No. 15-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2015

TRAVIS HITTSON,

Petitioner,

-v-

BRUCE CHATMAN, Warden,
Georgia Diagnostic Prison,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTION PRESENTED FOR REVIEW

THIS IS A CAPITAL CASE

(Execution Scheduled for TODAY, February 17, 2016, at 7:00 p.m.)

Has a capital defendant been denied his rights to due process, a fair and reliable sentencing proceeding, and judicial review when the State has successfully obfuscated a meritorious claim of federal constitutional error it now concedes occurred so as to prevent its consideration in state court?

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Petitioner, Travis Hittson, respectfully petitions this Court to issue a Writ of Certiorari to review the judgment of the Supreme Court of Georgia, entered in the above case on February 17, 2016 (Attachment A), denying review of the state habeas court's order denying relief (Attachment B).

INTRODUCTION

This Court, in keeping with a long line of precedent, should grant the writ, vacate the judgment of the Supreme Court of Georgia, and remand for proper consideration of Petitioner's claim that the trial court violated *Estelle v. Smith*, 451 U.S. 454 (1981), when, over objection, it allowed the state to present testimony regarding statements Petitioner allegedly made during a compelled mental health examination, even though the defense presented no expert evidence in

mitigation.[1] After years of vigorously arguing that no *Estelle* violation occurred (despite Respondent's on-record concession on November 30, 2007, that it had),[2] Respondent finally agreed, in briefing before the Eleventh Circuit Court of Appeals, that in fact the trial court's admission of this testimony violated *Estelle*.[3] Having confessed error, after years of obfuscating the issue so as to evade review, the case should be remanded with instructions to the Georgia state courts to determine whether the error was harmless beyond a reasonable doubt pursuant to *Chapman v. California*, 386 U.S. 18 (1967). In the alternative, Petitioner respectfully asks the Court to grant the writ and address the merits of the *Estelle* claim.

Until now, Respondent has successfully prevented Georgia state courts from addressing the merits of Mr. Hittson's *Estelle* claim. On direct appeal, the Georgia Supreme Court ruled *Estelle* was not violated because the State's expert had extracted a "*Miranda* waiver" from Petitioner prior to conducting the compelled examination and accordingly Petitioner had waived his Fifth Amendment privilege. *See Hittson v. State*, 264 Ga. 682, 683-85 (1994), *overruled in pertinent part by Nance v. State*, 272 Ga. 217, 220 n.2 (2000).

Six years later, the Supreme Court of Georgia recognized that it had erred and expressly overruled that portion of its decision in *Hittson*. *Nance*, 272 Ga. at 220 n. 2 (holding that trial

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[1] This error was all the more egregious because Petitioner, in reliance on the trial court's prior rulings, had chosen not to present any expert testimony in mitigation of the death penalty precisely to prevent the admission of these statements.

[2] At the evidentiary hearing conducted in state court, the trial court asked the Assistant Attorney General handling the case whether "we all agree there was a *Nance* violation but that y'all are going to contend it's harmless error," and the Assistant Attorney General agreed. HT (2005-V-615) at 298.

[3] *See* Brief on Behalf of the Respondent/Appellant/Cross-Appellee in *Hittson v. Warden, GDCP*, 11th Cir. No. 12-16103, filed January 8, 2013, at p. 14 ("Respondent agrees with the court's ultimate finding of Fifth and Sixth Amendment violations and does not appeal this portion of the district court's decision.").

court erred in admitting statements made during compelled mental health examination and expressly ruling that "[t]o the extent *Hittson* . . . authorized a State expert to testify in response to lay witness testimony that the defendant was remorseful, it is overruled"). The *Nance* decision provided a valid basis under Georgia law for the state habeas court to reconsider the claim. *See, e.g., Bruce v. Smith*, 274 Ga. 432 (2001) (habeas court erred in erecting *res judicata* bar where prior ruling in case was subsequently overruled, as the new decision constituted "an intervening change in the law sufficient to permit review of [petitioner's] substantive claim in this habeas petition"). Despite Respondent's brief concession that the trial court had erred, however, it submitted a proposed final order, ultimately adopted by the habeas court, that mischaracterzied *Nance* as a decision that "did not set forth a new rule of constitutional dimension, but merely narrowed an existing rule of criminal procedure," and, as such, that it could not be applied retroactively to Petitioner's case. Final Order in *Hittson v. Hall*, Butts County Court No. 2005-V-615, at 12-14. It further clouded the issue by asserting that, even assuming some sort of error, it was harmless under *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), *id.* at 16, a harmless error standard that, under state and federal law, was inapplicable, as constitutional errors are reviewed in Georgia courts under *Chapman*'s harmless-beyond-a-reasonable doubt standard. *See, e.g., Davis v. Thomas*, 261 Ga. 687, 688 (1991). The Supreme Court of Georgia denied Petitioner's application for certificate of probable cause to review the case.

Having successfully mischaracterized the claim in a fashion that prevented state court review of the *Estelle* claim, now seeks to pitch its recent confession of error as irrelevant. But, Respondent's concession that, under *Estelle*, Petitioner's Fifth and Sixth Amendment rights were violated constitutes a significant new fact that should have resulted in meaningful review of the claim in state habeas proceedings *for the first time*. *See, e.g., Gibson v. Head*, 282 Ga. 156, 159

(2007) ("The claim would not be barred by *res judicata*, however, if it were based on facts that were not reasonably available at the time of the first habeas proceeding") (citations omitted). Instead, the Georgia Supreme Court has eschewed its constitutional duty to adjudicate federal constitutional claims, not once, not twice, but now three times. This Court, under clear precedent, is empowered to vacate the Georgia courts' refusal to consider the claim, and to remand for proper consideration of the *Estelle* claim. *See, e.g.*, *Saldano v. Texas*, 530 U.S. 1212 (2000) (vacating judgment and remanding to state court "for further consideration in light of the confession of error by the Solictor General of Texas"); *Lawrence v. Chater*, 516 U.S. 163, 165 (1996) (granting petition, vacating judgment and remanding for further consideration in light of Solicitor General's new understanding of statutory requirements, even though the Solicitor General did not "conced[e] Lawrence's ultimate entitlement to benefits"); *Marino v. Ragen*, 332 U.S. 561 (1947) (remanding to state court to determine if habeas relief should be granted "[i]n light of the [state attorney general's] confession of error . . . and the undisputed facts") (citations omitted). As this Court explained in *Lawrence*:

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe potentially appropriate.

Lawrence, 516 U.S., at 167. In this case, where Petitioner will be executed without having had a federal constitutional violation he has vigorously pursued ever considered under the proper standard, such action is appropriate.[4]

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[4] To the extent the state courts have erected procedural bars to review, this Court may disregard them under the circumstances here. In rejecting an asserted procedural bar in *Williams v. Georgia*, 349 U.S. 375, 383 (1955), this Court noted that it had jurisdiction to decide "whether

OPINIONS BELOW

The decision of the Supreme Court of Georgia, entered February 17, 2016, denying Petitioner's appeal from the denial of habeas corpus relief, is unreported and attached as Appendix A. The underlying Superior Court decision is unreported and attached hereto as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Georgia denying Petitioner's appeal from the denial of relief was entered on February 17, 2016. *See* Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257, Petitioner asserting a deprivation of his rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition invokes the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. "No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." U.S. Const. amend. VI. "No state shall make or enforce any law which shall abridge the privileges

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the state court action in the particular circumstances is, in effect, an avoidance of the federal right." In *Walker v. Martin*, 131 S.Ct. 1120 (2011), this Court reaffirmed this principle, noting that "federal courts must carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights." *Id*. at 1130. The *Martin* decision also cites Justice Kennedy's concurring opinion in *Beard v. Kindler*, 130 S.Ct. 612 (2009), for the proposition that "a state procedural ground would be inadequate if the challenger shows a 'purpose or pattern to evade constitutional guarantees.'" *Martin*, 131 S.Ct. at 1130, citing *Beard*, 130 S.Ct. at 620 (Kennedy, J., concurring). Here, such a purpose or pattern is evident.

or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law...." U.S. Const. amend. XIV §1.

PROCEEDINGS BELOW

1. Mr. Hittson is a person in the custody of the State of Georgia. On February 27, 1993, after trial before a jury, Mr. Hittson was found guilty and convicted of malice murder, aggravated assault, possession of a firearm during the commission of a crime, and theft by taking. Mr. Hittson was tried and convicted in the Superior Court of Houston County, in Warner Robbins, Georgia.

2. On March 17, 1993, at the conclusion of the penalty phase of the trial, Mr. Hittson was sentenced to death by electrocution for the crime of malice murder. On the other counts, Mr. Hittson was sentenced to consecutive terms of twenty years, five years, and one year of imprisonment. Mr. Hittson did not testify at either the guilt/innocence phase or the penalty phase of his trial.

3. Mr. Hittson filed a Motion for New Trial on April 16, 1993. The trial court denied the motion for new trial on December 7, 1993. After filing a timely notice of appeal, Mr. Hittson's conviction and sentence were affirmed by the Georgia Supreme Court on October 31, 1994. *Hittson v. State*, 264 Ga. 682 (1994) *overruled in part, Nance v. State*, 272 Ga. 217 (2000). A timely filed motion for reconsideration was denied on December 1, 1994. This Court denied certiorari on May 22, 1995. *Hittson v. Georgia*, 514 U.S. 1129 (1995).

4. Mr. Hittson filed a Petition for Writ of Habeas Corpus in the Superior Court of Butts County on December 28, 1995. An evidentiary hearing was held on October 6 and 7, 1997. On July 13, 1998, the habeas court denied relief. On October 13, 1998, Mr. Hittson filed an Application for Certificate of Probable Cause to Appeal with the Georgia Supreme Court. On

September 29, 2000, the Court denied the Application.[5] The Georgia Supreme Court denied Mr. Hittson's Motion for Reconsideration on January 5, 2001.

5. On April 5, 2001, Mr. Hittson filed a Petition For Writ of Certiorari, which was denied by this Court on May 29, 2001. *Hittson v. Turpin*, 532 U.S. 1052 (2001).

6. On January 4, 2002, Mr. Hittson filed a Petition for Writ of Habeas Corpus with the federal District Court for the Middle District of Georgia. On April 10, 2003, the District Court granted Mr. Hittson's Motion for Discovery in part, allowing discovery of the contents of the Houston County District Attorney's file. Thereafter, on November 14, 2003, the Superior Court of Houston County ordered the District Attorney's file unsealed.

7. After discovering previously undisclosed exculpatory evidence in the District Attorney's file pertaining to the co-defendant Edward Vollmer, Mr. Hittson filed a Motion for Stay of Federal Court Proceedings Pending Complete Exhaustion of State Remedies. On August 30, 2004, the District Court granted Mr. Hittson's Motion, retaining jurisdiction over the federal habeas corpus petition until Mr. Hittson fully exhausted his state remedies with respect to newly discovered claims.

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[5] While Petitioner's Application for Certificate of Probable Cause to Appeal was pending, the Georgia Supreme Court overruled a key part of its earlier decision denying Petitioner's direct appeal. On direct appeal, Mr. Hittson's attorneys had argued that Mr. Hittson's Fifth Amendment privilege against self-incrimination and Sixth Amendment right to guidance of counsel were violated when, despite the fact that Mr. Hittson did not put on any mental health experts in his mitigation case, the State was allowed to present its mental health expert to repeat statements made by Mr. Hittson during a court-ordered psychological evaluation. *See Estelle v. Smith, supra*. The Georgia Supreme Court held that the testimony was properly admitted. *Hittson*, 264 Ga. at 685. The Court later reversed itself on this issue, ruling that when a defendant must submit to a court-ordered mental health examination, the State expert may testify *only* in rebuttal to the testimony of a defense expert or to rebut the testimony of the defendant himself, and expressly overruled its decision in *Hittson*. *Nance*, 272 Ga. at 220 n. 2 ("To the extent *Hittson v. State,* 264 Ga. 682, 449 S.E.2d 586 (1994) authorized a State expert to testify in response to lay witness testimony that the defendant was remorseful, it is overruled.").

8. On July 22, 2005, Mr. Hittson filed a second petition in the state habeas court raising three claims that could not reasonably have been raised in his first state habeas petition, including his claim under *Estelle v. Smith*, 451 U.S. 454 (1981). *See Hittson v. Hall*, Butts Co. Superior Court Case No. 2005-V-615.

9. An evidentiary hearing was held on November 29-30, 2007. During the hearing, Respondent and the habeas judge conceded there had been an *Estelle* violation which was properly before the court for merits review. However, on January 30, 2009, the habeas court signed Respondent's proposed order *verbatim*, procedurally defaulting most claims, finding no *Estelle* violation, and denying relief. Thereafter, Mr. Hittson filed a timely notice of appeal and an Application for Certificate of Probable Cause to Appeal with the Georgia Supreme Court. The application was denied on October 18, 2010**.**

10. On July 11, 2011, Mr. Hittson filed an amended petition for writ of habeas corpus in the federal District Court, where proceedings had been stayed. During resumed federal proceedings, Respondent again flip-flopped, conceding that an *Estelle* violation had occurred, but claiming it was harmless. On November 13, 2012, the District Court granted sentencing relief on the *Estelle* claim, but denied all other claims. Respondent appealed. On July 9, 2014, the Eleventh Circuit U.S. Court of Appeals reversed the District Court's grant of habeas relief and affirmed on all other grounds. On June 15, 2015, the United States Supreme Court denied Mr. Hittson's timely filed Petition for Writ of Certiorari to the Eleventh Circuit.

11. On February 1, 2016, the Superior Court of Houston County issued an execution warrant setting Mr. Hittson's execution to take place between February 17 and 24, 2016. His execution is currently set for February 17, 2016.

12. On February 15, 2016, Mr. Hittson filed a third Petition for Writ of Habeas Corpus in the Superior Court of Butts County. The habeas court denied relief in an order entered February 16, 2016. Mr. Hittson appealed and filed an Application for Certificate of Probable Cause to Appeal and Motion for Stay of Execution in the Georgia Supreme Court. The Georgia Supreme Court denied the Application on February 17, 2016. This Petition follows.

STATEMENT OF THE CASE

Travis Hittson faces imminent execution today, Wednesday, February 17, 2016, because of a tragic concatenation of foul blows by prosecutors (and, later, Respondent's counsel) made worse by significant and avoidable blunders by the Georgia courts presiding over and reviewing this case. Had these state actors complied in a timely manner with this Court's clearly established precedent, Mr. Hittson's sentencing verdict either would not have been rendered fundamentally unfair and unreliable or would have been overturned on appeal.

First, Mr. Hittson was robbed of a fair and reliable sentencing trial when the prosecutor was permitted to sandbag the defense with the testimony of a state psychologist, Dr. Robert Storms, who revealed off-the-cuff but nevertheless callous statements allegedly made by Mr. Hittson about the victim, Conway Utterbeck, during a pre-trial evaluation. *See* T. Sent. 241-42[6]; *Hittson v. State*, 264 Ga. 682, 684 (1994). The defense had planned to present psychiatric mitigation testimony addressing *inter alia* Mr. Hittson's particular susceptibity to his co-defendant Edward Vollmer's perverse influence, but worried it would open the door to Dr. Storms' testimony about Mr. Hittson's alleged statements. The court assured the defense that Storms would not be permitted to

[6] Legend: T. = Trial Transcript; Sent. T. = Sentencing Transcript; HT = Habeas Transcript; ROA = Record On Appeal.

testify if the defense did not open the door by presenting the testimony of a mental health doctor and social worker -- witnesses who could have provided clinical insight into his vulnerability to manipulation by Edward Vollmer, his superior officer who instigated and directed the murder of Mr. Utterbeck.[7] Based on the court's representations, the defense chose to forego psychiatric

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[7] Mr. Vollmer is currently serving a parolable life sentence pursuant to a plea deal. At trial, the defense presented lay witness testimony to substantiate Vollmer's greater culpability, as recounted by the federal District Court which previously granted Mr. Hittson sentencing relief:

> Trial counsel presented "considerable evidence" to support its theme that Hittson "exhibited a pattern of alcohol dependence and abuse and had been psychologically or personality-wise dependent to ... or ... submissive psychologically to ... Vollmer," who was an intelligent, violent, and corrupt manipulator. Numerous witnesses testified that Hittson grew up in an unaffectionate family that did not care about him and that he was a dim-witted, impressionable, non-violent, generous, and trustworthy follower who abused alcohol. [Cits. omitted.]
>
> The evidence also showed that, following his return from Georgia, Hittson just "deteriorated." Conversely, Vollmer was "just the same old guy," who continued to have a fascination with murder and dismemberment and even laughed when he, on numerous occasions, "jokingly" told his shipmates that he had killed Utterbeck. Additionally, Hittson accepted responsibility for the crime, confessed to his role in Utterbeck's murder early in the investigation, and fully cooperated with law enforcement. Investigator Wendell Hall, who was one of the State's witnesses during the guilt/innocence phase of the trial, testified that when Hittson was brought in for questioning he "appeared as someone that was very troubled," who had "been involved in something he was not extremely proud of, something that he had been a part of that he might not have necessarily been the instigator of...." During that interview, Hittson provided a detailed confession of the crime. Hittson subsequently took law enforcement officers to the locations where Utterbeck's remains were buried, and voluntarily told them where they could find the baseball bat and other instruments used in the crime. Meanwhile, the jury heard no evidence, and there was no evidence, that Vollmer had acknowledged his guilt. [Cits. omitted.]

Hittson v. Humphrey, 2012 U.S. Dist. LEXIS 161727 at 125-27.

Additionally, evidence presented in prior state habeas proceedings, including a report of a Navy psychiatric evaluation of Vollmer which was found in federal habeas proceedings to have been illegally withheld from the defense, showed that Vollmer had an "extremely high level of intelligence with an Antisocial Personality Disorder suggest[ing] a very manipulative, clever, sophisticated con artist –that is typically a person who often gets away with their infractions

mitigation precisely in order to avoid Storms' harmful testimony. But the court, over objection, allowed the state to present Dr. Storm's damaging testimony anyway.

As even Respondent's counsel now agree,[8] the trial court's betrayal of its promises to the defense that the state doctor would not be permitted to testify ran roughshod over Mr. Hittson's basic constitutional rights. *See, e.g., Estelle v. Smith,* 451 U.S. 454 (1981). As ought to have been obvious at the time, Dr. Storms should never have been allowed to testify. Mr. Hittson's defense was totally undercut by the prosecution's tactic, abetted by the trial court's disregard of both governing law and its own assurances. Dr. Storms was the last witness the jury heard before deliberating, and his testimony was a centerpiece of the prosecution's argument for death. The prosecutor even printed Mr. Hittson's purported remarks on poster board and displayed them before the jury during the entirety of his closing argument.[9]

In response to this disaster, Mr. Hittson's counsel did everything right: they objected to the state doctor's testimony (Sent. T. 240), they moved for a mistrial (*id.* at 260-61), they appealed to the Georgia Supreme Court (*Hittson,* 264 Ga. at 684-86). Yet the Georgia Supreme Court mistakenly found no constitutional violations despite the clear import of this Court's precedent. *See, e.g., Estelle*; *Buchanan v. Kentucky,* 483 U.S. 402 (1987).

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because they are smart enough to avoid getting caught, many times at the expense of a weaker codefendant'" which "'must be viewed in conjunction with the passive-dependency and the other psychological vulnerabilities, including lower intellect, exhibited by Mr. Hittson.'" *Id.* at 62.

[8] *See Hittson v. Warden,* 759 F.3d 1210, 1232 (11th Cir. 2014) ("The State now concedes the denial of Hittson's Fifth and Sixth Amendment rights and, accordingly, does not challenge the District Court's conclusion, reached under [28 U.S.C.] § 2254(d)(1), that the Georgia Supreme Court unreasonably applied *Estelle* [*v. Smith*] in denying both claims.").

[9] *See* further discussion *infra*.

Several years after Mr. Hittson's conviction and sentence were final, the Georgia Supreme Court recognized its plain error in Mr. Hittson's case and expressly overruled itself. *See Nance v. State,* 272 Ga. 217 (2000) ("To the extent *Hittson v. State* . . . authorized a State expert to testify in response to lay witness testimony that the defendant was remorseful, it is overruled.").[10]

Mr. Hittson attempted in state habeas proceedings (*Hittson v. Hall*, Butts Co. Superior Court Case No. 2005-V-615) to give Georgia courts an opportunity to rectify this obvious constitutional error in a capital case in which his life was at stake. And, in Butts County habeas proceedings, Respondent's counsel, Sabrina Graham, explicitly told the habeas court that the state agreed that an *Estelle* error had occurred in Mr. Hittson's case, per the Georgia Supreme Court's decision in *Nance,* and was properly before the court for merits review:

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[10] In *Nance,* the Georgia Supreme Court reaffirmed that a defendant who intends to present expert mental health testimony must submit to a mental health evaluation by the State, but held that the Fifth Amendment waiver of the defendant's right to silence involved in submitting to an evaluation is limited and that the state may only use information derived from the evaluation in the event that the defendant presents expert mental health testimony. *Nance,* 272 Ga. at 219 ("The rule seeks a fair balance between the interests of the State, the regard for the function of the courts to ascertain the truth, and the scope of a defendant's privilege against self-incrimination."). The Court explained that in Nance's case:

> This purpose was subverted in Nance's case when, during the State's case-in-chief in the guilt-innocence phase, the State's expert stripped off her medical title and testified as a lay witness about what the defendant told her during the examination. Access to the defendant's psyche was permitted so the State could respond to the defendant's mental health expert, not to gather incriminating statements that bolster the State's case. A defense lawyer in a capital case, who must prepare for the sentencing phase should his client be convicted, should not be forced to choose between presenting mental health mitigation evidence through an expert and providing the State with evidence with which to convict his client.

Nance, 272 Ga. at 220.

> The Court: Ms. Graham, the way I understand it, just to make sure I'm clear, we all agree there was a Nance violation but that y'all are going to contend that it's harmless error, and you're going to contend that it's not?
>
> Mr. Dunn: Correct, Your Honor.
>
> The Court: Am I correct?
>
> Ms. Graham: Yes, Your Honor.

HT (2005-V-615) at 298.

Despite this concession, Ms. Graham submitted a now discredited proposed order, riddled with legal and factual errors,[11] which found precisely the opposite, and which the habeas court signed. The order mischaracterized *Nance* as a nonconstitutional ruling that "merely narrowed an existing rule of criminal procedure," rather than the Georgia Supreme Court's corrected application of the Supreme Court's 1981 decision in *Estelle*, and concluded that it provided no new-law basis to permit reconsideration of the *Estelle* issue; *see* Case No. 2005-V-615, Order of January 9, 2009, at 12. It further imported a wholly inapplicable standard for evaluating constitutional errors in federal habeas corpus review. *Id.* at 15-16 (applying the "substantial and injurious effect" standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993)). As a consequence of the court's adoption of the flawed proposed order, it cannot be said that Mr. Hittson's constitutional claim of error under *Estelle* received review on the merits before the Georgia courts, despite clear state law requiring its reconsideration. *See, e.g.*, *Bruce v. Smith*, 274 Ga. 432, 432-33 (2001) (state

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[11] In federal habeas proceedings, the District Court described Ms. Graham's order "replete with misstatements of law and other mistakes..." *Hittson*, 2012 U.S. Dist. LEXIS 161727 at 20. The court further asked rhetorically, "[W]hen a party-drafted order is replete with misstatements of law and other mistakes, and a judge signs off on the order without even removing the lawyer's certificate of service, can a reviewing court have any confidence that the court read the order and that it is a product of independent judicial review?" *Id.* at 20.

habeas court should not have applied *res judicata* bar to claim initially denied on direct review, as the Supreme Court of Georgia had "expressly overruled" that ruling nine years later).[12]

The change in the law announced by *Nance*'s express overruling of the *Estelle* portion of Mr. Hittson's direct appeal decision was a development in the law that provided an exception to *res judicata* and required the Georgia courts to reconsider that claim in light of the Georgia Supreme Court's decision in *Nance*. Had the Georgia courts adjudicated Mr. Hittson's claim on the merits, as Ms. Graham initially agreed they should, they would almost certainly have granted relief under the correct *Chapman* harm standard,[13] instead of the incorrect and more onerous standard of *Brecht*, which Ms. Graham wrongly propounded as the proper standard when this case was previously before the state habeas court. As Judge Wilson on the Eleventh Circuit stated: "Hittson probably would have achieved habeas relief at the state court level, had the state court applied the proper, less onerous standard that constitutional violations require reversal unless they were 'harmless beyond a reasonable doubt.'" *Hittson*, 759 F.3d at 1282 (Wilson, J., dissenting) (emphasis supplied).

In subsequent federal court proceedings, Respondent's counsel, Ms. Graham, flip-flopped again, conceding not only that the Georgia courts had erred in failing to find violations of Mr. Hittson's fair trial and effective counsel rights under *Estelle* and the Fifth, Sixth and Fourteenth Amendments, but that the Georgia courts' adjudications of the claimed violations were so wrong

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[12] The state habeas court below has now repeated its error in denying relief by signing the Attorney General's proposed order *verbatim*.

[13] Georgia Supreme Court precedent is clear that in habeas proceedings, a cognizable constitutional error is reviewed under the "harmless beyond a reasonable doubt" standard set out in *Chapman v. California*, 386 U.S. 18, 24 (1967). *See, e.g., Williams v. Kemp*, 255 Ga. 380, 382, 388 (1986); *Gavin v. Vasquez*, 261 Ga. 568, 570 (1991); *Davis v. Thomas*, 261 Ga. 687, 688 (1991). *See also Hittson*, 759 F.3d at 1233 (acknowledging same).

as to constitute an "unreasonable application"[14] of clearly established Supreme Court precedent, namely: *Estelle v. Smith*. Thus, the federal courts looking at the history of this claim found, and the state agreed, that the Georgia courts' adjudication of the issue was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement"[15] as to the *Estelle* error. *See Hittson*, 2012 U.S. Dist. LEXIS 161727 at 107-16;[16] *Hittson*, 759 F.3d at 1230, 1232.

The federal District Court, having identified the glaring deficiencies in the Georgia courts' handling of Mr. Hittson's *Estelle* claim, also found that the state's illegal presentation of Dr. Storms' testimony substantially injured Mr. Hittson's chances for a sentence less than death by "effectively undercut[ting] the defense's mitigation." *Hittson*, 2012 U.S. Dist. LEXIS 161727 at 134 (applying *Brecht*'s "substantial and injurious effect" harm standard). The District Court then granted sentencing relief.

At that point, Ms. Graham could have allowed fairness to prevail, but instead she persisted in her effort to see Mr. Hittson executed by appealing the District Court's order to the Eleventh Circuit Court of Appeals. That court of course agreed with Ms. Graham that the Georgia courts had severely blundered in not finding an *Estelle* error. But the court came out differently on the question of "substantial and injurious effect" and reversed the grant of sentencing relief. *See Hittson*, 759 F.3d at 1238.

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[14] *See* 28 U.S.C. § 2254(d)(1).

[15] *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

[16] The District Court stated the obvious: "[T]he state of the law at the time the Georgia Supreme Court decided *Hittson* [*v. State*] was clear," and "[a]ny doubt that *Hittson* unreasonably applied *Estelle* was eliminated in *Nance v. State*, 272 Ga. 217, 526 S.E.2d 560 (2000)." *Hittson*, 2012 U.S. Dist. LEXIS 161727 at 107, 109.

The final result of Ms. Graham's unfortunately successful efforts to muddy the waters in the Georgia courts as to both the existence and cognizability of an *Estelle* violation and the correct harm analysis is that Mr. Hittson has been robbed of the opportunity to have his claim adjudicated and his right to a fair, reliable sentencing vindicated in the Georgia courts under the correct and proper standard – whether the error in this case was "harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24; *see also, e.g., Davis*, 261 Ga. at 688 (applying *Chapman* in habeas case).

Further, just as there can be no fair-minded disagreement that Mr. Hittson's constitutional rights were violated, no reasonable jurist could find the state's and the trial court's illegal conduct at sentencing to have been harmless beyond a reasonable doubt. *See* discussion *infra*. Now that Respondent's counsel has acknowledged that the proposed order previously drafted for this Court was poorly written[17] and in fact egregiously mistaken as to the law, and that the federal courts have found that the Georgia courts have unreasonably erred in failing to find what is obviously a significant constitutional violation in a capital case, it is urgent that this Court take this last opportunity to afford Mr. Hittson the justice he should have received long ago.[18]

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[17] *See Hittson*, 2012 U.S. Dist. LEXIS 161727 at 58 (discussing Ms. Graham's acknowledgment of having poorly drafted this Court's previous order in Butts Co. Superior Court Case No. 2005-V-615).

[18] Respondent's counsel's recent admissions in federal court that this Court's prior habeas order – Ms. Graham's order in other words – along with the Georgia Supreme Court's decisions on appeal, unreasonably erred in failing to acknowledge a clear *Estelle* error, along with parallel findings by the federal courts, warranted revisitation of Mr. Hittson's claim in the Georgia courts below. In Georgia, intervening developments, including new facts, or changes or clarification of the law, even those not of constitutional dimension, enable Georgia habeas corpus courts to consider, on the merits, legal challenges that were previously unavailable to petitioners, even where petitioners previously raised the same error. See, e.g., *Luke v. Battle*, 275 Ga. 370, 374 (2002) (intervening changes in law, including those which clarify existing law, render claim cognizable in habeas); *Johnson v. Zant*, 249 Ga. 812, 818 (1982) (previously unavailable facts warrant revisitation of claim); Bruce v. Smith, 274 Ga. at 435; *Jarrell v. Zant*, 248 Ga. 492, 492 n.1 (1981) (intervening developments in state law since earlier habeas petition allowed habeas court to consider new challenge to jury instructions on the merits in second habeas petition);

ARGUMENT

I. There Is Now No Dispute That Mr. Hittson's Fifth, Sixth And Fourteenth Amendment Rights Were Violated When The Trial Court Reversed Its Prior Position And Issued A Last-Minute Ruling Allowing The State's Mental Health Expert To Testify To Statements Made During His Evaluation Of Mr. Hittson, Even Though Mr. Hittson Had Chosen Not To Introduce Any Mental Health Or Expert Testimony Precisely In Order To Preclude Such Testimony.

That Mr. Hittson's rights under *Estelle* were egregiously violated is no longer disputed.

In preparation for Mr. Hittson's capital trial his counsel requested funds *ex parte* to conduct "a psychological profile" of Mr. Hittson (HT (2005-V-615) at 11779), which the trial court granted. Mr. Hittson was then examined by a mental health expert who found that Mr. Hittson displayed symptoms of several psychological disorders (Sent. T. at 24), had suffered brain damage and was of low-average intelligence. *Id*. at 26-27; ROA at 416-26. The defense was also granted funds for a social worker to interview Mr. Hittson's family and friends and provide testimony about his background and childhood to the jury. Sent. T. at 43-50; ROA at 1303-64. The social worker found that the Hittson family was severely dysfunctional and displayed signs of alcohol dependency, that Mr. Hittson grew up in squalid conditions, and that he was physically and emotionally neglected by his family. ROA at 1303-64. Further, the social worker found that Mr. Hittson was frequently teased by his peers, but that he had "never acted out or sought attention" and he "was a follower, not a leader." *Id*.

Tucker v. Kemp, 256 Ga. 571, 573 (1987) (recognizing exception to rule of res judicata "in that habeas would likely be allowed if the law changed which might render a later challenge successful") (quoting *Hammock v. Zant,* 243 Ga. 259, 260 n.1 (1979), citing *Stevens v. Kemp,* 254 Ga. 228 (1985)). The Georgia courts have again refused to review Mr. Hittson's federal constitutional claim.

On February 5, 1993, Mr. Hittson filed a "Notice Of Intent Of Defense To Raise Issue Of Insanity Or Mental Incompetence." ROA at 210-11. In response, the State requested that Mr. Hittson be made available "to the State for examination and testing by experts of the State's choosing." *Id*. at 236-38. On February 11, 1993, the trial court ruled that the State's psychologist, Dr. Storms, could examine Mr. Hittson in order to respond to any insanity defense the defense later might raise. PT (02/11/93) at 89-91; ROA at 340-341.

In granting the State's motion to allow Dr. Storms to examine Mr. Hittson, the trial court made clear that it was only doing so "based on the assumption" that the defense was considering presenting expert psychological evidence at trial and that, in order to rebut such evidence, the state's expert needed access to Mr. Hittson. PT (02/11/93); ROA at 340-41. The court reserved ruling on the state's demand that the defense produce the defense psychiatrist's written report, reasoning that the state would have no need to examine the results of that report if the doctor did not testify at trial. PT (02/11/93) at 89-91. Consistent with the limited purpose of Dr. Storms' examination, the court admonished defense counsel "to be real [sic] careful [not to interfere] because if anything happens that taints the result of the test," it would prohibit the defense from presenting expert psychiatric testimony of its own. *Id.* at 98. The district attorney echoed this warning, claiming that if "in the expert's opinion" the presence of defense counsel "interfere[d] with the expert's ability to make an evaluation," neither side would be permitted to introduce any expert testimony at trial. *Id*. at 99.

Concerned that such restrictions would permit the state's expert to make unfettered inquiry into the factual details of the crime and Mr. Hittson's alleged involvement, defense counsel asked the court to clarify whether Mr. Hittson would be compelled to answer questions concerning those matters. PT (02/11/93) at 100. The court ruled that Dr. Storms would be permitted to ask about

factual matters only to the extent necessary "to make an evaluation" of Mr. Hittson, and assured counsel that he would be prohibited from "serving as nothing but a surrogate prosecutor or DA or sheriff's deputy." *Id*. The district attorney noted that the State's psychologist may have to make "some inquiry" into the facts surrounding the crime, but agreed that "[i]t's a different matter, surely, if they come into court and say, well, members of the jury, let me tell you what he told me." *Id.* at 102. It was based upon this understanding of Dr. Storms' role and on the trial court's assurances that Dr. Storms would not be permitted to report to the jury statements that Mr. Hittson made in the course of the evaluation that defense counsel did not object to any questions asked. *See* HT (2005-V-615) at 49.

Dr. Storms examined Mr. Hittson on February 13 and 14, 1993. At the outset, in the absence of counsel, he presented Mr. Hittson with a document purporting to waive Mr. Hittson's Fifth and Sixth Amendment rights. After a brief discussion, Mr. Hittson signed the form. Sent. T. at 264-65. Mr. Hittson's trial counsel arrived late to the examination and was not present when Dr. Storms had Mr. Hittson execute the waiver form. *Id*. at 257; ROA at 1349-50; HT (2005-V-615) at 31. Dr. Storms later testified that, in the course of the examination, Mr. Hittson stated that Mr. Utterbeck was a "hillbilly" and an "asshole." Sent. T. at 248-49.

At the outset of the penalty phase of Mr. Hittson's capital trial, trial counsel proffered the testimony of their mental health expert and social worker and argued that the proffered testimony should not open the door to rebuttal by the state's mental health expert. *See* Sent. T. at 28-35, 59-63. The trial court ordered, consistent with its previous rulings, that if the defense presented testimony from their mental health expert, the State could call Dr. Storms in rebuttal. Sent. T. at 38-39. The court also indicated, for the first time, that testimony by the defense social worker

about Mr. Hittson's family background and impoverished childhood might constitute "mental condition" testimony and open the door to expert rebuttal by the State. *Id*. at 64-65, 67-69.

After the trial court's last minute rulings, trial counsel made the decision not to call their mental health expert or social worker. Trial counsel also clarified with the court, prior to the penalty phase presentation, that if they presented only lay witness testimony, testimony from the state's mental health expert would not be admitted. Sent. T. at 65. Based on this representation, trial counsel presented only lay witnesses who testified about Mr. Hittson's troubled background, his limited abilities and his nonviolent character, as well as describing Vollmer as manipulative, conniving, dominating and threatening. *See* summary at *Hittson*, 2012 U.S. Dist. LEXIS 161727 at 125-26.

Trial counsel's efforts not to "open the door" to the state's mental health testimony ultimately proved futile. After lay witnesses described Mr. Hittson as remorseful for his actions, the court allowed the State, over defense objection, and despite the court's prior rulings, to call Dr. Storms to testify in rebuttal that Mr. Hittson had referred to the victim as a "hillbilly" and an "asshole." Sent. T. at 248-49. Dr. Storms was the only witness called by the State in the penalty phase and the final witness the jury heard before determining Mr. Hittson's sentence.[19] The prosecutor made Storm's testimony a focus of his penalty phase summation, and Mr. Hittson was indeed sentenced to death.

[19] Rather than explaining that he was selected and compensated by the State for his testimony, Dr. Storms deliberately left a very different impression with the jury: "Let me preface. . .the following statements, so that the jury understands that we are a neutral party that responds only to court orders, and our reports are primarily for a judge." Sent. T. 264.

II. The *Estelle* Error Was Not Harmless Beyond A Reasonable Doubt Under *Chapman v. California*.

A. Respondent's Counsel's Prior Misrepresentations Or Mistakes Of Fact And Law Have Prevented The Georgia Courts From Both Properly Addressing Mr. Hittson's *Estelle* Claim And Applying The Correct *Chapman* Harm Standard, Errors This Court Can And Must Rectify.

As previously discussed, Respondent's counsel initially told the habeas court in Case No. 2005-V-615 that the state agreed that an *Estelle* violation had occurred in Mr. Hittson's case and was properly cognizable on the merits, but then drafted a proposed order in that case which stated the exact opposite, and, furthermore, applied a flat wrong harm standard – that of *Brecht v. Abrahamson*, *supra*, which sets forth a more onerous standard which *federal*, not state, courts are to use in assessing whether a constitutional error was harmless. The habeas court then signed that order – an order which Respondent's counsel later admitted was "poorly written"[20] and about which the federal District Court had significant doubts as to its reliability. *See Hittson*, 2012 U.S. Dist. LEXIS 161727 at 20-21.

Nevertheless, the federal habeas courts could not correct the state court error by independently applying the *Chapman* standard, rather than the significantly more onerous *Brecht* harm standard.[21] Yet, this Court has continued to insist that state courts assess the prejudicial impact of constitutional error under the *Chapman* standard. *See Fry*, 551 U.S. at 118.

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[20] *See Hittson*, 2012 U.S. Dist. LEXIS 161727 at 44 n.23.

[21] *See also Fry v. Pliler*, 551 U.S. 112, 118 (2007): "To say (a) that since state courts are required to evaluate constitutional error under *Chapman* it makes no sense to establish *Chapman* as the standard for federal habeas review is not at all to say (b) that whenever a state court fails in its responsibility to apply *Chapman* the federal habeas standard must change."

Moreover, in Georgia, the law is clear that in habeas corpus proceedings, as on direct appeal, cognizable federal constitutional violations are reviewed under *Chapman*'s "harmless beyond a reasonable doubt" standard. *See, e.g.*, *Williams*, 255 Ga. at 382, 388; *Vasquez*, 261 Ga. at 570; *Davis*, 261 Ga. at 688. *See also Hittson*, 759 F.3d at 1233 (acknowledging same).

Respondent's counsel's poorly drafted order, and the Georgia courts' collective failure to correct the critical errors therein, have deprived Mr. Hittson of a just adjudication of his *Estelle* claim and have thus ratified a flawed and unreliable death sentence without any meaningful opportunity for review.

B. No Reasonable Jurist Could Find The Error Harmless Beyond A Reasonable Doubt.

The improper admission of Dr. Storms' testimony was absolutely devastating to Mr. Hittson's defense. Through the testimony of lay witnesses, the defense had attempted to demonstrate that Mr. Hittson was a nonviolent, passive and vulnerable individual of low intelligence who personally had no hostility toward Mr. Utterbeck but was in the thrall of his more savvy and manipulative co-defendant Edward Vollmer. Trial counsel also, and more importantly, demonstrated, through the testimony of one of their defense mitigation witnesses and through the cross-examination of a state witness that Mr. Hittson was remorseful, burdened and ashamed. Sent. T. at 299, 301, 278-79; T. at 233-35, 237-38. Trial counsel also argued, as was evident from the record, that Mr. Hittson had accepted responsibility for his crimes. Sent. T. at 300. As the federal District Court explained, additionally, "defense counsel clearly recognized the significance of Hittson's statements to Dr. Storms and played every card they could to keep him from testifying." *Hittson*, 2012 U.S. Dist. LEXIS 161727 at 127.

As the District Court further explained, the effect of Dr. Storms' testimony was extremely damaging:

> The fact that the jury heard Dr. Storms' testimony last carries a significance that any trial lawyer can appreciate. However, it requires no trial experience to understand that Dr. Storms' testimony shifted the field dramatically....
>
> While Dr. Storms' testimony was brief, it was effective. The State recognized just how effective[22] and made sure the testimony remained center stage throughout closing arguments. During its closing, the State displayed the words "asshole" and "hillbilly" on "big poster boards"[23] alongside photographs of Utterbeck's mutilated remains and described both as the "reality" versus the false image of Hittson that the defense witnesses sought to dupe the jury into believing.

Hittson, 2012 U.S. Dist. LEXIS 161727 at 129-30.

Indeed, the testimony presented by Dr. Storms formed the basis for the state's most powerful arguments to the jury in closing:

> Now of course you've heard one of the defense witnesses talk about, well, as I think about it now he was remorseful. I think he was remorseful. Well, members of the jury, there's your remorse. (Referring to easel). As early, or as late, rather, as three weeks ago this is this defendant's response when asked about Conway Utterbeck being an innocent human being. Conway was a hillbilly, he was an asshole. Is that remorse? What does your common sense tell you? What does reason tell you? Members of the jury, there's no remorse here.

Sent. T. at 278-79. This argument was all the more convincing and authoritative for having been based on evidence of what was alleged to be the Mr. Hittson's actual statements. In fact, it was the only evidence presented at sentencing that purported to come from Mr. Hittson himself, and

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[22] At the second state habeas evidentiary hearing, defense counsel was questioned whether he thought the admission of Dr. Storms' testimony affected the jury. He explained, "It was like getting hit in the head with a board. I mean, it just was, it was just, it was like getting gutted." HT (2005-V-615) at 226.

[23] *See* Sent. T. at 92-93; HT (2005-V-615) at 13-14.

therefore was the most compelling evidence in front of the jury.[24] *See Arizona v. Fulminante*, 499 U.S. 279, 296 (1991).

It is beyond dispute that remorse and acceptance of responsibility are powerful mitigating evidence. "In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies." *Riggins v. Nevada*, 504 U.S. 127, 143 (1992) (Kennedy, J., concurring). *See also Brown v. Payton*, 544 U.S. 133, 142-43 (2004) ("[R]emorse . . . is something commonly thought to lessen or excuse a defendant's culpability.").

The introduction of Dr. Storms' testimony left the unmistakable impression that an expert in psychology had found Mr. Hittson's remorse to be contrived. Unlike Dr. Storms, none of the witnesses who testified to Mr. Hittson's remorsefulness carried the authority of a mental health expert. Like the testimony of the expert in *Satterwhite v. Texas*, 486 U.S. 249 (1988)—who had testified at sentencing in violation of the defendant's Sixth Amendment right to counsel—Dr. Storms' testimony "stands out both because of his qualifications as a medical doctor specializing in psychiatry and because of the powerful content of his message." *Id*. at 1799. The damage was compounded by Dr. Storms' misrepresentation of his role. As the District Court stated: "Dr. Storms, claiming to be a neutral party testifying at the behest of the court, rather than an expert employed by the State, explained that he was 'the senior psychologist for the Forensic Services Division at Central State Hospital' and that he had examined Hittson just sixteen days earlier, which was only two days before the start of Hittson's trial for the murder of Utterbeck." *Hittson*, 2012 U.S. Dist. LEXIS 161727 at 128.

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[24] Nor did the jury ever learn that Dr. Storms had stated in his report that he noted no hostility behind Mr. Hittson's statements. HT (2005-V-615) at 591.

The state's heavy focus on Dr. Storms' testimony in closing argument endorses a finding that the testimony had enormous import to the state's case in aggravation against Mr. Hittson. Sent. T. at 92-93; HT (2005-V-615) at 13-14. *See Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (whether an error is harmless depends upon "the importance of the witness' testimony in the prosecution's case" and "whether the testimony was cumulative," along with other factors).

As the District Court explained in finding the *Estelle* violation to be substantially harmful under *Brecht*, Dr. Storms' testimony aided the State in arguing for the "depravity of mind" aggravator, *Hittson*, 2012 U.S. Dist. LEXIS 161727 at 132, the only aggravator found by a jury which the evidence shows was struggling[25] with its verdict:

> For these reasons, to the extent that the second state habeas court made a finding of fact when, without discussion, it found Dr. Storms' testimony to be only "minor evidence" in aggravation, Hittson has shown by clear and convincing evidence that this finding was clearly erroneous. This Court cannot say, with fair assurance, that the jury's decision to sentence Hittson to death was not substantially swayed by the erroneous admission of Dr. Storms' testimony. When the Court considers the admission of Storms' testimony in the context of the entire trial, it is apparent that his improperly admitted statement effectively undercut the defense's mitigation theory. Affording the second state habeas court's order all appropriate deference, it is clear to this Court that the violation of Hittson's constitutional rights had a "'substantial and injurious effect or influence'" in the jury's determination to sentence Hittson to death. *Brecht*, 507 U.S. at 637.

Id. at 134.

It bears repeating that the District Court's finding of harm was made under the far more onerous "substantial and injurious effect" standard of *Brecht* and not the *Chapman* standard. In his dissent from the denial of relief in the Eleventh Circuit, Judge Charles Wilson accurately stated that:

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[25] *See Hittson*, 2012 U.S. Dist. LEXIS 161727 at 133 (discussing jurors submission of notes asking meaning of life sentence).

> Hittson probably would have achieved habeas relief at the state court level, had the state court applied the proper, less onerous standard that constitutional violations require reversal unless they were "harmless beyond a reasonable doubt," *Chapman*, 386 U.S. at 24, 87 S. Ct. at 828....
>
> [A]ccording to our precedent and the clear implication of the Supreme Court, Hittson was still entitled to have his Fifth Amendment claim considered by the State of Georgia under the *Chapman* analysis before our review and *he was deprived of that entitlement*.

Hittson, 759 F.3d at 1282 (Wilson, J., dissenting) (emphasis supplied).

Fair-minded jurists simply could not find beyond a reasonable doubt that Dr. Storms' constitutionally infirm testimony did not impact the jury to Mr. Hittson's detriment. Had Respondent's counsel properly acknowledged the existence of the *Estelle* error in prior state habeas proceedings and acceded to merits review and the applicable *Chapman* standard for assessing harm, Mr. Hittson would almost certainly have received the proper Georgia court review he was instead denied. A remand to the Georgia courts for review of Mr. Hittson's *Estelle* claim is appropriate. Alternatively, Mr. Hittson asks that this Court grant the Petition and after review, grant relief directly.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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Counsel for Mr. Hittson

Attachment A

SUPREME COURT OF GEORGIA
Case No. S16W0863

Atlanta February 17, 2016

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

TRAVIS CLINTON HITTSON v. BRUCE CHATMAN, WARDEN

Upon consideration of Hittson's application for a certificate of probable cause to appeal the dismissal of his third state habeas corpus petition, the Warden's response thereto, and the record, the application is denied as lacking arguable merit as a matter of Georgia procedural law. See Supreme Court Rule 36 ("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. . . .").

Hittson's motion for a stay of execution is also denied.

All the Justices concur.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk 's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk

Attachment B

THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

TRAVIS CLINTON HITTSON,	*	
	*	**CIVIL ACTION NO.**
Petitioner,	*	**2016-HC-5**
	*	
v.	*	**HABEAS CORPUS**
	*	
BRUCE CHATMAN, Warden, Georgia Diagnostic and Classification Center,	*	
	*	
Respondent.	*	

ORDER

This is Petitioner's third state habeas petition. As all of Petitioner's claims are barred from this Court's review under state law, the petition is DISMISSED and the stay DENIED.

Petitioner alleges that his Fifth, Sixth and Fourteenth Amendment rights were violated under Estelle v. Smith, 451 U.S. 454 (1981) by the testimony of the court-ordered mental health expert in the sentencing phase of his trial concerning statements made by Petitioner in his pretrial evaluation. Petitioner raised these claims on direct appeal, and they were rejected. Hittson, 264 Ga. 682, 684-686 (1994). Thereafter, alleging a change in the law, Petitioner again raised these claims in a motion for reconsideration to the Georgia Supreme Court following that Court's denial of an application to appeal from the denial of Petitioner's first state habeas proceeding. The Georgia Supreme Court denied the motion. Hittson v. Turpin, Case No. S99R0100 (Jan. 5, 2001). Subsequently, Petitioner raised the

same claims in a second state habeas petition. This Court found that Nance did not apply retroactively to Petitioner's case and, in two separate orders, this Court found the claims were barred as res judicata. Hittson v. Terry, Civil Action No. 2005-V-615, pp. 4-5 (Butts Superior Court, Oct. 5, 2005); Hittson v. Hall, Civil Action No. 2005-V-615, pp. 10-16 Butts Superior Court, Jan. 1, 2009). Petitioner then filed an application to appeal with the Georgia Supreme Court which expressly alleged that this Court had utilized an incorrect standard in reviewing the Estelle claim. The Georgia Supreme Court denied Petitioner's second application for certificate of probable cause to appeal. Hittson v. Hall, Case No. S09E1294 (Oct. 18, 2010). Finally, the Eleventh Circuit Court of Appeals also rejected the claims. Hittson v. GDCP Warden, 759 F.3d 1210 (11th Cir. 2014).

The Court further finds there has been no intervening change in the facts or the law to overcome this procedural bar, nor has Petitioner established a miscarriage of justice. Therefore, this Court finds that these claims remain barred from this Court's review by the doctrine of res judicata. See Roulain v. Martin, 266 Ga. 353 (1996); Gaither v. Gibby, 267 Ga. 96, 97 (1996); Gunter v. Hickman, 256 Ga. 315 (1986).

As this Court is able to determine from the face of the pleadings that the claims in the petition are barred from this Court's review, the petition is dismissed

without the necessity of a hearing. See Collier v. State, 290 Ga. 456 (2012).

Additionally, Petitioner's request for a stay of execution is denied.

SO ORDERED, this 16 day of February, 2016.

THOMAS H. WILSON
Chief Judge of the Superior Courts
Towaliga Judicial Circuit

Prepared by:
Sabrina Graham
Senior Assistant Attorney General
sgraham@law.ga.gov

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Pleading and Proposed Order, prior to filing the same, by emailing, properly addressed upon:

Brian Kammer
Marcia Widder
Kirsten Salchow
Georgia Resource Center
303 Elizabeth Street NE
Atlanta, Georgia 30303

This 16th day of February, 2016.

Sabrina Graham/sc
SABRINA GRAHAM
Senior Assistant Attorney General

No. 15-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2015

TRAVIS HITTSON,

Petitioner,

-v-

BRUCE CHATMAN, Warden,
Georgia Diagnostic Prison,

Respondent.

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing document this day by hand delivery/electronic mail on counsel for Respondent at the following address:

Beth Burton
Assistant Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300

This 17th day of February, 2016.

Attorney