Nos. 15-8157 15A857

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 BUTTS COUNTY SUPERIOR COURT

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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QUESTION PRESENTED

A. Should this Court grant certiorari to review a decision of a fact-specific Estelle v. Smith, 451 U.S. 454 (1981) claim that was decided solely on independent and adequate state law grounds?

B. Should this Court grant certiorari to review a state law evidentiary question?

C. Should this Court grant certiorari to review a state court's prior decision that was not contrary to this court's precedent?

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BRIEF IN OPPOSITION
ON BEHALF OF RESPONDENT

Certiorari review is not warranted in this case and the state habeas court properly dismissed Petitioner's third state habeas petition based solely on adequate and independent state law ground of res judicata. Further, the question of which harmless error standard should be applied by the Georgia courts is a state law question and the decision of the state court does not conflict with any precedent of this Court.

Petitioner argues attempts to circumvent this bar and disparage opposing counsel by repeatedly asserting Respondent conceded constitutional error on these claims, but then relied upon procedural defenses; however, it is without question that constitutional errors are subject to procedural bars, as in this case, and can be harmless. This Court should deny Petitioner's application to appeal and motion for stay of execution.

I. STATEMENT OF THE CASE

Petitioner has repeatedly raised these same claims for the past 23 years.

A. Trial (1993)

Petitioner was tried before a jury in February 1993. In preparation for trial, Petitioner's counsel had him evaluated by an independent mental health expert. Following that examination, the trial court ordered an evaluation of Petitioner by the state's expert on the issues of criminal responsibility and competency.

Subsequently, at the sentencing phase of trial, Petitioner presented testimony from a Navy shipmate that Petitioner had admitted to killing the victim, but he seemed remorseful. In response, the State presented the testimony of the court-ordered expert, Dr. Robert Storms. Dr. Storms testified that during the pretrial evaluation of Petitioner, and after Miranda warnings, Petitioner described the victim as a "hillbilly" and an "asshole."[1]

On March 17, 1993, Petitioner was convicted of murder, theft by taking as a lesser included offense of armed robbery, aggravated assault, and possession of

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[1] Although Petitioner argues that trial counsel decided to forego mental health mitigation solely to prevent these statements from being introduced, (Petition, p. 2, n1), the Eleventh Circuit, quoting the trial attorneys' testimony, found:

> "[Trial counsel Sammons] explained his fear "that [the defense expert] would testify that Travis was just mean, and that he just did this because he is mean." Apparently, after talking to Dr. Moore, Sammons did not think they should put on any mental health evidence: "I was scared to death that Dr. Moore's testimony would come in, that Dr. Prewett would testify that he had a consultation with Dr. Moore, and that Dr. Moore would have been called, and he was our psychiatrist, and he would have testified that Travis was just mean." "I didn't think that there was anything worth doing to take the risk of putting, of having the State put our psychiatrist on the stand to testify that our client was just mean." While Hollman was less troubled by Dr. Moore's possible testimony (which presumably explains why they still proffered Dr. Prewett's testimony), he still felt that Dr. Moore's findings were not very helpful to their mitigation theory, and he wanted to avoid having Dr. Moore testify before the jury, if possible.

Hittson v. GDCP Warden, 759 F.3d 1210, 1245 (11th Cir. 2014) (Citations omitted). The Court also noted that trial counsel was worried about Petitioner's "elevated Psychopathic Deviant score," and that "all of the psychologies and psychological evaluations taken together were very, well, they were unfavorable." Id.

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.

B. Direct Appeal (1993-1995)

Petitioner appealed to the Georgia Supreme Court and raised claims that the introduction of his statement through Dr. Storms deprived him of his Fifth, Sixth and Fourteenth Amendment rights under Estelle**.** The Georgia Supreme affirmed Petitioner's convictions and sentences on October 31, 1994. Hittson v. State, 264 Ga. 682, 683-686 (1994).

In denying Petitioner's claim that his Fifth Amendment right to self-incrimination was violated, the court held:

> Custodial communications made to a court-appointed mental health expert are testimonial in nature, and, generally, must be preceded by Miranda warnings for the defendant's statements to be admissible during the state's case-in-chief or sentencing phase of trial. Estelle v. Smith, 451 U.S. 454, 467-469 (101 S. Ct. 1866, 68 L. Ed. 2d 359) (1981); Buchanan v. Kentucky, 483 U.S. 402, 422 (107 S. Ct. 2906, 97 L. Ed. 2d 336) (1987).
>
> In this case defense counsel had notice of the evaluation and were aware that they could be present throughout the proceedings. The record supports the trial court's finding that Miranda warnings were properly administered, that Hittson voluntarily waived his right to remain silent, and that he willingly participated in the evaluation. The record does not support Hittson's contention that he waived his Fifth

> Amendment privilege only to the extent of permitting an evaluation to rebut a possible insanity defense. Nor does the record support Hittson's contention that the trial court's rulings prevented defense counsel from objecting to any part of the evaluation. As we read the record, the trial court correctly cautioned defense counsel that refusing to submit to the examination could result in the striking of the testimony of Hittson's own mental health expert. Strickland v. State, 257 Ga. 230 (5) (357 S.E.2d 85) (1987).
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> Further, the state psychologist's request that Hittson characterize the victim did not exceed the scope of the court-ordered evaluation. Christenson v. State, 261 Ga. 80, 84 (402 S.E.2d 41) (1991). Admission of Hittson's Mirandized statements to rebut a claim of remorse was proper. Harris v. Pulley, 692 F2d 1189 (9th Cir. 1982); Hicks v. State, 256 Ga. 715 (14) (352 S.E.2d 762) (1987).

Hittson, 264 Ga. at 684-685.

The Georgia Supreme also rejected Petitioner's claim that his Sixth Amendment right to counsel was violated holding as follows:

> We agree with the state that the trial court's order identifying the scope of mental evaluation to be made by the state's expert coupled with the extensive discussion of this matter at a hearing prior to the evaluation adequately put defense counsel on notice as to the scope and nature of the proceeding. The trial court left to defense counsel the decision of whether to be present during the evaluation, and it is undisputed that defense counsel chose to be present during most of the two-day evaluation. The trial court further made it clear that if issues regarding the scope and nature of the evaluation arose, it would be available throughout the course of the evaluation to make rulings. The record also shows that at least one defense attorney counseled Hittson prior to the evaluation.
>
> Under these circumstances, Hittson's Sixth Amendment right to counsel was not violated within the meaning of Estelle v. Smith, supra.

Hittson, 264 Ga. at 685.

Finally, the court reviewed and rejected Petitioner's claim that his due process rights under the Fourteenth Amendment had been violated.

> Hittson argues that his due process rights were violated because the trial court did not inform him that the state's psychologist would be permitted to testify to issues other than mental competency and criminal responsibility. Contrary to Hittson's assertions, the trial court did not limit the issues upon which the state's expert would be permitted to testify. Further, both the oral warnings and the signed waiver form notified Hittson that anything he said to the psychologist could be used against him during the state's case-in-chief or during the sentencing phase of trial. Finally, because defense counsel was present when Hittson made the statements in question, he may not claim surprise at the content of the psychologist's testimony.

Hittson, 264 Ga. at 685-686. Petitioner petition this Court for certiorari review on this issue. This Court denied review. Hittson v. Georgia, 514 U.S. 1129 (1995).

C. First State Habeas (1995-2001)

Petitioner then filed his first state habeas corpus petition on or about December 31, 1995. Recognizing that his claims were res judicata, Petitioner only alleged that trial counsel were deficient and he was prejudiced by trial counsel not being present during the entirety of Dr. Storms's pretrial evaluation. The state habeas court rejected Petitioner's claim of ineffectiveness, and denied Petitioner's first state habeas petition on July 13, 1998.

The Georgia Supreme denied Petitioner's first application for a certificate of probable cause to appeal on September 29, 2000. Petitioner then filed a petition for writ of certiorari with this Court on April 5, 2001. He did not raise

any allegations as to his ineffectiveness claim regarding Dr. Storms's testimony. The petition for certiorari review was denied on May 29, 2001. Hittson v. Turpin, 532 U.S. 1052 (2001).

In the interim, in 2000, the Georgia Supreme held, that "the State expert may only testify in rebuttal to the testimony of the defense expert or to rebut the testimony of the defendant himself." Nance v. State, 272 Ga. 217 (2000). Noting the discrepancy in Hittson, the court further held, "To the extent Hittson v. State, 264 Ga. 682 (2) (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." Id. at 220, n.2.

Thereafter, following the denial of Petitioner's application for a certificate of probable cause to appeal, in a motion for reconsideration Petitioner reasserted his Estelle claims to this Court citing to Nance. The Georgia Supreme denied the motion for reconsideration.

D. Federal Habeas Proceedings (2002-2004)

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. Hittson v. Head, 5:01-CV-384 (M.D. Ga., Aug. 30, 2004).

E. Second State Habeas Proceedings (2005-2011)

Petitioner filed his second state habeas corpus petition on July 20, 2005. In that second habeas petition, Petitioner again raised his Estelle claims, citing to Nance, in addition to the two Brady claims.

The state habeas court rejected Petitioner's claim, dismissing Petitioner's Fifth Amendment claim as follows:

> This claim is barred as successive under O.C.G.A. § 9-14-51 and precluded from review under Black v. Hardin. To prevail on this subsequent state habeas claim, Petitioner must show constitutional errors or deficiencies, adequate cause for failure to object or to pursue on appeal *and* **a showing of actual prejudice**, or, alternately, a miscarriage of justice. See Black v. Hardin, 255 Ga. at 240.
>
> There has been **no showing of actual prejudice** to Petitioner flowing from Dr. Storms's brief testimony, nor has there been a showing of substantial denial of constitutional rights to warrant relief as a miscarriage of justice.
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> Alternatively, this claim **fails under the principle of *res judicata* as the Georgia Supreme Court rejected this claim on direct appeal, Hittson v. State, 264 Ga. at 683-685 (2), denied Petitioner's application for certificate of probable cause to appeal on this claim on September 29, 2000, and refused reconsideration of this claim on January 5, 2001, a year after deciding Nance v. State, 272 Ga. 217, 526 S.E.2d 560 (2000).**

Hittson v. Terry, Civil Action No. 2005-V-615, pp. 4-5 (Butts Superior Court, Oct. 5, 2005) (emphasis added). 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 this 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 state habeas court "to conduct a hearing in accordance with O.C.G.A. § 9-14-47."

An evidentiary hearing was held on November 29-30, 2007. At the conclusion of the evidentiary hearing, the state 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 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 state habeas court

granted this request and again, Petitioner failed to file a post-hearing brief. Thereafter, the 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.

In that 2009 order, the state habeas court again reviewed Petitioner's Estelle claims and found they remained barred from review under the doctrine of res judicata. The state habeas court found the claims had already been decided by this Court on direct appeal. Hittson v. Hall, Civil Action No. 2005-V-615, pp. 11-16 (Butts Superior Court, Jan. 1, 2009). In its 2009 Order, the state habeas court also found Petitioner had failed to present new facts or new law, that Nance was not applied retroactively, and that Petitioner had failed to show a miscarriage of justice to overcome the bar to these claims. Id.

Additionally, the state habeas court found, alternatively, that even if there was no procedural bar to the claim, any error was harmless under the Brecht v. Abrahamson, 507 U.S. 619 (1993) standard. Id. at 16.

Petitioner filed his application for a certificate of probable cause to appeal on February 17, 2009. In that application, Petitioner again cited Nance as an intervening change in the law. The application for a certificate of probable cause to appeal was denied by the Georgia Supreme on October 18, 2010. Petitioner filed a petition for writ of certiorari with this Court on April 21, 2011. In his

petition, Petitioner alleged that the state habeas court erred in denying his Estelle claims. This Court denied certiorari review on June 20, 2011. Hittson v. Humphrey, 131 S. Ct. 3038 (2011).

F. Federal Habeas Proceeding (2011-2015)

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 based upon Petitioner's claims that the admission of evidence from a mental health expert during the sentencing phase of trial violated his Fifth and Sixth Amendment rights.

The Eleventh Circuit reversed the district court's grant of relief on July 9, 2014. Hittson v. GDCP Warden, 759 F.3d 1210 (11th Cir. 2014). 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 (emphasis added). 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 Eleventh Circuit, "flatly reject[ed]" the conclusion that Dr. Storms's testimony helped to establish depravity of mind explaining:

> 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.

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'ss 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 (emphasis added).

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. 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 state habeas court in support of his ineffectiveness claim that Petitioner's name calling to Dr.

Storms were "offhand remarks." Id. at 1238.[2] 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 filed a petition for writ of certiorari with this Court on February 23, 2015, again raising these same claims. That petition was denied on June 15, 2015. Hittson v. Chatman, 135 S. Ct. 2126 (2015).

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[2] As noted by the Eleventh Circuit, even **Petitioner conceded that Dr. Storms's comments were not "devastating," as he claims to this Court**. Petitioner argued in his first state habeas post-hearing brief to the state habeas court:

> Mr. Hollman's [(lead trial counsel)] concern over Dr. Storms' potential testimony . . . was exaggerated and unfounded. Mr. Hollman was not concerned about Dr. Storms' professional assessment of Mr. Hittson, but feared only that Dr. Storms would testify to remarks Mr. Hittson made during their pre-trial interview. During that interview, Mr. Hittson referred to the victim as a "hillbilly" and, at another point, an "asshole." However, given that Mr. Hittson had just been found guilty of a horrific murder, **these offhand remarks** hardly outweighed the benefits of introducing favorable psychological evidence.Doc. 76-1, at 39 (citation omitted).

Hittson, 759 F.3d at 1237. **Accordingly, under any standard, Petitioner's Estelle claims would fail as he seems to have acknowledged in his post-hearing brief.**

An order setting the execution of Petitioner was filed on February 1, 2016. On February 15, 2016, Petitioner filed his third state habeas petition. The state habeas court denied relief on February 16, 2016 finding all of Petitioner's claims were procedurally barred based on Georgia law.

II. STATEMENT OF THE FACTS OF THE CRIME

In light of Petitioner's claims that he suffered harm from the remarks of the court-ordered expert during the sentencing phase of trial, a review of the facts of the crimes are important. 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.

When Utterbeck failed to report for roll call on Monday, April 6, the Navy took note of his unauthorized absence but did not further investigate until later that month, when Utterbeck's mother called his division commander to tell him that she had not heard from her son since the first weekend in April—when he had traveled to Warner Robins with two shipmates. Inquiries aboard the Forrestal led Navy personnel to Hittson and Vollmer. When questioned about Utterbeck's whereabouts, they confirmed that they had gone to Vollmer's parents' house over the April 3 weekend with Utterbeck, but they claimed that

they dropped him off at a bar in Pensacola sometime in early morning hours of Monday, April 6. On April 27, 1992, the Naval Investigative Service issued a missing persons alert for Utterbeck, and on May 5 he was declared a Navy deserter.

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

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

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

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

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

III. REASONS CERTIORARI REVIEW IS NOT WARRANTED

A. This Court Should Deny Certiorari Review As The State Habeas Court Dismissed The Petition On Independent And Adequate State Law Grounds.

The state habeas court properly concluded that all of Petitioner's claims filed in his successive state petition were barred from review based on state law. As the state court's dismissal of the successive petition was on adequate and independent state law grounds, which are routinely applied in Georgia and present no federal question, the Court should deny certiorari review.

1. State Habeas Court Properly Found Petitioner's Estelle Claims Were Barred Based on State Law

Under longstanding Georgia law, issues previously raised may not be relitigated in habeas corpus if there has been no change in the facts or the law. Bruce v. Smith, 274 Ga. 432, 434 (2001); Gaither v. Gibby, 267 Ga. 96, 97 (1996); Gunter v. Hickman, 256 Ga. 315 (1986); Elrod v. Ault, 231 Ga. 750 (1974). As

Petitioner's Estelle claims have previously been raised and rejected by the state courts, the state habeas court properly applied state law in dismissing the petition.

The state habeas court properly dismissed this claim in this third state habeas proceeding holding:

> 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).

Hittson v. Chatman, Butts Co. Sup. Ct., Case No. 2016-HC-5, pp. 1-2 (February 16, 2016) (emphasis added).

2. Adequate And Independent State Law Grounds Provide No Federal Question

This Court has held on numerous occasions that a state court judgment which rests on an independent and adequate state law ground presents no federal question for adjudication by this Court in a petition for a writ of certiorari. See, e.g., Fox Film Corp. v. Miller, 296 U.S. 207, 210 (1935); Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945); Michigan v. Long, 463 U.S. 1032 (1983).

Therefore, as the decision of the state habeas court, which Petitioner is requesting that this Court review, clearly rests upon adequate and independent state law grounds, this Court should deny Petitioner's petition for writ of certiorari.

3. The State Habeas Court Properly Found No Miscarriage of Justice To Overcome the State Procedural Bars

The state habeas court also properly concluded that Petitioner had failed to establish a miscarriage of justice to overcome the state procedural bars. In Valenzuela v. Newsome, 253 Ga. 793. 796 (1985), the Georgia Supreme Court stated that the term miscarriage of justice is to be reviewed on a case-by-case basis and the court specifically set "no definitive limits." Id. The court concluded:

> However, the term is by no means to be deemed synonymous with procedural irregularity, or even with reversible error. To the contrary, it demands a much greater substance, approaching perhaps the imprisonment of one who, not only is not guilty of the specific offense for which he is convicted, but, further, is not even culpable in the circumstances under inquiry.

Id. As the allegation does not turn on actual innocence, the state habeas court properly found Petitioner failed to meet this standard.

Further, contrary to the "devastating effects" now claimed by Petitioner, the Eleventh Circuit found in federal habeas review that the court-ordered evaluator's comments were not significant. Hittson, 759 F.3d at 1238. Moreover, as also noted by the Eleventh Circuit, even Petitioner conceded in his first state habeas corpus proceedings the comments did not amount to much. Id. at 1237. Petitioner: snuck up on a sleeping man; beat him several times in the head with a baseball bat; moved him to kitchen so as not to mess up the carpet; castrated his victim; skinned his penis and buttocks; carved out his rectum; cut off his head, hands and feet; and took a break grab a bite to eat in the middle of the mutilation. As conceded by Petitioner in a prior post-hearing brief claiming that counsel were ineffective, "given that Mr. Hittson had just been found guilty of a horrific murder, **these offhand remarks** hardly outweighed the benefits of introducing favorable psychological evidence" from the defense's own expert. Hittson, 759 F.3d at 1237, quoting Petitioner's prior state habeas post-hearing brief.

B. This Court Should Deny Certiorari Review As The Claim Petitioner Is Attempting Raise Is Solely A State Law Evidentiary Question.

Petitioner acknowledges that his Estelle claim has been reviewed by both the state and federal courts, but argues that the state habeas court utilized the wrong standard of review in denying the claim. This is question of state law and not a constitutional issue for certiorari review.

Petitioner argues that Georgia case law establishes that the Chapman v. California, 386 U.S. 18, 24 (1967) harmless error standard should have been applied to his claim by the state habeas court.[3] Instead, in addition to finding a res judicata bar, the state habeas court in 2009, in the alternative, applied the Brecht v. Abrahamson, 507 U.S. 619, 633 (1993) harmless error standard and concluded that there was not a "substantial or injurious effect" resulting from the testimony. Petitioner raised this analysis as error in an application to appeal to the Georgia Supreme Court. The Georgia Supreme Court denied Petitioner's application.

The standard the Georgia courts determine to utilize in reviewing claims on collateral review is not a constitutional issue. The fact that Petitioner alleges that Georgia should provide a harsher standard of review in collateral proceedings than this Court has found applies in federal collateral review does not present a federal

[3] Respondent acknowledges that the Georgia Supreme Court has used the Chapman standard in ruling upon state habeas appeals; however, the court has never issued an opinion stating that the Chapman standard must be applied in state habeas proceedings.

question. Certiorari review and Petitioner's request for a stay of execution should be denied.

C. This Court Should Deny Certiorari Review As The State Court's Prior Decision Was Not Contrary to This Court's Precedent.

In accordance with this Court's precedent the state habeas court, in 2009, applied the Brecht harmless error standard in denying Petitioner relief on these claims. In Brecht this Court held that the "Kotteakos harmless-error standard is better tailored to the nature and purpose of collateral review than the Chapman standard, and application of a less onerous harmless-error standard on habeas promotes the considerations underlying our habeas jurisprudence." 507 U.S. at 623. Accordingly, as the state habeas court's holding does not conflict with the precedent of this Court, certiorari review is unwarranted and the accompanying request for stay should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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This 17th day of February, 2016.

s/Beth Burton
BETH BURTON
Deputy Attorney General