IN THE
SUPREME COURT OF MARYLAND

SEPTEMBER TERM, 2024

NO. 7

MOIRA E. AKERS,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE
APPELLATE COURT OF MARYLAND

BRIEF OF RESPONDENT

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INTRODUCTION

A jury convicted Moira Akers of committing second-degree murder of Baby A just after he had taken his first breaths. The State presented evidence that Akers concealed her pregnancy from everyone, including her husband Ian Akers. She gave birth in her bathroom (still without his knowledge). She did not check Baby A for signs of life, or to see if the baby was a boy or a girl. She put his body into a plastic storage bag and placed him unceremoniously in the closet, with blankets on top of the bag.

After authorities found Baby A's body (a delayed process, because Akers did not tell anyone about the baby until she could no longer conceal her condition from doctors), Akers claimed she only found out she was pregnant after it was too late to get an abortion (a lie disproven by her medical records) and that her plan had been to take the baby to a safe haven (a claim uncorroborated by any evidence). The State's expert, Assistant Medical Examiner Dr. Nikki Mourtzinos, testified that Baby A was breathing after delivery, the cause of his death was asphyxiation, and the manner of death was homicide. That is, the evidence established that Akers murdered Baby A right after he was born.

The State charged Akers with first- and second-degree murder and child abuse resulting in death. The State posited that Akers never intended to let Baby A live if he were born alive, and at the very least had remained in denial about the pregnancy and chose not to see if he was alive at birth. It proffered evidence in support of that theory in two particular categories that Akers challenges on appeal: that Akers, a 37-year-old mother twice over, forwent prenatal care even though she had gotten such care for her other two children ("disparate prenatal care evidence"), and that Akers conducted online searches early in her pregnancy, when she could legally have gotten an abortion, about at-home pregnancy termination methods ("self-help termination evidence").

The context of this case made the facts in both those categories relevant to the State's theory about Akers' state of mind and to her credibility, and the trial judge correctly deemed the evidence relevant. From there, the judge properly exercised his discretion in determining that the probative value of the evidence was not substantially outweighed by any danger of unfair prejudice. The Appellate Court affirmed.

In her appeal to this Court, Akers presents an alternate factual narrative that Baby A was stillborn—a narrative the jury rejected. She whitewashes her admissions that after delivery, and without looking to see if Baby A was breathing, she wrapped him in a towel, put him in a bag, and hid him in a closet. She glosses over evidence that she did not tell EMTs she had been pregnant or that Baby A lay upstairs in a closet, and that she saw two health care providers without disclosing the delivery before an exam exposed her severed umbilical cord protruding from her vagina.

Akers' brief also contains only passing mention of the Appellate Court's opinion. That court repeatedly stressed Akers' highly unusual behavior—concealing the pregnancy, delivering the baby in secret and getting no help for the baby or herself, and continuing not to disclose it to EMTs or health care providers—as it affirmed the trial court's rulings admitting the disparate prenatal care and self-help termination evidence.

Akers now asks this Court to rule that evidence a woman has forgone prenatal care and considered self-help methods to end a pregnancy in its early stages is irrelevant per se to establishing intent to murder her newborn. That request asks this Court to

carve out an across-the-board exception to fundamental rules governing admissibility of evidence and to afford this evidence special treatment, for no other reason than its political and social significance. This Court should reject that invitation and affirm the proper application of the accepted, fact-specific approach that governs a relevance inquiry under Maryland Rule 5-401 and a trial court's balancing of evidence under Maryland Rule 5-403.

Baby A's death presented a bizarre and sad case where his mother concealed her pregnancy and his brief life ended in a closet. The Appellate Court repeatedly stressed the uniqueness of this case, thereby proving the point that a decision about relevance defies a one-size-fits-all approach. This would present a different appeal indeed if it resembled some of the out-of-state cases Akers cites, which often involve either the birth of a stillborn baby (Baby A was not that), or a young woman faced with no resources or family support who lacks life experience to manage a decision whether to exercise a right that in many states is now curtailed by law (Akers was not that). But the fact that a woman's decision whether to terminate a pregnancy is deeply personal and often difficult does not justify excising from this trial any and all

evidence that even touches on the issue. Doing so would effectively import into the law an unprecedented morals-based relevance test that this Court should decline to adopt.

STATEMENT OF THE CASE

Respondent, the State of Maryland, accepts the Statement of the Case in Petitioner Moira E. Akers' brief, clarifying that the charges against her included first- and second-degree murder, and child abuse resulting in death. The jury acquitted her of first-degree murder and convicted her of the other charges.

QUESTION PRESENTED

Should this Court decline to adopt Akers' proposed categorical rule that, where a woman is charged with murdering her newborn infant and has concealed evidence of the pregnancy and birth, evidence that she forwent prenatal care and explored self-help methods to terminate the pregnancy (when she could have done so legally) can never be relevant to proving an intent to kill her newborn, and that a judge lacks discretion to determine that the probative value of such evidence is not substantially outweighed by the danger of unfair prejudice?

STATEMENT OF FACTS & PROCEDURAL HISTORY

1. *Akers' pregnancy and Baby A's birth*

Akers confirmed she was pregnant with Baby A on May 14, 2018, when she visited Dr. Danielle Waldrop. (E.231, 233-34, 395).[1] According to her (unobjected to) medical record (State's Ex. 50; E.431), she "came to discuss termination." (E.232, 431). She and Ian first planned to terminate the pregnancy, but she told him after her visit that it was ectopic and then hid the pregnancy from everyone. (E.394, 396-97). She later claimed to Detective Tambra Weigman, who interviewed her the night of Baby A's death, that she had been in denial and "kept hoping something would happen" so the baby would "[g]o away[.]" (E.397-98). Evidently, her decision not to get prenatal care for Baby A (which she did get during prior pregnancies) (E.420) was part of that approach. (E.398).

Contrary to her medical records, Akers later claimed she was told at the May doctor's visit that it was too late to terminate:

> [AKERS]: So, he was, (sigh), I, I had told [Ian] that I had an ectopic pregnancy, so we had taken care of it.

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[1] The State adopts Akers' citation form for the Joint Record Extract, Petitioner's Brief Appendix (which contains the Appellate Court opinion), and the trial transcripts. (Petitioner's Br. at 1 n.1).

> [DETECTIVE WEIGMAN]: So why did you tell him that?
>
> [AKERS]: Because I was, when I went to the doctor to confirm it, I was too late to, to terminate it.
>
> * * *
>
> [DETECTIVE WEIGMAN]: So when you went for that you were at 15 weeks.
>
> [AKERS]: Yeah. [2]

(E.394-95).

Akers related the following story about Baby A's birth. She started having heavy contractions and her water broke in the early afternoon. (E.391). She "felt like [she] had to go to the bathroom," so she sat on the toilet. (E.392). After a time, she delivered the baby into the toilet and got a towel: "I just grabbed it and grabbed him, or I didn't even look at *the thing*." (E.416) (emphasis added).

The baby was not making noise, and although she knew babies are often delivered without crying (E.414), she assumed Baby A was dead: she "thought it was too late, because the baby hadn't been moving for a couple days at the point, inside[,] . . . so I

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[2] Despite Akers' claim that she was 15 weeks pregnant when she went to Dr. Waldrop (E.395), the medical record placed gestational age at 11 weeks and 1 day. (E.233, 432).

assumed it was just, it had already passed." (E.399). She did not know Baby A's sex (E.403) and "didn't look at the baby that closely." (E.414). She carried Baby A into her bedroom and cut the umbilical cord. (E.393). She wrapped him in her son's "Star Wars" bath towel, put him in a blue-tinted, clear, plastic Ziploc clothing storage bag, put the bag in the closet under blankets, and shut the door. (E.393-94; T2.199).

Ian found Akers upstairs trying to clean up blood and was concerned she was bleeding heavily (she did not tell him why), so he called 911. (E.83-84, 394; State's Ex. 1). Paramedic Thomas Sullivan and Emergency Medical Technician ("EMT") Irvin Black responded, and Akers told them there was no chance she was pregnant, and that she had an ectopic pregnancy some time ago; she did not tell them she had just delivered a baby. (E.93-94, 126).

2. *Akers' admission to Howard County General Hospital and the police investigation*

Nurse Lynn Cannade met Akers in an exam room at Howard County General Hospital; her clothing was saturated with blood. (E.155-56). Akers told her about a purported pregnancy in May 2018. (E.156), but it was only when the nurse removed Akers'

clothing that she saw the severed umbilical cord protruding from Akers' vagina and Akers revealed the truth. (E.156-57, 164).

Akers was not forthcoming with emergency room physician Dr. Igor Kukelyansky. (E.167, 173). He did not know she just delivered a baby, and he recalled his shock when he performed a visual exam and saw her umbilical cord. (E.169-70). Dr. Carol Goundry, the obstetrician on call at the time, saw Akers with him and was the first to ask the baby's fate. (T2.165-66). Akers told the doctors "that it was in a closet at home in a Ziploc bag." (E.173).

Akers came to the hospital alone in the ambulance, and Ian arrived shortly thereafter. (E.158, 376). Staff did not allow him to see her; she told them not to permit him in her room. (*Id.*).

In the meantime, Paramedic Sullivan and EMT Black rushed back to the house. (E.97-98). They saw blood throughout the upstairs, and the closet door was closed, with a bloody smear on the doorknob. (E.129, 132). Baby A's body was in the bag under other items, and Paramedic Sullivan carefully extricated him. (E.111, 134-35). The bag had condensation inside, "where you could see something warm had been in there." (E.135). Finding no signs of life, they did not perform CPR. (E.111, 120, 136-37).

Police returned to the Akers home, including Detective Patrick Rafferty (who was assigned to the Howard County Child Advocacy Center). (T2.194). He saw blood leading into the master bedroom and in the bathroom, and he recovered a blood-soaked towel on the stairs and a blood-soiled bathmat in the washing machine. (T2.198-99, 207-08). He recovered a pair of scissors from the bathroom, which Akers used to cut the umbilical cord. (T2.201).

Police took Akers' cellphone and discovered the self-help termination evidence. (T3.92).[3] Akers performed the searches between March and May of 2018, when she could have "legally secure[d] abortion services in Maryland." (App. 15).

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[3] The State introduced two extraction reports from Akers' cellphone conducted by digital forensics expert Detective Joshua Lapier. (E.247). The report, State's Ex 52, showed that at an unspecified time, Akers searched "medicine to cause miscarriage" and "scheduling an abortion." (E.252). On March 4, 2018, she searched "over the counter pills that cause miscarriage," "does rue extract cause you to miscarry," and "rue tea for abortion." (E. 256-61, 435-36, 444-46). On March 8, 2018, she searched "miscarriage at 7 weeks" and "miscarriage at 7 weeks do I need a d&c." (E.255-56, 261, 434, 433). On May 4, 2018, she searched "how to end an ectopic pregnancy" and "how to treat an ectopic pregnancy naturally." (E.255, 261, 437-38, 441). She searched on eBay for "Misoprostol in Midtrimester Termination of Pregnancy: Oral and Vaginal" and visited a website partially titled "Women Resort to Over-the-Counter Remedies to End Pregnancies[.]" (State's Ex. 53; E.444-47).

3. *Pre-trial motions, the State's evidence at trial that Baby A was alive at birth, and the appeal.*

Before trial, Akers moved to exclude the disparate prenatal care and self-help termination evidence. She argued the evidence was irrelevant and unduly prejudicial, and the issue of forgoing prenatal care would "cause confusion of the issues." (E.33).

The court denied Akers' motion, holding that her conduct was relevant and probative to the question of intent to commit murder and child abuse. (E.50). The court found that any danger of unfair prejudice did not substantially outweigh the evidence's probative value. (E.51). It also denied Akers' pre-trial motions to exclude both her statement to Detective Weigman (M1.106), and testing performed by Dr. Mourtzinos. (M4.49).

At trial, the State posited that Akers made a series of choices that led her to deliver a baby she did not want, and that "she chose to decide that [Baby A] was stillborn." (E.63, 65). The prosecutor also argued the more sinister theory that Akers smothered Baby A and let him die in the closet. (E.71).

Among its witnesses, the State called Dr. Mourtzinos, who performed Baby A's autopsy as Assistant Medical Examiner. At

birth Baby A was fully developed, measuring 19" long and weighing over 7 pounds. (T5.34). The doctor's testing led her to conclude he had taken in air and was born alive. (T5.73, 100). *See* Md. Code Ann., Health General § 4-201(n) (stating that to prove "live birth," the State must show an infant "breathes or shows any other evidence of life"). The cause of death was asphyxiation and exposure; the manner of death was homicide. (T5.101-02).

Akers raised four issues on appeal, and the Appellate Court affirmed in an unreported opinion.[4] It noted, in discussing this issue in particular, the highly unusual nature of this case and the narrow, fact-bound scope of its holding. (App. 22, 23). It deemed the disparate prenatal care and self-help termination evidence relevant under Maryland Rule 5-401 and held that the trial court properly exercised its discretion under Rule 5-403. (App. 14-31).

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[4] While only one issue is before this Court, the other issues have tangential importance. The Appellate Court deemed Dr. Mourtzinos' testing admissible, noting the trial court's finding that the State's experts were "more convincing" than Akers' experts. (App. 9). It affirmed admission of Akers' statement, pointing out that she was "an adult woman with some college education" and Detective Weigman was not antagonistic or threatening. (App. 38). Finally, the court rejected Akers' challenge to the legal sufficiency of the evidence, where she had argued that the evidence did not establish Baby A was born alive. (App. 41-42).

ARGUMENT

I.

THE TEST FOR RELEVANCE SETS A LOW BAR FOR ADMITTING PROBATIVE AND MATERIAL EVIDENCE IN THE CONTEXT OF A PARTICULAR CASE, AND A TRIAL COURT'S SUBSEQUENT BALANCING DOES NOT COUNTENANCE WHOLESALE EXCLUSION OF A CLASS OF EVIDENCE.

A. The bar for relevance is low and context-specific.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401 (LexisNexis 2024). The standard has two dimensions: (1) evidence must be probative of the proposition it is offered to prove—i.e., it logically tends to make the proposition more or less likely (probity); and (2) the proposition that the evidence affects must be consequential to an issue in the case (materiality). *Lai v. Sagle*, 373 Md. 306, 319 (2003). Such evidence is presumptively admissible, Md. Rule 5-402 (LexisNexis 2024), and the test sets a low bar for admission. *Williams v. State*, 457 Md. 551, 564 (2018); *Montague v. State*, 471 Md. 657, 695 (2020).

Evidence having *any* tendency to increase or decrease the likelihood of the proposition qualifies as probative. It "need not prove conclusively the proposition for which it is offered," and it "need not ever make that proposition appear more probable than not." *Smith v. State*, 423 Md. 573, 591 (2011) (internal quotations omitted). Rather, "it is enough if the item could reasonably show that a fact is slightly more probable than it would appear without the evidence." *Id.* (internal quotations omitted).

Importantly, the relevance analysis does not take place in a vacuum. *Snyder v. State*, 361 Md. 580, 592 (2000). Instead, the test asks whether, in conjunction with all other evidence, "the evidence tends to make the proposition asserted more or less probable." *Id.*[5] In sum, in order to be relevant, evidence has to move the needle, if even a little, to help prove a fact that matters.

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[5] McLain offers a helpful hypothetical where, on the one hand, evidence that a defendant learned of his wife's adultery with the victim a month before the victim's murder is material and relevant if offered "to establish the material issue of motive, and thus is admissible." Lynn McLain, *Maryland Evidence State & Federal*, § 401:1 (Westlaw 2024). The month-earlier discovery would not, on the other hand, be relevant for the same defendant to establish "the mitigating circumstance of heat of passion," because it is "too remote from the day of the crime to be proper proof of the issue of mitigation." *Id.*

B. Even if evidence is relevant, a trial court retains discretion to exclude certain evidence under Maryland Rule 5-403.

The trial court retains discretion to exclude relevant evidence if its probative value is substantially outweighed by the danger of: (1) unfair prejudice, (2) confusion of the issues, (3) misleading the jury, or (4) wasting time. Md. Rule 5-403 (LexisNexis 2024). This case focuses on the danger of alleged unfair prejudice, which arises when evidence has an "adverse effect . . . beyond tending to prove the fact or issue that justified its admission." *Woodlin v. State*, 484 Md. 253, 265 (2023) (cleaned up).

The emphasis is on the unfairness of the prejudice. A court does "not exclude relevant evidence merely because it is prejudicial," *id.*, in the sense that it lessens the defendant's chance for an acquittal. *Odum v. State*, 412 Md. 593, 615 (2010). Rather, prejudice is unfair, and may justify exclusion of relevant evidence, only when it "produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case." *Id.* (internal quotations omitted); *see, e.g.*, *Burris v. State*, 435 Md. 370, 393 (2013) (explaining "the inherent danger of unfair prejudice with the admission of gang evidence because a

jury may respond viscerally to a negative image of a gang and associate the defendant with that unfavorable viewpoint, thereby vilifying him or her").

II.

THE DISPARATE PRENATAL CARE EVIDENCE WAS RELEVANT, AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING IT.

Akers had already carried and delivered two children by the time she became pregnant with Baby A. She obtained prenatal care during her pregnancies with her two prior children but did not do so with Baby A. This disparate prenatal care evidence did not matter in the abstract, but it mattered in light of the other evidence. It tended to show that during the pregnancy Akers did not want Baby A, did not make plans for his arrival, and could have intended even then to kill him if he was born alive. It also took on greater probative value in combination with the self-help termination evidence.

A. The court was legally correct in deeming the disparate prenatal care evidence relevant on these facts, and policy considerations do not justify undoing that decision.

1. *The evidence was relevant in the context of this case.*

The Appellate Court was correct that the facts of this case were stunningly unique: unchallenged evidence showed that Akers did not want Baby A, denied the pregnancy, delivered him in secret, tried to cover up evidence of the birth, concealed his body, and failed to disclose his existence until medical evidence made it undeniable. Expert evidence contradicted her unsubstantiated claims of stillbirth and showed, instead, that Baby A was born alive. The disparate prenatal care evidence helped to "move the needle" to establish the State's case that Akers murdered Baby A.

Akers made her view of the pregnancy clear in her statement and ostensibly explained why she did not get prenatal care:

> [DETECTIVE WEIGMAN]: Were you seeking, were you getting care? Like prenatal care? At all?
>
> [AKERS]: No.
>
> * * *

> [DETECTIVE WEIGMAN]: So how come you didn't get any prenatal care or anything?
>
> [AKERS]: Just—
>
> [DETECTIVE WEIGMAN]: Was that like part of your thing of hoping that it would go away?
>
> [AKERS]: Yeah.
>
> [DETECTIVE WEIGMAN]: Okay.
>
> [AKERS]: Like I almost didn't want to admit to myself that it was.

(E.398).

This evidence (and Akers' almost casual admission about her state of denial) made apparent that throughout the pregnancy, Akers declined to invest any resources or energy in nourishing the baby's healthy development because she did not want, and did not intend, for him to survive. That fact was important to support the State's theory that she remained in denial about the pregnancy to the point that she "chose," as the prosecutor had put it, simply to assume that Baby A was stillborn. (E.65).

Moreover, the law did not require that each piece of evidence, standing alone, prove the State's case unequivocally; rather, each had only to satisfy the low bar of relevance and did. And importantly, each piece of evidence at issue here served, too,

to reinforce the value of the other. *See Montague*, 471 Md. at 689 (deeming relevant evidence that Montague wrote rap lyrics detailing circumstances of victim's murder and noting that nexus between rap lyrics and the details of the crime was "strengthened—and thus probative value is heightened," when lyrics contain other relevant references). In much the same way that the nexus between—and therefore relevance of—Montague's rap lyrics and his crime was strengthened by other references within the lyrics, the nexus between the disparate prenatal care evidence and Baby A's murder was strengthened by the self-help termination evidence, and vice versa.

Finally, the State sought to prove first-degree murder, the elements of which include intent and premeditation. *See Garcia v. State*, 480 Md. 467, 477 (2022), *reconsideration denied* (Sept. 26, 2022). "An intent to kill often must be proved by circumstantial evidence and found by inference. Absent an admission by the accused, it rarely can be proved directly." *Burch v. State*, 346 Md. 253, 273 (1997) (citing *State v. Earp*, 319 Md. 156, 167 (1990)). The disparate prenatal care evidence demonstrated that Akers treated this pregnancy differently from her prior pregnancies (which

ended in the births of her two living children, who unlike Baby A survived well beyond the day of their respective births), and it operated as circumstantial evidence that she intended a different result with this pregnancy. The jury could infer that that different result was that she did not intend for Baby A to live. (App. 20) (citing *Thomas v. State*, 372 Md. 342, 351 (2002)).

The fact that a parent does not act to care for a baby before his birth does not matter in the abstract, but it can be probative of their actions at birth. The degree of relevance is context-dependent, based on factors such as temporal connection between delivery and harm to the child, or method and extent of injury. But Akers' breathtaking claim that such evidence can *never* be relevant unjustifiably creates a wide field of conduct that can never be examined in a criminal case.

Akers appears to view the only time at which her mental state mattered to be the time of delivery. (Petitioner's Br. at 23) (discussing her "state of mind at delivery"). But that perspective unduly limits the time period that the State could seek to establish her thought process. That is, the State had to prove Akers intended on the day he was born to murder Baby A. As a result, evidence

that, in the months leading up to the delivery of Baby A, she took actions inconsistent with an expectation of having a healthy, living baby was relevant to her intent. *Snyder*, 361 Md. at 605.[6]

2. *The policy reasons not to intrude on a woman's decision to forgo prenatal care do not justify an arbitrary rule deeming evidence about it never to be relevant.*

Akers points out that a woman is not obligated to seek prenatal care, and a decision not to obtain prenatal care surely is not a crime. (Petitioner's Br. at 27) (citing Md. Code Ann., Criminal Law ("CR") § 2-103(f), and *Kilmon v. State*, 394 Md. 168 (2006)). But neither the statute nor this Court's decision in *Kilmon* affects a relevancy determination here.

Section 2-103(f) is part of a statute that created the first Maryland law to allow "the State to charge a person with the murder or manslaughter of a viable fetus[,]" but it "does not create a new crime" or include penalty provisions. *State v. Fabien*, 259

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[6] The State disagrees with Akers' claim that the State altered its argument on appeal. (Petitioner's Br. at 22-23). The State has consistently argued that Akers' actions during pregnancy showed her intent formed *over that period of time* to kill Baby A if he were born alive. Her actions were also suggestive of motive: that she never wanted the baby. (E.40; State's ACM Br. at 20, 24-26).

Md. App. 1, 14 (2023). Rather, "[i]nstead of expanding the concept of 'personhood' to include a viable fetus, the General Assembly created a new class of victim, a viable fetus, the death of which could be prosecuted for murder or manslaughter." *Id.* at 37.

It is in that context that CR §2-103(f) ensures the statute not be read to confer rights or personhood on a fetus. That point is unconnected to this case. Akers was charged not with committing a crime against her fetus but with murdering her newborn son. Lack of prenatal care is but one piece of evidence probative of her intent to kill her child. It does not elevate her fetus to the level of "personhood" or punish her for not getting prenatal care.[7]

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[7] To the extent Akers raises a policy argument that evidence relating to prenatal care should be categorically deemed irrelevant because of any policy against "fetal personhood," that argument is untethered to the facts of this case and does not justify a suspension of rules governing admissibility of evidence where the defendant has been charged with murder. Any such change—particularly where, as Akers stresses, the matter involves a fundamental right—should be accomplished by legislation rather than by a judicial declaration in this highly unusual case. *See Woodlin*, 484 Md. at 266-67 (noting that if narrow scope of rule permitting prior sexually assaultive behavior "was to be expanded, then such a change would need to come from the General Assembly or by this Court, sitting in its legislative capacity, exercising its authority to enact Rules of Practice and Procedure and Rules of Evidence, not by judicial fiat") (cleaned up).

Kilmon also does not undo the relevance of the disparate prenatal care evidence here. There, this Court considered whether the State could charge two women with reckless endangerment of their newborns by using controlled dangerous substances while pregnant. *See* CR § 3-204. This Court held that the statute was not intended to criminalize that conduct. 394 Md. at 182. The facts in *Kilmon* patently would not have supported a murder charge, *id.* at 170-71, and Akers does not explain how it alters the analysis.

Here, the purpose of introducing the disparate prenatal care evidence was not to suggest that the jury should punish Akers. Rather, the evidence was relevant against the backdrop of the facts surrounding her pregnancy and the fact that Baby A was alive at birth. Even if this Court accepts Akers' argument that evidence of lack of prenatal care is prejudicial, that does not factor into a threshold relevance calculus; if anything it would constitute a part of a trial court's Rule 5-403 balancing.

The Appellate Court addressed Akers' concern, pointing out that forgoing prenatal care is "a legally protected activity," and it is "typically either irrelevant or minimally probative of a mother's intent to subsequently harm her child after birth." (App. 22) (citing

CR § 2-103). But the first point does not drive the second. Relevance is not determined by a policy about the importance of protecting a woman's rights. It is driven by the facts in a particular case—which here were "far from typical." (App. 22). The existence of a sound policy against criminalizing a decision not to obtain prenatal care is not grounds to exclude evidence of that decision where it is relevant to help prove a fact that matters in a particular criminal case.

B. The trial court properly exercised its discretion in concluding that the disparate prenatal care evidence was admissible under Maryland Rule 5-403.

1. *Akers' claims that the disparate prenatal care evidence created confusion of the issues and that the judge did not make sufficient on-the-record findings are forfeit on appeal and fail on the merits.*

Akers raises two new grounds for reversal, ostensibly connected to Rule 5-403: the notion that the prenatal care evidence (and, for that matter, the self-help termination evidence) confused the issues and a claim that the judge did not articulate his ruling on the record. (Petitioner's Br. at 35-36). Neither claim is preserved.

This Court should decline to address issues not argued before the Appellate Court and not properly preserved for review. Md. Rule 8-131(a) (LexisNexis 2024) ("Ordinarily, an appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"); Md. Rule 8-131(b)(1) (providing that "in reviewing a decision rendered by the Appellate Court . . . the Supreme Court ordinarily will consider only an issue that has been raised in the petition for certiorari . . . and that has been preserved for review by the Supreme Court"); *Holbrook v. State*, 364 Md. 354, 375 (2001) (applying Rule 8-131(b), declining to address unpreserved issue).

First, Rule 5-403 identifies "confusion of issues" as a potential basis for exclusion separate from undue prejudice. To the extent such confusion is grounds for excluding evidence, it is incumbent on counsel to identify at trial precisely what evidence should be excluded to prevent confusion. *Cf. Klauenberg v. State*, 355 Md. 528, 541 (1999) ("It is well-settled that when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal.").

Akers now claims that the "potential for the abortion and forgoing obstetric prenatal care to mislead and confuse the jury was particularly high in this case." (Petitioner's Br. at 35). She goes on to detail the State's expert testimony from Dr. Mourtzinos and the testimony of her experts, Drs. Gregory Davis and David Margolis. (*Id.* at 35-36). But she has never previously connected the disparate prenatal care evidence to the expert testimony here.

Akers did not argue confusion of the issues in the written motion in limine. True, at the motions hearing, she asked the court to bar evidence about her "failure to obtain prenatal care because it will also cause confusion of the issues" and elaborated briefly on that claim. (E.33, 37-38). But she failed to reiterate that argument in the Appellate Court. Neither did she raise the argument in the Certiorari Petition. Passing references fall short of preserving the appellate claim she levels here. Accordingly, this Court should decline to address the claim.

Even if this Court considers it, the jury's hearing the disparate prenatal care evidence in no way confused the issues. Akers suggests that the potential for confusion "was particularly high in this case." (Petitioner's Br. at 35). But then she simply

relates the testimony of her experts. It may be that she is suggesting that because the expert testimony was confusing (it was not), the supposedly "highly charged" disparate prenatal care evidence somehow led the jury to resolve a battle among experts by convicting her. (*Id.* at 37). But that claim makes no logical sense, and there is nothing to suggest the jury misunderstood the evidence, expert or otherwise. Quite simply, the jury (like the judge at the motions hearing) (M4.48-49) appears to have credited Dr. Mourtzinos' testimony over that of Dr. Davis, who opined that he could not say one way or the other whether Baby A was born alive or stillborn. (T5.231).

Second, Akers devotes a substantial part of her discussion to the notion that the judge was duty-bound to express on the record the basis for his relevance ruling with respect to the disparate prenatal care and self-help termination evidence. (Petitioner's Br. at 34-35). At trial, she did not seek an explanation of the court's ruling. (M5.23). She did not raise the lack of on-the-record findings in her brief to the Appellate Court. She did not do so in the Petition. Accordingly, this Court should decline to address the claim.

What's more, the claim fails on the merits. No rule required this trial judge to explain his ruling on the record or in detail after argument from the parties. (E.33-50). Rule 5-403 does not impose such a requirement. *Cf. Woodlin*, 484 Md. at 282 (recognizing the "latitude and discretion [trial courts] have in making . . . determinations under Maryland Rule 5-403's balancing test"). The balancing test for admissibility of prior bad acts evidence likewise does not require an on-the-record explanation of the judge's reasoning. *See* Md. Rule 5-404(b) (LexisNexis 2024); *Ayers v. State*, 335 Md. 602, 635-36 (1994) (noting the "strong presumption that judges properly perform their duties in weighing the probative value and prejudicial effect of so-called 'other crimes' evidence," and clarifying that a trial judge is not "obliged to spell out in words every thought and step of logic") (internal citations omitted). Accordingly, Akers could not succeed on this (unpreserved) claim.

2. *The court properly found that the probative value of the disparate prenatal care evidence was not substantially outweighed by the danger of unfair prejudice.*

The trial court properly exercised its discretion in admitting the disparate prenatal care evidence, in the form of Nurse

Cannade's testimony and Akers' statement to police. (E.157, 398). The Appellate Court highlighted the unique facts of the case in affirming the trial court's discretionary ruling:

> Due to the specific facts of this case, we cannot say that no reasonable person could take the view espoused by the circuit court, and thus, cannot conclude the court abused its discretion on the issue of Appellant's lack of prenatal care. Here, the court had evidence that Appellant *hid her pregnancy* from her family, emergency responders and hospital workers, *only disclosing that she had delivered a child when medical personnel visually observed a severed umbilical cord*. The court heard evidence that *Baby A was killed very shortly after being born*, that *Appellant did not attempt to seek help for the baby*, and that *after Baby A's death, she wrapped the body in towels, which she disposed of in a bag and placed in a closed closet*. Additionally, evidence was submitted that *Appellant received prenatal care during her other pregnancies* and had access to an OBGYN. Given this evidence, the court could reasonably conclude that Appellant's lack of prenatal care was probative of her intent during her pregnancy to harm or cause the death of Baby A once delivered.

(App. 22) (emphasis added; citation omitted).

Against that backdrop, the evidence reinforced that Akers was in denial—the position that she took in her interview with Detective Wiegman (E.398)—and took no steps to treat her unborn baby. That information assumed greater relevance given that she did avail herself of prenatal care during her other two pregnancies.

(E.420). The evidence was, therefore, more probative of her motive and intent than her decision would have been in a vacuum. (App. 20-21). The prosecutor was also entitled to and did argue an alternate, more sinister motive associated with that decision that supported premeditation: that Akers did not ever plan to let the baby live, and her decision not to obtain prenatal care showed she did not plan to invest resources in his condition.

It is true there are important concerns about unequal access to prenatal care, as the Appellate Court recognized. (App. 22 & n.11). A woman's affirmative decision to forgo prenatal care is her own to make, although realistically that fact can create an emotional response for some. And to be sure, a woman ought not be judged in the abstract for not getting prenatal care, and a decision to do so can be based on any number of factors beyond a woman's control such as lack of resources or access.

But the fact of the matter is that in *this case*, on *these facts*—in the way relevance is to be assessed—it mattered very much, when the evidence also showed that Akers had availed herself of those resources with her other two pregnancies. As the Appellate Court pointed out, the topic is not "*so* inherently inflammatory and

contentious to engender substantial unfair prejudice." (App. 23) (emphasis added). That is, simply because a particular fact is susceptible to people forming *value judgments* about it, that does not give rise to a presumption that any probative value about that fact is substantially outweighed by the danger of *unfair prejudice*. Accordingly, the trial court correctly exercised its discretion in deeming the disparate prenatal care evidence admissible, and so this Court should affirm.

III.

THE SELF-HELP TERMINATION EVIDENCE WAS RELEVANT, AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING IT.

Akers' argument that the self-help termination evidence was not relevant ignores the nature of the searches, which showed she was exploring methods to terminate the pregnancy not by going to a clinic or getting other assistance, but on her own. That reinforced the notion that the greatest motivator for Akers was avoiding detection. It had greater significance given the stunning details about the lengths she went to in hiding her pregnancy and Baby A's birth, and it negatively affected her credibility.

A. The self-help termination evidence was relevant to prove Akers' intent and motive and undercut her credibility.

1. *The evidence was relevant to prove intent and motive.*

The Appellate Court correctly held that the self-help termination evidence was relevant to Akers' later murder of Baby A. It deemed her intent during pregnancy to be "unambiguously a 'fact of consequence,'" such that her online searches "made it more probable" that she was keeping her pregnancy and Baby A's birth secret. And hiding the pregnancy would also enable Akers to mask Baby A's murder. Thus, the evidence permitted "an inference that she would be inclined to harm or cause the death of the child to keep the pregnancy and birth secret." (App. 24). The court also noted that the searches were independently relevant to undercut Akers' credibility, by contradicting her claims that by the time she found out about the pregnancy, it was too late for an abortion. (*Id.*).

The searches showed that even early in the pregnancy, Akers did not want others to know about it and she was contemplating ways to end it. Relatedly, the searches evidenced her general desire not to have a child and helped establish her

motive to kill the baby if he were born alive. Finally, they weakened Akers' credibility by showing that, contrary to her post-birth narrative, she could have terminated the pregnancy when it was legal for her to do so.

Even if the jury did not ascribe to Akers the early-in-pregnancy intent to murder Baby A to support a first-degree murder conviction, it helped establish that she had no plan if the baby was born alive. That, in turn, *did* support a finding that she committed second-degree murder: the fact that she did not want the baby, along with evidence of how she furtively managed the pregnancy and birth, continuing to keep it secret until its inevitable exposure, and her admission that her approach was just to hope the pregnancy would "go away," tended to show that she denied the pregnancy until she no longer could do so, and once Baby A was born alive she decided to kill him. In that context, the substance of the searches mattered. The fact that Akers searched for "rue tea for abortion," and how to obtain Misoprostol (a known and in many places approved medication to induce abortion), to end pregnancy, showed she was looking for ways to terminate the pregnancy undetected.

Moreover, the fact that Akers contemplated terminating the pregnancy helped to show that she did not want the baby. That, in turn, helped establish a motive for her to kill Baby A when he was born. *Cf. Snyder*, 361 Md. at 605 ("Evidence of previous quarrels and difficulties between a victim and a defendant is generally admissible to show motive."). Furthermore, "where intent is at issue, proof of a defendant's prior conduct may be admissible to prove the defendant's intent." *Johnson v. State*, 332 Md. 456, 470 (1993); *see also Commonwealth v. Avellar*, 622 N.E.2d 625, 630 (Mass. 1993) (affirming admission of evidence, in Avellar's trial for first-degree murder of his six-month-old son Shawn, that he had urged baby's mother to get an abortion, as "relevant to [Avellar's] attitude toward Shawn when Shawn died"); *see also Walker v. State*, 707 So.2d 300, 309 (Fla. 1997) (affirming admission, in Walker's trial for murder of his girlfriend and their 15-month-old son, of evidence that he offered to pay her to have an abortion, which was "part of a long chain of events taking place over a two-year period leading up to the murders which is admissible for the purpose of establishing Walker's motive and intent to kill [his girlfriend] and their son").

Finally, Akers has not pointed to any case where a court has deemed a particular type of evidence irrelevant based on the character of the evidence alone. Even the out-of-state cases she cites, *see infra* Part III.A.3, do not impose an absolute ban on abortion evidence and instead view the question of relevance in the context of the facts at issue. *Cf. Snyder*, 361 Md. at 595 (holding that defendant's failure to ask police about progress of their investigation into his wife's murder was "too equivocal to be probative," and that "*in most circumstances* silence is so ambiguous that it is of little probative force") (emphasis added; citation omitted).

In her effort to detract from the relevance of her searches, Akers continues to conflate the threshold question of relevance with that of potential prejudice based on the emotional nature of the abortion debate (Petitioner's Br. at 23)—an issue that, if anything, would form a part of the trial court's balancing of evidence under Rule 5-403. Her persistent efforts to import policy arguments into her appeal cloud the simple question of relevance that lies at its core. (*See* Petitioner's Br. at 24) (claiming that permitting the self-help termination evidence "will chill the free

exercise of the right"). *See Avellar*, 622 N.E.2d at 630 (affirming Avellar's conviction and rejecting his argument that "*as a matter of policy* we should not permit a person's desire or lack of desire for a particular nonviable fetus to be aborted to raise the inference that that person bears ill will toward the child into which that fetus ultimately develops") (emphasis added; cleaned up).

Evidence of Akers' intent before Baby A's birth should not be categorically excluded as irrelevant simply because it relates to an incendiary topic. Considering an example that does not involve the issue of abortion helps inform the analysis. Suppose D had searched the internet for "how to buy a handgun" on January 1, 2000. That search is meaningless in the abstract and shows only that D exercised a constitutionally protected right. It patently would be inadmissible in D's motor tort case, or where D faced second-degree assault charges decades after the search. But if D were charged with the murder of V on June 1, 2000, that evidence assumes greater relevance. *See Hayes v. State*, 3 Md. App. 4, 8 (1968) ("It is always relevant to show that the defendant before the date of the crime had in his possession the means for its commission[.]"). Evidence of the search would be relevant, indeed,

even if D was ultimately unsuccessful in purchasing a handgun and V was bludgeoned to death.

The same is true of Akers' searches. She had every right to search for information about pregnancy termination methods. But when taken with other evidence—that Akers hid the pregnancy, gave birth to a baby in a delivery she concealed, displayed consciousness of guilt by opting not to get post-delivery care for the baby or herself, hid the baby in the closet, and irrationally continued to deny the birth—the self-help termination evidence became relevant to illuminate her state of mind.

The mere presence of an inflammatory component to a particular piece of evidence—or one that paints the defendant in a negative light—should not affect an initial determination of relevance or raise the relevance threshold. *Cf. Kazadi v. State*, 467 Md. 1, 53 (2020) ("Generally, a witness's immigration status is not relevant to his or her credibility because, *absent additional circumstances*, a witness's status as an undocumented immigrant . . . does not make the witness any more likely to falsely testify than any person would be.") (emphasis added); *Urbanski v. State*, 256 Md. App. 414, 438 (2022), *cert. denied*, 483 Md. 448 (2023)

(holding that evidence on Urbanski's cell phone of racially offensive memes, which "depicted violence against Black people" and "encouraged and promoted violence against Black people," was relevant as probative of Urbanski's motive and intent in murder trial of young Black man); *see also Ayers v. State*, 335 Md. 602, 634-35 (1994) (holding that circumstantial evidence of racial motivation was of "vital importance" to proving Ayers had committed a hate crime). Such a question remains a matter for the trial judge to consider under Rule 5-403, if called upon to do so, in a later discretionary analysis of whether the probative value of such evidence is substantially outweighed by the danger of unfair prejudice. *See infra* Part III.B.

2. *The evidence was relevant because it negatively affected Akers' credibility.*

The self-help termination evidence was also relevant for an independent reason: to undercut Akers' credibility. She conducted the online searches in early March and early May of 2018. (E.434-36). That made apparent that she knew then she was pregnant and was considering ways to end the pregnancy.

Nevertheless, when Akers got to the hospital after Baby A's death, she told social worker Alison Tiedke that by the time she learned she was pregnant, it was too late for her to terminate the pregnancy. (E.192-93). She repeated that story to Detective Weigman. (E.394-95). The claim was disproven both by the timing of her searches and evidence that Dr. Waldrop had provided her with two referrals for abortion clinics on May 14, 2018. (E.431).

Curiously, Akers seems to misunderstand this part of the Appellate Court's holding to involve her purported "adoption plan" or "safe haven plan" (Petitioner's Br. at 21), arguing that the evidence was not material or probative evidence of her "intent to kill or credibility of an adoption plan." (Petitioner's Br. at 27). But the issue on appeal has never been whether her *adoption plan* was credible. In fact, she offered no evidence other than her claim to Detective Weigman to suggest she had an adoption or safe haven plan of any sort. *Cf. Bynum v. State*, 546 S.W.3d 533, 536 (Ark. Ct. App. 2018) (reversing Bynum's conviction for concealing the birth of a newborn, noting that Bynum told others about her adoption plan and had potential parents in mind). Rather, the State argued the searches were relevant to show Akers was lying when she told

hospital personnel that by the time she learned of the pregnancy, it was too late to have an abortion. (E.41). The Appellate Court clearly articulated its finding on that issue. (App. 28).

One court has deemed similar evidence relevant to a defendant's credibility. In *People v. Feldmann*, 732 N.E.2d 685, 689-90 (Ill. App. 2000), the State prosecuted Feldmann for the first-degree murder of her newborn daughter, Judy, whom the State claimed she delivered in her bedroom and promptly drowned in a toilet. Feldmann presented the jury with a different narrative, claiming that she carried Judy to term and delivered her without knowing she was pregnant. *Id.* at 695. The jury convicted her of involuntary manslaughter. *Id.* at 687.

The trial judge permitted the jury to learn of Feldmann's prior pregnancy—but not the fact that it ended with an abortion when she was 7 1/2 months pregnant. The appellate court affirmed admission of the fact of the pregnancy, and opined that the judge would have been within his discretion to admit evidence of the prior abortion as undercutting her credibility, regardless of potential juror bias, and as relevant considering Feldmann's defense:

> *[Such a bias] does not mean that a prior abortion, procured shortly before another child's death in a toilet bowl, lacks relevancy*. Prior to Judy, the defendant carried another baby almost to full term but decided to prevent a live birth. The reason for that decision resided in the defendant's desire to avoid motherhood. She obviously did not want to raise a child. *Evidence of this state of mind, possessed in the not-too-distant past, bears weight on how and why the defendant's newborn baby ended up face down in a toilet bowl. It provides the reason for Judy's death.*

Id. at 695 (emphasis added).

In her brief, Akers does not explain what about the Appellate Court's rationale was incorrect. The court's emphasis on Akers' credibility correctly served as an appropriate independent basis to admit the self-help termination evidence.

3. *The cases Akers cites that deem "abortion evidence" irrelevant do not apply, given the facts surrounding Baby A's murder.*

Akers tries to connect a threshold relevance determination to political beliefs. (Petitioner's Br. at 17) (arguing that affirmance "would constitute a profoundly pro-life belief that abortion equals murder, in a pro-choice state"). But that misperceives the function of a relevance determination, and the four out-of-state cases she cites in support do not justify her proposed rule. (Petitioner's Br.

at 25-26) (citing *Houselog v. State*, 690 S.W.3d 850 (Ark. Ct. App. 2024); *Bynum v. State*, 546 S.W.3d 533 (Ark. Ct. App. 2018); *Stephenson v. State*, 31 So.3d 847 (Fla. Dist. Ct. App. 2010); *Wilkins v. State*, 607 So.2d 500 (Fla. Dist. Ct. App. 1992) (per curiam)).

There can be any number of unanticipated factual scenarios where abortion evidence might be admissible, and so drawing an arbitrary line about its evidentiary value is not appropriate. *See, e.g.*, *People v. Cooper*, 991 N.E.2d 789, 811 (Ill. App. 2013) (noting that testimony from woman whom Cooper sexually abused about her abortion was relevant to show he sexually assaulted her, "because she would not have required the procedure otherwise").

The differently unique facts in the cases Akers cites render her supposedly persuasive authority of no value; her discussion of *Houselog* demonstrates that point. (Petitioner's Br. at 26). There, the appellate court considered not murder charges, but Houselog's claim that the circuit court erred in denying her motion to transfer her case to juvenile court after she was charged with abuse of a corpse. 690 S.W.3d at 853. Houselog, a 17-year old living under the thumb of her abusive adult boyfriend (they met when she was 14

years old), took medication to terminate her pregnancy, but her baby was born alive and was further along than she expected. *Id.* at 854. The baby stopped breathing ten minutes after birth, and Houselog's efforts to revive him failed. She wrapped the baby in a shirt, gave the corpse to her boyfriend, and then asked him to "do the rest," disclaiming any interest in knowing the fate of the body. *Id.* The baby's apparent burial ground was a dumpster. *Id.*

Houselog was charged with abusing a corpse. The trial court denied her motion to transfer partly because it believed the crime was committed in "a violent, premeditated and willful manner." *Id.* at 861. The appellate court disagreed, noting there was no evidence Houselog knew what her boyfriend was going to do with the baby's body. It was to that point that the court responded when it stated, "Evidence of planning to terminate a pregnancy is not evidence of planning to abuse a corpse. Whether a person medically induces an abortion is irrelevant to charges outside of that action." *Id.* at 862. The court in no way suggested, as Akers claims, that there is *never* "permissible relevance to a pregnant woman's consideration of abortion to the legal issue of an intent to kill or harm a child at birth from the same pregnancy." (Petitioner's Br. at 27).

The *Houselog* court relied in part on *Bynum*, an Arkansas case charging abuse of a corpse and concealing a birth (only the latter survived a motion for directed verdict). 546 S.W.3d at 536. That court deemed evidence that Bynum took pharmaceutical drugs before delivering a stillborn baby irrelevant. *Id.* at 542. While the drug she took was not marketed to cause termination of a pregnancy, Bynum admitted she took it in an effort to induce early labor, but she also claimed she intended to deliver the baby safely and give the child up for adoption. *Id.* There were facts in evidence to support that claim: she concealed the pregnancy from her mother but had talked with friends, her priest, and her lawyers about giving the baby up for adoption. *Id.* at 536-37. She took the fetal remains to the hospital within hours of delivery, and an autopsy determined the baby was stillborn. *Id.* at 537.

Like the court considering juvenile transfer in *Houselog*, the court permitted the jury to hear Bynum took abortion-inducing drugs. It also allowed the State to introduce evidence that she had undergone prior abortions. *Id.* at 542. The appellate court reversed, noting that the crime of concealing a birth required proving that a newborn's corpse was intentionally hidden either to

conceal the fact of birth or to prevent a finding that the child was born alive. *Id.* It deemed Bynum's abortion history and the fact that she took drugs before the birth irrelevant, as facts that "did not tend to make it more or less probable Bynum had hidden her newborn's corpse with purpose to conceal the birth," where the baby was born dead and the evidence did not establish that Bynum's ingestion of the drugs caused the stillbirth. *Id.*

Here, the facts supported a determination that the evidence at issue was relevant in a way that the facts in *Bynum* did not. Of course there was no reason in *Bynum* to introduce abortion *history*, nor did the State seek to introduce such evidence here. And there was no reason to introduce evidence of Bynum's ingestion of a drug that did not cause stillbirth, and that bore no connection to the crime for which she was on trial. Here, on the other hand, Akers told no one about Baby A's birth and concealed his body, not telling her husband or health care providers about it until she could no longer hide the truth. She claimed to have a safe haven plan but the only evidence to support that plan was her statement to Detective Weigman. She admitted she did not check Baby A for signs of life (E.416) ("I didn't even look at the thing"), and Dr.

Mourtzinos testified Baby A was born alive.[8] The charges required the State to establish intent to kill. Accordingly, the facts supporting reversal in *Bynum* simply were not present here.

Akers' citation of two Florida cases, *Stephenson* and *Wilkins*, incorrectly suggests they involve similar factual circumstances. (Petitioner's Br. at 25-26). *Stephenson* did involve introduction of evidence that the defendant had considered aborting the child whose death she was charged with causing. But our Appellate Court noted crucial factual distinctions, including a lack of any temporal connection between Stephenson's considering abortion and her daughter's death when she was over a year old. (App. 27).

Stephenson was convicted of killing her 13-month-old daughter, who had severe health problems since birth. 31 So.3d at 848 & n.2. The State claimed she died of malnutrition caused by neglect and introduced evidence that Stephenson considered terminating her pregnancy. The defense painted Stephenson, who was 25 years old, as a young woman whom the system failed, and

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[8] The Appellate Court affirmed the sufficiency of the evidence that Baby A "was born alive, and that [Akers'] actions caused his death"—a ruling Akers does not challenge before this Court. (App. 42).

who was burdened by having to care for a baby with major health problems. *Id.* at 848, 850-51.

The reviewing court opined that "'abortion is one of the most inflammatory issues of our time,'" *id.* at 849 (citation omitted), concluded the evidence was not relevant, and held that "any conceivable relevance was substantially outweighed by the danger of unfair prejudice." *Id.* at 850. It distinguished *Walker*, 707 So.2d 300 (Fla. 1997), where abortion was relevant to Walker's motive. *Stephenson*, 31 So.3d at 851. Crucially, any motive for Stephenson to kill her 13-month-old arose after the baby was born with health problems, such that her contemplating abortion could not be tied to her later-developed ostensible motive for killing the child. That position is consistent with the evidence in *Stephenson*—the fact that she considered abortion before she knew that the baby would even be born with the serious medical problems that plagued her, *id.* at 852 (Shepherd, J., concurring), would not be relevant to show intent or motive to kill her over a year after her birth.

Here, on the other hand, the fact that Akers contemplated abortion months before delivery was highly relevant to show intent and motive, given that the State's expert testified Baby A took at

least one breath and then died by homicide of asphyxia and exposure. The State was not offering the evidence just to show that because Akers "consider[ed] abortion" she was "more likely to have killed the child not aborted." *Stephenson*, 31 So.3d at 851. Rather, the evidence was relevant, as probative of the fact that Akers did not want a third child and that she contemplated terminating the pregnancy early on. It also unmasked the false narrative that Akers spun to doctors and law enforcement.

In distinguishing *Stephenson*, our Appellate Court highlighted that Stephenson's child was over a year old when she died. Not so here: "Akers was charged with causing the death of a child on the same day as birth, and her motive was alleged to be related to the very existence of the child, as opposed to any previously unknown unique issues." (App. 27). Thus, the evidence here showed a tight nexus between the timing of Baby A's death and the motive that the State sought to prove.

Wilkins similarly lacks any temporal connection between the birth and death of an infant. Wilkins and his wife were on trial for attempted first-degree murder of their ten-week-old child and related child abuse charges. The Florida court reversed (in a one-

paragraph ruling) on the basis that Wilkins was denied a for-cause challenge of a prospective juror. 607 So.2d at 501. The court then devoted just one more paragraph to what it viewed as the introduction of other inadmissible evidence at trial, and it cited as one of five grounds the admission of evidence that Wilkins and his wife had considered having an abortion before the victim was born. *Id.* at 501-02. In a single sentence, the court opined that introduction of all this evidence, taken together, "constituted an impermissible assault on the defendant's character and was otherwise irrelevant and inflammatory." *Id.* at 502.

The court's cursory analysis blurs the line between a threshold relevance determination and a subsequent discretionary balancing of whether probative value is substantially outweighed by the danger of unfair prejudice. And while the death occurred closer in time to the infant's birth than in *Stephenson*, there was no suggestion the parents sought or intended to end the child's life at birth—the opinion did not clarify what conduct formed the basis for the charges. *Id.* at 501. The court's passing discussion in a per curiam opinion sufficed to resolve the issue before it, but that issue was materially different from the question here.

None of these cases involved a charged murder of a newborn, and facts that the State has recited as crucial here are absent from them. Accordingly, this Court should reject them as unpersuasive and deem the self-help termination evidence to be relevant.

B. The trial court properly exercised its discretion in deeming the self-help termination evidence admissible under Rule 5-403.

1. *As they relate to the internet searches, Akers' claims concerning confusion of the issues and the lack of on-the-record findings are forfeit on appeal and fail on the merits.*

Akers raises the same claim about confusion of issues and her ostensible right to an on-the-record ruling from the judge about admitting the self-help termination evidence as she does with respect to the disparate prenatal care evidence. But for the reasons the State explains above in Part II.B.1, this Court should decline to address her claims. Indeed, even though Akers argues that the risk of confusing the jury was "particularly high" with respect to both types of evidence (Petitioner's Br. at 35), she never raised that claim about the self-help termination evidence. She argued at the motions hearing only that the disparate prenatal care evidence

confused the issues. (E.33). Thus, she cannot now complain about admission of the self-help termination evidence based on confusion of the issues or an inadequate record of the court's ruling.

2. *The trial court properly exercised its discretion in concluding that the probative value of the self-help termination evidence was not substantially outweighed by the danger of unfair prejudice.*

Akers' brief vacillates between (1) her (waived and incorrect) arguments about issue confusion and the claimed need for an on-the-record balancing under Rule 5-403, and (2) her (preserved but also incorrect) argument that this Court should upend the judge's decision that the probative value of the self-help termination evidence was not substantially outweighed by the danger of unfair prejudice. Looking closely at the latter, Akers has not given this Court any basis to reverse the judge's discretionary ruling.

The analysis calls for a reviewing court's deference. Once a relevancy determination is made, courts "are generally loath to reverse a trial court unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion." *Merzbacher v. State*, 346 Md. 391, 404-05 (1997); *Portillo Funes v. State*, 469 Md. 438, 479 (2020). Like

the threshold relevance inquiry, this inquiry is context-dependent: "Our determination of whether a trial court abused its discretion usually depends on the particular facts of the case [and] the context in which the discretion was exercised." *King v. State*, 407 Md. 682, 696 (2009) (internal quotations omitted). The circuit court's decision in this case was solidly within its purview, and the mere subject matter of abortion does not warrant upending it.

First, this Court's recent decision in *Woodlin* addressed the relative importance of potentially prejudicial evidence—there, addressing evidence that Woodlin committed other prior sexually assaultive behavior. In noting that a circuit court could (by statute) consider the potential for unfair prejudice of his prior conduct, the Court noted that courts could consider the potential "inflammatory character" of such evidence: "If juries were allowed to consider heinous acts that completely overshadow the crime charged, then we run the risk that juries predominantly will focus on the other sexually assaultive behavior and not the present charge." 484 Md. at 287. The Court pointed out that "juries are more likely to convict based on propensity grounds when the other crimes/bad acts

evidence *is more inflammatory than the crime charged*." *Id.* at 287-88 (emphasis added).

Here, however, the evidence Akers sought to exclude was not "more inflammatory" than the grisly details of the case that gave rise to the murder charges. The fact of the matter is this: any potential prejudice in this case flowed not from evidence about what Akers *thought about doing* with the pregnancy 6 months before the murder (which is nevertheless material and probative), but from what she admitted she *did do*: she furtively placed the body of a baby, who had been born in secret and found in a blood-covered room, into a bag and buried it under blankets in a closet. *See People v. Cooper*, 991 N.E.2d 789, 811 (Ill. App. Ct. 2000) (noting, where court admitted evidence of sexual abuse victim's abortion after Cooper impregnated her, that "[g]iven the already highly taboo facts of this case, where defendant was charged with repeated sexual abuse of his younger adopted sister during her formative years, with the adoptive mother helping to cover it up, any prejudice to defendant was minimal").

Any prejudicial impact of the self-help termination evidence was dwarfed by the impact of the other evidence the jury saw and heard:

- photographs of Baby A's body in the blue plastic bag where Akers hid him (State's Ex. 7, 36);
- photographs of a blood-soaked towel and blankets recovered from the closet, and the scene showing the bloody aftermath of his birth (State's Ex. 4-6, 9-11, 14-25, 26-29, 31-33);
- "as-is" photographs of Baby A's body when he arrived in the OCME, in and outside of the blue plastic bag (State's Ex. 58-63; T5.40-41);
- testimony from Dr. Kukelyansky, who was "shocked" to learn that Akers just delivered a baby (E.169-70);
- Akers' statements that when Baby A was born, she "didn't even look at the thing" and she was "hoping [the pregnancy] would go away." (E.398, 416).

Second, Akers does not acknowledge the Appellate Court's ruling that the self-help termination evidence was properly admitted in part because the record already contained evidence that she had considered abortion, and therefore "it is reasonable to conclude that the evidence of [Akers'] search history was less prejudicial than it might otherwise have been absent other admitted evidence showing that [Akers] had previously considered abortion." (App. 29-30) (citing *Snyder v. State*, 210 Md. App. 370,

395 (2013)). That is, Dr. Waldrop's testimony and the medical record referenced Akers' obstetrical visit "to discuss termination," and the record reflected that she was given referral information "for local clinics that complete second trimester termination." (E.234, 431-32). That evidence was introduced at trial without objection, and Akers did not appeal its admission. (E.230; App. 16 & n.9).

Third, Akers also omits the fact that she protected against the possibility of prejudice in this case, when she requested a voir dire question that the trial court read verbatim:

> Many people have strong opinions about the morality of having considered getting, or having an abortion, would your beliefs about abortion prevent you from giving a fair and impartial verdict in this case?

(E.26, 54).

Three jurors responded, and all of them were stricken. (E. 54-59). The question assured that selected jurors were unaffected by the evidence. *See Brashear v. State*, 90 Md. App. 709, 715 (1992) (noting, where court admitted evidence of racial epithets that Brashear screamed at victim just before murder, that potential prejudice was removed by conducting voir dire about the issue).

Fourth, the prosecutor's remarks commended, rather than criticized, Akers' right to an abortion. (E.63 (noting that at 15 weeks pregnant, Akers was "well within her rights under Maryland law to terminate her pregnancy"); E.292 ("[H]ad [Akers] exercised her lawful right to terminate her pregnancy when she sought out [Dr. Waldrop], we would not be here. That is not a crime had she gone and gotten an abortion. It would be perfectly fine.").

Notably, with the exception of this comment in closing and her direct examination of Joshua Lapier (who testified about the searches themselves), the prosecutor never used the word "abortion" before the jury. Defense counsel, in contrast, did so repeatedly, raising the Dr. Waldrop visit and mentioning several times in her opening statement Akers' wanting an abortion at that time. (E.73-75, 81). In her cross-examination of Detective Weigman, she reintroduced the fact that Akers inquired about abortion in her visit with Dr. Waldrop. (T3.128).

These facts undercut Akers' unsupported claim that the prosecutor weaponized the self-help termination evidence, and they show that the jury was not prejudiced by the information. *See Walker v. State*, 707 So.2d 300, 310 (Fla. 1997) (noting, where

Walker had urged his girlfriend to abort the child he was later accused of killing, and he was also charged with killing her, that even though "evidence of this type may have a tendency to raise emotional responses relating to the morality of abortion in general, the presentation of the evidence and closing argument to the jury in this case reflect that the prosecutor used this evidence solely to establish the long chain of events leading up to the murders shortly after Walker was obligated to make child support payments").

Finally, the fact that the jury acquitted Akers on the charge of first-degree murder suggests that jurors were not prejudiced by the evidence—they rejected the idea that she acted with premeditated intent to kill. *See Gross v. State*, 481 Md. 233, 270 (2022) ("The jury's acquittal of Petitioner on the charge based on cunnilingus reflects that the jury did its job dispassionately and was not swayed by the emotional nature of" victim's recorded statement.).

3. *The cases Akers cites do not meaningfully assess relevance or the balancing test in any similar or significant factual context.*

Akers persists in citing to cases where appellate courts in other jurisdictions have barred evidence that a person has had an abortion. (Petitioner's Br. at 33-34). Of course that has happened. But in those cases, the evidence in question did not relate to the issue being litigated, so it was not relevant in the first place. So, for example, the State does not take issue with the notion that a court ought not introduce evidence of a witness's abortion history for the purpose of showing bias. *See Billet v. State*, 877 S.W.2d 913, 914-15 (Ark. 1994) (affirming decision to bar murder defendant from cross-examining state's witness, his girlfriend to whom he confided details of the murder, about her three abortions, noting that the evidence was "at most, marginally relevant and had very little, if any, probative value") (cited in Petitioner's Br. at 33).

Yet there are still factual circumstances that have led courts to affirm admission of such testimony, given the context of a particular case. *See Walker*, 707 So.3d at 309 ("In applying the balancing test, the trial court necessarily exercises its discretion. Indeed, the same item of evidence may be admissible in one case

and not in another, depending upon the relation of that item to the other evidence.") (citation omitted); *see also Brummett v. Burberry Ltd.*, 597 S.W.3d 295, 304-05 (Mo. Ct. App. 2019) (holding that trial court properly exercised discretion in admitting evidence of former employee's prior abortion, where she filed religious discrimination and retaliation action and claimed her workplace treatment caused her such mental distress that she considered aborting her pregnancy); *Davila v. Bodelson*, 704 P.2d 1119, 1124-25 (N.M. Ct. App. 1985) (affirming admission of evidence, in medical products liability and malpractice case, that Davila had prior abortions, which her doctor claimed she never disclosed, and that he testified would have led him not to administer the drug in question).

Evidence about abortion does not lend itself to a bright-line exclusionary rule (not that any sort of evidence does), given the inherently context-dependent nature of relevance and a court's exercise of discretion in determining admissibility under Rule 5-403. But the cases cited by Akers have deemed abortion evidence inadmissible in contexts inapposite here. She claims that the trial court's discretionary decision "was egregiously wrong, as recognized by numerous courts" in a total of eight other

jurisdictions. (Petitioner's Br. at 33) (emphasis added). That sweeping claim is inaccurate, and it is contradicted by both obvious and subtle distinctions in the cases she cites—many of which the Appellate Court already pointed out in its opinion. (App. 24-26).

Two cases cited by Akers concern the death of a child where the parent or parents on trial had a *history* of *prior* abortion(s). *See Hudson v. State*, 745 So.2d 1014, 1016 (Fla. Dist. Ct. App. 1999) (holding, where Hudson was charged with manslaughter after concealing pregnancy and birth, that introduction of evidence of her abortion two years before this delivery was "too remote in time" and inflammatory); *People v. Ehlert*, 654 N.E.2d 705, 710-11 (Ill. App. 1995) (reversing where mother's two prior abortions were admitted into evidence, where she was charged with murdering her newborn, disposing of body in a lake, and medical examiner could not determine if baby was born alive; noting that three jurors admitted they had "strong feelings" about abortion, and evidence about prior abortions "served only to prejudice defendant").

This case did not involve evidence of abortion of prior pregnancies. It related instead to Akers contemplating aborting her pregnancy with Baby A, the victim in this case, which was

relevant as probative of whether she intended to kill him once she gave birth (assuming he was not stillborn, as she evidently hoped would be the case). The State's point was not to taint Akers with a broad negative brush about abortion; her searches showed she did not want the baby to begin with—which bore directly on motive, intent, and credibility.

The remaining cases to which Akers cites are even further attenuated. (Petitioner's Br. at 33-34). It is no surprise that courts prohibit introduction of evidence that someone had an abortion as irrelevant when unconnected to the facts at issue in a case. *See, e.g.*, *People v. Morris*, 285 N.W.2d 446, 447-48 (Mich. App. 1979) (per curiam) (reversing after court admitted evidence that Morris, charged with murder, fought with victim over her prior abortions; even if relevant to their "strife," nevertheless "[t]he existing strong and opposing attitudes" about abortion rendered the evidence highly prejudicial); *Collman v. State*, 7 P.3d 426, 436 (Nev. 2000) (affirming exclusion of evidence that Collman's girlfriend—whom he claimed was the actual murderer of her infant son—had prior abortion, which he proffered to undercut her claim that she "love[d] being pregnant"; issue was collateral and any minimal probative

value was "overwhelmingly outweighed" by danger of unfair prejudice); *Schneider v. Tapfer*, 180 P. 107, 108 (Or. 1919) (holding, in 100-plus year-old case, that evidence that defendant approved of daughter's abortion was irrelevant and likely to inflame jury, in son-in-law's civil case for alienation of affection).

It is not surprising to see such evidence excluded in civil cases such as those Akers incorrectly cites as persuasive: abortion history in a medical malpractice case,[9] in a civil wrongful death case,[10] or in a harassment case.[11] (Petitioner's Br. at 23, 33-34).

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[9] *See Andrews v. Reynolds Mem. Hosp.*, 499 S.E.2d 846, 855 (W.Va. 1997) (excluding evidence of plaintiff's prior abortions in medical malpractice case based on potential prejudice, despite defense claim that they exposed her to an infection that led to pregnancy problems, where there was no proof she had infection).

[10] *See Brock v. Wedincamp*, 558 S.E.2 836, 842 (Ga. App. 2002) (deeming evidence of decedent's abortion history and sex life irrelevant in wrongful death suit, and prejudicial as "particularly inflammatory," reasoning that it did not rebut plaintiff's claims that decedent was a "good person and a good mother").

[11] *See Nichols v. American Nat'l Ins. Co.*, 154 F.3d 875, 885 (8th Cir. 1998) (reversing verdict for employer after trial court admitted evidence that Nichols had abortion, which ran counter to her religious beliefs; finding minimal relevance in spite of trial court's considering it in calculating emotional distress damages, and noting that it presented danger of "provoking the fierce emotional reaction" that the subject of abortion can engender).

It behooves Akers to interpret these cases broadly, but it is not accurate to suggest that they meaningfully discuss factual situations like this one. Here, the evidence was relevant for all the reasons discussed and the Appellate Court correctly deferred to the trial court's discretionary decision under Maryland Rule 5-403.

The court cautioned "that our decision today should be read narrowly, and *in strict accordance with the specific facts of this case*." (App. 23) (emphasis added). Under the Rule 5-403 analytical framework, the trial court soundly exercised its discretion in admitting the self-help termination evidence. Because this Court cannot say that "no reasonable person would have concluded as the motions judge did," *Woodlin*, 484 Md. at 293, it should affirm.

CONCLUSION

The State respectfully asks the Court to affirm the judgment of the Appellate Court of Maryland.

Dated: August 7, 2024

Respectfully submitted,

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CERTIFICATION OF WORD COUNT AND
COMPLIANCE WITH THE MARYLAND RULES

This filing was printed in 13-point Century Schoolbook font; complies with the font, line spacing, and margin requirements of Maryland Rule 8-112; and contains 12,913 words, excluding the parts exempted from the word count by Maryland Rule 8-503.

/s/ Virginia S. Hovermill
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PERTINENT PROVISIONS

Maryland Rule 5-404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes.

* * *

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or other acts including delinquent acts as defined by Code, Courts Article § 3-8A-01 is not admissible to prove the character of a person in order to show action in the conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, absence of mistake or accident, or in conformity with Rule 5-413.

Maryland Rule 8-131. Scope of Review.

(a) Generally. The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by an appellate court whether or not raised in and decided by the trial court. Ordinarily, an appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

(b) In Supreme Court--Additional Limitations.
(1) Prior Appellate Decision. Unless otherwise provided by the order granting the writ of certiorari, in reviewing a decision rendered by the Appellate Court or by a circuit court acting in an appellate capacity, the Supreme Court ordinarily will consider only an issue that has been raised in the petition for certiorari or any cross-petition and that has been preserved for review by the Supreme Court. Whenever an issue raised in a petition for certiorari or a cross-petition involves, either expressly or implicitly, the assertion that the trial court committed error, the Supreme Court may consider whether the error was harmless or non-prejudicial even though the matter of harm or prejudice was not raised in the petition or in a cross-petition.

MOIRA E. AKERS,	IN THE
Petitioner,	SUPREME COURT
v.	OF MARYLAND
STATE OF MARYLAND,	September Term, 2024
Respondent.	No. 7

CERTIFICATE OF SERVICE

In accordance with Md. Rule 20-201(g), I certify that on this day, August 7, 2024, I electronically filed the foregoing "Brief of Respondent" using the MDEC System, which sent electronic notification of filing to all persons entitled to service, including:

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