Appendix A

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Court of Criminal Appeals of Alabama.

Dennis Morgan HICKS
v.
STATE of Alabama

CR-15-0747
|
July 12, 2019

Synopsis
Background: Defendant was convicted in the Circuit Court, Mobile County, CC-12-4687, of capital murder and second-degree theft of property, and was sentenced to death. He appealed.

Holdings: The Court of Criminal Appeals, McCool, J., held that:

defendant's constitutional right to counsel was not violated in connection with his pretrial court-ordered mental examination;

defendant's Fifth Amendment right against self-incrimination was not violated by the introduction, during penalty phase of trial, of expert witness's testimony and report regarding his pretrial psychological evaluation of defendant;

trial court made adequate determination regarding defendant's competency to stand trial following his pretrial mental examination;

trial court did not abuse its discretion in denying defendant's "emergency" pretrial motion for third competency evaluation after defendant had undergone two prior competency evaluations; and

any improper reliance by State, during its arguments to jury in guilt phase of case, on hearsay statements of child eyewitnesses as substantive evidence of guilt was not reversible error.

Affirmed as to convictions; remanded as to sentencing.

Kellum, J., concurred in result.

Appeal from Mobile Circuit Court (CC-12-4687 and CC-12-4994); Charles A. Graddick, Judge.

Attorneys and Law Firms

Angela L. Setzer and Rachel P. Judge, Montgomery, for appellant.

Luther Strange and Steve Marshall, attys. gen., and William D. Dill and Audrey K. Jordan, asst. attys. gen., for appellee.

Opinion

McCOOL, Judge.

***1** Dennis Morgan Hicks was convicted of capital murder, see § 13A-5-40(a)(6), Ala. Code 1975, for intentionally killing Joshua Duncan, while Hicks was under a sentence of life imprisonment. He was also convicted of theft of property in the second degree, see § 13A-8-4, Ala. Code 1975, for exerting unauthorized control over Dorothy Hudson's utility trailer, valued at $1,500, with the intent to deprive her of the trailer. Following a jury trial, the jury recommended a sentence of death as to the capital murder conviction, by a vote of 11 to 1, and Hicks was subsequently sentenced to death. He was sentenced to time served for his theft-of-property conviction.

Facts

Joshua Duncan, the victim, was 23 years old at the time of the murder and had met Hicks at a church, The Power of God Worship Center; Hicks performed odd jobs around the church and worked as a handyman. Duncan had mental disabilities and received Social Security benefits. He lived with his grandmother, Dorothy Hudson, who had raised him after his father died. Hudson hired Hicks to do some work for her, and Hicks asked her to sell him a utility trailer that she had been left by her deceased husband. The trailer was located on a part of her property that was near her house. Hicks wanted to fix the trailer to use or to sell. Hudson refused to sell the utility trailer to Hicks.

On August 31, 2011, Hudson allowed Duncan to accompany Hicks on an errand of Hicks's and, while on the errand, Hicks offered to include Duncan as a worker on an upcoming painting job. Hicks also offered to teach Duncan how to drive. Hudson reluctantly agreed and Duncan left the next day, September 1, to stay with Hicks so they could leave early for the job.

On September 1, Hudson, who had gotten Duncan's Social Security income (SSI) check, accompanied Hicks and Duncan to the bank to cash the check for Duncan and give him the money. The next day, September 2, Hicks and Duncan unsuccessfully attempted to eliminate Hudson as a recipient of Duncan's Social Security benefits check and to have his checks sent to Hicks's house.

Hicks and Duncan went to stay in a mobile home belonging to Regina Norris, Hicks's sister. Norris, who lived in the mobile home, was caring for three of her grandchildren who were living with her while their mother was in jail; they were six-year-old Alyssa,[1] five-year-old Jatton,[2] and four-year-old Chance.[3] Duncan did not have a phone, and, when Hudson did not hear from Duncan, she became concerned and tried to contact Hicks by calling him and by driving to his house.

One of Hudson's neighbors saw her utility trailer being pulled away from her property by a white “Blazer or Jimmy-type vehicle.” (R. 1116.) He testified that the vehicle looked similar to that depicted in a photograph of Hicks's vehicle. The witness did not see who was driving the vehicle or who was inside. Hicks and Duncan went by the house of a friend of Hicks's, Mary Ann Lambert, who agreed to witness a written statement that served as a bill of sale for the utility trailer. She witnessed Hicks and Duncan sign the paper. Duncan told Lambert that the trailer was his and that it had belonged to his deceased grandfather. Lambert's son then accompanied Hicks and Duncan to get the utility trailer from Hudson's property. At trial, Lambert testified that she could not remember when this occurred, but the bill of sale was dated August 29, 2011.

***2** On the night of the murder, September 5, 2011, as documented by a neighbor's security camera, Hicks and Duncan were working on the utility trailer that had been relocated near Norris's mobile home. Hicks and Duncan began fighting later that night and two of Norris's children, Jatton and Chance, who were in Norris's mobile home, witnessed the fight as it transpired in the backyard.[4] The boys stated during their interview with law enforcement that Hicks hung Duncan from a chain on a tree in the backyard, decapitated him, and cut off his hands.[5] Hicks then loaded the body in his vehicle and left. The body parts were later discovered dumped in a trash pile located at a firing range once used by the Mobile Police Department.

The following morning, on September 6, Hicks telephoned Hudson and asked what she was doing. He called her again that afternoon and told her that he and Duncan had gotten into a fight the previous night, and that Duncan had walked away at approximately 2 a.m. Hudson became suspicious because Hicks had not mentioned in the earlier phone call that Duncan had left. She began trying to find Duncan. She called Hicks repeatedly and drove around asking if anyone had seen Duncan. She then discovered that her utility trailer was missing.

In hopes of finding Duncan, friends of his family put out fliers depicting Duncan as well people with whom he was last seen, specifically Hicks and Regina Norris. Mary Ammons Clark, a friend of the family, testified that she took part in posting fliers and noticed that the fliers were being taken down. She later saw Hicks taking down several fliers.

Hudson contacted the police to inform them that Duncan and her trailer were missing and that when she last saw both Duncan and her trailer they were in Hicks's presence. She continued to call Hicks who eventually answered and told her that Duncan was at his house, although she could never contact Duncan.

Later that day, Hicks was taken to the police station, where he gave a statement indicating that, while inside Norris's mobile home on the night of September 5, he had caught Duncan masturbating and had gotten upset. Hicks took Duncan back to Hicks's house where they fought and Duncan left by foot. Hicks told the police that he did not see Duncan again. He also told the police that he bought the utility trailer from Duncan who, Hicks stated, has told Hicks that he owned the trailer. Hicks stated that he purchased the trailer from Duncan for $375, fixed it up, and sold it for $600.

Duncan's sister testified that, after Duncan was determined to be missing, she called Hicks and he told her that he did not know what had happened to Duncan. She further stated that Hicks recounted several different stories as to what had happened when Duncan disappeared.

Over a month later, city workers who were cleaning the old police firing range discovered Duncan's remains in a tree-line

of the property. The decomposed body had no hands or head. The body had suffered blows that indicated chopping wounds. The body had also been disemboweled. The pathologist could not determine at what point during the offense Duncan had died.

Later, while in prison, Hicks talked to two fellow prisoners about the offense. Hicks told a cell-mate, after he had met with counsel, that a boy had seen him do it and Hicks told another prisoner that he had killed the victim and put him in the bushes.

Standard of Review

***3** The plain error standard of review stated in Rule 45A, Ala. R. App. P., applies when a defendant makes arguments on appeal that were not brought up before the circuit court.

> " ' "Plain error is defined as error that has 'adversely affected the substantial right of the appellant.' The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal. As the United States Supreme Court stated in United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed. 2d 1 (1985), the plain-error doctrine applies only if the error is 'particularly egregious' and if it 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' See Ex parte Price, 725 So.2d 1063 (Ala. 1998), cert. denied, 526 U.S. 1133, 119 S.Ct. 1809, 143 L.Ed. 2d 1012 (1999)." '
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> "Ex parte Brown, 11 So. 3d 933, 935–36 (Ala. 2008)(quoting Hall v. State, 820 So. 2d 113, 121–22 (Ala. Crim. App. 1999)). See also Ex parte Walker, 972 So. 2d 737, 742 (Ala. 2007); Ex parte Trawick, 698 So. 2d 162, 167 (Ala. 1997); Harris v. State, 2 So. 3d 880, 896 (Ala. Crim. App. 2007); and Hyde v. State, 778 So. 2d 199, 209 (Ala. Crim. App. 1998)('To rise to the level of plain error, the claimed error must not only seriously affect a defendant's "substantial rights," but it must also have an unfair prejudicial impact on the jury's deliberations.'). Although the failure to object in the trial court will not preclude this Court from reviewing an issue under Rule 45A, Ala. R. App. P., it will weigh against any claim of prejudice made on appeal. See Dotch v. State, 67 So. 3d 936, 965 (Ala. Crim. App. 2010)(citing Dill v. State, 600 So. 2d 343 (Ala. Crim. App. 1991)). Additionally, application of the plain-error rule
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> " ' " 'is to be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." ' " Whitehead v. State, [777 So. 2d 781], at 794 [(Ala. Crim. App. 1999)], quoting Burton v. State, 651 So. 2d 641, 645 (Ala. Crim. App. 1993), aff'd, 651 So. 2d 659 (Ala. 1994), cert. denied, 514 U.S. 1115, 115 S.Ct. 1973, 131 L.Ed. 2d 862 (1995).'
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> "Centobie v. State, 861 So. 2d 1111, 1118 (Ala. Crim. App. 2001)."

Phillips v. State, [Ms. CR–12–0197, December 18, 2015] ––– So. 3d ––––, –––– (Ala. Crim. App. 2015).

Discussion

I.

Hicks first argues that he was without legal representation during his court-ordered, pretrial psychiatric examination, which, he says, was a critical stage of his trial. Hicks alleges that, although he had requested court-appointed counsel, the court failed to appoint counsel until after the examination. Hicks is entitled to no relief on this issue.

A brief review of the facts regarding Hicks's legal representation in this case is in order. Before trial, Hicks changed counsel a number of times. The record indicates that during a pretrial hearing held on November 6, 2014, Hicks again asked that his counsel be removed and a specific different counsel be appointed to represent him. Hicks stated that "I have respect for these guys. They may be great lawyers ... I'm just saying there's a conflict of interest and trust issue here and I don't want them as my lawyer if I can't trust them." (Pretrial R. 44.) Hicks maintained that counsel had "lied" numerous times and specifically argued that one of his counsel had stated that Hicks had gotten out of prison in 2010 when, in fact, he had been released in 2005. (Pretrial R. 43, 44.) The court agreed to speak to counsel Hicks had requested be appointed. Hicks had filed complaints about his counsel, and one of his counsel made the following statement to the court:

> ***4** "I would just like to say I have contacted the office of general counsel, Alabama State Bar, and I was referred to Rule 1.7 conflict of interest and I would state on the record that I've been on Mr. Hick's case since April of 2014 and worked diligently on the case when I received this

complaint and will continue to work diligently on the case even after all that and after the complaint. I view the rule that I have -- it has no adverse impact on my ability to represent Mr. Hicks."

(Pretrial R. 49.)

On November 13, 2014, Hicks's counsel moved to withdraw. On November 20, 2014, at a hearing, the court informed Hicks that counsel Hicks requested be appointed had never tried a capital murder case and that counsel did not feel that he should represent Hicks. The court also stated that it had spoken to other attorneys before the hearing and that none would represent Hicks. Hicks asked to use the services of an attorney who had previously been appointed to represent him. However, the court and Hicks acknowledged that counsel might not do so because of Hicks's behavior and that Hicks might have difficulty finding representation. The court acknowledged that he was concerned about Hicks's mental stability and the State agreed and requested a mental evaluation of Hicks, "given some of the behavior in and out of court." (Pretrial hearings R. 53.)[6] The following then transpired in the presence of Hicks's counsel:

"THE COURT: ... One thing we need to make sure you're competent to stand trial. If you have to represent yourself, I mean, I'm not saying you're crazy. Crazy isn't even in it, the vocabulary. You know how it goes.

"THE DEFENDANT [Hicks]: Yes, sir. Let's get it on the record either I am or I'm not.

"THE COURT: That's right. So cooperate. I was going to tell you it's Dr. McKeown but it may be somebody else. They don't hypnotize you or anything. They just talk to you. You know how it goes. Hopefully that will happen in the next few weeks. I was going to tell you if, but I can't predict that now, if he comes by on the first Monday or whatever. We're going to reset it maybe for about four weeks so you won't get lost.

"THE DEFENDANT: Can I get a little clarification here?

"THE COURT: Yes.

"THE DEFENDANT: I am now without counsel at this moment; correct?

"THE COURT: No. I'm going to keep -- I'm going to keep them on standby right now about whether to relieve them. So they're still your counsel.

"THE DEFENDANT: He just informed me that he didn't want to be. I don't want him to be. So I can't continue to write counselor and say --

"THE COURT: He's filed a motion to —- He's filed a motion to -- But I want to make sure you are before I relieve them of being your counsel.

"THE DEFENDANT: Whenever I write like Mr. Tyson or different ones out there, or John Beck, all these others I still have to say they're still here?

"THE COURT: Give them a copy [i]f you want to do that, yes. Send them a copy. I want to make sure you are.

"....

"THE DEFENDANT: Between now and January a psychologist is supposed to call me up and get evaluated?

"THE COURT: Right, should come by the jail. They have room over there. They'll interview you and get us a report.

"THE DEFENDANT: During the meantime I can still be on hunt for counsels that qualify?

"THE COURT: Sure you can do that if you want to. Yes."

(Pretrial hearings R. 53-56.)

***5** On January 8, 2015, another hearing was held concerning a mental evaluation for Hicks, and the court explained that Hicks would be sent to Taylor Hardin Mental Facility in 6 to 10 weeks. Again, Hicks's counsel was present for the hearing. The court also granted Hicks's motion to have his family hire an attorney but gave him only until January 30 to do so. If Hicks did not retain an attorney by that date, an attorney would be appointed. The court stated:

"What I'm going to do is I'm going to give you until January 30th and if you can hire an attorney fine; if not, I'm going to appoint someone at that time, end of the month. Then we'll enter this order getting you to Taylor Hardin and then I'm granting their motion to withdraw right now and then if you can get somebody by the end of the month, fine; after that I'm going to appoint somebody."

(Pretrial hearings R. 59.)

On February 19, Hicks's motion for appointment of counsel was granted and then current counsel was allowed to withdraw;[7] new counsel was appointed.

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On appeal, Hicks argues that he did not have meaningful contact with counsel during his pretrial psychiatric evaluation, which, he alleges, was a critical stage of his prosecution. He submits that he had sent complaints to the court, as well as the Alabama State Bar, regarding the attorneys who were acting as his counsel at that time. He contends that, although counsel were on standby, they had not met with him for months and were not present at the time of the evaluation.

Hicks did not object at trial or before trial on these grounds;[8] therefore, any error must rise to the level of plain error. Rule 45A, Ala. R. App. P. Moreover, Hicks's failure to object weighs against any finding of prejudice. Gobble v. State, 104 So. 3d 920, 937 (Ala. Crim. App. 2010).

This Court recently held that the right to counsel associated with the critical stage of trial proceeding has not been extended to the psychiatric examination. This Court stated:

> "The Tennessee Supreme Court in State v. Martin, 950 S.W. 2d 20 (Tenn. 1997), discussed the problems in extending the right to counsel to a mental-health examination:
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> > " 'Both the United States and Tennessee Constitutions require the presence of counsel to represent a defendant not only at trial but also at "critical stages" of the proceedings "where counsel's absence might derogate from the accused's right to a fair trial." The purpose underlying the right is to "preserve the defendant's basic right to a fair trial as affected by his [or her] right meaningfully to cross examine the witnesses ... and to have effective assistance of counsel at the trial itself." United States v. Wade, 388 U.S. 218, 226–27, 87 S. Ct. 1926, 1931–32, 18 L. Ed. 2d 1149 (1967).
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> > " 'The defendant asserts that the court-ordered mental examination was a "critical stage" of the proceedings requiring the presence of counsel under the United States and Tennessee Constitutions. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. The State maintains that the mental examination is not a "critical stage" of the proceedings and moreover, that counsel's presence would impair or limit the effectiveness of the examination.
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> > ***6** " 'In Estelle v. Smith, [451 U.S. 454 [101 S.Ct. 1866, 68 L.Ed. 2d 359] (1981)], the Supreme Court held that the Sixth Amendment right to counsel was violated when the defendant "was denied the assistance of his attorneys in making the significant decision of whether to submit to the [psychiatric] examination and to what end the psychiatrist's findings could be employed." Although the court said that the psychiatric interview "proved to be a 'critical stage' against" the defendant, its holding was limited to the question of whether the defendant was entitled to consult with counsel prior to the examination. The court did not find a Sixth Amendment right to have counsel at the examination and, in fact, noted with apparent approval the Court of Appeals' finding that "an attorney present during the psychiatric interview could contribute little and might seriously disrupt the examination." 451 U.S. at 470–71, 101 S.Ct. at 1877, n. 14.
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> > " 'In later clarifying Estelle, the court stressed that "for a defendant charged with a capital crime, the decision whether to submit to a psychiatric examination designed to determine his future dangerousness is 'literally a life and death matter' which the defendant should not be required to face without "the guiding hand of counsel.' " Satterwhite v. Texas, 486 U.S. 249, 254, 108 S.Ct. 1792, 1796, 100 L.Ed. 2d 284 (1988). Similarly, the court said that "[w]hile it may be unfair to the state to permit a defendant to use psychiatric testimony without allowing the state a means to rebut that testimony, it certainly is not unfair to the state to provide counsel with notice before examining a defendant concerning future dangerousness." Powell v. Texas, 492 U.S. 680, 685, 109 S.Ct. 3146, 3150, 106 L.Ed.2d 551 (1989); see also State v. Bush, 942 S.W. 2d 489 (Tenn. 1997).
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> > " 'While the United States Supreme Court has not directly addressed the issue, a substantial majority of state and federal jurisdictions have held that a defendant does not have the right to counsel during a psychiatric examination. In United States v. Byers, [740 F.2d 1104 (D.C. Cir. 1984)], for instance, the court distinguished the need for counsel before an examination, as opposed to during the examination itself, by pointing out that before examination
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> > > " ' "[the defendant] was confronted by the procedural system at the point at which he had to decide whether to raise the insanity defense, a determination that would have several legal consequences, including the likelihood of a court order that he undergo a psychiatric examination....

" ' "But at the psychiatric interview itself, [the defendant] was not confronted by the procedural system; he had no decisions in the nature of legal strategy or tactics to make -- not even, as we have seen, the decision whether to refuse, on Fifth Amendment grounds, to answer the psychiatrist's questions. The only conceivable role for counsel at the examination would have been to observe....

" '740 F.2d at 1118–1119.

" 'Similarly, numerous courts have considered the "pragmatic" effect that counsel's presence, instead of rendering assistance, would impede or inhibit the examination. Moreover, a number of courts have stressed that the defendant's rights to a fair trial and to confrontation are sufficiently preserved by counsel's opportunity to interview the witnesses, review the results and information generated by the examination, conduct cross-examination of the psychiatric witnesses, and introduce defense witnesses. See, e.g., State v. Schackart, [175 Ariz. 494,] 858 P. 2d [639] at 646–47 [(1993)].

" 'Accordingly, we agree with the courts which have distinguished the "critical stage" prior to a psychiatric examination from the examination itself. We are convinced that the examination differs in purpose and procedure from other stages of the adversarial system, and that counsel's physical presence in a strictly passive, observational capacity, is not necessary to protect the defendant's related rights to a fair trial and to confront witnesses. In particular, the defendant has access to the information and results generated by the mental examination, as well as the right to interview, subpoena, and cross-examine the experts with regard to their methodology, opinions, and results.

***7** " 'Thus, we conclude that the Sixth Amendment of the U.S. Constitution and article I, § 9 of the Tennessee Constitution do not require the presence of counsel during a court-ordered mental examination. It follows that the trial court's order, which did not specifically permit counsel to attend and monitor the mental examination, did not violate the defendant's right to counsel.'

"State v. Martin, 950 S.W.2d 20, 25–27 (Tenn. 1997).

"Since the United States Supreme Court release of Atkins [v. Virginia, 536 U.S. 304 (2002)], one federal court has declined to extend the right to counsel to the actual mental evaluation for the reasons set out by the Tennessee Supreme Court:

" '[T]he court finds compelling the Government's representation that, according to its experts, "the presence of third parties during examinations can be disruptive and have adverse effects on the performance and outcome of the evaluation." (Gov't Mem. at 32.) The Second Circuit and district courts in this Circuit have repeatedly denied requests by counsel to be present at mental examinations because of these precise effects. See, e.g., Hollis [v. Smith], 571 F.2d [685] at 692 [(2nd Cir. 1978)]("It is difficult to imagine anything more stultifying to a psychiatrist, as dependent as he is upon the cooperation of his patient, than the presence of a lawyer objecting to the psychiatrist's questions and advising his client not to answer this question and that."); United States v. Baird, 414 F.2d 700, 711 (2d Cir. 1969)("[T]he presence of a third party, such as counsel ..., at [a mental] examination tends to destroy the effectiveness of the interview."); Marsch v. Rensselaer Cty., 218 F.R.D. 367, 371 (N.D.N.Y. 2003)("In federal court, [ ] the attendance of a subject's counsel or other observer is generally prohibited unless required by unusual circumstances."); Equal Emp't Opportunity Comm'n v. Grief Bros. Corp., 218 F.R.D. 59, 63–64 (W.D.N.Y. 2003)("[F]ederal law generally rejects requests that a party's attorney attend a [mental] examination."); Baba–Ali v. City of N.Y., No. 92-CV-7957 (DAB)(THK) (S.D.N.Y. Dec. 19, 1995)("The weight of authority is clearly against the presence of counsel at a [mental] examination.").'

"United States v. Wilson, 920 F.Supp. 2d 287, 305 (E.D.N.Y. 2012)."

Callen v. State, [Ms. CR-13-0099, April 28, 2017] ––– So. 3d ––––, –––– (Ala. Crim. App. 2017).

In Ex parte Wilson, 571 So. 2d 1251, 1258 (Ala. 1990), Wilson had argued that it was improper to force him to undergo a psychiatric examination by the State on a number of grounds; among them, he contended that his right to counsel was violated. The Court wrote:

"[W]e note that the defendant and his counsel were advised that the examination at Taylor Hardin would include any

mitigating circumstances. In that regard, the defendant claims that the testimony of the state's expert violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. The defendant relies heavily on the case of Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed. 2d 359 (1981).

"We find Estelle distinguishable. In Estelle, the appellate court was required to make a finding of 'future dangerousness' in order to impose the death penalty, while in the present case no such requirement exists. The Estelle court held that the examination was improper because the defendant was not informed of his Miranda rights before he was examined by the State's expert and his attorneys were not informed that the scope of the examination would include the issue of 'future dangerousness.' In this case, the defendant's counsel was informed that the examination would encompass matters of mitigation and the defendant was informed of his Miranda rights prior to the examination."

***8** Here, the court ordered a pretrial psychiatric examination on Hicks; the State agreed that it was necessary. The State had also asked that Hicks be evaluated. Dr. Karl Kirkland, a clinical psychologist, testified that he was an expert for the court as opposed to an expert for one of the parties and that the purpose of his evaluation was not to suggest treatment. He testified that his report was

"a pre-trial evaluation to ensure that [Hicks's] constitutional rights are protected in the sense of that he can be present and is able to be present physically and psychologically, cognitively, and to cooperate with his attorneys and can continue to do that. And so the focus of the evaluation is on answering that competency to proceed question. And then to answer the question of what was his mental state like to the best that can be determined at the time of what he is alleged to have done --

"Again, my role is not to gather evidence either way ... and then to report that to the court."

(R. 2549-50.)

In this case, Dr. Kirkland's report, dated March 1, 2015, states that the evaluation was conducted on February 21, 2015. Dr. Kirkland testified during sentencing on cross-examination that he had spent time with Hicks only once for two-and-a-half hours on February 21, 2015. He also reviewed documents and other materials. Dr. Kirkland opined that Hicks had antisocial personality disorder, but did not have a clinical disorder; he did not believe that Hicks was depressed or psychotic.

Also, during the penalty phase of trial, Hicks presented the testimony of a clinical psychologist, Dr. Marianne Rosenzweig, whom he hired as a mitigation specialist for sentencing. The expert interviewed Hicks at length from August 2013 until June 2015. She also interviewed "a variety of people who've known" Hicks "in different ways across [his] lifetime." (R. 2576.) She also reviewed many pertinent documents and records. She concluded that he suffered from bipolar disorder with manic episodes.

Although Hicks's Sixth Amendment right to counsel had attached at the time he was examined by Dr. Kirkland,[9] even if the right to counsel applied to the examination, Hicks was not "denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed." Compare Estelle v. Smith, 451 U.S. at 471, 101 S.Ct. 1866. Hicks's counsel were present at the hearings when the evaluation was discussed and were aware of the arrangements and that Hicks would be evaluated for competency to stand trial, as well as his mental state at the time of the offense. Copies of the court's orders for outpatient evaluations of Hicks's competency to stand trial and his mental state at the time of the offense were also served on defense counsel. Apart from whether this pretrial psychological evaluation was a critical stage of Hicks's proceedings, Hicks's right to counsel was not violated.

"The right to counsel of choice -- either initially or continued representation -- is not absolute -- either for indigent or nonindigent defendants. See Wheat[v. United States], 486 U.S. [153] at 159 [108 S.Ct. 1692, 100 L.Ed.2d 140 (1988)] ('The Sixth Amendment right to choose one's own counsel is circumscribed in several important respects.'); Ex parte Walker, 675 So. 2d [408] at 410 [(Ala. 1996)](Although 'an indigent defendant has a right to request counsel of his or her choice, the law is clear that the right of an indigent defendant to choose counsel is not absolute.'); Hamm[v. State], 913 So. 2d [460,] at 472 [(Ala. Crim. App. 2002)] ('No amendment, statute, or caselaw guarantees the absolute right to representation by any particular counsel or by counsel of the accused's choice, even in a criminal trial.'); and Briggs v. State, 549 So. 2d 155, 160 (Ala. Crim. App. 1989) ('[T]he right to counsel of one's choice is not absolute, as is the right to assistance of counsel.') '[W]hile the right to

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select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.' Wheat, 486 U.S. at 159.

***9** "With respect to the right to choose counsel initially, no criminal defendant has the right to insist on being represented by an attorney who is not authorized to practice law or who declines to represent the defendant. See, e.g., United States v. Gonzalez–Lopez, 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed. 2d 409 (2006), and Wheat, 486 U.S. at 159. In addition, although 'the right [to counsel of choice] extends to indigent defendants, it does not afford them carte blanche in the selection of ... counsel.' [United States v.]Myers, 294 F.3d [203,] at 206 [(1st Cir. 2002)]. Just as a nonindigent defendant has a presumptive or qualified right to retain counsel of his or her own choosing, an indigent defendant who secures pro bono counsel at no expense to the State has a presumptive or qualified right to choose that counsel. See Ex parte Walker, 675 So. 2d at 410 ('The fact that [a criminal defendant] has inadequate resources to hire an attorney should be of no consequence, if [he or] she can secure representation at no expense to the State. Just as a defendant who can pay for legal counsel has a right to choose his or her own attorney, an indigent defendant can choose to be represented by an attorney who offers to represent the defendant at no expense to the State.'); and Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624, 109 S.Ct. 2646, 105 L.Ed. 2d 528 (1989) ('[T]he Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds.' (emphasis added)). However, an indigent defendant who requires counsel appointed by the court at the State's expense has no right to choose the counsel to be appointed. See Ex parte Moody, 684 So. 2d 114, 121–22 (Ala. 1996) ('[A]n indigent defendant is not entitled to legal counsel of his choice, when counsel is to be paid by public funds, but rather is entitled to competent legal representation.'). '[A] defendant may not insist on representation by an attorney he cannot afford.' Wheat, 486 U.S. at 159. 'An indigent defendant has no right to compel the trial court to appoint an attorney of his own choosing.' Davis[v. State], 261 Ga. [221] at 222, 403 S.E. 2d [800] at 801 [(1991)].

"With respect to continued representation, however, there is no distinction between indigent defendants and nonindigent defendants. See, e.g., State v. Huskey, 82 S.W. 3d 297, 305 (Tenn. Crim. App. 2002) ('[A]ny meaningful distinction between indigent and non-indigent defendants' right to representation by counsel ends once a valid appointment of counsel has been made.'). See also Morris v. Slappy, 461 U.S. 1, 23 n. 5, 103 S.Ct. 1610, 75 L.Ed. 2d 610 (1983) (Brennan, J., concurring in the result) ('[T]he considerations that may preclude recognition of an indigent defendant's right to choose his own [court-appointed] counsel, such as the State's interest in economy and efficiency, ... should not preclude recognition of an indigent defendant's interest in continued representation by an appointed attorney with whom he has developed a relationship of trust and confidence.'); and Commonwealth v. Jordan, 49 Mass. App. Ct. 802, 733 N.E. 2d 147 (2000) (recognizing that an indigent defendant with court-appointed counsel must be treated the same as a nonindigent defendant with retained counsel when it comes to removing that counsel). As the Florida Supreme Court explained in Weaver v. State, 894 So. 2d 178 (Fla. 2004):

> " 'The general rule is that an indigent defendant has no right to choose a particular court-appointed attorney. See Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624, 109 S.Ct. 2646, 105 L.Ed. 2d 528 (1989); Capehart v. State, 583 So. 2d 1009, 1014 (Fla. 1991) (citing Hardwick v. State, 521 So. 2d 1071, 1074 (Fla. 1988)); Harold v. State, 450 So. 2d 910, 913 (Fla. 5th DCA 1984) ("An indigent defendant does not have the right to pick and choose the lawyer who will represent him."). Thus, if a trial court decides that court-appointed counsel is providing adequate representation, the court does not violate an indigent defendant's Sixth Amendment rights if it requires him to keep the original court-appointed lawyer or represent himself. Foster v. State, 704 So. 2d 169, 172 (Fla. 4 th DCA 1997).' "

Lane v. State, 80 So. 3d 280, 295-96 (Ala. Crim. App. 2010).

The record indicates that Hicks was represented by a number of different attorneys and that he struggled to find counsel who would work with him. He was represented by competent counsel, although not Hicks's most desired counsel, throughout the proceedings. Counsel indicated to the court that, although Hicks had filed grievances about counsel, his representation of Hicks was and continued to be diligent until his withdrawal. The specific misstatement and alleged ineffectiveness cited by Hicks did not amount to the absence of counsel. Hicks made no complaint that his counsel at the time of the evaluation was not present, rather he maintained that he wanted different counsel. He did not later object when

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he was represented by subsequent counsel and Dr. Kirkland's report was admitted or Dr. Kirkland testified. Based on the foregoing, Hicks is entitled to no relief on this claim.

II.

***10** Hicks argues that Dr. Kirkland's testimony and his pretrial psychiatric report were illegally admitted because, he argues, the report and testimony were admitted during the penalty phase and, therefore, the purpose of their admission was not to determine competency. Rather, Hicks argues, the testimony and report were introduced as evidence as to the conclusion both that Hicks was competent and that he suffered from antisocial personality disorder. Hicks argues that this evidence was inadmissible because he did not enter a plea of not guilty by mental disease or defect, because he was not informed that his evaluation could be used against him in violation of his Fifth Amendment rights, and because, he says, he was denied his right to counsel in violation of his Sixth Amendment rights. Hicks did not object at trial on any of those grounds; therefore, any error must amount to plain error. Rule 45A, Ala. R. App. P. Hicks's claim of error based on the violation of his Sixth Amendment rights has previously been discussed and decided adversely to him. See Part I, supra. As discussed below, Hicks is not entitled to relief on the other issues.

A.

Hicks's Fifth Amendment rights against self-incrimination were not violated by the introduction of Dr. Kirkland's testimony or report regarding his psychological evaluation of Hicks. Hicks contends that he did not knowingly and intelligently waive his Fifth Amendment privileges prior to cooperating in the examination because he was told that the examination was intended only to determine his competency to stand trial.

In the present case, the pretrial psychological examinations were discussed extensively in pretrial hearings. Dr. Karl Kirkland was ordered by the court to conduct a pretrial evaluation to determine "competency to proceed" and "what [Hicks's] mental state [was] like to the best that can be determined at the time of what he is alleged to have done." (R. 2549.) Hicks was aware of the purpose of the evaluation before trial through discussions with the court. Dr. Kirkland's report states:

> "Prior to the beginning the evaluation, the defendant was informed as to the purpose of the evaluation and the limited confidentiality involved. He was told that the results will be submitted in the form of a report to the Court, the defense attorney, and the District Attorney. He was also informed that the results could be used in Court proceedings either through testimony of the examiner and/or the written report to assist in reaching decisions concerning his competency to stand trial, but that none of the information could be used as evidence against him concerning his guilt of any charge. The defendant indicated that he understood the purpose and the limited confidentiality of the evaluation, agreed to proceed, and signed the notification form."

(C.337.) Moreover, during direct examination, Dr. Kirkland testified concerning his evaluation of Hicks:

> "[Hicks] was able to understand the -- I'm required to inform him why I'm there and to tell him about how that affects his rights and the trial proceeding. He was able to understand that. And he agreed to participate in the evaluation, signed the release form and proceeded."

(R. 2552.) Thus, Hicks was aware of the consequences and purpose of the evaluation in determining his competency to stand trial and mental state at the time of the offense.

Moreover, Hicks requested and received additional funding for his mitigation expert, Dr. Rosenzweig. It was noted that one of Hicks's early appointed attorneys filed a motion under the Health Insurance Portability and Accountability Act that "sought some of Hicks's psychological records for his mitigation expert." (Pretrial R. 33, C.269.) The expert, according to defense counsel, had completed most of her work at the time of the pretrial hearing and would be ready for trial. (Pretrial R. 43, 70, 78.) It was clear that the defense intended to rely on psychological evaluations for mitigation purposes.

Hicks was aware that the psychological examinations were intended to be used for determining his competency to stand trial, his mental state at the time of the offense, and sentencing purposes. The evaluations were not used for evidence of guilt or as evidence of future dangerousness.[10]

> ***11** "A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. Because respondent did not voluntarily consent to the pretrial psychiatric examination after being informed of his right to remain silent and

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> the possible use of his statements, the State could not rely on what he said to Dr. Grigson to establish his future dangerousness. If, upon being adequately warned, respondent had indicated that he would not answer Dr. Grigson's questions, the validly ordered competency examination nevertheless could have proceeded upon the condition that the results would be applied solely for that purpose. In such circumstances, the proper conduct and use of competency and sanity examinations are not frustrated, but the State must make its case on future dangerousness in some other way."

Estelle v. Smith, 451 U.S. at 468-69, 101 S.Ct. 1866 (footnote omitted).

There was no Fifth Amendment violation in the admission of Dr. Kirkland's report or testimony during the penalty phase.

B.

Although Hicks neither entered a plea of not guilty by reason of mental disease or defect nor requested a mental evaluation, there was no error, plain or otherwise, in Dr. Kirkland's testimony and the admission of his report during the penalty phase of Hicks's trial.

Dr. Kirkland's testimony and report were relevant to rebut the testimony of Hicks's mitigation expert, Dr. Rosenzweig. Rule 11.2(b), Ala. R. Crim. P. Hicks introduced mitigation evidence concerning his mental and psychological state through the testimony and evaluation of Dr. Rosenzweig, who extensively evaluated Hicks before trial. "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." California v. Brown, 479 U.S. 538, 545, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring specially).

The State may properly rebut evidence of mitigating circumstances. See McWilliams v. State, 640 So. 2d 982, 988–991 (Ala. Crim. App. 1991), aff'd in part, remanded in part, 640 So. 2d 1015 (Ala. 1993). See also George v. State, 717 So. 2d 844, 848 (Ala. 1996). If the defendant presents mitigation evidence, the burden then shifts to the State to disprove the factual existence of the defendant's mitigating circumstance by a preponderance of the evidence. § 13A–5–45(g), Ala. Code 1975.[11] "In fact, the State ... has a greater burden in disproving the existence of mitigating circumstances than the defendant has in introducing [evidence of] mitigating circumstances." Dill v. State, 600 So. 2d 343, 362 (Ala. Crim. App. 1991). The State attempted to rebut the evidence offered by Dr. Rosenzweig through the testimony and evaluation of Dr. Kirkland.

Any evidence that is probative and relevant to sentencing is properly presented in a capital-sentencing hearing. Section 13A–5–45(d), Ala. Code 1975, provides that "[a]ny evidence which has probative value and is relevant to sentence shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements."

***12** From a thorough review of the record, it is clear that the evidence the State presented at the sentencing phase of the trial pertaining to Hicks's psychological or mental state was offered to rebut the evidence of mental instability Hicks offered in mitigation of the capital offense for which he was convicted. This evidence was probative and relevant to the sentencing. The trial court found as a mitigating circumstance that Hicks suffered from extreme mental or emotional disturbance and accorded the evidence of Dr. Rosenzweig supporting this mitigating circumstance some weight. Thus, the State properly introduced evidence to rebut this mitigating circumstance. Hicks is entitled to no relief on this issue.

III.

Hicks contends that the court improperly failed to make the requisite finding of competency and improperly refused to grant defense counsel's "Emergency Motion for a Psychiatric Evaluation to Determine Competency to Stand Trial." However, our analysis shows that Hicks is not entitled to any relief on this claim.

A.

Hicks argues that the court never made a determination of competency following the pretrial examination, although it was the court's duty to do so. However, the record contains two competency evaluations of Hicks before trial, one ordered by the court, both of which found him to be competent, and the court then proceeded to trial. Before trial, the court conducted

a hearing to resolve outstanding motions and the following transpired:

"THE COURT: ... We have done the competency evaluation of Mr. Hicks, at least once if not more.

"[Prosecutor]: Yes sir.

"[Defense counsel]: Yes, sir."
(Pretrial R. 69.)

Throughout the pretrial hearings, it is clear that the court determined that Hicks was competent to stand trial. Exact language is not required in such a determination or ruling. Owens v. State, 597 So. 2d 734, 736 (Ala. Crim. App. 1992)("It is clear to us that the circuit court did make a determination as to the appellant's competency, even though the record does not reveal any clear statement of that fact before the trial. For instance, there was testimony from two doctors, one from Taylor Hardin, the other from East Central Mental Health-Mental Retardation, Inc., who each performed different evaluations of the appellant prior to trial. Both of these doctors testified during the trial that the appellant was competent to stand trial. Also, the very fact that the circuit judge commenced the trial after ordering the evaluations to be conducted makes it clear that the appellant had been found competent.").

The court mentioned the finding of competency in the reports and proceeded to trial after having clearly considered those reports. There was no error on this ground.

B.

Further, the court did not err in denying Hicks's "emergency" motion to determine competency. Hicks had undergone two prior competency evaluations, and there was no showing of abuse of discretion by the court in determining that a third competency evaluation was unnecessary.

Rule 11.3(a), Ala. R. Crim. P., provides, in pertinent part:

"If the circuit court determines that reasonable grounds for an examination exist, it shall either appoint a psychiatrist or psychologist to examine the defendant and to testify regarding the defendant's mental condition, or order that an examination be conducted by a psychiatrist or psychologist appointed by the commissioner of the Department of Mental Health and Mental Retardation."

Rule 11.3(d), Ala. R. Crim. P., provides:

"The circuit court may, in its discretion, appoint additional experts and may order the defendant to submit to physical, neurological, or psychological examinations, when the court is advised by the examining psychologist or psychiatrist that such examinations are necessary for an adequate determination of the defendant's mental condition."

***13** In this case, Hicks was given a pretrial mental evaluation to determine his competency to stand trial and his mental state at the time of the offense after the court acknowledged concerns regarding Hicks's competency. He was determined to be competent. Hicks was also given an extensive psychological evaluation by his own expert who met with him nine times. There is no indication in the record that a third evaluation was warranted.

" 'A defendant is mentally incompetent to stand trial or to be sentenced for an offense if that defendant lacks sufficient present ability to assist in his or her defense by consulting with counsel with a reasonable degree of rational understanding of the facts and the legal proceedings against the defendant.' Rule 11.1, Ala. R. Crim. P. 'The defendant bears the burden of persuading the court that a reasonable and bona fide doubt exists as to the defendant's mental competency, and this is a matter within the discretion of the trial court.' Cliff v. State, 518 So. 2d 786, 790 (Ala. Crim. App. 1987). 'In order to overturn the trial judge's competency determination, we must find that the judge abused his or her discretion.' Tankersley v. State, 724 So. 2d 557, 565 (Ala. Crim. App. 1998). ' "In the absence of any evidence, the mere allegations by counsel that the defendant is incompetent to stand trial do not establish reasonable grounds to doubt the defendant's sanity and warrant an inquiry into his competency." ' Id., quoting Cliff, 518 So. 2d at 791.

" ' "[N]ot every manifestation of mental illness demonstrates incompetence to stand trial; rather, the evidence must indicate a present inability to assist counsel or understand the charges." [Card v. Singletary, 981 F.2d 481] at 487–88 [(11th Cir. 1992)] (quoting United States ex rel. Foster v. DeRobertis, 741 F.2d 1007, 1012 (7th Cir.[1984]), cert. denied, 469 U.S. 1193, 105 S.Ct. 972, 83 L.Ed. 2d 975 (1985)). Similarly, neither low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence to stand trial. McCune v. Estelle,

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> 534 F.2d 611, 612 (5th Cir. 1976). The fact that a defendant has been treated with anti-psychotic drugs does not per se render him incompetent to stand trial. Fallada [v. Dugger], 819 F.2d [1564] at 1569 [(11th Cir. 1987)].'

"Medina v. Singletary, 59 F.3d 1095, 1107 (11th Cir. 1995)."

Hodges v. State, 926 So. 2d 1060, 1068-69 (Ala. Crim. App. 2005).

Because Dr. Kirkland had already determined Hicks to be competent to stand trial and there was no other indication that an additional evaluation was necessary, the court did not abuse its discretion in denying Hicks's "emergency" motion to determine competency.

IV.

Hicks alleges that the trial court improperly allowed Chance Norris to testify because, according to Hicks, Chance was not a competent or qualified witness. Specifically, Hicks argues that the State failed to show that Chance had any knowledge of the murder and that Chance was allowed to testify, although he was not administered an oath or affirmation prior to his testimony. Hicks is not entitled to relief on this claim.

A.

Based on our review of the record, we conclude that Chance was a competent witness. After the court asked Chance a few preliminary questions, the following transpired during initial questioning by the prosecutor:

"Q. And how old are you?

"A. Eight.

"Q. And I know that you can talk louder than that in the mic[rophone]. Can you talk really loud for me?

***14** "Did you just have a birthday?

"A. Yes.

"Q. Last week? Did you turn 8 last week?

"A. Yes.

"....

"Q. Okay. And what do we call that seat that you're sitting in? Why is it important? Do you remember?

"A. (Shakes head.)

"Q. Can you tell us -- do you know the difference between a truth and a lie?

"A. Yes.

"Q. Okay. And tell me what the difference is, the difference between a truth and a lie is.

"A. A lie is when the thing didn't happen.

"Q. And what's the truth?

"A. It did happen.

"Q. Okay. And do we call that the truth seat? You remember us saying that was the truth seat?

"A. Yes.

"Q. And why is that the truth seat? Do you know why?

"A. Because you tell the truth in it.

"Q. You tell the truth in it.

"And if I say. Chance, this TV is yellow, is that a truth or a lie?

"A. A lie.

"Q. And so you're smart; right? Very good at school, aren't you? And you know the difference between what's right and what's wrong, don't you?

"You have to say yes or no.

"A. Yes."

(R. 1201-02.) Subsequently, before his direct examination, the prosecutor also questioned Chance about his ability to distinguish right from wrong and the truth from a lie, as well as his knowledge that he must tell the truth in his testimony. Chance was also examined by the prosecutor to ascertain that he had not been coached for his answers.

"In the case of Jackson v. State, 239 Ala. 38, 193 So. 417, Justice Bouldin observed, 'The exclusion of a witness having good sense, however tender the age, is disfavored

because it would often close the door to prove crimes against children themselves.' Our Courts have declined to set an age limit for children of very young age, and have placed the burden on the trial judge to determine, within his discretion, whether the child is intelligent enough to qualify as a witness. Code of Alabama, 1975, Sec. 12-21-165 provides, as follows:

" 'Incompetent witnesses.

" '(a) Persons who have not the use of reason, such as idiots, lunatics during lunacy and children who do not understand the nature of an oath, are incompetent witnesses.

" '(b) The court must, by examination, decide upon the capacity of one alleged to be incompetent from idiocy, lunacy, insanity, drunkenness or infancy.' "

Miller v. State, 391 So. 2d 1102, 1106 (Ala. Crim. App. 1980)("The trial court was satisfied, after having seen and talked with the four-year-old child, that she was an intelligent child, and understood the difference between truth and lies, and was of the opinion that the witness meets the standards of competency sufficient to testify in the case. We have read the testimony of the child contained in the record. This Court does not have the privilege of personal observation of the child as did the trial judge. We have examined the record and do not find sufficient evidence to indicate to us that the trial judge abused his discretion by allowing the four-year-old girl child to testify."). Pruitt v. State, 232 Ala. 421, 427, 168 So. 149, 154 (1936)("There is no precise age under which a child is deemed incompetent as a witness, but, under fourteen years of age, competency is within the discretion of the trial court, and is to be determined by an examination of the child...").

***15** Moreover, under Rule 601, Ala. R. Evid., "[e]very person is competent to be a witness except as otherwise provided in these rules."

" 'Pre-rules Alabama law allowed finding a witness incompetent due to drunkenness, infancy, insanity, or a conviction for perjury. Although these same witnesses are now presumed competent under Rule 601, some may not be permitted to testify because of several other factors .... A person who is an infant or mentally impaired may still be disqualified to testify as a witness under the rules. The principal difference is that the burden of proof has been shifted. The rules provide that a witness is competent and will be allowed to testify, unless the opponent can establish a basis for disqualification under one of the rules of evidence. On the other hand, common law required the proponent to prove the witness's competency. In either event, the issue of competency is decided by the trial judge.' "

Ex parte Brown, 74 So. 3d 1039, 1048 (Ala. 2011)(emphasis added). "The trial court is in the best position to examine a child's demeanor and determine if the child is competent to testify. Hamilton v. State, 520 So. 2d 155 (Ala. Crim. App. 1986), aff'd, 520 So. 2d 167 (Ala. 1987), cert. denied, 488 U.S. 871, 109 S. Ct. 180, 102 L. Ed. 2d 149 (1988); Langham v. State, 494 So. 2d 910 (Ala. Crim. App. 1986)." Davidson v. State, 591 So. 2d 901, 903 (Ala. Crim. App. 1991).

Here, the record does not indicate that the circuit judge, who was in a better position to observe Chance first-hand, erred in allowing the witness to testify.

B.

Furthermore, Chance's testimony and statements indicate that he had knowledge of the murder. Hicks argues, based on certain witness testimony that indicated that Chance was not present in the house at the time of the offense, that Chance did not witness the murder. However, the cited testimony was conflicting, and questions of witness credibility and the weight to be given to testimony are matters for the trier of fact.

In Ex parte Brown, 74 So. 3d at 1048, the appellant acknowledged that "all witnesses, including children, are competent to testify" and that "the trial court's duty [is] to determine a child witness's ability to tell the truth." However, he argued that,

"in addition to determining whether a child witness understands his or her responsibility to tell the truth when testifying, the trial court should also determine the reliability of the child witness's testimony. Brown reasons that, because of a child's age, the child witness may be unable to 'truly register' the occurrence he or she observed or the child's memory may have eroded over time, may be distorted or a false creation, or may have been influenced by the suggestion of adults. According to Brown, because the child witness believes his or her testimony to be true, despite its being the result of imagination, distortion, or suggestion, the admission of the child witness's testimony without an examination to determine its reliability presents a substantial risk that the testimony will unfairly prejudice the defendant and will mislead the jury."

The Alabama Supreme Court "decline[d] Brown's invitation to require a trial court to conduct an examination to determine the reliability of a child witness's testimony." Ex parte Brown, 74 So. 3d at 1048. The Court held that "[t]he concerns raised by Brown regarding a child witness's testimony are adequately addressed by our Rules of Evidence" and that "[i]f a party has concerns about the reliability of a child witness's testimony, then the party must present his or her concerns in an objection for the trial court based on the Rules of Evidence." Id. at 1048-49. Specifically, the Court stated that Brown's concerns were addressed by Rule 602, Ala. R. Evid., which provides that a witness's testimony may be excluded if the witness lacks personal knowledge of the matter, and Rule 403, Ala. R. Evid., which provides that testimony may be held inadmissible if the probative value of the testimony is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury. Id. Rule 602, Ala. R. Evid., states:

> ***16** "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony."

In the present case, as in Ex parte Brown, the child witness testified that he "had personal knowledge of the matter as to which [he] testified" and "about [his] recollection of the house [he] and [Jatton] were living in and the last time [he] saw [Duncan]." 74 So. 3d at 1049. The fact that Chance was a child went to his credibility and the weight to be given to his testimony rather than the admissibility of his testimony. Credibility and weight are considerations for the jury. The trial court did not err in this matter.

C.

Although Chance was not sworn in under oath before his testimony, he declared that he would testify truthfully by affirmation. Rule 603, Ala. R. Evid., requires that "[b]efore testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so." This rule mirrors Rule 603, Fed. R. Evid., and "[a]s observed by the drafters of the federal rule: 'The rule is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children.' See Fed. R. Evid. 603 advisory committee's note." Rule 603, Ala. R. Evid., Advisory Committee's Notes.

The examination of Chance established that he understood that he was required to testify truthfully and therefore established a sufficient affirmation of his understanding of his duty. Burkett v. State, 439 So. 2d 737, 744 (Ala. Crim. App. 1983)("[T]he record reflects that the trial court had the victim 'promise' to tell 'the absolute truth' and not tell 'something that is not true.' This clearly served the purpose of swearing an oath to tell the truth in substance if not in form."). No error occurred in the trial court's handling of this matter.

V.

Hicks argues that the trial court improperly allowed hearsay statements made by Jatton and Chance into evidence and that the State improperly relied on the statements as substantive evidence. Hicks argues that the State relied heavily on the statements given by Jatton, who was four years old at the time of the offense, and Chance, who was three years old at the time of the offense, to prove its case. The boys gave statements claiming to have seen Hicks murder Duncan in the backyard of Norris's mobile home. Hicks argues that Jatton's and Chance's testimony should have been admissible only as impeachment evidence and not as substantive evidence because, at trial, Jatton recanted his rendition of the facts of the offense he gave in his prior statement and Chance "gave only vague statements that did not describe the crime as alleged" in his prior statements. (Hick's brief, 35-36.) Hicks claims that, although Jatton and Chance were available at trial and subject to cross-examination, their prior out-of-court statements were hearsay and that the court failed to give proper limiting instructions regarding the admission of the statements. A review of the trial record is helpful in the disposition of this claim.

***17** At trial, defense counsel argued to the jury during opening statement that the jury would hear the children's statements and could judge the credibility of their accounts of the offense. Before the admission of the statements, the parties agreed that the statements should be admitted following the testimony of Jatton and Chance. Defense counsel had asked that the portion of the recording that contained Alyssa's statement be redacted because her statement contained hearsay and she was not available and was not going to testify.

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Defense counsel, however, asked that the statements be played to the jury, presumably so the jury could immediately assess the credibility of the boys' accounts. The redaction of Alyssa's statement was made. Both parties argued that the statements were not being offered for the truth of the matter asserted by the witnesses. The State argued that the statements were to be introduced to show that the boys were not manipulated and that "ideas [were not] planted in their minds" to manufacture their statements as to what they witnessed. (R. 1103.) Thus, the State also intended that the statements be used for credibility purposes to show that they were consistent and believable. Hicks argued that the statements would show that the boys' testimony was not credible.

Before the introduction of the statements, defense counsel, outside the presence of the jury, asked the court: "So there's a ruling, though, among the attorneys that it's a –- that it's not admitted as substantive proof. Is that correct?" (R. 1248.) The court responded affirmatively. The court then instructed the jury as follows:

> "And those statements are 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 [them] 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 whatever weight and credibility you think that it should receive. Okay?"

(R. 1249.)

In the first statement that was recorded on April 5, 2012, approximately seven months after the offense, Jatton and Chance were both questioned. Jatton basically stated that he did not remember anything. Although his statement was somewhat inconsistent, Chance stated that Hicks and Duncan began fighting in a bedroom inside the mobile home and that, after the fighting moved to the backyard by the swing set, the fight accelerated. According to Chance, Hicks and Duncan fought over a knife[12] or knives and fell doing so. Chance stated that, during his fight with Hicks, Duncan was cut on his side, choked, "got his head cut off" (C. 914,) and that Duncan's hands "got cut off too." (C. 918.) He stated that Duncan was taken away by a "[h]ospital guy." (C. 920.)

In the second statement that took place on the afternoon of same day, Chance was interviewed by Nikki Formwalt of Lifeline Counseling, as well as Officers Andrew Peak and Terri Hall. During that statement, Chance stated that, on the night of the offense, Hicks and Duncan began fighting inside Norris's mobile home and that he, Jatton, Alyssa, and Norris were aware they were fighting. He and Jatton were in their bedroom at Norris's mobile home when Chance was awakened by Hicks and Duncan fighting. Chance stated that Duncan was unarmed but that Hicks had a sword. He demonstrated the fight as he had observed it, using toys. He indicated that Duncan was cut in his neck and in his stomach and that Duncan was bleeding. He also stated that Duncan was cut on his feet.

In the third statement, taken the following day, Lawanna Kennedy, a counselor at the Child Advocacy Center, interviewed Jatton, Chance, and Alyssa, again with Officers Peak and Hall present; however, Alyssa's statements were redacted for trial. During that interview, Chance's and Jatton's renditions of what they saw involved a number of incredulous inconsistencies, involving their involvement, the weapons, who was present, the aftermath, and the nature of the injuries. However, they stated that Hicks and Duncan fought, that both men were armed with knives, that Hicks cut Duncan and hung him with a chain from a tree in the backyard of Norris's mobile. The boys both stated that Hicks cut off Duncan's head, hands, legs and feet, and cut out his stomach and eyes. The boys both stated that Duncan was taken to the hospital by doctors.

***18** On appeal, Hicks argues that the court's limiting instruction was insufficient because it did not specify the purpose for which the statements could be considered. Hicks also contends that the State relied on the statements for substantive evidence of Hicks's guilt. Hicks further alleges that the admission of the statements was not harmless error.

A.

Hicks argues that the vague and open-ended limiting instruction given by the court was insufficient and that it fostered prejudicial confusion by the jury. Hicks is entitled to no relief on this claim.

The record indicates that the court instructed the jury as follows regarding the statements by Chance and Jatton:

> "There are going to be tape recordings that are going to be played this morning to you. Some will be lengthy. Some may not be so lengthy, and they deal with children's

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statements to various individuals, detectives, and so forth over a period, I'm told, of a couple of days.

"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 [s]uch. 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.)

Hicks cites Ex parte Billups, 86 So. 3d 1079 (Ala. 2010)[13] to support his argument that the court's instructions were too vague because the court did not pinpoint the exception for which the statements were admissible. However, Billups involved the admission of evidence of a collateral bad act, specifically Billups's involvement in the killings that were not part of the murder for which he was being tried. Thus, the limiting instructions were required to be specific regarding the jury's use of evidence of the other murder. Here, the statements addressed the current offense. The defense sought to introduce the taped statements to show that the children were manipulated into giving their accounts and the State sought to introduce the statements to show that the children were not manipulated. Thus, both parties argued at trial that they wanted the statements to be admitted so that they could be considered by the jury in its determination of the credibility of the children. (R. 1243-46.) The court charged the jury that the statements were not to be considered as substantive evidence, as Hicks requested, and the jury should consider the statements in determining credibility and weight to be given the evidence. Compare Randolph v. State, 348 So. 2d 858 (Ala. Crim. App. 1977). There was no error in the trial court's handling of this matter.

B.

Hicks also argues that, during the State's arguments to the jury, the State improperly relied on the children's statements as substantive evidence of guilt. At trial, Hicks did not object to any of the statements made by the prosecutor that Hicks now argues on appeal were improper. Rule 45A, Ala. R. App. P. Based on our review, there was no reversible error on this issue.

***19** It is well settled that " '[t]he jury is presumed to follow the instructions given by the trial court.' " Mitchell v. State, 84 So. 3d 968, 983 (Ala. Crim. App. 2010) (quoting Frazier v. State, 758 So. 2d 577, 604 (Ala. Crim. App. 1999)). As already stated, the trial court's limiting instruction to the jury was proper. The trial court specifically instructed the jury that it could not consider the statements as substantive evidence or for the truth of the matter asserted. We presume the jury followed the trial court's instructions. Thus, Hicks is not entitled to any relief on this claim.

VI.

Similarly, Hicks alleges that the circuit court erred in allowing into evidence prior nonverbal statements by Jatton and Chance Norris during the investigation because, Hicks says, the statements constituted inadmissible hearsay. Specifically, Hicks refers to diagrams of a human body marked by the children during the interview with the counselor at the Child Advocacy Center to demonstrate where Duncan was injured. Hicks also complains of Officer Peak's testimony regarding where the children pointed when he asked them about the location of the injuries that they witnessed in Norris's house and backyard.

We find that these nonverbal statements were an integral part of the children's prior statements that we held were admissible in Part V, supra, and, thus, those nonverbal statements are admissible for the same reason. The admission of this evidence was a matter within the trial court's discretion, and there was no abuse of that discretion.

Moreover, the evidence contained in the diagram of the victim's body indicating the location of the injuries and in the children's gestures when asked about the location of the injuries they witnessed was cumulative of evidence admitted through the coroner's and police officers' testimony. "The admission of cumulative evidence constitutes harmless error. See Dawson v. State, 675 So. 2d 897, 900 (Ala. Crim. App. 1995), affirmed, 675 So. 2d 905 (Ala. 1996). 'The harmless error rule applies in capital cases.' Musgrove v. State, 519 So. 2d 565, 575 (Ala. Crim. App. 1986), affirmed, 519 So. 2d 586 (Ala. 1986), cert. denied, Musgrove v. Alabama, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 611 (1988)." Whatley v. State, 146 So. 3d 437, 464 (Ala. Crim. App. 2010) (opinion

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on return to remand). Thus, to the extent the admission of the nonverbal statements might have been error, it was harmless.

VII.

Hicks argues that the court improperly failed to instruct the jury on the definition of the heinous, atrocious, or cruel aggravating circumstance, which the State argued existed in the present case. Moreover, according to Hicks, the court improperly determined the existence of that aggravating circumstance by using "an unconstitutionally broad definition." (Hicks's brief, at 67.) Specifically, Hicks argues that the court found that Duncan's murder was especially heinous, atrocious, or cruel when compared to other capital offenses because Duncan might have been dismembered and disemboweled while he was still alive, and because the crime was committed in the presence of two small children. Hicks points out that, under the proper definition, the homicide must be torturous to the victim, not to other people. Hicks did not object on these grounds at trial; therefore, his claims are reviewed pursuant to the plain-error rule. Rule 45A, Ala. R. App. P.

A.

Section 13A-5-49(8), Ala. Code 1975, designates as an aggravating circumstance that "[t]he capital offense was especially heinous, atrocious, or cruel compared to other capital offenses." In its jury instructions in the present case, the trial court simply listed the aggravating circumstances the jury could consider and informed the jury that "the third is that the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses." (R. 2780.) The trial court did not define this aggravating circumstance, and Hicks did not object.

***20** In Lawhorn v. State, 581 So. 2d 1159 (Ala. Crim. App. 1990), this Court explained:

> "In Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), the Supreme Court held that the mere words 'especially heinous, atrocious, or cruel,' without more, are unconstitutionally vague under the Eighth Amendment because they fail 'adequately to inform juries what they must find to impose the death penalty and as a result leave[ ] them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 [92 S. Ct. 2726, 33 L. Ed. 2d 346] (1972),' id. 486 U.S. at 361–62, 108 S. Ct. at 1858. The Court recognized that it is well established that 'the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.' Id. at 362, 108 S. Ct. at 1858.
>
> "Unlike the state court reviewed in Maynard v. Cartwright, Alabama has restricted its 'heinous, atrocious, or cruel' circumstance to application only in a crime 'of such a nature that it is "conscienceless or pitiless" and "unnecessarily torturous to the victim," ' Ex parte Whisenhant, 555 So. 2d 235, 244 (Ala. 1989), cert. denied, 496 U.S. 943, 110 S. Ct. 3230, 110 L. Ed. 2d 676 (1990) (quoting Ex parte Kyzer, 399 So. 2d 330, 334 (Ala. 1981))....
>
> "In the instant case, the trial court's entire instruction on this circumstance consisted of the following:
>
>> " 'Another one that you could consider but is not proven by your verdict is that the capital offense was especially heinous, atrocious, or cruel, compared with other capital offenses as set out in Subdivision 8 defining aggravating circumstances.'
>
> "The court instructed the jury in the bare terms of the statute, § 13A–5–49(8). This instruction gave the jury no guidance concerning the meaning of any of the terms; the jury was not instructed on the meanings of these words in the context of a capital crime. Compare Hallford v. State, 548 So. 2d [526,] at 541-43 [(Ala. Crim. App. 1988)]; Bui v. State, 551 So. 2d 1094, 1119–20 (Ala. Cr. App. 1988), aff'd, 551 So. 2d 1125 (Ala. 1989). 'There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence.' Maynard v. Cartwright, 486 U.S. at 363, 108 S. Ct. at 1859 (quoting Godfrey v. Georgia, 446 U.S. 420, 428, 100 S. Ct. 1759, 1765, 64 L. Ed. 2d 398 (1980)).
>
> "Although we consider the jury's finding of the aggravating circumstance to be invalid because it was not guided by sufficient instruction, we find no imperative to reverse and remand this cause for resentencing. In Clemons v. Mississippi, 494 U.S. 738, ——, 110 S. Ct. 1441, 1441, 108 L. Ed. 2d 725 (1990), the Court held that 'the Federal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on invalid or improperly defined aggravating circumstances either by

reweighing of the aggravating and mitigating evidence or by harmless error review.'

***21** "Our [S]upreme [C]ourt held, in Ex parte Williams, 556 So. 2d 744 (Ala. 1987), that the trial court, upon its finding that an aggravating circumstance on which the jury was instructed was invalid, cannot cure such error by disregarding that circumstance and finding, upon reweighing, that the remaining aggravating circumstances outweigh the mitigating evidence. In Williams, the jury had been improperly instructed that it could consider the fact that the capital offense was committed by a person under sentence of imprisonment, § 13A–5–49(1)[, Ala. Code 1975]; however, it was subsequently established that the appellant was not on probation or parole at the time the crime was committed. In holding that the sentence of death could not be affirmed, our [S]upreme [C]ourt reasoned as follows:

" 'The Court of Criminal Appeals reasoned that, because the trial court, as the ultimate sentencing authority, did not consider illegal evidence ("the incorrect aggravating circumstance") in the sentencing hearing, the trial court's error in permitting the jury to consider such evidence in arriving at its recommendation of the death sentence was harmless. The basic flaw in this rationale is that it totally discounts the significance of the jury's role in the sentencing process.

" 'The legislatively mandated role of the jury in returning an advisory verdict, based upon its consideration of aggravating and mitigating circumstances, can not be abrogated by the trial court's errorless exercise of its equally mandated role as the ultimate sentencing authority. Each part of the sentencing process is equally mandated by the statute (§§ 13A–5–46, –47(e)[, Ala. Code 1975]); and the errorless application by the court of its part does not cure the erroneous application by the jury of its part. For a case consistent with our holding, see Johnson v. State, 502 So. 2d 877 (Ala. Cr. App. 1987). To hold otherwise is to hold that the sentencing role of the jury, as required by statute, counts for nothing so long as the court's exercise of its role is without error.

" 'We emphasize that our holding that the Court of Criminal Appeals erred in its application of the harmless error rule is based upon independent state law grounds and upon statutory construction. We reverse as to the judgment of sentence and remand to the Court of Criminal Appeals with instructions to remand this cause for a new sentencing hearing before a jury and before the court as required by law.'

"Id. at 745 (emphasis in original).

"In consideration of this rationale, we presume that this court, in reviewing the propriety of a death sentence after a jury recommendation based, in part, on an invalid aggravating circumstance, cannot resort to the first analysis recognized by the Maynard Court: a reweighing, by the appellate court, of the valid aggravating and the mitigating circumstances.

"However, we find no impediment to prevent us from reviewing the insufficient instruction for harmless error. The Clemons Court, in discussing this alternative stated the following:

" 'Even if under Mississippi law, the weighing of aggravating and mitigating circumstances were not an appellate, but a jury function, it was open to the Mississippi Supreme Court to find that the error which occurred during the sentencing proceeding was harmless. See, e.g., Satterwhite v. Texas, 486 U.S. 249, 108 S. Ct. 1792 [100 L. Ed. 2d 284] ... (1988). As the plurality in Barclay v. Florida, [463 U.S. 939, 103 S. Ct. 3418, 77 L. Ed. 2d 1134 (1983)], opined, the Florida Supreme Court could apply harmless error analysis when reviewing a death sentence imposed by a trial judge who relied on an aggravating circumstance not available for his consideration under Florida law:

***22** " ' "Cases such as [those cited by the petitioner] indicate that the Florida Supreme Court does not apply its harmless-error analysis in an automatic or mechanical fashion, but rather upholds death sentences on the basis of this analysis only when it actually finds that the error is harmless. There is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance.... 'What is important ... is an individualized determination on the basis of the character of the individual and the circumstances of the crime.' Zant [v. Stephens, 462 U.S. 862,] 879[, 103 S. Ct. 2733, 2744, 77 L. Ed. 2d 235 (1983)] (emphasis in original). Id., [463 U.S.] at 958, 103 S. Ct. at 3429." '

"494 U.S. at [752], 110 S. Ct. at 1450.

> "In Alabama, 'the harmless error rule does apply in capital cases at the sentence hearing.' Ex parte Whisenhant, 482 So. 2d 1241, 1244 (Ala. 1983). However, it 'is to be applied with extreme caution in capital cases,' and this caution must be observed when reviewing error in the penalty phase, for '[a]fter all, it is the penalty which distinguishes these cases from all other cases.' Ex parte Whisenhant, 482 So. 2d 1247, 1249 (Ala. 1984).
>
> "To determine whether the trial court's failure to instruct properly was harmless error, the Clemons Court suggests one of two inquiries: (1) whether beyond reasonable doubt the sentence would have been the same had the 'especially heinous' circumstance not been considered by the jury at all, or (2) whether beyond reasonable doubt the result would have been the same had the circumstance been properly defined in the jury instructions. See also Henry v. Wainwright, 721 F.2d 990, 995 (5th Cir. 1983), cert. denied, 466 U.S. 993, 104 S. Ct. 2374, 80 L. Ed. 2d 846 (1984) (wherein the court, in holding harmless the trial court's failure to instruct that aggravating circumstances must be found beyond a reasonable doubt, stated that '[f]or the failure to give the instruction to be harmless, the evidence must be so overwhelming that the omission beyond a reasonable doubt did not contribute to the verdict')."

Lawhorn, 581 So. 2d at 1174-77 (footnote omitted).

After setting forth that explanation, this Court "employ[ed] the second Clemons inquiry" and held that, under the particular facts of the case, "[t]here is no question, at all, that, had the jury been properly instructed, it would still have returned a recommendation of death because the facts presented to the jury established, beyond any doubt, that this crime was especially heinous, atrocious, or cruel when compared to other capital offenses." Lawhorn, 581 So. 2d at 1177. The Court then proceeded to

> "note that this situation does not involve the jury's consideration of misleading, inaccurate, or illegal information or evidence. Rather, it is a case where the aggravating circumstance, overwhelmingly supported by admissible evidence, was rendered invalid because it was unconstitutionally presented to the jury. We find that the jury's improper consideration of this aggravating circumstance and possibly improper consideration by the trial court did not render appellant's sentencing fundamentally unfair. It is unnecessary to vacate appellant's sentence because we are convinced beyond a reasonable doubt that, had the circumstances been properly narrowed, the jury would have recommended the same sentence and the trial court would have imposed the same sentence. We hold this, even in the face of our recognition of the utmost importance of insuring that a death sentence not be based on arbitrary and capricious action. While we, in theory, would be very hesitant to find harmless error in the submission to the jury of an unconstitutionally defined aggravating circumstance, we find that the facts of this case support such an application beyond a reasonable doubt."

***23** Lawhorn, 581 So. 2d at 1177.

In the present case, under Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), the trial court's failure to define the heinous, atrocious, or cruel aggravating circumstance rendered that aggravating circumstance unconstitutionally vague under the United States Constitution.[14] However, the United States Supreme Court has held that, under the United States Constitution, even if the trial court failed to properly define an aggravating circumstance, a state appellate court can uphold a death sentence based in part on that aggravating circumstance either by reweighing the aggravating and mitigating evidence or by harmless-error review. Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). Nevertheless, under the rationale set forth in Ex parte Williams, 556 So. 2d 744 (Ala. 1987), this Court has "presume[d]" that, under "state law grounds," we "cannot resort to the first analysis recognized by the [United States Supreme] Court: a reweighing, by the appellate court, of the valid aggravating and the mitigating circumstances." Lawhorn, 581 So. 2d at 1176.

Here, we hold that, beyond a reasonable doubt, the jury's sentencing verdict would have been the same had the "heinous, atrocious, or cruel" circumstance not been considered by the jury at all and that, beyond a reasonable doubt, the result would have been the same had the circumstance been properly defined in the jury instructions. Either of those holdings is sufficient to find that the trial court's error in failing to define the "heinous, atrocious, or cruel" circumstance was harmless.

The jury's sentencing verdict would have been the same had the "heinous, atrocious, or cruel" circumstance not been considered by the jury at all. The jury correctly found that two other aggravating circumstances existed — that Hicks had caused the death while he was under a

sentence of life imprisonment, specifically two sentences of life imprisonment for two prior murder convictions, and that the offense was committed while Hicks had previously been convicted of a felony involving violence to a person, specifically two counts of murder. Certified copies of Hicks's prior convictions and incarceration records supported this finding. The mitigating evidence included that Hicks was under the influence of extreme mental or emotional disturbance at the time of Duncan's death, that Hicks was born into a dysfunctional family, that Hicks showed some capacity for love and care, and that Hicks was deserving of mercy. The evidence established that Duncan, who had mental disabilities, was either brutally beaten to death and then dismembered by Hicks or was brutally beaten and dismembered while still alive. “The jury is not free ... to arbitrarily ignore any factor, positive or negative, in arriving at the correct sentence.” Whisenhant v. State, 482 So. 2d 1225, 1236 (Ala. Crim. App. 1982). This Court concludes that, beyond a reasonable doubt, the jury's sentencing verdict would have been the same had the “heinous, atrocious, or cruel” circumstance not been considered by the jury at all; thus, the trial court's error in failing to define the “heinous, atrocious, or cruel” circumstance was harmless.

***24** Moreover, the result would have been the same had the “heinous, atrocious, or cruel” circumstance been properly defined in the jury instructions because “the facts presented to the jury established, beyond any doubt, that this crime was especially heinous, atrocious, or cruel when compared to other capital offenses.” Lawhorn, 581 So. 2d at 1177. The evidence established that Hicks carried out a conscienceless, pitiless, and unnecessarily torturous murder.

In the present case, Dr. Eugene Hart, who performed the autopsy on Duncan, testified that, when he performed the autopsy, the remains were missing a number of parts, including the skull, facial bones, the first six cervical vertebrae,[15] the hands, and one of the fibulae[16] –- specifically, one group of the ankle bones were present. Dr. Hart testified that a number of the bones had been crushed or had suffered blunt-force trauma. (R. 2061.) There were other marks indicating clean breaks that revealed the end of toolmarks.[17] Regarding Duncan's internal organs, a portion of the liver was found, the kidneys, and what Dr. Hart believed to be the spleen. The rest of the organs were missing. Dr. Hart testified that he could not be certain if they had been removed or had decomposed. Dr. Hart testified that he also could not be certain whether the body had been butchered before or after Duncan's death. He determined that the “[c]ause of death would be homicidal violence and the manner of death would be homicide.” (R. 2073.)

The evidence established that Duncan's death was precipitated by a fight between Hicks and Duncan that began in Norris's mobile home, continued through several rooms, and concluded in the backyard. There was also evidence indicating that Duncan suffered extensive blunt-force breaks and trauma, in addition to the chopping and slicing of his bones. His death resulted from violent homicide. Either he died as a result of having been brutally beaten beginning in the mobile home and culminating in the backyard, or he remained alive during part or all of his ensuing dismemberment before dying. Under either scenario, the evidence established that his death was especially heinous, atrocious, or cruel. See McGahee v. State, 632 So. 2d at 983 (holding that where the victim was beaten, kicked, and strangled, “the trial court correctly followed [Ex parte] Kyzer, [399 So. 2d 330 (Ala. 1981),] because the evidence tends to show that McGahee's crime was ‘unnecessarily torturous’ under the Kyzer standard,” despite claims that the trial court considered improper factors in applying this aggravating circumstance). Accordingly, beyond a reasonable doubt, the result would have been the same had the “heinous, atrocious, or cruel” circumstance been properly defined in the jury instructions; thus, the trial court's error in failing to define the “heinous, atrocious, or cruel” circumstance was harmless.

B.

Hicks further argues that “the trial court committed additional error by relying on an unlawfully broad definition” of the “heinous, atrocious, or cruel” aggravating circumstance in the court's order. (Hicks's brief, at 69.) Specifically, Hicks argues that the court found that the murder was especially heinous, atrocious, or cruel because Duncan might have been dismembered and disemboweled while he was still alive and because the crime was committed in the presence of two small children. Hicks points out that, under the proper definition, to be especially heinous, atrocious, and cruel the homicide must have been torturous to the victim, not to other people. See Ex parte McGahee, 632 So. 2d 981 (Ala. 1993) (holding that the court did not improperly consider the injuries of a third party in determining the existence of the especially heinous, atrocious, or cruel circumstance, allegedly in violation of Ex parte Kyzer, 399 So. 2d 330, 334 (Ala. 1981), which requires that the homicide be “unnecessarily torturous to the victim”).

***25** In its order, the trial court stated the following regarding the especially heinous, atrocious, and cruel aggravating circumstance:

> "In regard to the aggravating circumstances that the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses, the evidence showed that the defendant murdered Joshua Duncan and then cut his hands -- his head and his hands off and disemboweled him.
>
> "The State's pathologist could not confirm whether Joshua Duncan was dead when the defendant began dismemberment and disembowelment.
>
> "The court further notes that the defendant murdered Joshua Duncan in or around Regina Norris's residence where three very young children were present. The evidence showed that two of the three young children were present when the defendant brutally murdered Joshua Duncan and chopped Joshua Duncan's head and hands off and disemboweled him.
>
> "Subjecting these three young children to such a horrendous act is heinous, atrocious, or cruel. This is heinous, atrocious, or cruel compared to other criminal offenses."

(R. 2852-53.)

Under the proper definition of the "heinous, atrocious, or cruel" aggravating circumstance, the circumstance includes only those "conscienceless or pitiless homicides which are unnecessarily torturous to the victim." Ex parte Kyzer, 399 So. 2d 330, 334 (Ala. 1981). Hicks correctly asserts that, under the proper definition, the homicide must have been unnecessarily torturous to the victim -- Duncan –- not to the children. However, in addition to being unnecessarily torturous to the victim, the homicide must be "conscienceless or pitiless." We hold that the presence of the children could be one circumstance the trial court could consider in determining whether the homicide was "conscienceless or pitiless." See Clark v. State, 896 So. 2d 584, 648-49 (Ala. Crim. App. 2000) (holding that the fact that the victim was mentally and physically handicapped was "of no consequence in determining whether the crime was unnecessarily torturous to the victim[;] [h]owever, it is relevant and probative of whether the crime was conscienceless or pitiless"). Thus, contrary to Hicks's argument, the trial court did not necessarily broaden the definition of this aggravating circumstance when it considered the presence of the children in determining that this aggravating circumstance existed. However, it is unclear from the trial court's order whether the court properly considered the presence of the children under the "conscienceless or pitiless" element of the "heinous, atrocious, or cruel" definition or whether the court improperly considered the presence of the children because the homicide was unnecessarily torturous to them, rather than Duncan. Therefore, we remand the case to the trial court for it to clarify its order concerning this issue.

Furthermore, concerning Hicks's argument that the trial court erroneously found that the murder was especially heinous, atrocious, or cruel because, according to Hicks, the trial court improperly considered that Duncan might have been alive when he was dismembered and disemboweled, any error was harmless beyond a reasonable doubt. As set forth in Part VII.A., supra, Duncan, who had mental disabilities, either died as a result of having been brutally beaten beginning in the mobile home and culminating in the backyard, or he remained alive throughout the entire beating and through at least part of his ensuing dismemberment. Under either scenario, the evidence established that his death was especially heinous, atrocious, or cruel. Thus, Duncan's violent homicide was especially heinous, atrocious, or cruel -- whether he died after being savagely beaten or remained alive when being hung, decapitated, and dismembered. Hicks is entitled to no relief in regard to this claim.

VIII.

***26** Hicks argues that the prosecutor illegally excluded black veniremembers from the jury on the basis of their race in violation of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Initially, we note that Hicks did not object at trial to the alleged use of prejudicial peremptory strikes by the prosecutor to remove potential jurors. Therefore, because there was neither argument espousing this claim or specifics regarding the claim, nor response or counter-argument to this claim, there is no support in the record to substantiate a claim of racial discrimination in the striking of the jury. Because there was no objection, the alleged error, to be reversible, must rise to the level of plain error; we conclude that it does not.

" 'For plain error to exist in the Batson context, the record must raise an inference that the state [or the defendant] engaged in "purposeful discrimination" in the exercise of its peremptory challenges. See Ex parte Watkins, 509 So. 2d

1074 (Ala.), cert. denied, 484 U.S. 918, 108 S. Ct. 269, 98 L. Ed. 2d 226 (1987).' " Ex parte Phillips, [Ms. 1160403, October 19, 2018] ––– So. 3d ––––, –––– (Ala. 2018) (quoting Ex parte Walker, 972 So. 2d 737, 742 (Ala. 2007)). "[The defendant] cannot successfully argue that error is plain in the record when there is no indication in the record that the act upon which error is predicated ever occurred (i.e., the State's use of its peremptory challenges to exclude people of color)." Phillips, ––– So. 3d at ––––.

In discussing the common tactic of raising a Batson issue on appeal of a capital-murder case when no objection or discussion took place at trial, Presiding Judge Windom has stated:

> "A procedure providing an appellant sentenced to death with the ability to delay the execution of his or her sentence to develop a record is not supported by the purpose of the plain-error doctrine. Rule 45A, Ala. R. App. P. Rather, the purpose of the plain-error doctrine is to correct particularly egregious errors that already appear on the face of the record. Ex parte Walker, 972 So. 2d 737, 753 (Ala. 2007) (recognizing that 'plain error must be obvious on the face of the record')."

Scheuing v. State, 161 So. 3d 245, 304 (Ala. Crim. App. 2013)(Windom, P.J., concurring specially).

Moreover, the reasoning behind Batson, as well as the procedure to best address and rectify any alleged error in striking a jury, calls for a timely objection.

> " 'First, Batson [v. Kentucky, 476 U.S. 79 (1986),] itself, as well as its progeny, appears to contemplate a testing of the prosecutor's reasons for his or her strikes contemporaneously with the making of those strikes .... As the United States Court of Appeals for the First Circuit has stated: "[C]ontemporaneous objection is especially pertinent as to Batson claims, where innocent oversight can so readily be remedied and an accurate record of the racial composition of the jury is crucial on appeal." United States v. Pulgarin, 955 F.2d 1, 2 (1st Cir. 1992)....
>
> " 'Second, ... in most cases, the type of inquiry contemplated by Batson simply cannot be undertaken in any meaningful way months or years after the trial. Pretrial research regarding jurors and real-time notes taken during voir dire may have been lost, and, more importantly, unwritten memories and impressions of body language, voice inflections, and the myriad of other nuances that go into striking jurors likely will have faded, not only for counsel, but also for the judge who must evaluate the positions of both the defendant and the prosecutor in the context of his or her own observations at trial (and who, in some cases, will have even left the bench in the meantime).' "

Scheuing, 161 So. 3d at 299 (Windom, P.J., concurring specially) (quoting Ex parte Floyd, 190 So. 3d 972, 980 (Ala. 2012) (Murdock, J., concurring in the result)).

***27** Further, in Petersen v. State, [Ms. CR-16-0652, January 11, 2019] ––– So. 3d –––– (Ala. Crim. App. 2019), before determining that the defendant was not entitled to relief because there has been no plain error, this Court stated:

> "Petersen next argues that the State used its peremptory strikes against women in violation of J.E.B. v. Alabama, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994), and that this Court should remand the case for a hearing to determine whether the State can offer gender-neutral reasons for those strikes. (Petersen's brief, pp. 46-51.) Because Petersen did not raise this claim at trial, we question whether it is properly before this Court.
>
> "Initially, we note that a plurality of the Alabama Supreme Court has recently stated that Alabama appellate courts should no longer include such claims in plain-error review under circumstances like those present in Petersen's case. See Ex parte Phillips, [Ms. 1160403, October 19, 2018] ––– So. 3d ––––, –––– (Ala. 2018) (Stuart, C.J., concurring specially, joined by Main and Wise, JJ.) ('Simply, (1) plain error should not be available for a Batson [or J.E.B.] issue raised for the first time on appeal because the failure to timely make a Batson inquiry is not an error of the trial court; (2) the defendant should be required to timely request a Batson hearing to determine whether there was purposeful discrimination because, under the plain-error rule, the circumstances giving rise to purposeful discrimination must be so obvious that failure to notice them seriously affects the integrity of the judicial proceeding ....'); see also id. at –––– (Sellers, J., concurring specially) ('I also concur with Justice Stuart's discussion of the Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), issue, which aligns our jurisprudence with what I believe is persuasive jurisprudence from federal courts. A Batson claim is a unique type of constitutional claim that, for the reasons set out in Justice Stuart's opinion, should be deemed waived even in capital cases if not timely made. Batson claims are forfeited if there is no objection to the composition of the jury before the commencement of a trial.'). For the

> reasons stated in that opinion, plain-error review should likewise no longer apply to J.E.B. claims in circumstances like Petersen's."

—— So. 3d at ——.

Likewise, in the present case, we question whether Hicks's Batson claims are properly before this Court. Nevertheless, based on the silence of the record, there is no indication of prejudicially motivated strikes of black veniremembers by the prosecution. Thus, there was no error, let alone plain error.

After the jury was struck, the prosecutor was asked to state the reasons for her strikes, despite the lack of an objection or a finding by the court of a prima facie showing of discrimination.[18] However, those reasons need not be reviewed because we have "found no inference of discrimination in the record pursuant to our plain-error review, consideration of the State's unsolicited proffer of reasons for its strikes is beyond the scope of that review, and it is both unwarranted and unnecessary." Henderson v. State, 248 So. 3d 992, 1020 (Ala. Crim. App. 2017). Although the question of whether a prima facie case of discrimination existed can become moot for purposes of appeal when reasons for strikes are provided by the prosecutor, here we have found that no plain error existed as to the discriminatory striking of potential jurors and, therefore, the reasons need not be evaluated for intended prejudicial purpose. Cf. Dallas v. State, 711 So. 2d 1101, 1104 (Ala. Crim. App. 1997).

IX.

***28** Hicks alleges that the admission of irrelevant and prejudicial evidence concerning an unrelated investigation constituted reversible error. Specifically, Hicks refers to evidence that he was investigated for possible involvement in the September 4, 2011, death of his brother-in-law, Charles Seignious, during a fire at Seignious's house in Gulf Shores, Alabama. For the reasons stated below, he is not entitled to relief on this issue.

The record indicates that before trial, defense counsel made a motion in limine regarding evidence of the death of Hicks's brother-in-law, Seignious, in the fire in Gulf Shores and that the prosecutor indicated that she did not intend to introduce any evidence of that death. A letter written by Hicks was discovered by the State during the trial when Hicks's nephew, William Cook, produced it just before his testimony. The letter was written by Hicks approximately a month before his trial and was addressed to Cooks's daughter and her family. The prosecutor stated that he wished to admit the letter for the purpose of proving statements by Hicks as to when he was with Duncan and when Duncan "went missing" (R. 1378) that were inconsistent with statements Hicks had given to the police. The prosecutor stated that he would "redact out everything about Gulf Shores and the fire and the death of John Seignious." (R. 1378.) Defense counsel argued that most of the letter would have to be redacted and that its prejudicial effect outweighed its probative value. The court found that because it was written by Hicks and was inconsistent with other statements that he had given, it would be allowed. Discussion was had on how to redact the letter and what instructions should be given to the jury. The prosecutor then stated that he would redact any portion related to the death in Gulf Shores.

Following a recess, defense counsel addressed the redacted version of the letter and argued that, "other than what [he had] already stated about the entire letter," the defense "just ha[d] one disagreement" and argued about a different passage from the sentence he now cites as objectionable. (R. 1385.) The sentence that mistakenly remained in the letter was: "Haven't murdered none of those people." (R. 1404.)

In the context of his writing in the letter, Hicks was informing Cooks's daughter that her father had given the police an incorrect version of the events that had occurred around the time of Duncan's disappearance and that her father had misstated the timing of the events. Hicks recounted his rendition of the events and prompted her to confirm his version. The letter was read to the jury by Cook, and Hicks did not object to the sentence until prior to cross-examination, when he objected as follows:

> "Now, we -- that clearly causes a significant problem for Mr. Hicks in this case that there is apparently some accusation. From the context of that letter from that particular line there is an accusation pending against him that he had murdered more than one person in this case.
>
> "I submit it's incumbent on the State when they seek to introduce exhibits like this to comply with any previous orders that have been entered in this case and previous understandings about things that can and cannot come in.
>
> "One of those in particular was the allegation that surfaced outside the presence of the court -–...

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"The previous understanding we had with the prosecution was that the Seignious -- any allegation that Mr. Seignious in Gulf Shores was murdered would not be a part of this trial. And this line, obviously to us knowing what it makes context to, is the allegation or the claim that Dennis Hicks was somehow responsible for the death of Charles Seignious in Gulf Shores.

***29** "And this line makes it clear that –- and the jury has now heard it, that there is an allegation against Dennis Hicks that he has murdered more than one person at the time of this letter, which was December the 16th of 2015.

"It's incumbent on the State to abide by the understanding and by the rulings of and keep out stuff that could relate to [Rule] 404(b)[, Ala. R. Evid.,] evidence of an allegation of another wrong. And this clearly, clearly is a denial of an allegation made against him that he committed another wrong. And we would move for a mistrial at this point in time because of this line in the letter.

"I mean, to me it is extremely prejudicial that there is an allegation that he has committed more than one murder and that the jury now knows about that. And even though it's just a denial, the damage there is extreme.

"And if this jury is left with an impression that this is not the only murder that he is accused of, then he is not going to get a fair trial at this point. And we would ask the court to grant a mistrial and we move for a mistrial at this point."

(R. 1408-10.) The court noted that defense counsel had read the redacted letter and had not asked that the sentence be removed and further stated that "[t]here's nothing in this letter that even implies that somebody in Gulf Shores was murdered during this period of time, nobody by any particular name for sure. And I still don't know the person that you're referring, Seignious or whatever.... He's denying having killed anybody. And, frankly, any curative instruction by me might give it more emphasis than needs to be given at all." (R. 1411.) The court found that Hicks had suffered no prejudice as a result of the statement, and defense counsel objected. The prosecutor responded that any mistake was unintentional and that he believed that the redactions were a result of excessive caution. He argued, "I don't think it rises to the level of a mistrial because there's no context around it. And it's the words of the defendant himself. It's not anyone else making an accusation." (R. 1412.) The sentence was then redacted from the exhibit before it went to the jury room.

" ' "A mistrial is a drastic remedy to be used sparingly and only to prevent manifest injustice, and the decision whether to grant it rests within the sound discretion of the trial court." Talley v. State, 687 So. 2d 1261, 1275 (Ala.Cr.App. 1996)(citing Inmin v. State, 654 So. 2d 86 (Ala.Cr.App. 1994)); see also Grimsley v. State, 678 So. 2d 1197, 1206 (Ala.Cr.App. 1996).' " Lynch v. State, 209 So. 3d 1131, 1137 (Ala. Crim. App. 2016). A mistrial specifies such fundamental error in a trial as to vitiate the result and should be granted only when "a high degree of 'manifest necessity' " is demonstrated. Wadsworth v. State, 439 So. 2d 790, 792 (Ala. Crim. App. 1983).

"A party must show a high degree of necessity for a motion for a mistrial to be granted. 'A motion for mistrial implies a miscarriage of justice and should only be granted where it is apparent that justice cannot be afforded.' Dixon v. State, 476 So. 2d 1236, 1240 (Ala. Crim. App. 1985); Young v. State, 416 So. 2d 1109 (Ala. Crim. App. 1982). 'A trial judge is allowed the exercise of broad discretion in determining whether a mistrial should be declared, because he is in the best position to observe the scenario, to determine its effect upon the jury, and to determine whether the mistrial should be granted.' Dixon at 1240; Elmore v. State, 414 So. 2d 175 (Ala. Crim. App. 1982)."

***30** Click v. State, 695 So. 2d 209, 219 (Ala. Crim. App. 1996).

Here, the statement makes no reference to any specifics and is merely a denial by Hicks of killing anyone. Taken in context, there was no assertion or inclusion of facts or any indicia that another killing had occurred. This vague reference to plural victims made by Hicks did not rise to the degree of prejudice required for a mistrial, nor did the introduction of the letter including the statement so prejudice the jury as to vitiate the result of Hicks's trial. The court did not abuse its discretion in denying the motion for a mistrial.

X.

Hicks argues that evidence regarding a canine search was improperly admitted because, he says, the scientific evidence was not shown to be sufficiently reliable pursuant to Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Hicks raises this argument for the first time on appeal; therefore, it must rise to the level of plain error. Rule 45A, Ala. R. App. P.

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Hicks refers to testimony given by a canine officer regarding a canine search conducted at Regina Norris's mobile home to locate any site or trace of human remains or decomposition. Officer Bradley Dennis testified that three handlers and four cadaver dogs searched the premises, including in the home, outside the home, and the adjacent areas. As to his expertise, Officer Dennis testified that he was a "Level I search and rescue technician for the National Association of Search & Rescue," as well as "a master trainer for the National Association for Search & Rescue when it comes to human remains." (R. 1683.) He further stated that he was "an instructor at the Western Carolina University ... [where they] have a body farm" and "an instructor for the National Network of Detection Dogs as well as for tactical tracking teams out of Georgia." (R. 1683-84.) He testified that he had been recognized as a canine handler for dogs that searched for human remains and had previously testified in court "as a human remains detection K-9 expert." (R. 1684.) Officer Dennis also testified that all four of the cadaver dogs were "single-purpose dogs. Their only responsibility [was] odor in human remains." (R. 1687.) Officer Dennis explained the extensive training that the dogs underwent, as well as their certifications and the science behind their abilities. Two of the dogs had participated in approximately 13-19 searches and the other two had participated in 35-50 searches. In the search in this case, all the dogs independently hit on the area outside around the tree, and inside in the kitchen and hallway.

> "In Alabama, '[t]he admissibility of dog-tracking evidence upon a proper predicate has been recognized ... for over a century. See Burks v. State, 240 Ala. 587, 200 So. 418 (1941); Orr v. State, 236 Ala. 462, 183 So. 445 (1938); Loper v. State, 205 Ala. 216, 87 So. 92 (1920); Gallant v. State, 167 Ala. 60, 52 So. 739 (1910); Hargrove v. State, 147 Ala. 97, 41 So. 972 (1906); Richardson v. State, 145 Ala. 46, 41 So. 82 (1906); Little v. State, 145 Ala. 662, 39 So. 674 (1905); Hodge v. State, 98 Ala. 10, 13 So. 385 (1893); Holcombe v. State, 437 So. 2d 663 (Ala. Crim. App. 1983); Moore v. State, 26 Ala. App. 607, 164 So. 761 (1935); and Allen v. State, 8 Ala. App. 228, 62 So. 971 (1913).' Gavin v. State, 891 So. 2d 907, 971 (Ala. Crim. App. 2003). In Gavin, this court established the proper predicate for the admission of dog-tracking evidence. Id. Specifically, this court held that dog-tracking evidence is admissible if the State establishes 'the training and reliability of the dog, the qualifications of the person handling the dog, and the circumstances surrounding the tracking by the dog.' Gavin, 891 So. 2d at 971. See also State v. Montgomery, 968 So. 2d 543, 550 n. 6 (Ala. Crim. App. 2006) (reiterating the three foundational requirements for the admission of dog-tracking evidence); State v. Neeley, 143 Ohio App. 3d 606, 630-31, 758 N.E. 2d 745, 764 (2001) (holding that the State may establish the predicate for dog-tracking evidence by showing 'the training and reliability of the dog, the qualifications of the person handling the dog, and the circumstances surrounding the trailing by the dog....'); McDuffie v. State, 482 N.W. 2d 234, 237 (Minn. Ct. App. 1992) (same requirements); Rule 702, Ala. R. Evid. ('A witness qualified as an expert by knowledge, skill, experience, training, or education, may testify ... in the form of an opinion or otherwise.'). This court further explained that '[t]he foundational evidence need not be overwhelming or specific, but must be sufficient to indicate reliability of the evidence.' Gavin, 891 So. 2d at 971 (citing Burks v. State, 240 Ala. 587, 200 So. 418, 419 (1941)). See also Montgomery, 968 So. 2d at 550 n.6 (same)."

***31** Vanpelt v. State, 74 So. 3d 32, 63 (Ala. Crim. App. 2009).

We have already detailed the evidence admitted regarding the dog-tracking evidence in this case. This evidence established the training and reliability of the dogs, the qualifications of the dogs' handler, and the circumstances surrounding the tracking in this case. This evidence concerning the canine search for human remains around and inside Regina Norris's mobile home was clearly sufficient to lay a proper predicate for admission of the results of the canine search. We find no error as to this claim.

XI.

Hicks argues that the trial judge should have recused himself because he had previously been employed by the Mobile County District Attorney's Office when Hicks had been convicted of prior offenses. Specifically, Hicks was convicted as a youthful offender of three counts of burglary and one count of possession of marijuana. Those convictions were introduced during the penalty phase at trial. Hicks did not raise this issue at trial; therefore, it must be analyzed pursuant to the plain-error rule. Rule 45A, Ala. R. App. P.

Hicks makes no specific allegations concerning this issue, nor does he offer any supporting details or facts to support this claim. He fails even to allege that the judge had any direct role in the prosecutions. He merely speculates that the judge may remember something about the offenses that was not introduced in the present trial.

> " 'The burden is on the party seeking recusal to present evidence establishing the existence of bias or prejudice. Otwell v. Bryant, 497 So. 2d 111, 119 (Ala. 1986). Prejudice on the part of a judge is not presumed. Hartman v. Board of Trustees, 436 So. 2d 837 (Ala. 1983); Duncan v. Sherrill, 341 So. 2d 946 (Ala. 1977); Ex parte Rives, 511 So. 2d 514, 517 (Ala. Civ. App. 1986)." ' [T]he law will not suppose a possibility of bias or favor in a judge who is already sworn to administer impartial justice and whose authority greatly depends upon that presumption and idea.' " Ex parte Balogun, 516 So. 2d 606, 609 (Ala. 1987), quoting Fulton v. Longshore, 156 Ala. 611, 46 So. 989 (1908). Any disqualifying prejudice or bias as to a party must be of a personal nature and must stem from an extrajudicial source. Hartman v. Board of Trustees of the University of Alabama, 436 So. 2d 837 (Ala. 1983); Reach v. Reach, 378 So. 2d 1115 (Ala. Civ. App. 1979). Thus,
>
> > " ' " '[T]he disqualifying prejudice of a judge does not necessarily comprehend every bias, partiality, or prejudice which he may entertain with reference to the case, but must be of a character, calculated to impair seriously his impartiality and sway his judgement, and must be strong enough to overthrow the presumption of his integrity.'
>
> " 'Ross v. Luton, 456 So. 2d [249] at 254 [(Ala.1984)], quoting Duncan v. Sherrill, 341 So. 2d 946, 947 (Ala. 1977), quoting 48 C.J.S. Judges § 82(b).' "

Hodges v. State, 856 So. 2d 875, 898 (Ala. Crim. App. 2001) (opinion on return to remand).

"[R]ecusal is not required by mere accusations without proof of supporting facts. Acromag-Viking v. Blalock, 420 So. 2d 60 (Ala. 1982); Miller v. Miller, 385 So. 2d 54 (Ala. Civ. App. 1980)." Bryars v. Bryars, 485 So. 2d 1187, 1189 (Ala. Civ. App. 1986). Thus, there is no error, much less plain error, as to this claim.

XII.

***32** Hicks alleges that the State improperly argued future dangerousness as an aggravating circumstance, in violation of state and federal law. Hicks did not object on this ground at trial; therefore, any error on this ground must rise to the level of plain error. Rule 45A, Ala. R. App. P.

The record indicates that the prosecutor did improperly inform the jury during her opening statement at the penalty phase that the State would prove future dangerousness as an aggravating circumstance. The prosecutor argued:

> "So what are the aggravating factors or circumstances that the State will present in this penalty phase of the trial? Several of these are laid out by the statute that we're required to prove.
>
> "The first one, that the capital offense was committed by the defendant while he was under a sentence of life imprisonment. As the judge already stated, that aggravating factor has already been proven beyond a reasonable doubt and that's because of your verdict in the guilt phase of the trial.
>
> "That the defendant was previously convicted of a felony involving the threat or violence -- involving the use of threat or violence to the person. And we will prove that to you.
>
> "That the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses. We will prove that to you as well.
>
> "And the defendant's propensity for the future -- for future dangerousness. And we will prove that as well."

(R. 2523.) She then explained how she intended to "prove each of these factors." (R. 2524.) As to future dangerousness, she alleged:

> "Future dangerousness, you're going to see records. We will admit records in this portion of the trial, records from the Department of Corrections in Mississippi, and you're going to receive records from the Mobile County Metro Jail.
>
> "You're going to see throughout the records a history of attempted escapes, escape from the Department of Corrections. You're going to see history of shanks, knives, guards, razor blades, and dangerous activity all done while this defendant was incarcerated. And we will show that he is a future danger to this society."

(R. 2525.) She then concluded that the State would prove that the mitigating circumstances were outweighed by the aggravating circumstances, "the ones I just listed for you." (R. 2526.) This argument improperly conflated future dangerousness with the three legitimate aggravating factors; however, any impropriety in the prosecutor's opening statement was rectified during closing argument and by the court's charge to the jury. During the closing argument at the

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penalty phase, the other prosecutor clarified that there were three aggravating circumstances that were alleged to exist by the State: that the capital offense was committed while Hicks was under a sentence of life imprisonment, that he had been previously convicted of another felony involving the use of violence, and that the capital offense here was especially heinous, atrocious, or cruel. The prosecutor then stated that there was, in addition to the aggravating circumstances, some evidence of Hicks's future dangerousness, specifically behavior while he was in the custody of the Alabama Department of Corrections, the Mississippi Department of Corrections, and the metro jail. The prosecutor then argued:

> ***33** "In our case, the aggravating circumstances, when incorporated with all the evidence from the first phase of the trial -- and you can consider all of that.
>
> "You have his Department of Corrections history now that shows his future dangerousness, that the entire time -- or after, you know, five years he was escaping, assaulting guards, other inmates, he was involved in the money order scheme, the mail fraud scheme. It shows a history that you can infer the fact that he will be dangerous in the future.
>
> "And, you know, the defense paid Dr. Rosenzweig $30,000 to get up here on the witness stand and say that even she believes he'll be a future danger should he be incarcerated in the Alabama Department of Corrections. Even she admitted to that. But she said, oh, that can be dealt with because, you know, they can strap him to a gurney and force medicate him for the rest of his life and only then will he not be a danger anymore. Oh, and if they can't force medicate him, they can just restrain him. So even the defense expert believed that [Hicks] will be a danger in the future.
>
> "You heard the testimony of Dorothy Hudson about Josh. And in a minute I'm going to get back to Josh because you've heard so much about [Hicks] over the last couple of days. And the testimony of Dr. Kirkland, his determination was [Hicks] has an antisocial personality disorder."

(R. 2762-64.) The prosecutor thereafter discussed the aggravating circumstances.

After the closing statements in the penalty phase, the court charged the jury as follows:

> "The first thing that you must determine is whether any aggravating circumstance exist. And I've already told you you found one. The State has put forward two others.
>
> "The law provides a list of aggravating circumstances which you may consider. And you must be convinced beyond a reasonable doubt from the evidence that one or more of these circumstances exist in this case.
>
> "....
>
> "Of the list of aggravating circumstances provided to you for your consideration -- and they're the only ones. As I said, you've already found beyond a reasonable doubt that [Hicks] committed an intentional murder while he was under a sentence of life imprisonment.
>
> "The second aggravating circumstance was that [Hicks] was previously convicted of a felony involving the use of threat or violence to the person.
>
> "And the third is that the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses."

(R. 2778-80.) The court then appropriately and properly charged only as to the three applicable statutory aggravating circumstances and the process of weighing the aggravating circumstances and the mitigating circumstances. The court did not address future dangerousness.

Even though the prosecution initially conflated future dangerousness with the three legitimate aggravating factors, the jury was well apprised that there were only three applicable aggravating circumstances that they could consider. Thus, any error regarding this issue is harmless beyond a reasonable doubt. Moreover, the evidence regarding future dangerousness was a proper penalty-phase consideration.

As this Court stated in Floyd v. State, [Ms. CR-13-0623, July 7, 2017] ––– So. 3d –––– (Ala. Crim. App. 2017):

> ***34** "When viewed in their entirety and in the context of the entire trial, the prosecutor's complained-of remarks did not urge the jury or the trial court to impermissibly consider a nonstatutory aggravating circumstance to support a death sentence. Rather, the remarks were proper argument about Floyd's criminal history and future dangerousness and what weight should be afforded the aggravating circumstances that the State had proven. Although future dangerousness is not an aggravating circumstance under § 13A–5–49, Ala. Code 1975, 'future dangerousness [is] a subject of inestimable concern at the penalty phase of the trial' and evidence and argument about future dangerousness are

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permissible. McGriff v. State, 908 So. 2d 961, 1013 (Ala. Crim. App. 2000), rev'd on other grounds, 908 So. 2d 1024 (Ala. 2004). See also Whatley v. State, 146 So. 3d 437, 481–82 (Ala. Crim. App. 2010) (holding that evidence of a capital defendant's future dangerousness is admissible during the penalty phase of the trial under § 13A–5–45(d), Ala. Code 1975); and Arthur v. State, 575 So. 2d 1165, 1185 (Ala. Crim. App. 1990) (holding that prosecutor's remark during penalty phase of capital trial that the defendant would kill again if given the chance was 'proper because [it] concerned the valid sentencing factor of [the defendant's] future dangerousness.')."

—— So. 3d at ——. Moreover, the United States Supreme Court has stated:

> "This Court has approved the jury's consideration of future dangerousness during the penalty phase of a capital trial, recognizing that a defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system. See Jurek v. Texas, 428 U.S. 262, 275 [96 S.Ct. 2950, 49 L.Ed.2d 929] (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (noting that 'any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose'); California v. Ramos, 463 U.S. 992, 1003, n.17 [103 S.Ct. 3446, 77 L.Ed.2d 1171] (1983) (explaining that it is proper for a sentencing jury in a capital case to consider 'the defendant's potential for reform and whether his probable future behavior counsels against the desirability of his release into society')."

Simmons v. South Carolina, 512 U.S. 154, 162, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994).

Also, § 13A–5–45(d), Ala. Code 1957, provides:

> "Any evidence which has probative value and is relevant to sentence shall be received at the sentencing hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of Alabama."

Here, the jury was entitled to consider the evidence concerning Hicks's violent behavior in determining his sentence. Thus, we find no reversible error as to these claims.

XIII.

Hicks argues that the trial court committed reversible error by failing to require the State to prove the absence of provoked heat of passion. On appeal, Hicks contends that there was some evidence indicating that Duncan would become "physically aggressive when angry." (Hicks's brief, at 90.) Thus, according to Hicks, because the court charged the jury on provocation, a charge as to the State's burden to prove the absence-of-provoked-heat-of-passion should have been given in conjunction with the capital-murder charge. He argues that this omission was exacerbated by the court's instruction that the jury could not consider provocation manslaughter unless it did not find Hicks guilty of capital murder. Hicks did not object on this ground at trial; therefore, this issue must be analyzed pursuant to the plain-error rule. Rule 45A, Ala. R. App. P. Based on our review of the evidence, Hicks is not entitled to relief on this claim.

Section 13A–6–3(a)(2), Ala. Code 1975, provides that a person commits the crime of manslaughter if

> "[h]e causes the death of another person under circumstances that would constitute [intentional murder]; except, that he causes the death due to a sudden heat of passion caused by provocation recognized by law, and before a reasonable time for the passion to cool and for reason to assert itself."

***35** " 'To constitute adequate legal provocation, it must be of a nature calculated to influence the passions of the ordinary, reasonable man. Other than discovered adultery, courts have reached different conclusions as to what factual situations are embraced within this doctrine.' Biggs v. State, 441 So. 2d 989, 992 (Ala.Cr.App. 1983)." Cox v. State, 500 So. 2d 1296, 1298 (Ala. Crim. App. 1986).

At trial, the following transpired before the jury charge at the guilt phase after the court was asked if it planned on charging the jury as to provocation manslaughter or reckless manslaughter:[19]

> "THE COURT: Reckless.
>
> "[Prosecutor]: And, Judge, the only other thing we would ask, I think we've already discussed but that you've covered --

"[Defense counsel]: Well, provocation, I mean, there's some evidence that Josh struck first and I think that that might be enough to warrant a provocation charge.

"THE COURT: So you want -- we would have both reckless and a provocation?

"[Defense counsel]: Yes, sir, just -- if you would, just do it that way.

"THE COURT: Okay. We'll confuse them really good.

"[Defense counsel]: I know. But I think it's necessary.

"THE COURT: All right. I'll put the provocation in there if you ask for it.

"[Defense counsel]: All right. We do."

(R. 2262-63.)

Thus, the court agreed to charge on provocation manslaughter at Hicks's request, although the defense's theory was that Hicks had nothing to do with Duncan's murder and that Duncan had wandered away from the house and was killed by an unknown party. After charging the jury on capital murder, the court instructed the jury on reckless manslaughter and then charged on provocation manslaughter as follows:

"The original charge of capital murder also includes this second type of manslaughter and that is manslaughter by provocation. A person commits the crime of manslaughter by provocation if he causes the death of another person under circumstances that ordinarily would constitute murder except that he causes the death due to a sudden heat of passion caused by provocation recognized by law and before a reasonable time for the passion to cool or for reason to reassert itself.

"To convict, the State must prove beyond a reasonable doubt each of the following elements of manslaughter by provocation:

"That Josh Duncan is dead;

"That the Defendant Hicks caused the death of Josh Duncan by either stabbing, decapitating, and/or disemboweling him with a bladed instrument and/or by homicidal violence;

"Three, that in committing the act which caused the death of Josh Duncan, Defendant Hicks acted with intent;

"And that, in so acting, the defendant was lawfully provoked to do the act which caused the death of the deceased either by sudden heat of passion before a reasonable time for the passion to cool or for reason to reassert itself.

"I previously defined intent for you: Did he mean to do it?

"Lawful provocation means that the defendant was moved to do an act which caused the death of the deceased by a sudden heat of passion before that person had a reasonable time for the passion to cool or for reason to reassert itself.

"The defendant must have been so provoked at the time he did the act, that is he must have been deprived of self-control by the provocation which he received. The state of mind must be such that the suddenly excited passion suspends the exercise of judgment but it is not required that the passion to be so overpowering as to destroy volition. The killing and sudden passion excited by sufficient lawful provocation is manslaughter only.

***36** "The law presumes that the passion disturbed the defendant's reasoning and led him to act regardless of the admonition of law if he is so overwhelmed by such provocation."

(R. 2458-60.)

The circuit court's instructions did not contain any misstatement of the law, but the circuit court did not state that, once the defendant has injected the issue of provocation, the State must prove beyond a reasonable doubt that the defendant was not lawfully provoked. However, in the present case, the evidence would not support a theory of provocation manslaughter; therefore, any error in the court's charge as to provocation manslaughter, did not adversely affect Hicks's substantial rights. Rule 45A, Ala. R. App. P. Although there was evidence indicating that Hicks and Duncan fought on the night of the offense, there was no evidence concerning the details or circumstances of the fight itself. Perry v. State, 453 So. 2d 762, 765 (Ala. Crim. App. 1984). There was no evidence indicating who started the fight or that Hicks was assaulted or faced an imminent assault. Hicks did not submit that he was provoked by a sudden heat of passion into causing Duncan's death. Cf. Ex parte McGriff, 908 So. 2d 1024, 1032-33 (Ala. 2004)("Because McGriff's entire trial strategy was not to contest guilt of the homicide but only to persuade the jury to convict him of a lesser offense than capital murder, the failure of the trial court to charge the jury accurately on provoked heat of passion as it applied to the capital murder

charge constitutes plain error." Id. at 1036-37). Therefore, because Hicks was not entitled to an instruction at all on "heat-of-passion" manslaughter there can be no plain error based on the trial court's failure to give a complete charge on this issue.

XIV.

Hicks alleges that the circuit court erroneously refused to find and to consider the mitigating circumstance of diminished capacity. Hicks alleges that Dr. Rosenzweig's testimony that her examination revealed that Hicks suffered from bipolar disorder established the diminished-capacity mitigating circumstance. Moreover, Hicks argues, the circuit court's reliance on Dr. Kirkland's findings that Hicks was not mentally ill at the time of the offense and was competent to stand trial did not support the court's decision to give no weight to the diminished-capacity mitigating circumstance; he submitted that his burden of proving the mitigating circumstance was not as great as proving incapacity to commit a crime due to mental disease or defect. Because this matter is being raised for the first time on appeal, it is due to be analyzed pursuant to the plain-error rule. Rule 45A, Ala. R. App. P.

> " 'During the sentencing phase of a capital proceeding, a defendant's burden of proof regarding the mitigating circumstance found in § 13A–5–51(6) is substantially less than his burden during the guilt phase, of proving the defense of not guilty by reason of mental disease or defect. See Lewis v. State, 380 So. 2d 970, 977 (Ala.Cr.App. 1979) ("the extent of sub-normal mental capacity [shown in support of this mitigating factor] does not have to measure up to the applicable test necessary to show ... insanity that makes one incapable of committing a crime"), cert. denied, 370 So. 2d 1106 (Ala. 1979); Whisenhant v. State, 370 So. 2d 1080, 1095–96 (Ala.Cr.App.) cert. denied, 370 So. 2d 1106 (1979) (a finding that a diminished capacity mitigating circumstance exists "may be based on evidence of a lesser standard that is necessary to find insanity").' "

***37** Smith v. State, 213 So. 3d 108, 150 (Ala. Crim. App. 2000), reversed on other grounds, 213 So. 3d 214 (Ala. 2003).

According to § 13A-5-45(g), Ala. Code 1975,

> "[w]hen the factual existence of an offered mitigating circumstance is in dispute, the defendant shall have the burden of interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence."

However, the court is not required to find the existence of a mitigating circumstance simply because evidence of its existence is proffered. " ' "Although the trial court must consider all mitigating circumstances, it has discretion in determining whether a particular mitigating circumstance is proven and the weight it will give that circumstance." ' Simmons v. State, 797 So. 2d 1134, 1182 (Ala. Crim. App. 1999)(quoting Wilson v. State, 777 So. 2d 856, 893 (Ala. Crim. App. 1999). ' "While Lockett [v. Ohio, 438 U.S. 586 (1978),] and its progeny require consideration of all evidence submitted as mitigation, whether the evidence is actually found to be mitigating is in the discretion of the sentencing authority." ' Ex parte Slaton, 680 So. 2d 909, 924 (Ala. 1996), quoting Bankhead v. State, 585 So. 2d 97, 108 (Ala. Crim. App. 1989)." Albarran v. State, 96 So. 3d 131, 213 (Ala. Crim. App. 2011).

The trial court acted within its discretion in determining that the nonstatutory circumstance of Hicks's mental health was to be afforded only small weight in its weighing process. "The doctrine of diminished capacity provides that evidence of an abnormal mental condition not amounting to legal insanity but tending to prove that the defendant could not or did not entertain the specific intent or state of mind essential to the offense should be considered in determining whether the offense charged or one of a lesser degree was committed." Williams v. State, 710 So. 2d 1276, 1309 (Ala. Crim. App. 1996).

> " ' " [T]he weight to attach to [a] known mitigating circumstance is within the discretion of the trial court. See Bush v. State, 695 So. 2d 70 (Ala. Crim. App. 1995), aff'd 695 So. 2d 138 (Ala.), cert. denied, 522 U.S. 969, 118 S.Ct. 418, 139 L.Ed. 2d 320 (1997)." Hodges v. State, 856 So. 2d 875, 893 (Ala. Crim. App. 2001), aff'd 856 So. 2d 936 (Ala. 2003).
>
> > " ' "The circuit court must consider evidence offered in mitigation, but it is not obliged to find that the evidence constitutes a mitigating circumstance. As the Alabama Supreme Court has stated:
> >
> > " ' " 'See Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978); Ex parte Hart, 612 So. 2d 536, 542 (Ala. 1992) ("Lockett does not require that all evidence offered as mitigating evidence be found to be mitigating."), cert. denied, 508 U.S. 953, 113 S.Ct. 2450, 124 L.Ed. 2d 666 (1993); and Ex parte

Slaton, 680 So. 2d 909, 924 (1996) (" 'While Lockett and its progeny require consideration of all evidence submitted as mitigation, whether the evidence is actually found to be mitigating is in the discretion of the sentencing authority.' ") (quoting Bankhead v. State, 585 So. 2d 97, 108 (Ala. Crim. App. 1989)).'

***38** " ' "Ex parte Ferguson, 814 So. 2d 970, 976 (Ala. 2001)."

" 'Calhoun v. State, 932 So. 2d 923, 975 (Ala. Crim. App. 2005), cert. denied, 548 U.S. 926, 126 S.Ct. 2984, 165 L.Ed. 2d 990 (2006).'

"Spencer v. State, 58 So. 3d 215, 257 (Ala. Crim. App. 2008), (opinion on return to second remand)."

Dotch v. State, 67 So. 3d 936, 998-99 (Ala. Crim. App. 2010). See Burgess v. State, 827 So. 2d 134, 181 (Ala. Crim. App. 1998)(noting, in reviewing and affirming the propriety of the court's sentencing order, that "[i]t was within this discussion of the evidence of nonstatutory mitigating circumstances that the trial court ... included its finding that while Burgess was not incompetent, insane, or suffering from diminished capacity, he did have a personality disorder").

Here, the trial court made the following finding concerning the mitigating circumstance in § 13A-5-51(2) that the offense was committed while Hicks was under the influence of extreme mental or emotional disturbance:

"Defendant Hicks offered the testimony of Dr. Marianne Rosenzweig, a mitigation expert, who testified in her opinion [Hicks] was under the influence of extreme mental or emotional disturbance in the form of bipolar disorder.

"She testified that [Hicks] suffered from problems associated with his upbringing in a dysfunctional family as described by several of the defendant's family members. She indicated that she believed that [Hicks] had siblings that also suffered from mental disorders.

"Dr. Rosenzweig based her opinion of bipolar disorder on her observation of [Hicks] moving between manic and hypomanic episodes and major depressive episodes.

"The court notes that no evidence was presented of a clinical diagnosis for bipolar disorder. However, Dr. Rosenzweig's observations are entitled to some weight. Accordingly, the court gives this mitigating circumstance some weight."

(R. 2855-56.) Regarding the court's findings that there was no evidence of diminished capacity, the court stated:

"There was no compelling evidence that [Hicks] suffered from diminished capacity or was under the influence of alcohol or drugs at the time that he killed Joshua Duncan. To the contrary, Dr. Kirkland testified in the sentence portion of the trial that [Hicks] was competent at the time of the offense and that he was competent to stand trial.

"This court agrees with Dr. Kirkland in this regard and further specifically finds that [Hicks] could appreciate the criminality of his conduct and conform his conduct to the requirements of law. Accordingly, this court assigns no weight to this statutory mitigating circumstance."

(R. 2857.) See Washington v. State, 106 So. 3d 423, 440 (Ala. Crim. App. 2007), reversed on other grounds, Ex parte Washington, 106 So. 3d 441 (Ala. 2011) (stating, in determining that the record supported the trial court's decision of no nonstatutory mitigating circumstances, that "[w]e also note that in its discussion of the statutory mitigating circumstances, the trial court specifically found that Washington was not laboring under the influence of an extreme mental or emotional disturbance at the time of Campbell's murder and, further, that Washington was not suffering from a diminished capacity so as to be unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law"). There was no indication in the court's findings that it was confused as to Hicks's failure to plead not guilty by reason of mental disease or defect, Hicks's burden of proof for a mitigating circumstance, or proof of his intent at the time of the offense. Compare Ex parte Washington, supra.

***39** There was no error, plain or otherwise, in the trial court's findings at the sentencing phase as to the nonstatutory mitigating factor of Hicks's alleged diminished capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

XV.

Hicks argues for the first time on appeal that the circuit court violated Hicks's constitutional rights by failing to instruct the jury that mercy is a proper basis for a life sentence, as he had requested. Rule 45A, Ala. R. App. P. Hicks's argument consists of a one-sentence argument. Thus, he has waived his appellate argument because he has presented nothing more than a theoretical postulation with no argued application to

his case. Rule 28(a)(10), Ala. R. App. P. Nevertheless, as required by Rule 45A, Ala. R. App. P., we have reviewed the court's jury instructions for any error that has or probably has adversely affected Hicks's substantial rights, and we have found no such error. Hicks's argument is completely without merit. As this Court stated in Albarran v. State, 96 So. 3d 131 (Ala. Crim. App. 2011):

> " 'Alabama courts have held that capital defendants are not entitled to jury instructions on mercy and residual doubt.' Burgess v. State, 723 So. 2d 742, 769 (Ala. Crim. App. 1997). '[A] juror may not arbitrarily consider mercy when deciding whether a defendant should be sentenced to death or life imprisonment without the possibility of parole.' Blackmon v. State, 7 So. 3d 397, 438 (Ala. Crim. App. 2005). Because Albarran was not entitled to a jury instruction on mercy, McMillan v. State, 139 So. 3d 184, 245 (Ala. Crim. App. 2010), no error, much less plain error, resulted from the circuit court's failure to give such an instruction."

96 So. 3d at 210-11.

XVI.

Hicks contends that the statements he gave to law enforcement were involuntary and that the circuit court therefore improperly failed to suppress evidence of those statements. More specifically, he claims that because he was on the way to a family member's funeral when he was detained and because he was left in handcuffs for hours when he was questioned, his statements and waivers were involuntary. Hicks also argues that his statements were involuntary because, he says, he suffered from mental illness and he cites Issue VI in his brief (Part III in this opinion.) Hicks raises these claims for the first time on appeal; therefore, they must rise to the level of plain error for this Court to grant him any relief. Rule 45A, Ala. R. App. P.

In his brief in support of this argument, Hicks makes no reference to any facts in his case, cites no specific law supporting his argument, and provides no citation to the record. Therefore, under Rule 28(a)(10), Ala. R. App. P., he has waived his appellate argument.

Even standing alone, his claims as to this issue lack merit. See United States v. Cardenas, 410 F.3d 287, 295 (5th Cir. 2005) ("Such basic police procedures as restraining a suspect with handcuffs have never been held to constitute sufficient coercion to warrant suppression."). Compare Bennefield v. State, 44 Ala. App. 33, 39, 202 So. 2d 48, 54 (1966), reversed on other grounds, Bennefield v. State, 281 Ala. 283, 202 So. 2d 55 (1967) ("[I]t does not appear that the offer by the Sheriff to take appellant a distance of two hundred yards to the church where deceased's funeral services were being held was meant by the Sheriff or considered by appellant as a promise of reward or inducement whereby appellant would be taken to the church only under the condition that he confess to the killing of deceased .... Even if this offer of transportation by the Sheriff was the motive for the confession, it is not thus excluded. The offer was a mere collateral benefit to appellant and had no relation to the legal consequences of the offense itself. Pittman v. State, 36 Ala. App. 179, 54 So. 2d 630, cert. den. 256 Ala. 369, 54 So. 2d 632; Dalrymple v. State, 41 Ala. App. 223, 127 So. 2d 385; Smith v. State, 247 Ala. 354, 24 So. 2d 546."). Quinlivan v. State, 627 So. 2d 1082, 1086 (Ala. Crim. App. 1992)("The appellant's emotional condition may have made the statement 'unreliable,' but it did not make it 'involuntary.' "). "Voluntariness is determined by an assessment of the totality of the circumstances, but that assessment must include an element of official overreaching to warrant a conclusion that a confession is involuntary under constitutional law." Miller v. Dugger, 838 F.2d 1530, 1536 (11th Cir. 1988)("The motive that impels a defendant to confess to the police, other than a motive to end police coercion, is not an issue to which the United States Constitution speaks; 'coercive police activity is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment.' " (quoting Colorado v. Connelly, 479 U.S. 157, 164, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986)). United States v. Kell, (CR-121-ELR-AJB, August 7, 2017)(N.D. Ga. 2017)(not reported in F.Supp.)("[T]here is no evidence that [Special Agent] Clark was aware that [appellant] had bipolar disorder when he interviewed him in September 2012. As a result, he did not take advantage of any such disorder. Further, as the witness told Clark, Kell was very highly functioning even with the disorder. Therefore, Kell's bipolar disorder did not render his statements involuntary.").

***40** In this case, we conclude that Hicks is not entitled to any relief as to this claim.

XVII.

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Hicks alleges that his death sentence must be vacated in light of Hurst v. Florida, 577 U.S. ––––, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016) and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), because, he says, his jury did not make all the findings concerning the existence of the aggravating circumstances and the determination that they outweighed the mitigating circumstances. Hicks takes issue with the holdings in Ex parte Bohannon, 222 So. 3d 525 (Ala. 2016), and Ex parte Waldrop, 859 So. 2d 1181 (Ala. 2002).

However, this Court has previously applied those rulings.

> " ' " Hurst applies Ring and reiterates that a jury, not a judge, must find the existence of an aggravating factor to make a defendant death-eligible. Ring and Hurst require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty -- the plain language in those cases requires nothing more and nothing less. Accordingly, because in Alabama a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-eligible, Alabama's capital-sentencing scheme does not violate the Sixth Amendment.
>
> " ' "Moreover, Hurst does not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. This Court rejected that argument in Ex parte Waldrop, [859 So.2d 1181 (Ala. 2002),] holding that the Sixth Amendment 'do[es] not require that a jury weigh the aggravating circumstances and the mitigating circumstances' because, rather than being 'a factual determination,' the weighing process is 'a moral or legal judgment that takes into account a theoretically limitless set of facts.' 859 So. 2d at 1190, 1189. Hurst focuses on the jury's factual finding of the existence of a aggravating circumstance to make a defendant death-eligible; it does not mention the jury's weighing of the aggravating and mitigating circumstances. The United States Supreme Court's holding in Hurst was based on an application, not an expansion, of Apprendi [v. New Jersey, 530 U.S. 466 (2000)] and Ring; consequently, no reason exists to disturb our decision in Ex parte Waldrop with regard to the weighing process. Furthermore, nothing in our review of Apprendi, Ring, and Hurst leads us to conclude that in Hurst the United States Supreme Court held that the Sixth Amendment requires that a jury impose a capital sentence. Apprendi expressly stated that trial courts may 'exercise discretion -- taking into consideration various factors relating both to offense and offender -- in imposing a judgment within the range prescribed by statute.' 530 U.S. at 481, 120 S.Ct. 2348. Hurst does not disturb this holding.
>
> " 'Ex parte Bohannon, 222 So.3d at 531–33.' "

Knight v. State, [Ms. CR-16-0182, August 10, 2018] ––– So. 3d ––––, –––– (Ala. Crim. App. 2018). Moreover, this Court is bound by the decisions of the Alabama Supreme Court, which has held that Alabama's capital sentencing scheme does not run afoul of Hurst and Ring. Revis v. State, 101 So. 3d 247, 326-27 (Ala. Crim. App. 2011)(quoting Reynolds v. State, 114 So. 3d 61, 157 n.31 (Ala. Crim. App. 2010)(stating, in challenge to the constitutionality of Ex parte Waldrop, that " 'this Court is bound by the decisions of the Alabama Supreme Court and has no authority to reverse or modify those decisions. See § 12–3–16, Ala. Code 1975." Doster[v. State], 72 So.3d [50,] 103 n. 13[(Ala. Crim. App. 2010)].' ")). Hicks is not entitled to relief on this claim.

XVIII.

***41** Hicks argues that a myriad of his constitutional rights were violated by the State's reliance on "the same circumstance to the crime charged as capital and as a basis for imposing death." (Hicks's brief, at 96.) Hicks did not raise before the circuit court the issue of "double counting" circumstances both as an element of the offense and as an aggravating circumstance; therefore, we review this issue for plain error. Rule 45A, Ala. R. App. P.

As this Court has held:

> "[T]here is no constitutional or statutory prohibition against double counting certain circumstances as both an element of the offense and an aggravating circumstance. See § 13A–5–45(e), Ala. Code 1975 (providing that 'any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing'). The United States Supreme Court, the Alabama Supreme Court, and this court have all upheld the practice of double counting. See Lowenfield v. Phelps, 484 U.S. 231, 241–46, 108 S.Ct. 546, 98 L.Ed. 2d 568 (1988) ('The fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally

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> infirm.'); Tuilaepa v. California, 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed. 2d 750 (1994) ('The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both).'); Ex parte Kennedy, 472 So. 2d 1106, 1108 (Ala. 1985) (rejecting a constitutional challenge to double counting); Brown v. State, 11 So. 3d 866 (Ala. Crim. App. 2007); Harris v. State, 2 So. 3d 880 (Ala. Crim. App. 2007); Jones v. State, 946 So. 2d 903, 928 (Ala. Crim. App. 2006); Peraita v. State, 897 So. 2d 1161, 1220–21 (Ala. Crim. App. 2003); Coral v. State, 628 So. 2d 954 (Ala. Crim. App. 1992); Haney v. State, 603 So. 2d 368 (Ala. Crim. App. 1991). Because double counting is constitutionally permitted and statutorily required, [Hicks] is not entitled to any relief on this issue. § 13A–5–45(e), Ala. Code 1975."

Vanpelt, 74 So. 3d at 89.

In this case, Hicks was convicted of committed the murder while he was under a sentence of life imprisonment in violation of § 13A-5-40(a)(6), Ala. Code 1975. That same evidence also supported the statutory aggravating circumstance in § 13A-5-49(1), Ala. Code 1975, that the capital offense was committed while Hicks was under a sentence of imprisonment. Such "double counting" did not amount to a violation of Hicks's constitutional rights.

XIX.

Hicks argues that "sentencing a mentally ill defendant to death is cruel and unusual punishment in violation of state and federal law." (Hicks's brief, at 97.) Hicks cites Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005),[20] and Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).[21] Hicks also makes a laundry list of other constitutional rights that he says were violated by sentencing a mentally ill defendant to death. It should be noted that Hicks does not argue, nor is there evidence indicating, that he was intellectually disabled. Moreover, he cites no law to support his claim that his constitutional rights would be violated if he were executed, because he suffers from mental illness. See In re Neville, 440 F.3d 220, 221 (5th Cir. 2006)("[Neville] asserts that Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed. 2d 335 (2002), and Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed. 2d 1 (2005), created a new rule of constitutional law, made retroactive by the Supreme Court, making the execution of mentally ill persons unconstitutional. No such rule of constitutional law was created, however, by either Atkins or Roper. See, e.g., In re Woods, 155 Fed. Appx. 132, 136 (5th Cir. 2005) (declining to grant a successive habeas petition to consider the defendant's alleged mental illness because the new constitutional rule created in Atkins does not cover mental illness)."). See also In re Garner, 612 F.3d 533, 536 (6th Cir. 2010).

***42** Before trial, after mental evaluations, Hicks was determined to be competent to stand trial, and it was also determined that he was not mentally ill at the time of the offense. Hicks pleaded not guilty, and he did not enter a plea of not guilty by reason of mental disease or insanity.

At sentencing, Dr. Kirkland, a forensic psychologist, testified that he was brought into the case as an expert for the court rather than being retained by one of the parties. Dr. Kirkland opined:

> "[Hicks] did not have a clinical disorder. He was not depressed. He was not psychotic. He would not meet the normal reasons that one would think a mental evaluation like this would be done.
>
> "And what I found the evidence for was he -– I mean, he had been in prison most of his adult life. That he had multiple episodes of breaking the law or antisocial action, an antisocial personality disorder, which is described, really, as someone who characteristically has a hard time respecting the rights of other people, tends to see other people as objects that they can use to bring about goals, meeting their own goals, and those were the primary diagnoses."

(R. 2557.)

Thereafter, Hicks presented the testimony of Dr. Rosenzweig, who opined that Hicks had bipolar disorder. The circuit court noted in its sentencing findings that accorded some weight to Dr. Rosenzweig's opinion that she "based her opinion of bipolar disorder on her observation of [Hicks] moving between manic or hypomanic episodes and major depressive episodes ...[and] [t]he court note[d] that no evidence was presented of a clinical diagnosis for bipolar disorder." (C. 89.)

Here, there was a pretrial determination that Hicks did not suffer from a mental illness and a concurring opinion from a court-appointed forensic psychologist. Moreover, as the court stated, despite Dr. Rosenzweig's opinion, that there was no clinical diagnosis that Hicks suffered from bipolar disorder or any mental illness. Therefore, there is no merit to his claim.

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XX.

Hicks alleges that the pretrial death qualification of the jury during voir-dire examination violated his right to an impartial jury. He specifically argues that "social scientific evidence shows that death-qualified juries are significantly more prone to convict and death qualification disproportionately excludes minorities and women." (Hicks's brief, at 98.) Hicks failed to object on this ground to the circuit court; therefore, plain-error review must be applied. Moreover, Hicks makes no citation to the record or any questioning by the prosecutor or instruction by the court to support his claim. Rule 28(a)(10), Ala. R. App. P.

This Court has previously addressed the arguments Hicks raises and decided those claims adversely to his position. In Dotch v. State, 67 So. 3d 936, 988-89 (Ala. Crim. App. 2010), this Court stated:

> "In Lockhart v. McCree, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986), the United States Supreme Court held that veniremembers in a capital-murder trial may be 'death-qualified' to determine their views on capital punishment. The appellate courts in Alabama have repeatedly applied the Lockhart holding. As this Court stated in Sockwell v. State, 675 So. 2d 4 (Ala. Crim. App. 1993):
>
> > " ' "In Lockhart v. McCree, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986), the Supreme Court held that the Constitution does not prohibit states from 'death qualification' of juries in capital cases and that so qualifying a jury does not deprive a defendant of an impartial jury. 476 U.S. at 173, 106 S. Ct. at 1764. Alabama Courts have consistently held likewise. See Williams v. State, 556 So. 2d 737 (Ala. Crim. App. 1986), rev'd in part, 556 So. 2d 744 (Ala. 1987); Edwards v. State, 515 So. 2d 86, 88 (Ala. Crim. App. 1987); Martin v. State, 494 So. 2d 749 (Ala. Crim. App. 1985).
> >
> > ***43** " '675 So.2d at 18.'
>
> "Lee v. State, 44 So. 3d 1145, 1161–62 (Ala. Crim. App. 2009)."
>
> "In Sneed v. State, 1 So. 3d 104 (Ala. Crim. App. 2007), cert. denied, 555 U.S. 1155, 129 S. Ct. 1039, 173 L. Ed. 2d 472 (2009), Sneed raised the same issues Dotch raises, and this court found no merit to his claims, stating:
>
> > " 'The appellant also argues that death-qualifying a jury is unconstitutional because the jurors are more prone to convict, it assumes that the defendant is guilty, and it disproportionately excludes minorities and women. In Davis v. State, 718 So. 2d 1148, 1157 (Ala. Crim. App. 1995) (opinion on return to remand), aff'd, 718 So. 2d 1166 (Ala. 1998), we stated:
> >
> > > " ' "A jury composed exclusively of jurors who have been death-qualified in accordance with the test established in Wainwright v. Witt, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985), is considered to be impartial even though it may be more conviction prone than a non-death-qualified jury. Williams v. State, 710 So. 2d 1276 (Ala. Cr. App. 1996). See Lockhart v. McCree, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986). Neither the federal nor the state constitution prohibits the state from[ ] death-qualifying jurors in capital cases. Id.; Williams; Haney v. State, 603 So. 2d 368, 391–92 (Ala. Cr. App. 1991), aff'd, 603 So. 2d 412 (Ala. 1992), cert. denied, 507 U.S. 925, 113 S. Ct. 1297, 122 L. Ed. 2d 687 (1993).
> >
> > " '(Footnote omitted.) Therefore, the appellant's argument is without merit.'
>
> "1 So. 3d at 136–37."

Therefore, Hicks is due no relief as to this claim.

XXI.

Hicks argues that his conviction for theft of property in the second degree should be reversed because, he says, the State failed to establish the value of the stolen trailer as required by § 13A-8-4(a), Ala. Code 1975. Specifically, Hicks argues that the State failed to prove that the market value of the trailer at the time it was stolen was between $1,500 and $2,500. In a single-sentence footnote, Hicks adds that the State failed to prove that Hicks knowingly obtained unauthorized control of the trailer or intended to deprive anyone of the trailer. Hicks raises these arguments for the first time on appeal.

Plain-error review does not apply to convictions in which the death penalty has not been imposed. In Ex parte Woodall, 730 So. 2d 652 (Ala. 1998), the Alabama Supreme Court stated:

> "Because the defendant in this case was sentenced to death, we have complied with our obligation under Rule

> 39(k) and conducted a plain-error review. However, with respect to his attempted murder conviction, for which he received a sentence of less than death, we do not believe the defendant is entitled to benefit from our plain error review. We have found no Alabama decision dealing with the particular situation present here: a case in which plain error necessitated a reversal on a capital conviction and death sentence but in which the defendant was also sentenced to a term of imprisonment on another conviction. However, the defendant's sentence of imprisonment for his conviction of attempted murder does not implicate the same heightened degree of concern for reliability that attended his sentence of death for the capital conviction. It is well established that where a defendant receives only a prison sentence the plain-error doctrine is not applicable and an appellate court will not consider an alleged error that the defendant failed to preserve by making a proper and timely objection in the trial court. See Biddie v. State, 516 So. 2d 846 (Ala. 1987); Harris v. State, 347 So. 2d 1363 (Ala. Cr. App. 1977), cert. denied, 347 So. 2d 1368 (Ala. 197[7]). Indeed, it has been said that the plain-error doctrine 'applies to death penalty cases, but not to other convictions.' Pugh v. State, 355 So. 2d 386, 389 (Ala. Cr. App.), cert. denied, 355 So. 2d 392 (Ala. 1977) (citations omitted) (emphasis added).
>
> ***44** "Had the defendant been convicted and sentenced to a term of imprisonment on the attempted murder count but either acquitted or sentenced to life imprisonment without the possibility of parole on the capital murder count, the plain-error doctrine would not have applied. Thus, we would not have even considered the error upon which we have predicated our reversal of his capital conviction and death sentence: the State's questioning of the defendant regarding his character and the subsequent introduction of evidence of specific incidents tending to indicate a propensity for violence. No objection to that questioning was raised at trial. The defendant should not be put in a more favorable position with respect to our review of his noncapital conviction simply because he was also found guilty of a capital offense and was sentenced to death. Thus, we conclude that the defendant's failure to object to the State's inquiry into his character or to the introduction of evidence of the three violent incidents precludes this Court from considering those grounds as the foundation for a reversal of his attempted-murder conviction, for which he received a sentence of less than death."

730 So. 2d at 665.

Accordingly, this Court will not review any argument related to Hicks's conviction for theft of property in the second degree unless the specific argument was raised in the trial court and was preserved for appellate review. Because Hicks did not preserve for appellate review the specific arguments he raises on appeal concerning the sufficiency of the evidence to sustain his conviction for second-degree theft of property and because plain-error review does not apply to that conviction, this Court will not review those arguments.

XXII.

For now, this Court pretermits our mandatory review of the propriety of Hick's death sentence pursuant to § 13A–5–53, Ala. Code 1975, and our review of the entire sentencing proceedings for plain error, as required by Rule 45A, Ala. R. App. P.. However, we have searched the record for any error that has or probably has adversely affected Hicks's substantial rights concerning his capital-murder conviction, and we have found no plain error or defect in the proceedings under review.

Conclusion

Based on the foregoing, this Court affirms Hicks's convictions for capital murder and second-degree theft of property. We remand the case for the trial court to clarify its sentencing order in the capital-murder case concerning its application of the definition of the "heinous, atrocious, or cruel" aggravating circumstance. See Part VII.B., supra. If the court improperly applied the definition, it must reconsider that aggravating circumstance under the proper definition. If the court applied the proper definition, it must clarify its order. Due return shall be made to this Court within 42 days from the date of this opinion.

AFFIRMED AS TO CONVICTIONS; REMANDED AS TO SENTENCING.

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

All Citations

--- So.3d ----, 2019 WL 3070198

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Footnotes

1 Alyssa's name is also spelled in the record as "Alissa"; for consistency in this opinion, we use the prior spelling "Alyssa."

2 In parts of the record, this child's name is also spelled "Jayton"; for consistency, we use the spelling "Jatton" in this opinion.

3 Jatton testified that he also had a younger sister, Rayna, however she apparently did not live with Norris.

4 In their statements to the police following the offense, both boys stated that they witnessed the offense and described it. However, at trial Jatton recanted and denied having witnessed any offense. Chance testified at trial to the circumstances of the offense.

5 Subsequently, during the police investigation, the police dogs alerted at the same tree.

6 The page numbering for the pretrial record recommences beginning with pretrial hearings dated April 7, 2015, and subsequent pretrial hearings forward through trial. This transcript will be denoted as "(R.)"

7 The case-action summary states that counsel's motion to withdraw was granted by a separate order on February 19; however, the record indicates that the court granted counsel's motion to withdraw at the January 8 hearing.

8 The State's psychologist testified during the sentencing phase concerning his evaluation of Hicks to rebut the testimony of the clinical psychologist who testified for the defense. The defense expert testified that Hicks suffered from bipolar disorder.

9 See Estelle v. Smith, 451 U.S. 454, 470, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)("When respondent was examined by Dr. Grigson, he already had been indicted and an attorney had been appointed to represent him. The Court of Appeals concluded that he had a Sixth Amendment right to the assistance of counsel before submitting to the pretrial psychiatric interview. [Smith v. Estelle,] 602 F.2d [694], at 708–709 [(5th Cir. 1979)]. We agree.") See also Satterwhite v. Texas, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988).

10 The State properly introduced evidence of Hicks's behavior while imprisoned to prove future dangerousness.

11 Section 13A–5–45(g) provides: "The defendant shall be allowed to offer any mitigating circumstance defined in Sections 13A–5–51 and 13A–5–52. When the factual existence of an offered mitigating circumstance is in dispute, the defendant shall have the burden of interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence."

12 Chance referred to a sword as well and stated that Hicks "choked" Duncan with the sword. (C. 913.)

13 We note that the Supreme Court has subsequently applied the harmless-error rule to the error in Billups. R.C.W. v. State, 168 So. 3d 102 (Ala. 2014).

14 We note that the State in its arguments to the jury properly defined the especially heinous, atrocious, and cruel aggravating circumstance as "a conscienceless or pitiless homicide which [is] unnecessarily torturous to the victim." (R. 2765.) However, the trial court did not include this language in its instructions.

15 These bones constitute the neck.

16 Dr. Hart testified that he had "the left foot encased in a boot and a sock." (R. 2058.)

17 On cross-examination, Dr. Hart stated that the bones with the clean breaks appeared to have been "sliced." (R. 2078.) A toolmarks expert testified that the injuries appeared to have been a result of chopping or slicing using a "machete, a knife, or an ax." (R. 2087.)

18 After the State gave its reasons for striking black veniremembers, the court stated, "Okay. I think all of those are -- satisfies me. Had we had a Batson motion, that's certainly race-neutral reasons. But I didn't see a prima facie case anyhow and I guess that's why the defense chose not to." (R. 973.) Compare Harris v. State, 705 So. 2d 542, 545 (Ala. Crim. App. 1997)(holding that where the court did not find or required counsel to state reasons for peremptory strikes, the reasons will be reviewed on appeal).

19 The record fails to indicate which party posed the question.

20 Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), held that execution of someone under 18 years of age at time of his or her capital crime is prohibited by Eighth and Fourteenth Amendments.

21 Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), held that the execution of a mentally retarded individual was cruel and unusual punishment prohibited by Eighth Amendment.

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Appendix B

THE STATE OF ALABAMA - - JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

CR-15-0747

Dennis Morgan Hicks, Appellant

vs.

State of Alabama, Appellee

Appeal from Mobile Circuit Court No. CC-12-4687 and CC-12-4994

ORDER

On Return to Remand

Dennis Morgan Hicks was convicted of capital murder for intentionally killing Joshua Duncan while Hicks was under a sentence of life imprisonment. Hicks was also convicted of second-degree theft of property. The jury recommended a sentence of death as to the capital murder conviction, and Hicks was subsequently sentenced to death. Hicks was sentenced to time served for his theft of property conviction. Hicks appealed.

On July 12, 2019, this Court affirmed Hicks's convictions for capital murder and second-degree theft of property. However, we remanded the case for the trial court to "clarify its sentencing order in the capital-murder case concerning its application of the definition of the 'heinous, atrocious, or cruel' aggravating circumstance." Further, we stated: "If the court improperly applied the definition, it must reconsider that aggravating circumstance under the proper definition. If the court applied the proper definition, it must clarify its order."

On remand, in a new sentencing order, the trial court addressed the "heinous, atrocious, or cruel" aggravating circumstance by omitting certain language from its discussion of that aggravating circumstance. However, as Hicks notes in his brief on return to remand, the new sentencing order also omitted the discussion of two nonstatutory mitigating circumstances that the court had explicitly considered in its original sentencing order.

Concerning nonstatutory mitigating circumstances, the trial court's original sentencing order stated:

"Under section 13A-5-47(d), this Court must also consider each of the non-statutory mitigating circumstances interjected by Defendant Hicks. Under Section 13A-5-52, this Court recognizes that non-statutory mitigating circumstances can include evidence concerning the defendant's character, life, or record; the facts of the crime; mercy for the defendant, and any other relevant information for sentencing purposes. Because non-statutory mitigating circumstances are wide-ranging, it is difficult to list every possible way to label them. This Court's outline of non-statutory mitigating circumstances is based on Hicks's requested jury instructions for mitigating circumstances and any additional circumstances this Court heard during the sentencing phase. As outlined below, this Court has considered each of these nonstatutory mitigating circumstances. To the extent that some piece of evidence, theory, or testimony concerning a non-statutory mitigating circumstance does not fit into the categories below, this Court avers that it did consider all relevant evidence produced by Hicks, at the guilt phase and penalty phase, sentencing hearing and gave such evidence its appropriate weight.

"This Court also considered the following:

"a. Childhood Problems: The defendant's mitigation expert, Dr. Marianne Rozensweig testified that Hicks was born into a dysfunctional family and that as a child the defendant witnessed abuse in the family and experienced difficulties related to his father's behavior. The defendant testified however, that he had a good childhood and good step-parents. The Court finds that this mitigating circumstance was sufficiently interjected by Hicks and not disproved by the State. Accordingly, this Court gives this mitigating circumstance some, but relatively little, weight.

"b. Mercy: Hicks attorneys pleaded for the jury to show mercy for Hicks. While it is impossible to quantify a plea for mercy, this Court finds that Hicks sufficiently raised the issue and it was not (and cannot be) disproved by the State, as a result, this Court gives Hicks plea for mercy some weight as a nonstatutory mitigator.

"c. <u>Capacity for Love and Care</u>: There was some testimony from the mitigation expert and Hicks' sister regarding this mitigator. His caring for and taking care of his mother and his involvement at church, as well as doing odd jobs for various people. The State did not disprove this testimony and accordingly the Court gives it some weight."

(C. 91-92.)

The trial court's new sentencing order states:

"Under section 13A-5-47(d), this Court must also consider each of the non-statutory mitigating circumstances interjected by Hicks. Under Section 13A-5-52, this Court recognizes that non-statutory mitigating circumstances can include evidence concerning the defendant's character, life, or record; the facts of the crime; mercy for the defendant, and any other relevant information for sentencing purposes. Because non-statutory mitigating circumstances are wide-ranging, it is difficult to list every possible way to label them. This Court's outline of non-statutory mitigating circumstances is based on Hicks's requested jury instructions for mitigating circumstances and any additional circumstances this Court heard during the sentencing phase. As outlined below, this Court has considered each of these nonstatutory mitigating circumstances. To the extent that some piece of evidence, theory, or testimony concerning a non-statutory mitigating circumstance does not fit into the categories below, this Court avers that it did consider all relevant evidence produced by Hicks, at the guilt phase and penalty phase, sentencing hearing and gave such evidence its appropriate weight.

"a. Childhood Problems: The defendant's mitigation expert, Dr. Mary Ann Rozensweig testified that Hicks was born into a dysfunctional family and that as a child the defendant witnessed abuse in the family and experienced difficulties related to his father's behavior. The defendant testified however, that he had a good childhood and good step-parents. The Court finds that this mitigating circumstance was sufficiently interjected by Hicks and not

disproved by the State. Accordingly, this Court gives this mitigating circumstance some, but relatively little, weight."

(R.T.R. C. 33-34.)

Thus, the trial court's new sentencing order omitted the subheadings specifically addressing the "mercy" and "capacity for love and care" nonstatutory mitigating circumstances. It is unclear whether this omission was intentional, but if it was intentional, the trial court went beyond the scope of our remand order, which instructed the court to clarify its order concerning its application of the "heinous, atrocious, or cruel" aggravating circumstance only. See Anderson v. State, 796 So.2d 1151, 1156 (Ala. Crim. App. 2000) (holding that "any act by a trial court beyond the scope of an appellate court's remand order is void for lack of jurisdiction"). Accordingly, we must **REMAND** this case to the trial court **WITH INSTRUCTIONS** to correct its new sentencing order to include the nonstatutory mitigating circumstances that were omitted, and if the trial court failed to consider those nonstatutory mitigating circumstances on remand, it must consider them on second remand. The circuit court shall take all necessary action to see that the circuit clerk makes due return to this Court at the earliest possible time and within 28 days after the release of this order.

Windom, P.J., and Kellum, McCool, Cole, and Minor, JJ., concur.

Done this 24th day of June, 2020.

MARY B. WINDOM, PRESIDING JUDGE

cc: Hon. Charles A. Graddick, Judge
Hon. James Patterson, Judge
Hon. JoJo Schwarzauer, Clerk
Lynne Frantz, Court Reporter
Rachel Judge, Esq.
Angela Setzer, Esq.
Office of the Attorney General

Appendix C

2021 WL 2177671
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Court of Criminal Appeals of Alabama.

Dennis Morgan HICKS
v.
STATE of Alabama

CR-15-0747
|
May 28, 2021

Synopsis
Background: Defendant was convicted in the Circuit Court, Mobile County, CC-12-4687, of capital murder and second-degree theft of property, for which he sentenced to death as to the capital-murder conviction and time served as to the theft conviction. Defendant appealed. The Court of Criminal Appeals, 2019 WL 3070198, affirmed the convictions but remanded as to sentencing. On remand, the Circuit Court, Mobile County, CC-12-4687, issued a revised sentencing order. On return to remand, the Court of Criminal Appeals, by unpublished order, again remanded. On second remand, the Circuit Court, Mobile County, CC-12-4687, issued another revised sentencing order.

On return to second remand, the Court of Criminal Appeals, McCool, J., held that sufficient evidence supported death sentence for capital-murder conviction.

Affirmed.

Appeal from Mobile Circuit Court (CC-12-4687)

On Return to Second Remand

McCOOL, Judge.

***1** Dennis Morgan Hicks was convicted of capital murder, see § 13A-5-40(a)(6), Ala. Code 1975, for intentionally killing Joshua Duncan while Hicks was under a sentence of life imprisonment. Hicks was also convicted of theft of property in the second degree, see § 13A-8-4, Ala. Code 1975, for exerting unauthorized control over Dorothy Hudson's utility trailer, valued at $1,500, with the intent to deprive her of the trailer. Following a jury trial, the jury, by a vote of 11 to 1, recommended a sentence of death as to the capital-murder conviction, and Hicks was subsequently sentenced to death. Hicks was sentenced to time served for his theft-of-property conviction. Hicks appealed.

On July 12, 2019, this Court affirmed Hicks's convictions for capital murder and second-degree theft of property. However, we remanded the case for the trial court to "clarify its sentencing order in the capital-murder case concerning its application of the definition of the 'heinous, atrocious, or cruel' aggravating circumstance." Further, we stated: "If the court improperly applied the definition, it must reconsider that aggravating circumstance under the proper definition. If the court applied the proper definition, it must clarify its order." Hicks v. State, [Ms. CR-15-0747, July 12, 2019] ––– So. 3d –––, –––, 2019 WL 3070198 (Ala. Crim. App. 2019).

On remand, in a revised sentencing order, the trial court addressed the "heinous, atrocious, or cruel" aggravating circumstance by omitting certain language from its discussion of that aggravating circumstance. However, the revised sentencing order also omitted the discussion of two nonstatutory mitigating circumstances the court had explicitly considered in its original sentencing order. Specifically, the trial court's revised sentencing order omitted the discussion of the "mercy" and "capacity-for-love-and-care" nonstatutory mitigating circumstances that were included in the original sentencing order. It was unclear whether that omission was intentional, but, if it was intentional, the trial court went beyond the scope of our remand order, which instructed the court to clarify its order concerning its application of the "heinous, atrocious, or cruel" aggravating circumstance only. See Anderson v. State, 796 So. 2d 1151, 1156 (Ala. Crim. App. 2000) (holding that "any act by a trial court beyond the scope of an appellate court's remand order is void for lack of jurisdiction"). Accordingly, on June 24, 2020, by unpublished order, we remanded the case to the trial court with instructions to correct its revised sentencing order to include the nonstatutory mitigating circumstances that were omitted, and, if the trial court failed to consider those nonstatutory mitigating circumstances on remand, to consider them on second remand.

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On second remand, the trial court issued a corrected sentencing order that included a discussion of the "mercy" and "capacity-for-love-andcare" nonstatutory mitigating circumstances, and the trial court stated that it "considered all of these nonstatutory mitigating circumstances at the previous sentencing hearing" and that "[t]he omission of any of these mitigating circumstances in the prior sentencing order was unintentional." Thus, the trial court complied with our instructions.

***2** However, on second remand, the trial court also made slight alterations to its discussion of the "heinous, atrocious, or cruel" aggravating circumstance. On initial remand, the trial court's revised sentencing order stated:

> "In regard to the aggravating circumstance that the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses, the evidence shows that the defendant murdered Joshua Duncan and then chopped his head and hands off and disemboweled him. The State's pathologist could not confirm whether Joshua Duncan was dead when the defendant began the dismemberment and disembowelment. This is heinous, atrocious, or cruel compared to other capital offenses."

On second remand, the trial court's revised sentencing order stated:

> "In regard to the aggravating circumstance that the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses, the evidence shows that the defendant murdered Joshua Duncan and cut off his head and hands off and disemboweled him. The State's pathologist could not confirm whether Joshua Duncan was dead when the defendant began the dismemberment and disembowelment, so this question of fact was left to the jury. The Court agrees with the jury's finding that this is heinous, atrocious, or cruel compared to other capital offenses."

(Altered portion emphasized.)

Initially, we note that this added language in the order on second remand is not a new finding by the trial court or a substantive change. The added language states no more than what was implicit in the trial court's finding in its order on initial remand, i.e., that the trial court agreed with the jury's finding that this offense was especially heinous, atrocious, or cruel when compared to other capital offenses. Nevertheless, on second remand, this Court remanded the case solely for the trial court to correct its new sentencing order to include the nonstatutory mitigating circumstances that were omitted on remand and to consider those mitigating circumstances if the trial court had failed to do so. Thus, on second remand, the trial court's revisions to its discussion of the "heinous, atrocious, or cruel" aggravating circumstance were beyond the scope of remand. This Court has held that "any act by a trial court beyond the scope of an appellate court's remand order is void for lack of jurisdiction" and "is a nullity." Anderson, 796 So. 2d at 1156. Therefore, the language that the trial court added to its discussion of the "heinous, atrocious, or cruel" aggravating circumstance on second remand is void, and it will not be considered in our review of Hicks's death sentence.

Next, we must review the trial court's actions on initial remand. Originally, we remanded the case for the trial court to "clarify its sentencing order in the capital-murder case concerning its application of the definition of the 'heinous, atrocious, or cruel' aggravating circumstance." Further, we stated: "If the court improperly applied the definition, it must reconsider that aggravating circumstance under the proper definition. If the court applied the proper definition, it must clarify its order." Hicks, —— So. 3d at ——.

The trial court's original sentencing order stated the following regarding the "heinous, atrocious, or cruel" aggravating circumstance:

> ***3** "In regard to the aggravating circumstance that the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses, the evidence shows that the defendant murdered Joshua Duncan and then cut off his head and hands and disemboweled him. The State's pathologist could not confirm whether Joshua Duncan was dead when the defendant began the dismemberment and disembowelment. The court further notes that the defendant murdered Joshua Duncan in or around Regina Norris's residence where three very young children were present. The evidence showed that two of the three young children were present when the defendant brutally murdered Joshua Duncan and then chopped Joshua Duncan's head and hands off and disemboweled him. Subjecting these very young children to such a horrendous act is heinous, atrocious, or cruel. This is heinous, atrocious, or cruel compared to other capital offenses."

(C. 85-86.)

Concerning the portion of that order discussing the presence of children during the murder, this Court stated:

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> "Under the proper definition of the 'heinous, atrocious, or cruel' aggravating circumstance, the circumstance includes only those 'conscienceless or pitiless homicides which are unnecessarily torturous to the victim.' Ex parte Kyzer, 399 So. 2d 330, 334 (Ala. 1981). Hicks correctly asserts that, under the proper definition, the homicide must have been unnecessarily torturous to the victim -- Duncan -- not to the children. However, in addition to being unnecessarily torturous to the victim, the homicide must be 'conscienceless or pitiless.' We hold that the presence of the children could be one circumstance the trial court could consider in determining whether the homicide was 'conscienceless or pitiless.' See Clark v. State, 896 So. 2d 584, 648-49 (Ala. Crim. App. 2000) (holding that the fact that the victim was mentally and physically handicapped was 'of no consequence in determining whether the crime was unnecessarily torturous to the victim[;] [h]owever, it is relevant and probative of whether the crime was conscienceless or pitiless'). Thus, contrary to Hicks's argument, the trial court did not necessarily broaden the definition of this aggravating circumstance when it considered the presence of the children in determining that this aggravating circumstance existed. However, it is unclear from the trial court's order whether the court properly considered the presence of the children under the 'conscienceless or pitiless' element of the 'heinous, atrocious, or cruel' definition or whether the court improperly considered the presence of the children because the homicide was unnecessarily torturous to them, rather than Duncan. Therefore, we remand the case to the trial court for it to clarify its order concerning this issue."

Hicks, —— So. 3d at ——.

On initial remand, the trial court revised its order and read it into the record with Hicks present. Concerning the "heinous, atrocious, or cruel" aggravating circumstance, the revised order stated:

> "In regard to the aggravating circumstance that the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses, the evidence shows that the defendant murdered Joshua Duncan and then chopped his head and hands off and disemboweled him. The State's pathologist could not confirm whether Joshua Duncan was dead when the defendant began the dismemberment and disembowelment. This is heinous, atrocious, or cruel compared to other capital offenses."

Thus, the trial court removed the language concerning the presence of the children during the murder. Therefore, it appears that the trial court had improperly applied the definition as it concerned the presence of the children and removed that circumstance from its consideration. Then, in compliance with our instructions, the trial court reconsidered the "heinous, atrocious, or cruel" aggravating circumstance, and, after that reconsideration, the court again followed the jury's recommendation and sentenced Hicks to death.

***4** On return to remand, Hicks attempted to argue that, after removing the language concerning the presence of the children, the trial court's remaining discussion concerning its application of the "heinous, atrocious, or cruel" aggravating circumstance was insufficient. However, on original submission, this Court addressed Hicks's argument that the trial court's reasoning was insufficient because, Hicks said, the trial court relied on speculation and "an unlawfully broad definition" of the aggravating circumstance. Specifically, this Court stated:

> "Furthermore, concerning Hicks's argument that the trial court erroneously found that the murder was especially heinous, atrocious, or cruel because, according to Hicks, the trial court improperly considered that Duncan might have been alive when he was dismembered and disemboweled, any error was harmless beyond a reasonable doubt. As set forth in Part VII.A., supra, Duncan, who had mental disabilities, either died as a result of having been brutally beaten beginning in the mobile home and culminating in the backyard, or he remained alive throughout the entire beating and through at least part of his ensuing dismemberment. Under either scenario, the evidence established that his death was especially heinous, atrocious, or cruel. Thus, Duncan's violent homicide was especially heinous, atrocious, or cruel -- whether he died after being savagely beaten or remained alive when being hung, decapitated, and dismembered. Hicks is entitled to no relief in regard to this claim."

Hicks, —— So. 3d at ——.

Therefore, to the extent that Hicks attempted to raise this claim again in his brief on return to remand, it has already been decided by this Court on original submission. Again, this Court has decided that Hicks is entitled to no relief regarding this claim.

Finally, pursuant to § 13A–5–53, Ala. Code 1975, this Court is required to address the propriety of Hicks's capital-murder conviction and sentence of death.

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Hicks was convicted of one count of capital murder for intentionally killing Joshua Duncan by stabbing him with a bladed instrument and/or by decapitating him with a bladed instrument and/or by disemboweling him with a bladed instrument and/or by homicidal violence, while Hicks was under a sentence of life imprisonment, a violation of § 13A-5-40(a)(6), Ala. Code 1975. The jury, after deliberating for less than an hour, recommended by a vote of 11 to 1 that Hicks be sentenced to death. After receiving a presentence-investigation report and conducting a judicial sentencing hearing, the trial court followed the jury's recommendation and sentenced Hicks to death.

The record does not reflect that Hicks's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. See § 13A-5-53(b)(1), Ala. Code 1975.

Additionally, the trial court correctly found that the aggravating circumstances outweighed the mitigating circumstances. The trial court, in its sentencing order, found three aggravating circumstance to exist -- that Hicks committed the capital offense while he was under a sentence of imprisonment, see § 13A–5–49(1), Ala. Code 1975, specifically two sentences of life imprisonment for two murder convictions in Mississippi in 1981, that Hicks had been previously convicted of a felony involving the use of violence to a person, specifically two counts of murder in 1981, see § 13A-5-49(2), Ala. Code 1975, and that the capital offense was especially heinous, atrocious, or cruel when compared to other capital offenses, see § 13A-5-49(8), Ala. Code 1975. The court found these aggravating circumstances to exist beyond a reasonable doubt. The trial court then considered each of the statutory mitigating circumstances and found one to exist -- that the capital offense was committed while Hicks was under the influence of extreme mental or emotional disturbance, see § 13A–5–51(2), Ala. Code 1975 -- and gave that statutory mitigating circumstance "some weight." In its final sentencing order, the trial court also considered the nonstatutory mitigating evidence presented by Hicks, finding as follows:

> ***5** "As outlined below, this court has considered each of these nonstatutory mitigating circumstances. To the extent that some piece of evidence, theory, or testimony concerning a nonstatutory mitigating circumstance is not specifically articulated below, this should not be taken as an indication it was not considered. This Court avers that it did consider all relevant evidence produced by Hicks at the guilt phase, penalty phase, and sentencing hearing as reflected in the entire record of the case, and gave such evidence all due consideration.
>
> "This Court also specifically notes the following nonstatutory mitigating circumstances:[1]
>
> "1. Childhood Problems
>
> "The defendant's mitigation expert, Dr. Mary Ann Rozensweig, testified that Hicks was born into a dysfunctional family and that, as a child, the defendant witnessed abuse in the family and experienced difficulties related to his father's behavior. The defendant testified, however, that he had a good childhood and good stepparents. The court finds that this mitigating circumstance was sufficiently interjected by Hicks and not disproved by the State. After consideration, this court gives this mitigating circumstance some, but relatively little, weight.
>
> "2. Mercy
>
> "Hicks's attorneys pleaded for the jury to show mercy to Hicks. While it is impossible to quantify a plea for mercy, this court finds that Hicks sufficiently raised the issue and it was not (and cannot be) disproved by the State. As a result, this court gives Hicks's plea for mercy some weight as a nonstatutory mitigating circumstance.
>
> "3. Capacity for Love and Care
>
> "There was some testimony from the mitigation expert and Hicks's sister regarding this mitigating circumstance. The testimony consisted of Hicks caring for and taking care of his mother and his involvement at church, as well as doing odd jobs for various people. The State did not disprove this testimony, and, accordingly, the court gives it some weight."
>
> "________________
>
> "[1]The Court considered all these nonstatutory mitigating circumstances at the previous sentencing hearing. The omission of any of these mitigating circumstances in the prior sentencing order was unintentional."

The trial court explicitly stated that it did not consider the jury's verdict to be an aggravating circumstance, but the court did give the verdict "due weight" and "great deference."

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Thereafter, the trial court weighed the statutory aggravating circumstances and the statutory and nonstatutory mitigating circumstances and concluded that the aggravating circumstances in this case outweighed the mitigating circumstances. The record supports the trial court's findings and the imposition of the sentence of death.

Additionally, § 13A–5–53(b)(2), Ala. Code 1975, requires this Court to independently weigh the aggravating and mitigating circumstances to determine whether Hicks's sentence of death is appropriate. We have independently weighed the aggravating and the mitigating circumstances, and we are convinced, as was the trial court, that death is the appropriate sentence for the murder Hicks committed.

Pursuant to § 13A–5–53(b)(3), Ala. Code 1975, we determine that Hicks's sentence is neither disproportionate nor excessive to the penalty imposed in similar cases. In this case, Hicks was convicted of capital murder for causing the death of Joshua Duncan, who was mentally disabled, by stabbing him, by decapitating him, by disemboweling him, or by some other homicidal violence, while Hicks was under a sentence of life imprisonment. Sentences of death have been imposed for similar crimes throughout this state. See Peraita v. State, 897 So. 2d 1161 (Ala. Crim. App. 2003); Jones v. State, 450 So. 2d 165 (Ala. Crim. App. 1983).

***6** Lastly, as required by Rule 45A, Ala. R. App. P., we have searched the record for any error that has or probably has adversely affected Hicks's substantial rights and have found no plain error or defect in the proceedings under review.

After careful review and consideration, this Court concludes that Dennis Morgan Hicks received a fair trial and that the sentence of death is proper. Accordingly, the judgment of the trial court is affirmed.

AFFIRMED.

Windom, P.J., and Kellum, Cole, and Minor, JJ., concur.

All Citations

--- So.3d ----, 2021 WL 2177671

End of Document

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Appendix D

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk

P. O. Box 301555
Montgomery, AL 36130-1555
(334) 229-0751
Fax (334) 229-0521

October 1, 2021

CR-15-0747 **Death Penalty**

Dennis Morgan Hicks v. State of Alabama (Appeal from Mobile Circuit Court: CC12-4687; CC12-4994)

NOTICE

You are hereby notified that on October 1, 2021, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell

D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. James Patterson, Circuit Judge
Hon. JoJo Schwarzauer, Circuit Clerk
Rachel Judge, Attorney
Angela Setzer, Attorney
Randall S. Susskind, Attorney
William Daniel Dill, Asst. Attorney General
Audrey K. Jordan, Asst. Attorney General

Appendix E

2022 WL 17073090
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Supreme Court of Alabama.

EX PARTE Dennis Morgan HICKS
(In re: Dennis Morgan Hicks
v.
State of Alabama)

1210013
|
November 18, 2022

Synopsis
Background: Defendant was convicted in the Circuit Court, Mobile County, CC-12-4687, of capital murder and second-degree theft of property, for which he was sentenced to death as to the capital-murder conviction and time served as to the theft conviction. Defendant appealed. The Court of Criminal Appeals, 2019 WL 3070198, affirmed the convictions but remanded as to sentencing. On remand, the Circuit Court, Mobile County, CC-12-4687, issued a revised sentencing order. On return to remand, the Court of Criminal Appeals, by unpublished order, again remanded. On second remand, the Circuit Court, Mobile County, CC-12-4687, issued another revised sentencing order. On return to second remand, the Court of Criminal Appeals, 2021 WL 2177671, affirmed. Defendant petitioned for certiorari review.

Holdings: The Supreme Court, Wise, J., held that:

[1] any deprivation of counsel suffered by defendant when trial court ordered that he undergo a pretrial mental evaluation did not contaminate the entire criminal proceedings, and

[2] any error in the trial court's penalty-phase admission of mental health evaluator's testimony and report was harmless error, despite argument that defendant lacked counsel when the evaluation took place.

Writ quashed.

Mitchell, J., concurred in the result and filed opinion.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion; Sentencing or Penalty Phase Motion or Objection.

West Headnotes (6)

[1] **Criminal Law** Decisions of Intermediate Courts

On certiorari review, the Supreme Court accords no presumption of correctness to the legal conclusions of the intermediate appellate court.

[2] **Criminal Law** Counsel for Accused

Any deprivation of counsel suffered by capital-murder defendant when trial court ordered that he undergo a pretrial mental evaluation did not contaminate the entire criminal proceedings, and thus the alleged deprivation of counsel did not warrant an automatic reversal of the conviction, i.e., the harmless-error test applied; despite argument that defendant lacked counsel when that first evaluation took place, he was represented by court-appointed counsel when State made its oral motion for a mental evaluation, and although the court allowed the court-appointed counsel to withdraw at the end of a hearing on what was needed for the evaluation and did not appoint new counsel until two days after that first evaluation took place, a clinical psychologist conducted a second mental evaluation after the appointment of new counsel, and that psychologist concluded that defendant had an adequate understanding of the legal system and the charges against him. U.S. Const. Amend. 6.

[3] **Criminal Law** Doubt as to competency; reasonable cause or grounds

Reasonable grounds did not exist to doubt mental competency of capital-murder defendant, and thus trial court was not required under the Alabama Rules of Criminal Procedure to conduct a competency hearing; despite argument that defendant was not represented by counsel when competency evaluation took place, defendant was represented by counsel when the evaluator

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generated his report, and that report stated that defendant was capable of understanding the charges and assisting counsel in preparing an adequate defense. Ala. R. Crim. P. 11.1, 11.6(a).

[4] **Sentencing and Punishment** 🔑 Dangerousness

Alabama law does not require the State to prove a capital defendant's future dangerousness to impose the death penalty.

[5] **Sentencing and Punishment** 🔑 Dangerousness

Evidence regarding future dangerousness was a proper penalty-phase consideration in capital-murder trial, even though future dangerousness was not a statutory aggravating circumstance when determining if the death penalty is warranted, and even though Alabama law did not require the State to prove a capital defendant's future dangerousness to impose the death penalty. Ala. Code § 13A-5-49.

[6] **Sentencing and Punishment** 🔑 Harmless and reversible error

Any error in the trial court's penalty-phase admission of mental-health evaluator's testimony and report was harmless error at capital-murder trial, which resulted in a death sentence; despite argument that defendant lacked counsel when the evaluation took place, defense presented during the penalty phase the testimony of a forensic psychologist who also had evaluated defendant, evidence did support the trial court's finding that defendant could appreciate the criminality of his conduct and conform his conduct to the requirements of law, and State presented evidence regarding three statutory aggravating factors—that the capital offense was committed while defendant was under a sentence of life imprisonment, that defendant had previously been convicted of a felony involving the use or threat of violence to the person, and that the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses. U.S. Const. Amend. 6; Ala. Code §§ 13A-5-49, 13A-5-51(6).

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (Mobile Circuit Court, CC-12-4867 and CC-12-4994; Court of Criminal Appeals, CR-15-0747)

Opinion

WISE, Justice.

***1** Dennis Morgan Hicks was convicted of one count of capital murder for the killing of Joshua Duncan. The murder was made capital because Hicks committed it while he was under a sentence of life imprisonment, a violation of § 13A-5-40(a)(6), Ala. Code 1975. Hicks was also convicted of one count of second-degree theft of property, a violation of § 13A-8-4, Ala. Code 1975. By a vote of 11-1, the jury recommended that Hicks be sentenced to death on the capital-murder conviction. The Mobile Circuit Court followed the jury's recommendation and sentenced Hicks to death on the capital-murder conviction; it sentenced him to time served on the second-degree theft-of-property conviction. Hicks appealed to the Court of Criminal Appeals, and, on original submission, that court affirmed Hicks's conviction but remanded the case for the trial court to address some sentencing issues. Hicks v. State, [Ms. CR-15-0747, July 12, 2019] ––– So. 3d ––––, 2019 WL 3070198 (Ala. Crim. App. 2019).

On remand, the trial court entered a new sentencing order. In the new sentencing order, the trial court addressed the "heinous, atrocious, or cruel' aggravating circumstance. However, it omitted any discussion of two nonstatutory mitigating circumstances that it had explicitly considered in its original sentencing order. On return to remand, the Court of Criminal Appeals noted in an order that, if the trial court had intentionally omitted the discussion of those nonstatutory mitigating circumstances, the trial court had exceeded the scope of its previous remand instructions. Therefore, in that order, the Court of Criminal Appeals remanded the case a second time, with instructions that the trial court include its discussion of the nonstatutory mitigating circumstances that had been omitted from the new sentencing order. The Court of Criminal Appeals stated that, if the trial court had failed

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to consider those nonstatutory mitigating circumstances on remand, it must consider them on second remand.

On return to second remand, the Court of Criminal Appeals unanimously affirmed the sentence of death in an opinion. Hicks v. State, [Ms. CR-15-0747, May 28, 2021] ––– So. 3d ––––, ––––, 2021 WL 2177671 (Ala. Crim. App. 2019) (opinion on return to second remand). Hicks filed an application for rehearing, which the Court of Criminal Appeals overruled, without an opinion. Hicks then petitioned this Court for certiorari review. We subsequently granted certiorari review as to Issues IV and V in Hicks's petition:

> Issue IV: Whether the Court of Criminal Appeals' holding that Hicks's right to counsel was not violated by the deprivation of counsel at the time of his pretrial mental evaluation conflicts the United States Supreme Court's decision in Estelle v. Smith, 451 U.S. 454 [, 101 S.Ct. 1866, 68 L.Ed.2d 359] (1981).
>
> Issue V: Whether the Court of Criminal Appeals' holding that the trial court properly admitted Dr. Karl Kirkland's testimony regarding the pretrial mental evaluation during the penalty-phase proceedings conflicts with State and federal law.

We denied certiorari review as to the remaining issues raised in his petition.

Standard of Review

> ***2** **[1]** " ' " 'On certiorari review, this Court accords no presumption of correctness to the legal conclusions of the intermediate appellate court. Therefore, we must apply de novo the standard of review that was applicable in the Court of [Criminal] Appeals.' " ' Ex parte S.L.M., 171 So. 3d 673, 677 (Ala. 2014) (quoting Ex parte Helms, 873 So. 2d 1139, 1143 (Ala. 2003), quoting in turn Ex parte Toyota Motor Corp., 684 So. 2d 132, 135 (Ala. 1996))."

Ex parte Jones, 322 So. 3d 970, 975 (Ala. 2019).

Relevant Facts and Procedural History

This Court granted certiorari review as to two issues that arose from Dr. Kirkland's pretrial mental evaluation of Hicks. The following facts will be helpful to an understanding of those issues.

On February 28, 2013, the initial judge assigned to the case, Judge Joseph Johnston, entered an order appointing Arthur Powell and Russell Bergstrom to represent Hicks. Hicks was arraigned and entered a plea of not guilty on that same date. Subsequently, Powell filed a motion to withdraw as counsel, and Hicks filed a pro se motion to dismiss Powell as counsel. Judge Johnston granted that motion and appointed Sidney Harrell to replace Powell.

During a November 6, 2014, hearing, Hicks stated that he had filed a complaint against both of his attorneys, that "they misrepresented" and were ineffective, and that he was asking to remove both of his attorneys from his case. In response, Judge Johnston stated:

> "Well, the first problem is when you filed those motions, which you had every right to do, they couldn't see you. They couldn't do anything on your case by the rules. They had to back off and that lost two, two and a half months of the case. So you had to sit in jail two, two and a half months while they had to seek opinions about whether or not they could represent you."

He went on to explain that not many attorneys wanted to represent capital defendants. After some discussion, Hicks stated that he was going to file additional complaints against Harrell and Bergstrom, that there was a conflict of interest and trust issues, and that he did not want them as his attorneys if he could not trust them. After some further discussions, Hicks stated that he had talked to another attorney, Steve Dugan, and that Dugan had said that he would be willing to represent Hicks. Hicks further stated that he had also submitted to the trial court a list of attorneys who had capital-litigation experience. Judge Johnston ultimately stated that he was going to adjourn the hearing until the following week and that he wanted to talk Dugan. Subsequently, the following occurred:

> "MR. HARRELL: I have filed a response to Mr. Hicks's asking the Court for instructions about [Hicks's] motion.
>
> "THE COURT: I know.
>
> "MR. HARRELL: I would just like to say I have contacted the office of general counsel, Alabama State Bar, and I was referred to Rule 1.7 conflict of interest and I would state on the record that I've been on Mr. Hick's case since April of 2014 and worked diligently on the case when I received this complaint and will continue to work diligently on the case even after all that and after the complaint. I view the

rule that I have -- it has no adverse impact on my ability to represent Mr. Hicks.

"THE COURT: I know. My concern is what he just said that he intended to continue filing complaints, I feel like y'all would do a very good job but -- And I didn't know anybody else possible and then he's thrown Mr. Dugan's name out and I would like to talk to him.

***3** "MR. HARRELL: I just wanted to state that for the record.

"THE COURT: Thank you. We'll see you at two o'clock in one week."

On November 19, 2014, Harrell and Bergstrom filed a joint motion to withdraw that was filed under seal. In that motion, they asserted that Hicks had recently filed a Bar complaint against them and that, for a two-month period, they could not visit with Hicks at the Mobile Metro Jail due to the pending Bar complaint. However, they also asserted that, during that time, they had continued to diligently work on Hicks's case by interviewing witnesses and filing pretrial motions. Harrell and Bergstrom further stated that, during the November 6, 2014, hearing, Hicks was advised in open court that the Bar had ruled that his grievance against his attorneys had no merit and that the case had been closed; that Hicks stated that he was going to continue to file Bar complaints against them; and that, based on what had transpired during that hearing, there was an irreparable breakdown in communication with Hicks.

On November 20, 2014, Judge Johnston conducted another hearing. During that hearing, the following occurred:

"THE COURT: I don't know. It's just this constant lawyer shopping has put this case off for way too long and you don't deserve that and the family of the victim doesn't deserve that. It needs to a conclusion to this. And after what happened last week in court these lawyers are rightly concerned. They don't want to represent you. <u>You may be at the point of having to represent yourself because of all this happening</u>.

"THE DEFENDANT: Amen. I got the truth and God on my side. So if that's what it takes I appreciate y'all and what y'all have done.

"THE COURT: <u>There's one of these that I was concerned about their mental stability when they represent themselves</u>.

"[PROSECUTOR:] Yes, Your Honor. <u>The State would request at this point a motion for a mental evaluation of the Defendant given some of the behavior in and out of court</u>.

"THE COURT: <u>I think that's reasonable considering you may need to represent yourself</u>. Some of y'all kind of know his schedule. When does he come through here? It's like once a month on Monday.

"MR. BERGSTROM: I think as needed when he has a collection of -- But I understand that all has changed and there's like several other psychologists doing it. But since this case goes back three years, I think he may still be the one who gets grandfathered in to do the evaluations.

"THE DEFENDANT: My mitigation expert, she's a Ph.D. She's a licensed psychologist. She said she would do it.

"THE COURT: This person kind of serves as the Court's expert. <u>One thing we need to make sure you're competent to stand trial. If you have to represent yourself, I mean, I'm not saying you're crazy. Crazy isn't even in it, the vocabulary. You know how it goes</u>.

"THE DEFENDANT: Yes, sir. Let's get it on the record either I am or I'm not.

"THE COURT: That's right. <u>So cooperate</u>. I was going to tell you it's Dr. McKeown but it may be somebody else. They don't hypnotize you or anything. They just talk to you. You know how it goes. Hopefully that will happen in the next few weeks. I was going to tell you if -- but I can't predict that now, if he comes by on the first Monday or whatever. We're going to reset it maybe for about four weeks so you won't get lost.

***4** "THE DEFENDANT: Can I get a little clarification here?

"THE COURT: Yes.

"THE DEFENDANT: <u>I am now without counsel at this moment; correct</u>?

"THE COURT: <u>No. I'm going to keep I'm going to keep them on standby right now about whether to relieve them. So they're still your counsel</u>.

"THE DEFENDANT: He just informed me that he didn't want to be. I don't want him to be. So I can't continue to write counselor and say --

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"THE COURT: He's filed a motion to -- He's filed a motion to -- But I want to make sure that -- I'm sure you're okay but I want to make sure you are before I relieve them of being your counsel.

"THE DEFENDANT: Whenever I write like Mr. Tyson or different ones out there, or John Beck, all these others I still have to say they're still here?

"THE COURT: Give them a copy of you want to do that, yes. Send them a copy. I want to make sure you are.

"So we --

"THE CLERK: Do we want to reset it to January?

"THE COURT: Maybe the first week in January.

"THE CLERK: It will be January 8th.

"THE COURT: Okay. Hopefully that will get done quicker than that.

"THE DEFENDANT: Between now and January a psychologist is supposed to call me up and get evaluated?

"THE COURT: Right, should come by the jail. They have room over there. They'll interview you and get us a report.

"THE DEFENDANT: During the meantime I can be on hunt for counsels that qualify?

"THE COURT: Sure you can do that if you want to. Yes. Okay.

"MR. BERGSTROM: Thank you. Judge."

(Emphasis added.) The trial court subsequently entered a written "Order for Out-Patient Evaluation of Defendant's Competency to Stand Trial and Mental State at the Time of the Offense."

On January 8, 2015, Judge Johnston conducted another hearing. Hicks, Harrell, and Bergstrom, among others, were present at that hearing. During that hearing, Judge Johnston stated that, unbeknownst to him, the State had changed its procedure for appointing a psychologist to examine defendants; that, as he understood it, defendants were now being sent to Taylor Hardin Secure Medical Facility for such examinations; and that a psychologist there would examine them. Judge Johnston stated that they "were going to find out what the procedure is and have that done." He further stated that it was his understanding that Hicks's family might be looking for an attorney. Subsequently, the following occurred:

"THE DEFENDANT: Yes. They offered me some money and I wanted to get with the Court to see if -- they gave about three, four, five thousand, if the Court would back up the rest to start with a lawyer and when we run out of our money and then the Court appoint one.

"THE COURT: I don't think we can really do that with a mixture like that. What I'm going to do is I'm going to give you until January 30th and if you can hire an attorney fine; if not, I'm going to appoint someone at that time, end of the month. Then we'll enter this order getting you to Taylor Hardin and then I'm granting their motion to withdraw right now and then if you can get somebody by the end of the month, fine; after that I'm going to appoint somebody. We'll try to push this through as quick as we can. It's just irritating that happened. Based on where we are we're going to shoot for a trial date like in September."

***5** (Emphasis added.)

On January 9, 2015, Judge Johnston entered an order stating, in pertinent part:

"Defendant to be transported to Taylor Hardin for Mental evaluation. See order in file.

"Motion to Withdraw filed by Defendant's attorneys, Sidney Harrell and Russell Bergstrom -- GRANTED.

"Oral Motion by Defendant to have his family hire an attorney -- GRANTED. Defendant's family has until January 30, 2015 to retain an attorney. If an attorney is not retained by January 30, 2015, one will be appointed."

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On that same date, the trial court entered an "Order for Outpatient Evaluation of Competency to Stand Trial and Mental State at the Time of the Offense." That order stated, in pertinent part: "[T]he defendant through his attorney, has timely filed notice pursuant to Rule 15, Alabama Rules of Criminal Procedure, of his/her intent to pursue a special plea of not guilty by reason of mental disease." The trial court also entered an "Order of Commitment to the Alabama Department of Mental Health (On Stipulation to Report of Examiner)."

Hicks subsequently filed a pro se "Combine[d] Motion(s) for Appointment of Counsel and Dismissal of Case." In that motion, Hicks asked the trial court "to entertain and consider setting a date and time for a hearing to appoint legal representation." That motion was stamped as filed on February 18, 2015.

On February 21, 2015, Dr. Kirkland conducted a mental evaluation of Hicks at the Mobile Metro Jail.

On February 23, 2015, Judge Charles Graddick entered a written order stating:

> "The Court hereby revokes the appointments of Sid Harrell and Russell Bergstrom on February 23, 2015.
>
> "The Court having ascertained that the defendant is not represented by Counsel, desires the assistance of counsel, and is not able financially or otherwise to obtain the assistance of counsel; it is ordered and adjudged by the Court that Glenn Davidson, a licensed attorney, be and is hereby appointed to represent, assist and defend the defendant in this case."

He also entered a separate order stating that Glenn Davidson was appointed to represent Hicks. On March 30, 2015, Judge Graddick also entered an order appointing Debbie McGowin to represent Hicks. [1]

Discussion

Hicks argues that the trial court violated his constitutional rights by ordering him to undergo a pretrial mental evaluation while he was not represented by counsel. Specifically, Hicks contends that he

> "was deprived of 'the guiding hand of counsel' during a critical stage of his capital trial, in violation of his Sixth Amendment rights. Estelle v. Smith, 451 U.S. 454, 469-781[471] [101 S.Ct. 1866, 68 L.Ed.2d 359] (1981); see also United States v. Cronic, 466 U.S. 648, 653-54, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); Gideon v. Wainwright, 372 U.S. 335, 343-45 [83 S.Ct. 792, 9 L.Ed.2d 799] (1963); Ex parte Pritchett, 117 So. 3d 356, 359 (Ala. 2012)."

Hicks's brief at 9-10. Hicks asserts that, on January 8, 2015, the trial court granted the motion to withdraw filed by Harrell and Bergstrom, that Dr. Kirkland conducted the pretrial mental evaluation on February 21, 2015, that new counsel was not appointed to represent him until February 23, 2015, and that he was completely without counsel during the six-week period preceding his mental evaluation. He further asserts:

> ***6** "Harrell and Bergstrom's nominal representation of Mr. Hicks during the weeks leading up to their removal rendered him deprived of counsel for the purposes of the Sixth Amendment throughout the entire time the examination was at issue in this case. [Ex parte]Pritchett, 117 So. 3d [356,] 361 [(Ala. 2012)] (finding Sixth Amendment violation where defendant 'nominally had counsel' at critical stage of motion to withdraw plea because it was 'clear that the motion was prepared and relief was sought ... without the involvement of that counsel'). On November 6, 2014, the trial court noted that the attorney-client relationship between Mr. Hicks and his lawyers had effectively ceased, and on November 19th, Harrell and Bergstrom filed their motion to withdraw, confirming that they had not met with Hicks in over two months (Sealed Joint Mot. to Withdraw). Although counsel were in fact physically present for two hearings at which the possibility of a psychiatric examination were discussed -- on November 20, 2014, and January 8, 2015 -- it is clear that they maintained a no-contact policy toward Mr. Hicks through both hearings both inside and outside the courtroom."

Hicks's petition at 48-49 (citations to the record omitted).

In Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), Ernest Benjamin Smith was indicted for a murder committed during the robbery of a grocery store, and the State of Texas announced its intent to seek the death penalty. Subsequently, the trial court, sua sponte, ordered the prosecutor to arrange for Dr. James P. Grigson to conduct a psychiatric examination of Smith to determine his competency to stand trial. Dr. Grigson examined Smith and concluded that he was competent to stand trial. Subsequently, Smith was tried and convicted of murder. Pursuant to Texas law at the time:

> "At the penalty phase, if the jury affirmatively answers three questions on which the State has the burden of proof beyond a reasonable doubt, the judge must impose the death sentence. See Tex. Code Crim. Proc. Ann., Arts. 37.071(c) and (e) (Vernon Supp. 1980). One of the three critical issues to be resolved by the jury is 'whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.' Art. 37.071(b)(2). In other words, the jury must assess the defendant's future dangerousness."

Estelle, 451 U.S. at 457-58, 101 S.Ct. 1866 (footnote omitted). Subsequently, during the penalty phase of the proceedings, the prosecutor called Dr. Grigson as a witness.

> "Defense counsel were aware from the trial court's file of the case that Dr. Grigson had submitted a psychiatric report in the form of a letter advising the court that Smith was competent to stand trial.[5] This report termed Smith 'a severe sociopath,' but it contained no more specific reference to his future dangerousness. ... Before trial, defense counsel had obtained an order requiring the State to disclose the witnesses it planned to use both at the guilt stage, and, if known, at the penalty stage. Subsequently, the trial court had granted a defense motion to bar the testimony during the State's case in chief of any witness whose name did not appear on that list. Dr. Grigson's name was not on the witness list, and defense counsel objected when he was called to the stand at the penalty phase.
>
> "In a hearing outside the presence of the jury, Dr. Grigson stated: (a) that he had not obtained permission from Smith's attorneys to examine him; (b) that he had discussed his conclusions and diagnosis with the State's attorney; and (c) that the prosecutor had requested him to testify and had told him, approximately five days before the sentencing hearing began, that his testimony probably would be needed within the week. ... The trial judge denied a defense motion to exclude Dr. Grigson's testimony on the ground that his name was not on the State's list of witnesses. Although no continuance was requested, the court then recessed for one hour following an acknowledgment by defense counsel that an hour was 'all right.' ...
>
> "
>
> "[5] Defense counsel discovered the letter at some time after jury selection began in the case on March 11, 1974. The trial judge later explained that Dr. Grigson was 'appointed by oral communication,' that '[a] letter of appointment was not prepared,' and that 'the court records do not reflect [the entry of] a written order.' ... The judge also stated: 'As best I recall, I informed John Simmons, the attorney for the defendant, that I had appointed Dr. Grigson to examine the defendant and that a written report was to be mailed to me.' ... However, defense counsel assert that the discovery of Dr. Grigson's letter served as their first notice that he had examined Smith. ...
>
> ***7** "On March 25, 1974, the day the trial began, defense counsel requested the issuance of a subpoena for the Dallas County Sheriff's records of Dr. Grigson's 'visitation to ... Smith.' ..."

Estelle, 451 U.S. at 458-59, 101 S.Ct. 1866. Dr. Grigson testified as to the issue of Smith's future dangerousness, and the jury answered the three requisite questions affirmatively, which mandated the imposition of the death penalty. Smith sought a writ of habeas corpus in the United States District Court for the Northern District of Texas, and that court vacated Smith's death sentence based on a finding of constitutional error in the admission of Dr. Grigson's testimony during the penalty phase of Smith's trial. Smith v. Estelle, 445 F. Supp. 647 (N.D. Tex. 1977). The United States Court of Appeals for the Fifth Circuit affirmed the federal district court's decision, Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), and the United States Supreme Court granted certiorari review "to consider whether the prosecution's use of psychiatric testimony at the sentencing phase of [Smith's] capital murder trial to establish his future dangerousness violated his constitutional rights." 451 U.S. at 456, 101 S.Ct. 1866 (emphasis added).

Initially, the United States Supreme Court held that the admission of Dr. Grigson's testimony, which was based on Smith's statements made during the psychiatric examination, had violated Smith's Fifth Amendment right against self-incrimination because Smith had not been advised before the pretrial psychiatric examination that he had a right to remain silent and that any statement he made could be used against him during the penalty phase of his trial.

The United States Supreme Court next addressed Smith's argument that he had been deprived of the right to counsel.

> " When [Smith] was examined by Dr. Grigson, he already had been indicted and an attorney had been appointed to represent him. The Court of Appeals concluded that he had a Sixth Amendment right to the assistance of counsel before submitting to the pretrial psychiatric interview. [Smith v. Estelle,] 602 F.2d [694,] 708-709 [(5th Cir. 1979)]. We agree.
>
> "The Sixth Amendment, made applicable to the states through the Fourteenth Amendment, provides that '[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.' The 'vital' need for a lawyer's advice and aid during the pretrial phase was recognized by the Court nearly 50 years ago in Powell v. Alabama, 287 U.S. 45, 57, 71, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Since then, we have held that the right to counsel granted by the Sixth Amendment means that a person is entitled to the help of a lawyer 'at or after the time that adversary judicial proceedings have been initiated against him ... whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' Kirby v. Illinois, 406 U.S. 682, 688-689, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972) (plurality opinion); Moore v. Illinois, 434 U.S. 220, 226-229, 98 S.Ct. 458, 54 L.Ed.2d 424 (1977). And in United States v. Wade, 388 U.S. [218,] 226-227 [87 S.Ct. 1926, 18 L.Ed.2d 1149 (1961),] the Court explained:
>
> > " 'It is central to [the Sixth Amendment] principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.' (Footnote omitted.)
> >
> > ***8** "See United States v. Henry, 447 U.S. 264 [, 100 S.Ct. 2183, 65 L.Ed.2d 115] (1980); Massiah v. United States, 377 U.S. 201 [, 84 S.Ct. 1199, 12 L.Ed.2d 246] (1964). See also White v. Maryland, 373 U.S. 59 [, 83 S.Ct. 1050, 10 L.Ed.2d 193] (1963); Hamilton v. Alabama, 368 U.S. 52 [, 82 S.Ct. 157, 7 L.Ed.2d 114] (1961).
>
> "Here, [Smith's] Sixth Amendment right to counsel clearly had attached when Dr. Grigson examined him at the Dallas County Jail, and their interview proved to be a 'critical stage' of the aggregate proceedings against [Smith]. See Coleman v. Alabama, 399 U.S. 1, 7-10 [, 90 S.Ct. 1999, 26 L.Ed.2d 387] (1970) (plurality opinion); Powell v. Alabama, supra, 287 U.S. at 57, 53 S.Ct. 55. Defense counsel, however, were not notified in advance that the psychiatric examination would encompass the issue of their client's future dangerousness, [15] and [Smith] was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed.
>
> "Because '[a] layman may not be aware of the precise scope, the nuances, and the boundaries of his Fifth Amendment privilege,' the assertion of that right 'often depends upon legal advise from someone who is trained and skilled in the subject matter.' Maness v. Meyers, 419 U.S. 449, 466 [, 95 S.Ct. 584, 42 L.Ed.2d 574] (1975). As the Court of Appeals observed, the decision to be made regarding the proposed psychiatric evaluation is 'literally a life or death matter' and is 'difficult ... even for an attorney' because it requires 'a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections, [and] of possible alternative strategies at the sentencing hearing.' 602 F.2d at 708. It follows logically from our precedents that a defendant should not be forced to resolve such an important issue without 'the guiding hand of counsel.' Powell v. Alabama, supra, 287 U.S. at 69, 53 S.Ct. 55.
>
> "Therefore, in addition to Fifth Amendment considerations, the death penalty was improperly imposed on [Smith] because the psychiatric examination on which Dr. Grigson testified at the penalty phase proceeded

in violation of [Smith's] Sixth Amendment right to the assistance of counsel. [16]

"

" [15] It is not clear that defense counsel were even informed prior to the examination that Dr. Grigson had been appointed by the trial judge to determine [Smith's] competency to stand trial. See n.5, supra.

" [16] We do not hold that [Smith] was precluded from waiving this constitutional right. Waivers of the assistance of counsel, however, 'must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends ... "upon the particular facts and circumstances surrounding [each] case...." ' Edwards v. Arizona, 451 U.S. [477,] 482, 101 S.Ct. 1880, 68 L.Ed.2d 378 [101 S.Ct. 1880, 68 L.Ed.2d 378(1981)], quoting Johnson v. Zerbst, 304 U.S. 458, 464 [, 58 S.Ct. 1019, 82 L.Ed. 1461] (1938). No such waiver has been shown, or even alleged, here."

Estelle, 451 U.S. at 469-71, 101 S.Ct. 1866 (footnote 14 omitted).

In this case, the State made an oral motion for a mental evaluation of Hicks during the November 20, 2014, hearing. At that time, Hicks was represented by Harrell and Bergstrom, and both were in court during that hearing. In fact, Bergstrom responded when the trial court had a question about the court-appointed psychologist's schedule. Although Harrell and Bergstrom had filed a motion to withdraw, the trial court did not grant that motion at that time. Thus, Hicks's attorneys were aware that the trial court had ordered a mental evaluation of Hicks.

***9** Harrell and Bergstrom were also present during the January 8, 2015, hearing during which the trial court discussed what needed to be done to have Hicks evaluated. However, at the end of that hearing, the trial court granted Harrell and Bergstrom's joint motion to withdraw. New counsel was not appointed until February 23, 2015, two days after Hicks's mental evaluation. Hicks was not represented by counsel at the time of his mental evaluation or in the six weeks leading up to his mental evaluation. Thus, it appears that Hicks's right to counsel during this critical stage of the proceedings was violated. However, our inquiry does not end there.

In his brief, Hicks asserts that he is entitled to reversal of his convictions and sentences based on this violation of his Sixth Amendment right to counsel. Specifically, he states:

> " '[W]hen a defendant is deprived of the presence and assistance of his attorney ... during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic.' Holloway v. Arkansas, 435 U.S. 475, 489 [, 98 S.Ct. 1173, 55 L.Ed.2d 426] (1978); see also [Ex parte]Pritchett, 117 So. 3d [356,] 358 [(Ala. 2012)] (where defendant deprived of counsel at critical stage, Sixth Amendment' stands as a jurisdictional bar to a valid conviction and sentence depriving him of life or liberty)."

Hicks's brief at 18. However, in Satterwhite v. Texas, 482 U.S. 905, 107 S.Ct. 2480, 96 L.Ed.2d 372 (1987), the United States Supreme Court "granted certiorari to decide whether harmless error analysis applies to violations of the Sixth Amendment right set out in Estelle v. Smith." Satterwhite v. Texas, 486 U.S. 249, 254, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988).

In Satterwhite, John T. Satterwhite was charged with capital murder on March 15, 1979. The following day, before Satterwhite was represented by counsel, the trial court granted the State's request for a psychological evaluation to determine Satterwhite's competency to stand trial, his sanity at the time of the offense, and his future dangerousness. The State's motion and the court's order were placed in the court file but were not served upon Satterwhite. Betty Lou Shroeder, a psychologist, examined Satterwhite pursuant to that order.

Satterwhite was indicted on April 4, 1979, and counsel was then appointed to represent him. Satterwhite was arraigned on April 13, 1979. On April 17, 1979, the State filed a second motion requesting a psychological examination to determine Satterwhite's competency to stand trial, his sanity at the time of the offense, and his future dangerousness. However, the State did not serve a copy of the motion on defense counsel. The following day, the trial court granted the motion and ordered the sheriff to produce Satterwhite for examination by Schroeder and John T. Holbrook, a psychiatrist. The record did not show when the trial court's order was placed in the court file. However,

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"[o]n May 18, a letter to the trial court from psychiatrist James P. Grigson, M.D., appeared in the court file. Dr. Grigson wrote that, pursuant to court order, he had examined Satterwhite on May 3, 1979, in the Bexar County Jail. He further reported that, in his opinion, Satterwhite has 'a severe antisocial personality disorder and is extremely dangerous and will commit future acts of violence.' "

486 U.S. at 252-53, 108 S.Ct. 1792.

Subsequently, Satterwhite was convicted of capital murder.

"In accordance with Texas law, a separate proceeding was conducted before the same jury to determine whether he should be sentenced to death or to life imprisonment. See Tex. Code Crim. Proc. Ann., Art. 37.071(a) (Vernon Supp. 1988). The State produced Dr. Grigson as a witness in support of its case for the death penalty. Over defense counsel's objection, Dr. Grigson testified that, in his opinion, Satterwhite presented a continuing threat to society through acts of criminal violence.

***10** "At the conclusion of the evidence, the court instructed the jury to decide whether the State had proved, beyond a reasonable doubt, (1) that 'the conduct of the defendant that caused the death [was] committed deliberately and with the reasonable expectation that the death of [the victim] would result,' and (2) that there is 'a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.' ... Texas law provides that if a jury returns affirmative findings on both special verdict questions, 'the court shall sentence the defendant to death.' Tex. Code Crim. Proc. Ann., Art. 37.071(e) (Vernon Supp. 1988). The jury answered both questions affirmatively, and the trial court sentenced Satterwhite to death."

Satterwhite, 486 U.S. at 253, 108 S.Ct. 1792. On appeal, Satterwhite argued that the admission of Dr. Grigson's testimony during the sentencing hearing, which was based on his pretrial examination of Satterwhite, violated his right to counsel recognized in Estelle because defense counsel had not been given advance notice that Dr. Grigson's examination of Satterwhite would encompass the issue of Satterwhite's future dangerousness. The Texas Court of Criminal Appeals agreed but concluded that error was harmless "because an average jury would have found the properly admitted evidence sufficient to sentence Satterwhite to death." 486 U.S. at 253, 108 S.Ct. 1792.

In addressing whether a harmless-error analysis can be applied to violations of the Sixth Amendment right recognized in Estelle, the United States Supreme Court concluded that the use of Dr. Grigson's testimony at the sentencing hearing on the issue of Satterwhite's future dangerousness violated the Sixth Amendment. However, the Supreme Court went on to state:

"Our conclusion does not end the inquiry because not all constitutional violations amount to reversible error. We generally have held that if the prosecution can prove beyond a reasonable doubt that a constitutional error did not contribute to the verdict, the error is harmless and the verdict may stand. Chapman v. California, 386 U.S. 18, 24], 87 S.Ct. 824, 17 L.Ed.2d 705 , 87 S.Ct. 824, 17 L.Ed.2d 705 87 S.Ct. 824, 17 L.Ed.2d 705] (1967). The harmless error rule ' "promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." ' Rose v. Clark, 478 U.S. 570, 577 [, 106 S.Ct. 3101, 92 L.Ed.2d 460] (1986) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 681 [, 106 S.Ct. 1431, 89 L.Ed.2d 674] (1986)).

"Some constitutional violations, however, by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless. Sixth Amendment violations that pervade the entire proceeding fall within this category. See Holloway v. Arkansas, 435 U.S. 475 [, 98 S.Ct. 1173, 55 L.Ed.2d 426] (1978) (conflict of interest in representation throughout entire proceeding); Chapman, supra, 386 U.S. at 23, n. 8 [, 87 S.Ct. 824] (citing Gideon v. Wainwright, 372 U.S. 335 [, 83 S.Ct. 792, 9 L.Ed.2d 799] (1963) (total deprivation of counsel throughout entire proceeding)); White v. Maryland, 373 U.S. 59 [, 83 S.Ct. 1050, 10 L.Ed.2d 193] (1963) (absence of counsel from arraignment proceeding that affected entire trial because defenses not asserted were irretrievably lost); Hamilton v. Alabama, 368 U.S. 52 [, 82 S.Ct. 157, 7 L.Ed.2d 114] (1961) (same). Since the scope of a violation such as a deprivation of the right to conflict-free representation cannot be discerned from the record, any inquiry into

its effect on the outcome of the case would be purely speculative. As explained in Holloway:

> " 'In the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury. But in a case of joint representation of conflicting interests the evil -- it bears repeating -- is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process.... Thus, any inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.' 435 U.S. at 490-491, 98 S.Ct. 1173 (citations omitted).

***11** "Satterwhite urges us to adopt an automatic rule of reversal for violations of the Sixth Amendment right recognized in Estelle v. Smith. He relies heavily upon the statement in Holloway that 'when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic. Gideon v. Wainwright, 372 U.S. 335 [, 83 S.Ct. 792, 9 L.Ed.2d 799] (1963); Hamilton v. Alabama, 368 U.S. 52 [, 82 S.Ct. 157, 7 L.Ed.2d 114] (1961); White v. Maryland, 373 U.S. 59 [, 83 S.Ct. 1050, 10 L.Ed.2d 193] (1963).' 435 U.S. at 489 [, 98 S.Ct. 1173] . His reliance is misplaced, however, for Holloway, Gideon, Hamilton, and White were all cases in which the deprivation of the right to counsel affected -- and contaminated -- the entire criminal proceeding. In this case, the effect of the Sixth Amendment violation is limited to the admission into evidence of Dr. Grigson's testimony. We have permitted harmless error analysis in both capital and noncapital cases where the evil caused by a Sixth Amendment violation is limited to the erroneous admission of particular evidence at trial. In Milton v. Wainwright, 407 U.S. 371 [, 92 S.Ct. 2174, 33 L.Ed.2d 1] (1972), for example, the Court held the admission of a confession obtained in violation of Massiah v. United States, 377 U.S. 201 [, 84 S.Ct. 1199, 12 L.Ed.2d 246] (1964), to be harmless beyond a reasonable doubt. And we have held that harmless error analysis applies to the admission of identification testimony obtained in violation of the right to counsel at a postindictment lineup. Moore v. Illinois, 434 U.S. 220 [, 98 S.Ct. 458, 54 L.Ed.2d 424] (1977); Gilbert v. California, 388 U.S. 263 [, 87 S.Ct. 1951, 18 L.Ed.2d 1178] (1967) (capital case); United States v. Wade, 388 U.S. 218 [, 87 S.Ct. 1926, 18 L.Ed.2d 1149] (1967). Just last year we indicated that harmless error analysis would apply in a noncapital case to constitutional error in the use of a psychological evaluation at trial. Buchanan v. Kentucky, 483 U.S. 402, 425, n. 21, 107 S. Ct. 2906, 2919, n. 21 [, 97 L.Ed.2d 336] (1987).

> "It is important to avoid error in capital sentencing proceedings. Moreover, the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer. Nevertheless, we believe that a reviewing court can make an intelligent judgment about whether the erroneous admission of psychiatric testimony might have affected a capital sentencing jury. Accordingly, we hold that the Chapman harmless error rule applies to the admission of psychiatric testimony in violation of the Sixth Amendment right set out in Estelle v. Smith."

Satterwhite, 486 U.S. at 256-58, 108 S.Ct. 1792.

I.

[2] In this case, as in Satterwhite, the deprivation of Hicks's right to counsel did not contaminate the entire criminal proceedings. Even though Davidson was appointed to represent Hicks two days after the competency evaluation, Hicks did not object on this ground at or before trial. Additionally, he did not object to the admission of Dr.

Kirkland's testimony and report during the penalty-phase proceedings. In his brief to this Court, Hicks asserts that "the pretrial psychiatric examination limited subsequent counsel's strategic options and played a key role in shaping both the parties' and the trial court's impressions of Mr. Hicks." Hicks's brief at 19-20. However, he does not include any facts or citations to the record to support such that assertion. Hicks also asserts that he was "unable to ensure that the question of his competency received a proper hearing. See, e.g., Ala. R. Crim. P. 11.2 (requiring written demand for jury hearing on question of competency)." Hicks's brief at p. 21.

Rule 11.1, Ala. R. Crim. P., provides: "A defendant is mentally incompetent to stand trial or to be sentenced for an offense if that defendant lacks sufficient present ability to assist in his or her defense by consulting with counsel with a reasonable degree of rational understanding of the facts and legal proceedings against the defendant." With regard to competency hearings, Rule 11.6(a), Ala. R. Crim. P., provides:

> "After the examinations have been completed and the reports have been submitted to the circuit court, the judge shall review the reports of the psychologists or psychiatrists and, if reasonable grounds exist to doubt the defendant's mental competency, the judge shall set a hearing not more than forty-two (42) days after the judge received the report or, where the judge has received more than one report, not more than forty-two (42) days after the date the judge received the last report, to determine if the defendant is incompetent to stand trial, as the term 'incompetent' is defined in Rule 11.1[, Ala. R. Crim. P.]. At this hearing all parties shall be prepared to address the issue of competency."

***12** **[3]** Dr. Kirkland generated a report of his evaluation on March 1, 2015. At that time, Hicks was represented by Davidson, and Dr. Kirkland's report refers to the fact that Hicks was represented by Davidson. With regard to Hicks's competency, Dr. Kirkland concluded:

> "Assessment of competency was ordered by Judge Johnston. Assessment involved evaluation of Mr. Hicks's competency to stand trial using forensic evaluation and specific competency assessment devices. Results reveal that Mr. Hicks is capable of understanding the charges and assisting counsel in preparing an adequate defense. It is therefore recommended that the case proceed to hearing, disposition, and/or trial."

Based on Dr. Kirkland's report, the trial court could have concluded that reasonable grounds did not exist to doubt Hicks's mental competency. Thus, the trial court was not required to conduct a hearing on Hicks's competency.

Additionally, the record indicates that Dr. Thomas Bennett, a clinical psychologist, conducted another mental evaluation of Hicks in July 2015. In the summary and conclusion section of his psychological report, Dr. Bennett stated, in pertinent part:

> "Mr. Hicks has an adequate understanding of the legal system and of the charges against him. He has a great deal of difficulty listening well enough and focusing on specific issues to be very effective in assisting his attorneys in his own defense. As is the case with many inmates, he believes that more should be done to exonerate him. It may be possible for his attorneys and the investigator to communicate with him about the case by keeping their communications very simple and focusing on only one element at a time. It would probably be wise to give him a written account of any evidence against him, as he is completely convinced that the state's case centers around the victim having been at his home and is based around the testimony of a four-year-old child. In terms of the evidence that he believes exists to prove him not guilty, the information gleaned from each individual that he has named as a potential witness should be reviewed with him piecemeal.
>
> "While many inmates profess their innocence, it is this examiner's opinion that Mr. Hicks actually believes himself to be innocent. If he were, in fact, guilty, then his belief system would rise to the level of delusion.
>
> "Mr. Hicks understands appropriate courtroom behavior and, for the most part, he should be able to demonstrate such behavior. However, when important elements of his case are presented in court, he may have great deal of difficulty inhibiting himself from making comments to the court. He should be strongly reminded not to speak out in court, as this could potentially interfere with his defense. It may be necessary to take frequent breaks during any court proceeding, so that his attorneys can review with him what has happened and what will be happening next. Should he be unable to inhibit expression of his frustration and agitation in the courtroom, he may need to be evaluat[ed] for medication to help control this agitation.
>
> "Mr. Hicks will probably be disappointed and frustrated with any attorneys who represent him, primarily because

he may be giving inappropriate weight to a wide range of potential elements of evidence that or may not be helpful to him.

***13** "Given the approach described, Mr. Hicks can probably be assumed to be competent to stand trial at this point. However, it is also possible that his conduct could deteriorate rather quickly as the case progresses and evidence is presented."

On January 15, 2016, after the jury-selection proceedings, Hicks's counsel filed an "Emergency Motion for Psychiatric Evaluation to Determine Competency to Stand Trial." In the motion, defense counsel asserted that Hicks's "mental status had deteriorated over the past week." They also asserted that Hicks's conduct before, during, and after the voir dire proceedings "clearly demonstrated that he does not possess a reasonable degree of rational understanding of the facts and the legal proceedings against him." Counsel further asserted that Hicks had also demonstrated a "significant inability to control his behavior during breaks, in his interaction with the jail staff." They also stated that Dr. Bennett's mental evaluation "foretells the exact difficulties now being presented by Mr. Hicks."

During a hearing on the motion, the trial court stated:

"All right. Over the weekend, there was filed a motion to determine competency. I have Dr. Bennett's and Dr. Kirkland's evaluation and I think both those evaluations are extremely thorough and make a more than reasonable and adequate assessment of Mr. Hicks. And if the motion that has been filed is to ask for additional evaluation, I'm going to not rule on that at this point."

After personally addressing Hicks, the trial court ultimately denied the emergency motion for a competency evaluation.

Based on the foregoing, the record shows that the trial court properly addressed the question of Hicks's competency to stand trial. Thus, Hicks's argument that he was prevented from ensuring that "the question of his competency received a proper hearing" is without merit. Hicks's brief at 21.

For these reasons, Hicks has not demonstrated that the violation of his right to counsel in this case contaminated the entire criminal proceedings. See Satterwhite, supra. Accordingly, Hicks's argument that the deprivation of his right to counsel should result in the automatic reversal of his convictions and sentences is without merit.

II.

In this case, as in Satterwhite, the violation of Hicks's Sixth Amendment right to counsel affected only whether Dr. Kirkland's testimony and report should have been admitted during the penalty-phase proceedings. Hicks did not object at the time Dr. Kirkland's testimony and report were admitted during the penalty-phase proceedings.

Ultimately, in Satterwhite, the United States Supreme Court applied the harmless-error test set forth in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and concluded that it could not agree with the Texas Court of Criminal Appeals' conclusion that the erroneous admission of Dr. Grigson's testimony in that case was harmless beyond a reasonable doubt. In reaching that conclusion, the Supreme Court stated:

"[Dr. Grigson] stated unequivocably that, in his expert opinion, Satterwhite 'will present a continuing threat to society by continuing acts of violence.' He explained that Satterwhite has 'a lack of conscience' and is 'as severe a sociopath as you can be.' To illustrate his point, he testified that on a scale of 1 to 10 -- where 'ones' are mild sociopaths and 'tens' are individuals with complete disregard for human life -- Satterwhite is a 'ten plus.' Dr. Grigson concluded his testimony on direct examination with perhaps his most devastating opinion of all: he told the jury that Satterwhite was beyond the reach of psychiatric rehabilitation."

***14** Satterwhite, 486 U.S. at 259-60, 108 S.Ct. 1792. The Supreme Court also pointed out that, during his closing argument, the district attorney had highlighted Dr. Grigson's credentials and conclusions. The Supreme Court then concluded:

"The finding of dangerousness was critical to the death sentence. Dr. Grigson was the only psychiatrist to testify on this issue, and the prosecution placed significant weight on his powerful and unequivocal testimony. Having reviewed the evidence in this case, we find it impossible to say beyond a reasonable doubt that Dr. Grigson's expert testimony on the issue of Satterwhite's future dangerousness did not influence the sentencing jury."

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486 U.S. at 260, 108 S.Ct. 1792.

In his brief, Hicks asserts that Dr. Kirkland's evaluation

> "produced substantive evidence -- a diagnosis, a written report, and testimony -- that was used against Mr. Hicks's at his capital trial. The majority of the State's penalty-phase testimony came from Dr. Kirkland, and he was their only new witness and only expert witness to testify at the penalty phase. Further underscoring this focus, the prosecutor set Dr. Kirkland apart even from other expert witnesses -- giving him the imprimatur of apparent neutrality -- by prompting him to affirm that he was a 'court's expert as opposed to an expert for the State or the defense.'
>
> "It is further significant that the prosecutor went on to center his closing argument on Dr. Kirkland's diagnosis. 'The truth is and the evidence shows,' he began, 'that Dennis Hicks is a sociopath and he sees those people around him as objects that exist for his own benefit.' Further, in arguing that they had proven Mr. Hicks's 'future dangerousness,' the prosecutor invited the jury to consider 'the testimony of Dr. Kirkland' and 'his determination [that] the defendant has an antisocial personality disorder.' The effect of these arguments is evident in the trial court's sentencing order, where it relied on and 'agree[d] with' Dr. Kirkland's findings as grounds for imposing a death sentence."

Hicks's brief at 20-21 (citations to the record omitted).

During the penalty phase of the trial, the State presented evidence regarding three statutory aggravating factors -- that the capital offense was committed while Hicks was under a sentence of life imprisonment; that Hicks had previously been convicted of a felony involving the use or threat of violence to the person; and that the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses. The aggravating factor that Hicks had committed the murder while under a sentence of life imprisonment was established by the jury's verdict during the guilt phase. With regard to the aggravating circumstance that Hicks had previously been convicted of a felony involving the use or threat of violence, the State presented certified convictions showing that Hicks had previously been convicted of two counts of murder in Mississippi.

In the penalty-phase opening statements, the prosecutor stated that the State would also prove the aggravating circumstance of Hicks's future dangerousness.[2] Subsequently, the prosecutor stated:

> "Future dangerousness, you're going to see records. We will admit records in this portion of the trial, records from the Department of Corrections in Mississippi, and you're going to receive records from the Mobile County Metro Jail.
>
> ***15** "You're going to see throughout the records a history of attempted escapes, escape from the Department of Corrections. You're going to see history of shanks, knives, guards, razor blades, and dangerous activity all done while this defendant was incarcerated. And we will show that he is a future danger to this society."

The State introduced into evidence records from the Mississippi Department of Corrections that included information about Hicks's conduct during while incarcerated. Andrew Peak, who was the detective from the Mobile County Sheriff's Office that had investigated this case, testified that he had reviewed those records. He testified that the records indicated that Hicks had been convicted of two counts of murder for the murder of two people. He also testified about Hicks's escape attempts while incarcerated. In one escape attempt, Hicks tried to take the corrections officer's weapon away from him. Peak also testified about other incidents that had led to prison-discipline proceedings against Hicks's. In some instances, Hicks had been involved in fights with other inmates. During one of those fights, Hicks stabbed one of the corrections officers who came to break up the fight. Also, there were incidents during which Hicks was found in possession of "shanks," which Peak described as "just any instrument that's found in jail that can be sharpened in any way"; a 10-inch homemade knife that was found in his sock; and a homemade stinger, which Peak described as "a weapon that's made on the end of a string or inside -- wrapped in a towel or bedsheet or something you can hit somebody with." In another incident, Hicks had two razor blades hidden in a cast. Hicks had also been involved in a mail-fraud scheme that involved sending money orders through the mail. Hicks had telephoned the person who had reported that conduct to the prison facility, using obscene and abusive language and threatening to burn her house down. Peak also testified that the records included an incident in which Hicks wrote a letter to his brother, accusing a corrections officer of stealing things from him and telling his brother that he had "propositioned another inmate that was HIV positive to give [Hicks] some of his blood so that he could infect the corrections officers with HIV."

The State also introduced evidence from the Mobile Metro Jail that included information regarding Hicks's conduct while he was in custody for the present offenses. Those records indicate that, while Hicks was in the Mobile Metro Jail, he had issues with fighting and acting out. One report indicated that Hicks had been “acting insolent towards personnel, using abusive language, and disrupting religious and medical services and other jail activity” and that Hicks “was rioting and encouraging others to riot in a way that would disrupt the jail.” On that same day, Hicks had another disciplinary report. Peak testified:

> ***16** “A nurse was trying to administer medicine and the report says [Hicks] became irate and angry and start[ed] asking about his dinner or lunch tray. He was informed that the lunch tray had already been special ordered and that the kitchen was aware of his needs. He just continued to be angry about lunch tray. He got the nurse's medical books and threw them across the floor on the ground.”

Peak testified that, when corrections officers responded, they had to restrain Hicks and place him in handcuffs.” In another report, Hicks said that another inmate had been harassing him, that the other inmate bumped into him, and that he then hit the other inmate.

During the penalty phase, Dr. Kirkland testified that he had conducted a forensic evaluation of Hicks and that he had completed a report regarding the results of that evaluation. Dr. Kirkland testified that he had spent about two to two and one-half hours with Hicks. Subsequently, the following occurred:

> “[PROSECUTOR:] And this is an initial court-ordered evaluation, it's not done specifically for the purpose of penalty, what we're here for today?
>
> “[DR. KIRKLAND:] Correct.
>
> “This is a pre-trial evaluation to ensure that his constitutional rights are protected in the sense of that he can be present and is able to be present physically and psychologically, cognitively, and to cooperate with his attorneys and can continue to do that. And so the focus of the evaluation is on answering that competency to proceed question. And then to answer the question of what was his mental state like to the best that can be determined at the time of what he is alleged to have done --
>
> “Again, my role is not to gather evidence either way.
>
> “-- and so -- and then to report that to the court.”

Dr. Kirkland testified that he had determined that Hicks's academic ability, reasoning, and intellectual ability were far above the range of mild intellectual impairment. He further testified that the forensic evaluation was a standardized evaluation, that the results of the evaluation were all within the normal range, and that he had perceived nothing that suggested that Hicks was unable to understand the charges against him and cooperate with his attorney. Dr. Kirkland further testified:

> “In fact, he appeared to have a greater than average knowledge of the legal system than most people that I speak with. And that he -- and while he left school, formal education, early, he had -- I think he has a lot of common sense and a lot of knowledge of the world from a social and adaptive point of view and he was very much able to take care of himself. And he was able to give me a comprehensive history.
>
> “He was able to understand the -- <u>I'm required to inform him why I'm there and to tell him about how that affects his rights and the trial proceeding. He was able to understand that. And he agreed to participate in the evaluation, signed the release form and proceeded</u>.”

(Emphasis added.)

Dr. Kirkland also testified that he had access to some of the material from the Mississippi Department of Corrections as well as the medical records and disciplinary records from the Mobile Metro Jail. He further testified that, when he met with Hicks, he took an early history and gathered background information, including information about Hicks's criminal history, employment history, and substance-abuse history.

Dr. Kirkland testified that Hicks had a high degree of social and adaptive intelligence and that Hicks “would characterize his history as being a person who works with what he's got

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to -- to survive and is able to use his -- those tools to protect himself." Dr. Kirkland further stated: "He clearly is a -- if you look at the world in terms of givers and takers, he would be characterized as someone being more of a taker than a giver in that broad characterization."

***17** Dr. Kirkland testified that Hicks did not have a clinical disorder, that he was not depressed or psychotic, and that "[h]e would not meet the normal reasons that one would think a mental evaluation like this would be done." He further testified:

> "And what I found the evidence for was he -- I mean, he had been in prison most of his adult life. That he had multiple episodes of breaking the law or antisocial action, an antisocial personality disorder, which is described, really, as someone who characteristically has a hard time respecting the rights of other people, tends to see other people as objects that they can use to bring about goals, meeting their own goals, and those were the primary diagnoses."

Subsequently, the following occurred:

> "[PROSECUTOR:] And what about this defendant's history that you considered and his choices that you know of that you considered lead you to believe that he is antisocial?
>
> "[DR. KIRKLAND:] Well, the repeated -- the thing that -- primarily the behavior itself. The best place to look for that is the behavior itself. And the second place to look is how a person characterizes and thinks about their own experience.
>
> "He is able to do that. He does not have a lot of insight into how things might sound to another person. So that he -- he tends to believe that --
>
> "For example, what he said earlier about his perception about his role in the case. I think that he tends to believe that but he doesn't necessarily -- not very good at taking into account how that might be perceived by other people. And that's really a feature of the diagnosis, that he has a hard time seeing things from other people's point of view.
>
> "Taken to an extreme, that would be violating the rights of other people to an extreme. And that's -- that's the basis for that diagnosis is that that's one of the main features is the lack of ability to consider the needs or rights of other people in a more mature way.
>
> "[PROSECUTOR:] And how would someone who is antisocial tend to treat other people?
>
> "[DR. KIRKLAND:] Well, they would often superficially treat them kind and -- and good enough to establish relationships but there -- but there would be a pattern of having a hard time regarding the rights of the other person, intending to see them more as useful to them in reaching their goals.
>
> "[PROSECUTOR:] And as far as how someone who is antisocial personally acts, do they broadcast this to others or do they tend to present some other kind of persona?
>
> "[DR. KIRKLAND:] Well, with different degrees of success -- and I think Mr. Hicks is likely to be perceived, at least initially, as being likable and -- and certainly someone who would be genuine in their attempts to interact with the other person. And that it -- that it appears to me, and I think what's documented in the history, that whether he's confined or outside that he has a hard time identifying and conforming to the needs that other people might present in terms of their own safety and needs.
>
> "[PROSECUTOR:] And what about right and wrong? Someone that's antisocial, are they aware of what is right and wrong?
>
> > "[DR. KIRKLAND:] Sure. And he's certainly aware of the difference between right and wrong and also aware of the difference between, technically, what's legal and illegal."

***18** Dr. Kirkland's report was also admitted into evidence. The report was consistent with Dr. Kirkland's trial testimony.

During the penalty phase, defense counsel presented the testimony of Dr. Marianne Rosenzweig, a forensic psychologist, who also had evaluated Hicks. Dr. Rosenzweig testified that she had spent a total of 19 and one-half hours with Hicks, that she had interviewed some of Hicks's family members and family acquaintances, that she had reviewed various records, including the records from the Mississippi Department of Corrections and the Mobile Metro Jail, that she had reviewed various other documents, and that

she had administered two psychological tests to Hicks. Dr. Rosenzweig did not generate a report of her evaluation.

Dr. Rosenzweig testified that Hicks was the youngest of 10 children and that he had a difficult childhood. She further testified about the poor conditions in which Hicks's family had lived because his father had refused to spend money on his family. Dr. Rosenzweig testified that she had received information indicating that Hicks's father had been violent, that he had been much more violent when he was drunk, that Hicks's father would beat his mother, and that, on one occasion, his father had beaten one of Hicks's sisters until she was unconscious. She also testified that Hicks did not remember witnessing any of his father's violence against his mother, but Hicks's siblings had different memories of that. She testified, however, that Hicks had related things that he had heard regarding incidents of violence his father had committed against his mother. Ultimately, Hicks's parents divorced and both remarried. Dr. Rosenzweig further testified that Hicks had no memory of his father beating him, but one of his older sisters testified about an incident when their father had "flung [Hicks] against the wall very hard and really hurt him." Dr. Rosenzweig testified that she had learned about violent acts Hicks's father had committed against people outside the immediate family. Dr. Rosenzweig further testified that, even if Hicks had been too young to remember these events, witnessing or experiencing such events could still have had an impact on his life.

Dr. Rosenzweig testified that she concluded that Hicks suffered from some form of bipolar disorder, which includes manic episodes and major depressive disorder. She further testified that experts do not know exactly what causes bipolar disorder but that the current consensus is that there are three factors that contribute to bipolar disorder -- the genetic background of the person, neurochemical factors, and environmental factors. With regard to genetic factors, Dr. Rosenzweig testified that bipolar disorders run in families. She also testified "that schizophrenia and bipolar disorder have been found to likely share the same genetic origin. That is, they tend to co-occur in the same families, meaning that if somebody has schizophrenia, you will often see bipolar disorder in that same family." With regard to environmental factors, she testified that a life event can trigger an episode, that hormonal problems and changes that fluctuate over the course of a person's life can be a factor, and that alcohol and drug abuse can be linked to a triggering episode. Dr. Rosenzweig testified that one of Hicks's sisters had been committed to a hospital for mental-health treatment and had been diagnosed with paranoid schizophrenia and schizoaffective disorder. She also testified about impressions that she had formed based on discussions she had with some of Hicks's other relatives, stated that some of Hicks's father's behavior resembled manic and hypomanic behaviors, and pointed out that Hicks's paternal grandfather was known to have a violent temper and that she had been told that he "was a very mean man who beat his kids."

***19** Dr. Rosenzweig also testified that, after Hicks's first escape attempt from Parchman Prison, which is where he had been incarcerated in Mississippi, Hicks had been seen by a psychologist. She testified that psychologist's notes stated:

> "This is a direct quote. His mental status was marked by poor insight and very poor judgment, particularly impulsive. Hostility and agitation are very evident. Probably he is a high risk for suicide, not from clinical depression but from the traits which define his current mental status.
>
> "Psychological testing suggested a very malignant personality structure with marked antisocial and sexual conflicts.
>
> "Testing also suggested the presence of extreme hostility, and again capable of extreme forms of acting out, likely impulsively, and with the -- the underlined, that was not mine that was the psychologist -- very, very poor judgment.
>
> > "The psychologist says he will consult with this other -- I think it was a psychiatrist -- to the possibility of short-term medication to reduce his agitation. And his diagnostic impression was mixed personality disorder with emotional agitation."

Subsequently, the following occurred:

> "[DEFENSE COUNSEL:] And can you explain what the psychologist meant when he wrote that the previous psychology testing suggested a very malignant personality structure with marked antisocial and sexual conflicts?
>
> "[DR. ROSENZWEIG:] Okay. Again, I -- there was no testing in the file that I got. And I'm guessing that the MMPI was the most frequently used psychological test in prisons

at that point in time. It's a personality test. So I'm guessing that was the test that he was referring to.

"And it seems that the psychologist, when he's talking about a malignant personality structure, I -- my inference is he's talking about something called borderline personality disorder with antisocial features. Borderline personality disorder is -- it's a diagnosis. And it is characterized by people who have very rapid shifts in their mood. They can have intense anger and be really impulsive among other symptoms. ...

"....

"[DEFENSE COUNSEL:] And what about the mixed personality disorder with mixed emotional agitation? Can you explain that?

"[DR. ROSENZWEIG:] Yes. That the mixed part means basically that the psychologist thought that [Hicks] is having more -- elements of more than one personality disorder.

"Personality disorder is a classification within our diagnostic system. It refers to patterns of -- enduring patterns of behavior, the way the person acts, the way they think that are maladaptive. There are a number of different personality disorders. And it looks like -- again, -- like I'm inferring again. I think that the psychologist here is referring to borderline and antisocial personality disorders."

Dr. Rosenzweig further testified that she thought that all of Hicks's behavior that she had discussed could be better explained by her diagnosis of bipolar disorder. She further testified about other incidents that had occurred during Hicks's incarceration at Parchman Prison that were consistent with her diagnosis.

Dr. Rosenzweig testified that the information from the incident involving the nurse at the Mobile Metro Jail and the hearing regarding that incident was consistent with her diagnosis.

***20** Dr. Rosenzweig also testified that she had concluded that Hicks had bipolar disorder, that she could not say what type of bipolar disorder he had, that the difference between the two types of bipolar disorder is whether the person has had a manic episode, and that she had not seen Hicks have a manic episode. She further testified that "[t]he descriptions of his behavior by the psychologist and the documentation in his prison records in Mississippi, it sounds as though he had a manic episode, but I don't -- I don't know that for a fact." However, Dr. Rosenzweig testified that, every time she had seen Hicks, "he certainly falls into the kind of hypomanic behavior."

Subsequently, the following occurred:

"[DEFENSE COUNSEL:] Now, this jury is aware that they've got a responsibility of imposing a sentence. If [Hicks] were to be given a sentence of life without the possibility of parole as opposed to the death penalty, in your professional opinion, would he likely pose a risk of danger to others while in the penitentiary or even himself?

"[DR. ROSENZWEIG:] Yes. I think given his diagnosis and his past history that, yes, I think that at times you could expect him to act out again to the point that he might be a danger to himself or to other people."

She also testified that the Alabama Department of Corrections policies provide "that if an inmate becomes, because of a mental condition, ... a danger to themselves or others, the Department of Corrections can force them to take medication." She further testified that Hicks would be placed in a maximum-security setting, that Alabama prisons "are designed to be able to manage the behavior of people who are acting out," and that "they all have psych units in the prisons where they can basically manage the behavior of individuals with these kinds of problems."

On cross-examination, Dr. Rosenzweig testified that, before her diagnosis, Hicks had never been diagnosed with or treated for bipolar disorder. She agreed that Hicks could understand right from wrong and that he could make his own choices. She also agreed that, if Hicks were incarcerated on a sentence of life imprisonment without the possibility of parole, "he

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could act out, would act, your words, and could be a danger to himself and others."

During his penalty-phase closing argument, the prosecutor stated:

> "The defense expert would have you believe that Dennis Hicks is a product of his upbringing and his environment, his family, his genetics. The truth is and the evidence shows that Dennis Hicks is a sociopath and he sees those people around him as objects that exist for his own benefit.
>
> > "Ladies and gentlemen, that is not environment. That is not genetics. That is choice."

The prosecutor then went on to discuss the aggravating and mitigating evidence in the case: "And you'll hear other evidence, too, of [Hicks's] future dangerousness based on his behavior in the Alabama Department of Corrections, the Mississippi Department of Corrections, and the Metro Jail." When discussing Hicks's future dangerousness, the prosecutor went on to state:

> "You have his Department of Corrections history now that shows his future dangerousness, that the entire time -- or after, you know, five years he was escaping, assaulting guards, other inmates, he was involved in the money order scheme, the mail fraud scheme. It shows a history that you can infer the fact that he will be dangerous in the future.
>
> "And, you know, the defense paid Dr. Rosenzweig $30,000 to get up here on the witness stand and say that even she believes he'll be a future danger should he be incarcerated in the Alabama Department of Corrections. Even she admitted to that. But she said, oh, that can be dealt with because, you know, they can strap him to a gurney and force medicate him for the rest of his life and only then will he not be a danger anymore. Oh, and if they can't force medicate him, they can just restrain him. So even the defense expert believed that the defendant will be a danger in the future.
>
> ***21** "You heard the testimony of Dorothy Hudson about Josh. And in a minute I'm going to get back to Josh because you've heard so much about the defendant over the last couple of days. And the testimony of Dr. Kirkland, his determination was the defendant has an antisocial personality disorder."

After discussing the heinous, atrocious, and cruel aggravating circumstance and the facts that he contended would support that aggravating circumstance, the prosecutor stated:

> "Josh didn't deserve that. Josh Duncan deserved life. He deserved every day of natural life that he had on God's green earth. And he didn't get that because this man took that away from him. And the way he did it was heinous, atrocious, and cruel.
>
> "I'm not being cruel about the defendant's past. I'm not being cruel about a mental disorder that he may have. He may have had a tough life. He might be bipolar. A lot of people have tough lives. A lot of people are bipolar.
>
> "Having a tough life and having bipolar, if he does, does not cause a man to murder.
>
> "Circumstances and environment do not cause a man to murder.
>
> "Dennis Hicks needed to murder Joshua Duncan for the most important person in Dennis Hicks's life. Himself.
>
> "This isn't about vengeance for Josh either. Josh is gone. Josh is never coming back and this isn't about revenge. This is about a choice. It's a choice that each and every one of you have to make.
>
> "The defendant has chosen to be a cold-blooded murderer. He's already served two life sentences. He's already murdered two people in Mississippi. He's already heinously, atrociously, and cruelly murdered Joshua Duncan when he hacked him to pieces. The defendant deserves the death penalty."

In rebuttal closing argument, the prosecutor stated, in pertinent part:

> "I'm going to talk a little bit about the future dangerousness because their own expert, as you heard [the other prosecutor] say, and their expert testified to, their own expert that they paid an exorbitant amount of money for to come in here and testify says the defendant is going to be a danger to himself and to others. May not be always but it will manifest. That's what she said.
>
> "And what do we know from the pattern, from the history? Why did we admit all of these records? To show you that history, to show you that pattern.

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"And what do they show? Time and again, four different times of escapes, four different times. One time tried to take a weapon from a corrections officer.

"What do they show you? The violence over and over and over again. Throughout starting in 1988 all the way through Alabama, through Mississippi, assaulting inmates, having weapons, all the way through the Metro Jail and attempting to hurt and throw something from a nurse because the defendant didn't get his way and he didn't get the food he wanted on his cart.

"What do they show? Violence and future dangerousness. Future dangerousness."

[4] [5] In this case, the State presented testimony from Dr. Kirkland that Hicks had antisocial personality disorder. The State also referred to this testimony during its closing arguments. However, this case is distinguishable from Estelle and Satterwhite. First, Alabama law does not require the State to prove a capital defendant's future dangerousness to impose the death penalty. Additionally, future dangerousness is not a statutory aggravating circumstance under § 13A-5-49, Ala. Code 1975. However, as the Court of Criminal Appeals noted in its opinion on original submission in this case, "the evidence regarding future dangerousness was a proper penalty-phase consideration." Hicks v. State, [Ms. CR-15-0747, July 12, 2019] ––– So. 3d at ––––.

***22** Additionally, unlike in Satterwhite, Dr. Kirkland did not provide "powerful and unequivocal testimony" as to Hicks's future dangerousness. 486 U.S. at 260, 108 S.Ct. 1792. Rather, he testified that he had diagnosed Hicks with antisocial personality disorder; that Hicks "would be characterized as someone being more of a taker than a giver in that broad characterization"; that someone with "an antisocial personality disorder, ... is described, really, as someone who characteristically has a hard time respecting the rights of other people, tends to see other people as objects that they can use to bring about goals, meeting their own goals"; that Hicks did not have a lot of insight into how things might sound to others; that Hicks has a hard time seeing things from other people's point of view; that, such behavior, "[t]aken to an extreme, ... would be violating the rights of other people to an extreme"; that Hicks has a hard time identifying and conforming to the needs that other people might present in terms of their own safety and needs"; and that Hicks was aware of the difference between right and wrong and was "also aware of the difference between, technically, what's legal and illegal." That testimony falls far short of the type of testimony the psychiatrist presented in Satterwhite. Additionally, the State's closing arguments regarding future dangerousness did not center on Dr. Kirkland's testimony. Rather, the State relied heavily on the evidence regarding Hicks's two prior murder convictions, Hicks's conduct while incarcerated in Mississippi and in the Mobile Metro Jail, and Dr. Rosenzweig's testimony that Hicks would be a danger to himself and others in the future.

Additionally, in its sentencing order, the trial court addressed the statutory mitigating circumstance that the capital offense was committed while Hicks was under the influence of an extreme mental or emotional disturbance, § 13A-5-51(2), Ala. Code 1975, as follows:

"Defendant Hicks offered the testimony of [Marianne] Rosenzweig, a mitigation expert, who testified that in her opinion the Defendant was under the influence of extreme mental or emotional disturbance in the form of Bipolar Disorder. She testified that the Defendant suffered from problems associated with his upbringing in a dysfunctional family, as described by several of the Defendant's family members. She indicated she believed the Defendant had a sibling who also suffered from mental disorders. Dr. Rosenzweig based her opinion of bipolar disorder on her observation of the Defendant moving between manic or hypomanic episodes and major depressive episodes. The Court notes that no evidence was presented of a clinical diagnosis for bipolar disorder; however Dr. Rosenzweig's observation are entitled to some weight. Accordingly, this Court concludes that this mitigating circumstance has been established and assigns this mitigating circumstance some weight."

"Section 13A-5-51(6), Ala. Code 1975, also provides as a mitigating circumstance that '[the] capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired' during the commission of the capital offense." Callen v. State, 284 So. 3d 177, 242 (Ala. Crim. App. 2017). With regard to that statutory mitigating circumstance, the trial court stated:

"There was no compelling evidence that the Defendant suffered diminished capacity or was under the influence of alcohol or drugs at the time he killed Joshua Duncan. To the contrary, Dr. Karl Kirkland testified in the sentencing

portion of trial that the Defendant was competent at the time of the offense and that he was competent to stand trial. This Court agrees with Dr. Kirkland in this regard and further specifically finds that the Defendant could appreciate the criminality of his conduct and conform his conduct to the requirements of law. Accordingly, this Court does not assign weight to this statutory mitigating circumstance. However, the Defendant's mental disturbance was established and weighed, as the Court previously explained."

During the penalty phase, defense counsel never argued that Hicks did not have the capacity to appreciate the criminality of his conduct. In fact, Dr. Rosenzweig agreed that Hicks could understand right from wrong and that he could make his own choices. Additionally, Dr. Rosenzweig did not specifically testify that Hicks's "capacity to conform his conduct to the requirements of law was substantially impaired" at the time of the offense. In fact, she did not present any testimony about Hicks's mental capacity at the time of the offense. Rather, throughout the trial, Hicks maintained that he did not kill Duncan. Therefore, even excluding Dr. Kirkland's testimony and report, the evidence presented supported the trial court's finding that Hicks "could appreciate the criminality of his conduct and conform his conduct to the requirements of law."

***23 [6]** In light of the specific facts of this case, Hicks has not established that he was prejudiced by the admission of Dr. Kirkland's testimony and report during the penalty-phase proceedings. Accordingly, any error in the admission of that testimony and report was harmless beyond a reasonable doubt. See Satterwhite, supra; Chapman, supra; Rule 45A, Ala. R. App. P. Therefore, Hicks is not entitled to relief as to this claim. [3]

Conclusion

Based on the foregoing, we quash the writ.

WRIT QUASHED.

Parker, C.J., and Bolin, Shaw, Bryan, Sellers, Mendheim, and Stewart, JJ., concur.

Mitchell, J., concurs in the result, with opinion.

MITCHELL, Justice (concurring in the result).

I agree that no reversible error occurred, but I reach that conclusion after applying what I believe is the correct standard of review.

The main opinion reviews the issues presented for harmless error based on the United States Supreme Court's test announced in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and applied to Sixth Amendment violations in Satterwhite v. Texas, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988). In my view, that is the wrong standard of review. Rather, on certiorari review, this Court applies " ' " 'de novo the standard of review that was applicable in the Court of [Criminal] Appeals.' " ' " Ex parte Jones, 322 So. 3d 970, 975 (Ala. 2019) (quoting Ex parte S.L.M., 171 So. 3d 673, 677 (Ala. 2014)) (citations omitted). As the State's brief makes clear, when a defendant who has been sentenced to death raises an issue that he did not properly raise in the proceedings below, the Court of Criminal Appeals reviews the trial court's decision for plain error only. Rule 45A, Ala. R. App. P.; Ex parte Brown, 11 So. 3d 933, 935 (Ala. 2008). That standard applies to all unpreserved issues, even those based on assertions that the defendant's constitutional rights were violated. See United States v. Margarita Garcia, 906 F.3d 1255, 1266 (11th Cir. 2018) ("The constitutional errors here are trial errors. Thus, normally, we would ask whether the government had met its burden of establishing that the errors were harmless beyond a reasonable doubt. But if a defendant fails to lodge a timely objection, we are required to apply plain error review instead." (citations omitted)).

There are two important differences between harmless-error review under Chapman and plain-error review under Rule 45A. First, harmless-error review asks whether any constitutional errors occurred that did not "pervade the entire [criminal] proceeding" and, if so, places the burden on the prosecution to prove that the "error did not contribute to the verdict." Satterwhite, 486 U.S. at 256, 108 S.Ct. 1792. Plain-error review, by contrast, requires the reviewing court "to review the transcript of the proceedings for plain error." Hall v. State, 820 So. 2d 113, 121 (Ala. Crim. App. 1999). Second, harmless-error review requires reversal when the trial court violated a defendant's constitutional rights unless the error was harmless beyond a reasonable doubt. Satterwhite, 486 U.S. at 250, 108 S.Ct. 1792. But plain-error review requires reversal only when it is evident from the

record that the trial court made an error that " ' "adversely affected the substantial right of the appellant" ' " in a way that was " ' "particularly egregious" ' " and " ' "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." ' " Brown, 11 So. 3d at 935-36 (quoting Hall, 820 So. 2d at 121) (citations omitted). Because of these differences in burden and deference to the trial court, " '[t]he standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal.' " Id. at 935 (quoting Hall, 820 So. 2d at 121); cf. Margarita Garcia, 906 F.3d at 1266 (explaining that, while the appellant could not "carry her burden under the plain error standard, the outcome may well have been different if trial counsel had preserved the errors").

***24** Plain-error review is all that is required here. And if Dennis Morgan Hicks, the defendant in this case, is not entitled to any relief based on harmless-error review -- a standard that is more favorable for him -- we can comfortably infer that he fails under plain-error review as well. Indeed, a review of the briefs and applicable record materials in this case confirms that there was no plain error on his Sixth Amendment claim. Because the main opinion does not apply the correct standard of review, I am able to concur in the result only.

All Citations

--- So.3d ----, 2022 WL 17073090

Footnotes

1 On March 30, 2015, this case was transferred to Judge Graddick's docket.

2 As the Court of Criminal Appeals noted in its opinion on original submission, although the prosecutor "improperly conflated future dangerousness with the three legitimate aggravating factors" during her penalty-phase opening statements, "any impropriety in the prosecutor's opening statement was rectified during closing argument and by the court's charge to the jury." Hicks v. State, [Ms. CR-15-0747, July 12, 2019] ––– So. 3d at –––.

3 Hicks also argues that the trial court violated his rights under the Fifth Amendment to the United States Constitution by admitting the results of Dr. Kirkland's pretrial mental evaluation into evidence during the penalty-phase proceedings. In his petition, Hicks asserts that the admission of Dr. Kirkland's testimony and report violated his Fifth Amendment rights because Dr. Kirkland did not inform him that anything he said during the evaluation could be used against him during the penalty-phase proceedings. He also asserts that the admission of Dr. Kirkland's testimony and report further violated Alabama law because the trial court did not have the authority to order an evaluation of his mental state at the time of the offense because he had not entered a plea of not guilty by reason of mental disease or defect. However, we previously determined that any error in the admission of Dr. Kirkland's testimony and report during the penalty-phase proceedings was harmless. Therefore, Hicks is not entitled to relief as to either of those claims

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