REL: December 17, 2021

Alabama Court of Criminal Appeals

OCTOBER TERM, 2021-2022

CR-20-0145

Cedric Lamont Cowan

v.

State of Alabama

Appeal from Morgan Circuit Court
(CC-15-1271)

KELLUM, Judge.

The appellant, Cedric Lamont Cowan, was convicted of three counts of capital murder for murdering Anselmo Antonio Hernandez-Lopez and Joshua Davis during a robbery and pursuant to one scheme or course of conduct, see § 13A-5-40(a)(2) and § 13A-5-40(a)(10), Ala. Code 1975; five counts of robbery in the first degree for using a deadly weapon to rob or

attempt to rob Dylan Jones, Hunter Nelson, Phillip Garland, Jose Juan Zenteno, and Krista Mayfield, see § 13A-8-41(a)(1), Ala. Code 1975; and discharging a firearm into an occupied dwelling, see § 13A-11-61, Ala. Code 1975. Cowan, who was 16 years old at the time of the offenses, was sentenced to life imprisonment without the possibility of parole for each capital-murder conviction, 20 years' imprisonment for each robbery conviction, and 15 years' imprisonment for the conviction of shooting into an occupied dwelling.

In May 2015, Cowan and his three codefendants, Joseph Christopher Cowan, Amani Juan Goodwin, and Cortez Ocie Mitchell,[1] were jointly indicted for three counts of capital-murder, six counts of robbery, one count of shooting into an unoccupied dwelling, and one count of shooting into an occupied dwelling.[2] Cowan moved that his case be severed from

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[1]Joseph, the oldest of the 4 codefendants, was 21 years old at the time of the offenses. The other 3 defendants were either 16 or 17 years old at the time. (R. 1396.)

[2]Cowan was found not guilty of shooting into an unoccupied dwelling, Count IV of the indictment. Count VIII of the indictment, which charged Cowan with robbing Zachary Stevenson, was dismissed before the case was submitted to the jury. (R. 2344.)

that of his codefendants, (C. 161), and that motion was granted. (C. 176-78.)

In January 2018, Goodwin pleaded guilty to two counts of felony murder and three counts of robbery in the first degree in exchange for his truthful testimony at his codefendants' trials. Goodwin was sentenced to two sentences of life imprisonment for the felony-murder convictions and to three 20-year sentences for the robbery convictions, those sentences were to run concurrently.

In February 2018, Mitchell was convicted of four counts of robbery and two counts of felony murder. He was sentenced to consecutive sentences of life imprisonment for the 2 felony-murder convictions and to 20 years' imprisonment for each robbery conviction. The court further directed that the felony-murder sentences and the robbery sentences be served concurrently. This Court affirmed Mitchell's convictions in an unpublished memorandum. See Mitchell v. State, (No. CR-17-0818, August 8, 2019) 309 So. 3d 1226 (Ala. Crim. App. 2019) (table).

In September 2019, Joseph Cowan pleaded guilty to four counts of robbery, three counts of capital murder, and shooting into an occupied

dwelling. Joseph was sentenced to life imprisonment without the possibility of parole for each capital-murder conviction, to 25 years' imprisonment for each robbery conviction, and to 15 years' imprisonment for shooting into an occupied dwelling .

Cedric Cowan's trial commenced in November 2019. The State's evidence tended to show that in May 2015, Cowan and his three codefendants engaged in a crime spree that started on May 13 with robbery and ended on May 15 with murder. Goodwin testified that on May 13 he met Cowan at his house and they discussed "hitting a lick" or, he said, robbing people. (R. 2117.)[3] The two went to Cowan's house, where they were joined by Joseph Cowan, who was Cowan's older brother, and Cortez Mitchell. A fifth person was with them, Goodwin said, but he could not identify him and, according to Goodwin, the fifth person participated in only the first three robberies. Goodwin testified that Joseph Cowan was armed with a .380 caliber handgun and that Cedric Cowan was carrying a .22 caliber rifle and that he and Mitchell were not

[3]Goodwin was 17 years of age at the time of the offenses.

armed. He drove his mother's automobile, a silver Nissan Altima, and they first stopped at a house where the garage door was open but returned to the car after another car approached. Goodwin then drove to Julian Harris School where several people were on the playground. The group walked up to the people and those in the group who had guns pointed the guns and robbed the people at the school. After taking a Fossil brand watch, a necklace, an iPhone cellular telephone, and keys, the group ran back to Goodwin's mother's car and drove off. (R. 2126.) Goodwin said that one guy did not make it back to the car and that it was the guy that he did not know. (R. 2127.)

As they were driving to Cowan's house they stopped at a Wal-Mart department store but left when they saw a man wearing a security badge. (R. 2128.) They got back into the car, and, on the way to Cowan's house, they saw a man walking on the side of the road. Goodwin stopped the car and Joseph told the man to come over. The man began to approach and then started running. At this time, Goodwin testified, Joseph shot at him out of the window of the car. (R. 2130.) After the man ran to the opposite side of the car Cowan started shooting at the man with his rifle. The

group then arrived at the Cowan residence. Goodwin said that he threw the keys that had been taken from the robberies out the window and that Cowan, Joseph, and Mitchell took the other items that they had stolen at Julian Harris.

Goodwin testified that on May 15, 2015, he spoke to Cowan and they discussed "doing the same thing again." (R. 2132.) He drove his mother's car to Cowan's house that night and the same four got into the car and he drove away from Cowan's house. Down the street, he said, Cowan shot into a house. (R. 2135.) They continued to drive to the corner where a store was located. At this point, Goodwin stopped the car and Cowan and Joseph started shooting at people who were on the porch of the house across the street from the store. (R. 2137.) After Goodwin turned the car around he drove toward Brookhaven Middle School. On their way to the school they passed a house and the Cowans told him that the guy who lived in that house had "snitched on their dad." (R. 2138.) Cowan and Joseph, he said, shot into this man's house and his truck. (R. 2138.) Goodwin made a U-turn and drove up the street and they passed two "Hispanics" under a carport. (R. 2139.) They parked and approached the

two men. They covered their faces and walked up to the men, and Cowan and Joseph pointed their guns at the men. Goodwin said that Mitchell tried to take a watch off one of the men and the other man "took off running" away from the house. (R. 2144.) Cowan and Joseph both started shooting at the man who had remained in the carport. (R. 2144.) When the shooting started, Goodwin said, he and Mitchell ran back to the car. Cowan and Joseph did not immediately come back to the car and did not arrive at the car at the same time. Goodwin then drove toward Wilson Morgan Park. When they were talking in the car, Goodwin said, Cowan was "gloating and laughing" about shooting the Hispanic man. (R. 2148.) After arriving at the park, they got out of the car, walked to the park, and observed a man under the pavilion. Cowan and Joseph pointed their guns at the man, who was identified as Joshua Davis. Davis screamed and Cowan began to hit him with the end of his rifle. (R. 2151.) As Davis screamed and was beaten by Cowan, Joseph walked up and shot Davis in the head. (R. 2154.)

Goodwin said that he went to meet a friend and gave the keys to his mother's car to Joseph. Later that evening Goodwin telephoned Cowan

and the group met at a gas station. When Goodwin got back into his mother's car, he said, he noticed a Michael Kors brand handbag that had not been there earlier. At this point, Goodwin "faked a phone call from his mother" and drove everyone back to Cowan's house. (R. 2160.) The three took the purse and got out of his car.

In addition to Goodwin's testimony, the State presented the testimony of 27 witnesses. (R. 1173-2341.)

Hunter Nelson testified that around 9:00 p.m. on May 13, 2015, he was at Julian Harris School on the playground with two friends, Dylan Jones and Phillip Garland, when "about 4 or 6" African-American men approached them, put guns to their heads, and demanded "their stuff." (R. 1206.) He could not identify the men because their faces were covered at the time of the incident. (R. 1212.) They took his iPhone, his wallet, and his keys. (R. 1206.) Garland testified that a silver Nissan automobile pulled into the parking lot, that four men got out of the car, that they yelled for them to get on the ground, and that they pointed guns in their faces. He said that one of the men started searching his pockets so he took his cellular telephone and keys and gave them to the man. (R. 1225.)

Garland said that he could not identify the men because they were wearing white bandanas covering their faces. As they ran away the biggest guy fell. Jones testified that they took his necklace, his Fossil brand watch, and his cellular telephone. (R. 1240.) His keys were still on the ground so he retrieved them and drove to his house. The day after the robbery, May 14, 2015, Jones got a new iPhone cellular telephone, logged into his account, and downloaded his data from the "cloud." (R. 1245.) When he went through the photographs he noticed a picture that he had not taken and that had been made after his phone had been stolen. (R. 1246.) The next day, he said, he received a text message from his old phone that contained various emojis with "people running with smoke behind them and money bags." (R. 1267.)

The photograph that Jones discovered on his stolen iPhone was identified as having been taken in the cafeteria of Decatur High School. Sgt. Mike Burleson of the Decatur Police Department testified that once police connected all the criminal activity it became their main priority to speak to the person in the photograph. Police located that individual and interviewed him and he gave police two names of individuals who could

have taken the photograph. This information led police to Cortez Mitchell. (R. 1369.)

Anna McTaggart testified that in May 2015 she lived two blocks from Julian Harris School and that on the evening of May 13, 2015, she was with a few friends at Julian Harris and she could see the playground. She testified that she saw Nelson, Jones, and Garland at the playground and that they were still there when she left at approximately 9:00 p.m. or 9:30 p.m. McTaggart drove home, pulled in her driveway, and sat in the car. As she was sitting in her car a heavyset African-American man approached her passenger's side window and asked her to give him a ride to a certain gas station. (R. 1304.) He had been walking swiftly from Julian Harris, she said, and had approached her from the yard. She told him that she had no gas and he walked away. (R. 1306.) McTaggart testified that after she learned about the robberies she contacted Garland and he told her to contact the police. (R. 1307.) She met with a detective, Sgt. Burleson, and was shown a photographic array. Sgt. Burleson testified that McTaggart identified Cedric Cowan as the man who had approached her vehicle on the night of May 13, 2015.

Sgt. James Harton of the Decatur Police Department testified that on May 15, 2015, at around 9:00 p.m. he was dispatched to Albert Street in response to an emergency 911 call concerning a possible shooting. When he arrived at the residence he discovered the body of a man lying face up in the carport. The man, identified as Anselmo Hernandez-Lopez, had no pulse. (R. 1461.) Dr. Valerie Green, a forensic pathologist, testified that she conducted an autopsy on Hernandez-Lopez and that he had five gunshot wounds on his body -- one bullet entered his left chest, one bullet entered his scrotum, and three bullets entered his left thigh. The cause of death, Dr. Green testified, was multiple gunshot wounds. (R. 1717.) The bullet to his chest, she said, would have been fatal without the other bullet wounds. Sgt. Burleson testified that when he arrived at the Albert Street shooting, Jose Juan Zenteno had returned to the scene after he had run away when the two tried to take Hernandez-Lopez's watch.

Barbara Allen testified that she lived on the corner of Albert Street and 2nd Street and across the street from 110 Albert Street. She was in her house and her daughter was walking their dog when at around 9:00 p.m. she heard "popping" that sounded like five or six gunshots. (R. 1414;

1421.) Allen said that when she opened her front door she saw a Hispanic man across the street lying in his carport. She telephoned emergency 911. When she ran out of the house, she said, she saw a small gray car driving away.

Destiny Taylor testified that on May 15, 2015, she was living with her mother, Barbara Allen, on 2nd Street and that evening at around 9:00 p.m. she was out walking her dog. Two men were outside around the house across the street. She observed a four-door silver car drive slowly with its lights off and she thought that that was "weird." (R. 1440.) About two or three minutes after she went inside she heard gunshots. Taylor and her mother opened the door and ran across the street. Taylor went to the man lying on the ground and her mother telephoned 911. The man, she said, stopped breathing while she was with him. She observed what she thought was the same silver car again when she was walking back to her house.

Tyler Morgan testified that on May 15, 2015, he was with a group of friends sitting on the front porch of Tina Hall's house when a car approached and someone in the car started firing at them. He testified

that, based on his experience with firearms, it sounded like the shots were being fired from a .22 caliber gun. (R. 1180.) Morgan found .22 caliber casings after the shooting. Officer Allen Rawls of the Decatur Police Department testified that he was dispatched to investigate an emergency 911 call of a shooting into a dwelling. When he got to the address, he said, he spoke to three people who told him that they had been shot at from a car. (R. 1398.) The people gave him a description of the vehicle involved in the shooting, a silver or gray Nissan Altima, and he put out a BOLO ("be on the lookout") for a similar vehicle. (R. 1401.) He found no casings or any other physical evidence that a shooting had occurred at this residence.[4]

Officer Stephen Bowen of the Decatur Police Department testified that in May 2015 he was dispatched to Wilson Morgan Park in response to an emergency call that there was a dead body under the pavilion at the park. When he arrived he located a white male, identified as Joshua

[4]Count IV charged Cowan with shooting in an unoccupied dwelling owned by Tina Hall. Cowan was found not guilty of this count of the indictment.

Davis, lying face down with blood coming from a wound to his head. (R. 1615.) Dr. Green testified that she conducted an autopsy on Davis and that Davis's head injury was the result of a gunshot from a gun that had been placed "against his scalp." (R. 1725.) Because the barrel of the gun was on his skull when the gun was fired, she said, the bullet expanded the scalp and caused the scalp to hit back against the barrel of the gun. (R. 1725.) Davis also had a dislocated clavicle and abrasions and lacerations to his upper body. Dr. Green testified that Davis died from the gunshot wound to his head.

Krista Mayfield testified that at around 11:30 p.m. on the evening of May 15, 2015, she arrived home from work and pulled her car under the carport. Her five-year old daughter was in the backseat. Mayfield noticed a car sitting at a stop sign near her house. Two men got out of the car and approached her house through her yard. The men had black and white masks on, she said, and both were armed. "The larger one put a gun to my head and told me if I didn't give him all of my stuff, he was going to kill me in front of my child," Mayfield testified. (R. 1539.) They specifically wanted her purse and her cellular telephone so she grabbed

her Michael Kors brand handbag but could not reach her phone because it had fallen between the seats. The smaller man, she said, kept telling the larger man to "just shoot her." (R. 1553.) After she gave her purse to the larger man the two left in the same direction as they had approached her house and they got into a light-colored small Nissan sedan. (R. 1540.)

Valerie Curtis testified that late in the evening of May 15, 2015, she was sitting at home watching a movie on her computer when she heard the sound of breaking glass. She went to the front of the house and discovered bullet holes in the window and glass on the floor. She telephoned emergency 911 and walked outside. There was a "distinct smell of gunpowder," she said, by the window with the bullet holes. (R. 1559-60.) There were eight or nine bullet holes, she said. Mike Nelville, an evidence technician with the Decatur Police Department, testified that there were eight holes in a front window, that six projectiles had been recovered from the scene, and that the recovered shell casings had been fired from a .22 caliber rifle. He further testified that the casings were stamped with the mark "S&B," which stands for Sellier & Bellot, an ammunition manufacturer. (R. 1597-98.)

The investigation focused on Cedric Cowan after Cortez Mitchell turned himself into police. As a result of Mitchell's statement, a search warrant was obtained for Cowan's residence. (R. 1904.) On May 16, 2015, Decatur police officers executed that warrant and discovered several items connected to the robberies and the murders. Officer Jeff Clem of the Decatur Police Department testified that he gathered and logged the evidence that had been recovered and that numerous firearms and ammunition were recovered from the house. In one of the bedrooms, Officer Clem said, police recovered a .22 caliber rifle on the bed, another firearm on the side of the mattress, and a black bandana. A safe contained a box of Sellier & Bellot ammunition. (R. 1942.) On the front porch was more Sellier & Bellot ammunition. There were several vehicles on the property that were included in the scope of the search warrant. A search of one of those vehicles, an inoperable older model black Ford Mustang, revealed a Michael Kors brand handbag. (R. 1946.) Inside the handbag were two handguns, a .380 caliber Lorcin brand handgun and a .25 caliber handgun. A Fossil brand watch was also found in the handbag. (R. 1952.) A black iPhone cellular telephone was also recovered. (R.

1955.) McTaggart testified that the handbag recovered at Cowan's property was the handbag that had been taken from her and that there were no guns in the handbag when it was stolen. Garland testified that the Fossil watch recovered from Cowan's house was the watch that had been stolen from him at Julian Harris School.

Ellas Aldrich, a forensic scientist with the Alabama Department of Forensic Sciences, testified that DNA tests were conducted on the Lorcin brand pistol recovered from Cowan's residence. Aldrich testified: "The genetic traits detected in the swab from the Lorcin pistol originated from a male individual, assuming a single source, and matched the DNA profile of Joshua Davis." (R. 1869.) Aldrich further stated:

> "A swabbing of the grip area and trigger of the Lorcin was also taken for the DNA testing process. And the genetic traits detected in that item are a mixture of at least three individuals, at least one of which is male. Cedric Cowan is included as a potential contributor to this mixture of genetic traits. The probability of including a random unrelated individual as a potential contributor to this mixture, is one of 164,400 Caucasian individuals, and one and 1.85 million African-American individuals."

(R. 1869-70.)

Brandon Best, a firearm and toolmarks scientist with the Alabama Department of Forensic Sciences, testified that numerous bullets and guns were given to him for testing in the case. He testified that a projectile retrieved from the Hernandez-Lopez murder scene and a bullet recovered from the Davis murder scene were fired from the same .380 caliber handgun, although he could not identify the exact gun that fired those rounds. (R. 1844.)

The jury found Cowan guilty of two counts of capital-murder, five counts of robbery, and one count of shooting into occupied dwelling.[5] This appeal followed.

We note that several of the issues raised by Cowan were not raised in the circuit court. Although Cowan was convicted of three counts of capital murder, he was not sentenced to death. Therefore, this Court does not review this record for plain error. See Rule 45A, Ala. R. App. P.

[5]Cowan was convicted of Counts I, II, III, V, VI, VII, IX, X, and XI, as charged in the indictment, and was acquitted of Count IV; Count VIII was dismissed on agreement of the parties.

Guilt-Phase Issues

I.

Cowan first argues that the circuit court erred in denying his motion seeking Judge Jennifer Howell's recusal from his case. Specifically, Cowan argues that remarks that Judge Howell made while presiding over his codefendants' cases showed that she was biased against him and could not render an impartial decision in his case.

The record shows that in February 2019, Cowan moved that Judge Howell recuse herself because of statements she made at Mitchell's sentencing hearing and at Goodwin's guilty-plea colloquy. During Mitchell's sentencing, Judge Howell stated:

> "You know, I've had a lot to consider about your role in this. And you know, I know that you weren't the shooter, I understand that, and I don't think anybody puts a gun in your hand. But what keeps me awake about this is that you never had to go. You never had to go the first night, and after knowing what these brothers [the Cowans] were capable of, you went back."

(C. 190)(emphasis added).) During Goodwin's guilty plea hearing, Judge Howell stated: "It's important to me that you've been honest about what happened and your involvement in that. And I think that that probably

has a hand in why the sentence was offered to you as it was." (C. 191.) Cowan argued in the motion that the statements showed that Judge Howell "deemed Amani Goodwin to be 'honest,' " and that the "Court had prejudged the truthfulness of his statement." (C. 191.)

A hearing was held on Cowan's motion to recuse. (R. 565-575.) At that hearing, Cowan argued that, according to Canon 3.C.(1) of the Canons of Judicial Ethics, Judge Howell should recuse herself because, he argued, her "impartiality might reasonably be questioned." Cowan argued:

> "[Dealing with Mr. Goodwin's statements first, he is probably the most important witness the State has as far as tying the case together for their theory and burden. And, you know, we're going to have to cross-examine him. And so when you made statements that were reported in the press, the legalese would be ... that you believe that statement to be honest, well, then, when he comes to the stand, there's already that appearance, that, regardless of what is elicited or discredited by cross-examination, the Judge believes it.
>
> "With Cortez Mitchell, similarly, the comments have the appearance that you agreed this is a horrible crime, but that's not an issue that I really take issue. It is -- the allegations in this case are horrible, and the questions of who did it and what's their culpability, but the more important part from Cortez Mitchell's statement is what I read ... that after knowing what these brothers were capable of you went back.

> And so that, certainly, has the appearance that you've made prejudgments about my client and his codefendant brother."

(R. 572-73.) Judge Howell denied the motion to recuse. (C. 205.)

Immediately after the circuit court denied Cowan's motion to recuse, he filed a petition for a writ of mandamus with this Court requesting that we direct Judge Howell to recuse herself. This Court denied that petition by order. See Ex parte Cowan (CR-18-1260, October 31, 2019). In denying Cowan's petition, we stated, in part:

> "[I]in Ex parte Smith, [282 So. 3d 831] (Ala. 2019), the Alabama Supreme Court held that the trial judge must recuse herself from a criminal case in which the judge stated during an immunity hearing that he did not find the defendant's testimony to be credible. The Supreme Court noted, however, that the hearing was held against an 'emotionally charged background' consisting of 'protests and public discourse that has been the subject of frequent and intense media coverage.' Ex parte Smith, [282 So. 3d at 840]. The trial judge's statement regarding his opinion of the credibility of the defendant's testimony was made in a courtroom with a large contingent of media present. The judge's statement was then widely reported throughout the coverage area of the local media. The Supreme Court therefore held that 'for [the judge] to declare in open court and in [the] presence of the media that he did not find [the defendant's] testimony to be credible, during this emotional and hotly contested proceedings, provides a reasonable basis for questioning [the judge's] impartiality.' Ex parte Smith, [282 So. 3d at 841] (quotations omitted). Cowan notes in his petition that there has been local

> media coverage of Judge Howell's comments. In support of that contention, he appended to his petition an April 12, 2019, article from the Decatur Daily about his brother, Joseph Cowan, petitioning the Alabama Supreme Court for a writ of mandamus after this Court had denied the petition for a writ of mandamus that he filed with this Court. The article includes the quotations from Judge Howell made during Mitchell's sentencing as well as while accepting Goodwin's guilty plea. The media coverage cited by Cowan in this matter is not near that which was found in Smith; therefore, this matter is distinguishable from Smith."

This Court's records[6] show that Cowan's brother, Joseph Cowan, filed a petition for a writ of mandamus requesting that we direct Judge Howell to recuse herself from his case because, he said, she was biased. His belief was based on statements she made during Mitchell's and Goodwin's proceedings. This Court denied that petition by order for reasons similar to those cited above in this Court's order denying Cowan's petition. See Ex parte Cowan (CR-18-0608, April 4, 2019). Joseph then filed a petition for a writ of mandamus in the Alabama Supreme Court requesting that that Court direct Judge Howell to recuse herself. That

[6]This Court may take judicial notice of its records. See Nettles v. State, 731 So. 2d 626, 629 (Ala. Crim. App. 1998).

petition was also denied. See Ex parte Cowan (Ms. 1180529, April 25, 2019).

Initially, we note that

> "the filing of a petition for a writ of mandamus does not preclude an appellant from raising the same issue on appeal. See Ex parte Crawford, 686 So. 2d 196, 198 (Ala. 1996) ('While a mandamus petition is a proper method for obtaining appellate review on this issue, it is not the sole method for obtaining it.'). Indeed, this is true because the burden of establishing the prerequisites for the issuance of a writ of mandamus are higher than those that warrant relief on appeal."

McMillan v. State, 258 So. 3d 1154, 1185 (Ala. Crim. App. 2017).

"All judges are presumed to be impartial and unbiased." Luong v. State, 199 So. 3d 173, 205 (Ala. Crim. App. 2015). "The question is not whether the judge was impartial in fact, but whether another person, knowing all of the circumstances, might reasonably question the judge's impartiality -- whether there is an appearance of impropriety." Ex parte Duncan, 638 So. 2d 1332, 1334 (Ala. 1994).

Canon 3.C. of the Alabama Canons of Judicial Ethics provides, in pertinent part:

"C. Disqualification:

> "(1) A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned, including but not limited to instances where:
>
> "(a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. ..."
>
> The United States Supreme Court has held:
>
> "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. Berger v. United States, 255 U.S. 22, 31 (___). Any adverse attitudes that [the trial judge] evinced toward the defendants were based on his study of the depositions and briefs which the parties had requested him to make."

United States v. Grinnell Corp., 384 U.S. 563, 583 (1966).

> "The trial judge is a human being, not an automaton or a robot. He is not required to be a Great Stone Face which shows no reaction to anything that happens in his courtroom. Testimony that is amusing may draw a smile or a laugh, shocking or distasteful evidence may cause a frown or scowl, without reversible error being committed thereby. We have not, and hopefully never will reach the stage in Alabama at which a stone-cold computer is draped in a black robe, set up behind the bench, and plugged in to begin service as Circuit Judge."

Allen v. State, 290 Ala. 339, 342–43, 276 So. 2d 583, 586 (1973).

We reaffirm the reasons set out in this Court's order denying Cowan's mandamus petition seeking Judge Howell's recusal. Indeed, the circumstances in this case do not rise to the level of those facts presented to the Alabama Supreme Court in Ex parte Smith, 282 So. 3d 831 (Ala. 2019), a case in which the Alabama Supreme Court directed the judge to recuse herself. In Smith, the trial judge commented on the defendant's credibility in a courtroom filled with media. Here, one of Judge Howell's comments was directed at a codefendant's credibility. The other comment concerned the Cowan brothers' conduct and was clearly based on Judge Howell's exposure to the case. "The trial judge's statements arose out of a judicial proceeding, not from an extrajudicial source ... in our opinion the remarks he made do not show bias, hostility, or prejudice against [the appellant] arising from a 'personal,' i.e., extrajudicial source." Duncan, 638 So. 2d at 1334.

For the reasons stated above, we find that the statements made by Judge Howell did not establish that she had a personal bias or prejudice against Cowan that warranted her recusal in the case. Accordingly, Cowan is due no relief on this claim.

II.

Cowan next argues that the circuit court erred by refusing to admit an extrajudicial statement made by Jose Juan Zenteno, the victim in Count VI of the indictment, in violation of his Sixth Amendment right to confront his accusers and his right to a fair trial. Specifically, Cowan argues that "no doubt under ordinary circumstances Zenteno's statement, in his absence[,] would be inadmissible as hearsay"; however, based on the Alabama Supreme Court's holding in Ex parte Griffin, 790 So. 2d 351 (Ala. 2002), the statement was admissible in that it constituted exculpatory evidence. (Cowan's brief at pp. 49-50.)

The circuit court read Zenteno's statement for the record:

> "I opened the door and went inside the room while Antonio [Hernandez-Lopez] stayed outside. I exited the room, and there were four black males under the carport. I did not see where they came from. I did not hear any car doors being shut, and I did not see any other cars. Three of them surrounded us, and they were holding black handguns. They were wearing black clothes and had a black rag covering their faces. All three of them were about five foot, eight inches tall and were slim around 140 to 150 pounds. The fourth subject stood behind the first three. He also was wearing black clothes about five foot, eight and was about 140, 150 pounds, as well. His face was also covered by a black rag and he was holding a

> black rifle with a brown muzzle. He was wearing a green and black hat."

(R. 2395.) Goodwin testified that Mitchell was the one in the group wearing a green and black hat because he did not have a mask with him. In Zenteno's statement, he was quoted as saying that the man in the green and black hat was the man carrying the rifle.

It is uncontested that Zenteno was with Hernandez-Lopez when two men came up to Hernandez-Lopez's carport and pulled a gun on them. Zenteno could not speak English and gave a statement to Det. Selby DeLeon, a detective who could speak Spanish. Zenteno could not be located for trial, and Det. DeLeon was in Cuba. During Sgt. Burleson's testimony, he was asked if he had reviewed a statement made by Zenteno to Det. DeLeon. Defense counsel objected and argued that Zenteno's statements were hearsay. (R. 2315.) A lengthy sidebar discussion was held. The Court did not allow Sgt. Burleson to testify as to what Zenteno said in his statement. At the conclusion of Sgt. Burleson's cross-examination, the admission of Zenteno's statement was revisited. Defense counsel argued that it had a right to present Zenteno's statement and that

it could "get it in through Officer DeLeon." (R. 2336.) The circuit court did not allow the statement to be admitted into evidence.

On appeal, Cowan argues that he had a constitutional right to present Zenteno's statement because, he says, it contradicted Goodwin's testimony and it was evidence indicating that another person committed the offense. The State argues that Zenteno's statement did not contain exculpatory evidence because, it argues, under the doctrine of accomplice liability it did not matter who held the rifle; it only mattered that Cowan was present and aided and abetted in the robbery and murder of Hernandez-Lopez. It was uncontested that the fatal shot to Hernandez-Lopez was fired by a .380 caliber handgun that was carried by Joseph Cowan.

As the State correctly argues, Zenteno's statement was classic hearsay and was inadmissible. "Hearsay" is defined in Rule 801 (c), Ala. R. Evid., as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

Nor are we persuaded by Cowan's argument that Zenteno's statement was exculpatory. Cowan appears to concede that he was present at the scene but argues that Zenteno's statement shows that another person was holding the rifle. The Alabama Supreme Court in Griffin stated that before evidence that points to a third party's guilt may be admitted, a court must consider the following:

> "Alabama courts have also recognized the danger in confusing the jury with mere speculation concerning the guilt of a third party:
>
> > " 'It generally is agreed that the defense, in disproving the accused's own guilt, may prove that another person committed the crime for which the accused is being prosecuted.... The problem which arises in the application of this general rule, however, is the degree of strength that must be possessed by the exculpatory evidence to render it admissible. The task of determining the weight that must be possessed by such evidence of another's guilt is a difficult one.'
>
> "Charles W. Gamble, McElroy's Alabama Evidence § 48.01(1) (5th ed. 1996). To remove this difficulty, this Court has set out a test intended to ensure that any evidence offered for this purpose is admissible only when it is probative and not merely speculative. Three elements must exist before this evidence can be ruled admissible: (1) the evidence 'must relate to the "res gestae" of the crime'; (2) the evidence must exclude the accused as a perpetrator of the offense; and (3) the evidence

> 'would have to be admissible if the third party was on trial.' See Ex parte Walker, 623 So. 2d [281] at 284 [(Ala. 1992)], and Thomas [v. State], 539 So. 2d [375] at 394–96 [(Ala. Crim. App. 1988)].
>
> > "....
> >
> > "... Professor Gamble has stated:
> >
> > " 'The accused cannot ... prove the guilt of another by the use of hearsay statements. This hearsay ban constitutes the major barrier to exculpatory evidence, particularly in the form of a third party's confession to the crime with which the accused is charged. Such a statement could surmount a hearsay objection if it qualifies under some hearsay exception.'
>
> "McElroy's Alabama Evidence, § 48.01(1). However, Gamble also notes that a situation could arise where 'an accused's constitutional right to present his defense would dictate admission of evidence suggesting another's guilt.' Id. The United States Supreme Court has encountered such a situation, where the defendant's due-process rights conflicted with the rules of evidence. In Chambers [v. Mississippi], the Court stated: 'In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.' 410 U.S. [284] at 302, 93 S.Ct. 1038 [(1973)]."

790 So. 2d at 354.

Zenteno's statement did not establish that another person killed Hernandez-Lopez and did not show that Cowan did not participate in the events that led to the murder. The three-prong test in Griffin was not established.

> "[W]e fail to see how this information would have been exculpatory. Exculpatory evidence is defined in Black's Law Dictionary 597 (8th ed. 2004), as 'Evidence tending to establish a criminal defendant's innocence.' This evidence did not exonerate [Cowan] from any wrongdoing; indeed, it was an admission that he participated in the murder with his codefendants. In Alabama no distinction is made between principals and accessories to a criminal act. See § 13A–2–23, Ala. Code 1975."

Flowers v. State, 922 So. 2d 938, 952 (Ala. Crim. App. 2005).

Moreover, we agree with the State that if any error occurred in the court's failure to admit Zenteno's statement, that error was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18 (1967). Cowan was convicted under the doctrine of accomplice liability. The fact that Cowan was not the person holding the rifle did not exonerate Cowan from liability for Hernandez-Lopez's death. For the above reasons, Cowan is due no relief on this claim.

III.

Cowan next argues that the State failed to present sufficient evidence to corroborate the testimony of his accomplice Goodwin according to § 12-21-222, Ala. Code 1975. In his brief, Cowan argues: "If Amani Goodwin's testimony is eliminated, there is virtually no evidence to support any convictions. ... All of the evidence tends to connect Cedric to the various crimes ' .. [only when given direction or interpreted by, and read in conjunction with ...' Amani Goodwin's testimony." (Cowan's brief at p. 46.) He further argues that there was no evidence to show that he had a particularized intent to kill to support a conviction for capital murder.

Section 12-21-222 provides:

> "A conviction of felony cannot be had on the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and such corroborative evidence, if it merely shows the commission of the offense or the circumstances thereof, is not sufficient."

In addressing the scope of § 12-21-222, this Court has stated:

> " '[I]t is not necessary that the accomplice should be corroborated with respect to every fact as to which he or she

testifies, nor is it necessary that corroboration should establish all the elements of the offense.' 23 C.J.S. Criminal Law § 1369 (2006) (footnotes omitted). See also Arthur v. State, 711 So. 2d 1031, 1059 (Ala. Crim. App. 1996) (citations omitted) ('Corroborative evidence need not directly confirm any particular fact nor go to every material fact stated by the accomplice.'); Ferguson v. State, 814 So. 2d 925, 952 (Ala. Crim. App. 2000) (same). 'If the accomplice is corroborated in part, or as to some material fact or facts tending to connect the accused with the crime, or the commission thereof, this is sufficient to authorize an inference by the jury that he or she has testified truly even with respect to matters as to which he or she has not been corroborated, and thus sustain a conviction.' 23 C.J.S. Criminal Law § 1369 (2006) (footnotes omitted). See also Dykes v. State, 30 Ala. App. 129, 133, 1 So. 2d 754, 756–57 (1941) (citations omitted) (explaining that '[i]t has been repeatedly held, and advisedly so, that the corroboration of the testimony of an accomplice need not go to every material fact to which he testifies. If corroborated in some of such facts the jury may believe that he speaks the truth as to all.'). Further, circumstantial evidence may be sufficient to corroborate the testimony of an accomplice. Arthur, 711 So. 2d at 1059 (citing Jackson v. State, 451 So. 2d 435, 437 (Ala. Crim. App. 1984)). See also Steele v. State, 911 So. 2d 21, 28 (Ala. Crim. App. 2004) (explaining that accomplice testimony may be corroborated by circumstantial evidence).

" 'Whether such corroborative evidence exists is a question of law to be resolved by the trial court, its probative force and sufficiency being questions for the jury.' Caldwell v. State, 418 So. 2d 168, 170 (Ala. Crim. App. 1981) (citations omitted)."

Green v. State, 61 So. 3d 386, 393 (Ala. Crim. App. 2010). See also Ex parte Bullock, 770 So. 2d 1062, 1067 (Ala. 2000).

> " 'Corroborating evidence need not refer to any particular statement or fact testified to by an accomplice, but if it strengthens the probative criminating force of the accomplice's testimony and tends to connect the defendant with the commission of the offense, it is sufficient to warrant the submission of the case to the jury.' White v. State, 48 Ala. App. 111, 117, 262 So.2d 313, 319 (Ala. Crim. App. 1972) (citations omitted)."

Jackson v. State, 98 So. 3d 35, 41 (Ala. Crim. App. 2012). "While corroborating evidence need not be strong, it '... must be of substantive character, must be inconsistent with the innocence of a defendant and must do more than raise a suspicion of guilt.' " Booker v. State, 477 So. 2d 1388, 1390 (Ala. Crim. App. 1985)(quoting McCoy v. State, 397 So. 2d 577 (Ala. Crim. App. 1981)).

> "The entire conduct of the accused may be surveyed for corroborative circumstances and if from them his connection with the offense may be fairly inferred the requirement of the statute is satisfied.
>
> "And statements made by the defendant, in connection with other testimony, may afford corroboratory proof sufficient to sustain a conviction. 2 Wharton's Criminal Evidence, § 750.

> "The suspicious conduct of the accused may furnish sufficient corroboration of the testimony of the accomplice."

Moore v. State, 30 Ala. App. 304, 306, 5 So. 2d 644, 645 (1941). "The requirement for corroboration of an accomplice's testimony cannot be satisfied by the testimony of still other accomplices." In re Hardley, 766 So. 2d 154, 157 (Ala. 1999).

First, the State argues that this issue is not preserved for appellate review because it was not raised until Cowan filed his motion for a new trial. It relies on Marks v. State, 20 So. 3d 166 (Ala. Crim. App. 2008) (on rehearing), and Brown v. State, 645 So. 2d 309 (Ala. Crim. App. 1994), to support this contention. In Marks, this Court stated:

> "[P]ursuant to Ex parte Weeks, [591 So. 2d 441 (Ala. 1991)] , we hold that a motion for a judgment of acquittal that challenges the sufficiency of the evidence only generally, i.e., that the State failed to prove a prima facie case or words to that effect, does not preserve for review the specific claim that an accomplice's testimony was not sufficiently corroborated. To the extent that Fortier [v. State, 515 So. 2d 101 (Ala. Crim. App. 1987)], and Adkison [v. State, 548 So. 2d 606 (Ala. Crim. App. 1988)], hold otherwise, they are hereby overruled. Because Marks made only a general challenge to the sufficiency of the evidence in his motions for a judgment of acquittal and did not specifically argue to the trial court that the accomplices' testimony was not sufficiently corroborated, his argument on appeal that the accomplices' testimony was

> not sufficiently corroborated was not properly preserved for review and will not be considered by this Court."

Marks, 20 So. 3d at 171-72. In Brown, this Court stated: "This issue was presented for the first time in the appellant's motion for a new trial and thus was not timely. If a defendant does not object to the testimony of an accomplice, that issue is not preserved for appellate review." 645 So. 3d at 312.

In response to the State's argument, in Cowan's reply brief, he appears to cite this Court's original opinion in Marks, which was subsequently withdrawn and a new opinion issued on rehearing, and argues that, according to Marks, the issue was preserved.[7] He further argues that the Alabama Supreme Court in Ex parte Maxwell, 439 So. 2d 715, 717 (Ala. 1983), held that no magic words are necessary to preserve an issue for appellate review.

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[7]Cowan cites the following quote to support his argument that this issue was preserved: "Marks moved for a judgment of acquittal, and he challenged the sufficiency of the evidence. Therefore, his argument that the accomplice testimony was not sufficiently corroborated has been preserved for review." (Cowan's reply brief at p. 8.) This quote does not appear in the Marks opinion that was issued on rehearing.

The record shows that at the conclusion of the State's case Cowan moved for a judgment of acquittal and argued:

> "On the robberies, we don't think that robberies 1 through 3 of the gentlemen at Julian Harris, that the State has presented evidence to meet their prima facie case. No one identified Cedric Cowan out there, [and,] even accepting the liberal aiding and abetting statutes, there's no proof that Cedric Cowan provided any assistance. The victims stated they were affected only by the person on them. So we don't think they reached their case on that one. "

(C. 2343.) Cowan further argued that there was no evidence indicating that Cowan pulled the trigger, that there was no evidence indicating that Cowan had a particularized intent to kill, and that there was no testimony concerning how Cowan aided and abetted in the crimes. (R. 2342-45.) At no time during this argument did Cowan argue that the State failed to present evidence to corroborate Goodwin's testimony. This issue was not raised until Cowan filed a motion for a new trial, in which he argued: "The defendant was improperly convicted on the basis of testimony by co-defendant Amani Goodwin without sufficient corroboration by other evidence of sufficient weight." (C. 300.)

Moreover, the State fully complied with § 12-21-222 and presented a plethora of evidence that connected Cowan to the nine offenses and that corroborated Goodwin's testimony. The State was not required to corroborate every element of each case, unlike Cowan's argument. " '[I]t is not necessary that the accomplice should be corroborated with respect to every fact as to which he or she testifies, nor is it necessary that corroboration should establish all the elements of the offense.' " Green v. State, 61 So. 3d 386, 393 (Ala. Crim. App. 2010), quoting 23 C.J.S. Criminal Law § 1369 (2006) (footnotes omitted). DNA evidence connected Cowan to a weapon used in the crime. McTaggart testified that a few blocks from Julian Harris School, minutes after the robberies, she was approached by Cowan and that he asked her to drive him to a gasoline service station. Items recovered from Cowan's home were identified as those taken from several of the robberies. Ammunition discovered at Cowan's house matched ammunition discovered at the locations of several of the offenses. Based on the facts as cited above, the State presented more than sufficient evidence to corroborate Goodwin's testimony. Therefore, Cowan is due no relief on this claim.

Sentencing-Phase Issues

IV.

Cowan next argues that § 13A-5-2 and § 13A-5-43, Ala. Code 1975, are unconstitutional according to the Eighth Amendment to the United States Constitution and that his sentence of life imprisonment without parole is due to be set aside. Specifically, Cowan argues in his brief:

> "The mandatory sentencing scheme under the foregoing statutes violates the Eighth Amendment prohibition against cruel and unusual punishment. The statutes are unduly vague and do not set out sentencing factors for the sentencing judge to consider. They are arbitrary in setting a mandatory sentence for juvenile. The statute does not allow a trial court to pronounce an individualized sentence for each juvenile offender. The mandatory sentencing scheme removes from the sentencing authority its discretion to give an appropriate sentence. Thus, the statutes violate the Eighth Amendment and are unconstitutional."

(Cowan's brief at p. 56.)

Although Cowan does not cite the paragraph in the statutes he cites in this section of his brief, we presume that Cowan is referring to § 13A-5-2(f) and 13A-5-43(e). Section 13A-5-2(f) states:

> "Every person convicted of murder shall be sentenced by the court to imprisonment for a term, or to death, life imprisonment without parole, or life imprisonment in the case

> of a defendant who establishes that he or she was under the age of 18 years at the time of the offense, as authorized by subsection (c) of Section 13A-6-2."
>
> Section 13A-5-43(e) states:
>
> > "If the defendant is found guilty of a capital offense or offenses with which he or she is charged and the defendant establishes to the court by a preponderance of the evidence that he or she was under the age of 18 years at the time of the capital offense or offenses, the sentence shall be either life without the possibility of parole or, in the alternative, life, and the sentence shall be determined by the procedures set forth in the Alabama Rules of Criminal Procedure for judicially imposing sentences within the range set by statute without a jury, rather than as provided in Sections 13A-5-45 to 13A-5-53, inclusive. The judge shall consider all relevant mitigating circumstances.
> >
> > "If the defendant is sentenced to life on a capital offense, the defendant must serve a minimum of 30 years, day for day, prior to first consideration of parole."

First, the State argues that Cowan failed to preserve this issue for appellate review. The record shows that in February 2017 Cowan moved that the circuit court "declare code §§ 13A-5-2 and 13A-5-54 unconstitutional." (C. 164-67.) In this motion, Cowan made the same arguments he now makes on appeal. The circuit court deferred ruling on that motion and stated that the motion would "be addressed by the Court

if [Cowan] is convicted." (C. 177.) As the State asserts, there is no indication that this issue was raised after Cowan was convicted. Thus, there is no adverse ruling necessary for appellate review. See Harris v. State, 563 So. 2d 9, 11 (Ala. Crim. App. 1989)(defendant must first obtain an adverse ruling in order to preserve an issue for appellate review).

Moreover, Cowan argues that the statutes are unduly vague because they set out no sentencing factors that a court must first consider before imposing a sentence of life imprisonment without parole on a juvenile. Recently, this Court addressed this issue and stated:

> "Wynn contends that 'the framework for imposing life without the possibility of parole on Alabama juvenile offenders' is unconstitutionally vague and results in sentences of life imprisonment without the possibility of parole being imposed on juvenile capital offenders 'in an arbitrary and discriminatory manner.' (Issues III and IX in Wynn's brief, pp. 61 and 75.) Specifically, he argues that 'Alabama statutes and case law provide no substantive standards by to which' to distinguish between juveniles whose crimes reflect transient immaturity and juveniles whose crimes reflect irreparable corruption or permanent incorrigibility (Wynn's brief, p. 61); that the Alabama Supreme Court's opinion in Ex parte Henderson, 144 So. 3d 1262 (Ala. 2013), provides 'no guidance on deciding the ultimate question of whether a juvenile offender is irreparably corrupt' (Wynn's brief, p. 62), and fails 'to ensure that life without parole is rarely imposed on juvenile offenders' (Wynn's brief, p. 75); and that this Court

'exacerbate[d] the problem' by holding in Wilkerson v. State, 284 So. 3d 937 (Ala. Crim. App. 2018), that whether to sentence a juvenile capital offender to life imprisonment without the possibility of parole is a moral judgment, and holding in Bracewell v. State, [Ms. CR-17-0014, March 8, 2019] ___ So. 3d ___, 2019 WL 1104801 (Ala. Crim. App. 2019), that, pursuant to Rule 26.6(b)(2), [Ala. R. Evid.,] a court may consider, in addition to the Ex parte Henderson factors, any evidence it deems probative on the issue of sentencing. (Wynn's brief, p. 62.) According to Wynn, 'Alabama law "provides no reliable way to determine" whether a juvenile offender is substantively eligible for life without parole' and, therefore, it ' "invites arbitrary enforcement by judges" because there is no objective benchmark by which to determine whether or not a defendant meets Miller's substantive standard.' (Wynn's brief, p. 62 (internal citations omitted).)

" ' "Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." ' Barber v. Jefferson Cnty. Racing Ass'n, Inc., 960 So. 2d 599, 615 (Ala. 2006) (quoting City of Chicago v. Morales, 527 U.S. 41, 56, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999)). 'To withstand a challenge of vagueness, a statute [or ordinance] must: 1) give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, and, 2) provide explicit standards to those who apply the laws.' Hughes v. State, 315 So. 3d 1139, 1147 (Ala. Crim. App. 2020) (citations omitted). The United States Supreme Court 'has invalidated two kinds of criminal laws as "void for vagueness": laws that define criminal offenses and laws that fix the permissible sentences for criminal offenses.' Beckles v. United States, 580 U.S. ___, ___, 137 S.Ct. 886, 892, 197 L.Ed.2d 145 (2017).

> " 'For the former, the Court has explained that "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." [Kolender v. Lawson, 461 U.S. 352,] 357, 103 S.Ct. 1855 [75 L.Ed.2d 903 (1983)]. For the latter, the Court has explained that "statutes fixing sentences," Johnson[v. United States, 576 U.S. 591, 596,] 135 S.Ct. [2551,] 2557 [192 L.Ed.2d 569 (2015)] (citing United States v. Batchelder, 442 U.S. 114, 123, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979)), must specify the range of available sentences with "sufficient clarity," id., at 123, 99 S.Ct. 2198; see 'also United States v. Evans, 333 U.S. 483, 68 S.Ct. 634, 92 L.Ed. 823 (1948); cf. Giaccio v. Pennsylvania, 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966).'

"Beckles, 580 U.S. at ___, 137 S.Ct. at 892. Statutes that 'unambiguously specify ... the penalties available upon conviction' are not unconstitutionally vague. United States v. Batchelder, 442 U.S. 114, 123, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979). The Court 'has "never doubted the authority of a judge to exercise broad discretion in imposing a sentence within the statutory range" ... [and has] never suggested that a defendant can successfully challenge as vague a sentencing statute conferring discretion to select an appropriate sentence from within a statutory range, even when that discretion is unfettered.' Beckles, 580 U.S. at ___, 137 S.Ct. at 893 (quoting United States v. Booker, 543 U.S. 220, 233, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005)). As the State correctly points out in its brief to this Court, 'flexibility in sentencing does not equal vagueness.' (State's brief, p. 22.)

"Here, the statute under which Wynn was sentenced, § 13A-5-43(e), Ala. Code 1975, sets forth unambiguously and with sufficient clarity the range of punishment for a juvenile capital offender -- life imprisonment or life imprisonment without the possibility of parole -- and is not unconstitutionally vague. Contrary to Wynn's belief, the statute does not have to set out 'substantive standards' on how to determine whether a juvenile offender is irreparably corrupt or provide 'guidance' to ensure that a sentence of life imprisonment without the possibility of parole is rarely imposed on juvenile offenders. As already noted, the United States Supreme Court held in Jones, supra, that permanent incorrigibility or irreparable corruption is not a constitutional prerequisite to imposing a sentence of life imprisonment without the possibility of parole, and the Court further explained in Jones that 'a discretionary sentencing procedure -- where the sentencer can consider the defendant's youth and has discretion to impose a lesser sentence than life without parole -- would itself help make life-without-parole sentences "relatively rar[e]" for murderers under 18.' 539 U.S. at ___, 141 S.Ct. at 1318 (quoting Miller, 567 U. S. at 484 n.10, 132 S.Ct. 2455).

"Alabama has such a discretionary sentencing procedure. The Alabama Rules of Criminal Procedure apply to the sentencing of juvenile capital offenders and authorize consideration of any evidence deemed probative to sentencing. In addition, Ex parte Henderson requires courts to consider 14 specific factors, if applicable -- the same factors the United States Supreme Court held in Miller [v. Alabama, 567 U.S. 460 (2012),] were essential for juvenile sentencing -- before determining whether to sentence a juvenile capital offender to life imprisonment or life imprisonment without the possibility of parole. Alabama's framework for sentencing juvenile capital offenders offers discretion to courts to ensure the individualized sentencing mandated by Miller and its progeny

> and is sufficient to allow courts to sentence juvenile capital offenders in a nonarbitrary and nondiscriminatory manner."

Wynn v. State, [Ms. CR-19-0589, May 28, 2021] ___ So. 3d ___, ___ (Ala. Crim. App. 2021).

Furthermore, in adding § 13A-5-43(e), Ala. Code 1975, effective May 11, 2016, the legislature specifically provided that the Rules of Criminal Procedure controlled sentencing a juvenile who had been convicted of capital murder. Pursuant to Ala. Const. of 1901, Amend. 328, § 150 (off. Recomp.), the Alabama Supreme Court has exclusive rule-making authority "to make and promulgate rules governing the administration of all courts and rules governing practice and procedure in all courts . ..." See § 12-2-7, Ala. Code 1975. Its decision in Ex parte Henderson, was an extension of that authority and governs sentencing a juvenile upon a capital-murder conviction. Cowan's argument that a sentencing court has no guidance and no factors that it must consider is not supported by the law. For the foregoing reasons, Cowan is due no relief on this claim.

V.

Cowan next argues that his sentences of life imprisonment without parole for his capital-murder convictions should be commuted because, he says, it was based on unconstitutional criteria and the State failed to meet its burden of proving that a sentence of life imprisonment without parole was warranted in Cowan's case. Specifically, Cowan argues that "no where [sic] does the order indicate that the State has any burden to prove any aggravated circumstances beyond a reasonable doubt, or even upon some other standard. ..." (Cowan's brief at p. 58.) Cowan further argues that there was no testimony that refuted the findings of Dr. Joseph D. Ackerson, a pediatric neuropsychologist, that Cowan had the ability to be rehabilitated. Last, he argues that the State failed to prove any aggravating factors that warranted a sentence of life imprisonment without the possibility of parole.

The United States Supreme Court in Miller v. Alabama, 567 U.S. 460 (2012), held that a mandatory sentence of life imprisonment without the possibility of parole for a juvenile convicted of capital murder was cruel and unusual punishment and a violation of the Eighth Amendment

to the United States Constitution. 567 U.S. at 465. In response to this decision, the Alabama Supreme Court in Ex parte Henderson, 144 So. 3d 1262 (Ala. 2013), held:

> "[A] sentencing hearing for a juvenile convicted of a capital offense must now include consideration of: (1) the juvenile's chronological age at the time of the offense and the hallmark features of youth, such as immaturity, impetuosity, and failure to appreciate risks and consequences; (2) the juvenile's diminished culpability; (3) the circumstances of the offense; (4) the extent of the juvenile's participation in the crime; (5) the juvenile's family, home, and neighborhood environment; (6) the juvenile's emotional maturity and development; (7) whether familial and/or peer pressure affected the juvenile; (8) the juvenile's past exposure to violence; (9) the juvenile's drug and alcohol history; (10) the juvenile's ability to deal with the police; (11) the juvenile's capacity to assist his or her attorney; (12) the juvenile's mental-health history; (13) the juvenile's potential for rehabilitation; and (14) any other relevant factor related to the juvenile's youth."

144 So. 3d at 1284.

First, Cowan cites the incorrect standard and incorrect burden of proof in a sentencing hearing for a juvenile convicted of capital-murder. This Court addressed this issue in Wilkerson v. State, 284 So. 3d 937 (Ala. Crim. App. 2019), in which we stated:

> "[T]he legislature has already answered the questions (1) who bears the burden of proving the appropriate sentence for a

> juvenile defendant convicted of capital murder and (2) the degree of proof necessary to make that determination. Specifically, the legislature has placed those questions under the normal procedures applicable at a sentencing hearing. Thus, in capital cases involving juvenile offenders, both the State and the defendant may present evidence to the circuit court to assist in its sentencing determination under § 13A-5-43(e), Ala. Code 1975, and Rule 26.6, Ala. R. Crim. P. Whether the juvenile defendant convicted of capital murder is eligible for a sentence of life imprisonment without the possibility of parole is a question to 'be determined by the preponderance of evidence.' Rule 26.6, Ala. R. Crim. P.
>
> "....
>
> "We likewise hold that Miller [v. Alabama, 567 U.S. 460 (2012),] and Montgomery [v. Louisiana, 577 U.S. 190 (2016),] do not require a presumption against life-imprisonment-without-the-possibility-of-parole sentences for juveniles convicted of capital murder and do not require the State to bear the burden of proving that a juvenile defendant is 'the rare irreparably depraved or corrupt offender warranting a life-without-parole sentence.' ... before that juvenile may be sentenced to life imprisonment without the possibility of parole."

Wilkerson, 284 So. 3d at 950-55.

As this Court noted in Wilkerson, the State did not have the burden of proof, and whether a sentence of life imprisonment without the possibility of parole was warranted in Cowan's case was to be determined by a "preponderance of the evidence." Also, the legislature, in adopting §

13A-5-53(e), specifically stated that "the procedures set forth in the Alabama Rules of Criminal Procedure for judicially imposing sentences within the range set by statute without a jury, rather than as provided in Sections 13A-5-45 to 13A-5-53, inclusive." Aggravating circumstances are set out in § 13A-5-49, Ala. Code 1975, and based on the clear language of § 13A-5-53(e) have no application to sentences for juveniles convicted of capital murder. Last, we review the circuit court's findings on the Henderson factors for an abuse of discretion. See Boyd v. State, 306 So. 3d 907 (Ala. Crim. App. 2019).

As stated above, Cowan further argues that the circuit court erred in finding that he was incapable of being rehabilitated. When making this finding, the circuit court stated:

> "The Court in Miller [v. Alabama, 567 U.S. 460 (2012),] and Montgomery [v. Louisiana, 577 U.S. 190 (2016),], supra, held that most children, including those convicted of violent homicides, will change over time in ways that make a sentence of life without parole constitutionally prohibited. See Montgomery 136 S.Ct. at 736. Dr. Joseph Ackerson[, a pediatric neuropsychologist,] testified about brain development and brain science and opined that [Cowan] has the potential for rehabilitation. Dr. Ackerson's opinion does not come from any actual interaction with [Cowan] or personal observation. The defense argues that [Cowan] would not re-offend if he was

released from prison. However, prior to committing the crimes in this case, [Cowan] was convicted of armed robbery. Though [Cowan] was adjudicated delinquent and sentenced, [Cowan] did in fact re-offend. Prior to the armed robbery, [Cowan] had multiple issues with truancy and continued to miss school even after truancy court. [Cowan's] history does not reflect that he learns from his mistakes or has potential for rehabilitation.

"Furthermore, both [Cowan's] parents testified that they repeatedly spoke to him about avoiding trouble. [Cowan's] mother stated she disciplined him repeatedly and he would not correct his behavior. [Cowan] also failed to meet with his parole officer and refused to be interviewed by the expert witness his attorneys secured for his sentencing hearing. [Cowan's] behavior suggests that he is reluctant to receive help and make corrections in his behavior.

"[Cowan's] father solemnly testified that his having been sent to prison led [Cowan] down the path that ultimately led to these charges. [Cowan's] father further testified that in prison, those inmates who have sentences of life with parole have more opportunities for classes, programs, and rehabilitation than those inmates who have sentences of life without parole. Dr. Ackerson noted that [Cowan] wrote a letter to the jail warden asking for access to programs, opining that [Cowan] is 'hungry for learning and to obtain skills.' Dr. Ackerson testified that [Cowan's] letter to the warden indicates that [Cowan] has hope, which means he has potential for rehabilitation. At the conclusion of the sentencing hearing, [Cowan] submitted the following written statement to the Court: 'I am truly sorry for what happened. Please don't give up on me.' [Cowan's] statement only expresses general remorse and he does not take any specific responsibility for his actions during the nights of May 13, 2015, and May 15, 2015. Nonetheless, the Court infers from [Cowan's] request to 'not

> give up on me' that he does have hope that he can become a productive member of society in the future. This factor is slightly mitigating in favor of a sentence of life imprisonment without the possibility of parole.
>
> "....
>
> "While much evidence has been offered by [Cowan] as to why [Cowan] should not receive a sentence of life without parole for these crimes, one thing has not been offered by the defense or [Cowan]: acceptance of personal responsibility. The Court finds that [Cowan] cannot be rehabilitated if he cannot accept his responsibility in the crimes he and his codefendants committed."

(C. 291-93.)

In Boyd, supra, this Court considered whether the circuit court erred in finding that Boyd was not capable of being rehabilitated after a doctor testified that with "medications and counseling, Nathan Boyd is absolutely capable of rehabilitation.' " 306 So. 3d at 928. We held that no error occurred: "Boyd's different conclusion based on his own interpretation of the evidence does not demonstrate that the circuit court abused its discretion. The record supports the circuit court's conclusion in this regard." Boyd, 306 So. 3d at 929.

Our neighboring state of Mississippi reached a similar result that this Court reached in Boyd. In Shoemaker v. State, 323 So. 3d 1093 (Miss. Ct. App. 2021), a doctor testified at the juvenile's sentencing hearing after Shoemaker's capital murder conviction, that he believed that it was "probable" that the juvenile could be rehabilitated. That court stated:

> "We find that the record reflects that the trial court considered the rehabilitation factor along with the other four factors it was obligated to consider under Miller [v. Alabama, 567 U.S. 460 (2012),] and Parker [v. State], 119 So. 2d 987 (Miss. 2013)]. Chandler [v. State], 242 So. 3d [65] at 68 (¶8) [(Miss. 2018)]. There is no Mississippi precedent for the proposition that the possibility of rehabilitation overrides the other Miller factors -- or even that it is the preeminent factor. Rather, it is one of the five Miller factors a trial court must consider in determining whether to sentence a juvenile offender to LWOP [life without parole]. Parker, 119 So. 3d at 995-96 (¶19), 998 (¶26)."

Shoemaker, 323 So. 3d at 1104.

The circuit court's sentencing order clearly shows that it considered all the 14 factors discussed in Henderson and made individual findings of fact as to each factor. The court fully complied with the sentencing requirements of Miller and Henderson. There is no indication that the

circuit court abused its discretion in sentencing Cowan to life imprisonment without the possibility of parole for his convictions for capital-murder.

For the foregoing reasons, we affirm Cowan's nine convictions and the sentences imposed in those cases.

AFFIRMED.

Windom, P.J., concurs. McCool, Cole, and Minor, JJ., concur in the result.