NEWS RELEASE

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FOR IMMEDIATE RELEASE
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## AG ANNOUNCES THAT COURT OF CRIMINAL APPEALS UPHOLDS WINSTON COUNTY MURDER AND MANSLAUGHTER CONVICTIONS

Attorney General Luther Strange announced that the Alabama Court of Criminal Appeals on Friday upheld the murder conviction of Michael Dale Bonds and the two reckless manslaughter convictions of Larry Craig McCluskey. Bonds, 31, of Double Springs, was convicted in the Winston County Circuit Court in March of 2008 for the murder of Jimmy Ingram. McCluskey, 37, of Jasper, was convicted in the Winston in County Circuit Court in May of 2011 for the deaths of William and Doris Humphries.

In the Bonds case, the evidence presented at trial indicated that Bonds shot Jimmy Ingram at a Double Springs gas station after the men had been having an extended quarrel relating to child visitation matters. Bonds shot Ingram while Ingram's three year old child was present, then Bonds stood over Ingram while he was on the ground and shot Ingram until Bonds ran out of ammunition. Ingram died from the gunshot wounds.

In the McCluskey case, the evidence presented at trial indicated that McCluskey casued a fatal traffic collision that killed William and Doris Humphries, ages 82 and 78, while McCluskey was under the influence of a controlled substance, methamphetamine.

The cases were prosecuted at trial by Winston County District Attorney John J. Bostick's office. Bonds was sentenced to life imprisonment for the murder conviction and as well a year imprisonment for an additional related conviction for reckless endangerment. McCluskely was sentenced to 20 years imprisonment for each manslaughter death, which sentences were ordered to be served consecutively. Each of these defendants subsequently sought to have their convictions reversed on appeal.

The Attorney General's Criminal Appeals Division handled the cases during the appeals process, arguing for the Alabama Court of Criminal Appeals to affirm the convictions. The Court did so in decisions issued on Friday, April 13.

Attorney General Strange commended Assistant Attorneys General William Dill and Jack Willis of the Attorney General's Criminal Appeals Division for their successful work in these cases.

*Note: For additional information regarding these cases, copies are attached of the decisions of the Alabama Court of Criminal Appeals.*

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# Court of Criminal Appeals

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**Presiding Judge**
**SAMUEL HENRY WELCH**
**J. ELIZABETH KELLUM**
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**MEMORANDUM**

CR-10-0603 Winston Circuit Court CC-07-91

Michael Dale Bonds v. State of Alabama

KELLUM, Judge.

The appellant, Michael Dale Bonds, was convicted of murder, a violation of § 13A-6-2, Ala. Code 1975, and reckless endangerment, a violation of § 13A-6-24, Ala. Code 1975. The circuit court sentenced Bonds to serve a term of life imprisonment for the murder conviction and 12 months' imprisonment for the reckless-endangerment conviction, with those sentences ordered to be served concurrently. The circuit court further ordered Bonds to pay $50 to the crime victims compensation fund, $4,800 in restitution, and court costs.

The evidence presented at trial established the following pertinent facts. Bonds and Meranda Shonta Ingram ("Shonta") had a child together when they were both teenagers. The child was named Genesis, and for the first 11 years of Genesis' life, Bonds had nothing to do with either Genesis or Shonta. Bonds paid no child support and had very limited contact with either Shonta or Genesis. When Genesis turned 11 years old, Bonds decided it was time for him to meet his daughter and become a part of her life. At this time, Shonta was married to Jimmy Ingram.

Ingram had been married to Shonta for almost 10 years and had raised Genesis since she was 3 months old. In addition, Ingram and Shonta had two children of their own, Makala Ingram and Jay Patrick Ingram. When Bonds first suggested that he and Genesis start having a normal father-daughter relationship, Ingram agreed that "Genesis ought to know her daddy, if that's what she wanted" and he did not attempt to stop Bonds from entering the family's life. (R. 132.) However, Ingram was not happy with Shonta, Genesis and Bonds meeting without him present. Shonta testified that "there was a lot of tension" during this time. (R. 196.)

Shortly after Bonds reentered Genesis's life, Bonds and Shonta started seeing each other again. Shonta was "running around with [Bonds]" before her relationship with Ingram ended. (R. 133). In June 2006, Ingram and Shonta were separated, and Shonta moved in with Bonds.

Bonds's relationship with Shonta created problems between him and Ingram. Ingram started leaving threatening telephone messages for Bonds and Shonta, stating that he would burn down the house where Bonds and Shonta lived. Ingram later threatened to beat or shoot Bonds and Shonta in another telephone message. Shonta found it necessary to obtain a restraining order against Ingram. Ingram also gave Genesis a knife and told her to stab Bonds if he did anything to her. Around this time, Ingram slashed Bonds's tires, scratched his vehicle, and broke his side view mirror. Shonta's parents came to Bonds's house armed with a pistol and a rifle. Shonta's parents left the pistol with Shonta so that she could protect herself from Ingram. However, after Shonta and Ingram's divorce was finalized in or about January 2007, things calmed down between Bonds and Ingram.

After things calmed between Ingram and Bonds, Bonds's relationship with Shonta began to deteriorate. Ingram had received custody of his children with Shonta , and this upset Bonds because Shonta continued to speak with Ingram on a regular basis. Bonds started threatening Shonta; he pushed Shonta around and threw her across a bed because he thought she and Ingram were talking too much. Around March 21, 2007, Shonta attempted suicide, taking a combination of "muscle relaxers, blood pressure medicines, and a pain medicine that is an opiate." (R. 212.) Shonta testified that she attempted suicide because "[Bonds] drove [her] crazy." (R. 212.) Shonta moved out of Bond's house after the suicide attempt and went to live with her mother, Sheila Richie.

After moving in with her mother, Shonta started to see Ingram again. Genesis was also living with Shonta and Richie, but Bonds wanted to know when he would be able to see Genesis. Shonta told Bonds that it was up to Genesis, but "[Genesis] did not want to see him." (R. 217.) This made Bonds angry. Bonds started making threats towards Shonta, telling her that "if he found out that [Shonta] was living in the house with his daughter with [Ingram] he would blow both of [them] away." (R. 218.) On more than one occasion, Bonds told Richie that "[Ingram] would never raise Genesis, that he would kill [Ingram] first." (R. 138.)

On April 14, 2007, Ingram, Shonta, and their 3-year-old son, Jay Patrick, went to the Gateway grocery store in Double Springs where Richie planned to meet them. When Richie arrived at the store she saw Bonds drive into the parking lot. Bonds pulled his vehicle up behind hers, got out of the vehicle, and angrily accused Richie of keeping Genesis away from him. Bonds was still arguing with Richie when Ingram, Shonta, and Jay Patrick arrived. Shonta got out of the vehicle and walked over to her mother; without saying anything to Bonds, Shonta and Richie entered the store. Ingram and Jay Patrick subsequently drove away and Bonds followed them.

When Richie and Shonta exited Gateway and pulled out from the parking lot, they saw Ingram and Bond's vehicles parked at an adjacent gas station. Ingram was on the driver's side of his vehicle arguing with Bonds who was on the passenger side. Jay Patrick was "on the hood of the car." (R. 151.) When Shonta and Richie approached, Ingram tried to give Jay Patrick to Richie, but as Richie reached for the child, Bonds shot at Ingram.

After the first shots were fired and Ingram had fallen to the ground, Bonds circled the car and stood over Ingram. Bonds then shot Ingram until he ran out of ammunition. Shonta started doing CPR on Ingram and Richie ran into the gas station to telephone 911. Richie testified that Ingram was unarmed at the time of the shooting.

Bonds started to walk off, then got back into his vehicle. While Bonds was sitting in his vehicle, Jeremy Dempsey, a friend of both Ingram and Bonds, pulled into the gas station and approached Bonds's vehicle. Bonds told Dempsey, that "he (Bonds) shot [Ingram]" and then Bonds handed Dempsey the gun. (R. 366.) Bonds then got out of the vehicle and walked back to where Ingram was lying on the ground and "stomped on his head." (R. 384.) As Bonds walked away he turned towards Shonta, who was administering CPR, and said "I told you I would do it." (R. 233.) Ingram was shot six times and died as a result of his injuries.

Bonds's defense theory was that his actions were justified on the ground of self-defense. Bonds put on evidence at trial demonstrating the contentious relationship he had with Ingram, that Ingram had made threats toward Bonds, and that Bonds had filed charges against Ingram for criminal mischief after Ingram damaged Bonds's truck. Police testified that Ingram and Bonds had been involved in a physical altercation at a Mexican restaurant in Double Springs a few months before the shooting and that Ingram was a "stand-up fist fight, kick in the rear-end type of guy." (R. 662.)

Bonds testified that on the day of the shooting he and Ingram argued over Genesis. While they argued, Ingram stood in the door of his vehicle; Bonds observed Ingram continuing to look inside the vehicle, as if there was something he wanted in the vehicle. Bonds thought this was strange so he went into his vehicle and got his gun. When Bonds turned back to face Ingram, Ingram jumped head first into his own vehicle. Bonds then pulled up his gun and shot at Ingram. Bonds testified that after firing at least one shot, he walked around the vehicle to where Ingram was lying. After he noticed that Ingram was still moving while on the ground, Bonds "shot again ... then walked up and kicked [Ingram] in the head." (R. 766.).

Bonds's case was tried before a jury. After both sides had rested and the court had instructed the jury on the

applicable principles of law -- including the law of self-defense -- the jury found Bonds guilty of murder in the death of Ingram and guilty of reckless endangerment because Bonds had placed 3-year-old Jay Patrick in substantial risk of serious injury when he shot in the child's direction.[1] This appeal followed.

The sole issue raised by Bonds on appeal is that the circuit court erred in denying his motion for a judgment of acquittal because, he argues, "the State failed to make out a prima facie case of murder... because the State failed to disprove that the killing was done in self-defense." (Bonds's brief, p. 1-2.)

The issue of whether Bonds's killing of Ingram was justified on the grounds of self-defense is a question of the weight of the evidence. Garraway v. State, 337 So. 2d 1349, 1353 (Ala. Crim. App. 1976)("The weight and credence given the testimony of the accused as to the issue of self-defense is a question for the jury."). The weight of the evidence refers to whether the State's evidence is palpably less persuasive than the defense's evidence. Living v. State, 796 So. 2s 1121, 1141 (Ala. Crim. App. 2000). To the extent that Bonds challenges the weight of the evidence, we note that it is not the role of this Court to reweigh the evidence on appeal. "The issue of the weight to be afforded the evidence is a question for the jury and this Court will not invade the province of the jury by reweighing the evidence." Living, 796 So. 2d at 1141 (citing Pearson v. State, 601 So. 2d 1119, 1124 (Ala. Crim. App. 1992)).

Regarding Bonds's challenge to the sufficiency of the State's evidence, the role of this Court is well-settled:

> "'"In determining the sufficiency of the evidence to sustain a conviction, a reviewing court must accept as true all evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider all evidence in a light most favorable to the prosecution."' Ballenger v. State, 720 So. 2d 1033, 1034 (Ala. Crim. App. 1998), quoting Faircloth v. State, 471 485, 488 (Ala. Crim. App. 1984),

[1]Bonds does not appear to challenge his conviction for reckless endangerment on appeal.

aff'd, 471 So. 2d 493 (Ala. 1985). '"The test used in determining the sufficiency of evidence to sustain a conviction is whether, viewing the evidence in the light most favorable to the prosecution, a rational finder of fact could have found the defendant guilty beyond a reasonable doubt."' Nunn v. State, 697 So. 2d 497, 498 (Ala. Crim. App. 1997), quoting O'Neal v. State, 602 So. 2d 462, 464 (Ala. Crim. App. 1992). '"When there is legal evidence from which the jury could, by fair inference, find the defendant guilty, the trial court should submit [the case] to the jury, and, in such a case, this court will not disturb the trial court's decision."' Farrior v. State, 728 So. 2d 691, 696 (Ala. Crim. App. 1998), quoting Ward v. State, 557 So. 2d 848, 850 (Ala. Crim. App. 1990). 'The role of appellate courts is not to say what the facts are. Our role ... is to judge whether the evidence is legally sufficient to allow submission of an issue for decision [by] the jury.' Ex parte Bankston, 358 So. 2d 1040, 1042 (Ala. 1978).

> "'The trial court's denial of a motion for judgment of acquittal must be reviewed by determining whether there was legal evidence before the jury at the time the motion was made from which the jury by fair inference could find the defendant guilty. Thomas v. State, 363 So. 2d 1020 (Ala. Cr. App. 1978). In applying this standard, this court will determine only if legal evidence was presented from which the jury could have found the defendant guilty beyond a reasonable doubt. Willis v. State, 447 So. 2d 199 (Ala. Cr. App. 1983). When the evidence raises questions of fact for the jury and such evidence, if believed, is sufficient to sustain a conviction, the denial of a motion for judgment of acquittal does not constitute error. McConnell v. State, 429 So. 2d 662 (Ala. Cr. App. 1983).'"

Gavin v. State, 891 So. 2d 907, 974 (Ala. Crim. App. 2003),

cert. denied, 891 So. 2d 998 (Ala. 2004)(quoting Ward v. State, 610 So. 2d 1190, 1191 (Ala. Crim. App. 1992)).

A person commits the offense of murder if, "[w]ith intent to cause the death of another person, he or she causes the death of that person or of another person." § 13A-6-2(a)(1), Ala. Code 1975. In a prosecution for murder, the intent of the defendant "must be inferred by the jury from a due consideration of all of the material evidence." Rivers v. State, 624 So. 2d 211, 213 (Ala. Crim. App. 1993).

Contrary to Bonds's assertion, the State presented sufficient evidence from which the jury could conclude that Bonds murdered Ingram. Bonds had expressed an intent to kill Ingram before the murder to both Shonta and Richie. There was undisputed evidence presented at trial that Bonds shot Ingram repeatedly from a very close distance. After Ingram fell to the ground, Bonds walked around Ingram's vehicle, stood over him, and continued shooting until his gun was out of ammunition. After emptying his weapon, Bonds then "stomped" on Ingram's head. The record indicates that Ingram was not armed and could not have defended himself against Bonds's attack.

This Court's duty is to determine whether there was legally sufficient evidence to support Bonds's conviction for murder. See Gavin, 891 So. 2d at 974. The State presented ample evidence indicating that Bonds murdered Ingram, thus presenting a question for the jury's determination. The jury weighed the evidence and found Bonds guilty of murder. It is not this Court's responsibility to reweigh the evidence. Accordingly, no basis for reversal exists regarding this issue.

Based on the foregoing, the judgment of the circuit court is affirmed.

AFFIRMED.

Windom, P.J., and Welch, Burke, and Joiner, JJ., concur.

# Court of Criminal Appeals

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**MEMORANDUM**

CR-11-0068 Winston Circuit Court CC-09-399

Larry Craig McCluskey v. State of Alabama

KELLUM, Judge.

The appellant, Larry Craig McCluskey, was indicted by a Winston County grand jury for two counts of reckless murder, a violation of § 13A-6-2(a)(2), Ala. Code 1975; two counts of counts of reckless manslaughter, a violation of § 13A-6-3(a)(1), Ala. Code 1975; two counts of homicide by vehicle, driving under the influence, a violation of § 32-5A-192, Ala. Code 1975; two counts of homicide by vehicle, driving on the wrong side of the road, a violation of § 32-5A-192, Ala. Code 1975; and one count of criminally negligent homicide, a violation of § 13A-6-4, Ala. Code 1975. These charges arose

after McCluskey caused a fatal traffic collision that killed William and Doris Humphries while he was driving under the influence of a controlled substance. Following a jury trial, McCluskey was convicted of two counts of reckless manslaughter and four counts of vehicular homicide. However, the circuit court dismissed the vehicular homicide convictions as duplicitous, lesser-included offenses. The circuit court sentenced McCluskey to 20 years' imprisonment for each of the reckless manslaughter convictions and ordered the sentences to run consecutively. The circuit court further ordered McCluskey to pay a $15,000 fine, $17,015.36 in restitution, and court costs. This appeal followed.

I.

McCluskey contends that the circuit court erred in denying his motion to dismiss the six counts in the indictment that alleged he was driving under the influence of a controlled substance when he caused the fatal traffic collision. Specifically, McCluskey contends that the State's failure to comply with the circuit court's discovery order requiring the State to reveal the specific controlled substances relied on to support the charges was prejudicial, and that the suppression of this exculpatory evidence was in violation of Brady v. Maryland.[1]

Rule 16, Ala. R. Crim. P., governs discovery in criminal cases. Failure to comply with this rule is viewed with disfavor and is condemned. Morrison v. State, 601 So. 2d 165 (Ala. Crim. App. 1992). The rule places the remedy for violations within the sound discretion of the trial court, and to support a claim for reversal of the exercise of that discretion, the accused must show prejudice to substantial rights. McLemore v. State, 562 So. 2d 639 (Ala. Crim. App. 1989). Moreover, "[t]he trial court is in the best position to determine whether its discovery orders have been complied with, and we will not reverse its decision on discovery matters unless a clear abuse of discretion has been shown." Smith v. State, 698 So. 2d 189, 208 (Ala. Crim. App. 1996).

The record indicates that on September 2, 2010, McCluskey filed a "Motion to Produce and Motion in Limine." (C. 21.) In

[1]Brady v. Maryland, 373 U.S. 83 (1963).

that motion, McCluskey acknowledged that he was injured in the traffic collision that resulted in the deaths of William and Doris Humphries. McCluskey, who was treated at a hospital for his injuries, stated, "as a result of said treatment [he] was administered certain controlled substances which would render him incapable of safely driving." (C. 22.) Because McCluskey believed that admittance into evidence of any post-accident controlled substance would be highly prejudicial, he requested that the State provide, prior to trial, "the controlled substance or substances which the State of Alabama alleges [he] was under the influence [of] prior to the accident which rendered him incapable of safely driving." (C. 22-23.)

The circuit court granted McCluskey's discovery request, ordering the prosecutor "to respond to [the] discovery request contained herein no later than 30 days prior to trial." (C. 21.) On November 16, 2010, McCluskey filed a "Motion in Limine and Motion to Dismiss" in which he argued that because the State had not provided the description or name of the controlled substance it alleged he was under the influence of, all of the counts in his indictment that mentioned his being under the influence of a controlled substance should be dismissed. (C. 26.)

On May 16, 2011, the circuit court conducted a hearing on McCluskey's "Motion in Limine and Motion to Dismiss." According to the transcript of the hearing, the State did not directly respond to McCluskey's discovery request regarding controlled substances, but instead provided the medical records from McCluskey's stay at the hospital. According to those records, there were numerous substances found in McCluskey's blood that could have impaired his ability to drive, but only three -- methamphetamine, marijuana, and Diazepam (Valium) -- were determined by the State's expert to be unrelated to McCluskey's medical treatment while at the hospital. McCluskey also had an independent expert review his medical records to determine what medications were related to his medical treatment. (C. 21.)

During the hearing, the circuit court heard arguments from the State and McCluskey, and the circuit court questioned John Posey, McCluskey's first trial counsel who started preparing for trial before he was later replaced by Dale Jones. The following exchange occurred during the hearing:

"[THE COURT]: Do you recall specifically any discussions with the DA about methamphetamine and amphetamines?"

"[Posey]: I do recall your Honor, the district attorney making a remark that methamphetamine was not a drug that is -- "

"[THE COURT]: Administered by a hospital. He said that in here [the court room] with you standing before the Court, and I recall that as well."

(R. 128.) The circuit court then tried to determine whether Posey had relayed to Jones that the State was going to pursue methamphetamine as the controlled substance when he turned over the representation of McCluskey. Posey stated his communication with Jones was, "extremely limited." (C. 144.)

After this exchange, the circuit court denied McCluskey's motion, stating:

"I'm going to deny your motions, and this is the reason why: I have been in this circuit as a judge for eight years. I have never required, nor have I ever had an attorney to expect written responses on discovery because that is humanly impossible to accomplish in any case. The DA has a number of cases to handle. I got with him early on when I took office and I said, 'look, open book. We're not going to have any trial by ambush.' And for you to come in here this morning and try to state and assert to the Court that you're being ambushed, that you were unaware of the fact that the State -- I say 'fact,' that the clear indication that the State is going after the meth as opposed to the Lidocaine or anything else ... I find it totally implausible that you could claim that you've been ambushed by the State."

"...

"I can tell you that based upon what I've heard here today in the courtroom, what I personally recall myself involving this -- and I remember when

> you mentioned the snide remark [the State] made about the meth, which was a clear indication where he was going. I mean, if you want a road map, a written road map, you've got it. I certainly did, and you know a lot more about -- y'all know a lot more about the facts of this case.
>
> "...
>
> "Any assertion by you that you're being ambushed is ludicrous. Any assertion by you that you expected and should have gotten written responses to your discovery request is equally, in this circuit, ludicrous. And I am also going to rule that under your Motions in Limine I think number one, two three four, and five are hereby denied."

(R. 145-48.) After this motion was denied the trial proceeded, and the State used methamphetamine and marijuana as the specific controlled substances to support the charge of driving under the influence of a controlled substance.

As discussed above, "[t]he trial court is in the best position to determine whether its discovery orders have been complied with, and we will not reverse its decision on discovery matters unless a clear abuse of discretion has been shown." Smith 698 So. 2d at 208 (Ala. Crim. App. 1996). The transcript of the hearing on the motion in limine and the record on appeal indicate that the circuit court did not abuse its discretion when it determined that the State's failure to provide McCluskey with the specific controlled substances it relied on to support a conviction for reckless manslaughter did not warrant dismissal of any charges. McCluskey was provided with medical records that demonstrated his blood contained methamphetamine and marijuana, two drugs that were clearly not administered by first responders or hospital workers to treat his injuries after the vehicle collision. In addition, there was ample discussion between the district attorney and McCluskey indicating that the State was going to rely on methamphetamine and marijuana such that no prejudice resulted from the failure of the State to provide a written response to the circuit court's discovery order. Because the circuit court's ample explanation for its denial of McCluskey's motion to dismiss is supported by the facts and

the record of this case, the circuit court did not abuse its discretion when it denied McCluskey's motion to dismiss.

McCluskey's argument that the State violated the rule of Brady v. Maryland when it did not comply with the circuit court's discovery order is also without merit.

> "'"In Brady v. Maryland, 373 U.S. [83] at 87, [83 S.Ct. 1194 at 1196-97, 10 L.Ed.2d 215 (1963) ], the Supreme Court held that 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' To establish a Brady violation, defendant must show that (1) the prosecution suppressed evidence, (2) the evidence suppressed was favorable to the defendant or was exculpatory, and (3) the evidence suppressed was material to the issues at trial. Ex parte Kennedy, 472 So. 2d 1106 (Ala. 1985), cert. denied, 474 U.S. 975, [106 S.Ct. 340, 88 L.Ed.2d 325] (1985)."

Mitchell v. State, 706 So. 2d 787, 805 (Ala. Crim. App. 1997). The purpose of the Brady rule is "not to provide a defendant with complete disclosure of all evidence in the State's file which might conceivably assist him in the preparation of his defense," but instead is meant to ensure the defendant is not denied access to exculpatory evidence known to the State but unknown to the defense. McMullin v. State, 442 So. 2d 155, 158 (Ala. Crim. App. 1983)(quoting United States v. Ruggiero, 472 F. 2d 599, 604 (2nd Cir. 1973)).

In the instant case, it cannot be said that the State denied McCluskey access to exculpatory evidence. The circuit court noted that the State had an open-file policy, allowing McCluskey to review the file and have access to whatever non-privileged information it contained. This file included the medical records which indicated that McCluskey had two illegal drugs in his blood stream at the time of the car accident. The State provided McCluskey with the evidence that it intended to use at trial in accordance with Brady. Therefore, the circuit court did not abuse its discretion in denying McCluskey's Brady claim.

II.

McCluskey also contends that the circuit court erred in refusing to grant a mistrial because, McCluskey argues, a State witness provided testimony about controlled substances other than methamphetamine and marijuana that were present in McCluskey's blood sample. Specifically, McCluskey argues that this testimony directly contradicted the State's assertions to the circuit court and McCluskey that the witness would discuss only methamphetamine and marijuana.

The record indicates that the State was assisted by Dr. Jack Kalin, Chief of the Alabama Department of Forensic Science. Dr. Kalin helped the State determine which controlled substances in McCluskey's blood contributed to the traffic collision and which substances in his blood were present because of medical treatment after the collision. Before Dr. Kalin's testimony, the State and McCluskey discussed what Dr. Kalin could tell the jury with regard to the controlled substances in McCluskey's blood sample. The State asserted that it would not ask any questions about any other controlled substances aside from methamphetamine and marijuana, and the circuit court responded to McCluskey's concerns as follows:

> "If in fact [Dr. Kalin] – if he makes any comment unsolicited by the DA – I don't think the DA, based on what he's just said, is going to try to go and show that there were any other controlled substances that the State contends were abused that proximately caused this accident other than meth and marijuana. But if Dr. Kalin or this other fellow blurt out anything, I will certainly have the jury to disregard that. I don't foresee that happening."

(R. 367.)

During his testimony, Dr. Kalin, in fact, made an unsolicited comment, testifying that "Diazepam (Valium), Nordiazepam[2], methamphetamine, amphetamine, and 9-Carboxy-Delta-9-THC (marijuana)" were present in McCluskey's system but were not administered for the treatment of McCluskey's

[2]Nordiazepam is an active metabolite of Diazepam.

injuries. (R. 487.) At that point, the circuit court asked the witness if the controlled substances other than methamphetamine and marijuana had any relevance to the proceedings. Dr. Kalin responded affirmatively, and the circuit court subsequently excused the jury.

After the jury exited the courtroom, the following exchange occurred:

> "[THE COURT]: From day one I've heard nothing from the State of Alabama but the only illegal substance that they allege the defendant was under which hampered his ability to safely drive a vehicle was meth and marijuana. I think marijuana by the evidence has pretty much been excluded by the prior witness. Now I'm hearing Diazepam and Nordiazepam. Where are you and this witness going with that?"
>
> "[THE STATE]: Judge, he and I had a conversation, and we talked about the fact that meth was the main contributor, is that correct as far as his impairment."
>
> "[Dr. Kalin]: That's the primary contribution, yes.
>
> "[THE COURT]: If he's going to offer testimony that these other two had anything to do with this, I'm going to instruct him - I'm either going to have to grant a mistrial because you haven't given notice to the defense attorney, and you have misled this Court as to where you're proceeding, or"
>
> "[THE STATE]: No sir. We're strictly going on methamphetamine."

(R. 488-89.)

After this exchange, the circuit court explained to the parties that it would be necessary to give an instruction to the jury in order to cure the prejudicial testimony of Dr. Kalin. The circuit court's instruction was, in part, as follows:

> "Now, specifically what I'm saying is Diazepam

> and Nordiazepam don't have diddly squat to do with this case, don't have diddly squat to do with this defendant, and I want you to totally strike any consideration from your mind with regard to the ultimate issue of whether or not the State's proven beyond a reasonable doubt that at the time of this accident the defendant was impaired to the point that - to the degree that he could not safely operate a motor vehicle. I'm making the same instruction to you with regard to this notation about THC or marijuana.
>
> "I hope I've made myself clear that you are not to consider the marijuana, the Diazepam, Nordiazepam with regard to your consideration of whether or not the State has proven beyond a reasonable doubt any, if at all, impairment the defendant may have had at the time of his accident. So what I'm saying is the only thing at this juncture that's on the table is a question involving a finding that you've heard earlier testified about of methamphetamine."

(R. 497.) After the circuit court completed the instruction, the jury was asked whether they understood the instruction. Several of the jurors nodded their heads, and when the circuit court asked, "do any of the jurors not understand what I've just tried to say," there was no response from the jury. (R. 498.) The State subsequently pursued the charges against McCluskey on the theory that methamphetamine alone was the substance he was under the influence of when the accident occurred.

"'The grant or denial of a mistrial is a matter within the sound discretion of the trial court, and its ruling will be disturbed only if an abuse of that discretion is shown.'" Culver v. State, 22 So. 3d 499, 518 (Ala. Crim. App. 2008)(quoting J.E. v. State, 997 So. 2d 335, 341 (Ala. Crim. App. 2007)). In Wilson v. State, 777 So. 2d 856 (Ala. Crim. App.), this court considered when prejudicial remarks require a mistrial:

> "Where the trial court immediately instructs the jury not to consider a fact, that instruction, in effect, removes or excludes that matter from the

> jury's consideration, and the prejudicial effect of the statement is deemed to be cured by such instruction. Bradley v. State, 450 So. 2d 173, 176 (Ala. Crim. App. 1983); Richardson v. State, 374 So. 2d 433 (Ala. Crim. App. 1979). The trial judge's immediate charge to the jury to disregard an impropriety raises a prima facie presumption against error. Kelley v. State, 405 So. 2d 728 (Ala. Crim. App.), cert. denied, 405 So. 2d 731 (Ala. 1981).
>
> "'The entry of a mistrial is not lightly to be undertaken. It should be only a last resort, as in cases of otherwise ineradicable prejudice. Where error is eradicable a mistrial is too drastic and is properly denied.' Woods. v. State, 460 So. 2d 291, 296 (Ala. Crim. App. 1984); Chillous v. State, 405 So. 2d 58 (Ala. Crim. App. 1981).
>
> "'When prejudicial remarks have been made, the trial judge is in a better position than the appellate court to determine whether the remarks were so prejudicial as to be ineradicable.' Chambers v. State, 382 So.2d 632, 635 (Ala. Crim. App.), cert. denied, 382 So. 2d 636 (Ala. 1980)."

777 So. 2d at 919 (some internal citations omitted).

In the instant case, the remarks made by Dr. Kalin were not highly prejudicial. Dr. Kalin used the medical terminology for the controlled substances found in McCluskey's blood and not the more familiar name of Valium. Dr. Kalin also stated that the controlled substances were relevant but he did not say anything about the sort of impairment that would occur should someone drive under the influence of those controlled substances. The circuit court provided a curative instruction immediately after the prejudicial remarks were made. This instruction eradicated the limited prejudice of Dr. Kalin's remarks because the circuit court made clear that the only controlled substance that the jury should consider when determining whether McCluskey was driving under the influence of a controlled substance was methamphetamine. The jury was specifically told to ignore marijuana and Diazepam and Nordiazepam, and the circuit court explicitly told the jury those drugs "don't have diddly squat to do with this case."

(R. 497.) Because this curative instruction was immediate and removed the prejudicial effect of Dr. Kalin's unsolicited remark, the circuit court did not abuse its discretion when it determined that a mistrial was "too drastic" given the facts and circumstances in this case. See Wilson, 777 So. 2d at 919.

Based on the foregoing, the judgment of the circuit court is affirmed.

AFFIRMED.

Windom, P.J., and Welch, Burke, and Joiner, JJ., concur.