No. ___________________

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2022

DENNIS HICKS,
Petitioner,

V.

STATE OF ALABAMA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ALABAMA COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

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March 20, 2023

CAPITAL CASE
QUESTION PRESENTED

In this capital case, Petitioner Dennis Hicks was convicted of the capital murder of Joshua Duncan based largely on statements provided by two young children who purportedly witnessed the murder–Jonah Chance ("Chance") Norris (age 3 at the time of the crime) and Jatton Norris (age 4 at the time of the crime). Even though the evidence at trial was that Chance was in Illinois at the time of Mr. Duncan's death, the two children were questioned several times by Detective Peak of the Mobile Police Department, who repeatedly asked them whether they had seen Mr. Duncan and Mr. Hicks fighting. The children gave inconsistent statements, including statements that implicated Mr. Hicks. When the children testified at Mr. Hicks' trial nearly five years later, however, Jatton recanted his prior incriminating statement and Chance gave only vague testimony regarding the incident, which conflicted with his recorded statement. To bolster this testimony, the State presented nearly all of the children's prior recorded statements to the jury. Although the State argued that the statements were admissible for valid non-hearsay purposes–and the Court gave a vague limiting instruction that the statements should not be considered for their truth (without informing the jury of any other purpose for which the statements could be considered)–the State also presented expert testimony that the prior statements were the "best" evidence of the children's observations of the crime, and then ultimately relied heavily on the prior out-of-court statements in their closing arguments, as evidence of Mr. Hicks' guilt.

In his direct appeal, Mr. Hicks argued that the admission of the children's prior recorded statements was improper and violated his Sixth Amendment right to confront his accusers and this Court's holding in *Crawford v. Washington*, 541 U.S. 36 (2004). The Alabama Court of Criminal Appeals affirmed Mr. Hicks' conviction, twice remanded his case on other grounds for further proceedings regarding his death sentence, and ultimately affirmed the sentence. The question presented is as follows:

1. Whether a criminal defendant is deprived of his Sixth Amendment right to confront witnesses against him, as set forth in *Crawford v. Washington* and its progeny, when prior testimonial statements are admitted and relied upon in order to bolster the testimony of child witnesses with little or no recollection of the events that are the subject matter of their testimony and prior statements.

RELATED PROCEEDINGS

State v. Hicks, Mobile County Circuit Court, No. CC-2012-4687. Order of conviction entered January 29, 2016; sentencing order entered on April 4, 2016.

Hicks v. State, Alabama Court of Criminal Appeals, No. CR-15-0747. Conviction affirmed, sentence remanded for clarification of sentencing order July 12, 2019).

Hicks v. State, Alabama Court of Criminal Appeals, No. CR-15- 0747. Sentence remanded for further clarification of sentencing order June 24, 2020.

Hicks v. State, Alabama Court of Criminal Appeals, No. CR-15-0747. Sentence affirmed on return on second remand, May 28, 2021. Application for rehearing denied October 1, 2021.

Ex parte Hicks, Alabama Supreme Court No. 1210013. Petition for writ of certiorari granted in part, denied in part; writ quashed November 18, 2022.

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Dennis Hicks respectfully petitions for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals.

OPINIONS BELOW

After Mr. Hicks timely appealed his convictions and sentence, the Alabama Court of Criminal Appeals affirmed his convictions on July 12, 2019, *see Hicks v. State*, No. CR-15-0747, 2019 WL 3070198, at *44 (Ala. Crim. App. July 12, 2019) (Appendix A), but twice remanded the case to the circuit court for clarification of its sentencing order, *see id.*; Order, *Hicks v. State*, No. CR-15- 0747 (Ala. Crim. App. June 24, 2020) (Appendix B). On May 28, 2021, the Alabama Court of Criminal Appeals affirmed Mr. Hicks's sentence on return to second remand. *Hicks v. State*, No. CR-15-0747, 2021 WL 2177671, at *6 (Ala. Crim. App. May 28, 2021) (opinion on return to second remand) (Appendix C). On October 1, 2021, the Court of Criminal Appeals denied Mr. Hicks's application for rehearing. (Appendix D). Mr. Hicks filed a petition for writ of certiorari to the Alabama Supreme Court and on November 18, 2022, the Alabama Supreme Court issued an order quashing the writ. *Ex parte Hicks*, No. 1210013, 2022 WL 17073090 (Ala. Nov. 18, 2022) (Appendix E)

STATEMENT OF JURISDICTION

The Alabama Court of Criminal Appeals affirmed Mr. Hicks' conviction and remanded for further proceedings regarding his sentence in a decision dated July 12, 2019. The Alabama Court of Criminal Appeals again remanded for further proceedings regarding Mr. Hicks' sentence in an order dated June 24, 2020. The Alabama Court of Criminal Appeals affirmed Mr. Hicks' sentence in an order dated May 28, 2021. The Alabama Court of Criminal Appeals denied Mr. Hicks' Application for Rehearing on October 1, 2021. Mr. Hicks timely filed his petition for certiorari with the Alabama Supreme Court on November 18, 2021. On March 17, 2022, the Alabama Supreme Court granted certiorari on issues not raised in this petition, and denied certiorari on all other issues (including those raised here). On November 18, 2022, the Alabama Supreme Court issued an order quashing the writ. This Court granted Mr. Hicks an extension of time within which to file a petition for writ of certiorari, up to and including March 20, 2023.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOKED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a capital case arising out of the death of Joshua Duncan, who was reported missing on September 6, 2011, and whose remains were located in a wooded area in Mobile, Alabama on October 24, 2011.

(*See* C. 1707-09; R. 1419-23.[1])

At trial, the State argued that Mr. Hicks had killed Mr. Duncan in order to gain access to his Supplemental Security Income and food stamps, and to hide the fact that he had stolen a trailer that belonged to Mr. Hudson's grandmother. (R. 2276.) They alleged that on the evening of September 5th, Mr. Hicks stabbed Mr. Duncan, then eviscerated him and cut off his head and hands before disposing of the remains. (R. 2276-77.) Under the State's theory, Mr. Hicks committed the murder at the home of his step-sister, Regina Norris, while she and her three grandchildren were present. (R. 2388.)

The only source for this narrative, however, were the out-of-court statements of a toddler who was three years old at the time of the alleged offense and his then-four-year-old brother. Seven months after Mr. Duncan's disappearance, Detective Peak of the Mobile Police Department questioned two of Ms. Norris's grandchildren, Jatton and Jonah Chance ("Chance") Norris, on the belief that they had been living with her at the

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[1] Throughout this petition, citations to the Trial Reporter's Transcript in Mr. Hicks' criminal trial will be preceded by the letter "R.". Citations to the Trial Clerk's Record in Mr. Hicks' criminal trial will be preceded by the letter "C.".

time of the alleged crime. (R. 1252-55.) After repeatedly asking the boys whether they had seen Mr. Hicks and Mr. Duncan "fighting," the detective got affirmative responses – particularly from Chance. (*See* C. 899-909.) In response to repeated prompting, Chance eventually told a story in which he had seen Mr. Hicks cut off Mr. Duncan's head and hands and cut him across the stomach. (C. 906-20.)

Evidence later established, however, that three-year-old Chance was actually living with extended family in Illinois in September 2011, and could not have witnessed the alleged crime. (*See* R. 1310-11.) Specifically, Mr. Hicks' counsel presented testimony that Chance had gone to live with his step-grandmother Michelle McCammon in Illinois from early June 2011 until November 2011–throughout the entire period in which the crime in this case could have taken place–as well as photographs and social media posts that corroborated this testimony. (*See* R. 1295, 1302-13, 2156, 2158-59; C. 1704-06, 1758-76). Medical records also established that Chance was treated for a broken ankle at an Illinois hospital on August 12, 2011, and returned for aftercare visits on August 22nd, September 8th and October 17th. (C. 1067, 1117, 1134.)

The State persisted in its theory, however, and both children testified. When the children testified, however, Jatton recanted his prior incriminating statements (*see* R. 1190-92, 1197) and Chance gave only vague testimony indicating that he had seen Mr. Hicks and Mr. Duncan fighting, but that Mr. Hicks had been using only his fists and that he did not know how Mr. Duncan had been hurt (*see* R. 1206-07, 1220).

The State then presented nearly the entirety of the children's out-of court statements in their case-in-chief, arguing that their purpose was solely to preemptively rebut the defense's impeachment.[2] (R. 1100-03.) The defense repeatedly objected to reliance on the statements for their substantive truth and requested a limiting instruction (R. 1244), but the court failed to provide the instruction as requested (R. 1249). Moreover, the State further bolstered the out-of-court statements by presenting testimony from a clinical psychology expert that the statements–rather than the children's testimony–were "the best" account of the facts. (R. 2106-07.) Then, in their guilt/innocence phase closing argument, the

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[2] The defense had indicated that they would submit portions of the children's out-of-court statements as impeachment evidence, solely to show that Chance and Jatton had been subjected to suggestive questioning. (R. 1030-31.)

State relied on the out-of-court statements as the sole source of most of their substantive allegations as to what the children had witnessed. (*See* R. 2397-98.)

On January 29, 2016, the jury convicted Mr. Hicks of capital murder and second-degree theft. (C. 131-33.) On February 2, 2016, the jury returned a non-unanimous verdict for death. (C. 134.) On April 4, 2016, the Circuit Court sentenced Mr. Hicks to death, relying heavily on the children's out of court statements. (C. 85-96.) After Mr. Hicks timely appealed his conviction and sentence, the Alabama Court of Criminal Appeals affirmed his convictions on July 12, 2019, *see Hicks v. State*, No. CR-15-0747, 2019 WL 3070198, at *44 (Ala. Crim. App. July 12, 2019), but twice remanded the case to the circuit court for clarification of its sentencing order. *See id.*; Order, *Hicks v. State*, No. CR-15-0747 (Ala. Crim. App. June 24, 2020). On May 28, 2021, the Court affirmed Mr. Hicks's sentence. *Hicks v. State*, No. CR-15-0747, 2021 WL 2177671, at *6 (Ala. Crim. App. May 28, 2021). The Alabama Supreme Court denied certiorari regarding the issues raised herein. This Petition follows.

REASONS FOR GRANTING THE WRIT

I. MR. HICKS WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WHEN THE STATE RELIED ON OUT-OF-COURT STATEMENTS OF CHILD WITNESSES AS SUBSTANTIVE EVIDENCE AGAINST HIM

The Sixth Amendment guarantees a criminal defendant's right "to be confronted with the witnesses against him." In *Crawford v. Washington*, this Court held that the Sixth Amendment prevents the government from introducing at trial the out-of-court statements of a witness against a defendant, unless the witness testifies and is available for meaningful cross-examination. 541 U.S. 36, 68 (2004); *see also Michigan v. Bryant*, 562 U.S. 344, 358 (2011) (Confrontation Clause applies to statements "with a primary purpose of creating an out-of-court substitute for trial testimony");

As this Court noted in *Crawford*:

> [The Confrontation] Clause's ultimate goal is to ensure reliability of evidence . . . It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best

be determined.

541 U.S. at 61. Where, as here, the State seeks to present an out-of-court statement made by a witness, that witness must be available to "defend or explain" the prior statement. 541 U.S. at 59 n.2.

This case presents factual circumstances that exemplify the purpose of–and need for–the protections provided by the Sixth Amendment's confrontation clause. Petitioner Dennis Hicks was convicted and sentenced to death based largely on out-of-court recorded statements by Chance and Jatton Norris, children who were three and four years old, respectively, at the time they gave their statements. By the time this case reached trial five years later, the reliability of these young children's out-of-court statements could not be meaningfully subjected to the crucible of cross-examination. Nevertheless, the State bolstered the statements as the "best" account of the underlying facts and relied on them extensively in its closing statement, and the trial court relied on the statements in sentencing Mr. Hicks to death.

The out-of-court statements at issue here comprised of three extensive audio recordings (and corresponding transcripts) that were

given seven months after the alleged crime, during the course of three interviews led by Detective Andrew Peak. (*See* C. 894-1044.) First, in an interview that took place on April 5, 2012 (R. 1255-57), Jatton denied seeing anything between Mr. Hicks and Mr. Duncan, but Chance eventually claimed that he saw the men fighting, using knives and/or a sword, and that he saw Mr. Duncan get cut on his side and got his head and hands cut off. (*See, e.g.*, C. 914-20). Second, in a subsequent interview of Chance alone, Chance again claimed to have seen violence between Mr. Hicks and Mr. Duncan, this time specifying that Mr. Duncan was unarmed and got injured in his neck and stomach. (*See, e.g.*, C. 945-53.; R. 1263). Third, in an interview that took place the next day, both Chance and Jatton[3] claimed to have seen their sister Alyssa (R. 1267-68); both boys claimed to have seen Mr. Hicks and Mr. Duncan fighting, and said – among other things – that they saw Mr. Hicks cut off Mr. Duncan's

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[3] Also present for this interview was Chance and Jatton's older sister, Alyssa, who consistently maintained, both prior to and during trial, that she did not witness anything related to Mr. Duncan's death and that her brothers were fabricating stories insofar as they claimed to have witnessed the alleged crime. (C. 982-83 (stating that she had never seen Mr. Hicks "do anything" to Mr. Duncan); R. 2241-44 (testifying that she did not witness violence between Mr. Hicks and Mr. Duncan).)

head, hands, and feet and hang him from a tree. (*See, e.g.*, C. 1002-23.)

Mr. Hicks' trial took place nearly five years later, when Chance and Jatton were eight and nine years old, respectively. At Mr. Hicks' trial, both children were scheduled to testify as the State's only purported eyewitnesses to the alleged crime. (*See, e.g.*, R. 315.) When the children took the stand, however, their testimony was quite limited, and inconsistent with the statements they had given as three- and four-year-olds. First, Jatton, who was nine by the time of the trial (R. 1180) expressly recanted his prior statements, repeatedly testifying that he had *not* seen Mr. Hicks hurt Mr. Duncan (R. 1185-87, 1189-92, 1195, 1197). He further testified that he remembered staying with Regina Norris, his grandmother, but that he did not have specific memories of seeing Mr. Hicks or Mr. Duncan during his time there. (R. 1183-85.) When questioned about his earlier statements incriminating Mr. Hicks in the murder of Mr. Duncan, Jatton testified that he remembered talking to Det. Peak, but insisted that the statements he made then were not true. (R. 1185-87, 1190-92, 1197.)

Chance took the stand next. Although he testified that he had seen

Mr. Hicks hurt Mr. Duncan (*see* R. 1206, 1218, 1222), his testimony was otherwise vague. Chance testified that he had seen Mr. Hicks and Mr. Duncan "fighting" (R. 1205, 1220) and that he had seen Mr. Duncan hanging from a tree limb outside of Ms. Norris's house (R. 1207-08, 1211, 1217-18, 1225). He also said, however, that he had not seen Mr. Hicks put Mr. Duncan on that tree limb (R. 1224), and that Mr. Hicks had used his fists, not a "sword," as the State suggested (R. 1207, 1220-21). Chance further testified that he did not know what parts of Mr. Duncan's body had been hurt (R. 1206) or in what way Mr. Hicks had hurt Mr. Duncan (R. 1206-07, 1222).

Faced with testimony that no longer supported their theory of the case against Mr. Hicks, the State pivoted to rely on the children's out-of-court recorded statements for their substantive truth. (*See, e.g.*, R. 2397-98). Importantly, although defense counsel stipulated to the admission of the children's recorded statements, they made it clear that they were doing so only insofar as the statements would be used for impeachment purposes, and not for their substantive truth. (*See* R. 1029-30.) The state purported to agree that "none of it is really offered for the truth of the

matter asserted," and that Chance and Norris "are testifying and we hope that they will tell the truth." (R. 1102-03.)[4]

Contrary to these assurances, the State quickly shifted to relying on the children's out-of-court statements for their substantive truth. (*See, e.g.*, R. 2107). First, the State bolstered the children's statements with testimony from a clinical psychology expert, Dr. Catalina Arata, who

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[4] Mr. Hicks' defense counsel requested that the trial court issue a limiting instruction explaining that the statements were to be considered only "on the issue of the – of the credibility of the children's in-court testimony." (R. 1244.) The trial court ostensibly granted this request, instructing the jury that the statements were not offered for the truth of the matter, but failing to instruct the jury regarding any purposes for which the statements could be used:

> And those statements are not offered by the State or the defense for as we call substantive matter. It's – and they're not offered for the truth of the matter that will be asserted in those statements and can't be considered by you as much. But you, as jurors, will give it whatever weight and credibility as you determine they deserve as it relates to any defenses or issues that may have been or will be raised in this case.
>
> In other words, listen to it and give it what credibility and weight you think that it should receive. Okay?

(R. 1249.)

testified that the out-of-court statements (rather than the children's testimony) were "the best" account of the facts (R. 2106-07; *see also* R. 2115 ("[T]he first statement you can get . . . is the best under whatever circumstances that is. The first statement is always the best").) Dr. Arata's testimony highlighting the children's out-of-court statements was the last testimony presented in the State's case-in-chief. (R. 2115)

Then, during its guilt-phase closing argument, the State relied almost exclusively on the children's out-of-court statements–rather than their testimony–to support the State's case against Mr. Hicks, repeatedly asserting that the State had proven facts that appeared only in the children's recorded statements. (*See, e.g.*, R. 2393-94; 2310 ("they talked about the head being cut and falling off and, you know, the sword and all of that")). The State returned to the out-of-court statements in its rebuttal closing, listing "Chance and Jatton Norris's statement" as among the primary evidence against Mr. Hicks, (R. 2388), and arguing that the victim "was strung up and his head was cut off and his hands were cut off at that tree. And [Jatton and Chance] knew it and they told you." (R. 2393; *see also* R. 2494 ("They're very specific. Chopping off body parts. And

guess what? Josh is found with no hands and no head with toolmarks"); R. 2405 (arguing forensic evidence confirmed "[a]ll of this happened just like the kids said").)

The State's reliance on these untestable out-of-court statements was uniquely and potently prejudicial. They were the only evidence implicating Mr. Hicks in the crime as alleged, and as such they were unparalleled by anything else before the jury. (*See* C. 83 (sentencing order describing children's statements as "[t]he most convincing evidence of Hicks's guilt")). Moreover, the credibility of these statements was particularly questionable–and the need for a meaningful cross-examination particularly evident–in light of the evidence that Chance Norris was not even in the State of Alabama at the time the crime was allegedly committed. (*See* R. 1295, 1302-13, 2156, 2158-59; C. 1704-06, 1758-76). Finally, bolstered as they were by the expert testimony from Dr. Arata (*see* C. 81), the statements held a particular emotional power by positioning the children as, in effect, additional victims of the alleged murder. (*See* C. 84-86 (court finding offense especially heinous, atrocious, or cruel based on finding that "two . . . young children were present"

during the capital murder).)

The impact of the hearsay evidence presented is illustrated by its presence in the trial court's sentencing order. After noting that the statements had been admitted for a limited purpose (C. 33), the order went on to apparently confuse the children's testimony with the recorded statements, claiming that "[t]he most convincing evidence of Hicks's guilt was the testimony of the children, which was corroborated by the forensic evidence and the cadaver dogs" and noting that Chance's "eyewitness account," specifically "his description of how Joshua was decapitated and dismembered," was particularly compelling (C. 35.) These descriptions of the children's accounts of the crime referenced allegations that were contained in the children's out-of-court statements, but *not* their subsequent trial testimony. The trial court could not have reached the conclusions that it did without relying on these unreliable out-of-court statements.

Critically, the out-of-court recorded statements provided by the three- and four-year-old Chance and Jatton Norris were not, and could not be, subject to meaningful cross-examination at trial. Although Chance

and Jatton both testified at Mr. Hicks's trial, that trial took place nearly five years after the crime, and after they provided their statements to Det. Peak. By that point, more than half of the children's young lives had passed. For all relevant purposes, the children who testified at Mr. Hicks's trial were essentially different people than the children who provided statements to Det. Peak. The reliability of the statements provided by the three- and four-year-old Chance and Jatton could not be meaningfully assessed through the "crucible" of cross-examining the eight- and nine-year-old Chance and Jatton. *See Crawford*, 541 U.S. at 53-54. The State's use of those out-of-court statements during Mr. Hicks's trial–and the trial court's subsequent reliance on them–deprived Mr. Hicks of a critical safeguard to ensure the fairness of his trial, and the reliability of his conviction and sentence.

This Court should grant certiorari, vacate the Alabama Court of Criminal Appeals' affirmance of Mr. Hicks' conviction and sentence, and remand for further proceedings, because the State's reliance on the children's out-of-court statements for their substantive truth violated Mr. Hicks's right to confront the witnesses against him as guaranteed by the

Sixth Amendment to the United States Constitution.

<u>CONCLUSION</u>

For the foregoing reasons, Mr. Hicks' petition for certiorari should be granted.

Respectfully submitted,

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