No. 14-8589

IN THE SUPREME COURT OF THE UNITED STATES

TRAVIS CLINTON HITTSON,

PETITIONER,

v.

GDCP, WARDEN,
GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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QUESTIONS PRESENTED

1. SHOULD THIS COURT DENY CERTIORARI TO REVIEW THE ELEVENTH CIRCUIT'S OPINION WHICH MAY HAVE GIVEN DEFERENCE TO THE WRONG STATE COURT OPINION BUT STILL DETERMINED PETITIONER'S CLAIMS IN ACCORD WITH THIS COURT'S PRECEDENT?

2. SHOULD THIS COURT DENY CERTIORARI TO REVIEW A DECISION WHICH WAS A FACT SPECIFIC APPLICATION OF BRADY AND KYLES THAT WAS IN ACCORD WITH THIS COURT'S PRECEDENT?

3. SHOULD THIS COURT DENY CERTIORARI TO REVIEW A DECISION OF A FACT SPECIFIC ESTELLE CLAIM THAT WAS IN ACCORD WITH THIS COURT'S PRECEDENT?

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BRIEF IN OPPOSITION
ON BEHALF OF RESPONDENT

I. STATEMENT OF THE CASE

On March 17, 1993, Petitioner, Travis Hittson, 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. 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). Following the jury's binding recommendation, the trial court sentenced Petitioner to death for murder. The trial court also sentenced Petitioner to 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.

The Georgia Supreme Court affirmed Petitioner's convictions and sentences on direct appeal on October 31, 1994. Hittson v. State, 264 Ga. 682 (1994). This Court denied Petitioner's petition for writ of certiorari on May 22, 1995. Hittson v. Georgia, 514 U.S. 1129 (1995).

Petitioner filed his first state habeas corpus petition on or about December 31, 1995. An evidentiary hearing was conducted on October 6 and 7, 1997. The state habeas court denied Petitioner's first habeas petition on July 13, 1998. The Georgia Supreme Court denied Petitioner's first application for a certificate of probable cause to appeal on September 29, 2000. Petitioner filed a petition for writ of certiorari with this Court on April 5, 2001, which was denied on May 29, 2001.

Petitioner filed a federal habeas corpus petition on January 4, 2002. On August 30, 2004, the federal court issued a stay, directing Petitioner to return to the state courts to exhaust two specific Brady claims.

Petitioner filed his second habeas corpus petition in the Butts County Superior Court on July 20, 2005. In his second petition, Petitioner asserted 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.

The state habeas court dismissed Petitioner's second state habeas petition on October 7, 2005. Petitioner then filed an application for a certificate of probable cause to appeal in the Georgia Supreme Court on January 5, 2006. On October 2, 2006, the court granted Petitioner's application for a certificate of probable cause to appeal and remanded the case to the habeas court "to conduct a hearing in accordance with O.C.G.A. § 9-14-47." The court "further directed" the habeas court "to take note of Kyles v. Whitley, 514 U.S. 419, 436 (III) (115 SC 1555, 131 LE2d 490)(1995) [] in further consideration of this case."

An evidentiary hearing was held in the state habeas court on November 29-30, 2007. At the conclusion of the evidentiary hearing, the habeas court established a schedule for the filing of post-hearing briefs to which both counsel for Petitioner and Respondent agreed. This schedule

required Petitioner to file his post-hearing brief 60 days after the filing of the evidentiary hearing transcript. The transcript was filed on March 31, 2008, thereby establishing Petitioner's deadline for filing his post-hearing brief as May 31, 2008.

After receiving three extensions totaling 57 days, Petitioner failed to file his post-hearing brief on July 28, 2008. Respondent filed a *Motion to Compel Filing of Petitioner's Post-Hearing Brief* on August 21, 2008. The stare habeas court granted the motion and ordered Petitioner to file his brief within seven days or his right to file a brief would be waived. Petitioner failed to file his post-hearing brief. On September 15, 2008, Respondent filed his *Request for Ruling on Habeas Corpus Petition* with the habeas court. Petitioner responded on September 15, 2008 requesting until September 26, 2008 to file his brief. Again, the habeas court granted this request and again, Petitioner failed to file a post-hearing brief. Thereafter, the habeas court found that Petitioner waived his repeated opportunities to file a post-hearing brief and signed Respondent's *Proposed Final Order* on January 12, 2009, but did not file the final order until January 30, 2009, denying Petitioner habeas relief.

Petitioner filed his application for a certificate of probable cause to appeal from the denial of his second habeas corpus petition on February 17, 2009. Petitioner's application for a certificate of probable cause to appeal was denied by the Georgia Supreme Court on October 18, 2010.

The stay in Petitioner's federal habeas proceeding was lifted and Petitioner filed his amended federal petition for writ of habeas corpus on July 7, 2011. On November 11, 2012, the federal habeas court granted relief as to Petitioner's death sentence. The Eleventh Circuit Court of Appeals reversed the district court's grant of relief on July 9, 2014. Hittson v. GDCP Warden, 759 F.3d 1210 (11th Cir. 2014).

II. STATEMENT OF THE FACTS OF THE CRIME

The Eleventh Circuit Court of Appeals summarized the facts of the crime as follows:

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.[5] 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. 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.

n5 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.

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.
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> 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.

Hittson v. GDCP Warden, 759 F.3d at 1218-1221.

III. DENIAL OF SPECIFIC "FACTS" SET OUT IN PETITION

In Petitioner's *Statement of the Case*, Petitioner continues to maintain that the State suppressed a Navy mental health report regarding his co-defendant Edward Vollmer. Petitioner has never proven suppression of this document. As pointed out by the Eleventh Circuit, "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." Hittson, 759 F.3d at 1251, fn. 47. The second state habeas court properly chronicled Petitioner's attempts to obtain records from the State regarding Vollmer:

> 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).

(D63-RX143, 19-20). In the sealed District Attorney's file there was a Navy psychiatric report regarding Vollmer in which he is diagnosed with Antisocial Personality Disorder.

However, the state habeas court properly found that Petitioner came into possession of Vollmer's psychiatric report **prior to obtaining it from the District Attorney's sealed file.** (D63-RX143, 20-21). Specifically, the court found:

> 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.

Id. at 21. There was no explanation in the record before the state habeas court stating where counsel for Petitioner had obtained this document prior to receiving it from the sealed file.[1]

Petitioner represented to the district court that this finding was unreasonable and argued the following in his merits brief to the district court:

> However, the source of the report was not "unnamed" and was clearly set forth in the state habeas record.[2] Vollmer's complete Navy records, previously unavailable to Mr. Hittson, were first obtained during federal habeas proceedings through a release from Vollmer. RX10 at 3380-81. … The fact that current habeas counsel were able, ten years after Vollmer's sentencing and during a time when he was not represented by counsel, to persuade Vollmer to release his Navy record does not invalidate Mr. Hittson's Brady claim, nor does it support a finding that the claim was procedurally defaulted.

(D82, 31-32). The district court agreed with Petitioner's argument and found habeas counsel had gotten the record from Vollmer's Navy file. (D104, 24-25).

Respondent pointed out the falsity of this argument to the Eleventh Circuit. Vollmer's written release to Petitioner for his Navy records is dated **October 11, 2002**. Dr. Brittain's affidavit, which was attached to Petitioner's federal motion for discovery requesting access to the State's sealed file, (and was attached to Petitioner's second state habeas petition), which attaches as Exhibit E the allegedly suppressed Vollmer psychiatric report, is also dated **October 11, 2002**.

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[1] This includes all of Petitioner's pleadings in his original federal habeas proceeding including his motion for discovery, (D15), and his motion for evidentiary hearing and motion for stay, (D27; D28; D33).

[2] As chronicled in the *Statement of the Case*, Petitioner **NEVER** briefed his claims to the state habeas court following the evidentiary hearing. Therefore, Petitioner never made this argument to the habeas court. According to Petitioner's argument, the "clearly set forth" comes from the state court intuitively understanding that the Vollmer release for his Navy records located on pages 3373-3569 of page 12,506 of the state habeas evidentiary hearing record proves that is where he got the report.

The letter from the National Personnel Record Center, located in St. Louis, Missouri, to counsel for Petitioner at the Georgia Resource Center providing Vollmer's Navy records by mail is stamped dated as **November 13, 2002**. Thus, Petitioner had Vollmer's psychiatric report prior to receiving Vollmer's Navy records.

Additionally, the National Personnel Record Center redacted two identifying numbers from Vollmer's psychiatric report on the copy sent to habeas counsel for Petitioner. However, on the report attached to Dr. Brittain's affidavit, these identifying numbers are not redacted. Clearly, Vollmer's report attached to Dr. Brittain's affidavit **did not** come from Vollmer's Navy records requested by Petitioner's habeas counsel pursuant to the release signed by Vollmer. Petitioner has never shown how habeas counsel had this document prior to obtaining it from the sealed District Attorney's files.

After having reviewed in detail the pre-trial proceedings on this issue, it is Respondent's belief that this document was turned over by the trial court to trial counsel or was obtained by Petitioner's trial counsel prior to trial from the Navy. Trial counsel's files were turned over to habeas counsel. Respondent presented this argument to the Eleventh Circuit and given the page limitations of this brief will not regurgitate those arguments. (See Attachment A, pp. 24-43).

Petitioner was evaluated prior to trial by State mental health expert Dr. Robert Storms. During this interview, Petitioner called the victim a "hillbilly" and an "asshole." Petitioner states that trial counsel "kept both their mental health expert and social worker off the stand" during the sentencing phase when they were assured by the trial court that testimony from Dr. Storms "would not be admitted if the defense eschewed the presentation of expert mental health evidence." (Petitioner's brief, p. 4). This is inaccurate. As correctly found by the Eleventh Circuit, there were several reasons why trial counsel chose not to present their expert mental

health evidence: 1) Petitioner's neuropsychiatrist, Dr. Moore informed trial counsel he "would testify that Travis was just mean, and that he just did this because he is mean," (Hittson, 759 F.3d at 1244); 2) on the Minnesota Multiphasic Inventory Test Petitioner received an "elevated Psychopathic Deviant score," (id. at 1245); 3) out of four mental health evaluations, only Petitioner's psychologist, Dr. Michael Prewett, "found any indication of brain damage," (id.); and, 4) when all four evaluations were taken as a whole they were "unfavorable,"[3] (id.).

Petitioner alleges, based upon testimony by trial counsel during the state habeas proceedings, that the State wrote the words "hillbilly" and "asshole" on "large poster boards" and displayed them next to photographs of the victim's "mutilated remains" on an easel during the State's sentencing phase closing arguments. (Petitioner's brief, p. 5). However, as correctly found by the Eleventh Circuit, and not disputed by Petitioner, the trial "record does not indicate what was displayed on the easel." Hittson, 759 F.3d at 1225.

Petitioner alleges that the "only evidence to counter" his mitigation evidence was the testimony of Dr. Robert Storms that the called the victim a "hillbilly" and an "asshole" after the crime. (Petitioner's brief, p. 25). This is untrue. The State did not sit idly by while the defense presented their mitigation witnesses. During cross-examination, the State brought out negative statements made by the witnesses regarding Petitioner such as his violence when drinking and one witness's statement that Petitioner was capable of killing. Travis Edenfield testified that Petitioner would become violent and when he drank liquor and Petitioner's friends would not let him drink liquor. (Doc. 10, RX 26a, pp. 122). Petitioner's friend Steven Nix also admitted that he had given a statement to a Naval Investigative Service (NIS) agent that he thought Petitioner was capable of killing and was violent when drunk. Id. at 172, 175. Additionally, Petitioner's

[3] For example, Petitioner was diagnosed with Antisocial Personality Disorder. Id. at 1241.

friend Alan Whaley informed an NIS agent that Petitioner would become argumentative, loud, and violent when drinking and Michael Barlow testified that Petitioner would become obnoxious when he drank liquor. Id. at 137, 150. In addition, the State made sure the gruesome facts of Petitioner's crime were not forgotten when the prosecutor questioned the witnesses about Petitioner's crimes during cross-examination.

Other facts will be discussed as they become relevant throughout the brief.

IV. REASONS FOR NOT GRANTING THE WRIT

A. CERTIORARI REVIEW SHOULD BE DENIED AS THE ELEVENTH CIRCUIT COURT OF APPEAL'S DECISION IS CORRRECT DESPITE ITS DEFERENCE TO THE SUMMARY DENIAL OF PETITIONER'S APPLICATION FOR CERTIFICATION TO APPEAL BY THE GEORGIA SUPREME COURT INSTEAD OF THE STATE HABEAS COURT'S REASONED OPINION.

The Eleventh Circuit Court of Appeals held that the Georgia Supreme Court's summary denial of Petitioner's certificate for probable cause to appeal from the denial of state habeas relief was the final decision on the merits of Petitioner's claims. The court then held that due to this Court's decision in Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770 (2011), it "declined" the principle announced in Ylst v. Nunnemaker, 501 U.S. 797, 111 S. Ct. 2590 (1991) to "look through" to the last reasoned state court opinion. Hittson v. GDCP Warden, 759 F.3d 1210, 1233 (11th Cir. 2014). Therefore, for purposes of Petitioner's federal habeas appeal, the Eleventh Circuit gave deference under 28 U.S.C. § 2254(d) to the Georgia Supreme Court's summary denial and did not "look through" to the last reasoned opinion which was the state habeas court. Petitioner alleges this was not in accord with this Court's precedent and if the court had instead looked to the state habeas court's opinion he would have been entitled to relief. Having reviewed the precedent in question, it is unclear whether the Eleventh Circuit's interpretation of deference is in accord with this Court's precedent regarding the "look through"

principle for cases reviewed under the Anti-Terrorism and Effective Death Penalty Act. However, it is clear that the Eleventh Circuit's reversal of the district court and denial of habeas relief is in accord with this Court's precedent it properly determined, like the state courts, that Petitioner's claims lacked merit. Accordingly, certiorari review is not warranted.

As an initial matter, this question only applies to one of Petitioner's claims. Petitioner presents two claims to this Court, a Brady claim and a claim that evidence admitted at trial violated his Fifth and Sixth Amendment rights. However, the second claim was reviewed de novo under Brecht v. Abrahamson, 507 U.S. 619 (1993) by the Eleventh Circuit.

In determining which state court opinion, either the state habeas court order or the summary denial by the Georgia Supreme Court, the Eleventh Circuit looked to state court procedures and found the following:

> 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. 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. Sup. Ct. R. 36 (emphasis added) "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. 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 petitions, 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).

Hittson v. GDCP Warden, 759 F.3d 1210, 1231-1232 (11th Cir. 2014) (citation omitted).

After finding the Georgia Supreme Court's summary denial was the final decision on the merits, the court held, pursuant to the "Richter directive" that a summary denial was entitled to deference under § 2254. The court noted that Ylst was a pre-AEDPA case decided prior to Richter and "declined to" apply Ylst's "'look through'" principle to the reasoned opinion by the state habeas court order. Hittson, 759 F.3d at 1233. Instead, the court determined whether there was a "reasonable basis for the state court to deny relief" and "reviewed the record to see 'whether the outcome of the state court proceedings permits a grant of habeas relief in this case.'" Id. at 1233.

In Ylst, Nunnemaker raised a Miranda claim on direct appeal and the court found as he had failed to raise it below it was procedurally barred. Ylst v. Nunnemaker, 501 U.S. at 799.[4] Petitioner then proceeded through his collateral attacks in superior court, the California Court of Appeal and ended with his final state habeas petition filed in the California Supreme Court under the original jurisdiction of the court. All courts issued a summary denial of Petitioner's state habeas petition. Id. at 800. Nunnemaker filed a federal habeas petition, was denied relief in the district court and appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit found "because the California Supreme Court did not 'clearly and expressly state its reliance on Nunnemaker's procedural default,' the federal court could not say that the Supreme Court's

[4] Specifically, "The California Court of Appeal affirmed the conviction. The sole basis for its rejection of the Miranda claim was the state procedural rule that 'an objection based upon a Miranda violation cannot be raised for the first time on appeal.'"

order 'was based on a procedural default rather than on the underlying merits of Nunnemaker's claims.'" Id. at 801.

This Court granted certiorari to consider "whether the California Supreme Court's unexplained order denying his second habeas petition to that court, which according to the Ninth Circuit sought relief on the basis of his Miranda claim, constituted a 'decision on the merits' of that claim sufficient to lift the procedural bar imposed on direct appeal." Id. The Court examined the issue and found there were presumptions present:

> 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. If an earlier opinion "fairly appear[s] to rest primarily upon federal law," we will presume that no procedural default has been invoked by a subsequent unexplained order that leaves the judgment or its consequences in place.

Id. at 803. The Court then explained that, "The essence of unexplained orders is that they say nothing. We think that a presumption which gives them no effect -- which simply 'looks through' them to the last reasoned decision -- most nearly reflects the role they are ordinarily intended to play." Id. at 804.

Twenty years later this Court granted certiorari to another Ninth Circuit decision arising from the California Supreme Court. In Harrington v. Richter, a case governed by the AEDPA, Richter filed a state habeas petition in the California Supreme Court under the court's original jurisdiction. The court issued a summary denial of the petition.[5] The Ninth Circuit did not give deference under § 2254 (d) to the summary denial. This Court granted certiorari. In examining this issue, this Court looked at the plain text of the statute noting that § 2254 "refers only to a 'decision,' which resulted from an 'adjudication.'" Harrington v. Richter, 562 U.S. at 98. The Court also pointed out that the statute does not require reasons to support the decision. Id. The

[5] There was no reasoned state court opinion, only summary denials.

court held that "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." Id. at 99. Then citing to Ylst, this Court held that this **presumption** could be overcome "when there is reason to think some other explanation for the state court's decision is more likely." Id. at 99-100. The Court concluded with "This Court now holds and reconfirms that § 2254(d) does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'" Id. at 100. There is no other mention of Ylst in the majority opinion.

Two years later, in another case arising from California and the Ninth Circuit Court of Appeals, Johnson v. Williams, the Ninth Circuit found the state court had overlooked a portion of Williams' Sixth Amendment claim in denying her claim and, therefore, the state court opinion was not afforded deference under § 2254. In Williams, the California Court of Appeal had decided Petitioner's Sixth Amendment claim in a reasoned opinion. The California Supreme Court issued a summary denial of Williams' "petition for review." Johnson v. Williams, 133 S. Ct. 1088, 1094 (2013). In footnote one, this Court stated the following, "Consistent with our decision in Ylst v. Nunnemaker, 501 U.S. 797, 806, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991), the Ninth Circuit 'look[ed] through' the California Supreme Court's summary denial of Williams' petition for review and examined the California Court of Appeal's opinion, the last reasoned state-court decision to address Juror 6's dismissal." Williams, 133 S. Ct. at 1094. This Court found the California Court of Appeal's reasoned opinion was entitled to the "Richter presumption" and held, "When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits--but that presumption can in some limited circumstances be rebutted." Id. at 1096.

Looking at the plain text of § 2254(d), the statute does not require a federal court to "look through" a summary denial that is an adjudication on the merits to the last reasoned opinion. In addition, in Ylst, as stated above, an opinion without articulated reasons was presumed to mean "nothing." Ylst, 501 U.S. at 804. However, in Harrington, the same type of opinion was presumed to be an adjudication on the merits of all state collateral claims and given deference under § 2254(d). Respondent is not suggesting that the "look through" principle should not still be applied, indeed it seems wise to do so, but it is not clear that either § 2254 (d) or this Court's AEDPA precedent **requires** its application.[6]

Regardless of whether this Court has mandated the "look through" principle for AEDPA cases, Respondent does disagree with the Eleventh Circuit's finding that the denial of Petitioner's application for certificate of probable cause to appeal by the Georgia Supreme Court is a decision on the merits. Respondent has requested clarification of on this issue by the Georgia Supreme Court. (See Attachment B). The court has yet to rule on this request.

However, even assuming that the Eleventh Circuit did not give deference to the appropriate state court decision in determining Petitioner's Brady claim, the court did reach the correct conclusion and certiorari review is not warranted. The court analyzed whether there was a "reasonable basis" to deny Petitioner's claim. Hittson, 759 F.3d at 1233. As explained by this Court in Richter, "Under § 2254(d), a habeas court must determine what arguments or theories supported...the state court's decision; and then it must ask whether it is possible fairminded

[6] Petitioner also cites to Metrish v. Lancaster, ___ U.S. ___, 133 S. Ct. 1781 (2013), in support of his argument that this Court "looks through" summary denials. In Lancaster, the Michigan Court of Appeals decided the claim in question on direct appeal and the Michigan Supreme Court declined to review the Court of Appeals decision. This Court examined the court of appeals decision. However, the Court did not state that the Michigan Supreme Court decision was the last decision on the merits nor did it mention Ylst.

jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Richter, 562 U.S. at 102. The statute and the language from Richter suggest that federal courts are focused on the result of the state courts, not grading the reasoning. But this is exactly what Petitioner is advocating. Although he guises his arguments under concerns for deference what he really wants is what he received in the district court. The federal courts taking the opinions of the state court's and, in shark like fashion, hunting for any error in the order to ridicule so that the entirety of the order may be tossed aside and the claims be determined de novo. This is not the purpose of the federal courts. Therefore, as the result from the state habeas court and the Georgia Supreme Court are the same, a denial of the merits of Petitioner's claim, which the Eleventh Circuit found to be reasonable under established federal law, this petition presents nothing warranting this Court's certiorari review.

B. CERTIORARI REVIEW SHOULD BE DENIED AS THE ELEVENTH CIRCUIT COURT OF APPEALS' DECISION REGARDING PETITIONER'S BRADY CLAIM IS IN ACCORD WITH THIS COURT'S PRECEDENT.

Petitioner alleges the Eleventh Circuit Court of Appeals erroneously analyzed and concluded that he was not entitled to relief for his Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963) claim. During Petitioner's second state habeas proceeding he alleged that a Navy psychiatric report belonging to co-defendant Edward Vollmer and post-arrest letters sent by Vollmer to his friend Joleen Ward were suppressed by the State and would have created a reasonable probability of a different outcome at the sentencing phase of his trial. The Eleventh Circuit found the record supported the state court's denial of Petitioner's Brady claim. Petitioner fails to show that the Eleventh Circuit's opinion is not in accord with this Court's precedent. Accordingly, certiorari review is not warranted.

1. Vollmer's Psychiatric Report

During the sentencing phase of trial, trial counsel attempted to mitigate Petitioner's crime by showing him to be gullible and easily controlled by his co-defendant Vollmer. Petitioner alleged in state habeas that a Navy psychiatric report belonging to Vollmer, wherein he was diagnosed with Antisocial Personality Disorder, was suppressed by the State and would have changed the outcome of his trial. The state habeas court found the claim was procedurally defaulted and, in the alternative, lacked merit. The Georgia Supreme Court denied Petitioner's application to appeal which contained this claim. The Eleventh Circuit found the Georgia Supreme Court's summary denial was a merits determination, gave deference to this decision and found the there was a reasonable basis for a denial on the merits of this claim.

As previously mentioned in the *Denial of the Facts*, the Eleventh Circuit went straight to materiality and did not address suppression. After reviewing the record and analyzing Petitioner's arguments, the court found the Vollmer report was not the "silver bullet [Petitioner] tries to make it out to be." Hittson, 759 F.3d at1253. The court summarized its analysis and reasons for rejecting this claim:

> 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.

Id. at 1252. The Court then did exactly that and analyzed each piece of evidence, a review the district court utterly failed at conducting.[7]

While in the Navy, Vollmer was evaluated by a social worker, R. J. Dusan, and the report was signed off on by a psychiatrist, Dr. Donald Gibson, who never met Vollmer. Id. at 1253. Petitioner's main allegation, aided by newly acquired mental health professionals in his collateral proceedings, was that the diagnosis of Antisocial Personality Disorder of Vollmer in the report would have proven he was the type of person who could have controlled Petitioner on the night of the crimes. After careful review, the Eleventh Circuit rejected this argument:

> 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.[51] 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 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."
>
> n51 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).
>
> 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 intelligencen[52] 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

[7] Instead, the district court graded the state habeas court's order with Petitioner's arguments as the answer key.

> 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 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.
>
> fn.52 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.

Id. at 1254-1255. The court concluded on this argument that it was not questioning the opinions of Petitioner's collateral experts, but:

> [G]iven that they were formed in 2002 and 2007, with the benefit of hindsight and evidence that was not available [to] 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. 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.

Id. at 1255-1256.

The court then went on to explain that even though it was rejecting this argument, it was not stating that the Vollmer report was "irrelevant." Id. at 1256. The court found that this report would have supported trial counsel's theory that Vollmer "was 'a real bad guy'—that he was 'amoral about the effect that things that he did had on other people.'" Id. (quoting trial counsel's testimony). However, as explained in detail by the court, this was cumulative of the evidence presented by trial counsel:

> 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.
>
> * * * *
>
> 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.

Id. at 1256, 1257.

Petitioner argues that the district court was correct to find that this evidence was not cumulative, however, he does not address the Eleventh Circuit's decision. And for good reason, the Eleventh Circuit's decision is in line with this Court's precedent whereas the district court's decision shows a fundamental misunderstanding of cumulative evidence. The evidence

presented in state habeas regarding the report describing Vollmer's personality disorder is merely more evidence of the same theme presented at trial. In Cullen v. Pinholster, ___ U.S. ___, 131 S. Ct. 1388, 1409-1410 (2011), this Court held that additional evidence of a childhood abuse, although much more detailed and from new sources such as school and medical records, "largely duplicated" the evidence presented at trial. See also Wong v. Belmontes, 130 S. Ct. 383, 387 (2009) (holding "[s]ome of the [new] evidence was merely cumulative of the humanizing evidence [trial counsel] actually presented; adding it to what was already there would have made little difference"). Petitioner fails to show how the Eleventh Circuit's decision is not in accord with these decisions.

Petitioner also alleges, "a diagnosis of anti-social personality disorder, unmitigated by other evidence, is commonly understood to a carry a great deal of weight with juries." (Petitioner's brief, p. 21). Certainly, if **a petitioner** is diagnosed with Antisocial Personality Disorder this is often considered aggravating evidence. But Petitioner fails to cite to any precedent that a diagnosis of Antisocial Personality Disorder of a **co-defendant**, especially when the co-defendant did not commit the actual murder, carries enough "weight" to thoroughly mitigate **a petitioner's crimes.** Petitioner fails to address the well-reasoned opinion of the Eleventh Circuit that a diagnosis of Antisocial Personality Disorder did not prove Vollmer controlled Petitioner, and, although this diagnosis may have been helpful at trial, it was not strong enough to create a reasonable probability of a different outcome. As pointed out by the court, Petitioner "was responsible for his own action" and "confessed to swinging the bat, pulling the trigger, and cutting up Utterbeck's corpse." Id. at 1257. An expert label on Vollmer's mental health condition could do little to mitigate those facts.

The Eleventh Circuit's opinion is entirely in accord with this Court's precedent. Accordingly, this portion of Petitioner's Brady claim presents nothing worthy of this Court's certiorari jurisdiction.

2. The State Habeas Court Found Vollmer's Post-Arrest Letters Were Not Material Under Brady.

Post-arrest letters were sent by Vollmer to his friend Joleen Ward. These letters were found in the sealed portion of the District Attorney's file during Petitioner's federal habeas proceeding. The state habeas court found these letters were suppressed by the State in violation of Brady but went on to find that Petitioner had failed to establish that the letters were material in the sentencing phase of his trial. (D63-RX143, 30). Consequently, the state habeas court found this portion of Petitioner's Brady claim was without merit. (D63-RX143, 29-34). The Eleventh Circuit analyzed this claim in detail, found the letters were cumulative to the evidence presented at trial and concluded there was a reasonable basis for the Georgia Supreme Court's summary denial of this claim. Petitioner fails to prove that the Eleventh Circuit's opinion is not in accord with this Court's precedent, therefore, this claim does not present an issue worthy of this Court's certiorari review.

For clarification purposes, there were two sets of letters analyzed by the courts below. The first set of letters was presented at trial and the Eleventh Circuit took note of certain passages:

> 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.

Hittson, at 1258. The second set of letters written by Vollmer to Ms. Ward, (hereinafter Ward letters), are the subject of the Brady claim.

In deciding this claim, the Eleventh Circuit compared the evidence presented at trial with the content of the Ward letters and Petitioner's arguments in support. The court found the letters were cumulative of the evidence presented at trial and "only indirectly related to [Petitioner's] sentence." Id. at 1257. The court took note of Petitioner's arguments in relation to the portions of the Ward letters wherein Vollmer brags that he will be released and degrades local law enforcement, the prosecution and the trial court:

> 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.

Id. at 1257-1258. The Court then analyzed this portion of the letters and found they "reflect[ed] arrogance or delusions of grandeur" but that the letters that were presented to the jury "contained similar braggadocio." Id. at 1258. The court went on to conclude that although more evidence of Vollmer's "bad character" might have been helpful to Petitioner's mitigation case it was too "tenuous" to "have turned the tide in Hittson's favor." Id.

The court then analyzed the portion of Petitioner's argument relating to Vollmer's statements that he was the only one who could explain why the crimes happened and concluded it also would not have changed the jury's sentence determination:

> 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.

Id. at 1259. The court went on to analyze other portions of the Ward letters and held the State could have carved out portions, as done by Petitioner, to counter Petitioner's case in mitigation:

> [T]hese ramblings could have been used by the State to undercut Hittson's mitigation theory—they hint that Hittson had a reason for 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.

Id.

The court ultimately held the record supported the state court's denial of this claim:

> 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.

Id.

Instead of showing that the Eleventh Circuit's decision is not in accord with this Court's precedent, Petitioner merely makes the same arguments he did in the lower courts. Once again, he "cherry picks" passages from the letters, spins his argument through a thesaurus of personality traits for Vollmer, and largely ignores the record as a whole, especially his confession. This was Petitioner's sentencing trial, not Vollmer's. No matter how despicable Vollmer's personality may have been, these letters do not disprove Petitioner's own confession. These letters do not

take the bat, the gun or the carving instrument out of Petitioner's hands. The Eleventh Circuit's decision is plainly in accord with this Court's precedent and this issue presents nothing worthy of this Court's certiorari review.

3. The Eleventh Circuit's Cumulative Error Brady Review Was In Accord with This Court's Precedent.

The Eleventh Circuit found the following with regard to Petitioner's cumulative error claim:

> 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.

Id. at 1259-1260.[8] Petitioner thoroughly attacked Vollmer's character in sentencing, which went unchallenged by the State. But more evidence of Vollmer's bad character does not remove Petitioner's culpability for the crimes nor does it provide mitigation powerful enough to create a reasonable probability of a different outcome. Petitioner fails to show how this decision is not in accord with this Court's precedent

[8] The state habeas court concluded that as "there was only one claim, the post-arrest letters," for which Petitioner had shown suppression "a cumulative review of the evidence as mandated by Kyles v. Whitley, 514 U.S. 419, 436 (1995), is unnecessary." The state habeas court also held, in the alternative, that, even considering all of the evidence Petitioner alleged was suppressed, "the 'cumulative effect' of this evidence would still fail to establish a Brady violation."

4. Deference to the State Habeas Decision

Petitioner alleges if the Eleventh Circuit had instead applied § 2254 to the state habeas court's order he would have been entitled to relief. Petitioner's argument fails. As stated above, this Court's precedent and § 2254 (d)(1) focuses on the result of the decision, not tearing apart the reasoning. Indeed, the Eleventh Circuit has repeatedly held that when it reviews a state court's opinion under § 2254, it focuses on the final decision not the reasoning. As explained in Loggins v. Thomas, 654 F.3d 1204, 1216-1217 (11th Cir. 2011):

> The Supreme Court in Harrington cited favorably this Court's decision in Wright v. Secretary for the Department of Corrections, 278 F.3d 1245 (11th Cir. 2002), where we reached exactly the same conclusion about the requirements of § 2254(d). See Harrington, 131 S.Ct. at 784. We explained in Wright: A judicial decision and a judicial opinion are not the same thing. The chief responsibility of judges is to decide the case before them. They may, or may not, attempt to explain the decision in an opinion. The text of § 2254(d)(1) accepts this orthodox view. The statutory language focuses on the result, not on the reasoning that led to the result, and nothing in that language requires the state court adjudication that has resulted in a decision to be accompanied by an opinion that explains the state court's rationale. Accordingly, all that is required is a rejection of the claim on the merits, not an explanation. Wright, 278 F.3d at 1255 (citations omitted). We also noted in Wright that our interpretation of § 2254(d)(1) was consistent with the "main thrust" of the AEDPA amendments, which "were intended to require greater federal court deference to state court decisions and to promote more federal-state judicial comity." Id. "Requiring state courts to put forward rationales for their decisions so that federal courts can examine their thinking" we observed, "smacks of a 'grading papers' approach that is outmoded in the post-AEDPA era." Id.

Petitioner discusses how the district court found many alleged faults with the state habeas court's reasoning but, in the end, not even the district court could find the state court's final decision was

contrary to, or an unreasonable application, of this Court's precedent.[9] (Doc. 104, pp. 43-44).

Petitioner also alleges there were unreasonable determinations of the fact that would have removed § 2254 deference. However, Petitioner only cites to one, which was the only factual finding to which the district court could assign "clear factual error" in deciding prejudice of the Vollmer report. (Petitioner's brief, p. 18). Specifically, the state habeas court found the following, in response to the argument made in Petitioner's state habeas petition:

> 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 [not] 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.

(D63-RX143, 25). The district court found that it was factual error to find that Dr. Britain stated in his affidavit that "in order to properly evaluate the relationship between Petitioner and Vollmer, he would also have to evaluate Vollmer."

In support of the state habeas court's finding, the state court cited to two pages of Dr. Brittain's affidavit which contain the following language:

> *Initial Conclusions*. Although I am able to draw several conclusions from previous evaluations, none provide a complete psychological profile that satisfactorily explains Mr. Hittson's relative involvement in this crime as it relates to his co-defendant, Edward Vollmer. ... As a mental health professional and

[9] Petitioner alleges the district court found the state habeas court did not evaluate the materiality of the Vollmer report with regard to the sentencing phase. Although the district court initially questioned whether the state habeas court did this analysis in its order, the district court concluded that when read as a whole the state habeas court did conduct this evaluation: "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. 104, p. 44).

> former Navy psychologist, I believe that there should be a *complete, thorough*, and *comprehensive* psychological, neuropsychological, and psychiatric mental health evaluation of Mr. Hittson, both for the presence or absence of psychopathology and neurocognitive deficits, as well as the dynamics of his relationship with the codefendant, Mr. Vollmer. **This would require an evaluator to have knowledge of Mr. Vollmer's mental health history.**

(D55-RX62, Exhibit F, pp. 2-3) (emphasis in original) (emphasis added). Of note, Dr. Brittain's affidavit was created in support of Petitioner's request for discovery in his federal habeas proceeding, and Dr. Brittain already had Vollmer's Navy psychiatric report diagnosing him with Antisocial Personality Disorder. As there were no other documents from mental health professionals who had evaluated Vollmer in the record before the state habeas court, the only source of Vollmer's mental health history would have to be Vollmer. Therefore, although Dr. Brittain does not specifically state he would need to evaluate Vollmer, it was entirely reasonable for the court to conclude that Dr. Brittain would need to evaluate Vollmer in order to understand his mental health history before he could opine about Vollmer's relationship with Petitioner.

As stated by this Court in Wood v. Allen, 558 U.S. 290, 130 S. Ct. 841, 849 (2010), "'[t]he term 'unreasonable' is no doubt difficult to define.'" This Court went on to "note[]" that "even if '[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the trial court's . . . determination.'" Id. at 301 (quoting Rice v. Collins, 546 U.S. 333, 341-342, (2006)). The state habeas court's finding was clearly not unreasonable. Moreover, contrary to Petitioner's assertions, the state habeas court's overall decision was not predicated on this factual finding.[10] The state habeas court concluded that given the overwhelming evidence of Petitioner's guilt and the cumulative nature

[10] Additionally, as stated above, the Eleventh Circuit found Dr. Brittain's opinion "formed in 2002 and 2007, with the benefit of hindsight and evidence that was not available [to] the defense team during Hittson's trial" was not "particularly helpful in weighing the impact of Vollmer's 1991 diagnosis on the jury's penalty-phase deliberations during Hittson's 1993 trial." Hittson v. GDCP Warden, 759 F.3d at 1255-1256.

of the report, Petitioner had failed to show that this report would have created a reasonable probability of a different outcome at trial.

Consequently, as not even the district court, which attempted at every turn to find fault with the state habeas court's order, found the decision was not contrary to, or an unreasonable application, of this Court's precedent, Petitioner has not shown the Eleventh Circuit's well-reasoned opinion is not in accord with this Court's precedent. This claim presents nothing worthy of this Court's certiorari review.

C. THE ELEVENTH CIRCUIT'S REVERSAL OF THE DISTRICT COURT'S GRANT OF RELIEF FOR PETITIONER'S ESTELLE CLAIM IS IN ACCORD WITH THIS COURT'S PRECEDENT.

During the sentencing phase of trial, the State presented testimony from the trial court's mental health expert, Dr. Robert Storms, that Petitioner called the victim a "hillbilly" and an "asshole" during Dr. Storm's evaluation. This testimony was presented in rebuttal to lay witness evidence of remorse. Petitioner did not present testimony regarding his mental health from an expert. Petitioner challenged this testimony in the state courts and each time he was denied relief. The federal habeas court disagreed with the state courts, found there had been a violation of Petitioner's Fifth and Sixth amendment rights pursuant to Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866 (1981), and that Dr. Storms' testimony was not harmless under the standard announced in Brecht v. Abrahamson. (Doc. 104, pp. 63-64, 73). On appeal to the Eleventh Circuit, Respondent conceded there had been a violation of Petitioner's Fifth and Sixth Amendment rights but appealed the district court's finding that error was not harmless. Given the overwhelming evidence of guilt, the aggravated nature of the crimes, the aggravating evidence elicited by the State in cross-examination of Petitioner's sentencing phase witnesses, and the extensive evidence presented in mitigation, the Eleventh Circuit disagreed and found Dr.

Storms' testimony was not harmful under the Brecht standard and reinstated Petitioner's death sentence. Petitioner fails to prove that this decision was not in accord with this Court's precedent. Certiorari review is not warranted.

In deciding the claim the Eleventh Circuit performed a de novo review under Brecht:

> 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)).

Hittson, 759 F.3d at 1234-1235.

The court first looked at the statutory aggravator found by the jury, the evidence to support that finding and discussed how the testimony from Dr. Storms could have affected the jury's decision. "The jury found that the 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)." Hittson v. State, 264 Ga. 682. The court summarized the facts which "justified" this statutory aggravator:

> 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."

Hittson, 759 F.3d at 1235. The court held that this "overwhelming" evidence, "particularly the post-mortem dismemberment and mutilation" in support of the verdict persuaded the court that "Dr. Storms's testimony did not meaningfully influence the jury's reliance on the 'vile, horrible, and inhuman' aggravating factor." Id.

The district court found, now relied upon by Petitioner, that Dr. Storms' testimony helped the state prove depravity of mind. The Eleventh Circuit, "flatly reject[ed]" this conclusion and explained:

> 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. 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."

Id. at 1236. Additionally, the State did not argue in its closing arguments that Petitioner's name calling showed depravity of mind but instead discussed the actual murder and the subsequent mutilation. (Doc. 10, RX 26b, pp. 286-288). Petitioner has failed to prove that the Eleventh Circuit's decision on this issue is not in accord with this Court's precedent.

Subsequently, the Eleventh Circuit then evaluated the "effectiveness of Dr. Storms's testimony as a rebuttal of [Petitioner's] mitigation evidence." Id. at 1236. The court found Petitioner's argument that Dr. Storms's testimony "devastated" Petitioner's defense that he was "remorseful, burdened and ashamed" was an "overstate[ment]." Id. The court analyzed the evidence of remorse presented at trial and found it consisted of one statement from a friend

during the sentencing phase that Petitioner may have been remorseful and testimony from a detective during guilt innocence that the detective "felt" Petitioner was not "proud" of being involved in the crime. Id. Based upon this accurate account of the record, the court concluded:

> 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. 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.

Id. at 1236-1237.

The court also rejected Petitioner's arguments that Dr. Storms's testimony showed him to be a "brazen unrepentant man." Id. at 1237. Instead, the court found Petitioner's name calling merely showed that he "disliked" the victim and the court was "skeptical" that the information was "truly detrimental." Id. Explaining further, the court stated, "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." Id. Petitioner alleges this finding is the "height of absurdity" arguing that the Court declared that Petitioner's crimes were "based upon no greater passion or purpose than mere dislike" which would, in Petitioner's argument, make him seem like a "psychopath" not less culpable. Obviously, that is not what the court found. The court clearly stated that the idea that Petitioner would have been willing to murder someone he was "fond" of with nothing more than Vollmer's command would not make him less culpable.

The court also pointed out that Petitioner had argued to the court in support of his ineffectiveness claim that Petitioner's name calling were "offhand remarks." Id. at 1238. The court agreed with that "assertion" and found: "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." Id. Consequently, the court held "that the erroneous admission of Dr. Storms's testimony" did not have a "substantial effect on the jury's finding that Hittson committed an 'outrageously or wantonly vile, horrible, or inhuman' murder with 'depravity of mind.'" Id.

Petitioner alleges the Eleventh Circuit's analysis was in error because it failed to take into account Petitioner's argument that Dr. Storms's testimony made his entire mitigation case appear "contrived." (Petitioner's brief, p. 25). Petitioner argues that as part of the mitigation theory was to show he a dependent individual being controlled by Vollmer, testimony that he called the victim names after the crime shows he had his own "independent motivation" for killing and mutilating. First, simply because the Eleventh Circuit did not mention this argument does not mean it did not consider it. Second, this portion of Petitioner's argument is illogical. Petitioner calling the victim names only alludes to the idea that Petitioner did not think well of the victim, a fact which Vollmer could have known and exploited on the night of the crime. The portrayal of Vollmer as the leader of the crimes does not foreclose the fact that Petitioner could have had his own negative feelings towards Mr. Utterbeck. Indeed, Petitioner was not an automaton devoid of his own emotions programmed by Vollmer to kill.

As repeatedly stated above, Petitioner confessed to murdering Mr. Utterbeck and participating in the dismemberment of his body and the State had overwhelming corroborating evidence. There was no question as to Petitioner's guilt. In sentencing, trial counsel presented

twenty witnesses to mitigate Petitioner's crimes including evidence of Petitioner's: difficult childhood; "fragile" ego; gullibility; friendly and generous nature; and, Vollmer's disturbing and manipulative personality and influence over Petitioner. The State's presentation of Dr. Storms' testimony merely corroborated what the jury already knew from the heinous nature of the crime that Petitioner did not think well of the victim. Petitioner's allegation that Dr. Storms's testimony was the "only evidence" presented to counter his case in mitigation is false. As stated above in the *Denial of the Facts*, during cross-examination, the State brought out negative statements made by the witnesses regarding Petitioner such as his violence when drinking and one witness's statement that Petitioner was capable of killing. In addition, the State made sure the gruesome facts of Petitioner's crime were not forgotten when the prosecutor questioned the witnesses about Petitioner's crimes during cross-examination.[11]

This Court found in Brecht, that the reviewing court must look to the "record as a whole," which is clearly what the Eleventh Circuit's order relies upon in making its decision. Brecht, 507 U.S. at 638. Petitioner fails to do so, and instead, as he did in the courts below, inflates the importance of Dr. Storms's testimony while ignoring the heinous nature of his crimes. He alone swung the bat and he alone pulled the trigger. He also participated in post-mortem mutilation that would have horrified any reasonable juror. It was his actions on the night of the crime that resulted in his death sentence not, as stated in Petitioner's own words, "offhand remarks" made long after. Therefore, the Eleventh Circuit's decision is entirely in accord with this Court's precedent and certiorari review is not warranted.

[11] Petitioner spends half of his argument referring to the alleged poster boards with the words "hillbilly" and "asshole" written on them that were allegedly displayed during the State's closing arguments. As stated in the *Denial of Facts* above, the trial record does not support this. Regardless, it was Petitioner's crimes that caused the jury to impose a death sentence not words on a poster board.

CONCLUSION

WHEREFORE, for all the above and forgoing reasons, Respondent prays that this Court decline to exercise its certiorari jurisdiction and deny the instant petition for writ of certiorari seeking review of the judgment of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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COMPLIANCE WITH WORD LIMITATIONS

This brief complies with Rule 33.2 of this Court.

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing pleading, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

Brian Kammer
Kirsten Andrea Salchow
Georgia Resource Center
303 Elizabeth Street NE
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This 27th day of March, 2015.

_____
SABRINA D. GRAHAM
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