Rel: November 18, 2022

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2022-2023

1210013

Ex parte Dennis Morgan Hicks

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: Dennis Morgan Hicks

v.

State of Alabama)

(Mobile Circuit Court, CC-12-4867 and CC-12-4994; Court of Criminal Appeals, CR-15-0747)

WISE, Justice.

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 ___ (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 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 ___, ___ (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 (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

> "'"'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.
>
> "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. You may be at the point of having to represent yourself because of all this happening.
>
> "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: There's one of these that I was concerned about their mental stability when they represent themselves.

"[PROSECUTOR:] Yes, Your Honor. 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.

"THE COURT: I think that's reasonable considering you may need to represent yourself. 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. 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: 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 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 that happened. Based on where we are we're going to shoot for a trial date like in September."

(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."

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 (1981); see also United States v. Cronic, 466 U.S. 648, 653-54 (1984); Gideon v. Wainwright, 372 U.S. 335, 343-45 (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,

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

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:

> "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 (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 (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. …

"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. 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 (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 (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 (1972) (plurality opinion); Moore v. Illinois, 434 U.S. 220, 226-229 (1977). And in United States v. Wade, 388 U.S. [218,] 226-227 [(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.)

"See United States v. Henry, 447 U.S. 264 (1980); Massiah v. United States, 377 U.S. 201 (1964). See also White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (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 (1970) (plurality opinion); Powell v. Alabama, supra, 287 U.S., at 57. 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 (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.
>
> "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 [(1981)], quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938). No such waiver has been shown, or even alleged, here."

Estelle, 451 U.S. at 469-71 (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.

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 (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, 486 U.S. 249 (1988), 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. State, 482 U.S. 905 (1987)." 486 U.S. at 254.

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,

> "[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.

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.
>
> "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. 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 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.

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 (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 (1986) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 681 (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 (1978) (conflict of interest in representation throughout entire proceeding); Chapman, supra, 386 U.S., at 23, n. 8 (citing Gideon v. Wainwright, 372 U.S. 335 (1963) (total deprivation of counsel throughout entire proceeding)); White v. Maryland, 373 U.S. 59 (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 (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 (citations omitted).

"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 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961); White v. Maryland, 373 U.S. 59 (1963).' 435 U.S., at 489. 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 (1972), for example, the Court held the admission of a confession obtained in violation of Massiah v. United States, 377 U.S. 201 (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 (1977); Gilbert v. California,

> 388 U.S. 263 (1967) (capital case); United States v. Wade, 388 U.S. 218 (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 (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.

I.

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."

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.

> "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 (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."

Satterwhite, 486 U.S. at 259-60. 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."

486 U.S. at 260.

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:

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[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

> "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."

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

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court's charge to the jury." Hicks v. State, [Ms. CR-15-0747, July 12, 2019] ___ So. 3d at ___.

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 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:

> "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 -- 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."

(Emphasis added.)

Dr. Kirkland also testified that he had 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 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."

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."

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 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 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."

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 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 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.

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 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.
>
> "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.
>
> "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."

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 ___.

Additionally, unlike in Satterwhite, Dr. Kirkland did not provide "powerful and unequivocal testimony" as to Hicks's future dangerousness. 486 U.S. at 260. 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."

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]

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[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

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.

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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

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 (1967), and applied to Sixth Amendment violations in Satterwhite v. Texas, 486 U.S. 249 (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. 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. Civ. 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. 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").

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.