IN THE SUPREME COURT OF ALABAMA

January 12, 2023

ORDER

IT IS ORDERED that Rule 45A, Alabama Rules of Appellate Procedure, be amended to read in accordance with the appendix to this order;

IT IS FURTHER ORDERED that the amendment to Rule 45A is effective immediately;

IT IS FURTHER ORDERED that the following note from the reporter of decisions be added to follow Rule 45A:

> "Note from the reporter of decisions: The order amending Rule 45A, Alabama Rules of Appellate Procedure, effective January 12, 2023, is published in that volume of Alabama Reporter that contains Alabama cases from __ So. 3d."

Parker, C.J., and Bolin and Sellers, JJ., concur.

Mitchell, J., concurs specially, with opinion, which Mendheim and Stewart, JJ., join.

Shaw, J., dissents, with opinion.

Wise, J., dissents, with opinion, which Bryan, J., joins.

Witness my hand and seal this 12th day of January, 2023.

Megan B. Rhodeheck

Clerk of Court,
Supreme Court of Alabama

FILED
January 12, 2023

Clerk of Court
Supreme Court of Alabama

IN THE SUPREME COURT OF ALABAMA

January 12, 2023

MITCHELL, Justice (concurring specially).

I concur in the Court's decision to amend Rule 45A, Ala. R. App. P. I write specially to explain why. As detailed below, the system of mandatory plain-error review imposed by former Rule 45A is an outlier. It is at odds with the common law, federal law, and the laws of our regional sister states. It is also unnecessary, because any plain error that has affected a defendant's substantial rights but that his counsel unreasonably failed to challenge can be litigated in a postconviction proceeding under Rule 32, Ala. R. Crim. P., by way of an ineffective-assistance-of-counsel claim. Today's amendment returns plain-error review in death-penalty cases to its proper role and scope. In doing so, it brings our Rules of Appellate Procedure into closer alignment with the common law and the approach of other jurisdictions. The amendment also streamlines the appellate-review process and, as a result, promotes the fair and efficient administration of justice.

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At common law, the default rule in both criminal and civil cases was that any ground for error not raised in the trial court and adequately

presented to the appellate court was deemed waived (or, more precisely, forfeited) on appeal. 7 Wayne R. LaFave et al., Criminal Procedure § 27.5(c)-(d) (4th ed. 2015). The common law acknowledged a narrow exception to this rule for certain "'fundamental error[s]'" in criminal cases that were so obvious and egregious as to "'shock the judicial conscience'" and imperil the very "'foundation of the case.'" Id. at § 27.5(d) & n.168 (citation omitted). That exception, which has come to be known as "plain-error review," was discretionary at common law. Id. In other words, appellate courts had the authority to reverse based on unpreserved or unbriefed plain errors, but they were not required to do so.

Initially, the Alabama Rules of Appellate Procedure were consistent with the common-law approach.[1] Rule 45 of the Alabama Rules of

[1]This is not to say that other Alabama statutes and rules have always been consistent with the common-law approach to plain-error review. For example, in the late 19th century, the Legislature enacted a statute that required appellate courts in criminal cases to consider all questions apparent "on the record," even if those questions had not been briefed by the parties, see § 4990, Ala. Code 1876 (the substance of which is now codified at § 12-22-240, Ala. Code 1975), though that requirement was later abrogated by Rule 45B, Ala. R. App. P., see Biddie v. State, 516

Appellate Procedure, which this Court adopted in its modern form in 1975,[2] neither requires nor prohibits plain-error review. It simply emphasizes that an appellate court cannot "reverse[] or set aside" a judgment unless the error "injuriously affected substantial rights of the parties."

In 1978, however, this Court supplemented Rule 45 by adopting former Rule 45A, which departed from the common-law standard. Essentially, former Rule 45A required the Court of Criminal Appeals to conduct across-the-board plain-error review in all death-penalty cases,

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So. 2d 846, 847 (Ala. 1987). Likewise, at least one rule of criminal procedure has been interpreted to alter the scope of plain-error review. See Biddie, 516 So. 2d at 846-47 (holding that former Temporary Rule of Criminal Procedure 14, the substance of which is now embodied in Rule 21.3, Ala. R. Crim. P., required that a party must object to an erroneous jury charge before the jury retires in order to preserve that error for appellate review).

[2]The rule has been around in other forms for much longer. See, e.g., De Wyre v. State, 190 Ala. 1, 7, 67 So. 577, 580 (1914) (quoting Rule 45, Rules of Practice in the Alabama Supreme Court, published at 175 Ala. xxi, which provided that "no judgment will be reversed or set aside[] in any civil or criminal case … unless … it should appear that the error complained of has probably injuriously affected substantial rights of the parties").

even if not asked to do so by the parties and even if the underlying defect was not objected to at trial. It read:

> "In all cases in which the death penalty has been imposed, the Court of Criminal Appeals shall notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial right of the appellant."

The mandatory nature of that rule was an outlier at the time of its enactment and remains an outlier today. So far as I can tell, neither the federal rules nor the rules of our regional sister states -- such as Arkansas, Florida, Georgia, Mississippi, South Carolina, and Tennessee -- require appellate courts to ferret out any and all plain errors in death-penalty cases.[3]

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[3]Federal courts have preserved the common-law rule that plain-error review "is permissive, not mandatory." United States v. Olano, 507 U.S. 725, 735 (1993); accord Rule 52, Fed. R. Crim. P. (providing that harmless error "must be disregarded" but that a "plain error that affects substantial rights may be considered even though it was not brought to the court's attention," and making no exception to the permissive nature of plain-error review for death-penalty cases (emphasis added)). Tennessee and Mississippi appear to follow a similar approach. See State v. Jordan, 325 S.W.3d 1, 58 (Tenn. 2010) (noting that plain-error review is "discretionary" even in a death-penalty case); Walker v. State, 913 So.

2d 198, 217 (Miss. 2005) (similar); Ambrose v. State, 254 So. 3d 77, 112 (Miss. 2018) ("declin[ing] to employ plain error review" in a death-penalty case).

Meanwhile, Arkansas and South Carolina do not even permit discretionary plain-error review on direct appeal. South Carolina has entirely foreclosed judicial review of unpreserved errors on direct appeal, even in death-penalty cases, see State v. Rocheville, 310 S.C. 20, 24, 425 S.E.2d 32, 34 (1993), while Arkansas's prohibition admits only a handful of "exceptional" circumstances in which a court is permitted (but not obligated) to conduct plain-error review, see Gay v. State, 506 S.W.3d 851, 855 (Ark. 2016). Notably, Arkansas's exceptions do not permit across-the-board plain-error review in death-penalty cases but, rather, permit such review only when "a trial court … fails to bring to the jury's attention a matter essential to its consideration of the death penalty itself." Id.

Florida and Georgia, on the other hand, have modified the common-law rule to require additional leniency in death-penalty cases, but neither state's modifications go as far as former Rule 45A did. The Florida Rules of Appellate Procedure require the Florida Supreme Court (which sits in direct review of all appeals from death-penalty cases) to ensure sufficiency of the evidence in death-penalty cases, even if a sufficiency-of-evidence challenge was not preserved, but Florida does not appear to compel plain-error review for other types of unpreserved errors. See Fla. R. App. P. 9.142(a)(5); F.B. v. State, 852 So. 2d 226, 230 (Fla. 2003). Georgia, meanwhile, requires appellate courts in death-penalty cases to conduct plain-error review of "each of the assertions of error timely raised by the defendant during the proceedings in the trial court," even if that error was not mentioned in the defendant's appellate briefing, but it does not appear to require plain-error review for most errors not objected to at trial. Rule IV.B.2., Georgia Unified Appeal Procedure; see also Martin v. State, 298 Ga. 259, 277, 278, 779 S.E.2d 342, 360 (2015) (noting that, in addition to the review required by Rule IV.B.2., the Court has also

There are good reasons why other jurisdictions have rejected a system of mandatory plain-error review. Plain-error review requires already overloaded appellate courts to spend hundreds, if not thousands, of hours per case scrutinizing trial-court records for possible errors and then explaining why those errors are (or are not) reversible. That is true even in cases where the appeal is premised on a purely procedural violation -- such as an alleged exclusionary-rule error[4] -- and in which no one, including the defendant, disputes that the defendant committed the crime for which he was convicted. In such instances, plain-error review can have the effect of transferring limited judicial resources away from non-death-penalty appeals in which the defendant has a plausible claim of factual innocence and redirecting those resources toward death-

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reviewed "the jury's selection of a death sentence" -- but not the "jury's finding of guilt" -- to "ensure that no death sentence is 'imposed under the influence of passion, prejudice, or any other arbitrary factor'" (citation omitted)).

[4]See Weeks v. United States, 232 U.S. 383, 386 (1914); Mapp v. Ohio, 367 U.S. 643, 657 (1961).

penalty appeals in which there is no doubt about the defendant's factual guilt. That result is bizarre at best, unjust at worst.

Compounding that problem is the fact that a de novo search of the trial record is rarely a fruitful exercise. That's because -- as one might expect in a system where all criminal defendants are entitled to professional representation -- errors that are both obvious and fundamental are usually objected to at trial and briefed on appeal. Former Rule 45A thus imposed an extraordinary cost on appellate courts without a correspondingly clear benefit.

None of this is meant to deny that there have been tragic (and, thankfully, rare) cases in which a defendant has been convicted based on an obvious, fundamental error that his lawyers failed to competently challenge or preserve. But defendants in such cases already have a powerful tool to correct that failure: a postconviction petition brought under Rule 32 of the Alabama Rules of Criminal Procedure. Rule 32 allows individuals convicted of a criminal offense to seek a new trial or other appropriate relief in several circumstances, including where the original conviction was the product of a constitutional violation. See Rule

32.1, Ala. R. Crim. P. Because the United States Supreme Court has held that the Sixth and Fourteenth Amendments to the federal Constitution guarantee a right to effective assistance of counsel in criminal cases -- both at the trial stage, Gideon v. Wainwright, 372 U.S. 335 (1963), and during the first direct appeal, Evitts v. Lucey, 469 U.S. 387, 396 (1985) -- a defendant convicted based on a plain error that defense counsel unreasonably failed to challenge is eligible for relief under Rule 32.[5] See Ex parte Walker, 800 So. 2d 135, 138 (Ala. 2000).

Today's amendment preserves defendants' postconviction protections while simultaneously bringing our appellate-review system into closer alignment with the common law and the law of other jurisdictions. The amendment also promotes the fair and efficient

[5]Of course, a defendant cannot prevail on an ineffective-assistance claim if the decision to not object to an error (whether "plain" or not) was the result of the defense team's "reasonable strategic choice[]," Roe v. Flores-Ortega, 528 U.S. 470, 481 (2000), but that is a feature of an ineffective-assistance claim, not a bug. Even in criminal cases, courts will not reward deliberate gamesmanship. See State v. Bledsoe, 226 S.W.3d 349, 354 (Tenn. 2007) (explaining that, even under a direct-review plain-error analysis, an error is not reversible if the accused failed to preserve the objection "for tactical reasons").

administration of justice by streamlining our direct-appeal process. Going forward, the Court of Criminal Appeals will have discretion to correct plain errors in death-penalty cases but it will not be obligated to scour the record in search of such errors, nor will it be compelled to analyze claims of error that should have been, but were not, presented to the trial court.

Mendheim and Stewart, JJ., concur.

IN THE SUPREME COURT OF ALABAMA

January 12, 2023

SHAW, Justice (dissenting).

I see no compelling reason to repeal the mandatory plain-error review provided under Rule 45A, Ala. R. App. P. The Alabama Court of Criminal Appeals is well-suited to conduct such a review on direct appeal, and if there is reversible error in a case in which the death penalty has been imposed, it should be detected and resolved sooner rather than later. If such error is detected in subsequent state or federal postconviction litigation and relief is granted, which can occur many, many years after trial, the State, because of the passage of time and its effect on the evidence and witnesses, may be substantially hindered in prosecuting a new trial and obtaining another sentence of death. Further, because of the limitations of postconviction proceedings, including those involving ineffective-assistance-of-counsel claims, such proceedings may provide a defendant less effective remedies than plain-error review on direct appeal: ineffective-assistance-of-counsel claims have unique restrictions, and constitutional violations are barred from review in Rule 32, Ala. R. Crim. P., proceedings if they could have been,

but were not, raised at trial or on direct appeal. Rule 32.2(a)(3) & (5), Ala. R. Crim. P.

I have personally conducted many plain-error reviews of records in death-penalty cases, and it concerns me that no longer will the fact that a plain-error review occurred on direct appeal add to the confidence in a capital conviction and sentence of death. In my view, a thorough plain-error review of a death-penalty case on direct appeal serves the interests of both the State and the defendant. Mandatory plain-error review under Rule 45A has existed for 44 years; I see no need for its unsolicited demise.

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WISE, Justice (dissenting).

In his dissent, Justice Shaw sets forth compelling reasons as to why this Court should not repeal mandatory plain-error review in cases in which the death penalty has been imposed and explains why "a thorough plain-error review of a death-penalty case on direct appeal serves the interests of both the State and the defendant." I understand that plain-error review on direct appeal places a burden on the Court of Criminal Appeals and requires the use of judicial resources. However, in these cases, the defendants' very lives are at stake, and I believe that such cases are entitled to heightened review on direct appeal.

That being said, I believe that the scope of plain-error review should be limited with regard to claims brought pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), in cases where the defendant did not object at trial. In her special concurrence in Ex parte Phillips, 287 So. 3d 1179 (Ala. 2018), Chief Justice Stuart thoroughly discussed why this Court should "limit the scope of plain-error review with regard to Batson claims to errors that are truly obvious on the record." 287 So 3d at 1243. Specifically, she stated:

"The purpose of the plain-error rule is to protect and preserve the integrity and reputation of the judicial process. However, in a misguided effort to satisfy this mandate, the Bankhead Court[, see Ex parte Bankhead, 585 So. 2d 112 (Ala. 1991),] and subsequent courts have overlooked the requirement that the error must be obvious. The integrity and the reputation of the judicial process is impugned equally when plain error is employed to attempt to remedy possible error.

"Moreover, in keeping with the principles of Batson and its progeny, an unobjected-to inference of purposeful discrimination on the record creates a claim of ineffective assistance of counsel for failure to make a Batson objection, not an error by the trial court. In cases such as this one, where the record creates an inference of discrimination in the jury selection and yet there is no objection by defense counsel, the only obvious error an appellate record reflects is one made by counsel. Considering these claims under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), allows an evaluation of the effect of a forgone challenge on the outcome of the event to which it properly applies: the jury-selection process. Applying Strickland to the jury-selection process, a defendant would have to prove that if a Batson objection had been made there was a 'reasonable probability' it would have been heard and that the trial court would have taken curative action before the trial began. This evaluation of the error and its prejudicial effect promotes the requirement of Batson that the jury-selection process not be infected and the requirement of Strickland that prejudice determines the outcome.

"For the reasons set forth above, I would overrule Ex parte Bankhead and its progeny in this regard and now hold that failure to make a timely objection forfeits consideration under a plain-error standard of a Batson objection raised for

> the first time on appeal. Simply, (1) plain error should not be available for a Batson issue raised for the first time on appeal because the failure to timely make a Batson inquiry is not an error of the trial court; (2) the defendant should be required to timely request a Batson hearing to determine whether there was purposeful discrimination because, under the plain-error rule, the circumstances giving rise to purposeful discrimination must be so obvious that failure to notice them seriously affects the integrity of the judicial proceeding; and (3) trying a criminal case twice is so burdensome that, to avoid such a result, trial courts may be tempted to require the prosecutor to provide reasons for most or all of his or her peremptory challenges, effectively eliminating the peremptory challenge in death-penalty cases. I maintain that for plain-error review to provide relief in the Batson context, the appellate record must clearly demonstrate that the trial court erred because evidence in the record, not evidence developed at a hearing conducted after the trial, supports a finding that the prosecutor's proffered reasons were not credible and the trial court's findings are not supported by the record."

Ex parte Phillips, 287 So. 3d at 1243-44 (Stuart, C.J., concurring specially).

For these reasons, I believe that this Court should limit the scope of plain-error review of claims brought pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), in cases where the defendant did not object to the State's use of peremptory challenges at trial. However, I am not prepared, at this time, to go so far as the wholesale repeal of mandatory

plain-error review in cases in which the death penalty has been imposed without a thorough review of Rule 45A, Ala. R. App. P., by the Court of Criminal Appeals, the Alabama Supreme Court Standing Committee on the Alabama Rules of Appellate Procedure, and the Alabama Supreme Court's Standing Committee on the Alabama Rules of Criminal Procedure.

Bryan, J., concurs.

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APPENDIX

Rule 45A, Ala. R. App. P.

In all cases in which the death penalty has been imposed, the Court of Criminal Appeals may, but shall not be obligated to, notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial right of the appellant.