." (Smith's brief, pp. 38-39.)

***16** This Court, however, rejected this precise claim in Barbour v. State, 673 So. 2d 461 (Ala. Crim. App. 1994):

> " 'In Payne[v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597, 115 L.Ed. 2d 720 (1991)], the court held that if the State "chooses to permit the admission of victim impact evidence and prosecutorial argument on the subject, the Eighth Amendment erects no per se bar." McMillian v. State, 594 So. 2d 1253, 1275 (Ala. Cr. App. 1991). Payne did not address the issue in this case, whether a request for leniency by the victim's family can properly be considered as a mitigating circumstance.
>
> " 'The United States Supreme Court in Eddings v. Oklahoma, 455 U.S. 104 [102 S. Ct. 869, 71 L.Ed. 2d 1] (1982), held that the sentencer in capital cases must be permitted to consider any relevant mitigating factor touching the defendant's character and record.
>
> " 'The Court is aware of three cases which address the specific issue presented. In Floyd v. State, 497 So. 2d 1211 (Fla. 1986), the court held the testimony of the murder victim's daughter that she and the victim opposed capital punishment was mitigating evidence. However, on retrial of the case, the trial judge refused to allow the victim's daughter to testify to her opinion as to whether Floyd should be executed and the Florida Supreme Court held that the trial judge did not abuse his discretion. Floyd v. State, 569 So. 2d 1225 (1990), cert.

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denied, 501 U.S. 1259, 111 S. Ct. 2912 [115 L.Ed. 2d 1075] (1991). The Tenth Circuit Court of Appeals held that a victim's relative was properly prohibited from expressing her opinion that the death penalty should not be imposed in Robison v. Maynard, 829 F.2d 1501 (10th Cir. 1987) (applying Oklahoma law). See Robison v. Maynard, 943 F.2d 1216 (10th Cir. 1991) (the court reached the same conclusion upon consideration after Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597, 115 L.Ed. 2d 720 (1991) was decided). See Kathryn E. Bartolo, Payne v. Tennessee: The Future Role of Victim's Statements of Opinion in Capital Sentencing Proceedings, 77 [Iowa] L. Rev. 1217 (1992).

" 'The Alabama Supreme Court recently held that the defendant's "Eighth Amendment rights were violated if the trial judge ... considered the portions of the victim impact statement wherein the victim's family members offered their characterizations or opinions of ... the appropriate punishment." Ex parte McWilliams, 640 So. 2d 1015 (Ala. 1993).

" 'The Court held that opinions of family members as to the appropriate punishment either for the death penalty, Ex parte McWilliams, or against the death penalty, Robison I & II, are inadmissible. The reasoning of the Court in Robison I is persuasive. The Court reasoned that such opinion evidence is not relevant because mitigating evidence is composed of evidence of the defendant's character or record or any of the circumstances of the offense, and the witnesses' opinion of the appropriate punishment is not relevant to either. In Robison II the court further explained its holding in Robison I, and, notwithstanding that the jury is the sentencing authority in Oklahoma, the court's reasoning is also persuasive. The court said that the proffered testimony "was calculated to incite an arbitrary response [from the jury], thus it was properly excluded." Robison II at 1217,.'

***17** "The trial court's ruling was correct for the reasons stated by the Alabama Supreme Court in McWilliams v. State, 640 So. 2d 1015, 1017 (Ala. 1993). The court stated:

" 'In Booth v. Maryland, 482 U.S. 496, 107 S. Ct. 2529, 96 L.Ed. 2d 440 (1987), the United States Supreme Court vacated a death sentence, holding that it violated the defendant's Eighth Amendment rights for the sentencer to consider victim impact statements in sentencing the defendant to death. The victim impact statements in that case contained the same types of information as were in the statements in the present case. In Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597, 115 L.Ed. 2d 720 (1991), the Supreme Court partially overruled Booth. The Court in Payne held that the defendant's Eighth Amendment rights were not violated by the trial court's consideration of statements regarding the victims and the impact of their deaths upon the family members. The victim impact statements in Payne did not contain characterizations or opinions about the defendant, the crime, or the appropriate punishment. That portion of Booth that proscribed the trial court's consideration of that type of statement was, therefore, left intact by Payne.

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" 'We conclude that McWilliams's Eighth Amendment rights were violated if the trial judge in this case considered the portions of the victim impact statements wherein the victim's family members offered their characterizations or opinions of the defendant, the crime, or the appropriate punishment.'

"(Emphasis added.)"

Barbour, 673 So. 2d at 468-69.

Here, Bobby's proposed testimony that Smith should be sentenced to life imprisonment without the possibility of parole is precisely the type of testimony that Payne, Booth, and McWilliams prohibit. The opinion of a victim's family member as to what punishment the defendant should receive is impermissible, whether favorable to the defendant or not.[7] Thus, the trial court did not err in refusing to allow Smith to present Bobby's testimony as to what he believed the proper punishment in this case should be. Accordingly, Smith is not entitled to relief on this claim.

V.

Smith next argues that the State commented on Smith's "potential testimony," which, he says, "infringed upon his right to remain silent." (Smith's brief, p. 39.) According to Smith, during its penalty phase opening statement, the State told the jury that Smith " 'may testify that there was some pressure on him because he owed some people money up the line,' (R. 229) and that '[y]ou will hear, I believe, Mr. Smith's testimony in regards to how he would sometimes transport [the .22 rifle].' (R. 231.)" (Smith's brief, p. 41.) Smith also argues that the State again brought up Smith's potential testimony during its cross-examination of Dr. William Morton when the State noted that Smith " 'does not mention that in any of his testimony.' (R. 505.)" (Smith's brief, p. 41.)

Because Smith did not object to any of these complained-of comments, we review this claim for plain error. In so doing, we note:

***18** " ' " 'While th[e] 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 [Kennedy]). '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). 'Plain error is error which, when examined in the context of the entire case, is so obvious that failure to notice it would seriously affect the fairness, integrity, and public reputation of the judicial proceedings.' United States v.

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Butler, 792 F.2d 1528, 1535 (11th Cir.), cert. denied, 479 U.S. 933, 107 S. Ct. 407, 93 L.Ed. 2d 359 (1986). See also Biddie v. State, 516 So. 2d 837, 843 (Ala. Cr. App. 1986), reversed on other grounds, 516 So. 2d 846 (Ala. 1987).” ’ ”

Taylor v. State, 666 So. 2d 36, 55 (Ala. Crim. App. 1994) (quoting Ex parte McWilliams, 640 So. 2d 1015 (Ala. 1993)).

Concerning a prosecutor's alleged comment on a defendant's failure to testify, this Court has explained:

“ ‘The law governing our review is stated by the Alabama Supreme Court, as follows:

“ ‘ “In all criminal prosecutions, the accused shall not be compelled to give evidence against himself. Alabama Constitution, Art. 1, § 6.

“ ‘ “ ‘On the trial of all indictments, complaints or other criminal proceedings, the person on trial shall, at his own request, but not otherwise, be a competent witness, and his failure to make such a request shall not create any presumption against him nor be the subject of comment by counsel. If the district attorney makes any comment concerning the defendant's failure to testify, a new trial must be granted on motion filed within 30 days from entry of the judgment.’

“ ‘ “Ala. Code 1975, § 12-21-220; see also Ex parte Wilson, 571 So. 2d 1251, 1261 (Ala. 1990); Ex parte Yarber, 375 So. 2d 1231, 1233 (Ala. 1979); Whitt v. State, 370 So. 2d 736, 738-39 (Ala. 1979).

“ ‘ “Comments by a prosecutor on a defendant's failure to testify are highly prejudicial and harmful, and courts must carefully guard against a violation of a defendant's constitutional right not to testify. Whitt, supra, at 739,; Ex parte Williams, 461 So. 2d 852, 853 (Ala. 1984); see Ex parte Purser, 607 So. 2d 301 (Ala. 1992). This Court has held that comments by a prosecutor that a jury may possibly take as a reference to the defendant's failure to testify violate Art. I, § 6, of the Alabama Constitution of 1901. Ex parte Land, 678 So. 2d 224 (Ala.), cert. denied, 519 U.S. 933, 117 S. Ct. 308, 136 L.Ed. 2d 224 (1996); Ex parte McWilliams, 640 So. 2d 1015 (Ala. 1993); Ex parte Wilson, supra; Ex parte Tucker, 454 So. 2d 552 (Ala. 1984); Beecher v. State, 294 Ala. 674, 320 So. 2d 727 (1975). Additionally, the Fifth and Fourteenth Amendments of the United States Constitution may be violated if the prosecutor comments upon the accused's silence. Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L.Ed. 2d 106 (1965); Ex parte Land, supra; Ex parte Wilson, supra. Under federal law, a comment is improper if it was ‘ “ ‘manifestly intended or was of such a character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.’ ” ’ United States v. Herring, 955 F.2d 703, 709 (11th Cir.), cert. denied, 506 U.S. 927, 113 S. Ct. 353, 121 L.Ed. 2d 267 (1992) (citations omitted); Marsden v. Moore, 847 F.2d

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1536, 1547 (11th Cir.), cert. denied, 488 U.S. 983, 109 S. Ct. 534, 102 L.Ed. 2d 566 (1988); United States v. Betancourt, 734 F.2d 750, 758 (11th Cir.), cert. denied, 469 U.S. 1021, 105 S. Ct. 440, 83 L.Ed. 2d 365 (1984). The federal courts characterize comments as either direct or indirect, and, in either case, hold that an improper comment may not always mandate reversal.

***19** " ' "Consistent with this reasoning, Alabama law distinguishes direct comments from indirect comments and establishes that a direct comment on the defendant's failure to testify mandates the reversal of the defendant's conviction, if the trial court failed to promptly cure that comment. Whitt v. State, supra; Ex parte Yarber, supra; Ex parte Williams, supra; Ex parte Wilson, supra. On the other hand, 'covert,' or indirect, comments are construed against the defendant, based upon the literal construction of Ala. Code 1975, § 12-21-220, which created the 'virtual identification doctrine.' Ex parte Yarber, 375 So. 2d at 1234. Thus, in a case in which there has been only an indirect reference to a defendant's failure to testify, in order for the comment to constitute reversible error, there must have been a virtual identification of the defendant as the person who did not become a witness. Ex parte Yarber, 375 So. 2d at 1234; Ex parte Williams, supra; Ex parte Wilson, supra; Ex parte Purser, supra. A virtual identification will not exist where the prosecutor's comments were directed toward the fact that the State's evidence was uncontradicted, or had not been denied. See Beecher v. State, 294 Ala. 674, 682, 320 So. 2d 727, 734 (1975); Ex parte Williams, supra; Ex parte Purser, supra. Yet, in such circumstances, it becomes important to know whether the defendant alone could have provided the missing evidence.

" ' "A challenged comment of a prosecutor made during ... arguments must be viewed in the context of the evidence presented in the case and the entire ... arguments made to the jury -- both defense counsel's and the prosecutor's. Ex parte Land, supra; Windsor v. State, 683 So. 2d 1021, 1023 (Ala. 1994); Ex parte Musgrove, 638 So. 2d 1360, 1368 (Ala.1993), cert. denied, 513 U.S. 845, 115 S. Ct. 136, 130 L.Ed. 2d 78 (1994).'

" 'Ex parte Brooks, 695 So. 2d 184, 188-89 (Ala.) (footnotes omitted), cert. denied, 522 U.S. 893, 118 S. Ct. 233, 139 L.Ed. 2d 164 (1997), quoted in Ex parte Clark, 728 So. 2d 1126, 1130-31 (Ala. 1998).

" 'In United States v. Knowles, 66 F.3d 1146 (11th Cir. 1995), cert. denied, 517 U.S. 1149, 116 S. Ct. 1449, 134 L.Ed. 2d 568 (1996), more specifically addressing the alternative criteria for a comment to be improper -- the comment was (1) manifestly intended to be a comment on the defendant's failure to testify or (2) of such character that the jury would have naturally and necessarily taken it to be a comment on the defendant's failure to testify -- the court stated:

" ' " 'The question is not whether the jury possibly or even probably would view the remark in this manner, but whether the jury necessarily would have done so.' [United States v. Swindall, 971 F.2d 1531, 1552 (11th Cir. 1992), cert. denied, 510 U.S. 1040, 114 S. Ct. 683, 126 L.Ed.

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2d 650 ... (1994) (citations omitted) (emphasis in Swindall).] 'The defendant bears the burden of establishing the existence of one of the two criteria.' [United States v. Muscatell, 42 F.3d 627, 632 (11th Cir.), cert. denied, 515 U.S. 1162, 115 S. Ct. 2617, 132 L.Ed. 2d 859 ... (1995).] The comment must be examined in context, in order to evaluate the prosecutor's motive and to discern the impact of the statement. [Id.]'

" '66 F.3d at 1163.' "

Smith v. State, 797 So. 2d 503, 539-41 (Ala. Crim. App. 2000) (quoting Thomas v. State, 824 So. 2d 1, 21-23 (Ala. Crim. App. 1999), overruled on other grounds by Ex parte Carter, 889 So. 2d 528 (Ala. 2004)).

Here, examining the complained-of comments in context, Smith cannot establish either that the prosecutor's statement was (1) manifestly intended to be a comment on Smith's failure to testify or (2) that it was of such a character that the jury would have naturally and necessarily taken it to be a comment on Smith's failure to testify.

During the State's opening statement during the penalty phase of Smith's trial, the prosecutor, after explaining the aggravating factors it was going to attempt to prove and setting out some preliminary facts of the case, said to the jury:

"I believe the evidence will show that Mr. Smith's girlfriend -- I think it's her mom or her daddy or maybe even her grandmother had a house over in that area. And that would be kind of a refuge from the crack house. From time to time, they'd go back over there and be with family, and then they'd want to get high and maybe do some business and go back to the crack house.

***20** "Well, he was focused on getting his money that day. And I don't know this, but there may be some pressure on him. He may testify that there was some pressure on him because he owed some people money up the line.

"His girlfriend, Ms. Smith, I think it's Lakenia, and that her nickname is Shay. So I'm going to say Shay. Shay was going over there and she's 17 years old. Mr. Smith, I think, about this time is 25. And so his girlfriend, I think, she may still be in high school at that point in time. And I think she considers him her husband. And she's -- you know, she's attached to him. Let me leave it at that. She's in love with him. He's an older man. And there is this Theresa over there.

"Well, maybe there may be a little jealousy that may be going on between Shay and Theresa. And she's worried that Theresa may be moving in on her man. She might be offering him sex for drugs or something along those lines. I think there is probably evidence that was not the case, but that is not necessarily what she believed. And sometimes we can have the wrong impression of something like that.

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"So there were multiple times that I think Mr. Smith is going back and forth over there. You've got a kitchen in the back door. And everybody uses the back door. No one used the front. The front opens to the street. Everybody can see the comings and going. But if you pull around to the back of the house, you've got more privacy. You can come in and out and that kind of stuff and the neighbors aren't looking out the door at you and see every move that you are making.

"So they are coming in and out the back door. In fact, I believe the front door has got some type of iron bars or some type of impediment where you can't go in it essentially. I think you'll hear that the paramedics were able to break in that impediment and extract Mr. Bennett out. But that is down the line a little bit.

"On this occasion I'm thinking this is the third or fourth time that he has been over there in the evening and this last time he's had a little arguing with his girlfriend and he's upset a little bit. And he has this rifle and it's a .22 rifle. I don't know if it's a .22 automatic. And he has taken the stock off of it. They called it sawed off. But I don't know that he actual sawed it off. It looks like he attaches a small pistol handle. It's about this long. And if I had long arms, I don't have long arms, if I had longer arms, I might be able to put it up my sweater and things like that. I can [allude] to that.

> "You will hear, I believe, Mr. Smith's testimony in regards to how he would sometimes transport it. It is not like you can walk around with a .22 in the city of Dothan and not draw attention. But if you slide it up your sleeve and you acted like that, you might not know what was going on. You say his arm is hurt. You are not thinking somebody is carrying a loaded firearm. Inside that weapon it will hold about 18 rounds. So anybody knows that the slide, before you pull it up and you drop all your shells in, you put it down, and you twist it and that is basically the way this gun operates. And he's got a small little pistol grip in there. And when he comes back the last time, I think he's been over there earlier in the evening, he sets it up against the door. And he didn't point it at anybody and threaten anybody with it at that point in time."

***21** (R. 229-32 (emphasis added).) Then, during its cross-examination of Dr. William Morton, the State and Dr. Morton engaged in the following exchange:

"[Prosecutor]: Okay. And just because you use alcohol or cocaine, that is not going to preclude your ability to say, I just shot everybody in the house or tried to, and police are probably going to come. I need to get rid of this gun over here. I'm going to take it over to mom and dad's

house. No, I'm going to take it over to somebody else's? Does that sound like he's reasoning relatively well?

"[Dr. Morton]: After the event, I think so. I think the actual event was a spontaneous reaction of a complex social interaction of people arguing. That is -- arguing, calling names to each other, and probably his response to the one person that loves him, Shay, his girlfriend, the one person that has ever shown him any love, is called a whore, is called a bitch. And he just clicks and starts shooting

"[Prosecutor]: Okay.

"[Dr. Morton]: That is my impression.

"[Prosecutor]: And who is calling her those words at that point in time? Because I don't think I've heard any reference to that at this point in time. And so you are saying that somebody there at the house said that?

"[Dr. Morton]: Yes. Flint, who he first shot.

"[Prosecutor]: Now, he does not mention that in any of his testimony when [h]e first gives his statement to the police. He doesn't say anything like that. He just says, get the hell out of the way, and he starts shooting, bang, bang?

"[Dr. Morton]: Right."

(R. 504-05 (emphasis added).)

According to Smith, because the State used the words "testify" and "testimony" in its opening statement and in its cross-examination of Dr. Morton, the State suggested that Smith "would testify," it "set an improper expectation in jurors' minds," and when Smith did not testify during the penalty phase it "left the jury with their expectations unmet, unconstitutionally prejudicing [him] and potentially affecting the sentence he received." (Smith's brief, p. 41.) We disagree.

To be sure, the State used the words "testify" and "testimony" in reference to Smith. But, examining the State's words in context does not lead us to conclude that the State "manifestly intended" its comments to be comments on Smith's failure to testify, and it certainly does not lead us to conclude that the State's comments were of such a character that the jury would have "naturally and necessarily" have taken them to be comments on Smith's failure to testify. Rather, the State's use of the words "testify" and "testimony" references what the State thought the jury would hear in Smith's statements to law enforcement and in his statements detailed in Dr. Morton's report, not what they might hear from Smith when he testified during the penalty phase of his trial.

The State's comments about Smith's "testimony" about his being owed money, about how he carried the firearm he used to shoot Flournoy, Helms, and Bennett, and its comment to Dr. Morton about Smith not mentioning something in his "testimony" to the police are not references to possible trial testimony; rather, they are references to statements that Smith had given to law enforcement. Indeed, during its examination of Sgt. Jonathan Beeson of the Dothan Police Department, the State introduced to the jury a copy of Smith's statement to law enforcement, and it introduced to the jury a transcript of that statement. (C. 732-46; R. 410-25.) In his statement, Smith explained that he had gone to Flint's house to collect "between fifteen to seventeen hundred dollars" in drug money that Flint owed him, that Flint told him that he did not have it and would not have it until the next morning, and that it led to an argument between Smith and his girlfriend, which precipitated his returning to Flint's house and shooting. (C. 733-37.) Smith also detailed for law enforcement in his statement how he carried the .22 caliber rifle that he used to shoot Flournoy, Helms, and Bennett:

***22** "[Law Enforcement]: Did you load this gun before going over there?

"[Smith]: The gun was already loaded.

"[Law Enforcement]: Do you know how many rounds it had in it?

"[Smith]: It hold, it held eighteen. I believe it was eighteen in there. Yeah, eighteen.

"....

"[Law Enforcement]: Okay, When you went over to the house, you said you had the gun with you when you went over the first time?

"[Smith]: First time I went.

"[Law Enforcement]: How did you have the gun?

"[Smith]: Had ... Well, I had ... I had, had a sweater on. I had it kinda cuffed up 'bout that far up in the sweater and tote it like that.

"[Law Enforcement]: All right. So, could ... could it be seen?

> "[Smith]: Yeah. ... Cause soon as I hit the door, I always drops it down and sit it in the corner. And I always did every time I always took it over. I always drop the gun. Sit it in a corner."

(C. 743.)

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Additionally, the State's comment in its opening statement that Smith "may testify that there was some pressure on him because he owed some people money up the line" appears to be a reference to statement attributed to Smith by Dr. Morton in his "Preliminary Psychopharmacology Evaluation Report," which was admitted as Defense Exhibit Six during Smith's penalty-phase proceeding. [8] (C. 816-22; R. 488-89.) In Dr. Morton's report, Dr. Morton concluded, in part, as follows:

> "There are reports of suspicious thinking, thoughts of infidelity, and argumentative interaction between [Smith's] girlfriend (Shay) and Ms. Helms as well as argumentative interactions between Shay and Mr. Flournoy, as well as with her boyfriend, [Smith]. In addition, Jerry Smith had earlier argumentative interactions with Mr. Flournoy regarding trust issues, and argumentative interactions with and his girlfriend (Shay). [Smith] also believed a drug dealer was going to kill his mother if he didn't pay the money he owed."

(C. 822.)

In short, although the State used the words "testify" and "testimony" in its opening statement and in its cross-examination of Dr. Morton, Smith failed to show that those comments were "manifestly intended" to be comments on Smith's failure to testify or that they were of such a character that the jury would have "naturally and necessarily" taken them to be comments on Smith's failure to testify. There was no objection to the comments, and it was shown to the jury that the information alluded to by the prosecutor was derived from statements given by Smith to witnesses who conveyed that information to the jury through their testimony. Thus, the State committed no error, plain or otherwise, when it made the complained-of comments in its opening statement and in its cross-examination of Dr. Morton.

VI.

Smith argues that "the State's race conscious exercise of peremptory strikes violated Batson v. Kentucky[, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)]." (Smith's brief, p. 43.) Specifically, Smith argues that the State's use of its peremptory strikes "raise an inference of discrimination." (Smith's brief, p. 44.) Smith also argues that, although the trial court concluded that he had not established a prima facie case of discrimination, the State nonetheless provided its reasons for striking the Black veniremembers, and its "purported race-neutral reasons ... for removing [Black] veniremembers are not supported by the record, evince disparate treatment, and were clearly a pretext for discriminatory jury selection." (Smith's brief, p. 47.) Smith's arguments are without merit.

***23** This Court has repeatedly explained the three-step process used to evaluate Batson claims:

" 'First, the defendant must establish a prima facie case to raise the inference of discriminatory intent. Second, if the inference of discriminatory intent is established, the prosecution must offer legitimate, race-neutral reasons for striking the jurors in question. Third, the trial court must then evaluate the evidence to determine whether the defendant has shown purposeful discrimination in the prosecution's jury strikes.' "

Capote v. State, 323 So. 3d 104, 135-36 (Ala. Crim. App. 2020) (quoting Henderson v. State, 248 So. 3d 992, 1015 (Ala. Crim. App. 2017)). If "the prosecutor volunteers his reasons prior to the trial court's determination on the defendant's establishment of a prima facie case [or even if a prima facie case is not established], the trial court is to consider those reasons in making" a decision on the Batson motion. Jackson v. State, 594 So. 2d 1289, 1293 (Ala. Crim. App. 1991).

Here, after 4 jurors were removed from the venire for cause, each side was given 22 peremptory strikes. The State used its 3d, 5th, 8th, 9th, and 16th strikes to remove 5 of the 8 Black jurors from the venire. Smith, in contrast, used all 22 of his peremptory strikes to remove White jurors from the venire. The struck jury consisted of nine White members and three Black members. After the parties exercised their peremptory strikes, the following occurred:

"The Court: .... Do you wish to make a Batson?

"[Smith's counsel]: Yes, sir. Could we have just a moment? We are trying to get all the information together.

"The Court: All right. You are holding them up. So let's go.

"[Smith's counsel]: Your Honor, at the beginning of the Voir Dire, there were ten blacks on the panel, which constituted 16.6 percent of the total percentage of blacks to whites, which is less than the population of the racial quota of Houston County, which is closer to 25 percent. There were two blacks that were stricken for cause leaving eight. And of those eight, the State struck five. And we are left with eight blacks on the jury. But the ones who the State struck. Your Honor, were [M.D.] And let me go in order. I'm sorry. [J.A.], Number Three. Number 27, [V.B.]; Number 58, [M.D.]; Number 59, [B.D.]; and 63, [J.D.]. Judge, of those five individuals, there is one I would concede that the State had a valid reason for striking. That would be Number 58, [M.D.] The others gave no answers. No response that would indicate that there were -- there was any race neutral reason for striking them at this point, Judge. And I would ask the State to be required to give race neutral reasons for striking those individuals.

"[Prosecutor]: I think you are getting confused on 58 and 63.

"[Smith's counsel]: He's right. 63 is the one I concede.

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"[Prosecutor]: 63?

"[Smith's counsel]: Uh-huh.

"The Court: What is your rationale or your foundation?

"[Smith's counsel]: That the other ones did not give any responses that would rise to a reason for the State striking on a race-neutral basis. We are left with a disparity percentage-wise.

***24** "The Court: I don't find you brought a prima facie case, [Smith's counsel]. I'm going to deny your Batson motion.

"[Prosecutor]: For the record, I'll be happy to give my reasons. Judge, on 63, and I think he conceded that. But that was because of the picture on the wall. And animosity with the DA'S Office. That was that individual, that gentleman. The other three. Number 27, 58, and 59 on their jury questionnaire they all checked the same answer about they had apprehension. I'll read you what they all said. That although I do not believe in the death penalty ought to be used, as long as the law allows for it, I could assess the under proper circumstances. And it's important that I would offer to the Judge that I struck every person that answered that question, regardless of race or nationality. And I would offer that I struck Number One, Number Three, Number 20, Number 27, Number 40, Number 45, Number 58, Number 59, Number 70, and Number 90. And they all answered that. I struck every single one of them. And I also struck everybody that answered.

"The Court: Any response to the State's response?

"[Smith's counsel]: No, sir, I don't have anything else.

"The Court: The Batson motion is denied."

(R. 218-21.)

Although on appeal Smith argues that he established a prima facie case of discrimination under Batson,

"[b]ecause the State offered what it said were race-neutral reasons for each of its challenged strikes, we need not decide whether [Smith] established a prima facie case of discrimination, and we turn to the second and third steps of the Batson inquiry: whether the reasons the State

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offered for its peremptory strikes were race-neutral, and whether those reasons were pretextual or merely a sham."

Young v. State, [Ms. CR-17-0595, Aug. 6, 2021] ––– So. 3d ––––, –––– (Ala. Crim. App. 2021) (citing Battles v. City of Huntsville, 324 So. 3d 403, 407-08 (Ala. Crim. App. 2020)). Although Smith raised a Batson objection and tried to establish a prime facie case of discrimination, Smith made no argument as to whether the State's proffered race-neutral reasons were pretextual. Thus, we review for plain error Smith's argument on appeal that the State's race-neutral reasons were pretextual. See Rule 45A, Ala. R. App. P.

Concerning the second and third prongs of the Batson analysis, this Court has explained:

> " ' " ' "Within the context of Batson, a 'race-neutral' explanation 'means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.' Hernandez v. New York, 500 U.S. 352, 360, 111 S. Ct. 1859, 1866, 114 L.Ed. 2d 395 (1991). 'In evaluating the race-neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law.' Id. '[E]valuation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within the trial judge[ ]'s province." ' Hernandez, 500 U.S. at 365, 111 S. Ct. at 1869."
>
> ***25** " ' " 'Allen v. State, 659 So. 2d 135, 147 (Ala. Crim. App. 1994).'

" ' "Martin v. State, 62 So. 3d 1050, 1058-59 (Ala. Crim. App. 2010).

> " ' " ' "When reviewing a trial court's ruling on a Batson motion, this court gives deference to the trial court and will reverse a trial court's decision only if the ruling is clearly erroneous." Yancey v. State, 813 So. 2d 1, 3 (Ala. Crim. App. 2001). "A trial court is in a far better position than a reviewing court to rule on issues of credibility." Woods v. State, 789 So. 2d 896, 915 (Ala. Crim. App. 1999). "Great confidence is placed in our trial judges in the selection of juries. Because they deal on a daily basis with the attorneys in their respective counties, they are better able to determine whether discriminatory patterns exist in the selection of juries." Parker v. State, 571 So. 2d 381, 384 (Ala. Crim. App. 1990).
>
> " ' " ' "Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in Batson, the finding will 'largely turn on evaluation of credibility' 476 U.S. at 98, n.21, 106 S. Ct. 1712. In the typical challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on

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that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge."

" ' " 'Hernandez v. New York, 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).'

" ' "Doster v. State, 72 So. 3d 50, 73-74 (Ala. Crim. App. 2010).

"....

" ' " 'Once the prosecutor has articulated a race-neutral reason for the strike, the moving party can then offer evidence showing that those reasons are merely a sham or pretext.' Ex parte Branch, 526 So. 2d 609, 624 (Ala. 1987). 'A determination regarding a moving party's showing of intent to discriminate under Batson is " 'a pure issue of fact subject to review under a deferential standard.' " Armstrong v. State, 710 So. 2d 531, 534 (Ala. Crim. App. 1997), quoting Hernandez v. New York, 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).' Williams v. State, 55 So. 3d 366, 371 (Ala. Crim. App. 2010). 'The trial court is in a better position than the appellate court to distinguish bona fide reasons from sham excuses.' Heard v. State, 584 So. 2d 556, 561 (Ala. Crim. App. 1991)."

" 'Thompson, [153] So. 3d at [123].' "

Young, ––– So. 3d at –––– (quoting Wilson v. State, 142 So. 3d 732, 753-54 (Ala. Crim. App. 2010)).

Smith argues that the State's proffered reason for using a peremptory strike to remove J.A. (Juror Number 3); V.B. (Juror Number 27); M.D. (Juror Number 58); and B.D. (Juror Number 59) from the venire is "not supported by the record, evince[s] disparate treatment, and [was] clearly a pretext for discriminatory jury selection."[9] (Smith's brief, p. 47.) We disagree.

***26** As explained above and as Smith notes on appeal, the State asserted that it used its peremptory strikes to remove J.A., V.B., M.D., and B.D. from the venire because they had expressed reservations about imposing the death penalty when they answered question number 40 on the juror questionnaire that they filled out in this case. Question 40 reads as follows:

"40. WITH REFERENCE TO THE DEATH PENALTY, WHICH OF THE FOLLOWING FIVE STATEMENTS BEST REPRESENTS YOUR BELIEFS (circle one)?

"a. 'I believe that the death penalty is appropriate for all crimes involving intentional murder.'

"b. 'I believe that the death penalty is appropriate for most crimes involving intentional murder and I could return a verdict which assessed the death penalty in a proper case.'

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"c. 'I believe that the death penalty is appropriate for some intentional murders and I could return a verdict which assessed the death penalty.'

"d. 'Although I do not believe that the death penalty ever ought to be used, as long as the law provides for it, I could assess it, under the proper set of circumstances.'

"e. 'I could never, regardless of the facts and circumstances of the intentional or, [sic] return a verdict which assessed the death penalty.' "[10]

J.A., V.B., M.D., and B.D. all answered "d," indicating that they do not believe in the death penalty but could assess it in the proper circumstance. These potential jurors' " '[m]ixed feelings or reservations regarding imposition of the death penalty [is a] valid race-neutral reason[ ] for peremptory strikes.' " Martin v. State, 62 So. 3d 1050, 1062 (Ala. Crim. App. 2010) (quoting Acklin v. State, 790 So. 2d 975, 988 (Ala. Crim. App. 2000)). Thus, the circuit court did not commit any error when it denied Smith's Batson motion after the State provided its race-neutral reason for striking J.A., V.B., M.D., and B.D.

Additionally, although Smith argues on appeal that the State's given reason for striking J.A., V.B., M.D. and B.D. was "clearly a pretext for discriminatory jury selection" (Smith's brief, p. 47), Smith has not offered any evidence showing that the State's given reason for striking these jurors was "merely a sham or pretext." Ex parte Branch, 526 So. 2d 609, 624 (Ala. 1987). Smith makes only one argument to show pretext -- that struck jurors J.A. and B.D. expressed support for the death penalty elsewhere in their juror questionnaires while seated White juror B.B. "expressed more reservation about the death penalty" in his juror questionnaire when he indicated that "the death penalty should be 'used seldom' and only served a purpose 'in rare cases.' " (Smith's brief, pp. 48-49.) Smith claims that "[t]his disparate treatment is evidence that the State's explanation for striking [Black] veniremembers was pre-textual." (Smith's brief, p. 49.) But "[t]his Court has recognized that for disparate treatment to exist, the persons being compared must be 'otherwise similarly situated.' " Sharp v. State, 151 So. 3d 342, 367 (Ala. Crim. App. 2010) (quoting Yancey v. State, 813 So. 2d 1, 7 (Ala. Crim. App. 2001)). B.B. is not "otherwise similarly situated" with either J.A. or B.D.

For example, while seated juror B.B. answered in his juror questionnaire that he believes "that the death penalty serves a legitimate purpose in our society," struck juror J.A. answered in his juror questionnaire that he does not believe "that the death penalty serves a legitimate purpose in our society." And while seated juror B.B. answered every death-penalty related question on the juror questionnaire, struck juror B.D. left blank several death-penalty related questions on the juror questionnaire. And although both J.A. and B.D. answered in their juror questionnaires that "the death penalty should be available" when someone commits murder generally, B.B. answered in his juror questionnaire that "the death penalty should be available" for "death of several people"

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-- a circumstance unique to Smith's case. Because seated juror B.B. is not "otherwise similarly situated" with either J.A. or B.D., Smith has not satisfied his burden of establishing that the State's given reason for striking these prospective jurors is merely a sham or pretext. Accordingly, Smith is not entitled to any relief on this claim.

VII.

***27** Smith argues that "the admission of Dr. [Harry] McClaren's testimony violated [his] Fifth Amendment privilege against self-incrimination because [he] was not informed that the evaluation could be used at sentencing." (Smith's brief, p. 50.) Specifically, Smith argues:

> "In the State's rebuttal case during the sentencing phase of the trial, Dr. Harry McClaren, a forensic psychologist, was called to testify about Mr. Smith's mental state and specifically whether or not he is intellectually disabled. During voir dire of Dr. McClaren, defense counsel asked if he had advised Mr. Smith that the 'evaluation can be used by the State to seek the death penalty,' to which Dr. McClaren responded, '[n]ot in that manner, no.' (R. 989.) While Dr. McClaren did tell Mr. Smith that the evaluation 'would be used in future court proceedings' (R. 988), such a vague warning is insufficient under Estelle[v. Smith], 451 U.S. [454,] 456-63, 101 S.Ct. 1866, 68 L.Ed.2d 359 [(1981)], and Williams[v. State], 601 So. 2d [1062,] 1079 [(Ala. Crim. App. 1992)]. On this basis, defense counsel objected to Dr. McClaren's testimony about his interviews with Mr. Smith but the trial court denied the motion. (R. 989-90.) Defense counsel objected once more during Dr. McClaren's testimony, citing directly to Estelle, but that objection was again overruled by the trial court. (R. 991-992.)"

(Smith's brief, pp. 51-52.) According to Smith, Dr. McClaren's testimony was "extremely prejudicial and violated [his] rights against self-incrimination and to an attorney, an impartial jury, due process, a fair trial, and reliable sentencing as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Alabama law." (Smith's brief, p. 53.) Smith's argument is without merit.

As explained earlier, as a part of Smith's penalty-phase case he claimed that his alleged intellectually disability was a mitigating circumstance, and he attempted to interject that mitigating circumstance, in part, through the testimony of two expert witnesses -- Dr. D'Erricco and Dr. Goff. In its rebuttal case during the penalty-phase, the State had the prior deposition testimony of Dr. McClaren, which was based on his pre-Atkins hearing evaluation of Smith, read to the jury. (R. 977-1029.) In his testimony, Dr. McClaren opined that Smith is not intellectually disabled, and he provided his reasons for reaching that conclusion.

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In Williams v. State, 601 So. 2d 1062 (Ala. Crim. App. 1991), this Court addressed a similar situation, in which Williams argued that the introduction of a psychiatrist's testimony during the penalty phase of his trial violated Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). This Court rejected Williams's argument as follows:

> "[P]rior to the commencement of the trial [Williams] filed a motion requesting that a psychiatrist evaluate [him] to assist him in his defense and to aid counsel in the 'sentencing phase of the trial if defendant is convicted.' He also filed a petition for 'inquisition on the sanity' of the defendant. It is clear that [Williams's] sanity at the time of the offense was put at issue prior to the trial.
>
> "After [Williams] had been found guilty and during the sentencing phase of the proceedings, [he] introduced the testimony of Professor Raymond Sumrall, a certified social worker, as to the issue of mitigating evidence. Sumrall testified that the act of murdering an individual would be inconsistent with [Williams's] previous behavior. To rebut this testimony, the prosecution presented the testimony of Dr. Bernard Bryant, a psychologist. He testified that [Williams] has a personality disorder, that treatment for this disorder is often ineffective, and that because of the attitude of people with personality disorders they are very unlikely to change.
>
> ***28** "[Williams] relies on Estelle v. Smith, supra, as the basis for his argument that his constitutional rights were violated.
>
>> " 'The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, commands that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." The essence of this basic constitutional principle is "the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." '
>
> "Estelle, 451 U.S. at 462, 101 S. Ct. at 1872 (citations omitted). The United States Supreme Court in Estelle held that under the circumstances of the case, the psychiatrist could not be allowed to testify concerning the 'future dangerousness' of the defendant. Estelle is readily distinguishable from the instant case. In Estelle, the prosecutor had the burden of proving the existence of future dangerousness, beyond a reasonable doubt, at the sentencing hearing. Further, in Estelle, the mental competency of the defendant was not placed at issue.
>
> "We quote the recent Alabama Supreme Court case of Ex parte Wilson, 571 So. 2d 1251, 1258 (Ala. 1990):
>
>> " 'We are mindful that the defendant offered the psychiatric testimony in this case in order to establish mitigating circumstances under [Ala.] Code 1975, § 13A-5-51(2). The defendant clearly bears the burden of proving mitigation under § 13A-5-45(g). However, § 13A-5-45(g) states that once the defendant interjects the issue of mitigation "the State shall have the burden

> of disproving the factual existence of that circumstance by a preponderance of the evidence." Thus, the State was justified in producing its own expert to rebut the evidence of mitigation offered by the defendant's expert.'

> "The Supreme Court went on to say further that Estelle was readily distinguishable. They stated 'the Supreme Court [of the United States] noted that "a different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase" as opposed to the case where the defendant intends to offer no such evidence.' Wilson, 571 So. 2d at 1259, quoting from Estelle, 451 U.S. at 472, 101 S. Ct. at 1878. In Wilson, the Supreme Court stated that the appellant had been notified that the examination would cover any evidence of mitigating evidence. As the state argues, it appears from the motion filed by the appellant that he was aware that the examination would cover any evidence offered during the sentencing phase of the trial."

Williams, 601 So. 2d at 1078-79.

This case, like Williams, is "readily distinguishable" from Estelle. In Estelle, "the trial court had ordered, sua sponte, a psychiatric examination when the defendant had neither asserted an insanity defense nor offered any psychiatric evidence at trial." Williams v. State, 710 So. 2d 1276, 1330 (Ala. Crim. App. 1996).

Here, the trial court ordered that Smith be evaluated by Dr. McClaren after Smith had been evaluated by his own mental-health experts and in anticipation of an evidentiary hearing on Smith's Atkins claim. Additionally, the State did not present Dr. McClaren's testimony about his Atkins evaluation of Smith until after Smith had raised the issue of his intellectual disability in the penalty phase of his case by presenting testimony from Dr. D'Erricco and Dr. Goff. Once Smith interjected his intellectual disability as a mitigating circumstance into the penalty phase of his case, the State had the "burden of disproving the factual existence of that circumstance by a preponderance of the evidence." § 13A-5-45(g), Ala. Code 1975. And, because it had such a burden, the State "was justified in producing its own expert to rebut the evidence of mitigation offered by [Smith's] expert." Ex parte Wilson, 571 So. 2d 1251, 1258 (Ala. 1990). See also Williams, 710 So. 2d at 1329 ("[B]y actively pursuing an insanity defense and introducing testimony of qualified psychologists or psychiatrists as defense witnesses, a defendant waives any privilege against self-incrimination the defendant may have had against subsequent qualified testimony or rebuttal.").

***29** Accordingly, Smith is not entitled to any relief on this claim.

VIII.

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Smith argues that the trial court erred "by refusing to instruct the jury regarding [his] parole ineligibility." (Smith's brief, p. 53.) Specifically, Smith, citing Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) and Kelly v. South Carolina, 534 U.S. 246, 122 S.Ct. 726, 151 L.Ed.2d 670 (2002), argues:

> "Because the State injected the issue of future dangerousness, defense counsel included the following instruction in their requested charges:
>
> > " 'If you decide upon the penalty of life imprisonment without possibility of parole, your sentence will have the effect that the defendant will be sent to prison for the rest of his natural life. He will never be paroled, and his sentence will never be shortened. He will suffer imprisonment for the remainder of his life. He will not be eligible for work release or any other non-custodial decrease of his sentence. Your sentence will mean incarceration until his death.'
> >
> > > "(C. 205.) The trial court improperly refused to give defense counsel's requested jury instruction regarding parole and work-release ineligibility despite the prosecutor introducing evidence of a prior escape by Mr. Smith. (R. 970.)"

(Smith's brief, p. 55.) In other words, Smith argues that, because the State injected "future dangerousness" into the penalty phase of Smith's trial, the trial court was required to define for the jury that a sentence of life imprisonment without the possibility of parole means that Smith would never be paroled. Smith's argument is without merit. [11]

> "When reviewing a trial court's jury instructions, this Court keeps in mind the following principles:
>
> > " '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).'
>
> "Williams v. State, 795 So. 2d 753, 780 (Ala. Crim. App. 1999), aff'd, 795 So. 2d 785 (Ala. 2001)."

Capote, 323 So. 3d at 129. Additionally,

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" '[i]n a criminal case ... the trial court is required to define technical words and expressions, but not words and expressions which are of common understanding and self-explanatory.' State v. O'Donnell, 142 Wash. App. 314, 325, 174 P.3d 1205, 1211 (2007). ' "Jury instructions need not specifically define '[t]erms of common usage and meaning.' " Law v. State, 249 Ga. App. 253, 254, 547 S.E.2d 784, 786 (2001).

> " ' "When a term, word, or phrase in a jury instruction is one with which reasonable persons of common intelligence would be familiar, and its meaning is not so technical or mysterious as to create confusion in jurors' minds as to its meaning, an instruction defining [that term, word, or phrase] is not required." '

***30** "People v. Esparza-Treto, 282 P.3d 471, 480 (Colo. App. 2011), quoting People v. Thoro Prods. Co., 45 P.3d 737, 745 (Colo. App. 2001).

> " 'A trial court is not required to define each term or phrase used in its jury instructions. "If we required otherwise, a jury charge could potentially continue ad infinitum; for every term in a jury charge could become the subject of attack." Thornton v. State, 570 So. 2d 762, 772 (Ala. Crim. App. 1990). "[W]hether it is necessary for the trial court to define the term for the jury hinges on the facts of the case," Ivery v. State, 686 So. 2d 495, 501-02 (Ala. Crim. App. 1996), and on whether "the challenged terms can be understood by the average juror in their common usage." Thornton, 570 So. 2d at 772. As this Court recognized in Roberts v. State, 735 So. 2d 1244 (Ala. Crim. App. 1997):
>
> > " ' " '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." '
>
> " '735 So. 2d at 1252 (quoting Boyde v. California, 494 U.S. 370, 380-81, 110 S. Ct. 1190, 108 L.Ed. 2d 316 (1990)).'

"DeBlase v. State, 294 So. 3d 154, 241-42 (Ala. Crim. App. 2018)."

Graham v. State, 299 So. 3d 273, 328-29 (Ala. Crim. App. 2019).

Here, the trial court repeatedly instructed the jury that in reaching its sentencing recommendation it would have only two choices: death or life imprisonment without the possibility of parole. (See R. 1118, 1123, 1124, 1126, 1127, 1128, 1129, 1130, and 1132.) The phrase "without the possibility of parole" is a phrase that is easily understood by the average juror and conveys to the jury what Smith's requested instruction wanted the jurors to know: that Smith would not be eligible for

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parole if he received that sentence. Moreover, Smith's counsel explained to the jury in his closing argument that a sentence of life imprisonment means that Smith "will be locked away forever. He'll never get out of prison until they carry him out to bury him because he died of natural causes or was murdered in prison or whatever happens." (R. 1099.) Thus, the trial court did not err when it refused Smith's requested jury instruction, defining the phrase "life imprisonment without the possibility of parole." Accordingly, Smith is not entitled to any relief as to this claim.

IX.

Smith argues that the trial court "improperly permitted reference to testimonial hearsay statements in violation of [his] rights under the confrontation clause." (Smith's brief, p. 57.) According to Smith, before Probation Officer Robert McCollough testified, Smith "objected to the possible introduction of testimonial hearsay" -- namely, "Officer McCollough reading from a presentence report regarding a 1989 assault of Judson Threat by Mr. Smith. The report included Mr. Threat's official statement to the Headland City Police Department, which included testimony about Mr. Threat hearing Mr. Smith say he was going to kill Mr. Threat." (Smith's brief, p. 57.) Smith says that, although the State "acknowledged the portion of improper testimonial hearsay and said, '[w]e are not going there,' " it "nonetheless introduced [the statement] while cross-examining a later witness[-- Charles Davis]." (Smith's brief, p. 58.) Specifically, Smith challenges the following exchange:

> ***31** "[Prosecutor]: When [Smith] went to prison for shooting Judson Threat[ ], did you hear he says, get out of the way, I'm going to the penitentiary tonight, I'm going to kill somebody?
>
> "[Charles Davis]: I wasn't in Headland. I only heard of the incident. I wasn't there."

(R. 543.) Because Smith did not object to the State's cross-examination of Davis about what Smith had said concerning shooting Threat, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

In one of Smith's previous appeals, this Court addressed Smith's argument that the trial court had erred when it allowed the State, "in its presentation of evidence supporting the aggravating circumstance that the appellant had previously been convicted of a violent felony, § 13A-5-49(2), to elicit from Probation Officer Robert McCullough the details of that prior felony." Smith, 213 So. 3d at 155. Those details included an allegation that Smith had "pointed a shotgun at [Threat]

and said, 'I'm going to kill the son of a bitch; I'm going to go to the penitentiary.' " Smith, 213 So. 3d at 155. In rejecting Smith's argument in that appeal, this Court explained:

> "While the relevancy of a few of the details is questionable, we agree with the attorney general that this claim does not present plain error under Dill v. State, 600 So. 2d 343, 364 (Ala. Crim. App. 1991), aff'd, 600 So. 2d 372 (Ala. 1992). In Dill, the court, in addressing the appellant's contention that the prosecution had improperly elicited details about a prior conviction for a violent felony, by relying on hearsay evidence, explained:
>
> > " ' "Any evidence which has probative value and is relevant to sentence shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements." Ala. Code 1975, § 13A-5-45(d). See also Stephens v. State, 580 So. 2d 11 (Ala. Crim. App. 1990). Thus, the appellant's hearsay claim has no merit. [T]he testimony concerning the violence surrounding the robbery conviction was properly admitted to show the violent nature of the offense under Ala. Code 1975, § 13A-5-45(c). Siebert v. State, 562 So. 2d 586 (Ala. Crim. App. 1989), aff'd, 562 So. 2d 600 (Ala.), cert. denied, 498 U.S. 963, 111 S. Ct. 398, 112 L.Ed. 2d 408 (1990).'
>
> "600 So. 2d at 364. See also Smith v. State, 698 So. 2d 189, 212-13 (Ala. Crim. App. 1996) (testimony of the circuit clerk regarding the appellant's testimony at a prior proceeding wherein the appellant described his violent behavior during his commission of a burglary was properly admitted pursuant to §§ 13A-5-45(c) and (d) and was relevant and of probative value), aff'd, 698 So. 2d 219 (Ala. 1997)."

Smith, 213 So. 3d at 155-56.

Here, as Smith acknowledges, the State did not present to the jury any of the details of Smith's prior first-degree assault through Officer McCullough's testimony. Rather, Smith claims that the State presented one detail about that prior offense through its cross-examination of Charles Davis -- that is, Smith said that he was "going to the penitentiary tonight, I'm going to kill somebody." As set out above, however, Davis denied having heard Smith make such a statement. (R. 543.) If Officer McCullough's testimony in Smith's previous appeal about the actual details of Smith's threat to Threat was not plain error, then it follows that Davis's denial of having heard Smith ever make such a statement certainly does not rise to the level of plain error. Accordingly, Smith is not entitled to any relief as to this claim.

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X.

***32** Smith argues that the trial court erred when it "refused to instruct the jury on specific nonstatutory mitigating circumstances offered by [him]." (Smith's brief, p. 59.) According to Smith, "the trial court's instructions were constitutionally deficient because they failed to allow the jury to accord full weight to the relevant mitigating evidence presented at the penalty phase," and "[t]here is a reasonable likelihood that after listening to the trial court's instructions, the jury failed to understand that it could consider and give effect to certain non-statutory mitigation evidence offered by Mr. Smith that was not specifically referenced in the 'catch-all' charge, such as Mr. Smith's family history of mental retardation and drug and alcohol abuse." (Smith's brief, pp. 59-60.) As Smith correctly acknowledges, however, " '[t]his Court has held that the trial court does not have to instruct the jury from a list of specific nonstatutory mitigating circumstances provided by the defendant.' " Albarran v. State, 96 So. 3d 131, 206 (Ala. Crim. App. 2011) (quoting Brown v. State, 686 So. 2d 385, 403 (Ala. Crim. App. 1995)). We see no reason to overrule Albarran, and we decline to do so. Accordingly, Smith is not entitled to any relief as to this claim.

XI.

Smith argues that there were "numerous instances of prosecutorial misconduct throughout the trial" that denied him a fair trial and require reversal of his death sentence. First, Smith argues that the "prosecutor improperly told the jury that Derrick Gross and Miranda Felder 'testified truthfully.' " (Smith's brief, p. 61.) Second, Smith argues that "during its direct examination of Sergeant John Beeson of the Dothan Police Department, the prosecutor made reference to Mr. Smith's demeanor in the courtroom." (Smith's brief, p. 62.) Third, Smith argues that "during his closing argument, the prosecutor improperly referred to the mitigating circumstances presented by the defense as an excuse." (Smith's brief, p. 63.) Fourth, Smith argues that the prosecutor committed misconduct when he "ended his closing argument" by "impl[ying] to the jurors that the only way that they could ensure 'truth' and 'justice' would be to sentence Mr. Smith to death." (Smith's brief, pp. 63-64.) Finally, Smith argues that the "aggregate effect of the prosecutorial misconduct in this case rendered the trial process unreliable." (Smith's brief, p. 64.) Because Smith did not object to any of the complained-of comments in the trial court, we review his arguments on appeal for plain error only. See Rule 45A, Ala. R. App. P. And, although his failure to object does not bar review of Smith's prosecutorial-misconduct claims, " ' "it does weigh against any claim of prejudice." ' " Thompson v. State, 153 So. 3d 84, 170 (Ala. Crim. App. 2012) (quoting Kuenzel v. State, 577 So. 2d 474, 489 (Ala. Crim. App. 1990), quoting in turn Ex parte Kennedy, 472 So. 2d 1106, 1111 (Ala. 1985)).

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Concerning arguments that a prosecutor has committed misconduct when either questioning witnesses or making an argument to the jury, this Court has explained as follows:

> " 'There is no doubt that, in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be, prejudicial to the accused. ... If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation.'

"Dunlop v. United States, 165 U.S. 486, 498, 17 S. Ct. 375, 41 L.Ed. 799 (1897). 'On the other hand, "[w]e must not lose sight of the fact that a trial is a legal battle, a combat in a sense, and not a parlor social affair." Arant v. State, 232 Ala. 275, 280, 167 So. 540, 544 (1936).' Davis v. State, 494 So. 2d 851, 853 (Ala. Crim. App. 1986).

> " ' "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. Whitlow v. State, 509 So. 2d 252, 256 (Ala. Cr. App. 1987); Wysinger v. State, 448 So. 2d 435, 438 (Ala. Cr. App. 1983); Carpenter v. State, 404 So. 2d 89, 97 (Ala. Cr. App. 1980), cert. denied, 404 So. 2d 100 (Ala. 1981). Moreover, this Court has also held that statements of counsel in argument to the jury must be viewed as delivered in the heat of debate; such statements are usually valued at their true worth and are not expected to become factors in the formulation of the verdict. Orr v. State, 462 So. 2d 1013, 1016 (Ala. Cr. App. 1984); Sanders v. State, 426 So. 2d 497, 509 (Ala. Cr. App. 1982)." '

***33** "Callahan v. State, 767 So. 2d 380, 392 (Ala. Crim. App. 1999) (quoting Bankhead v. State, 585 So. 2d 97, 105-07 (Ala. Crim. App. 1989)).

> " ' "[I]t is not enough that the prosecutors' remarks were undesirable or even universally condemned." Darden v. Wainwright, 699 F.2d [1031] at 1036 [(11th Cir. 1983)]. The relevant question is whether the prosecutors' comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L.Ed. 2d 431 (1974).'

"Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L.Ed. 2d 144 (1986).

> "....

> "The United States Supreme Court stated the following concerning plain error as it related to a prosecutor's argument:

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> " 'Inappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding. Instead, ... the remarks must be examined within the context of the trial to determine whether the prosecutor's behavior amounted to prejudicial error. In other words, the Court must consider the probable effect the prosecutor's [remark] would have on the jury's ability to judge the evidence fairly....
>
> " '....
>
> " 'Especially when addressing [a claim of] plain error, a reviewing court cannot properly evaluate a case except by viewing such a claim against the entire record. We have been reminded:
>
>> " ' "In reviewing criminal cases, it is particularly important for appellate courts to relive the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure. To turn a criminal trial into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution." Johnson v. United States, 318 U.S. 189, 202, 63 S. Ct. 549, 555, 87 L.Ed. 704 (1943) (Frankfurter, J., concurring).
>
> " 'It is simply not possible for an appellate court to assess the seriousness of the claimed error by any other means. As the Court stated in United States v. Socony-Vacuum Oil Co., 310 U.S. [150] , at 240, 60 S. Ct. [811] , at 852, [84 L.Ed. 1129 (1940)], "each case necessarily turns on its own facts." '
>
> "United States v. Young, 470 U.S. 1, 11-16, 105 S. Ct. 1038, 84 L.Ed. 2d 1 (1985). See also Ex parte Parker, 610 So. 2d 1181 (Ala. 1992).
>
>> "Moreover, the circuit court on several occasions instructed the jury that arguments of counsel were not evidence and should not be considered as evidence. Jurors are presumed to follow the court's instructions. See Burgess v. State, 827 So. 2d 134, 162 (Ala. Crim. App. 1998)."

Thompson, 153 So. 3d at 169-71. With these principles in mind, we address Smith's claims of prosecutorial misconduct.

XI.A.

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First, Smith argues that the "prosecutor improperly told the jury that Derrick Gross and Miranda Felder 'testified truthfully.' " (Smith's brief, p. 61.)

This Court has explained that "it is improper for a prosecutor to vouch for the credibility of a witness." Shanklin v. State, 187 So. 3d 734, 790 (Ala. Crim. App. 2014). But

> ***34** " ' "[a] distinction must be made between an argument by the prosecutor personally vouching for a witness, thereby bolstering the credibility of the witness, and an argument concerning the credibility of a witness based upon the testimony presented at trial. '[P]rosecutors must avoid making personal guarantees as to the credibility of the state's witnesses.' Ex parte Parker, 610 So. 2d 1181 (Ala. 1992). See Ex parte Waldrop, 459 So. 2d 959, 961 (Ala. 1984), cert. denied, 471 U.S. 1030, 105 S. Ct. 2050, 85 L.Ed. 2d 323 (1985).
>
> > " ' " ' "Attempts to bolster a witness by vouching for his credibility are normally improper and error." ... The test for improper vouching is whether the jury could reasonably believe that the prosecutor was indicating a personal belief in the witness' credibility.... This test may be satisfied in two ways. First, the prosecution may place the prestige of the government behind the witness, by making explicit personal assurances of the witness' veracity.... Secondly, a prosecutor may implicitly vouch for the witness' veracity by indicating that information not presented to the jury supports the testimony.'
>
> " ' "United States v. Sims, 719 F.2d 375, 377 (11th Cir. 1983), cert. denied, 465 U.S. 1034, 104 S. Ct. 1304, 79 L.Ed. 2d 703 (1984)."
>
> " 'DeBruce v. State, 651 So. 2d 599, 610-11 (Ala. Crim. App. 1993), aff'd, 651 So. 2d 624 (Ala.1994).' "

Johnson v. State, 120 So. 3d 1130, 1165 (Ala. Crim. App. 2009). Furthermore, "[a] prosecutor does not personally vouch for the credibility of a witness when he or she does not personally guarantee the truthfulness of the witness's testimony at trial but argues that the witness is credible based on the evidence presented at trial." Young v. State, [Ms. CR-17-0595, Aug. 6, 2021] ––– So. 3d –––, ––– (Ala. Crim. App. 2021). See also Jackson v. State, 169 So. 3d 1, 75 (Ala. Crim. App. 2010) (finding that the prosecutor's closing argument that the witness "could have lied to you. But he didn't" was not an improper vouching for the witness); and DeBruce v. State, 651 So. 2d 599, 610 (Ala. Crim. App. 1993) (holding that prosecutor's statements in closing that "I'll submit to you, [the accomplice] is telling you the truth" and "I'll submit to you, [how the robbery/murder occurred] is just like [the accomplice] said" was not an improper bolstering of a witness's testimony because the prosecutor "did not give any personal assurance of [the accomplice's] veracity and did not imply that he had information that had not been presented to the jury that supported [the accomplice's] testimony").

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Here, Smith contends that the prosecutor made two comments vouching for the credibility of witnesses -- one in opening statement and one in closing argument. In the State's opening statement, the prosecutor explained that Derrick Gross was one of the people who was in Flournoy's house the night Smith shot Flournoy, Helms, and Bennett, and he told the jury what he expected the evidence to be, and then he said:

> "They are going to eventually run Mr. Gross in the NCIS to see if there are any warrants on him, just like they would if they picked me up. And, basically, he's got some warrants in Conecuh or Escambia County, kind of south of Andalusia back towards north of Pensacola. And he's a brick layer. He's been up here. He escaped from maybe a work release situation. He had some previous felony convictions. We are going to cover all that. We've got nothing to hide. As [the other prosecutor] said, we have paid him to come down here, but it's not to pay him for his testimony. It's to reimburse him for his expenses for coming down here and telling you the truth."

***35** (R. 239-40 (emphasis added).) In the State's closing argument, as the prosecutor was detailing the evidence presented during the penalty phase, he said the following:

> "Miranda Felder, I imagine it was a little difficult for her to come back in here 22 years later. She's a grown lady. She was a young girl at the time. But she testified truthfully that they came by there when he was trying to get rid of the gun. Why was he getting rid of the gun? Because he didn't want to be caught with the evidence that is going to link him to the crime scene. Does that sound like somebody that would be significantly mentally impaired? Does that sound like somebody that is mentally retarded? That sounds like somebody that is thinking clear to me."

(R. 1077 (emphasis added).)

After examining these statements in the context of the entire arguments, the prosecutor's above-quoted statements did not rise to the level of giving personal assurance that either Gross or Felder was, in fact, telling the truth, nor did the statements convey a belief in the validity of the witnesses based upon information not presented to the jury. See, e.g., Ex parte Parker, 610 So.2d 1181, 1182 (Ala.1992) (holding that a prosecutor's comment in closing argument that, "I can assure you he told you the truth," was improper). Thus, Smith is not entitled to any relief on this claim.

XI.B.

Second, Smith argues that the prosecutor committed misconduct when, "during [the] direct examination of Sergeant John Beeson of the Dothan Police Department, the prosecutor made reference to Mr. Smith's demeanor in the courtroom." (Smith's brief, p. 62.) The complained-of exchange was as follows:

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"[Prosecutor]: And would you tell the ladies and gentlemen of the jury he was brought to the Dothan Police Department, and if I use the term, the two detectives that were assigned to talk to him, who are they?

"[Sgt. Beeson]: That would be Sgt. Jay and myself.

"[Prosecutor]: Will you tell the ladies and gentlemen of the jury, if I could, did you talk to him with Sgt. Jay?

"[Sgt. Beeson]: Yes.

"[Prosecutor]: And where did you talk to Jerry Jerome Smith?

"[Sgt. Beeson]: In the interview room at the Dothan Police Department.

"[Prosecutor]: Is that how he was looking to the left or right, or was he looking at you?

"[Sgt. Beeson]: Yes, sir.

"[Prosecutor]: Will you tell the ladies and gentlemen of the jury when you interviewed him, what location were you in?

"[Sgt. Beeson]: We have an interview room in CID."

(R. 405 (emphasis added).)

With regard to questions about a defendant's demeanor, this Court has explained that "evidence of a defendant's demeanor before or after the offense is admissible at trial. E.g., Pressley v. State, 770 So. 2d 115 (Ala. Crim. App. 1999); Lowe v. State, 627 So. 2d 1127 (Ala. Crim. App. 1993); Sheridan v. State, 591 So. 2d 129 (Ala. Crim. App. 1991)." Largin v State, 233 So. 3d 374, 398 (Ala. Crim. App. 2015). See also DeBlase v. State, 294 So. 3d 154, 224 (Ala. Crim. App. 2018) ("Lt. Hagan and Officer Eerie did nothing more than testify about DeBlase's demeanor when they encountered him, and 'evidence of a defendant's demeanor before or after the offense is admissible at trial.' Largin, 233 So. 3d at 398."). Although Smith couches this argument in terms of a comment on his demeanor at trial, it is more of a question regarding Smith's demeanor at the time of his interview after the shootings. Because the prosecutor's question was permissible, the prosecutor committed no misconduct when he asked Sgt. Beeson about Smith's demeanor during his interview with law enforcement. Thus, Smith is not entitled to any relief on this claim.

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***36** To the extent that this question about Smith's demeanor can be construed as a comment regarding his demeanor at trial, Smith is not entitled to relief. There was no objection, and the record does not reflect how a statement that Smith was looking left, right, or at someone could in any way be detrimental to Smith's defense. Plain-error review is used to correct "egregious errors" that "have an unfair prejudicial impact on the jury's deliberations." Ex parte Bryant, 951 So. 2d at 727. Smith is not entitled to relief because this question and answer, even if viewed as a comment on Smith's demeanor at trial, did not prejudice Smith in any way.

XI.C.

Third, Smith argues that the prosecutor committed misconduct when, "during his closing argument, the prosecutor improperly referred to the mitigating circumstances presented by the defense as an excuse." (Smith's brief, p. 63.)

Here, during the State's closing argument, after the prosecutor explained to the jury the aggravating circumstances he thought the State had proved and while he was recounting the evidence presented during the penalty phase, the prosecutor said:

> "It's all in this trial -- and I know I'm bouncing around like a ricochet. But it's important that we don't -- that we don't forget the victims, you know Theresa Helms, David Bennett, and Flint, Willie Flournoy. Their lives matter. Just because they did crack does not give anybody the right to take their life. And him going in there and killing all the witnesses, that just shows -- just slaughtering them, there is no excuse for what happened. There is no excuse for what happened that night."

(R. 1078 (emphasis added).)

Smith claims that, "[g]iven the critical nature of mitigation, suggesting that the evidence presented on behalf of Mr. Smith is 'no excuse,' not only misstates the law, but also risks confusing the jury regarding whether the mitigating factors are to be considered, undermining the reliability of [his] sentence." (Smith's brief, p. 63.)

Although this Court, in the context of an ineffective-assistance-of-counsel claim, has noted that " 'a prosecutor cannot improperly denigrate mitigation during a closing argument,' " Jones v. State, 322 So. 3d 979, 1020 (Ala. Crim. App. 2019) (quoting Williamson v. State, 994 So. 2d 1000, 1014-15 (Fla. 2008)), we disagree with Smith's assessment of the prosecutor's comment here. When viewed in context of the entire closing argument, the prosecutor's remarks do not denigrate Smith's mitigation evidence. Rather, the prosecutor's statement merely summed up the events of the night as being senseless and unjustifiable.

What is more, during the State's closing argument, the prosecutor addressed the importance of considering Smith's mitigation evidence, explaining to the jury:

> "You need to listen to the mitigating evidence. Yes, you are hearing that come from the prosecutor because it is the legal thing for you to have to do. If you say I'm not listening to it, then, that is wrong. You need to listen to it. You need to give it the weight in your heart that you believe it deserves.
>
> "I'm not hiding from it. I'm going to meet it head on. But I'm telling you at the end of the day I believe that the aggravators outweigh the mitigators. And I believe you will believe that too when you consider the evidence."

(R. 1073-74.)

In short, the prosecutor's comment about there being "no excuse" for Smith's actions did not denigrate Smith's mitigation evidence. At worst, it was "an argument that the ... aggravating circumstances offered by the prosecution far outweighed the mitigating circumstances offered by the defense and that [Smith] should be sentenced to death." McCray v. State, 88 So. 3d 1, 49 (Ala. Crim. App. 2010). Thus, Smith is not entitled to any relief on this claim.

XI.D.

***37** Fourth, Smith argues that the prosecutor committed misconduct when he "ended his closing argument" by "impl[ying] to the jurors that the only way that they could ensure 'truth' and 'justice' would be to sentence Mr. Smith to death." (Smith's brief, pp. 63-64.) Specifically, Smith takes issue with the following statement the prosecutor made at the end of the State's closing argument: "I want you to speak loudly. I want you to speak truthfully. I want you to speak justice today. I want you to come back with the death penalty. Thank you." (R. 1097.) This statement, when viewed in context, is nothing more than the " 'prosecutor's appeal to the jury for justice and to properly perform its duty.' " Minor v. State, 914 So. 2d 372, 421 (Ala. Crim. App. 2004) (quoting Price v. State, 725 So. 2d 1003, 1033 (Ala. Crim. App. 1997)). Thus, the prosecutor did not commit misconduct when he implored the jury to "speak truthfully" and to "speak justice." Even so, the statement did not " ' "so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process." ' " Sneed v. State, 1 So. 3d 104, 138 (Ala. Crim. App. 2007) (quoting Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986), quoting in

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turn Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). Thus, Smith is not entitled to any relief as to this claim.

XI.E.

In his final prosecutorial-misconduct claim, Smith asserts that the "aggregate effect of the prosecutorial-misconduct in this case rendered the trial process unreliable." (Smith's brief, p. 64.)

> "After thoroughly reviewing the record and considering the allegations of prosecutorial misconduct cumulatively, we find no prosecutorial misconduct, but even if there was impropriety, this Court finds that the cumulative effect of any alleged errors did not probably injuriously affect [Smith's] substantial rights and does not require reversal."

Stanley v. State, 143 So. 3d 230, 305 (Ala. Crim. App. 2011). Accordingly, Smith is due no relief on his prosecutorial-misconduct claims.

XII.

Smith argues that the trial court erred when it admitted "irrelevant prior bad act evidence as nonstatutory aggravation during the penalty phase." (Smith's brief, p. 64.) Smith contends that, "[t]hroughout the penalty phase hearing, the prosecutor repeatedly asked questions that improperly introduced irrelevant prior bad acts evidence." (Smith's brief, p. 64.) According to Smith, this occurred when the State cross-examined his witnesses about their knowledge of his prior convictions for unlawful breaking and entering a motor vehicle and for third-degree assault. Specifically, Smith takes issue with the State's questioning of Anthony McGlaun, whom Smith characterized as a childhood friend:

> "[Prosecutor]: Let's talk about Jerry Jerome Smith. In other words, when he was 18 years old, you graduated from school, and you went to the military, you lost contact with him, didn't you?
>
> "[McGlaun]: Yes, sir.
>
> "[Prosecutor]: Would you agree that when you came back and found out by seeing him or talking with him, he had taken a shot gun and shot a man and tried to blow his arm off and went to prison for ten years on that; correct?
>
> "[McGlaun]: Yeah, I found out about that.

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"[Prosecutor]: You found that he went to prison on another case for unauthorized breaking and entering of a motor vehicle? Went to prison on that?

"[McGlaun]: Well, I didn't -- I know that now. I didn't know that back then.

"[Prosecutor]: Are you familiar with that, that he had taken knives and stabbed people? He's done that. You know; correct?

"[McGlaun]: Yeah.

"....

"[Prosecutor]: Let's talk about, if we could, you said that he never had a chance. Well, you know, he's going to prison -- well, you know, he's going to prison; right?

"[McGlaun]: Uh-huh.

"[Prosecutor]: And since he's been to prison and come out of prison, he hasn't changed, has he?

"[McGlaun]: Since he come out of prison?

"[Prosecutor]: Let me ask you he went to prison for shooting someone and got out; correct?

"[McGlaun]: Yes, sir.

"[Prosecutor]: And he went to prison for unauthorized breaking and entering a motor vehicle and got out; correct?

***38** "[McGlaun]: Yes.

"[Prosecutor]: And now he's back in court for killing three people and trying to kill a fourth. Are you familiar with that?

"[McGlaun]: Uh-huh.

"[Prosecutor]: So he hasn't changed, has he? Yes or no?

"[McGlaun]: No, I guess.

(R. 711-14.) Smith also takes issue with the State's questioning of his niece, Charlotte Smith:

"[Prosecutor]: Ma'am, Mr. Smith is your uncle. Do you know he went to prison for shooting someone with a shotgun, Mr. Judson Threats? He got ten years and went to prison for that. Are you aware of that?

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"[Charlotte]: I have heard about it, but I wasn't familiar with it. Now, I know. I know now.

"[Prosecutor]: Okay. And do you understand that he got a conviction for robbery in the third degree and went to prison for that?

"[Charlotte]: Now, I wasn't familiar with that, but now I know that.

"[Prosecutor]: Do you know about his unauthorized breaking and entering of a vehicle?

"[Charlotte]: I don't know nothing about that.

"[Prosecutor]: Do you know that Mr. Smith is smart enough to give his fake name, Christopher Turner, to the police? Are you aware of that?

"[Charlotte]: No.

"[Prosecutor]: Do you believe that Mr. Smith is smart enough to use a false name when he was arrested?

"[Charlotte]: No.

(R. 940-41.) Finally, Smith takes issue with the following exchange between the State and Charles Davis:

"[Prosecutor]: All right. Now, let's talk about, if we can, are you familiar that he went to prison, Jerry Jerome Smith, for unauthorized breaking and entering of a motor vehicle?

"[Davis]: No, sir.

"[Prosecutor]: Well, do you recall giving testimony in deposition before where last time you said that you were familiar with that?

"[Davis]: I don't remember that.

(R. 539-41.)

Smith says that these questions were "improper because evidence that [he] allegedly stabbed someone and broke into a car was not relevant to any aggravating circumstance, nor to rebut any mitigation, nor for any other purpose at the sentencing hearing." (Smith's brief, p. 65 (citations omitted).) Smith says that "[t]he only potential purpose that this evidence served was for the prosecutor to use it as nonstatutory aggravation in seeking a death sentence -- a purpose which is clearly improper under Alabama law." (Smith's brief, pp. 65-66.) Because Smith did not object

to this complained-of evidence in the trial court, we review his argument for plain error only. See Rule 45A, Ala. R. App. P.

In one of Smith's previous appeals, this Court addressed Smith's argument that the State had improperly introduced evidence of his prior bad acts when

> “Officer Ted Yost, a former officer with the Headland Police Department, testified at the penalty phase that a few days before the murders he stopped a vehicle driven by Smith, that Smith gave him a false name, that he found a pistol during a search of the vehicle, and that Smith was arrested for carrying a concealed weapon and for contributing to the delinquency of a minor -- several minors were in the vehicle when Smith was stopped by Yost. He also testified that while at the police station Smith asked to use the restroom and escaped.”

***39** Smith v. State, 213 So. 3d 255, 278-79 (Ala. Crim. App. 2007) (footnote omitted). Smith objected to Officer Yost's testimony because it “would be highly prejudicial and would have no relevance to the aggravating circumstances that the State was relying on to seek the death penalty.” Id. at 279. The State responded that it was “offering the evidence to rebut Smith's defense that he was mentally retarded.” Id. at 279. This Court rejected Smith's argument on appeal as follows:

> “At a penalty phase in a capital-murder case, the State has the burden of proving the existence of any applicable aggravating circumstances and the burden of disproving the factual existence of any mitigating circumstances that are presented by the defendant. The State has the burden of proving the aggravating circumstances ‘beyond a reasonable doubt.’ § 13A-5-45(e), Ala. Code 1975. Also, ‘when the factual existence of an offered mitigating circumstance is in dispute, the defendant shall have the burden of interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence.’ See § 13A-5-45(g), Ala. Code 1975.
>
> “Also, the evidence relating to Smith's prior bad acts was introduced at the penalty phase and not the guilt phase. Section 13A-5-45(d), Ala. Code 1975, states:
>
> > “ ‘Any evidence which has probative value and is relevant to sentence shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of Alabama.’
>
> “See Burton v. State, 651 So. 2d 641 (Ala. Crim. App. 1993). ‘In the conduct of the sentencing hearing, the rules of evidence should be relaxed....’ Harris v. State, 352 So. 2d 479, 495 (Ala. 1977). ‘ “Alabama recognizes a liberal test of relevancy....” ’ Gavin v. State, 891 So. 2d 907, 965 (Ala. Crim. App. 2003), quoting Hayes v. State, 717 So. 2d 30, 36 (Ala. Crim. App. 1997). The

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> circuit court committed no error in allowing evidence of Smith's prior bad acts to be admitted at the penalty phase."

Smith v. State, 213 So. 3d at 279. For the same reasons, we hold that there was no error when the prosecutor asked witnesses about Smith's "prior bad acts" in this case.

But even if it was error for the State to ask those witnesses questions about Smith's prior convictions for breaking and entering a motor vehicle and for third-degree assault, that error certainly would not rise to the level of plain error. Although Smith argues that the harm the State caused by asking questions about Smith's prior convictions was that it was a way of presenting nonstatutory aggravating circumstances to the jury in seeking a death sentence, nothing in the record shows that questions about Smith's prior convictions for breaking and entering a motor vehicle and third-degree assault were considered by the jury or the trial court as nonstatutory aggravating circumstances.

Indeed, in both its opening statement and its closing argument, the State explained to the jury that it was asking it to find the existence of two aggravating circumstances -- namely, that Smith had a prior conviction for "a felony involving the use or threat of violence to the person" and that he "knowingly created a great risk of death to many persons." (R. 226, 1070-72.) After the closing arguments, the trial court instructed the jury that it could consider only those two aggravating circumstances:

> ***40** "The aggravating circumstances that you consider is limited to any of the following that is established by the evidence: The defendant was previously convicted of a felony involving the use of threat or violence to the person, namely, assault one; two, the defendant knowingly created a great deal of risk of death to many persons. The State of Alabama has the burden of proving beyond a reasonable doubt the existence of, at least, one aggravating circumstance."

(R. 1121.) After deliberating for 41 minutes, the jury unanimously found the existence of only one aggravating circumstance -- that Smith had been "previously convicted of a felony involving the use or threat of violence to the person, namely, assault one." (R. 1138.) The trial court, in its sentencing order, found the existence of only two aggravating circumstances -- namely, that Smith knowingly created a great risk of death to many persons, and that Smith had a prior conviction "of another felony involving the use or threat of violence to the person." (C. 427-28.)

Because the trial court instructed the jury on the only aggravating circumstances it could consider in this case, because "an appellate court 'presume[s] that the jury follows the trial court's instructions unless there is evidence to the contrary' " Ex parte Belisle, 11 So. 3d 323, 333 (Ala. 2008) (quoting Cochran v. Ward, 935 So. 2d 1169, 1176 (Ala. 2006)), and because the jury found the existence of only one aggravating circumstance in this case, we hold that, even if the State erred when it asked the above-mentioned witnesses about Smith's prior convictions, the error was

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not of such a nature that it "probably ... adversely affected the substantial right" of Smith. Rule 45A, Ala. R. App. P. Accordingly, Smith is due no relief on this claim.

XIII.

Smith next argues that the State "disproportionately struck jurors on the basis of gender" in violation of J.E.B. v. Alabama, 511 U.S. 127, 114 S. Ct. 1419, 128 L.Ed. 2d 89 (1994). (Smith's brief, p. 67.) Here, after 4 jurors were stricken for cause, 56 veniremembers remained. Of those 56 veniremembers, 28 were female and 28 were male. Thus, females made up 50% of the venire. The State used 14 of its 22 peremptory strikes to remove female veniremembers. Smith used 9 of his 22 peremptory strikes to remove female veniremembers. The seated jury consisted of five females and seven males. Thus, females made up almost 42% of Smith's jury. After the jury was selected, neither Smith nor the State made a J.E.B. motion. Consequently, we review this claim for plain error.

> " '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.' Saunders v. State, 10 So. 3d 53, 78 (Ala. Crim. App. 2007). Where the record contains no indication of a prima facie case of gender discrimination, there is no plain error. See Gobble v. State, 104 So. 3d 920, 949 (Ala. Crim. App. 2010).
>
> "In Ex parte Trawick, 698 So. 2d 162 (Ala. 1997), the Alabama Supreme Court stated:
>
> > " '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.'

***41** "698 So. 2d at 167-68, quoted in Gobble, 104 So. 3d at 948.

> " 'A defendant makes out a prima facie case of discriminatory jury selection by "the totality of the relevant facts" surrounding a prosecutor's conduct during the defendant's trial.' Lewis v. State, 24 So. 3d 480, 489 (Ala. Crim. App. 2006) (quoting Batson, supra at 94, 106 S.Ct. 1712), aff'd, 24 So. 3d 540 (Ala. 2009)."

Largin v. State, 233 So. 3d 374, 402 (Ala. Crim. App. 2015).

In his brief on appeal, Smith claims that "several factors give rise to an inference of discrimination sufficient to support a prima facie case of improper gender discrimination," including: (1) that "the State illegally used 14 of its 22 peremptory strikes -- or 64% -- to remove women"; (2) that "the women struck were heterogeneous"; and (3) that "several women who were struck were treated disparately from men who were not struck." (Smith's brief, pp. 67-68.) None of these "factors" establish a prima facie case of discrimination.

First, Smith's claim that the State's using 14 of its 22 peremptory strikes to remove women from the venire does not support an inference of discrimination. Indeed, as noted above, the female veniremembers made up 50% of the venire, and, after each side exercised their peremptory strikes, females made up nearly 42% of the seated jury. This scenario is similar to the one in Petersen v. State, 326 So. 3d 535, 569 (Ala. Crim. App. 2019), in which this Court held that, "[a]lthough the State used 14 of its 18 peremptory strikes to remove 14 of the 22 women remaining on the venire after excuses and challenges for cause, this fact does not establish a prima facie case of gender discrimination, and we do not think a prima facie case has been established in this case." See also Largin v. State, 233 So. 3d 374, 403 (Ala. Crim. App. 2015) (holding that the State's use of 22 of 29 strikes against female veniremembers did not raise an inference of gender discrimination). Even so, we address Smith's remaining arguments.

Next, Smith contends that "the women struck were heterogeneous," sharing only "the characteristic of gender." (Smith's brief, p. 67.) But

> "there is almost always going to be some variance among prospective jurors who are struck; therefore, this alone does not establish heterogeneity of the struck veniremembers so as to support an inference of discrimination. The question, as noted in both Ex parte Branch[, 526 So. 2d 609 (Ala. 1987)], and Ex parte Trawick[, 698 So. 2d 162 (Ala. 1997)], is whether the struck jurors shared only the characteristic at issue, in this case, gender."

McCray v. State, 88 So. 3d 1, 20 (Ala. Crim. App. 2010). Here, a review of both the record on appeal and the juror questionnaires establishes that many of the women struck shared characteristics other than gender.

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For example, 12 of the female jurors the State struck expressed that either they were not in favor of the death penalty or had uncertainty about the death penalty, explained that they could have a negative interaction with a friend or family member if they voted to impose the death penalty, or expressed hesitancy about sitting as a juror in Smith's case. Specifically, female veniremembers S.B. (Juror Number 20), V.B. (Juror Number 27), B.M. (Juror Number 40), J.C. (Juror Number 45), B.D. (Juror Number 59), D.E. (Juror Number 77), and M.F. (Juror Number 90) all answered question number 40 on the juror questionnaire as follows: " 'Although I do not believe that the death penalty ever ought to be used, as long as the law provides for it, I could assess it, under the proper set of circumstances.' " As explained in Part VI of this opinion, the State struck every veniremember who answered question number 40 the same way. Female veniremember D.C. (Juror Number 53) answered question number 40 as follows: " 'I could never, regardless of the facts and circumstances of the intentional or, [sic] return a verdict which assessed the death penalty.' " Female veniremember L.F. (Juror Number 81) said in her questionnaire that she "would prefer not to sit [ ] as a juror for [Smith's] sentencing when [she] was not a part of his conviction." Female veniremember M.B. (Juror Number 6) answered "Yes" to the following question in the juror questionnaire: "Do you have any close friends or relatives who would criticize you or be disappointed if you voted for the death penalty, or if you did not vote for the death penalty?" Female veniremember K.D. (Juror Number 64) answered in her questionnaire that she was "unsure" whether she was in favor of the death penalty as a punishment for a crime. Female veniremember T.D. (Juror Number 68) explained in her questionnaire: "Having never been asked to consider a man's final fate, I can't honestly say what my ability will be to sit on this jury." As explained above in Part VI of this opinion, opposition to or hesitancy about the death penalty are valid reasons for a party to exercise a peremptory strike.

***42** The other two female veniremembers struck by the State -- M.D. (Juror Number 60) and D.B. (Juror Number 29) -- also shared a characteristic other than gender. During voir dire, D.B. explained that her "nephew has been arrested" and "was heavy into drugs and so he went to jail for drying out" (R. 147), and M.D. explained that her "brother served two years in Mississippi .... for a DUI and drugs" (R. 196). "The fact that a prospective juror has a relative who has been convicted of a crime" is a valid basis for using a peremptory strike. Jackson v. State, 169 So. 3d 1, 25 (Ala. Crim. App. 2010).

Finally, Smith argues that "several women who were struck were treated disparately from men who were not struck." (Smith's brief, p. 67.) To support his argument, Smith compares struck female jurors B.D., D.B., L.F., and J.C. to seated male jurors B.B. (Juror Number 23) and K.C. (Juror Number 50). As explained above in Part VI of this opinion, "for disparate treatment to exist, the persons being compared must be 'otherwise similarly situated.' " Sharp v. State, 151 So. 3d 342, 367 (Ala. Crim. App. 2010) (quoting Yancey v. State, 813 So. 2d 1, 7 (Ala. Crim. App. 2001)). B.B. and K.C. are not similarly situated with B.D., D.B., L.F., or J.C. Unlike B.D., D.B., L.F., or

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J.C., neither B.B. nor K.C. answered in response to question number 40 on the juror questionnaire that they were not in favor of the death penalty, neither B.B. nor K.C. expressed that they had a relative who had been convicted of a crime, and neither B.B. nor K.C. said that they "would prefer not to sit [ ] as a juror for [Smith's] sentencing when [they were] not a part of his conviction."

Because there were valid reasons for exercising peremptory strikes to remove each of these females from the venire and because Smith has failed to show any disparate treatment in the State's exercise of its strikes to remove these jurors, the trial court did not commit any error, plain or otherwise, when it did not sua sponte find a J.E.B. violation. Thus, Smith is not entitled to any relief on this claim.

XIV.

Smith next argues that "references to [his] time at Holman Prison improperly informed the jury that [he] had been previously sentenced to death." (Smith's brief, p. 69.) Specifically, Smith takes issue with the following exchange on cross-examination between the State and Dr. Goff:

> "[Prosecutor]: Let's start off with I know you stated at the beginning of your testimony that you met with Mr. Smith at Holman Prison; correct?
>
> "[Dr. Goff]: Right.
>
> "....
>
> "[Prosecutor]: And up until now when you first got involved, do you know how much money the State has paid you to be here to testify, to go see Mr. Smith at Holman to generate this report?
>
> > "[Dr. Goff]: I would have to -- it would have to be an estimate. In the last hearing, I think probably around fifteen thousand all together."

(R. 746-48.) Because Smith did not object to the State's "references to [his] time at Holman Prison," we review this argument for plain error. Smith's argument is without merit.

> "In Frazier v. State, 632 So. 2d 1002, 1007 (Ala. Crim. App. 1993), we held that it was plain error for the prosecutor to comment that Frazier had previously been convicted of the same offense, stating:

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> ***43** " 'In Lloyd v. State, 53 Ala. App. 730, 733, 304 So. 2d 232, cert. denied, 293 Ala. 410, 304 So. 2d 235 (1974), this court held that it is reversible error for the prosecution to comment on the result of a defendant's previous trial at a subsequent trial for the same offense. See also Wyatt v. State, 419 So. 2d 277, 282 (Ala. Crim. App. 1982). As the Fifth Circuit Court of Appeals stated in United States v. Attell, 655 F.2d 703, 705 (5th Cir. 1981), "[W]e are hard pressed to think of anything more damning to an accused than information that a jury had previously convicted him for the crime charged." '

> "Likewise, in Hammond v. State, 776 So. 2d 884, 892 (Ala. Crim. App. 1998), we held that, 'at the sentencing phase of a second or subsequent capital murder trial, it is reversible error for the prosecution to comment on the result of a defendant's previous trial for the same offense.' We noted that this is especially true when a prosecutor tells a penalty phase jury that a previous jury recommended that a defendant be sentenced to death. However, we have never held that it is error, much less plain error, for a witness to merely comment about a 'first trial' or a prior proceeding. Cf. Hood v. State, 245 Ga. App. 391, 392, 537 S.E. 2d 788, 790 (2000) (footnote omitted) (noting that, '[w]here there is no mention of the result of a prior judicial proceeding, the bare reference to an earlier trial does not necessarily imply a conviction and reversal on appeal. The equally rational inference is a mistrial due to the inability to achieve a unanimous verdict'); State v. Lawrence, 123 Ariz. 301, 305, 599 P.2d 754, 758 (1979) (noting that '[w]e are aware of no authority in this jurisdiction supportive of the contention that mere mention of a previous trial mandates reversal on appeal')."

Sneed v. State, 1 So. 3d 104, 114 (Ala. Crim. App. 2007). See also Osgood v. State, 341 So. 3d 170, 225-26 (Ala. Crim. App. 2020) (opinion on return to remand) (finding that the trial court did not err when it denied Osgood's motion for a mistrial because the prosecutor's statement "was merely a reference to the first sentencing hearing and did not inform the jury of the result of that proceeding").

Smith argues that the prosecutor's mention in his cross-examination question to Dr. Goff that Smith was at Holman Prison conveyed to his penalty-phase jury that Smith had been previously sentenced to death. But as the State correctly points out in its brief on appeal, Holman Prison "houses some inmates who are not on death row and some inmates who are." (State's brief, p. 78.) The prosecutor's mere reference to Holman Prison -- without any comment as to Smith's prior sentence -- does not convey to the jury that Smith had been previously sentenced to death. More to the point, here, unlike in Hammond, supra, the prosecutor never told the jury that five previous juries had recommended that Smith be sentenced to death. Thus, this case is distinguishable from Hammonds, and there was no error, plain or otherwise, with the prosecutor's reference to Holman Prison.

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But, even assuming that the prosecutor's reference to Holman Prison was error, Smith would still not be entitled to any relief because he invited that error. Indeed, the complained-of cross-examination questions that mention Holman Prison came only after Smith elicited that same information from Dr. Goff on direct examination. Specifically, when Smith's counsel questioned Dr. Goff, the following exchange occurred:

"[Smith's counsel]: Do you know Jerry Jerome Smith?

"[Dr. Goff]: Yes, I do.

***44** "[Smith's counsel]: How do you know him?

> "[Dr. Goff]: I've seen him -- I saw him initially at Holman Prison on the 24th of March of 2008."

(R. 726.) Because it was Smith, not the State, who first mentioned that Dr. Goff met with Smith at Holman Prison, error, if any, was invited by Smith. See Bohannon v. State, 222 So. 3d 457, 497 (Ala. Crim. App. 2015) (recognizing that the invited-error doctrine applies to death-penalty cases and, under that doctrine, " ' "a defendant cannot by his own voluntary conduct invite error and then seek to profit thereby" ' ") (quoting Robitaille v. State, 971 So. 2d 43, 59 (Ala. Crim. App. 2005), quoting in turn Phillips v. State, 527 So. 2d 154, 156 (Ala. 1988)). The testimony elicited by the prosecution was also harmless because it merely repeated information presented to the jury during Smith's earlier cross-examination. Accordingly, Smith is due no relief as to this claim.

XV.

Smith argues that the "trial court failed to consider or give effect to relevant mitigating evidence in sentencing [him] to death." (Smith's brief, p. 71.) Specifically, Smith argues that he

> "presented detailed and unrebutted testimony regarding the horrific poverty that he grew up in -- a house without running water, buckets of feces being kept inside, animals permitted to roam free, and holes throughout the floor of his childhood home. (R. 463-65, 518, 550, 555, 783-84, 799, 804, 891, 893.) In sentencing Mr. Smith to death, the trial court in this case failed to give meaningful effect to, or even mention, the extreme poverty that engulfed Mr. Smith as a child. (C. 431-32.) Because evidence of being raised in poverty is a well-established mitigating circumstance, see, e.g., Martin v. State, 548 So. 2d 488, 495 (Ala. Crim. App. 1988), the trial court's refusal to properly consider such evidence deprived Mr. Smith of a fair and accurate

sentencing, see Lockett, 438 U.S. at 604, 98 S.Ct. 2954; Abdul-Kabir, 550 U.S. at 250, 127 S.Ct. 1654."

(Smith's brief, pp. 71-72.) According to Smith, the trial court's "failure to give meaningful consideration to this uncontested nonstatutory mitigating evidence violated [his] rights to have mitigation found and considered, due process, a fair trial, and a reliable sentence as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Alabama law." (Smith's brief, p. 72.) Because Smith did not make this argument in the trial court, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

To begin, Smith's argument that the trial court erred because it did not both consider and find the existence of an "unrebutted" nonstatutory mitigating circumstance -- in this case, "horrific poverty" -- is meritless. This Court has consistently rejected the argument that a court must both consider and find uncontested mitigation evidence in sentencing. See Phillips v. State, 287 So. 3d 1063, 1160 (Ala. Crim. App. 2015). Thus, Smith's argument that the trial court must both consider unrebutted mitigating circumstance and then find that mitigating circumstance to exist is incorrect. Rather, all that is required is that the sentencer (in this case the trial court) consider all evidence that is submitted as mitigation. See Phillips, 287 So. 3d at 1168. Whether that evidence is found to be mitigating is up to the sentencer.

***45** Moreover, although Smith correctly points out that the trial court did not specifically mention "horrific poverty" as a nonstatutory mitigating circumstance in its order sentencing Smith to death, the court's failing to mention a nonstatutory mitigating circumstance does not mean that the court did not consider it.

> " 'In Ex parte Lewis, 24 So. 3d 540 (Ala. 2009), the Alabama Supreme Court stated:
>
> > " ' "In Clark v. State, 896 So. 2d 584 (Ala. Crim. App. 2000), the Court of Criminal Appeals conducted a proper review of a trial court's failure to find that proffered evidence constituted a mitigating circumstance, stating, in pertinent part:
> >
> > > " ' " 'The sentencing order shows that the trial court considered all of the mitigating evidence offered by Clark. The trial court did not limit or restrict Clark in any way as to the evidence he presented or the arguments he made regarding mitigating circumstances. In its sentencing order, the trial court addressed each statutory mitigating circumstance listed in § 13A-5-51, Ala. Code 1975, and it determined that none of those circumstances existed under the evidence presented. Although the trial court did not list and make findings as to the existence or nonexistence of each nonstatutory mitigating circumstance offered by Clark, as noted above, such a listing is not required, and the trial court's not making such findings indicates only that the trial court found the offered evidence not to be mitigating, not that the trial court did not consider this evidence. Clearly, the trial court considered

Clark's proffered evidence of mitigation but concluded that the evidence did not rise to the level of a mitigating circumstance. The trial court's findings in this regard are supported by the record.

" ' " 'Because it is clear from a review of the entire record that the trial court understood its duty to consider all the mitigating evidence presented by Clark, that the trial court did in fact consider all such evidence, and that the trial court's findings are supported by the evidence, we find no error, plain or otherwise, in the trial court's findings regarding the statutory and nonstatutory mitigating circumstances.'

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

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

Phillips, 287 So. 3d at 1170 (quoting Stanley, 143 So. 3d at 328-29) (opinion on remand from the Alabama Supreme Court)).

Here, the record establishes that the trial court was well aware of its duty to consider all mitigating evidence presented by Smith. In its instructions to the jury, the trial court explained that a "mitigating circumstance is any circumstance that indicates or tends to indicate that the defendant should be sentenced to life in prison without parole" (R. 1118 (emphasis added)), that the jury should "[c]onsider all of the evidence without bias, without prejudice, or sympathy to either side" (R. 1120 (emphasis added)), that Smith "is allowed to offer any evidence in mitigation" and "does not bear a burden of proof in this regard" (R. 1124 (emphasis added)), and, after instructing the jury on all the statutory mitigating circumstances, that

"[m]itigating circumstances shall also include any aspect of a defendant's character or record or any of the circumstances of the offense that the defendant offers as a basis for a sentence of life without parole instead of death, and any other relevant mitigating circumstance that the defendant offers as a basis for a sentence of life in prison without parole instead of death, such as the mitigating evidence that the defendant has offered in this case, the intellectual capacity of the defendant, any aspect of his character or background, any circumstances surrounding the offense or any other relevant mitigating circumstance that the defendant offers to support for a sentence of life imprisonment without parole instead of death."

***46** (R. 1126-27 (emphasis added)).

Additionally, before the trial court sentenced Smith to death, Smith's counsel argued, in part, the following:

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"Our Supreme Court has stated that evidence about the defendant's background and character is relevant in a capital murder sentencing hearing because of the belief long held by this society that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems may be less culpable than defendants who have no such excuse. And that was a citation in California versus Brown, a 1987 United States Supreme Court case.

"Your Honor, if this case does not present to this Court a case of a defendant who fits that particular situation, a defendant whose background and character relates to him committing criminal acts attributable to a disadvantaged background and to emotional and mental problems, then there is no such case, and that language is just wasted ink.

"The undisputed evidence in this case showed that Jerry Jerome Smith came from an extremely disadvantaged background, the worst that I think any Court probably has ever seen with evidence going back into the late 50's about the conditions of the home, the physical conditions of the home, the inability of his parents to provide and take care of him because of mental problems, because of crime that they were involved in, the lack of role models that they provided him, a father in prison, a mother attempted murder on a woman talking to her husband, holes in the walls and floors, feces in buckets in the kitchen and other parts of the house, and then undeniably retarded siblings who were unable to provide any type of sustenance for him or emotional support.

"You had the Department of Pensions and Securities constantly involved in the home and noting time after time that this family was at risk. In one of the reports the children in that home were reported to be in need of protection.

"For all of those reasons, and certainly the Courts eventually acted and took the children out of the home of Arrie Smith, Jerry Jerome Smith's mother, and also the homes of his siblings because of these factors, these problems, these generational curses, if you will, that fell on this family because of the sins of the parents.

> "In one of the DHR reports noting that the children [were] in need of protection, it states children without supervision and guidance to help develop behavior problems acceptable to the community standards."

(Sent. Hrg. R. 4-6.) In its written sentencing order, the trial court acknowledged the "argument from counsel for the Defendant" but "followed the Jury's recommendation and sentenced [him] to death." (C. 427.)

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In short, the trial court was aware of its duty to consider all mitigation evidence and heard Smith's proffered mitigation concerning his upbringing. The trial court did find some childhood factors to be mitigating. Although the trial court did not specifically list Smith's "horrific poverty" as a nonstatutory mitigating circumstance in its sentencing order, "the trial court's 'not making such findings indicates only that [the trial court] found the offered evidence not to be mitigating, not that [the trial court] did not consider this evidence.' Stanley, 143 So. 3d at 329 (internal quotation marks omitted)." Phillips, 287 So. 3d at 1170-71. Accordingly, the trial court did not commit any error, plain or otherwise, when it did not list in its sentencing order Smith's "horrific poverty" as a nonstatutory mitigating circumstance. Thus, Smith is not entitled to any relief as to this claim.

XVI.

***47** Smith argues that "the 'great risk of death to many persons' aggravating circumstance is inapplicable [to his case] and was wrongly charged to the jury and relied upon by the trial court." (Smith's brief, p. 72.) According to Smith, "[t]he 'great risk of death to many persons' aggravating circumstance is intended to narrow the class of death-eligible cases to those situations where a defendant threatens a wide group of people beyond those targeted as victims," and that, applying that circumstance to this case, "would permit it to be used in all cases where the capital offense involved 'two or more' victims." (Smith's brief, pp. 72-73.)

Smith correctly recognizes, however, that this Court has twice held in his prior appeals that the great-risk-of-death-to-many-persons aggravating circumstance applied to his case and that the trial court properly instructed the jury on that aggravating circumstance. See Smith, 213 So. 3d at 154-55 (opinion on original submission), and Smith, 213 So. 3d at 293-94 (opinion on return to fourth remand).

Here, just as in his previous appeals, the State presented evidence that Smith

> "knowingly created a great risk of death to at least six people: in addition to the three victims killed, the appellant attempted to kill Gross; he put his girlfriend's life in danger as he struggled with Gross over a gun and attempted to obtain a knife from her, this struggle occurring in a backyard in a residential area; he discontinued his deadly rampage only when the driver of a car pulled up to the residence; and this crime occurred in a 'crack house,' which was visited frequently."

Smith, supra. As we held in Smith's previous appeals, the trial court did not err when it instructed the jury on the aggravating circumstance that Smith knowingly created a great risk of death to many persons.

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Additionally, Smith's argument that "[t]he 'great risk of death to many persons' aggravating circumstance is intended to narrow the class of death-eligible cases to those situations where a defendant threatens a wide group of people beyond those targeted as victims," and that, applying that circumstance to this case, "would permit it to be used in all cases where the capital offense involved 'two or more' victims" is meritless. (Smith's brief, pp. 72-73.) This Court has previously rejected that argument. See, e.g., Wilson v. State, 777 So. 2d 856, 920-21 (Ala. Crim. App. 1999) (holding that "the four dead victims cannot be counted along with the survivors in determining the number of people who were present at the crime scene" for purposes of applying the great-risk-of-death-to-many-persons aggravating circumstance). Accordingly, Smith is not entitled to any relief on this claim.

XVII.

Smith argues that "the jury was incorrectly informed that its penalty phase verdict was merely a recommendation." (Smith's brief, p. 74.) Smith claims that, as a result of this instruction, the jury was misled " 'as to its role in the sentencing process in a way that allows the jury to feel less responsible that it should for the sentencing decision.' " (Smith's brief, pp. 74-75 (quoting Darden v. Wainwright, 477 U.S. 168, 183 n.15, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)).) As Smith correctly acknowledges, however, the Alabama Supreme Court in Ex parte Phillips, 287 So. 3d 1179, 1222-27 (Ala. 2018), recognized that this argument has been repeatedly rejected by both this Court and the Alabama Supreme Court. This Court also addressed and rejected this same argument in Smith, 213 So. 3d at 289. Thus, Smith is not entitled to any relief on this claim.

XVIII.

Smith argues that his death sentence must be vacated in light of Hurst v. Florida, 577 U.S. 92, 136 S. Ct. 616, 193 L.Ed. 2d 504 (2016), and Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed. 2d 556 (2002). (Smith's brief, p. 76.) Although he acknowledges the Alabama Supreme Court's decisions in Ex parte Bohannon, 222 So. 3d 525 (Ala. 2016), and Ex parte Waldrop, 859 So. 2d 1181 (Ala. 2002), Smith "maintains that Ring and Hurst render Alabama's death penalty sentencing scheme unconstitutional, and his death sentence must be reversed." (Smith's brief, p. 76.) Because Bohannon and Waldrop are controlling authority from the Alabama Supreme Court that uphold Alabama's death-penalty scheme in light of Hurst and Ring, this Court cannot reverse or modify those decisions. See Reynolds v. State, 114 So. 3d 61, 157 n.31 (Ala. Crim. App. 2010) ("[T]his Court is bound by the decisions of the Alabama Supreme Court and has no authority to reverse or modify those decisions."). Even so, this Court has upheld Alabama's death-penalty scheme in light of Hurst and Ring. See State v. Billups, 223 So. 3d 954 (Ala. Crim. App. 2016). Thus, Smith's claim does not entitle him to any relief.

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XIX.

***48** Finally, Smith argues that "the death qualification process produced a jury that was prone to sentence [him] to death." (Smith's brief, p. 78.) But "[a]ppellate courts in Alabama have repeatedly held that there is no violation of state or federal law in death-qualifying prospective jurors in a capital case, even if it results in a more conviction-prone jury." Jackson v. State, 305 So. 3d 440, 465 (Ala. Crim. App. 2019). Accordingly, the circuit court did not err when it allowed prospective jurors to be death-qualified about their views on capital punishment.

XX.

Finally, pursuant to § 13A-5-53, Ala. Code 1975, this Court is required to address the propriety of Smith's capital-murder conviction and death sentence.

As set out above, Smith was convicted of one count of capital murder for killing Willie Flournoy, Theresa Helms, and David Bennett by one act or pursuant to one scheme or course of conduct. See § 13A-5-40(a)(10), Ala. Code 1975. At the conclusion of the sixth penalty-phase proceeding, the jury found one aggravating circumstance to exist beyond a reasonable doubt and, by a vote of 10 to 2, recommended that Smith be sentenced to death. (C. 411.) After conducting a judicial-sentencing hearing, the trial court followed the jury's recommendation and sentenced Smith to death.

After examining the record on appeal, this Court finds nothing to show that Smith's death sentence was imposed as the result of the influence of passion, prejudice, or any other arbitrary factor. See § 13A-5-53(b)(1), Ala. Code 1975.

Additionally, § 13A-5-53(b)(2), Ala. Code 1975, requires this Court to reweigh the aggravating and mitigating circumstances to determine whether Smith's sentence of death is appropriate. In so doing, we are mindful of the following:

> " 'Section 13A-5-48, Ala. Code 1975, provides:
>
> " ' "The process described in Sections 13A-5-46(e)(2), 13A-5-46(e)(3) and Section 13A-5-47(e) of weighing the aggravating and mitigating circumstances to determine the sentence shall not be defined to mean a mere tallying of aggravating and mitigating circumstances for the purpose of numerical comparison. Instead, it shall be defined to mean a process by which circumstances relevant to sentence are marshalled and considered in an organized fashion for the purpose

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of determining whether the proper sentence in view of all the relevant circumstances in an individual case is life imprisonment without parole or death."

" ' "The determination of whether the aggravating circumstances outweigh the mitigating circumstances is not a numerical one, but instead involves the gravity of the aggravation as compared to the mitigation." Ex parte Clisby, 456 So. 2d 105, 108-09 (Ala. 1984). "[W]hile the existence of an aggravating or mitigating circumstance is a fact susceptible to proof, the relative weight of each is not; the process of weighing, unlike facts, is not susceptible to proof by either party." Lawhorn v. State, 581 So. 2d 1159, 1171 (Ala. Crim. App. 1990).' "

Collins v. State, [Ms. CR-14-0753, October 25, 2019] ––– So. 3d ––––, ––––, 2019 WL 5608055 (Ala. Crim. App. 2019) (opinion on return to second remand) (quoting Stanley v. State, 143 So. 3d 230, 333 (Ala. Crim. App. 2011) (opinion on remand from the Alabama Supreme Court)).

Here, the trial court, in its sentencing order, found the existence of two aggravating circumstances -- namely, that Smith knowingly created a great risk of death to many persons and that Smith had been previously convicted of a felony involving the use or threat of violence to the person. (C. 427-28.) The trial court found one statutory mitigating circumstance to exist -- namely, the "capacity of the Defendant to appreciate the criminality of his conduct or to conform to his conduct to the requirements of laws was substantial impaired." (C. 429-30.) But the trial court concluded that this statutory mitigating circumstance "did not mitigate [Smith's] crime or punishment." (C. 431.) The trial court also found the following eight nonstatutory mitigating circumstances to exist:

***49** "(1) Mr. Smith did not resist arrest.

"(2) Jerry Jerome Smith was on drugs and alcohol when this crime was committed.

"(3) His mother was an alcoholic.

"(4) Mother and Father and all siblings had a criminal history.

"(5) Jerry Jerome Smith was in special education classes all of his life and only finished the eighth grade.

"(6) Jerry Jerome Smith has a history of excessive alcohol and drug abuse.

"(7) Jerry Jerome Smith cannot read or write.

"(8) Jerry Jerome Smith's siblings were dysfunctional."

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(C. 431-32.) The trial court then sentenced Smith to death, concluding:

> "The Court has weighed the aggravating circumstances against the mitigating circumstances, and finds that the aggravating circumstances outweigh the mitigating circumstances. The Court also considered, as required by § 13A-5-47(e) the jury's recommendation in its advisory verdict. The Court believes the jury correctly viewed the evidence presented at the sentencing phase, and correctly decided that a death sentence was a more appropriate sentence than life without parole considering it was an intentional killing of three persons by the Defendant who had a history of violence. This outweighed the consideration that the Defendant deserved a lesser sentence."

(C. 432.)

The trial court's findings are correct, and this Court, after independently weighing the aggravating circumstances found to exist and all the mitigating circumstances found to exist, holds that Smith's death sentence is appropriate.

Next, as required by § 13A-5-53(b)(3), Ala. Code 1975, this Court must now determine whether Smith's sentence is excessive or disproportionate when compared to the penalty imposed in similar cases. Again, Smith was convicted of capital murder for killing three people by one act or pursuant to one scheme or course of conduct. See § 13A-5-40(a)(10), Ala. Code 1975. As we have previously recognized,

> " '[s]imilar crimes have been punished by death on numerous occasions. See, e.g., Pilley v. State, 930 So. 2d 550 (Ala. Crim. App. 2005) (five deaths); Miller v. State, 913 So. 2d 1148 (Ala. Crim. App.), opinion on return to remand 913 So. 2d at 1154 (Ala. Crim. App. 2004) (three deaths); Apicella v. State, 809 So. 2d 841 (Ala. Crim. App. 2000), aff'd, 809 So. 2d 865 (Ala. 2001), cert. denied, 534 U.S. 1086, 122 S. Ct. 824, 151 L.Ed. 2d 706 (2002) (five deaths); Samra v. State, 771 So. 2d 1108 (Ala. Crim. App. 1999), aff'd, 771 So. 2d 1122 (Ala.), cert. denied, 531 U.S. 933, 121 S. Ct. 317, 148 L.Ed. 2d 255 (2000) (four deaths); Williams v. State, 710 So. 2d 1276 (Ala. Crim. App.), aff'd, 710 So. 2d 1350 (Ala. 1997), cert. denied, 524 U.S. 929, 118 S. Ct. 2325, 141 L.Ed. 2d 699 (1998) (four deaths); Taylor v. State, 666 So. 2d 36 (Ala. Crim. App.), on remand, 666 So. 2d 71 (Ala. Crim. App. 1994), aff'd, 666 So. 2d 73 (Ala. 1995), cert. denied, 516 U.S. 1120, 116 S. Ct. 928, 133 L.Ed. 2d 856 (1996) (two deaths); Siebert v. State, 555 So. 2d 772 (Ala. Crim. App.), aff'd, 555 So. 2d 780 (Ala. 1989), cert. denied, 497 U.S. 1032, 110 S. Ct. 3297, 111 L.Ed. 2d 806 (1990) (three deaths); Holladay v. State, 549 So. 2d 122 (Ala. Crim. App. 1988), aff'd, 549 So. 2d 135 (Ala.), cert. denied, 493 U.S. 1012, 110 S. Ct. 575, 107 L.Ed. 2d 569 (1989) (three deaths); Fortenberry v. State, 545 So. 2d 129 (Ala. Crim. App. 1988), aff'd, 545 So. 2d 145 (Ala. 1989), cert. denied, 495 U.S. 911, 110 S. Ct. 1937, 109 L.Ed. 2d 300 (1990) (four deaths); Hill v. State, 455 So. 2d 930 (Ala. Crim. App.), aff'd, 455 So. 2d 938 (Ala.), cert. denied, 469 U.S. 1098, 105 S. Ct. 607, 83 L.Ed. 2d 716 (1984) (three deaths).' "

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***50** Phillips v. State, 287 So. 3d 1063, 1151-52 (Ala. Crim. App. 2016) (opinion on return to remand) (quoting Stephens v. State, 982 So. 2d 1110, 1147-48 (Ala. Crim. App. 2005), rev'd on other grounds, Ex parte Stephens, 982 So. 2d 1148 (Ala. 2006)). Therefore, this Court holds that Smith's death sentence is neither excessive nor disproportionate when compared to the penalty imposed in similar cases.

Lastly, this Court has searched the record for any error that may have adversely affected Smith's substantial rights and has found none. See Rule 45A, Ala. R. App. P.

Conclusion

Based on these reasons, Smith's death sentence is affirmed.

AFFIRMED.

Windom, P.J., and Kellum, McCool, and Minor, JJ., concur.

All Citations

--- So.3d ----, 2022 WL 4007496

Footnotes

1 Before Smith's sixth penalty-phase proceeding began, the legislature amended §§ 13A-5-45, 13A-5-46, and 13A-5-47, Ala. Code 1975, which, in part, makes the jury's verdict as to sentencing binding on the trial court. Those amendments became effective on April 11, 2017. Because Smith was charged with capital murder before April 11, 2017, the jury's verdict as to sentencing in Smith's sixth penalty-phase proceeding was advisory. See § 13A-5-47.1, Ala. Code 1975 ("Sections 13A-5-45, 13A-5-46, and 13A-5-47 shall apply to any defendant who is charged with capital murder after April 11, 2017, and shall not apply retroactively to any defendant who has previously been convicted of capital murder and sentenced to death prior to April 11, 2017.").

2 This Court has already affirmed Smith's capital-murder conviction; thus, it has already reviewed the guilt phase of Smith's trial for plain error. Consequently, we do not review for

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plain error anything that occurred during the guilt phase of his trial. Instead, our plain-error review is limited to Smith's sixth penalty-phase proceeding.

3 This Court has noted that "[t]he condition referred to as 'intellectually disabled' was formerly known as 'mentally retarded.' " Carroll v. State, 300 So. 3d 51, 52 n. 2 (Ala. Crim. App. 2017) (citing Hall v. Florida, 572 U.S. 701, 134 S. Ct. 1986, 1990, 188 L.Ed. 2d 1007 (2014)). This Court uses the phrase "intellectually disabled" throughout this opinion, but quotations from older cases and from the trial testimony may use the phrase "mentally retarded."

4 The United States Supreme Court has remanded other "pending-direct-review" cases to this Court for further consideration in light of Moore I. See, e.g., Carroll v. State, 300 So. 3d 51 (Ala. Crim. App. 2017) (opinion on remand from the Supreme Court of the United States). If we must consider those pending cases in light of Moore I, then, logically, it follows that we must also consider this case in light of Moore I, and, in turn, Moore II.

5 Smith objected to the complained-of instruction (R. 1134); thus, Smith's argument is preserved for appellate review.

6 This Court takes judicial notice of the records filed with this Court in Smith's previous appeals.

7 Notably, the trial court did let Bobby testify to the fact that his family had forgiven Smith -- a fact that the jury could consider when assessing the penalty-phase evidence.

8 Notably, in his penalty-phase closing argument, Smith argued as mitigation to the jury that he had acted under extreme duress, explaining: "You heard evidence that [Smith] owed a lot of money to someone who had supplied drugs to him." (R. 1103)

9 Smith appears to agree that the State's reason for striking J.D. (Juror Number 63) from the venire was appropriate. But to the extent that Smith's argument on appeal could be construed as also challenging the State's reason for striking J.D., that claim is without merit. Indeed, as explained above, the State explained that it had struck J.D. because of his expressed animosity toward the State, which is a valid race-neutral reason for exercising a peremptory strike. See, e.g., Scott v. State, 163 So. 3d 389, 423 (Ala. Crim. App. 2012) (recognizing that a hostile attitude toward law enforcement is a valid race-neutral explanation for using a peremptory strike to remove a juror). Nothing in the record on appeal demonstrates that the State's proffered reason for striking J.D. was pretextual.

10 Copies of the juror questionnaires that the jurors completed in this case were transmitted to this Court pursuant to Rule 18.2(b), Ala. R. Crim. P.

11 Smith's argument is preserved for appellate review. Here, the trial court instructed the parties to provide it with requested jury instructions and stated that it would consider them. But the court told the parties that it was "not going to hold a charge conference." (R. 1063, 1065-66.)

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After the trial court instructed the jury, Smith objected to the trial court's refusal to give Smith's written instructions. (R. 1134.)

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EXHIBIT 3

ALABAMA COURT OF CRIMINAL APPEALS

December 9, 2022

CR-17-1014
Jerry Jerome Smith v. State of Alabama. (Appeal from Houston Circuit Court: CC97-270).

NOTICE

You are hereby notified that on December 9, 2022, the following action was taken in the above-referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell, Clerk

EXHIBIT 4

IN THE SUPREME COURT OF ALABAMA

June 23, 2023

SC-2022-1033

Ex parte Jerry Jerome Smith. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Jerry Jerome Smith v. State of Alabama)(Houston Circuit Court: CC-97-270; Criminal Appeals: CR-17-1014).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on June 23, 2023:

Writ Denied. No Opinion. Cook, J. -- Parker, C.J., and Bryan, Sellers, Stewart, and Mitchell, JJ., concur. Shaw, Wise, and Mendheim, JJ., recuse themselves.

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, Megan B. Rhodebeck, certify that this is the record of the judgment of the Court, witness my hand and seal.

Megan B. Rhodebeck

Clerk, Supreme Court of Alabama