

No. 14-\_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

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TRAVIS CLINTON HITTSON,

Petitioner,

-v-

GDCP WARDEN,  
Georgia Diagnostic Prison,

Respondent.

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

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Brian Kammer (GA 406322)  
Kirsten Andrea Salchow (GA 773308)  
Georgia Resource Center  
303 Elizabeth Street, NE  
Atlanta, Georgia 30307  
404-222-9202

COUNSEL FOR PETITIONER

## QUESTIONS PRESENTED FOR REVIEW

### THIS IS A CAPITAL CASE

Whether the Eleventh Circuit has correctly determined that this Court's decision in *Harrington v. Richter*, 131 S. Ct. 770 (2011), overruled *sub silentio* the holding of *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991), that "where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground."

Whether, once a finding that the state court's factual findings and/or legal analysis are unreasonable and/or contrary to clearly established Supreme Court precedent, a federal district court may nevertheless defer to the state court's unreasonable findings and conclusions despite having determined that, applying *de novo* review, a court could find that an error of constitutional magnitude had been committed.

Whether the Eleventh Circuit's misapplied the harmless error analysis of *Brecht v. Abrahamson*, 507 U.S. 619 (1993), by failing to consider the manner in which the prosecutor introduced and relied on evidence taken in violation of Mr. Hittson's Fifth and Sixth Amendment rights.

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Petitioner, Travis Clinton Hittson, respectfully petitions this Court to issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit reversing a grant of habeas relief.

Petitioner, Travis Clinton Hittson, respectfully petitions this Court to issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit reversing a grant of habeas relief.

The Eleventh Circuit, in this and several other recent cases,<sup>1</sup> has departed from the accepted and usual course of judicial proceedings in cases brought under 28 U.S.C. § 2254 by holding that the last reasoned state court decision is irrelevant if an appeal is summarily denied by state's high court, thereby ignoring the actual reasoning underlying the state court's adjudication of the claims.

The Eleventh Circuit identified as the relevant state-court ruling the Georgia Supreme Court's summary denial of an application seeking leave to appeal the state habeas court's denial of habeas corpus relief. The court reached this result by finding that this Court's decision in *Harrington v. Richter*, 131 S. Ct. 770 (2011), overruled *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), although this determination directly conflicts with decisions of this Court and sister circuits, and is unsupported by Georgia law. If the panel's decision is allowed to stand, it will require AEDPA deference to be applied to fictional decisions created by federal courts rather than review of the actual reasoning on which the state court decision was based, an approach that has no basis in the language of the AEDPA and that does disservice to the concerns for comity that underlie federal habeas review of state court decisions.

In this case, the approach permitted the Eleventh Circuit to ignore numerous instances of unreasonable findings and legal conclusions by the state court—including what the district court correctly identified as “a fundamental misunderstanding of prejudice analysis” and a failure to consider “a significant part of the evidence” (Appendix C at 38, 41)—and instead to manufacture from whole cloth what court considered a not-unreasonable basis for denying relief.

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<sup>1</sup> See e.g. *Jones v. GDCP Warden*, 753 F.3d 1171, 1182 (11<sup>th</sup> Cir. 2014); *Lucas v. Ga. Diagnostic Prison*, 771 F.3d 785, 792 (11<sup>th</sup> Cir. 2014); *Wilson v. Warden, Ga. Diagnostic Prison*, 774 F.3d 671, 678 (11<sup>th</sup> Cir. 2014).

## JURISDICTION AND OPINIONS BELOW

Jurisdiction is invoked under 28 U.S.C. § 1254.

The order by the United States District Court for the Eleventh Circuit reversing the United States District Court's grant of federal habeas relief is attached as Appendix A. The order by the United States District Court for the Eleventh Circuit denying rehearing is attached as Appendix B. The order of the United States District Court granting a writ of habeas corpus is attached as Appendix C. Appendix D is the Supreme Court of Georgia's denial of a Certificate of Probable Cause to Appeal. The order of the Superior Court of Butts County denying state habeas relief is attached as Appendix E. On December 3, 2014, Justice Thomas granted Petitioner's timely-filed motion for extension of time within which to file this Petition until February 22, 2015, which is attached at Appendix F.

## CONSTITUTIONAL PROVISIONS INVOLVED

This petition invokes the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. "No person shall be held to answer for a capital, or otherwise infamous crime...nor be deprived of life, liberty, or property without due process of law..." U.S. Const. amend. V. "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." U.S. Const. amend. VI. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law..." U.S. Const. amend. XIV §1.

## STATEMENT OF THE CASE

The defense case in mitigation attempted to demonstrate that Mr. Hittson was led into participating in the crime by his co-defendant, Edward Vollmer, who exercised an unnatural dominance and control over Mr. Hittson. To this end, defense counsel presented lay witnesses who described Mr. Hittson as a mild-mannered, gullible, needy and easily manipulated person of below-average intelligence (DOC 74-26A at 88-99, 100-105, 106-114, 138, 187) and Vollmer as manipulative, conniving, dominating and threatening. *Id.* at 120, 138, 159-60, 161, 171.

During pretrial proceedings, the defense filed discovery motions seeking, in part, all potentially exculpatory material. Doc 71-4 at 7; Doc 70-1A at 184-193. After discovering, through a telephone conversation with someone from the United States Navy, that Vollmer had received a diagnosis of anti-social personality disorder while in the Navy, Doc 59-105 at 4817-19, trial counsel filed a supplemental and more specific *Brady* motion seeking information related to the culpability, mental health, and intelligence of Vollmer, and issued subpoenas to secure certain letters written by Vollmer to various persons. Doc 70-1A at 184-193. Despite these requests, the State resisted meaningful discovery (*See generally* Doc 72-18; Doc 72-15 at 29-31; Doc 72-17 at 27-29) and continued to thwart discovery throughout Mr. Hittson's state habeas proceedings.

Also prior to trial, counsel were aware that their client had made potentially damaging statements in a compelled mental health examination, and sought to determine the admissibility of that testimony. Trial counsel received assurances from the trial court that testimony by the State's expert, Dr. Robert Storms, would not be admitted if the defense eschewed the presentation of expert mental health evidence. Relying on this ruling, the defense kept both their mental health expert and social worker off the stand, and presented only lay witness testimony. The court reversed course mid-trial and permitted Dr. Storms to testify that, during a court-ordered interview

and when asked what he thought of the victim, Mr. Hittson had referred to the victim as a “hillbilly” and an “asshole.” Despite the defense’s objection, the trial court failed to correct the error. Dr. Storms’ testimony was the only evidence presented by the state in rebuttal to the defense case in mitigation, the only expert testimony before the jury, and the last testimony the jury heard before deliberating.

Predictably, the State spotlighted the testimony during closing argument, putting the two words “Hillbilly” and “Asshole” on large poster boards alongside photographs of the victim’s mutilated remains and telling the jury while referring to the easel: “As . . . late . . . as three weeks ago this is the defendant’s response when asked about Conway Utterbeck being an innocent human being. Conway was a hillbilly, he was an asshole. Is that remorse? . . . Members of the jury, there’s no remorse here.” Doc 74-26B at 29-93, 278-79; Doc 56-90B at 215-16. Following lengthy deliberations during which the jury twice indicated members were struggling with a verdict, the jury returned a recommendation of death on March 17, 1993.

Petitioner’s co-defendant, Edward Vollmer, pled guilty and was given a parolable life sentence the following October.

On direct appeal, the Supreme Court of Georgia found no reversible error and Petitioner’s conviction and sentence were affirmed on October 31, 1994. *Hittson v. State*, 264 Ga. 682 (1994).

Petitioner filed a first Petition for Writ of Habeas Corpus in state court on December 28, 1995. During Mr. Hittson’s first state habeas proceedings, Mr. Hittson’s habeas counsel filed a request under Georgia’s Open Records Act seeking access to the Houston County District Attorney’s files relating to the prosecution of this case. Doc 75-46B at 423, 425, 428. Pursuant to this request, Mr. Hittson’s state habeas counsel was permitted to review the District Attorney’s File. In the file presented to counsel for review, no documents pertaining to Vollmer’s psychiatric

diagnosis by the Navy or copies of Vollmer's pre-trial letters beyond those already seen by trial counsel were found, although, as set forth below, subsequent events would demonstrate that the state in fact had possession of these documents and had suppressed them. *Id.* at 423.

Counsel also sought information regarding Vollmer through initiating a separate action under the Freedom of Information Act (the "FOIA Action") directed at the United States Navy. Doc 75-46B at 420-421. As a result of the FOIA Action, original state habeas counsel learned that the Navy did in fact possess a written psychiatric report on Vollmer ("Vollmer Psychiatric Report"), as well as certain letters written by Vollmer after his arrest (the "Post-Arrest Letters"). *Id.* at 421-31; 433. State habeas counsel had been provided brief descriptions of these documents in an index of documents being withheld by the Navy in response to Mr. Hittson's FOIA Action. *Id.* at 420-421. As state habeas counsel explained, these documents had not been in the file presented to state habeas counsel for review by the district attorney in response to an Open Records Act request. State habeas counsel maintained that these documents were exculpatory material pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and had been suppressed. *Id.* at 419, 429-431.<sup>2</sup>

In response, Respondent made repeated assertions to the state habeas court that the Vollmer Psychiatric Report and the Post-Arrest Letters were not in the State's possession:

Well, as far as - to my knowledge, nothing like that is in the possession of the State, was in the possession of the State at the time or trial, therefore it wouldn't be Brady material." Doc 75-46B at 421.

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<sup>2</sup> State habeas counsel made clear that these documents had not been produced in response to Mr. Hittson's Open Records Act Request, stating that "I know that in my review of the State's files, I haven't seen them." Doc 75-46B at 420.

And, again, I would state that, to my knowledge, the State is not in possession of anything of this sort. *Id.* at 422-423.

Even if they were, you know, what might be considered exculpatory material, if it wasn't in the possession of the State at the time of Mr. Hittson's trial, it is not Brady material." *Id.* at 433.

I think their basis for having a belief that the District Attorney's office was in the possession of these things may be faulty.... *Id.* at 433.

In spite of the state's representations that the Vollmer Psychiatric Report and the Post-Arrest Letters were not in its possession, state habeas counsel requested that the habeas court conduct an *in camera* inspection for *Brady* material. *Id.* at 420. Additionally, state habeas counsel explained to the court that it had been attempting to secure the materials that counsel believed might form the basis for a *Brady* claim:

We have tried as diligently as we can through the statutory means available to obtain that information. We have done it diligently and not in a dilatory fashion. We simply don't have that information. We simply didn't want it to be precluded.

*Id.* at 425. Finally, state habeas counsel asked the court to keep the record open solely on the *Brady* issue, and requested permission to supplement the record if they were to receive the Vollmer Psychiatric Report and the Post-Arrest Letters in the FOIA Action. *Id.* at 420, 432.<sup>3</sup> The habeas court denied the *Brady* claim on the record. *Id.* at 438.

On July 13, 1998 the state court denied relief and on September 29, 2000 the Supreme Court of Georgia denied Petitioner's Application for Certificate of Probable Cause to Appeal. While Petitioner's Application for Certificate of Probable Cause to Appeal was pending, the

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<sup>3</sup> Though counsel had no "procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred," *Strickler v. Greene*, 527 U.S. 263, 286-287 (1999), they nevertheless attempted to do so and were thwarted both by Respondent's assertions that the state did not possess the information sought and the court's refusal to entertain counsel's requests.

Supreme Court of Georgia overruled a key part of its earlier decision denying Petitioner's direct appeal.<sup>4</sup> On April 5, 2001, Petitioner filed a Petition for Writ of Certiorari to the Supreme Court of Georgia which was denied by this Court on May 29, 2001. *Hittson v. Turpin*, 532 U.S. 1052 (2001).

On January 4, 2002, Petitioner filed a Petition for Writ of Habeas Corpus in the Federal District Court for the Middle District of Georgia. On April 10, 2003, the district court granted Petitioner's Motion for Discovery in part, allowing Petitioner access to the Houston County District Attorney's file. After discovering previously undisclosed exculpatory evidence in the file, Petitioner filed a Motion for Stay of Federal Court Proceedings Pending Complete Exhaustion of State Remedies. On August 30, 2004, the district court granted Petitioner's motion, retaining jurisdiction over the federal habeas corpus petition until Petitioner fully exhausted his state remedies with respect to newly discovered claims. As the district court found in remanding the case back to state court, Petitioner's *Brady* claims could not reasonably have been raised in his state habeas petition because, despite Petitioner's diligence in state court in seeking to discover the evidence that would form the basis of these claims, the evidence was suppressed by the State. In fact, the State, on the record, had denied having possession of it. Doc 75-46B at 421, 422-23, 433.

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<sup>4</sup> On direct appeal, Petitioner's attorneys had argued that Petitioner's Fifth Amendment right against self-incrimination was violated when, despite the fact that Petitioner called no mental health experts to testify on his behalf, the state was permitted to present a mental health expert to repeat statements made by Petitioner during a court-ordered psychological evaluation. The Supreme Court of Georgia held that the testimony was properly admitted. *Hittson*, 264 Ga. at 685. The court later overruled this holding, ruling that when a defendant must submit to a court-ordered mental health examination, the state expert may testify *only* in rebuttal to the testimony of a defense expert or to rebut the testimony of the defendant himself. *Nance v. State*, 272 Ga. 217, 220 (2000) ("To the extent [*Hittson*] authorized a State expert to testify in response to lay witness testimony that the defendant was remorseful, it is overruled.").

On July 22, 2005, Petitioner filed a second petition in the state habeas court raising three claims that could not reasonably have been raised in his first state habeas petition, including his claim that the state had suppressed material exculpatory evidence bearing on his death sentence. On August 1, 2005, Respondent filed its Return and Answer and a motion to dismiss the petition. On October 5, 2005, without a hearing, the habeas court entered an order summarily dismissing the petition as successive.

On January 5, 2006, Petitioner filed application for Certificate of Probable Cause to Appeal with the Supreme Court of Georgia. On October 2, 2006, the Supreme Court of Georgia granted Petitioner's application and remanded the case to the Habeas Court to conduct a hearing. An evidentiary hearing was held on November 29-30, 2007. On January 30, 2009, the Habeas Court signed Respondent's proposed order, procedurally defaulting most claims, alternatively denying them on the merits, and denying all relief, *verbatim*. Appendix E.

Thereafter, Petitioner filed a timely notice of appeal and an Application for Certificate of Probable Cause to Appeal with the Supreme Court of Georgia. The application was denied on October 18, 2010. On July 11, 2011, Petitioner filed an Amended Petition for Writ of Habeas Corpus in the United States District Court for the Middle District of Georgia. On November 13, 2012, the district court issued the writ on the two claims arising from the trial court's erroneous admission of expert testimony regarding statements obtained in violation of Petitioner's Fifth and Sixth Amendment Rights, and vacated his death sentence.

On November 27, 2012, Respondent appealed the grant of relief to the United States Court of Appeals for the Eleventh Circuit and Petitioner cross-appealed. After briefing and argument, the Eleventh Circuit issued a panel decision reversing the district court's grant of relief. The Eleventh Circuit expressly declined to follow *Ylst*, 501 U.S. at 803-05, which held that a state

court's summary affirmance of a lower court ruling was presumed to rest on the reasons set forth in the last-reasoned state court decision on the claim. Instead, the Eleventh Circuit concluded that the Georgia Supreme Court's one-sentence denial of a certificate of probable cause to review the superior court's opinion was a merits decision and that, under *Richter*, 131 S. Ct. at 770, a federal court must ignore the superior court's reasoning and instead determine what, if any, arguments or theories could have supported the state court's decision. Appendix A at 37-39.

This Petition follows.

### REASONS FOR GRANTING THE WRIT

#### **I. THE ELEVENTH CIRCUIT'S DECISION TO NOT TO REVIEW THE STATE HABEAS COURT'S REASONED DECISION CONSTITUTED AN UNWARRANTED DEPARTURE FROM BINDING SUPREME COURT LAW.**

The Eleventh Circuit, in this and several other recent cases,<sup>5</sup> has departed from the accepted and usual course of judicial proceedings in cases brought under 28 U.S.C. § 2254 by holding that the last reasoned state court decision is irrelevant if an appeal is summarily denied by a higher state court, thereby ignoring the actual reasoning underlying the state courts' adjudication of the claims. The Eleventh Circuit has reached this result by finding that this Court's decision in *Harrington v. Richter*, 131 S. Ct. 770 (2011), overruled *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), although *Richter* does not purport to overrule *Ylst* and, in fact, cites to that case with approval, albeit on a separate issue. *Richter*, 131 S. Ct. at 785 (citing *Ylst*, 501 U.S. at 803). The Eleventh

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<sup>5</sup> See e.g. *Jones v. GDCP Warden*, 753 F.3d 1171, 1182 (11<sup>th</sup> Cir. 2014); *Lucas v. Ga. Diagnostic Prison*, 771 F.3d 785, 792 (11<sup>th</sup> Cir. 2014); *Wilson v. Warden, Ga. Diagnostic Prison*, 774 F.3d 671, 678 (11<sup>th</sup> Cir. 2014).

Circuit's determination, moreover, is fueled by the court's erroneous construction of Georgia law and is at odds with decisions from both its sister circuits and this Court, which have continued to view the last reasoned state court decision as the decision to be reviewed in federal habeas corpus proceedings under the AEDPA.

**A. THIS COURT'S POST-*RICHTER* DECISIONS REVEAL NO INTENT TO DEPART FROM THIS COURT'S EARLIER RULING IN *YLST*.**

The Georgia Supreme Court (as discussed below) does not consider its refusal to review a state habeas court's decision denying relief to be a merits ruling. *See* Section I(B), *infra*. Even assuming, however, that the panel correctly interpreted the Georgia Supreme Court's denial of the application for certificate of probable cause to appeal to be a considered ruling on the merits of the petition, the panel was nonetheless ill-advised to adopt that order as the relevant merits ruling subject to federal habeas review. Although, in reaching that conclusion, the panel purported to rely on this Court's decision in *Richter*, nothing in *Richter* supports the panel's departure from this Court's binding precedent.

This Court has held that, “[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim **rest upon the same ground.**” *Ylst*, 501 U.S. at 803 (emphasis added). This Court's decision in *Richter* did not alter this rule. The issue in *Richter* had nothing to do with how a federal court should identify the state court decision subject to federal review.

*Richter* involved a petitioner whose original habeas corpus petition to the California Supreme Court was denied “in a one-sentence summary order.”<sup>6</sup> *Richter*, 131 S. Ct. at 783. In federal habeas proceedings, the Ninth Circuit, sitting *en banc*, suggested the state supreme court’s summary denial of the habeas petition was not a ruling on the merits and that, accordingly, 28 U.S.C. § 2254(d) did not constrain consideration of petitioner’s claims. *Id.* This Court disagreed, observing that “[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.” *Richter*, 131 S. Ct. at 784-85. Such presumption may be rebutted “when there is reason to think some other explanation for the state court’s decision is more likely.” *Id.* at 785. Where the state court has provided no explanation for its merits ruling, “the habeas petitioner’s burden still must be met by showing there was no reasonable basis for the state court to deny relief.” *Id.* at 784.

In *Richter*, there was only one state court ruling on petitioner’s ineffective-assistance-of-counsel claim and that ruling, this Court concluded, was presumptively on the merits and thus entitled to deference under the AEDPA. Nothing in that decision purported to limit or modify in any fashion the Court’s distinct determination in *Ylst* that, where there are multiple state court

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<sup>6</sup> The habeas petition was filed directly in the California Supreme Court under that court’s original jurisdiction. “California’s system of habeas review . . . is unusual in that there is no way for a prisoner seeking post-conviction relief to formally appeal a lower court’s decision. . . . Instead, each level of the California court system has original jurisdiction over habeas petitions, and a petitioner . . . faced with an unfavorable result in a lower court must file an original petition with the higher state court.” *Maxwell v. Roe*, 628 F.3d 486, 495 (9th Cir. 2010) (internal citation omitted).

rulings, a federal habeas court must “look through the subsequent unexplained denials” to “the last reasoned decision.” *Ylst*, 501 U.S., at 804, 806.<sup>7</sup>

Here, as in *Ylst*, there was a reasoned state-court judgment to examine. The district court heeded *Ylst* and examined that decision to conclude the state court had unreasonably denied Mr. Hittson relief. The Eleventh Circuit panel, however, declined to examine the state habeas court order.

The panel decision, expressly refusing to follow *Ylst*, is incorrect and must be vacated. This is aptly demonstrated by numerous decisions from United States Circuit Courts of Appeal<sup>8</sup> and, most importantly, this Court that continue to follow *Ylst*’s “look-through” doctrine post-*Richter*. See, e.g., *Metrish v. Lancaster*, 133 S.Ct. 1781, 1786 (2013) (in a case in which the Michigan Supreme Court declined to review Petitioner’s denial of relief, in a reasoned opinion, by the lower court, this Court stated that “to obtain federal habeas relief under AEDPA strictures, [Petitioner] must establish that, in rejecting his due process claim, the Michigan Court of Appeals [not the Michigan Supreme Court] unreasonably applied federal law.”); see also *Johnson v. Williams*, 133 S. Ct. 1094-99 and 1094 n.1 (2013) (noting that “[c]onsistent with our decision in *Ylst* . . . , the Ninth Circuit ‘look[ed] through the California Supreme Court’s summary denial of Williams’ petition for review and examined the California Court of Appeals’ opinion, the last

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<sup>7</sup> To the contrary, the *Richter* Court cited *Ylst* with approval, albeit on a separate matter. *Richter*, 131 S. Ct. at 785 (citing *Ylst*, 501 U.S. at 803).

<sup>8</sup> Every circuit outside of the Eleventh to have addressed the issue continues to review the last reasoned state habeas court decision. See *Martinez v. Hartley*, 413 Fed. Appx. 44, 47 n 3 (10<sup>th</sup> Cir. 2011); *Cannedy v. Adams*, 706 F.3d 1148, 1158 (9<sup>th</sup> Cir. 2013); *Worthington v. Roper*, 631 F.3d 487,497 (8<sup>th</sup> Cir. 2011) *Wooley v. Rednour*, 702 F.3d 411, 421-22 (7<sup>th</sup> Cir. 2012); *Wogenstahl v. Mitchell*, 668 F.3d 307, 340 (6<sup>th</sup> Cir. 2012); *Blystone v. Horn*, 664 F.3d 397, 417 n 15 (3<sup>rd</sup> Cir. 2011); *Sanchez v. Roden*, 753 F.3d 279, 298 n 13 (1<sup>st</sup> Cir. 2014).

reasoned state-court decision to address” the claim and reviewing the court of appeals’ reasoned ruling, rather than the state supreme court’s summary denial).

**B. THE SUPREME COURT OF GEORGIA’S DENIAL OF REVIEW IS NOT A MERITS DECISION, AND COMITY AND FEDERALISM PRINCIPLES PROHIBIT FEDERAL COURTS FROM TREATING IT AS SUCH.**

The Eleventh Circuit justified its application of *Richter* in this manner by misconstruing the Georgia Supreme Court’s denial of leave to appeal a ruling adverse to habeas petitioner as a decision on the merits, rather than what it is under state law – a denial of leave to appeal. Left uncorrected, this logical misstep sanctions outright disregard of comity to state courts and elementary federalism principles.

“Georgia law does not allow for a direct appeal as of right of the denial of a habeas petition but rather provides for a discretionary appeal procedure whereby an unsuccessful petitioner may seek a certificate of probable cause to appeal to the Supreme Court of Georgia.” *Mancill v. Hall*, 545 F.3d 935, 939-40 (11<sup>th</sup> Cir. 2008). Under Georgia law, “[i]f an unsuccessful [habeas] petitioner desires to appeal, he must file a written application for a certificate of probable cause to appeal with the clerk of the Supreme Court within 30 days from the entry of the order denying him relief.” O.C.G.A. § 9-14-52(b). “The Supreme Court shall either grant or deny the application within a reasonable time after filing.” *Id.* The statute does not define the term “probable cause.”

By contrast, the warden is entitled to appeal any ruling adverse to the state: “If the trial court finds in favor of the petitioner, no certificate of probable cause need be obtained by the respondent *as a condition precedent to appeal.*” *Id.* § 9-14-52(c) (emphasis added).<sup>9</sup>

If the warden appeals, or if the Supreme Court of Georgia grants the petitioner leave to appeal, the parties file briefs addressing the issues on appeal, Ga. Sup. Ct. R. 10; and, in a capital case, the court automatically hears oral argument, Ga. Sup. Ct. R. 50(1).<sup>10</sup> No such process is provided on an application for a certificate of probable cause to appeal. Instead, pursuant to the court’s rules, the petitioner must demonstrate that there is “arguable merit” and must have complied with O.C.G.A. § 9-14-52(b) in order to be granted a certificate of probable cause to appeal. Ga. Sup. Ct. R. 36. The phrase “arguable merit” is not defined, and Rule 36 does not indicate whether it is the petition that must have “arguable merit” or the underlying claims. The court, when rejecting an application for certificate of probable cause to appeal, does not purport to “affirm” the underlying opinion,<sup>11</sup> but rather states only that the application for certificate of probable cause to appeal the denial of habeas corpus has been denied. *See* Appendix C.

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<sup>9</sup> In *Reed v. Hopper*, 235 Ga. 298 (1975), the Supreme Court of Georgia held that the Equal Protection Clause was not offended by the legislative decision to “giv[e] the warden a right to appeal and . . . the prisoner the right to appeal upon a showing of probable cause” because “a judgment adverse to the warden reverses the sentence already imposed and presumed to be legal and will require further proceedings by the state,” whereas “a judgment adverse to the prisoner reaffirms the sentence.” *Id.* at 300. In dissent, Justice Jordan (joined by Justice Ingram) warned that the “doctrine of ‘selective review . . . is a dangerous one and is clearly unconstitutional,” and creates a risk that “[s]even ‘lazy’ or incompetent judges, by failing to find probable cause in any case, could thereby abolish appellate review.” *Id.* at 301 (Jordan, J., dissenting).

<sup>10</sup> Rule 50(1) provides in pertinent part that “appeals following the grant of applications of certificates of probable cause to appeal in habeas corpus cases where a death sentence is under review, and appeals in habeas corpus cases where a death sentence has been vacated in the lower court will be placed on the calendar automatically, and oral argument in such cases is mandatory . . . .”

<sup>11</sup> Under its rules, the court is authorized to issue an affirmance without opinion. Ga. Sup. Ct. R. 59. Such decisions typically state “[t]he judgment of the court below is affirmed without opinion pursuant

The grant of a certificate of probable cause to appeal does not mean that the habeas petition ultimately succeeds on the merits, and the ruling that issues under such circumstances clearly indicates that the court is “affirming” the lower court judgment, rather than “denying” the appeal. *See, e.g., Brown v. State*, 290 Ga. 50, 50 (2011) (affirming lower court judgment after granting CPC); *Whatley v. Terry*, 284 Ga. 555, 555 (2008) (same); *Wright v. Hall*, 281 Ga. 318, 318 (2006) (same); *Brand v. Szabo*, 263 Ga. 119, 119 (1993) (same); *Smith v. Francis*, 253 Ga. 782, 782 (1985) (same); *Hamm v. Weldon*, 252 Ga. 213, 213 (1984). A certificate of probable cause to appeal is a jurisdictional precursor, along with a notice of appeal, to review by the Georgia Supreme Court. *Fullwood v. Sivley*, 271 Ga. 248, 251 (1999).

The panel’s conclusion that the Georgia Supreme Court’s denial of a certificate of probable cause to appeal was an adjudication on the merits finds no support in Georgia’s actual habeas corpus procedure. To the contrary, that procedure establishes a very clear distinction between a petitioner’s request for leave to appeal an adverse ruling and the appellate review that follows either the warden’s appeal from an adverse ruling or the Georgia Supreme Court’s grant to the petitioner of a certificate of probable cause to appeal. Moreover, the Georgia Supreme Court’s language clearly distinguishes between instances in which it “affirms” a lower court ruling and those in which it “denies” an application for leave to appeal. That the state supreme court purports to grant or deny applications for certificates of probable cause to appeal on the basis of an undefined standard hardly demonstrates that the court’s denial of leave to appeal in this case was based on a merits review of the issues.

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to Supreme Court Rule 59,” *State v. Colack*, 273 Ga. 361, 361 (2001), or “the judgment is affirmed without opinion pursuant to Rule 59,” *Dennis v. State*, 251 Ga. 845, 845 (1984).

Federal courts *cannot* disregard binding decisions from state high courts about what state law means. See *Veale v. Citibank, F.S.B.*, 85 F.3d 577, 580 (11th Cir. 1996) (“In matters of state law, federal courts are bound by the rulings of the state’s highest court.”). To call a CPC denial a decision on the merits, irrespective of the Georgia Supreme Court’s construction of Georgia law, is to do just that.

**II. THE DISTRICT COURT CORRECTLY FOUND THAT THE STATE HABEAS COURT’S ORDER REGARDING MR. HITTSON’S *BRADY* CLAIMS WAS BASED UPON UNREASONABLE FINDINGS OF FACT AND AN UNREASONABLE APPLICATION OF *BRADY* BUT INCORRECTLY FAILED TO REVIEW MR. HITTSON’S CLAIM *DE NOVO*.**

The Eleventh Circuit, rather than reviewing the district court’s findings regarding the applicability of 28 U.S.C. § 2254(d)(1) & (2) to the reasoned stated court opinion in this case, determined only (pursuant to its erroneous failure to follow *Ylst*) “if there [was] any reasonable basis to support the court’s denial of relief.” Appendix A at 83-84. As argued in Section I, *supra*, this approach was improper. The correct approach would have been to review the reasoned state court opinion to determine if 28 U.S.C. § 2254(d)(1) & (2) were met, and then (because, as the district court found, that decision was filled with unreasonable errors of fact and law) to correct the district court’s erroneous decision to nevertheless accord deference to the state court opinion.

The district court correctly found that “the second state habeas court’s decision [that the state had not suppressed the Vollmer psychiatric report] was based on an unreasonable determination of the facts and involved an unreasonable application of *Brady* [*v. Maryland*].” Appendix C at 28. However, although the district court identified and described numerous unreasonable errors, both factual and legal, on which the state habeas court relied in arriving its opinion that the Vollmer psychiatric report and the Vollmer post-arrest letters were not material,

the district court refrained from granting the Writ because it nonetheless deferred to the state habeas court's ultimate conclusion, rather than reviewing the *Brady* claim *de novo*. Appendix C at 32-44. *See Early v. Packer*, 537 U.S. 3, 8 (2002) (§2254 does not preclude relief if either “the reasoning [or] the result of the state-court decision contradicts” clearly established Supreme Court precedent.).

The errors identified by the district court reflected, in the district court's words, a “fundamental misunderstanding of prejudice analysis” (Appendix C at 41) in addition to unreasonable fact findings which led to further unreasonable legal analysis. For instance:

The finding that led the court, in its prejudice analysis, to dismiss Dr. Brittain's testimony is clear factual error. The court's order stated that “Petitioner's own expert Dr. Brittain stated in his affidavit that in order to properly evaluate the relationship between Petitioner and Vollmer, he would also have to evaluate Vollmer.” (Doc. 63-1 at 25). The court found “Petitioner has failed to prove that Vollmer would have submitted to such an evaluation....” (Doc. 63-1 at 25). The problem with this is that Dr. Brittain's affidavit said no such thing; he never said or even suggested that he needed to evaluate Vollmer. Thus, based on an erroneous factual finding, the second state habeas court did not consider a significant part of the evidence relied on by Hittson to prove prejudice to overcome procedural default.

Appendix C at 38. The failure to consider a “significant part of the evidence” is unreasonable. *See, e.g., Porter v. McCollum*, 130 S.Ct. 447, 456 (2009) (courts may not altogether decline to consider or unreasonably discount “mitigation evidence adduced in the postconviction hearing”).<sup>12</sup> Additionally, the state habeas court unreasonably found that possession of the suppressed evidence would not have altered trial counsel's strategy, in direct contradiction of the evidence. Appendix C at 40 (“If, however, that finding meant to suggest that trial counsel's strategy regarding mental

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<sup>12</sup> The standard for materiality under *Brady* is identical to the prejudice standard under *Strickland v. Washington*, 466 U.S. 668, 694 (1984). *See United States v. Bagley*, 473 U.S. 667, 682 (1985).

health evidence would not have changed, it clearly is unreasonable and is not supported at all by the record.”).

Furthermore, the state habeas court found that the suppressed evidence—individually and cumulatively—was cumulative of that presented at Mr. Hittson’s trial. Appendix E at 29; 49-50. In so finding, the state court failed to address the quality of the suppressed evidence, looking instead only to the similarity of the evidence. Appendix E at 49-50; *See Cone v. Bell*, 129 S.Ct. 1769, 1784 (2009). The district court, however, correctly found that “the psychiatric evidence Hittson now has and Vollmer’s writings about the prosecution’s supposed bumbling and fumbling and his control over the entire process are not at all cumulative of the evidence the jury heard.” Appendix C at 41.

Lastly, the state habeas court held that the Vollmer psychiatric report was not material because there was overwhelming evidence of guilt and that “there is simply no doubt that [Hittson] is guilty of malice murder and that the inclusion of co-defendant Vollmer’s psychiatric report would have had no effect on this verdict.” Doc 63-1 at 29; *see also id.* at 34, 49. As the district court found, it was not evident that the state habeas court evaluated the materiality of the suppressed Psychiatric report with regard to the sentencing phase. Appendix C at 42-43. The order’s treatment of the evidence as it related to the mitigation of Mr. Hittson’s sentence was summary at best. Appendix E at 28-29; *Cone*, 129 S.Ct. at 1784-85 (The lower court’s treatment of the evidence as it related to mitigation was “summary” and “[b]ecause the evidence suppressed at Cone’s trial may well have been material to the jury’s assessment of the proper punishment in this case” the United States Supreme Court “conclude[d] that a full review of the suppressed evidence and its effect [was] warranted.”)

These unreasonable findings of fact and legal errors were not ancillary to the state habeas court's findings but were central to the state habeas court's decision not to grant relief, and permitted the district court to review the issue of prejudice *de novo* and grant the Writ. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 531 (2003) (where state court fact-finding is clearly in error, *de novo* review of the facts and claim based on those facts is mandated). And, as the district court stated, “[a] court applying a *de novo* standard of review could conclude that Vollmer’s psychiatric report and his post-arrest letters mere material. Certainly a court conducting a *de novo* review could reasonably find, in a cumulative analysis, that had jurors heard the suppressed evidence, there is a reasonable probability that they would not have sentenced Hittson to die.” Appendix C at 44.

The district court’s finding that the suppressed evidence was material is supported by the record. Trial counsel’s effort at trial to demonstrate Vollmer’s malign influence over Mr. Hittson consisted of presenting lay witnesses who were personal acquaintances of Mr. Hittson and therefore vulnerable to allegations of bias. Unlike the lay testimony presented at trial, the suppressed evidence was derived, in one instance, from an authoritative, neutral source—lending necessary credibility to the testimony of lay witnesses,<sup>13</sup> and in the other instance, from Vollmer himself. Not one of the witnesses presented were medical professionals or otherwise qualified to do anything more than describe, anecdotally, Vollmer’s behavior. Had the lay testimony been accompanied by proof that Vollmer’s behavior reflected a medically diagnosed personality disorder established prior to the crime and not in anticipation of litigation, the credibility of these

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<sup>13</sup> *Napue v. People of State of Ill.*, 360 U.S. 264, 269 (1959) (“The jury’s estimate of the truthfulness and reliability of a given witness may well be determinative. . .”)

witnesses' statements would have been bolstered immeasurably. This missing piece of evidence would have placed the witness' observations within the larger context of Vollmer's mental health diagnosis and dissuaded the jury from perceiving the testimony as the subjective impressions of friendly witnesses whose testimony was solicited by defense counsel in anticipation of a trial. The Vollmer evaluation would have demonstrated that these witnesses' recollections of Mr. Vollmer's personality were not after-the-fact rationalizations but were consistent with the diagnosis recognized by Navy mental health professionals more than a year before the crime took place and would have affected the credibility of virtually all other evidence presented. Like the suppressed evidence in *Cone v. Bell*, 129 S.Ct. 1769 (2009), this evidence would have “strengthened the inference[s]” that the jury could glean from the case presented by defense counsel and “len[t] support” to the evidence counsel did have. *Cone*, 129 S.Ct. at 1783.

Furthermore, a diagnosis of anti-social personality disorder, unmitigated by other evidence, is commonly understood to carry a great deal of weight with juries. Anti-social personality disorder, “a disorder also referred to as psychopathy or sociopathy . . . is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others.” *Roper v. Simmons*, 543 U.S. 551, 573 (2005). Courts have consistently recognized the degree to which jurors respond negatively to this diagnosis, presuming the individual diagnosed is corrupt, violent and irredeemable. *E.g. DeYoung v. Schofield*, 609 F. 3d 1260, 1288 (11th Cir. 2010) (finding no ineffectiveness where trial counsel failed to introduce psychiatric testimony that “would have opened the door to harmful evidence” of anti-social personality disorder); *Reed v. Sec’y, Florida Dept. of Corr.*, 593 F. 3d 1217, 1237 (11th Cir. 2010) (citing state court’s finding that trial counsel was not deficient for failure to introduce psychiatric evidence that would have included a diagnosis of anti-social personality disorder); *Ward v. Hall*, 592 F. 3d 1144 (11th Cir. 2010) (noting district

court's observation that a trial attorney worried that "the anti-social personality disorder diagnosis was harmful. . .and, if presented, would be seized upon by the state. . .").

After Vollmer's medical diagnosis, his writing is the best evidence of Vollmer's sophistication, dominance, arrogance, self-assurance, manipulation, and control. The Post-Arrest Letters support, illustrate and emphasize the stark contrast (testified to by lay witnesses) between the two co-defendants. Additionally, these letters reference the crime and are the only recorded acknowledgment made by Vollmer of his involvement. While trial counsel did have two letters written by Vollmer which provided some evidence of his grandiosity and violence, neither of those letters contained his admission to his participation in the crime or established Vollmer's absolute lack of remorse and perceived invulnerability. They are compelling particularly because they are the words of the co-defendant himself, neither filtered nor interpreted by a witness:

A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.... [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so."

*Arizona*, 499 U.S. at 296, quoting *Bruton v. United States*, 391 U.S. 123, 139–140 (1968) (WHITE, J., dissenting).

Combined,<sup>14</sup> the suppression of this evidence deprived Mr. Hittson of a fair trial. *Kyles*, 514 U.S. at 434 ("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial,

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<sup>14</sup> Suppressed evidence must be considered collectively in determining materiality. *Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995).

understood as a trial resulting in a verdict worthy of confidence.”). Even without benefit of the evidence that had been suppressed by the State, the jury indicated, twice, that it was struggling with the notion of sentencing Mr. Hittson to death when it asked the judge for a definition of a life sentence and the likelihood that Mr. Hittson would ever be paroled.<sup>15</sup> The implication is clear: The jury was looking for an alternative to the death sentence, even in the absence of the compelling mitigation evidence that was suppressed. *United States v. Agurs*, 427 U.S. 97, 113 (1976) (Addressing a *Brady* issue in the context of guilt, the United States Supreme Court stated that “if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.”). Had the jury been aware of the information that the state suppressed, there is a reasonable probability that at least one juror’s vote would have been different.<sup>16</sup>

The materiality of the suppressed materials is perfectly illustrated by the district attorney’s written statement to the parole board opposing parole for Vollmer. The district attorney, having had access to materials never disclosed to Mr. Hittson at his trial or to Mr. Hittson’s jury, formed the following opinion of Vollmer in relation to Mr. Hittson:

In February, 1993, Travis Hittson was tried, convicted and sentenced to death for his participation in the murder. In October of that year, Vollmer entered a plea of guilty to murder and was sentenced to life imprisonment. Although he received the "lesser" sentence, it is evident from the information received in the investigation **that Vollmer was the instigator in the murder, that he convinced Hittson to do**

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<sup>15</sup> During sentencing phase deliberations, the jury sent two notes to the judge concerning the meaning of a life sentence. The jury notes read: "With a sentence of life imprisonment, does the court intend that the defendant will have no opportunity for freedom from incarceration?" and "Does a verdict of 'life imprisonment' mean that the defendant would ever be eligible [sic] for parole or a reduced sentence on the basis of good behavior?" Doc 74-26B at 336-373, 340-341.

<sup>16</sup> In Georgia, one juror holding out against a sentence of death will result in a life or life without parole sentence. O.C.G.A. § 17-10-31.

**it, that the manner of disposing of the body was Vollmer's idea, and that Vollmer is, in a word, EVIL!** As you consider the following material, you will be able to see that this inmate has a perverted mind and has no capacity for remorse. Not only does the heinous nature of the crime warrant his remaining in prison, but the fact that he is clearly incorrigible and would be extremely dangerous if ever released back into society.

Doc 56-92A & B at 684-808 (emphasis added). This opinion of Vollmer was precisely what trial counsel's strategy at trial was intended to evoke in the minds of Mr. Hittson's jurors, and, armed with the evidence suppressed by this same District Attorney, that is what trial counsel could have accomplished within reasonable probability.

### **III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT RELIEF WAS DUE ON MR. HITTSON'S *ESTELLE* CLAIMS.**

Dr. Storms' testimony that Mr. Hittson thought the victim was a hillbilly and an asshole — the admission of which was, as the State now concedes, a violation of *Estelle v. Smith*, 451 U.S. 454 (1981) — changed the landscape for the State's argument in favor of a death sentence. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (holding an error is not harmless if it “had a substantial and injurious effect or influence in determining the jury's verdict” (internal quotation marks omitted)).

By concluding the error was actually harmless, the panel opinion entirely overlooks an important context in which Dr. Storms' testimony mattered, ignored the weight of the testimony in light of Dr. Storms' professed position as a neutral expert (and the only expert who testified at sentencing), and disregarded the centrality of Mr. Hittson's purported statements to the prosecutor's closing argument and the degree to which the jury struggled to reach its sentencing decision.

The testimony did not merely rebut evidence of remorse, nor was it simply corroborating evidence of the aggravating circumstance found by the jury. It was evidence that the defense case in mitigation—that Mr. Hittson was a nonviolent, mild-mannered, passive, and vulnerable individual—was contrived. As the Eleventh Circuit noted, trial counsel’s strategy was built primarily upon the notion that Mr. Hittson was “sort of a needy kind of **harmless** little guy, and that Mr. Vollmer was the brains of this operation and basically manipulated [Mr. Hittson] into doing something that he would never have done.” Appendix A at 48. Dr. Storms’ testimony provided evidence that Mr. Hittson may have had independent motivation for his actions and a personal animus and desire to do violence against Mr. Utterbeck. Dr. Storms’ testimony also provided evidence that Mr. Hittson had so little regard for human life that he would call the decedent a hillbilly and an asshole after he brutally murdered him. All of this runs counter to the defense case in mitigation—it was, in fact, was the *only* evidence to counter the defense presentation, and the last evidence the jury heard—and it carried the weight not only of an expert but a self-professed neutral expert who had not been retained by the State (when in fact he had been). Doc 74-26B at 264; *Napue*, 360 U.S. at 269 (“The jury’s estimate of the truthfulness and reliability of a given witness may well be determinative. . .”).

It is abundantly clear that the State considered the admission of Dr. Storms’ testimony to be central to its attempt to secure a death sentence. There is unrebutted testimony that, for the *entirety* of the State’s closing argument, the jury had before it poster boards displaying the victim’s mutilated remains and but two words, “hillbilly” and “asshole.” The jury, following the gestures of the prosecutor, undoubtedly gazed at those boards while contemplating the State’s admonition that, “*this* is the defendant’s response when asked about Conway Utterbeck being an innocent human being.” Doc 74-26B, at 29-93, 278-79; Doc 56-90B, at 215-16 (emphasis added). The

State also emphasized, and the court's instructions reiterated, that the jury could "consider the actions of the defendant . . . after the commission of the murder" when deciding whether the offense involved depravity of mind. *Id.* at 287, 308

Mr. Hittson's case was a close one, where the jury struggled and sent out two notes to the trial judge asking whether "life imprisonment" would ever allow for the possibility of parole or release. Doc 74-26B at 336-337, 340-41. If we assume (as we must<sup>17</sup>) that the jury listened attentively to the parties' arguments and the court's instructions, it is impossible to maneuver around the substantial and injurious influence of seeing those words in large print next to a mutilated corpse on the jury's finding that Petitioner was exceptionally dangerous, brutal, and personally worthy of a death sentence.

Lastly, the Eleventh Circuit's reliance on the concept that Mr. Hittson's words suggested simply that he disliked Mr. Utterbeck, in conjunction with the fact that the "State never identified a concrete motive for the murder," Appendix A at 49-50, is merely additional evidence in favor of a finding of substantial and injurious effect. It is the height of absurdity to declare that the killing and dismembering another human being based upon no greater passion or purpose than mere dislike would minimize Petitioner's culpability or make him appear to be anything short of a psychopath.

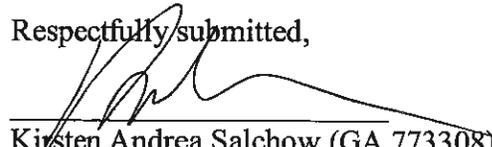
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<sup>17</sup> See, e.g., *Adams v. Wainwright*, 709 F.2d 1443, 1447 (11th Cir. 1983) ("A jury is presumed to follow jury instructions."); *United States v. Stone*, 9 F.3d 934, 938-39 (11th Cir. 1993) (noting jurors are well equipped to analyze evidence and to apply evidence to the law (citing *Griffin v. United States*, 502 U.S. 46, 59-60 (1991))).

CONCLUSION

Petitioner prays that this Court grant the Petition for Writ of Certiorari in order to correct the United States Court of Appeals for the Eleventh Circuit's erroneous determinations of law.

Respectfully submitted,



Kysten Andrea Salchow (GA 773308)  
Brian Kammer (GA 406322)  
Georgia Resource Center  
303 Elizabeth Street, NE  
Atlanta, Georgia 30307  
404-222-9202

Counsel for Mr. Hittson

# **APPENDIX A**

**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING  
56 Forsyth Street, N.W.  
Atlanta, Georgia 30303

John Ley  
Clerk of Court

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July 09, 2014

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 12-16103-P  
Case Style: Travis Hittson v. GDCP Warden  
District Court Docket No: 5:01-cv-00384-MTT

**This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.** Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the CRIMINAL JUSTICE ACT must file a CJA voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for a writ of certiorari (whichever is later).

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Jan S. Camp at (404) 335-6171.

Sincerely,

JOHN LEY, Clerk of Court

Reply to: Jan S. Camp  
Phone #: 404-335-6161

OPIN-1 Ntc of Issuance of Opinion

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 12-16103

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D.C. Docket No. 5:01-cv-00384-MTT

TRAVIS CLINTON HITTSON,

Petitioner – Appellee–Cross Appellant,

versus

GDCP WARDEN,

Respondent – Appellant–Cross Appellee.

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Appeal from the United States District Court  
for the Middle District of Georgia

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(July 9, 2014)

Before CARNES, Chief Judge, TJOFLAT and WILSON, Circuit Judges.

TJOFLAT, Circuit Judge:

In April 1992, Travis Hittson and Edward Vollmer, who were enlisted men in the Navy, brutally killed, mutilated, and dismembered their shipmate Conway Utterbeck. Hittson confessed to the crime, and in February 1993 he was convicted of murder in the Superior Court of Houston County, Georgia. During the penalty phase of his trial,<sup>1</sup> Hittson tried to show that his co-defendant, Vollmer, had planned the murder and manipulated Hittson into helping him carry it out. This strategy fell short and the jury returned a unanimous death sentence, finding as an aggravating factor that the murder “was outrageously or wantonly vile, horrible, or inhuman.” See O.C.G.A. § 17-10-30(b)(7).

After Hittson exhausted his direct appeal and collateral attack remedies in the Georgia courts, he petitioned the United States District Court for the Middle District of Georgia for a writ of habeas corpus pursuant 28 U.S.C. § 2254. In his petition, Hittson presented twenty separate claims for relief. Those relevant to this appeal concern the penalty phase of his trial: (1) The trial court erroneously allowed the State’s psychologist to testify to statements made by Hittson during a court-ordered mental-health examination, in violation of Hittson’s Fifth Amendment right against self-incrimination and Sixth Amendment right to the

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<sup>1</sup> Georgia death-penalty cases proceed in two phases. If a defendant is found guilty of a capital offense during the guilt phase, then the case proceeds to the penalty phase, during which the same jury must unanimously find at least one statutory aggravating factor in order to return a death sentence. See O.C.G.A. §§ 17-10-2(c); 17-10-31(a).

effective assistance of counsel.<sup>2</sup> (2) Hittson’s attorneys failed to properly present to the jury expert testimony regarding his background and mental condition, thus denying him his Sixth Amendment right to the effective assistance of counsel. And (3) the State withheld exculpatory evidence in violation of the Due Process Clause of the Fourteenth Amendment and the rule of Brady v. Maryland<sup>3</sup>—to wit, a Navy psychiatric report diagnosing Vollmer with severe Antisocial Personality Disorder, and two letters written by Vollmer from jail following his arrest, in which he discussed the murder.

The District Court found that Hittson was entitled to habeas relief from his death sentence based on the State psychologist’s testimony. Hittson v. Humphrey, No. 5:01–cv–384 (MTT), 2012 WL 5497808, at \*56 (M.D. Ga. Nov. 13, 2012). The court found that trial court’s allowance of the psychologist’s testimony denied Hittson his Fifth and Sixth Amendment rights under Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981),<sup>4</sup> and that the testimony had a “substantial and injurious effect” on the jury’s death sentence and was therefore

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<sup>2</sup> The Sixth Amendment right to counsel and the Fifth Amendment right against self-incrimination have been made applicable to the states through the Fourteenth Amendment’s Due Process Clause. See Duncan v. Louisiana, 391 U.S. 145, 148, 88 S. Ct. 1444, 1447, 20 L. Ed. 2d 491 (1968).

<sup>3</sup> 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

<sup>4</sup> More accurately, the District Court found, under § 2254(d)(1), that the Georgia Supreme Court unreasonably applied Estelle in concluding that the trial court’s admission of the psychologist’s testimony into evidence did not deny Hittson his Fifth and Sixth Amendment rights.

not harmless, see Brecht v. Abrahamson, 507 U.S. 619, 638, 113 S. Ct. 1710, 1722, 123 L. Ed. 2d 353 (1993). The court denied the remainder of Hittson’s claims for relief.

On appeal, the State now concedes that the trial court’s admission of the psychologist’s testimony violated Hittson’s constitutional rights and does not appeal the District Court’s ruling on this point—leaving only the question of whether the admission of the testimony was harmless error under Brecht. Hittson also cross-appealed the District Court’s denial of some of his penalty phase challenges. The District Court granted Hittson a certificate of appealability (“COA”) on his Brady claims, and we expanded the COA to include his ineffective-assistance-of-counsel claim—that counsel failed to present expert testimony relating to Hittson’s background and mental condition.

We expanded the COA a second time after the Supreme Court decided Trevino v. Thaler, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1911, 1852 L. Ed. 2d 1044 (2013)—by which point briefing was already underway in this appeal. Trevino recognized certain circumstances in which a federal court may excuse a habeas petitioner’s failure to properly raise his claims in state court. \_\_\_ U.S. at \_\_\_, 133 S. Ct. at 1920–21; see also Martinez v. Ryan, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1309, 1320–21, 182 L. Ed. 2d 272 (2012). Before Trevino came down, Hittson sought leave from the District Court to add four new claims to his federal petition—claims that he had not raised

in any of his state proceedings. The District Court denied the motion. Because Trevino has some bearing on the District Court's analysis, we expanded Hittson's COA to decide:

Whether Hittson should be allowed to amend his federal habeas petition to include claims of ineffective assistance of trial counsel which were previously defaulted through prior counsel in state habeas proceedings in light of the United States Supreme Court's ruling in Trevino v. Thaler . . . .

After reviewing the record and entertaining the parties' arguments in open court, we (1) reverse the District Court's grant of habeas relief setting aside Hittson's death sentence based on the State psychologist's testimony, (2) affirm the District Court's denial of Hittson's Brady claims and ineffective-assistance-of-counsel claim, and (3) hold that Trevino does not enable Hittson to raise new claims that he failed to litigate in state court.

Part I of this opinion describes the crime, as presented to the jury in the State's case in chief, and the law enforcement's investigation. Part II covers Hittson's 1993 trial, his direct appeal to the Georgia Supreme Court, and that court's refusal to grant him habeas corpus relief. Part III covers the § 2254 proceedings in the United States District Court and its granting of the writ setting aside Hittson's death sentence. Part IV explains the standard we apply under § 2254 in reviewing the Georgia courts' denial of Hittson's constitutional claims. In parts V, VI, and VII, we review and dispose of those claims. Part VIII explains

our reasons for concluding Hittson may not rely on Trevino to excuse his procedural default. And we briefly conclude in part IX.

I.

A.

In the spring of 1992, Travis Hittson, Edward Vollmer, and Conway Utterbeck were stationed aboard the USS Forrestal, an aircraft carrier that was based in Pensacola, Florida, at the time. They were all assigned to the electrical division of the engineering department. Vollmer and Hittson were on the same work detail, and Vollmer was Hittson's Leading Petty Officer. Utterbeck had a different assignment but worked in a similar capacity in the same area of the ship.

On Friday, April 3, 1992, Vollmer invited Hittson and Utterbeck to come with him to his parents' house in Warner Robins, Georgia, for the weekend. His parents were out of town. Apparently neither Hittson nor Utterbeck was aware that the other had also been invited until shortly before they left Pensacola. The three men arrived at Vollmer's parents' house late Friday evening, but they did not have a key, so they spent the night in a storage shed behind the house. On Saturday, April 4, a friend of Vollmer's parents came by to check on the house; finding Vollmer and the two others there, he gave them a key. The three sailors spent most of the day on Saturday hanging around the house, but sometime Saturday evening, Hittson and Vollmer went out drinking. They left Utterbeck at the house.

Early in the morning of Sunday, April 5, after several hours of drinking, Hittson and Vollmer headed back to the Vollmer residence. According to the statement later given by Hittson to law enforcement, he was very drunk by that time. On the drive back, Vollmer worked Hittson up by telling him that Utterbeck was “going to get us”—that Utterbeck was plotting to kill the two of them—so “we’ve got to get him” by killing him first. At some point—though it is not clear when—Vollmer told Hittson that Utterbeck had a hit list with Hittson’s and Vollmer’s names on it. When they pulled into the driveway, Vollmer put on a bulletproof vest and a long trench coat and grabbed a sawed-off shotgun and a .22 caliber handgun from his car. He gave Hittson an aluminum bat that was also in the car and told Hittson that Utterbeck was waiting for them inside the house and was planning to shoot them.<sup>5</sup> Vollmer instructed Hittson to go in first and “get him” and then “get him in the kitchen”—so they would not make a mess on the carpet.

When Hittson entered the house, he found Utterbeck asleep in a recliner in the living room. Hittson sneaked up on him and hit him in the head with the bat.

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<sup>5</sup> While Vollmer’s parents did have guns in their house, it has never been established whether Vollmer (whom Hittson described as “very paranoid”) actually believed that Utterbeck was planning to kill them that night, or if Vollmer just told Hittson as much to get him to kill Utterbeck. There is no evidence in the record to indicate that Utterbeck harbored any particular ill will towards either Hittson or Vollmer, or that Utterbeck had any intention to do them harm that night. And, other than the crime itself, there is no evidence in the record to indicate that Vollmer or Hittson had a reason to kill Utterbeck.

Utterbeck woke up and jumped up out of the chair. Hittson hit him in the head again, knocking him to the floor. Utterbeck raised a hand to defend himself, so Hittson hit his hand with the bat and then hit him in the head a third time. The third hit was apparently enough to subdue Utterbeck. Hittson dragged him by his hands into the kitchen, where Vollmer was waiting. Utterbeck was still conscious and asked Hittson, “what did I ever do to you?” Vollmer gave Hittson the .22 pistol and stood on Utterbeck’s hand to keep him from struggling. Utterbeck screamed “no, no,” and begged for his life, but Hittson shot him point blank in the forehead. In his own words, “I had no emotion or nothing on my face. I know I didn’t. I was cold and Vollmer steps on his hand and . . . handed me the gun, I shot him.”

Hittson and Vollmer stripped Utterbeck’s body, taking the \$62 they found in his pockets. They left the body in the kitchen and went to a nearby Waffle House to get something to eat. Upon their return, Vollmer told Hittson that they had to dismember the body and clean up the house to conceal the crime. They initially tried to cut up the body with a serrated steak knife from the kitchen, but then switched to a hacksaw from the tool shed out back. They also found a piece of slate in the shed, which they placed under the body to avoid scratching up the kitchen floor. Following Vollmer’s directions, Hittson sawed off one of Utterbeck’s hands and began working on sawing off his head, but got sick and had

to stop. Vollmer finished sawing off the head, the other hand, and both feet.

Vollmer also skinned part of Utterbeck's arm and chest with a knife and a pair of pliers. The autopsy later showed that Utterbeck's buttocks and penis were partially skinned and his testicles and rectum were removed. Hittson denied performing the sexual mutilation and stated that he had not seen Vollmer do it either.

After finishing their grisly task, Hittson and Vollmer wrapped Utterbeck's torso and severed body parts in plastic bags and left them in the kitchen while they drove to a nearby wooded area to dig a shallow grave. As they were returning to Vollmer's parents' house—around 10:30 on Sunday morning—they happened to pull onto the highway in front of a local woman who was traveling in the same direction. The woman took notice of Vollmer's car, which had an out-of-state license plate and was pulling off of a lightly traveled dirt road that led to an undeveloped tract of land owned by a friend. Suspicious, she wrote down the license plate number and a description of the car, which she later turned over to the Houston County Sheriff's Office after Utterbeck's torso was discovered on the property two months later.

Hittson and Vollmer returned to Vollmer's parents' house and began cleaning the blood off the kitchen floor and the living room carpet. Vollmer's sister-in-law (who lived nearby) came by around noon on Sunday, while they were still cleaning. Vollmer left with her to go grab a bite to eat, without ever letting her

inside the house. While they were gone, Hittson kept cleaning. When Vollmer returned, he and Hittson drove back out to the grave to bury Utterbeck's torso and then went back to the house to finish cleaning. The family friend who had given them the key came by Sunday evening to check on the house again. Hittson had to quickly hide Utterbeck's clothes and throw a blanket over a lingering blood spot in the living room. When the family friend asked where the third guy was, Vollmer told him that Utterbeck was asleep in the back room.

Hittson and Vollmer finally finished cleaning up the house sometime Sunday evening, and so they packed up and set out for Pensacola. They put Utterbeck's severed hands, head, and feet in the trunk of Vollmer's car, along with a few other pieces of evidence, including Utterbeck's clothing, his identification card, and the .22 shell casing. They threw Utterbeck's clothing and ID card in a dumpster close to Vollmer's parents' house. Before leaving Warner Robins, they stopped at Vollmer's sister-in-law's for about an hour to say goodbye. As they drove back to Pensacola, Vollmer tried to find a good place to dump the remaining body parts, but apparently did not find a spot to his liking.

They made it back to Pensacola around 6 a.m. on Monday, April 6. With Utterbeck's body parts still in Vollmer's trunk, they drove onto the Navy base and reported for duty aboard the Forrestal. When they got off work that day, they drove to a wooded area outside of Pensacola and buried the body parts in several

shallow holes. On their drive back into town, they scattered some remaining pieces of evidence in a few dumpsters.

B.

When Utterbeck failed to report for roll call on Monday, April 6, the Navy took note of his unauthorized absence but did not further investigate until later that month, when Utterbeck's mother called his division commander to tell him that she had not heard from her son since the first weekend in April—when he had traveled to Warner Robins with two shipmates. Inquiries aboard the Forrestal led Navy personnel to Hittson and Vollmer. When questioned about Utterbeck's whereabouts, they confirmed that they had gone to Vollmer's parents' house over the April 3 weekend with Utterbeck, but they claimed that they dropped him off at a bar in Pensacola sometime in early morning hours of Monday, April 6. On April 27, 1992, the Naval Investigative Service issued a missing persons alert for Utterbeck, and on May 5 he was declared a Navy deserter.

On June 16, 1992, Utterbeck's torso was discovered by loggers who were clearing the wooded property near Vollmer's parents' house. The loggers called the Houston County Sheriff's Office, who unearthed the torso and sent it to the state crime lab in Atlanta. The autopsy did not reveal the victim's identity. Upon hearing about the dead body, the local woman, who had months earlier written down Vollmer's license plate, called the sheriff's office. The plate number she had

written down was off by one digit, so the Houston County officials were not able to immediately trace the car to Vollmer.

On June 23, 1992, after receiving no new leads on Utterbeck's whereabouts, Navy investigators broadcast a request to other law enforcement agencies for information regarding any unidentified bodies matching Utterbeck's general description. The Houston County Sheriff's Office responded the same day, informing the Navy that they had unearthed the remains of a white male matching Utterbeck's characteristics approximately two miles from Vollmer's parents' house, with a time of death estimated sometime in early April.

Investigators from Houston County and the Navy interviewed Hittson on June 25, 1992. Hittson initially stuck to his story—that he and Vollmer had dropped Utterbeck off at a bar sometime early Monday morning—but after being confronted with the investigators' suspicions that they had found Utterbeck's dismembered body, Hittson confessed that he and Vollmer had murdered Utterbeck and buried him there. In a taped statement given to the investigators—which was later played for the jury—Hittson described the murder, dismemberment, and disposal of the body parts in detail. After confessing, Hittson led investigators to the spot outside Pensacola where the remaining body parts were buried. He also told the investigators where to find the baseball bat, which he and Vollmer had stashed in the rafters of the shed at Vollmer's parents' house.

Hittson was then taken into custody by the Houston County Sheriff's Office. That same day, Vollmer was arrested in Houston County, at his parents' house.

The next day, investigators executed search warrants for Vollmer's car and his parents' house. They found traces of blood and .22 caliber ammunition in the trunk of Vollmer's car. They recovered the .22 pistol, the aluminum bat, the hacksaw, the piece of slate Hittson and Vollmer used during the dismembering, and other various pieces of evidence from the house, and they found traces of blood on the kitchen floor and baseboard.

## II.

### A.

A Houston County grand jury returned an indictment on June 30, 1992, charging Hittson and Vollmer with four counts: Count One, malice murder; Count Two, armed robbery; Count Three, aggravated assault; and Count Four, possession of a firearm during the commission of a crime. At arraignment, both defendants pled not guilty, and in September 1992, the Houston County District Attorney filed a notice of the State's intention to seek the death penalty. The cases against Hittson and Vollmer were severed; at a joint trial, Hittson's confession, which implicated Vollmer, would technically be introduced against Hittson only, but the

spillover effect would deny Vollmer a fair trial.<sup>6</sup> The case against Hittson would be tried first.

Hittson's trial began on February 25, 1993, in the Superior Court of Houston County. During the guilt phase, Hittson's recorded confession formed the framework for the State's case, with various experts and lay witnesses confirming the gory details Hittson related and a raft of gruesome autopsy photos showing Utterbeck's partially-decomposed torso and severed head, hands, and feet. The State rested its case after three days, and Hittson did not put on a defense to contest guilt. On Saturday, February 27, 1993, the jury found Hittson guilty on all counts.<sup>7</sup>

The penalty phase of the trial began Monday, March 1. Under Georgia law, to sentence a convicted murderer to death, the jury must return a unanimous verdict finding at least one statutorily defined aggravating factor. See O.C.G.A. § 17-10-31(a). The State, relying on the evidence presented in the guilt phase, pointed to two such factors in support of a death sentence: the murder was committed during the commission of an aggravated battery, see id. § 17-10-30(b)(2), and the murder "was outrageously or wantonly vile, horrible, or inhuman

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<sup>6</sup> At a joint trial, unless Hittson took the witness stand, which would be highly unlikely, Vollmer would be unable to examine him about his confession. See generally *Reeves v. State*, 237 Ga. 1, 3, 226 S.E.2d 567, 568 (1976) ("[T]he admission of a co-defendant's confession that implicated another defendant at a joint trial constitutes prejudicial error . . . ." (citing *Bruton v. United States*, 391 U.S. 123, 126, 88 S. Ct. 1620, 1622, 20 L. Ed. 2d 476 (1968))).

<sup>7</sup> On Count Two, armed robbery, the jury found Hittson guilty of the lesser charge of theft by taking.

in that it involved torture, depravity of mind, or an aggravated battery to the victim,” see id. § 17-10-30(b)(7).<sup>8</sup> The State did not put on any new evidence during the penalty phase.

A Georgia jury must also consider mitigating factors in deciding whether to return a death sentence. Id. § 17-10-30(b). Even if the jury finds an aggravating factor, they may still return a life sentence, with no requirement that they explain their reasons for doing so. Head v. Thomason, 276 Ga. 434, 436, 578 S.E.2d 426, 429 (2003).

Hittson’s defense against a death sentence took a day and a half; it consisted of the testimony of twenty lay witnesses who either knew Hittson before he joined the Navy or worked with him or supervised him on the Forrestal. The witnesses portrayed Hittson as a good-natured guy who, though somewhat dim-witted, was a hard worker and was eager to please. His shipmates, some of whom shared an apartment with him in Pensacola, testified that Hittson drank frequently and heavily and would sometimes do stupid things when drunk. The defense also elicited testimony that Hittson grew up in an unaffectionate home and was constantly in search of affirmation from others, he occasionally grew depressed

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<sup>8</sup> The State initially proposed a third aggravating factor, that the murder was committed during the commission of another capital felony (the armed robbery). However, because the jury found Hittson guilty of theft by taking instead of armed robbery, see note 7, supra, the trial court only instructed the jury on the two aggravating factors listed above.

because he thought no one could love him, and he would go to great lengths to be accepted by others. Several of his shipmates testified that he was impressionable and gullible and would generally go along with whatever he thought people wanted from him. His supervisors had similar assessments—e.g., “he was just a kid that needed some guidance and direction,” and “he had a very fragile personality and he wanted to fit in.” Lt. Cornelius Mapp, Hittson’s division officer, explained that “Hittson’s the type of person that you can convince that he’d done anything.” In his assessment, Hittson wasn’t capable of such a brutal murder—“If he’s guilty, I think he’s guilty of being in the presence of a crime and he didn’t report it.”

In contrast to painting Hittson as the easily-duped kid with a dependent personality, the defense sought to portray Vollmer as a violent sociopath who had plotted the murder and manipulated Hittson into helping him carry it out. Several witnesses testified that Vollmer was intelligent and domineering; one shipmate explained that he “wanted people to think he was in control,” and a friend of Vollmer’s explained that he “liked to play with people’s heads.” The defense submitted letters written by Vollmer that showed him to be arrogant and violent.<sup>9</sup> Shipmates described Vollmer as a “violent guy” who “likes to hold a grudge” and

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<sup>9</sup> For example, Vollmer bragged about participating in gang fights, dealing drugs, and putting bounties out on rivals’ heads; he called himself “King of the Knights of Death” and wrote, “I’m not afraid of dying and I have no problem with killing anyone . . . . Morals are for losers trying to justify their place in life.”

was known to keep his bulletproof vest and aluminum bat in his car and occasionally carry a sawed-off shotgun under his trench coat.

The defense laid out evidence that Vollmer had been contemplating murder long before the April 3 weekend. On three or four occasions, Vollmer borrowed a shipmate's copy of a documentary describing forensic techniques used to detect and solve murders. He read books about murder. He told several people, both before and after the murder, that the best way to dispose of a body was to cut it up. In one of his letters, Vollmer described a detailed plan to murder the boyfriend of a woman he used to be romantically involved with.<sup>10</sup> Regarding Utterbeck, a few witnesses testified that Vollmer did not like him and, prior to the murder, had told shipmates who had disagreements with Utterbeck that he would "take care of" him for them. No one ever identified a concrete motive for either Vollmer or Hittson, but the inference the defense team wanted the jury to draw was that Vollmer had been thinking about killing someone for quite a while, and on that April weekend, Hittson "was led by Mr. Vollmer to do this out of some perverse or demented fantasy that Mr. Vollmer had entertained."<sup>11</sup>

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<sup>10</sup> The plan laid out in the letter had no obvious similarities to Utterbeck's murder.

<sup>11</sup> Doc. 56-9, at 95 (testimony given by trial counsel during habeas proceedings before the Butts County Superior Court).

According to the defense's theory, it was no surprise that someone like Hittson would be vulnerable to manipulation by someone like Vollmer. The narrative they sought to create was "that basically away from the co-defendant, [Hittson] was a pretty harmless guy . . . he drank a lot, but, basically, he was sort of a needy kind of harmless little guy, and that Mr. Vollmer was the brains of this operation and basically manipulated [Hittson] into doing something that he would have never done."<sup>12</sup> One witness during the penalty phase described Hittson as Vollmer's "sidekick"—his "dog." In the words of another witness, "Vollmer was, you know, he liked to tell somebody what to do, and Hittson was the kind of guy, you know, if you're his friend and . . . you tell him something to do, he'll do it. So Vollmer had somebody to tell what to do and somebody to do it, and Hittson had somebody who . . . would tell him what to do."

To further distinguish Hittson from Vollmer, the defense presented testimony that, after that April weekend, their relationship deteriorated. Vollmer continued to be the "same old guy." He jokingly told his friends that he had killed Utterbeck and told shipmates that if they shot someone, to shoot them in the heart instead of the head, because head wounds bleed too much. In comparison, Hittson stopped hanging around Vollmer after the murder—they even got in a fight shortly

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<sup>12</sup> Doc. 75-17, at 61–62 (testimony given by trial counsel during habeas proceedings before the Butts County Superior Court).

before they were arrested—and Hittson became withdrawn and depressed and began to drink even more. One night after some heavy drinking, Hittson confessed to his best friend, Steven Nix, that Utterbeck “wasn’t ever coming back.” When asked if Hittson appeared remorseful during this conversation, Nix responded, “[l]ooking back now, maybe, he might have been.”

To rebut Nix’s testimony that Hittson might have been remorseful, the State called Dr. Robert Storms, the psychologist the State had employed to examine Hittson prior to trial,<sup>13</sup> to testify to statements made by Hittson during the examination. Prior to trial, the defense team had Hittson examined by a psychologist and psychiatrist and were considering using some of the experts’ findings as mitigation evidence during the penalty phase. To preserve their right to present this evidence, a few weeks before the trial began they filed a Notice of Intent of Defense to Raise Issue of Insanity or Mental Incompetence. See Ga. Unif. Super. Ct. R. 31.4 (1993) (now Rule 31.5). To allow the State to counter the defense experts’ findings, the trial court granted the State’s motion for an order requiring Hittson to submit to an examination by an expert of the State’s choosing, Dr. Storms. Hittson’s attorneys were allowed to attend the examination, and

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<sup>13</sup> Dr. Storms was the senior psychologist in the Forensic Services Division of the Central State Hospital in Milledgeville, Georgia.

Hittson signed a form waiving his Miranda<sup>14</sup> rights before talking to Dr. Storms. During the interview, Hittson described Utterbeck as a “hillbilly” and an “asshole.” The defense team eventually decided not to put on any expert opinion testimony of Hittson’s mental condition; instead, they stuck to the lay testimony they had already presented and rested their case. Nonetheless, the State, in rebuttal, proffered in camera the testimony Dr. Storms would give, as a “lay” witness, about Hittson’s description of Utterbeck—ostensibly to counter Nix’s testimony that Hittson was remorseful. The defense team strenuously objected to the proffer on the grounds that Hittson’s waiver of his Miranda right against self-incrimination was limited to the admission of Dr. Storms’s opinion testimony to rebut the defense experts’ opinions. The court overruled the objection, and Dr. Storms testified before the jury in accordance with his proffer.

After stating his name, position, and reason for interviewing Hittson, Dr. Storms testified as follows:

Q Now, in the course of . . . your interview with [Hittson] did you, at any time, ask him about his opinion, or to give some statement about Mr. Conway Utterbeck?

A Yes. I wanted to find out about that relationship.

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<sup>14</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). In signing the form, Hittson purported to waive his right to remain silent—his right against self-incrimination—during the examination.

Q All right. And if you would, please, state what this defendant said about Conway.

A Well, at one point he stated that Mr. Utterbeck was a “hillbilly,” and at another point he stated that he was an “asshole.”

Hittson’s attorneys did not cross examine Dr. Storms or present any evidence in surrebuttal.

In its closing argument to the jury, the State made reference to the “hillbilly” and “asshole” comments again:

[Y]ou’ve heard one of the defense witnesses talk about, well, as I think about it now he was remorseful. I think he was remorseful. Well, members of the jury, there’s your remorse. (Referring to easel.)<sup>15</sup> As early, or as late, rather, as three weeks ago this is this defendant’s response when asked about Conway Utterbeck being an innocent human being. Conway was a hillbilly, he was an asshole. Is that remorse? What does your common sense tell you? What does reason tell you?

In the defense’s closing argument, Hittson’s attorney discounted the comments and sought to mitigate their impact by pointing out Hittson’s cooperation with investigators—he confessed, led investigators to the body parts, and told them where to find the bat. In other words, regardless of how Hittson described Utterbeck, he was clearly overcome with guilt about what he had done—

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<sup>15</sup> The record does not indicate what was displayed on the easel, but one of Hittson’s attorneys testified before the Butts County Superior Court, in a hearing on Hittson’s petition for a writ of habeas corpus, that the District Attorney wrote “hillbilly” and “asshole” on “big poster boards” and displayed them to the jury during some portion of his closing argument.

why else would he have confessed and aided investigators in making the case against him?

The court charged the jury with their task—that, in considering whether to impose the death penalty, they unanimously find at least one aggravating factor to exist beyond a reasonable doubt. In explaining the requirements for finding that the murder was “outrageously or wantonly vile, horrible, or inhuman,” the court instructed the jury that they must find that the murder involved either “[1] depravity of mind; or [2] torture of the victim prior to the death of the victim; or [3] aggravated battery to the victim prior to the death of the victim.” See O.C.G.A. § 17-10-30(b)(7). The court further clarified that “[d]epravity of mind is a reflection of an utterly corrupt, perverted, or immoral state of mind,” and in deciding whether the murder involved such a mindset, the jury could consider “the actions of the defendant prior to and after the commission of the murder,” including whether the defendant “subjected the body of a deceased victim to mutilation.”

The jury took all of the evidence from the guilt phase with them into deliberations, including a picture of Utterbeck before the murder; pictures of Utterbeck’s mutilated torso and severed head, hands, and feet; autopsy photos showing the mutilation in great detail; and a diagram of Vollmer’s parents’ house indicating where Hittson hit Utterbeck with the bat, dragged him into the kitchen,

and where he was positioned when Hittson shot him. The jury also had the defense's exhibits from the penalty phase, including the letters written by Vollmer, several pictures of Hittson with his family and as a child, and an art project Hittson made in school.

During deliberations, the jury sent the court two questions aimed at whether a "life sentence" actually meant that Hittson would spend the rest of his life in prison. The court responded to both by repeating its original charge, that a life sentence meant Hittson would "serve the remainder of life in the penitentiary." After approximately four hours, the jury returned a unanimous death sentence. The aggravating circumstance they found was that the murder was "outrageously or wantonly vile, horrible, or inhuman, in that it involved depravity of mind." The judge imposed Hittson's death sentence on March 17, 1993.

In October 1993, Vollmer pled guilty to the murder count in exchange for a life sentence.<sup>16</sup> He is currently eligible for parole.

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<sup>16</sup> The District Attorney who tried Hittson and offered Vollmer a plea deal explained his reasons for seeking the death penalty for Hittson, while offering Vollmer a plea, as follows:

[I]t was my impression that [Vollmer] was a manipulator and certainly an evil person. . . . The problem I had is, in deciding what to do I have to divorce my gut and my feelings from what the evidence is and what the law is. I felt like, you know, for all his personality problems and his being evil, whatever you want to call it, it was Mr. Hittson who swung the bat and got Mr. Utterbeck basically groggy or dazed or semi-conscious, and it was Mr. Hittson who put the gun between his eyes and blew his brains out. And so . . . from a factual standpoint, that's a stronger case.

B.

Hittson appealed his convictions and death sentence to the Georgia Supreme Court, asserting a raft of trial court errors; chief among them was the court's ruling that allowed Dr. Storms to testify in accordance with his proffer. Hittson's brief to the Supreme Court reiterated his objection at trial, arguing that, to the extent that he waived his privilege against self-incrimination when he signed the Miranda waiver form and submitted to the court-ordered examination, that waiver was limited to allowing the State to rebut defense expert testimony of his mental condition. Thus, when the trial court allowed Dr. Storms to testify as a lay witness to rebut Hittson's evidence of remorse, it went beyond the scope of the waiver and violated Hittson's Fifth Amendment right against compelled self-incrimination. Hittson also argued that, by ordering him to submit to Dr. Storms's examination without any notice that his statements could be used against him—even if he did not present expert testimony in his own defense—the trial court denied him any meaningful assistance of counsel in connection with the examination, in violation of the Sixth Amendment. Hittson relied on Estelle v. Smith, 451 U.S. 454, 101

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The other things, they're more nebulous. They're more, you know, on some other plane they might mean a lot but when you start talking about facts and evidence and who did what, I had a great concern that the jury would, in the end would say, well [Vollmer] didn't pull the trigger, he didn't swing the bat, and so I felt at that point a bird in the hand.

Doc. 56-11, at 148–49.

S. Ct. 1866, 68 L. Ed. 2d 359 (1981), as the legal basis for both arguments. For convenience, we refer to the Fifth and Sixth Amendment violations based on Dr. Storms's testimony as Hittson's "Estelle claims."

In October 1994, the Georgia Supreme Court upheld Hittson's convictions and death sentence. Hittson v. State, 264 Ga. 682, 449 S.E.2d 586 (1994), cert. denied 514 U.S. 1129, 115 S. Ct. 2005, 131 L. Ed. 2d 1005 (1995). In rejecting his Fifth Amendment claim, the court explained that Hittson voluntarily waived his privilege against self-incrimination when he signed the Miranda form prior to the examination. Id. at 684–85, 449 S.E.2d at 591–92. And the court found no Sixth Amendment violation because the trial court adequately instructed defense counsel on the scope and nature of the examination and allowed them to observe it and voice objections if necessary. Id. at 685, 449 S.E.2d at 592.

C.

In December 1995, Hittson petitioned the Superior Court of Butts County, Georgia, for a writ of habeas corpus. See O.C.G.A. § 9-14-42. His petition alleged ineffective assistance of counsel "at virtually every critical stage before and during trial." The ineffective-assistance claim before us in the immediate appeal—that Hittson's trial counsel, in the penalty phase of his trial, failed to present mitigating expert testimony regarding his background and mental condition—was

among the allegations.<sup>17</sup> The petition also raised a “protective” Brady claim, which generally alleged that the State withheld exculpatory evidence but did not identify the evidence. Hittson’s petition did not include his Estelle claims—because the Georgia Supreme Court rejected the claims on direct appeal, he was precluded from raising them on collateral attack absent an intervening change in the law. See Bruce v. Smith, 274 Ga. 432, 434, 553 S.E.2d 808, 810 (2001).

The Superior Court held a two-day evidentiary hearing on Hittson’s petition in October 1997. At the close of the hearing, the court denied Hittson’s protective Brady claim because he failed to come forward with any exculpatory evidence the State had withheld at trial. In an order issued in July 1998, the court shaped Hittson’s ineffective-assistance allegations into eight discrete claims and rejected all of them under the standard set forth in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984).

In October 1998, Hittson applied to the Georgia Supreme Court for a certificate of probable cause to appeal (“CPC”), pursuant to O.C.G.A. § 9-14-52.<sup>18</sup> He took issue with the Superior Court’s denial of five of his ineffective-assistance

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<sup>17</sup> We present the facts related to this claim and expound on the state courts’ treatment of the claim in part VI, infra.

<sup>18</sup> Section 9-14-52(a) requires petitioners to obtain a certificate of probable cause before appealing an adverse decision in the superior court. Rule 36 of the Georgia Supreme Court’s Rules provides that a certificate of probable cause must be granted “where there is arguable merit.”

claims. Finding that his arguments lacked “arguable merit,” the Georgia Supreme Court denied the CPC in September 2000. See Ga. Sup. Ct. R. 36.

While Hittson’s CPC application was pending, the Georgia Supreme Court decided Nance v. State, 272 Ga. 217, 526 S.E.2d 560 (2000), in which the court explicitly overruled its decision in Hittson’s direct appeal on the following point:

[W]hen a defendant must submit to a court-ordered mental health examination because he wishes to present expert mental health testimony at his trial, the State expert may only testify in rebuttal to the testimony of the defense expert or to rebut the testimony of the defendant himself.

...

To the extent Hittson v. State authorized a State expert to testify in response to lay witness testimony that the defendant was remorseful, it is overruled.

Id. at 220, 220 n.2, 526 S.E.2d at 565, 565 n.2 (citations omitted). Hittson did not seek leave to amend his CPC application to ask the Georgia Supreme Court to consider the effect of Nance on his Estelle claims (which he had not raised in the Butts County Superior Court). However, after the Supreme Court denied his CPC application, Hittson filed a motion for reconsideration, asking the high court to consider the Estelle claims in light of Nance. The Supreme Court summarily denied the motion in January 2001, and the United States Supreme Court denied certiorari review in May 2001, Hittson v. Turpin, 532 U.S. 1052, 121 S. Ct. 2193, 149 L. Ed. 2d 1025 (2001).

### III.

#### A.

In January 2002, Hittson petitioned the United States District Court for the Middle District of Georgia for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, setting aside his convictions and death sentence. The petition included most of the claims he presented to the Georgia Supreme Court on direct appeal and to the Butts County Superior Court in his habeas petition, including the Estelle claims, several ineffective-assistance claims, and the protective Brady claim. To allow Hittson to flesh out his Brady claim, the District Court ordered the State to turn over the District Attorney's file on the Utterbeck murder prosecution. When Hittson's habeas counsel reviewed the file, they discovered a 1991 Navy psychiatric report, which diagnosed Vollmer with Antisocial Personality Disorder, and two letters Vollmer had written from jail that touched on certain aspects of the murder. Because Hittson had not litigated Brady claims based on this evidence in the Butts County Superior Court, the District Court stayed further proceedings to allow Hittson to exhaust the newfound Brady claims in state court.

#### B.

Accordingly, in July 2005, Hittson returned to the Butts County Superior Court, filing a second habeas petition. The petition included two new Brady claims, one based on Vollmer's psychiatric report and the other on the post-arrest

letters he wrote from the jail. Hittson also resubmitted his claim that the admission of Dr. Storms's lay testimony violated his Fifth Amendment right against self-incrimination.<sup>19</sup> Under Georgia law, a state prisoner may only bring a successive habeas petition that raises claims "which could not reasonably have been raised in the original or amended petition." O.C.G.A. § 9-14-51. Hittson alleged that his new petition was his first opportunity to bring these claims because (a) he didn't have access to the Brady material until the federal district court ordered discovery of the District Attorney's file and (b) res judicata barred his Fifth Amendment claim at the time he prosecuted his first habeas petition—it was only after the Supreme Court in Nance overruled its decision rejecting his Fifth Amendment claim in his direct appeal that he was able to assert the claim in a habeas petition.

The Superior Court disagreed. Without conducting an evidentiary hearing, the court held that all of Hittson's claims could have been presented while he was prosecuting his first habeas petition and were thus barred as successive. The Georgia Supreme Court granted a certificate of probable cause to appeal from this decision, vacated the Superior Court's decision, and remanded the case with instructions that the court conduct an evidentiary hearing.

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<sup>19</sup> Hittson's petition did not re-allege his claim that the trial court's order requiring him to submit to Dr. Storms's examination denied him his Sixth Amendment right to counsel.

With the benefit of a two-day hearing, the Superior Court again denied habeas relief, in January 2009. In a somewhat convoluted opinion, the court rejected Hittson's Fifth Amendment claim on three separate grounds: (1) The claim was barred by res judicata because the Georgia Supreme Court rejected it on direct appeal, and even though Nance overruled that decision, Nance did not apply retroactively because "Nance did not set forth a new rule of constitutional dimension, but merely narrowed an existing rule of criminal procedure." (2) The claim was barred by res judicata because, even if Nance applied retroactively, the Supreme Court denied Hittson's CPC application, and motion for reconsideration of that denial, after Nance was decided. (3) Even if the Fifth Amendment claim was properly before the court, and even if the admission of Dr. Storms's testimony violated Hittson's privilege against self-incrimination, it was harmless error in light of the overwhelming evidence in support of the jury's death sentence.

The Superior Court rejected the Brady claims on alternative grounds too. It held that the claim based on Vollmer's psychiatric report was procedurally defaulted because Hittson's trial counsel or the attorneys who represented him in his first habeas proceeding could have obtained the report from a source other than the Houston County District Attorney through the exercise of reasonable diligence and Hittson had not shown cause and resulting prejudice to excuse his failure to

raise the claim on direct appeal or in his first habeas petition.<sup>20</sup> Even so, the court held that both Brady claims failed on the merits because the Vollmer psychiatric report and Vollmer's jailhouse letters were cumulative of the mitigation evidence presented during the penalty phase and the evidence supporting a death sentence was overwhelming; thus, even when considered cumulatively, the "withheld" evidence did not create a reasonable probability of a different result.<sup>21</sup>

Hittson again sought a certificate of probable cause from the Georgia Supreme Court. He argued that (1) none of his claims could have been raised at any point before he filed his second habeas petition; (2) that the allowance of Dr. Storms's testimony violated his Fifth and Sixth Amendment rights and the error was not harmless; and (3) that the suppressed Brady material, considered either separately or cumulatively, created a reasonable probability that the jury would have returned a life sentence. The Georgia high court concluded that these arguments lacked arguable merit and summarily denied Hittson's CPC application in October 2010. The United States Supreme Court denied certiorari review in

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<sup>20</sup> Georgia's procedural default rules mimic the federal doctrine: "A claim that is subject to procedural default may nevertheless be considered in habeas corpus proceedings if the petitioner can satisfy the cause and prejudice test." Perkins v. Hall, 288 Ga. 810, 822, 708 S.E.2d 335, 346 (2011).

<sup>21</sup> See Kyles v. Whitley, 514 U.S. 419, 433, 115 S. Ct. 1555, 1566, 131 L. Ed. 2d 490 (1995) (explaining that to prevail on a Brady claim, the petitioner must show a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" (quotation mark omitted)).

June 2011. Hittson v. Humphrey, \_\_\_ U.S. \_\_\_, 131 S. Ct. 3038, 180 L. Ed. 2d 858 (2011).

C.

In July 2011, Hittson returned to the District Court and amended his habeas petition to include his now-exhausted Brady claims. In November 2012, the District Court granted the writ, setting aside Hittson's death sentence based on his Estelle claims. The court found that the trial court's admission of Dr. Storms's testimony violated Hittson's Fifth and Sixth Amendment rights and that the Georgia Supreme Court's decision on direct appeal (the decision Nance overruled) unreasonably applied Estelle and its progeny in concluding otherwise. Hittson, 2012 WL 5497808, at \*30–35.

The District Court then applied the harmless-error standard from Brecht v. Abrahamson, 507 U.S. 619, 637–38, 113 S. Ct. 1710, 1721–22, 123 L. Ed. 2d 353 (1993), and concluded that Dr. Storms's testimony had a “substantial and injurious effect” on the jury's death sentence deliberations. Hittson, 2012 WL 5497808, at \*37–40. Accordingly, the court vacated Hittson's sentence and ordered that the State conduct a new penalty-phase proceeding or impose a lesser sentence.

The District Court denied the rest of Hittson's claims, but granted a COA for his Brady claims. This court then expanded the COA to include one of his ineffective-assistance-of-counsel claims.

#### IV.

“We review de novo the grant or denial of a writ of habeas corpus by a district court.” Muhammad v. Sec’y, Fla. Dep’t of Corr., 733 F.3d 1065, 1071 (11th Cir. 2013). Thus, we review Hittson’s Estelle claims, Brady claims, and ineffective-assistance claim using the standard established by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L. No. 104-132, 110 Stat. 214—the same standard the District Court used.

#### A.

Under AEDPA, if a petitioner’s claims have been “adjudicated on the merits in State court,” a federal court cannot grant habeas relief unless the state court’s adjudication of the claims (1) “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” or (2) “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).

A state-court decision is “contrary to” federal law if it either “applies a rule that contradicts the governing law set forth in [Supreme Court] cases”—e.g., by applying the wrong legal standard to a particular claim—or “confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court

and nevertheless arrives at a [different] result.” Williams v. Taylor, 529 U.S. 362, 405–06, 120 S. Ct. 1495, 1519–20, 146 L. Ed. 2d 389 (2000).

A state-court decision is an “unreasonable application” of Supreme Court precedent if the state court “correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner’s case.” Id. at 407–08, 120 S. Ct. at 1520. “[A]n unreasonable application of federal law is different from an incorrect application of federal law.” Id. at 410, 120 S. Ct. at 1522. “[S]o long as fairminded jurists could disagree on the correctness of the state court’s decision,” a federal court cannot grant habeas relief. Harrington v. Richter, \_\_\_ U.S. \_\_\_, 131 S. Ct. 770, 786, 178 L. Ed. 2d 624 (2011) (citation and quotation marks omitted).

Finally, “AEDPA instructs that, when a federal habeas petitioner challenges the factual basis for a prior state-court decision rejecting a claim, the federal court may overturn the state court’s decision only if it was ‘based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.’” Burt v. Titlow, \_\_\_ U.S. \_\_\_, 134 S. Ct. 10, 15, 187 L. Ed. 2d 348 (2013) (quoting 28 U.S.C. § 2254(d)(2)). In such cases, “[t]he prisoner bears the burden of rebutting the state court’s factual findings ‘by clear and convincing evidence.’” Id. (quoting 28 U.S.C. § 2254(e)(1)). Like the “unreasonable application” standard in § 2254(d)(1), “a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a

different conclusion in the first instance.” Wood v. Allen, 558 U.S. 290, 301, 130 S. Ct. 841, 849, 175 L. Ed. 2d 738 (2010). “[E]ven if reasonable minds reviewing the record might disagree about the finding in question . . . that does not suffice to supersede the [state] court’s determination.” Id. (alterations and quotation marks omitted).

B.

Thus, AEDPA requires that our analysis of Hittson’s constitutional claims be grounded in the Georgia courts’ adjudication of those claims. Because we are considering multiple claims that were addressed by multiple state courts, it is useful at the outset to explain which state-court decisions we look to for purposes of AEDPA review.

Section 2254(d) requires that we defer to the state court’s adjudication of a petitioner’s constitutional claims. As this court has observed, “the state court’s ‘adjudication on the merits,’ which triggers our review under [§ 2254], is the same ‘adjudication of the claim’ that we review for its application of federal law. . . . Therefore, the highest state court decision reaching the merits of a habeas petitioner’s claim is the relevant state court decision” we review under AEDPA. Newland v. Hall, 527 F.3d 1162, 1199 (11th Cir. 2008); see also Harris v. Reed, 489 U.S. 255, 263, 109 S. Ct. 1038, 1043, 103 L. Ed. 2d 308 (1989) (instructing

federal courts to look to the “last state court rendering a judgment in the case” for the state court’s reasons for rejecting a claim).

In Hittson’s case, the last state court to pass on the merits of the relevant claims was the Georgia Supreme Court, when it summarily denied a certificate of probable cause to appeal from the Butts County Superior Court’s denial of Hittson’s first, and then second, habeas petition. See Newland, 527 F.3d at 1199. Because the denial of the right to appeal by the state’s highest court does not always constitute an adjudication on the merits, we briefly describe Georgia’s habeas appeals process to reveal why the Georgia Supreme Court’s denial of a CPC in this case constituted an adjudication on the merits.

Georgia habeas petitioners are required to obtain a certificate of probable cause from the Georgia Supreme Court before appealing a superior court decision denying relief.<sup>22</sup> O.C.G.A. § 9-14-52(b). The standard for granting a CPC is set forth in Rule 36 of the Georgia Supreme Court Rules, which provides that “[a] certificate of probable cause to appeal a final judgment in a habeas corpus case involving a criminal conviction will be issued where there is arguable merit.” Ga.

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<sup>22</sup> In Pope v. Rich, 358 F.3d 852 (11th Cir. 2004) (per curiam), we held that a Georgia prisoner who did not apply for a certificate of probable cause to appeal failed to exhaust his state-court remedies as required by § 2254(b)(1). Id. at 854; see also O’Sullivan v. Boerckel, 526 U.S. 838, 845, 119 S. Ct. 1728, 1732, 144 L. Ed. 2d 1 (1999) (“[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State’s established appellate review process.”).

Sup. Ct. R. 36 (emphasis added); see also Sears v. Humphrey, 294 Ga. 117, 117, 751 S.E.2d 365, 368 (2013) (explaining that a CPC denial rests on the Supreme Court’s conclusion that a claim lacks “arguable merit”). “In order for the Supreme Court to consider fully the request for a certificate,” § 9-14-52(b) directs the superior court clerk to transfer the record and transcript of the proceedings below to the Supreme Court. As the Supreme Court has explained, the purpose of transcribed evidentiary hearings in the superior courts is, at least in part, “to assist the parties in preparing and opposing the application for a certificate of probable cause to appeal” and “to assist the [Supreme] Court in considering the application.” Edwards v. State, 288 Ga. 459, 460, 707 S.E.2d 335, 336 (2011).

Therefore, in denying Hittson’s CPC applications to appeal the denial of his first and second habeas petitions, the Supreme Court was not exercising discretionary review akin a denial of a petition for certiorari review. See generally Ga. Sup. Ct. R. 34. Instead, the court was required to grant a CPC if it found arguable merit to any of the arguments in the application.<sup>23</sup> In concluding that Hittson’s claims lacked arguable merit, the Supreme Court had the benefit of the record from prior proceedings, the transcripts of the hearings held on his habeas

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<sup>23</sup> Because Georgia prisoners are required to apply for a CPC before they have exhausted their state remedies, see note 22, supra, claims not in Hittson’s CPC application are unexhausted.

petitions,<sup>24</sup> and briefing on the merits of his constitutional claims. Such a standard clearly constitutes an adjudication on the merits for AEDPA purposes. See Johnson v. Williams, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1088, 1097, 185 L. Ed. 2d 105 (2013) (“A judgment is normally said to have been rendered on the merits only if it was delivered after the court heard and evaluated the evidence and the parties’ substantive arguments.” (alteration, emphasis, and quotation marks omitted)).

While the Georgia high court denied each CPC without explaining why it found Hittson’s arguments to be meritless, there is no AEDPA requirement that a state court explain its reasons for rejecting a claim; “Section 2254(d) applies even where there has been a summary denial.” Cullen v. Pinholster, \_\_\_ U.S. \_\_\_, 131 S. Ct. 1388, 1402, 179 L. Ed. 2d 557 (2011). “When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.” Richter, \_\_\_ U.S. at \_\_\_, 131 S. Ct. at 784–85. Our task in these situations is to review the record before the Georgia Supreme Court to “determine what arguments or theories supported or,

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<sup>24</sup> In fact, the Supreme Court granted Hittson’s application for a CPC to appeal the Superior Court’s first denial of his second habeas petition and remanded with instructions that the court conduct an evidentiary hearing.

as here, could have supported, the state court’s decision.”<sup>25</sup> Id. at \_\_\_, 131 S. Ct. at 786. Hittson may only obtain federal habeas relief “by showing there was no reasonable basis for the state court to deny relief.” Id. at \_\_\_, 131 S. Ct. at 784.

With this standard in mind, we turn to Hittson’s constitutional claims.

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<sup>25</sup> Prior to Richter, this circuit applied the Supreme Court’s pre-AEDPA decision, Ylst v. Nunnemaker, 501 U.S. 797, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991), to “look through” summary decisions by state appellate courts—reviewing, under § 2254(d), “the last reasoned decision” by a state court. See McGahee v. Ala. Dep’t of Corr., 560 F.3d 1252, 1261 n.12 (11th Cir. 2009); Powell v. Allen, 602 F.3d 1263, 1268 n.2 (11th Cir. 2010) (“When the last state court rendering judgment affirms without explanation, we presume that it rests on the reasons given in the last reasoned decision.”). In light of Richter’s directive—“[w]here a state court’s decision is unaccompanied by an explanation, the habeas petitioner’s burden still must be met by showing there was no reasonable basis for the state court to deny relief,” \_\_ U.S. at \_\_\_, 131 S. Ct. at 784—we explained that “state appellate court[s]’ [summary] affirmances warrant deference under AEDPA because ‘the summary nature of a state court’s decision does not lessen the deference that it is due,’” Gill v. Mecusker, 633 F.3d 1272, 1288 (11th Cir. 2011) (quoting Wright v. Moore, 278 F.3d 1245, 1254 (11th Cir. 2002)). Accordingly, we declined to “look through” a summary decision by a state appellate court and instead reviewed the record to see “whether the outcome of the state court proceedings permits a grant of habeas relief in this case.” Id. (emphasis added); see also Jones v. GDCP Warden, No. 11-14774, slip op. at 23–24 (11th Cir. Apr. 24, 2014) (“Though the Georgia Supreme Court did not give reasons for its decision [to deny the petitioner’s CPC application], ‘[w]here a state court’s decision is unaccompanied by an explanation, the habeas petitioner’s burden still must be met by showing there was no reasonable basis for the state court to deny relief.’” (quoting Richter, \_\_ U.S. at \_\_\_, 131 S. Ct. at 784)).

While some decisions of this court have continued to apply Ylst to ascribe the reasoning of a lower court to the decisions of later state courts, see, e.g., Adkins v. Warden, Holman CF, 710 F.3d 1241, 1250 n.6 (11th Cir. 2013); Price v. Allen, 679 F.3d 1315, 1320 n.4 (11th Cir. 2012); Madison v. Comm’r, Ala. Dep’t of Corr., 677 F.3d 1333, 1336 n.1 (11th Cir. 2012), we are bound to follow the earliest of our post-Richter decisions, which is Gill (decided a month after Richter), see Morrison v. Amway Corp., 323 F.3d 920, 929 (11th Cir. 2003) (“[W]hen circuit authority is in conflict, a panel should look to the line of authority containing the earliest case, because a decision of a prior panel cannot be overturned by a later panel.”) (quotation marks and citation omitted). Accordingly, we do not review the reasoning given in the Butts County Superior Court decision; rather, we review the decision of the Georgia Supreme Court, in accordance with Richter’s instructions.

V.

We begin with the two Estelle claims. The first Estelle claim is that Hittson's Fifth Amendment right against self-incrimination was denied when the trial court, over Hittson's objection, permitted Dr. Storms to testify before the jury in conformance with his in camera proffer. The second claim is that the trial court deprived Hittson of any meaningful assistance of counsel when it ordered him to submit to an examination by Dr. Storms after waiving his Miranda rights. The State now concedes the denial of Hittson's Fifth and Sixth Amendment rights and, accordingly, does not challenge the District Court's conclusion, reached under § 2254(d)(1), that the Georgia Supreme Court unreasonably applied Estelle in denying both claims. But that does not end our inquiry. We must decide whether these violations, which yielded Dr. Storms's testimony, prejudiced Hittson's defense in the penalty phase so to entitle Hittson to habeas relief.

A.

In § 2254 proceedings, federal courts must evaluate constitutional errors under the harmless-error standard articulated in Brecht v. Abrahamson, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).<sup>26</sup> As Brecht explained, “[federal]

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<sup>26</sup> The District Court and the parties have devoted considerable attention to the fact that the Butts County Superior Court applied the Brecht harmless-error standard when it denied Hittson's second habeas petition. Georgia habeas courts typically apply the more petitioner-friendly standard from Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705

habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish

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(1967), which requires the State to show harmlessness beyond a reasonable doubt. See Horne v. State, 281 Ga. 799, 808, 642 S.E.2d 659, 667 (2007). But state (and federal) courts are only required to use Chapman on direct review. See Fry v. Pliler, 551 U.S. 112, 116, 127 S. Ct. 2321, 2325, 168 L. Ed. 2d 16 (2007). The Supreme Court has not established a harmless-error standard for state collateral review. Because we are not reviewing the reasoning announced by the Superior Court, we need not decide how to treat that court's (seemingly anomalous) application of Brecht. In his CPC application to the Georgia Supreme Court, Hittson argued that the Chapman standard applied, under Georgia law, and that the admission of Dr. Storms's testimony was not harmless beyond a reasonable doubt. In concluding that his application lacked arguable merit, the Supreme Court could have concluded either that Dr. Storms's testimony did not violate Hittson's constitutional rights, or that the error was harmless under Chapman.

Either way, we would apply the Brecht standard, because Brecht is an independent hurdle to obtaining relief under § 2254. See Mansfield v. Sec'y, Fla. Dep't of Corr., 679 F.3d 1301, 1307–08 (11th Cir. 2012); Fry, 551 U.S. at 119, 127 S. Ct. at 2327 (“[Section 2254(d)] sets forth a precondition to the grant of habeas relief . . . not an entitlement to it.”). Where a state court finds an error harmless under Chapman, a federal habeas court could conclude that the state court unreasonably applied Chapman's harmless-beyond-a-reasonable-doubt standard (which would allow the federal court to issue the writ under § 2254(d)(1)), but nonetheless deny the writ because the error did not cause “actual prejudice” under Brecht. See Fry, 551 U.S. at 119–20, 127 S. Ct. at 2327; Mansfield, 679 F.3d at 1307–08. Because Brecht's “actual prejudice” standard is more stringent than AEDPA review of the state court's Chapman determination, it “makes no sense to require formal application of both tests” because the Brecht standard “obviously subsumes” the “more liberal AEDPA/Chapman standard.” Fry, 551 U.S. at 119–20, 127 S. Ct. at 2327. Accordingly, federal habeas courts apply Brecht both where the state court, in rejecting a constitutional claim, failed to recognize the error (and thus did not conduct its own harmless error review) and where the state court found harmless error under Chapman. Fry 551 U.S. at 121–22, 127 S. Ct. at 2328.

Even if we were faced with a state court decision applying Brecht, we still would have no need to decide how to treat that decision under AEDPA, because we conclude that Dr. Storms's testimony did not cause “actual prejudice” under our own application of Brecht. See Berghuis v. Thompkins, 560 U.S. 370, 390, 130 S. Ct. 2250, 2265, 176 L. Ed. 2d 1098 (2010) (“Courts can . . . deny writs of habeas corpus under § 2254 by engaging in de novo review when it is unclear whether AEDPA deference applies . . . .”); Mansfield, 679 F.3d at 1308 (“[A] federal habeas court may deny relief based solely on a determination that a federal constitutional error was harmless under the Brecht standard.”); see also Hodges v. Fla. Att'y Gen., 506 F.3d 1337, 1343 (11th Cir. 2007) (“[I]f the state court did not apply the correct harmless error standard . . . federal habeas relief is still due to be denied if the constitutional error was harmless [under Brecht].”).

that it resulted in ‘actual prejudice.’” Id. at 637, 113 S. Ct. at 1722. To find “actual prejudice,” a federal habeas court must conclude that the error “had substantial and injurious effect or influence in determining the jury’s verdict.” Id. (quoting Kotteakos v. United States, 328 U.S. 750, 776, 66 S. Ct. 1239, 1253, 90 L. Ed. 1557 (1946)).

The District Court concluded that Dr. Storms’s testimony had a “substantial and injurious effect” on the jury’s deliberations over Hittson’s sentence. We review this decision de novo; therefore, we review the record to determine if Dr. Storms’s testimony had a “substantial or injurious effect” on the jury’s deliberations. In conducting this review, “[t]he inquiry [is not] merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence.” Kotteakos, 328 U.S. at 764–65, 66 S. Ct. at 1248. If there is “more than a reasonable possibility that the error contributed to the conviction or sentence,” then the error is not harmless. Mansfield v. Sec’y, Fla. Dep’t of Corr., 679 F.3d 1301, 1313 (11th Cir. 2012).

Because Georgia law requires a jury to unanimously find at least one statutorily defined aggravating factor to return a death sentence, O.C.G.A. § 17-10-31, “habeas relief is warranted in this case if we believe even one of the jurors who

voted in favor of the death penalty likely was substantially influenced” by the error, Duest v. Singletary, 997 F.2d 1336, 1339 (11th Cir. 1993) (per curiam).

Because the error in Hittson’s trial resulted in the improper admission of evidence, we must measure the impact of Dr. Storms’s testimony on the jury in light of the body of evidence before them at the time. See Kotteakos, 328 U.S. at 764, 66 S. Ct. at 1248 (“[Courts] must take account of what the error meant to [the jury], not singled out and standing alone, but in relation to all else that happened.”). We analyze this impact by “looking at several factors, including ‘the importance of the witness’[s] testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, . . . and, of course, the overall strength of the prosecution’s case.’” Mason v. Allen, 605 F.3d 1114, 1123–24 (11th Cir. 2010) (per curiam) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 1438, 89 L. Ed. 2d 674 (1986)).

B.

We begin with the jury’s sentence. The jury found, after deliberating for four hours, that Hittson should be sentenced to death on account of the “outrageously or wantonly vile, horrible, or inhuman” nature of the murder. See O.C.G.A. § 17-10-30(b)(7). The trial court instructed the jury that, in order to rely on this aggravating factor, it must find that the murder was both “outrageously or

wantonly vile, horrible, or inhuman” and that it involved “depravity of mind; or torture to the victim prior to the death of the victim; or aggravated battery to the victim prior to the death of the victim.” As the court explained it, “[d]epravity of mind is a reflection of an utterly corrupt, perverted, or immoral state of mind,” and in evaluating Hittson’s mindset, the jury could consider his actions “prior to and after the commission of the murder,” including whether he “subjected the body of a deceased victim to mutilation.”

It is abundantly clear that the jury could have relied on this aggravating factor in the absence of Dr. Storms’s testimony. The jury heard Hittson’s taped confession, during which he calmly described his role in the murder: how he found Utterbeck (who, according to Vollmer, was planning to ambush them) asleep in the living room, hit Utterbeck in the head with a baseball bat three times, dragged him to the kitchen so as not to make a mess on the living room carpet, and shot him in the forehead while he begged for his life. After stripping Utterbeck’s corpse and leaving it to bleed out on the kitchen floor, Hittson and Vollmer left to grab a bite to eat. Upon their return, they meticulously sawed off Utterbeck’s head, hands, and feet, and at least one of them castrated him, skinned his penis and buttocks, and cut out his rectum. They tossed Utterbeck’s mutilated torso in a shallow grave, spent the better part of a day cleaning his blood off the interior of the house, and headed back to Pensacola with his severed head, hands, and feet in the trunk—

stopping off to say “bye” to Vollmer’s sister-in-law on the way out of town. Clearly, the crime itself justified the jury’s conclusion that Hittson carried out an “outrageously or wantonly vile, horrible, or inhuman” murder with “depravity of mind.”

While Brecht “does not require a showing that but for the error the jury would have rendered a verdict in favor of the defendant,” Duest, 997 F.2d at 1338, the overwhelming amount of evidence that supports the aggravating factor found by the jury—particularly the post-mortem dismemberment and mutilation, which the court explicitly mentioned in its charge—convinces us that Dr. Storms’s testimony did not meaningfully influence the jury’s reliance on the “vile, horrible, and inhuman” aggravating factor. See Mansfield, 679 F.3d at 1313 (“[T]he erroneous admission of evidence is likely to be harmless under the Brecht standard where there is significant corroborating evidence . . .”).

In reaching the opposite conclusion, the District Court explained:

Dr. Storms’ testimony that Hittson called Utterbeck an asshole and a hillbilly certainly helped the State prove depravity of mind. The jury was instructed that they could consider Hittson’s actions after the commission of the crime. Dr. Storms’ testimony was the only evidence that months after the crime, and with Vollmer completely out of the picture, Hittson possessed a “corrupt” or “immoral state of mind.”

Hittson, 2012 WL 5497808, at \*40. We flatly reject the District Court’s conclusion that the jury found Hittson’s statements to Dr. Storms, made long after

the crime, to be probative of the “vile, horrible, and inhuman” nature of the murder or his “utterly corrupt, perverted, or immoral” state of mind. The trial court told the jury that, in evaluating Hittson’s mindset during the murder, they should consider whether he committed aggravated battery, torture, or mutilation.<sup>27</sup> The jury heard, from Hittson’s own mouth, a detailed description of how he and Vollmer cut Utterbeck up and stuffed him into garbage bags, and the State paraded a raft of grisly photos before the jury to give life to Hittson’s words. In light of the trial court’s instructions and the overwhelming evidence supporting the jury’s aggravating factor, we do not believe that the jury, in faithfully executing their duty, gave any weight to Dr. Storms’s testimony in concluding that Hittson carried out the “vile, horrible, and inhuman” murder with “depravity of mind.”<sup>28</sup>

But the aggravating factor merely allowed the jury to return a death sentence. They could have still sentenced Hittson to life imprisonment based on mitigating circumstances, and so we must also assess the effectiveness of Dr. Storms’s testimony as a rebuttal of Hittson’s mitigation evidence—the purpose for

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<sup>27</sup> Likewise, in urging the jury to find “depravity of mind,” the District Attorney explained, “you can consider the dismemberment, you can consider the decapitation, you can consider the fact that they went to the Waffle House, you can consider the fact that the body was strewn all over the place.” Doc. 74-11, at 6.

<sup>28</sup> “We presume that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court’s instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.” United States v. Olano, 507 U.S. 725, 740, 113 S. Ct. 1770, 1781, 123 L. Ed. 2d 508 (1993) (alteration and quotation marks omitted).

which it was admitted. Hittson claims that “Dr. Storms’s testimony was absolutely devastating to Mr. Hittson’s defense . . . that Mr. Hittson was remorseful, burdened and ashamed.” Hittson Appellee Br. at 26–27. This argument overstates both the strength of the “remorse” evidence and the ability of Dr. Storms’s testimony to rebut that evidence.

Over the course of two days and twenty witnesses, the only mention of remorse during the penalty phase came from Hittson’s best friend on the Forrestal, Steven Nix. Nix testified that, when Hittson told him Utterbeck was never coming back, Hittson seemed “kind-of sad, kind-of down, kind-of depressed.” Doc. 74-9, at 43. When asked if Hittson seemed remorseful, Nix responded, “Maybe. . . . Looking back now, maybe, he might have been. . . . I didn’t notice it at the time.” Id. at 48. The only other evidence of Hittson’s remorse during trial came from one of the detectives who interviewed Hittson. He testified, during the guilt phase, that prior to confessing:

I felt that [Hittson] had possibly been involved in something that he was not extremely proud of, something that he had been a part of that he might not have necessarily been the instigator of; and that there was a possibility that he had been at the wrong place at the wrong time; and that this was something that I wasn’t real sure that he could, he could live with; that it might would be to his best interest to clear his conscience, to tell what really happened.

Doc. 74-4, at 63.

Hittson now attempts to convert these isolated, equivocal statements into “powerful mitigating evidence” that was subsequently “dismantle[d]” by Dr. Storms’s testimony. Hittson Appellee Br. at 27, 30. As is evident, though, the defense had a weak case for remorse and, accordingly, did not spend much time developing it. Instead, they spent the two-day penalty phase trying to prove that Hittson had been overborne by the evil, controlling Vollmer.<sup>29</sup> Remorse was an afterthought to the main strategy, and so, even if Dr. Storms had dismantled their perfunctory attempts to show remorse, the impact of his testimony on the jury’s death sentence deliberations still would not have amounted to much. Cf. Randolph v. McNeil, 590 F.3d 1273, 1277 (11th Cir. 2009) (per curiam) (rejecting a habeas

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<sup>29</sup> In Hittson’s first state habeas proceedings—in which Hittson’s Estelle claims were not at issue—Steve Hollman (lead counsel at trial) engaged in the following colloquy with Hittson’s habeas counsel:

Q [I]n fact, your whole theory in mitigation, part of your theory in mitigation was, that Mr. Hittson was, in fact, remorseful; correct?

[objection overruled]

A Well, I don’t know that, you know, it seems to me that the point that we were trying to make was that Travis was, was a guy who was pretty impressionable, and that basically away from the co-defendant, he was a pretty harmless guy, that he was, you know, just that he drank a lot, but, basically, he was sort of a needy kind of harmless little guy, and that Mr. Vollmer was the brains of this operation and basically manipulated Travis into doing something that he would have never done. I don’t know how much the notion of remorse played into the case in mitigation.

Doc. 75-17, at 61–62.

Likewise, Bill Shurling (appointed by the court to advise Hittson’s two trial lawyers) characterized trial counsel’s mitigation strategy as follows: “[T]hey were not trying to bring out remorse. What they were trying to do is . . . show this [crime] is out of character with this particular defendant . . . .” Doc. 75-18, at 113.

petitioner's argument that an isolated statement that he lacked remorse had a substantial effect on the jury's death sentence, where there was an abundance of evidence to support the aggravating factors relied on by the jury).

But Dr. Storms's testimony did not necessarily rebut the little evidence of remorse that the defense mustered. Certainly, Hittson's unflattering description of his victim was illustrative of his indiscretion (and perhaps his dim-wittedness that the defense witnesses testified to), but these bare statements did not convert Hittson into a "brazen, unrepentant man." See Hittson, 2012 WL 5497808, at \*39. Put simply, Hittson could regard Utterbeck as a hillbilly and an asshole and could also regret murdering him.

Stripped of embellishment, Dr. Storms's testimony suggested that Hittson disliked Utterbeck. As damning as Hittson now tries to make it, we are skeptical as to whether this information was truly detrimental.<sup>30</sup> Certainly, evidence that Hittson called Utterbeck a hillbilly and an asshole after the murder seems prejudicial when considered in isolation. But, in context, if Hittson had been fond of Utterbeck, his willingness to murder him on command would have made Hittson more culpable, not less. Since the State never identified a concrete motive for the

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<sup>30</sup> We do not doubt the reaction by one of Hittson's attorneys—"It was like getting hit in the head with a board. I mean, it was, it was just, it was like getting gutted." Doc. 56-10, at 24. While we understand the distress felt by an attorney when the jury hears evidence he tried to keep from them, that visceral response does not absolve this court of its duty to rationally assess the evidence in the full context of all that was said and done at trial.

murder, Hittson's statements at least provide some alternative (albeit a weak one) to the inference that the murder was nothing more than a senseless act of violence.

In fact, in this very appeal, Hittson maintains that his trial counsel failed to fulfill their Sixth Amendment duty because they didn't present expert testimony of his mental condition—testimony that, had it been put before the jury, would have allowed the State to call Dr. Storms in rebuttal. His state habeas counsel discounted trial counsel's "strategic" concerns with Dr. Storms's testimony as follows:

Mr. Hollman's [(lead trial counsel)] concern over Dr. Storms' potential testimony . . . was exaggerated and unfounded. Mr. Hollman was not concerned about Dr. Storms' professional assessment of Mr. Hittson, but feared only that Dr. Storms would testify to remarks Mr. Hittson made during their pre-trial interview. During that interview, Mr. Hittson referred to the victim as a "hillbilly" and, at another point, an "asshole." However, given that Mr. Hittson had just been found guilty of a horrific murder, these offhand remarks hardly outweighed the benefits of introducing favorable psychological evidence.

Doc. 76-1, at 39 (citation omitted). We agree with the assertion underlying this argument; given that Hittson murdered, mutilated, and dismembered Utterbeck, the fact that he later called Utterbeck a "hillbilly" and an "asshole" was simply not that significant.

Therefore, we cannot say that the erroneous admission of Dr. Storms's testimony had a substantial effect on the jury's finding that Hittson committed an

“outrageously or wantonly vile, horrible, or inhuman” murder with “depravity of mind.” We reverse the District Court’s holding to the contrary.

## VI.

Hittson’s next claim is that he was denied his Sixth Amendment right to counsel because his trial team failed to put on expert testimony regarding his mental condition during the penalty phase of his trial.

To prevail on an ineffective assistance claim, a habeas petitioner must establish both that his counsel’s performance was constitutionally deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). Under Strickland’s performance prong, a petitioner must show that his attorneys’ conduct “fell below an objective standard of reasonableness”—i.e., that it was not “reasonable[] under prevailing professional norms.” Id. at 688, 144 S. Ct. at 2064–65. And under the prejudice prong, he must show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 694, 144 S. Ct. at 2068.

The Georgia Supreme Court rejected Hittson’s ineffective-assistance claim. Hittson now argues that the court unreasonably applied Strickland. The District Court disagreed, and so do we.

A.

Hittson's trial team consisted of three court-appointed lawyers: Walter "Bo" Sammons, Steve Hollman, and William Shurling. Sammons was appointed first, in June 1992, and Hollman was appointed a few months later (the trial began in February 1993). At the time, neither had tried a death-penalty case through to verdict and sentencing, and so after the State indicated its intention to seek the death penalty (in September 1992), the trial court appointed Shurling, who had tried a handful of capital cases, to advise Sammons and Hollman. Shurling appeared in court and attended strategy sessions, but Sammons and Hollman did most of the work and had the final say on important decisions.<sup>31</sup>

Hittson's defense team had him evaluated twice by a psychologist and once by a neuropsychiatrist, and they had a social worker research and prepare a detailed analysis of his upbringing and family dynamics. Sammons and Hollman also interviewed a number of lay witnesses (many of whom testified during the penalty phase) and compiled various records from Hittson's adolescence and Naval service. They traveled to Hittson's hometown in Nebraska to interview family, friends, counselors, and teachers; Hollman traveled to Pensacola and Philadelphia to interview sailors aboard the Forrestal; and both lawyers spent dozens of hours talking to Hittson.

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<sup>31</sup> As Hollman put it, "Mr. Shurling did virtually nothing." Doc. 75-17, at 28.

Because of what their experts found, Hittson's attorneys filed a notice of their intent to raise Hittson's mental condition at trial. In accordance with Georgia law, the trial court required Hittson to submit to an examination by the State's chosen expert and the court's expert. Hittson's trial team eventually decided not to put on their experts because they felt that the overall weight of the expert testimony would hurt Hittson. Hittson claims that this decision amounted to constitutionally-deficient conduct. We thus examine the attorneys' decision, starting with their efforts to develop mitigating expert testimony and then describing their ultimate decision not to use the fruits of their labor.

1.

In July 1992 (shortly after Sammons was appointed), Sammons successfully petitioned the trial court for funds to have Hittson examined by a psychologist. According to Sammons, "[w]e were hopeful that it would be determined that Travis was mentally retarded or that he had some sort of psychiatric condition that would truly render sympathy, you know, from the jury." Doc. 75-16, at 74. Sammons hired Dr. Michael Prewett, a clinical psychologist from Macon, Georgia. Dr. Prewett interviewed Hittson twice, in July 1992 and January 1993, and administered a battery of psychometric tests, including the then-current versions of the widely-used Wechsler Adult Intelligence Scale ("WAIS") and Minnesota

Multiphasic Personality Inventory (“MMPI”).<sup>32</sup> Dr. Prewett also reviewed Hittson’s school records, counseling records, and letters written by Hittson. Dr. Prewett did not prepare a report; he just discussed his findings with Sammons and Hollman.

Based on interviews with Hittson, Dr. Prewett concluded that “he was a serious alcoholic who suffered from alcoholic blackouts,” and “engaged in very aggressive behavior” when drinking. Doc. 74-8, at 38; Doc. 72-5, at 7. His father was an alcoholic and his family was dysfunctional, and, as a result, so was Hittson. He had a hard time maintaining stable relationships; in fact, “he really never had anything resembling a meaningful relationship with anybody,” including his family. Doc. 75-18, at 22. At the same time, “he was so desperate to belong some place, that the first person that was nice to him he was going to kind of fall in with.” *Id.* at 24–25. Hittson had also contemplated suicide as an adolescent.

Dr. Prewett pegged Hittson’s IQ at 86—in the low-average range of intelligence. His MMPI test results suggested a number of possible diagnoses: depression, schizophrenia, schizoid personality disorder, schizo-typical personality

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<sup>32</sup> Dr. Prewett also administered the Personal Problems Checklist, Wide Range Achievement Test, Luria-Nebraska Neuropsychological Test Battery, Trail Making Test, and Bender-Gestalt Test.

disorder, and borderline personality disorder.<sup>33</sup> Of those possibilities, Dr. Prewett believed that Borderline Personality Disorder was the correct diagnosis—based on Hittson’s history of unstable interpersonal relationships, substance abuse, suicidal ideation, difficulty controlling his anger, and efforts to avoid abandonment.<sup>34</sup>

On account of this diagnosis, Dr. Prewett believed that it was possible that Hittson could have experienced brief psychotic episodes, triggered by extreme stress. As he explained to the state habeas court:

Individuals with severe characterological disturbance, when they are under stress, their behavior will frequently deteriorate to the point that for a brief period of time, they may, in fact, be out of touch with reality or have very poor reality testing. He was capable of doing that, and perhaps had done that on at least one or two occasions.

Doc. 75-18, at 26. Dr. Prewett could not determine whether Hittson had experienced a psychotic episode on the night of the crime:

[H]e was severely intoxicated on the night of the incident. That would have masked anything that was going on, so it would have been impossible to make any determination of what was happening at that particular moment and time.

Id.

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<sup>33</sup> The MMPI consists of several hundred true-false questions, which are then “scored” by a computer (the questions are statistically correlated to certain psychological traits). The disorders listed above are correlated to Hittson’s raw score; however, the results are subject to interpretation, which is why an expert (in this case, Dr. Prewett) is needed to reach a diagnosis.

<sup>34</sup> These characteristics tracked the entry for Borderline Personality Disorder in the then-current edition of the DSM, which Dr. Prewett relied on in making his diagnosis. See Am. Psych. Ass’n, Diagnostic and Statistical Manual of Mental Disorders, at 346–47 (3d ed., rev. 1987) (hereinafter “DSM-III-R”).

With respect to the crime, Hittson “expressed a good deal of remorse and disbelief that he could have done something like this.” Id. Prior to the murder, he was not particularly close to Utterbeck, nor did he harbor any ill will towards him—they had a “neutral relationship.” But Hittson had a “very strange relationship” with Vollmer; he “felt controlled by this individual [and] alternated between very intense hatred for this person versus almost hero worship at times.” Id. at 22.

Dr. Prewett also believed that Hittson might have “some degree” of brain damage—possibly the result of a mild concussion or Hittson’s alcohol abuse. Dr. Prewett suggested that Hittson’s attorneys hire Dr. Norman Moore, a neuropsychiatrist who also practiced in Macon, to further evaluate Hittson—in particular, to evaluate the existence or extent of his brain damage. Hittson’s trial team again successfully petitioned the court for funds, and in January 1993, Dr. Moore examined Hittson.

Dr. Moore did not find any evidence of brain damage, but he nonetheless prepared a detailed report of his observations. The report recounted Hittson’s troubled childhood, including suicide attempts, heavy drinking, an alcoholic father,

and a dysfunctional family life.<sup>35</sup> Dr. Moore observed that Hittson “has a quick temper but cools down quickly,” and “does not get violent when sober but was always hostile and very violent on alcohol, especially liquor.” Doc. 75-20, at 39. Dr. Moore also noted past misbehavior by Hittson, including stealing \$1500 from his father and a burglary arrest while enlisted in the Navy.

Aboard the Forrestal, Hittson said that he tried to avoid working with Vollmer because Vollmer played “mind games.” Vollmer was higher in rank, though, and apparently hand-picked Hittson to be a part of his work crew. Hittson said that Vollmer would try to “get him drunk, and as a test, take him out to pick up a hooker and use an electric zapper on her,” but Hittson refused. Id. at 38. On the night of the murder, Hittson claimed that Vollmer “filled him with alcohol” before he told him that Utterbeck was going to kill them. Id. While he did not deny his participation in the murder, Hittson expressed disbelief at how he could have done the things he did. When discussing his findings with the attorneys, Dr. Moore stated his belief that the crime had homosexual overtones, although he did not think that Hittson was a homosexual, and he characterized Hittson as “just mean” and told his attorneys that he would say as much if called to testify. Doc. 75-16, at 100, 124.

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<sup>35</sup> Dr. Moore’s evaluation was based solely on his interview with Hittson. Dr. Moore noted in his report, though, that “he impressed me with his openness and frankness and I have no reason to doubt the truthfulness of his statements.” Doc. 75-20, at 39–40.

Dr. Moore did not administer any psychometric tests; however, based on the interview, he diagnosed Hittson with alcoholism and Antisocial Personality Disorder. He also opined that Hittson “may have” experienced Induced Psychotic Disorder on the night of the murder. As Dr. Moore explained it:

The central feature of this disorder is a delusional system that develops in a second person (Mr. Hittson) as a result of a close relationship with another person (the primary case, Mr. Vollmer) who already has a psychotic disorder with delusions. The same delusions are partly shared by both persons. The content of the delusion is usually within the realm of possibility, and is often based on common past experiences of the two people. Usually the primary person (Mr. Vollmer) with the psychotic disorder is the dominant one in the relationship and gradually imposes his or her delusional system on the more passive and initially healthy second person (Mr. Hittson).

Doc. 75-20, at 40. Dr. Moore pointed out that, for Hittson to have shared Vollmer’s psychotic delusion on the night of the murder, Vollmer himself would have had to have had a psychotic delusion that Utterbeck intended to kill the two of them—something that Dr. Moore had no way of determining. Nonetheless, Dr. Moore noted that “[e]ven if Mr. Vollmer’s belief did not reach delusional level, many of the other criteria were present,” and so, it was his opinion “that Mr. Hittson was unduly influenced by Mr. Vollmer.” Id.

Finally, in early February 1993, defense counsel obtained funds from the court to hire a social worker, Mary Shults, to work up a profile of Hittson’s family. Shults traveled to Nebraska to interview family, friends, and teachers; she

interviewed Hittson in jail; and she reviewed some of the same records provided to Dr. Prewett.

Her research confirmed much of Hittson's account of his upbringing. There was a history of alcohol abuse on both sides of Hittson's family; Hittson's father was an alcoholic who had emotionally abused Hittson when he was drunk; Hittson's three siblings struggled with alcohol dependency; and Hittson himself began drinking at a very young age—when he was a teenager, he was twice referred to treatment but never went. The Hittson home had been a “chaotic environment” to grow up in. When Shults visited, the house was in disrepair, the inside was “extremely cluttered, in disarray, and dirty,” and family members “looked rather unkempt.” Doc. 75-20, at 6. Shults believed that Hittson's parents “failed to provide clean appropriate clothing for themselves and their children, had poor hygiene skills, and failed to teach their children cleanliness and good hygiene.” Id. at 9–10. Family dynamics paralleled living conditions—as Shults put it, “Hittson's family can only be described as dysfunctional.” Id. at 9. Shults believed Hittson's parents to be emotionally neglectful; they “were very ineffective in providing nurturing and love for any of their children, but they neglected Travis even more than the rest.” Id. at 10. Because of the lack of affection at home, Hittson spent a lot of time at a friend's house and became very attached to his

friend's family—he even took to calling the friend's mother “mom.”<sup>36</sup> At school, Hittson was “extremely needy, both emotionally and academically”; not surprisingly, he performed poorly and was thought to have a learning disability. Id. at 8. And he was teased by other children because he had poor hygiene and dressed “awkwardly and clumsily” in “outdated and often dirty clothing.” Id.

In Shults's opinion, Hittson's upbringing “hampered . . . his ability to form appropriate relationships and interact appropriately with society” and led him to “develop[] a pattern of seeking . . . attention and love from others.” Id. at 10, 11. Neither Shults nor Hittson's attorneys believed that this information would excuse Hittson's participation in the murder, but they hoped it would at least explain “some of the forces that went to mold Travis Hittson” and possibly show “how he might be a bit more vulnerable . . . to being overwhelmed by the will of Mr. Vollmer.” Doc. 75-17, at 46.

2.

On February 5, 1993, the defense team filed a notice of their intent to use Hittson's insanity or mental incompetence as a defense—as required if they wanted the option of using any of their experts at trial. See Ga. Unif. Super. Ct. R. 31.4 (1993) (now Rule 31.5). In response, the State sought discovery of any expert

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<sup>36</sup> Mrs. Evie Fletcher—the friend's mother—testified to this during the penalty phase of Hittson's trial.

reports and requested that its own expert be allowed to evaluate Hittson. On February 11, 1993, the trial court ordered him to submit to an examination by Dr. Storms, the psychologist the State employed.<sup>37</sup> The court also appointed its own expert, Dr. Paul Coplin, to examine Hittson, pursuant to O.C.G.A. § 17-7-130.1.<sup>38</sup> Hittson's trial counsel were permitted to attend both examinations, but the court cautioned them not to disrupt the interviews, else they would lose the right to present their own experts. The court also stated that both sides could talk to Dr. Coplin before trial.

Drs. Storms and Coplin independently interviewed Hittson over the course of the next few days.<sup>39</sup> Sammons attended most of Dr. Storms's interview—he observed and took notes but did not interfere—but none of Hittson's attorneys attended Dr. Coplin's interview. In addition to interviewing Hittson, both doctors administered a handful of psychometric tests (including the WAIS and MMPI) and

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<sup>37</sup> See generally *Motes v. State*, 256 Ga. 831, 832, 353 S.E.2d 348, 349 (1987) (“[I]f a defendant wants to tell his story to a jury through the mouth of an expert, the state should have an equal opportunity to tell that story through the mouth of an expert, and . . . the state could not practically possess this opportunity unless their expert gained access to the defendant.”).

<sup>38</sup> “When notice of an insanity defense is filed, the court shall appoint at least one psychiatrist or licensed psychologist to examine the defendant and to testify at the trial.” O.C.G.A. § 17-7-130.1.

<sup>39</sup> Dr. Coplin interviewed Hittson on Friday, February 12; Dr. Storms interviewed him on Saturday, February 13 and Sunday, February 14. Jury selection for Hittson's trial (which commenced on February 25) began on Tuesday, February 16.

reviewed some limited information on Hittson's background and the crime.<sup>40</sup> They each prepared a report stating their findings.

The reports contained much of the same background information. Hittson did not have a close relationship with his parents; his father was an alcoholic; he started drinking in high school; and he had contemplated suicide. Dr. Storms reported that Hittson was "somewhat vague concerning his relationship with Mr. Vollmer" but at one point stated that "Vollmer 'considered me to be his protégé.'" Doc. 70-4, at 18. Dr. Storms's report included Hittson's characterization of Utterbeck—as a "hillbilly" and an "asshole"—but noted that "there was no apparent intense feeling one way or the other between Mr. Hittson and his alleged victim." *Id.* Dr. Storms did not find any motive for the murder, other than Vollmer's statements telling Hittson that Utterbeck was going to kill them. When he asked Hittson how he felt just before he killed Utterbeck, Hittson indicated "that he was afraid" and "that he was not thinking." *Id.* at 21.

Dr. Storms scored Hittson's IQ at 105, placing him squarely in the average range, and he found no evidence of brain damage. Dr. Storms noted that the MMPI scores indicated that "Hittson was attempting to unconsciously exaggerate

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<sup>40</sup> Dr. Storms administered the WAIS, MMPI, Rorschach Inkblot Test, and Trail Making Test. Dr. Coplin administered the WAIS, MMPI, Bender-Gestalt Test, Adult Sentence Completion Test, Draw-A-Person Human Figure Drawing Test, and Beck Depression Inventory.

his psychological problems,”<sup>41</sup> but he nonetheless believed that the test results fit with his impressions from the interview:

[Hittson] has basically led a passive-dependent life style overlaid on mild depression. He seemingly has been one to unquestioningly go along with others who are perceived to have more personal power than he, however, he has, at times, acted out, especially when he has been drinking.

...

He tends to solve problems by “trial and error” and tends to not think through the ramifications of his actions before he acts. . . . He usually has enough psychological resources to control and direct his actions; however, under extraordinary circumstances, his controls may falter.

Id. at 20–21. Dr. Storms did not find anything that would have impaired Hittson’s ability to distinguish right from wrong on the night of the murder. He noted that Hittson was drunk that night, and opined that alcohol tends to exacerbate Hittson’s “natural style” of “act[ing] before he thinks.” Id. at 21.

Like Dr. Storms, Dr. Coplin found Hittson’s IQ to be average (93) and did not find evidence of brain damage. Dr. Coplin’s test results showed Hittson to be passive-dependent, depressed, anxious, and intrapunitive (“blaming himself for all problems in his life situation”). Hittson had elevated MMPI scores on several

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<sup>41</sup> The MMPI has built-in validity tests in the form of questions that are designed to ferret out individuals who may be trying to exaggerate or minimize their problems.

scales<sup>42</sup>—including the “Psychopathic Deviant” scale<sup>43</sup>—but Dr. Coplin did not diagnose him with any personality disorders or otherwise find “any psychiatric symptoms or psychiatric history that would render him not responsible for the charges against him.” Doc. 70-5, at 16. He did note that Hittson was probably an alcoholic.

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<sup>42</sup> The true–false answers given in response to MMPI questions correlate to numerical scores on one or more of ten MMPI clinical scales. Elevated scores on a given scale, or combinations of scores, are statistically correlated to certain personality traits or personality disorders. The psychometrician who analyzed Hittson’s MMPI scores (as part of Dr. Coplin’s examination) described Hittson’s score profile as follows:

[H]e tends to be anxious, tense and jumpy. He worries excessively and is vulnerable to real and imagined threat[s]. He may anticipate problems before they occur and over-react to minor stress. Somatic symptoms are common, involve vague complaints of fatigue, tiredness, bored[om], insomnia, and other physiological features. Depression is evident. He may not report feeling especially sad or happy but shows symptoms of clinical depression including slow personal tempo, slowed speech, and retarded thought processes. He is pessimistic about the world in general and more specifically about the likelihood of overcoming his problems. He may broo[d] and ruminate about his problems much of the time. Although he has a strong need for achievement and recognition for accomplishments, he feels guilty when he falls short of his goals. He tends to be rather indecisive and harbors feelings of inadequacy, insecurity, and inferiority. He is intrapunitive, blaming himself for all problems in his life situation. He is rigid in his thinking and problem solving and meticulous and perfectionistic in daily activities. He tends to be rather passive-dependent in his relationships with other people. He has the capacity for forming deep emotional ties and in times of stress may become overly clinging and dependent. He tends to elicit nurturance and helping behavior from others.

Doc. 70-5, at 14.

<sup>43</sup> Sammons later testified in the state habeas proceedings that Hittson’s elevated Psychopathic Deviant score worried him, but neither party presented evidence in the state court to explain what an elevated Psychopathic Deviant score is understood to mean. Cf. Cullen v. Pinholster, \_\_\_ U.S. \_\_\_, 131 S. Ct. 1388, 1398, 179 L. Ed. 2d 557 (2011). (“[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.”).

These findings remained unknown to the defense team when the guilt phase of the trial began on February 25, 1993. The court did not require the parties to disclose their experts' findings before trial, and the court did not disclose Dr. Coplin's findings, because the defense had yet to definitively commit to putting on evidence of Hittson's mental condition. While Sammons had attended Dr. Storms's interview, he was not privy to Dr. Storms's professional opinion. None of Hittson's attorneys attended Dr. Coplin's interview or tried to talk to Dr. Coplin before trial.

The defense team waited to commit to a course of action until the start of the penalty phase—when they could wait no longer. Following the parties' opening statements, they proffered Dr. Prewett's testimony to see if the court would let him testify to some of his findings without opening the door to the State's introduction of Drs. Coplin and Storms.

They did not present anything from Dr. Moore; in fact, it appears that the State was never aware of Dr. Moore's involvement. Later, during the state habeas proceedings, Sammons explained his fear "that [Dr. Moore] would testify that Travis was just mean, and that he just did this because he is mean." Doc. 75-16, at 101. Apparently, after talking to Dr. Moore, Sammons did not think they should put on any mental health evidence: "I was scared to death that Dr. Moore's testimony would come in, that Dr. Prewett would testify that he had a consultation

with Dr. Moore, and that Dr. Moore would have been called, and he was our psychiatrist, and he would have testified that Travis was just mean.” Id. at 102. “I didn’t think that there was anything worth doing to take the risk of putting, of having the State put our psychiatrist on the stand to testify that our client was just mean.” Id. at 103. While Hollman was less troubled by Dr. Moore’s possible testimony (which presumably explains why they still proffered Dr. Prewett’s testimony), he still felt that Dr. Moore’s findings were not very helpful to their mitigation theory, and he wanted to avoid having Dr. Moore testify before the jury, if possible.

After Dr. Prewett gave a condensed version of his testimony outside the jury’s presence, Hittson’s counsel engaged in a lengthy colloquy with the court and District Attorney regarding their ability to present some or all of Dr. Prewett’s findings without allowing rebuttal from Drs. Storms or Coplin (even though they were not yet aware of either doctor’s findings). The court rejected their arguments and made it clear that, if they called Dr. Prewett, the State could call Drs. Storms or Coplin. Before forcing them to decide what course to pursue, the court gave both sides Dr. Coplin’s report—cautioning Hittson’s attorneys that, “I don’t think y’all are going to find that that’s going to be for the benefit of Mr. Hittson.” Doc. 74-8, at 47. And the court required the State to turn over Dr. Storms’s report. Trial counsel then had a thirty-minute recess to review the reports—Dr. Prewett

was still present and also read the reports, but did not recall having an in-depth discussion with the attorneys.

Upon seeing the doctors' findings, Sammons and Hollman were convinced that whatever benefit they might gain from having Dr. Prewett testify would be outweighed by the other experts' findings. In particular, Sammons recalled being worried about Dr. Coplin's MMPI test results showing Hittson to have an elevated Psychopathic Deviant score. In his words, "I felt like if the jury heard that—you know, you look at the photographs, you look at the crime, the jury hears that he is elevated on a scale for being a psychopathic deviant, you know, it was my feeling that that is what they would remember." Doc. 75-17, at 14. Sammons was also worried because Dr. Coplin did not find any evidence of brain damage—which conflicted with Dr. Prewett's findings (of the four doctors that examined Hittson, Dr. Prewett was the only one that found any indication of brain damage). Hollman likewise felt that the balance of the psychological testimony would not benefit Hittson: "we were very concerned that the State and the Court's, that is Dr. Storms[']s and Dr. Coplin's opinions of Mr. Hittson's mental state would have been very difficult for us to overcome and would have been potentially even frightening to the jury." Id. at 67.

Shurling was more ambivalent; he testified in the state habeas proceedings that, "[a]s a general proposition, I think one could say that all of the psychologies

and psychological evaluations taken together were very, well, they were unfavorable.” Doc. 75-18, at 91. But later he stated that, had it been his call, he might have risked the rebuttal testimony because, in his experience, he preferred to put on all the evidence he has at his disposal and let the jury sort it out. Shurling was not the primary decisionmaker, though, and notwithstanding his inclination to put on all available evidence, he apparently did not object to Sammons’s and Hollman’s decision to forego expert testimony.

Following their review of the expert reports, trial counsel proffered Shults’s testimony—again to see if they could have her testify without triggering rebuttal from Drs. Storms or Coplin. They again struck out. The court made it clear that if they put on Shults, then the State could call its own mental health experts to not only rebut Shults’s testimony, but also to state their own conclusions based on their independent evaluation of Hittson.

Faced with an all-or-nothing proposition, the defense decided to forego expert testimony and just stick with their lay witnesses. In an abundance of caution, they even asked the court, “[i]f we put up lay witnesses to testify about [Hittson’s] character, you won’t let them put up Coplin and Storms?” To which the court replied “Right.” Doc. 74-8, at 77. As recounted earlier, the defense team’s twenty lay witnesses testified that Hittson was a pretty good guy—he was not the brightest and he drank a lot, but he was pretty much harmless—and that

Hittson was particularly impressionable and emotionally needy. And, as discussed in detail, one lay witness testified that Hittson “might have been” remorseful about the murder, which led to Dr. Storms’s “lay” testimony that Hittson called Utterbeck a “hillbilly” and an “asshole” during his interview.

Following Dr. Storms’s brief rebuttal testimony, Hittson’s trial team did not try to re-open their case in chief to put on their experts, despite the fact that at least some of the testimony they had hoped to keep from the jury had now slipped out. When asked why Dr. Storms’s testimony did not change their calculus, Sammons pointed out that he was still worried about the specter of Dr. Moore’s testimony. Likewise, Hollman “didn’t see the value” in having Dr. Prewett testify after Dr. Storms but conceded that, “at that point, I’m not sure any of us really knew what to do.” Doc. 75-17, at 59, 62.

3.

In his first state habeas petition, Hittson claimed that his trial counsel failed to render effective assistance because they did not call Dr. Prewett or Ms. Shults during the penalty phase—even after Dr. Storms testified. After the evidentiary hearing, Hittson elaborated on this claim, arguing in his post-hearing brief that “counsel’s decision to withhold psychological evidence during the penalty phase of trial was uninformed,”—and therefore, by definition, not strategic—because counsel “inexplicably failed to interview Dr. Coplin prior to trial.” Doc. 76-1, at

31, 34. In the alternative, Hittson contended that, “[e]ven if the investigation could be said to be reasonable . . . [c]ounsel’s purported reason for withholding the evidence” was unreasonable because they only spent thirty minutes reviewing Drs. Coplin’s and Storms’s reports—leading to “a non-strategic rush to judgment.” Id. at 36–37. Because of such “blind decision-making,” counsel failed to recognize that “Dr. Coplin’s report was mostly positive,” and their “concern over Dr. Storms’s potential testimony also was exaggerated and unfounded.” Id. at 38, 39. Moreover, “any basis for withholding [Dr. Prewett and Ms. Shults] disappeared when Dr. Storms recounted [Hittson’s ‘hillbilly’ and ‘asshole’] statements . . . .” Id. at 39.

In denying habeas relief, the Butts County Superior Court held that Hittson had failed to show that his attorneys’ conduct fell below the “objective standard of reasonableness” required by the Sixth Amendment, and, in the alternative, that Hittson had not been prejudiced by the complained-of conduct—i.e., he failed to establish either of Strickland’s prongs.

The Superior Court found the defense attorneys’ assessment of the mental health evidence to be reasonable:

[T]rial counsel’s decision to forego mental health evidence was reasonable based [solely] upon the fear that Dr. Moore might testify . . . .

. . .

[Moreover], in light of the contradictions to Dr. Prewett's testimony which are presented by the reports of Coplin and Storms, the possible negative inferences which could be drawn from the psychological reports, as well as the conclusions drawn in the reports concerning Hittson's responsibility for the crime, the Court concludes that it was reasonable for trial counsel to conclude that the reports of Storms and Coplin were unfavorable. [Therefore] trial counsel's decision not to present the testimony of Dr. Prewett and Ms. Shults, which was based on the aforementioned reasonable conclusion was not unreasonable.

Doc. 76-4, at 17, 19 (citation omitted). Even after Dr. Storms testified, the court believed that enough unfavorable evidence remained—unrelated to the “hillbilly” and “asshole” statements—to support counsel's decision not to call their experts. And the court brushed aside the “uninformed judgment” argument because, in the court's view, thirty minutes was sufficient time to digest Drs. Coplin's and Storms's reports, “as the reports are not lengthy [(together they totaled sixteen pages)], and Dr. Coplin's report contains a summary which would make it possible to determine the substance of his testimony within that period of time.” *Id.* at 17.

In the alternative, the court held that, even if trial counsel had been constitutionally deficient, the expert testimony did not create a reasonable probability of a different result:

[I]n light of all the evidence adduced, including the crime committed, the gruesome nature of that crime, Petitioner's characterization of the victim after the crime, the mitigation evidence which was actually presented, and the possibly unfavorable psychological testimony

which includes not only [Drs. Prewett's,<sup>44</sup> Coplin's, and Storms's findings], but the possibility of Dr. Moore, the defense's own expert, testifying that Travis was "just mean," the Court does not believe there to be a reasonable probability that the jury would have returned with a sentence of life had Ms. Shults and Dr. Prewett been presented in the penalty phase.

Id. at 21 (citations omitted).

Hittson applied to the Georgia Supreme Court for a certificate of probable cause, claiming error in the Superior Court's application of both Strickland prongs. He maintained that thirty minutes was not enough time for his attorneys to assess the reports and, in their rush to judgment (which they manufactured by failing to interview Dr. Coplin before trial), "[t]hey overlooked helpful material in the reports and misinterpreted irrelevant material as harmful." Doc. 76-6, at 26. The Supreme Court found no merit to his arguments and accordingly denied a CPC.

In his federal habeas petition, Hittson contended that the state courts unreasonably applied Strickland when they found the defense team's assessment to be reasonable: "In these circumstances, counsel could not possibly make an informed decision to withhold psychiatric evidence"; "[i]n their rush during a 30 minute recess, the lawyers misread the reports, overlooking helpful material, and misinterpreting irrelevant material as harmful." Am. Pet. for Writ of Habeas

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<sup>44</sup> The court pointed out that some of Dr. Prewett's testimony could have worked against Hittson's interests—e.g., the Borderline Personality Disorder diagnosis and his opinion that Hittson was violent and impulsive.

Corpus, ECF no. 45, at 48. The District Court evaluated the experts' findings and agreed with the Butts County Superior Court's reasons for holding that Hittson's counsel acted reasonably—going as far as to note that “trial counsel more likely would have been ineffective if they had opened the door to the damaging testimony of Dr. Coplin, Dr. Storms, and Dr. Moore,”—“regardless of the mitigation strategy that capital defense lawyers choose, they are often damned if they do, and damned if they don't when they decide to use, or not use, mental health testimony.”

Hittson, 2012 WL 5497808, at \*48 (quotation marks omitted).

B.

Like the District Court, we review the state courts' rejection of Hittson's ineffectiveness claim through the lens of AEDPA and, accordingly, look only to whether the Georgia Supreme Court had a reasonable basis in the record to conclude that Hittson's ineffective-assistance claim was meritless.

AEDPA review of a state court's adjudication of a Strickland claim is an especially onerous standard for a federal habeas petitioner to overcome. We begin with Strickland's performance prong, which, in staking out the standard for constitutionally defective representation, demands that courts give considerable deference to trial counsel's judgment. See Richter, \_\_\_ U.S. at \_\_\_, 131 S. Ct. at 788 (“Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing

counsel, and with the judge.”). Because it would be “all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable . . . a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. This presumption insulates all but those errors that are “so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. at 687, 104 S. Ct. at 2064.

To show that an attorney failed to discharge his Sixth Amendment duty, a petitioner must establish that the attorney’s conduct “amounted to incompetence under ‘prevailing professional norms.’” Richter, \_\_ U.S. at \_\_, 131 S. Ct. at 788 (quoting Strickland, 466 U.S. at 690, 104 S. Ct. at 2066) (emphasis added). “The [Strickland] test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done.” White v. Singletary, 972 F.2d 1218, 1220 (11th Cir. 1992). “[A] petitioner must establish that no competent counsel would have taken the action that his counsel did take.” Chandler v. United States, 218 F.3d 1305, 1315 (11th Cir. 2000) (en banc) (emphasis added).

Thus, “[e]ven under de novo review, the standard for judging counsel’s representation is a most deferential one.” Richter, \_\_ U.S. at \_\_, 131 S. Ct. at 788.

But “[e]stablishing that a state court’s application of Strickland was unreasonable under § 2254(d) is all the more difficult. The standards created by Strickland and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so.” Id. (citations and quotation marks omitted). “The question is not whether a federal court believes the state court’s determination under the Strickland standard was incorrect but whether that determination was unreasonable—a substantially higher threshold.” Knowles v. Mirzayance, 556 U.S. 111, 123, 129 S. Ct. 1411, 1420, 173 L. Ed. 2d 251 (2009) (quotation marks omitted). If there is “any reasonable argument that counsel satisfied Strickland’s deferential standard,” then a federal court may not disturb a state-court decision denying the claim. Richter, \_\_\_ U.S. at \_\_\_, 131 S. Ct. at 788.

Hittson has come nowhere close to satisfying this combined Strickland–AEDPA standard. At best, he has demonstrated that his attorneys faced a tough choice—they had to let the jury hear all the expert testimony or none of it and, based on their assessment of the evidence, they decided that this would do more harm than good. Such a showing is not enough to establish ineffectiveness under a de novo application of Strickland—much less justification for upsetting the Georgia high court’s decision under § 2254(d)(1).

We need not rehash the expert evidence. It suffices to say what should be evident: The experts’ findings were a mixed bag (even after the “hillbilly” and

“asshole” statements came in)—some of what they had to say would have been good for Hittson, and some would have been bad. The defense team’s judgment that the findings were more aggravating than mitigating is precisely the type of game-time decision that Strickland insulates from Monday-morning quarterbacking. See Waters v. Thomas, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc) (“Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess.”).

Hittson tries to avoid the broad deference owed to defense counsel’s best judgment by arguing that their “decision” was just guesswork, because they failed to fully investigate the other experts’ findings. The record does not support this argument. First, even without considering Drs. Storms’s and Coplin’s findings, trial counsel had reason enough to forego Dr. Prewett’s testimony based solely on the risk that the State (and then the jury) would hear from Dr. Moore. A reasonable attorney could have concluded, as Sammons did, that “there was [not] anything worth doing to take the risk of . . . having the State put our psychiatrist on the stand to testify that our client was just mean,” Doc. 75-16, at 103—not to mention Dr. Moore’s Antisocial Personality Disorder diagnosis, his observation that Hittson was “always hostile and very violent on alcohol,” and the report’s references to Hittson’s burglary arrest and theft from his parents, Doc. 75-20, at 38–39.

Even so, the team reserved judgment until after they had access to Drs. Coplin's and Storms's reports and after the court ruled that Dr. Prewett's or Ms. Shults's testimony would allow the state to call Drs. Coplin or Storms in rebuttal. Hittson's contention that thirty minutes was not enough time for three attorneys and a psychologist to digest two eight-page reports is little more than wishful thinking.<sup>45</sup> The trial team was already familiar with Hittson's psychological profile from their discussions with Drs. Prewett and Moore, and the trial judge told them, point blank, "I don't think y'all are going to find that [Dr. Coplin's report is] going to be for the benefit of Mr. Hittson." Doc. 74-8, at 47. As we have just said, their assessment of the evidence was objectively reasonable, and Hittson has done nothing to overcome the strong presumption that counsel "made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

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<sup>45</sup> Hittson quibbles with some of the aggravating parts of the reports that his trial attorneys highlighted in the state habeas proceedings. He forgets, though, that he bears the burden of proving his attorneys' incompetence; it is not up to defense counsel to articulate each and every reason they had for a single decision made in the course of an entire trial, litigated years ago. Richter, \_\_\_ U.S. at \_\_\_, 131 S. Ct. at 790 ("[C]ourts may not . . . insist [that] counsel confirm every aspect of the strategic basis for his or her actions. There is a strong presumption that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect." (quotation marks omitted)); see also Chandler, 218 F.3d at 1315 n.16 ("To uphold a lawyer's strategy, we need not attempt to divine the lawyer's mental processes underlying the strategy."). The only "evidence" Hittson puts forth to support his argument that the defense team's decision was uninformed is the very fact that the defense team found the reports to be, on the whole, unfavorable. In other words, Hittson argues that the attorneys' assessment of the expert evidence was unreasonable because it was uninformed, and as proof that it was uninformed, he points to their unreasonable assessment. Needless to say, such tautology is unpersuasive.

That the attorneys might have been able to glean some information from Dr. Coplin before trial is irrelevant.<sup>46</sup> For context, we note that Dr. Coplin interviewed Hittson on Friday, February 12, 1993; Dr. Storms interviewed Hittson on Saturday and Sunday February 13 and 14; and jury selection began on Tuesday, February 16. Assuming that the attorneys could have found time to run down Dr. Coplin (before the state habeas court, Hittson never asked the attorneys why they didn't interview Dr. Coplin), Hittson has produced no evidence to show that he would have told them anything other than what was in his report (Hittson did not call Dr. Coplin during the state habeas proceedings). At most, Hittson has shown that trial counsel might have been able to learn—slightly earlier—the same information they got from Dr. Coplin's report.

Courts are not in the business of micromanaging attorney trial prep. See Richter, \_\_\_ U.S. at \_\_\_, 131 S. Ct. at 788 (“[I]ntrusive post-trial inquiry threaten[s] the integrity of the very adversary process the right to counsel is meant to serve.”)

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<sup>46</sup> In his federal habeas petition and brief to this court, Hittson claims that his counsel also should have interviewed Dr. Storms before trial. The first time Hittson made this claim was in his CPC application to the Georgia Supreme Court. Putting aside Hittson's failure to present this argument to the Butts County Superior Court, there is no support in the trial record (and obviously none in the collateral record) for the proposition that Hittson's attorneys could have obtained Dr. Storms's findings prior to trial. In the pretrial hearing in which the trial court ordered Hittson to submit to an examination by Dr. Storms, the court explained that neither side had an obligation to disclose their respective experts' findings until the defense team decided whether they were going to use their expert evidence. Thus, Dr. Storms had no obligation to disclose his findings to the defense team. In fact, after Dr. Storms interviewed Hittson, Sammons tried to ask him about his impressions in the parking lot, but Dr. Storms rebuffed his inquiries.

(quotation marks omitted)); Strickland, 466 U.S. at 490, 104 S. Ct. at 2066 (“Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel . . .”). We are all too familiar with the strain of claims alleging ineffective assistance because an attorney could have interviewed one more witness, read one more document, or chased down one more loose end. In the face of these claims, courts have explained ad nauseam that attorneys are not required to conduct an exhaustive investigation of each and every decision made at trial—merely a reasonable one. See Strickland, 466 U.S. at 691, 104 S. Ct. at 2066 (“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”); Richter, \_\_\_ U.S. at \_\_\_, 131 S. Ct. at 789 (“Counsel [is] entitled to . . . balance limited resources in accord with effective trial tactics and strategies.”).

With unlimited time and resources, there is always something more that might have been done in a capital case—such allegations “prove[] at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel.” Waters, 46 F.3d at 1514. Hittson takes this worn-out argument one step further—complaining, not that his attorneys failed to investigate a particular line of inquiry,

but that they didn't investigate it fast enough. We refuse to stretch the Sixth Amendment to include such a right.

In sum, Hittson has failed to show that his attorneys' decision to forego expert testimony fell below an objective standard of reasonable attorney conduct—much less that the state courts unreasonably applied Strickland in rejecting his Sixth Amendment claim. The District Court's rejection of habeas relief on Hittson's Strickland claim is, accordingly, affirmed.

## VII.

Hittson's final constitutional claim is that the State withheld Vollmer's psychiatric report and post-arrest letters he wrote from jail, in violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

Under Brady, “the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment.” Id. at 87, 83 S. Ct. at 1196–97. But “the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense.” Kyles v. Whitley, 514 U.S. 419, 436–37, 115 S. Ct. 1555, 1567, 131 L. Ed. 2d 490 (1995). To prevail on a Brady claim, a

defendant must establish three elements: “[1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued.” Strickler v. Greene, 527 U.S. 263, 281–82, 119 S. Ct. 1936, 1948, 144 L. Ed. 2d 286 (1999).

We focus on the third element.<sup>47</sup> To show “prejudice,” or “materiality,” under Brady, the petitioner must show that “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” Kyles, 514 U.S. at 433, 115 S. Ct. at 1566 (quotation mark omitted). This process, “will necessarily require a court to ‘speculate’ as to the effect of the new evidence.” Sears v. Upton, \_\_\_ U.S. \_\_\_, 130 S. Ct. at 3259, 3266, 177 L. Ed. 2d 1025 (2010).<sup>48</sup> “The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a

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<sup>47</sup> There has been considerable debate as to whether Hittson’s trial counsel or first state habeas counsel could have, or in fact did, obtain the psychiatric report. Because we conclude that the report would not have made a difference, we need not wade into the quagmire that has developed over whether or why the report was unavailable. Cf. Strickler, 527 U.S. at 295, 119 S. Ct. at 1955 (interchangeably using the Brady materiality requirement and the procedural-default prejudice requirement).

<sup>48</sup> Sears explained this in the context of Strickland prejudice, but the point obviously holds true for the identical Brady materiality test.

verdict worthy of confidence.”<sup>49</sup> Kyles, 514 U.S. at 434, 115 S. Ct. at 1566. In conducting this analysis, courts first evaluate the effect of each suppressed item on its own and then weigh the cumulative impact of all of the suppressed evidence. Id. at 436 n.10, 115 S. Ct. at 1567 n.10.

Vollmer’s psychiatric report was prepared in February 1991—more than a year before the murder—by R. J. Dusan, a social worker in the psychiatric department of the Naval Hospital in Jacksonville, Florida, where the Forrestal was stationed at the time. The Forrestal’s flight surgeon requested the psychiatric evaluation because Vollmer’s attitude was affecting his work performance and causing interpersonal problems aboard the ship. After interviewing Vollmer and reviewing his medical and military records, Dusan diagnosed Vollmer with “severe” Antisocial Personality Disorder and recommended that he be discharged from the Navy. The hospital’s chief of psychiatry, Dr. Donald Gibson, signed off on the report—he did not interview Vollmer or prepare the report.

The two jailhouse letters were addressed to Joleen Ward, a sailor on the Forrestal and friend of Vollmer’s; they were written after Vollmer was arrested but before Hittson’s trial. The letters are a few pages each and ramble through a

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<sup>49</sup> The Brady materiality test is more stringent (from a petitioner’s perspective) than the Brecht “substantial and injurious effect” standard that we applied to Hittson’s Estelle claims. See Kyles v. Whitley, 514 U.S. 419, 435–36, 115 S. Ct. 1555, 1566–67, 131 L. Ed. 2d 490 (1995).

variety of topics, including the murder investigation, Vollmer's ex-wife, Ms. Ward's boyfriend, foreign affairs, recollections of good times with friends, sports, jokes, and poetry. Of chief relevance to Hittson's Brady claim are Vollmer's references to his impending prosecution, in which he casually dismisses the likelihood of a conviction because of police incompetence and because "[t]hey're in my hometown . . . with my hand picked judge and my hand picked jury." Doc. 56-15, at 8. He also wrote, "only two people actually know what happened, and I've never talked to any cops or made a confession, so it looks like the whole world[']s gonna have to wait till August to hear me speak, and only if I feel like it." Id. at 17.

As recounted earlier, in rejecting Hittson's second state habeas petition, the Butts County Superior Court concluded that Hittson could have obtained Vollmer's psychiatric report during trial or in his first state habeas proceeding, and so the report claim was procedurally defaulted. Nonetheless, the court analyzed the report under Brady's materiality requirement, along with the post-arrest letters, and concluded that the suppressed evidence was not material, either individually or collectively, because it was duplicative of other evidence put on by the defense during the penalty phase. In his CPC application, Hittson argued that his psychiatric report claim was properly before the court on the merits, and that the suppressed evidence was material, both individually and cumulatively. The

Georgia Supreme Court summarily denied his CPC application. As explained above, this was a rejection on the merits, and so our task is to review the record before the Georgia Supreme Court to determine if there is any reasonable basis to support the court's denial of relief. See Richter, \_\_\_ U.S. at \_\_\_, 131 S. Ct. at 784.

We find ample support in the record for the conclusion that Vollmer's psychiatric report and post-arrest letters did not create a reasonable probability of a different result. We examine this evidence separately and then cumulatively.

A.

In analyzing the materiality of the psychiatric report—as with any piece of evidence—we must necessarily determine how Hittson would have used it at trial and then weigh the “tendency and force” of the evidence as it would have been presented to the jury. See Kyles, 514 U.S. at 436 n.10, 115 S. Ct. at 1567 n.10. Throughout his state and federal habeas proceedings, Hittson has brandished Vollmer's diagnosis as if it were dispositive proof of every attribute his trial team sought to ascribe to Vollmer during the penalty phase. But Hittson has consistently failed to explain how the evidence he produced to this effect in the 2005 to 2009 time frame, when he was litigating his state habeas petition, relates back to his trial in 1993. More importantly, Hittson has lost sight of the fact that Vollmer was not the one on trial. He apparently assumes that anything that would have made Vollmer look bad necessarily would have helped him, but culpability

for this crime was not a zero-sum game. Hittson has not carefully traced the inferences the jury could have drawn about Vollmer to the jury's ultimate decision to return a death sentence. Thus, we must parse the record to answer the only two questions that matter: what would the jury have heard or seen during Hittson's 1993 trial, and what effect would that have had on the jury's conclusion that Hittson deserved the death penalty.

In the habeas proceedings before the Butts County Superior Court, Hollman testified that he would have either called the Navy personnel who prepared the report, or submitted the report as an exhibit, to "acquaint the jury with Mr. Vollmer's psychological condition" as a way to "buttress[] the defense" that "Vollmer was the stronger personality and the more intelligent of the two and that he, in fact, had induced Mr. Hittson to participate in this crime." Doc. 56-9, at 115. We assume, for sake of discussion, that the report would have been admissible and Hittson's attorneys could have called Mr. Dusan (the social worker who interviewed Vollmer and prepared the report) or Dr. Gibson (the psychiatrist who signed off on the report) to testify regarding the contents of the report or meaning of the diagnosis.<sup>50</sup> See generally Gissendaner v. State, 272 Ga. 704, 714, 532

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<sup>50</sup> Hittson also claims that, with the benefit of Vollmer's report, his trial counsel would have decided to put on their own experts (we presume that he means Dr. Prewett) who would have then been able to explain the relevance of Vollmer's diagnosis in light of his assessment of Hittson. We can give short shrift to this assertion. As we have just discussed in detail, Hittson's

S.E.2d 677, 688–89 (2000) (explaining that the Georgia rules of evidence are relaxed in the penalty phase of a capital case). We also assume that, in admitting evidence of Vollmer’s mental condition, Hittson would not have opened the door to damaging rebuttal evidence—in particular, his own Antisocial Personality Disorder diagnosis made by Dr. Moore.

We agree that, when used in this manner, the report could have supported Hittson’s mitigation theory during the penalty phase; however, it is not the silver bullet that Hittson tries to make it out to be. See Strickler, 527 U.S. at 289, 119 S. Ct. at 1952 (“[The suppressed evidence] might have changed the outcome of the trial. That, however, is not the standard . . . . He must [show] that there is a reasonable probability that the result of the trial would have been different . . . .”) (quotation marks omitted).

As an initial matter, we are skeptical as to how probative the report would have been to the crux of Hittson’s mitigation theory—that he was acting under Vollmer’s control on the night of the crime. In his report, Dusan made the

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defense team had a number of well-founded reasons not to call their experts—not the least of which was that they would have risked the State calling Dr. Moore to testify that he had diagnosed Hittson with Antisocial Personality Disorder. In his state habeas proceedings related to the Brady claims, Hittson did not submit a scrap of evidence from Drs. Prewett or Moore, and neither Hollman nor Sammons could say that the added value of Vollmer’s psychiatric report would have changed their risk calculus and led them to put on one or all of their experts. Thus, we limit our materiality review to the admission of the psychiatric report and testimony from Mr. Dusan or Dr. Gibson explaining the report.

following observations—drawn from an hour-and-a-half interview and a review of Vollmer’s medical and military records:

This patient admits that as child there was lying, stealing, truancy, vandalism, initiating fights, and running away from home. Presently he is unable to sustain consistent work behavior. He frequently becomes intoxicated, is promiscuous and has no remorse for his actions as they affect others.

Doc. 56-15, at 4. This paragraph recites—nearly verbatim—the diagnostic criteria for Antisocial Personality Disorder listed in the Diagnostic and Statistical Manual of Mental Disorders (“DSM”) in print in 1991. See Am. Psychiatric Ass’n, Diagnostic and Statistical Manual of Mental Disorders, at 344–46 (3d ed., rev. 1987) (hereinafter “DSM-III-R”). According to the DSM-III-R, a person with Antisocial Personality Disorder typically “fail[s] to conform to social norms and repeatedly perform[s] antisocial acts that are grounds for arrest, such as destroying property, harassing others, stealing, and having an illegal occupation.” Id. at 342. They also “tend to be irritable and aggressive and to get repeatedly into physical fights and assaults,” “[t]ypically . . . are promiscuous,” “they generally have no remorse about the effects of their behavior on others; they may even feel justified in having hurt or mistreated others,” and they have “the conviction (often correct) that others are hostile towards them.” Id. at 342–43.

Dr. Gibson testified in the state habeas proceedings that a “severe” diagnosis was typically given to indicate “that this patient has a personality disorder that is of

such severity as to preclude further military service”—“so people will know that we’re not just kidding, this is something that’s serious and needs to be taken care of right away.” Doc. 56-11, at 109, 110. Dr. Gibson also explained that a person with severe Antisocial Personality Disorder, “has adaptability problems. He has interpersonal problems. He has problems with authority. He has problems doing what he’s supposed to do. He’s done illegal things, things for which if he had gotten caught doing them he would have been arrested. He violates the rights of everybody.” *Id.* at 110. This testimony also tracks the DSM-III-R’s description of the disorder (Dr. Gibson did not evaluate Vollmer and, understandably, did not recall signing off on the 1991 report when he testified in 2007 before the state habeas court).

Critically lacking is any support for the theory that Vollmer had a propensity for manipulating or controlling others. Neither the report, the DSM, nor Dr. Gibson’s description indicate that a person with Antisocial Personality Disorder in general, or Vollmer in particular, is adept at bending others to his will.<sup>51</sup> The “essential feature” of the disorder is described as “a pattern of irresponsible and antisocial behavior”—i.e., a “fail[ure] to conform to social norms.” DSM-III-R, at

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<sup>51</sup> The DSM lists, as one of the diagnostic criteria for the disorder, “no regard for the truth, as indicated by repeated lying, use of aliases, or ‘conning’ others for personal profit or pleasure.” DSM-III-R, at 345. Dusan did not rely on this criterion in reaching his diagnosis (the DSM lists ten diagnostic criteria, of which a doctor must find four in order to reach a diagnosis).

342. While this type of behavior might include attempts to control others, there is nothing in the report or the diagnosis that indicates that Vollmer possessed this particular attribute among the host of traits that could be deemed “antisocial.”

Hittson submitted an affidavit to the Butts County Superior Court from Dr. Jerry Lee Brittain, a neuropsychologist who, in 2002, reviewed Vollmer’s military and medical records along with the various expert assessments of Hittson that were prepared for trial. Dr. Brittain gave the following opinion:

The combination of Mr. Vollmer’s extremely high level of intelligence<sup>52]</sup> with an Antisocial Personality Disorder suggests a very manipulative, clever, sophisticated con artist—this is typically a person who often gets away with their infractions because they are smart enough to avoid getting caught, many times at the expense of a weaker codefendant.

Doc. 56-16, at 48. In forming this opinion, Dr. Brittain relied on the version of the DSM in print in 2002, which was published nearly a decade after Vollmer was diagnosed with Antisocial Personality Disorder. See generally Am. Psychiatric Ass’n, Diagnostic and Statistical Manual of Mental Disorders (4th ed., text rev. 2000) (hereinafter “DSM-IV-TR”). Dr. Brittain cited the updated version of the DSM for the proposition that “[i]ndividuals with Anti-social Personality Disorder ‘are frequently deceitful and manipulative in order to gain personal profit or

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<sup>52</sup> The psychiatric report pegged Vollmer’s intelligence at “average or above.” Dr. Brittain presumably got the idea that Vollmer possessed “extremely high” intelligence from Vollmer’s Armed Forces Qualifying Test scores—which were in the 99th percentile.

pleasure, (e.g., to obtain money, sex, or power).” Doc. 56-16, at 46 (quoting DSM-IV-TR at 702). This language, or its equivalent, is not in the version of the DSM in print in 1991 and 1993 (the DSM-III-R), and Dr. Brittain did not explain whether these traits were commonly understood to be a characteristic of the disorder in 1991 and did not otherwise attempt to establish what an expert could have testified to during Hittson’s 1993 trial.

Hittson also called Dr. Keith Caruso in the habeas proceedings in state court. Dr. Caruso is a forensic psychiatrist who, in 2007, reviewed Vollmer’s report, the various expert assessments of Hittson, a transcript of the penalty phase, and a variety of other evidence related to Vollmer (much of which was not available to the defense at the time of trial). The following colloquy ensued:

Q Why is [Vollmer’s diagnosis] significant to understanding Mr. Hittson’s behavior on the night of the offense?

A Well, I think it was considerable, there is evidence that [Hittson’s behavior] may have been considerably influenced by Mr. Vollmer, that Mr. Hittson’s behavior as a passive, dependent individual, he would, potentially he would be very easily influenced by someone with antisocial personality disorder, particularly someone who can be conning and manipulative.

Q And is there evidence in the record, of the stuff that you reviewed, that Mr. Vollmer was conning, cunning and manipulative?

A Yes.

...

Q What does it tell me, as a lay person, what does it mean when you have a severe antisocial personality disorder?

A You've got someone who essentially can, I think for the purposes of this case, someone who potentially could be very good at controlling and manipulating someone else. And you had a combination of two individuals, between Mr. Vollmer with a diagnosis of antisocial personality disorder and then Mr. Hittson, who has been described as having a passive, dependent personality, that he would be particularly prone to manipulation by someone as bright and antisocial as Mr. Vollmer has been described.

Doc. 56-12, at 16, 18. Dr. Caruso's testimony spilled the bounds of the psychiatric report, wandering into the other experts' assessments of Hittson and evidence that was either already before the jury or was not available to the defense at the time of trial. Hittson made no attempt to establish what portion, if any, of Dr. Caruso's testimony his trial counsel could have presented during the 1993 trial.

We do not question Drs. Brittain's or Caruso's professional opinions, but, given that they were formed in 2002 and 2007, with the benefit of hindsight and evidence that was not available the defense team during Hittson's trial, we do not find their opinions particularly helpful in weighing the impact of Vollmer's 1991 diagnosis on the jury's penalty-phase deliberations during Hittson's 1993 trial.<sup>53</sup>

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<sup>53</sup> In the state habeas court, the State presented expert testimony to counter Drs. Brittain's and Caruso's explanations of Vollmer's diagnosis. The State asked Dr. Coplin (the court-appointed expert from Hittson's trial), "because Vollmer was diagnosed with an antisocial personality disorder, what kind of impact would that have had on [Hittson's] actions on the night of the crime?" Dr. Coplin responded, "I don't think it would have had any, other than [Vollmer is] prone for repetitive behavior, trouble with the law. Antisocial is a sociopath, you know. It's a person who repetitively has no concept of the law." Doc. 56-12, at 3.

At bottom, Hittson has not produced evidence to show that his trial counsel could have called an expert to testify at trial who would have said, based on the 1991 Navy psychiatric report, that Vollmer had a propensity or aptitude for controlling others.

That is not to say, though, that Vollmer's psychiatric report would have been irrelevant. Bo Sammons's assessment of the report, which he explained in the 2007 state evidentiary hearing, is on firmer footing. In his view, the diagnosis would have helped them show that Vollmer was "a real bad guy"—that he was "amoral about the effect that things that he did had on other people." Doc. 56-10, at 30, 80. The report itself, the DSM-III-R, and Dr. Gibson's explanation of the diagnosis before the state habeas court (which was effectively a recitation of the DSM-III-R) all support the proposition that Vollmer had "no remorse for his actions as they affect others." Doc. 56-15, at 4; see also DSM-III-R at 342 (Individuals with Antisocial Personality Disorder "generally have no remorse about the effects of their behavior on others.").

Accepting that this aspect of Vollmer's character had some bearing on Hittson's sentence, the idea that Vollmer had amoral or antisocial tendencies certainly would not have come as news to Hittson's jury. The defense team had shipmates testify that Vollmer was violent, had a fixation with murder, and liked to tote around a bulletproof vest and sawed-off shotgun. They submitted two letters

written by Vollmer in which he bragged about his illegal and amoral escapades. They had a witness read part of one of those letters in which Vollmer described a detailed plot to murder someone. One of Vollmer's friends testified that, after the murder, Vollmer often joked about having killed Utterbeck. Other shipmates testified that Vollmer doled out advice on getting rid of dead bodies. And, of course, the jury heard Hittson's uncontested version of the crime, in which Vollmer played a central role. The State never tried to rebut any of this evidence. It never tried to redeem Vollmer in the jury's eyes; in fact, the District Attorney made clear that Vollmer would be separately prosecuted for his role in the crime.

In light of the evidence presented by the defense, Vollmer's diagnosis would have simply put a label on something that was abundantly clear—something that was not really in controversy. Certainly, a medical diagnosis can carry more weight with a jury than lay testimony. And a report prepared before the crime by a neutral expert would have bolstered the credibility of lay witnesses whose view of Vollmer might have been skewed by their knowledge of his complicity in the crime. But where the point being proven is both uncontested and amply supported by the evidence, we can hardly say that additional evidence that would only reinforce the obvious is the type of evidence that puts the case in a whole new light, as required for relief under Brady.

More importantly, though, even if the report would have cemented an otherwise shaky proposition, proving Vollmer's bad character was not the lynchpin to securing a life sentence for Hittson. When considered in isolation, Vollmer's character is irrelevant to Hittson's punishment; i.e., making Vollmer out to be "a real bad guy" in the eyes of the jury did not automatically make Hittson less culpable for his own choices. As Hollman put it in the state habeas court:

I wouldn't say that it was our mission to do everything that we could possibly do to make [Vollmer] look bad. I think that what we were trying to do is show that he was the lead actor in this terrible crime and that he was the one who actually was the primary mover in the murder and the dismemberment.

Doc. 56-9, at 125. In effect, the defense team's attempts to prove that Hittson was a pretty good guy and Vollmer was a really bad guy were a means to an end—a way of prodding the jury to infer that Hittson had not acted on his own volition but had instead been overborne by his evil co-defendant. While this was a sensible strategy, there is no question that the jury could have accepted their portrayal of Vollmer and still concluded that Hittson was responsible for his own actions. After all, Hittson confessed to swinging the bat, pulling the trigger, and cutting up Utterbeck's corpse.

While Brady's materiality requirement "is not a sufficiency of the evidence test,"—i.e., courts do not simply look to whether there is still enough evidence to support the result—a defendant must show "that the favorable evidence could

reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” Kyles, 514 U.S. at 434–35, 115 S. Ct. at 1566. “In the face of [an abundance of evidence to support the result] it should take more than supposition on . . . weak premises offered by [a habeas petitioner] to undermine a court’s confidence in the outcome.” Wood v. Bartholomew, 516 U.S. 1, 8, 116 S. Ct. 7, 11, 133 L. Ed. 2d 1 (1995) (per curiam). Vollmer’s psychiatric report is simply not the type of evidence that undermines our confidence in Hittson’s sentence. The Antisocial Personality Disorder diagnosis merely assigns a medical term to character traits that were already well-attested-to. And whatever reinforcing effect this “new” information would have had regarding Vollmer’s bad character would have only minimally improved the chances that the jury would believe that Vollmer controlled Hittson on the night of the crime. Thus, the state court could have reasonably concluded that Vollmer’s report was not material under Brady.

B.

Like the psychiatric report, Vollmer’s post-arrest letters are cumulative of evidence that was already before the jury and are only indirectly related to Hittson’s sentence.

We begin with how the letters would have been used by Hittson’s trial counsel. When Hollman was asked, in the state collateral hearing, if the post-arrest

letters would have been helpful at trial, he candidly replied, “[h]onestly, I don’t know if they would have or not. I’ve read them. There are matters of interest that are contained in these letters. I don’t know if they would or wouldn’t have.” Doc. 56-9, at 124. He conceded that he would have liked for the jury to have heard certain passages from the letters, because they would have “impacted on the jury’s view of Mr. Vollmer in a negative way,” but still explained, “I wouldn’t say that it was our mission to do everything that we could possibly do to make [Vollmer] look bad. . . . [W]e were trying to . . . show that he was the lead actor in this terrible crime and that he was the one who actually was the primary mover in the murder and the dismemberment.” Id. at 125.

Despite Hollman’s ambivalence, we will assume that trial counsel would have submitted the post-arrest letters into evidence (along with the pre-arrest letters that were already in evidence) and could have had Ms. Ward, the recipient, read selected portions to the jury. In his arguments in both the state and federal habeas proceedings, Hittson has cherry-picked a few paragraphs from the post-arrest letters and touted them as “the best evidence” of “Vollmer’s inflated and arrogant self-appraisal . . . complete indifference to the consequences of his actions . . . sophistication, dominance, arrogance, self-assurance, manipulation and control . . . [and] the unequal relationship (testified to by lay witnesses) between the two co-defendants.” Hittson Appellee Br. at 41–42. This is hyperbole.

In the first of Hittson's excerpts, Vollmer wrote:

It's not like I'm going to be stuck in here forever. Sure, I may do two or three more years at the most, but I wouldn't be surprised if I'm cut loose after the trial in August. These fuckers haven't got a clue or a brain in their heads, and they'll be lucky if they keep their jobs after the public finds out how bad they've bungled the investigation and how far out of bounds they've stepped. When this case goes to trial, it'll be a damn three ring circus. They're in my hometown, for christ sakes, with my hand picked judge and my hand picked jury. Everyone who's lived here since '73 are my character witnesses, and there isn't a man or woman who doesn't know me, at least in passing. I used to think I didn't have a chance, because of the dirty, underhanded way the investigation was going, but now I know who doesn't have a chance.

Doc. 56-15, at 8. Certainly, this maniacal rant reflects arrogance or delusions of grandeur. Vollmer's pre-arrest letters, which the jury had, contained similar braggadocio. Vollmer wrote that he was one of the three "Bad Asses" in the world; he had only lost one fight in his life; he toted a pistol and sawed-off shotgun to gang fights; he was "in tight with the Outlaws biker gang" and was "dealing grass at \$130 an ounce and snow at \$60 a gram"; he had bounties out on rival gang-members' heads; and he had "done more than most will do in their miserable lives." Doc. 74-15, at 16-17. He explained, "I'm not afraid of dying and I have no problems with killing anyone. Hand me \$500 cash and I'll kill whoever you point your finger at. Morals are for losers trying to justify their place in life." Id. at 17. And, after describing a detailed plan to kill a man, he told the woman he was writing to that he would "spit on his lifeless body for you." Id. at 15.

It is possible that the above-quoted passage from Vollmer's post-arrest letter would have strengthened the existing evidence of Vollmer's brazenness or sense of superiority. It is also possible that this additional indictment of Vollmer's character would have made Hittson's mitigation theory slightly more believable to the jury. And it's possible that this incremental boost in believability would have led the jury to conclude that Hittson did not deserve the death penalty. But our task is not to stack inference upon inference—"petitioner's burden is to establish a reasonable probability of a different result." Strickler, 527 U.S. at 291, 119 S. Ct. at 1953 (emphasis in original). The tenuous connection between Vollmer's bad character and Hittson's death sentence is reason enough to conclude that more evidence that Vollmer was brazen, wicked, etc., wouldn't have turned the tide in Hittson's favor.

Hittson next points us to Vollmer's veiled references to the crime:

These fuckers couldn't come up with a better motive than "drugs" or "cult religion"? They're the fuckin Keystone Cops. I could sit on the shitter reading the paper and come up with more and better motives. . . . There are a lot of questions left unanswered, and I'm the only key to the mystery. They can assume and guess, but only two people actually know what happened and I've never talked to any cops or made a confession, so it looks like the whole world[']s gonna have to wait till August to hear me speak, and only if I feel like it.

Doc. 56-15, at 17. Apart from exhibiting more of Vollmer's aggrandizing style, this cryptic paragraph does little to help Hittson. It does tend to corroborate Hittson's uncontested account of the crime—at least insofar as it confirms

Vollmer's participation—and it implies that either Vollmer or Hittson had some undisclosed motive for the crime, but there is nothing from which the jury could have inferred that Vollmer was pulling Hittson's strings. Without more, it is impossible to say that this paragraph somehow advances Hittson's mitigation theory.

In fact, other parts of the letters contain similarly oblique references to the crime. Some of these passages could be read to inculcate Hittson:

But the bit with Hittson really torqued my gonads cause it was obvious why he did it. . . . I kinda majorly screwed up his plan [to date Ward (the recipient)] and that just about sent him over the edge. Oh fucking well, I won't ever shed a fucking tear over his twisted love life. I'm a tad bent out of shape because I heard what he said to the cops about me, and I also heard Mike believed it. That really hurt me guys.

Doc. 56-15, at 17.

I froze under pressure, Jo. That's all I can say. Tell Mike I got kicked out<sup>[54]</sup> on purpose, he was right about that. Things were more than a little dangerous (remember the fights before I left?<sup>[55]</sup>) so I bailed to avoid going overboard on a moonless night. Reasons I could never have told you guys at the time, do you understand.

Id. at 12. While vague, these ramblings could have been used by the State to undercut Hittson's mitigation theory—they hint that Hittson had a reason for

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<sup>54</sup> After the crime, but before being arrested, Vollmer was discharged from the Navy for possession of marijuana.

<sup>55</sup> A handful of witnesses testified during the penalty phase that, shortly before Hittson and Vollmer were arrested, their relationship deteriorated and they got into a fight.

disliking Vollmer, that the confession was not entirely true, and that Vollmer was scared of Hittson, enough so to get himself kicked out of the Navy. While these passages, like the ones Hittson highlights, leave much to speculation, we cannot entertain Hittson's requests that we divine meaning from select parts without also considering the State's attempts to do the same.

When read as a whole and considered in light of the body of evidence before the jury, the letters have little bearing on their ultimate task of sentencing Hittson. The two new letters might have added a little more flavor to the jury's understanding of Vollmer's personality, but Vollmer was not on trial. And the handful of references to the crime itself raise more questions than answers. Given that Hittson did not pursue a "residual doubt" strategy during the penalty phase (and does not now argue that the letters would have enabled him to do so), we do not see how anything in the letters supports Hittson's mitigation theory that Vollmer held sway over him on the night of the murder. Accordingly, the record amply supports a conclusion that the post-arrest letters were not material under Brady.

### C.

Because neither Vollmer's psychiatric report nor his jailhouse letters had much to do with Hittson's sentence, we need not rehash the above analysis to see if, when considered cumulatively, they might have turned the tide. It is sufficient

to say that the psychiatric report and post-arrest letters would have reinforced the existing evidence of Vollmer's bad character. But the jury sentenced Hittson based on his own choices, and we find nothing in either the report or the letters that would have helped Hittson show that those choices were less than voluntary because Vollmer overpowered him psychologically. Considered together, the evidence does not cast the case in such a different light as to entitle Hittson to a new sentencing proceeding. Therefore, we affirm the District Court's holding that the state courts had a reasonable basis to conclude that the suppressed evidence was not material under Brady.

### VIII.

Hittson's final claim requires us to decide whether he should have been granted leave to further amend his federal habeas petition to add four brand-new ineffective-assistance claims that he did not raise in any of his state court proceedings, his original § 2254 petition, or his amended federal petition. It is a matter of first principles that a state prisoner cannot raise claims for the first time in his federal habeas petition. See 28 U.S.C. § 2254(b)(1)(A). Hittson does not contest that he has failed to exhaust his "new" claims. Instead, he would have us treat the claims as procedurally defaulted<sup>56</sup> and then excuse the default by relying

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<sup>56</sup> Where a return to state court would be futile—because the petitioner's claims would clearly be barred by state procedural rules—a federal court can "forego the needless 'judicial

on the recent Supreme Court decisions Martinez v. Ryan, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), and Trevino v. Thaler, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1911, 1852 L. Ed. 2d 1044 (2013). We decline to do so for reasons explained below. We first explain the relevance of Martinez and Trevino, and then why Hittson cannot rely on those cases to excuse his procedural default.

A.

A federal court may consider the merits of a procedurally defaulted claim only if the petitioner can show both “cause” for the default and “prejudice” from a violation of his constitutional right. Wainwright v. Sykes, 433 U.S. 72, 84–85, 97 S. Ct. 2497, 2505, 53 L. Ed. 2d 594 (1977). To establish cause, a petitioner must ordinarily “demonstrate ‘some objective factor external to the defense’ that impeded his effort to raise the claim properly in state court.” Ward v. Hall, 592 F.3d 1144, 1157 (11th Cir. 2010) (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645, 91 L. Ed. 2d 397 (1986)). Before its 2012 decision in Martinez, the Supreme Court had long held that § 2254 petitioners cannot rely on errors made by their state collateral counsel to establish cause. See Coleman v. Thompson, 501 U.S. 722, 752–53, 111 S. Ct. 2546, 2566–67, 115 L. Ed. 2d 640

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ping-pong” and treat unexhausted claims as procedurally defaulted. Snowden v. Singletary, 135 F.3d 732, 736 (11th Cir. 1998). There is no doubt that Hittson’s “new” claims are barred by O.C.G.A. § 9-14-51, as all of the claims could have been raised in Hittson’s first or second state habeas petition.

(1991). Martinez created a limited, equitable exception to Coleman where, (1) “a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding,” as opposed to on direct appeal;<sup>57</sup> (2) “appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of Strickland”; and (3) “the underlying ineffective-assistance-of-trial-counsel claim is a substantial one.” Martinez, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 1318–19 (citations omitted).

Shortly after Martinez was decided, Hittson sought leave from the District Court to further amend his federal habeas petition to add the following ineffective-assistance claims:

[1] Mr. Hittson Was Deprived of the Effective Assistance of Counsel under the Sixth Amendment When His Counsel Failed to Thoroughly Investigate His Upbringing, Background, and Mental Health and Failed to Secure More Time from the Trial Court for this Investigation.

[2] Mr. Hittson was Deprived of the Effective Assistance of Counsel Due to His Counsel’s Failure to Alert the Trial Court that It Had

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<sup>57</sup> Martinez dealt with Arizona law, which bars criminal defendants from raising ineffective-assistance claims on direct appeal. \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 1314 (citing State v. Spreitz, 202 Ariz. 1, 3, 39 P.3d 525, 527 (2002)). The Court explained the reasons for this limitation as follows:

By deliberately choosing to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, the State significantly diminishes prisoners’ ability to file such claims. It is within the context of this state procedural framework that counsel’s ineffectiveness in an initial-review collateral proceeding qualifies as cause for a procedural default.

Id. at \_\_\_, 132 S. Ct. at 1318.

Forced Them Into a Conflict Regarding the Adequacy of the Waiver Signed by Mr. Hittson During His Evaluation by Dr. Storms.

[3] Mr. Hittson Was Deprived of the Effective Assistance of Counsel by His Counsel’s Failure to Independently Discover Exculpatory Material Suppressed by the State.

[4] Mr. Hittson was Deprived of the Effective Assistance of Counsel Due at Motion for New Trial and Direct Appeal.

Second Am. Pet. for Writ of Habeas Corpus, ECF no. 94, at 2 (hereinafter “Second Am. Habeas Pet.”). Hittson conceded that none of these claims had been raised in any of his state proceedings, but, relying on Martinez, asserted that the cause for this failure was his lawyers’ incompetence during his first state habeas proceeding—when the claims should have been raised.

The District Court denied Hittson’s motion because Georgia law allows defendants to litigate ineffective-assistance claims on direct appeal.<sup>58</sup> As the District Court pointed out, the Martinez exception to Coleman’s general rule is limited to circumstances where state law “requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding.” Martinez, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 1318 (emphasis added). So, “because Georgia did not bar Hittson from presenting his ineffective assistance of trial counsel claims during his direct appeal, Martinez is not applicable, and pursuant to Coleman, ineffective

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<sup>58</sup> Georgia defendants may raise ineffective-assistance-of-trial-counsel claims on direct appeal if they have new counsel. White v. Kelso, 261 Ga. 32, 32, 401 S.E.2d 733, 734 (1991).

assistance of counsel during state post-conviction proceedings cannot serve as cause to excuse procedural default.” Order Den. Mot. for Leave to Am., ECF no. 102, at 5.

After the District Court denied Hittson’s motion to further amend, the Supreme Court decided Trevino. Trevino expanded Martinez’s exception to states that effectively prohibit defendants from raising ineffective-assistance claims on direct appeal. \_\_\_ U.S. at \_\_\_, 133 S. Ct. at 1921 (“[A] distinction between (1) a State that denies permission to raise the claim on direct appeal and (2) a State that in theory grants permission but, as a matter of procedural design and systemic operation, denies a meaningful opportunity to do so is a distinction without a difference.”).<sup>59</sup> By the time Trevino came down, Hittson’s appeal in this court was well underway; however, he sought to expanded his COA, asking that we decide the effect of Trevino on his right to raise and litigate his new claims in the District Court. We granted his request and expanded his COA to resolve the following issue:

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<sup>59</sup> Trevino considered Texas law. While Texas technically allows a defendant to raise ineffective-assistance-of-trial-counsel claims on direct appeal, “Texas procedure makes it ‘virtually impossible for appellate counsel to adequately present an ineffective assistance [of trial counsel] claim’ on direct review,” and “Texas courts in effect have directed defendants to raise claims of ineffective assistance of trial counsel on collateral, rather than on direct, review.” Trevino, \_\_\_ U.S. at \_\_\_, 133 S. Ct. at 1918–19 (quoting Robinson v. State, 16 S.W.3d 808, 810–11 (Tex. Crim. App. 2000)).

Whether Hittson should be allowed to amend his federal habeas petition to include claims of ineffective assistance of trial counsel which were previously defaulted through prior counsel in state habeas proceedings in light of the United States Supreme Court’s ruling in Trevino . . . .

In supplemental briefing on the issue, Hittson has focused on Georgia’s requirements for raising ineffective-assistance claims on direct appeal. He asserts that, under Georgia law, “there is no ‘meaningful opportunity’ to litigate ineffectiveness on direct appeal.” Hittson Supp. Br. at 10 (quoting Trevino, \_\_\_ U.S. \_\_\_, 133 S. Ct. at 1921). While that may be true, we leave that question for another day because Hittson has failed to establish either of the other two elements of the Martinez exception—that “appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of Strickland”; or that “the underlying ineffective-assistance-of-trial-counsel claim is a substantial one.” Martinez, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 1918. We address each element in turn.

B.

To establish cause under Martinez, Hittson must demonstrate that state habeas counsel were themselves ineffective for failing to raise the four claims in his second amended § 2254 petition. This is a somewhat familiar inquiry, as petitioners have long been able to claim ineffective assistance of trial or appellate counsel to establish cause to excuse a procedural default caused by their trial or

appellate counsel. See Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645, 91 L. Ed. 2d 397 (1986). As the Supreme Court has explained in that context, “[n]ot just any deficiency in counsel’s performance will do . . . the assistance must have been so ineffective as to violate the Federal Constitution.” Edwards v. Carpenter, 529 U.S. 446, 451, 120 S. Ct. 1587, 1591, 146 L. Ed. 2d 518 (2000) (citation omitted). While Martinez did not establish a constitutional right to counsel in state post-conviction proceedings, it did adopt the constitutional standard from Strickland as the standard governing petitioners’ claims that their post-conviction counsel’s conduct should excuse a procedural default. See Martinez, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 1318.

Accordingly, Hittson must establish that his habeas counsel’s conduct “fell below an objective standard of reasonableness,” and that, “but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 688, 694, 144 S. Ct. at 2064, 2068. Obviously the merits of the underlying ineffective-assistance claims have some bearing on both Strickland prongs; collateral counsel would clearly not fall below Strickland’s minimum competency requirements by deciding not to raise a meritless claim, and a petitioner would also not be prejudiced by his counsel’s failure to do so.

But the merits of the underlying claim is only a part of the Strickland analysis. With unlimited time and the benefit of hindsight, a petitioner can come

up with any number of potentially meritorious ineffective-assistance claims that he now wishes his collateral counsel had raised. However, a petitioner does not establish constitutionally defective performance simply by showing that (a) potentially meritorious claims existed and (b) his collateral counsel failed to raise those claims. Murray, 477 U.S. at 486, 106 S. Ct. at 2644 (“[T]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default.”). “Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.”<sup>60</sup> Jones v. Barnes, 463 U.S. 745, 751–52, 103 S. Ct. 3308, 3313, 77 L. Ed. 2d 987 (1983). “[A] per se rule that . . . the professional advocate, [is not] allowed to decide what issues are to be pressed . . . seriously undermines the ability of counsel to present the client’s case in accord with counsel’s professional evaluation.” Id. at 751, 103 S. Ct. at 3313.

As we have explained, Strickland instructs courts to “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance”—that counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” 466

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<sup>60</sup> “Even in a court that imposes no time or page limits . . . [a] brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions.” Barnes, 463 U.S. at 753, 103 S. Ct. at 3313.

U.S. at 689–90, 104 S. Ct. at 2065–66. To overcome this presumption, a petitioner must “establish that no competent counsel would have taken the action that his counsel did take.” Chandler v. United States, 218 F.3d 1305, 1315 (11th Cir. 2000) (en banc).

Thus, to show that his habeas counsel failed to provide the level of representation required by Strickland, Hittson must show more than the mere fact they failed to raise potentially meritorious claims; he must show that no competent counsel, in the exercise of reasonable professional judgment, would have omitted those claims. Even assuming that the underlying ineffective-assistance claims are meritorious (which, as we explain in the following section, they are not), Hittson has not established that his state habeas counsel were incompetent for failing to raise them.

During Hittson’s first state habeas proceedings, he was represented, pro bono, by several attorneys from the law firm Swindler & Berlin of Washington, D.C. His habeas petition to the Butts County Superior Court was prepared by Andrew Lipps, Melissa Rogers, and John Lange. Lipps and Rogers had previously assisted Hittson’s trial counsel in the direct appeal to the Georgia Supreme Court,

and they were Hittson's primary attorneys before the Butts County Superior Court.<sup>61</sup>

Their petition to the Superior Court included the following allegations of trial-level incompetence:

¶ 17. Petitioner's counsel failed to render reasonably effective assistance to petitioner at virtually every critical stage before and during trial . . . .

(1) Pre-Trial

(a) Failure to Provide Plaintiff With the Assistance of Counsel During State Psychiatric Evaluation

. . .

¶ 22. . . . Defense counsel arrived late to [Dr. Storms's] interview and was not present when Dr. Storms presented petitioner with the waiver form. . . . Accordingly, defense counsel never consulted with or advised petitioner with respect to the waiver.

. . .

(b) Failure to Raise Proper Grounds to Challenge Location of Trial

. . .

(2) Trial

¶ 26. Defense counsel failed to introduce any evidence whatsoever at the guilt-innocence phase of trial. . . .

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<sup>61</sup> Lipps and Rogers represented Hittson during the state habeas proceedings conducted in October 1997, and Lipps and Rogers helped prepare the post-hearing brief, with the assistance of Jeremy Simon and Christina Novak—also of Swindler & Berlin. Neither Lipps nor Rogers worked on the CPC application to the Georgia Supreme Court.

(3) Sentencing

¶ 27. Counsel failed to introduce relevant mitigating evidence at the sentencing hearing. . . .

. . .

¶ 31. Counsel called only lay witnesses in mitigation. At no point did the defense present any testimony by Dr. Prewett or Ms. Shults. . . .

¶ 32. . . . Once Dr. Storms testified about [Hittson’s “hillbilly” and “asshole”] statements, the sole reason for keeping Dr. Prewett and Ms. Shults off the stand evaporated. . . .

¶ 33. . . . [D]efense counsel did not provide clear guidance and assistance to petitioner as to whether he should testify, and ultimately forced him to forego the exercise of his right to testify.

. . .

¶ 39. Counsel also failed to object to the prosecutor’s closing argument at the sentencing hearing, in which the prosecutor engaged in an improper and misleading appeal to passion, prejudice and other arbitrary factors.

¶ 40. . . . Despite the prosecutor’s improper reference to the defendant’s exercise of his [Fifth Amendment] rights, defense counsel failed to object.

¶ 41. Defense counsel also failed to object when the prosecutor referred to photographs of the victim in an effort to inflame the jury. . . .

¶ 42. Counsel further failed to object to the trial court’s responses to two questions that the jury asked during deliberations. . . .

¶ 43. Defense counsel also failed to object to the trial court’s failure in its sentencing instructions to explain to the jury the concept of mitigating circumstances . . . .

¶ 44. Defense counsel also failed to object to the court's sentencing instructions that stated that the jury should "fix" or "recommend" that the death penalty be imposed.

Doc. 75-13 (citations omitted). The Superior Court formed these allegations into eight separate ineffective-assistance claims, and denied all of them.

Hittson claims that Lipps and Rogers were incompetent for failing to tack on the four additional claims from his second amended § 2254 petition; however, he has alleged no facts to overcome the presumption that they exercised reasonable professional judgment in deciding which claims to raise and which claims to omit.

In his motion to further amend, Hittson made the following general allegations of habeas-counsel incompetence:

[S]tate habeas counsel failed to pursue obvious avenues of investigation, resulting in a failure to raise meritorious and potentially meritorious claims. Ineffective Assistance claims which Mr. Hittson believes are "substantial" and which have "some merit" were available to be litigated in state habeas proceedings but post-conviction counsel unreasonable failed to raise them.

...

Undersigned counsel represents, upon information and belief, that Mr. Hittson's original habeas attorneys performed no investigation beyond the limited investigation performed by Mr. Hittson's trial attorneys into Mr. Hittson's background. In fact, original habeas counsel appear to have raised only claims which were apparent from a review of the trial transcript, failing to look beyond the record in order to determine whether Mr. Hittson's trial attorneys failed to discover, for instance, available and compelling mitigation evidence. Further, original habeas counsel failed, absent any reasonable explanation, to bring a claim which was apparent from the record.

Mot. for Leave to Amend, ECF no. 93, at 5–7 (footnotes omitted).

Such generalized allegations are insufficient in habeas cases. Rule 2(c) of the Rules Governing Section 2254 Cases requires petitioners to “specify all the grounds for relief available to the petitioner” and “state the facts supporting each ground.”<sup>62</sup> In other words, Rule 2(c) “mandate[s] ‘fact pleading’ as opposed to ‘notice pleading,’ as authorized under Federal Rule of Civil Procedure 8(a).” Borden v. Allen, 646 F.3d 785, 810 (11th Cir. 2011); see also Mayle v. Felix, 545 U.S. 644, 655, 125 S. Ct. 2562, 2570, 162 L. Ed. 2d 582 (2005) (explaining that § 2254 Rule 2(c) is more demanding than Fed. R. Civ. P. 8(a)). These generalized allegations from Hittson’s motion to further amend do not satisfy Rule 2(c)’s requirements; Hittson has not alleged any facts to support his allegations that his state habeas attorneys were incompetent for failing to raise the four “new” claims.<sup>63</sup>

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<sup>62</sup> Hittson’s allegations of habeas-counsel ineffectiveness are not technically “grounds for relief,” since they are pled only to establish cause to excuse his procedural default. See Martinez, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 1320. He must nevertheless plead the facts necessary to demonstrate that his lawyers were ineffective under the standard of Strickland. See Hill v. Lockhart, 474 U.S. 52, 60, 106 S. Ct. 366, 371, 88 L. Ed. 2d 203 (1985).

<sup>63</sup> Moreover, by relying on “information and belief,” Hittson misapprehends the requirements of habeas pleading. “The reason for the heightened pleading requirement—fact pleading—is obvious. Unlike a plaintiff pleading a case under Rule 8(a), the habeas petitioner ordinarily possesses, or has access to, the evidence necessary to establish the facts supporting his collateral claim; he necessarily became aware of them during the course of the criminal prosecution or sometime afterwards.” Borden, 646 F.3d at 810.

Hittson’s trial was in 1993, and his first state habeas petition was filed in 1995. Hittson’s current counsel has the same record and all of the evidence that was available to trial counsel and

Hittson's second amended § 2254 petition itself contains somewhat more specific allegations of habeas-counsel ineffectiveness. The allegations in the amended petition relate to each underlying ineffective-assistance claim, and so we examine the habeas-counsel allegations for each of the four "new" claims to see (1) if the allegations satisfy Rule 2(c)'s pleadings requirements and (2) if the allegations, taken as true, would allow a court to conclude that habeas counsel was ineffective under Strickland.

1.

Hittson's first ineffective-assistance-of-trial-counsel claim is:

**Mr. Hittson Was Deprived of the Effective Assistance of Counsel under the Sixth Amendment When His Counsel Failed to Thoroughly Investigate His Upbringing, Background, and Mental Health and Failed to Secure More Time From the Trial Court for this Investigation.**

Second Am. Habeas Pet., ECF no. 94, at 14. The related allegations of habeas-counsel ineffectiveness are:

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first state habeas counsel. Current counsel also has the benefit of the record generated by Hittson's federal habeas proceedings and second state habeas proceedings. And Hittson's current counsel has access to their client. By the time they sought to further amend Hittson's federal habeas petition, in 2012, they had ample opportunity to conduct whatever investigation they needed to plead the facts necessary to support the claims therein. See Borden, 646 F.3d at 810 ("[T]he petitioner is, or should be, aware of the evidence to support the claim before bringing his petition.").

First state habeas counsel conducted almost no independent investigation into the facts of Mr. Hittson's case outside the available record from trial and direct appeal. First habeas counsel did not travel to the places where Mr. Hittson grew up or interview family, friends, neighbors and teachers; they did not hire an investigator or mitigation specialist; they did not have Mr. Hittson psychologically evaluated; and, they failed to speak with the mitigation witnesses offered at trial to see if they had further mitigating information about Mr. Hittson that would have changed the result of his trial. It appears that first habeas corpus counsel also failed to request any educational records, medical or mental health records regarding Mr. Hittson or his family. These omissions constitute deficient performance under the relevant standards of performance for habeas corpus attorneys at the time of first habeas counsel's representation of Mr. Hittson.

Id. at 13 (citations omitted).

First state habeas counsel also failed to have Mr. Hittson evaluated by a neuropsychologist or other mental health professional, despite the fact that there were numerous red flags in his background indicating that he had come from a family of alcoholics, suffered neglect and abuse within his family, tried to commit suicide seven times as a teenager, had a learning disability, and suffered from recurrent blackouts even when he was not drinking.

Id. at 28 (citation omitted).

Hittson supported these allegations with an affidavit from Ms. Rogers and another from Mark Olive—a capital defense attorney from Tallahassee, Florida. According to Ms. Rogers, she was the a third-year associate at Swindler & Berlin when she started working on Hittson's case. She was supervised by Mr. Lipps, a

senior partner, and consulted with staff from the Georgia Resource Center<sup>64</sup> but she was “largely left to develop the case on [her] own.” Rogers Aff., ECF no. 92-2, at 2. She confessed that, “[t]hough I received the impression that Mr. Hittson had a very rough childhood, I did not delve into Mr. Hittson’s background and upbringing to find out if there was any information that should have been presented to the jury that was omitted at trial.” Id. More specifically, she did not “hire a private investigator or a mitigation specialist,” “have Mr. Hittson psychologically or medically evaluated,” “travel to Nebraska or Oklahoma to talk with Mr. Hittson’s family,” or “speak with any of the lay witnesses presented at Mr. Hittson’s trial.” Id. She did “travel[] to Georgia on three or four occasions”; on those trips she “spoke with two out of the three trial attorneys on Mr. Hittson’s case, as well as went to the District Attorney’s office to review their file [and] also met with Travis Hittson on these occasions.” Id. at 2–3.

Mr. Olive’s affidavit attempted “to provide a description of the standard of care for counsel representing death-sentenced inmates in Georgia post-conviction cases in the mid-1990s.” Olive Aff., ECF no. 92-3, at 3. He summed it up as follows:

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<sup>64</sup> The Georgia Resource Center is a nonprofit that provides free legal representation to indigent Georgia death-row inmates. Hittson’s current counsel are attorneys with the Georgia Resource Center.

The standard of care for attorneys representing death-sentenced clients in state habeas corpus proceedings is, and was in the mid-1990s, that habeas counsel undertake a substantial and thorough investigation in order to identify all available claims for relief and all available evidence which may support those claims. It is not enough to confine one's efforts primarily to scrutiny of the trial and appellate record; counsel must investigate, and investigate thoroughly, issues which may not be readily apparent from the record . . . .

Id. at 7–8.

While Hittson has at least set out some substantive facts for us to analyze, these facts, even if taken as true, are insufficient to establish that his habeas counsel's conduct fell below Strickland's performance standard. Despite Mr. Olive's purported "standard of care," we have explained that "no absolute duty exists to investigate particular facts or a certain line of defense." Chandler, 218 F.3d at 1317. "[C]ounsel has a duty to make reasonable investigations or make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691, 104 S. Ct. at 2066 (emphasis added). "[C]ounsel need not always investigate before pursuing or not pursuing a line of defense. Investigation (even a nonexhaustive, preliminary investigation) is not required for counsel reasonably to decline to investigate a line of defense thoroughly." Chandler, 218 F.3d at 1318. "In assessing the reasonableness of an attorney's investigation . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Wiggins, 539 U.S. at 527, 123 S. Ct. at 2538.

Hittson has alleged that his collateral counsel failed to conduct certain investigatory steps, but he has not explained why, in this particular case, a competent attorney would have undertaken those steps—i.e., why a competent attorney would have been compelled to dig deeper into Hittson’s background when faced with the evidence in the record. Hittson fails to mention that Hollman and Sammons—with whom Lipps and Rogers worked on direct appeal—undertook all of the investigatory steps that Hittson now complains of. They traveled to Nebraska, Pensacola, and Philadelphia to interview friends, family, counselors, teachers, shipmates, and officers; they hired a social worker to travel to Nebraska to interview many of the same people and work up an analysis of Hittson’s background; and they had Hittson examined by a psychologist and a neuropsychiatrist. Lipps and Rogers had Sammons’s and Hollman’s notes from the witness interviews; they had Shults’s report on Hittson’s background and family dynamics; and they had Drs. Prewett’s, Moore’s, Storms’s, and Coplin’s findings regarding Hittson’s mental condition.

It would have been reasonable for Lipps and Rogers to conclude that additional investigation into Hittson’s background would not yield anything useful to Hittson’s collateral attack. Even if additional investigation would have turned up new evidence that might have been relevant at trial (Hittson has not identified any such evidence), Lipps and Rogers could have reasonably concluded that they

did not have a viable “failure to investigate” ineffective-assistance claim given the investigation conducted by Sammons and Hollman. See Waters v. Thomas, 46 F.3d 1506, 1514 (11th Cir. 1995) (en banc) (“The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of [trial] counsel.” (quotation marks omitted)); see also Chandler, 218 F.3d at 1316 n.20 (“Once we conclude that declining to investigate further was a reasonable act, we do not look to see what a further investigation would have produced.” (quotation marks omitted)).

Rather than attacking trial counsel’s investigation itself, Lipps and Rogers chose to challenge trial counsel’s decision not to use some of the results of their investigation (i.e., trial counsel’s decision not to call Dr. Prewett or Ms. Shults). Strickland instructs us to presume that they exercised reasoned professional judgment in doing so, and Hittson has alleged nothing to overcome that presumption.

2.

Hittson’s next trial-counsel claim is:

**Mr. Hittson was Deprived of the Effective Assistance of Counsel Due to His Counsel’s Failure to Alert the Trial Court that It Had Forced Them Into a Conflict Regarding the Adequacy of the Waiver Signed by Mr. Hittson During His Evaluation by Dr. Storms.**

Second Am. Habeas Pet., ECF no. 94, at 29. We briefly elaborate on the underlying claim. After Dr. Storms testified to Hittson’s “hillbilly” and “asshole” statements during the penalty phase of Hittson’s trial, the trial court proposed that the State supplement the record by calling Dr. Storms to testify regarding the voluntariness of Mr. Hittson’s statements and the circumstances surrounding the execution of a Miranda waiver at the beginning of the interview. According to Hittson’s second amended § 2254 petition, this line of inquiry “created an impermissible professional conflict for counsel” because, “along with Mr. Hittson, [his trial attorneys] were the only witnesses who could have testified regarding whether or not the waiver was truly a knowing and voluntary one, based on how they had prepared Mr. Hittson for his evaluation by the State’s expert.” Id. at 30. By failing to object to this conflict, trial counsel “deprived Mr. Hittson of the effective assistance of counsel, as well as the only witnesses aside from Mr. Hittson, who could counter the State’s testimony that the waiver was valid.” Id. at 31.

His allegations of habeas-counsel ineffectiveness for failing to raise this claim are contained in one sentence: “Despite [the conflict of interest], first state habeas counsel from Swindler & Berlin failed to raise these issues and to litigate them, causing them to become procedurally defaulted.” Id. at 31–32. As

explained above, the mere fact that counsel did not raise a particular claim does not establish deficient performance under Strickland.

3.

Hittson's third-trial counsel claim is:

Mr. Hittson Was Deprived of the Effective Assistance of Counsel by His Counsel's Failure to Independently Discover Exculpatory Material Suppressed by the State.

Second Am. Habeas Pet., ECF no. 94, at 32. This claim relates to the hotly-contested issue of whether trial counsel could have obtained Vollmer's 1991 psychiatric report from a source other than the Houston County District Attorney—an issue we did not address in part VII above because we concluded that the report was not “material” under Brady. Throughout his state and federal post-conviction proceedings, Hittson has maintained, as part of his Brady claim, that “[t]rial counsel were, at the time of trial, diligent in attempting to discover the mitigating evidence in the State's possession.” Am. Pet. for Writ of Habeas Corpus, ECF no. 45, at 114–15. Nonetheless, Hittson sought to add as a claim in his second amended § 2254 petition, that “trial counsel was ineffective for failing to locate and use [Vollmer's psychiatric report] on Mr. Hittson's behalf.” Second Am. Habeas Pet., ECF no. 94, at 33–34.

Putting aside the merits of the underlying trial-counsel claim and the fact that we have already concluded that the psychiatric report would not have created a

reasonable probability of a different result, we look to the relevant habeas-counsel ineffectiveness allegations. They are brief: “Had first habeas counsel not failed to make an alternative allegation of trial counsel ineffectiveness, the state habeas court would have been required to assess whether Mr. Hittson’s trial counsel were ineffective for failing to discover the evidence.” Id. at 34. Again, habeas counsel’s failure to raise a claim does not, standing alone, establish deficient conduct under Strickland.

4.

Hittson’s final claim is:

Mr. Hittson was Deprived of the Effective Assistance of Counsel Due at Motion for New Trial and Direct Appeal.

Second Am. Habeas Pet., ECF no. 94, at 34. Hittson does not identify what his attorneys did wrong in his motion for a new trial or on direct appeal, nor does he explain how habeas counsel were ineffective for failing to raise these claims. He has not pled any facts to support relief and, thus, has not established that habeas counsel’s conduct fell below Strickland’s standard.

In sum, even if Hittson’s underlying ineffective-assistance claims were “substantial,” Hittson has failed to overcome the presumption that, in choosing not to present those claims to the Butts County Superior Court, his habeas counsel were exercising reasoned professional judgment. We nonetheless address the merits of the underlying ineffective-assistance-of-trial-counsel claims, explaining

Martinez's "substantial claim" requirement and why Hittson's trial-counsel claims are not "substantial."

C.

Martinez articulated the "substantial claim" requirement as follows:

To overcome the default, a prisoner must . . . demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. Cf. Miller-El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (describing standards for certificates of appealability to issue).

Martinez, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 1318–19. Neither Martinez nor Trevino elaborated on or applied this standard, but we take the Court's reference to Miller-El to mean that it intended that lower courts apply the already-developed standard for issuing a COA, which requires "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

As the Court explained in Miller-El, "[a] petitioner satisfies this standard by demonstrating . . . that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." 537 U.S. at 327, 123 S. Ct. at 1034. Where a petitioner must make a "substantial showing" without the benefit of a merits determination by an earlier court,<sup>65</sup> he must demonstrate that "jurists of

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<sup>65</sup> In the COA context, this situation presents itself where a district court dismisses a petitioner's federal petition on procedural grounds, without passing on the merits of the claims. Because § 2253 requires a "substantial showing of the denial of a constitutional right" before an

reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right.” Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604, 146 L. Ed. 2d 542 (2000). That does not mean that a petitioner must show “that some jurists would grant the petition.” Miller-El, 537 U.S. at 338, 123 S. Ct. at 1040. “[A] claim can be debatable even though every jurist of reason might agree, after the . . . case has received full consideration, that petitioner will not prevail.” Id.

We observe that this standard is similar to the preliminary review conducted by district judges in § 2254 proceedings. Rule 4 of the § 2254 Rules allows the district judge to summarily dismiss a petition “[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief.” The Advisory Committee Notes further instruct that, in keeping with the heightened, fact-pleading requirement in habeas cases, “the petition is expected to state facts

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appeal may be taken, a petitioner must show, “[1] that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and [2] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604, 146 L. Ed. 2d 542 (2000).

Where a petitioner seeks to overcome procedural default by way of Martinez, the court initially tasked with evaluating the underlying ineffective-assistance claims (in most future cases, it will be a district court) will necessarily have to decide whether the claims are “substantial” without the benefit of a state-court determination on the merits. The “substantial showing” standard from Slack, then, is a good fit for this task.

that point to a real possibility of constitutional error.” Advisory Committee Note to Rule 4 of the Rules Governing Section 2254 Cases (quotation marks omitted).

Thus, we examine the allegations in Hittson’s proposed second amended § 2254 petition to see whether “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right.” In making this determination, we consider the fact-pleading requirement for § 2254 petitions, and the standard from Strickland.

1.

Mr. Hittson Was Deprived of the Effective Assistance of Counsel under the Sixth Amendment When His Counsel Failed to Thoroughly Investigate His Upbringing, Background, and Mental Health and Failed to Secure More Time from the Trial Court for this Investigation.

Hittson’s second amended § 2254 petition devotes considerable effort to explaining why trial counsel’s conduct fell below Strickland’s performance requirement. The incompetent-conduct allegations boil down the claim that “[t]rial counsel were ineffective due to the lateness with which they began this investigation,” and “[w]hile trial counsel originally called for more time and expert funds to conduct a thorough mitigation investigation . . . they failed to use the resources they were given effectively and presented very little information to the jury about the origins of Mr. Hittson’s problems in his early family life and upbringing.” Second Am. Habeas Pet., ECF no. 94, at 20, 25. Thus, “[t]rial

counsel's decision to offer very little evidence in mitigation regarding their client's family background and upbringing was not reasonable because they conducted an inadequate investigation into this area." Id. at 19–20.

Even if we assumed that Hittson could satisfy Strickland's performance prong based on these allegations of a constitutionally deficient investigation, he has not alleged any facts that would warrant a finding of prejudice. Hittson's petition only hints in broad, conclusory terms that more investigation by his trial counsel would have yielded something useful:

[¶ 27] There is nothing to suggest that further investigation would have been fruitless.

[¶ 29] Trial counsel . . . were on notice that Mr. Hittson's background was such that it would likely produce mitigating evidence regarding his upbringing, family, and psychological profile.

[¶ 33] [C]ounsel was on notice from their visit to Mr. Hittson's parents, the nature of Mr. Hittson's crime, and the results of the psychological evaluations that Mr. Hittson did have pre-trial, that there was likely more mitigating information about Mr. Hittson's childhood that a thorough investigation into his background and upbringing would likely uncover.

[¶ 40] But for trial counsel's ineffective representation, there is a reasonable probability that the result of trial, motion for a new trial, and the appeal would have been different.

Id. at 21–28.

Nowhere in these generalized claims does Hittson allege any facts that would allow a court to find "that there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 144 S. Ct. at 2068. Apart from broad statements that trial counsel's investigation was not thorough enough, Hittson does not identify what additional investigatory steps his attorneys should have taken; he has not identified a single piece of mitigating evidence that his attorneys failed to discover; he has not explained how that undiscovered evidence should have been presented to the jury; and he has not stated, even in conclusory fashion, that the jury would have returned a life sentence if they had heard the mitigating evidence that his attorneys would have discovered had they been competent.

"[A] habeas case is not a vehicle for a so-called fishing expedition via discovery, an effort to find evidence to support a claim." Borden, 646 F.3d at 810 n.31. Because Hittson has not alleged any facts to warrant a finding of Strickland prejudice, his first claim is not "substantial."

2.

**Mr. Hittson was Deprived of the Effective Assistance of Counsel Due to His Counsel's Failure to Alert the Trial Court that It Had Forced Them Into a Conflict Regarding the Adequacy of the Waiver Signed by Mr. Hittson During His Evaluation by Dr. Storms.**

As explained in the preceding section, Hittson complains that the inquiry into the voluntariness of his "hillbilly" and "asshole" statements to Dr. Storms and the circumstances surrounding his Miranda waiver created a conflict of interests, because his attorneys had some knowledge of "whether or not the waiver was truly

a knowing and voluntary one.” Second Am. Habeas Pet., ECF no. 94, at 30.

According to Hittson, trial counsel abrogated their Sixth Amendment duty by failing to object to this conflict.

The claim is meritless. This type of inquiry into the voluntariness of a defendant’s statements and the circumstances surrounding the execution of a Miranda waiver is routine in criminal cases where a statement or confession is admitted. See generally Jackson v. Denno, 378 U.S. 368, 377–81, 84 S. Ct. 1774, 1780–833, 12 L. Ed. 2d 908 (1964). Hittson has laid no foundation for his bare assertion that his attorneys’ failure to object to the Jackson–Denno hearing deprived him of his Sixth Amendment right to counsel. He has not cited a scrap of legal authority for his theory that such hearings create a conflict of interest where the attorney has personal knowledge of the circumstances being inquired into. Nor has he identified any professional or ethical standards that would require an attorney to bring such a conflict to the court’s attention.

3.

Mr. Hittson Was Deprived of the Effective Assistance of Counsel by His Counsel’s Failure to Independently Discover Exculpatory Material Suppressed by the State.

Hittson has long claimed, as an element of his Brady claim, that “[t]rial counsel were . . . diligent in attempting to discover the mitigating evidence in the State’s possession,” Am. Pet. for Writ of Habeas Corpus, ECF no. 45, at 114–15,

but he now also seeks to claim that “trial counsel was ineffective for failing to locate and use [Vollmer’s psychiatric report] on Mr. Hittson’s behalf,” Second Am. Habeas Pet., ECF no. 94, at 33–34. We need not attempt to resolve this inconsistency because Hittson has pled no facts to support the ineffective-assistance claim—nor could he, if his representations to this court, the District Court, and the state courts are to be believed.

4.

Mr. Hittson was Deprived of the Effective Assistance of Counsel Due at Motion for New Trial and Direct Appeal.

Hittson’s last claim does not specify what conduct he is complaining of. The entirety of the allegations of constitutionally-deficient performance are as follows:

In his motion for new trial proceeding and direct appeal . . . [c]ounsel failed to fully research, raise, brief and support with evidence the meritorious claims that could and should have been raised based on the errors that occurred during Mr. Hittson’s capital trial.

Second Am. Habeas Pet., ECF no. 94, at 35. The allegation of prejudice is equally lacking:

The attorneys appointed at the motion for new trial and direct appeal stages of Mr. Hittson’s capital proceedings failed to effectively litigate strong claims on Mr. Hittson’s behalf. Other claims, they abandoned entirely. Not only did these omissions deprived Mr. Tollette [sic] of relief at those levels, but significantly hindered his ability to assert these claims in the current habeas proceedings.

Id. at 36. Such allegations are patently frivolous.

Thus, in addition to his failure to establish habeas-counsel ineffectiveness, Hittson has also failed to raise any “substantial” underlying ineffective-assistance claims. Accordingly, he cannot rely on Martinez to excuse his procedural default.

IX.

For the foregoing reasons, the District Court’s grant of habeas relief is REVERSED, and the District Court’s denial of habeas relief on all other grounds is AFFIRMED.

SO ORDERED.

CARNES, Chief Judge, concurring:

I fully concur in all of the Court's opinion. I write separately to respond to the dissent's insistence that the Georgia Superior Court, in rejecting the petitioner's Estelle claims on state collateral review, clearly erred in applying Brecht's harmless-error standard instead of Chapman's more petitioner-friendly standard, and that the asserted error is somehow relevant to whether the petitioner is entitled to federal habeas relief. See Diss. Opn. at 1–8. It did not, and it is not.<sup>1</sup>

The central premise of the dissent's position is that circuit precedent, as well as what it sees as the “obvious implications” of the United States Supreme Court's decisions in Brecht and Fry, requires state courts to apply Chapman's harmless-beyond-a-reasonable-doubt standard on collateral review, not just on direct review. Id. That premise and the conclusions that the dissent draws from it are wrong for a number of reasons.

First, the dissent's focus on the Georgia Superior Court's application of Brecht is inconsistent with our task under AEDPA, which is to evaluate whether

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<sup>1</sup> The dissenting opinion seems to be of two minds about whether the harmless standard that the state collateral trial court applied is relevant to the issue of whether federal habeas relief should be granted. The first paragraph of that opinion states: “To be clear, I agree with the Concurrence that the state court's application of the incorrect standard would not be an independent basis for granting habeas relief.” Diss. Opn. at 1. But the dissenting opinion goes on to state, “I disagree with the Majority's statement that it does not matter whether Georgia's application of Brecht instead of Chapman was unreasonable.” Id. at 8. And it says, “Fry makes it unclear whether we can grant habeas relief based upon the [state collateral trial] court's error . . .” Id. at 7 n.4. As a precaution, I will respond to the dissenting opinion's second mind, which says that it does matter, as well as to that opinion's assertion that “it was error,” id.

the highest state court decision addressing the petitioner's claims is incompatible with clearly established Supreme Court precedent. See 28 U.S.C. § 2254(d)(1); Newland v. Hall, 527 F.3d 1162, 1199 (11th Cir. 2008) (“[T]he highest state court decision reaching the merits of a habeas petitioner’s claim is the relevant state court decision.”). As Judge Tjoflat’s opinion for the Court in today’s case correctly explains, the relevant state court decisions for AEDPA purposes are the Georgia Supreme Court’s summary denials of Hittson’s applications for a certificate of probable cause (CPC), not the Georgia Superior Court’s denials of his two state habeas petitions. See Maj. Opn. at 35–39, 39 n.25, 41 n.27. And “[b]ecause we are not reviewing the reasoning announced by the Superior Court,” whether the Superior Court’s application of Brecht was contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent is irrelevant. See Maj. Opn. at 41 n.27. Because of AEDPA the only question before us is whether the Georgia Supreme Court had any “reasonable basis” for denying Hittson relief on his Estelle claims. See Harrington v. Richter, — U.S. —, 131 S.Ct. 770, 784 (2011) (“Where a state court’s decision is unaccompanied by an explanation, the habeas petitioner’s burden [under AEDPA] still must be met by showing there was no reasonable basis for the state court to deny relief.”). We cannot presume from the Georgia Supreme Court’s silence that it followed the Superior Court in applying Brecht, especially given that Hittson’s application for a

CPC argued that the Chapman standard applied under state law. See Maj. Opn. at 39 n.25, 41 n.27; Gill v. Mecusker, 633 F.3d 1272, 1288–89 (11th Cir. 2011) (examining whether a summary state appellate decision was entitled to AEDPA deference even though the trial court’s ruling was “based on potentially flawed reasoning”).

Second, our own precedent does not, as the dissent contends, “clearly require[] state courts hearing habeas corpus appeals to use the more petitioner-friendly standard provided in Chapman.” Diss. Opn. at 4. Citing our decisions in Trepal v. Secretary, Florida Department of Corrections, 684 F.3d 1088 (11th Cir. 2012), and Duest v. Singletary, 997 F.2d 1336 (11th Cir. 1993), the dissent asserts that “we have unambiguously required that state collateral courts apply Chapman in reviewing . . . federal constitutional claims.” Diss. Opn. at 3. That is wrong, unless you count ambiguous dicta as an unambiguous holding.

In Trepal we explicitly recognized that “Chapman was a direct-appeal case” and that “Brecht determined that [Chapman’s] harmless error standard did not apply on collateral review.” 684 F.3d at 1111. Although we said in a footnote that Brecht “does not apply to state courts’ review of their own convictions,” that statement was founded upon the observation that, as a matter of practice, “Florida courts apply the more petitioner-friendly Chapman standard of whether the constitutional error is ‘harmless beyond a reasonable doubt.’” Id. at 1112 n.27

(quoting Pittman v. State, 90 So. 3d 794, 811 (Fla. 2011)). In Trepal we had no occasion to decide, and did not purport to decide, whether state courts are constitutionally required to apply Chapman on collateral review because the state collateral courts in that case had rejected the petitioner’s claims on the merits, not on grounds of harmlessness; they did not apply either the Chapman or the Brecht standard. See id. at 1104–06. The most that can be said about the dicta in our Trepal opinion is that it recognized that state courts are required to apply Chapman on direct review and that they usually do apply that same standard on collateral review. We did not say, even in dicta, that they must do so.

In any event, our dissenting colleague fails to recognize that whatever one may attempt to read into one of our opinions, or indeed whatever they may say, a decision can never hold anything beyond the facts of the case before it; all else is dicta, which is not binding on anyone for any purpose. See Edwards v. Prime, Inc., 602 F.3d 1276, 1298 (11th Cir. 2010) (“We have pointed out many times that regardless of what a court says in its opinion, the decision can hold nothing beyond the facts of that case. All statements that go beyond the facts of the case . . . are dicta. And dicta is not binding on anyone for any purpose.”) (citations omitted); Pretka v. Kolter City Plaza II, Inc., 608 F.3d 744, 762 (11th Cir. 2010) (“We are not required to follow dicta in our own prior decisions. Nor for that matter is anyone else.”) (citation omitted); Watts v. BellSouth Telecomms., Inc., 316 F.3d

1203, 1207 (11th Cir. 2003) (“Whatever their opinions say, judicial decisions cannot make law beyond the facts of the cases in which those decisions are announced.”); United States v. Aguillard, 217 F.3d 1319, 1321 (11th Cir. 2000) (“The holdings of a prior decision can reach only as far as the facts and circumstances presented to the Court in the case which produced that decision.”) (quotation marks omitted); Browning v. AT&T Paradyne, 120 F.3d 222, 225 n.7 (11th Cir. 1997) (“Since this statement was not part of any holding in the case, it is dicta and we are not bound by it.”).

Our decision in Duest is no different. In that case we merely acknowledged that Brecht’s harmless-error standard for federal habeas review is identical to “the harmless-error standard federal appellate courts use on direct review as to nonconstitutional error,” and then vaguely noted that Chapman applies “in all other situations.” Duest, 997 F.2d at 1338 & n.2. In context, the most that can be said about our statements in Duest is that they recognize that Chapman applies to constitutional errors reviewed on direct appeal, whether in state or federal court. Like Trepal, our Duest decision did not address, did not purport to address, and could not have held anything about whether Chapman must be applied in state collateral proceedings, because the state collateral courts in that case had actually applied Chapman. Id. at 1339 n.4. Neither Trepal nor Duest nor any other

decision issued by this circuit has held, or had occasion to hold, that state courts must apply Chapman not only on direct review, but also on collateral review.

And even if there were an actual holding to that effect in one of our decisions, it would still be irrelevant under AEDPA, which forecloses federal habeas relief unless the relevant state court decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1) (emphasis added). By relying on our precedent, our dissenting colleague forgets what the Supreme Court has repeatedly told us, which is that the only thing that can clearly establish federal law for AEDPA purposes is a holding of the United States Supreme Court, not dicta, and certainly not the holdings of lower federal courts. See Parker v. Matthews, 132 S.Ct. 2148, 2155 (2012) (explaining that the decisions of federal appeals courts “cannot form the basis for habeas relief under AEDPA” because they do “not constitute clearly established Federal law, as determined by the Supreme Court”) (quotation marks omitted); Marshall v. Rodgers, 133 S.Ct. 1446, 1450 (2013) (“The Court of Appeals’ contrary conclusion rested in part on the mistaken belief that circuit precedent may be used to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced.”); see also White v. Woodall, 134 S.Ct. 1697, 1702 n.2 (2014); Renico v. Lett, 559 U.S. 766, 778–79, 130 S.Ct. 1855, 1865–66 (2010);

Dombrowski v. Mingo, 543 F.3d 1270, 1274 (11th Cir. 2008) (“We have held that the ‘clearly established law’ requirement of § 2254(d)(1) does not include the law of the lower federal courts.”); Putnam v. Head, 268 F.3d 1223, 1241 (11th Cir. 2001) (“Clearly established federal law is not the case law of the lower federal courts, including this Court.”).

The third reason that the premise and conclusion of the dissenting opinion is wrong is that the Supreme Court’s decisions in Brecht and Fry do not imply, let alone clearly hold (and thereby establish for AEDPA purposes), that state courts are required to apply Chapman’s harmless-error standard on collateral review. To support its belief that they do, the dissenting opinion clips language from those two decisions, disregards the context of that language, and omits most of the limiting references to direct review. See Diss. Opn. at 6–7. Brecht and Fry both underscored that Chapman was decided on direct review and that it requires states to apply its harmless-beyond-a-reasonable-doubt standard on direct review. See Brecht, 507 U.S. at 630, 636, 113 S.Ct. at 1718, 1721 (explaining that “Chapman reached this Court on direct review” and set the standard that state courts must “engage in on direct review”) (emphasis added); Fry, 551 U.S. at 116, 127 S.Ct. at 2325 (“In Chapman, . . . a case that reached this Court on direct review of a state-court criminal judgment, we held that a federal constitutional error can be considered harmless only if a court is able to declare a belief that it was

harmless beyond a reasonable doubt.”) (quotation marks omitted). In Brecht, the Supreme Court declined to extend Chapman’s standard to federal habeas review, broadly concluding that a “substantial and injurious effect” standard was “better tailored to the nature and purpose of collateral review than the Chapman standard.” 507 U.S. at 623, 113 S.Ct. at 1714 (emphasis added).

One of the primary reasons the Brecht Court gave for refusing to extend Chapman to federal collateral review — a reason equally applicable to state collateral review — is the fundamental difference between direct review, which “is the principal avenue for challenging a conviction,” and collateral review, where the state has an “interest in the finality of convictions that have survived direct review within the state court system.” Id. at 633–35, 113 S.Ct. at 1719–20; see also Mansfield v. Sec’y, Dep’t of Corr., 679 F.3d 1301, 1307 (11th Cir. 2012) (“The Supreme Court emphasized in Brecht that ‘collateral review is different from direct review,’ and, therefore, that ‘an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.’”) (quoting Brecht, 507 U.S. at 633–34, 113 S.Ct. at 1719–20). Nothing in Brecht implies, let alone clearly establishes, that state courts must apply Chapman on collateral review. If anything, Brecht’s principal rationale — that “collateral review is different from direct review” and that the “substantial and injurious effect” standard is “better tailored to the nature and purpose of collateral review than the Chapman standard”

— implies that state courts, like federal courts, are not bound to apply the Chapman standard when conducting collateral review.

The Supreme Court’s Fry decision took Brecht one step further away from the position of the dissenting opinion in the present case. Fry held that federal habeas courts must apply the “substantial and injurious effect” standard to evaluate constitutional errors regardless of whether the state courts recognized the error and reviewed it for harmlessness under the Chapman standard. Fry, 551 U.S. at 121–22, 127 S.Ct. at 2328. Fry did not imply, much less definitively decide, that state courts must apply Chapman on collateral review. Indeed, it had no occasion to address that question because the relevant state court decision in that case — which notably failed to apply Chapman — was issued on direct appeal, not on collateral review. See id. at 115, 166 n.1, 127 S.Ct. at 2324, 2325 n.1. Thus, when the Supreme Court in Fry noted that “state courts are required to evaluate constitutional error under Chapman,” it was simply reiterating the well-worn principle that Chapman sets forth the appropriate harmless-error standard on direct appeal, which is what that case was. Id. at 118, 127 S.Ct. at 2326. That Brecht, Fry, and circuit precedent establish that regardless of what the state courts do, federal habeas courts must apply Brecht’s harmless-error standard does not imply, as the dissent suggests, that Chapman is the only appropriate standard on state collateral review. See Diss. Op. at 5–6; cf. Brooks v. Kyler, 204 F.3d 102, 108 (3d

Cir. 2000) (“[D]rawing instruction from Supreme Court passages through the use of the negative pregnant is risky and unsatisfactory.”). It implies nothing at all about the proper harmless standard for state collateral review.

From its unfounded premise that state collateral courts are categorically required to apply Chapman instead of Brecht, the dissent suggests that the harmless-error standard employed by a state collateral court may affect whether a petitioner is entitled to federal habeas review. See Diss. Opn. at 7–8. Setting aside the flaws in its underlying premise, which have already been discussed, the dissent’s suggestion cannot be squared with the Supreme Court’s decision in Fry. In that case a state appellate court had rejected a petitioner’s constitutional claim on direct appeal, concluding that the asserted error resulted in “no possible prejudice.” Fry, 551 U.S. at 115, 127 S.Ct. at 2324 (quotation marks omitted). The state court, however, “did not specify which harmless-error standard it was applying,” and the Supreme Court assumed for the sake of argument that the state court “did not determine the harmless standard of the error under the Chapman standard,” as it was required to do on direct appeal. Id. at 115, 116 n.1, 127 S.Ct. at 2324, 2325 n.1. Even with that assumption, the Supreme Court concluded that the petitioner in Fry was not entitled to federal habeas relief because the error was harmless under the Brecht standard. Id. at 116, 122, 127 S.Ct. at 2324, 2328. The Fry Court held that a federal habeas court must apply

Brecht “whether or not the state appellate court recognized the [constitutional] error and reviewed it for harmlessness under the harmless beyond a reasonable doubt standard set forth in Chapman.” Id. at 121–22, 127 S.Ct. at 2328 (quotation marks omitted). And it explained that a petitioner, even one who can demonstrate that the state court’s “harmlessness determination . . . was unreasonable,” is not entitled to federal habeas relief unless he “also satisf[ies] Brecht’s standard.” Id. at 119, 127 S.Ct. at 2326–27 (emphasis omitted); see also Mansfield, 679 F.3d at 1308 (“[A] federal court may deny habeas relief based solely on a determination that the constitutional error is harmless under the Brecht standard.”).

In other words, even if a state court failed to recognize a constitutional error, failed to review it for harmlessness, or failed to apply the correct harmless-error standard, the Supreme Court’s Fry decision requires that federal habeas relief must still be denied if the error was harmless under Brecht’s “substantial and injurious effect” standard. We have recognized exactly that. See Hodges v. Att’y Gen., State of Fla., 506 F.3d 1337, 1342–43 (11th Cir. 2007) (“[I]f the state court did not apply the correct harmless error standard, or even if it did not recognize that there was error, federal habeas relief is still due to be denied if the constitutional error was harmless [under Brecht].”).

The dissenting opinion’s insistence that Fry, despite its clear language, is unclear on this point rests on the spurious notion that Fry “assumes that state

collateral courts will properly apply the Chapman standard.” Diss. Opn. at 7 n.4. Fry assumed no such thing. To the contrary, it explicitly assumed just the opposite. The Court plainly stated that it was assuming that the state appellate court in that case had not applied the correct harmless standard. Fry, 551 U.S. at 116 n.1, 127 S.Ct. at 2325 n.1 (“We also assume that the state appellate court did not determine the harmless of the error under the Chapman standard . . .”). Judge Tjoflat’s opinion for this Court is absolutely right when it says that Hittson would not be entitled to federal habeas relief under Brecht’s harmless-error standard even if we assumed both that the Georgia Supreme Court had applied Brecht and that that application was contrary to clearly established Supreme Court precedent. That is what Fry says and holds. The dissenting opinion errs in suggesting otherwise.

I have put off until the end the most noteworthy of the dissenting opinion’s errors, one that would have the most profound and far reaching impact if it were the law, which thankfully it is not. The error is embodied in that opinion’s attitude about the relationship between this Court and the state courts. The dissenting opinion takes the position that we have the authority and the duty to lecture state courts about federal law and to admonish them to follow the law, that we are their teachers, and that the state courts in this circuit are bound to follow our views. In footnote 4, for example, the dissenting opinion says that regardless of whether the

state collateral trial court's application of the Brecht standard is a basis for granting federal habeas relief, "we should be clear that it was error, that it should not be repeated, and that it matters." Diss. Opn. at 7 n.4. Instead, what we should be clear about is that outside of what is necessary to decide if federal habeas relief is due to be granted, it is not the role of inferior federal courts, of which we are one, to sit in judgment of state courts on issues of federal law, and we should not arrogate to ourselves the role of lecturing them that one of their rulings is an error of federal law that "should not be repeated." The Supreme Court alone, and not any inferior federal court, may do that. We have no more right to lecture state courts about federal law than they have to lecture us about it.

The Supreme Court has rejected and disparaged as "remarkable" a passage from a Ninth Circuit opinion saying that state courts are bound to follow rulings of the federal court of appeals in the circuit in which they are located. Arizonans for Official English v. Arizona, 520 U.S. 43, 58 n.11, 117 S.Ct. 1055, 1064 n.11 (1997). In making it clear that the Ninth Circuit's view was wrong, the Supreme Court cited with favor its own decision in ASARCO Inc. v. Kadish, 490 U.S. 605, 617, 109 S.Ct. 2037, 2045 (1989), which instructed federal courts that "state courts . . . possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law." Id. The Court also cited with favor Justice Thomas' concurring opinion in

Lockhart v. Fretwell, 506 U.S. 364, 375–376, 113 S.Ct. 838, 845–846 (1993), for the proposition that the “Supremacy Clause does not require state courts to follow rulings by federal courts of appeals on questions of federal law.” Id. As Justice Thomas explained in that opinion: “The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court’s interpretation. In our federal system, a state trial court’s interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located.” Lockhart, 506 U.S. at 376, 113 S.Ct. at 846.

We have reiterated that same core principle of federalism. See Casale v. Tillman, 558 F.3d 1258, 1260 (11th Cir. 2009) (describing as a “well settled” principle of federalism that “a state court’s interpretation of federal law is no less authoritative than that of the corresponding federal court of appeals”) (brackets and quotation marks omitted); Glassroth v. Moore, 335 F.3d 1282, 1302 n.6 (11th Cir. 2003) (“[S]tate courts when acting judicially, which they do when deciding cases brought before them by litigants, are not bound to agree with or apply the decisions of federal district courts and courts of appeal.”); see also Powell v. Powell, 80 F.3d 464, 467 (11th Cir. 1996) (referring to “the dual dignity of state and federal court

decisions interpreting federal law” as going “to the heart of our system of federalism”).

WILSON, Circuit Judge, dissenting:

The district court correctly decided this case by concluding that the violation of Hittson's constitutional rights had a "substantial and injurious effect or influence" on the jury's determination to sentence him to death. *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 1722 (1993). In addition, I am unable to join the Majority's disregard of our precedent inherent in its conclusion that it does not matter whether a state court, sitting in collateral review, applies either the harmless error standard articulated in *Brecht*, or the more petitioner-friendly harmless error standard provided by *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824 (1967). To be clear, I agree with the Concurrence that the state court's application of the incorrect standard would not be an independent basis for granting habeas relief. *See Fry v. Pliler*, 551 U.S. 112, 121–22, 127 S. Ct. 2321, 2328 (2007) (holding that federal habeas courts must apply the *Brecht* standard even where the state court did not recognize a constitutional error). However, the fact that we would not grant habeas on that basis alone does not mean that state courts are free to apply *Brecht* instead of *Chapman*, or as in *Fry*, no review at all, when a constitutional error was committed. As our court has said three times, state courts are supposed to apply *Chapman*, not *Brecht*, even on collateral review. Here, my concurring colleague goes to great lengths to characterize what we have said as dicta. In so doing, the Concurrence disregards binding precedent for

purposes that are not even relevant to the resolution of this case, given our conclusion that *Fry* precludes use from granting relief based solely on a state collateral court's application of the wrong harmless error standard. But we have made clear that, even though we cannot grant habeas relief on this basis, it is nevertheless erroneous for state courts to apply *Brecht* not *Chapman* on collateral review. To the extent that the Majority suggests otherwise, I cannot endorse that opinion, which essentially tells state courts that because we cannot grant relief when they apply the wrong standard, they are free, despite our precedent, to apply the wrong standard at will.

The district court concluded that Hittson was entitled to habeas relief, holding that the trial court's allowance of Dr. Storms's testimony denied Hittson his Fifth and Sixth Amendment rights under *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866 (1981), and that the testimony had a "substantial and injurious effect" on the jury's death sentence and was therefore not harmless under the *Brecht* standard. 507 U.S. at 637, 113 S. Ct. at 1722. In Hittson's case, the jury imposed the death penalty after finding one aggravating statutory circumstance: that the murder was "outrageously or wantonly vile, horrible, or inhuman in that it involved depravity of mind." *Hittson v. Humphrey*, No. 5:01-cv-384, 2012 WL 5497808, at \*40 (M.D. Ga. November 13, 2012). As the district court notes, Dr. Storms's testimony was the only evidence that, months after the crime, Hittson possessed a

corrupt or depraved mind. *Id.* Because Georgia law requires a jury to unanimously find at least one statutory aggravating factor to return a death sentence, “habeas relief is warranted in this case if we believe even one of the jurors who voted in favor of the death penalty likely was substantially influenced” by the error. *Duest v. Singletary*, 997 F.2d 1336, 1339 (11th Cir. 1993) (per curiam). Thus, contrary to the Majority, I agree with the district court that we cannot conclude with fair assurance that the erroneous admission of Dr. Storms’s testimony in the context of the trial as a whole did not substantially sway the jury. The testimony was admitted in violation of clearly established Supreme Court precedent. *See Estelle*, 451 U.S. at 471, 101 S. Ct. at 1877. The constitutional violation was harmful under the *Brecht* standard, and therefore Hittson is entitled to habeas relief.

Further, the district court correctly noted that the state collateral court erred applying the *Brecht* harmless error standard rather than the *Chapman* harmless error standard. Although the Majority concedes that the Georgia Superior Court’s application of the *Brecht* standard to Hittson’s *Estelle* claims was “seemingly anomalous” and that Georgia habeas courts typically apply the more petitioner-friendly standard from *Chapman*, it concludes that state courts are only required to

use *Chapman* harmless error standard on direct review.<sup>1</sup> Also, the Majority ultimately finds the state habeas court's choice of a standard of review irrelevant because, in any event, the federal court will apply the *Brecht* standard.

However, our precedent clearly requires state courts hearing habeas corpus appeals to use the more petitioner-friendly standard provided in *Chapman*. Before today's case, no state appellate court in this circuit, as far as I can find, has applied the *Brecht* standard to review the lower state court's constitutional error. This is expected, as we have unambiguously required that state collateral courts apply *Chapman* in reviewing their federal constitutional claims. *See Trepal v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1088, 1112 n.27 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 1598 (2013); *Duest*, 997 F.2d at 1338 & n.2. In *Trepal*, we said:

We emphasize that the *Brecht* standard is a harmless error test that applies to federal habeas review of state convictions. *Brecht*, 507 U.S. at 634–38, 113 S. Ct. at 1720–22; [*Ventura v. Atty. Gen., Fla.*, 419 F.3d 1269, 1279 n.4 (11th Cir. 2005)]. **It does not apply to state courts' review of their own convictions. Instead, the Florida courts apply the more petitioner-friendly *Chapman* standard of whether the constitutional error is “harmless beyond a reasonable doubt.”**

684 F.3d at 1112 n.27 (emphasis added).<sup>2</sup> And in *Duest*, we said again, “The harmless-error standard for constitutional violations in all other situations remains

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<sup>1</sup> The Majority places their analysis of the appropriate standard of review for state collateral courts assessing constitutional errors in footnote 26.

the longstanding test of *Chapman v. California*: whether the State has proved the error was harmless beyond a reasonable doubt.” 997 F.2d at 1338 n.2 (citation omitted). This guidance to the state court is not vague in any way, as my concurring colleague suggests. We clearly stated that the appropriate standard in “all other situations,” obviously including collateral review, is the “longstanding test of *Chapman v. California*.” *Id.* Most recently in *Rodriguez v. Sec’y of Fla.*, No. 11-13273, \_\_\_ F.3d \_\_\_, (11th Cir. June 30, 2014), we reiterated that *Brecht* is only the appropriate harmless error standard for federal habeas review, citing our decision in *Trepal*. *See Rodriguez*, p. 53, n.44 (“Because we consider the *Brecht* question *in the first instance on federal habeas review*, there is no state court *Brecht* actual-prejudice finding to review or to which we should defer.” (emphasis added) (citing *Trepal*, 684 F.3d at 1112)). Our precedent has routinely advised state courts that while the *Brecht* standard applies to assess constitutional error in federal court, *Chapman* is the appropriate standard on state collateral review. Each of my colleagues in today’s Majority was on the panel in either *Trepal* or *Duest*,

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<sup>2</sup> I disagree with my concurring colleague that the most that can be said of *Trepal* is that we said that state courts “usually do apply [*Chapman*] standard on collateral review.” Concurring Op., p. 4.

and both were on *Rodriguez*, joining opinions making it clear that state courts are expected to use *Chapman* —not *Brecht*—to analyze constitutional errors.<sup>3</sup>

In addition to our own precedent, the Supreme Court in *Brecht* itself indicated that state courts are required to apply the more petitioner-friendly *Chapman* analysis of whether the constitutional error is “harmless beyond a reasonable doubt.” *See Brecht*, 507 U.S. at 636, 113 S. Ct. at 1721 (noting the “harmless-error review that *Chapman* requires” of state courts). In *Brecht*, the Supreme Court explained that it would not make sense for federal courts to apply *Chapman* in reviewing state errors, after the state courts had themselves used that standard. *Id.* (“[I]t scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review.”). Indeed, the Supreme Court acknowledged that interests in comity and federalism support a standard, such as *Brecht*, which is less petitioner-friendly than *Chapman*, for federal collateral review of state constitutional errors. *Id.* That federal habeas courts apply a more deferential harmless error standard does not mean that states are free to do the same: it only means that we cannot grant relief for less egregious constitutional errors in state courts. To be clear, however, applying *Brecht* in state courts is error.

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<sup>3</sup> The Majority’s analysis of this issue, which appears only in footnote 26, does not even cite this binding Circuit precedent.

More recently, the Supreme Court implied the mandatory nature of *Chapman* review for state courts analyzing the effects of constitutional error in *Fry v. Pliler*. 551 U.S. at 117–18, 127 S. Ct. at 2326. In *Fry*, while addressing the standard under which a federal court must assess the prejudicial impact of a constitutional error, the Supreme Court repeatedly acknowledged that state courts “are required to” apply the *Chapman* standard in reviewing their own constitutional errors. *See, e.g., Fry*, 551 U.S. at 118, 127 S. Ct. at 2326 (“To say (a) that since state courts are *required* to evaluate constitutional error under *Chapman* it makes no sense to establish *Chapman* as the standard for federal habeas review is not at all to say (b) that whenever a state court fails in its responsibility to apply *Chapman* the federal habeas standard must change.”). The Supreme Court ultimately held that *Brecht*’s applicability to federal review of state constitutional errors is not contingent on whether or not the state appellate court recognized the constitutional error and “reached the *Chapman* question,” thus implicitly recognizing that *Chapman* continues to be the proper standard for a state court’s review of its own constitutional errors. *Id.*, 127 S. Ct. at 2326. *Fry* certainly did not tell state courts that the Constitution does not require them to apply *Chapman* when they recognize and evaluate constitutional errors. *Id.* at 120–22, 127 S. Ct. at 2327–28. Even if we disregard the obvious implications of *Brecht* and *Fry*, in addition to our court’s clear precedent, neither Respondent nor

the Majority has pointed us to any authority indicating that states are free to use *Brecht* on initial collateral review in habeas corpus proceedings.<sup>4</sup> Indeed, if there was any doubt that *Chapman* was meant to apply as the harmless error standard on state collateral review, our precedent clarifies the expectation that *Chapman* does apply.

Finally, I disagree with the Majority's statement that it does not matter whether Georgia's application of *Brecht* instead of *Chapman* was unreasonable, because we will just apply *Brecht* de novo anyway. If we apply *Brecht* de novo without first affording the State an opportunity to apply *Chapman*, what is the point—why have we been telling the states all these years to apply *Chapman* and not *Brecht*? The state court here, unlike the state court in *Fry*, found that the lower court had committed constitutional error and applied a standard that was more difficult for Hittson to meet than the standard precedent required the court to apply. That the error was not, in the Majority's view, harmful based on the *Brecht*

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<sup>4</sup> I disagree that *Fry* supports the Majority's conclusion that it does not matter what standard a state collateral court applies in assessing constitutional error. In that decision, the Supreme Court held that a federal court must assess the prejudicial impact of a state court's constitutional error under *Brecht*'s "substantial and injurious effect" standard, not under *Chapman*'s "harmless beyond reasonable doubt" standard, regardless of whether the state court has recognized the error and found it harmless under the *Chapman* standard. *Fry*, 551 U.S. at 121, 127 S. Ct. at 2328. Thus, *Fry* assumes that state collateral courts will properly apply the *Chapman* standard. That the state court failed to do as required matters a great deal, especially because the error deprived Hittson of his opportunity to have the petitioner-friendly standard applied to him. *Fry* makes it unclear whether we can grant habeas relief based upon the court's error, but again, we should be clear that it was error, that it should not be repeated, and that it matters.

standard, simply does not mean the state court did not err in applying *Brecht* rather than *Chapman*.

Here, the district court properly applied *Brecht* and concluded that the violation of Hittson's constitutional rights had a "substantial and injurious effect or influence" on the jury's determination to sentence him to death. *Brecht*, 507 U.S. at 637, 113 S. Ct. at 1722. Thus, Hittson probably would have achieved habeas relief at the state court level, had the state court applied the proper, *less onerous* standard that constitutional violations require reversal unless they were "harmless beyond a reasonable doubt," *Chapman*, 386 U.S. at 24, 87 S. Ct. at 828. The State insists that the record as a whole and the horrific details of Hittson's crime are so overwhelming that Dr. Storms's unconstitutional testimony, rebutting the minimal testimony of remorse Hittson provided, did not make a difference in the outcome of the trial. Like the district court I disagree, and find that the violation of Hittson's constitutional rights was substantial and injurious. *Brecht*, 507 U.S. at 638; 113 S. Ct. at 1722. Also, according to our precedent and the clear implication of the Supreme Court, Hittson was still entitled to have his Fifth Amendment claim considered by the State of Georgia under the *Chapman* analysis before our review and he was deprived of that entitlement.

Accordingly, I respectfully dissent.

# **APPENDIX B**

**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING  
56 Forsyth Street, N.W.  
Atlanta, Georgia 30303

John Ley  
Clerk of Court

For rules and forms visit  
[www.ca11.uscourts.gov](http://www.ca11.uscourts.gov)

September 25, 2014

**MEMORANDUM TO COUNSEL OR PARTIES**

Appeal Number: 12-16103-P  
Case Style: Travis Hittson v. GDCP Warden  
District Court Docket No: 5:01-cv-00384-MTT

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

JOHN LEY, Clerk of Court

Reply to: Jan S. Camp  
Phone #: (404) 335-6171

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 12-16103-P

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TRAVIS CLINTON HITTSON,

Petitioner - Appellee  
Cross Appellant,

versus

GDCP WARDEN,

Respondent - Appellant  
Cross Appellee.

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Appeal from the United States District Court  
for the Middle District of Georgia

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: ED CARNES, Chief Judge, TJOFLAT and WILSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat  
UNITED STATES CIRCUIT JUDGE

ORD-42

# **APPENDIX C**



parole. The State, thus far successful in its efforts to deny parole, has summarized the difference between Hittson and Vollmer:

In February, 1993, Travis Hittson was tried, convicted and sentenced to death for his participation in the murder. In October of that year, Vollmer entered a plea of guilty to murder and was sentenced to life imprisonment. Although he received the "lesser" sentence, it is evident from the information received in the investigation that Vollmer was the instigator in the murder, that he convinced Hittson to do it, that the manner of disposing of the body was Vollmer's idea, and that Vollmer is, in a word, EVIL! As you consider the following material, you will be able to see that this inmate has a perverted mind and has no capacity for remorse. Not only does the heinous nature of the crime warrant his remaining in prison, but the fact that he is clearly incorrigible and would be extremely dangerous if ever released back into society.

(Doc. 56-13 at 114-15).<sup>1</sup> Hittson's lawyers strongly decry this apparent disparity in punishment.<sup>2</sup> That argument, whatever its practical appeal, has no legal relevance to the issues before this Court. Although Vollmer's role in the murder and his manipulation of Hittson are factors relevant to several of the issues Hittson raises, the fact that Vollmer does not face death is not. The "fairness" of Hittson's death sentence in relation to Vollmer's life sentence is not before this Court.

For the reasons discussed below, Hittson's petition is **GRANTED IN PART and DENIED IN PART.**

## I. BACKGROUND AND PROCEDURAL HISTORY

### A. Facts

The Georgia Supreme Court summarized the facts of this case in Hittson's direct appeal:

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<sup>1</sup> Because all documents have been electronically filed, this Order cites to the record by using the document number and electronic screen page shown at the top of each page by the Court's CM/ECF software rather than the sometimes illegible Bates numbers affixed many years ago.

<sup>2</sup> For various reasons, the State faced hurdles in Vollmer's prosecution that it did not face in Hittson's. For example, Hittson readily confessed and cooperated with authorities, while Vollmer, consistent with his "evil" and "manipulative" personality, schemed even as he awaited trial.

On April 3, 1992 Hittson, his co-defendant Edward Vollmer, and the victim, Conway Utterbeck, left Pensacola, Florida, where they were stationed on the U.S.S. Forrestal, and they drove to the home of Vollmer's parents in Warner Robins, Georgia. The elder Vollmers were out of town, and the three men spent the first night in a shed on the property. They obtained a key to the house from a family friend the following day. According to statements Hittson subsequently made to law enforcement officers, on the second day of the trip he and Vollmer went to several bars, leaving the victim at the Vollmers' home. As they drove back to the house, Vollmer stated that the victim planned to kill them, and they should "get" him first. Vollmer gave Hittson an aluminum baseball bat and the two entered the house to find the victim dozing. Hittson stated that, at Vollmer's direction, he struck the victim several times in the head with the baseball bat, then dragged him into the kitchen where Vollmer waited. According to Hittson, the victim screamed, "Travis, whatever have I did to you?" While Vollmer stepped on the victim's hand, Hittson shot him in the head. Hittson stated that he was "cold" and "had no emotion" when he shot the victim.

According to Hittson's statement, approximately two hours later Vollmer stated that they needed to dismember the body in order to get rid of the evidence. Hittson stated that they used a hacksaw to remove the victim's hands, head and feet, but that he became sick after he removed a hand, and Vollmer completed the dismemberment. Hittson stated that Vollmer acted alone in removing the victim's genitals and carving out his rectum. Vollmer and Hittson then packed the victim's remains in numerous garbage bags. They buried the victim's torso in Houston County, cleaned up the Vollmers' home, and hid the baseball bat in the Vollmers' shed. Subsequently they drove back to Pensacola where they buried the rest of the victim's remains.

On April 5, 1992, Louise Davidson observed a black Thunderbird with Florida license plates emerging from a seldom used dirt road in Houston County. Two people were in the car. Suspicions were aroused, and she noted the license number. When the victim's torso was discovered two months later by loggers in an area off the same dirt road, police determined that the car previously observed by Davidson belonged to Edward Vollmer.

Relying on information that the victim had gone to Warner Robins just before his disappearance, the Navy contacted the Houston County Sheriff's Department. Representatives of the Sheriff's Department travelled to Pensacola, Florida, and, along with agents from the Naval Investigative Service (NIS), interviewed a number of the victim's shipmates, including Hittson. Hittson subsequently confessed and gave information leading to the discovery of the rest of the victim's remains.

At Hittson's trial the medical examiner testified that, in his opinion, the victim died from a single gunshot wound to the head, but that it was not possible to determine whether the dismemberment occurred before or after death.

*Hittson v. State*, 264 Ga. 682, 682-83, 449 S.E.2d 586, 590-91 (1994), *overruled in part by Nance v. State*, 272 Ga. 217, 526 S.E.2d 560 (2000).

## **B. Procedural History**

On February 27, 1993, a jury found Hittson guilty of malice murder, aggravated assault, possession of a firearm during the commission of a crime, and theft by taking. (Doc. 70-4 at 14). He was sentenced to death for the crime of malice murder and the Georgia Supreme Court affirmed his conviction and sentence on October 31, 1994. (Doc. 70-5 at 25, 29-32); *Hittson*, 264 Ga. at 682-91, 449 S.E.2d at 590-96.

Hittson filed a Petition for Writ of Habeas Corpus in the Superior Court of Butts County, Georgia on December 31, 1995 ("first state habeas"). (Doc. 75-13). After conducting an evidentiary hearing, the first state habeas court denied relief on July 10, 1998. (Docs. 75-16 to 75-21; Doc. 76-4).

On January 4, 2002, Hittson filed in this Court a Petition for Writ of Habeas Corpus by a Person in State Custody. (Doc. 6). The Court granted Hittson's request for discovery of the Houston County District Attorney's file so he could determine if the State had withheld certain evidence. (Doc. 22). When Hittson discovered what he claimed was suppressed evidence, he moved to stay federal court proceedings. (Doc. 27 ). On August 30, 2004, this Court stayed his habeas corpus action to allow Hittson to return to state court and exhaust his *Brady* claims. (Doc. 35).

Hittson filed a Petition for Writ of Habeas Corpus in the Superior Court of Butts County ("second state habeas"). (Docs. 55-1 to 55-3). After being ordered to do so by the Georgia Supreme Court, the second state habeas court held an evidentiary hearing on

November 29 and 30, 2007. (Doc. 55-9; Docs. 56-9 to 62-11). On January 26, 2009, the second state habeas court denied Hittson's petition. (Doc. 63-1).

Following denial of his Application for Certificate of Probable Cause to Appeal and Petition for Writ of Certiorari, Hittson filed his Amended Petition for Writ of Habeas Corpus by a Person in State Custody in this Court on July 11, 2011. (Docs. 63-3 to 63-9; Doc. 45); *Hittson v. Humphrey*, 131 S. Ct. 3038 (2011). The Respondent has filed his answer and both parties have now briefed the issues. (Doc. 54; Docs. 82 to 84).

## II. STANDARD OF REVIEW

Because Hittson filed his federal habeas corpus petition in 2002, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides the standard of review.

### A. Exhaustion and procedural default

Procedural default bars federal habeas relief when a habeas petitioner has failed to exhaust state remedies that are no longer available and when the state court rejects the habeas petitioner's claim on independent state procedural grounds. *Ward v. Hall*, 592 F.3d 1144, 1156-57 (2010); *Frazier v. Bouchard*, 661 F.3d 519, 524 n.7 (11th Cir. 2011).

There are exceptions to procedural default. If the habeas respondent establishes that a default has occurred, the petitioner bears the burden of establishing "cause for the failure to properly present the claim and actual prejudice, or that the failure to consider the claim would result in a fundamental miscarriage of justice." *Conner v. Hall*, 645 F.3d 1277, 1287 (11th Cir. 2011) (citing *Wainwright v. Sykes*, 433 U.S. 72, at 81-88 (1977); *Marek v. Singletary*, 62 F.3d 1295, 1301-02 (11th Cir. 1995)). "To establish "cause" for procedural default, a petitioner must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in the state court." *Spencer v. Sec'y, Dep't of Corr.*, 609 F.3d 1170, 1180 (11th Cir. 2010) (quoting *Henderson v. Campbell*, 353 F.3d 880,

892 (11th Cir. 2003)). “To establish “prejudice,” a petitioner must show that there is at least a reasonable probability that the result of the proceeding would have been different.” *Id.* at 1180 (quoting *Henderson*, 353 F.3d at 892). To the extent the state court’s cause and prejudice findings are based upon determinations of fact, and they typically will be, those factual findings are presumed to be correct and can be rebutted only by clear and convincing evidence. 28 U.S.C. § 2254.

### **B. Claims that were adjudicated on the merits in the state courts**

Pursuant to 28 U.S.C. § 2254(d), this Court may not grant habeas relief with respect to any claim that has been adjudicated on the merits in state court unless the state court’s decision was (1) “contrary to ... clearly established Federal law;” or (2) “involved an unreasonable application of ... clearly established Federal law” or (3) “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(1)-(2); *see also Harrington v. Richter*, 131 S. Ct. 770, 785 (2011). The phrase “clearly established Federal law” used in § 2254(d)(1) refers to only the holdings, not the dicta, of the United States Supreme Court in existence at the time of the relevant state court decision. *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *Thaler v. Haynes*, 130 S. Ct. 1171, 1173 (2010).

The “contrary to” and “unreasonable application” clauses of § 2254(d)(1) are separate bases for reviewing a state court’s decisions. *Fotopoulos v. Sec’y, Dep’t of Corr.*, 516 F.3d 1229, 1232 (11th Cir. 2008) (quoting *Putman v. Head*, 268 F.3d 1223, 1241 (11th Cir. 2001)).

Under § 2254(d)(1), “[a] state court’s decision is ‘contrary to’ ... clearly established law if it ‘applies a rule that contradicts the governing law set forth in [the United States Supreme Court’s] cases’ or if it ‘confronts a set of facts that are materially indistinguishable from a decision of [the United States Supreme] Court and nevertheless arrives at a [different] result....’”

*Michael v. Crosby*, 430 F.3d 1310, 1319 (11th Cir. 2005)(quoting *Mitchell v. Esparza*, 540 U.S. 12, 15-16 (2003)).

A state court's decision involves an "unreasonable application" of federal law when "the state court identifies the correct governing legal rule but unreasonably applies it to the facts of the particular state prisoner's case, or when it unreasonably extends, or unreasonably declines to extend, a legal principle from Supreme Court case law to a new context." *Reese v. Sec'y, Fla. Dep't of Corr.*, 675 F.3d 1277, 1286 (11th Cir. 2012) (quoting *Greene v. Upton*, 644 F.3d 1145, 1154 (11th Cir. 2011)). An "unreasonable application" and an "incorrect application" are not the same:

We have explained that an *unreasonable* application of federal law is different from an *incorrect* application of federal law. Indeed, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must be objectively unreasonable. This distinction creates a substantially higher threshold for obtaining relief than *de novo* review. AEDPA thus imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt.

*Hill v. Humphrey*, 662 F.3d 1335, 1344-45 (11th Cir. 2011) (quoting *Renico v. Lett*, 130 S. Ct. 1855, 1862 (2010)(emphasis in original)).

With regard to a state court's determination of factual issues, that determination is "presumed to be correct" and this presumption can only be rebutted by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). "We therefore grant habeas relief to a petitioner challenging a state court's factual findings only in those cases where the state court's decision 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Price v. Allen*, 679 F.3d 1315, 1320 (11th Cir. 2012) (quoting 28 U.S.C. § 2254(d)(2)); *but see Cave v. Sec'y for the Dep't. of Corr.*, 638 F.3d 739, 746 (11th Cir. 2011) (noting the uncertainty regarding the interaction between

§ 2254(d)(2) and § 2254(e)(1)).

### C. The Relevant State Court Orders and AEDPA Deference

The Respondent argues this Court must give AEDPA's near total deference to three state court orders. The first is the Georgia Supreme Court's decision in Hittson's direct appeal. *Hittson v. State*, 264 Ga. 682, 449 S.E.2d 586 (1994). That decision was partially overruled by *Nance v. State*, 272 Ga. 217, 526 S.E.2d 560 (2000). The second is the superior court order denying relief in Hittson's first state court habeas action. (Doc. 76-4). The third is the January 26, 2009, superior court order in Hittson's second state habeas action.<sup>3</sup> (Doc. 63-1).

Hittson contends that the second state habeas court's order is "not an adjudication worthy of the deference typically given to state court findings" because the court simply signed the proposed order submitted by the Respondent's counsel. (Doc. 82 at 19, 21, 22). He also alleges the presiding judge routinely adopts verbatim orders prepared by respondents in capital habeas corpus cases.<sup>4</sup> (Doc. 82 at 19-23). Hittson argues that

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<sup>3</sup> In both state habeas actions, the Georgia Supreme Court denied Hittson's applications for certificate of probable cause to appeal. (Doc. 76-9; Doc. 63-5).

<sup>4</sup> The specifics of this allegation are contained in Footnote 12 of Hittson's brief in support of his petition: "In addition to RX 68 (10-page Order of October 7, 2005, dismissing the petition, authored by Assistant Attorney General John Taylor) and RX 143 (52-page Order of January 30, 2009, denying petition, authored by Assistant Attorney General Sabrina Graham, with Ms. Graham's signature still appended to the final order), see *James Willie Brown v. Head*, 2002-V-868 (Superior Court of Butts County, Georgia) (final order denying relief of June 3, 2003, titled 'Respondent's Proposed Order Denying Relief' [sic], with the signatures of *both* Senior Assistant Attorney General Susan V. Boleyn *and* Judge Thomas Wilson on the final page, and with Ms. Boleyn's service of proposed order page still appended to the final court's order); *Jimmy Fletcher Meders v. Upton*, 2007-V-751 (Superior Court of Butts County, Georgia)(88-page final order denying relief of December 16, 2009, authored by Assistant Attorney General Sabrina Graham, with Ms. Graham's signature still appended to the final order); *Brandon Joseph Rhode*, 2010-V-1023 (Superior Court of Butts County, Georgia)(14-page final order denying relief of September 24, 2010, authored by Beth Burton). In response to the objections lodged by Mr. Rhode the previous day to the court's use of proposed orders, Ms. Burton included for Judge Wilson the following assurance on the face of the order: 'The Court gave serious consideration to all of the proposed findings of fact and conclusions of law submitted by the parties in their draft orders while at the same time independently researching cases for the most current statements of the precise state of the law on the numerous legal arguments raised. The Court declines to allow either party's proposed order to substitute for the Court's own research on the law and facts of the case and deliberation on the issues presented by the habeas petition. As such, the Court hereby finds as follows ... [text of order]. Prepared by: Beth A. Burton.'"

“[t]he judgment of such a court could not possibly qualify as an ‘adjudication’ [on the merits] to be deferred to by this Court for purposes of 2254(d).” (Doc. 82 at 20).

Hittson’s argument has some appeal. Given AEDPA’s broad deference to state court rulings, it seems particularly important that those rulings be the product of independent judicial review. Yet, for all but one of the key issues in Hittson’s petition for writ of habeas corpus, the only court of review, and the court to which this Court must give near total deference, adopted verbatim an order prepared by attorneys for the Respondent, which they submitted approximately thirteen months after the evidentiary hearing. This order, which still has attached to it the certificate of service affixed by the Respondent’s attorneys when they submitted the order, contains significant errors, some of which the Respondent admits.<sup>5</sup> Nevertheless, Hittson’s argument that the second state habeas court’s order in its entirety is not worthy of deference faces significant obstacles.

Although criticizing the practice, the United States Supreme Court has held that “even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous.” *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985) (citing *United States v. Marine Bancorporation*, 418 U.S. 602, 615 n.13 (1974); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964)). The Eleventh Circuit has “consistently upheld the use of such orders as long as they were adopted after adequate evidentiary proceedings and are fully supported by the evidence.” *Brownlee v. Haley*, 306 F.3d 1043, 1067 n.19 (11th Cir. 2002). In a fairly recent capital habeas corpus case, the petitioner also complained “that the state habeas court adopted verbatim the State’s proposed order.” *Rhode v. Hall*, 582 F.3d 1273, 1281 (11th Cir. 2009) (The state

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<sup>5</sup> This Court is not unmindful of the tremendous burdens placed on Georgia’s superior court judges and the relatively meager resources available to them. The Court notes, however, that the first state habeas court did not adopt proposed findings of facts and conclusions of law, but rather crafted its own order. The contrast between that order and the order drafted by the Respondent for the second state habeas court is stark.

habeas judge in *Rhode* was also the presiding judge in Hittson's second state habeas action.). The Eleventh Circuit concluded that "[d]espite the fact that the state habeas court adopted the State's facts verbatim, these findings of fact are still entitled to deference from this court unless Rhode can show the facts to be clearly erroneous." *Id.* at 1282.

Hittson relies on *Jefferson v. Upton*, 130 S. Ct. 2217 (2010), a pre-AEDPA case. There, the state habeas judge contacted the attorneys for the Respondent ex parte and requested that they "draft the opinion of the court." *Id.* at 2219. Jefferson's counsel knew nothing of this request, and he was never asked to draft a proposed order. The state habeas court then adopted verbatim the Respondent's proposed order even though it "recounted evidence from a nonexistent witness." *Id.* at 2222.

During his federal habeas proceedings, Jefferson argued that the district court should not have afforded any deference to the state court's opinion. The pre-AEDPA version of 28 U.S.C. § 2254(d) governed, and thus, if any of the eight enumerated exceptions contained in the prior law applied, the state court's factfinding was not entitled to a presumption of correctness. *Id.* at 2221. Addressing the ghost-written opinion, the Supreme Court stated:

Although we have stated that a court's "verbatim adoption of findings of fact prepared by prevailing parties" should be treated as findings of the court, we have also criticized that practice. And we have not considered the lawfulness of, nor the application of the habeas statute to, the use of such a practice where (1) a judge solicits the proposed findings *ex parte*, (2) does not provide the opposing party an opportunity to criticize the findings or to submit his own, or (3) adopts findings that contain internal evidence suggesting that the judge may not have read them.

*Id.* at 2223 (quoting *Anderson*, 470 U.S. at 572); Ga. Code of Judicial Conduct, Canon 3(A)(4) (1993). The Supreme Court concluded the Eleventh Circuit had erred by presuming the state court's factfinding to be correct without considering all eight statutory exceptions and remanded for a determination of whether the state court's factual findings warranted a presumption of correctness. *Id.*

Here, the second state habeas court did not act *ex parte*. Hittson also submitted a proposed order, which arguably was as one-sided as that submitted by the Respondent.<sup>6</sup> However, as the Respondent repeatedly notes, Hittson's lawyers refused to submit a post-hearing brief. (Doc. 62-15 to Doc. 62-23). Of course, if a court is simply going to sign off on one party's order or the other, the need for briefing is debatable. Still, the relevant point is that Hittson had an opportunity to criticize the Respondent's proposed order.

Hittson suggests though that the second state habeas court may have signed the Respondent's proposed order without reading it. It is hardly surprising that the Supreme Court in *Jefferson* acknowledged that a habeas court's adoption of "findings that contain internal evidence suggesting that the judge may not have read them" could be problematic. *Jefferson*, 130 S. Ct. at 2223. How could a state court order be an adjudication of a petitioner's claims if the judge never read the order? Put a slightly different way, when a party-drafted order is replete with misstatements of law and other mistakes, and a judge signs off on the order without even removing the lawyer's certificate of service, can a reviewing court have any confidence that the court read the order and that it is a product of independent judicial review?

As troubling as these issues are, Hittson cites no authority holding that a mistake-laden party-drafted order is not an adjudication contemplated by 28 U.S.C. § 2254.<sup>7</sup> Nor is there sufficient evidence here to establish that the second state habeas court did not read the order it signed. Accordingly, this Court rejects Hittson's argument that the second state habeas court order is not entitled to AEDPA deference.

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<sup>6</sup> This is not a criticism. Lawyers are advocates and lawyer-drafted orders can be expected to be skewed. So long as proposed orders serve as the starting point, rather than the ending point, of judicial analysis, they serve a proper function.

<sup>7</sup> See *Gill v. Mecusker*, 633 F.3d 1272, 1292 ("Nothing in the language of AEDPA required the district court to evaluate or rely upon the correctness [of] the state court's process of reasoning.").

### III. HITTSON'S CLAIMS<sup>8</sup>

#### A. The *Brady* Claims

This Court granted Hittson's motion to stay federal proceedings so he could return to state court to exhaust his *Brady* claims involving (1) a Navy psychiatric report diagnosing codefendant Edward Vollmer with antisocial personality disorder before Utterbeck's murder ("Vollmer's psychiatric report"); and (2) letters written by Vollmer after his arrest discussing the State's investigation ("Vollmer's post-arrest letters"). In his second state habeas petition, Hittson raised a third *Brady* claim – the State failed to disclose the names of, and information given by, three witnesses ("three witnesses *Brady* claim"). (Doc. 55-1 at 50-53).

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held "the suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to guilt or to punishment." *Id.* at 87. A *Brady* violation has three components: "[1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). The prejudice prong is satisfied if "there is a

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<sup>8</sup> Hittson initially submitted a brief consisting of 161 pages, and later filed a reply brief consisting of 33 pages. (Docs. 82, 84). He states that his briefs "focus on the primary claims before this Court" and that he "does not abandon any claims not ... addressed [in his briefs], but relies instead on factual and legal arguments contained in the petition itself, his subsequent Reply to Respondent's Answer-Response, and in briefing before the state courts ...." (Doc. 82 at 7-8). This Court addresses in detail only those claims which Hittson addresses in his two briefs. In the August 17, 2011, Scheduling Order, Hittson was instructed to "file a brief addressing all claims raised in his Amended Petition and all arguments relating to those claims." (Doc. 67). The Court specifically warned that "[a]ny issue or argument not raised shall be considered abandoned." (Doc. 67). "It did so because mere recitation in a petition, unaccompanied by argument, in effect forces a judge to research and thus develop supporting arguments—hence litigate—on a petitioner's behalf. Federal judges cannot litigate on behalf of the parties before them, and it is for this reason that any claims in [Hittson's] petition that were not argued in his brief are abandoned." *Blankenship v. Terry*, 2007 WL 4404972 at \*40 (S.D. Ga.), *aff'd* 542 F.3d 1253 (11th Cir. 2008) (citing *United States v. Burkhalter*, 966 F. Supp. 1223, 1225 n.4 (S. D. Ga. 1997); *GJR Investments, Inc. v. County of Escambia, Fla.*, 132 F.3d 1359, 1369 (11th Cir. 1999)).

reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *United States v. Bagley*, 473 U.S. 667, 682 (1985). The Court must “evaluate the tendency and force of the undisclosed evidence item by item; there is no other way.” *Kyles v. Whitley*, 514 U.S. 419, 436-37 n.10 (1995). Then, the Court must make a determination about the “cumulative effect.” *Id.*

There is a near complete overlap between cause and prejudice analysis and *Brady* analysis. A petitioner who establishes cause by demonstrating that the State’s suppression of the evidence prevented him from raising his *Brady* claim earlier will generally have also satisfied *Brady*’s second prong – suppression. *Strickler*, 527 U.S. at 281-82.<sup>9</sup> Similarly, the prejudice necessary to overcome procedural default mirrors *Brady*’s materiality requirement. *Id.* Thus, if the suppressed evidence is favorable to the petitioner, a petitioner who “succeeds in demonstrating ‘cause and prejudice,’ ... will at the same time succeed in establishing the elements of his ... *Brady* death penalty due process claim.” *Banks v. Dretke*, 540 U.S. 668, 691 (2004). Consequently, it is not unusual for courts to combine their procedural default and *Brady* analyses.

However, combining completely this Court’s review of Hittson’s *Brady* claims is not appropriate, primarily because the second state habeas court did not combine its procedural default and *Brady* analyses.<sup>10</sup> Accordingly, this Court will first address the issues of cause

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<sup>9</sup> As discussed below, and peculiar to the facts here, it is the overlap between cause and suppression that is not quite a complete overlap. Suppression in the literal sense, i.e., concealment, can be sufficient to establish cause. A petitioner cannot assert a *Brady* claim if he does not know the State concealed evidence. However, even if there has been literal suppression, a petitioner cannot satisfy *Brady*’s second prong if he could have gotten the concealed evidence from another source. *Maharaj v. Sec’y for the Dep’t of Corr.*, 432 F.3d 1292, 1315 (11th Cir. 2005).

<sup>10</sup> Normally, when a state court rules in the alternative, finding both a procedural default and addressing the merits of a claim, as the second state habeas court did with Hittson’s *Brady* claims, this Court should apply the procedural bar and decline to reach the merits of the claim. *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989); *Richardson v. Thigpen*, 883 F.2d 895, 898 (11th Cir. 1989). However, due to the overlap between cause and

and suppression with regard to Vollmer's psychiatric report. The Court will then discuss briefly the suppression of Vollmer's post-arrest letters. After which, the Court will address the issues of prejudice and materiality with regard to both Vollmer's psychiatric report and post-arrest letters. The three witnesses *Brady* claim requires little discussion, and is addressed last.

### **1. The Suppression of Vollmer's Psychiatric Report**

Long after Hittson's trial, his lawyers found Vollmer's psychiatric report in the State's files. Hittson claims this suppressed evidence was critical to his mitigation theory.

#### **a. Trial Counsel's Efforts to Obtain *Brady* Material**

On October 23, 1992, trial counsel filed their first *Brady* motion. (Doc. 70-1 at 53-60). The State first provided discovery on January 11, 1993, when it produced a copy of the indictment, a witness list, "scientific reports" relating to Utterbeck's autopsy, along with some of Utterbeck's medical records. (Doc. 70-1 at 72-110). At a January 13, 1993, status conference, the State announced that not all discovery had been produced but "at some point in time we're going to have to give the court and will give the court our file to look at, of course, we submit, there's nothing in there that's exculpatory in the least." (Doc. 72-4 at 30). At a January 20, 1993, status conference, the trial court announced that the State had delivered to the court the State's "original file pursuant to *Brady* along with a copy to be maintained and made part of the record." (Doc. 72-6 at 5). The trial judge informed trial counsel that he and his law clerk were reviewing the file. At an ex parte hearing with Hittson's lawyers immediately following that status conference, the court, responding to a

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prejudice and the underlying *Brady* claims as well as the manner in which the second state habeas court handled the claims, this Court discusses both.

question from trial counsel, said the State had not produced Vollmer's file. (Doc. 72-7 at 28-29). Trial counsel informed the Court they would be requesting an in-camera inspection of the State's file on Vollmer as well. (Doc. 72-7 at 29).

On January 25, 1993, the State produced a supplemental witness list, Hittson's in custody statements, and two pages of medical records revealing Utterbeck's and Vollmer's blood types. (Doc. 70-2 at 41-75).

On January 26, 1993, trial counsel filed a supplemental motion requesting disclosure of any "report ... which yields any information pertaining to the mental, emotional, or psychological (sic) state or competency of co-indictee, Edward Paul Vollmer." (Doc. 70-2 at 85). Counsel also sought Vollmer's Naval Service Record, including "the results of each and every psychological test or evaluation ... tending to show his propensity for aberrant conduct or behavior." (Doc. 70-2 at 86).

At a status conference that same day, the District Attorney acknowledged this supplemental motion and said he had already complied with that *Brady* request because he had submitted his "file" to the court. (Doc. 72-9 at 11). With regard to evidence of mitigation, the District Attorney said he knew of none. (Doc. 72-9 at 14-15). At an *ex parte* conference following that hearing, trial counsel expressed concern that the State was not discharging its *Brady* obligations. They informed the trial court that two lawyers representing a potential witness had told trial counsel they had given the State two letters written by Vollmer before Utterbeck's murder, the contents of which would support their mitigation theory.<sup>11</sup> Defense counsel made clear what their theory was:

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<sup>11</sup> These are not the letters Vollmer wrote after Utterbeck's murder and which are the subject of Hittson's second *Brady* claim.

[O]ur theory will be you've got one person ... who's evil and one person who has a low intelligence and is mentally ill; who is the more culpable person? And so those letters ... would be enormously exculpatory with regard to mitigation and should be discoverable under *Brady*. But I believe that ... in the file that [the District Attorney] turned over to the Court that those letters aren't there.

(Doc. 72-11 at 9). The court told trial counsel to subpoena the two lawyers, which they promptly did. (Doc. 72-11 at 14).

The next day the State moved to quash the subpoenas, contending that “none of the requested material is exculpatory of or mitigating toward the defendant...” (Doc. 70-2 at 90). The hearing on that motion was held January 29, 1993. (Doc. 72-13). The State argued the letters were not “relevant” because they didn’t involve Utterbeck and “basically what it is is an attempt by the defense to say, well, the co-defendant’s a bad guy so therefore, you know - there’s absolutely no relevance.” (Doc. 72-13 at 5). This prompted the trial court to ask “if they could show that he is a bad guy as opposed to their guy being a good guy that wouldn’t go towards mitigation? Is that your position?” (Doc. 72-13 at 5). The State maintained its position that the letters were relevant neither to the guilt phase nor the sentencing phase. (Doc. 72-13 at 5). However, the State agreed to produce the letters to the trial court, and the court quashed the subpoenas. (Doc. 72-13 at 9-12, 22).

Also, at the January 29 hearing, it became apparent that the State had not yet produced Vollmer’s file. Consequently, the trial court orally ordered the in-camera production of all materials, including prosecutorial and investigative files relating to Vollmer, and a written order to that effect was entered February 4, 1993.<sup>12</sup> (Doc. 72-13 at 17; Doc. 70-2 at 104-05).

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<sup>12</sup> While it is clear the parties relied on the trial court to extract *Brady* material from the State’s files, the Respondent properly has never contended that the State discharged its *Brady* obligations by producing its files

At the February 4 arraignment, the District Attorney announced he had produced his files to the trial court, including everything received from the Naval Investigative Service (“NIS”).<sup>13</sup> (Doc. 72-15 at 14-15). At some point the trial court sealed the files (the “Sealed File”), which consisted of approximately 850 pages. (Doc. 56-11 at 145-46, Doc. 75-19 at 55-56).

At the February 4 arraignment, the State also announced a modification of its position regarding Hittson’s efforts to get the letters Vollmer wrote before Utterbeck’s murder. The District Attorney said that he now agreed that a statement of a codefendant could be admissible at the sentencing phase. (Doc. 72-15 at 29-30). Nevertheless, he maintained that Vollmer’s letters were still not “relevant” because they did not “apply to Mr. Vollmer’s activities or behavior in this case.” (Doc. 72-15 at 31). In other words, under [*Green v. Georgia*, 442 U.S. 95 (1979)], they are not highly relevant to a critical issue in this case.” (Doc. 72-15 at 31).

On February 9, 1993, trial counsel moved for the imposition of sanctions, including dismissal, because of the State’s alleged failure to discharge its *Brady* obligations. (Doc. 70-3 at 26-31). They contended the State, notwithstanding the trial court’s order for the production of prosecution files for in-camera inspection, had still not produced Vollmer’s letters. They attached affidavits from the potential witness’ attorneys in which the attorneys stated they gave the letters to the Sheriff and the District Attorney in June 1992. (Doc. 70-3

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to the Court for in-camera inspection. The prosecutor’s good faith, or his good faith reliance on the trial court, does not negate *Brady* error.

<sup>13</sup> Much of the State’s case was actually developed by the Navy, which perhaps explains the State’s eagerness for trial. Hittson does not argue that the Navy was effectively an investigative arm of the State and thus, also subject to *Brady*. See *Kyles*, 514 U.S. at 438. However, it is clear that the Navy worked closely with the State in its investigation of Hittson, Vollmer and Utterbeck’s death. In fact, the NIS may have been the primary investigating agency. As trial counsel put it, the Navy gave the case to the State on a “silver platter.” (Doc. 72-7 at 25).

at 32-33). The motion was addressed at a February 11 hearing, the last hearing before the start of trial. The District Attorney argued that the court originally ordered him to produce only Hittson's file and the letters were not in that file. (Doc. 72-18 at 61). Rather, the letters were in the Sheriff's file. (Doc. 72-19 at 1). The District Attorney also again argued the letters were not relevant and that trial counsel was "trying to bring before the jury unrelated bad acts of a co-defendant so that they can get the jury to free this defendant, or at the sentencing phase to go easier on him." (Doc. 72-19 at 3). Still, the District Attorney acknowledged that such evidence could be admissible in mitigation if "highly relevant to a critical issue in the case." (Doc. 72-19 at 3) The trial court denied the motion, and trial began February 16, 1993.<sup>14</sup> (Doc. 72-19 at 7).

**b. First State Habeas Counsel's Efforts to Develop *Brady* Claims**

First state habeas counsel raised a general, protective *Brady* claim in their petition. (Doc. 75-13 at 16). As a part of their efforts to develop that claim, they had filed a Freedom of Information Act ("FOIA") request with the Navy. (Doc. 75-19 at 47-48). In response, they received some documents and a log of withheld documents. (Doc. 75-19). The log listed Vollmer's psychiatric report, which the Navy withheld "based on FOIA exemptions." (Doc. 75-19 at 52). The Navy informed Hittson's habeas counsel that Vollmer's psychiatric report was two pages, but would not reveal who performed the evaluation or who prepared the report. (Doc. 75-19 at 58). First state habeas counsel also filed a Georgia Open Records Act request to gain access to the Houston County District Attorney's file. (Doc.

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<sup>14</sup> It is not clear whether the State or the trial court ever produced to trial counsel the letters written by Vollmer before Utterbeck's murder or whether trial counsel got the two letters from the two lawyers who claim they gave them to the District Attorney. In any event, by the time the sentencing phase of trial began, the State acknowledged the letters were admissible: "I guess to the extent that they're offered to show some different degree of culpability, which I'm assuming is the reason the defense is offering them, I believe the case law is clear they would come in. And the State has no objection." (Doc. 74-10 at 7).

75-19 at 52, 57). Habeas counsel reported they were allowed to review the District Attorney's file (not the Sealed File which would not be opened until this Court allowed discovery), and Vollmer's psychiatric report was not in the file. (Doc. 75-19 at 52-53).

At the evidentiary hearing, counsel asked the court to continue the case or keep the record open because Vollmer's psychiatric report was "the subject of an ongoing FOIA action in the United States District Court, the District of Columbia."<sup>15</sup> (Doc. 75-19 at 48). In the alternative, counsel requested that "if the State is in possession of ... the psychiatric on Mr. Vollmer, if they would turn [it] over to you, and you can do an in camera review to see if there is any *Brady* material in there." (Doc. 75-19 at 49). Counsel explained, "It is just very difficult for me right now to say that we don't have a *Brady* claim, or we do have a *Brady* claim, when I haven't seen what those documents are." (Doc. 75-19 at 49). Counsel acknowledged that the *Brady* claim was speculative at that point:

Well, first of all, I can only assume that they<sup>16</sup> are *Brady* material. I haven't seen them, so there is really no way for me to know. Maybe they are not exculpatory at all, but I just don't know what they are....

I think that they may provide, you know, evidence that is relevant to mitigation in Mr. Hittson's case.

(Doc. 75-19 at 60).

The Respondent did not then, and does not now, dispute that Vollmer's psychiatric report was not in the State's file produced to first state habeas counsel. Rather, he contended the State never had the report and thus, the report was not *Brady* material. (Doc. 75-19 at 50). The Respondent suggested that counsel's "basis for having a belief

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<sup>15</sup> *Hittson v. Dep't of Navy*, 1:97-CV-1513-RMU (D.D.C., July 2, 1997).

<sup>16</sup> Counsel is referring to both Vollmer's psychiatric report and Vollmer's post-arrest letters, which the Navy was also withholding.

that the District Attorney's office was in possession of these things may be faulty...." (Doc. 75-19 at 62).

The first state habeas court denied Hittson's request to keep the record open:

To establish the *Brady* violation, it would be your burden to come forward at the evidentiary hearing with evidence that there was materially exculpatory information in the possession of the State that was not turned over, and you haven't met that burden.

I don't care to delay the proceedings any further, so I'm just going to deny your *Brady* violation because I don't think you've established it.

(Doc. 75-19 at 67). Thus, the first state habeas court denied Hittson's general, protective *Brady* claim because there was no evidence, at that point, the State had concealed anything from Hittson.

Following denial of his first state habeas petition, Hittson filed this action and requested discovery. This Court ordered that the Houston County District Attorney's entire file be produced for Hittson to review. (Doc. 22 at 12). The Sealed File was opened pursuant to this order. (Doc. 59-13).<sup>17</sup> After inspection of the Sealed File, Hittson informed this Court that a copy of Vollmer's psychiatric report was in the file.<sup>18</sup> (Doc. 27 at 2). This action was stayed, and Hittson returned to state court.

### **c. The Second State Habeas Action: Analysis**

The second state habeas court found that Hittson's *Brady* claim for the suppression of Vollmer's psychiatric report was procedurally defaulted and Hittson had not established

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<sup>17</sup> It is not clear to this Court why the Sealed File was not available to the parties before this Court allowed discovery. However, the Respondent does not contend that Hittson could have gained access to the Sealed File any earlier than he did.

<sup>18</sup> This is one mystery in a case of many mysteries. No one has explained why Vollmer's psychiatric report was not in the State's file during the first state habeas action, but yet the report was in the Sealed File.

cause and prejudice to overcome the default. In the alternative, the court found this *Brady* claim failed on its merits. (Doc. 63-1 at 25).

The second state habeas court's order succinctly stated its finding that Hittson had failed to establish cause:

It is clear from the record before this Court that with "reasonable diligence" trial counsel or his original state habeas counsel could have obtained Vollmer's psychiatric report from a source other than the District Attorney's Office. Petitioner's current counsel obtained Vollmer's report first from a source other than the District Attorney's file.... Therefore, Petitioner has failed to prove cause to overcome the procedural default of his claim.

(Doc. 63-1 at 23).

Thus, the second state habeas court found that Hittson failed to prove cause because his trial counsel and first state habeas counsel, with reasonable diligence, could have obtained the report from another source. Putting aside for a moment the factual accuracy of this finding, there is a subtle but fundamental flaw in the court's analysis. The question in cause analysis in the context of a *Brady* claim is whether the prosecutor's concealment of evidence prevented a petitioner from asserting his *Brady* claim earlier. *Banks*, 540 U.S. at 691. Here, the answer to that question is undisputed. The State failed to produce Vollmer's psychiatric report.<sup>19</sup> Indeed, even the Respondent represented during the first state habeas proceeding that the State never had the report.<sup>20</sup> (Doc. 75-19 at 55, 61-62). That trial counsel or first state habeas counsel may have been able to get the report from another source does not change the fact that the State literally suppressed the report. First state habeas counsel could not have asserted a *Brady* claim for the suppression of the

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<sup>19</sup> It is, of course, more accurate to say that the trial court failed to produce the report. Again, however, that does not absolve the State of its obligation to produce *Brady* material.

<sup>20</sup> This Court does not doubt that this misrepresentation was made in good faith. There is no evidence that the Respondent knew that Vollmer's psychiatric report was in the Sealed File.

report when they never knew it had been suppressed. Clearly, the State's suppression of Vollmer's psychiatric report impeded trial, appellate, and first state habeas counsel's "access to the factual basis for making a *Brady* claim." *Strickler*, 527 U.S. at 283.

In this Court, the Respondent cites cases which he claims hold that the ability of defense counsel to get suppressed evidence from another source precludes a finding of cause.<sup>21</sup> The Respondent is incorrect. Each case he cites holds that if defense counsel could have with reasonable diligence discovered facts that would have alerted them to the existence of a claim and yet they failed to assert that claim, then they cannot demonstrate cause to excuse procedural default. To apply those cases here, this question would have to be asked: Whether Hittson's lawyers knew or should have known that the State had suppressed Vollmer's psychiatric report. If so, then Hittson could not prove cause to overcome procedural default because if he knew the State had suppressed the report, he was obligated to raise that claim.

In short, the Respondent's cause argument confuses knowledge of the information suppressed with knowledge that the information was suppressed. Of course, knowledge of the information suppressed and the ability to get that information from another source are highly relevant to substantive *Brady* analysis and for that reason it is unnecessary to dwell

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<sup>21</sup> *Strickler*, 527 U.S. at 283-90 (Prosecutor's suppression of documents favorable to defense "impeded trial counsel's access to the factual basis for making a *Brady* claim" and hindered state habeas counsel from raising the claim. "[I]t is just such [a] factor[] that ordinarily establish[es] the existence of cause for a procedural default."); *Banks*, 540 U.S. at 691-98 (same); *McCleskey v. Zant*, 499 U.S. 467, 497-500 (1991) (In the context of abuse of the writ and addressing a claim brought, not under *Brady*, but under *Massiah v. United States*, 377 U.S. 201 (1964), the Court explained that the unavailability or suppression of a document during petitioner's first habeas proceeding did not establish cause for failure to raise the *Massiah* claim because petitioner, even without the document, was fully aware of the factual basis for his claim.); *Williams v. Taylor*, 529 U.S. 420, 438-40 (2000) (Addressing diligence in relation to a federal habeas petitioner's request for an evidentiary hearing, the Court faulted Williams, not for failing to obtain an undisclosed report from another source, but for making only a "cursory" effort to "develop the factual basis of [his] *Brady* claim in state court." After being put on notice of the "report's existence and possible materiality," Williams failed to diligently investigate whether the State suppressed the report.).

long on the second state habeas court's cause analysis. If trial counsel, with the information they had, could have gotten Vollmer's psychiatric report from another source, then there was no *Brady* violation and any discussion of cause is rendered moot. With that, the Court turns to the second state habeas court's substantive *Brady* suppression analysis.

The second state habeas court denied Hittson's *Brady* claim on its merits for essentially the same reasons:<sup>22</sup>

This Court finds Petitioner has failed to meet the requirements of the second prong of *Brady*. As discussed above, **trial counsel** was aware of Vollmer's Navy psychiatric report and diagnosis of anti-social personality disorder. Further, Petitioner has failed to prove that his **original state habeas counsel** could not have discovered this report from a source other than the State with reasonable diligence as Petitioner's current counsel obtained this report by means other than the District Attorney's file. Therefore, this Court finds Petitioner has failed to prove that he could not have obtained this report through reasonable diligence from a source other than the District Attorney's office during trial, direct appeal or during his original state habeas proceeding.

(Doc. 63-1 at 27-28) (emphasis added).

The finding that Hittson's *Brady* claim fails because **first state habeas counsel** could have obtained Vollmer's psychiatric report from another source reveals another mistake in the order drafted by the Respondent's counsel. Whether appellate or state habeas counsel might have been able to get the report has no relevance to *Brady*, and the conclusion that Hittson's *Brady* claim fails on the merits because his appellate or habeas counsel could have gotten Vollmer's psychiatric report is an obvious unreasonable application of clearly established federal law. The Respondent acknowledges this error.<sup>23</sup>

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<sup>22</sup> The Respondent does not dispute that Vollmer's psychiatric report is evidence favorable to Hittson. Therefore, Hittson has established the first element of this *Brady* claim. *Banks*, 540 U.S. at 691.

<sup>23</sup> The Court: So with regard to substantive *Brady* analysis what difference does it make whether or not habeas counsel could have gotten it?

Counsel: I don't think it does, Your Honor.

This leaves only the finding that trial counsel's knowledge of Vollmer's psychiatric report or its contents prevents Hittson from proving a *Brady* violation. On this point, the second state habeas court's order is on firm legal footing. If Hittson's trial counsel could have with reasonable diligence gotten the report or the information contained in the report, then he cannot establish *Brady*'s second prong.

The second state habeas court based its finding that trial counsel should have been able to get Vollmer's psychiatric report on the fact that Hittson's second state habeas counsel were able to get the report. (Doc. 63-1 at 23). However, the order does not explain how the mere fact that habeas counsel were eventually (almost ten years later) able to get the report established that the report could have been obtained by trial counsel. Indeed, the second state habeas court did not know how counsel were finally able to get the report. "This Court has reviewed the entire record and is unable to ascertain where Petitioner initially obtained this report." (Doc. 63-1 at 21). Actually, the record does answer this question.

Hittson's current counsel got Vollmer's psychiatric report because Vollmer, who pled guilty after Hittson's trial and is now unrepresented, signed an authorization allowing the Navy to release his psychiatric records to Hittson's lawyers.<sup>24</sup> (Doc. 59-1 at 3-4). It is

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The Court: Why is it in the order then?

Counsel: Just kind of trying to cover everything.

The Court: It covers everything, no doubt about that. ... I mean, what on earth difference does it make if habeas counsel could have gotten it. I mean, the *Brady* violation occurred, if it occurred, at trial and before trial started actually. ... [W]hat possible answer is it that habeas counsel could have gotten it five or six years after trial? On a cause analysis maybe, but on a substantive *Brady* analysis I hear you're saying it doesn't make any difference.

Counsel: I agree, Your Honor. I mean, again, poorly written, sorry, it doesn't matter.

(Doc. 99 at 20-21).

<sup>24</sup> The Respondent blames Hittson for this mistake in the order drafted by his lawyers. He argues that if Hittson had filed a post-hearing brief pointing to Vollmer's authorization, the drafters of the order would not

undisputed Hittson's trial counsel did not have access to Vollmer, who was then awaiting trial. Specifically, Vollmer's counsel would not allow access to Vollmer for the purpose of obtaining "information about the psychological condition of ... Vollmer for use at" the sentencing phase of Hittson's trial. (Doc. 56-9 at 122; Doc. 56-10 at 67).

Thus, the second state habeas court based its finding that trial counsel reasonably could have obtained Vollmer's psychiatric report on the fact that second state habeas counsel were able to get the report years later. Yet, for whatever reason, the second state habeas court was unaware the record revealed that habeas counsel were able to get the report only after Vollmer signed an authorization. The conclusion that trial counsel, operating under extreme time pressure, not knowing the author of the report, and lacking Vollmer's authorization could have in some unspecified way gained access to the report before or during trial is an unreasonable finding in no way supported by this record.

This, however, does not end the inquiry. The second state habeas court's finding that there was no *Brady* suppression of Vollmer's psychiatric report because trial counsel could have gotten the report themselves is still entitled to full AEDPA deference. Thus, although it was unreasonable for the second state habeas court to conclude that trial counsel could have gotten the report simply because second state habeas counsel got it, there remains the question of whether there is other evidence that trial counsel, with reasonable diligence, could have gotten the report.

To answer this question, it is necessary to determine what trial counsel knew and when they knew it. Shortly before the start of trial, the trial court, after its in-camera inspection of the State's files, provided trial counsel with a NIS document summarizing the

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have made this mistake. (Doc. 83 at 21).

Navy's investigation of Utterbeck's death, including a summary of Hittson's confession to NIS investigators ("NIS document"). One sentence of the NIS document stated that Vollmer "had been seen by CDR K. Bohnker, MC, USN, Medical Department, USS Forrestal, on 08Feb91 and was diagnosed as having an antisocial personality disorder. Exhibit (4) pertains."<sup>25</sup> (Doc. 70-6 at 46).<sup>26</sup> The exact date trial counsel received the NIS document from the trial court is not clear, but there is no indication they got it before the February 4, 1993 hearing, when the District Attorney informed the trial court that he had then produced all his files. Nor is it clear why the trial court produced the NIS document but did not produce Vollmer's psychiatric report, which was attached as Exhibit 4 in the Sealed File. Most likely the trial court, or the court's law clerk,<sup>27</sup> produced the NIS document because it generally summarized the Navy's investigation, including Hittson's confession. (Doc. 70-6 at 47). Certainly, the NIS document should have been produced for reasons apart from its brief reference to Vollmer's psychiatric disorder, but it is difficult to understand why the trial court did not produce Vollmer's psychiatric report given the detailed discussions with trial counsel about their mitigation strategy and its focus on Vollmer. (Doc. 71-12 at 4, 8; Doc. 71-15 at 7; Doc. 72-11 at 8-10, 13; Doc. 72-13 at 5).

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<sup>25</sup> The Respondent does not argue that the reference to Vollmer's antisocial personality disorder in the NIS report should have put trial counsel on notice that the State was suppressing Vollmer's psychiatric report, thus precluding a finding of cause. The State had produced all its files to the trial court, and trial counsel had no reason to think that the court had not produced to them all exculpatory material.

<sup>26</sup> This record cite is potentially confusing. When Hittson's lawyer examined one of Hittson's trial counsel at the second state habeas evidentiary hearing, he used as an exhibit the copy of the NIS document that was in the Sealed File. (Doc. 56-9 at 117). However, the transcript makes clear that a copy of the NIS document was in trial counsel's file and that trial counsel had received the NIS document from the trial court. (Doc. 56-9 at 117, 120). This Court has located a partial copy of the NIS document in trial counsel's files at pages 63-64 and 66-67 of Doc. 62-5. In addition to the NIS document, trial counsel apparently received copies of Naval interviews with several sailors and a copy of Hittson's waiver of rights and the results of his Naval interrogation. (Doc. 59-17 at 80-109, 138-40; Doc. 62-5 at 30-44, 70-72; Doc. 62-7 at 16-30, 9-11). However, it is undisputed that neither the State nor the trial court ever disclosed Vollmer's psychiatric report.

<sup>27</sup> It appears the law clerk conducted most if not all the review.

Had Vollmer's psychiatric report been produced, trial counsel would have learned that Dr. Donald Gibson, a forensic psychiatrist, actually made Vollmer's psychiatric diagnosis of antisocial personality disorder. At the second state habeas court evidentiary hearing, Dr. Gibson testified that Dr. Bohnker was a USS *Forrestal* flight surgeon, not a psychiatrist, who referred Vollmer to Dr. Gibson because of Bohnker's provisional diagnosis of "Personality Disorder, Antisocial." (Doc. 56-11 at 79-83; Doc. 56-15 at 4-5). Dr. Gibson testified at the evidentiary hearing in the second state habeas action that R. J. Dusan, a mental health social worker, interviewed Vollmer and then discussed the interview with Dr. Gibson. Dr. Gibson made the diagnosis of antisocial personality disorder, which he characterized in his report as a "severe personality disorder that will not improve with counseling ...." (Doc. 56-15 at 5). Dusan wrote the final report, and both signed the report. (Doc. 56-11 at 85-88). It is undisputed that trial counsel were not aware of either Dr. Gibson or Dusan.

Thus, to the extent the NIS document suggested Dr. Bohnker made Vollmer's psychiatric diagnosis, it was misleading – not intentionally so – but misleading nonetheless. Nevertheless, trial counsel acknowledged they were "aware of the existence of a possible report." (Doc. 56-9 at 120). Based upon the NIS document, trial counsel, with only days before the start of trial, attempted to locate Dr. Bohnker. Trial counsel's handwritten notes of a telephone conversation with Navy personnel state: "Sr. Med Off--Bruce Bonkers, M.D. currently attached to Comdr Naval Forces Atlantic--Norfolk, VA. Staff Med. Off. reviewed Vollmer and found him to have psych. prob serious enough to be discharged shortly before they killed Utterbeck--getting into trouble." (Doc. 59-13 at 37). Thus, they attempted to find the author of the possible report "so we could put a subpoena in their hands, or at least

discuss as much as possible the psychological or psychiatric condition of Mr. Vollmer.” (Doc. 56-9 at 120).

Under these circumstances, it is apparent that trial counsel “did not have equal access to [Vollmer’s psychiatric report] nor could [they] have obtained it through the exercise of due diligence.” *United States v. Severdija*, 790 F.2d 1556, 1559 (11th Cir. 1986). First, Vollmer’s psychiatric report was not a public record that was readily available to trial counsel. *Parker v. Allen*, 565 F.3d 1258, 1277 (11th Cir. 2009). Second, even if trial counsel had been able to locate Dr. Bohnker, who was neither the author of the report nor the doctor who made the diagnosis, there is nothing to support any conclusion that he would have talked to trial counsel or that he would or could have directed trial counsel to Dr. Gibson. Certainly, there is no reason to think that Dr. Bohnker, even if he had Vollmer’s psychiatric report, would have produced it to trial counsel. In short, based on the scant information given to trial counsel shortly before the start of trial, there is no reasonable basis to conclude that trial counsel, with reasonable diligence, could have obtained the report or located Dr. Gibson. The State, on the other hand, had full access to the Navy’s files. The District Attorney explained that he requested “anything that the Naval Intelligence Service ha[d] ... and of course, they gave it to [him].” (Doc. 72-15 at 14).

Thus, the limited information given to trial counsel shortly before the start of trial cannot support a finding of no suppression, and the second state habeas court’s decision to the contrary was based on an unreasonable determination of the facts and involved an unreasonable application of *Brady*.

This leaves only the issues of prejudice and materiality, which the Court discusses after reviewing the suppression of Vollmer’s post-arrest letters.

## **2. The Suppression of Vollmer's Post-Arrest Letters**

On January 12, 1993, and again on January 15, Vollmer wrote letters to Joleen Ward, a shipmate. (Doc. 56-15 at 6-17). The NIS somehow got the letters and forwarded them to the State during Hittson's trial. (Doc. 56-15 at 6). The State did not produce the letters to trial counsel. The discussion above regarding first state habeas counsel's efforts to get Vollmer's psychiatric report largely applies to their efforts to get Vollmer's post-arrest letters, although trial counsel had no hint the letters existed. There is some mystery surrounding Vollmer's post-arrest letters. There is also another significant error in the second state habeas court's analysis of Hittson's *Brady* claim arising from the alleged suppression of the post-arrest letters. Respondent admits and takes responsibility for this error.

The mystery is this: As discussed, there was considerable debate and controversy before Hittson's trial about the letters Vollmer wrote before Utterbeck's murder. Trial counsel eventually got these letters and used them in the sentencing phase, but trial counsel knew nothing about the post-arrest letters. By the time of the first state habeas evidentiary hearing, Hittson's lawyers still did not have Vollmer's post-arrest letters. (Doc. 75-19 at 48-52). They knew they existed because they were identified in the log of withheld documents produced by the Navy in its FOIA response. (Doc. 75-19 at 44-47, 52). First state habeas counsel claimed they had reviewed the State's file, produced in response to the Open Records Act request, and the post-arrest letters were not in the file. (Doc. 75-19 at 52-53). They suspected, however, that Navy investigators had sent the letters to the District Attorney. As they did with Vollmer's psychiatric report, first state habeas counsel asked the court for additional time to obtain the letters and requested the Respondent give the post-arrest letters to the court to conduct an in-camera review to determine if the letters were *Brady* material. (Doc. 75-19 at 49). The Respondent's position was that the State

never had possession of the letters, and therefore no *Brady* violation had occurred.<sup>28</sup> (Doc. 75-19 at 50-52, 55).

As it turned out, the post-arrest letters were not in the Sealed File, not because the State did not have them but rather because they were not sent to the State until after the State had produced its files for in-camera inspection. (Doc. 56-9 at 62; Doc. 99 at 34, 38). Apparently, and notwithstanding the trial court's order imposing a continuing obligation on the State to submit after-acquired evidence to the court, the letters were not submitted to the trial court. (Doc. 70-2 at 104-05).

By the second state habeas evidentiary hearing, the letters were in the District Attorney's file. No one can explain why the letters were not in the District Attorney's file at the time of the first state habeas evidentiary hearing, why the Respondent represented at the first state habeas evidentiary hearing that the State never had the letters, and how it is that the letters came to be in the State's files many years later. (Doc. 99 at 40-45, 48).

Fortunately, it is not necessary for this Court to answer these questions because the second state habeas court found that the State suppressed Vollmer's post-arrest letters, a finding that is supported by the record. (Doc. 63-1 at 29). However, this leads to the error in the second state habeas court's order.

The Respondent contended in the second state habeas action that the *Brady* claim for the suppression of the post-arrest letters, like the *Brady* claim for the suppression of Vollmer's psychiatric report, was procedurally defaulted. (Doc. 56-9 at 60-61; Doc. 99 at 40). Yet the second state habeas court's order, as drafted by the Respondent's counsel,

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<sup>28</sup> Just as this Court does not doubt that the Respondent's misrepresentation that the State did not have Vollmer's psychiatric report was made in good faith, this misrepresentation too was made in good faith.

concluded that the State had suppressed the letters and found that “this portion of Petitioner’s Brady claim is properly before this Court.” (Doc. 63-1 at 30). Given the finding of suppression, and hence cause, the court’s conclusion that Hittson’s *Brady* claim was properly before the court suggests that the court also found prejudice. Yet the court then proceeds to find, in its substantive *Brady* analysis, that the suppressed evidence was not material. (Doc. 63-1 at 33-34). Because procedural default prejudice analysis is the same as the *Brady* materiality analysis, it seems impossible that the court could find prejudice but not materiality. *Banks*, 540 U.S. at 691.

The reason for this mistake in the Order is not a mystery. As explained at oral argument in this Court, the Respondent’s counsel made a mistake when they drafted the order:

I don't think the order skips over the procedural default. I think he looks at cause to begin with and he says, well, they have been suppressed therefore I'm going to look at this claim and he skips over prejudice, which was incorrect. I mean, he should have done the prejudice -- essentially a prejudice analysis for [a] procedurally defaulted claim is the same as your materiality argument. I mean, the Eleventh Circuit has lots of case law saying those are the same analysis.

So he could have done that analysis under the prejudice which that’s how it should have been written, it just was not. I apologize.

(Doc. 99 at 44-45). At another point, counsel for the Respondent explained that because of “some rather inaccurate writing there, it’s clearly not found to be procedurally defaulted.... But it should have been a cause and prejudice analysis. It should have been procedurally defaulted.” (Doc. 99 at 40).

Thus, this Court finds itself in this position. The *Brady* claim for the suppression of Vollmer’s post-arrest letters was procedurally defaulted and absent a showing of cause and prejudice, that claim should have been barred. Yet the second state habeas court’s order,

after finding cause, ruled that the claim was properly before the court and, therefore, not procedurally defaulted. The Respondent contends that this finding excusing procedural default was not based on a finding of prejudice but rather was based on poor drafting by his lawyers. Nevertheless, this finding leaves the Respondent only with the argument that the suppressed evidence was not material, *Brady's* third prong. Yet, the Respondent acknowledges that the materiality and prejudice analyses are identical. Therefore, if there had truly been a finding that the claim had not been procedurally defaulted, that finding would have necessarily meant that Hittson had proven the suppressed evidence was prejudicial. If so, he would also have established *Brady* materiality, and thus Hittson would have prevailed on this *Brady* claim.

Of course, the Respondent's counsel never intended to draft the second state habeas order to find in Hittson's favor on this claim, and thus the Court accepts the Respondent's explanation. As incongruous as it is, this means that there is no procedural default but the issue of *Brady* materiality remains.

**3. The Prejudicial Impact, Individual Materiality, and Cumulative Materiality of the Suppressed Evidence**

With regard to Vollmer's psychiatric report, the second state habeas court found that Hittson failed to prove prejudice to excuse procedural default and failed to prove *Brady* materiality. (Doc. 63-1 at 23-25, 28-29). The second state habeas court found that Vollmer's post-arrest letters had been suppressed but found that the letters were not material, and thus concluded Hittson had failed to prove a *Brady* violation. (Doc. 63-1 at 29-34). The second state habeas court then conducted a cumulative *Brady* materiality analysis of all allegedly suppressed evidence and found Hittson had failed to prove cumulative materiality. (Doc. 63-1 at 48-50).

Before examining the second state habeas court's prejudice and materiality rulings, it is appropriate to summarize Hittson's argument regarding the importance of the suppressed evidence to his mitigation theory. Hittson's lawyers sought to prove that Vollmer was a brilliant but evil manipulator who could easily control someone as dim-witted as Hittson. To help make the point, Hittson cites the statement made by the District Attorney when he opposed parole for Vollmer.

Although he received the "lesser" sentence, it is evident from the information received in the investigation that Vollmer was the instigator in the murder, that he convinced Hittson to do it, that the manner of disposing of the body was Vollmer's idea, and that Vollmer is, in a word, EVIL!

(Doc. 56-13 at 114-15). Hittson argues that if his trial counsel had this "information received in the investigation," then they could have better shown that Vollmer was the "instigator," that he convinced Hittson to participate, that Vollmer was responsible for the dismemberment, and that he had an "evil" and "perverted mind." (Doc. 56-13 at 115). In short, defense counsel's mitigation theory was that Vollmer was a smart, manipulative, and controlling individual who had a strong, overwhelming influence over Hittson, who was submissive, passive, slow, and dependent.

Vollmer's psychiatric report supports this mitigation theme. Vollmer's intelligence was average or above and he "has no remorse for his actions as they affect others." (Doc. 56-15 at 4). The report includes a diagnosis of antisocial personality disorder and a recommendation that Vollmer be discharged from the Navy because he had "a severe personality disorder that will not improve with counseling and ... he will continue acting out." (Doc. 56-15 at 4-5).

Dr. Gibson testified at the evidentiary hearing convened by the second state habeas court. He explained why he classified Vollmer's antisocial personality disorder as severe:

But the severe is placed there so they'll understand that we're not just talking about somebody with average problems; we're talking about somebody who has severe problems. He has adaptability problems. He has interpersonal problems. He has problems with authority. He has problems doing what he's supposed to do. He's done illegal things, things for which if he had gotten caught doing them he would have been arrested. He violates the rights of everybody. And that's basically it, and that's why we say it that way, so people will know that we're not just kidding, this is something that's serious and needs to be taken care of right away.

(Doc. 56-11 at 109-110).

Hittson also submitted to the second state habeas court the affidavit of Dr. Jerry Lee Brittain, a neuropsychologist with considerable military medicine experience. (Doc. 56-16 at 40). Dr. Brittain reviewed Vollmer's psychiatric report and opined on the significance of Vollmer's diagnosis of antisocial personality disorder. Dr. Brittain noted that the report reveals that Vollmer scored in the 99th percentile on the Armed Forces Qualification Test, a score that he had only seen once before in his Navy career. (Doc. 56-16 at 47). Hittson, on the other hand, scored in the 48th percentile. Vollmer's "extremely high level of intelligence with an Antisocial Personality Disorder suggests a very manipulative, clever, sophisticated con artist – that is typically a person who often gets away with their infractions because they are smart enough to avoid getting caught, many times at the expense of a weaker codefendant." (Doc. 56-16 at 48). This, Dr. Brittain continued, "must be viewed in conjunction with the passive-dependency and the other psychological vulnerabilities, including lower intellect, exhibited by Mr. Hittson." (Doc. 56-16 at 48).

Vollmer's post-arrest letters fit neatly with Vollmer's psychiatric report and Dr. Gibson's and Dr. Brittain's testimony. Although, as the second state habeas court found, much in these letters is cumulative of the letters Vollmer wrote before Utterbeck's murder,

which the jury had, two portions of the post-arrest letters speak directly to the prosecution for Utterbeck's murder:

It's not like I'm going to be stuck in here forever. Sure, I may do two or three more years at the most, but I wouldn't be surprised if I'm cut loose after the trial in August. These fuckers haven't got a clue or a brain in their heads, and they'll be lucky if they keep their jobs after the public finds out how bad they've bungled the investigation and how far out of bounds they've stepped. When this case goes to trial, it'll be a damn three ring circus. They're in my hometown, for [C]hrist sakes, with my hand picked judge and my hand picked jury. Everyone who's lived here since '73 are my character witnesses, and there isn't a man or woman who doesn't know me, at least in passing. I used to think I didn't have a chance, because of the dirty, underhanded way the investigation was going, but now I know who doesn't have a chance.

(Doc. 56-15 at 8).

[S]it down and think long and hard about it. Why? These fuckers couldn't come up with a better motive than "drugs" or "cult religion"? They're the fuckin Keystone Cops. I could sit on the shitter reading the paper and come up with more and better motives ....

There are a lot of questions left unanswered, and I'm the only key to the mystery. They can assume and guess, but only two people actually know what happened and I've never talked to any cops or made a confession, so it looks like the whole world's gonna have to wait till August to hear me speak, and only if I feel like it.

(Doc. 56-15 at 17).

The second state habeas court found that Hittson failed to prove prejudice to excuse the procedural default of his *Brady* claim for the suppression of Vollmer's psychiatric report for two reasons.<sup>29</sup> First, the court found that Vollmer's psychiatric report was cumulative of the testimony of Hittson's lay witnesses who testified that Vollmer was an intelligent and violent manipulator while Hittson was a "kind of stupid" follower. (Doc. 63-1 at 23-24). The court rejected the notion that jurors would have given more weight to expert medical evidence than lay witness testimony because there was "no evidence that the jury

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<sup>29</sup> As it did in its cause and *Brady* suppression analysis, the second state habeas court's order discusses prejudice and *Brady* materiality separately and in part bases its conclusions on different findings.

discounted the testimony of the defense witnesses.” (Doc. 63-1 at 24). “Mere speculation on what weight the jury might have given to Vollmer’s psychiatric report does [not]<sup>30</sup> fulfill the prejudice prong of *Brady* (sic) ....”<sup>31</sup> (Doc. 63-1 at 24).

Second, the court rejected the argument that Vollmer’s psychiatric report would have been useful to Hittson’s mental health expert, Dr. Brittain, because Dr. Brittain testified in his affidavit that he would need to evaluate Vollmer to render his opinions, and Hittson failed to prove that Vollmer would have submitted to such an evaluation. (Doc. 63-1 at 25). Moreover, the court concluded, Hittson had failed to prove that trial counsel’s strategy regarding their mental health experts would have changed, because they did not testify they would have called their mental health experts if they had the report. (Doc. 63-1 at 25).

With regard to *Brady* materiality, the second state habeas court concluded that given the “enormous body of evidence against Hittson, there is simply no doubt that Petitioner is guilty of malice murder and that the inclusion of the co-defendant Vollmer’s psychiatric report would have had no effect on this verdict.” (Doc. 63-1 at 29). Further, as it did in its prejudice analysis, the court concluded that Vollmer’s psychiatric report was cumulative of the lay witness testimony about Vollmer and Hittson and the two letters written by Vollmer before Utterbeck’s murder. (Doc. 63-1 at 29). With regard to the materiality of Vollmer’s post-arrest letters, the second state habeas court tersely concluded Hittson had failed to prove the letters were material because they “were merely cumulative of other evidence and testimony offered at trial, and there was overwhelming evidence of Petitioner’s guilt.” (Doc. 63-1 at 34).

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<sup>30</sup> The “not” is missing. Clearly, however, the Respondent’s counsel intended the “not” to be there.

<sup>31</sup> The Respondent’s counsel meant to write “the prejudice prong of procedural default analysis” when they drafted the order.

In its cumulative *Brady* review, the second state habeas court evaluated not only Vollmer's psychiatric report and post-arrest letters, but other evidence that Hittson claimed had been suppressed. However, its cumulative review was consistent, in part, with its separate review of these two items.

Trial counsel presented the testimony of many witnesses who personally knew Vollmer and Petitioner, had interacted on a daily basis in closed quarters aboard a Navy ship, and testified about Vollmer's manipulative arrogant and evil personality and how Petitioner was taken in by Vollmer. This Court fails to see how further evidence in the form of a Navy psychiatric report ... that simply restate[s] this evidence and post-arrest letters written by Vollmer, that are entirely similar to the letters read at trial, would have created a reasonable probability of a different result.

(Doc. 63-1 at 48-49). Thus, in its cumulative review, the court found the suppressed evidence to be cumulative of the evidence Hittson offered at trial.

However, the court also noted Hittson's confession "to swinging the bat that assaulted the victim and to being the triggerman [and] ... to participating in the mutilation and burial of the body." (Doc. 63-1 at 49). Presumably, this is a reference to the overwhelming evidence of the horror of the murder. If so, then the court also found in its cumulative review that the evidence was so overwhelming that there is no reasonable probability that the timely production of Vollmer's psychiatric report and the post-arrest letters would have changed the outcome of the sentencing phase of the trial.

Although confusing in some respects, the second state habeas court identified and applied the correct legal standard in its prejudice and materiality analyses, including its cumulative analysis: Whether there was a reasonable probability that the outcome of the proceedings would have been different if the suppressed evidence had been disclosed. (Doc. 63-1 at 25, 49). The court ultimately determined that it would not have been. In reaching this decision, the second state habeas court made several findings of fact. This

Court must determine whether these factual findings were unreasonable in light of the evidence presented at the second state habeas evidentiary hearing. In making this determination, the Court presumes the second state habeas court's factual findings to be correct and recognizes that Hittson can rebut this presumption only by clear and convincing evidence.<sup>32</sup> The Court also must determine whether the second state habeas court unreasonably applied the materiality prong of *Brady* to these facts.

Some of the reasons given by the second state habeas court for its prejudice and materiality conclusions can be addressed fairly quickly. First, the finding that led the court, in its prejudice analysis, to dismiss Dr. Brittain's testimony is clear factual error. The court's order stated that "Petitioner's own expert Dr. Brittain stated in his affidavit that in order to properly evaluate the relationship between Petitioner and Vollmer, he would also have to evaluate Vollmer." (Doc. 63-1 at 25). The court found "Petitioner has failed to prove that Vollmer would have submitted to such an evaluation...." (Doc. 63-1 at 25). The problem with this is that Dr. Brittain's affidavit said no such thing; he never said or even suggested that he needed to evaluate Vollmer.<sup>33</sup> Thus, based on an erroneous factual finding, the second state habeas court did not consider a significant part of the evidence relied on by Hittson to prove prejudice to overcome procedural default.

Also in its prejudice analysis, the second state habeas court found that "trial counsel refused to testify that, in light of Vollmer's psychiatric report, they would have presented

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<sup>32</sup> Regardless of whether the second state habeas court's factual findings were made when determining prejudice to overcome procedural default or materiality to establish a *Brady* claim, its factual findings are presumed correct and Hittson has the burden of rebutting that presumption by clear and convincing evidence. See *Greene v. Upton*, 644 F.3d 1145, 1154 (11th Cir. 2011).

<sup>33</sup> The Court asked the Respondent to explain why his counsel put this finding in the order. Counsel responded that Dr. Brittain's statement that he needed to know Vollmer's mental health history meant that he would have to evaluate Vollmer. (Doc. 97). It is stretches like this that could undermine any confidence that the second state habeas court order is a product of independent judicial review.

Petitioner's mental health expert," referring, presumably, not to Dr. Brittan but rather to the experts retained by trial counsel, Dr. Michael J. Prewett, Dr. Norman Moore, and Ms. Mary Shults.<sup>34</sup> (Doc. 63-1 at 25). Thus, the court found Hittson failed to prove that trial counsel, armed with Vollmer's psychiatric report, would have "changed their trial strategy regarding presentation of [his] mental health experts." (Doc. 63-1 at 25). This finding has somewhat firmer footing. Trial counsel did not directly testify that they would have put Dr. Prewett or any other mental health expert on the stand if they had Vollmer's psychiatric report. (Doc. 56-9 at 184-85; Doc. 56-10 at 80).

However, the second state habeas court made no mention of what trial counsel said about the expert mental health testimony they could have presented if they had Vollmer's psychiatric report. Hollomon testified that they "could have put up the information, specifically the report about Mr. Vollmer, perhaps even using the individual that drafted it ... if we'd known about it." (Doc. 56-9 at 185; Doc. 56-10 at 80). If they had the report, he continued, they could have spoken with Dr. Gibson and "potentially brought this individual to court to ask him about this or ... more generically, utilized information to acquaint the jury with Mr. Vollmer's psychological condition" because "it would have buttressed the defense that we had initially pursued in a pretty significant manner." (Doc. 56-10 at 115-16). Trial counsel made clear that the importance of the report was not limited to whether their experts would have testified. As Walter Sammons put it, they:

would have ... gotten into Vollmer's mental health problems, without talking about [Hittson] .... I don't think that putting any evidence on Vollmer would have opened the door on Hittson, so ... if we had the report ... we'd have wanted to use it to strengthen or bolster our argument that ... Vollmer was a severe, had a severe antisocial personality disorder and was amoral about the

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<sup>34</sup> Although Mary Shults's name is spelled in various ways throughout the record, "Shults" is correct. (Doc. 75-20 at 4-11).

effect that things that he did had on other people and that it wasn't just lay witnesses saying that, it was a Navy psychiatrist or psychologist.

(Doc. 56-10 at 80).

Thus, to the extent that the second state habeas court's finding that Vollmer's psychiatric report would not have led trial counsel to change "their trial strategy regarding presentation of Petitioner's mental health expert" is a conclusion that trial counsel would not have called Dr. Prewett, Dr. Moore, or Ms. Shults, it is reasonable and is fairly supported by the record. If, however, that finding meant to suggest that trial counsel's strategy regarding mental health evidence would not have changed, it clearly is unreasonable and is not supported at all by the record.

Also, in its prejudice analysis, the second state habeas court rejected Hittson's arguments regarding the significance of expert testimony about Vollmer's severe personality disorder because "there is no evidence that the jury discounted the testimony of the defense witnesses." (Doc. 63-1 at 24). Thus, the court concluded, Hittson's "mere speculation on what weight the jury might have given to Vollmer's psychiatric report does [not] fulfill the prejudice prong of *Brady*."<sup>35</sup> (Doc. 63-1 at 24). While it is true that Hittson offered no evidence that jurors discounted lay testimony because it was not supported by expert testimony, it is just as true that it would not have been possible for Hittson to have adduced such evidence. For example, testimony by jurors offered to impeach their verdict is not admissible. O.C.G.A. § 17-9-41 (juror affidavits "may be taken to sustain but not impeach their verdict").

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<sup>35</sup> As noted (fn 30 *infra*), the Court assumes the Respondent's counsel meant the order to say that Hittson could not fulfill the prejudice prong of the procedural default analysis.

Moreover, the court's out-of-hand rejection of Hittson's contentions regarding Vollmer's psychiatric report and the labeling of expert testimony its disclosure may have prompted as "mere speculation" reflects a fundamental misunderstanding of prejudice analysis. Never has the Supreme Court required a petitioner seeking to prove prejudice to show that jurors at his trial did or did not do something during their deliberations. On the contrary, the Supreme Court has specifically recognized that determining prejudice "will necessarily require a court to 'speculate' as to the effect of the new evidence." *Sears v. Upton*, 130 S. Ct. 3259, 3266-67 (2010).<sup>36</sup>

The second state habeas court found in both its prejudice and materiality analyses that Vollmer's psychiatric report and post-arrest letters were cumulative of the lay witness testimony and the two letters Vollmer wrote before Utterbeck's murder. In a broad nonspecific sense this may be true. The lay witnesses testified that Vollmer was intelligent, violent, a leader who told Hittson what to do, "played with people's heads," and spoke of killing people and cutting up their bodies since he had been in high school. (Doc. 74-9 at 7, 9, 11, 21, 46, 55, 57; Doc. 74-10 at 28). In the two letters, Vollmer wrote about getting "that redheaded sack of shit and mak[ing] him suffer hardships and woe of biblical proportions. Then [he would] outright kill him" and "spit on his lifeless body."<sup>37</sup> (Doc. 74-15 at 14-15). He would kill anyone for \$500 and "[m]orals are for losers trying to justify their place in life." (Doc. 74-15 at 17).

In a more reasonable sense, however, the psychiatric evidence Hittson now has and Vollmer's writings about the prosecution's supposed bumbling and fumbling and his control over the entire process are not at all cumulative of the evidence the jury heard. Had Dr.

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<sup>36</sup> *Sears* involved prejudice in the *Strickland* context, but the relevant point is the same.

<sup>37</sup> In these letters, Vollmer was referring to the boyfriend of his former girlfriend. (Doc. 74-15 at 14-15).

Gibson testified during the sentencing phase of Hittson's trial, the jurors would have heard the former Navy chief of psychiatry, who was not an expert hired by one side or the other, testify that Vollmer suffered from a severe psychiatric disorder, so severe that the doctor went to some length to let the Navy know that something needed to be done about Vollmer right away. (Doc. 56-11 at 79, 92). The jury would have heard the testimony of a military neuropsychologist, albeit one retained by the defense, about the control Vollmer could have exercised over Hittson. (Doc. 56-16 at 40-49). The post-arrest letters would have painted a far starker, much more relevant picture of Vollmer than his abstract rants in letters he wrote before Utterbeck's death. They reveal that Vollmer, having now engaged in murder rather than just talking about it, still viewed himself as the puppet master. The prosecution was inept and unethical. He was on his home turf and had handpicked the judge and would handpick the jury. In any realistic, reasonable sense, this evidence was not cumulative of the evidence the jury heard during the sentencing phase of trial. However, if given appropriate AEDPA deference, whether the court's finding that the suppressed evidence was cumulative is a close call. Rather than making that call, the Court turns to the second state habeas court's remaining finding supporting its conclusion that the suppressed evidence would not have changed the outcome of Hittson's trial.

In its materiality analyses, including its cumulative *Brady* review, the second state habeas court cited the overwhelming evidence against Hittson, finding that "there is simply no doubt that [Hittson] is guilty of malice murder and that the inclusion of co-defendant Vollmer's psychiatric report would have had no effect on this verdict," and, with regard to Vollmer's post-arrest letters, "there was overwhelming evidence of Petitioner's guilt." (Doc. 63-1 at 29, 34, 49). Not surprisingly, Hittson argues that the second state habeas court considered the "overwhelming evidence" in the context of his guilt, which Hittson did not

contest, rather than in the context of punishment. (Doc. 84 at 12). The Respondent argues that “it is clear from the order that the state habeas court evaluated the materiality of the report with regard to both the guilt/innocence phase and the sentencing phase.” (Doc. 83 at 22). While the Court acknowledges the Respondent’s unique insight into the order drafted by his lawyers, this argument is not convincing. There was simply no reason for the second state habeas court to evaluate the materiality of Vollmer’s psychiatric report or his post-arrest letters with regard to the guilt/innocence phase of Hittson’s trial.

Nevertheless, reading the order as a whole and with appropriate AEDPA deference, the Court accepts that the second state habeas court viewed the “enormous body of evidence against Hittson” as it related to the sentence imposed. (Doc. 63-1 at 29). The evidence cited by the court, although introduced during the guilt/innocence phase, was used by the prosecution during the penalty phase. In his opening statement before the sentencing phase of Hittson’s trial, the prosecutor informed the jury that he did not expect to present additional evidence, but rather he would rely on “all evidence, all testimony, and all exhibits which have been given to you in the guilt-innocent part.” (Doc. 74-8 at 15). In his closing argument at the sentencing phase, the prosecutor, as did the second state habeas court, emphasized the manner in which Hittson bludgeoned Utterbeck as he slept, shot him in the head as he begged for his life, and “dismembered and bagged and strewed out” Utterbeck’s body over two states. (Doc. 74-10 at 94). While it would have been helpful if the second state habeas court’s order had been a little clearer, this Court is satisfied that the second state habeas court found that the evidence necessary for the jury to recommend the death penalty was overwhelming, so overwhelming that there is not a reasonable probability the suppressed evidence, viewed independently and cumulatively, would have changed the outcome at the sentencing phase of Hittson’s trial.

The second state habeas court's finding was reasonable; the evidence of the horror of Utterbeck's murder was overwhelming. But the suppressed evidence was far from insignificant. A court applying a de novo standard of review could conclude that Vollmer's psychiatric report and his post-arrest letters were material. Certainly a court conducting a de novo review could reasonably find, in a cumulative analysis, that had jurors heard the suppressed evidence, there is a reasonable probability that they would not have sentenced Hittson to die.

However, if anything is clear in AEDPA jurisprudence, it is that "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 130 S. Ct. 841, 849 (2010). As the Eleventh Circuit recently said, "[t]o be unreasonable, the error in the state court's finding must be so clear that there is no possibility for 'fairminded disagreement.'" *Holsey v. Warden, Georgia Diagnostic Prison*, 694 F.3d 1230, \_\_\_ (11th Cir. 2012) (quoting *Harrington*, 131 S. Ct. at 786-87). Similarly, the "state court's application of clearly established federal law ... is unreasonable only if no 'fairminded jurist' could agree with the state court's determination or conclusion." *Id.* at \*25 (quoting *Harrington*, 131 S. Ct. at 786). Bound by AEDPA deference, this Court cannot say that the second state habeas court's decision that, due to the overwhelming evidence of the brutality of Hittson's crime, there is no reasonable probability the suppressed evidence, considered individually or cumulatively, would have changed the outcome at the sentencing phase of Hittson's trial, is based on an unreasonable determination of the facts or involved an unreasonable application of *Brady*.

In sum, of the various reasons given by the second state habeas court, the Court concludes that its findings that the evidence heard by the jury was so overwhelming that the

outcome would not have been different had the jury had the benefit of the suppressed evidence was not an unreasonable conclusion.<sup>38</sup> Thus, the second state habeas court reasonably found that Hittson failed to establish a *Brady* claim for the suppression of Vollmer's psychiatric report because he had not shown the report to be material. Further, the second state habeas court did not unreasonably find that Hittson failed to establish the *Brady* materiality of Vollmer's post-arrest letters. Finally, the second state habeas court did not unreasonably find that Hittson failed to establish the cumulative materiality of the suppressed evidence.

#### **4. The Three Witnesses *Brady* Claim**

In his motion for leave to conduct discovery filed in this Court on October 15, 2002, Hittson argued that Connie Michelle Vollmer, Christopher Landin, and Diana McCarty all gave the State exculpatory information about Vollmer, which the State failed to disclose. (Doc. 15 at 26-27). To support this claim, Hittson relied on affidavits from each of these individuals, which his attorneys obtained in 2002. (Doc. 15 at 26-27). Hittson argued that additional evidence of this suppression might be in the Sealed File. (Doc. 15 at 26-27). Now that the Sealed File has been opened, Hittson does not allege that he made any discovery related to Connie Michelle Vollmer, Christopher Landin, or Diana McCarty.<sup>39</sup>

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<sup>38</sup> The Court understands that it has not ruled on the second state habeas court's conclusion that Hittson failed to prove prejudice to excuse procedural default of his *Brady* claim for Vollmer's psychiatric report. For some reason, the second state habeas court's prejudice analysis did not rely on the overwhelming evidence of the brutality of the crime. If it had, this Court would have affirmed for the same reason it was unable to disturb the court's materiality rulings based on this overwhelming evidence. Under AEDPA, this Court can rely on this overwhelming evidence to find no prejudice even though the state court did not. In any event, because of the complete overlap between the prejudice and materiality standards, this Court's ruling on *Brady* materiality, establishes that Hittson failed to prove cause to excuse procedural default.

<sup>39</sup> In addition to the affidavits, Hittson relies on three handwritten notes to support his argument that the State interviewed and obtained exculpatory information from these three witnesses. (Doc. 56-15 at 18-19; Doc. 59-13 at 93; Doc. 58-1 at 67-68; Doc. 99 at 51-52). Hittson does not maintain that he first discovered these notes after this Court ordered production of the District Attorney's file. Hittson's counsel stated that she did not know if "trial counsel ever saw any notes from the DA's file that had the names of any one of these witnesses written on them." (Doc. 99 at 53). She explained that Hittson's contention is not that these notes

After this Court granted a stay to allow Hittson to exhaust his *Brady* claims related to Vollmer's psychiatric report and post-arrest letters, Hittson returned to state court and raised, not only these two *Brady* claims, but several others, including his claim that the State withheld the names of, and exculpatory information provided by, Connie Michelle Vollmer, Christopher Landin, and Diana McCarty. (Doc. 44 at 50-53).

When Hittson returned to this Court, he did not include this *Brady* claim in his amended habeas corpus petition. (Doc. 45). However, he briefed this claim, and the Respondent addressed the claim in his brief. (Docs. 82-84). When the Court told Hittson's lawyers their petition did not include this claim, they made no effort to amend Hittson's petition. This alone is sufficient reason to deny this claim. Nevertheless, because this claim has been briefed, the Court will address the claim, albeit briefly.

As with the other *Brady* claims, the second state habeas court's reasoning in resolving this claim is a little difficult to follow, primarily because of the manner in which the court set forth its cause analysis. Of the findings upon which the second state habeas court relied to find a lack of cause, two are actually relevant to the substantive *Brady* analysis. For example, the court found, as it did with regard to Vollmer's psychiatric report, that trial counsel could have with reasonable diligence obtained the exculpatory information on their own, i.e., by interviewing the witnesses themselves. (Doc. 63-1 at 35, 37). This finding is

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were suppressed but "it was the information that the DA had that was not disclosed. And [she was] using the notes just to provide additional support for the affidavits of those witnesses." (Doc. 99 at 53). These notes are vague, at best, and contain no statements from these witnesses. The first note states: "Michelle Vollmer-knew of Rossi [and] Vollmer's relationship for a long time;" "Chris Landon Dianna (sic) McCarty 70 Pine Trace Loop Ocala, Fla. 34472 (904) 687-2865 Re: Vollmer—statement made-" (Doc. 56-15 at 18-19). The second states: "? interview Connie Vollmer? ("ex") Michelle ??." (Doc. 59-13 at 93). The second state habeas court found that these two notes came from the District Attorney's file (not the Sealed File) and that Hittson failed to show when he obtained the second note. (Doc. 63-1 at 36 n.5). The second state habeas court found that the third note, which states "Michelle Vollmer, 432 Westcliff Cir.," was located in the Sealed File. (Doc. 58-1 at 67-68; Doc. 63-1 at 36). The second state habeas court found that these notes do not prove the State ever interviewed these three witnesses. (Doc. 63-1 at 36). This is not an unreasonable finding of fact.

amply supported by the record but it is relevant, not to cause, but to the second prong in the *Brady* analysis.<sup>40</sup> The second state habeas court also found that Hittson failed to establish cause because the three witnesses were available to first state habeas counsel. (Doc. 63-1 at 35, 37). This finding is relevant to cause and is supported by the record.

In its cause analysis, the second state habeas court also found that Hittson “failed to prove that the State withheld any documentation regarding interviews” of the three witnesses. (Doc. 63-1 at 36). Although the second state habeas court referred only to “documentation,” it is clear in context that the court found Hittson failed to prove that the State withheld any information relating to the three witnesses, primarily because Hittson failed to prove that the State ever interviewed the witnesses in any meaningful sense. (Doc. 63-1 at 36). In short, the second state habeas court found that the State did not have exculpatory information to withhold.

The record clearly supports this finding. The District Attorney testified that he may have spoken to Vollmer’s ex-wife, Connie Michelle Vollmer, but he had no independent recollection of the conversation. (Doc. 56-11 at 152-54). Additionally, he had no recollection of speaking with either Landin or McCarty. (Doc. 56-11 at 154). The lead investigator, Jon Holland, testified that he had one telephone conversation with Connie Vollmer and she expressed fear of Vollmer and a concern for her safety and the safety of her child. (Doc. 56-11 at 39). Other than “just that brief conversation on the phone,” he could not “recall that much about Connie.” (Doc. 56-11 at 41). There is no evidence that Holland ever spoke with either Landin or McCarty. The second state habeas court found the testimony of the District Attorney and the lead investigator credible. Credibility

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<sup>40</sup> In its substantive *Brady* analysis, the second state habeas court also relied upon the fact that trial counsel could have, with reasonable diligence, obtained testimony from these three witnesses. This finding is supported by the record and provides an additional ground for denying this *Brady* claim.

determinations are presumed to be correct and Hittson has presented no clear and convincing evidence to rebut this presumption, especially in light of the meager evidence regarding these three people contained within the State's files. *Consalvo v. Sec'y for the Dep't of Corr.*, 664 F.3d 842, 845 (11th Cir. 2011).

Although the second state habeas court used this finding to support its conclusion that Hittson failed to prove cause, its true relevance is to the substantive *Brady* analysis. If the State never withheld exculpatory information regarding the other witnesses, Hittson has no *Brady* claim. Therefore, this Court, based on the finding that the State had no exculpatory evidence regarding these three witnesses, concludes that the second state habeas court properly denied this *Brady* claim on the merits. Because this Court finds that the second state habeas court reasonably found that Hittson failed to prove cause to excuse procedural default and failed to prove suppression, the second element of *Brady*, this Court will not address prejudice and materiality. *Ward*, 592 F.3d at 1157 (citing *McClesky*, 499 U.S. at 502 (explaining that "[i]t is well established that if the petitioner fails to show cause, we need not proceed to the issue of prejudice"); *Putman v. Turpin*, 53 F. Supp. 2d 1285, 1292 (M.D. Ga. 1999) (citing *United States v. Frady*, 456 U.S. 152 (1982) (explaining that "[a] petitioner must show both cause and prejudice to prevail; therefore a finding by the court that one prong has not been met alleviates the need to analyze the claim under the other prong").

### **B. The *Estelle* Claim**

After Hittson rested his case during the sentencing phase of his trial, the trial court allowed the State to call its psychiatrist in rebuttal even though Hittson had not put his mental health experts on the stand. The psychiatrist offered no opinion testimony, but rather testified about statements Hittson made during the psychiatrist's court-ordered evaluation of

Hittson. Hittson claims this violated the Fifth, Sixth, and Fourteenth Amendments.

To build a possible mental status defense, trial counsel retained psychologist Michael J. Prewett. (Doc. 62-2 at 89-97). Dr. Prewett then associated neuropsychiatrist Norman Moore. (Doc. 75-16 at 47). Trial counsel also retained a social worker, Mary Shults, to investigate Hittson's background. (Doc. 74-8 at 54-55).

On February 5, 1993, trial counsel filed a "Notice of Intent of Defense to Raise Issue of Insanity or Mental Incompetence." (Doc. 70-2 at 106). The State immediately responded with discovery seeking the names of Hittson's experts and their reports. The State also asked the court to order Hittson to "submit to examination and testing by its experts and by experts appointed by and for the Court." (Doc. 70-3 at 12-14).

The issue came to a head at a February 11, 1993, pretrial hearing. The State argued that unless Hittson submitted to an evaluation by its expert, he could not call his experts. (Doc. 72-18 at 30). The District Attorney acknowledged that lay witnesses could testify "as to sanity or competence ..., but no expert unless and until the State is afforded the same opportunity." (Doc. 72-18 at 30). The trial court ordered Hittson to submit to an evaluation by the court's expert, psychiatrist Paul Coplin, and the State's psychologist, Dr. Robert Storms. (Doc. 72-18 at 31). As discussed in more detail below, the trial court made clear that it was ordering Hittson to submit to the evaluations pursuant to *Estelle v. Smith*, 451 U.S. 454 (1981), and state cases applying *Estelle*.

Hittson's trial counsel questioned whether the State's expert could "get into issues concerning the facts of this case." (Doc. 72-18 at 36). The District Attorney responded that "inquiry into what went on that night" might be necessary, but "[i]t's a different matter, surely, if they come into court and say, well, members of the jury, let me tell you what he told me." (Doc. 72-18 at 38). The trial court assured trial counsel that the expert would have to

“lay a foundation” for questions about what happened the night of the murder because he is not serving as a “surrogate prosecutor or DA or sheriff’s deputy.” (Doc. 72-18 at 36).

Thus, the court continued, experts are “not out there to gather evidence against your client on a – factual evidence against your client.” (Doc. 72-18 at 40-41). The court ruled that if trial counsel became concerned, they could “call a halt to the proceeding,” but again cautioned that if they “start calling halts to the proceeding, you know, then you get close to that line of being not – of being uncooperative.” (Doc. 72-18 at 36-37).

Dr. Storms examined Hittson on February 13 and 14, 1993. Prior to defense counsel’s arrival the first day, Dr. Storms gave Hittson a form entitled “NOTICE OF RIGHTS AND RELEASE OF INFORMATION TO PATIENTS REFERRED FOR PRE-TRIAL EXAM OR AFTER A FINDING OF MENTAL INCOMPETENCY FOR TRIAL.” (Doc. 74-11 at 69; Doc. 74-8 at 51; Doc. 74-10 at 63-66). This document stated:

1. You have the right not to answer questions about your case or your mental condition.
2. Anything you say or do during your examination may be brought out in court, if the court so requires.
3. We will send to the court, your attorney, and the District Attorney a written report giving the staff’s opinion about your ability to stand trial and/or your mental condition at the time of the crime for which you are charged.
4. You have the right to telephone or write your lawyer, and to have your lawyer visit you if you are hospitalized.
5. If you are found guilty, information obtained from the exam may be used in deciding your sentence.
6. I understand that I can terminate this interview at anytime.

(Doc. 74-11 at 69). Hittson signed the form. (Doc. 74-11 at 69). At some point after defense counsel arrived, Dr. Storms asked Hittson what he thought of Utterbeck, and Hittson responded that Utterbeck was a “hillbilly” and an “asshole.” (Doc. 74-10 at 57).

On March 1, 1993, as the sentencing phase of the trial began, Hittson’s lawyers were in the throes of deciding whether to put their mental health experts on the stand. Although they had not seen the trial court’s and the State’s experts’ reports, they had reason to

believe their testimony would not be favorable. Also, of course, they knew that Hittson had told Dr. Storms that Utterbeck was a hillbilly and an asshole. Their decision was complicated by the fact that the defense psychiatrist, Dr. Moore, had reached conclusions not favorable to Hittson. Thus, they were concerned that if they called Dr. Prewett and Ms. Shults, it would not only open the door for the court's and the State's experts, but they may run the risk of allowing the State to adduce evidence of Dr. Moore's conclusions. (Doc. 75-16 at 100-01; Doc. 75-20 at 38-40).

After opening statements in the sentencing phase, trial counsel made a proffer of the testimony of Dr. Prewett and Ms. Shults. (Doc. 74-8 at 24-39, 54-70). Trial counsel then moved the court to allow Dr. Prewett to testify but to exclude the State's expert testimony. (Doc. 74-8 at 39-46, 71-75). The court refused: "[I]f we allow a psychologist or psychiatrist, either one, to testify, at the behest and request of the Defense, then the same is a waiver of the Fifth Amendment Right." (Doc. 74-8 at 50). The court's ruling included Ms. Shults; it "would allow [the State] to put a qualified expert, whether it be a psychologist or otherwise, to rebut the conclusions she was trying to infer." (Doc. 74-8 at 75).

Having lost that battle, trial counsel made sure that their lay witnesses would not open the door to testimony from the State's expert. Trial counsel requested a bench conference (not because the jury was present, but apparently because spectators were in the courtroom) and the following colloquy took place:

Mr. Sammons: I wanted to do this at the bench because I don't want to appear to be an idiot. If we put up lay witnesses to testify about his character, you won't let them put up Coplin or Storms?

The Court: Right.

Mr. Sammons: Okay.

(Doc. 74-8 at 77).

The trial court, relying on *Motes v. State*, 256 Ga. 831, 353 S.E.2d 348 (1987), summarized its rulings: “[I]f the Defense attempts to put up through an expert witness any evidence of Mr. Hittson’s mental state, then that’s going to open the door for the State to bring in their own expert witnesses as to the defendant’s mental state.” (Doc. 74-8 at 78-79). Trial counsel then offered their own summary: “[T]he bottom line is, if we put up expert psychological testimony, they can put up expert psychiatric testimony.” (Doc. 74-8 at 82). When the trial court confirmed this summary, trial counsel announced “we’ll just go with lay witnesses.” (Doc. 74-8 at 82).

One of these lay witnesses, Steven Nix, testified that approximately two months after the murder, Hittson told him that Utterbeck “was not ever coming back, that he was dead.” (Doc. 74-9 at 43). He said that Hittson was “kind-of sad, kind-of down, and kind-of depressed” when he relayed this information about Utterbeck. (Doc. 74-9 at 43). Trial counsel questioned:

Q. Well, Mr. Nix, when [Hittson] told you that Mr. Utterbeck would not be coming back, that he was dead, you said he seemed depressed. Did he also seem remorseful?

A. Maybe.

Q. Maybe?

A. Looking back now, maybe, he might have been.

Q. Okay.

A. I didn’t notice it at the time.

(Doc. 74-9 at 48).

Based on this testimony, the trial court allowed the State to call Dr. Storms, not to discuss findings, but to testify about Hittson’s comments regarding Utterbeck. (Doc. 74-10 at 48-57). Over defense objections, Dr. Storms testified that he was a “senior psychologist for the Forensic Services Division at Central State Hospital in Milledgeville,” and that “as a forensic psychologist” and “[u]pon Order of this Court,” he examined Hittson on February 13 and 14, 1993. (Doc. 74-10 at 55). During the course of that examination, he asked Hittson

his opinion of the victim, and Hittson responded that Utterbeck was a “hillbilly” and an “asshole.” (Doc. 74-10 at 57).

Although the State then rested, the trial court expressed concern that there had been no testimony that Hittson had been advised of his rights prior to the court-ordered examination by Dr. Storms. Accordingly, the trial court allowed the State to reopen its case, and Dr. Storms testified that he informed Hittson of his rights. (Doc. 74-10 at 76). He also testified, “Let me preface that the following statements, so that the jury understands that we are a neutral party that responds only to court orders, and our reports are primarily for a judge.” (Doc. 74-10 at 76).

Hittson claims that the admission of Dr. Storms’ testimony violated his Fifth and Sixth Amendment rights.<sup>41</sup> The Georgia Supreme Court resolved these claims adversely to Hittson, but that court’s ruling on Hittson’s Fifth Amendment claim was overruled in *Nance v. State*, 272 Ga. 217, 220-21 n.2, 526 S.E.2d 560, 565-66 n.2 (2000).<sup>42</sup>

Hittson claims that the Georgia Supreme Court’s adjudication of this claim involved an unreasonable application of *Estelle v. Smith*, 451 U.S. 454 (1981). In *Estelle*, a Texas state court ordered Smith to submit to a psychiatric examination by a doctor retained by the State. Smith had not placed in issue his mental health, and his attorneys may not have

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<sup>41</sup> Hittson also claims that Dr. Storms’ testimony violated his Fourteenth Amendment due process rights. The Georgia Supreme Court denied that claim as well, but a detailed discussion is unnecessary because Hittson has not pointed to any “clearly established Federal law” on the issue. 28 U.S.C. § 2254 (d)(1). The two cases he cites, *Raley v. Ohio*, 360 U.S. 423 (1959) and *Lankford v. Idaho*, 500 U.S. 110 (1991), are completely inapposite. In *Raley*, the Court held that a State may not entrap a citizen by convicting him “for exercising a privilege which the State had clearly told him was available to him.” *Raley*, 360 U.S. at 426. In *Lankford*, the Court held that a criminal defendant and his counsel must be given adequate notice that the judge is contemplating the imposition of the death penalty.” *Lankford*, 500 U.S. at 127. Neither holding is relevant here.

<sup>42</sup> Hittson does not argue AEDPA’s deference should not apply to the Georgia Supreme Court’s overruled ruling on his Fifth Amendment claim. This Court has found no authority addressing whether deference applies in such a situation. Therefore, this Court has afforded the Georgia Supreme Court’s decision on this issue deference even though it has been overruled.

been informed of the examination. *Estelle*, 451 U.S. at 471 n.15. In any event, Smith was not Mirandized. *Id.* at 467. The State's psychiatrist concluded that Smith was a severe sociopath and the trial court allowed the psychiatrist to testify about Smith's "future dangerousness" at the penalty phase of the trial.<sup>43</sup> *Id.* at 458-60. The Supreme Court held this testimony violated Smith's Fifth Amendment rights. Of relevance here, the Supreme Court noted the limited context of Smith's examination: "[The trial court] ordered a psychiatric evaluation of respondent for the limited, neutral purpose of determining his competency to stand trial, but the results of that inquiry were used by the State for a much broader objective that was plainly adverse to respondent." *Id.* at 465. Smith had not made his mental status an issue, yet the State nevertheless used the results of the mandated evaluation to meet its burden of proving future dangerousness. The Supreme Court's holding was clear: "A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." *Id.* at 468.

With regard to the Sixth Amendment, the Supreme Court in *Estelle* framed the issue this way: "[W]hether a defendant's Sixth Amendment right to the assistance of counsel is abridged when the defendant is not given prior opportunity to consult with counsel about his participation in the psychiatric examination." *Id.* at 470 n.14. The Supreme Court held that Smith's right to counsel had been violated because his attorneys had not been notified that the examination would address the issue of future dangerousness, and thus Smith "was denied the assistance of his attorneys in making the significant decision of whether to submit

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<sup>43</sup> In Texas, juries in capital cases must determine whether a "defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Estelle*, 451 U.S. at 458 (internal citations omitted). The State has to prove "future dangerousness" beyond a reasonable doubt. *Id.*

to the examination and to what end the psychiatrist's findings could be employed." *Id.* at 471.

The Supreme Court next addressed this issue in *Buchanan v. Kentucky*, 483 U.S. 402 (1987). The parties jointly requested that Buchanan undergo a psychiatric evaluation pursuant to a state law involving involuntary hospitalization for psychiatric treatment. Buchanan raised the defense of "extreme emotional disturbance," and at trial his sole witness, a social worker, "read to the jury from several reports and letters dealing with evaluations of [Buchanan's] mental condition." *Buchanan*, 483 U.S. at 408-09. On cross-examination, the State, over Buchanan's objection, asked the social worker to read from the jointly requested psychiatric evaluation. On appeal, Buchanan argued that his Sixth Amendment right to counsel had been violated because his lawyers could not have anticipated that the evaluation would be used to attack his extreme emotional disturbance defense.<sup>44</sup> The Supreme Court rejected this argument:

[Buchanan], however, misconceives the nature of the Sixth Amendment right at issue here by focusing on the use of Doctor Lange's report rather than on the proper concern of this Amendment, the consultation with counsel, which [Buchanan] undoubtedly had. Such consultation, to be effective, must be based on counsel's being informed about the scope and nature of the proceeding. There is no question that [Buchanan's] counsel had this information. To be sure, the effectiveness of the consultation also would depend on counsel's awareness of the possible uses to which [Buchanan's] statements in the proceeding could be put. Given our decision in [*Estelle*], however, counsel was certainly on notice that if, as appears to be the case, he intended to put on a "mental status" defense for petitioner, he would have to anticipate the use of psychological evidence by the prosecution in rebuttal. In these circumstances, then, there was no Sixth Amendment violation.

*Id.* at 424-25. Thus, the question is whether a defendant's lawyers are informed about the

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<sup>44</sup> Buchanan also argued that his Fifth Amendment rights had been violated. However, the social worker was not asked to read to the jury any statements made by Buchanan concerning his alleged crimes. Rather, she recounted only general observations about Buchanan's mental state, and the Court held that any introduction of these statements "for this limited rebuttal purpose does not constitute a Fifth Amendment violation." *Buchanan*, 483 U.S. at 424.

scope and nature of the evaluation. To provide effective counsel, a lawyer must know how her client's statements could be used. However, because *Estelle* made clear that the prosecution can use a defendant's psychological evaluation to rebut a mental status defense, Buchanan's lawyers had that notice.

*Estelle* Fifth Amendment and Sixth Amendment claims are intertwined and it is appropriate to discuss those claims together. The Georgia Supreme Court's relevant reasoning disposing of Hittson's Fifth Amendment claim is found in two sentences: "The record supports the trial court's finding that *Miranda* warnings were properly administered, that Hittson voluntarily waived his right to remain silent, and that he willingly participated in the evaluation. The record does not support Hittson's contention that he waived his Fifth Amendment privilege only to the extent of permitting an evaluation to rebut a possible insanity defense." *Hittson*, 264 Ga. at 684, 449 S.E.2d at 591. This is the holding overruled in *Nance*.

Factually, it is not clear from the Georgia Supreme Court's opinion how the court was able to conclude that the "record" revealed that Hittson generally waived his Fifth Amendment rights. The court's reference to *Miranda* warnings could only mean the form Hittson signed at the beginning of Dr. Storms' examination and before trial counsel arrived.<sup>45</sup>

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<sup>45</sup> The State's brief in the direct appeal is very clear in this regard. No doubt recognizing that *Estelle* and its progeny contemplate only a limited Fifth Amendment waiver, the State argued that Dr. Storms successfully secured a general waiver of Hittson's Fifth Amendment rights. (Doc. 75-1 at 16, 21, 23, 26). That was the Respondent's position here, but it is a position he understandably found not particularly comfortable:

The Court: So the [Respondent's] position is that when you have an *Estelle* situation, which is what the trial judge set up, put in his order, you've got to appear for this, cites *Motes*. Well, first at that point that's a limited waiver, right?

Ms. Graham: It can be, yes.

The Court: It's got to be. And it's the [Respondent's] position that because the psychiatrist had him sign a general waiver before his lawyer got there that we now have a general waiver?

Ms. Graham: Yes. Again I think this claim again comes down to your analysis under [*Brecht v. Abrahamson*, 507 U.S. 619 (1993)].

The court made no reference to the facts leading to the examination; i.e., Hittson's objection to the examination, the court's discussion with counsel, and the trial court's order that Hittson submit to the examination. That order was very clear:

WHEREAS the sanity and mental competency of this Defendant has been called into question, and a Notice regarding the same having been filed, this Court finds it is appropriate for an evaluation of this defendant to be conducted. This evaluation is to be done by psychologists and/or psychiatrists of the State's choosing, pursuant to the State's entitlement to the same per Motes v. State, 256 Ga. 831, 832 (1987), citing Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866 (1981).

(Doc. 60-1 at 101). The significance of the citation to *Motes* is discussed below; the significance of the citation to *Estelle* is obvious. Nor did the supreme court discuss the events after the evaluation confirming that Hittson had waived his Fifth Amendment rights only in the event he put experts on the stand, i.e., trial counsel's attempt to use expert testimony but still barring Dr. Storms' testimony, and, when that failed, foregoing any expert testimony when the trial court ruled that Dr. Storms could not testify if they called only lay witnesses. These facts make clear that Hittson did not generally waive his Fifth Amendment rights. Therefore, the only factual basis for the conclusion that Hittson generally waived his Fifth Amendment rights was the general waiver secured by Dr. Storms before Hittson's counsel arrived for the examination.

The legal basis for the Georgia Supreme Court's conclusion that Hittson's Fifth Amendment waiver was general is also difficult to discern. At the time it decided *Hittson*, the Georgia Supreme Court had addressed the limited nature of an *Estelle*-waiver. Four years before it decided *Hittson*, the Georgia Supreme Court, in *Motes v. State*, 256 Ga. 831, 353 S.E.2d 348 (1987), addressed the extent of an *Estelle* Fifth Amendment waiver. The Court's understanding of *Estelle* was clear:

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In other words, the Respondent's real argument is that the error was harmless. (Doc. 99 at 49-50).

The United States Supreme Court in *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866, 68 L.Ed. 2d 359 (1981), held that a defendant who introduces expert psychiatric testimony in support of an insanity defense, waives his right to remain silent to the extent that he must make himself available to the state's psychiatric expert for examination. This **limited waiver** of a defendant's fifth amendment rights simply amounts to a determination that if a defendant wants to tell his story to a jury through the mouth of an expert, the state should have an equal opportunity to tell that story through the mouth of an expert, and that the state could not practically possess this opportunity unless their expert gained access to the defendant. *Estelle* in no way holds that the assertion of an insanity defense will result automatically in the absolute waiver of the right to remain silent.

*Id.* at 832, 353 S.E.2d at 349 (emphasis added).

In *Motes*, the Georgia Supreme Court addressed *Estelle* in the context of an interlocutory appeal from a trial court ruling requiring a defendant to submit to an evaluation by a court-appointed expert. When the defendant refused to talk to the expert, the trial court barred the defendant from introducing any, not just expert, evidence relating to the issue of insanity. The trial court based its order "upon the premise that an insanity plea constitutes a waiver of Fifth Amendment rights, and that any invocation of the right to remain silent constitutes a waiver of the right to present an insanity defense." *Id.* at 831, 353 S.E.2d at 349. However, the defendant in *Motes*, although intending to pursue an insanity defense, did not plan to use expert testimony. Consequently, the Georgia Supreme Court reversed. The court held that the limited waiver of the right not to incriminate oneself arises only if the defendant intends to use expert testimony to prove insanity. In that event, "the state must be allowed the same privilege and the defendant must cooperate, in light of her partial waiver of the right to remain silent." *Id.* at 832, 353 S.E.2d at 350.

Thus, the state of the law at the time the Georgia Supreme Court decided *Hittson* was clear. A defendant wishing to present expert testimony to support an insanity defense did not generally waive his Fifth Amendment rights. He waived those rights only to the extent

that he must submit to an evaluation by a prosecution expert if he intended to support his insanity defense with expert testimony.<sup>46</sup>

Factually and legally, this is precisely what happened in *Hittson*. Citing *Estelle* and *Motes*, the trial court ordered Hittson to submit to Dr. Storms' evaluation. Yet the Georgia Supreme Court held the general waiver signed by Hittson at Dr. Storms' request and without the benefit of counsel trumped the limited waiver that occurred when the court ordered him to submit to that evaluation.

The Respondent *now* does not dispute that the Georgia Supreme Court erred in its resolution of Hittson's *Estelle* Fifth Amendment claim. Less than a year after its decision in *Hittson*, the Georgia Supreme Court rejected, on interlocutory appeal, a defendant's claim that his Fifth Amendment rights would be violated "if he is required to cooperate in a free-ranging evaluation by a State mental health expert who may then testify regarding matters beyond the scope of mitigation evidence, such as [his] state of mind at the time of the murders." *Abernathy v. State*, 265 Ga. 754, 755, 462 S.E.2d 615, 617 (1995). But, the Georgia Supreme Court made clear, "we reiterate our holding in *Jenkins* [*v. State*, 265 Ga. 539, 458 S.E.2d 477 (1995)] that the State may offer expert mental health testimony only in the sentencing phase and strictly in rebuttal of the expert mental health evidence offered in mitigation by the defense." *Id.*

Any doubt that *Hittson* unreasonably applied *Estelle* was eliminated in *Nance v. State*, 272 Ga. 217, 526 S.E.2d 560 (2000). There, the trial court ordered Nance to submit to a mental health examination after he announced his intention to present expert mental

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<sup>46</sup> Of course, the Supreme Court in *Estelle*, in its holding, did not address a court-ordered psychiatric examination to rebut expert testimony in support of a mental status defense. Yet, as the Georgia Supreme Court acknowledged in *Motes*, the reasonable application of *Estelle* clearly establishes that a defendant ordered to submit to a psychiatric examination to allow the State to rebut his mental status defense does not generally waive his Fifth Amendment rights. Nor is this Court suggesting that the Georgia Supreme Court's discussion of *Estelle* is part of the clearly established law governing Hittson's petition. Again, the point is that it is clearly established that an *Estelle* waiver is a limited waiver.

health testimony in the sentencing phase of his trial. The examiner, like Dr. Storms, read Nance his constitutional rights, Nance signed a waiver form, and his attorneys were present throughout the examination. During the examination, Nance said that he had used drugs and drank alcohol the night of the offense. Over Nance's objection, the State called the doctor to testify to these statements during the guilt-innocence phase of the trial. The doctor was not qualified as an expert and, indeed, there was no reference to the fact that she was a doctor. Citing pre-*Hittson* authority and *Estelle*, the Georgia Supreme Court acknowledged that the rationale behind requiring a defendant who intends to present mental health expert testimony to submit to an examination by a State expert arises from "the State's overwhelming difficulty in responding to the defense psychiatric testimony without its own psychiatric examination of the accused and by the need to prevent fraudulent mental defenses." *Id.* at 219, 526 S.E.2d at 564-65 (quoting *Lynd v. State*, 262 Ga. 58, 64, 414 S.E.2d 5, 11 (1992)). This principle draws a "fair balance between the interests of the State, the regard for the function of the courts to ascertain the truth, and the scope of a defendant's privilege against self-incrimination." *Id.*, 526 S.E.2d at 565. Again citing *Estelle*, the court noted that "the purpose of the rule requiring the defendant to submit to a State mental health examination under these circumstances is to permit the State to formulate a response or a rebuttal to the testimony of the defendant's mental health expert." *Id.* at 219-20, 526 S.E.2d at 565. However, when "the State's expert stripped off her medical title and testified as a lay witness about what the defendant told her," the State "subverted" that purpose. *Id.* at 220, 526 S.E.2d at 565. "We therefore restate our holding in *Abernathy* that when a defendant must submit to a court-ordered mental health examination because he wishes to present expert mental health testimony at his trial, the State expert may only testify in rebuttal to the testimony of the defense expert or to rebut the

testimony of the defendant himself.” *Id.* The Georgia Supreme Court then overruled *Hittson* to the extent it “authorized a State expert to testify in response to lay witness testimony that the defendant was remorseful....” *Id.* at 220 n.2, 526 S.E.2d at 565 n.2.<sup>47</sup>

To the extent that the Georgia Supreme Court in *Hittson* made a factual determination when it concluded that the “record” did not support a finding that Hittson’s Fifth Amendment waiver was limited, rather than general, its decision “was based on an unreasonable determination of the facts in light of the presented evidence in the State court proceeding.”<sup>48</sup> 28 U.S.C. § 2254(d)(2). The facts in this regard are undisputed and allow but one conclusion. Pursuant to the trial court’s order and the colloquy between the court and counsel, Hittson did not generally waive his Fifth Amendment rights. There is no factual basis for concluding that the limited waiver was converted to a general waiver simply because the State’s psychiatrist had Hittson sign a form waiver when his counsel were not present.

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<sup>47</sup> It is appropriate to note another serious anomaly in the order drafted by the Respondent’s lawyers. At the evidentiary hearing in the second state habeas action, the court addressed the “*Nance* claim.”

The Court: I want to go back right quick. On the first claim, the *Nance* claim-

Mr. Dunn: Yes, Your Honor?

The Court: - Ms. Graham, the way I understand it, just to make sure I’m clear, we all agree there was a *Nance* violation but that y’all are going to contend that it’s harmless error, and you’re going to contend that it’s not?

Mr. Dunn: Correct, Your Honor.

The Court: Am I correct?

Ms. Graham: Yes, Your Honor.

(Doc. 63-8 at 32).

For whatever reason, the Respondent’s lawyers took a much different position when they drafted the order denying relief. The Respondent’s order concluded that *res judicata* barred the “*Nance* claim,” and, alternatively, *Nance* could not be applied retroactively because it merely narrowed a “state procedural rule.” (Doc. 63-1 at 13-15). Arguably, that the court signed an order that directly conflicted with its understanding of the “*Nance* claim” and the Respondent’s express acceptance of the court’s understanding, suggests that the court did not read the order when counsel submitted it some 13 months after the evidentiary hearing. Moreover, the notion that *Nance* simply narrowed a rule of procedure seems farfetched. *Nance* held that *Hittson* misapplied *Estelle*. *Estelle* is not a mere rule of procedure.

<sup>48</sup> The Court understands that appellate courts do not make findings of fact and perhaps, strictly speaking, may not make factual determinations of the kind contemplated by 28 U.S.C. § 2254(d)(2). *Holsey*, 694 F. 3d at \_\_\_\_\_. However, the Georgia Supreme Court either made a factual determination that Hittson generally waived his Fifth Amendment rights or it relied on an implicit finding to that effect by the trial court.

To the extent that the Georgia Supreme Court reached a legal conclusion that Hittson generally waived his Fifth Amendment rights, that decision “involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1). At the time of the Georgia Supreme Court’s decision, the reasonable application of *Estelle* clearly required the conclusion that a defendant raising a mental status defense waived his Fifth Amendment rights, as the Georgia Supreme Court held in *Motes*, only “to the extent that he must make himself available to the state’s psychiatric expert for examination.” 256 Ga. at 832, 353 S.E.2d at 349.<sup>49</sup>

The Georgia Supreme Court’s discussion of Hittson’s Sixth Amendment claim was also short. Trial counsel were aware of the “scope and nature” of the evaluation, and were present during most of the evaluation. Trial counsel were also informed by the trial court that it would be available in the event issues arose during the evaluation. Finally, Hittson’s attorneys “counseled” with Hittson before the evaluation. The Georgia Supreme Court held that “[u]nder these circumstances, Hittson’s Sixth Amendment right to counsel was not violated within the meaning of *Estelle v. Smith, supra.*” *Hittson*, 264 Ga. at 685, 449 S.E.2d at 592.

Again, it is difficult to tell what the Georgia Supreme Court meant. Clearly trial counsel were aware of the “scope and nature” of the evaluation, but that hardly supports the Georgia Supreme Court’s conclusion. The scope and nature and the possible use of the evaluation were determined by the trial court’s written order, citing *Motes* and *Estelle*, and

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<sup>49</sup> It is perhaps not surprising that neither Hittson nor the Respondent have found much authority addressing whether an *Estelle*-waiver can be converted to a general waiver when a defendant is Mirandized when he shows up for the court-ordered evaluation. However, the Third Circuit has addressed this scenario and held that the admission of the expert’s testimony, not to rebut the psychiatric evidence, but “simply to repeat incriminating statements that [the defendant] had made in the interview” was an “unreasonable application [*Estelle*] to the facts or an unreasonable failure to extend [*Estelle*] to the facts.” *Gibbs v. Frank*, 387 F.3d 268, 275 (3d Cir. 2004).

oral pronouncements directing Hittson to appear for evaluation. In short, as far as the Fifth Amendment was concerned, Hittson would waive his rights only in accordance with *Estelle* and *Motes*. The State's expert could testify only if Hittson's experts testified. That is what the trial court told his lawyers. Yet, according to the supreme court, the "scope and nature" of the evaluation was that Hittson would generally waive his Fifth Amendment rights and the State's expert could testify even though Hittson's experts did not. *Id.* Not only were trial counsel not advised of that "scope and nature," the trial court told them just the opposite – the "scope and nature" and use of the evaluation were governed by *Estelle* and *Motes*.

In *Estelle*, Smith's attorneys were not aware that the court-ordered examination would address the issue of future dangerousness, and thus Smith unconstitutionally "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." 451 U.S. at 471. On the other hand, in *Buchanan*, Buchanan's right to counsel had not been impinged because his attorneys had been informed of the scope and nature of the examination and his lawyers were thus "on notice that if ... he intended to put on a 'mental status' defense for petitioner, he would have to anticipate the use of psychological evidence by the prosecution in rebuttal." *Buchanan*, 483 U.S. at 425. Hittson's lawyers were never told that Hittson would be generally waiving his Fifth Amendment rights and that his statements to Dr. Storms could be used against him regardless of whether he put on a mental status defense.

Certainly there was no notice, from Supreme Court cases or otherwise, that Dr. Storms would be allowed to testify as a fact witness and merely repeat Hittson's incriminating statements. In fact, the trial court specifically assured defense counsel that Dr. Storms was not serving as a "surrogate prosecutor or DA or sheriff's deputy" and that he

was “not out there to gather evidence against your client on a – factual evidence against your client.” (Doc. 72-18 at 36, 40-44). Likewise, the District Attorney informed defense counsel that Dr. Storms may inquire into what happened the night of the murder, but “[i]t’s a different matter” should he “come into court and say, well, members of the jury, let me tell you what he told me.” (Doc. 72-18 at 38). Thus, the Georgia Supreme Court’s conclusion that Hittson’s Sixth Amendment right to counsel was not violated involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1).

In Hittson’s direct appeal, the Georgia Supreme Court did not address the issue of whether the admission of Dr. Storms’ testimony was harmless error. That issue was addressed only by the second state habeas court.<sup>50</sup> Its reasoning and conclusion are found in one paragraph:

During the sentencing phase Petitioner put on twenty witnesses, spanning two days. Petitioner’s witnesses consisted of a coach, life-long friends, military peers and superiors, and family members. These twenty witnesses testified about their opinions of Petitioner’s non-violence, gullibility, alcohol problems, and pleaded for mercy on behalf of Petitioner. Dr. Storms was the State’s only witness during the sentencing phase. Thus, given the overwhelming evidence of guilt, the minor evidence presented in aggravation and the considerable evidence presented in mitigation, this Court finds that Dr. Storm’s testimony did not have a “substantial and injurious effect or influence in determining the jury’s verdict” and was therefore harmless.

(Doc. 63-1 at 16). Thus, as it did in its *Brady* materiality analysis, the court relied on the “overwhelming evidence of guilt” to justify its finding of harmless error. This Court will

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<sup>50</sup> The second state habeas court ruled that Hittson’s *Estelle* claims were barred by res judicata and that the Georgia Supreme Court’s overruling of *Hittson* in *Nance* could not be applied retroactively. Those rulings are not before this Court because this Court’s review is limited to “deciding whether a conviction violated the Constitution, laws, or treaties of the United States.” *Estelle v. McGuire*, 502 U.S. 62, 68 (1991) (citations omitted). The Court notes, however, that the second state habeas court rejected Hittson’s retroactivity argument because “*Nance* did not set forth a new rule of constitutional dimension, but merely narrowed an existing rule of criminal procedure.” (Doc. 63-1 at 12). That characterization of *Nance*, as noted, is suspect.

accept, as it did in its review of the court's *Brady* materiality analysis, that the second state habeas court, when it referenced "overwhelming evidence of guilt," actually meant the overwhelming evidence of the horror of Hittson's crime considered by the jury during the sentencing phase of trial. However, in its *Brady* materiality analysis, the second state habeas court's order at least weighed this overwhelming evidence with the suppressed evidence. In its harmless error analysis, it provides no analysis of the impact or effect of Dr. Storms' testimony, simply labeling it "minor evidence ... in aggravation."<sup>51</sup> (Doc. 63-1 at 16). Determining whether Dr. Storms' testimony was only "minor" requires somewhat more discussion, conducted under the appropriate standard of review.

With regard to the standard of review, it is appropriate to note yet another problem in the second state habeas court's order. Because Hittson was asserting error based on his federal constitutional rights in the second state habeas court, he logically enough cited the harmless error standard formulated by the United States Supreme Court in *Chapman v. California*, 386 U.S. 18 (1967). (Doc. 62-25 at 15 n.4). The second state habeas court's order refused to apply *Chapman*, concluding that "the United States Supreme Court held that the standard for determining whether habeas relief must be granted is not beyond a reasonable doubt," but rather the standard applied in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), a standard "more favorable to and 'less onerous' on the" Respondent, and "thus less favorable to" Hittson. (Doc 63-1 at 15-16); *Mansfield v. Sec'y, Dep't of Corr.*, 679 F.3d 1301, 1307 (11th Cir. 2012).

Apparently, the Respondent's lawyers thought that because the second state habeas court was sitting as a habeas court, they should skip the *Chapman* standard in the order they

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<sup>51</sup> This lack of discussion about the facts that led the court to conclude Dr. Storms' testimony was minor evidence of aggravation is not fatal to the court's finding of harmless error. Faulty analysis or even no analysis, the state habeas court's factual findings are presumed correct.

drafted. However, *Brecht* held that *federal* habeas courts reviewing *state* criminal convictions must apply the less petitioner-friendly *Brecht* standard. The Supreme Court did not hold that petitioners who establish federal constitutional error in state habeas proceedings are subject to the *Brecht* harmless error standard. See *Duest v. Singletary*, 997 F.2d 1336, 1338 n.2 (11th Cir. 1993) (explaining that *Brecht* is the standard for harmless constitutional error in federal habeas corpus cases but “[t]he harmless error standard for constitutional violations in all other situations remains the longstanding test of Chapman.”). Indeed, the second state habeas court was the court of initial review on the question of whether the claimed *Estelle* violation constituted harmless error; that issue was not addressed by the Georgia Supreme Court. Thus, clearly the second state habeas court should have applied *Chapman*.<sup>52</sup> *Trepal v. Sec’y, Fla Dep’t of Corr.*, 684 F.3d 1088, 1112 n.27 (11th Cir. 2012) (citing two state court habeas corpus decisions and explaining that the *Brecht* standard “does not apply to state courts’ review of their own convictions” as they should “apply the more petitioner-friendly *Chapman* standard”).

Regardless of the standard applied by the second state habeas court, this Court reviews the unconstitutional admission of Dr. Storms’ testimony using the *Brecht* harmless error standard.<sup>53</sup> *Fry v. Plier*, 551 U.S. 112, 121-22 (2007). Under *Brecht*, “a federal constitutional error is harmless unless there is ‘actual prejudice,’ meaning that the error had a ‘substantial and injurious effect or influence’ on the jury’s verdict.” *Mansfield*, 679 F.3d at

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<sup>52</sup> When deciding state habeas appeals, the Georgia Supreme Court applies the *Chapman*, not the *Brecht*, harmless error standard. See *Brown v. Baskin*, 286 Ga. 681, 685, 690 S.E.2d 822, 826 (2010); *Brewer v. Hall*, 278 Ga. 511, 513, 603 S.E.2d 244, 247 (2004); *Hicks v. Schofield*, 278 Ga. 159, 160, 599 S.E.2d 156, 157 (2004) (Chief Justice Fletcher dissenting from the denial of petitioner’s motion for certificate of probable cause to appeal and explaining that the Eleventh Circuit’s previous decision that the constitutional error was harmless did not bind the Georgia Supreme Court because state courts are “required to apply” the *Chapman* harmless error standard, not the *Brecht* standard that the Eleventh Circuit used).

<sup>53</sup> This means that Hittson never had the benefit of the *Chapman* standard of review.

1307 (quoting *Brecht*, 507 U.S. at 637). The Court must find that there is “more than a reasonable possibility that the error contributed to the conviction or sentence.” *Mason v. Allen*, 605 F.3d 1114, 1123 (11th Cir. 2010) (quoting *Horsley v. Alabama*, 45 F.3d 1486, 1493 (11th Cir. 1995)) (internal quotation marks omitted) (brackets omitted). To determine if the error affected the sentence, the Court considers the error in the context of the entire trial. “The question turns on whether the Court can ‘say, with fair assurance,’ that the [sentence] ‘was not substantially swayed by the error.’” *Trepal*, 684 F.3d at 1114 (quoting *O’Neal v. McAninch*, 513 U.S. 432, 437 (1995)). The Supreme Court has explained:

“If, when all is said and done, the [court’s] conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand. ... But, if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, *or if one is left in grave doubt*, the conviction cannot stand.”

*O’Neal*, 513 U.S. at 437-38 (quoting *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946) (emphasis in original)).

Thus, Hittson does not have to prove that but for Dr. Storms’ testimony, the jury would not have imposed the death penalty. See *Duest*, 997 F.2d at 1338. Nor must he make the showing required to establish materiality under *Brady*; i.e., that there is a “reasonable probability” had the error not occurred “the result of the proceeding would have been different.” *United States v. Bagley*, 473 U.S. 667, 682 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (internal quotation marks omitted)). “[T]he *Brady* materiality standard ‘impose[s] a higher burden on the [criminal] defendant’ than” the *Brecht* standard. *Trepal*, 684 F.3d at 1113 (quoting *Kyles v. Whitley*, 514 U.S. 419, 436 (1995)).

However, when making the harmless error determination, the Court views “the evidence through the lens of AEDPA.” *Mansfield*, 679 F.3d at 1309. Thus, the second state habeas court’s factual findings are presumed correct and Hittson bears the burden of rebutting the presumption by clear and convincing evidence. *Id.* This Court must, however, make a *de novo* determination whether the constitutional error “‘had [a] substantial and injurious effect or influence in determining the jury’s verdict.’” *Id.* at 1313 (quoting *Brecht*, 507 U.S. at 637). To make this determination, the Court reviews the entire record. *Id.* at 1315.

As the second state habeas court repeatedly acknowledged, Hittson’s trial counsel pieced together a fairly effective case in mitigation. Trial counsel presented “considerable evidence” to support its theme that Hittson “exhibited a pattern of alcohol dependence and abuse and had been psychologically or personality-wise dependent to ... or ... submissive psychologically to ... Vollmer,” who was an intelligent, violent, and corrupt manipulator. (Doc. 63-1 at 16; Doc. 56-9 at 85; Doc. 74-9 at 55). Numerous witnesses testified that Hittson grew up in an unaffectionate family that did not care about him and that he was a dim-witted, impressionable, non-violent, generous, and trustworthy follower who abused alcohol. (Doc. 74-8 at 85-151; Doc. 74-9 at 1-78; Doc. 74-10 at 12-31).

The evidence also showed that, following his return from Georgia, Hittson just “deteriorated.” (Doc. 74-9 at 9-10). Conversely, Vollmer was “just the same old guy,” who continued to have a fascination with murder and dismemberment and even laughed when he, on numerous occasions, “jokingly” told his shipmates that he had killed Utterbeck. (Doc. 74-9 at 10-13, 21). Additionally, Hittson accepted responsibility for the crime, confessed to his role in Utterbeck’s murder early in the investigation, and fully cooperated

with law enforcement. Investigator Wendell Hall, who was one of the State's witnesses during the guilt/innocence phase of the trial, testified that when Hittson was brought in for questioning he "appeared as someone that was very troubled," who had "been involved in something he was not extremely proud of, something that he had been a part of that he might not have necessarily been the instigator of...." (Doc. 74-4 at 62-63). During that interview, Hittson provided a detailed confession of the crime. (Doc. 74-4 at 62-64). Hittson subsequently took law enforcement officers to the locations where Utterbeck's remains were buried, and voluntarily told them where they could find the baseball bat and other instruments used in the crime. (Doc. 74-4 at 9, 39-40). Meanwhile, the jury heard no evidence, and there was no evidence, that Vollmer had acknowledged his guilt.<sup>54</sup>

As the sentencing phase of trial began, defense counsel clearly recognized the significance of Hittson's statements to Dr. Storms and played every card they could to keep him from testifying. In the end, as discussed above, the only way defense counsel could keep Dr. Storms off the stand was to forego the presentation of their own mental health experts, which they ultimately decided to do.

Hittson's twenty lay witnesses and the letters Vollmer wrote before Utterbeck's death painted the picture defense counsel wanted the jury to see. Vollmer was evil, and he manipulated Hittson. Vollmer was far more intelligent than Hittson, who was dimwitted at best. Only under Vollmer's influence would Hittson have ever participated in such a horrific crime. Away from Vollmer, Hittson was a "harmless guy" who was just "manipulated ... into doing something that he would have never done." (Doc. 75-17 at 62). When trial counsel rested their case in the sentencing phase of trial, there was no evidence that Hittson, except

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<sup>54</sup> On the contrary, as his post-arrest letters reveal, Vollmer was still scheming and manipulating.

when under the influence of Vollmer, could ever have done what he did. Defense counsel had shown that the crime was completely out of character for Hittson. (Doc. 75-18 at 113). Perhaps just as importantly, the prosecution would have no evidence in rebuttal. The last and only evidence the jury would hear during the sentencing phase of the trial would be Hittson's evidence in mitigation.

That drastically changed when the trial court ruled Dr. Storms could testify. Dr. Storms, claiming to be a neutral party testifying at the behest of the court, rather than an expert employed by the State, explained that he was "the senior psychologist for the Forensic Services Division at Central State Hospital" and that he had examined Hittson just sixteen days earlier, which was only two days before the start of Hittson's trial for the murder of Utterbeck. (Doc. 74-10 at 55). Dr. Storms testified that during the examination, Hittson stated that Utterbeck was a "hillbilly" and an "asshole." (Doc. 74-10 at 57).

The fact that the jury heard Dr. Storms' testimony last carries a significance that any trial lawyer can appreciate. However, it requires no trial experience to understand that Dr. Storms' testimony shifted the field dramatically. First, according to Hittson's mitigation evidence, Hittson's horrible conduct was an aberration and something that he would never have done on his own. As horrific as his crime was, nothing in his life suggested that he was capable of such conduct. Thus, something unique to the circumstances that night had to have led him to commit the crime. Dr. Storms' testimony effectively undercut that image. Now, Hittson was a man who, approximately ten months after Utterbeck's murder and just a few days before his trial for that murder, referred to the victim in derogatory and demeaning terms. According to the court's expert (as far as the jury knew), Hittson was no longer the mild-mannered, manipulated, weak man his lawyers portrayed him to be. Instead, he was

a brazen, unrepentant man who casually told the court's neutral expert that Utterbeck, the man he brutally murdered and dismembered, was an asshole and a hillbilly.

Second, Dr. Storms' testimony flatly contradicted the defense theory that Hittson did what he did only because of Vollmer's overpowering and evil influence. By the time he saw Dr. Storms, Hittson had been free from Vollmer's influence for many months. Clearly, it was not because of Vollmer that Hittson was so callous that he could refer to his victim as a hillbilly and an asshole. Instead, this was evidence of Hittson's own evil and unremorseful character, and it came, according to Dr. Storms, directly from Hittson's own mouth.

While Dr. Storms' testimony was brief, it was effective.<sup>55</sup> The State recognized just how effective and made sure the testimony remained center stage throughout closing arguments. During its closing, the State displayed the words "asshole" and "hillbilly" on "big poster boards" alongside photographs of Utterbeck's mutilated remains and described both as the "reality" versus the false image of Hittson that the defense witnesses sought to dupe the jury into believing:

[Y]ou've heard one of the defense witnesses talk about, well, as I think about it now he was remorseful. ... Well, members of the jury, there's your remorse. (Referring to easel.) As ... late ... as three weeks ago this is this defendant's response when asked about Conway Utterbeck being an innocent human being. Conway was a hillbilly, he was an asshole. Is that remorse? What does your common sense tell you? What does reason tell you? Members of the jury, there's no remorse here. On this stage, or in this stage, if you will, he will come and talk about remorse. But that's the reality every bit as much as every picture up here is the reality.

(Doc. 74-10 at 92-93; Doc. 56-10 at 13-14).

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<sup>55</sup> At the second state habeas evidentiary hearing, defense counsel was questioned whether he thought the admission of Dr. Storms' testimony affected the jury. He explained, "It was like getting hit in the head with a board. I mean, it just was, it was just, it was like getting gutted." (Doc. 56-10 at 24).

The jury was instructed that it could find the following statutory aggravating circumstances: (1) that the murder was committed while the defendant was engaged in the commission of an aggravated battery; and/or (2) that the offense of murder was outrageously or wantonly vile, horrible or inhuman, in that it involved depravity of mind, torture to the victim prior to his death, or aggravated battery to the victim prior to his death. (Doc. 74-11 at 26-27). The trial court instructed the jury:

Depravity of mind is a reflection of an utterly corrupt, perverted, or immoral state of mind. In determining whether the offense of murder in this case involved depravity of mind on the part of the defendant, you may consider the age and physical characteristics of the victim and you may consider the actions of the defendant prior to and after the commission of the murder. In order to find that the offense of murder involved depravity of mind you must find that the defendant, as a result of utter corruption, perversion, or immorality, committed aggravated battery or torture upon a living person, or subjected the body of a deceased victim to mutilation.

(Doc. 74-11 at 28-29). The jury imposed the death penalty after finding one statutory aggravating circumstance: “The offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved depravity of mind.” (Doc. 70-5 at 25).

Dr. Storms’ testimony that Hittson called Utterbeck an asshole and a hillbilly certainly helped the State prove depravity of mind. The jury was instructed that they could consider Hittson’s actions after the commission of the crime. Dr. Storms’ testimony was the only evidence that months after the crime, and with Vollmer completely out of the picture, Hittson possessed a “corrupt” or “immoral state of mind.” (Doc. 74-11 at 29).

Finally, and although the Court does not place great significance on this, there is some evidence that the jury struggled with its death sentence. During sentencing phase deliberations, the jury sent two notes to the judge concerning the meaning of a life sentence. The first note asked the judge if a sentence of life imprisonment means “no opportunity for freedom from incarceration.” (Doc. 74-11 at 37). The court responded with the pattern

charge that it had already given the jury: “[A] ‘life sentence’ means [Hittson] would serve the remainder of his life in the penitentiary.” (Doc. 74-11 at 37-38). Obviously dissatisfied with this answer, the jury asked if Hittson would ever be “eligible for parole or a reduced sentence on the basis of good behavior” if he was sentenced to life imprisonment. (Doc. 74-11 at 39). The court responded that it had answered this question in response to their first question. Thus, there is good reason to believe the jury was looking for an alternative to the death sentence.

For these reasons, to the extent that the second state habeas court made a finding of fact when, without discussion, it found Dr. Storms’ testimony to be only “minor evidence” in aggravation, Hittson has shown by clear and convincing evidence that this finding was clearly erroneous. This Court cannot say, with fair assurance, that the jury’s decision to sentence Hittson to death was not substantially swayed by the erroneous admission of Dr. Storms’ testimony. When the Court considers the admission of Storms’ testimony in the context of the entire trial, it is apparent that his improperly admitted statement effectively undercut the defense’s mitigation theory. Affording the second state habeas court’s order all appropriate deference, it is clear to this Court that the violation of Hittson’s constitutional rights had a “substantial and injurious effect or influence” in the jury’s determination to sentence Hittson to death. *Brecht*, 507 U.S. at 637 (quoting *Kotteakos*, 328 U.S. at 776).

### **C. The Ineffective Assistance of Counsel Claims**

“*Strickland*<sup>56</sup> is the touchstone for all ineffective assistance of counsel claims.” *Blankenship v. Hall*, 542 F.3d 1253, 1272 (11th Cir. 2008). To obtain relief for ineffective assistance of counsel, Hittson “must meet both the deficient performance and prejudice

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<sup>56</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

prongs of *Strickland*.” *Id.* at 384. To establish deficient performance, Hittson must show that “counsel’s representation fell below an objective standard of reasonableness.”

*Strickland*, 466 U.S. at 688. The Court must apply a “‘strong presumption’ that counsel’s representation was within the ‘wide range’ of reasonable professional assistance.”

*Harrington*, 131 S. Ct. at 787 (quoting *Strickland*, 466 U.S. at 689). “To overcome that presumption, [Hittson] must show that counsel failed to act ‘reasonabl[y] considering all of the circumstances.’” *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011) (quoting *Strickland*, 466 U.S. at 688). To establish prejudice, Hittson must show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

Hittson contends that, but for trial counsel’s errors, he would not have received a death sentence. To resolve this claim, the Court must “consider ‘whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.’” *Newland v. Hall*, 527 F.3d 1162, 1184 (11th Cir. 2008) (quoting *Strickland*, 466 U.S. at 695). When determining if prejudice exists, “it is necessary to consider *all* the relevant evidence that the jury would have had before it if [Hittson’s counsel] had pursued the different path—not just the mitigation evidence [Hittson’s counsel] could have presented, but also the [aggravating evidence] that almost certainly would have come in with it.” *Wong v. Belmontes*, 130 S. Ct. 383, at 386 (2009); see also *Porter v. McCollum*, 130 S. Ct. 447, 453-54 (2009).

Federal courts must “take a ‘highly deferential’ look at counsel’s performance through the ‘deferential lens of § 2254(d).’” *Pinholster*, 131 S. Ct. at 1403 (quoting *Knowles v.*

*Mirzayance*, 556 U.S. 111, 121 n.2 (2009); *Strickland*, 466 U.S. at 689). The Supreme Court has explained that when the deference due under § 2254 combines with the *Strickland* standard for assessing the performance of counsel, the result is a “doubly deferential judicial review.” *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

### **1. Trial counsel’s Investigation and Presentation of Mitigating Evidence**

Hittson essentially raises two claims regarding trial counsel and mitigating evidence. First, Hittson claims trial counsel failed to investigate adequately “the mental health mitigation case,” and they failed to present the mental health evidence they had. (Doc. 82 at 88). Second, Hittson claims trial counsel failed to “meet their duty to introduce mitigating mental health evidence in rebuttal to the damaging ‘lay’ testimony of Dr. Storms.” (Doc. 82 at 88).

It is appropriate to begin by noting two significant points. First, the first state habeas court, in a thorough and detailed opinion drafted by the court, rather than by counsel for the Respondent, found that Hittson failed to prove his ineffective assistance of counsel claims. (Doc. 76-4 at 2-22). Hittson does not argue this order is not entitled to AEDPA deference. Second, Hittson’s trial counsel operated under highly unusual, for a capital case, time constraints. Hittson was indicted in June 1992. The trial court appointed Walter Sammons to represent Hittson shortly thereafter. (Doc. 75-16 at 14). Stephen Hollomon was appointed in July 1992, and William Shurling was appointed in October 1992. (Doc. 75-18 at 5; Doc. 75-17 at 27). The State had the fruits of the Navy’s extensive investigation, a case on a “silver platter,” as trial counsel put it, while Hittson’s lawyers struggled to piece together a defense that required travel to, and investigation in, four different states. (Doc. 72-7 at 25). After the trial court denied counsel’s repeated requests, indeed pleas, for

continuances, trial began February 16, 1993. (Doc. 72-7 at 8; Doc. 72-14 at 23-24; Doc. 72-15 at 13).

a. **Trial counsel's Investigation and the Decision Not to Present Expert testimony**

(1) **Performance**

Trial counsel quickly realized that because of the strong evidence of Hittson's guilt, which included his recorded confession, the "focus of the case really was ... the sentencing phase." (Doc. 75-16 at 72). Sammons explained:

[T]he theory of the case was that Mr. Vollmer had used and manipulated Mr. Hittson, and Mr. Hittson was a very emotionally needy, hungry person. And our theory of mitigation was to develop that as much as we could and hope that the jury would be sympathetic to Mr. Hittson.

(Doc. 75-16 at 72).

To develop this theory, counsel met with Hittson on numerous occasions prior to the trial. (Doc. 75-16 at 72-73; Doc. 75-17 at 82-83). Sammons travelled to Pensacola, Florida, where the U.S.S. *Forrestal* was docked at the time, to interview numerous shipmates and others who knew Hittson, Vollmer, and Utterbeck. (Doc. 75-16 at 73-74). When the U.S.S. *Forrestal* was docked in Philadelphia, Hollomon visited the ship to interview additional sailors who knew the men. (Doc. 75-16 at 73-74). Both Sammons and Hollomon travelled to Nebraska, where Hittson grew up, to interview Hittson's family and another family, the Fletchers, who had "adopted" Hittson and treated him as part of their family. (Doc. 75-16 at 73). While in Nebraska, counsel visited the schools that Hittson attended and met "with as many teachers and counselors and people of that nature who remembered him." (Doc. 75-16 at 73; Doc. 75-17 at 91). Sammons explained that they "spent about two and a half days in Nebraska meeting with everybody [they] could who knew him and remembered him." (Doc. 75-16 at 73). Hollomon testified that they also looked

for and obtained various records. (Doc. 75-17 at 91-92).

Counsel recognized the need for mental health evidence and “were hopeful that it would be determined that [Hittson] was mentally retarded or that he had some sort of psychiatric condition that would truly render sympathy ... from the jury.” (Doc. 75-16 at 74). In an attempt to obtain this mitigation evidence, trial counsel arranged for Dr. Michael Prewett to examine Hittson. (Doc 71-12 at 3; Doc. 75-16 at 36). Trial counsel provided Dr. Prewitt with Hittson’s medical records, clinical records from the Fremont Family Counseling Center and Immanuel Alcoholism Treatment Center, school records, and various letters written by Hittson. (Doc. 75-18 at 12-13, 46-47).

Dr. Prewett found that Hittson scored in the low-average range of intellectual ability. (Doc. 74-8 at 38). He opined that Hittson was a follower who “expressed a good deal of remorse and disbelief that he could have done something like this.” (Doc. 75-18 at 26). Dr. Prewett explained that he diagnosed Hittson as a “chronic alcoholic” who has a borderline personality disorder with “some schizoid features” and “mild brain dysfunction.” (Doc. 75-18 at 21). He explained the borderline personality disorder criteria that fit Hittson as follows:

A pattern of unstable and intense interpersonal relationships characterized by alternating between extremes of idealization and devaluation. That certainly fit the situation with Mr. Vollmer. Identity disturbance, a markedly persistently unstable self image or sense of self, certainly that was the case. Impulsivity in at least two areas that are potentially self damage (sic). The examples that are given are spending, sex, substance abuse, reckless driving, binge eating. Clearly he met that criteria. Recurrent suicidal behavior or gestures or threats. There was some indication in the history of suicidal ideation. Chronic feelings of emptiness would be one that he certainly experienced. Inappropriate intense anger, or difficulty controlling anger. The examples that are given, frequent displays of temper, constant anger, recurrent physical fights. He fought frequently in school, and certainly had some troubles controlling his anger.

(Doc. 75-18 at 23-24).

Dr. Prewett found that Hittson had mild brain damage, which “was fairly diffuse” and that was caused by a minor concussion or alcohol abuse. (Doc. 75-18 at 44). Dr. Prewett testified at the first state habeas evidentiary hearing that he informed counsel of all these findings prior to Hittson’s trial. (Doc. 75-18 at 26). There is no evidence that trial counsel were unaware of any of Dr. Prewett’s findings.

Based on Dr. Prewett’s recommendation, trial counsel retained Dr. Norman Moore, a neuropsychiatrist, for further neurological studies. (Doc. 75-18 at 17). Dr. Moore reported that Hittson “tried to kill himself seven times,” drank heavily at a young age, was arrested for stealing \$1,500.00 from his father, and was later arrested for “burglary when he went into the wrong apartment.” (Doc. 75-20 at 38-39). Dr. Moore found that Hittson “has a quick temper, but cools down quickly. He does not get violent when sober but was always hostile and very violent on alcohol, especially liquor.” (Doc. 75-20 at 39). Dr. Moore found that Hittson may have “suffered from Induced Psychotic Disorder (folie á deux)” at the time of the murder. (Doc. 75-20 at 40).

The central feature of this disorder is a delusional system that develops in a second person (Mr. Hittson) as a result of a close relationship with another person (the primary case, Mr. Vollmer) who already has a psychotic disorder with delusions. ...

For Mr. Hittson to have the diagnosis of Induced Psychotic Disorder, Mr. Vollmer would have had to have had a psychotic disorder and been deluded at the time (for example that the murder victim intended to kill him and Mr. Hittson). Even if Mr. Vollmer’s belief did not reach delusional level, many of the other criteria were present. Although the full syndrome may not have been present, it is my opinion that Mr. Hittson was unduly influenced by Mr. Vollmer.<sup>57</sup>

(Doc. 75-20 at 40).

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<sup>57</sup> Hittson points to this possible diagnosis as particularly mitigating. However, both Dr. Moore and Dr. Prewett said that it would be impossible to confirm the diagnosis without evaluating Vollmer to determine whether he was delusional at the time and counsel had no way of forcing Vollmer to undergo a psychological evaluation. Sammons also testified that neither Dr. Prewett nor Dr. Moore thought Hittson had this particular psychotic disorder. (Doc. 75-16 at 123-24).

Although Dr. Moore provided some support, qualified though it was, for the theory that Vollmer manipulated Hittson, some of his findings were not helpful. He diagnosed Hittson with alcohol abuse and antisocial personality disorder. (Doc. 75-20 at 39). Sammons testified that he met with Dr. Moore prior to trial and Dr. Moore told them that Hittson “was just mean,” and “talked a lot about homosexuality.” (Doc. 75-16 at 100). According to Sammons, Dr. Moore said “he felt like the crime had ... homosexual overtones.” (Doc. 75-16).

Trial counsel also hired a social worker, Mary Shults. (Doc. 75-16 at 41). Shults interviewed Hittson, reviewed voluminous records, and travelled to Nebraska to interview Hittson’s family, friends, and teachers. She found that Hittson’s family home was “cluttered, in disarray, and dirty” and that “[a]ll family members looked rather unkempt.” (Doc. 75-20 at 6). Hittson’s family seemed unconcerned about his fate. (Doc. 75-20 at 7). His father was an alcoholic who sometimes pulled Hittson “out of bed by his hair” and showed more interest in the family dogs than in Hittson. (Doc. 75-20 at 8-9). To fill the void created by his emotionally and physically neglectful parents, Hittson “latched on to Mr. and Mrs. Fletcher,” the parents of his friend. (Doc. 75-20 at 9). Shults found that Hittson was subjected to ridicule and abuse among his peers because of poor personal hygiene and inappropriate clothes. Shults opined that Hittson “suffered from emotional neglect by his [ineffective] parents,” and was a “lost child in the family.” (Doc. 75-20 at 10). Trial counsel were aware of Shults’ findings and opinions prior to Hittson’s sentencing hearing. (Doc. 75-17 at 45). At the first state habeas evidentiary hearing, Hittson did not present any new evidence that Shults failed to discover. There is no evidence that trial counsel were unaware of any of Shults’ findings.

On February 5, 1993, trial counsel filed a notice of their intent to raise an insanity or mental incompetence. (Doc. 70-2 at 106). The events that then occurred are discussed in detail above. In brief, after Dr. Storms and Dr. Coplin evaluated Hittson, trial counsel attempted to get their reports but the trial court denied their request, ruling that the reports would be produced only if trial counsel elected to present expert testimony. Sammons testified at the first state habeas hearing that he attempted to talk with Dr. Storms regarding his findings, but “Dr. Storms ... was just sort of noncommittal, [and] really didn’t answer the question that I had.” (Doc. 75-16 at 34). Trial counsel did not attend Dr. Coplin’s examination and made no attempt to speak with him. At the sentencing phase of the trial, counsel fought to keep Dr. Storms from testifying and yet still present their experts (except for Dr. Moore, whose involvement trial counsel successfully kept from the State). After trial counsel proffered Dr. Prewett’s testimony, counsel then requested Dr. Storms’ and Dr. Coplin’s reports and the trial court, over the State’s objections, ordered the parties to exchange reports and the court provided the parties with Dr. Coplin’s report.<sup>58</sup> (Doc. 74-8 at 45-48). Trial counsel and Dr. Prewett reviewed the reports during a thirty-minute recess.

After the recess, the Court ruled that if Hittson put up Dr. Prewett, the State could call Dr. Storms and Dr. Coplin. (Doc. 74-8 at 49-50). Trial counsel then proffered the testimony of Shults and argued that her testimony should not trigger rebuttal from Dr. Storms or Dr. Coplin because she was offering no diagnosis. (Doc. 74-8 at 53-71). The Court ruled that if she testified to any extent regarding Hittson’s mental state, it would “open the door for the State to bring in [its] own expert witnesses as to ... [Hittson’s] mental state.” (Doc. 74-8 at 78).

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<sup>58</sup> It does not appear that Dr. Prewett actually prepared a report, and the record does not show that trial counsel disclosed Dr. Moore’s identity or his report.

After getting confirmation from the trial court that if they called no experts, the State's and the trial court's experts could not testify, trial counsel announced they would "just go with lay witnesses." (Doc. 74-8 at 82).

Trial counsel then presented the testimony of twenty lay witnesses. The first state habeas court found:

These witnesses were discovered through trial counsel's visits to both Hittson's home in Nebraska, and the U.S.S. *Forrestal* .... Through these witnesses trial counsel's goal was to show that Mr. Hittson was an impressionable, easily led, emotionally needy, and generally harmless guy, who was manipulated and controlled by Vollmer into doing something he would never normally have done. They felt they were able to accomplish this goal.

The witnesses from Nebraska were able to testify that [Hittson] was emotionally hungry and needy from an early age, and that he actually adopted another family because his own family was so cold and distant. The witnesses from the *Forrestal* were able to testify at length about Hittson, Vollmer, and their relationship. More specifically, the Navy witnesses testified that Hittson was a very gullible, easily led individual who was constantly trying to fit in. On the other hand, these witnesses testified that Vollmer was a very intelligent, manipulative and controlling individual, who liked playing with people's heads; who had spoken on occasion prior to the murder of "taking care" of the victim, implying danger to the victim; who subsequent to the murder discussed with people the best way to kill someone and dispose of the body; and who had, in a letter to an acquaintance, detailed a plan to kill his ex-girlfriend's then current boyfriend. Lastly, these witnesses testified that in Vollmer and Hittson's relationship, Vollmer was the leader, Hittson was the follower, and that consequently, Hittson would do what Vollmer told him to do.

(Doc. 76-4 at 12-13).

Hittson claims that trial counsel's failure to introduce expert mitigation testimony was a "glaring omission" that occurred because of their "failure to adequately investigate the mental health mitigation case and find out what evidence was available to the [S]tate; [and] their failure to rationally assess the evidence once they were allowed to see the [S]tate's and Court's expert reports during a recess." (Doc. 82 at 88). The first state habeas court disagreed and held that "[i]n viewing counsel's actions in light of the totality of

circumstances, the Court concludes that trial counsel's decision not to present the testimony of Dr. Prewett and Ms. Shults was reasonable" and that Hittson was not prejudiced by this decision. (Doc. 76-4 at 15, 21). This Court agrees.

First, trial counsel conducted a detailed investigation into Hittson's background and employed at least three mental health professionals to assist them. During the first state habeas evidentiary hearing, Hittson presented no mental health testimony or evidence that was not known to trial counsel prior to the sentencing hearing. After conducting their investigation and reviewing reports from the State and court experts, trial counsel concluded that any advantage gained by presenting mental health evidence would be outweighed by the damage from the State's and the trial court's experts. (Doc. 75-16 at 37-91; Doc. 75-17 at 39, 42-43; Doc. 75-18 at 92-92). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable..." *Strickland*, 466 U.S. at 690.

Moreover, the defense experts' conclusions were not completely favorable. Sammons testified that he "didn't think that what Dr. Prewett had to say would be mitigating, or in light of the other psychiatric evidence, would be given much weight." (Doc. 75-16 at 37). Although Dr. Prewett found some mild brain damage, he also admitted that "there would be people who had brain damage who wouldn't do what was done in this case." (Doc. 75-16 at 37). Moreover, Dr. Prewett found Hittson's mild brain damage could have been caused by chronic heavy-drinking, a conclusion trial counsel did not think would be particularly helpful. (Doc. 75-16 at 39). Sammons explained that he did not "think that a jury would have looked at those photographs [of Utterbeck's mutilated body] and looked at what [Hittson] said he did and had any sympathy for him because he was an alcoholic." (Doc. 75-16 at 39-40). Also, Dr. Prewett found that the borderline personality disorder from

which Hittson suffered was characterized, in part, by “[i]nappropriate intense anger, or difficulty controlling anger .... frequent displays of temper, constant anger, [and] recurrent physical fights.” (Doc. 75-18 at 23). Dr. Prewett explained that Hittson “certainly had some troubles controlling his anger.” (Doc. 75-18 at 23-24). Clearly, this was at odds with the non-violent image the defense sought to portray.<sup>59</sup>

With regard to Shults, Hollomon testified that had she “been able to testify without opening the door” to other experts, it would have benefited the defense. (Doc. 75-17 at 45-46). However, Sammons did not think her a “compelling witness;” she “was sort of overbearing.” (Doc. 75-16 at 125-26). Similarly, Shurling testified that Shults was not a particularly “effective witness” and “might even possibly alienate some of the jurors.” (Doc. 75-18 at 115-16). After the trial court ruled that her testimony might open the door to rebuttal by the State’s mental health expert, trial counsel decided not to put her on the stand.

While Dr. Moore’s report provided some helpful information, some of his findings, as noted, were harmful. Hittson, Dr. Moore found, “has a quick temper” and “was always hostile and very violent on alcohol.” (Doc. 75-20 at 39). His diagnosis was alcohol abuse and antisocial personality disorder. “Evidence of drug and alcohol abuse is ‘a two-edged sword,’ and a lawyer may reasonably decide that it could hurt as much as help the defense.” *Housel v. Head*, 238 F.3d 1289, 1296 (11th Cir. 2001) (citations omitted). Moreover, the diagnosis of antisocial personality disorder can be “not mitigating but damaging.” *Cummings v. Sec’y for the Dep’t of Corr.*, 588 F.3d 1331, 1368 (11th Cir. 2009).

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<sup>59</sup> Hittson maintains that Hollomon did not understand the nature of mitigating evidence in general and, specifically, did not understand that Dr. Prewett’s diagnosis of “borderline personality disorder, schizoid personality features and neurological damage” could be mitigating. (Doc. 82 at 124). The record shows that all three attorneys understood the concept of mitigating evidence. Also, they understood that they must consider the possible mitigating evidence along with all the other psychological evidence. (Doc. 75-16 at 37-38; Doc. 75-17 at 39-43, 66-67; Doc. 75-18 at 91-92).

Then Dr. Moore told trial counsel that Hittson was “just mean” and obsessed with homosexuality. (Doc. 75-16 at 100). Sammons testified that following this meeting his “vote was to not put on any psychiatric or psychological testimony.” (Doc. 75-16 at 47). He was “scared to death that Dr. Moore’s testimony would come in, that Dr. Prewett would testify that he had ... a consultation with Dr. Moore, and that Dr. Moore would have been called, and he was our psychiatrist, and he would have testified that [Hittson] was just mean.” (Doc. 75-16 at 102).

Hittson maintains that trial counsel misread or “fail[ed] to rationally assess” the reports from the State and court experts. (Doc. 82 at 88). These reports contained some mitigating information. For example, Dr. Coplin’s report stated that Hittson felt guilty, is “passive-dependent,” blames himself for his problems, and is “guilt ridden.” (Doc. 75-20 at 47-48). However, his report said much that was unfavorable. Dr. Coplin reported that Hittson started drinking and fighting at an early age; fought “a circle of students at one time;” had been arrested twice in the past; and that he had a “quick temper” but claimed to “cool down quickly.” (Doc. 75-20 at 42-44). Dr. Coplin found that Hittson “does not show any psychiatric symptoms or psychiatric history that would render him not responsible for the charges against him;” “has no symptoms of psychosis at present or in the past”; and does not suffer from “any type of severe personality disorder.” (Doc. 75-20 at 44). Dr. Coplin also reported that Hittson’s MMPI personality profile showed “significant elevations” on “Scale 4 Psychopathic Deviant.” (Doc. 75-20 at 47). Dr. Coplin ultimately diagnosed Hittson with alcoholism and Gasner syndrome, which is a “syndrome that is very common in patients who are undergoing possible life threatening charges against them or have committed very violent acts.” (Doc. 75-20 at 44-45).

Dr. Storms' findings were also problematic. Unlike Dr. Prewett who found Hittson had a low average IQ and brain damage, Dr. Storms found he had a normal IQ of 105 and no brain damage. (Doc. 70-4 at 18). He also found that Hittson might be deliberately exaggerating his problems to some degree on one of the psychological tests. (Doc. 70-4 at 18-19). Dr. Storms opined that Hittson "led a passive-dependent life style overlaid on mild depression," and followed others, but did "act[] out, especially when he has been drinking." (Doc. 70-4 at 20). He explained that when Hittson "drinks his controls are loosened and a variety of acting out behaviors may occur." (Doc. 70-4 at 21). According to Dr. Storms, this would explain why several persons in the Navy "reported that they had seen Mr. Hittson become violent when he was intoxicated." (Doc. 70-4 at 21). Dr. Storms concluded that Hittson did not have a "disorder of thought or mood that would impair [his] ability to distinguish right from wrong with regards to the incident leading to his arrest." (Doc. 70-4 at 21). Dr. Storms added that "even under ordinary circumstances, Mr. Hittson tends to act before he thinks. It is my opinion that alcohol exacerbated this natural style." (Doc. 70-4 at 21).

"[W]hich witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess." *Cook v. Warden, Ga. Diagnostic Prison*, 677 F.3d 1133, 1137 (11th Cir. 2012) (quoting *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc)). As in *Cook*, trial counsel here made a strategic decision to forgo the presentation of expert testimony after the mental health evidence "revealed many pieces of potentially damaging evidence that could have been presented in rebuttal...." *Id.* Hittson's criticism of that decision calls to mind the Eleventh Circuit's recent observation "that, regardless of the mitigation strategy that capital defense lawyers choose, they are often 'damned if they do, and damned if they don't'" when they

decide to use, or not use, expert mental health testimony. *Morton v. Sec’y, Fla. Dep’t of Corr.*, 684 F.3d 1157, 1161 (11th Cir. 2012).

Contrary to Hittson’s implicit argument, there is no *per se* rule that expert mental health testimony must be presented. Instead, counsel’s duty at the penalty phase is to “investigate possible mitigating factors and make a reasonable effort to present mitigating evidence.” *Philmore v. McNeil*, 575 F.3d 1251, 1263 (11th Cir. 2009) (upholding state court decision that counsel was not ineffective for failing to present expert mental health testimony during the penalty phase of the trial); *see also Whisenhant v. Allen*, 556 F.3d 1198 (11th Cir. 2009). Trial counsel did just that. Their decision not to put Dr. Prewett and Shults on the stand was reasonable. Indeed, trial counsel more likely would have been ineffective if they had opened the door to the damaging testimony of Dr. Coplin, Dr. Storms, and Dr. Moore. Clearly, Hittson has not shown that the first state habeas court’s decision involved an unreasonable application of *Strickland* or was based on an unreasonable determination of the facts.

The first state habeas court also ruled that counsel was not ineffective for failing to speak with Dr. Coplin or obtain copies of Dr. Storms’ and Dr. Coplin’s reports prior to the sentencing hearing. The first state habeas court found:

Petitioner’s main contention is that trial counsel did not adequately investigate the possible testimony of the court’s expert, as they failed to discuss his findings with him prior to trial, although the trial court said such was permissible. The factual basis for this argument is correct; however, the record reflects that trial counsel had about 30 minutes to review the Drs. (sic) reports.

Petitioner argues that 30 minutes was insufficient time for trial counsel to properly review Dr. Coplin’s report and to reach an informed decision. However, the Court believes 30 minutes to be sufficient time as the reports are not lengthy, and Dr. Coplin’s report contains a summary which would make it possible to determine the substance of his testimony within that period of time.

Furthermore, trial counsel's decision not to present mental health expert testimony and the testimony of Mary Shults, was based not only on Dr. Coplin's report, but also on Dr. Storms and his report. It is also important to note that trial counsel based their decision in part on negative comments on [Hittson's] disposition presented by Dr. Moore, which trial counsel obtained prior to trial. As such, the Court finds unpersuasive Petitioner's argument that trial counsel's failure to attempt to determine what Coplin would say prior to trial caused them to make an uninformed and unreasonable decision concerning presentation of mental health evidence.

(Doc. 76-4 at 17).

The record fully supports this finding. Clearly, trial counsel had no way to obtain Dr. Storms' and Dr. Coplin's reports prior to the sentencing hearing. Trial counsel attempted to speak with Dr. Storms, but he refused to provide significant information. (Doc. 75-16 at 34). Even if trial counsel had spoken with Dr. Coplin, there is no evidence that he would have told them anything different from the information contained in his report, most of which is more aggravating than mitigating for Hittson.

*Rompilla v. Beard*, 545 U.S. 374 (2005), provides no support for Hittson. In *Rompilla*, counsel knew the State would attempt to establish the defendant's violent history by "proving [his] prior conviction for rape and assault, and would emphasize his violent character by introducing a transcript of the rape victim's testimony given in that earlier trial." *Rompilla*, 545 U.S. at 383. Nevertheless, "defense counsel did not look at any part of that file, including the transcript, until warned by the prosecution a second time" the day before *Rompilla*'s sentencing hearing. *Id.* at 384. Counsel then reviewed the transcript, but "none of the other material in the file." *Id.* at 385. The Supreme Court held that counsel was ineffective for failing to review the prosecutor's "readily available" file. *Id.* at 385-86.

Here, as the first state habeas court made clear, Dr. Storms' and Dr. Coplin's reports were not "readily available." *Id.* at 385; (Doc. 72-18 at 25-31, 41; Doc. 74-8 at 45-46).

Applying the "doubly deferential judicial review" that this Court must to the first state habeas

court's opinion regarding trial counsel's performance, the Court finds that the decision is neither contrary to, nor an unreasonable application, of *Strickland*. Nor was the court's decision based on an unreasonable determination of the facts.

**(2) Prejudice**

The first state habeas court also found that Hittson was not prejudiced by defense counsel's failure to present mental health expert testimony.

[I]n light of all of the evidence adduced, including the crime committed, the gruesome nature of that crime, [Hittson's] characterization of the victim after the crime, the mitigation evidence that was actually presented, and the possibly unfavorable psychological testimony which includes not only that which is described above, but the possibility of Dr. Moore, the defense's own expert, testifying that [Hittson] was "just mean," the Court does not believe there to be a reasonable probability that the jury would have returned with a sentence of life had Ms. Shults and Dr. Prewett been presented in the penalty phase. Accordingly, the Court concludes that Petitioner was not prejudiced by trial counsel's failure to present such evidence.

(Doc. 76-4 at 21).

To establish prejudice, Hittson must "establish 'a reasonable probability that a competent attorney, aware of [the available mitigating evidence], would have introduced it at sentencing' and 'that had the jury been confronted with this ... mitigating evidence, there is a reasonable probability that it would have returned a different sentence.'" *Wong*, 130 S. Ct. at 386 (quoting *Wiggins v. Smith*, 539 U.S. 510, 535-36 (2003)) (alterations in original). The Court must "consider *all* the relevant evidence that the jury would have had before it," not just the mitigating evidence. *Id.* (emphasis in original).

The twenty lay witnesses called by the defense supported trial counsel's mitigation theory: "Hittson was an impressionable, easily led, emotionally needy, and generally harmless guy, who was manipulated and controlled by Vollmer into doing something he would never normally have done." (Doc. 76-4 at 12). They testified not just to their beliefs, but also "about things that he had done and g[a]ve ... anecdotal illustrations of his being

easily led, doing things to try to belong ... things of that nature, being easily manipulated.” (Doc. 75-16 at 108). They testified that Vollmer was manipulative, controlling, intelligent, had a morbid fascination with dead bodies, spoke of the best way to kill someone and dispose of the remains, and had made detailed plans to kill the boyfriend of his ex-girlfriend. Again, if trial counsel had called Dr. Prewett or Shults, they would have opened the door to the negative testimony of Dr. Moore, Dr. Storms, and Dr. Coplin, which would have undercut the lay witnesses’ testimony for the defense.

It is clear that the first state habeas court analyzed the evidence presented at trial and at the first state habeas proceedings when making its determination that Hittson had not shown prejudice. This Court finds that the first state habeas court’s decision did not involve an unreasonable application of *Strickland* and was not based on an unreasonable determination of the facts.

**b. Trial Counsel’s Failure to Rebut Dr. Storms’ Testimony**

As discussed in detail above, one of Hittson’s lay witnesses testified that Hittson might have been remorseful. In response, the trial court allowed the State to call Dr. Storms as a lay witness to testify that Hittson called Utterbeck a “hillbilly” and an “asshole.” Defense counsel vigorously objected to this testimony, but did not rebut it. Hittson argues that “[t]his testimony was, by far, the most damaging psychological evidence available” and once Dr. Storms testified, defense counsel had no reason not to call any or all of their mental health experts. (Doc. 82 at 99). Hittson claims that counsel “had an affirmative duty at this point to rebut Dr. Storms’ testimony.” (Doc. 82 at 119).

The first state habeas court adjudicated this claim on the merits:

[Hittson] argues that the only damaging testimony that Dr. Storms could have offered related to Hittson’s statement that the victim was a “hillbilly” and an “asshole,” and once that testimony came in at the close of the State’s rebuttal, any basis for withholding psychiatric evidence disappeared. However, this

argument is unsupported by the record as it has been concluded that other portions of Dr. Storms' report, unrelated to Hittson's characterization of Utterbeck, could be construed as unfavorable. Furthermore, aside from Storms' report, presentation of Dr. Moore's unfavorable testimony would still have been a possibility.

Accordingly, trial counsel's failure to present Dr. Prewett and Ms. Shults' testimony, subsequent to the rebuttal testimony of Dr. Storms, should be considered reasonable. Furthermore, even if it could be considered unreasonable, [Hittson] was not prejudiced by trial counsel's failure to present such testimony. Accordingly, trial counsel was not ineffective for failing to present the testimony of Dr. Prewett and Ms. Shults, subsequent to Dr. Storms' testimony in rebuttal.

(Doc 76-4 at 21-22).

This finding is supported by the record. As Hittson points out, trial counsel were, understandably, surprised<sup>60</sup> when the trial court allowed Dr. Storms to testify. (Doc. 75-16 at 49). Hollomon admitted that when the trial court allowed Dr. Storms to testify, he was "not sure any of us really knew what to do." (Doc. 75-17 at 62). However, Hollomon also said he thought they "may have talked about putting up Dr. Prewett, but [he] didn't ... see the value of doing that." (Doc. 75-17 at 59). Trial counsel were still concerned that they would open the door to expert testimony. Sammons testified that even after Dr. Storms' testimony, he still was convinced calling Dr. Prewett and Ms. Shults would be a mistake.

Q. At the moment after [Dr. Storms' testimony was presented], did you change your decision about putting up Dr. Prewett or Ms. Shults?

A. No.

Q. Did you even think about it?

A. I don't recall whether we thought about it or talked about it. But I can tell you, prior to trial, because of what Dr. Moore had to say, I was committed to

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<sup>60</sup> Hittson cites *Gray v. Netherland*, 518 U.S. 152, 169 (1996) for the proposition that when counsel is "confronted and surprised" by the testimony of a witness, they are "under an obligation to ask for a continuance, as well as for exclusion of the testimony." (Doc. 82 at 136). *Gray* dealt with a notice-of-evidence claim under the due process clause. Ineffective assistance of counsel was not an issue and the Court did not make this statement even in *dicta*. The United States Supreme Court held that for *Gray* to prevail on his notice-of-evidence claim, he would have to establish not only that due process requires he receive more than a day's notice of the State's evidence, but also that due process requires either (1) he receive a continuance regardless of whether he moves for one or (2) if he chooses not to seek a continuance, that exclusion is the only remedy for inadequate notice. The Court denied relief because *Gray* could prevail only with the adoption of a new constitutional rule. This holding is completely inapplicable.

not having all that come up.

Q. And that commitment never changed, even after Dr. Storms got up and testified?

A. Not for me.

(Doc. 75-16 at 49-50).

As harmful as Dr. Storms' testimony was, trial counsel reasonably thought that their lay witnesses had demonstrated

that [Hittson] was ... pretty impressionable, and that ... away from the co-defendant, he was a pretty harmless guy ... [who] drank a lot, but, basically, he was sort of a needy kind of harmless little guy, and that Mr. Vollmer was the brains of this operation and basically manipulated [Hittson] into doing something that he would have never done.

(Doc. 75-17 at 61-62). Had trial counsel cross-examined Dr. Storms<sup>61</sup> or called Dr. Prewett or Ms. Shults after Storms' testified, they likely would have opened the door to testimony that had the potential of undoing the defense's entire mitigation case. For example, the jury could have heard that Hittson was not harmless and nonviolent. Rather, he was "mean," liked to fight, "acts out," and becomes hostile and violent when he drinks alcohol. (Doc. 70-4 at 20; Doc. 75-16 at 100-01, Doc. 75-20 at 39-40). The jury could have learned that, contrary to the lay witness testimony, Hittson was not a "slow" or "stupid" person, nor was he naïve or gullible. Rather, he had an average IQ of 105, and he was a deceptive person who attempted to exaggerate his psychological problems. (Doc. 70-4 at 18-19).

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<sup>61</sup> It is unclear if Hittson could have introduced Dr. Storms' mental health report and cross-examined Dr. Storms, who was not testifying as a mental health expert, without placing his mental health into issue and opening the door to additional expert mental health testimony. Hittson complains that counsel did not "stem the damage caused by Storms' testimony by simply cross-examining him and eliciting from him the other information available in the report—that Mr. Hittson had no enmity or intense feelings toward Mr. Utterbeck." (Doc. 82. at 135). Storms' report does show that "there was no apparent intense feeling one way or the other between Mr. Hittson and his alleged victim." (Doc. 70-4 at 18). The Court agrees with the Respondent that this finding does not establish that Hittson felt any remorse and might actually have been used against him. The State could have argued that Hittson beat with a baseball bat, shot in the forehead, dismembered, and mutilated Utterbeck, who was not someone he hated, but someone he had absolutely no intense feelings for "one way or the other." (Doc. 70-4 at 18; Doc. 83 at 136). Such an assertion would emphasize the cold, heartless nature of this crime.

Given these facts, the first state habeas court's decision that counsel was not ineffective for failing to rebut the testimony of Dr. Storms, and, in any event, that Hittson was not prejudiced, is not contrary to, nor does it involve an unreasonable application of, *Strickland*. Further, the court's decision was not based on an unreasonable determination of facts in light of the evidence presented.

## **2. Trial Counsel's Failure to Call Hittson**

Hittson maintains that

[his] attorneys ... acted unreasonably by failing to discuss with [him] ahead of trial whether or not it would be advisable to testify in his own defense. This omission was made worse by the fact that, at the time of this crucial decision which occurred immediately before [he] would have been called to testify, counsel could not agree amongst themselves what [he] should do.

(Doc. 82 at 141).

The first state habeas court adjudicated this claim on the merits. After discussing the applicable law and making numerous findings of fact, the state habeas court held:

In sum, the record indicates that counsel advised [Hittson] that he had a right to testify and the decision of whether to testify or not was [Hittson's] to make. Further, the record indicates that [Hittson] was advised of the strategic implication of each choice he could make, not only some time prior to his decision, but moments before. The record also indicates that after being advised of all of this, and after discussion between counsel which occurred in front of [Hittson] moments before he was to make his choice, trial counsel agreed that [Hittson] should not testify. Consequently, [Hittson] decided not to testify and this decision was communicated to trial counsel by [Hittson] on the record.

In light of this evidence the Court concludes that trial counsel, in assisting [Hittson] in deciding whether to waive his right to testify, acted within the wide range of competence demanded of attorneys in criminal cases and their actions or inactions did not deprive [Hittson] of the ability to choose whether or not to testify on his own behalf.

(Doc. 76-4 at 27).

In *United States v. Teague*, 953 F.2d 1525 (11th Cir. 1992), the Eleventh Circuit explained that "[b]ecause it is primarily the responsibility of defense counsel to advise the

defendant of his right to testify and thereby to ensure that the right is protected, we believe the appropriate vehicle for claims that the defendant's right to testify was violated by defense counsel is a claim of ineffective assistance of counsel under [*Strickland*]." *Id.* at 1534. Furthermore, "[d]efense counsel bears the primary responsibility for advising the defendant of his right to testify or not to testify, the strategic implications of each choice, and that it is ultimately for the defendant himself to decide." *Id.* at 1533. The first state habeas court found that trial counsel fulfilled all these requirements, and, thus their performance was not deficient. This Court agrees.

Hittson maintains that "[c]ounsel took no steps to prepare him for what the experience of testifying might be like if he chose to testify, nor did they tell him that it was his decision alone whether or not to testify." (Doc. 82 at 146). He alleges that counsel did not investigate whether he should or should not testify before they made a strategic recommendation to him on the issue. Accordingly, he states that the first state habeas court's findings to the contrary constitute unreasonable findings of fact. (Doc. 82 at 147).

The record does not support Hittson's contentions. Well before the mitigation phase of his trial, both Sammons and Hollomon discussed with Hittson whether he should testify in the sentencing phase of his trial. Sammons testified:

The way that I prepare a witness is to just sort of go through their testimony, to ask them questions and elicit their answers. And I met with [Hittson] repeatedly and done (sic) that, and he had on different occasions said wildly different things about what happened in regard to the mutilation of the body. So I never sat down and said, okay, you are going to testify, let's go through it. You know, now, so in that sense, I did not prepare him to testify. But in the other sense, ... I spent an awful lot of time trying to get a grip on whether or not he could or should testify. ...

I told him that he had the right to testify if he wanted to, but that my opinion was that he could not help himself, and that he should not testify.

(Doc. 75-16 at 54-55).

Similarly, Hollomon testified that he met with Hittson many times and:

Hittson changed a lot of the facts that he had given with respect to his participation in these events over the time that we had talked with him. And it seemed that Mr. Hittson was adding things that he did, and that it was a pretty gruesome factual case and [we] didn't really want that, didn't really look forward to the District Attorney cross examining him on ... things that occurred during the event. And that would have been especially true if Mr. Hittson had indicated that he had done things in addition to what he had admitted having done on the tape that was originally made of his confession.

(Doc. 75-17 at 49-50).

After the lay witnesses testified during the mitigation phase of trial, trial counsel again discussed whether Hittson should testify. Both Sammons and Hollomon continued to feel strongly that Hittson should not testify. While Shurling acknowledged that their concerns were legitimate, he testified that as "a personal rule" he would prefer a defendant to testify if at all possible. (Doc. 75-18 at 95, 97). Both of these positions were presented to Hittson before he made the final determination not to testify. Sammons advised Hittson that, in his opinion, "the lay testimony had gone real well" and that Hittson may face difficulty during the cross-examination. (Doc. 75-16 at 129-30). He explained to Hittson that the ultimate decision to testify or not was his and that the judge would tell the jury that they could not hold his failure to testify against him. (Doc. 75-16 at 129-31). Shurling testified that Sammons and Hollomon explained to Hittson "in detail the reasons why they didn't think he should testify." (Doc. 75-18 at 101). Shurling too discussed with Hittson the potential benefits and drawbacks of testifying, and they all made clear to "Hittson that it was ultimately his choice whether to testify." (Doc. 75-18 at 102).<sup>62</sup>

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<sup>62</sup> Following the lay witness testimony, the judge asked Hittson whether he understood that he "did have the right to testify." Hittson responded that he did. The judge then asked him if he was "electing not to testify." Hittson responded that he was. (Doc. 74-10 at 46). After Dr. Storms' testimony, the judge explained that he heard Hittson might want to testify and then heard that "upon further reflection ... he changed his mind." When the judge questioned Hittson if this was correct, he said it was. (Doc. 74-10 at 81).

Hittson now alleges that throughout the trial there was friction among trial counsel about whether he should testify. (Doc. 82 at 146). Hittson claims that “[t]he difference of opinion between counsel was so pronounced that Sammons was ‘concerned that Mr. Shurling and Mr. Hollomon were going to get into a fight.’” (Doc. 82 at 146) (quoting Doc. 75-16 at 67). Hittson testified that Hollomon and Sammons told him that if he “decided to testify ... they were going to go to the Judge and going to write something and say that they had advised [him] not to.” (Doc. 75-18 at 84). According to Hittson, “[u]nder these conditions, it cannot be said that [he] made a knowing and voluntary waiver of his right to testify at the sentencing phase of his case.” (Doc. 82 at 147).

Again, the record does not support Hittson’s contentions. While Sammons testified he “was concerned that Mr. Shurling and Mr. Hollomon were going to get into a fight,” he immediately qualified his testimony: “[T]hey didn’t get into a fight. I don’t know that they even got into an argument.” (Doc. 75-16 at 67). Shurling described the same meeting as “very professional” and all three attorneys testified that at no time did Hollomon raise his voice to Shurling. (Doc. 75-17 at 4; Doc. 75-18 at 102). Shurling explained: “[I]t did not seem like an argument. ... It was a professional discussion. ... [I]t was logical, it was calm, and it was matter of fact. Various reasons for it, various reasons against the fact that they didn’t feel like he should testify.” (Doc. 75-18 at 102). Hittson himself explained that “they were debating back and forth.” (Doc. 75-18 at 83). Shurling testified that following this discussion, he communicated to Hittson again that the ultimate decision was his. (Doc. 75-18 at 96).

The state habeas court found no merit to Hittson’s argument that he was coerced into waiving his rights to testify when his counsel threatened to go to the judge and inform him that they had advised Hittson not to testify. (Doc. 76-4 at 22-23). The court found: “This

allegation is supported only by [Hittson's] testimony. Neither Mr. Sammons, nor Mr. Hollomon testified as to whether this occurred or not, and Mr. Shurling provided unsolicited testimony that he does not recall that happening. Accordingly the Court finds there to be insufficient evidence to support such an allegation." (Doc. 76-4 at 22-23).

Hittson has not shown by clear and convincing evidence that these factual findings are unreasonable. See *Consalvo*, 664 F.3d at 845 (explaining that "[d]etermining the credibility of witnesses is the province and function of the state courts, not a federal court engaging in habeas review" and questions of credibility are questions of fact that are accorded a presumption of correctness that must be overcome by clear and convincing evidence).

The first state habeas court also rejected Hittson's claim that he suffered prejudice because his lawyers failed to put him on the stand. According to Hittson, there is a reasonable probability that the result of the proceedings would have been different had he taken the stand. Other than these conclusory allegations contained in one paragraph of Hittson's brief, Hittson provides no factual support and no cites to the record to support this contention. The Court, therefore, finds that Hittson has not shown the state habeas court's decision regarding the lack of prejudice is contrary to, or involved an unreasonable application of, *Strickland*. Nor has he made any showing, much less by clear and convincing evidence, that the state court's finding was based on an unreasonable determination of facts.

#### **D. Hittson's Request for Proportionality Review**

The Georgia Supreme Court ruled on Hittson's proportionality claim:

Hittson complains that his sentence of death is disproportionate to the life sentence given Edward Vollmer, his co-defendant. In his statement to law enforcement officers Hittson admitted striking the victim with a baseball bat, taking a gun Vollmer offered him, and shooting the victim in the head. Hittson

assisted Vollmer in dismembering and burying the body, as well as concealing the crimes. Given Hittson's degree of participation in the crimes, we are unable to say that his sentence of death is disproportionate to Vollmer's life sentence. ...

The evidence supports the jury's finding of the (b)(7) aggravating circumstance. We conclude that Hittson's sentence was not imposed as the result of passion, prejudice or other arbitrary factor. Hittson's death sentence is neither excessive nor disproportionate to penalties imposed in similar cases, considering both the crime and the defendant. The cases listed in the Appendix support the imposition of a death sentence in this case.

*Hittson*, 264 Ga. at 688, 690, 449 S.E.2d at 594, 596 (internal citations omitted).

Hittson raised a proportionality claim again in his second state habeas corpus petition and the second state habeas court held:

This Court finds that [Hittson's claim that his death sentence is disproportionate punishment] is successive as not only could [Hittson] pursue this claim on appeal, [Hittson] did pursue this claim on appeal, and the Georgia Supreme Court rejected this claim . ... Thus, this claim is barred under the doctrine of *res judicata* and not reviewable by this Court. ... Further [Hittson] has not shown a substantial denial of constitutional rights to warrant relief as a miscarriage of justice.

Alternatively, the Court finds that [Hittson] has not shown any substantive change in facts or law that would warrant a repeated proportionality review of this sentence.

(Doc. 63-1 at 50).

Hittson alleges that the proportionality review conducted by the Georgia Supreme Court no longer protects "against the 'wanton' and 'freakish' imposition of the death penalty."

(Doc. 82 at 150) (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)). Specifically, he alleges that the "[p]roportionality review as currently

administered by the Georgia Supreme Court is constitutionally deficient because the state court fails to consider capital cases in which life sentences were imposed alongside cases in which death sentences were imposed when determining the proportionality of the sentence."

(Doc. 82 at 153). He also claims that the second state habeas court's decision that his

claim is barred by res judicata is incorrect.

The short answer to this claim is that there is no constitutional right to proportionality review. Neither *Gregg v. Georgia*, 428 U.S. 153 (1976), nor any cases that have followed, have held that Georgia courts must conduct any proportionality review. In fact, the United States Supreme Court has held that it would be error to conclude “that *Gregg* required proportionality review.” *Pulley v. Harris*, 465 U.S. 37, 46 (1984). The Eleventh Circuit has specifically “instructed district courts to refuse such requests when deciding habeas corpus petitions.” *Mills v. Singletary*, 161 F.3d 1273, 1282 (11th Cir. 1998). In *Moore v. Balkcom*, 716 F.2d 1511, 1518 (11th Cir. 1983), the Eleventh Court held:

A federal habeas court should not undertake a review of the state supreme court’s proportionality review and, in effect, “get out the record” to see if the state court’s findings of fact, their conclusion based on a review of similar cases, was supported by the “evidence” in the similar cases. To do so would thrust the federal judiciary into the substantive policy making area of the state. It is the state’s responsibility to determine the procedure to be used, if any, in sentencing a criminal to death.

Hittson also claims, without citation to precedent that would allow such, that this Court should conduct a second proportionality review because the Georgia Supreme Court did not know that both the District Attorney and lead investigator considered Vollmer to be the instigator of the murder. The second state habeas court considered this claim and held that Hittson did not show any substantive change in facts or law that would warrant a repeated proportionality review.

While the lead investigator did testify that Vollmer was the instigator, he also explained that Hittson hit Utterbeck in the head with an aluminum baseball bat, drug him into the kitchen, and “looking straight at him,” shot him in the forehead as Utterbeck pleaded for his life. (Doc. 56-11 at 66). Also, the District Attorney testified that while he believed Vollmer was evil and was the instigator:

It was Mr. Hittson who swung the bat and got Mr. Utterbeck basically groggy or dazed or semi-conscious, and it was Mr. Hittson who put the gun between his eyes and blew his brains out. And so with that, that is the stronger case, from a factual standpoint that's a stronger case.

(Doc. 56-11 at 148).

These are the same facts on which the Georgia Supreme Court relied when it determined that “[g]iven Hittson’s degree of participation in the crimes,” his sentence is not disproportionate to Vollmer’s life sentence. *Hittson*, 264 Ga. at 688, 449 S.E.2d at 594. Thus, Hittson has not shown that the second state habeas court’s decision that a second proportionality review was unnecessary was based on an unreasonable determination of the facts. Moreover, as explained above, this Court has no authority to conduct a proportionality review.

#### **IV. CONCLUSION**

The Court finds that Hittson is entitled to habeas relief on Claim One and Claim Two in his Amended Petition for Writ of Habeas Corpus: The admission of Dr. Storms’ testimony violated Hittson’s Fifth Amendment privilege against self-incrimination and Sixth Amendment right to counsel. All remaining claims are denied and any of Hittson’s allegations not specifically addressed herein are determined to be without merit.

#### **V. CERTIFICATE OF APPEALABILITY**

A prisoner seeking to appeal a district court’s final order denying his petition for writ of habeas corpus has no absolute entitlement to appeal but must obtain a Certificate of Appealability (“COA”). 28 U.S.C. § 2253(c)(1)(A). As amended effective December 1, 2009, Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts provides that “[t]he district court must issue or deny a [COA] when it enters a final

order adverse to the applicant,” and if a COA is issued “the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2).”

The Court can issue a COA only if the petitioner “has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To merit a COA, the Court must determine “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citations omitted). If a procedural ruling is involved, the petitioner must show that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Under this standard, the Court issues a COA on the following issue: Whether Hittson was denied his right to a fair trial and reliable sentencing, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, due to the State’s failure to disclose Vollmer’s psychiatric report and Vollmer’s post-arrest letters.<sup>63</sup> (Doc. 45 at 99-111).

In relation to all other claims, grounds, and issues raised in Hittson’s Amended Petition for Writ of Habeas Corpus (Doc. 45), the Court finds that the standard shown above for the grant of a COA has not been met.

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<sup>63</sup> This issue is part of Claim Thirteen in Hittson’s Amended Petition for Writ of Habeas Corpus. (Doc. 45 at 99-111).

Accordingly, it is hereby Ordered as follows:

- (1) The Amended Petition for Writ of Habeas Corpus filed by Travis Clinton Hittson (Doc. 45) is **GRANTED** in part and **DENIED** in part.
- (2) Claims Three through Twenty in the Amended Petition for Writ of Habeas Corpus are **DENIED** with prejudice.
- (3) The Writ of Habeas Corpus shall issue on Claims One and Two only, and the death sentence entered in Case No. 92-C-18076-M in the Superior Court of Houston County, Georgia, is **VACATED** and the State of Georgia shall, within a reasonable time, decide to hold a new sentencing hearing or impose a lesser sentence consistent with the law.
- (4) A COA is issued only for Hittson's claim that his right to a fair trial and reliable sentencing, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, was denied due to the State's failure to disclose Vollmer's psychiatric report and Vollmer's post arrest letters. (Doc. 45 at 99-111).
- (5) The effect of this Order will be automatically stayed pending resolution of any appeal taken to the Eleventh Circuit Court of Appeals.
- (6) The Clerk of Court is directed to enter judgment and close the case.

**SO ORDERED**, this 13th day of November, 2012.

S/ Marc T. Treadwell  
MARC T. TREADWELL, JUDGE  
UNITED STATES DISTRICT COURT

Inb

# **APPENDIX D**



SUPREME COURT OF GEORGIA  
Case No. S09E1294

Atlanta, October 18, 2010

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

**TRAVIS CLINTON HITTSON v. HILTON HALL, WARDEN**

**From the Superior Court of Butts County.**

**Upon consideration of the Application for Certificate of Probable Cause to appeal the denial of habeas corpus, it is ordered that it be hereby denied.**

**All the Justices concur.**

Trial Court Case No. 2005V615

**SUPREME COURT OF THE STATE OF GEORGIA**

Clerk's Office, Atlanta

I certify that the above is a true extract from minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

*Pamela M. Smith*, Deputy Clerk

10/18/10

# **APPENDIX E**

IN THE SUPERIOR COURT OF BUTTS COUNTY  
STATE OF GEORGIA

TRAVIS CLINTON HITTSON

Petitioner,

v.

HILTON HALL, WARDEN,  
Georgia Diagnostic and  
Classification Prison,

Respondent.

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CIVIL ACTION NO.  
2005-V-615

HABEAS CORPUS

Filed 11/30 2009 at 10:00 <sup>a</sup>M.  
*Frances R. Barnes*  
Clerk, Butts Superior Court

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FINAL ORDER

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COMES NOW before the Court Petitioner's Amended Petition for his successive Writ of Habeas Corpus as to his conviction and sentence from the Superior Court of Houston County. Having considered Petitioner's Original and Amended Petition for his successive Writ of Habeas Corpus (hereinafter "Petition"), the Respondent's Answer and Amended Answer, relevant portions of the appellate record, evidence admitted at the hearing on this matter on November 29-30, 2007, and the arguments of counsel, this Court makes the following findings of fact and conclusions of law as required by O.C.G.A. § 9-14-49 and denies the petition for writ of habeas corpus as to the conviction and sentence.

## I. PROCEDURAL HISTORY

### A. Trial Proceedings

Petitioner, Travis Hittson, was indicted by the Houston County Grand Jury during the May 1992 Term for the offenses of murder, armed robbery, aggravated assault, and possession of a firearm during the commission of a crime. Following a jury trial, Petitioner was convicted of murder, theft by taking as a lesser included offense of armed robbery, aggravated assault, and possession of a firearm during the commission of a crime. (TT, 376).<sup>1</sup>

In the sentencing phase, the State alleged as statutory aggravating circumstances: that the murder was committed during the commission of the capital felony of armed robbery; that the murder was committed during the commission of the capital felony of aggravated battery; and that the murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery

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<sup>1</sup> TT denotes the portion of the guilt/innocence phase of the trial transcript.

ST denotes the portion of the sentencing phase of the trial transcript.

R denotes the record on appeal.

HTI denotes the original state habeas evidentiary hearing transcript.

HTII denotes the successive state habeas evidentiary hearing transcript.

PEX denotes Petitioner's Exhibits submitted during the successive state habeas evidentiary hearing transcript.

REX denotes Respondent's Exhibits submitted during the successive state habeas evidentiary hearing transcript.

to the victim. In imposing the death sentence, the jury found the statutory aggravating circumstance that the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved depravity of mind. O.C.G.A. § 17-10-30(b)(7).

The jury recommended a sentence of death for murder, and Petitioner was sentenced to death for murder, twenty years for aggravated assault, twelve months for theft by taking, consecutive to the twenty year sentence for aggravated assault, and five years for possession of a firearm during the commission of a crime, consecutive to the sentences imposed for aggravated assault and theft by taking.

**B. Motion for New Trial Proceedings**

Petitioner filed a motion for new trial, brief in support, and supplemental grounds in support, which motion was denied, following a hearing, in an order filed December 7, 1993.

**C. Direct Appeal Proceedings**

The Georgia Supreme Court affirmed Petitioner's convictions and sentences on direct appeal on October 31, 1994, and on December 1, 1994, denied his motion for reconsideration. Hittson v. State, 264 Ga. 682, 449 S.E.2d 586 (1994).

On appeal to the Georgia Supreme Court, Petitioner raised his Estelle claim, which is Claim I of his successive petition. The Georgia Supreme Court rejected Petitioner's Estelle claim

holding," Hittson argues that the psychologist's testimony violated his Fifth Amendment right against self-incrimination. We disagree." Hittson v. State, 264 Ga. at 684.

On direct appeal, the Court also performed its customary proportionality review of Petitioner's death sentence, finding:

Hittson complains that his sentence of death is disproportionate to the life sentence given Edward Vollmer, his co-defendant. In his statement to law enforcement officers Hittson admitted striking the victim with a baseball bat, taking a gun Vollmer offered him, and shooting the victim in the head. Hittson assisted Vollmer in dismembering and burying the body, as well as concealing the crimes. Given Hittson's degree of participation in the crimes, we are unable to say that his sentence of death is disproportionate to Vollmer's life sentence. McClesky v. State, 245 Ga. 108, 115 (263 S.E.2d 146) (1980); Collins v. State, 243 Ga. 291, 299-300 (253 S.E.2d 729) (1979).

Nor is Hittson's death sentence disproportionate to sentences imposed in comparable cases, considering both the crime and the defendant. O.C.G.A. § 17-10-35 (c) (3). See Division 16, infra, and the Appendix to this opinion.

Hittson v. State, 264 Ga. at 688.

The United States Supreme Court denied Petitioner's petition for writ of certiorari on May 22, 1995. Hittson v. Georgia, 514 U.S. 1129 (1995).

#### **D. First State Habeas Corpus Petition**

Petitioner then filed his first petition for writ of habeas corpus in the Superior Court of Butts County on or about

December 31, 1995. An evidentiary hearing was conducted on October 6 and 7, 1997.

The habeas corpus court denied Petitioner's first state habeas petition in an order filed July 13, 1998. Petitioner filed an application for certificate of probable cause to appeal with the Georgia Supreme Court on October 13, 1998. Respondent filed his response on November 20, 1998. The Court denied Petitioner's first application for certificate of probable cause to appeal the denial of habeas corpus on September 29, 2000. Petitioner submitted a motion for reconsideration on December 15, 2000, which the Court denied on January 5, 2001.

Petitioner filed a petition for writ of certiorari with the United States Supreme Court on April 5, 2001, which was denied on May 29, 2001.

**E. Federal Habeas Corpus Petition**

Petitioner filed his application for federal habeas corpus relief in the Middle District of Georgia on January 4, 2002. On August 30, 2004, the federal court issued a stay in the federal habeas corpus proceeding, directing Petitioner to return to the state courts to exhaust two specific Brady claims.

## F. Second State Habeas Corpus Petition

Petitioner filed the instant successive state habeas corpus petition in this Court on or about July 20, 2005. In his second petition, Petitioner asserts the following claims:

- 1) By allowing the State's psychologist to testify about statements allegedly made by Petitioner during a court-ordered examination, even though Petitioner had not presented any psychological evidence in his own defense, the trial court violated Petitioner's rights under the Fifth Amendment;
- 2) The State's suppression of exculpatory evidence deprived Petitioner of his constitutional rights to due process and a fair trial, in violation of Article I, § 1, ¶¶ 1, 2, 11, 12, 14 & 17 of the Constitution of the State of Georgia, the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Brady v. Maryland; and
- 3) A death sentence in Petitioner's case is disproportionate punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and analogous provisions of the Georgia Constitution.

Respondent submitted his return and answer and a motion to dismiss Petitioner's petition as successive on August 4, 2005. This Court dismissed Petitioner's second state habeas petition on October 7, 2005. Petitioner filed an application for certificate of probable cause to appeal with the Georgia Supreme Court on January 5, 2006. Respondent filed his response in opposition to Petitioner's application for certificate of probable cause to appeal on March 3, 2006. On October 2, 2006,

the Georgia Supreme Court granted Petitioner's application for certificate of probable cause to appeal and remanded the case to the this Court "to conduct a hearing in accordance with O.C.G.A. § 9-14-47." The Georgia Supreme Court also "further directed" this Court "to take note of Kyles v. Whitley, 514 U.S. 419, 436 (III) (115 SC 1555, 131 LE2d 490) (1995) (stating that the materiality of suppressed evidence should be 'considered collectively, not item by item'), in further consideration of this case."

Thereafter, an evidentiary hearing was held on November 29-30, 2007 in the courtroom at the Georgia Diagnostic and Classification Prison. At the conclusion of the evidentiary hearing, this Court established a schedule for the filing of post-hearing briefs to which both counsel for Petitioner and Respondent agreed. This schedule required that Petitioner file his post-hearing brief sixty (60) days following the completion and filing of the evidentiary hearing transcript in this case, and that Respondent file his post-hearing brief sixty (60) days following the filing of Petitioner's post-hearing brief.

The evidentiary hearing transcript in this case was completed and filed on March 31, 2008, thereby establishing Petitioner's deadline for filing his post-hearing brief as May 31, 2008.

On May 27, 2008, Petitioner filed a *Supplemental Motion for a Thirty (30) Day Extension to File Petitioner's Post-Hearing Brief*, requesting an extension until June 30, 2008. This Court granted Petitioner's request and signed Petitioner's *Amended Briefing Schedule* reflecting an extension for Petitioner's post-hearing brief filing until June 30, 2008. Following this extension, on June 26, 2008, Petitioner filed a *Motion for a Twenty (20) Day Extension to File Petitioner's Post-Hearing Brief*. This Court again granted Petitioner's request and Petitioner was given until July 21, 2008 to complete his post-hearing brief. Petitioner then filed a third request on July 18, 2008, for a seven (7) day extension and this Court granted that request placing Petitioner's current post-hearing brief due date on July 28, 2008. This deadline passed and Petitioner failed to file his post-hearing brief. Respondent then filed a *Motion to Compel Filing of Petitioner's Post-Hearing Brief* on August 21, 2008, and this Court granted Respondent's motion to compel and signed an Order on August 25, 2008 giving Petitioner seven (7) more days to file his post-hearing brief otherwise his right to file a brief would be waived. Again, Petitioner failed to file his post-hearing brief. On September 15, 2008, Respondent filed his *Request for Ruling on Habeas Corpus Petition* with this Court and requested that this Court issue a ruling on Petitioner's successive state habeas corpus claims.

Petitioner responded with a letter to this Court dated September 15, 2008 requesting until September 26, 2008 to file his post-hearing brief. The Court granted this request, however, Petitioner again failed to file his post-hearing brief. Over ten months since the filing of the transcript of the successive state habeas evidentiary hearing, five times the period allotted by Uniform Superior Court Rule 44.11 (sixty (60) days), Petitioner has yet to file his post-hearing brief.

Accordingly, this Court finds Petitioner has waived his repeated opportunities to file a post-hearing brief in this case.

**II. SUMMARY OF RULINGS ON PETITIONER'S CLAIMS FOR STATE HABEAS CORPUS RELIEF**

Petitioner's Amended Petition enumerates three (3) claims for relief. As is stated in further detail below, this Court finds: (1) some claims asserted by Petitioner are procedurally barred due to the fact that they were litigated on direct appeal; (2) some claims are procedurally defaulted, as Petitioner failed to timely raise the alleged errors and failed to satisfy the cause and prejudice test or the miscarriage of justice exception; and, (3) some claims are neither procedurally barred nor procedurally defaulted and are therefore properly before this Court for habeas review.

To the extent Petitioner failed to brief any allegations supporting his claims for relief, including any evidence submitted during the evidentiary hearing held before this Court, the Court deems those claims or portions of his claims abandoned. Any claims made by Petitioner that are not specifically addressed by this Court are DENIED.

### **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

#### **A. CLAIM I**

Petitioner alleges in Claim I of his Petition that testimony by the State's psychologist, Dr. Robert Storms, was improperly admitted during the sentencing phase by the trial court. (Petition, 15). Prior to trial Petitioner was evaluated by private and court appointed mental health experts. During the sentencing phase of trial Petitioner proffered the testimony of his own mental health expert, Dr. Michael Prewitt, but then decided not to present expert mental health testimony to the jury. (ST, 13-28). Instead Petitioner chose to present only lay witness testimony, which included the testimony of fellow ship-mate Steven Nix, who testified that Petitioner may have seemed remorseful for his crimes. (ST, 173). In response to this testimony, and over defense counsel's objections, the State presented the testimony of Dr. Robert Storms, the State's mental health expert that evaluated Petitioner prior to trial. (ST,

241-261). Dr. Storms testified that Petitioner referred to the victim as an "asshole" and a "hillbilly." (ST, 249).

On direct appeal Petitioner raised this objection and argued that under Estelle v. Smith, 451 U.S. 454, 467-469, 101 S.Ct. 1866 (1981), it was error for the trial court to have allowed Dr. Storms to testify as Petitioner chose not to present his own mental health experts. The Georgia Supreme Court rejected this claim on direct appeal but later overruled this decision in Nance v. State, 272 Ga. 217, 526 S.E.2d 560 (2000). Petitioner now claims that the decision in Nance created an intervening change in the law that warrants the grant of his successive state habeas petition. However, this Court finds this claim is barred from review under the doctrine of *res judicata*.

The Georgia Supreme Court rejected this claim on direct appeal and denied Petitioner's application for certificate of probable cause to appeal filed in response to the Court's decision in Nance. Hittson v. State, 264 Ga. at 683-685 (2) (application for certificate of probable cause to appeal denied September 29, 2000; Petitioner's motion for reconsideration denied January 5, 2001). Additionally, Petitioner raised this as Claim One in his original federal habeas petition but the federal habeas court also recognized that this claim has been exhausted, finding that "[i]t appears

that Petitioner's original federal habeas petition contained only exhausted claims," (Petition, Appendix A, pp. 6-7); See also *Petition for Writ of Habeas Corpus by a Person in State Custody, Hittson v. Head*, Middle District of Georgia, Case No. 5:01-CV-384-4 (DF)).

Petitioner argues in his current Petition that under Bruce v. Smith, 274 Ga. 432, 553 S.E.2d 808, (2001), this claim is not procedurally barred. (Petition, 22-23). In Bruce v. Smith, Bruce raised a claim regarding a jury charge that had been denied on direct appeal but was later overruled in Bishop v. State, 271 Ga. 291, 519 S.E.2d 206 (1999). The Georgia Supreme Court in Bruce chose to apply Bishop retroactively and therefore determined that Bruce was not procedurally barred from raising this claim during his second state habeas as it created an intervening change in the law. Bruce v. Smith, 274 Ga. at 433-437. However, this Court finds that the decision in Nance does not apply retroactively to Petitioner's case, therefore, no intervening change in the law exists to excuse the procedural bar to this claim.

Nance did not set forth a new rule of constitutional dimension, but merely narrowed an existing rule of criminal procedure. "[A] new rule of criminal procedure generally applies only to those cases on direct review or not yet final, and **would not** apply to cases on collateral review." Luke v.

Battle, 275 Ga. 370, 565 S.E.2d 816 (2002) (emphasis added).

New rules of criminal procedure are not applied retroactively to cases that have become final unless the new rule falls within two narrow exceptions. Luke, 275 Ga. at 373 n. 25, citing Teague v. Lane, 489 U.S. 288, 310 (1989).

The first exception applies to a new rule that "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" Teague, 489 U.S. at 311, citing Mackey v. United States, 401 U.S. 667, 692 (1971). The first exception does not apply to Petitioner because the question of when a State mental health expert may testify does not involve placing any of Petitioner's convicted felonies beyond proscription.

The second exception applies to a rule that "requires the observance of 'those procedures that ... are 'implicit in the concept of ordered liberty.'" Teague, 489 U.S. at 311, citing Mackey, 401 U.S. at 693. The second exception was limited by the Teague court to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." Teague, 489 U.S. at 313. As explained by the United States Supreme Court, "Although the precise contours of this exception may be difficult to discern, we have usually cited Gideon v. Wainwright, 372 U.S. 335 (1963), holding that a defendant has the right to be represented by counsel in all criminal trials

for serious offenses, to illustrate the type of rule coming within the exception." Saffle v. Parks, 494 U.S. 484, 495 (1990). Here, the narrowing of a procedural rule regarding mental health testimony is not the Gideon v. Wainwright type of rule coming within the second exception under Teague that would affect the accuracy of Petitioner's convictions.

The only other way to retroactively apply the holding in Nance would be if Nance announced new substantive criminal law, which is not the case here. See Luke v. Battle, 275 Ga. 370; 565 S.E.2d 816 (2002) (following the decision in Bousley v. United States, 523 U.S. 614, 620-621 (1998), in which "[t]he [United States Supreme] Court held that when it decides the 'meaning of a criminal statute' and decides that the statute 'does not reach certain conduct,' it has made a ruling of substantive criminal law."). Luke v. Battle, 275 Ga. at 372.

Accordingly, this Court finds that the Georgia Supreme Court's denial of Petitioner's request for certificate of probable cause to appeal after the decision in Nance bars Petitioner's claim under the doctrine of *res judicata*.<sup>2</sup>

Alternatively, this Court finds Petitioner's Fifth Amendment rights were not violated here merely because a state

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<sup>2</sup> Alternatively, this Court finds that as Nance did not create an intervening change in the law, the original denial of Petitioner's Estelle claim during direct appeal would also bar this claim under the doctrine of *res judicata*.

procedural rule was narrowed and that impacted the use of a defendant's statements against him. To adopt Petitioner's logic is to find that every procedural rule is a constitutional rule merely because every procedural rule can trace its original underpinnings back to the state or federal constitution; that is plainly not the standard announced in Black, *supra*. Instead, Petitioner must show harmful error, which the Court finds Petitioner has failed to do.

In Nance, under a similar factual scenario, the defense decided against presenting testimony from mental health experts during the guilt/innocence phase. Nevertheless, over Nance's objections, the trial court allowed the State to present its mental health expert during the guilt/innocence phase who testified that Nance "told her he ingested cocaine, Dom Perignon, and marijuana" the day of the crime. Nance, 272 Ga. at 219. However, the Georgia Supreme Court concluded that "the evidence that Nance ingested alcohol and illegal drugs on the morning of the murder was harmless due to the overwhelming evidence of his guilt." Id. at 220-221.

In his Petition, Petitioner cites to Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967), as controlling precedent on the burden of proof required to prove harmless error. However, the United States Supreme Court held that the standard for

determining whether habeas relief must be granted is not beyond a reasonable doubt, but rather whether the

...error 'had substantial and injurious effect or influence in determining the jury's verdict.' Kotteakos v. United States, 328 U.S. 750, 776, 90 L.Ed. 1557, 66 S.Ct. 1239 (1946). The Kotteakos harmless-error standard is better tailored to the nature and purpose of collateral review than the Chapman standard, and application of a less onerous harmless-error standard on habeas promotes the considerations underlying our habeas jurisprudence.

Brecht v. Abrahamson, 507 U.S. 619, 623, 113 S.Ct. 1710 (1993).

During the sentencing phase Petitioner put on twenty witnesses, spanning two days. Petitioner's witnesses consisted of a coach, life-long friends, military peers and superiors, and family members. These twenty witnesses testified about their opinions of Petitioner's non-violence, gullibility, alcohol problems, and pleaded for mercy on behalf of Petitioner. Dr. Storms was the State's only witness during the sentencing phase. Thus, given the overwhelming evidence of guilt, the minor evidence presented in aggravation and the considerable evidence presented in mitigation, this Court finds that Dr. Storm's testimony did not have a "substantial and injurious effect or influence in determining the jury's verdict" and was therefore harmless.

Accordingly, this Court finds Petitioner's Claim I is procedurally barred from review.

## B. CLAIM II

Petitioner alleges in Claim Two of his Petition that the State's non-disclosure of co-defendant Vollmer's psychiatric report, post-arrest letters written by co-defendant Vollmer, testimony of three witnesses, and certain "key" evidence violated Petitioner's constitutional rights under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). The Court will address each item of evidence in turn and together, those not precluded by procedural default, pursuant to Kyles v. Whitley, 514 U.S. 419, 421 (1995).

### 1. Vollmer's Psychiatric Report

Petitioner alleges in his second state habeas petition that the State withheld Edward Vollmer's, Petitioner's co-defendant, Navy psychiatric report, dated February 8, 1991, in violation of Brady. Petitioner claims this one page report would have helped bolster trial counsel's theory that Vollmer was more intelligent and manipulative than Petitioner and, due to the personality disorder Vollmer was diagnosed with in this report, Petitioner is less culpable for Mr. Utterbeck's death and mutilation. This Court finds that trial counsel were aware of this report and Vollmer's diagnosis of anti-social personality disorder<sup>3</sup> and has failed to prove why this issue could not have been raised at

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<sup>3</sup> Petitioner was also diagnosed with an anti-social personality disorder by his own mental health expert hired prior to trial, Dr. Norman Moore. (REX 7, 5043).

trial, on direct appeal or during his original state habeas corpus petition. (See HTII, 119-120, 171-172). Petitioner must show: constitutional errors or deficiencies; adequate cause for failure to object or to pursue on appeal or during his original state habeas proceeding; and actual prejudice; or, alternatively, a miscarriage of justice in order to overcome the procedural default of this claim. Black, 255 Ga. at 240. This Court finds Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome the procedural default of this portion of his Brady claim.

Under the procedural default doctrine set forth in Black v. Hardin, 255 Ga. 239, 336 S.E.2d 754 (1985), and Valenzuela v. Newsome, 253 Ga. 793, 325 S.E.2d 370 (1985), and codified at O.C.G.A. § 9-14-48(d), issues that were not raised at trial and/or on appeal may not be litigated in a habeas corpus proceeding absent a showing of cause and actual prejudice, or of a miscarriage of justice. O.C.G.A. § 9-14-48(d); Black v. Hardin; Valenzuela v. Newsome; Hance v. Kemp; White v. Kelso, 261 Ga. 32, 401 S.E.2d 733 (1991). Additionally, under the principles set forth in Smith v. Zant, 250 Ga. 645, 301 S.E.2d 32 (1983), and codified in O.C.G.A. § 9-14-51, issues that were not raised in the original state habeas corpus petition are procedurally barred from review in a successive state habeas corpus petition and may not be litigated absent a showing that

the claims could not reasonably have been raised in the original state habeas corpus action or that the claims are constitutionally non-waivable.

Therefore, even if Petitioner has raised a claim in the instant Petition that he could not reasonably have foreseen in order to raise it in his original petition, this does not invalidate application of a procedural bar to his new claim. Petitioner must still show constitutional errors or deficiencies, adequate cause for failure to object or to pursue on appeal and a showing of actual prejudice, or, alternatively, a miscarriage of justice. Black, 255 Ga. at 240. This Court finds Petitioner has failed to meet any of these standards.

Prior to Petitioner's death penalty trial, defense counsel filed a Brady motion requesting that the State produce its files for an *in camera* inspection, including any information that "might mitigate the Defendant's punishment." (R, 203-207; See also, R, 45-52, 184-188). The trial court granted Petitioner's Brady motion and ordered the State to produce its file for an *in camera* inspection, the file was then sealed and sent up to the Georgia Supreme Court for review during Petitioner's direct appeal. (R, 208-209, 1369).

Petitioner was granted access to the District Attorney's file during his first state habeas action pursuant to an Open Records Act request. (Petition, 29; HTI, 423). Also, during

Petitioner's first state habeas, Petitioner filed a Freedom of Information Act request for co-defendant Vollmer's Navy records. Id. However, Petitioner alleged in his first state habeas that the Navy provided an index of items the Navy was withholding, one of which being Vollmer's psychiatric report. (HTI, 423). Petitioner alleges in his second state habeas petition (hereinafter "Petition") that this report was not in the District Attorney's files reviewed during his first state habeas. (Petition, 29). Petitioner goes on to state in his Petition that he again filed an Open Records Act request during his federal habeas action and upon review of the file still did not find Vollmer's psychiatric report. Petitioner was granted discovery in federal court, and as part of that discovery, the federal court ordered that the District Attorney's file sent up on appeal be unsealed for Petitioner's review. (Federal Order, 4/09/03, p. 12).

Petitioner states in his Petition that "Upon review of the Sealed File by federal habeas counsel, Petitioner's counsel discovered the Vollmer Psychiatric Report." (Petition, 30). In the federal court's Order staying Petitioner's federal habeas action pending exhaustion of his new Brady claim in this Court, the federal court states Petitioner discovered Vollmer's psychiatric report in the sealed District Attorney's file and Petitioner "did not have copies of the Navy psychiatric report"

during his first state habeas. (Federal Order, 8/27/04, p. 6). However, attached to the Petition before this Court is the affidavit of Dr. Jerry Lee Brittain (Appendix F), dated October 11, 2002, six months prior to the Federal Court's Order unsealing the District Attorney's files in which Petitioner asserts he discovered Vollmer's Navy psychiatric report, Dr. Brittain relies upon this very report which is affixed to his affidavit as Attachment E. Therefore, at some point prior to Petitioner discovering this report in the District Attorney's sealed file, he had obtained Vollmer's psychiatric report from some unnamed source. This Court has reviewed the entire record and is unable to ascertain where Petitioner initially obtained this report.

During the evidentiary hearing held before this Court, trial counsel, Stephen Hollomon, was questioned extensively about his knowledge of Vollmer's psychiatric report. Mr. Hollomon initially testified that he was unaware of the existence of Vollmer's psychiatric report, however, after he was confronted with his notes (PEX 43) on the subject he corrected his earlier testimony and stated it was "obvious" he was aware of the existence of a report. (HTII, 119-120). Mr. Hollomon went on to explain that Petitioner's Exhibit 43 is notes he took during a telephone conversation with a Navy legal office.

(HTII, 176). Mr. Hollomon translated the following passage from his notes:

Senior Medical Officer Bruce Bonkers, MD, currently attached to Commander Naval Forces Atlantic, Norfolk, Virginia. Staff medical officer reviewed Vollmer and found him to have psychological problems serious enough to be discharged shortly before they killed Utterbeck. Getting into trouble."

(HTII, 119; PEX 43, 4819). Additional notes written on this exhibit reveal that trial counsel was inquiring into the location of Vollmer's Navy records and how trial counsel could obtain these records. (PEX 43, 4819).

Furthermore, Mr. Hollomon admitted he knew Vollmer had been diagnosed with an anti-social personality disorder while in the Navy. (HTII, 171-172). Mr. Holloman was presented with a Navy file obtained from his trial attorney files that states Vollmer was seen by "CDR K. Bohnker" in the medical office of his ship the U.S.S. Forrestal and was diagnosed with an anti-social personality disorder." (HTII, 172; REX 42, 5331). When questioned by this Court when and how trial counsel obtained this document, Mr. Hollomon could not provide the Court with a definitive answer. (HTII, 173-174).

Trial counsel were aware from Navy files contained in their trial attorney files and from speaking with Navy officials that Vollmer had been diagnosed with anti-social personality disorder by the medical staff in the Navy. (HTII, 119, 171-172; PEX 43;

REX 41-42). Even assuming trial counsel did not have this information prior to trial, Petitioner has failed to prove they did not have this information during the direct appeal process. More importantly, Petitioner would have had this information during his original state habeas action.

It is clear from the record before this Court that with "reasonable diligence" trial counsel or his original state habeas counsel could have obtained Vollmer's psychiatric report from a source other than the District Attorney's Office. Petitioner's current counsel obtained Vollmer's report first from a source other than the District Attorney's file. (See Petition, App. F). Therefore, Petitioner has failed to prove cause to overcome the procedural default of this claim.

Petitioner has also failed to establish prejudice. Petitioner called multiple witnesses to testify in support of the defense theory that Vollmer manipulated Petitioner into committing this crime. For example, Michael Barlow testified that Vollmer was intelligent, Petitioner was "kind-of stupid," Vollmer knew Petitioner was not smart, Petitioner was a follower, Petitioner was Vollmer's "little sidekick," and Vollmer liked to "play with people's heads" (ST, 136-140); Steven Nix testified that Vollmer was "a manipulative person," Vollmer was a leader who wanted people to think he was in control, and Petitioner was not a leader (ST, 171); Lonnie

Leverett testified that Vollmer was a "real smart guy," Vollmer was violent with a bad temper, Vollmer tried to manipulate others, and that Petitioner was gullible and wanted someone to "tell him what to do." (ST, 179-181).

The Court finds Petitioner's allegation that "[h]ad the report been available, the jury would not have discounted the testimony of these witnesses on the grounds that their testimony lacked medical foundation," (Petition, p. 33), to be meritless as there is no evidence that the jury discounted the testimony of the defense witnesses. Mere speculation on what weight the jury might have given to Vollmer's psychiatric report does fulfill the prejudice prong of Brady, especially when viewed in conjunction with the extensive testimony of multiple defense witnesses who testified about their real-life, daily impressions and interactions with Petitioner and Vollmer, both before and after the crime, and two of Vollmer's letters, discussed below, which the defense tendered to show Vollmer's anti-social, violent nature. There is nothing in co-defendant Vollmer's psychiatric report that was not constructively heard by the jury multiple times from multiple sources.<sup>4</sup>

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<sup>4</sup> Petitioner's reliance on Head v. Stripling, 277 Ga. 403, 590 S.E.2d 122 (2003), is misplaced as the facts underlying Stripling are not congruent with the facts in Petitioner's case; the suppressed evidence in Stripling tended to refute the State's position at trial that Stripling was not retarded, however in the present case, the State did not refute Petitioner's characterization of co-defendant Vollmer as anti-social and violent.

Petitioner also argues that Vollmer's psychiatric report would have been useful to Petitioner's mental health expert in helping to explain Vollmer's control over Petitioner. In fact, Petitioner's own expert Dr. Brittain stated in his affidavit that in order to properly evaluate the relationship between Petitioner and Vollmer, he would also have to evaluate Vollmer. (Petition, Attachment F, pp. 2-3). Moreover, trial counsel refused to testify that, in light of Vollmer's report, they would have presented Petitioner's mental health expert. (HTII, 184-185). This Court finds Petitioner has failed to prove that Vollmer would have submitted to such an evaluation or that trial counsel would have changed their trial strategy regarding presentation of Petitioner's mental health expert.

Therefore, as an examination of Vollmer's psychiatric report establishes that even if the report had been obtained and presented by trial counsel there is no reasonable probability that the outcome of Petitioner's trial would have been different, this Court finds Petitioner has also failed to establish prejudice to overcome the procedural default of this claim.

Accordingly, this Court finds this portion of Petitioner's Brady claim to be procedurally defaulted

Alternatively, this Court also finds Petitioner has failed to establish the necessary prongs of Brady to succeed under this

claim. Petitioner failed to prove that trial counsel could not have obtained this report through reasonable diligence and has also failed to show that there is a reasonable likelihood that the outcome of Petitioner's trial would have been different had this information been presented to the jury.

In order to establish a violation of a Petitioner's due process rights in violation of Brady v. Maryland and its progeny, the Petitioner must show "(1) that the State possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceeding would have been different." Zant v. Moon, 264 Ga. 93, 440 S.E.2d 657 (1994) (citing United States v. Meros, 866 F.2d 1304 (11th Cir. 1989) (cert. denied), 493 U.S. 392 (1989)).

Exclusion of evidence may be harmless if the evidence of Petitioner's guilt of malice murder is overwhelming. See Peterson v. State, 274 Ga. 165, 549 S.E.2d 387 (2001); See also Veasley v. State, 275 Ga. 516, 518, 570 S.E.2d 298 (2002) (constitutional error can be deemed harmless when evidence of guilt is so overwhelming that it negates the possibility that

the tainted evidence contributed to the verdict) (citing Vaughn v. State, 248 Ga. 127 (2), 281 S.E.2d 594 (1981)).

Moreover, if evidence withheld under Brady is "either immaterial, cumulative of other evidence, or known to or within [the defendant's] power to produce," there is no error. Golden v. Georgia Bureau of Investigation, 198 Ga.App. 115, 118, 400 S.E.2d 668, 671 (1990). The Georgia Supreme Court has held that newly discovered evidence that is "merely cumulative of other evidence which the defendant presented" at trial "is not so material that it would probably produce a different verdict." Ingram v. State, 276 Ga. 223, 224, 576 S.E.2d 855, 857 (2003). Finally, the Eleventh Circuit has held that even if undisclosed information arguably contains Brady material, failure to disclose is "harmless error" if the evidence "was merely cumulative." United States v. Dekle, 768 F.2d 1257 (11th Cir. 1985). See also Peterson v. State, 274 Ga. 165, 549 S.E.2d 387 (2001) (When substantial similar evidence has already been admitted, it is highly probable that any additional cumulative evidence would not affect the verdict; therefore, any erroneous exclusion of that evidence is harmless).

This Court finds Petitioner has failed to meet the requirements of the second prong of Brady. As discussed above, trial counsel was aware of Vollmer's Navy psychiatric report and diagnosis of anti-social personality disorder. Further,

Petitioner has failed to prove that his original state habeas counsel could not have discovered this report from a source other than the State with reasonable diligence as Petitioner's current counsel obtained this report by means other than the District Attorney's file. Therefore, this Court finds Petitioner has failed to prove that he could not have obtained this report through reasonable diligence from a source other than the District Attorney's office during trial, direct appeal or during his original state habeas proceeding.

Furthermore, the evidence against Petitioner at trial was overwhelming. Petitioner voluntarily gave multiple confessions to law enforcement describing the crimes with minute details that only the perpetrator could possibly know. An eyewitness observed co-defendant Vollmer's car on the day after the murder with two occupants emerging from the dirt road where the victim's torso was found two months later. Police recovered the baseball bat that Petitioner described as using to beat the victim. Police recovered scissors described by Petitioner as those used to skin the victim. Police recovered the victim's cut-up body parts that were buried in Georgia and Florida based on information from Petitioner. The fatal bullet fired by Petitioner into the victim's skull was recovered, and blood was found at the murder scene of the same type as the victim.

Given this enormous body of evidence against Petitioner, there is simply no doubt that Petitioner is guilty of malice murder and that the inclusion of co-defendant Vollmer's psychiatric report would have had no effect on this verdict.

Further, assuming the psychiatric report was admitted at trial, any alleged Brady material would have been cumulative as multiple witnesses testified about co-defendant Vollmer's violence, Vollmer's pre-crime interaction with Petitioner and others, and Vollmer's manipulative nature, in addition to the two Vollmer letters, discussed below, which the defense tendered to show Vollmer's anti-social, violent nature.

Thus, any error flowing from the non-disclosure of co-defendant Vollmer's psychiatric report was harmless in that it could not have created a reasonable probability that the sentence would have been different and the report was merely cumulative of other testimony and evidence offered at trial.

#### **1. Post-Arrest Letters**

In section B of Claim II, Petitioner alleges that letters written by Vollmer to Joleen Ward, post-arrest, were withheld by the State in violation of Brady. The Court finds that State did improperly withhold the post-arrest letters written by Vollmer to Ms. Ward, however, Petitioner was not prejudiced by the non-disclosure and the error was harmless.

As stated above, the District Attorney turned over his entire file to the trial judge for an *in camera* inspection prior to trial in January of 1993. (See Pre-trial Hearing, 1/20/93, p. 5). According to a chain of custody receipt, (PEX 11, 811), the Navy received the post-arrest letters on February 25, 1993, the first day of Petitioner's death penalty trial. There is no evidence before this Court proving when the District Attorney's Office received these letters, but it is clear from District Attorney Lukemire's testimony at the evidentiary hearing held before this Court and D.A. Lukemire's handwritten notes that he did receive the letters. (HTII, 472-473; PEX 58). These letters were not part of the file turned over for the *in camera* inspection. (See R, 448-1297). Petitioner states that these letters were not included in the District Attorney's file reviewed by Petitioner's counsel during the original state habeas proceeding. Therefore, this Court finds this portion of Petitioner's Brady claim is properly before this Court.

Petitioner alleges that the suppression of Vollmer's post-arrest letters creates a "reasonable probability that that the result of the proceedings would have been different." (Petition, 43-44). Specifically, Petitioner alleges statements in the post-arrest letters stating how the cops had "bungled the investigation", how Vollmer picked the judge and jury, and how only Vollmer and one other person knew what happened and he

(Vollmer) would refuse to ever say what was the motive of the killing, would have helped prove trial counsel's theory that Vollmer was "manipulative and controlling." (Petition, pp. 40-41).

As previously stated, in order to prevail on a Brady claim, Petitioner must prove, "(1) that the State possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceeding would have been different." Zant v. Moon, 264 Ga. 93, 440 S.E.2d 657 (1994) (citing United States v. Meros, 866 F.2d 1304 (11th Cir. 1989) (cert. denied), 493 U.S. 392 (1989)). Additionally, as also previously stated, The Georgia Supreme Court has held that newly discovered evidence that is "merely cumulative of other evidence which the defendant presented" at trial "is not so material that it would probably produce a different verdict." Ingram v. State, 276 Ga. 223, 224, 576 S.E.2d 855, 857 (2003).

During trial, trial counsel filed a notice to produce letters written by Mr. Vollmer, (R, 361), and were eventually successful in securing two letters. Trial counsel then presented those letters at trial to support their theory that

Mr. Vollmer was the mastermind of the crimes and to demonstrate Mr. Vollmer's obsession with violence, gore, and death. (HTI, 89-90). In the first of those letters, Vollmer wrote:

- "all there is to do is get drunk or get laid"
- "I'm going to get that red headed sack of shit and make him suffer hardship and woe of biblical proportions. Then I'll outright kill him."
- "I spit on his lifeless body for you."

(Defendant's Exhibit 2, ST, 425-426).

In this same letter, Vollmer details how he would kill the boyfriend of his female friend. At Petitioner's trial, Rachel Smith, to whom this letter was written, read to the jury the entire section describing Petitioner's murder plan. (TT, 217-219).

In a second letter introduced at trial by Petitioner, Vollmer wrote:

- "I have earned the title "Billy Bad Ass."
- "I can shit plutonium."
- "I am Sir Edward Paul Vollmer I, King of the Knights of Death. I carried a pistol in my P-coat at school and when I went to gang fights I carried that pistol and a sawed-off shotgun."
- "I'm not afraid of dying and I have no problems with killing anyone. Hand me \$500 cash and I'll kill whoever you point your finger at."
- "Now then, you remember who I am and have some sympathy for the devil."

(Defendant's Exhibit 3, ST, 427-429).

Petitioner also introduced uncontested testimony of several live witnesses describing Vollmer as manipulative and arrogant. Petitioner's assertion that "[a]ny information that added to the portrayal of Vollmer as manipulative, deceitful, and dominant would have strengthened the mitigation case" ignores the cumulative nature of this evidence. See Peterson v. State, 274 Ga. 165, 549 S.E.2d 387 (2001) (When substantial similar evidence has already been admitted, it is highly probable that any additional cumulative evidence would not affect the verdict; therefore, any erroneous exclusion of that evidence is harmless).

Additionally, there was an enormous body of evidence against Petitioner, discussed above, proving beyond a reasonable doubt that Petitioner beat the victim in the head with a baseball bat, shot him, participated in the mutilation and burial of the body and concealment of the crime.

To prevail on his Brady claim Petitioner must show "that the favorable evidence could reasonably be taken to put the **whole case** in such a different light as to **undermine confidence in the verdict.**" Kyles, 514 U.S. at 435 (emphasis added). "[S]howing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a Brady violation, without more." Kyles, 514 U.S. at 437. Therefore,

any error flowing from the non-disclosure of co-defendant Vollmer's post-arrest letters was harmless in that it could not have created a reasonable probability that the sentence would have been different, the letters were merely cumulative of other evidence and testimony offered at trial, and there was overwhelming evidence of Petitioner's guilt.

Accordingly, this Court finds there is no reasonable probability that this jury would have decided Petitioner's sentence differently had these post-arrest letters been produced at trial and DENIES this claim.

### 3. Other Witnesses

Petitioner alleges in his Petition that the State spoke with three witnesses, Christopher Landin, Diana McCarty and Connie Michelle Vollmer, who provided information "material to Petitioner's mitigation case" and withheld this information from trial counsel in violation of Brady. (Petition, 44). However, Petitioner has failed to present an argument or evidence explaining why this claim was not raised on direct appeal or during his first state habeas. As Petitioner bears the burden of proof for all elements of his claim, this Court finds this claim procedurally defaulted. See Black v. Hardin, Valenzuela v. Newsome, *supra*.

During Petitioner's federal habeas action he filed a *Motion for Discovery* in which he admits that the Georgia Resource

Center, his counsel during first state habeas, interviewed Christopher Landin, Diana McCarty and Connie Michelle Vollmer and obtained the affidavits he now submits in his second state habeas action. (Motion for Discovery, 10/15/02, pp. 13-14). Petitioner has failed to provide this Court with an argument explaining why these individuals were not available to trial counsel, during direct appeal or during Petitioner's original state habeas action.

Trial counsel presented twenty lay witnesses during the sentencing phase of Petitioner's trial, a dozen of which were shipmates of both Petitioner and Vollmer. Consequently, Christopher Landin, a fellow shipmate, and his wife Diane McCarty, would have been discoverable to trial counsel. Although trial counsel testified before this Court that they could not recall speaking with Connie Vollmer, notes from their trial attorney files prove trial counsel were aware of her maiden name, social security number and a possible address. (HTII, 170; REX 45). Mr. Hollomon testified that counsel did not have time to find Connie Vollmer. (HTII, 170).

Petitioner alleges in his Petition that the State's interviews with Landin, McCarty and Connie Vollmer were contained in the State's files. (Petition, p. 46). Files taken from the District Attorney's files admitted by this Court in Petitioner's current state habeas action do contain notations

regarding these individuals but do not prove that the State did in fact interview these individuals. (See PEX 12, 823-824; PEX 37A, 2463; PEX 58, 4875; Petitioner's exhibits 12 and 58<sup>5</sup> appear to have been obtained from the District Attorney's file and Petitioner's exhibit 37A is from the sealed portion of the Record on Appeal containing the District Attorney's files). District Attorney Lukemire could not recall interviewing any of these individuals. (HTII, 336). Jon Holland of the Houston County Sheriff's Office testified that he recalled a phone conversation with Connie Vollmer shortly after Vollmer was arrested in which she expressed concern for her safety but did not discuss the details of the case with her. (HTII, 360).

Therefore, based upon a review of the evidence and arguments presented to this Court, Petitioner has failed to prove that the State withheld any documentation regarding interviews of Landin, McCarty and Ms. Vollmer. Petitioner has also failed show that the few documents from the District Attorney files containing notations referencing these individuals, specifically PEX 12 and PEX 58, were not available to Petitioner during his first state habeas. Further, Petitioner has failed to show that trial counsel could not have,

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<sup>5</sup> Counsel for Petitioner, Mr. Dunn, stated during the evidentiary hearing that PEX 58 came from the District Attorney files but did not indicate when he obtained this document from the District Attorney's files. (HTII, 459).

with reasonable diligence, interviewed these individuals. Petitioner's counsel of record during his original state habeas, the Georgia Resource Center, interviewed and obtained affidavits from these individuals prior to obtaining the sealed portion of the District Attorney's file or the District Attorney's file produced pursuant to the federal court's order. Consequently, Petitioner has not proven that either trial counsel or Petitioner's first state habeas counsel could not have found and interviewed these individuals in his previous state court actions. Thus, this Court finds that Petitioner has failed to prove cause to overcome the procedural default of this Brady claim.

Furthermore, as discussed above, trial counsel presented twenty witnesses during the sentencing phase that testified about Vollmer's evil and manipulative nature and Petitioner's gullibility under Vollmer's control. The Court finds that the information contained within the affidavits of Landin, McCarty and Connie Vollmer is cumulative of the information presented at trial and does not create a reasonable probability that the outcome of the trial would have been different had this testimony been introduced. Thus, this Court finds Petitioner has also failed to prove prejudice to overcome the procedural default of this claim. Accordingly, this Court find this claim is procedurally defaulted.

Alternatively, this claim also fails to establish a Brady violation. As discussed above, in order to establish a violation of a defendant's due process rights in violation of Brady, Petitioner must show "(1) that the State possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceeding would have been different." Zant v. Moon, 264 Ga. 93, 440 S.E.2d 657 (1994) (citing United States v. Meros, 866 F.2d 1304 (11th Cir. 1989) (cert. denied, 493 U.S. 392 (1989))).

Given Petitioner's original state habeas counsel's ability to obtain this testimony prior to discovery in his federal habeas action, this Court finds Petitioner has failed to prove that he was unable to obtain this testimony with reasonable diligence during his preceding state court actions. Additionally, as discussed above, and contrary to Petitioner's interesting characterization of this information as "unique," (Petition, 46), this information was exhaustively covered at trial through multiple defense witnesses and exhibits. Therefore, this Court finds this cumulative evidence would not

have been so prejudicial as to create a reasonable probability that the outcome of the trial would have been different.

#### **4. Other "Key" Evidence**

Petitioner alleges in Section D of Claim II of his Petition that certain "key" evidence was withheld by the State in violation of his rights under Brady. This Court finds that Petitioner has failed to prove that trial counsel were not aware of this evidence, that the State "withheld" this evidence or that these allegations could not have been raised during trial, direct appeal or in his first state habeas corpus petition. Consequently this Court finds this portion of Petitioner's Brady claim is procedurally defaulted. See Black v. Hardin, Valenzuela v. Newsome, *supra*.

##### **a. Tissue Samples**

Petitioner alleges that the State "never revealed that the GBI possessed tissue samples from the victim" during the autopsy. (Petition, 49-50). Petitioner goes on to explain that this evidence could have proven that the victim was dead prior to mutilation. Dr. John J. Lazarchick conducted the autopsy of

the head, hands and feet, and Dr. John B. Parker<sup>6</sup> conducted an autopsy of the torso and the heads, hands, and feet. (TT, 304, 402, 411). Petitioner admits in his Petition that Dr. Parker testified during trial that he took a portion of the victim's skin from his chest and examined it under the microscope. (TT, 419, 425-426). As trial counsel were aware that Dr. Parker had taken a portion of Petitioner's skin and examined it under the microscope, they were aware that skin samples had been taken from the body.

In Petitioner's federal habeas corpus action, Petitioner requested the court grant him discovery regarding the time of death and dismemberment as it related to his claims of ineffective assistance of counsel and his claim that his death sentence was imposed arbitrarily. (See Order Denying in Part and Granting in Part Petitioner's Motion for Leave to Conduct Discovery, 4/10/03, p. 15). In support of this request, Petitioner submitted the affidavit of Dr. Brian Frist, the same affidavit submitted to this Court, a medical examiner who evaluated the relevant evidence, including the aforementioned

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<sup>6</sup> Interestingly, as Petitioner concedes, Dr. Parker's trial testimony supports Petitioner's claim that the victim was dead when he was dismembered. (TT, 422-423). Therefore, Petitioner's argument that faults the State for "failing to examine or test the skin despite its evidentiary value," (Petition, 49), is meritless as the State expert Dr. Parker agreed with the defense that the victim was already dead when Petitioner and co-defendant Vollmer cut him to pieces.

allegedly suppressed tissue slides. The federal court denied this portion of Petitioner's motion for leave to conduct discovery because Petitioner had failed to present any evidence to prove why he could not have consulted with an independent medical examiner and presented this claim during his original state habeas corpus action.<sup>7</sup> Id.

This Court agrees with the federal court. Although Petitioner argues that trial counsel were allegedly unable to obtain the crime scene photographs from the District Attorney, this does not prove that the GBI would have withheld the tissue samples taken during the autopsy. In fact, Petitioner's own evidence belies this fact. In the expert affidavits attached to Petitioner's current Petition and *Motion for Discovery* in federal court, it is shown that the tissue samples were promptly produced by the GBI to Petitioner's experts after requested. (Petition, Attachment I; Motion for Discovery, 10/15/02, Attachment D, Affidavit of Lisa Harris). Therefore, this Court finds that Petitioner has failed to prove cause to overcome the procedural default of this claim as he has failed prove this evidence was not available during trial, on direct appeal or during his first state habeas action.

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<sup>7</sup> The United States District Court, Middle District of Georgia, ordered a stay in Petitioner's federal state habeas action so that Petitioner may exhaust only his **new** Brady claims. These new claims did not allegations regarding the tissue samples.

Furthermore, Petitioner has also failed to prove prejudice in order to overcome his procedural default. The trial court gave the following instruction regarding statutory aggravating circumstances:

Under the law of this State, the following may constitute statutory aggravating circumstances:

A: Where the offense of murder was committed while the defendant was engaged in the commission of aggravated battery. In this connection, I charge you that a person commits the offense of aggravated battery when they maliciously cause bodily harm to another by depriving him of a member of his body, by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof.

B: Where the offense of murder was outrageously or wantonly vile, horrible, or inhuman, in that it involved:

- 1: Depravity of mind; or
- 2: Torture to the victim **prior to the death of the victim**; or
- 3: Aggravated battery to the victim **prior to death of the victim**.

(ST. pp. 305-306). (emphasis added).

The jury recommended the following sentence:

We, the jury, recommend that the death of penalty be imposed. And we find the following statutory aggravating circumstance or circumstances. Where the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved depravity of mind.

(ST, pp. 318-319). As the jury did not find that the victim was still alive when he was dismembered by Petitioner and Vollmer, introduction of further evidence to prove a point of evidence rejected by the jury would be moot.

Accordingly, this Court finds this portion of Petitioner's Brady claim is procedurally defaulted.

**b. Blood-Stained Sheet**

Petitioner alleges in his Petition that a blood-stained sheet, found by Rachel Reid, with a possible piece of skin, was discovered in an apartment shared by Vollmer, Petitioner and other shipmates, was suppressed by the State in violation of Brady. Petitioner argues that had this sheet been tested it *may* have helped prove that the victim died prior to the mutilation or that the skin was kept as part of some satanic ritual. For reasons which will be discussed below, the Court finds this claim is also procedurally defaulted.

Petitioner alleges that trial counsel were unaware of this bloody sheet, however, trial counsel's files prove otherwise. Trial counsel's files contain two navy reports referencing a blood-stained sheet found by Rachel Reid in the apartment in which both Vollmer and Hittson lived. (REX 38, 5291-92). Furthermore, notes identified by trial counsel, Mr. Hollomon, stating, "Rachel told him [Alan Whaley, a shipmate of both Petitioner and Vollmer] about blood stained sheet" prove trial counsel was aware of the blood-stained sheet. (HTII, 189; REX 39, 5309). Further, Petitioner was aware of the blood-stained sheet prior to discovery during his federal habeas proceeding. (Motion for Discovery, 10/15/02, p. 18).

Additionally, Petitioner has failed to show how trial counsel would have succeeded in presenting this evidence at trial as the chain of custody would have kept such evidence out of a capital trial. Although the sheet was reportedly taken from the apartment in which both Petitioner and Vollmer lived, Petitioner has failed to present any evidence to prove to whom the sheet or alleged skin belonged. (PEX 16A). District Attorney Lukemire testified that part of the reason he declined having the sheet tested was due to the poor chain of custody.<sup>8</sup> (HTII, 456). Therefore, even assuming the skin was taken for occult purposes, without positive identification of the person who had possession of the sheet and skin, it would be inadmissible speculation as to whom the evidence belonged.

As for Petitioner's theory that the skin would help prove the victim was dead prior to mutilation, this Court finds that the testing of the skin, assuming it is actually skin from the victim, would only prove that that piece of skin was removed prior to or after death. A single piece of skin would not prove that the entire mutilation happened after the victim has ceased living. More importantly, as held above, the jury did not find that the victim had been tortured prior to death making the submission of such evidence ineffectual.

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<sup>8</sup> Jon Holland of the Houston County Sheriff's Office testified that his office did an exhaustive search and could not locate the blood-stained sheet found by Rachel Reid. (HTII, 361-362).

Accordingly, this Court finds Petitioner has failed to prove cause and prejudice to overcome the procedural default of this claim.

**c. Navy Consultation With Greg George**

Petitioner alleges the State suppressed the Naval Investigative Service's (NIS) consultation with Greg George of the Bradenton Police Department in Florida "regarding the bizarre and disturbing condition of the corpse." (Petition, 51).<sup>9</sup> This Court finds Petitioner has failed to show that trial could not have obtained such evidence or that the Navy's interview with Mr. George contained exculpatory or material evidence in Petitioner's case.

As stated several times above, in order to prevail on a Brady claim Petitioner must prove that the he could not have obtained the evidence "with any reasonable diligence" and "that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceeding would have been different." Zant v. Moon, 264 Ga. 93, 440 S.E.2d 657 (1994). Further, "Evidence is material only if there is a 'reasonable probability' that, had the evidence been disclosed to the defense, the result of the proceeding would have been

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<sup>9</sup> District Attorney Lukemire testified that he did not recall ever discussing the occult nature of the crime. Jon Holland, of the Houston County Sheriff's Office testified that, other than the mutilation of the victim's body, there was not evidence of the occult. (HTII, 358, 476).

different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

U.S. v. Bagley, 473 U.S. 667, 682 (1985). The mere fact that some undisclosed information might have helped the defense does not establish its materiality in a constitutional sense.

Castell v. State, 250 Ga. 776, 301 S.E.2d 234 (1983).

The interview with Mr. Greg George contains information about the possible occult nature of the crimes committed by Petitioner and Vollmer. Mr. George never identifies Petitioner or Vollmer but merely attempts to explain the possible motivations of the killing and mutilations, how to conduct an interview with individuals practicing in the occult and evidence to look for at the burial sites to indicate a ritual killing. Therefore, as it is Petitioner's current theory and his theory at trial that Petitioner followed Vollmer, this information could have been used by the State to also show that Petitioner was involved in the occult. For example, Mr. George stated the following in the interview, "The killing appears to be a psycho sexual ritual with very powerful sexual overtones...they obviously took a lot of time and enjoyed alot (sic) of pleasure out of killing the victim...It's sharks during a feeding frenzy but more methodical." (PEX 18, 873). As Petitioner confessed to committing the actual murder of Mr. Utterbeck, this Court finds this interview to be exceedingly inculpatory.

Additionally, trial counsel testified before this Court that they were aware of the occult nature of the crimes and their notes reveal they also investigated this aspect of the case, however, trial counsel chose not to present evidence of the occult. (HTII, 166-169; REX 35-37). Mr. Hollomon testified to the following regarding why counsel did not question their sentencing phase witnesses about Vollmer's interest in the occult:

Well, you know, there probably would be a reason why I wouldn't ask about that. You know, it very well might be that, you know, the fact that he played Dungeons and Dragons wouldn't necessarily correlate to, you know, our theory of the case. It might be, you know, that the satanic aspects of the case really didn't play out to be as involved as, you know, we might have thought. I think, personally, I thought that the satanic issue probably was the one that was on the money in the beginning, but the more I talked about this case to people that knew them the more it occurred to me that it was less about the satanic aspect and more just about the two individuals involved and their interplay with one another.

(HTII, 169).

Consequently, this Court finds Petitioner has failed to show that trial counsel was unaware Vollmer's alleged association with the occult and therefore could have, and possibly may have, contacted an expert in the field of occult homicides. Most importantly, Petitioner has failed to show that the testimony of Mr. George would have created a "reasonable

probability" that the result of the proceeding would have been different.

Accordingly, this Court DENIES this portion of Petitioner's Brady claim.

#### 5. Cumulative Brady Review

As explained and held above this Court finds Petitioner has failed to prevail under Claim II which contains his Brady allegations. The Court finds that each Brady allegation was either barred for procedural reasons, without merit or constituted harmless error. As there was only one claim, the post-arrest letters, that Petitioner was able to prove was an actual Brady violation, the Court finds that a cumulative review of the evidence as mandated by Kyles v. Whitley, 514 U.S. 419, 436 (1995), is unnecessary.

In the alternative, were this Court to consider all of the evidence alleged in Claim II of his Petition was suppressed, this Court would find that the "cumulative effect" of this evidence would still fail to establish a Brady violation. Petitioner argues that the evidence supporting Claim II would have provided further proof that co-defendant Vollmer manipulated Petitioner into committing the murder, mutilation and concealment of the crimes and that the mutilation occurred after the victim had died. Trial counsel presented the testimony of many witnesses who personally knew Vollmer and

Petitioner, had interacted on a daily basis in closed quarters aboard a Navy ship, and testified about Vollmer's manipulative, arrogant and evil personality and how Petitioner was taken in by Vollmer. This Court fails to see how further evidence in the form of a Navy psychiatric report and lay witnesses that simply restate this evidence and post-arrest letters written by Vollmer, that are entirely similar to the letters read at trial, would have created a reasonable probability of a different result. Taking that evidence in conjunction with a blood-stained sheet, with no proper chain of custody, another medical expert concluding with the testimony of one of the State's medical examiners that the mutilation happened after the victim had died, and the testimony of an expert in the field of the occult that paints Petitioner in similarly sadistic light as Vollmer, also fails to establish that there is reasonable probability that Petitioner's convictions and sentences would have been different.

Petitioner confessed to swinging the bat that assaulted the victim and to being the triggerman of the pistol that ultimately took Mr. Utterbeck's life. He also confessed to participating in the mutilation and burial of the body. The Court in Kyles held:

Bagley's touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the

defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

Kyles, 514 U.S. at 434. See also Strickler v. Greene, 527 U.S. 263, 289-290 (1999). Therefore, this Court finds that cumulative evidence of Vollmer's personality traits and cumulative evidence that the mutilation occurred after the murder does not undermine confidence in verdicts found at Petitioner's death penalty trial.

### C. CLAIM III

Petitioner alleges that his death sentence is disproportionate punishment. This Court finds that Claim III is successive as not only could Petitioner pursue this claim on appeal, Petitioner did pursue this claim on appeal, and the Georgia Supreme Court rejected this claim in Hittson v. State, 264 Ga. at 688. Thus, this claim is barred under the doctrine of *res judicata* and not reviewable by this Court. See Elrod v. Ault, *supra*, and Gunter v. Hickman, *supra*. Further, Petitioner has not shown a substantial denial of constitutional rights to warrant relief as a miscarriage of justice.

Alternatively, the Court finds that Petitioner has not shown any substantive change in facts or law that would warrant a repeated proportionality review of this sentence. See Davis v. Turpin, 273 Ga. 244, 245, 539 S.E.2d 129 (2000); Brown v.

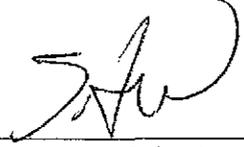
Ricketts, 233 Ga. 809, 213 S.E.2d 672 (1975) (One review on the merits, whether on habeas corpus or on appeal of conviction, is sufficient, if neither the facts nor the law has changed).

Accordingly, this claim is procedurally barred from review.

#### IV. DISPOSITION

Based upon the findings of fact and conclusions of law, this Court hereby orders that the writ of habeas corpus is DENIED as to the conviction and to the sentence. The Clerk for the Superior Court of Butts County, Georgia, is directed to serve a copy of this Order on the Petitioner, Counsel of Record for the parties, and the Council of Superior Court Judges of Georgia.

IT IS SO ORDERED this 26 day of JAN, 2009.

  
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THOMAS WILSON, Chief Judge  
Superior Court of Butts County

Prepared by:  
Sabrina D. Graham  
Assistant Attorney General  
40 Capitol Square, S.W.  
Atlanta, Georgia 30334-1300  
(404) 656-7659

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing *Proposed Final Order*, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed, upon:

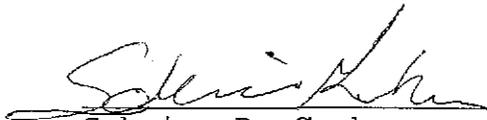
Honorable Thomas H. Wilson  
Chief Judge, Towaliga Circuit  
One Courthouse Square, 2<sup>nd</sup> Floor  
P.O. Box 950  
Forsyth, GA 31029

*Courtesy copy to:*

Thomas H. Dunn  
Georgia Resource Center  
303 Elizabeth Street, N.E.  
Atlanta, Georgia 30307

Alexander J. Lathrop  
Heller Ehrman LLP  
1717 Rhode Island Avenue, NW  
Washington, DC 20036

This 12th day of January, 2009.

  
Sabrina D. Graham  
Assistant Attorney General

# **APPENDIX F**

Supreme Court of the United States  
Office of the Clerk  
Washington, DC 20543-0001

Scott S. Harris  
Clerk of the Court  
(202) 479-3011

December 3, 2014

Mr. Brian Kammer  
Georgia Resource Center  
303 Elizabeth Street, NE  
Atlanta, GA 30307

Re: Travis Hittson  
v. Bruce Chatman, Warden  
Application No. 14A549

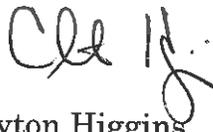
Dear Mr. Kammer:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on December 3, 2014, extended the time to and including February 22, 2015.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by 

Clayton Higgins  
Case Analyst

**Supreme Court of the United States  
Office of the Clerk  
Washington, DC 20543-0001**

**Scott S. Harris**  
Clerk of the Court  
(202) 479-3011

**NOTIFICATION LIST**

Mr. Brian Kammer  
Georgia Resource Center  
303 Elizabeth Street, NE  
Atlanta, GA 30307

Clerk  
United States Court of Appeals for the Eleventh Circuit  
56 Forsyth Street, N.W.  
Atlanta, GA 30303

No. 14-\_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

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TRAVIS CLINTON HITTSON,

Petitioner,

-v-

GDCP WARDEN,  
Georgia Diagnostic Prison,

Respondent.

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**CERTIFICATE OF SERVICE**

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This is to certify that I have served a copy of the foregoing document this day by U.S. Mail, first class postage prepaid, on counsel for Respondent at the following address:

Sabrina Graham, Esq.  
Assistant Attorney General  
132 State Judicial Building  
40 Capitol Square, S.W.  
Atlanta, Georgia 30334-1300

This the 23<sup>rd</sup> day of February, 2015.

  
\_\_\_\_\_  
Attorney