No. 18-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

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MARION WILSON, Petitioner,

-v-

STATE OF GEORGIA, Respondent.

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**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA AND/OR THE SUPERIOR COURT OF BALDWIN COUNTY, GEORGIA**

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**THIS IS A CAPITAL CASE**

**EXECUTION SET FOR JUNE 20, 2019, AT 7:00 P.M.**

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## QUESTIONS PRESENTED FOR REVIEW

## THIS IS A CAPITAL CASE—EXECUTION IS SCHEDULED FOR TODAY

Petitioner Marion Wilson has consistently maintained that he was present when his codefendant Robert Butts killed Donovan Parks with a single shotgun blast to the head and that he knew in advance that Butts was armed and intended to rob someone. But Petitioner has always denied having any knowledge that Butts intended to commit a murder, and has also always denied having any involvement in the planning and commission of the crime. When Petitioner and Butts were separately tried, convicted, and sentenced to death for the murder, the science of DNA testing did not allow forensic evaluation of a critical piece of evidence, the victim's necktie, which the prosecutor used to spin a tale of Petitioner's active participation in the crime. At the guilt phase, the prosecutor argued that Petitioner had pulled the victim out of his car by the necktie and forced him to the ground just before he was killed. At sentencing, the prosecutor went further, arguing that after grabbing the victim's tie, Petitioner personally fired the shot that killed him. If the prosecutor's claim that someone grabbed the victim by the necktie is true, the tie likely still has that person's epithelial cells on its surface. Touch DNA testing, however, was unavailable until more than a decade after Petitioner's trial and after post-conviction evidence development had ended. Nonetheless, when Petitioner moved under Georgia's DNA-testing statute to test the tie for DNA, the trial court denied the motion without first providing Petitioner the statutorily required hearing or even giving him a chance to respond to the State's arguments. The Supreme Court of Georgia, in turn (over the dissent of a single justice), denied Petitioner's Application for Leave to Appeal without comment, presumptively endorsing the reasoning of the trial court.

These rulings give rise to the following important questions:

1. Was Petitioner denied due process by the state court's refusal to provide a hearing that was mandated by Georgia's DNA statute, particularly given Petitioner's overriding interest in avoiding being executed on the basis of false evidence, the increased likelihood of an erroneous ruling in the absence of such a hearing, and the State's minimal interest in expediency—an interest that should give way to the far greater societal interest in preventing a miscarriage of justice?

2. In considering the potential impact of favorable DNA results, did the Georgia court violate Petitioner's rights under the Eighth and Fourteenth Amendments by limiting its consideration of the evidence to the trial evidence viewed in the light most favorable to the prosecution, instead of considering all the evidence developed in the case that bears on Petitioner's culpability?

3. In a capital case, does a state violate the Eighth Amendment by limiting DNA testing to cases in which the evidence would potentially acquit the defendant, even where it is reasonably probable that favorable DNA results would have resulted in a sentence less than death?

4. Does Georgia's DNA statute violate Equal Protection, Due Process, and the Eighth Amendment by targeting death-sentenced inmates and limiting their access to DNA on the basis of when the extraordinary motion for new trial was filed?

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**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA AND/OR THE SUPERIOR COURT OF BALDWIN COUNTY, GEORGIA**

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Petitioner, Marion Wilson, respectfully petitions this Court for a Writ of Certiorari to review the decision of the Supreme Court of Georgia, entered in this case on June 20, 2019. *See Wilson v. State*, Case No. S19W1323 (GA) (Appendix A).

## ORDERS AND OPINIONS BELOW

The June 20, 2019, order of the Supreme Court of Georgia, denying Mr. Wilson's Consolidated Application to Appeal Denial of Extraordinary Motion for New Trial and for Stay of Execution is attached hereto as Appendix A. The unpublished May 30, 2019, Order Denying Defendant's Extraordinary Motion for New Trial of the Superior Court of Baldwin County, Georgia, is attached hereto as Appendix B. The decision of the Supreme Court of Georgia in *Wilson v. State*, 271 Ga. 811 (1999), affirming Mr. Wilson's conviction and death sentence on direct appeal is attached hereto as Appendix C. The trial court's order setting Mr. Wilson's

execution for some time during the week beginning June 20, 2019, and June 27, 2019, is attached hereto as Appendix D.

## JURISDICTION

The decision of the Supreme Court of Georgia denying Mr. Wilson's application for leave to appeal from the trial court's denial of an extraordinary motion for new trial and for a stay of execution was entered on June 20, 2019. *See* Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) as Petitioner asserts a deprivation of his rights secured by the Constitution of the United States.

## CONSTITUTIONAL PROVISIONS INVOLVED

This petition invokes the Eighth and Fourteenth Amendments to the United States Constitution:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII.

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

## STATUTORY PROVISIONS INVOLVED

O.C.G.A. § 5-5-41, in pertinent part, provides:

> § 5-5-41. Requirements as to extraordinary motions for new trial generally; notice of filing of motion; limitations as to number of extraordinary motions in criminal cases; DNA testing
>
> (a) When a motion for a new trial is made after the expiration of a 30 day period from the entry of judgment, some good reason must be shown why the motion was not made during such period, which reason shall be judged by the court. In all such cases, 20 days' notice shall be given to the opposite party.
>
> (b) Whenever a motion for a new trial has been made within the 30 day period in any criminal case and overruled or when a motion for a new trial has not been

made during such period, no motion for a new trial from the same verdict or judgment shall be made or received unless the same is an extraordinary motion or case; and only one such extraordinary motion shall be made or allowed.

(c) (1) Subject to the provisions of subsections (a) and (b) of this Code section, a person convicted of a felony may file a written motion before the trial court that entered the judgment of conviction in his or her case for the performance of forensic deoxyribonucleic acid (DNA) testing.

(2) The filing of the motion as provided in paragraph (1) of this subsection shall not automatically stay an execution.

(3) The motion shall be verified by the petitioner and shall show or provide the following:

(A) Evidence that potentially contains deoxyribonucleic acid (DNA) was obtained in relation to the crime and subsequent indictment, which resulted in his or her conviction;

(B) The evidence was not subjected to the requested DNA testing because the existence of the evidence was unknown to the petitioner or to the petitioner's trial attorney prior to trial or because the technology for the testing was not available at the time of trial;

(C) The identity of the perpetrator was, or should have been, a significant issue in the case;

(D) The requested DNA testing would raise a reasonable probability that the petitioner would have been acquitted if the results of DNA testing had been available at the time of conviction, in light of all the evidence in the case;

(E) A description of the evidence to be tested and, if known, its present location, its origin and the date, time, and means of its original collection;

(F) The results of any DNA or other biological evidence testing that was conducted previously by either the prosecution or the defense, if known;

(G) If known, the names, addresses, and telephone numbers of all persons or entities who are known or believed to have possession of any evidence described by subparagraphs (A) through (F) of this paragraph, and any persons or entities who have provided any of the information contained in petitioner's motion, indicating which person or entity has which items of evidence or information; and

(H) The names, addresses, and telephone numbers of all persons or entities who may testify for the petitioner and a description of the subject matter and summary of the facts to which each person or entity may testify.

(4) The petitioner shall state:

(A) That the motion is not filed for the purpose of delay; and

(B) That the issue was not raised by the petitioner or the requested DNA testing was not ordered in a prior proceeding in the courts of this state or the United States.

(5) The motion shall be served upon the district attorney and the Attorney General. The state shall file its response, if any, within 60 days of being served with the motion. The state shall be given notice and an opportunity to respond at any hearing conducted pursuant to this subsection.

(6) (A) If, after the state files its response, if any, and the court determines that the motion complies with the requirements of paragraphs (3) and (4) of this subsection, the court shall order a hearing to occur after the state has filed its response, but not more than 90 days from the date the motion was filed.

(B) The motion shall be heard by the judge who conducted the trial that resulted in the petitioner's conviction unless the presiding judge determines that the trial judge is unavailable.

(C) Upon request of either party, the court may order, in the interest of justice, that the petitioner be at the hearing on the motion. The court may receive additional memoranda of law or evidence from the parties for up to 30 days after the hearing.

(D) The petitioner and the state may present evidence by sworn and notarized affidavits or testimony; provided, however, any affidavit shall be served on the opposing party at least 15 days prior to the hearing.

(E) The purpose of the hearing shall be to allow the parties to be heard on the issue of whether the petitioner's motion complies with the requirements of paragraphs (3) and (4) of this subsection, whether upon consideration of all of the evidence there is a reasonable probability that the verdict would have been different if the results of the requested DNA testing had been available at the time of trial, and whether the requirements of paragraph (7) of this subsection have been established.

(7) The court shall grant the motion for DNA testing if it determines that the petitioner has met the requirements set forth in paragraphs (3) and (4) of this subsection and that all of the following have been established:

(A) The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion;

(B) The evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect;

(C) The evidence was not tested previously or, if tested previously, the requested DNA test would provide results that are reasonably more discriminating or probative of the identity of the perpetrator than prior test results;

(D) The motion is not made for the purpose of delay;

(E) The identity of the perpetrator of the crime was a significant issue in the case;

(F) The testing requested employs a scientific method that has reached a scientific state of verifiable certainty such that the procedure rests upon the laws of nature; and

(G) The petitioner has made a prima facie showing that the evidence sought to be tested is material to the issue of the petitioner's identity as the perpetrator of, or accomplice to, the crime, aggravating circumstance, or similar transaction that resulted in the conviction.

(8) If the court orders testing pursuant to this subsection, the court shall determine the method of testing and responsibility for payment for the cost of testing, if necessary, and may require the petitioner to pay the costs of testing if the court determines that the petitioner has the ability to pay. If the petitioner is indigent, the cost shall be paid from the fine and bond forfeiture fund as provided in Article 3 of Chapter 21 of Title 15.

(9) If the court orders testing pursuant to this subsection, the court shall order that the evidence be tested by the Division of Forensic Sciences of the Georgia Bureau of Investigation. In addition, the court may also authorize the testing of the evidence by a laboratory that meets the standards of the DNA advisory board established pursuant to the DNA Identification Act of 1994, Section 14131 of Title 42 of the United States Code, to conduct the testing. The court shall order that a sample of the petitioner's DNA be submitted to the Division of Forensic Sciences of the Georgia Bureau of Investigation and that the DNA analysis be stored and maintained by the bureau in the DNA data bank.

(10) If a motion is filed pursuant to this subsection the court shall order the state to preserve during the pendency of the proceeding all evidence that contains biological material, including, but not limited to, stains, fluids, or hair samples in the state's possession or control.

(11) The result of any test ordered under this subsection shall be fully disclosed to the petitioner, the district attorney, and the Attorney General.

(12) The judge shall set forth by written order the rationale for the grant or denial of the motion for new trial filed pursuant to this subsection.

(13) The petitioner or the state may appeal an order, decision, or judgment rendered pursuant to this Code section.

## STATEMENT OF THE CASE

### A. Procedural History

On November 5, 1997, following a trial in the Superior Court of Baldwin County, Georgia, Marion Wilson was convicted and sentenced to death for the 1996 murder of Donovan Parks. The Georgia Supreme Court affirmed on direct appeal. *Wilson v. State*, 271 Ga. 811 (1999), *cert. denied*, 531 U.S. 838 (2000).

After this Court denied certiorari, Wilson sought state post-conviction relief alleging, *inter alia*, that under *Strickland v. Washington*, 466 U.S. 668 (1984), trial counsel were constitutionally ineffective for failing to investigate, develop, and present available mitigating evidence and evidence rebutting the State's case in aggravation. An evidentiary hearing was held on February 22-23, 2005, at which Wilson presented significant evidence, unheard by his sentencing jury, regarding his childhood privations and abuse, and frontal lobe brain damage, and challenged the reliability and admissibility of gang-related evidence the State had submitted, without objection, at sentencing. The Superior Court of Butts County, Georgia ("state habeas court") denied Wilson's petition on December 1, 2008, and the Supreme Court of Georgia summarily denied application for a certificate of probable cause to appeal. This Court denied his petition for writ of certiorari on December 6, 2010. *Wilson v. Terry*, 562 U.S. 1093 (2010).

On December 17, 2010, Wilson filed his timely federal habeas petition in the United States District Court for the Middle District of Georgia. Although the district court observed that "the conduct of Wilson's trial attorneys with regard to their investigation and presentation of

mitigation evidence is difficult to defend," Doc. 51 at 1, it nonetheless denied the petition on the ground that any deficiencies were not prejudicial. *See* Doc. 51 at 59-73. It granted a certificate of appealability on a single issue: "[w]hether trial counsel was ineffective during the penalty phase by failing to conduct a reasonable investigation into mitigation evidence and by failing to make a reasonable presentation of mitigation evidence." *Id.* at 108-09. It subsequently denied Wilson's motion to alter or amend the judgment. *See* Docs. 53, 55. Wilson appealed. Doc. 57.

The Eleventh Circuit denied Wilson's motion to expand the certificate of appealability and, on December 15, 2014, affirmed the district court's denial of habeas relief. *See Wilson v. Warden*, 774 F.3d 671 (11th Cir. 2014). The court determined that the focus of its review under 28 U.S.C. § 2254(d) was the Georgia Supreme Court's summary denial of CPC, based on its determination that the Georgia Supreme Court's one-sentence ruling was "the final decision 'on the merits,'" and that, under *Harrington v. Richter*, 562 U.S. 86, 98 (2011), rather than "deferring to the reasoning of the state trial court, we ask whether there was any 'reasonable basis for the [Supreme Court of Georgia] to deny relief.'" *See Wilson*, 774 F.3d at 678 (citations omitted). The panel accordingly disregarded the specific grounds the state habeas court articulated as the bases for its denial of relief, and instead affirmed on the basis of hypothetical reasons for the Georgia Supreme Court's summary denial of CPC. *Id.* at 679-81.

The panel opinion was vacated when the Eleventh Circuit granted rehearing "to determine en banc whether federal courts must 'look through' the summary denial [of a CPC application] by the Supreme Court of Georgia and review the reasoning of the Superior Court of Butts County." *Wilson v. Warden, Ga. Diagnostic Prison*, 834 F.3d 1227, 1230 (11th Cir. 2016). On August 23, 2016, the en banc Eleventh Circuit, by a 6-5 vote, adopted the panel's approach, holding that "[w]hen the last adjudication on the merits provides no reasoned opinion, federal

courts review that decision using the test announced in *Richter*," which, the majority concluded, required Wilson to "establish that there was no reasonable basis for the Georgia Supreme Court to deny his certificate of probable cause." *Id.* at 1235. The en banc court remanded the case to the panel for consideration of the remaining issues. *Id.* at 1242.

On February 27, 2017, this Court granted certiorari to review the Eleventh Circuit's en banc ruling. *Wilson v. Sellers*, 137 S. Ct. 1203 (2017).[1] On April 17, 2018, the Court reversed the Eleventh Circuit, holding that when a final state court ruling is unaccompanied by reasons for the decision, "the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale" and "then presume that the unexplained decision adopted the same reasoning." *Wilson*, 138 S. Ct. at 1192. A short time later, this Court vacated the Eleventh Circuit's post-en banc panel decision, *Wilson*, 842 F.3d 1155, and remanded for consideration in light of its decision in *Wilson*, 137 S. Ct. 1203. *See Wilson v. Sellers*, 138 S. Ct. 1591 (2018).

Following this Court's remand, Wilson moved to remand the case to the district court or, alternatively, to expand the COA and allow supplemental briefing. The Eleventh Circuit did not rule on the motion until August 10, 2018, when it issued its opinion on remand. *Wilson*, 898 F.3d at 1316. The court again affirmed the district court's denial of Wilson's petition for a writ of habeas corpus and denied his motion to remand or, alternatively, permit supplemental briefing and expand the COA. *Id*; *see also id.* at 1322. Mr. Wilson filed a petition for writ of certiorari to

[1] In the meantime, the Eleventh Circuit panel "reinstat[ed] the original panel opinion and affirm[ed] the denial of Wilson's petition for a writ of habeas corpus." *Wilson v. Warden, Ga. Diagnostic Prison*, 842 F.3d 1155, 1156 (11th Cir. 2016), *vacated by Wilson v. Sellers*, 138 S. Ct. 1591 (2018).

review the Eleventh Circuit's ruling on remand, which this Court denied on May 28, 2019. *Wilson v. Ford,* No. 18-8389, 2019 U.S. LEXIS 3640 (U.S. May 28, 2019).

While Mr. Wilson's petition for writ of certiorari was pending before this Court, Mr. Wilson filed an Extraordinary Motion for New Trial (hereinafter "EMNT") in the state trial court in Baldwin County, Georgia, seeking forensic deoxyribonucleic acid ("DNA") testing of a critical piece of evidence used by the prosecutor to secure Mr. Wilson's conviction and death sentence. *See* EMNT, attached as Appendix E hereto. Although he met all pleading requirements set forth in O.C.G.A. § 5-5-41 (c)(3) and (4) and, accordingly, the trial court was required to "order a hearing to occur after the state has filed its response, but not more than 90 days from the date the motion was filed," O.C.G.A. § 5-5-41(c)(6)(A), the trial court denied the EMNT on May 30, 2019 (Appendix A)—two days after the State had filed its response (Appendix F hereto) and one day after Mr. Wilson notified the trial court of his intent to file a reply brief in support of the EMNT (Appendix G hereto).

On June 5, 2019, the trial court issued an execution warrant scheduling Mr. Wilson's execution sometime between June 20, 2019, and June 27, 2019. Appendix D.

On June 6, 2019, Mr. Wilson filed a notice of appeal in the trial court and, on June 14, 2019, filed a Consolidated Application to Appeal Denial of Extraordinary Motion for New Trial and Motion for Stay of Execution, which is attached as Appendix H hereto. On June 17, 2019, the State filed its Brief in Opposition to the application (Appendix I hereto). On June 18, 2019, Mr. Wilson filed a Reply Brief in support of the application (Appendix J hereto). The Georgia

Supreme Court denied the Application on June 20, 2019, with one justice dissenting. (Appendix A hereto).[2]

This Petition follows.

**B. Statement of Relevant Facts**

In November 1997, a Baldwin County, Georgia, jury convicted Marion Wilson, Jr. and sentenced him to death for the murder of Donovan Parks, an off-duty state correctional officer who was killed by a single shotgun blast on March 28, 1996. The evidence showed that on the evening of March 28, 1996, Mr. Wilson's codefendant, Robert Butts, solicited a ride from the victim, Donovan Corey Parks,[3] at a Milledgeville Walmart. Butts sat in the front passenger seat of the victim's car while Mr. Wilson sat in the back seat. *Wilson v. State*, 271 Ga. 811, 811-13 (1999). As Mr. Wilson later explained to police, Butts pulled a sawed-off shotgun and ordered the victim to turn over his wallet and exit the car. Butts then exited the passenger side, ordered the victim to lie down, and shot and killed him. *Id*.; *see also* T 1585-90, 1600-01. Butts was arrested after Mr. Wilson's statement to police.

On April 17, 1996, Det. Russell Blenk corroborated the essential points of Mr. Wilson's account in an interview with Baldwin County Jail inmate Randy Garza. Garza, who knew Butts and had spoken with him in jail, reported that Butts admitted soliciting a ride from the victim, pulling the shotgun, ordering him from the car, and killing him while Wilson remained in the back seat. HT 2971-72. Two other inmates, Horace May and Shawn Holcomb, likewise

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[2] The Georgia Board of Pardons and Paroles denied Mr. Wilson's clemency application on June 20, 2019. (Appendix K hereto).

[3] According to evidence presented at Butts' trial, Butts knew Mr. Parks. *See* Butts T 1260 (*Butts v. State*, Baldwin Co. Criminal Action No. 39183).

reported that Butts had confessed to being the shooter. HT 778-80. In his own police interview, Butts denied any involvement with the crime, but also did not implicate Mr. Wilson. T 2336-74.

Under Georgia's accomplice liability law, Mr. Wilson faced a murder conviction and three sentencing possibilities: life with parole eligibility; life without parole eligibility; or death. Based on his assessment of the evidence of Mr. Wilson's culpability relative to Butts's, however, the prosecutor offered to allow Mr. Wilson to plead guilty in exchange for two consecutive, parolable life sentences, plus twenty years, with a possibility of parole after serving twenty years. PT (09/26/97) at 2-5. Wilson declined the offer. *Id*. at 6-8.[4]

Mr. Wilson went to trial in November 1997, asserting a "mere presence" defense based on Mr. Wilson's statements, as corroborated by Butts's confessions to jail inmates Garza, May, and Holcomb. To establish the admissibility of those confessions, however, defense counsel were required to—but did not—follow a simple procedure announced a year earlier in *Turner v. State*, 267 Ga. 149 (1996). *Wilson*, 271 Ga. at 814-15. As a result of counsel's failings, the prosecution convinced the trial court to exclude Butts' confessions in the culpability phase of trial. T 1794-1800.[5] Ultimately, Mr. Wilson was convicted and sentenced to death.

Although the prosecutor had sufficient evidence to establish that Mr. Wilson had knowledge of Butts's plans to commit a robbery and nonetheless got into the victim's car with him, the prosecutor's evidence that Mr. Wilson was underwhelming at best: the prosecutor had Mr. Wilson's statements in which Mr. Wilson

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[4] The prosecutor, by contrast, never offered Butts a deal, even though his attorney "begged" for one. Butts HT 1866.

[5] In the penalty phase, trial counsel resorted to presenting the testimony of the defense investigator, William Thrasher, who recounted as third-hand hearsay the contents of his own discussions with the inmates as to what they had heard Butts say about the crime. *See* T 2394-2411.

admitted to knowing that Butts intended to rob someone that evening and had a weapon, though Mr. Wilson denied that he did anything more than remain seated in the back of the car while Butts forced Mr. Parks out of the car and shot and killed him; Mr. Wilson's actions after the murder in attempting to cover it up (looking for a chop shop in Atlanta to get rid of the car, burning the car, and hiding the shotgun under his bed); and the testimony of a single witness, Kenya Mosley, that Mr. Wilson, in contradiction to his statement, had gone into the Walmart with Butts,[6] although Ms. Mosley's testimony on this point was contradicted by others,[7] and she apparently was mistaken in her belief that a fourth man got into the victim's car with Mr. Parks, Mr. Wilson and Butts.[8]

Given the lack of evidence to counter Mr. Wilson's statement that he remained in the car and did nothing to aid Butts in the robbery and murder of Mr. Parks, the prosecutor needed something more in order to persuade the jury that Mr. Wilson had taken an active role in the offense and, ultimately, that he deserved the death penalty. That something more was the

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[6] T 1365, 1367-68. The prosecutor later relied on this dubious testimony in sentencing phase summation to argue that Mr. Wilson was inside the Walmart "shopping for somebody to kill." T 2482.

[7] *See* T 1406 (Ms. Mosley's brother, Chico Mosley, testifying on cross examination that he did not see Mr. Wilson inside the Walmart, although he was with his sister in the store and at the check-out line); T 1369 (Walmart cashier Chassica Manson testifying that Mr. Wilson was not the man who bought gum right after Mr. Parks made his purchases). In state habeas proceedings, Mr. Wilson's statement that he was outside the Walmart talking to an acquaintance Felicia Ray, was confirmed by Felicia Ray's sworn testimony that he spoke with her for 10-15 minutes out by her car in the Walmart parking lot while the man he was with was doing something else. *See* HT 3183.

[8] *See* T 1381-82 (Kenya Mosley testifying on cross about third man who got into the car with Mr. Parks); T 1398-1400 (Chico Mosley testifying that he saw two men get into Mr. Parks's car, Butts in the front passenger seat and the person with Butts (*i.e.* Mr. Wilson) in the back). At Butts's trial, Sheriff Sills testified that never credited all of Kenya Mosley's statement and that he had stopped investigating the three-perpetrator theory because it was a red herring. Butts T 2277.

victim's necktie, which the prosecutor spun into proof that Mr. Wilson was engaged in physically assaulting the victim. According to the prosecutor, Mr. Wilson must have grabbed the victim by the tie to yank him out of the car before forcing him to the ground and, as the prosecutor told the sentencing jury, shooting him in the head. In large measure on the basis of the prosecutor's arguments about the tie, Mr. Wilson's jury rejected his defense at trial—that he was present when co-defendant Butts robbed and shot the victim, but did not know of Butts's plans to rob Mr. Parks and shoot him.

The necktie's importance to the prosecutor's case is reflected in the significant attention he gave it at trial. In guilt phase opening statement, the prosecutor urged: "Remember the defendant was sitting in the back seat. When the victim's body was found, his tie—somebody had grabbed his tie and yanked it like that. Remember it was this defendant sitting in the back seat. His tie was found so tight around his neck that the EMTs couldn't undo it like that, like a man normally undoes his tie, they had to snip it off." T 1153. The prosecutor's insinuation was clear: the condition of the necktie, together with Mr. Wilson's location in the back of the car, demonstrated that Mr. Wilson had grabbed the tie, yanked the victim by it, and dragged him from the car.

That insinuation became explicit in the prosecutor's guilt phase closing argument, which discussed the tie for a full two pages. T 1836-37. The prosecutor spelled it out:

> Who grabbed that tie like this? Who did it? Was it Butts over here? Remember the tie's not on the right side, it's on the left side. Was it Butts with these fifteen foot arms over the top of the roof of the car and over the side and through the window here, yanking it this way? Was it? Huh? If Butts pulled the tie, it would have been this way. How did it get over to this side? Or when he gave the signal or he got the signal, was it Murdock [Wilson] sitting right behind Butts here? And when whoever gave the signal, him, the tie, yanking it to the left like that. It had to be him. It had to be him. Whether he pulled the gun or not, he helped the whole yards.

T 1838.

Finally, in sentencing phase closing, the prosecutor relied on the tie as an aggravating factor warranting a death sentence:

> And when this nice man said I'll give you a ride and even went to the point of clearing out the back seat to make that man right there [Wilson] more comfortable, he took them out on Highway 49 and on Felton Drive there, grabbed his tie, yanked it over like this, ordered him to lay down on the ground like a dog with his head on the bottom on the ground and . . . picture this—Donavan Corey Parks—you were out at the scene—laying down on the ground with his tie choking him, face down. And the last three sounds that he ever heard before he left this world. Pow! That's why we're here.

T 2482-83. The prosecutor then promptly segued into an argument that Mr. Wilson in fact shot Mr. Parks—despite the prosecutor's earlier concession that the evidence did not establish who fired the fatal shot. Rather, he proclaimed: "[T]hat man right there took that shotgun and fired it and into the night—into the night, it sent 50 of these pellets—50 of them—that flash of light screaming out of this cartridge, aimed right in the back of that man's head, 50 of them. . . . That's what he did." T 2483.[9]

The tie thus played a critical role in the prosecution's case against Mr. Wilson at both guilt-innocence and penalty phases. And, it accordingly almost certainly influenced jurors in their decisions to convict Mr. Wilson and to sentence him to death. Proof that Mr. Wilson was

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[9] In Butts's trial a year later, the prosecutor made practically the same argument, this time aimed at Butts:

> [T]his man took this sawed-off shotgun on that dark and rainy night and I want you to picture in your minds the last sounds that Donavan [sic] Cory Parks heard before he left this earth. He sent these forty something pellets with this 1 shot roaring through the night into the head of poor, innocent Donavan [sic] Parks, blowing his brains out on the road and on the back of his coat.

Butts T 2909. Subsequently, in Butts's state habeas proceedings, the prosecutor testified that he personally believed Butts was the shooter. Butts HT 2282, 2285, 2295.

not the person who grabbed the tie would thus be compelling proof that, pursuant to *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987), Mr. Wilson is not eligible for the death penalty because he "did not [himself] kill the victim[]" and his "involvement in the events leading up to the murder[] was [not] active, recklessly indifferent and substantial." *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008). Moreover, even if not sufficient to render Mr. Wilson ineligible for the death penalty, proof that would have undermined the State's closing argument and demonstrated that Mr. Wilson was *not* the shooter is sufficient to create "a reasonable probability that the [sentence] would have been different if the results of the requested DNA testing had been available at the time of trial." O.C.G.A. § 5-5-41 (c)(3)(D); *see, e.g., Crawford v. State*, 278 Ga. 95, 99 (2004) (DNA testing not required where "results would not in reasonable probability have led to Crawford's acquittal or to his receiving a sentence less than death, if they had been available at Crawford's trial"). *See also Brady v. Maryland*, 373 U.S. 83, 86 (1963) (agreeing with state supreme court's conclusion that the prosecutor violated due process in suppressing codefendant's confession to shooting the victim and the court's decision that only sentencing relief was required because the suppressed evidence would not have reasonably changed the outcome of the guilt determination).

The trial court, however, denied Mr. Wilson's extraordinary motion for new trial and DNA testing without conducting the hearing required by statute, *see* O.C.G.A § 5-5-41 (c)(6), or even giving him an opportunity to respond to the State's misleading brief in opposition to the motion. The Supreme Court of Georgia, in turn, denied without comment the application for leave to appeal, over the dissent of Justice Benham. *See* Appendix A. The Georgia Supreme

Court's denial thus left the trial court's reasoning intact (or, to the extent the court's order is construed as merits decision, it presumptively adopted the trial court's reasoning[10]).

## HOW THE FEDERAL QUESTION WAS RAISED BELOW

After the trial court denied Mr. Wilson's extraordinary motion for new trial and for DNA testing without first affording him the statutorily mandated hearing or even the opportunity to respond to the State's brief in opposition, Mr. Wilson argued before the Supreme Court of Georgia that the failure to afford these rights to be heard violated the Fourteenth Amendment's Due Process Clause. The Supreme Court of Georgia, in turn, failed to enforce the DNA-testing statute and its own interpretation of the statute by denying Mr. Wilson's application for leave to appeal, giving rise to additional constitutional infirmities under the Eighth and Fourteenth Amendments.

## REASONS WHY THE PETITION SHOULD BE GRANTED

### I. By Failing to Conduct the Hearing Required by Georgia's DNA Statute or Even to Provide Mr. Wilson an Opportunity to Respond to the State's Arguments Before Ruling, the Trial Court Procedures Were Fundamentally Inadequate to Vindicate Mr. Wilson's Compelling Interest in Securing DNA Proof Establishing His Ineligibility for Execution.

Although this Court has held that a criminal defendant does not have a substantive due process right to access potentially exculpatory DNA testing, Mr. Wilson "does . . . have a liberty interest in demonstrating his innocence with new [DNA] evidence under state law." *DA's Office v. Osborne*, 557 U.S. 52, 68, 72-74 (2009).[11] "When . . . a State creates a liberty interest, the Due

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[10] *See Wilson v. Sellers*, 138 S. Ct. 1188 (2018).

[11] *Osborne* was not a capital case (and Alaska, where the case arose, does not authorize capital punishment), thus the language in *Osborne* is focused on questions of innocence. But the reasoning of *Osborne* extends to capital cases in which a defendant seeks the opportunity under

Process Clause requires fair procedures for its vindication—and federal courts will review the application of those constitutionally required procedures." *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011).

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). *See also, e.g., Wilkinson v. Austin*, 545 U.S. 209, 226 (2005) ("[A] fair opportunity for rebuttal . . . [is] among the most important procedural mechanisms for purposes of avoiding erroneous deprivations.").

Here, Mr. Wilson was denied due process by virtue of the lower courts' failure to afford him a hearing prior to denying his motion for access to DNA testing of the necktie. First, the Georgia statute mandates a hearing where a defendant makes a prima facie showing of certain required facts, which Mr. Wilson did in this case. O.C.G.A. § 5-5-41 (c)(6)(A) ("If . . . the court determines that the motion complies with the requirements of paragraphs (3) and (4) of this subsection, the court *shall* order a hearing to occur . . . ."). The purpose of that hearing, the statute explains, is

> to allow the parties to be heard on the issue of whether the petitioner's motion complies with the requirements of paragraphs (3) and (4) of this subsection, whether upon consideration of all of the evidence there is a reasonable probability

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state law to provide evidence demonstrating not actual innocence of the crime of conviction, but actual innocence of the death penalty, *see Sawyer v. Whitley*, 505 U.S. 333 (1992), and/or the likelihood that he would have received a sentence less than death had the DNA evidence been available. In *Skinner v. Switzer*, 562 U.S. 521 (2011), this Court held that a death-sentenced inmate could bring an action under 42 U.S.C. § 1983 to challenge the constitutionality of Texas's DNA-testing statute. In its opinion, the Court observed that Skinner had alleged that the state's "refusal 'to release the biological evidence for testing . . . has deprived [him] of his liberty interests in utilizing state procedures to obtain reversal of his conviction and/or to obtain a pardon *or reduction of his sentence* . . . ." *Id.* at 530.

> that the verdict would have been different if the results of the requested DNA testing had been available at the time of trial, and whether the requirements of paragraph (7) of this subsection have been established.

O.C.G.A. § 5-5-41 (c)(6)(E). If, after the hearing, the court finds that the defendant has satisfied those requirements and additional criteria, the court is directed to grant the motion for DNA testing. O.C.G.A. § 5-5-41(c)(7).

Mr. Wilson satisfied all of the statute's pleading requirements and, accordingly, the statute mandated a hearing to afford him the opportunity to prove his allegations and his entitlement to testing. Nonetheless, the trial court bypassed the hearing entirely, making factual findings it was not entitled to make under the statute until the parties had been given the opportunity to present evidence. This violated Mr. Wilson's liberty interest in having the courts follow the dictates of the statute and provide him the opportunity to demonstrate that he had met the criteria to obtain DNA testing. Moreover, under the *Mathews* balancing test—which weighs "(A) the private interest affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (C) the government interest at stake"[12]—for procedural due process required a hearing to address the complicated factors the statute requires litigants to prove. Mr. Wilson clearly has an interest of overriding importance in preventing his unjust execution; the issues that Georgia's DNA-testing statute require him to prove are complex and warrant adversarial testing in court; and the State, while it has an interest in carrying out properly-imposed death sentences, has no interest in conducting an unjust execution.

Mr. Wilson should have been given the opportunity to prove his entitlement to DNA testing of the necktie. The Georgia courts' failure to provide a hearing—in defiance of the mandatory language of the statute—denied him this meaningful opportunity to be heard in a

[12] *Nelson v. Colorado*, 137 S. Ct. 1249, 1255 (2017) (citing *Mathews*, 424 U.S. at 335).

meaningful forum, and thus created an unacceptable and unnecessary risk that Petitioner will be erroneously deprived of his liberty interest in preventing his unjust execution. Certiorari should be granted to correct this due process violation.

## II. The Georgia Courts Violated Due Process and the Eighth Amendment by Assessing the Impact of Potentially Favorable DNA Evidence Solely on the Basis of the Trial Evidence Viewed in the Light Most Favorable to the State, Rather Than Considering All the Evidence, Including that Presented at Trial and Developed Thereafter, with a Bearing on Mr. Wilson's Personal Culpability.

The DNA-testing statute requires the movant to show that favorable DNA results "would raise a reasonable probability that the petitioner would have been acquitted if the results of DNA testing had been available at the time of conviction, *in light of all the evidence in the case. . . .*" O.C.G.A. § 5-5-41 (c)(3)(D). The trial court, however, although bypassing the required hearing, assessed the possible impact of the evidence solely on the basis of the trial evidence, viewed in the light most favorable to the prosecution. *See* Appendix B at 5-8.[13] The trial court did not the evidence presented both at trial and in state habeas proceedings that severely undermined the State's contention at trial that Petitioner not only physically assaulted the victim by grabbing his necktie, but also fired the fatal shot.

The trial court's misleading and truncated analysis was not only contrary to the language of the statute, but it defeats the purpose of the statute to disregard all the evidence bearing on the

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[13] The trial court also found, specifically, that "regardless of whether Defendant ever touched the tie around Donovan Parks's neck with his gloved hand, *he was convicted of murder by shooting Parks in the head*," Appendix B at 7—despite the lack of any actual evidence that Mr. Wilson in fact shot Mr. Parks and disregarding the critical role the necktie played in the prosecutor's argument that Mr. Wilson was in fact the shooter. The trial court's conclusion that "identity" was never an issue because it was not an element of the offense of murder is similarly flawed, given how important it was for prosecutor Bright to argue, on the basis of the necktie, that Mr. Wilson *was* the shooter in order to obtain a death sentence.

issue of Mr. Wilson's culpability. This includes all the evidence that demonstrates that Butts, not Mr. Wilson, had the active role in the case, the prosecutor's personal belief (expressed years after Mr. Wilson's trial) that Butts was in fact the shooter, and, with regard to sentencing, the array of evidence that undermines the aggravated nature of the State's penalty phase case. As this court has observed, in addressing the analysis of new evidence of actual innocence:.

> [T]he *Schlup* inquiry [into proof of actual innocence]. . . requires a holistic judgment about "'all the evidence,'" . . . and its likely effect on reasonable jurors applying the reasonable-doubt standard. As a general rule, the inquiry does not turn on discrete findings regarding disputed points of fact, and "[i]t is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses," 513 U.S., at 329, 115 S. Ct. 851, 130 L. Ed. 2d 808. Here, although the District Court attentively managed complex proceedings, carefully reviewed the extensive record, and drew certain conclusions about the evidence, the court did not clearly apply *Schlup*'s predictive standard regarding whether reasonable jurors would have reasonable doubt. As we shall explain, moreover, we are uncertain about the basis for some of the District Court's conclusions—a consideration that weakens our reliance on its determinations.

*House v. Bell*, 547 U.S. 518, 539-40 (2006) (quoting *Schlup v. Delo*, 513 U.S. 298, 328-29 (1995) (internal citation omitted). The Georgia courts' disregard of the evidence that supports the conclusion that Mr. Wilson had only a marginal role in the offense—one that under *Enmund v. Florida* renders him *ineligible* for the death penalty or, at the least, evidence that would likely have resulted in a sentence less than death—violates the spirit of the DNA statute and renders its promise wholly illusory. Moreover, by failing to consider the cumulative effect of all the evidence bearing on Mr. Wilson's culpability the courts below created an unacceptable risk that the death penalty in will be executed in violation of the Eighth Amendment as excessive punishment for the actions reasonably attributed to Mr. Wilson.

## III. The statute's ambiguous disregard of the potential impact of favorable DNA test results on a capital sentence and the Georgia Supreme Court's

**repudiation of its prior reading of the statute to include the impact on a death sentence violate Due Process and the Eighth Amendment.**

As a precursor to the grant of a hearing, the DNA-testing statute instructs trial courts to consider whether "[t]he requested DNA testing would raise a reasonable probability that the petitioner would have been acquitted if the results of DNA testing had been available at the time of conviction, in light of all the evidence in the case." O.C.G.A. § 5-5-41 (c)(3(D). But, it also instructs trial courts that DNA testing *must* be granted upon a showing *inter alia* that "[t]he petitioner has made a prima facie showing that the evidence sought to be tested is material to the issue of the petitioner's identity as the perpetrator of, *or accomplice to*, the crime, *aggravating circumstance*, or similar transaction that resulted in the conviction." O.C.G.A. § 5-5-41(c)(7)(G).

In *Crawford v. State*, 278 Ga. 95 (2004), the only decision applying the DNA-testing statute to a death-sentenced defendant, the Georgia Supreme Court construed the statute to authorize DNA testing when favorable results would have a likely impact on sentence. It denied relief in the case "because, even assuming the reality of the DNA testing results Crawford has hypothesized, such results would not in reasonable probability have led to Crawford's acquittal, *or to his receiving a sentence less than death*, if they had been available at Crawford's trial." *Id.* at 99 (emphasis supplied). In Mr. Wilson's case, however, the Georgia Supreme Court repudiated its prior holding.

Having made DNA testing available to those convicted of felonies, *see* O.C.G.A. § 5-5-41 (c)(1), it is wholly arbitrary to disallow such testing for those who can demonstrate that favorable test results would have had a likely impact on the jury's decision to impose the death penalty. *See, e.g., Smith v. Murray*, 477 U.S. 527, 537-38 (1986) (acknowledging that concept of "actual innocence" may be applied to errors with respect to the death penalty); *see also Sawyer v.*

*Whitley*, 505 U.S. 333 (1992) (defining "actual innocence of the death penalty" as exception to procedural default in federal habeas proceedings).[14]

## IV. Georgia's DNA-Testing Statute Violates Due Process, the Eighth Amendment, and Equal Protection by Targeting Death-Sentenced Inmates and Precluding Their Access to DNA Testing on the Basis of When the Extraordinary Motion for New Trial Was Filed.

Georgia's DNA-testing statute requires a defendant to "state" that "the motion is not filed for the purpose of delay," O.C.G.A. § 5-5-41 (c)(4(A), and requires the trial court, after a hearing, to determine that "[t]he motion is not made for the purpose of delay," O.C.G.A. § 5-5-41(c)(7)(D), before granting DNA testing. The concept of "delay" has no application to a non-death-sentenced litigant, who is simply serving his or her sentencing and hoping to have it lessened by litigation. It only applies to individuals who are under a sentence of death and awaiting execution of their sentence. Yet, any concerns about preventing the filing of frivolous DNA lawsuits are adequately addressed by the statute's provision that "[t]he filing of the motion . . . shall not automatically stay an execution," O.C.G.A. § 5-5-41(c)(2), and the requirement that the movant set forth a colorable claim that favorable DNA results would likely have an impact on the conviction or death sentence.

By targeting death sentenced inmates and making it impossible for them to seek DNA testing that potentially could prevent the miscarriage of justice that would result from executing

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[14] The statute ambiguously appears to have included the impact of a death sentence of potentially favorable DNA results by requiring testing when it would have an impact on an "aggravating circumstance." O.C.G.A. § 5-5-41(c)(7)(G). Under the rule of lenity, the Georgia courts should have read the statute to including the impact on Mr. Wilson's death sentence. *See, e.g.*, *Banta v. State*, 281 Ga. 615, 617-18 (2007) (defining the "rule of lenity" as "a sort of 'junior version of the vagueness doctrine,'" which "applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute.") (quoting *United States v. Lanier*, 520 U.S. 259, 266 (1997) and *United States v. Shabani*, 513 U.S. 10, 17 (1994)).

someone who is in fact innocent or ineligible for execution, the State of Georgia has violated due process and the Fourteenth Amendment's Equal Protection Clause.

By making "delay" a dispositive focus—a concept that applies only to death-sentenced individuals—and without requiring the courts to assess the other legitimate reasons for filing the motion for DNA testing (as demonstrated in the movant's articulation of the potential impact of favorable results on the reliability of the conviction and/or sentence), the Georgia statute and courts have imposed a unfair barrier to capital litigants specifically, one that is not designed to discourage frivolous litigation, inasmuch as the statute also provides that "[t]he filing of the motion [for DNA testing] shall not automatically stay an execution," O.C.G.A. § 5-5-41 (c)(2), and the fact that the movant must demonstrate that potential DNA results would be relevant to assessing the reliability of the conviction and sentence. As such, the statute and its definitive interpretation by Georgia courts violate the Equal Protection Clause because they treat capital defendants differently from non-capital defendants in a manner that does not rationally promote any legitimate government interest. *See, e.g.*, *Marshall v. United States*, 414 U.S. 417, 422 (1974). The statute thus turns on its head its intended purpose—to prevent miscarriages of justice before they occur.

The statute also violates due process and the Eighth Amendment, as it creates an unacceptable risk that someone who is factually innocent of the crime or sentence will be executed without the opportunity to prove their ineligibility for execution.

"[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. . . . [D]iscrimination may be so unjustifiable as to be violative of due process." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). "[O]ur own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons.

Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" *Griffin v. Illinois*, 351 U.S. 12, 16 (1956)(citation omitted).

In *Beck v. Alabama*, 447 U.S. 625 (1980), disparate treatment between capital and non-capital defendants was critical to this Court's holding that due process was violated by a statute prohibiting the trial court, in a capital case, from giving the jury the opportunity to convict the defendant of a lesser included offense supported by the evidence, while providing that in non-capital cases the jury be so charged. Although the Court focused on the coercive effect this system would have on jurors limited to the options of convicting or acquitting the defendant for capital murder and the diminished reliability of the verdict,[15] central to its decision was the differential treatment accorded capital and non-capital defendants under state law.

Thus, in reversing the grant of habeas corpus relief in *Hopkins v. Reeves*, 524 U.S. 88 (1998), on the ground that due process did not require a trial court to instruct the jury on lesser charges that did not constitute lesser included offenses under state law, the Supreme Court stressed the "equal protection" underpinnings of its due process analysis in *Beck*:

> *Beck* is . . . distinguishable from this case in two critical respects. The Alabama statute prohibited instructions on offenses that state law clearly recognized as lesser included offenses of the charged crime, *and it did so only in capital cases.* Alabama thus erected an "artificial barrier" that restricted its juries to a choice between conviction for a capital offense and acquittal. . . . Here, by contrast, the Nebraska trial court did not deny respondent instructions on any existing lesser included offense of felony murder; it merely declined to give instructions on

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[15] "[W]hen the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense – but leaves some doubt with respect to an element that would justify conviction of a capital offense—the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction. Such a risk cannot be tolerated in a case in which the defendant's life is at stake." *Id.* at 637.

> crimes that are not lesser included offenses. In so doing, the trial court did not create an "artificial barrier" for the jury; *nor did it treat capital cases differently from noncapital cases*. Instead, it simply followed the Nebraska Supreme Court's interpretation of the relevant offenses under State law.

*Id.* at 95 (emphasis supplied).

Georgia's DNA-testing statute's focus on delay unfairly prevents capital defendants from accessing DNA evidence that has the potential to demonstrate that they should not be executed. This singular focus, which targets those most in need of the statute's assistance, is grossly unfair and discriminatory. Mr. Wilson urges the Court to grant certiorari to prevent the State of Georgia from executing him before he can demonstrate that he is constitutionally ineligible to be killed by the State.

## CONCLUSION

For the reasons set forth above, Mr. Wilson respectfully requests that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted this 20th day of June, 2019.

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ATTORNEYS FOR PETITIONER

No. 18-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

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MARION WILSON, Petitioner,

-v-

STATE OF GEORGIA, Respondent.

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**CERTIFICATE OF SERVICE**

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

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This 20th day of June, 2019.

Marcia A. Widder

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