No. 22-7075
CAPITAL CASE

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**In the SUPREME COURT of the UNITED STATES**

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DENNIS MORGAN HICKS,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

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On Petition for a Writ of Certiorari to the
Alabama Court of Criminal Appeals

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# BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## CAPITAL CASE

## QUESTION PRESENTED

At trial, prior out-of-court statements made by child witnesses Ja.N. and Jo.N. were admitted and presented to the jury. In their statements, the children explained that they had witnessed Dennis Morgan Hicks arguing with the victim, Joshua Duncan. They saw Hicks cut Duncan, hang him from a tree in the backyard, then cut off Duncan's head and hands, as well as cut out Duncan's stomach. *See Hicks v. State*, CR-15-0747, 2019 WL 3070198, *17 (Ala. Crim. App. July 12, 2019). Both Ja.N. and Jo.N. testified at trial and were cross-examined about their statements, as well as their memory of what they witnessed on the day Duncan was murdered.

The question arising from Hicks' petition:

1. Was Hicks' Sixth Amendment right to confront child witnesses Jo.N. and Ja.N. violated when both witnesses were confronted and cross-examined during trial?

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iii

STATEMENT OF THE CASE ..... 1

A. The Proceedings Below ..... 1

B. The Facts Presented at Trial ..... 3

C. The Facts Surrounding the Admission of the Out-of-Court Statements. ..... 9

REASONS FOR DENYING THE PETITION ..... 11

I. Hicks' claim that his Sixth Amendment right to confront witnesses was violated when prior out-of-court statements were admitted during trial is not preserved for review ..... 12

II. Hicks' claim is meritless. ..... 13

CONCLUSION ..... 16

## TABLE OF AUTHORITIES

**Cases**

*Adams v. Robertson*,
520 U.S. 83 (1997)..... 12

*Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*,
481 U.S. 537 (1987)..... 13

*California v. Green*,
399 U.S. 149 (1970)..... 13

*Crawford v. Washington*,
541 U.S. 36 (2004)..... 12, 13, 14

*Ex parte Hicks*,
2022 WL 17073090 (Ala. Nov. 18, 2022). ..... 3

*Hicks* v. State,
2019 WL 3070198 .....passim

*Michigan v. Bryant*,
562 U.S. 344 (2011)..... 13

*United States v. Scheffer*,
523 U.S. 303 (1998)..... 15

*Webb v. Webb*,
451 U.S. 493 (1981)..... 13

*Weeks v. Angelone*,
528 U.S. 225 (2000)..... 15

**Code of Alabama**

§13A-8-4 ..... 2
§13A-5-40(a)(6) ..... 1

## STATEMENT OF THE CASE

Dennis Hicks killed Joshua Duncan, dismembering Duncan's hands and head, disemboweling him, and causing multiple chopping-type wounds on his body. Approximately seven months after Duncan's murder, Ja.N. and Jo.N., who were four and three years old, respectively, provided three separate statements about what they had witnessed regarding the murder. These statements were admitted during trial. Hicks now challenges these out-of-court statements, arguing that their admission violated his right to confront Jo.N and Ja.N. But not only did Hicks waive this issue when he failed to present it to the state courts, the record also reflects that both witnesses testified at trial and were subject to cross-examination. As such, he presents no viable issue for this Court to consider. Thus, this Court should deny Hicks' petition.

### A. The Proceedings Below.

During Labor Day weekend in 2011, Dennis Morgan Hicks brutally murdered a mentally disabled man named Joshua Duncan, dismembering Duncan's hands and head. In December 2012, a Mobile County grand jury indicted Hicks for one count of capital murder for intentionally murdering Duncan while Hicks was under a sentence of life imprisonment in violation of Section 13A-5-40(a)(6) of the Code of Alabama and one count of second-

degree theft in violation of Section 13A-8-4 of the Code of Alabama. (C. 130–31, 136–37.)

Trial commenced on January 19, 2016; and, on January 29, 2016, the jury found Hicks guilty as charged in the indictment. (C. 72, 128, 131, 133, 137, 139.) The jury subsequently recommended a sentence of death by a vote of 11-1. (C. 72, 134, 135.) The trial court followed the jury's recommendation and sentenced Hicks to death for his capital murder conviction. (C. 73–96.[1]) He was sentenced to time served for his second-degree theft-of-property conviction. (*Id.*) Hicks' convictions and sentences were subsequently affirmed by the Alabama Court of Criminal Appeals. *See Hicks v. State*, CR-15-0747, 2019 WL 3070198 (Ala. Crim. App. July 12, 2019). His application for rehearing was overruled on October 1, 2021.

Hicks filed a petition for writ of certiorari on November 18, 2021. On May 17, 2022, the Alabama Supreme Court granted Hicks' writ of certiorari only to the issues stated in Ground IV–whether the Court of Criminal Appeals' holding that Hicks' constitutional rights were not violated by the deprivation of counsel during his pretrial mental evaluation conflicts with state and federal law–and Ground V–whether the Court of Criminal Appeals' finding that the

1. This case was remained twice to correct the trial court's sentencing order. (*See* Supp.2 C. 24–27; *see also* Supp.2 C. 28–45.)

trial court's admission of Dr. Karl Kirkland's testimony was proper conflicts with state and federal law. The Alabama Supreme Court subsequently quashed the writ, finding that Hicks failed to show that "the violation of his right to counsel . . . contaminated the entire criminal proceedings" and that any error resulting from the admission of Dr. Kirkland's testimony and report was harmless. *Ex parte Hicks*, No. 1210013, 2022 WL 17073090, *13, *23 (Ala. Nov. 18, 2022).

**B. The Facts Presented at Trial.**

Joshua Duncan, a mentally disabled man, was raised by his grandmother, Dorothy Smith Hudson, in Semmes, Alabama. (R. 1163.) As he had the mental capacity of a twelve-year-old and could not maintain a job, Duncan received a monthly check from the Social Security Administration. (C. 1152; R. 1052–53.)

Duncan and Hudson frequently attended services at the Power of God Worship Center. There, Duncan became acquainted with Dennis Hicks, who did odd jobs around the church and for its members. (R. 1371.) Hicks took Duncan under his wing and became somewhat of a father figure to him, even offering to teach him to drive. (R. 1374–75.) Hudson hired Hicks for small jobs around her house. On one of these occasions, Hicks saw a trailer that

belonged to Hudson and asked if he could use it, but she refused. (R. 1040–49.)

The events of Duncan's murder transpired around the Labor Day weekend in 2011. On Thursday, September 1, after receiving the money from his monthly SSI check, Duncan left with Hicks to paint a house. (R. 1052–53, 1085, 1089–92.) This was the last time that Hudson ever saw Duncan alive, and she was unable to reach him over the weekend. On Friday, Duncan was approved to receive food stamps at Hicks' address in the amount of $200 per month. (R. 1759–60.)

That Sunday, Duncan went to church with Hicks and his sister, Regina Norris. (R. 1108.) Later that afternoon, Duncan went with Hicks to take Hicks' other sister, Phyllis Lister, to her son's house. Hicks told his nephew that he and Duncan were on their way to Gulf Shores. (R. 1390.) Meanwhile, Hudson called her daughter, Karen Bankston, looking for Duncan. (R. 1109.)

On Labor Day, September 5, Hicks finally returned Hudson's calls. Around 4 or 5 PM, he told her that Duncan had left his house on foot at 2 AM after an argument. (R. 1056.) Based on this report, Hudson began searching the area for Duncan. (R. 1057–59, 1528.) Norris's neighbor, however, saw Duncan painting Hudson's trailer at 6 PM and took his picture. (R. 1333, 1341, 1546.)

The next day, Hudson reported her trailer stolen and Duncan missing. Mobile County Sheriff's Investigator Andrew Peak called Hicks, who claimed that he caught Duncan masturbating at Norris' house late Sunday or early Monday and that they left. Hicks further claimed that when he and Duncan returned to his house, they got in another argument, and Duncan left on foot at approximately 2 AM, never to be seen again. (R. 1525.)

Investigator Brad Grandquest took the report on the missing trailer and interviewed Hicks about it. (R. 1510, 1522.) Inv. Peak then interviewed Hicks about Duncan's disappearance; but this time, Hicks claimed that Duncan had walked away from his house around 5 or 6 PM Monday. (R. 1543.) Investigators went to extraordinary lengths to try to confirm Hicks's claims, including checking video recordings from gas stations between Hicks' residence and Duncan's home, but they found no evidence supporting Hicks' story. (R. 1524, 1528.)

Duncan's friends and family began a campaign to find him. While she was hanging flyers, Mary Ammons Clark noticed Hicks following her in his vehicle and removing the signs she was putting up. (R. 1168.) On September 29, Norris called Inv. Peak, informed him that her neighbor had surveillance video, and suggested that he look at it. (R. 1538.)

A few weeks later, on October 24, Charles Shepherd was clearing some fields at the back of an old gun range when he noticed a strong odor. Shepherd and his coworkers began to comb the area and soon found a shoe with a bone in it. Shortly thereafter, they found human remains wrapped in a blue tarp and notified law enforcement. (R. 1421–22, 1429–30, 1465.) Though the body was missing its head and hands, DNA testing identified it as Duncan's. (R. 2022.) His hands had been forcibly removed with a bladed instrument, possibly a heavy kitchen knife. (R. 1927, 2062, 2066, 2069.) His head was never found. (R. 1444–47, 1503.)

Around the time of Duncan's disappearance, Norris' three young grandchildren, A.N., Ja.N., and Jo.N (ages five, four, and three, respectively), were living with her. (R. 1253–50, 1295.) In April 2012, Shawna Mayo was babysitting two of the children and observed them acting out disturbing acts of fantasy violence, including stabbing, hanging, decapitating, and pretending to dismember a person. (R. 1236–39.) On April 5, Inv. Peak interviewed Ja.N. and Jo.N. at their home in Fairhope. (R. 1297.) Jo.N. told Inv. Peak that Duncan and Hicks got in a fight and that Hicks cut off Duncan's head and hands. (C. 915, 918.) Jo.N. demonstrated the type of injuries he witnessed. (R. 1261.) Later that day, Jo.N. was interviewed again at the Child Advocacy Center and reiterated his story. (C. 950–1042.) This

time, he acted out the murder with action figures as well as demonstrating the injuries on himself. (R. 1266.) The children were interviewed again on the following day by Sgt. Terrie Hall, a specialist in forensic interviews of children, at which time Ja.N. and Jo.N. drew diagrams depicting the injuries they observed Hicks inflict on Duncan. (R. 1267, 1276–79, 2092.) Information regarding Duncan's injuries had not yet been released to the public. (R. 1547.)

At Hicks' trial, Ja.N., who was then nine years old, testified that he could not remember the events from his earlier statements and that although he remembered staying with his grandmother and giving statements, he could not remember Hicks or Duncan being there at all. (R. 1183–86.) Ja.N. testified that he thought Hicks had stabbed Duncan in the stomach and killed him. (R. 1187.) He further testified that he remembered giving Inv. Peak his statement, taking him through the house and yard, and showing him where things happened, but he could not remember seeing it happen at the time of his testimony. (R. 1192, 1198.)

Jo.N., then eight years old, testified that while staying with Norris, he heard a noise and looked out the window to observe Hicks fighting with Duncan in the backyard, and that Hicks hurt Duncan and hung him from a chain in a tree. (R. 1200–25.) He also testified that he remembered giving

statements to the police and at the Child Advocacy Center and that he made drawings and told Inv. Peak the truth about what happened. (R. 1211.) Jo.N. testified on cross-examination that law enforcement had not told him what to say, but that they had told him to tell the truth, and that he was doing so. (R. 1223, 1227, 1230.) He was also crossed examined about the diagrams, stating that he recalled "taking a crayon and putting some marks on a piece of paper[.]" (R. 1215–16.)

Bradley Dennis, a canine handler, brought several experienced cadaver dogs to the Norris house on April 30, 2012. (R. 1694.) Four dogs indicated the odor of human decomposition inside the house. (R. 1727, 1733–34, 1737.) Two indicated on the tree from which the children saw Hicks hang and stab Duncan. (R. 1704–06, 1737.) Forensic analysis located blood on the linoleum inside the house, but the quantity was insufficient to obtain an identifiable DNA sample. (R. 2047.)

Numerous witnesses testified that Hicks had made incriminating statements. Ray Johnston stated that during the investigation, Hicks appeared worried and told Norris that Duncan was missing, and that Norris was "in it up to here." (R. 1359.) William Cook, Hicks' nephew, said that he met Hicks around 4 or 5 PM on Labor Day and that Hicks was pale, sweating, and looked worried. (R. 1394, 1415.) Several weeks later, Hicks showed up at Cook's

house in the middle of the night, woke him by calling his cell phone, and asked him to come outside. Hicks then asked Cook to lie to the police about where he was going if they talked to him. (R. 1407.)

Walter James Porter, Jr., Hicks's cellmate in late 2013, testified that Hicks returned to their cell agitated after a meeting with his attorney and asked him, "[H]ow can they use testimony of a child even if it's true?" (R. 1865, 1971, 1984.) Hicks told Porter that the little boy had been nearby and saw what happened, but the girl was inside watching television. (R. 1973.) Sherman Dunning, Hicks's cellmate in June 2015, testified that Hicks told him that he had killed a man over a bad deal involving a utility trailer, that he felt he had been cheated out of money, and that he was the last person to be seen with his victim. (R. 1865, 1989–92.)

### C. The Facts Surrounding the Admission of the Out-of-Court Statements.

During opening statements, Hicks' trial counsel advised the jury that:

> You'll hear this testimony from these children, and that's . . . is the cornerstone and . . . the star witnesses for the State are these two children who are going to, we believe . . . they're 8 years old now. They're 4 and 5 at the time. Two little boys who say that this happened.
>
> Their statements were not obtained until April the 5th of 2012. Josh's remains were discovered late October 2011. So you've got close to six months . . . from the time that Joshua's remains were discovered until the time that these children were interviewed by Detective Peak.

> You will – the children will give their testimony. But we will also play the recorded interviews of the children and you will get to hear firsthand how a child can be manipulated to say what someone wants him to say. And you will hear it for yourselves. And you'll be the judge of fact in this case whether to accept or reject the testimony of these two children.

(R. 1029–30.) *See also Hicks*, 2019 WL 3070198, at *17.

"Before the admission of the statements, the parties agreed that the statements should be admitted following the testimony of" Ja.N. and Jo.N. *Hicks*, 2019 WL 3070198 at * 17. The record shows that, after lunch recess, the prosecutor noted that "defense counsel brought up . . . during opening statement . . . admitting the statements the children had given at the Child Advocacy Center" (R. 1098), and argued that "since the defense raised this argument about the children being manipulated and ideas being planted in their mind, [the interviews] would be offer[ed] . . . for the purpose of showing that that is not the case, not offering the content for the truth of the matter asserted." (R. 1103.) Further, in response to trial counsel's hearsay objection regarding the portion of A.N.'s out-of-court statement that referred to what someone else had told her (R. 1100–01), the prosecution offered to redact this portion and argued that "none of it [wa]s really offered for the truth of the matter asserted. The children that we want to testify [Jo.N. and Ja.N.], are testifying and we hope that they will tell the truth." (R. 1102–03.)

The trial court subsequently instructed the jury that:

> 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?

*Hicks*, 2019 WL 3070198, at 17 (citing (R. 1249)).

## REASONS FOR DENYING THE PETITION

The sole question before this Court is whether Hicks' Sixth Amendment right to confront witnesses was violated when out-of-court statements by child witnesses Ja.N. and Jo.N. were admitted during trial. His Sixth Amendment challenge, however, is raised for the first time in this Court and is thus waived. Further, the petition fails to meet this Court's requirement that there be "compelling reasons" for granting certiorari. Sup. Ct. R. 10. Hicks offers no genuine confrontation issue here, presents no split of authority, and thus fails to establish any of the grounds for granting certiorari review. Accordingly, this Court should deny the writ.

## I. Hicks' claim that his Sixth Amendment right to confront witnesses was violated when prior out-of-court statements were admitted during trial is not preserved for review.

Because Hicks did not challenge the admission of the out-of-court statements by Ja.N. or Jo.N. on the ground that these statements violated his Sixth Amendment right to confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004), the claim that this testimony was improperly admitted and considered at trial is waived. Although Hicks challenged the testimony of Ja.N. and Jo.N., as well as the admission of their out-of-court statements in state court[2], Hicks did not argue that the admission of out-of-court statements violated his Sixth Amendment right to confront witnesses recognized under *Crawford*. *See generally Adams v. Robertson*, 520 U.S. 83, 90–91 (1997) ("Requiring parties to raise issues below not only avoids unnecessary adjudication in this Court by allowing state courts to resolve issues on state-law grounds, but also assists [in] deliberations by promoting the creation of

2. On direct appeal, Hicks challenged Jo.N.'s competency to testify, *Hicks*, 2019 WL 3070198, at * 13, and challenged the admission of prior statements by Jo.N. and Ja.N. on hearsay grounds, *see id.* at *16. Not until his petition for certiorari review in the Alabama Supreme Court did Hicks argue that "the improper admission of [Jo.N.'s] unsworn [in court] testimony . . . violated [his] right[] to confront witnesses" (*see* Cert. Pet. 24), and that the nonverbal responses from Jo.N. and Ja.N. (*i.e.*, the use of diagrams) during their out-of-court interviews were inadmissible hearsay, (*see id.* at 25).

an adequate factual and legal record."); *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549–50 (1987) ("It is well settled that this Court will not review a final judgment of a state court unless 'the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.'") (quotation omitted); *Webb v. Webb*, 451 U.S. 493, 498–99 (1981) ("[This] Court has consistently refused to decide federal constitutional issues raised . . . for the first time on review of state court decision."); *California v. Green*, 399 U.S. 149, 156 (1970) (noting that "merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied"). The CCA thus never ruled on this issue, and Hicks has waived this claim.

## II. Hicks' claim is meritless.

Even assuming the question presented by Hicks was not waived, he has not presented a genuine confrontation issue under *Crawford*. As this Court explained in *Michigan v. Bryant*, 562 U.S. 344, 353 (2011), "*Crawford* examined the common-law history of the confrontation right and explained that 'the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.'" Thus, "[w]here testimonial

evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 68. In this case, the right to confront was satisfied when Hicks was given the opportunity to confront and cross-examine Jo.N. and Ja.N. at trial. There is no dispute that both Jo.N. and Ja.N. testified at trial. There is also no dispute that both witnesses were subjected to cross-examination, including being asked about the circumstances surrounding the out-of-court statements they made and what they recalled at the time of trial about the murder. (*See* R. 1192–97, 1215–29.) The fact that they were unable to recall facts contained in their prior statements did not render them unavailable for purposes of the Confrontation Clause. As such, Hicks has not presented a viable *Crawford* claim.

Hicks' appears to argue that, even though both witnesses were subjected to cross-examination at trial, their statements "could not be[] subject[ed] to meaningful cross-examination at trial" because five years had lapsed between trial and the time the statements were given and the statements' "reliability could not be assessed" given the witnesses' young age. (Cert. Pet. 17.) He has presented no authority to support his assertion. Regardless, both the lapse of time and the age of the witnesses are factors to consider when determining the weight and credibility accorded the evidence.

*See United States v. Scheffer*, 523 U.S. 303, 313 (1998) ("A fundamental premise of our criminal trial system is that "the *jury* is the lie detector.") (citation omitted). Indeed, when reviewing Hicks' claim on direct appeal that Jo.N. was not competent or qualified to testify, the Alabama Court of Criminal Appeals noted that "[t]he fact that [Jo.N.] was a child went to his credibility and the weight to be given his testimony rather than to the admissibility of testimony." *Hicks*, 2019 WL 3070198, *16. The state appellate court further found that the jury was properly instructed that "the statements were not to be considered as substantive evidence, as Hicks requested, and the jury should consider the statements in determining the credibility and weight to be given the evidence." *Hicks*, 2019 WL 3070198, at *17. "A jury is presumed to follow its instructions." *Weeks v. Angelone*, 528 U.S. 225, 234 (2000). Thus, this Court should deny Hicks' petition for writ of certiorari.

## CONCLUSION

For the reasons set forth above, this Court should deny Hicks' petition for writ of certiorari.

Respectfully submitted,

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