No. 14-8589

IN THE SUPREME COURT OF THE UNITED STATES

TRAVIS CLINTON HITTSON,

Petitioner,

-v-

GDCP WARDEN,
Georgia Diagnostic Prison,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR REHEARING

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

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PETITION FOR REHEARING

Petitioner, Travis Clinton Hittson, respectfully requests rehearing of the Court's order dated June 15, 2015, denying the petition for a writ of certiorari to the Court of Appeals for the Eleventh Circuit. Specifically, Mr. Hittson requests that this Court enter an order granting, vacating and remanding the petition in light of this Court's recent decision in *Brumfield v. Cain*, ___ S.Ct. ___, slip op. (June 18, 2015), which makes clear that *Harrington v. Richter*, 562 U.S. 86 (2011), did not overrule the presumption set forth in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), that a federal habeas court must "look through" to the last reasoned state court decision, if one exists,

in evaluating whether a petitioner has satisfied AEDPA and is thus entitled to *de novo* review of his claims. *See Ylst*, 501 U.S. at 803, 806.

The Eleventh Circuit panel erred in identifying 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, an approach which permitted the panel 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"—and instead to manufacture from whole cloth what the panel considered a reasonable basis for denying relief.

Because analysis of the correct state court decision could determine the outcome of this case, this Court should grant, vacate and remand the petition to permit the Eleventh Circuit to undertake the proper analysis in the first instance.

ARGUMENT

In his petition for writ of certiorari, Mr. Hittson argued that the Eleventh Circuit erred in holding that the last reasoned state court judgment, the state habeas court order, was irrelevant and that, under *Richter*, it must instead defer to the Georgia Supreme Court's summary denial of review. In their statement regarding denial of certiorari review in this case, two members of this Court concluded that the Eleventh Circuit was wrong to jettison the presumption this Court articulated in *Ylst* 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."[1] *Hittson v. Chatman*, 576 U.S. ____ (2015) (Ginsburg, J., concurring).

In *Brumfield*, this Court made clear that the Eleventh Circuit's new approach to habeas review is patently incorrect. As the Court explained:

> In conducting the §2254(d)(2) inquiry, we, like the courts below, "look through" the Louisiana Supreme Court's summary denial of Brumfield'spetition for review and evaluate the state trial court's reasoned decision refusing to grant Brumfield an *Atkins* evidentiary hearing. See *Johnson* v.*Williams*, 568 U. S. ___, ___, n. 1, 133 S. Ct. 1088, 185 L. Ed. 2d 105 (2013) (slip op., at 6, n. 1); *Ylst* v. *Nunnemaker*, 501 U. S. 797, 806, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991).

Brumfield, Slip Op. at 7.

The Eleventh Circuit, rather than reviewing the district court's findings regarding the applicability of 28 U.S.C. § 2254(d) to the last reasoned stated court opinion in this case, analyzed only whether "there [was] any reasonable basis to support the [Georgia Supreme] court's [denial of relief." Appendix A at 83-84. The correct approach would have been to review the reasoned state court opinion to determine if the criteria in 28 U.S.C. § 2254(d) were met, and then (because, as the district court found, that decision was based upon unreasonable errors of fact and law) to correct the district court's erroneous decision to nevertheless accord deference to the state court opinion.

As this Court has said before, a heightened standard of reliability is required in capital cases because "death is different." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Where the state plans to enforce "the most irremediable and unfathomable of penalties," *Woodson*, 428 U.S. at 305, requiring that the Eleventh Circuit perform

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[1] *Ylst*, 501 U.S. at 803.

a proper analysis of the correct state court order—rather than relying upon assumptions as to the outcome of a such an analysis analysis—is an appropriate and necessary course of action. Mr. Hittson is entitled to a full and fair analysis not simply of whether there was any reasonable basis to support the prior determination that evidence suppressed by the state was immaterial but to an analysis of whether the state's actual legal and factual conclusions were reasonable. If the findings and conclusions were unreasonable—as they were found to be by only court which did analyze the state habeas order—Mr. Hittson is entitled to *de novo* review.

Furthermore, this Court routinely grants, vacates and remands petitions in circumstances where the lower court failed to identify and perform the proper analysis. *See Johnson v. California*, 543 U.S. 499, 515 (2005) ("We hold only that strict scrutiny is the proper standard of review and remand the case to allow the Court of Appeals for the Ninth Circuit, or the District Court, to apply it in the first instance."); *United States v. Lanier*, 520 U.S. 259, 271 (1997) ("[W]e vacate the judgment and remand for application of the proper standard" "because the Court of Appeals used the wrong gauge."); *Maraacich v. Spears*, 133 S.Ct. 2191, 2208 (2013) ("A remand is necessary for application of the proper standard because the Court of Appeals could conclude . . . [differently]).

In this case, the federal district court 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. 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 claim pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), *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").[2] 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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[2] 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 made a patently unreasonable determination of the facts. Appendix E at 49-50; *See Cone v. Bell*, 129 S.Ct. 1769, 1784 (2009) (Both the "quantity and quality" of the suppressed evidence must be evaluated). 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 ancillarybut rather 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 Eleventh Circuit did not engage in a similar analysis, finding instead only that there was "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." *Hittson v. GDCP Warden*, 759 F.3d 1210, 1252 (2014). This, however, is not the test. *See Rompilla v. Beard*, 545 U.S. 374, 394 (2005) ("[I]t is possible that a jury could have hear it all and still have decided on the death penalty, [but] that is not the test."); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) ("The question is not whether the defendant would more likely than not have received a different verdict . . . but whether . . . he received a fair trial"); 28 U.S.C. §2254(d) (Federal courts are not directed to defer to state court findings whenever there exists some reasonable basis for doing so, but to *not* defer to state court findings in which actual unreasonable error has been found).

The appropriate analysis was performed by the district court, which found a reasonable probability of a different result. By assuming that the Eleventh Circuit would or could have concluded otherwise after undertaking the proper analysis, rather than remanding in order that such

an analysis actually be performed, this Court compounds the error made by the lower court. Remand is warranted.

CONCLUSION

Petitioner prays that this Court grant, vacate and remand the petition for writ of certiorari in order to allow the United States Court of Appeals for the Eleventh Circuit to analyze the appropriate state court order in the first instance.

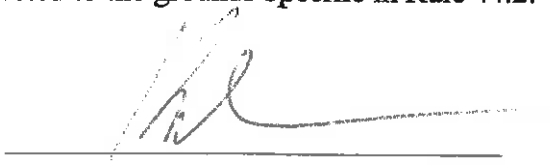
Respectfully submitted,

Kirsten 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

CERTIFICATE OF COUNSEL

As counsel for record for Mr. Hittson, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specific in Rule 44.2.



Counsel for Petitioner

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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing document this day by U.S. Mail, first class postage prepaid, and/or electronic mail, 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 10th day of July, 2015.

Attorney