Appendix A

SUPREME COURT OF GEORGIA
Case No. S19W1323

June 20, 2019

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

MARION WILSON, JR. v. THE STATE.

Upon consideration of Wilson's application for discretionary appeal of the trial court's denial of his extraordinary motion for a new trial and associated motion for DNA testing, the application is denied. Wilson's motion for a stay of execution is denied. The prematurely filed notice of appeal is dismissed.

The Clerk of this Court is directed to transmit the remittitur in this case immediately. Upon electronic receipt of the remittitur via this Court's docketing system, the Clerk of the Superior Court of Baldwin County is directed to file the remittitur immediately.

All the Justices concur, except Benham, J., who dissents. Warren, J., disqualified.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

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

, Clerk

Appendix B

IN THE SUPERIOR COURT OF BALDWIN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	*	
	*	Criminal Action No. 39249B
v.	*	
	*	
MARION WILSON, JR.,	*	
	*	
Defendant.	*	

ORDER DENYING DEFENDANT'S EXTRAORDINARY MOTION FOR NEW TRIAL

Defendant has filed an extraordinary motion for new trial and seeks DNA testing on a necktie introduced as evidence during his trial for the murder of Donovan Parks. O.C.G.A. § 5-5-41 allows the filing of an extraordinary motion for new trial outside the 30-day window for motion for new trials based on extraordinary circumstances. The Court finds that Defendant cannot establish: "the requested DNA testing would raise a reasonable probability that [Defendant] 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"; the identity of the perpetrator of the crimes was a significant issue at trial; or that his motion, filed at this late hour, is not for the purpose of delay. O.C.G.A. § 5-5-41(c)(3)(D). His motion is DENIED.

30th FILED IN OFFICE THIS
DAY OF May, 2019
DEPUTY CLERK SUPERIOR COURT
BALDWIN COUNTY, GEORGIA

PROCEDURAL HISTORY

Defendant, Marion Murdock Wilson, Jr., was tried before a jury October 27, 1997 through November 7, 1997 and convicted of the malice murder of Donovan Parks, the felony murder of Donovan Parks, the armed robbery of Donovan Parks, hijacking a motor vehicle, possession of a firearm during the commission of a crime, and possession of a sawed-off shotgun. (R. 13-15, 966). The jury found as a statutory aggravating circumstance that the offense of murder was committed while the offender was engaged in the commission of another capital felony, armed robbery, (R. 965), and, following the mandatory recommendation of the jury, the trial court sentenced Defendant to death on November 7, 1997. (R. 964, 968).[1] The Supreme Court of Georgia affirmed Defendant's convictions and sentences on November 1, 1999. *Wilson v. State*, 271 Ga. 811, 525 S.E.2d 339 (1999), *cert denied, Wilson v. Georgia*, 531 U.S. 838 (2000), *reh'g denied*, 531 U.S. 1030 (2000).

Defendant filed his state habeas corpus petition on January 19, 2001. On December 1, 2008, the state habeas court denied relief. The Georgia Supreme Court denied Defendant's certificate for probable

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[1] Defendant's co-defendant Robert Butts was also convicted of malice murder, sentenced to death and executed on May 4, 2018.

cause to appeal. The United States Supreme Court denied certiorari review on December 6, 2010. *Wilson v. Terry*, 562 U.S. 1093 (2010).

Defendant then filed a federal habeas corpus petition on December 15, 2010. On December 19, 2013, the district court denied relief. *Wilson v. Humphrey*, No. 5:10-CV-489, 2013 U.S. Dist. LEXIS 178241 (M.D. Ga. Dec. 19, 2013). The Eleventh Circuit Court of Appeals affirmed the denial of relief. *Wilson v. Warden*, 898 F.3d. 1314 (11th Cir. 2018). Defendant again applied for certiorari review on March 12, 2019. That petition was denied May 28, 2019. *Wilson v. Ford*, 587 U.S. ___ (2019).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

O.C.G.A. § 5-5-41(c) specifically governs requests for DNA testing and 5-5-41(c)(6)(A) necessitates defendants satisfy certain pre-requisites before a hearing is required. O.C.G.A. § 5-5-41(c) "requires a trial court to conduct a hearing *only* if a defendant's motion 'complies with the requirements of paragraphs (3) and (4)' of the statute." *Crawford*, 278 Ga. at 96 (emphasis added). After review, this Court finds that the Defendant cannot establish the necessary showing for O.C.G.A. § 5-5-41(c)(3)(C-D) and (c)(4)(A).

A. O.C.G.A. § 5-5-41(c)(3)(D).

The Court finds that Defendant failed to meet the requirements of O.C.G.A. § 5-5-41(c)(3)(D), that "the requested DNA testing would raise

a reasonable probability that the Defendant *would have been acquitted* if the results of the DNA testing had been available at the time of the conviction, *in light of all the evidence in the case.*" (Emphasis added). Assuming the tie was tested and determined to have Butts's DNA on it, this would not acquit Defendant. It was established by video-taped evidence and eyewitness testimony that Defendant had on gloves on the night of the murder. (T. 1450-51). Accordingly, the lack of his DNA or the presence of Butts's DNA on the tie would not acquit Defendant. This is true particularly in light of the evidence that establishes Defendant's guilt. On direct appeal, the Georgia Supreme Court found that the evidence at trial established the following facts:

> ... on the night of March 28, 1996, the victim, Donovan Corey Parks, entered a local Wal-Mart to purchase cat food, leaving his 1992 Acura Vigor parked in the fire lane directly in front of the store. Witnesses observed Wilson and Robert Earl Butts standing behind Parks in one of the store's checkout lines and, shortly thereafter, speaking with Parks beside his automobile. A witness overheard Butts ask Parks for a ride, and several witnesses observed Wilson and Butts entering Parks's automobile, Butts in the front passenger seat and Wilson in the back seat. Minutes later, Parks's body was discovered lying face down on a residential street. Nearby residents testified to hearing a loud noise they had assumed to be a backfiring engine and to seeing the headlights of a vehicle driving from the scene. On the night of the murder, law enforcement officers took inventory of the vehicles in the Wal-Mart parking lot. Butts's automobile was among the vehicles remaining in the lot overnight. Based upon the statements of witnesses at the Wal-Mart, Wilson was arrested. A search of Wilson's residence yielded a sawed-off

shotgun loaded with the type of ammunition used to kill Parks, three notebooks of handwritten gang "creeds," secret alphabets, symbols, and lexicons, and a photo of a young man displaying a gang hand sign.

Wilson gave several statements to law enforcement officers and rode in an automobile with officers indicating stops he and Butts had made in the victim's automobile after the murder. According to Wilson's statements, Butts had pulled out a sawed-off shotgun, had ordered Parks to drive to and then stop on Felton Drive, had ordered Parks to exit the automobile and lie on the ground, and had shot Parks once in the back of the head. Wilson and Butts then drove the victim's automobile to Gray where they stopped to purchase gasoline. Wilson, who was wearing gloves, was observed by witnesses and videotaped by a security camera inside the service station. Wilson and Butts then drove to Atlanta where they contacted Wilson's cousin in an unsuccessful effort to locate a "chop shop" for disposal of the victim's automobile. Wilson and Butts purchased two gasoline cans at a convenience store in Atlanta and drove to Macon where the victim's automobile was set on fire. Butts then called his uncle and arranged a ride back to the Milledgeville Wal-Mart where Butts and Wilson retrieved Butts's automobile.

Viewed in the light most favorable to the verdict, we find that the evidence introduced at trial was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that Wilson was guilty of the crimes of which he was convicted and to find beyond a reasonable doubt the existence of a statutory aggravating circumstance. *Jackson v. Virginia*, 443 U.S. 307 (99 S. Ct. 2781, 61 L. Ed. 2d 560) (1979); O.C.G.A. § 17-10-30(b)(2). The State was not required to prove that Wilson was "the triggerman" in order to prove him guilty of malice murder. Even assuming that Wilson did not shoot the victim, there is sufficient evidence that he intentionally aided or abetted the commission of the murder or that he intentionally advised, encouraged, or procured another to commit the murder to support a finding of guilt. []

Wilson, 271 Ga. at 812-13.

Defendant also argues that this testing could have precluded a death sentence. (Motion, p. 23). However, under the current procedural posture, this is not the standard. Defendant must first show his "motion 'complies with the requirements of paragraphs (3) and (4)' of the statute." *Crawford*, 278 Ga. at 96 (emphasis added). The standard is "[t]he requested DNA testing would raise a reasonable probability that the petitioner would have been *acquitted*...." O.C.G.A. § 5-5-41(c)(3)(D). However, even if the testing was conducted and Butts's DNA was on the tie, in light of the evidence presented at trial, there is no reasonable probability of a different sentencing verdict.

As to sentencing, the record also establishes that, during the penalty phase of trial, the State called a number of witnesses in aggravation of punishment to show that, although Defendant was only 21, he had an extensive, violent criminal history. As found by the district court:

> [T]rial counsel learned that the State could potentially present 39 witnesses to testify about 27 aggravating circumstances during the sentencing phase of Wilson's trial. [] These aggravating circumstances included crimes Wilson committed as an adult while living in Baldwin County and his membership/leadership in a gang. [] Also included were numerous crimes Wilson committed, or was accused of committing, when he was a juvenile living with his mother in Glynn and McIntosh Counties. [] The number of witnesses in

> aggravation ultimately increased to 72 and the number of aggravating circumstances rose to 29. []

Wilson v. Humphrey, 2013 U.S. Dist. LEXIS 178241, at *41 n.13. The Court notes that Defendant's criminal history is so extensive it elicited a special concurrence from Chief Judge Carnes of the Eleventh Circuit:

> Wilson's wholehearted commitment to antisocial and violent conduct from the age of 12 on not only serves as a heavy weight on the aggravating side of the scale, it also renders essentially worthless some of the newly proffered mitigating circumstance evidence. ...For example, a number of Wilson's teachers signed affidavits, carefully crafted by his present counsel, claiming that Wilson was "a sweet, sweet boy with so much potential," a "very likeable child," who was "creative and intelligent," and had a "tender and good side." One even said that Wilson "loved being hugged." A sweet, sensitive, tender, and hug-seeking youth does not commit arson, kill a helpless dog, respond to a son's plea to quit harassing his elderly mother with a threat "to blow . . . that old bitch's head off," shoot a migrant worker just because he "wanted to see what it felt like to shoot someone," assault a youth detention official, shoot another man in the head and just casually walk off—all before he was old enough to vote. Without provocation Wilson shot a human being when he was fifteen, shot a second one when he was sixteen, and robbed and shot to death a third one when he was nineteen. ...

Wilson v. Warden, 774 F.3d at 683.

Thus, 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. In fact, following the guilt phase closing arguments, the jury found Defendant guilty of malice murder in approximately one hour and a half. (T. 1907). When trial

counsel spoke to the jurors after the trial, some of the jurors commented on how quickly they were able to reach a unanimous decision as to Defendant's guilt. (State's Attachment C); *see also* State's Attachment D, juror comment: "There wasn't any question that he was guilty."; State's Attachment E, juror comment: "Evidence was overwhelming.").

There is no reasonable probability that Defendant would have been acquitted if the results of the DNA testing had been available at the time of the conviction, *in light of all the evidence in the case*" or not sentenced to death. (Emphasis added).

B. O.C.G.A. § 5-5-41(c)(3)(C).

The Court also finds that Defendant failed to meet the requirements of O.C.G.A. § 5-5-41(c)(3)(C), which mandates that he show "the identity of the perpetrator, was, or should have been, a *significant* issue in the case." (Emphasis supplied). The identity of the perpetrators in this case was never a significant issue. The question posed by Defendant at trial was who actually held the gun and fired the fatal shot into Parks's head. That issue was addressed on direct appeal. *Wilson*, 271 Ga. at 813 (State was not required to prove Defendant triggerman for malice murder, sufficient evidence showed "he intentionally aided or abetted the commission of the murder or that

he intentionally advised, encouraged, or procured another to commit the murder to support a finding of guilt").

C. O.C.G.A. § 5-5-41(c)(4)(A)

The Court also finds that the motion is filed for the purpose of delay. Most telling, Defendant filed the current motion 22 years after his conviction, but only one day prior to the United States Supreme Court conferenced his petition for certiorari review.

Further, Defendant was tried in 1997. At the time, DNA testing was available, but not requested by Defendant. *See* Defendant's Exhibit B, pp. 3-4, ¶ 13. During his state habeas proceedings, lasting from 2001-2008, Defendant conducted discovery and hired experts, but never requested the testing of any items for potential DNA. Defendant's new expert states in his affidavit that during this time touch DNA was available to Defendant. *See* Defendant's Exhibit B, p. 4, ¶ 15 (touch DNA testing available, eleven years ago, in 2008).

In the federal district court proceedings, which lasted until 2014, Defendant requested the opportunity for a hearing and for discovery and for expert assistance to present his claims. However, he did not request DNA testing or present any experts to assert DNA testing should be conducted. Clearly, this testing was available at that time.

Defendant's own expert concedes that all the DNA testing Defendant now seeks has been available for years. *See* Defendant's

Appendix B. Yet, Defendant has never sought this testing. It is only now, once all his appeals have been completed and an execution warrant is imminent, that he seeks DNA testing.

CONCLUSION

Defendant's extraordinary motion for new trial is denied.

SO ORDERED, this 30th day of May, 2019.

William A. Prior, Jr., Chief Judge
Ocmulgee Judicial Circuit

Prepared by:

Allison T. Martin
Chief Assistant District Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this Order Denying Defendant's Extraordinary Motion for New Trial to be delivered by the United States Postal Service with sufficient postage to insure delivery, addressed as follows:

Marcia A. Widder
Georgia Resource Center
303 Elizabeth Street
Atlanta, Georgia 30307

Beth Burton
Deputy Attorney General
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Brian Kammer
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Stephen A. Bradley
District Attorney
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Milledgeville, Georgia 31061

This 30th day of May, 2019.

Clerk of Superior Court, Baldwin County
Chief Deputy
Ocmulgee Judicial Circuit

Appendix C

Wilson v. State

Supreme Court of Georgia

November 1, 1999, Decided

S99P0651.

Reporter
271 Ga. 811 *; 525 S.E.2d 339 **; 1999 Ga. LEXIS 1035 ***; 2000 Fulton County D. Rep. 501

WILSON v. THE STATE.

Subsequent History: [*1]** Certiorari Denied October 2, 2000, Reported at: *2000 U.S. LEXIS 5355*. Reconsideration Denied December 20, 1999.

Reconsideration denied by, 12/20/1999

Writ of certiorari denied *Wilson v. Georgia, 531 U.S. 838, 121 S. Ct. 99, 148 L. Ed. 2d 58, 2000 U.S. LEXIS 5355 (2000)*

Companion case at *Butts v. State, 273 Ga. 760, 546 S.E.2d 472, 2001 Ga. LEXIS 323 (2001)*

Related proceeding at *Wilson v. Terry, 131 S. Ct. 799, 178 L. Ed. 2d 534, 2010 U.S. LEXIS 9493 (U.S., 2010)*

Habeas corpus proceeding at, Motion granted by *Wilson v. Upton, 2011 U.S. Dist. LEXIS 2889 (M.D. Ga., Jan. 12, 2011)*

Prior History: Murder. Baldwin Superior Court. Before Judge Prior.

Disposition: Judgment affirmed.

Counsel: Waddell, Emerson & Buice, John H. Bradley, Jon P. Carr, for appellant.

Fredric D. Bright, District Attorney, Thurbert E. Baker, Attorney General, Susan V. Boleyn, Senior Assistant Attorney General, Beth A. Burton, Assistant Attorney General, for appellee.

Judges: BENHAM, Chief Justice. All the Justices concur, except Carley, J., who concurs in judgment only as to Division 6, and Sears, J., who concurs in part and dissents in part.

Opinion by: Benham

Opinion

[342]** **[*811]** BENHAM, Chief Justice.

A jury convicted Marion Wilson, Jr. of malice murder, felony murder, armed robbery, hijacking a motor vehicle, possession of a firearm during the commission of a crime, **[**343]** and possession of a sawed-off **[*812]** shotgun. [1] The jury fixed the sentence for the murder at death, finding as a statutory aggravating circumstance that Wilson committed the murder while engaged in the commission of an armed robbery. *O.C.G.A. § 17-10-30 (b) (2)*. For the reasons that follow, we

[1] The crimes occurred on March 28, 1996. Wilson was indicted on May 29, 1996, by the Baldwin County Grand Jury for malice murder, felony murder, armed robbery, hijacking a motor vehicle, possession of a firearm during the commission of a crime, and possession of a sawed-off shotgun. The State filed written notice of its intent to seek the death penalty on July 22, 1996. Wilson's trial began on October 27, 1997, and the jury found Wilson guilty on all counts. The felony murder conviction was vacated by operation of law. *Malcolm v. State, 263 Ga. 369 (4) (434 S.E.2d 479) (1993)*; *O.C.G.A. § 16-1-7*. On November 7, 1997, the jury recommended the death sentence for malice murder. In addition to the death sentence, the trial court imposed consecutive sentences of life imprisonment for armed robbery, twenty years in prison for hijacking a motor vehicle, five years in prison for possession of a firearm during the commission of a crime, and five years in prison for possession of a sawed-off shotgun. Wilson filed a motion for a new trial on December 3, 1997, and supplemented his motion on December 10, 1997. The trial court denied the motion for a new trial on December 18, 1997. The appeal was docketed with this Court on February 3, 1999, and orally argued on April 19, 1999.

affirm.

[*2]** The evidence at trial showed that on the night of March 28, 1996, the victim, Donovan Corey Parks, entered a local Wal-Mart to purchase cat food, leaving his 1992 Acura Vigor parked in the fire lane directly in front of the store. Witnesses observed Wilson and Robert Earl Butts standing behind Parks in one of the store's checkout lines and, shortly thereafter, speaking with Parks beside his automobile. A witness overheard Butts ask Parks for a ride, and several witnesses observed Wilson and Butts entering Parks's automobile, Butts in the front passenger seat and Wilson in the back seat. Minutes later, Parks's body was discovered lying face down on a residential street. Nearby residents testified to hearing a loud noise they had assumed to be a backfiring engine and to seeing the headlights of a vehicle driving from the scene. On the night of the murder, law enforcement officers took inventory of the vehicles in the Wal-Mart parking lot. Butts's automobile was among the vehicles remaining in the lot overnight. Based upon the statements of witnesses at the Wal-Mart, Wilson was arrested. A search of Wilson's residence yielded a sawed-off shotgun loaded with the type of ammunition used **[***3]** to kill Parks, three notebooks of handwritten gang "creeds," secret alphabets, symbols, and lexicons, and a photo of a young man displaying a gang hand sign.

Wilson gave several statements to law enforcement officers and rode in an automobile with officers indicating stops he and Butts had made in the victim's automobile after the murder. According to Wilson's statements, Butts had pulled out a sawed-off shotgun, had ordered Parks to drive to and then stop on Felton Drive, had ordered Parks to exit the automobile and lie on the ground, and had shot **[*813]** Parks once in the back of the head. Wilson and Butts then drove the victim's automobile to Gray where they stopped to purchase gasoline. Wilson, who was wearing gloves, was observed by witnesses and videotaped by a security camera inside the service station. Wilson and Butts then drove to Atlanta where they contacted Wilson's cousin in an unsuccessful effort to locate a "chop shop" for disposal of the victim's automobile. Wilson and Butts purchased two gasoline cans at a convenience store in Atlanta and drove to Macon where the victim's automobile was set on fire. Butts then called his uncle and arranged a ride back to the Milledgeville **[***4]** Wal-Mart where Butts and Wilson retrieved Butts's automobile.

1. Viewed in the light most favorable to the verdict, we find that the evidence introduced at trial was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that Wilson was guilty of the crimes of which he was convicted and to find beyond a reasonable doubt the existence of a statutory aggravating circumstance. *Jackson v. Virginia, 443 U.S. 307 (99 S. Ct. 2781, 61 L. Ed. 2d 560) (1979)*; *O.C.G.A. § 17-10-30 (b) (2)*. The State was not required to prove that Wilson was "the triggerman" in order to prove him guilty of malice murder. Even assuming that Wilson did not shoot the victim, there is sufficient evidence that he intentionally aided or abetted the commission **[**344]** of the murder or that he intentionally advised, encouraged, or procured another to commit the murder to support a finding of guilt. *O.C.G.A. § 16-2-20 (b) (3)*, (4). See *Mize v. State, 269 Ga. 646 (1) (501 S.E.2d 219) (1998)*; *Chapman v. State, 263 Ga. 393 (435 S.E.2d 202) (1993)*; *Gambrel v. State, 260 Ga. 197 (391 S.E.2d 406) (1990)*.

The same standard of review of the evidence is **[***5]** applicable to the denial of the defendant's motion for a directed verdict. *Miller v. State, 270 Ga. 741 (1) (512 S.E.2d 272) (1999)*; *Smith v. State, 267 Ga. 502 (3) (480 S.E.2d 838) (1997)*. Accordingly, we disagree with Wilson's contention that his motion for a directed verdict was improperly denied by the trial court.

2. Wilson claims that his rights to freedom of speech and freedom of association were violated during the penalty phase of his trial by the introduction of evidence showing his involvement

with the Folks gang. [2] In support of his contention, Wilson relies upon *Dawson v. Delaware, 503 U.S. 159 (112 S. Ct. 1093, 117 L. Ed. 2d 309) (1992)*, wherein the U.S. Supreme Court held that a defendant's association with a racist organization was protected by the First and Fourteenth Amendments and that evidence of such an association could not lawfully be introduced unless relevant to the issues to be tried. Presentation by the State of evidence that proves "nothing more than [a **[*814]** defendant's] abstract beliefs[]" (*id. at 167*) invites punishment of a criminal defendant's exercise of constitutionally protected rights. **[***6]** In the present case, however, evidence of Wilson's involvement with the Folks gang and of the violent nature of that gang was relevant to the issues to be decided by the jury during the sentencing phase of his trial. The State presented testimony that the Folks gang required its members to commit violent, criminal acts and that Wilson held a powerful position in the gang. The State also presented a tape-recorded statement of Wilson claiming to be the gang's "chief enforcer," Wilson's handwritten notebooks regarding the gang, and a photograph found in Wilson's residence of a young man displaying a gang hand sign. Because the evidence in question was not objected to at trial, Wilson is barred from challenging its introduction on appeal. *Earnest v. State, 262 Ga. 494 (1) (422 S.E.2d 188) (1992)*.

3. Wilson contends that the trial court allowed improper expert testimony about gangs during the sentencing phase of his **[***7]** trial. The testimony in question was not objected to at trial and cannot now be complained of on appeal. Id.

4. Wilson claims that self-inculpatory statements allegedly made by Robert Earl Butts to three of Butts's fellow inmates were made "during the pendency of the criminal project" (*O.C.G.A. § 24-3-5*) in which Wilson and Butts had been engaged as co-conspirators and, therefore, that those alleged statements should have been admitted during the guilt/innocence phase of Wilson's trial. The trial court excluded the evidence on the basis that any conspiracy between Wilson and Butts ended when Wilson gave statements to law enforcement officers revealing certain details of the crime and seeking to place blame for the murder on Butts. While we agree with the trial court that any conspiracy between Butts and Wilson ended upon Wilson's statements to authorities (*Crowder v. State, 237 Ga. 141, 153 (227 S.E.2d 230) (1976))*, we further add that the statutory exception to the hearsay rule upon which Wilson relies makes declarations of conspirators admissible only *against* other conspirators. See *Dunbar v. State, 205 Ga. App. 867, 869 (424 S.E.2d 43) (1992)*. **[***8]** It is the long- standing rule in this state that declarations to third persons to the effect that the declarant and not the accused was the actual perpetrator are, as a rule, inadmissible. *Timberlake v. State, 246 Ga. 488 (1) (271 S.E.2d 792) (1980)*; *Lyon v. State, 22 Ga. 399 (1857)*.

Furthermore, although this type of hearsay evidence is generally inadmissible (see *Timberlake v. State, supra* at (1)), under the principles set forth by this Court in *Drane v. State, 265 Ga. 255 (455 S.E.2d 27) (1995)*, and by the U.S. Supreme Court in *Chambers v. Mississippi, 410 U.S. 284, 302 **[**345]** (93 S. Ct. 1038, 35 L. Ed. 2d 297) (1973)* (failure to admit evidence of another's confession offered during guilt/innocence phase of trial constituted a violation of due process right), and *Green **[*815]** v. Georgia, 442 U.S. 95 (99 S. Ct. 2150, 60 L. Ed. 2d 738) (1979)* (failure to admit evidence of co- indictee's confession offered at punishment phase of trial violated due process right because testimony was highly relevant to a critical issue in punishment phase and substantial reasons existed to assume its reliability), there **[***9]** may be exceptional circumstances that make the hearsay evidence sufficiently reliable and necessary to require its admission. However, as stated in *Turner v. State, 267 Ga. 149, 155 (476 S.E.2d 252) (1996)*, whenever defense counsel seeks to admit this type of hearsay evidence to

[2] No such evidence was introduced during the guilt/innocence phase of the trial.

support a claim that someone other than the defendant is responsible for the crimes being tried, counsel:

must make a proffer in which the reliability and necessity of the hearsay evidence are thoroughly set out, and the trial court's ruling must reflect consideration of the proffered evidence and a determination that the evidence does or does not show "persuasive assurances of trustworthiness," or was made under circumstances providing considerable assurance of its reliability.

Despite being tried approximately one year after the *Turner* ruling was issued, Wilson, the hearsay proponent at trial, did not utilize the procedures set forth in *Turner* and did not obtain a ruling from the trial court evidencing its consideration of the proffered hearsay evidence under *Turner*. Accordingly, the trial court did not err in failing to address whether, under the standards set forth in *Green* **[***10]** , *Chambers*, and *Drane*, the hearsay evidence in question was sufficiently reliable, relevant, and necessary to require its admission in the guilt/innocence phase of Wilson's trial.

5. Wilson contends that the trial court erred in not striking certain jurors for cause. We find no reversible error in the trial court's rulings.

(a) Juror James Peugh, a former defense attorney, stated during his individual voir dire that he believed "99.9 percent of [criminal defendants] were guilty. . . ." The trial court denied a defense motion that the juror be stricken for cause, finding the juror had "rehabilitated himself" by stating in three separate responses that he thought he could be fair. Whether to strike a juror for cause lies within the sound discretion of the trial court (*Holmes v. State, 269 Ga. 124 (2) (498 S.E.2d 732) (1998)*; *Garland v. State, 263 Ga. 495 (1) (435 S.E.2d 431) (1993))*, and a trial court is not obligated to strike a juror for cause in every instance where the potential juror expresses doubts about his or her impartiality or reservations about his or her ability to set aside personal experiences. Id.; *Waldrip v. State, 267 Ga. 739 (8) (c) (482 S.E.2d 299) (1997)*; **[***11]** *Johnson v. State, 262 Ga. 652 (2)* ***[*816]*** *(424 S.E.2d 271) (1993)*. The trial judge is uniquely positioned to observe a potential juror's demeanor and thereby to evaluate his or her capacity to render an impartial verdict. See *Greene v. State, 268 Ga. 47 (485 S.E.2d 741) (1997)*; *Arnold v. State, 236 Ga. 534 (6) (224 S.E.2d 386) (1976)*. The record reveals no evidence Juror Peugh had formed an opinion so fixed and definite that it would not be changed by the evidence or the charge of the court. See *Bright v. State, 265 Ga. 265 (455 S.E.2d 37) (1995)*; *Childs v. State, 257 Ga. 243 (357 S.E.2d 48) (1987)*; *Waters v. State, 248 Ga. 355 (2) (283 S.E.2d 238) (1981)*. Accordingly, we find that the trial court's denial of Wilson's motion to strike Juror Peugh for cause was not a manifest abuse of its discretion. See *Diaz v. State, 262 Ga. 750 (2) (425 S.E.2d 869) (1993)*.

(b) Juror John Mayzes had casually conversed with the victim about the Bible three times in Juror Mayzes's front yard but was otherwise completely unacquainted with the victim. Wilson did not move to strike Juror Mayzes **[***12]** for cause, and we find the trial court did not err by not striking him sua sponte. See *Mize v. State, supra* at (6) (c); *Spencer v. State, 260 Ga. 640 (1) (398 S.E.2d 179) (1990)*; *Childs v. State, supra.* See also *Blankenship v. State, 258 Ga. 43 (2) (365 S.E.2d 265) (1988)* (applying 10.1 10.1 10.1 Rule 10.1 of the Georgia Uniform Rules for the Superior Courts, *253 Ga. 823-824*, when party failed to object to trial court's excusing certain jurors).

[346]** (c) Juror Henry Craig stated in his individual voir dire that his son and daughter had repeated to him statements of persons associated with the Sheriff's Department that indicated the Sheriff was confident regarding the identity of the killer. However, the juror clearly stated that he had not formed an opinion about the guilt or innocence of the defendant, and both defense counsel and the trial court questioned the juror as to his ability to disregard the hearsay statements and to consider only the evidence presented at trial. Accordingly, we find no error in the trial court's denial of the

defendant's motion to strike the juror for cause. *Bright v. State, supra* **[***13]** at (8); *Waters v. State, supra*; *Tennon v. State, 235 Ga. 594 (2) (220 S.E.2d 914) (1975)*; *Irvin v. Dowd, 366 U.S. 717, 723 (81 S. Ct. 1639, 6 L. Ed. 2d 751) (1961)*.

(d) Wilson complains that, because the victim had worked as a corrections officer, the trial court erred in denying his motion to strike for cause all jurors who either worked for or who had relatives who worked for the Department of Corrections. Blanket disqualification of jurors based solely upon their membership in a group to which the victim belonged is not required. *Jordan v. State, 247 Ga. 328 (6) (276 S.E.2d 224) (1981)*; *Burgess v. State, 264 Ga. 777 (8) (450 S.E.2d 680) (1994)*. The record reveals that the trial court adequately considered the potential bias of individual jurors connected to the Department of Corrections, and, accordingly, we conclude that the **[*817]** trial court did not err in denying Wilson's blanket motion.

6. Wilson contends the trial court erred by not being present while the jury viewed the crime scene. Prior to the jury view, the defendant, the State, and the trial court agreed upon the procedure to be employed. The **[***14]** jury was to ride on a bus that would pause momentarily at the scene. The defense objected to having the trial judge travel on the bus with the jury, and the trial court acceded to the objection. The issue of whether the trial judge would follow in a separate vehicle was not discussed. The trial court dismissed the jury from the courtroom to board the bus with instructions that no one was to point at anything or to discuss anything at the scene and with instructions that they were to recognize their arrival at the crime scene based on their memory of the street names discussed at trial and by the momentary pause of the bus. The defendant and his counsel attended the jury view by following the bus in separate vehicles. No jury members left the bus at the scene.

Following the jury view, the defendant raised no objection to the jury view, including the apparent absence of the trial judge, and the defendant did not move for a mistrial. In his appeal, the defendant has not set forth any purported irregularity in the jury view, other than the trial judge's absence, despite the fact that he and his counsel were present at the jury view and enjoyed a vantage point that, given his objection **[***15]** to having the trial judge ride on the bus, was equivalent to that which the trial judge would have had if he had followed in a separate vehicle.

We find that the trial judge should have attended the jury view, even though his role at the jury view would have been minimal given the defendant's objection to the trial judge's presence on the bus. The absence of the trial judge from trial proceedings is reversible error when it is objected to and when it results in some harm. *Horne v. Rogers, 110 Ga. 362* (5), (6) *(35 S.E. 715) (1900)*; *Pritchett v. State, 92 Ga. 65 (2) (18 S.E. 536) (1893)*; *O'Shields v. State, 81 Ga. 301 (6 S.E. 426) (1888)*; see also *Malcom Bros. v. Pollock, 181 Ga. 687 (183 S.E. 917) (1935)*. However, in this case, no objection was made to the trial judge's brief absence, [3] and the defendant and his counsel, who were both present at the jury view, are unable to demonstrate any harm. Accordingly, the trial judge's absence during the jury view is not reversible error.

[*16]** 7. The defendant contends that the charge given to the jury regarding a defendant's mere presence during the commission of a crime was potentially misleading, despite the fact that it was read **[*818]** accurately from the **[**347]** suggested pattern charge, Suggested Pattern Jury Instructions: Vol. II, Criminal Charges, Part 3 (C), p. 18 (1995). The charge was a correct statement of the law and, particularly when read together with the other charges, would not have misled the jury.

8. Wilson contends that the trial court erred by failing to provide for opening statements at the

[3] The actual viewing of the crime scene by the jury was completed during the momentary pause by the bus. The mere transportation of the jury, of course, did not require the superintendence of the trial judge.

beginning of the sentencing phase and by giving inadequate guidance to the jury in the sentencing phase. We disagree. Allowing opening statements at the beginning of the sentencing phase is the better practice, but it is not required. *Smith v. State, 270 Ga. 240 (15) (510 S.E.2d 1) (1998)*. Furthermore, the trial court's instructions at the beginning of the sentencing phase, particularly when viewed together with the instructions given to the jury before it began deliberating on Wilson's sentence, provided ample guidance to the jury in fixing Wilson's sentence in the manner prescribed by law.

9. Wilson contends **[***17]** that the trial court's failure to charge the jury a second time on the credibility of witnesses during the penalty phase was reversible error. A second charge might be the better practice, but we find that the trial court had fully charged the jury with regard to the credibility of witnesses and expert witnesses during the guilt/innocence phase of the trial. The trial court's charge would have been understood by the jury to apply to all witnesses in both phases of the trial. This is comparable to a trial court's not again defining reasonable doubt in the sentencing phase after doing so in the guilt/innocence phase, which we have held not to be grounds for reversal. *Cromartie v. State, 270 Ga. 780 (22) (514 S.E.2d 205) (1999)*; *Bennett v. State, 262 Ga. 149 (10) (f) (414 S.E.2d 218) (1992)*. Accordingly, we find that the trial court's failure to charge the jury a second time on the credibility of witnesses was not reversible error.

10. The trial court was not required to charge the jury on a burden of proof applicable to non-statutory aggravating circumstances. *Cromartie, supra*; *Speed v. State, 270 Ga. 688 (46) (512 S.E.2d 896) (1999)*; **[***18]** *Whatley v. State, 270 Ga. 296 (11) (509 S.E.2d 45) (1998)*; *McClain v. State, 267 Ga. 378 (8) (477 S.E.2d 814) (1996)*; *Ross v. State, 254 Ga. 22 (5) (d) (326 S.E.2d 194) (1985)*; *Ward v. State, 262 Ga. 293 (29) (417 S.E.2d 130) (1992)*.

11. The trial court did not err in failing to instruct the jury that its findings as to mitigating circumstances need not be unanimous because the trial court clearly charged the jury that it was not necessary to find *any* mitigating circumstances in order to impose a life sentence instead of the death penalty. *Palmer v. State, 271 Ga. 234 (6) (517 S.E.2d 502) (1999)*; *McClain v. State, supra* at (6); *Wellons v. State, 266 Ga. 77 (23) (463 S.E.2d 868) (1995)*; *Ledford v. State, 264 Ga. 60 (20) (439 S.E.2d 917) (1994)*.

12. Wilson contends that the trial court erred by not charging the **[*819]** jury that a finding of an aggravating circumstance must be unanimous. However, reversal on this ground is not required when, as in this case, the trial court charged the jury that its verdict as to the penalty must be unanimous. *Sears v. State, 270 Ga. 834 (7) (e) (ii) (514 S.E.2d 426) (1999)*; **[***19]** *Davis v. State, 263 Ga. 5 (15) (426 S.E.2d 844) (1993)*.

13. Wilson contends that the trial court erred by denying his motion for a mistrial when, during the penalty phase, the jury heard inadmissible hearsay testimony suggesting Wilson had shot the victim. The hearsay testimony was heard by the jury when a witness for the State was asked when he first heard about Wilson's murder charge and answered, "[An investigator] called me up one day and told me that the boy that had shot me got out of prison and shot somebody else." The granting of a motion for a mistrial is within the discretion of the trial court, and the trial court's ruling will not be disturbed when the trial court has taken remedial measures sufficient to ensure a fair trial. *Jones v. State, 267 Ga. 592 (1) (b) (481 S.E.2d 821) (1997)*; *Cowards v. State, 266 Ga. 191 (3) (c) (465 S.E.2d 677) (1996)*. The record reveals that the trial court gave sufficient curative instructions and did not abuse its discretion in denying the defendant's motion for a mistrial.

14. Wilson contends that his right to a fair trial was abridged by the introduction of a photograph of the victim **[***20]** in **[**348]** life and by the manner in which that photograph was introduced. It is not

error to admit a photograph of the victim in life; however, the better practice is to have the photograph identified by someone other than a close relative of the victim. *James v. State, 270 Ga. 675 (5) (513 S.E.2d 207) (1999)*; *Whatley v. State, supra* at (8); *Ledford v. State, supra* at (14). In this case, the prosecutor asked the victim's father, the first witness at trial, whether he had given the State a picture of his son. The prosecutor then had the victim's father testify as to the date of and other details about the photograph. The photograph was never shown to the victim's father while he was on the stand, and there is no evidence in the transcript of any emotional display on his part. The photograph was later viewed and identified by a non-relative and was then introduced into evidence. We find that the defendant was not denied a fair trial under these circumstances.

15. Wilson contends that the trial court erred in admitting certain photographs which depicted the victim as he was found at the crime scene and as he appeared shortly before autopsy. **[***21]** We find that these photographs were material, relevant, and admissible. *Jackson v. State, 270 Ga. 494 (8) (512 S.E.2d 241) (1999)*; *Jenkins v. State, 269 Ga. 282 (20) (498 S.E.2d 502) (1998)*; *Crozier v. State, 263 Ga. 866 (2) (440 S.E.2d 635) (1994)*.

16. (a) We find that the prosecution's characterization of the victim **[*820]** as a helpless, nice, unarmed person was relevant to the jury's determination of guilt as to the malice murder charge and did not unfairly prejudice the defendant, constitute improper victim impact testimony, or deny the defendant a fair trial.

(b) Contrary to the defendant's contention, we conclude that the prosecution did not invite the jury to place itself in the place of the victim.

(c) During his closing argument at the end of the guilt/innocence phase of the trial, the prosecutor interspersed his argument with direct quotations from the Georgia Code, arguing how the statutory elements set forth in the quotations had been proved. The practice of "reading the law" in a criminal proceeding was condemned by this Court some time ago as offering a license for counsel to present portions of the law to the jury that **[***22]** would not constitute part of the trial court's charge. *Conklin v. State, 254 Ga. 558 (10) (331 S.E.2d 532) (1985)*. However, "counsel have every right to refer to applicable law during closing argument" when that law will be charged by the trial court. Id.; *Felder v. State, 270 Ga. 641 (3) (514 S.E.2d 416) (1999)*. Indeed, we have held that restraining counsel from discussing and arguing law that will be charged to the jury is error. *Minter v. State, 266 Ga. 73 (463 S.E.2d 119) (1995)*. Accordingly, we conclude that under the circumstances of this case, the trial court did not err in failing to restrain the State from discussing the law in the manner complained of.

(d) Wilson contends the State, in its closing argument in the guilt/innocence phase, made statements that improperly emphasized the defendant's exercise of his right not to testify and the failure of Butts, the other participant in the murder, to give a statement after being arrested. [4] We find no evidence in the record that the defendant objected to the purportedly inappropriate statements or moved for a mistrial, and, generally, such an objection cannot be raised for the **[***23]** first time in a motion for a new trial or on appeal. *Landers v. State, 270 Ga. 189 (2) (508 S.E.2d 637) (1998)*; *Roberts v. State, 231 Ga. 395 (1) (202 S.E.2d 43) (1973)*. When no objection has been made at trial, such allegedly improper statements warrant reversal only if they in reasonable probability changed the result of the trial. *Ledford v. State, supra* at (18) (a); *Todd v. State, 261 Ga. 766 (2) (410 S.E.2d 725) (1991)*. Without addressing whether the statements were improper, we find that they did not in reasonable probability change the result of the trial and, therefore, cannot serve as grounds for reversal because they were not objected to.

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[4] Given the defendant's failure to object at trial, we need not address the question of his standing to object to the alleged comment on the post-arrest silence of the co-participant.

[*821] **[**349]** 17. Wilson contends that certain portions of the State's opening statement during the guilt/innocence phase of his **[***24]** trial were inflammatory and improperly called into question the impact of the victim's death upon the victim's family. The proper test on review when, as here, the defendant has not objected to allegedly improper statements is whether the statements in reasonable probability changed the result of the trial. Id. We find no such reasonable probability with respect to the statements complained of, and, therefore we need not address whether the statements were improper.

18. Wilson contends that two statements he made to law enforcement officers (one tape-recorded, one written) along with statements he made to police regarding his and Butts's actions after the murder were improperly admitted into evidence. We disagree.

Wilson contends that the statements should have been excluded from evidence because they were allegedly induced by a hope of benefit in violation of O.C.G.A. § 24-3-50. Wilson's contention at the suppression hearing hinged upon an evaluation of the credibility of witnesses. It is the province of the trial court to weigh the credibility of witnesses in such a hearing, and, unless clearly erroneous, its findings of fact will not be disturbed on appeal. *Gilliam v. State, 268 Ga. 690 (3) (492 S.E.2d 185) (1997)*; **[***25]** *Arline v. State, 264 Ga. 843 (2) (452 S.E.2d 115) (1995)*; *Caffo v. State, 247 Ga. 751 (279 S.E.2d 678) (1981)*. We find no error in the trial court's ruling as to the absence of an inducement by a hope of benefit.

Wilson also contends that he was not made aware of his rights under *Miranda v. Arizona, 384 U.S. 436 (86 S. Ct. 1602, 16 L. Ed. 2d 694) (1966)*, prior to making the contested statements and that, prior to making the tape-recorded statement, he had been denied a request for an attorney. This contention also hinged upon the credibility of witness testimony, and we do not find the trial court's assessment of witness credibility in this matter to have been clearly erroneous. *Gilliam v. State, supra.* Accordingly, we conclude that the trial court did not err in its ruling as to Wilson's *Miranda* rights.

19. The trial court did not err in denying Wilson's motion for a change of venue. Wilson contends that a change of venue was necessary because of pretrial publicity and the fact that, like the victim, a large number of Baldwin County residents were Department of Corrections employees.

In order to justify a change **[***26]** of venue based upon pretrial publicity, a capital defendant must show that the trial setting was inherently prejudicial as a result of pretrial publicity or show actual bias on the part of the individual jurors. *Jenkins v. State, supra* at (3); *Jones v. State*, 267 Ga. at (1) (a). A change of venue is appropriate in a death penalty case when the "defendant can make a substantive showing of the likelihood of prejudice by reason of extensive publicity." **[*822]** *Jones v. State, 261 Ga. 665 (2) (409 S.E.2d 642) (1991)*. The decisive factor in determining whether a change of venue is required is "the effect of the publicity on the ability of prospective jurors to be objective." *Freeman v. State, 268 Ga. 185 (2) (486 S.E.2d 348) (1997)*. The extent and timing of pretrial publicity are also factors to be considered. Id.; *Thornton v. State, 264 Ga. 563 (17) (449 S.E.2d 98) (1994)*. Our review of the record does not indicate that the pretrial publicity created a likelihood of prejudice. Of the large number of jurors subjected to individual voir dire, none was stricken for cause because of his or her exposure to pretrial publicity.

[*27]** As to Wilson's contention that the large number of Department of Corrections employees in Baldwin County warranted a change of venue, we note, as in our discussion above regarding the defendant's motion to strike all such persons for cause, that persons are not deemed unqualified to serve as jurors based solely upon their membership in a group to which the victim belonged. *Jordan v. State, supra.* It must be demonstrated that the persons or class of persons will be unable to serve

as fair and impartial finders of fact, a showing not made by Wilson in his motions to strike for cause or his motion for a change of venue.

[350]** 20. Wilson contends that the trial court erred by allowing evidence during the penalty phase of a number of crimes committed by him as a juvenile, including shooting two persons and a dog, first degree arson, criminal trespass, felony obstruction of a law enforcement officer, assault of an officer in a youth detention facility, possession of cocaine, and making a death threat. We disagree. Such records are admissible in the penalty phase of a capital murder case. *Smith v. State, supra* at (2); *Burrell v. State, 258 Ga. 841 (7) (376 S.E.2d 184) (1989)*; **[***28]** *O.C.G.A. § 15-11-38 (b)*.

Wilson further contends that evidence of his prior criminal activity was improperly admitted during the penalty phase because the evidence was insufficiently reliable. Again, we disagree. "The factors normally considered in sentencing are (1) the character of the defendant, including his previous criminal activity, if any, and (2) the circumstances of the crime on trial." *Ford v. State, 257 Ga. 461 (1) (360 S.E.2d 258) (1987)*; *Kinsman v. State, 259 Ga. 89 (15) (376 S.E.2d 845) (1989)*. Evidence of bad character and previous crimes must be reliable (*Williams v. State, 258 Ga. 281 (7) (368 S.E.2d 742) (1988))* but, when considering non-statutory aggravating circumstances, the jury is not required to evaluate each and every evidentiary vignette pursuant to the reasonable doubt standard. *Ward v. State, supra*; *Ross v. State, supra.* The trial court is certainly not required to apply such a standard in determining if the evidence is admissible. The fact that the defendant was able to set forth evidence weighing against a finding of guilt as to the previous crimes does not in and of itself **[***29]** **[*823]** make the State's evidence unreliable. We find that the trial court did not err in admitting the contested evidence.

Finally, we find no merit in Wilson's contention that the trial court improperly admitted testimony that Wilson had threatened to kill a man and his mother. Wilson argues that the testimony was inadmissible because it lacked the corroboration required for conviction of the crime of making a terroristic threat. See *O.C.G.A. § 16-11-37 (a)*. However, we find that the testimony was admissible as evidence of bad character. For the same reasons that evidence of acts reflecting bad character need not be evaluated according to the reasonable doubt standard (*Ward v. State, supra*; *Ross v. State, supra*), such evidence also need not be sufficient to allow conviction under the evidentiary requirements of a specific criminal statute. The evidence need only be reliable. *Williams v. State, supra.*

21. Wilson contends that he was denied a fair trial because the judge who presided over many of the pretrial proceedings was replaced for health reasons before the trial began by another judge who presided over the remainder of the case, including **[***30]** two remaining pretrial motion hearings, jury selection, both phases of the trial, and the defendant's motion for a new trial. Prior to the first judge's departure, Wilson requested that only one judge preside over both jury selection and the trial, and this request was accommodated. Wilson made no other objection to the substitution, and, therefore, this argument is waived. *Earnest v. State, supra.*

22. Wilson contends that it was error for the trial court to deny his trial counsel's request to be discharged from representing Wilson based on the fact that counsel's wife worked for the Department of Corrections, knew persons who were acquainted with the victim, and was herself casually acquainted with the victim. Our evaluation of the alleged conflict requires us to "examine the particular circumstances of the representation[] to determine whether counsel's undivided loyalties remained with his . . . client, as they must." *Hill v. State, 269 Ga. 23 (2) (494 S.E.2d 661) (1998)* (evaluating alleged conflict of interest arising from defense counsel's previous representation of State's witness). See also *Hudson v. State, 234 Ga. App. 895 (3) (a) (508 S.E.2d 682) (1998)*. **[***31]** The

relationship between defense counsel and the victim was both minimal and indirect. Furthermore, the record reveals no evidence that defense counsel was affected by his minimal relationship to the victim. Accordingly, we find that the trial court did not err in ruling that there was no disqualifying conflict of interest.

[351]** 23. We find that the sentence of death in this case was not imposed under the influence of passion, prejudice, or any other arbitrary factor. *O.C.G.A. § 17-10-35 (c) (1)*. We also find, considering both the crime and the defendant, that the sentence of death was neither **[*824]** excessive nor disproportionate to the penalties imposed in similar cases. *O.C.G.A. § 17-10-35 (c) (3)*. The similar cases listed in the Appendix support the imposition of the death penalty in this case, as all are cases of intentional killing committed during the commission of an armed robbery or a motor vehicle hijacking.

Judgment affirmed. All the Justices concur, except Carley, J., who concurs in judgment only as to Division 6, and Sears, J., who concurs in part and dissents in part.

Concur by: Sears (In Part)

Dissent by: Sears (In Part)

Dissent

Sears, Justice, concurring in part and dissenting in **[***32]** part.

I concur in the majority's affirmance of appellant's adjudication of guilt. However, regarding appellant's death sentence, the majority implicitly concludes that no Eighth Amendment concerns are raised by the sentence of death by electrocution. [5] This conclusion, however, is reached without the benefit of forthcoming guidance from the United States Supreme Court on that issue, and without an analysis of the voluminous evidence that is available regarding the constitutional implications of electrocution. For the first time in its history, the United States Supreme Court is poised to make a determination of whether there is evidence to show that a particular method of execution -- electrocution -- violates the Eighth Amendment's prohibition against cruel and unusual punishment. Because I believe prudence requires this Court to stay its Eighth Amendment rulings in capital cases until we receive guidance from the United States Supreme Court in the coming months, I respectfully dissent to the affirmance of appellant's death sentence.

[*33]** At the outset, I emphasize that my constitutional concerns are not with the State's power to impose the death penalty for statutorily-enumerated crimes. [6] Rather, my concern focuses upon the only available method of carrying out a death sentence in Georgia -- electrocution in Georgia's electric chair. Despite having issued opinions in many matters in which death sentences have been imposed, the United States Supreme Court has never decided whether there is evidence to show that any particular method of execution (including electrocution) violates the Eighth Amendment's Cruel and Unusual Punishment Clause. [7] **[***35]** However, that will soon **[**352]**

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[5] In all capital cases, this Court is obligated to undertake a sua sponte review of the death sentence to determine, among other things, whether the penalty is excessive. *O.C.G.A. § 17-10-35*. "This penalty question is one of cruel and unusual punishment, and is for the court to decide" in all cases. *Blake v. State, 239 Ga. 292, 297 (236 S.E.2d 637) (1977)*.

[6] See, e.g., *Pruitt v. State, 270 Ga. 745 (514 S.E.2d 639) (1999)* (Sears, J., writing for the majority's affirmance of death sentence); *Whatley v. State, 270 Ga. 296 (509 S.E.2d 45) (1999)* (same); *Thomason v. State, 268 Ga. 298 (486 S.E.2d 861) (1997)* (same).

[7] Denno, *Getting to Death: Are Executions Constitutional?*, 82 Iowa Law Rev. 319 (1997). See ***Poyner v. Murray, 508 U.S. 931, 933 (113 S. Ct. 2397, 124 L. Ed. 2d 299) (1999)*** (Souter, J., joined by Blackmun and Stephens, dissenting from denial of certiorari).

Contrary to popular misconception, the Supreme Court's ruling in *In re Kemmler, 136 U.S. 436 (10 S. Ct. 930, 34 L.Ed 519) (1890)* (the last case in which the High Court has considered a method of execution), does not hold that electrocution is per se constitutional if

change, as the **[*825]** Supreme Court has recently granted certiorari in a capital habeas corpus action to review whether execution by electrocution violates the Federal Constitution's prohibition against cruel and unusual punishment. [8] Nor has Georgia's Supreme Court ever undertaken its own analysis of whether there is objective evidence to show that death in the State's electric chair constitutes cruel and unusual punishment, as that phrase is constitutionally understood. [9] Rather, this Court has habitually disposed of such claims perfunctorily, without considering **[***34]** whether a growing body of evidence indicates that electrocution causes a lingering death and undue violence, torture, and mutilation. [10] I believe that it is time for this Court to cease its cursory review of Eighth Amendment claims in capital cases, and to confront head-on the issue of whether there is evidence to show that execution by electrocution is unconstitutionally cruel and unusual. To my mind, the logical and prudent first step in that process is to await pending word from the nation's highest court regarding that very issue. [11]

The constitutional ramifications of electrocution are overly ripe for review. An Eighth Amendment analysis of evidence pertaining to any method of execution would adhere to four lines of inquiry: (1) Does the method of execution involve "something more **[***36]** than the mere extinguishment of life," [12] **[***37]** such as "torture or a lingering death . . . **[*826]** something inhuman and barbarous"?; [13] (2) Is the infliction of unnecessary pain, undue physical violence, or bodily mutilation and distortion inherent in the method of execution?; [14] (3) Does the method of execution offend "the evolving standards of decency that mark the progress of a maturing society," [15] and has it been approved, rejected or abandoned in other states and in other civilized nations?; [16] and (4) Are more

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there is no undue pain suffered by the condemned. See ***Poyner, supra.*** Rather, the *Kemmler* decision merely deferred to the New York state court's finding that, in light of the available options at that time, electrocution was permissible as a more humane alternative to death by hanging. *Kemmler, 136 U.S. at 444* (noting that the then-governor of New York had called execution by hanging "barbaric"). Indeed, *Kemmler* cannot be read as rejecting evidence that purportedly shows electrocution is constitutionally cruel and unusual, because, at the time it was decided, no one had yet been electrocuted. Moreover, at the time *Kemmler* was decided, it was not yet established that the Eighth Amendment applies to the States through the Fourteenth Amendment. Cf. *Robinson v. California, 370 U.S. 660, 667-668 (82 S. Ct. 1417, 8 L. Ed. 2d 758) (1962)*. Shortly after *Kemmler* was issued, William Kemmler became the first man executed in the electric chair in what was widely publicized as a grotesque and morbid technical bungle. See Denno, supra, p. 362 n. 261.

[8] *Bryan v. Moore*, Case No. 99-6723 (Oct. 26, 1999). See ***68 U.S.L.W. 3281*** (11/2/99).

[9] See *DeYoung v. State, 268 Ga. 780 (493 S.E.2d 157) (1997)* (Fletcher, P.J., concurring); see also *Stanford v. Kentucky, 492 U.S. 361, 369 (109 S. Ct. 2969, 106 L. Ed. 2d 306) (1989)* (Eighth Amendment determination should be based as much as possible upon objective criteria).

[10] See, e.g., *DeYoung, supra*; *Wellons v. State, 266 Ga. 77 (463 S.E.2d 868) (1995)*.

[11] I note that Florida, one of only two other states to currently practice electrocution, has stayed all of its executions of condemned prisoners until the U.S. Supreme Court issues its ruling on the constitutionality of electrocution. See "Special Session Could Introduce Lethal Injection," Orlando Sentinel, 12/6/99.

[12] *Kemmler, 136 U.S. at 447*. As stated by Justice Burton more than half a century ago:

> The taking of human life by unnecessarily cruel means shocks the most fundamental instincts of civilized man. It should not be possible under the constitutional procedure of a self-governing people. . . . The all-important consideration is that the execution shall be so instantaneous and substantially painless that the punishment shall be reduced, as nearly as possible, to no more than that of death itself.

Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 473-474 (67 S. Ct. 374, 91 L. Ed. 422) (1947) (Burton, J., dissenting). See *Kemmler, supra, 136 U.S. at 443-444, 447*; *Glass v. Louisiana, 471 U.S. 1080, 1085 (105 S. Ct. 2159, 85 L. Ed. 2d 514) (1985)* (Brennan, J., joined by Marshall, J., dissenting from denial of certiorari).

[13] *Kemmler, 136 U.S. at 447*.

[14] *Resweber, supra.*

[15] *Trop v. Dulles, 356 U.S. 86, 100-101 (78 S. Ct. 590, 2 L. Ed. 2d 630) (1958)*.

[16] See id.; *Coker v. Georgia, 433 U.S. 584, 593-594 (97 S. Ct. 2861, 53 L. Ed. 2d 982) (1977)*.

humane methods of execution available? [17]

Regarding **[***38]** the first two of these inquiries: Increasingly, there are reports that electrocution involves (a) lingering death that can **[**353]** last for more than a quarter hour; (b) bodily mutilation and distortion, including third and fourth degree burns to the face and scalp, exploding body parts, and layers of skin melting away so as to reveal bone; and (c) grotesque physical violence indicative of both inhumanity and barbarity. [18] **[***39]** In other words, there is mounting evidence to indicate **[*827]** that electrocution involves more than "the mere extinguishment of life," [19] the benchmark for constitutional executions, and such evidence should be addressed as part of this Court's responsibility to review all capital sentences in Georgia.

Concerning the third prong of the analysis discussed above, I am increasingly concerned that electrocution and its effects on the human body may offend society's evolving sense of decency. The Eighth Amendment's fundamental purpose is "to protect the dignity of society itself from the barbarity of exacting mindless vengeance." [20] The Amendment's scope is not static; rather, it is hewn from the evolving standards of decency that characterize a mature, civilized society, [21] and it acquires meaning "as public opinion becomes enlightened by a humane justice." [22] **[***40]** Thus, whether a particular form of punishment is cruel

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[17] See *Gregg v. Georgia, 428 U.S. 153, 170* and n. 17 (*96 S.Ct. 2909, 49 L. Ed. 2d 859) (1976)*. As stated by Justice Powell:

Neither the Congress nor any state legislature would today tolerate pillorying, branding, or cropping and nailing the ears -- punishments that were in existence during our colonial era. Should however, any such punishment be prescribed, the courts would certainly enjoin its execution. Likewise, no court would approve any implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives.

Furman v. Georgia, 408 U.S. 238, 430 (92 S. Ct. 2726, 33 L. Ed. 2d 346) (1972) (Powell, J., dissenting). These views of Justice Powell's were largely adopted in *Gregg, supra.*

[18] For example, in March 1997, Pedro Medina was executed in Florida's electric chair. When the electricity was applied, Medina "lurched backward and balled his hands into fists," while his face mask "burst into flames." Blue and orange flames up to twelve inches long shot from the right side of Medina's head and flickered for up to ten seconds. A solid flame then covered Medina's entire head, from one side to the other. After the current was turned off, a maintenance worker wearing electrical gloves patted out the flames on Medina's body and another worker opened a window to disperse the thick smoke that hung in the air. Witnesses described the smell as nauseating. An autopsy of Medina's corpse revealed a "burn ring" around the crown of his head, within which was a third degree burn containing deposits of charred material. Medina's face was covered with first degree burns, caused by scalding steam. See Denno, supra, App. 2 (A) (18); *Provenzano v. Moore, 744 So. 2d 413, 432, 1999 WL 756012* at * 19 (Fla. 1999) (Shaw, J., dissenting).

When Allen Lee Davis was executed in Florida's electric chair in July 1999, a leather strap was secured across his mouth and part of his nostrils, and a heavy fabric face mask was placed over his head. Blood poured from his nose before and during the electrocution, and several witnesses reported hearing two screams from Davis when the current was applied. By the time the execution was completed, a blood pool "the size of a dinner plate" covered the front of Davis's shirt. It was later determined that Davis's death was caused in part by asphyxiation caused by the leather face strap. As with Medina, Davis's head, face, and scalp were severely burned, as were his knees and thighs. *Provenzano, supra* at * 20-22.

Witnesses observing Larry Lonchar's November 1996 execution in Georgia's electric chair report that two 2000 volt jolts of electricity were required before he was pronounced dead, and that the process required twelve minutes to complete. During that time, Lonchar moaned, clenched his fists (which had turned dark red), lurched and gasped for air. Denno, supra, App. 2 (A) (17). Other electrocutions have routinely resulted in third and fourth degree burns with skin sloughing, "meaning the skin had literally come loose from [the] body and was sliding." Id., App. 2 (A) (8). Electrocution sometimes burns chunks of skin off a condemned person's head or leg, revealing the skull or bone beneath the tissue. Id. Electrocution also has caused a man's penis to explode, blood to pour from eye sockets, bodily fluids to boil, and ears to burn away. Id., 82 Iowa L. Rev. at 359, and App. 2 (A) (12).

For an in-depth account of electrocution's effects, see Denno, supra, Appendix 2 (A), "Post-*Gregg* Botched Executions." See also Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century*, *35 Wm. & Mary L. Rev. 551 (1994)*.

[19] *Kemmler, 136 U.S. at 447*.

[20] *Ford v. Wainwright, 477 U.S. 399, 410 (106 S. Ct. 2595, 91 L. Ed. 2d 335) (1986)*.

[21] *Trop, supra.*

[22] *Weems v. United States, 217 U.S. 349, 378 (30 S. Ct. 544, 54 L. Ed. 793) (1910)*.

and unusual under the Eighth Amendment must be determined by considering contemporary moral standards as determined by objective evidence regarding a national consensus. [23]

Electrocution is practiced in no other country in the civilized world. Within this country, 27 states practiced it in 1949. Since then, 20 states have dropped it altogether, and four states -- Arkansas, Ohio, South Carolina and Virginia -- continue to offer it as an alternative; although Ohio has not executed **[**354]** anyone since 1976. [24] At present, only three states -- Georgia, Florida, and Alabama -- actively **[*828]** use electrocution as the sole method of executing condemned prisoners. [25]

The death penalty is just punishment for those whose crimes deserve the ultimate penance, and it also serves a **[***41]** societal need to see retribution for that class of crimes. I believe, however, that it's time to examine whether Georgia's current method of enforcing the death penalty and its attending consequences are compatible with the dignity, morality, and decency of society's enlightened consciousness, and is reflective of a humane system of justice. I note that both the American Veterinarian Medical Association and the Humane Society of the United States prohibit electrocution as a means of euthanatizing animals. [26]

Finally, concerning the last prong of the inquiry discussed above, it appears that less cruel and more humane means of execution may currently be practiced in other states and countries.

While this dissent's overview of the Eighth Amendment implications of electrocution barely scratches the surface of **[***42]** what will be required for an adequate in-depth analysis of the constitutional issue I urge the Court to take up, I nonetheless hope it emphasizes the great need for us not to prolong fulfillment of our constitutional responsibility to "protect the dignity of society itself from the barbarity of exacting mindless vengeance." [27] For all the reasons discussed above, I would stay ruling on appellant's Eighth Amendment claim until we receive guidance on that issue from the United States Supreme Court, and I would then proceed with our own assessment of the issue.

APPENDIX

Lee v. State, 270 Ga. 798 (514 S.E.2d 1) (1999); *Whatley v. State, 270 Ga. 296 (509 S.E.2d 45) (1998)*; *Bishop v. State, 268 Ga. 286 (486 S.E.2d 887) (1997)*; *Jones v. State, 267 Ga. 592 (481 S.E.2d 821) (1997)*; *Carr v. State, 267 Ga. 547 (480 S.E.2d 583) (1997)*; *McClain v. State, 267 Ga. 378 (477 S.E.2d 814) (1996)*; **[***43]** *Greene v. State, 266 Ga. 439 (469 S.E.2d 129) (1996)*; *Crowe v. State, 265 Ga. 582 (458 S.E.2d 799) (1995)*; *Mobley v. State, 265 Ga. 292 (455 S.E.2d 61) (1995)*; *Christenson v. State, 262 Ga. 638 (423 S.E.2d 252) (1992)*; *Meders v. State, 261 Ga. 806 (411 S.E.2d 491) (1992)*; *Ferrell v. State, 261 Ga. 115 (401 S.E.2d 741) (1991)*; *Stripling v. State, 261 Ga. 1 (401 S.E.2d 500) (1991)*; *Cargill **[*829]** v. State, 255 Ga. 616 (340 S.E.2d 891) (1986)*; *Ingram v. State, 253 Ga. 622 (323 S.E.2d 801) (1984)*.

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[23] *Penry v. Lynaugh, 492 U.S. 302, 331 (109 S. Ct. 2934, 106 L. Ed. 2d 256) (1989)*; *Stanford, supra.*

[24] See *Provenzano, 744 So. 2d at 436, 1999 WL 756012* at * 23-24.

[25] Nebraska legally authorizes electrocutions as its sole method of execution, but has apparently ceased carrying out capital sentences.

[26] See Humane Sociey of the U. S., General Statement Regarding Euthanasia Method for Dogs and Cats, 17 Shelter Sense, Sept. 1994 at 11-12; American Veterinarian Med. Assn., 202 JAVMA 230, 230-249 (1993).

[27] *Ford, supra.*

Appendix D

IN THE SUPERIOR COURT OF BALDWIN COUNTY
STATE OF GEORGIA

THE STATE OF GEORGIA,	*	
	*	**CRIMINAL ACTION NO.**
v.	*	**39249B**
	*	
MARION WILSON, JR.,	*	
	*	
Defendant.	*	
	*	

ORDER

The Court having sentenced Defendant, Marion Wilson, Jr., on the 7th day of November, 1997, to be executed by the Department of Corrections at such penal institution as may be designated by said Department, in accordance with the laws of the State of Georgia, and;

The date for the execution of said Marion Wilson, Jr., having passed by reason of supersedeas incident to appellate review;

IT IS CONSIDERED, ORDERED, AND ADJUDGED by this Court, pursuant to O.C.G.A. § 17-10-40, that within a time period commencing at noon on the 20th day of June, 2019 and ending seven days later at noon on the 27th day of June, 2019, the Defendant, Marion Wilson, Jr., shall be executed by the Department of Corrections at such penal institution and on such a date and time within the aforementioned time period as may be designated by said Department in accordance with the laws of the State of Georgia.

54 FILED IN OFFICE THIS
DAY OF June, 2019
DEPUTY CLERK SUPERIOR COURT
BALDWIN COUNTY, GEORGIA

It is FURTHER ORDERED that the Clerk of the Superior Court of Baldwin County, Georgia shall record this order on the minutes of the court and shall cause a certified copy of this Order for execution of the original sentence to be served immediately to the Attorney General of Georgia, the Ocmulgee Judicial Circuit District Attorney, the Commissioner of the Georgia Department of Corrections, the Warden of the Georgia Diagnostic and Classification Prison, and Defendant's last known attorney of record.

This 5th day of June, 2019.

William A. Prior, Jr.

WILLIAM A. PRIOR, JR.
CHIEF JUDGE, SUPERIOR COURT
OCMULGEE JUDICIAL CIRCUIT

Appendix E

IN THE SUPERIOR COURT OF BALDWIN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	
v.	)	Criminal Action No. 39249B
	)	
MARION WILSON, JR.,	)	**THIS IS A CAPITAL CASE**
Defendant.	)	

EXTRAORDINARY MOTION FOR NEW TRIAL AND FOR POSTCONVICTION DNA TESTING PURSUANT TO O.C.G.A. § 5-5-41(c)

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TABLE OF CONTENTS

TABLE OF CONTENTS i

I. FACTUAL BACKGROUND 6

II. PROCEDURAL HISTORY 10

III. THE LEGAL STANDARD 12

A. The Threshold Showing 12

B. The Hearing and Post-Hearing Standard 14

IV. MR. WILSON SATISFIES THE THRESHOLD SHOWING AND IS THUS ENTITLED TO A HEARING 18

A. Evidence that Potentially Contains DNA Was Obtained. 18

B. The Evidence Was Not Subjected to DNA Testing Because the Technology for the Testing Was Not Available at the Time of Trial. 19

C. The Identity of the Perpetrator Was, or Should Have Been, a Significant Issue in the Case. 20

D. The Requested DNA Testing Would Raise a Reasonable Probability That Mr. Wilson Would Have Been Acquitted or Received a Sentence Less than Death if the Results of the DNA Testing Had Been Available at the Time of Trial. 21

1. The Proposed Testing is Reasonably Likely to Reveal Who Shot Donovan Parks. 21

2. In Light of the Evidence Presented, the DNA Evidence Raises a Reasonable Probability that Mr. Wilson Would Have Been Acquitted or Received a Sentence Less Than Death. 21

3. Mr. Wilson is Entitled to a Hearing on this Motion. 23

V. MR. WILSON WILL, AFTER A HEARING, MEET THE POST-HEARING STANDARD FOR DNA TESTING. 23

A. There is a Reasonable Probability that the Verdict at Trial or Sentencing Would Have Been Different if the Results of the Requested DNA Testing Had Been Available at the Time of Trial. 23

B. All Other Statutory Preconditions of a DNA-Testing Order Will Be Satisfied. 24

CONCLUSION 25

IN THE SUPERIOR COURT OF BALDWIN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	
v.	)	Criminal Action No. 39249B
	)	
MARION WILSON, JR.,	)	**THIS IS A CAPITAL CASE**
Defendant.	)	

EXTRAORDINARY MOTION FOR NEW TRIAL AND FOR POSTCONVICTION DNA TESTING PURSUANT TO O.C.G.A. § 5-5-41(c)

Marion Wilson, Jr., through undersigned counsel, moves the court, pursuant to O.C.G.A. § 5-5-41(c) *et seq.*, for the performance of forensic deoxyribonucleic acid (DNA) testing of State's Exhibit ("SE") 11, the necktie worn by Donovan Parks on March 28, 1996, the night he was killed. Marion Wilson and co-defendant Robert Butts were charged with the crime and, in separate trials, both were convicted and sentenced to death.

Mr. Wilson's defense at trial was 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 was a critical part of the State's case against Mr. Wilson, used by the prosecutor to directly implicate Mr. Wilson in the events leading up to the murder and to urge jurors to vote in favor of death. According to the prosecutor, at the time Mr. Parks' was found lying in the road with a single shotgun blast to the head, his necktie was pulled to the left and was unnaturally tight around his neck so

that paramedics had to cut it off rather than loosen and remove it. The prosecutor relied on this fact to argue at Mr. Wilson's 1997 trial that, although it was unclear who shot Mr. Parks, the necktie implicated Mr. Wilson because he was sitting in the backseat of the victim's car and must have grabbed Mr. Parks by the tie to drag him from the car.

In guilt phase opening statement, this claim was implicit: "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.[1] 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:

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[1] The transcript of the trial in *Wilson v. State* will be referenced as "T [page number]." Pretrial transcripts will be referenced as "PT ([date]) [page number]." The transcript of the trial in *Butts v. State* will be referenced as "Butts T [page number]." The transcript of habeas corpus proceedings in *Wilson v. Hall*, Butts Co. Superior Court Case No. 2001-V-38 will be referenced as "H [page number]."

> 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.

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.

If the prosecutor's theory about what happened to the necktie is accurate, there is a strong likelihood that the tie contains skin cells of the person who grabbed it to pull Donavan Parks from the car and force him to the ground, where he was shot point blank in the head. If that DNA turned out to belong to Butts,[2] that new evidence would critically undermine a key piece of evidence supporting Mr. Wilson's conviction and sentence. To Mr. Wilson's knowledge, the necktie (introduced as State's Exhibit (SE) 11 at trial) has never been tested for DNA. Indeed, the technology to test for such small quantities of DNA, such as that left by epithelial cells through touch, was not available at the time of Mr. Wilson's 1997 trial or even his state habeas proceedings. *See* Exhibit B (Affidavit of Dr. Greg Hampikian) at 4-5. This case thus satisfies the requirements of O.C.G.A. § 5-5-41(c) *et seq.*

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[2] Pursuant to O.C.G.A. § 35-3-160(b) and (c), a sample of Butts's "blood, an oral swab, or a sample obtained from a noninvasive procedure taken for DNA . . . analysis" would have been taken by the State and analyzed, and the analysis stored in a DNA data bank for future comparison.

Should Butts's DNA be present on SE 11 (or Mr. Wilson's DNA not be present on SE 11), Mr. Wilson asks the court to set aside his murder conviction returned in this Court on November 5, 1997, and/or his sentence of death entered on November 7, 1997, and order a new trial and/or sentencing. *See, e.g., Drane v. State*, 291 Ga. 298, 303 (2012) (trial court may grant new sentencing hearing where newly discovered evidence gives rise to reasonable probability of different verdict at capital sentencing).

The motion for new trial is predicated on the anticipated results of the DNA testing that would be conducted based on this motion. *See White v. State*, 346 Ga. App. 448, 448-49 (2018) ("[A] motion for DNA testing is a preliminary matter and will either precede or accompany any motion for a new trial predicated upon the discovery of exculpatory DNA evidence.").

The physical evidence has never, to Mr. Wilson's knowledge, been DNA tested. Advances in DNA technology now make it possible to develop DNA profiles from minute quantities of DNA evidence. This would not have been possible during the time encompassing Mr. Wilson's arrest and trial in 1996-97. Through these new processes, it is possible to reliably test SE 11, the necktie, to see if Mr. Wilson's or Butts's DNA is on it—*i.e.* to corroborate or refute the State's theory of how the crime occurred.

Mr. Wilson has always maintained that he did not shoot or assault Mr. Parks or intend that he be harmed, and the identity of the person who laid hands on and shot Mr. Parks was a significant issue in the case. It is only by subjecting the evidence to DNA testing that Mr. Wilson can demonstrate that he did not assault the victim.

In support of this motion, and as required by O.C.G.A. § 5-5-41(c)(3), Mr. Wilson sets forth in detail the evidence to be tested, when it was collected, and its present location. Mr. Wilson also submits in support of this motion the affidavit of Greg Hampikian, Ph.D., a preeminent geneticist and DNA expert with well over twenty years of experience in state-of-the-art DNA testing. *See* Exhibit B (affidavit and curriculum vitae of Dr. Greg Hampikian). Dr. Hampikian concludes that the DNA testing requested herein is possible and could reveal with certainty whether or not Mr. Wilson or Mr. Butts handled SE 11 on the night of the crime.

Mr. Wilson states that this motion is not filed for the purpose of delay and that no DNA testing has been requested or ordered at Mr. Wilson's behest in any other proceeding in this case. O.C.G.A. § 5-5-41(c)(4).

I. FACTUAL BACKGROUND

Marion Wilson, Jr., was convicted and sentenced to death for the 1996 murder of Donovan Parks, an off-duty state correctional officer, in Baldwin County, Georgia. Wilson was nineteen years old at the time of the crime. The evidence

showed that on the evening of March 28, 1996, Mr. Wilson's co-defendant, 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 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 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.

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[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).

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 service of twenty years. PT (09/26/97) at 2-5. Wilson declined the offer. *Id.* at 6-8.

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.[4] Ultimately, Mr. Wilson was convicted and sentenced to death.

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[4] 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.

As discussed above, the prosecutor in Mr. Wilson's 1997 trial had used the necktie to spin the story to Mr. Wilson's jury that Mr. Wilson, *not* Robert Butts, had pulled Donovan Parks' necktie tight around his neck, dragged him out of his car, forced him to the ground, and then shot him in the back of the head with a shotgun. *See, e.g.*, T. 1153, 1836-37, 2482-83. However, at Robert Butts' 1998 trial, the same prosecutor argued that Butts was not only the shooter but was in control of the events surrounding the crime. The prosecutor carefully explained that it was not credible to believe that the 6'1" Butts was in any way intimidated by 5'5" Marion Wilson, Jr., and that his larger size meant that he was capable of concealing a sawed-off shotgun in his sleeve. Butts T 2590-91. While the prosecutor successfully prevented jail inmates Holcomb, May and Garza from testifying at Mr. Wilson's trial that Butts had admitted culpability in shooting Mr. Parks,[5] he called May and Garza as witnesses at Butts' trial and argued that they had credibly testified that Butts concealed the shotgun in his sleeve and then shot Mr. Parks. *See* Butts T 2590.[6] The prosecutor told Butts' jury: "We proved that the man that actually, in fact, pulled the trigger and blew out the brains of Donovan Corey Parks is the defendant, Robert Earl Butts, Jr." Butts T 2604.

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[5] *See Wilson v. State*, 271 Ga. 811, 814 (1999).

[6] *See also Butts v. State*, 273 Ga. 760, 761 (2001).

II. PROCEDURAL HISTORY

On November 5, 1997, following a trial in the Superior Court of Baldwin County, Georgia, Marion Wilson, Jr., 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). The United States Supreme Court denied Mr. Wilson's petition for certiorari review on October 2, 2000. *Wilson v. Georgia*, 531 U.S. 838 (2000).

After the Supreme Court denied his petition for a writ of certiorari, Mr. Wilson sought state post-conviction relief alleging, *inter alia*, that his trial counsel had rendered ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984). The Superior Court of Butts County, Georgia ("state habeas court") denied Wilson's petition on December 1, 2008 (*Wilson v. Hall*, Butts Co. Superior Court Case No. 2001-V-38). The Georgia Supreme Court denied Mr. Wilson's Application for a Certificate of Probable Cause to Appeal (CPC) on May 3, 2010. The United States Supreme Court denied his subsequent petition for writ of certiorari on December 6, 2010. *Wilson v. Terry*, 562 U.S. 1093 (2010).

On December 17, 2010, Wilson timely filed a federal habeas corpus petition in the United States District Court for the Middle District of Georgia. Although recognizing significant errors in the state habeas court's analysis and findings as to the ineffective assistance of counsel claim, the district court nonetheless denied

relief, finding no prejudice. *Wilson v. Humphrey*, 2013 U.S. Dist. LEXIS 178241. 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 *193. Mr. Wilson's motion to alter or amend the judgment was denied on January 21, 2014. Mr. Wilson filed a timely notice of appeal on February 18, 2014.

On December 15, 2014, a panel of the United States Court of Appeals for the Eleventh Circuit affirmed the district court's denial of habeas relief. *See Wilson v. Warden*, 774 F.3d 671 (11th Cir. 2014). It ruled that it must assess the reasonableness of the summary CPC denial, rather than the underlying reasoned opinion of the state habeas court, and that because it could envision reasonable grounds for the CPC denial, habeas relief could not be granted. *Wilson*, 774 F.3d at 678 (quoting *Newland v. Hall*, 527 F.3d 1162, 1199 (11th Cir. 2008)).

The Eleventh Circuit granted rehearing *en banc*, thereby vacating the panel opinion, to address the standard of review and, following briefing and argument, affirmed. *Wilson v. Warden*, 834 F.3d 1227 (11th Cir. 2016). Mr. Wilson then petitioned the Supreme Court for certiorari review, and the petition was granted. On April 17, 2018, the Supreme Court reversed and vacated the Eleventh Circuit, and remanded the case for further proceedings. *Wilson v. Sellers*, 138 S. Ct. 1188 (2018).

On August 10, 2018, the Eleventh Circuit panel issued its opinion on remand. *Wilson v. Warden*, 898 F.3d 1314, 1316 (11th Cir. 2018). The Eleventh Circuit again affirmed the district court's denial of Mr. Wilson's petition for a writ of habeas corpus. *Id.* Mr. Wilson petitioned for rehearing and rehearing en banc, which was denied on October 11, 2018.

On March 8, 2018, Mr. Wilson petitioned the Supreme Court for a writ of certiorari; the case (Supreme Court Case No. 18-8389) is currently pending.

II. THE LEGAL STANDARD

The DNA-testing statute in section 5-5-41(c) is divided into two parts: first, the threshold showing that must be made to entitle a petitioner to a hearing and, second, the post-hearing standard that must be met to require the Court to order DNA testing.

A. The Threshold Showing

O.C.G.A. § 5-5-41(c) provides that a person convicted of a felony may submit a verified[7] extraordinary motion for new trial "before the trial court that entered the judgment of conviction in his or her case for the performance of forensic

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[7] Mr. Wilson's verification is attached as Exhibit A to this Motion.

deoxyribonucleic acid (DNA) testing." The petitioner must also "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;[8]

O.C.G.A. § 5-5-41(c)(3)(A)-(D). The movant must also describe the evidence to be tested (including when, where, and how it was collected and where it is presently located), the results of any prior testing, the names and contact information of the

---

[8] The Georgia Supreme Court has found under O.C.G.A. § 5-5-41 that the materiality of exculpatory evidence as to a death sentence can authorize a new sentencing trial even if the evidence is deemed insufficiently material as to a conviction. *See Drane v. State*, 291 Ga. 298, 303-04 (2012) (citing *Patillo v. State*, 258 Ga. 255, 258-262 (1988); *Horton v. State*, 249 Ga. 871, 877-878 (1982).

person(s) who presently have the evidence, and the names of witnesses who would testify for the petitioner. O.C.G.A. § 5-5-41(c)(3)(E)-(H).[9]

"Assuming the petitioner complies with the filing requirements set forth in O.C.G.A. § 5-5-41(c)(3) and (4), the trial court is *required* to hold a hearing on the motion." *White*, 346 Ga. App. at 449-50 (emphasis added). Under O.C.G.A. § 5-5-41(c)(3)(D), the petitioner must "satisfy the filing requirements and persuade the judge that there is a reasonable probability that the trial verdict would have been different if the results of the requested DNA testing (which are assumed to be valid for purposes of the motion) had been available at the time of the petitioner's trial." *White*, 346 Ga. App. at 450; *Crawford*, 278 Ga. at 97 (hypothetical DNA testing results must be "assumed valid" by trial court when considering a motion for DNA testing).

B. The Hearing and Post-Hearing Standard

If the petitioner's motion meets these criteria, the trial court "shall order a hearing to occur after the state has filed its response" so that the parties can be heard

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[9] O.C.G.A. § 5-5-41(c)(4) also requires the petitioner to state that the motion "is not filed for the purpose of delay; and . . . [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." Mr. Wilson has made that statement above, and no elaboration on this point is required. *Crawford v. State*, 278 Ga. 95, 97 (2004) ("These two prerequisites in paragraph (4) are simple matters that require no detailed explanation in a petitioner's motion.").

"on the issue of 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 . . . ." O.C.G.A § 5-5-41(c)(6)(A), (E) (emphasis added). The purpose of the hearing is also to determine whether the following requirements 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.

O.C.G.A. § 5-5-41 (c)(7). The Court may receive additional legal memoranda for up to thirty days after the hearing. If, after the hearing, this Court determines that

the petitioner has met the above requirements, it "*shall* grant the motion for DNA testing."[10] *Id.* (emphasis supplied).

Once a petitioner has established that potential DNA evidence exists, it is not for the trial court to speculate as to whether testing may or may not be successful. In *White*, the Georgia Court of Appeals reversed a trial court's denial of a DNA motion for precisely that error. *White*, 346 Ga. App. at 455-56. The trial court had concluded, after taking expert testimony, that there was a "substantial likelihood that the biological specimens . . . had been materially altered by the effects of light, heat, and humidity," and were accordingly not suitable for testing within the meaning of section 5-5-41(c). *Id.* at 454. The court of appeals reversed, explaining that:

> the portions of the DNA statute analyzed by the trial court require the petitioner to make only a threshold factual showing of the listed factors, namely that the evidence to be tested is available and that it has been subject to a chain of custody. The statute does not permit the trial court to speculate as to the viability of any DNA potentially located on the evidence in question. To permit such speculation to factor into whether the petitioner should be afforded the right to test the evidence for DNA in the first instance violates the clear directive of the General Assembly and, as a practical matter, would likely exclude DNA testing of all but the most recently and pristinely stored physical evidence. That violates both the spirit and the letter of O.C.G.A. § 5-5-41(c) .

Id. at 455-56.

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[10] The statute also has detailed provisions regarding the manner of conducting the DNA testing. O.C.G.A. § 5-5-41(c)(8)-(11). Those provisions need not be addressed at this juncture.

Because Mr. Wilson has established that testable evidence is available,[11] the likelihood that testing will or will not yield a DNA result is irrelevant to whether Mr. Wilson has satisfied the statute. Mr. Wilson also notes at this juncture that the Georgia courts have previously noted that "the GBI has in the past been able to obtain a contact DNA profile from articles of clothing." *White*, 346 Ga. App. at 453.

At this stage, Mr. Wilson need only demonstrate that he "complies with the filing requirements set forth in O.C.G.A. § 5-5-41(c)(3) and (4)," and this Court "is required to hold a hearing on the motion." *White*, 346 Ga. App. at 448. Assuming as the Court must that the DNA results are valid, *see id.*; *Crawford*, 278 Ga. at 97, Mr. Wilson submits that he also now satisfies (and after the hearing will satisfy) the requirements for testing set forth in subsections (c)(6) and (7).

As demonstrated below, Mr. Wilson can meet each of these requirements, and testing is necessary in the interests of justice.

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[11] The courts have likewise clarified that "testable evidence" for purposes of this standard is not the DNA evidence, but rather, it is the physical evidence that may contain DNA evidence. *White*, 346 Ga. App. at 455.

III. MR. WILSON SATISFIES THE THRESHOLD SHOWING AND IS THUS ENTITLED TO A HEARING.

A. Evidence that Potentially Contains DNA Was Obtained.[12]

In the attached sworn affidavit, Dr. Greg Hampikian concludes that SE 11, Donovan Parks' necktie obtained in relation to the crime of conviction potentially contains DNA evidence. *See* Exhibit B at 4-5.

The DNA testing statute requires Mr. Wilson to recite where the evidence is presently located. O.C.G.A. § 5-5-41(c)(3)(E). SE 11, the necktie, is currently in the custody of the Clerk of Superior Court for Baldwin County, GA, as counsel has very recently confirmed.

Mr. Wilson is likewise required by the statute to indicate when, where, and by whom each item of evidence was recovered. O.C.G.A. § 5-5-41(c)(3)(E). The necktie which became SE 11 was recovered from the body of the victim when he was being treated by emergency medical personnel in 1996.

SE 11 has not been previously tested by the prosecution or the defense, to Mr. Wilson's knowledge. O.C.G.A. § 5-5-41(c)(3)(F).

Finally, Mr. Wilson anticipates that he would call as a witness Dr. Greg Hampikian of 4808 West Alamosa St., Boise, ID 83703; telephone no. 208-426-

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[12] O.C.G.A. § 5-5-41(c)(3)(A).

4992. O.C.G.A. § 5-5-41(c)(3)(H). Mr. Wilson would also call any witnesses required to establish chain-of-custody and/or other matters required by O.C.G.A. § 5-5-41(c)(7).

Dr. Hampikian concludes that "application of the 'touch' DNA methods . . . to State's Exhibit 11 can yield an identifiable DNA profile of an assailant who had contact with the necktie on the night of the crime. A profile or profiles obtained from the tie could be compared to Mr. Wilson's DNA profile to determine whether Mr. Wilson was that assailant or one of the assailants." Exhibit B at 5.[13]

B. The Evidence Was Not Subjected to DNA Testing Because the Technology for the Testing Was Not Available at the Time of Trial.

The offense occurred in March 1996 and trial was held in October-November 1997. At that time, as Dr. Hampikian states, DNA testing was in its infancy and was "incapable of obtaining DNA profiles from extremely small amounts of biological material such as epithelial cells left behind from a person's having touched an object." Exhibit B at 4. Dr. Hampikian further states that "[i]n practical terms, it was not possible in 1996-97 for then-available methods to obtain a usable DNA

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[13] These methods were very recently used to test a necktie, which had been used to bind a murder victim, for DNA evidence in the case of *State of Georgia v. Johnny Lee Gates*, Muscogee County Criminal Case No. SU-75-CR-38335. The testing showed that Gates had not handled the tie, and caused the trial court to grant a new trial in January of this year. *See State v. Gates*, Order of January 10, 2019.

profile from an article of clothing, such as State's Exhibit 11, that may have been handled by an assailant." *Id.* at 5.

C. The Identity of the Perpetrator Was, or Should Have Been, a Significant Issue in the Case.

The identity of the person who actually murdered Donovan Parks, and whether each defendant was a party to the offense, were significant issues at Mr. Wilson's trial. There were no witnesses to the shooting of Donovan Parks, and the physical evidence did not offer clear answers to identify the shooter. The defense contended that Mr. Wilson was merely present at the scene and did not anticipate the crime. Although the prosecutor initially conceded that he did not know who had shot Mr. Parks in cold blood, the prosecutor nevertheless insisted that Mr. Parks' necktie was a pivotal piece of evidence because, having been pulled tightly around Mr. Parks' neck, combined with Mr. Wilson's location in the back seat of the vehicle, it tended to show that Mr. Wilson, not Butts, had savagely pulled Parks out of his car, laid him on the ground and shot him in the head. The prosecutor further found it extremely urgent to preclude the testimony of witnesses who had purportedly heard Butts confess to having taken Mr. Parks out of the car and shot him (only to use those same witnesses when prosecuting Butts to paint Butts as the actual shooter worthy of a death sentence). It was especially critical to the state's effort to obtain a death sentence for Mr. Wilson that the jury believe that he, not

Butts, had cold-bloodedly killed Mr. Parks, after first nearly strangling him with his tie.

Thus, identity of the actual murderer of Donovan Parks was very much in issue. Mr. Wilson has carried his burden as to this prong of the statute.

D. The Requested DNA Testing Would Raise a Reasonable Probability That Mr. Wilson Would Have Been Acquitted or Received a Sentence Less than Death if the Results of the DNA Testing Had Been Available at the Time of Trial.[14]

1. The Proposed Testing is Reasonably Likely to Reveal Who Shot Donovan Parks.

Dr. Hampikian proposes that DNA testing of SE 11 can reveal a DNA profile of who handled the necktie on the night of the crime. Exhibit B at 5. The profile or profiles obtained can be compared with the DNA profiles of Mr. Wilson and Butts to determine which of them did or did not handle SE 11. *Id.*

2. In Light of the Evidence Presented, the DNA Evidence Raises a Reasonable Probability that Mr. Wilson Would Have Been Acquitted or Received a Sentence Less Than Death.

Had the proposed DNA testing been available at the time of trial, and indicated that Mr. Wilson had not handled SE 11, or that Butts had, there is a reasonable probability that the jury would have credited the defense theory and acquitted Mr.

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[14] O.C.G.A. § 5-5-41(c)(3)(D).

Wilson of the charges, or at least the malice murder charge.[15] With DNA evidence showing that Mr. Wilson, whom the state conceded was sitting in the back seat of Mr. Parks' vehicle, had not touched SE 11, the state's theory of the crime -- a theory that posited an extremely brutal series of acts by Mr. Wilson, starting with his near strangulation of Mr. Parks with his own necktie -- would have been refuted.

It would have suggested, moreover, that Mr. Wilson remained in the back of the car, as he told police, while Robert Butts came around to Mr. Parks' side of the vehicle, forcibly pulled him out of the car by his tie, laid him on the ground, and shot him point blank in the head with a sawed-off shotgun—as the prosecutor later argued to Butts' jury. As previously discussed, the necktie was the pivotal piece of evidence in Mr. Wilson's trial because the prosecutor argued that it was more likely that the person sitting behind Mr. Parks—Marion Wilson—was the person who could grab the tie so tightly constricted around Mr. Parks's neck that it had to be cut off of him, and thereafter use it to drag Mr. Parks out of the car, lay him on the ground, and shoot him. This theory was especially pressed at sentencing because it was intended to convince the jury that Mr. Wilson, by these brutal acts, deserved death.

Had Mr. Wilson been acquitted of malice murder, and convicted only of felony murder, that may have constituted the prelude to a sentence less than death in

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[15] *See* note 12, *supra*, discussing a very similar scenario in the *Gates* case.

that it would arguably have reflected an understanding that Mr. Wilson had not acted with malice but had merely been involved with the felony of armed robbery during which the murder, perpetrated by Robert Butts, occurred. Alternatively, regardless of whether the jury verdict at the guilt-innocence phase of trial remained the same, evidence conclusively showing that Mr. Wilson had not handled the necktie would have raised a reasonable probability that "at least one juror would have struck a different balance" at sentencing. *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).[16]

3. Mr. Wilson is Entitled to a Hearing on this Motion.

Mr. Wilson has demonstrated above that he "complies with the filing requirements set forth in O.C.G.A. § 5-5-41(c)(3) and (4);" as such, this Court "is required to hold a hearing on the motion." *White*, 346 Ga. App. at 449-50.

IV. MR. WILSON WILL, AFTER A HEARING, MEET THE POST-HEARING STANDARD FOR DNA TESTING.

A. There is a Reasonable Probability that the Verdict at Trial or Sentencing Would Have Been Different if the Results of

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[16] *See Drane*, 291 Ga. at 303 (in extraordinary motion for new trial proceedings, trial court may grant new sentencing where newly discovered evidence gives rise to reasonable probability of different verdict at capital sentencing).

the Requested DNA Testing Had Been Available at the Time of Trial.[17]

At the hearing, the parties will present evidence on "whether upon consideration of all of the evidence here 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." O.C.GA. § 5-5-41(c)(6)(E) (emphasis added). For all of the foregoing reasons articulated in the preceding section, Mr. Wilson will meet that standard.

B. All Other Statutory Preconditions of a DNA-Testing Order Will Be Satisfied.[18]

Mr. Wilson will, at a hearing, satisfy all of the remaining preconditions set forth in section 5-5-41(c)(7). Specifically, the evidence requested to be tested is at the Office of the Clerk of Superior Court for Baldwin County, GA. Mr. Wilson believes that it is available and in a condition that would permit the requested testing. O.C.G.A. § 5-5-41(c)(7)(A). He likewise believes that he will, at a hearing, be able to show sufficient chain of custody of the evidence to warrant testing. O.C.G.A. § 5-5-41(c)(7)(B).

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[17] O.C.G.A. § 5-5-41(c)(6)(E).

[18] O.C.G.A. § 5-5-41(c)(7)(A)-(F).

The post-hearing standard in subsection (c)(7) repeats the following requirements that Mr. Wilson already addressed *supra*: SE 11 has not been tested previously, *id.* § 5-5-41(c)(7)(C), and Mr. Wilson does not make this motion for purposes of delay, *id.* § 5-5-41 (c)(7)(D). The identity of the perpetrator was in issue at the time of trial. *Id.* § 5-5-41(c)(7)(E).

Finally, the testing that Mr. Wilson proposes is well within the realm of general acceptance in the scientific community or, as the statute states, it "employs a scientific method that has reached a scientific state of verifiable certainty such that the procedure rests upon the laws of nature." O.C.G.A. § 5-5-41(c)(7)(F). Dr. Hampikian will be available and able to testify to as much at the hearing. Finally, as Mr. Wilson has explained above, he will make a *prima facie* showing that the evidence that he seeks to be tested is material to his identification as the perpetrator of the murder of Donovan Parks. *Id.* § 5-5-41(c)(7)(G).

It is appropriate and in the interests of justice for this Court to order the DNA testing of the physical evidence in this capital case.

CONCLUSION

For the foregoing reasons, Mr. Wilson respectfully requests that this Court:

1. Order the State to respond to this motion;
2. Order an evidentiary hearing as required by statute;
4. Order DNA testing as set forth herein and in the attached affidavit;

5. Grant Mr. Wilson a new trial or new sentencing; and

6. Enter any other order(s) required in the interests of justice.

This 22nd day of May, 2019.

Respectfully submitted,

Marcia A. Widder (Ga. 643407)
GEORGIA RESOURCE CENTER
303 Elizabeth Street
Atlanta, GA 30307
(404) 222-9202

Brian S. Kammer (Ga. 406322)
241 E Lake Dr.
Decatur, GA 30030
(678) 235-4964

COUNSEL FOR MR. WILSON

Exhibit A

IN THE SUPERIOR COURT OF BALDWIN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	
v.	)	Criminal Action No. 39249B
	)	
MARION WILSON, JR.,	)	**THIS IS A CAPITAL CASE**
Defendant.	)	

VERIFICATION

State of Georgia

County of Butts

Before me, the undersigned authority, personally appeared MARION WILSON, JR., who, being first duly sworn, says that he has personal knowledge of the allegations in the foregoing Extraordinary Motion for New Trial, and that the allegations and statements contained therein are true and correct to the best of his knowledge

Marion Wilson Jr.
MARION WILSON, JR.

Sworn to and subscribed before me
This 21st day of May, 2019.

NOTARY PUBLIC

My commission expires:

Rachel Chmiel
NOTARY PUBLIC
Fulton County, GEORGIA
My Comm. Expires
03/28/2020

Exhibit B

STATE OF IDAHO

COUNTY OF ADA

AFFIDAVIT OF GREG HAMPIKIAN, PH.D.

Comes now the Affiant, Greg Hampikian, who, being first duly sworn by an officer authorized by law to administer oaths, deposes and states as follows:

1. My name is Greg Hampikian. I am over the age of eighteen and competent to testify to the truth of the matters contained herein.

2. I am currently a Professor of Biology and Criminal Justice at Boise State University. I have a Ph.D. in Genetics from the University of Connecticut, and performed postdoctoral research at La Trobe University in Australia, and the Worcester Foundation for Experimental Biology in Massachusetts. A true copy of my curriculum vitae is attached to this affidavit as "Exhibit A". Currently, my research focuses on DNA analysis, including DNA database and population studies, forensic casework analysis, and forensic DNA technology development.

3. I have also held research and teaching positions at the Yale University Medical School, the Centers for Disease Control and Prevention (CDC), the Georgia Institute of Technology, Emory University, and Clayton State University.

4. I teach graduate and undergraduate courses such as Forensic Biology, Advanced Genetic Analysis, Biotechnology, Forensic Evidence in Cold Cases, DNA Evidence in Wrongful Convictions, and Genetics.

5. I have published the results of my work in peer-reviewed journals including *Nature; The Proceedings of the National Academy of Sciences; The International Journal of Legal Medicine*; *Forensic Science International: Genetics*, and *Human Biology*,

among others. I have written scholarly reviews of forensic DNA topics for T*he Canadian Journal of Police and Security Services*, and *The Annual Review of Genetics and Genomics*, among others.

6. I am a member of the American Academy of Forensic Sciences and have offered professional development courses for the Academy on Forensic DNA Analysis. I am also a member of the International Society for Forensic Genetics and have presented my research findings there.

7. I have trained police, crime lab workers, judges, and lawyers in DNA analysis, and have worked on murder and sexual assault cases with police in both the U.S. and France.

8. I have been qualified by the courts as a DNA expert in Colorado, Georgia, Idaho, Indiana, Massachusetts, Maine, Michigan, Ohio, Pennsylvania, Texas, and Virginia. I have worked on criminal cases involving DNA throughout the United States, England, Ireland, France, and Italy.

9. I have consulted on Georgia criminal and capital cases in the recent past and am familiar with the DNA testing protocols used by the Georgia Bureau of Investigation, as well as with the provisions of O.C.G.A. § 5-5-41. In fact, I was an expert in the first case in Georgia where DNA testing was performed pursuant to this statute, (Joe Brown, 2004), which confirmed guilt. Since then, I have been involved in a number of Georgia Innocence Project and Georgia death penalty cases, some of which have resulted in exonerations including: Clarence Harrison (2004), Robert Clark (2005), Pete Williams (2007), John White (2007), Michael Marshall (2009).

10. Recently, I was contacted by counsel for Marion Wilson, Jr., a death-sentenced prisoner in Georgia, and asked to advise them as to the availability and utility of DNA testing

methods with respect to physical evidence – specifically, a necktie worn by the victim, Donovan Corey Parks, collected at the crime scene and tendered as State's Exhibit 11 in the case of *State v. Wilson*, Baldwin County Criminal Action No. 39249B. At this time, I have seen recent photographs of State's Exhibit 11 showing the necktie, currently in the custody of the Baldwin County Sheriff's Office, to be in good condition.

11. Mr. Wilson was arrested in the fall of 1996 and tried in October and November of 1997. My review of portions of the trial transcript referencing State's Exhibit 11 indicate that the necktie was allegedly found to have been pulled very tightly around the victim's neck and had to be cut off the victim. The prosecutor argued that Mr. Wilson, who was sitting in the victim's car in the backseat, had "grabbed" and "yanked" the tie and "ordered [Parks] to lay down on the ground," then shot the victim in the head with a shotgun. Mr. Wilson's co-defendant, Robert Butts, was alleged to have been sitting in the front passenger seat.

12. If one of the co-defendants in this case "grabbed" and "yanked" the tie, causing it to be pulled tightly around the victim's neck, then it is my professional opinion that advanced DNA testing of the necktie using procedures for which the "technology . . . was not available at the time of trial," O.C.G.A. § 5-5-41(c)(3)(B), can determine whether he was the person who had contact with the necktie.

13. In 1996-97, available methods of DNA testing (which were utilized by the Georgia Bureau of Investigation at the time) required far larger quantities of biological material in order to obtain meaningful information than would potentially be present on an object such as a necktie, which might have retained DNA-containing epithelial cells as a result of being touched (in this case, forcibly grabbed) by an individual. Those methods, including enzyme analysis, Restriction Fragment Length Polymorphism (RFLP), and early Polymerase Chain Reaction

(PCR) tests which relied on dot blots, were virtually incapable of obtaining DNA profiles from extremely small amounts of biological material such as epithelial cells left behind from a person's having touched an object.

14. Over the last decade, substantial strides have been made in methods for obtaining DNA results from small or degraded samples, such as those from "touch" DNA from the surface of objects or articles of clothing, or fingernail scrapings, and have resulted in numerous exonerations in criminal cases. Some of these newer technologies, which increase the chances of getting probative results from small or degraded samples, include advanced Short Tandem Repeat (STR) testing kits which amplify smaller fragments of DNA ("mini-STRs"), and procedures for cleaning up amplified DNA (for example, Montage columns), and probabilistic genotyping software that can generate conclusions where traditional methods fail.

15. "Touch" DNA analysis, which is the swabbing (or soaking) areas without obvious stains or indications of biological material transfer, first achieved substantial attention when evidence from the 1996 murder of JonBenet Ramsey was reexamined in 2008. This application of DNA testing is able to identify DNA from areas that are not visibly obvious sources of DNA samples. This can include items such as clothing and even skin touched by the perpetrator. The GBI now performs this type of DNA testing, and other private forensic laboratories used by Georgia law enforcement such as Bode Laboratories use newer, enhanced technology such as "mini-STRs" to improve the detection of small amounts of degraded DNA commonly associated with touch evidence. These methods in particular have featured critically in a number of exonerations.

16. As a result of these and other advances, the chances of getting probative results from small or degraded samples are dramatically better today than in the mid-to-late 1990s, and

are also far better than they were just a decade ago. In practical terms, it was not possible in 1996-97 for then-available methods to obtain a usable DNA profile from an article of clothing, such as State's Exhibit 11, that may have been handled by an assailant. However, it is my opinion that application of the "touch" DNA methods – unavailable until the late 2000s -- to State's Exhibit 11 can yield an identifiable DNA profile of an assailant who had contact with the necktie on the night of the crime. A profile or profiles obtained from the tie could be compared to Mr. Wilson's DNA profile to determine whether Mr. Wilson was that assailant or one of the assailants. Any profiles obtained by this new testing could be compared to profiles in the GA or federal (NDIS) DNA databases, and can be compared to any STR DNA profiles obtained in the past.

Dated this 20th day of May, 2019.

Greg Hampikian, Ph.D.

Sworn to and subscribed before me
this 20th day of May, 2019.

John Michael Adrian Wojahn
NOTARY PUBLIC

X John M. Wojahn

comm. expires 4/25/2022

JOHN MICHAEL ADRIAN WOJAHN
NOTARY PUBLIC
Comm No. 67582
STATE OF IDAHO

Greg Hampikian
E-mail: forensicDNAanalysis@gmail.com
208-781-0438

Education

Ph.D. Genetics, The University of Connecticut, 1990
M.S. Genetics, The University of Connecticut, 1986
B.S. Biological Sciences, The University of Connecticut, 1982

Experience

2006-present
Professor of Biology, with a joint appointment in Criminal Justice, Boise State University (BSU), (Associate Professor, August 2004-2006).
Graduate and undergraduate courses: Forensic Biology, DNA Evidence in Cold Cases, Advanced DNA Analysis, Biotechnology, Cell Biology, Genetics, Small Peptide Drugs, Viral Archeology

2006-present
Founder and Director of the Idaho Innocence Project at Boise State University.
Volunteer position. Also emeritus Board Member of the Georgia Innocence Project (2002-).

2002-President of CompGenomics, Inc, consulting and technology development.

1993-2004
Professor, Biology, Clayton State University (CSU)
(Assistant Professor 1993-97, Associate Professor, 1997-2003)
Coordinated the Forensic Science Track for biology major. Courses: Biotechnology, Biotechnology Lab, Genetics, Human Genetics (on-line), Recombinant DNA Laboratory, Bioregulatory Affairs, Microbiology, Microbiology Lab, Anatomy and Physiology (A&P) sequence, A&P Labs, Sex and Reproduction, Introductory Biology (majors and non-majors sequence), Introductory Biology Labs, Biotechnology for teacher education students. Served as 2001-2002 Biology Coordinator, Natural Science Department.

2004
Chair of the Georgia Academic Advisory Committee for Biological Sciences
The Committee included department heads of all Georgia public colleges and universities.

2000
First Presidential Faculty Fellow, CSU
Coordinate new majors proposals; acted as faculty liaison to campus administration.

1997- 1998
National Science Foundation Research Opportunity Award, Georgia Tech, Biochemistry Dept., Research Faculty Member
Enzymatic nucleotides, and chromatin structural changes caused by anti-cancer drugs, with Loren Williams.

1994-1995
Visiting Scientist, Emory University and **The Centers for Disease Control and Prevention (CDC), Atlanta**
Sex-determination in malarial mosquitoes with John Lucchesi, Biology Department Chair, Emory University; and Frank Collins of the CDC.

1992
Worcester Foundation for Experimental Biology, Postdoctoral Associate with William Crain
Gene expression in mouse embryogenesis, toxicity of antisense therapies on pregnant mice.

1990-1991
U.S. National Science Foundation, Postdoctoral Fellow with Jennifer Graves, La Trobe University, Australia
The sequence and expression of mammalian sex-determining genes.

1986-1990
Ph.D. thesis with Linda Strausbaugh, The University of Connecticut
Transcriptional regulation of tagged histone genes in relation to the cell cycle in synchronized culture cells. Instructor in the Summer Institute of Molecular Biology, secured all funding for course from corporate sponsors.

1985-1986
Master's research with Paul Goetinck, University of Connecticut.
Cartilage Link protein c-DNA.

1983-1984
Yale University, School of Medicine, New Haven, Conn.
Research assistant, human keratins and drug response, psoriasis research with Joseph McGuire, Head of Pediatric Dermatology.

Selected Publications

Hampikian, G., et al., "Case report: Coincidental inclusion in a 17-locus Y-STR mixture, wrongful conviction and exoneration," 31 *Forensic Science International: Genetics* 1-4 (2017)

Alileche A., Hampikian G., The effect of Nullomer-derived peptides 9R, 9S1R and 124R on the NCI-60 panel and normal cell lines, BMC Cancer, Volume 17, 2017

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Science in the Courtroom for the 21st Century: Issues in Forensic DNA, Chicago, 2004.

Legal Communication in the 21st Century, 3-hour course, Clayton State University, 2003.

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208-781-0438

Education

Ph.D. Genetics, The University of Connecticut, 1990
M.S. Genetics, The University of Connecticut, 1986
B.S. Biological Sciences, The University of Connecticut, 1982

Experience

2006-present
Professor of Biology, with a joint appointment in Criminal Justice, Boise State University (BSU), (Associate Professor, August 2004-2006).
Graduate and undergraduate courses: Forensic Biology, DNA Evidence in Cold Cases, Advanced DNA Analysis, Biotechnology, Cell Biology, Genetics, Small Peptide Drugs, Viral Archeology

2006-present
Founder and Director of the Idaho Innocence Project at Boise State University.
Volunteer position. Also emeritus Board Member of the Georgia Innocence Project (2002-).

2002-President of CompGenomics, Inc, consulting and technology development.

1993-2004
Professor, Biology, Clayton State University (CSU)
(Assistant Professor 1993-97, Associate Professor, 1997-2003)
Coordinated the Forensic Science Track for biology major. Courses: Biotechnology, Biotechnology Lab, Genetics, Human Genetics (on-line), Recombinant DNA Laboratory, Bioregulatory Affairs, Microbiology, Microbiology Lab, Anatomy and Physiology (A&P) sequence, A&P Labs, Sex and Reproduction, Introductory Biology (majors and non-majors sequence), Introductory Biology Labs, Biotechnology for teacher education students. Served as 2001-2002 Biology Coordinator, Natural Science Department.

2004
Chair of the Georgia Academic Advisory Committee for Biological Sciences
The Committee included department heads of all Georgia public colleges and universities.

2000
First Presidential Faculty Fellow, CSU
Coordinate new majors proposals; acted as faculty liaison to campus administration.

1997- 1998
National Science Foundation Research Opportunity Award, Georgia Tech, Biochemistry Dept., Research Faculty Member
Enzymatic nucleotides, and chromatin structural changes caused by anti-cancer drugs, with Loren Williams.

1994-1995
Visiting Scientist, Emory University and **The Centers for Disease Control and Prevention (CDC), Atlanta**
Sex-determination in malarial mosquitoes with John Lucchesi, Biology Department Chair, Emory University; and Frank Collins of the CDC.

1992
Worcester Foundation for Experimental Biology, Postdoctoral Associate with William Crain
Gene expression in mouse embryogenesis, toxicity of antisense therapies on pregnant mice.

1990-1991
U.S. National Science Foundation, Postdoctoral Fellow with Jennifer Graves, La Trobe University, Australia
The sequence and expression of mammalian sex-determining genes.

1986-1990
Ph.D. thesis with Linda Strausbaugh, The University of Connecticut
Transcriptional regulation of tagged histone genes in relation to the cell cycle in synchronized culture cells. Instructor in the Summer Institute of Molecular Biology, secured all funding for course from corporate sponsors.

1985-1986
Master's research with Paul Goetinck, University of Connecticut.
Cartilage Link protein c-DNA.

1983-1984
Yale University, School of Medicine, New Haven, Conn.
Research assistant, human keratins and drug response, psoriasis research with Joseph McGuire, Head of Pediatric Dermatology.

Selected Publications

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IN THE SUPERIOR COURT OF BALDWIN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	
vs.	)	Criminal Action No. 39249B
	)	
MARION WILSON, JR.,	)	
Defendant.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing pleading upon the Baldwin County District Attorney and the Attorney General by electronic and/or hand delivery at the addresses below:

Sabrina Graham
Senior Assistant Attorney General
132 State Judicial Building
40 Capitol Square, SW
Atlanta, Georgia 30334

Stephen Bradley
District Attorney
166 Industrial Boulevard
Gray, Georgia 31032

This 22nd day of May, 2019.

Marcia A Wilder
Attorney

Appendix F

IN THE SUPERIOR COURT OF BALDWIN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	*	
	*	Criminal Action No. 39249B
v.	*	
	*	
MARION WILSON, JR.,	*	
	*	
Defendant.	*	

RESPONSE IN OPPOSITION TO EXTRAORDINARY MOTION FOR NEW TRIAL AND FOR POST-CONVICTION DNA TESTING PURSUANT TO O.C.G.A. § 5-5-41(c)

STEPHEN BRADLEY
District Attorney
Ocmulgee Judicial Circuit
121 N. Wilkinson Street, Suite 305
Milledgeville, Georgia 31061

BETH BURTON
Deputy Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

CONTROLLING STATUTORY PROVISION 2

PROCEDURAL HISTORY 5

ARGUMENT 7

A. Defendant is not entitled to a hearing because he fails to meet to the necessary statutory requirements. 7

1. Defendant cannot meet O.C.G.A. § 5-5-41(c)(3)(D)..... 8

2. Defendant cannot meet O.C.G.A. § 5-5-41(c)(3)(C)..... 14

3. Defendant cannot meet O.C.G.A. § 5-5-41(c)(4)(A)..... 15

B. Defendant's Guilt and stratagem are clear..... 17

CONCLUSION..... 18

STATEMENT OF THE CASE

Defendant has filed an extraordinary motion for new trial and seeks DNA testing on a necktie. The tie was found cinched so tightly around the neck of the victim, Donovan Parks, it had to be cut off.

O.C.G.A. § 5-5-41 allows the filing of an extraordinary motion for new trial any time outside the 30 day window for motion for new trials based on extraordinary circumstances. However, Defendant has waited 22 years after his trial and, at least, 11 years after the availability of the requested testing to request, for the first time, DNA testing on this piece of evidence from his trial. The record is clear that Defendant cannot establish: "the requested DNA testing would raise a reasonable probability that [Defendant] 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"; the identity of the perpetrator of the crimes was a significant issue at trial; or that his motion, filed at this late hour, is not for the purposes of delay. O.C.G.A. § 5-5-41(c)(3)(D). His extraordinary motion for new trial should be denied without a hearing. *See* O.C.G.A. § 5-5-41(c)(6)(A); *Crawford v. State*, 278 Ga. 95, 96, 597 S.E.2d 403, 404 (2004).

CONTROLLING STATUTORY PROVISION

O.C.G.A. § 5-5-41(a):

(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.

PROCEDURAL HISTORY

Defendant, Marion Murdock Wilson, Jr., was tried before a jury October 27, 1997 through November 7, 1997 and convicted of the malice murder of Donovan Parks, the felony murder of Donovan Parks, the armed robbery of Donovan Parks, hijacking a motor vehicle, possession of a firearm during the commission of a crime, and possession of a sawed-off shotgun. (R. 13-15, 966). The jury found as a statutory aggravating circumstance that the offense of murder was committed while the offender was engaged in the commission of another capital felony, armed robbery, (R. 965), and, following the mandatory recommendation of the jury, the trial court sentenced Defendant to death on November 7, 1997. (R. 964, 968).[1]

[1] Defendant's co-defendant Robert Butts was also convicted of malice murder, sentenced to death, and executed on May 4, 2018.

Defendant's motion for new trial, as amended, was denied on December 18, 1998. (R. 970-71, 980-84). The Supreme Court of Georgia affirmed Defendant's convictions and sentences on November 1, 1999. *Wilson v. State*, 271 Ga. 811, 525 S.E.2d 339 (1999), *cert denied, Wilson v. Georgia*, 531 U.S. 838 (2000), *reh'g denied*, 531 U.S. 1030 (2000).

Defendant filed his state habeas corpus petition on January 19, 2001. A two-day evidentiary hearing was held on February 22-23, 2005. At that hearing, 129 exhibits were tendered by Defendant; he presented 9 witnesses live and the affidavits of 33 witnesses, including 6 experts. The record ultimately comprised 5,679 pages. On December 1, 2008, the state habeas court denied relief. (Attachment A). The Georgia Supreme Court denied Defendant's certificate for probable cause to appeal. (Attachment B). The United States Supreme Court denied certiorari review on December 6, 2010. *Wilson v. Terry*, 562 U.S. 1093 (2010).

Defendant then filed a federal habeas corpus petition on December 15, 2010. On December 19, 2013, the district court denied relief. *Wilson v. Humphrey*, No. 5:10-CV-489, 2013 U.S. Dist. LEXIS 178241 (M.D. Ga. Dec. 19, 2013). On December 15, 2014, the Eleventh Circuit affirmed the denial of habeas relief. *Wilson v. Warden*, 774 F.3d 671, (11th Cir. 2014). Defendant applied for certiorari review and the

Supreme Court granted, vacated, and remanded the case to the Eleventh Circuit on the issue of how federal courts review state decisions under federal law. *Wilson v. Sellers*, ___ U. S. ___, 138 S. Ct. 1188 (2018).

On remand, the court of appeals reviewed the state habeas court's decision as directed by the Supreme Court and again denied relief. *Wilson v. Warden*, 898 F.3d. 1314 (11th Cir. 2018). Defendant again applied for certiorari review on March 12, 2019. Not coincidentally, that petition was denied today, May 28, 2019. *Wilson v. Ford*, 587 U.S. ___ (2019).

ARGUMENT

A. Defendant is not entitled to a hearing because he fails to meet to the necessary statutory requirements.

O.C.G.A. § 5-5-41(c) "requires a trial court to conduct a hearing *only* if a defendant's motion 'complies with the requirements of paragraphs (3) and (4)' of the statute." *Crawford*, 278 Ga. at 96 (emphasis added). The Defendant cannot establish the necessary showing for O.C.G.A. § 5-5-41(c)(3)(C-D) and (c)(4)(A):

> (c)(3)(C): The identity of the perpetrator was, or should have been, a significant issue in the case.
>
> (c)(3)(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.

(c)(4)(A): That the motion is not filed for the purpose of delay.

As Defendant cannot establish these mandatory prerequisites, he is not entitled to a hearing and his extraordinary motion for new trial should be denied instanter.

1. **Defendant cannot meet O.C.G.A. § 5-5-41(c)(3)(D).**

Most significantly, Defendant cannot meet the requirements of O.C.G.A. § 5-5-41(c)(3)(D), which requires that "the requested DNA testing would raise a reasonable probability that the Defendant *would have been acquitted* if the results of the DNA testing had been available at the time of the conviction, *in light of all the evidence in the case.*" (Emphasis added). Defendant argues that if there is DNA on the necktie and that DNA matches co-defendant Butts it would exculpate Defendant. This is patently false.

Even if there is DNA sufficient to conduct testing on the tie and even if it were tested and determined to have Butts's DNA on the tie, this finding would not acquit Defendant. It was established by video-tape evidence and eyewitness testimony that Defendant had on gloves on the night of the murder. (T. 1450-51). Accordingly, the lack of his DNA or the presence of Butts's DNA on the tie would not acquit Defendant. This is true particularly in light of the evidence that establishes Defendant's guilt. On direct appeal, the Georgia Supreme Court found that the evidence at trial established the following facts:

... on the night of March 28, 1996, the victim, Donovan Corey Parks, entered a local Wal-Mart to purchase cat food, leaving his 1992 Acura Vigor parked in the fire lane directly in front of the store. Witnesses observed Wilson and Robert Earl Butts standing behind Parks in one of the store's checkout lines and, shortly thereafter, speaking with Parks beside his automobile. A witness overheard Butts ask Parks for a ride, and several witnesses observed Wilson and Butts entering Parks's automobile, Butts in the front passenger seat and Wilson in the back seat. Minutes later, Parks's body was discovered lying face down on a residential street. Nearby residents testified to hearing a loud noise they had assumed to be a backfiring engine and to seeing the headlights of a vehicle driving from the scene. On the night of the murder, law enforcement officers took inventory of the vehicles in the Wal-Mart parking lot. Butts's automobile was among the vehicles remaining in the lot overnight. Based upon the statements of witnesses at the Wal-Mart, Wilson was arrested. A search of Wilson's residence yielded a sawed-off shotgun loaded with the type of ammunition used to kill Parks, three notebooks of handwritten gang "creeds," secret alphabets, symbols, and lexicons, and a photo of a young man displaying a gang hand sign.

Wilson gave several statements to law enforcement officers and rode in an automobile with officers indicating stops he and Butts had made in the victim's automobile after the murder. According to Wilson's statements, Butts had pulled out a sawed-off shotgun, had ordered Parks to drive to and then stop on Felton Drive, had ordered Parks to exit the automobile and lie on the ground, and had shot Parks once in the back of the head. Wilson and Butts then drove the victim's automobile to Gray where they stopped to purchase gasoline. Wilson, who was wearing gloves, was observed by witnesses and videotaped by a security camera inside the service station. Wilson and Butts then drove to Atlanta where they contacted Wilson's cousin in an unsuccessful effort to locate a "chop shop" for disposal of the victim's automobile. Wilson and Butts purchased two gasoline cans at a convenience store in Atlanta and drove to Macon where the victim's automobile

> was set on fire. Butts then called his uncle and arranged a ride back to the Milledgeville Wal-Mart where Butts and Wilson retrieved Butts's automobile.
>
> Viewed in the light most favorable to the verdict, we find that the evidence introduced at trial was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that Wilson was guilty of the crimes of which he was convicted and to find beyond a reasonable doubt the existence of a statutory aggravating circumstance. *Jackson v. Virginia*, 443 U.S. 307 (99 S. Ct. 2781, 61 L. Ed. 2d 560) (1979); O.C.G.A. § 17-10-30(b)(2). The State was not required to prove that Wilson was "the triggerman" in order to prove him guilty of malice murder. Even assuming that Wilson did not shoot the victim, there is sufficient evidence that he intentionally aided or abetted the commission of the murder or that he intentionally advised, encouraged, or procured another to commit the murder to support a finding of guilt. O.C.G.A. § 16-2-20(b)(3), (4). *See Mize v. State*, 269 Ga. 646(1) (501 S.E.2d 219) (1998); *Chapman v. State*, 263 Ga. 393 (435 S.E.2d 202) (1993); *Gambrel v. State*, 260 Ga. 197 (391 S.E.2d 406) (1990).

Wilson, 271 Ga. at 812-13.

Defendant also argues that a finding of Butts's DNA on the necktie could have precluded a death sentence. (Motion, p. 23). However, in the current procedural posture, this is not the standard. Defendant must first show his "motion 'complies with the requirements of paragraphs (3) and (4)' of the statute." *Crawford*, 278 Ga. at 96 (emphasis added). The standard is "[t]he requested DNA testing would raise a reasonable probability that the petitioner would have been *acquitted*...." O.C.G.A. § 5-5-41(c)(3)(D). However, even if the DNA testing was conducted and Butts's DNA was on the necktie, in light of

the evidence presented at trial, there is no reasonable probability of a different sentencing verdict.

As to sentencing, the record also establishes that, during the penalty phase of trial, the State called a number of witnesses in aggravation of punishment to show that, although Defendant was only 21, he had an extensive, violent criminal history. As found by the district court:

> [T]rial counsel learned that the State could potentially present 39 witnesses to testify about 27 aggravating circumstances during the sentencing phase of Wilson's trial. [] These aggravating circumstances included crimes Wilson committed as an adult while living in Baldwin County and his membership/leadership in a gang. [] Also included were numerous crimes Wilson committed, or was accused of committing, when he was a juvenile living with his mother in Glynn and McIntosh Counties. [] The number of witnesses in aggravation ultimately increased to 72 and the number of aggravating circumstances rose to 29. []

Wilson v. Humphrey, 2013 U.S. Dist. LEXIS 178241, at *41 n.13. Ultimately the State chose not to introduce all 72 witnesses or present all 29 non-statutory aggravators, but did introduce a number of non-statutory aggravators including evidence that in 1991, at age 15, Defendant had robbed and shot Luis Valle because Defendant wanted to know what it felt like to shoot somebody and in 1993, at age 17, shot Robert Underwood twice in the head. (T. 1916-19, 1958-61, 1970-73). Both men survived. Defendant's criminal history is so extensive it

elicited a special concurrence from Chief Judge Carnes of the Eleventh Circuit:

> Wilson's wholehearted commitment to antisocial and violent conduct from the age of 12 on not only serves as a heavy weight on the aggravating side of the scale, it also renders essentially worthless some of the newly proffered mitigating circumstance evidence. ...For example, a number of Wilson's teachers signed affidavits, carefully crafted by his present counsel, claiming that Wilson was "a sweet, sweet boy with so much potential," a "very likeable child," who was "creative and intelligent," and had a "tender and good side." One even said that Wilson "loved being hugged." A sweet, sensitive, tender, and hug-seeking youth does not commit arson, kill a helpless dog, respond to a son's plea to quit harassing his elderly mother with a threat "to blow . . . that old bitch's head off," shoot a migrant worker just because he "wanted to see what it felt like to shoot someone," assault a youth detention official, shoot another man in the head and just casually walk off—all before he was old enough to vote. Without provocation Wilson shot a human being when he was fifteen, shot a second one when he was sixteen, and robbed and shot to death a third one when he was nineteen. ...

Wilson v. Warden, 774 F.3d at 683.

Thus, 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, armed robbery, hijacking a motor vehicle, possession of a firearm during the commission of a crime and possession of a sawed-off shotgun. (R. 13-15, 966). In fact, following the guilt phase closing arguments, the jury found Defendant guilty of malice murder in approximately one hour and a half. (T.

1907). When trial counsel spoke to the jurors after the trial, some of the jurors commented on how quickly they were able to reach a unanimous decision as to Defendant's guilt. (Attachment C); *see also* Attachment D, juror comment: "There wasn't any question that he was guilty."; Attachment E, juror comment: "Evidence was overwhelming.").

There is no reasonable probability that Defendant would have been acquitted if the results of the DNA testing had been available at the time of the conviction, *in light of all the evidence in the case.*" (Emphasis added). As set forth above, the evidence as introduced during the trial showed Defendant was the leader of the Milledgeville Folks Gang (T. 2246, 2250), and went with co-defendant Butts to Walmart in Butts's car. The two men parked the car and went inside the Walmart together with a loaded sawed off shotgun, following closely behind Parks through Walmart and through the check-out line. They followed the victim to his car, asked for a ride they did not need, immediately took the victim to Felton Drive and executed him in the middle of the road. *Wilson*, 271 Ga. at 812-13. Within minutes, a dispassionate Defendant is seen on video-tape wearing gloves and purchasing gas for the stolen car. (T. 1427, 1451). Defendant admitted to going to his cousin in an attempt to locate a chop shop to sell the car. *Wilson*, 271 Ga. 812-13. He also admitted to burning the victim's car

and the weapon used in the murder was found in his house under his bed. *Id.*

DNA testing of the necktie, regardless of the testing results, would not acquit Defendant. The motion should be denied without a hearing on this basis alone.

2. Defendant cannot meet O.C.G.A. § 5-5-41(c)(3)(C).

Defendant failed to meet the requirements of O.C.G.A. § 5-5-41(c)(3)(C), which mandates that he show "the identity of the perpetrator, was, or should have been, a *significant* issue in the case." (Emphasis supplied). The identity of the perpetrators in this case was never a significant issue. There has never been a question concerning the two men who executed Mr. Parks.

The question posed by Defendant at trial was who actually held the gun and fired the fatal shot into Parks's head. That was addressed on direct appeal. *Wilson*, 271 Ga. at 813 (State was not required to prove Defendant triggerman for malice murder, sufficient evidence showed "he intentionally aided or abetted the commission of the murder or that he intentionally advised, encouraged, or procured another to commit the murder to support a finding of guilt").

The identity of the perpetrator was clearly not a significant issue at trial. Defendant's extraordinary motion should be denied without a hearing.

3. Defendant cannot meet O.C.G.A. § 5-5-41(c)(4)(A)

It must also be established that the motion is not filed for the purpose of delay. It is without question that Defendant cannot meet this prerequisite. Most telling, **Defendant's petition for writ of certiorari in the United States Supreme Court was denied today.**

Further, Defendant was tried in 1997. At the time, DNA testing was available, but not requested by Defendant. *See* Defendant's Exhibit B, pp. 3-4, ¶ 13. During his state habeas proceedings, lasting from 2001-2008, Defendant was afforded almost limitless discovery. He hired experts and made allegations that trial counsel should have hired other experts at trial. Yet, Defendant never requested the testing of any items for potential DNA. He also did not allege that trial counsel should have hired an expert to test evidence for DNA. Defendant's new expert states in his affidavit that during the time of the state habeas proceeding touch DNA was available to Defendant. *See* Defendant's Exhibit B, p. 4, ¶ 15 (touch DNA testing **available, eleven years ago**, in 2008).

In the federal district court proceedings, which lasted until 2014, Defendant requested the opportunity for a hearing and for discovery: "on the character" of his trial counsel who sat second chair; testing of his current cognitive abilities; and investigation into the lethal injections drugs formerly used by the Department of Corrections.

Petitioner also requested expert assistance as to each of these claims. However, he did not request DNA testing or present any experts to assert DNA testing should be conducted. Clearly, this testing was available at that time.

Défendant's own expert concedes that the DNA testing Defendant now seeks has been available for years. *See* Defendant's Appendix B. Yet, Defendant has never sought this testing. It is only now, once all his appeals have been completed and an execution warrant is imminent, that he seeks DNA testing.[2] If Defendant were truly innocent and believed this testing could exonerate him, he would not have waited 22 years to make such a request.

Additionally showing the gamesmanship of Defendant's filing is the recent pattern and practice of Georgia death row inmates who have reached the conclusion of their appeals process to file an extraordinary motion for new trial in an attempt to delay their executions. Ray Cromartie completed his appeals on December 3, 2018. He filed an extraordinary motion for new trial on December 27, 2018, after 24 years of appeals. Donnie Lance completed his appeals on January 7,

---

[2] Defendant filed the instant motion on May 22, 2019 with full awareness that his final petition for writ of certiorari was being conferenced by the United States Supreme Court on May 23, 2019, with an execution warrant to follow immediately upon the denial of that petition.

2019. Once his counsel learned an execution warrant was imminent, an extraordinary motion for new trial was filed on April 26, 2019, after 20 years of appeals. Likewise, Defendant has waited until the completion of his appeals, for 22 years, to file the instant extraordinary motion for new trial. It is clear that these filings are solely for the purpose of delay.

As this filing is for the purpose of delay, Defendant's extraordinary motion should be denied without a hearing.

B. Defendant's Guilt and stratagem are clear.

In light of all the evidence in this case, which has not been undermined by 22 years of extensive litigation, Defendant's guilt is clear and his extraordinary motion for new trial, filed at this eleventh hour should be denied without a hearing.

CONCLUSION

For the reasons set out above, this Court should deny Defendant's motion for DNA testing without a hearing. Should this Court determine a hearing is appropriate, the State will address the requirements of O.C.G.A. § 5-5-41(c)(7).

Respectfully submitted.

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ATTACHMENT A

COPY

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

MARION WILSON, JR.,	)	
	)	
Petitioner,	)	CASE NO: 2001-V-38
	)	
v.	)	
	)	
WILLIAM TERRY, Warden, Georgia Diagnostic and Classification Prison,	)	
	)	
Respondent.	)	

Filed 12/01 2008 at 10:00 a M.
Frances R Barnes
Clerk, Butts Superior Court
B.

FINAL ORDER
FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO O.C.G.A. § 9-14-49

This matter comes before this Court on the Petitioner's Amended Petition for Writ of Habeas Corpus as to his convictions and sentence of death from his trial in the Superior Court of Baldwin County. Having considered the Petitioner's original and amended Petition for Writ of Habeas Corpus (the "Amended Petition"), the Respondent's Answers to the original and amended Petitions, relevant portions of the appellate record, evidence admitted at the hearing on this matter on February 22-23, 2005, the documentary evidence submitted, the arguments of counsel, and the post-hearing briefs, this Court makes the following findings of fact and conclusions of law as required by O.C.G.A. § 9-14-49. The Court denies the writ as to the Petitioner's convictions and as to the Petitioner's sentence of death.

TABLE OF CONTENTS

I. PROCEDURAL HISTORY 1

II. SUMMARY OF RULINGS ON PETITIONERS CLAIMS FOR HABEAS RELIEF 3

III. FINDINGS OF FACTS AND CONCLUSIONS OF LAW 3

A. CLAIMS THAT ARE BARRED FROM THIS COURT'S REVIEW BY THE DOCTRINE OF RES JUDICATA 3

B. CLAIMS THAT ARE PROCEDURALLY DEFAULTED 6

C. INEFFECTIVE ASSISTANCE OF COUNSEL 10

D. SENTENCING PHASE JURY INSTRUCTIONS 40

IV. DISPOSITION 41

I. PROCEDURAL HISTORY

Petitioner was tried before a jury October 27, 1997 through November 7, 1997 and convicted of malice murder, felony murder, armed robbery, hijacking a motor vehicle, possession of a firearm during the commission of a crime and possession of a sawed-off shotgun. (R. 13-15, 966). The jury found a requisite statutory aggravating circumstance and Petitioner was sentenced to death on November 7, 1997. (R. 964, 968).

On direct appeal, the Georgia Supreme Court found that the evidence at trial established the following facts:

> ... on the night of March 28, 1996, the victim, Donovan Corey Parks, entered a local Wal-Mart to purchase cat food, leaving his 1992 Acura Vigor parked in the fire lane directly in front of the store. Witnesses observed Wilson and Robert Earl Butts standing behind Parks in one of the store's checkout lines and, shortly thereafter, speaking with Parks beside his automobile. A witness overheard Butts ask Parks for a ride, and several witnesses observed Wilson and Butts entering Parks's automobile, Butts in the front passenger seat and Wilson in the back seat. Minutes later, Parks's body was discovered lying face down on a residential street. Nearby residents testified to hearing a loud noise they had assumed to be a backfiring engine and to seeing the headlights of a vehicle driving from the scene. On the night of the murder, law enforcement officers took inventory of the vehicles in the Wal-Mart parking lot. Butts' automobile was among the vehicles remaining in the lot overnight. Based upon the statements of witnesses at the Wal-Mart, Wilson was arrested. A search of Wilson's residence yielded a sawed-off shotgun loaded with the type of ammunition used to kill Parks, three notebooks of handwritten gang "creeds," secret alphabets, symbols, and lexicons, and a photo of a young man displaying a gang hand sign.
>
> Wilson gave several statements to law enforcement officers and rode in an automobile with officers indicating stops he and Butts had made in the victim's automobile after the murder. According to Wilson's statements, Butts had pulled out a sawed-off shotgun, had ordered Parks to drive to and then stop on Felton Drive, had ordered Parks to exit the automobile and lie on the ground, and had shot Parks once in the back of the head. Wilson and Butts then drove the victim's automobile to Gray where they stopped to purchase gasoline. Wilson, who was wearing gloves, was observed by witnesses and videotaped by a security camera inside the service station. Wilson and Butts then drove to Atlanta where they contacted Wilson's cousin in an unsuccessful effort to locate a "chop shop" for disposal of the victim's automobile. Wilson and Butts purchased two gasoline

> cans at a convenience store in Atlanta and drove to Macon where the victim's automobile was set on fire. Butts then called his uncle and arranged a ride back to the Milledgeville Wal-Mart where Butts and Wilson retrieved Butts' automobile.
>
> Viewed in the light most favorable to the verdict, we find that the evidence introduced at trial was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that Wilson was guilty of the crimes of which he was convicted and to find beyond a reasonable doubt the existence of a statutory aggravating circumstance. Jackson v. Virginia, 443 U.S. 307 (99 S. Ct. 2781, 61 L. Ed. 2d 560) (1979); O.C.G.A. § 17-10-30(b)(2). The State was not required to prove that Wilson was "the triggerman" in order to prove him guilty of malice murder. Even assuming that Wilson did not shoot the victim, there is sufficient evidence that he intentionally aided or abetted the commission of the murder or that he intentionally advised, encouraged, or procured another to commit the murder to support a finding of guilt. O.C.G.A. § 16-2-20(b)(3), (4). See Mize v. State, 269 Ga. 646(1) (501 S.E.2d 219) (1998); Chapman v. State, 263 Ga. 393 (435 S.E.2d 202) (1993); Gambrel v. State, 260 Ga. 197 (391 S.E.2d 406) (1990).

Wilson v. State, 271 Ga. 811, 812-813, 525 S.E.2d 339 (1999).

The record also shows that during the penalty phase of trial, the State introduced evidence that, in 1991, Petitioner had robbed and shot Luis Valle because Petitioner wanted to know what it felt like to shoot somebody, (Tr. T., pp. 2037-2038, 2056-2057, 2086-2092, 2106-2109), and in 1993 had shot Robert Underwood. (Tr. T., pp. 1916-1919, 1958-1961, 1970-1973). Both men survived. Additionally, the State introduced evidence showing: that Petitioner had shot a neighbor's dog for no reason, (Tr. T., pp. 1981, 1988-1993, 2026); Petitioner's juvenile convictions for arson and criminal trespass, (Tr. T., pp. 2026-2029); Petitioner's fighting in school and assaulting a correctional officer at the Regional Youth Development Center, (Tr. T., pp. 2121-2125, 2139-2132); Petitioner's possession of 22 bags of marijuana when Petitioner came to the Baldwin County Solicitor's office, where he was subsequently arrested, (Tr. T., pp. 2195-2207, 2238); and Petitioner's leading a group of men in a verbal confrontation against a group of college students during an incident on the local college campus, and when subsequently

asked by law enforcement to leave, Petitioner became belligerent, refused to leave, attempted to grab the officer's gun and had to be sprayed with pepper spray to subdue and arrest him. Id.

Petitioner's convictions and sentences were affirmed on November 1, 1999. Wilson v. State, 271 Ga. 811, 525 S.E.2d 339 (1999), *cert denied* Wilson v. Georgia, 531 U.S. 838 (2000). Petitioner filed his habeas corpus petition on January 19, 2001. Thereafter, an evidentiary hearing was held on February 22-23, 2005.

II. SUMMARY OF RULINGS ON PETITIONERS CLAIMS FOR HABEAS RELIEF

The Petitioner's Amended Petition enumerates thirteen claims for relief. Petitioner's claims have numerous subparts. As set out herein, this Court finds: (1) some grounds or portions of grounds asserted by Petitioner are procedurally barred, having been litigated on direct appeal of the original convictions and sentence; (2) some grounds or portions of grounds are procedurally defaulted, the Petitioner having failed to raise the errors timely and having further failed to satisfy the cause and prejudice test or the miscarriage of justice exception; and (3) some grounds are neither procedurally barred nor procedurally defaulted and are therefore properly before this Court for habeas review. To the extent that Petitioner has failed to brief a claim, or has failed to present evidence in support of a claim, the claim is deemed abandoned and accordingly denied.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. CLAIMS THAT ARE BARRED BY THE DOCTRINE OF *RES JUDICATA*

This Court finds that the following claims were rejected by the Georgia Supreme Court on direct appeal and thus may not be relitigated by means of a habeas corpus proceeding, (Elrod

v. Ault, 231 Ga. 750, 204 S.E.2d 176 (1974); Gunter v. Hickman, 256 Ga. 315, 348 S.E.2d 644 (1986); Roulain v. Martin, 266 Ga. 353, 466 S.E.2d 837 (1996)):

Claim Three, disproportionality of his death sentence, Wilson, 271 Ga. at 823-824(23);

Claim Four, the death penalty in Georgia is imposed arbitrarily and capriciously, Wilson, 271 Ga. at 823-824(23);

Claim Five and Claim Seven, Paragraph D, the denial of Petitioner's motion for change of venue, Wilson, 271 Ga. at 821-822(19);

Claim Seven, Paragraph A, the trial court's rulings as to the alleged biases of Jurors Peugh, Mayzes, Craig and those jurors who worked for or who had relatives who worked for the Department of Corrections, Wilson, 271 Ga. at 815-817(5);

Claim Seven, Paragraph E, empanelling persons on the jury that were employed by the Department of Corrections, Wilson, 271 Ga. at 816-817(5d);

Claim Seven, Paragraph F, the admission of Petitioner's gang involvement, photographs of the victim, statements made to law enforcement officers by Petitioner, and Petitioner's prior criminal history, Wilson, 271 Ga. at 813-823(2)(14)(15)(18)(20);

Claim Seven, Paragraph G, the admittance of evidence and arguments that Petitioner was a member of the FOLKS Gang and gang activity in general during the sentencing phase, Wilson, 271 Ga. at 813-814(2)(3);

Claim Seven, Paragraph J, the trial court allowing the introduction of crimes committed by Petitioner as a juvenile, his prior criminal activity, and testimony that Petitioner threatened to kill a man and his mother, Wilson, 271 Ga. at 822-823(20);

Claim Seven, Paragraph M, the trial court denying the defense motions for directed verdicts based on a claim of lack of evidence sufficient to support guilt and/or the statutory aggravating factors, Wilson, 271 Ga. at 813(1);

Claim Seven, Paragraph N, the trial court denying Petitioner's motion to suppress his taped statements to law enforcement, Wilson, 271 Ga. at 821(18);

Claim Seven, Paragraph P, the trial court's exclusion of exculpatory hearsay evidence during the guilt phase of trial, Wilson, 271 Ga. at 814-815(4);

Claim Seven, Paragraph Q, the trial court not accompanying and supervising the jury during its view of the crime scene, Wilson, 271 Ga. at 817(6);

Claim Nine, the trial court's charge on "mere presence," Wilson, 271 Ga. at 817-818(7);

Claim Ten, challenge to the sentencing phase instructions, Wilson, 271 Ga. at 818-819 (11)(12)[1];

Claim Eleven, Paragraphs 92-94, remarks by the prosecution in its opening statement and closing arguments in both phases of trial, Wilson, 271 Ga. at 819-821(16)(17); and

Paragraph 95, the prosecution's introduction of evidence on gang activity, Wilson, 271 Ga. at 813-814(2).

As to Claim One, "actual innocence," Petitioner raised this same claim on direct appeal to the Georgia Supreme Court, arguing that he was not the triggerman and was merely present at the scene of the crimes. (See Petitioner's direct appeal brief, pp. 71-74). In rejecting this claim, the Georgia Supreme Court concluded:

> Viewed in the light most favorable to the verdict, we find that the evidence introduced at trial was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that Wilson was guilty of the crimes of which he was convicted and to find beyond a reasonable doubt the existence of a statutory aggravating circumstance. [Jackson v. Virginia, 443 U.S. 307 (99 S. Ct. 2781, 61 L. Ed. 2d 560) (1979); O.C.G.A. § 17-10-30 (b) (2).] The State was not required to prove that Wilson was "the triggerman" in order to prove him guilty of malice murder. Even assuming that Wilson did not shoot the victim, there is sufficient evidence that he intentionally aided or abetted the commission of the murder or that he intentionally advised, encouraged, or procured another to commit the murder to support a finding of guilt. O.C.G.A. § 16-2-20(b)(3), (4). See Mize v. State, 269 Ga. 646(1) (501 S.E.2d 219) (1998); Chapman v. State, 263 Ga. 393 (435 S.E.2d 202) (1993); Gambrel v. State, 260 Ga. 197 (391 S.E.2d 406) (1990).

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[1] To the extent, this claim raises a constitutional challenge to the sentencing hearing jury instructions not previously addressed on direct appeal by the Georgia Supreme Court, the claim is properly before this Court and is addressed on the merits below.

Wilson v. State, 271 Ga. at 813.

Even if this Court were to determine that Petitioner's bare claim of actual innocence was not barred by res judicata, the claim would be noncognizable in this habeas corpus proceeding. (See Deyton v. Wanzer, 240 Ga. 509, 510, 241 S.E.2d 228 (1978); Coleman v. Caldwell, 229 Ga. 656, 193 S.E.2d 846 (1972); Herrera v. Collins, 506 U.S. 390, 400-401 (1993) and Moore v. Dempsey, 261 U.S. 86 (1923)). Petitioner's proper avenue to assert his bare allegation of actual innocence would be in the trial court by properly filing an extraordinary motion for new trial. (See Herrera, 506 U.S. at 410-411, n. 11, citing O.C.G.A. § 5-5-41 (noting that Georgia has "state avenue open to process such a claim"; Felker v. Turpin, 83 F.3d 1303 (11th Cir. 1996) (noting that Georgia law, unlike a number of other states, permits motions for new trial on newly discovered evidence grounds and provides that the time for filing such motions can be extended)).

This Court also finds that Petitioner's claim that Mr. O'Donnell's wife's employment and her acquaintance with the victim was a conflict of interest is *res judicata,* Wilson v. State, 271 Ga. at 823.

B. CLAIMS THAT ARE PROCEDURALLY DEFAULTED

This Court finds that Petitioner failed to raise the following claims on direct appeal and further failed to establish cause and actual prejudice sufficient to excuse the procedural default of these claims in this collateral proceeding. Thus, these claims are procedurally defaulted and not reviewable by this Court, (see Black v. Hardin, 255 Ga. 239, 336 S.E.2d 754 (1985); Valenzuela v. Newsome, 253 Ga. 793, 325 S.E.2d 370 (1985); O.C.G.A. § 9-14-48(d); White v. Kelso, 261 Ga. 32, 401 S.E.2d 733 (1991)):

Claim Six, Petitioner was entitled to a bifurcated jury;

Claim Seven, Paragraph A, the trial court refused to strike certain jurors for cause, phrased its voir dire questions in a manner which suggested answers to jurors, engaged in improper voir dire, and allowed fair and impartial jurors to be struck for cause, excluding those jurors set forth above as *res judicata*;

Claim Seven, Paragraph B, the trial court excused potential jurors for improper reasons;

Claim Seven, Paragraph C, the trial court restricted voir dire;

Claim Seven, Paragraph H, denial of funds to hire an expert sociologist to counter "gang evidence" and/or funds for a neurological examination to support testimony of Petitioner's expert, Dr. Kohanski;

Claim Seven, Paragraph I, the trial court not giving charges on residual doubt and presumption of life sentencing;

Claim Seven, Paragraph K, the trial court not requiring the State to disclose certain items of evidence in a timely manner;

Claim Seven, Paragraph L, the trial court not requiring the State to disclose exculpatory or impeaching evidence;

Claim Seven, Paragraph M, the trial court not directing verdicts of acquittal or life sentence on its own motion;

Claim Seven, Paragraph O, trial court did not ensure Petitioner's statements to law enforcement were properly redacted;

Claim Seven, Paragraph Q, the jury failed to stay on the bus during its view of the crime scene;

Claim Seven, Paragraph S, the trial court failed to provide adequate funds for counsel to conduct a competent pretrial investigation and to secure the services of necessary experts and testing under Ake v. Oklahoma;

Claim Eight and footnote 9, misconduct on the part of jurors and error by the State and the trial court, insofar as they were aware of the juror misconduct;

Claim Nine, improper charges on the burden of proof, impeachment of witnesses, statutory terms and offenses charged in the indictment;

Claim Eleven, Paragraph 96, the prosecutor sought a sentence of death based solely on the argument that Petitioner fired the shot that killed the victim;

Claim Eleven, Paragraph 97, misleading argument and misconduct by the State;

Claim Twelve, Georgia's Unified Appeal Procedure is unconstitutional; and

Claim Thirteen, cumulative error, insofar as this is a cognizable claim, it is not only defaulted, but there is also no cumulative error rule in Georgia, Head v. Taylor, 273 Ga. 69, 70, 538 S.E.2d 416 (2000).

Further, as to Petitioner's prosecutorial misconduct claim, that the District Attorney changed theories of who was the triggerman in the trial of Petitioner and Co-Defendant Butts, this Court finds that Petitioner has failed to establish the requisite cause and prejudice to overcome his default of this claim. In fact, this Court notes that the record establishes that the District Attorney conceded that either Petitioner or Co-Defendant Butts was the triggerman during Petitioner's trial. (See, e.g., Tr. T., pp. 1816, 1821, 1830, 1832, 1836, 1837-1838, 1839).

Further, this Court finds that Petitioner failed to establish his ineffective assistance of counsel allegation to support "cause" to overcome his default of this claim or any prejudice resulting from counsel's representation as trial counsel at the sentencing phase of trial: counsel introduced evidence from various witnesses that Co-Defendant Butts had claimed to be the triggerman, (Tr. T., pp. 2389, 2391-2392, 2394, 2396-2398, 2401, 2403-2404); called Co-Defendant Butts to testify, who invoked his Fifth Amendment right to silence, (Tr. T., pp. 2384-2387); and, in the sentencing phase closing argument, repeatedly argued that Co-Defendant Butts was the person that had actually shot Donovan Parks. (Tr. T., pp. 2487-2488, 2499, 2501, 2505, 2506). Trial counsel also argued to the jury that the District Attorney had conceded the point that Petitioner may not have pulled the trigger, (Tr. T., p. 2499), and that the Sheriff had stated, on the tape recorded statement that the jury had heard, that Co-Defendant Butts shot Donovan Parks. (Tr. T., pp. 2500, 2504).

Further, as to Petitioner's claim of prosecutorial misconduct regarding the prosecutor's arguments at sentencing, this Court finds that Petitioner has failed to establish cause and prejudice to overcome his default of this claim as the prosecutor's arguments during the sentencing phase that Petitioner had killed Donovan Parks, after Petitioner had been found guilty of malice murder, were legally correct. Further, even if the prosecutor's argument had been misleading, this Court determines that, in light of the District Attorney's numerous concessions during his arguments at the guilt phase of Petitioner's trial as to who was the triggerman and in light of the evidence introduced as to Petitioner's guilt and in aggravation, Petitioner would be unable to show cause and prejudice to overcome his default of this claim.

Petitioner also raises a claim of conflict of interest in that Mr. O'Donnell represented Petitioner during trial, after Mr. O'Donnell had been offered a position by the Attorney General's Office as a Special Assistant Attorney General. As Mr. O'Donnell withdrew from Petitioner's case after trial, did not represent Petitioner on direct appeal and as appellate counsel was aware of Mr. O'Donnell's acceptance of the position of a SAAG at the time of the direct appeal, (HT 237-238), Petitioner could have raised this claim of conflict of interest on direct appeal.

This Court further finds that Petitioner has failed to establish cause or any prejudice to overcome his default of this claim as Petitioner failed to allege, much less prove, that there was an actual conflict, (Lamb v. State, 267 Ga. 41, 42, 472 S.E.2d 693 (1996), citing Hamilton v. State, 255 Ga. 468, 470, 339 S.E.2d 707 (1986); Smith v. White, 815 F.2d 1401, 1404 (11th Cir. 1987)) or that he was adversely impacted by Mr. O'Donnell's impending employment. (See, e.g., HT 526, 5411-5412 (Mr. O'Donnell's testimony that accepting a position as a SAAG did not affect his representation of Petitioner); HT 226-227 (co-counsel's testimony that he "saw Mr. O'Donnell just living and breathing this case;" "he was totally immersed in this case.")).

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner alleges numerous claims of ineffective assistance of trial and appellate counsel. As Petitioner was represented by the same counsel at trial and on appeal, making it impossible for counsel to raise claims of ineffective assistance of counsel, these claims are properly before this Court for review. See Thompson v. State, 257 Ga. 387, 359 S.E.2d 664 (1987); White v. Kelso, 261 Ga. 32, 401 S.E.2d 733 (1991).

Standard of Review

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court adopted a two-pronged approach to reviewing ineffective assistance of counsel claims:

> First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. at 687. See also Smith v. Francis, 253 Ga. 782, 325 S.E.2d 362 (1985). See also Wiggins v. Smith, 539 U.S. 510 (2003) (reaffirming the Strickland standard as governing ineffective assistance of counsel claims); Rompilla v. Beard, 125 S.Ct. 2456 (2005)("[T]oday's decision simply applies our longstanding case-by-case approach to determining whether an attorney's performance was unconstitutionally deficient under Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)." (O'Connor, J., concurring)).

The Court in Strickland also instructed, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the

defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689 (citations omitted). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690; accord Smith v. Francis, 253 Ga. at 783; see also Zant v. Moon, 264 Ga. 93, 97, 440 S.E.2d 657 (1994).

As the Georgia Supreme Court recognized, the parameters set forth by the United States Supreme Court for considering ineffective assistance claims are to "address not what is prudent or appropriate, but only what is constitutionally compelled." Zant v. Moon, 264 Ga. at 95-96, quoting Burger v. Kemp, 483 U.S. 776, 780, 107 S.Ct. 3114 (1987). "The test for reasonable attorney performance 'has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.'" Jefferson v. Zant, 263 Ga. 316, 318, 431 S.E.2d 110 (1993).

Counsel's Experience

Petitioner was represented at trial by Tom O'Donnell and Phillip Carr, both of whom had extensive criminal experience prior to Petitioner's trial. (HT 204-206, 441, 445, 4504, 5343-5344). Although Mr. O'Donnell, at the time of Petitioner's trial, had never been lead counsel through the entirety of a death penalty trial, he had worked with a very experienced death penalty attorney in fully preparing a death penalty case for trial, in which the defendant pled guilty immediately prior to trial. (HT 443, 447, 5344). Although Petitioner argues that these two men were not qualified to represent him at trial according to certain guidelines, this Court finds that, regardless of counsel's experience, Petitioner has the burden of establishing that counsel were

deficient and that their deficient representation prejudiced Petitioner. This Court finds that Petitioner has failed to carry that burden.

Guilt/Innocence Phase

Actual Innocence Claim

The record establishes that trial counsel introduced evidence to attempt to support Petitioner's defense of mere presence. (See, e.g., Tr. T., pp. 1336-1338, 1366-1368, 1372,1382-1383,1385-1386) (witness testimony that Petitioner may not have been inside Wal-Mart and testimony that Co-Defendant Butts, not Petitioner, was seen talking to the victim); Tr. T., pp. 1585-1589, 1607-1608 (Petitioner's own statements alleging mere presence); Tr. T., pp. 1787-1800 (trial counsel's attempts to introduce testimony of inmates who would allegedly testify that Co-Defendant Butts had claimed to be the triggerman)). At the close of the evidence, trial counsel moved for directed verdicts on malice murder and armed robbery, which were denied, (Tr. T., pp. 1781-1782, 1786-1787), and repeatedly argued in closing that Petitioner was merely present at the scene of the crime and did not know Co-Defendant Butts was going to commit any of the crimes. (Tr. T., pp. 1843-1873). Counsel also raised this same issue on direct appeal, which was denied. (Petitioner's direct appeal brief, pp. 71-74).

The Court notes that the majority of the testimony on which Petitioner relies to support his actual innocence claim before this Court was presented at Petitioner's trial. (See Petitioner's post-hearing brief, pp. 7-9, citing to the trial transcript). However, even after hearing this same evidence, the jury recommended a sentence of death. This Court finds that trial counsel were not deficient or Petitioner prejudiced by the counsel not submitting the additional evidence that Petitioner alleges trial counsel should have been presented at the guilt phase of his trial. (See Tr.

T., pp. 2515-2516; HT 3357, 3375, 3382, 3397; HT 3378, juror comments: "There wasn't any question that he was guilty.", HT 3393, "Evidence was overwhelming.").

Specifically, with regard to the testimony of Gary Garza, Horace Mays and Shawn Holcomb, which was ruled inadmissible by the trial court, (Tr. T., pp. 1800-1801), this Court finds that Petitioner failed to establish that counsel were deficient or that Petitioner was prejudiced by counsel not requesting a ruling as to the admissibility of their testimony based on Turner v. State, 267 Ga. 149, 476 S.E.2d 252 (1996). The defense team interviewed these three inmates, believed the inmate witnesses had "credibility issues," (HT 504-506, 3157, 3171, 4569-4570, 4582, 5365-5370, 5374-5374, 5447-5459; Tr. T., pp. 2403-2404), and felt the witnesses would be hard to control on the stand. (HT 504). This Court finds that based on these factors that trial counsel would not have been able to meet the exception circumstances of Turner required for the admission of such testimony.

Further, even pretermitting the lack of deficiency, this Court finds that Petitioner failed to establish ineffective assistance of counsel as he failed to establish the requisite prejudice. The record establishes that these witnesses would have undermined Petitioner's mere presence defense as Mr. Mays would have also testified that Co-Defendant Butts had stated that Petitioner was in control of the events on the night of the murder, including ordering the victim out of the car, (HT 5359, 5454, 5459), and as Mr. Garza would have testified that Petitioner stood outside Wal-Mart to detain the victim and was the person who ordered the victim to stop the car, (HT 5459), clearly showing Petitioner as a party to the crime. Also, the Court notes that trial counsel were able to submit this same testimony through their investigator during the sentencing phase of trial. Thus, this Court finds that counsel were not deficient or Petitioner prejudiced.

As to Rafael Baker, trial counsel spoke to Mr. Baker prior to trial and Mr. Baker told trial counsel that neither Petitioner nor Co-Defendant Butts mentioned a murder or shooting someone on the night of the murder. (HT 3169, 3051, 3054, 5358-5359, 5445). Accordingly, trial counsel were not deficient for not calling Mr. Baker to testify to evidence he expressly denied to trial counsel prior to trial. As to Mr. Baker's claim that he attempted to talk to defense counsel, but they would not talk to him, (HT 771), Mr. Baker's testimony is belied by Mr. Carr's testimony in which Mr. Carr testified, live before this Court with undeniable certainty, that neither Mr. Baker nor anyone else approached trial counsel with information in the days leading up to the trial. (HT 215-216). Further establishing that Petitioner failed to show deficiency or any resulting prejudice with regard to trial counsel's decision not to attempt to elicit testimony from Mr. Baker that Co-Defendant Butts was the triggerman, is the fact that Mr. Baker's roommate, who could have been called by the State in rebuttal, had previously stated that Mr. Baker made statements to him that implicated Petitioner in the murder and as the leader of crimes. (See HT 3172). In view of these facts and the above findings concerning Mr. Baker and as Mr. Baker's current affidavit testimony is merely cumulative of other testimony proffered at trial, or is otherwise contradicted by trial counsel, (see HT 215-216), Petitioner has failed to show that counsel were deficient or that he was prejudiced.

Trial counsel also spoke to Felicia Ray prior to trial, discussed whether to call her at trial and made a strategic decision not to utilize her testimony. (HT 5361-5362). Although Petitioner claims that Ms. Ray could have described Petitioner as "relaxed" while Co-Defendant Butts was inside Wal-Mart, this Court finds that counsel were not deficient in not presenting this evidence and that this evidence would not have, in reasonable probability changed the outcome of trial, particularly in light of the fact that the jury also witnessed Petitioner on videotape at the gas

station immediately after the murder of Mr. Parks, behaving in the same "relaxed" manner. (Tr. T., p. 1446).

Trial counsel also spoke to Angela Johnson prior to trial, (HT 3474-3475, 3477, 3478-3483, 3485, 5376), and made a reasonable strategic decision not to call her as a witness because they felt she could not help Petitioner's case, as she would have testified that Petitioner had stated that he "owned the gang" and would have undermined Petitioner's mere presence defense, (HT 5377), she had a "credibility problem, (HT 218), and they recognized that she would not have made a good witness since she had her own pending charges. (HT 3235, 5375-5378, 4524). The record establishes that although Ms. Johnson stated that Co-Defendant Butts brought the shotgun over to her home, (HT 5462), her statement also established that Petitioner **and** Co-Defendant Butts chose Donovan Parks as their victim. (HT 5462). Trial counsel's decision not to call Ms. Johnson as a witness in either phase of trial was reasonable and Petitioner was not prejudiced. (HT 4524-4525, 5377).

Plea Negotiations

As trial counsel worked under the assumption that Petitioner's case was going to trial, pursued plea negotiations, repeatedly conferred with Petitioner and urged him to accept the State's plea offer of two life sentences, which trial counsel procured for Petitioner, (HT 512, 3318, 3332), and as Petitioner, fully informed and on his own accord, refused the offers, (see HT 463, HT 512-517), trial counsel were not deficient and Petitioner was not prejudiced by trial counsels' representation.

Change in Presiding Judges

Petitioner failed to show deficiency or prejudice by the mere substitution of judges prior to the beginning of his trial.

Jury View

This Court finds that Petitioner failed to establish deficiency or prejudice in counsel not objecting to the trial judge being absent from the jury view of the crime scene as trial counsel and the State consulted and agreed upon the procedure to be employed, trial counsel and Petitioner attended the jury view by following the bus in separate vehicles, trial counsel interviewed the jurors following the conclusion of Petitioner's trial and asked a number of them about the jury view, and there was no indications from the answers of the jurors who attended the view that anything improper had occurred. (See, e.g., HT 3373, 3388 (interview notes of jurors)).

Counsel's Closing Argument

This Court finds that trial counsel were not deficient or Petitioner prejudiced by trial counsel's guilt phase closing argument as they reasonably argued Petitioner's mere presence at the scene of the crime and thus, his alleged innocence of murder. (See Tr. T., pp. 1843-1873).

Guilt Phase Charges

As the trial court's charge on reasonable doubt was proper, (Tr. T., pp. 1877-1879; See Suggested Pattern Jury Instructions), Petitioner failed to establish any deficiency or prejudice with regard to this claim.

Sentencing Phase

Dispute as to Responsibilities of Trial Counsel

At the habeas hearing, testimony was given by Petitioner's trial counsel. Philip Carr testified first, and in his testimony he stated he and his co-counsel (O' Donnell) "split duties" in preparing for trial. (HT 252). He further stated "I did some work on the issue of mitigation...." (HT 252) and "there were phases I was involved in more so than others. I was not involved in as

much of the mitigation stage..." (HT 253). When asked who was responsible for the mitigation evidence, Carr stated: "Mr. O'Donnell. And then he would give me assignments that I would take." (HT 253). When O'Donnell was asked who was responsible for going out and investigating Petitioner's background, he stated "that is what I had Mr. Thrasher and Mr. Carr do." (HT 456). His testimony was that Carr was to do "both the investigation in Glynn County and everything else." (HT 457).

On the surface, it appears there was confusion between counsel as to who was responsible for investigating and preparing mitigation evidence, specifically Petitioner's family background. The question raised by this apparent confusion is whether the result was a failure to investigate because of miscommunication and inattention, and whether this rendered counsel's performance constitutionally deficient. See e.g., *Terry v. Jenkins*, 280 Ga. 341 (2006); *Schofield v. Gulley*, 279 Ga. 413 (2005). When considering this testimony in context, however, the Court finds no such deficiency. As lead counsel, O'Donnell had Carr and the investigator report to him. (HT 457). He received daily reports from them while they were in Glynn County, and monitored their progress. (HT 458). Counsel spoke with Petitioner's mother, father, and girlfriend. (HT 475-476). They also interviewed, or attempted to interview, a number of other witnesses. (See e.g., HT 474-486, 456, 495). There is no indication of a haphazard investigation, nor of a lack of sharing of information between counsel. *Schofield*, at p. 414. Any miscommunication which may have occurred did not result in a lack of preparation of mitigating evidence. *Terry*, at p. 344. Counsel made a reasonable investigation into Petitioner's family background, and reasonable decisions as to what evidence to prepare and present, consistent with their defense strategy. (HT 251). The Court finds no deficiency in counsel's performance in this

regard, nor was Petitioner prejudiced in any way, given the particular facts and circumstances of the case.

Trial Counsel's Pretrial Investigation into Petitioner's Background

As Petitioner denied his guilt of the crimes and as the defense and mitigation theory was mere presence, defense counsel's preparation for the mitigation case actually began in the investigation and preparation for the guilt phase of Petitioner's trial. See Chandler v. United States, 218 F.3d 1305, 1320 n.27 (11th Cir. 2000)("At least when guilt in fact is denied, a 'lawyer's time and effort in preparing to defend his client in the guilt phase of a capital case continues to count at the sentencing phase,'" citing Darden v. Wainwright, 477 U.S. 168 (1986); Lockhart v. McCree, 476 U.S. 162 (1986)).

This Court further finds that Petitioner's defense counsel conducted a reasonable investigation of Petitioner's background by interviewing and speaking with Petitioner, (HT 466, 4523), and interviewing Petitioner's mother to obtain a social history of Petitioner. (HT 218-219, 475, 5388). However, Petitioner's mother was uncooperative and did not want to testify at trial, (HT 5388), and despite counsel's numerous interviews with Petitioner himself, Petitioner did not provide counsel with the names of any of his family members. (HT 4534). In fact, Petitioner told trial counsel, when asked about family members to contact, that he had no contact at all with his father's side of family. (HT 225-226). "That they never wanted him anyway and nobody would even just acknowledge he existed." Id.

"One of the circumstances that bears upon the reasonableness of an investigation is the information supplied by counsel's own client. Just as information supplied by the defendant may point to the need for further investigation, the lack of information supplied may also indicate that

further investigation would be unnecessary or fruitless." Waldrop v. Thigpen, 857 F. Supp. 872, 915 (S.D. Ala. 1994), citing Mulligan v. Kemp, 771 F.2d 1436 (11th Cir. 1985). "A client's failure to disclose information to his attorney, as well as his refusal to assist the attorney, necessarily must be considered in assessing the reasonableness of the investigation performed by counsel." Waldrop v. Thigpen, 857 F. Supp. at 915. "Counsel must undertake enough of an investigation to be able to reasonably advise his client about the advantages and disadvantages of further investigation." Id. n.30, citing Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991).

Further, this Court finds that, notwithstanding the fact that Petitioner did not provide counsel with the names of his family members and although Petitioner's mother was uncooperative and did not want to testify, trial counsel still interviewed witnesses, (see HT 3474-3486), attempted to contact potential witnesses, (see generally HT 456, 495, 3082-3108; Tr. T. 1189-1192, 1498-1506, 1333-1338, 1352-1360,1339-1351,1382-1383,1395-1414, 1363-1390, 1482-1485, 1417, 1423-1426, 5390), and hired Dr. Maish, a psychologist, to investigate and evaluate Petitioner's background. (HT 454-456, 5431). Trial counsel testified that in addition to speaking with Petitioner and his mother, they also spoke with Petitioner's father, Marion Wilson, Sr., and another man. (HT 458). They also attempted to talk to someone at DJJ and at the college Petitioner had attended. (HT 475, 476). Counsel testified the defense team tried to locate and talk to witnesses, but in addition to having trouble finding these witnesses, the witnesses trial counsel were able to find were more devastating than helpful to Petitioner's case. (HT 223).

Additionally, trial counsel requested numerous files regarding Petitioner's background, including: the files from various law enforcement agencies concerning Petitioner and/or his co-defendant, (HT 3109, 3115, 3121, 3122, 3125, 3127, 3110, 3114, 3120, 3124, 3126);

employment records, (HT 3111, 3129, 3132, HT 3153); institutional records from the Division of Youth Services, (HT 3112); Georgia Department of Corrections Records, (HT 3113); Petitioner's school records from numerous academic institutions, including the Georgia Military College, (HT 3116, 3119, 3123, 3131, 3128); Petitioner's medical records from various hospitals, (HT 3117, 3130, 3134); and Petitioner's records from the Georgia Vital Records Service (HT 3118). Trial counsel received many of these requested files. (See, e.g., HT 3139-3152, HT 3319-3320).

Trial counsel also hired Dr. James Maish to conduct a psychological evaluation, to present Petitioner's background, and to act as a "substitute for a sociologist." (HT 456; see also HT 3510). However, after Dr. Maish had evaluated Petitioner, had learned the defense theory, and Petitioner's social history, (HT 4508-4510), trial counsel made the reasonable strategic decision not to call Dr. Maish to testify. Dr. Maish was specifically asked not to write a report until after Mr. O'Donnell spoke with Dr. Maish because he was afraid it would be discoverable. (HT 509). Trial counsel testified that, after Dr. Maish's evaluation of Petitioner, Dr. Maish said he did not want to testify "because if he testified, and this is a summary, that he would have to say that Marion was a sociopath." (HT 5381).

Trial counsel also retained Dr. Renee Kohanski, a forensic psychiatrist. (HT 3327-3329). Dr. Kohanski examined Petitioner twice, consulted with trial counsel, reviewed records, and consulted with a "psychologist/attorney." (HT 3331, 5061-5062; Tr. T., p. 2437). Trial counsel "discussed anything that could be mitigating" with Dr. Kohanski, (HT 210-211), interviewed her and explained Petitioner's history to her. (HT 201-211). Dr. Kohanski testified that she also reviewed records, which included psychological service records from Petitioner's elementary school, Petitioner's social history, a special education placement committee report concerning

Petitioner from 1986, a psychological report from 1986 concerning Petitioner, Petitioner's Georgia Regional Savannah Hospital records from 1992 and information relevant to Petitioner's current charges, including witness statements, incident reports "and such." (Tr. T., p. 2415). Further, Dr. Kohanski's testimony from trial establishes that she conducted review of Petitioner's background as discussed below. Dr. Kohanski ultimately testified at trial and provided information to the jury regarding Petitioner's background for mitigation purposes, including his neglectful home life, lack of supervision as a child, and Petitioner having no adult authority figure. (Tr. T., p. 2414; HT 5066). This Court finds that trial counsel were not deficient by trial counsel's investigation of Petitioner's background.

This Court also finds that, in light of the evidence presented by trial counsel at sentencing, the facts of the crime and the evidence presented by the State as to Petitioner's guilt and in aggravation of sentence, Petitioner was not prejudiced by trial counsel's investigation of Petitioner's background.

Additional Testimony of Lay Witnesses.

Petitioner claims that defense counsel failed to interview certain potential mitigation witnesses. However, this Court finds that trial counsel were not deficient in not submitting this additional testimony and further finds that Petitioner has not established prejudice as the testimony proffered in support of this claim would have been inadmissible on evidentiary grounds, cumulative of other testimony, or otherwise would not have, in reasonable probability, changed the outcome of the trial. (See Chandler v. U.S., 218 F.3d 1305, 1318 (11th Cir. 2000) (no requirement that counsel do certain acts to be found effective (for example, interviewing some of Petitioner's neighbors or attempting to interview all of Petitioner's immediate family members); see also Head v. Carr, 273 Ga. 613, 626, 544 S.E.2d 409 (2001) (in which the

Georgia Supreme Court held that the habeas petitioner could not show actual prejudice with regard to mitigating evidence that trial counsel had allegedly failed to elicit from specific witnesses as most of the alleged mitigating information was presented to the jury through other witnesses); DeYoung v. State, 268 Ga. 780, 786 (5), 493 S.E.2d 157 (1997)("Not ineffective for failing to put up cumulative evidence")).

As the Eleventh Circuit noted in Waters v. Thomas, 46 F.3d 1506 (11th Cir. 1995), "[i]t is common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstance evidence, had they been called," but "the existence of such affidavits, artfully drafted though they may be, usually proves little of significance." Id. at 1513-1514. Such affidavits "usually prove[] at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel." Id. at 1514. "With all of the resources and time they have devoted to the case, this squad of attorneys has succeeded in proving the obvious: if [trial counsel] had their resources and the time they have been able to devote to the case, he could have done better." Williams v. Head, 185 F.3d 1223, 1236 (11th Cir. 1999).

As to the testimony of Petitioner's former teachers, this Court finds this evidence speculative and notes the limited contact these teachers had with Petitioner and/or the lapse in time between their contacts with Petitioner and the crimes. (HT 277, 292-295). Thus, while the testimony of Petitioner's former school teachers, including Ms. Gray's testimony, would have been largely cumulative of other evidence at trial, (Compare HT 284, 287 with Tr. T., pp. 2416-2418), or otherwise inadmissible on evidentiary grounds, even assuming its admissibility, the Court finds that Petitioner has failed to show that trial counsel were deficient in not submitting

this testimony or that the testimony would have a reasonable probability of changing the outcome of the case.

As to Eric Veal, (HT 767-769), given the speculative nature of this testimony, it would not have been admissible at trial. Further, even assuming the admissibility of the testimony, this Court finds that Mr. Veal's testimony would not have, with any reasonable probability, changed the outcome of Petitioner's trial.

This Court also finds that the remainder of Petitioner's lay affiants, like the aforementioned affiants, provide testimony that would not have been admissible at trial as the testimony is largely based on hearsay or speculation or was cumulative of testimony elicited by defense counsel from Petitioner's mother and Dr. Kohanski at trial concerning Petitioner's childhood. (See generally Tr. T., pp. 2412-2454). Further, given the defense theory that Butts was the triggerman, trial counsel were reasonable in declining to proffer the testimony that undermined that defense, (see Mitchell v. Kemp, 762 F.2d 886, 888-890 (11th Cir. 1985); Burger v. Kemp, 483 U.S. 776, 794-795 (1987) ("It appears that he [i.e. trial counsel] did interview all potential witnesses who had been called to his attention and that there was a reasonable basis for his strategic decision that an explanation of petitioner's history would not have minimized the risk of the death penalty."), and there is no reasonable probability that such additional testimony would have changed the outcome of the case. (See Head v. Carr, 273 Ga. 613, 626, 544 S.E.2d 409 (2001) (wherein the Georgia Supreme Court found no prejudice by counsel not submitting cumulative mitigating evidence through additional witnesses); Turpin v. Mobley, 269 Ga. at 641 ("We conclude beyond a reasonable doubt that the limited additional mitigation evidence concerning Mobley's childhood presented at the evidentiary hearing would not have changed the outcome of Mobley's trial.")).

Preparation of Dr. Kohanski.

Trial counsel hired Dr. Kohanski on July 22, 1997. (HT 3327-3329). Counsel felt that Dr. Kohanski had experience in dealing with "these kind of cases" as an expert. They interviewed Dr. Kohanski, discussed possible mitigation in the event of conviction, informed her of Petitioner's history, gave her documents and records for review and asked for advice and "discussed anything that could be mitigating." (HT 210-211). Further, as set forth above, Dr. Kohanski examined Petitioner, consulted with trial counsel and consulted with a "psychologist/attorney." (HT 3331, 5061-5063, 5322; Tr. T., p. 2437). This Court further finds that as Dr. Kohanski never informed trial counsel that further information was needed to complete her evaluation, (HT 5383, 5053), but, instead, informed trial counsel that they had "truly provided an excellent defense; exploring every single option available to you." (HT 3332), trial counsel's preparation of Dr. Kohanski was not deficient and Petitioner was not prejudiced. (See Head v. Carr, 273 Ga. at 631 (It is not reasonable to put the onus on trial counsel to know what additional information would have assisted a hired expert as "a reasonable lawyer is not expected to have a background in psychiatry or neurology."). This Court also finds that Petitioner's current diagnoses of impaired frontal lobe functioning, which allegedly affects Petitioner's impulsivity and reasoning, and ADHD, would not, if testified to at trial, in light of the facts of this case and the aggravating circumstances presented, in reasonable probability have changed the outcome of Petitioner's trial.

Counsel's Sentencing Phase Presentation

In the sentencing phase of trial, still attempting to show that Co-Defendant Butts was more culpable than Petitioner, defense counsel recalled Sheriff Howard Sills, (Tr. T., p. 2329), who testified that he took a statement from Co-Defendant Butts and that the "gist of that

statement" was Co-Defendant Butts denied he was involved in the murder and armed robbery and only acknowledged that he returned from Macon, Georgia with his uncle and Petitioner. Id. Sheriff Sills testified that Co-Defendant Butts made several other denials, which were clearly lies. (Tr. T., p. 2331). Trial counsel also had Co-Defendant Butts' statement played for the jury, (Tr. T., pp. 2336-2378), and, thereafter, through the testimony of Sheriff Sills pointed out inconsistencies and untruths from Co-Defendant Butts' statement, including his involvement in the crimes and his membership in the FOLKS Gang. (Tr. T., pp. 2337-2340, 2348, 2369, 2364, 2374-2376).

Trial Counsel also called Co-Defendant Butts to testify and questioned him about his alleged statements to inmates that he was the triggerman in the murder of Donovan Parks. (Tr. T., pp. 2384-2387). As trial counsel expected, Co-Defendant Butts repeatedly invoked his Fifth Amendment right to silence.

Trial counsel also called Captain Russell Blenk of the Baldwin County Sheriff's Office who testified, in great detail, concerning Co-Defendant Butts' alleged claims to inmates that Butts was the triggerman. (Tr. T., pp. 2389, 2391-2392).

Trial counsel also called their detective, William Thrasher, (Tr. T., p. 2394), who testified that he previously worked with the Milledgeville Police Department and the Police Officer's Standards and Training Council. (Tr. T., pp. 2394-2395). Mr. Thrasher testified that he was working on Petitioner's case and as part of the investigation he had spoken to Gary Garza, Shawn Holcomb and Horace May, (Tr. T., pp. 2396-2397), and all three informed Mr. Thrasher that Co-Defendant Butts had told them that Butts had shot Donovan Parks. (Tr. T., pp. 2397, 2398, 2401, 2403-2404).

Defense counsel also called Doctor Kohanski, (Tr. T., p. 2412), who testified that she had been qualified as an expert in the area of forensic psychiatry approximately thirty to forty times in the State of Georgia, (Tr. T., p. 2413), and that she had evaluated Petitioner's competency to stand trial and his background for mitigating circumstances. (Tr. T., p. 2414). She testified that she reviewed numerous records concerning Petitioner's background. (Tr. T., p. 2415) Dr. Kohanski told the jury that Petitioner was born three weeks late, one week beyond what is considered normal. (Tr. T., p. 2416). She testified that there were early difficulties, including severe respiratory infections, pneumonia at ages one, three and four, bronchitis and possible sickle cell disease. Id. Trial counsel had Dr. Kohanski testify that Petitioner began to have difficulties in the first grade. (Tr. T., pp. 2415-2416). She testified that the school had identified inappropriate aggressive behavior and conducted their own assessment. (Tr. T., p. 2416). According to Dr. Kohanski, the school found that Petitioner was having difficulty staying on task, had a poor self-image, excessive maternal dependence and the school requested a further medical evaluation to see if there might be some medical cause for Petitioner's behavior. (Tr. T., p. 2416). However, she testified, that the medical evaluation was never conducted, (Tr. T., pp. 2417-2419), because Petitioner's mother failed to follow through on these recommendations. Id.

According to Dr. Kohanski, following the school evaluation, it was believed that Petitioner was suffering from attention deficit hyperactive disorder, but no one ever followed through on that disorder. (Tr. T., p. 2417). Dr. Kohanski also testified that other complications were noted by the school, including that Petitioner came from an "extraordinarily chaotic home-life," that his parents were not together, that he lived in a difficult neighborhood and a difficult environment. (Tr. T., p. 2417-2418). She also testified that Petitioner's mother was Caucasian and his father was African American and that Petitioner had an identity conflict because he was

neither white nor black. (Tr. T., p. 2418). She told the jury that Petitioner's mother provided "little, if any, supervision" in the home and that Petitioner was "basically on his own from age nine on up, on the street." (Tr. T., p. 2418). Dr. Kohanski told the jury that there was no male supervision in the home and that the boyfriends of Petitioner's mother that "came and went, frequently used drugs" and Petitioner's mother denied to Petitioner that any drug use was going on even though he tried to explain to her that the men in their home were using drugs. (Tr. T., p. 2418). Dr. Kohanski testified that Petitioner "had no support in the home; had no guidance; was on the street from age ten" and that his guidance came from "the individuals roaming the streets" whom, she testified, gave little guidance to anyone. (Tr. T., p. 2418). By age nine or ten, Petitioner was on the streets fending for himself with "no structure, no support, no family guidance, nothing." Id.

Dr. Kohanski testified that Petitioner's public school records demonstrated that Petitioner continued to have difficulty as he was easily distracted, had a short attention span, was constantly moving and impulsive. (Tr. T., p. 2418). She testified that this diagnosis was consistent with attention deficit hyperactive disorder. Id. She also testified that the records noted that Petitioner was "having a difficult time with peers." Id.

Dr. Kohanski testified that the records also showed that Petitioner had a chaotic home environment without any male role model. (Tr. T., p. 2419). She testified that the only father figure Petitioner had was a gentleman who was in a common law marriage with his mother and who was "behaving in extremely dangerous ways," including holding a gun to his mother's head when Petitioner was approximately six or seven years old. (Tr. T., p. 2419). Dr. Kohanski testified that this type of violence "was not an uncommon event in that household." Id.

Dr. Kohanski testified that maternal dependence meant that he was "very, very attached to his mom." (Tr. T., p. 2420). She testified that Petitioner's mother could do no wrong in Petitioner's eyes. Id.

Dr. Kohanski testified that, with Petitioner's background, he should never have gone to college or had success in college. (Tr. T., p. 2421).

Dr. Kohanski testified that when Petitioner was sent to Central State Hospital during his incarceration, he was put on antidepressants. (Tr. T., p. 2422). She again testified as to the conflict with Petitioner's color being white when Petitioner considers himself to be African-American. (Tr. T., pp. 2422-2423).

Additionally, through Dr. Kohanski, trial counsel tried to undermine the State's gang evidence by testifying that Petitioner then sought a family that he did not have, gang life, which "provided a family for him that he did not have" "like a police brotherhood, only the brotherhood is the street brotherhood." (Tr. T., p. 2420). She testified that in the gang "they fend for each other; they take care of each other; they have laws that guide each other; they have the structure, something which Marion did not have." (Tr. T., p. 2420).

Trial counsel next called Charlene Cox, Petitioner's mother to testify on Petitioner's behalf, (Tr. T., p. 2441-2442), and had prepared Ms. Cox for her testimony, (HT 220). She testified that Dr. Kohanski's testimony, which she had sat in the courtroom and heard, was an accurate reflection of Petitioner's life in that Petitioner had a difficult time with his identity, that Petitioner's father had nothing to do with him since he was born, and that he had not had any sort of male guidance throughout his entire life. (Tr. T., pp. 2442-2443, 2444-2445). She also asked the jury to spare Petitioner's life so that he could be with his 18-month-old daughter for her own sake. (Tr. T., p. 2445, 2446).

In the sentencing phase closing argument trial counsel argued that Petitioner was not the triggerman, (Tr. T., pp. 2487-2488, 2499-2501, 2504-2506), deserved mercy, and attempted to undermine the evidence regarding the aggravating circumstances, including Petitioner's shooting of Jose Valle and Roy Underwood, the gang evidence, and his prior shooting of a dog. (Tr. T., pp. 2489-2490, 2491-2496). This Court finds that trial counsel's sentencing phase presentation was not deficient.

Further, with regard to the affidavit and witness evidence Petitioner presented to this Court as additional potential mitigating evidence, this Court finds that, even if this evidence had been admissible at trial, there is no reasonable probability that the outcome of the trial would have been different given: (1) the limited nature of the additional, admissible, non-cumulative portions of Petitioner's potentially mitigating testimony; (2) the overwhelming evidence of Petitioner's guilt, including: his statements to law enforcement officers; evidence that Petitioner and Co-Defendant Butts had taken the victim's car after shooting the victim and stopped to purchase gasoline, where Petitioner was observed by witnesses and videotaped by a security camera inside the service station; evidence that Petitioner and Co-Defendant Butts then drove to Atlanta where they contacted Petitioner's cousin in an unsuccessful effort to locate a "chop shop" for disposal of the victim's automobile; evidence that Petitioner and Co-Defendant Butts purchased two gasoline cans at a convenience store in Atlanta and drove to Macon where the victim's automobile was set on fire; and evidence that a sawed-off shotgun was found at Petitioner's residence that was loaded with the type of ammunition used to kill the victim, (see Wilson, 271 Ga. at 812-813); and (3) the evidence in aggravation that was presented to the jury, including: testimony that Petitioner had robbed and shot Jose Valle in 1991, because Petitioner wanted to know what it felt like to shoot somebody, (Tr. T., pp. 2037-2038, 2056-2057, 2086-

2092, 2106-2109); testimony that Petitioner had previously shot Robert Underwood in 1993, (Tr. T., pp. 1916-1919, 1958-1961, 1970-1973); testimony regarding Petitioner's arrest for possession of drugs, (Tr. T., pp. 1994-2009); testimony that Petitioner had previously shot a neighbor's dog for no reason, (Tr. T., pp. 1981, 1988-1993, 2026); evidence regarding Petitioner's juvenile convictions for arson and criminal trespass, (T. 2026-2029); evidence of Petitioner making a death threat, (Tr. T., p. 2048); and evidence of Petitioner's fighting in school and assaulting a correctional officer at the Regional Youth Development Center. (Tr. T., pp. 2121-2125, 2139-2132). [2]

Gang Evidence

Petitioner alleges that trial counsel were ineffective in not objecting to or being able, in some manner, to have the evidence regarding Petitioner's involvement in the FOLKS Gang and evidence concerning the FOLKS Gang excluded from the sentencing phase of Petitioner's trial. This Court finds that the Georgia Supreme Court found this evidence was relevant and admissible in Petitioner's trial. Wilson v. State, 271 Ga. at 814. Therefore, as to relevancy, this

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[2] The Court finds the facts of the instant case to be distinguishable from the far more compelling facts of Rompilla v. Beard, 125 S.Ct. 2456 (2005) and Hall v. McPherson, 284 Ga. 219 (2008). In these two cases, trial counsel failed to locate or to follow up on documentary red flags which would have led to a wealth of mitigating evidence. Additionally, in McPherson, trial counsel also failed to interview McPherson's brother, a Georgia prison inmate and the key witness to McPherson's horrific childhood. Id. at 222-223. In the instant case, the Court finds even had counsel presented the above-referenced witnesses at trial or located the documents Petitioner claims that counsel failed to obtain, the result of Petitioner's sentencing trial would not have been different.

Court finds that Petitioner cannot establish deficiency or prejudice under the Strickland standard and his claim fails. See also Butts v. State, 273 Ga. 760, 768-769, 546 S.E.2d 472 (2001) *citing*, Strickland, 466 U.S. at 687 and Dawson v. Delaware, 503 U.S. 159 (1992).

Further supporting the finding that trial counsel were not deficient and Petitioner not prejudiced are the facts that: prior to trial, trial counsel filed a motion in limine to redact gang references from Petitioner's statement for, at least, the guilt phase of trial, (HT 519-520); in his statement to law enforcement, Petitioner made it clear that he was a member of a gang, was the "Goddamn chief enforcer" of the gang, (HT 222); and trial counsel's investigation supported Petitioner's gang involvement. (HT 222, 224, 498).

This Court further finds that as to the sentencing phase closing argument, trial counsel had no choice but to concede that Petitioner was in a gang and made a reasonable strategic decision to argue in an attempt to undermine Petitioner's gang involvement, as well as arguing mercy, Petitioner's background, Petitioner's defense that he had not been the triggerman and attempting to undermine the State's aggravating evidence. This Court also finds that Petitioner was not prejudiced, particularly when contrasted with the State's evidence in aggravation and the horrendous facts of the crime.

Petitioner also asserts that trial counsel were ineffective for not objecting to the testimony of Ricky Horn and Sheriff Sills as inadmissible based on alleged lack of expertise and inaccuracies. However, this Court finds that Detective Horn qualified as an expert on gangs in Baldwin County. The record establishes that Detective Horn had worked for the Sheriff's Department for 16 years and had been in law enforcement for approximately 20 years. (HT 67). He was very well acquainted with the entire county and its residents. (HT 68). He had also been "collecting intelligence and information" on gangs in Baldwin County for approximately seven

years, had collected information from other law enforcement agencies throughout the State, including officers with Baldwin County and the Georgia Bureau of Investigation, (Tr. T., pp. 2284-2285, 1891), attended seminars, read periodicals from law enforcement, (id.), and conducted his own independent study, including interviewing informants, gang members in Baldwin County and one former FOLKS Gang member from Chicago. (Tr. T., pp. 2285, 2316; HT 37, 39-40, 71-73, 1890, 1893). As found by the Georgia Supreme Court, (Butts v. State, 273 Ga. at 769), Detective Horn easily qualified as an expert on the gangs in Baldwin County. This Court finds that Petitioner failed to establish deficiency or prejudice with regard to trial counsel not objecting to Detective Horn's qualifications or his testimony.

Further, this Court finds that trial counsel were not deficient or Petitioner prejudiced by trial counsel not objecting to the small portion of Sheriff Sills' testimony that Petitioner argues was inadmissible as it was merely cumulative of Ricky Horne's admissible testimony. (Tr. T., pp. 2287-2288, 2296, 2295, 2286).

Regarding hearsay evidence submitted by these witnesses, the Court notes that " an expert . . . may base his opinion on hearsay. The presence of hearsay does not mandate the exclusion of the testimony; rather, the weight given the testimony is a question for the jury." Cheek v. Wainwright, 246 Ga. 171, 174 (3), 269 S.E.2d 443 (1980). See also Roebuck v. State, 277 Ga. 200, 202, 586 S.E.2d 651 (2003). Accordingly, Petitioner has failed to show counsel were deficient. Further, this Court finds, that based on the law and the specific facts of this case, (HT 54-56, 103-104, 108-109; Tr. T., pp. 2249-2251), including Petitioner's own expert and Petitioner acknowledgment that gang members commit crimes to elevate their status, (HT 143, 178), Petitioner has failed to establish prejudice.

At trial, Sheriff Sills and Detective Horn testified that Petitioner was reportedly the leader of the FOLKS Gang in Baldwin County, which they learned from collective law enforcement in the community and informants. (Tr. T., pp. 2273, 2296; HT 110-111, 1817). Detective Horn also testified that there were other sets of FOLKS in Baldwin County with a different leader. (Tr. T., p. 2299). Further, the record before this Court establishes that in an April 15, 1996 statement to his defense team, Petitioner stated he was a "G," the "leader of a set" and the "highest ranking 'G' in Milledgeville." (HT 3071). Petitioner also stated in his statement to law enforcement that he was as high as he could be and could not get any higher within the gang, (Tr. T., p. 2250), and most damaging to his own case is Petitioner's emphatic declaration to law enforcement officers that he was the "Goddamn chief enforcer" of the FOLKS Gang in Baldwin County. (HT 222). Further, during the course of the defense investigation, the defense team learned that Petitioner was the highest "G" in the FOLKS Gang in Milledgeville. (HT 498-499), This Court finds that counsel were not deficient and Petitioner was not prejudiced by trial counsel not attempting to discredit Ricky Horn's testimony that Petitioner was a leader of the FOLKS Gang in Baldwin County as Petitioner failed to establish that Detective Horn's testimony was inaccurate and/or misleading in any manner. (See also HT 122, 224 2246, 2302-2303, 2315, 4436-4438).

As to the accuracy of Detective Horn's testimony concerning how many individuals were in the FOLKS Gang in Baldwin County, this Court finds that Petitioner failed to show deficiency or prejudice, as Detective Horn repeatedly testified before both the trial court and this Court, that the Sheriff's Department's system identified suspected gang members, but did not identify all the gang members in the area. (HT 41, 42-43, 89-90, 93, 1902; Tr. T., pp. 2297, 2306). He further testified that he and others in law enforcement still thought 300 was a conservative number. (HT

43, 89-90; see also HT 171, 175-176, 177, 179-180 (Petitioner's habeas gang expert's testimony corresponding to Horn's testimony)).

As to other criminal acts by gang members, this Court finds that counsel were not deficient or Petitioner prejudiced by trial counsel not objecting or attempting to rebut the testimony of Sheriff Sills and Detective Horn that there were a number of crimes committed in Baldwin County, not necessarily in the capacity of the FOLKS Gang, but people involved in the FOLKS Gang. (Tr. T., pp. 2276, 2294). Detective Horn testified that it would be hard to prove how many crimes were committed by gang members in furtherance of that gang, (Tr. T., pp. 2314-2315), which was also conceded by Dr. Hagedorn. (HT 171).

With regard to counsel not objecting to the specific incidences regarding the jogger and the dry cleaning murder, this Court finds that Petitioner failed to establish deficiency or prejudice as Petitioner was not tied to these incidents by the testimony of Sheriff Sills or Ricky Horn at Petitioner's trial. The testimony was only that these were gang related crimes, and that Petitioner was a part of a gang, not necessarily that set of the gang. (HT 107, 114-115, 116; see also Jackson v. State, 272 Ga. 191, 192, 528 S.E.2d 232 (2000)). Therefore, this Court finds that Petitioner failed to establish deficiency or prejudice with respect to trial counsel not objecting or attempting to rebut this evidence.

Further, as to the testimony of Sheriff Sills and Detective Horn that gang members commit crimes to elevate their status within the gang, this Court finds that Petitioner not only failed to show that this testimony was inaccurate, but Petitioner, in his post-arrest statement, conceded this point as did Dr. Hagedorn. (See, e.g., HT 54-56, 103-104, 108-109, 178; Tr. T., pp. 2249-2251). See also Jackson v. State, *supra* (in which the defendant admitted to robbing store, in which he killed the victim, and told officers that he did this to elevate his ranking in his

street gang.")). Accordingly, trial counsel were not deficient or Petitioner prejudiced by trial counsel not attempting to discredit this testimony.

As to Petitioner's claim that trial counsel were ineffective for not objecting to Detective Horn's testimony that the FOLKS acronym stands for "Followers of Lord King Satan," this Court finds that Petitioner failed to establish that trial counsel were deficient or Petitioner prejudiced as Petitioner did not show that Detective Horn's testimony was inaccurate. (HT 4417). In fact, Detective Horn testified before this Court that he obtained the acronym "Followers of Lord King Satan" from literature he had garnered that was written by gang members, (see, e.g., HT 77, 79, 4417) and probably from seminars. (HT 46, 49, 75-76). Further, both Detective Horn and Petitioner's expert, Dr. Hagedorn, testified that the FOLKS acronym may stand for something different in Milledgeville than it does in Chicago. (HT 49, 147, 199; see also Petitioner's gang notebooks which notes "Forever Our Love Kill Slobs" (Tr. T., pp. 2644, 2668, 2681, 2706).

As to the testimony that gangs in Milledgeville wear colors, this Court finds that Petitioner failed to establish deficiency or prejudice in trial counsel's representation as Petitioner failed to show that this information is inaccurate. (See, e.g., HT 524).

Obtaining an Expert

Petitioner has failed to establish that trial counsel's decision to rely on their psychiatrist, Dr. Renee Kohanski, to rebut the State's gang evidence was deficient or that Petitioner was prejudiced by trial counsel not hiring a gang expert to testify at trial. Mr. Carr testified that they did not consider getting their own gang expert, (HT 254), but chose to have Dr. Kohanski testify that the gang was the only family structure Petitioner had and why this was his family structure based on his background. (HT 223). He further testified that he did not feel there was anything

to be gained by hiring a gang expert other than Dr. Kohanski. (HT 254). In fact a review and comparison of the testimony of Petitioner's newly hired gang expert with the testimony presented at trial shows that trial counsel were not deficient or Petitioner prejudiced by trial counsel making the strategic decision not to hire a gang expert, but to rely on Dr. Kohanski, as Dr. Hagedorn's testimony was, in large part, cumulative of the testimony of Dr. Kohanski and the State's Witness, Ricky Horn. (See, e.g., HT 138, 143, 151, 171, 178-180). This Court finds that the limited additional testimony that Petitioner presented to this Court would not have, in reasonable probability, changed the outcome of Petitioner's trial.

Also supporting the denial of Petitioner's ineffective assistance claim with regard to hiring a gang expert is the fact that Dr. Hagedorn only spoke to Petitioner once over the telephone, (HT 190), conceded he could not testify "with any certainty about the gang situation in Milledgeville," (HT 164), that he had not "done the research here," (HT 164), did not contest that Petitioner said that he was the chief enforcer of the gang, nor Petitioner's declaration that Petitioner could not get any higher within the gang, (HT 179), and, although testifying that "chief enforcer" is not a particularly high rank, (HT 165), he conceded that a term in Chicago could "likely" mean something different in Milledgeville. (HT 199).

Thus, this Court finds that trial counsel were not deficient nor Petitioner prejudiced by trial counsel making a reasonable strategic decision not to hire a defense expert on gangs in addition to the testimony offered by Dr. Kohanski.

Investigative Support

Petitioner had two extremely experienced attorneys working on his case, along with a psychiatrist, a psychologist, an investigator, and a paralegal. (HT 452; 4/11/97 *Ex Parte* Hearing Tr., pp. 8-9; R. 25-27). Petitioner also sought, but was denied, funds for an evaluation by a

sociologist. (R. 33-34; 4/11/97 *Ex Parte* Hearing Tr., pp. 8-9). Instead of hiring a sociologist, defense counsel hired Dr. James Maish to conduct a psychological evaluation, to present Petitioner's background, and essentially to act as a "substitute for a sociologist," (HT 456; see also HT 3510) and Dr. Renee Kohanski, a psychiatrist, to testify at trial concerning mitigation, Petitioner's background and competency. (HT 5054). As part of her examination, Dr. Kohanski informed Mr. O'Donnell that she would conduct a social history, although it would be a cursory one. (HT 5100).

At the time of trial, Petitioner gave defense counsel no reason to believe additional testing was necessary. Petitioner had obtained his GED, (Tr. T., p. 2428), and attended the Georgia Military College in 1994-1995, where he obtained above-average grades. (HT 1085-1086). Petitioner was also able to assist in his defense at trial, (see HT 152, 216-217, 3459-3466, 5346), and assist counsel on appeal. (See HT 3451-3458). Further, Dr. Kohanski did not diagnosis Petitioner with ADHD, (HT 5072), found Petitioner was competent, knew right from wrong, did not act under any delusional compulsion, (Tr. T., p. 2424), found that Petitioner's I.Q. was "at least within the average range of intelligence," (Tr. T., p. 2429), and that Petitioner did not have a history of organic brain damage. (Tr. T., p. 2427; HT 5067). Thus, this Court finds that counsel reasonably declined to request additional funds from the trial court. See Holladay v. Haley, 209 F.3d 1243, 1250 (11th Cir. 2000) ("counsel is not required to seek an independent evaluation when the defendant does not display strong evidence of mental problems."), citing Bertolotti v. Dugger, 883 F.2d 1503, 1511 (11th Cir.1989); see also Baldwin v. Johnson, 152 F.3d 1304, 1314 (11th Cir. 1998) (decision not to pursue psychological testing reasonable when petitioner appeared normal to counsel), *cert. denied*, 526 U.S. 1047 (1999); Stephens v. Kemp, 846 F.2d 642, 653 (11th Cir. 1988).

This Court also finds, as set forth above, that had additional testing been conducted and revealed Petitioner's current diagnoses of impaired frontal lobe functioning, which allegedly affects Petitioner's impulsivity and reasoning, and ADHD, these diagnoses and testimony concerning the diagnoses would not in reasonable probability have changed the outcome of Petitioner's trial.

State's Opening Statement and Closing Statement

This Court finds that trial counsel were not deficient and Petitioner was not prejudiced by trial counsel not objecting to the state's statements and arguments concerning gang evidence as those statements and arguments were all reasonable inferences supported by the evidence submitted at trial and thus, were not improper. (See e.g., Morgan v. State, 267 Ga. 203, 203-204, 476 S.E.2d 747 (1996); Spivey v. State, 253 Ga. 187, 191(4), 319 S.E.2d 420 (1984)).

This Court finds that trial counsel were not deficient and Petitioner was not prejudiced by trial counsel not objecting to the arguments concerning Petitioner's demeanor and lack of remorse as a defendant's lack of remorse is a "permissible area of inquiry and argument during the sentencing phase of a capital trial." Carr v. State, 267 Ga. 547, 559(8)(d), 480 S.E.2d 583 (1997).

This Court finds that trial counsel were not deficient and Petitioner was not prejudiced by trial counsel not objecting to the prosecutor's reference to a Biblical verse, (Tr. T., p. 2484), as the prosecutor did not use a quote from the Bible to urge that the Bible required that Petitioner be sentenced to death. See Greene v. State, 266 Ga. 439, 449, 469 S.E.2d 129 (1996); Pace v. State, 271 Ga. 829(32)(g), 524 S.E.2d 490 (1999).

This Court finds that Petitioner failed to show deficiency or prejudice as to counsel's representation, concerning the State allegedly: commenting on Co-Defendant Butts not giving a

statement, Petitioner's silence, injecting the victim's character or asking the jury to put themselves in the place of the victim. Moreover, this Court notes that counsel previously raised these same claims on direct appeal and the Georgia Supreme Court rejected the basis of Petitioner's claims regarding the State allegedly injecting the victim's character, (Wilson, 271 Ga. 819-820(16)(a)), and asking the jury to put themselves in place of the victim. (Wilson, 271 Ga. 819-820(16)(b)). As to the remaining allegations, the Georgia Supreme Court concluded that these statements "did not in reasonable probability change the result of [Petitioner's] trial." (Wilson, 271 Ga. 820(16)(d)(alleged comment on Petitioner's right to silence and Butts' failure to give a statement)).

Trial Counsel's Sentencing Phase Closing Argument

This Court finds that trial counsel were not deficient and Petitioner not prejudiced by trial counsel's sentencing phase closing argument as trial counsel presented a cohesive and well-reasoned sentencing phase closing argument by arguing that Petitioner was not the triggerman, (Tr. T., pp. 2487-2488, 2499-2501, 2505-2506); by attempting to undermine the aggravating evidence, (Tr. T., p. 2489-2494); and arguing Petitioner's chaotic home life and background, (Tr. T., pp. 2491-2494), in an attempt to mitigate Petitioner's sentence.

Remainder of Petitioner's Ineffective Assistance of Counsel Claims

As to the remainder of Petitioner's ineffective assistance of counsel claims, including, *inter alia*, Petitioner's claims that counsel were deficient and he was prejudiced by counsel not: filing certain pretrial motions to exclude and/or prepare for gang evidence; having Petitioner's statements suppressed or further redacted; ensuring a proper voir dire of the jury; having aggravating evidence of prior assaults excluded; requesting jury instructions on unadjudicated aggravating circumstances; arguing disproportionality of Petitioner's sentence; challenging lethal

injection; challenging the non-bifurcated trial; raising juror misconduct claims; challenging the Unified Appeal Procedure; and researching circumstantial evidence law, this Court finds that Petitioner has failed to establish the requisite deficiency or prejudice with regard to any of Petitioner's ineffective assistance of counsel claims.

D. SENTENCING PHASE JURY INSTRUCTIONS

Petitioner's claims concerning the trial court's sentencing phase instructions are properly before this Court as such claims cannot be procedurally defaulted. Head v. Hill, 277 Ga. 255, 265, 587 S.E.2d 613 (2003).

This Court finds that the trial court's charge concerning the definition of mitigating circumstances was proper, (see Tr. T., pp. 2508-2511), as the jury need not be instructed as to specific standards for considering mitigating circumstances so long as the jury is allowed and instructed to consider the evidence in mitigation and is instructed that it has a discretion, notwithstanding proof of aggravating circumstances, to impose a life sentence. McClain v. State, 267 Ga. 378, 386(6), 477 S.E.2d 814 (1996); Peek v. State, 784 F.2d 1479 (11th Cir. 1986), en banc; Spivey v. State, 241 Ga. 477, 481, 246 S.E.2d 288 (1978). Petitioner's claim is denied.

This Court finds that the trial court properly charged the jury that their sentencing phase verdict must be unanimous. See, e.g., Harris v. State, 263 Ga. 526, 528(6), 435 S.E.2d 669 (1993). "Although a pre-deliberation charge on unanimity is proper, informing the jury in such a charge of the consequences of a failure to achieve unanimity is disapproved." Id. In fact, such a charge is not a proper statement of the law as any verdict returned by the jury as to sentence must be returned unanimously. See Tharpe v. State, 262 Ga. 110, 416 S.E.2d 78 (1992). Petitioner's claim is denied.

Petitioner has argued, in very general terms that the instructions regarding the definitions of sentences was so ambiguous it should have been objected to by trial counsel. This Court finds that the trial court's charge, (See Tr. T., pp. 2511-2513), was adequate and unambiguously defined each sentencing option in direct accordance with Georgia law. (See O.C.G.A. § 17-10-16; O.C.G.A. § 17-10-31.1). Petitioner's claim is denied.

IV. DISPOSITION

This Court hereby DENIES Petitioner's habeas corpus petition in its entirety. The clerk is instructed to serve this order on all counsel of record and habeas clerk for the Council of Superior Court Judges.

. This 25th day of Nov., 2008.

EDWARD D. LUKEMIRE
Judge of Superior Court sitting by
designation in Butts County Superior Court

ATTACHMENT B

SUPREME COURT OF GEORGIA
Case No. S09E0796

Atlanta, May 03, 2010

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

MARION WILSON, JR. v. WILLIAM TERRY, WARDEN

From the Superior Court of Butts County.

Upon consideration of the Application for Certificate of Probable Cause to appeal the denial of habeas corpus, it is ordered that it be hereby denied. All the Justices concur.

Trial Court Case No. 2001V38

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

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

Pamela M. Smith, Deputy Clerk

ATTACHMENT C

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

MARION WILSON, JR., EF-384422

PETITIONER, C.A. NO. 2001-V-38

VS.

DERRICK SCHOFIELD, WARDEN, EVIDENTIARY HEARING
GEORGIA DIAGNOSTIC &
CLASSIFICATION PRISON,

RESPONDENT.

TRANSCRIPT OF PROCEEDINGS

IN THE ABOVE CAPTIONED CASE, HEARD BEFORE THE HONORABLE EDWARD D. LUKEMIRE, JUDGE, HOUSTON JUDICIAL CIRCUIT, SITTING BY DESIGNATION IN BUTTS COUNTY SUPERIOR COURT FEBRUARY 22 AND 23, 2005

A P P E A R A N C E S:

FOR THE PETITIONER:

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GABRIELLE E. BINA
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MARIE HARVIL
CCR B-955

VOLUME 12

RESPONDENT'S EXHIBITS 100-172

Res. Ex. No. 65
Case No. 5:10-CV-489

Marion Wilson Juror Interviews

Juror: James Baugh
Date: 7/22/98
Interviewer: Tamar Todd
Witness: Kerry Dunn

Familiarity with Case Beforehand:

He hadn't heard of the case or anyone involved with it before the trial. Afterward he asked his parents what they'd heard during the trial, but he doesn't think they knew anything about the case beforehand.

Familiarity with Those Involved:

His family supported Sheriff Massee in the election. Year's ago, Massee helped his family when some things were stolen from their house.

A friend's brother is deputy Al Martinez, but he doesn't think he was part of the trial.

Other Jury Experience:

Sat on a civil case.

Jury:

The jurors got along pretty well, pretty cozy and cheerful. There was a lot of small talk about things like dreading how long the trial would last, where they would go to eat, themselves.

Guilt/Innocence Deliberations:

He was surprised at how quick and unanimous the decision was. They elected a foreperson and held a secret ballot to see where people were. Some people had questions about two of the charges, should he be guilty of murder or felony murder. The people who held back on the first vote were just waiting for further discussion on this issue. Then they were unanimous.

He was one of the people who abstained on the first vote because he wanted to talk through it. The other charges were straight forward--Marion didn't deny shotgun was his, had him with the car, videotape and statements put him at the scene--so they had felony murder. The only question in his mind was whether it was premeditated.

The guilt clincher for Baugh was the fact that they left their car and went with Parks with weapons, and that they knew him. They wouldn't rob someone they knew and then let him live.

Marion Wilson Juror Interviews

Juror: Christopher Hendley **(Alternate)**
Date: 7/25/98
Interviewer: Tamar Todd
Witness: Kerry Dunn

Familiarity with Case Beforehand:

He doesn't get the newspaper so he hadn't heard of it at all. He may have heard the name before, it was vaguely familiar. He doesn't know if his family followed along during the trial.

Familiarity with Those Involved:

He didn't know any name they asked him about in voir dire. He had just moved to Milledgeville a couple of months before. Didn't know any of the other jurors. One, Mr. Spivey, is the father of a son that goes to school with his son, but he didn't know him before. He has seen Kay Simpson, Linda Hewette and Mr. Hobby since the trial a couple of times at First Baptist church.

He works at the college where Marion was caught for trespassing, but he didn't know about that incident before the trial.

Other Jury Experience:

Had never been on a jury before. It was a positive experience. He enjoyed seeing the process, it was much like he expected.

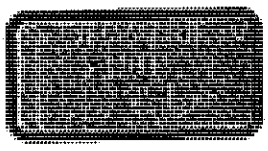
Jury:

The jurors had a lot in common, same morals or ethical makeup. The jurors didn't talk about the case. He understands the decisions were very unanimous. He doesn't remember where he heard that. They got a long real well, never any discontent. The had pleasant meals, sat in groups and some people floated. He ate with different people and got to know everybody a little bit. It was all surface conversation. He didn't ask too much about people's lives. They didn't know what they could and couldn't talk about so they were extra careful.

Guilt/Innocence Deliberations:

The alternates were ushered into a separate room. He just read. They didn't talk about the first phase. He was stunned it took such a short time.

The guilt evidence he thought was important was the coldness of the defendant and of the crime. There was pure and obvious intent--he saw that from the sequence of events. He felt toward the end how he would vote guilty if he was made a juror.



Marion Wilson Juror Interviews

Juror: Frank Hobby
Date: 7/20/98
Interviewer: Tamar Todd
Witness: Kerry Dunn

Familiarity with case beforehand:

Had read about it in the newspaper.

Familiarity with those involved:

Mr. Hobby had seen Parks at the grocery store where he works the day before and had a good impression of him. "nice boy" He remembers seeing "Don Parks" on his name tag. Didn't know Marion.

All of the jurors were familiar with the Walmart, Winn Dixie, area, Macon.

He knows all of the lawyers. He grew up with Carr and had some professional contacts with O'Donnell. He knew DA from sight. He has no bad feelings toward any of the lawyers.

He didn't know any of the other jurors and hasn't seen any of them since. He has seen Chris Hendley, an alternate, a few times at church.

Other Jury Experience:

He's been on juries before, mostly civil, one felony rape, one assault. He takes his civic responsibility very seriously.

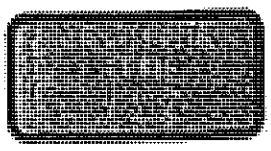
Jury:

The jury was cordial, compatible. There was no animosity or decisiveness. He was surprised at the youth of some of the jurors.

Guilt/Innocence Deliberations:

First order of business was to select a foreperson. Then they went around the room and gave their individual verdicts. Then they did a secret ballot and an official final secret ballot--it was unanimous. Everybody was free to discuss. There was a good bit of discussion, but the deliberations did not take long.

They talked about whether it mattered if Marion or Butts pulled the trigger. Nobody really disagreed that Marion's participation made him guilty, but they did discuss it. They also discussed the heinousness of the crime. Everybody took their responsibility quite seriously.



In the first couple of days she had doubts about guilt. She was torn, thought maybe he was just there but didn't do anything. She doesn't know what turned her around. At deliberations, she felt he was the mastermind. Maybe he didn't pull the trigger, but he gave the ok. Others felt the same way too by the time they voted.

When they first got in there, they didn't know what they were supposed to do. One woman who mingled and got along with everybody was chosen as foreperson. She said to take a vote so they did by secret ballot. The first vote was all guilty except two who held back because of minor points. Nobody else had any doubts. It didn't take very long, about an hour, and most of that tiem was spent just getting organized.

People mentioned that the first day or so they were torn, but as more testimony came out things became clearer.

Sentencing Deliberations:

Also didn't take long. Some of them went through the evidence, the gang notebooks. People were milling about, putting it off because they knew what they had to do. They talked about how creative Marion is. Someone held up one of the pictures of the victim and said they had to keep this in mind. Foreperson told everyone to get together and to see if anyone had anything to say. People got a little emotional. They didn't want to to it. It was hard, but she didn't hesitate. She knew it was the right thing to do. They voted and it was 11-1. The one who voted for life was a black woman around 26. They asked her why she voted this way. She said she recently was saved and can't sit, judge this man, and cost him his life. She had been bad when she was younger and somebody showed her the way. Someone could show him the way.

Soemone said that it could take years until he is actually executed. She stuck to her point, that she was not supposed to judge. They kept talking, everyone put their two cents in.. The holdout made her own decision. Kay thought they would be there a long time because the holdout's opinion was strong. People talked about the fact that Marion would be powerful in prison because of the gang. She probably saw they were right. Soemone brought up the innocence of tje victim again. They said they were not their to pressure her, because they all would have to say they came to the decision freely. Eventually, she said ok.

One of the younger men said he hated having to be there, but in his heart knew Marion was guilty.

At first she thought he was just a nice looking kid who was in the wrong place at the wrong time. But as more things came out about priors (she named Underwood, neighbor whose mother was threatened), people he was involved with she realized he was not as innocent as he looked. They showed a picture of him with his hair braided--he looked real tough and mean. So the jurors thought the lawyers had cleaned him up for trial. But then in the video the girl at the cash register notices that he had a haircut.

Everybody felt he was really a cold person. He threatened that old lady. He had several

ATTACHMENT D

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

MARION WILSON, JR., EF-384422

PETITIONER, C.A. NO. 2001-V-38

VS.

DERRICK SCHOFIELD, WARDEN, GEORGIA DIAGNOSTIC & CLASSIFICATION PRISON, EVIDENTIARY HEARING

RESPONDENT.

TRANSCRIPT OF PROCEEDINGS

IN THE ABOVE CAPTIONED CASE, HEARD BEFORE THE HONORABLE EDWARD D. LUKEMIRE, JUDGE, HOUSTON JUDICIAL CIRCUIT, SITTING BY DESIGNATION IN BUTTS COUNTY SUPERIOR COURT FEBRUARY 22 AND 23, 2005

A P P E A R A N C E S:

FOR THE PETITIONER:

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MARIE HARVIL
CCR B-955

VOLUME 12

RESPONDENT'S EXHIBITS 100-172

Res. Ex. No. 65
Case No. 5:10-CV-489

Marion Wilson Juror Interviews

Juror: Linda Hewette
Date: 7/21/98
Interviewer: Tamar Todd
Witness: Kerry Dunn

Familiarity with Case Beforehand:

Familiarity with Those Involved:

Linda has known Mr. Hobby off and on for years. She has seen Hendley and Garnto since the trial.

She was surprised when they read the long list of witnesses. It didn't always matter if you knew someone. Everybody knows somebody who works at a prison.

Some of the young black women on the jury knew some of the gang members. They shared some things with the other jurors--that they knew so and so who knew so and so. They knew people who'd been around the same neighborhood as the gang members.

Other Jury Experience:

She's been on two juries in the past--one was a boy at YDC, she doesn't remember the other.

She didn't want to be on the jury because she is a single parent. The judge wouldn't let her off and her son had to stay with friends for the week.

Jury:

There was a wide variety of people on the jury.

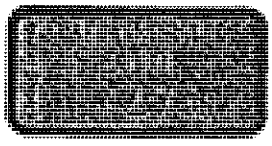
Ms. Garnto (foreperson) didn't mind doing things, getting things started, and leading discussions.

Jury didn't get to ask any questions. Somebody said once they wished they could have known "x."

The young black women hung out mostly with Ms. Garnto. Linda hung out with an alternate, Baugh, Hendley, and the mechanic at breakfast. Butts didn't mingle. She didn't see any of them after the trial.

Guilt/Innocence Deliberations:

There wasn't any question that he was guilty. They talked a little about who pulled the trigger and whether that mattered. Being at Walmart with a gun under his coat was a biggie



ATTACHMENT E

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

MARION WILSON, JR., EF-384422

PETITIONER,

C.A. NO. 2001-V-38

VS.

DERRICK SCHOFIELD, WARDEN,
GEORGIA DIAGNOSTIC &
CLASSIFICATION PRISON,

EVIDENTIARY HEARING

RESPONDENT.

TRANSCRIPT OF PROCEEDINGS

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VOLUME 12

RESPONDENT'S EXHIBITS 100-172

Res. Ex. No. 65
Case No. 5:10-CV-489

guilt/death (it was a little hard to tell if he was talking about verdict or sentence here).

Evidence was overwhelming. Girl seeing them at Walmart, receipt for gum right after Parks, video from gas station just moments after murder--so much evidence. The gun had to be at close range because the casing went into the victim's head. It would all have to be an awesome coincidence. The ammo was very rare, according to the experts from GBI. They told us there would be more evidence in the sentencing phase. People didn't really talk about the sentence during the guilt deliberations. Death penalty is in the back of your mind the whole time.

Sentencing Deliberations:

People were crying. It was horrible. He thinks they came to the right decision.

One person said they couldn't do it. A couple women had reservations. The rest said they had to make up their own minds, that they wouldn't pressure them. The deliberated for about 2.5 hours. She said she didn't want him to die. Shrewsbury told her Marion would get appeals--Marion might outlive him. They didn't want anyone to die, but Marion took somebody's life--they had already decided that. Finally, she (they) said they could do it. The other jurors told them to make sure because once it's done, it's done.

He didn't want someone who cared so little about human life in their community.

They could have picked life, but an overwhelming majority chose death, which is sad. Shrewsbury is sad we (society) let him down when he was young. We dropped the ball on this one. But he went too far for anyone to help him.

He knows a little about prisons because his wife works in one. He doesn't even like to go there to drop something off for her.

Sentencing evidence only took one day. After hearing all of the sentencing evidence, he pretty much knew his decision when he walked in the deliberations room. Marion committed the crime so the death penalty was warranted.

Mitigation:

The expert was good--the only thing the defense had going for them. The mom has problems, not a great individual, and is not such a believable person. The fact that Marion is bi-racial had nothing to do with Shrewsbury's decision--he was human, was born. Marion's father never had anything to do with him. Marion got in with these people. Violence became a way of life. By the time the jurors got to him, it was too late. Shrewsbury would have tried to help if he had been around when Marion was young.

If Marion had testified and said he was sorry, that he didn't want to die, 12 people wouldn't have sentenced him to death.

IN THE SUPERIOR COURT OF BALDWIN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	*	
	*	Criminal Action No. 39249B
v.	*	
	*	
MARION WILSON, JR.,	*	
	*	
Defendant.	*	

ORDER DENYING DEFENDANT'S EXTRAORDINARY MOTION FOR NEW TRIAL

Defendant has filed an extraordinary motion for new trial and seeks DNA testing on a necktie introduced as evidence during his trial for the murder of Donovan Parks. O.C.G.A. § 5-5-41 allows the filing of an extraordinary motion for new trial outside the 30-day window for motion for new trials based on extraordinary circumstances. The Court finds that Defendant cannot establish: "the requested DNA testing would raise a reasonable probability that [Defendant] 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"; the identity of the perpetrator of the crimes was a significant issue at trial; or that his motion, filed at this late hour, is not for the purpose of delay. O.C.G.A. § 5-5-41(c)(3)(D). His motion is DENIED.

PROCEDURAL HISTORY

Defendant, Marion Murdock Wilson, Jr., was tried before a jury October 27, 1997 through November 7, 1997 and convicted of the malice murder of Donovan Parks, the felony murder of Donovan Parks, the armed robbery of Donovan Parks, hijacking a motor vehicle, possession of a firearm during the commission of a crime, and possession of a sawed-off shotgun. (R. 13-15, 966). The jury found as a statutory aggravating circumstance that the offense of murder was committed while the offender was engaged in the commission of another capital felony, armed robbery, (R. 965), and, following the mandatory recommendation of the jury, the trial court sentenced Defendant to death on November 7, 1997. (R. 964, 968).[1] The Supreme Court of Georgia affirmed Defendant's convictions and sentences on November 1, 1999. *Wilson v. State*, 271 Ga. 811, 525 S.E.2d 339 (1999), *cert denied, Wilson v. Georgia*, 531 U.S. 838 (2000), *reh'g denied*, 531 U.S. 1030 (2000).

Defendant filed his state habeas corpus petition on January 19, 2001. On December 1, 2008, the state habeas court denied relief. The Georgia Supreme Court denied Defendant's certificate for probable

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[1] Defendant's co-defendant Robert Butts was also convicted of malice murder, sentenced to death and executed on May 4, 2018.

cause to appeal. The United States Supreme Court denied certiorari review on December 6, 2010. *Wilson v. Terry*, 562 U.S. 1093 (2010).

Defendant then filed a federal habeas corpus petition on December 15, 2010. On December 19, 2013, the district court denied relief. *Wilson v. Humphrey*, No. 5:10-CV-489, 2013 U.S. Dist. LEXIS 178241 (M.D. Ga. Dec. 19, 2013). The Eleventh Circuit Court of Appeals affirmed the denial of relief. *Wilson v. Warden*, 898 F.3d. 1314 (11th Cir. 2018). Defendant again applied for certiorari review on March 12, 2019. That petition was denied May 28, 2019. *Wilson v. Ford*, 587 U.S. ___ (2019).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

O.C.G.A. § 5-5-41(c) specifically governs requests for DNA testing and 5-5-41(c)(6)(A) necessitates defendants satisfy certain pre-requisites before a hearing is required. O.C.G.A. § 5-5-41(c) "requires a trial court to conduct a hearing *only* if a defendant's motion 'complies with the requirements of paragraphs (3) and (4)' of the statute." *Crawford*, 278 Ga. at 96 (emphasis added). After review, this Court finds that the Defendant cannot establish the necessary showing for O.C.G.A. § 5-5-41(c)(3)(C-D) and (c)(4)(A).

A. O.C.G.A. § 5-5-41(c)(3)(D).

The Court finds that Defendant failed to meet the requirements of O.C.G.A. § 5-5-41(c)(3)(D), that "the requested DNA testing would raise

a reasonable probability that the Defendant *would have been acquitted* if the results of the DNA testing had been available at the time of the conviction, *in light of all the evidence in the case.*" (Emphasis added). Assuming the tie was tested and determined to have Butts's DNA on it, this would not acquit Defendant. It was established by video-taped evidence and eyewitness testimony that Defendant had on gloves on the night of the murder. (T. 1450-51). Accordingly, the lack of his DNA or the presence of Butts's DNA on the tie would not acquit Defendant. This is true particularly in light of the evidence that establishes Defendant's guilt. On direct appeal, the Georgia Supreme Court found that the evidence at trial established the following facts:

> ... on the night of March 28, 1996, the victim, Donovan Corey Parks, entered a local Wal-Mart to purchase cat food, leaving his 1992 Acura Vigor parked in the fire lane directly in front of the store. Witnesses observed Wilson and Robert Earl Butts standing behind Parks in one of the store's checkout lines and, shortly thereafter, speaking with Parks beside his automobile. A witness overheard Butts ask Parks for a ride, and several witnesses observed Wilson and Butts entering Parks's automobile, Butts in the front passenger seat and Wilson in the back seat. Minutes later, Parks's body was discovered lying face down on a residential street. Nearby residents testified to hearing a loud noise they had assumed to be a backfiring engine and to seeing the headlights of a vehicle driving from the scene. On the night of the murder, law enforcement officers took inventory of the vehicles in the Wal-Mart parking lot. Butts's automobile was among the vehicles remaining in the lot overnight. Based upon the statements of witnesses at the Wal-Mart, Wilson was arrested. A search of Wilson's residence yielded a sawed-off

shotgun loaded with the type of ammunition used to kill Parks, three notebooks of handwritten gang "creeds," secret alphabets, symbols, and lexicons, and a photo of a young man displaying a gang hand sign.

Wilson gave several statements to law enforcement officers and rode in an automobile with officers indicating stops he and Butts had made in the victim's automobile after the murder. According to Wilson's statements, Butts had pulled out a sawed-off shotgun, had ordered Parks to drive to and then stop on Felton Drive, had ordered Parks to exit the automobile and lie on the ground, and had shot Parks once in the back of the head. Wilson and Butts then drove the victim's automobile to Gray where they stopped to purchase gasoline. Wilson, who was wearing gloves, was observed by witnesses and videotaped by a security camera inside the service station. Wilson and Butts then drove to Atlanta where they contacted Wilson's cousin in an unsuccessful effort to locate a "chop shop" for disposal of the victim's automobile. Wilson and Butts purchased two gasoline cans at a convenience store in Atlanta and drove to Macon where the victim's automobile was set on fire. Butts then called his uncle and arranged a ride back to the Milledgeville Wal-Mart where Butts and Wilson retrieved Butts's automobile.

Viewed in the light most favorable to the verdict, we find that the evidence introduced at trial was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that Wilson was guilty of the crimes of which he was convicted and to find beyond a reasonable doubt the existence of a statutory aggravating circumstance. *Jackson v. Virginia*, 443 U.S. 307 (99 S. Ct. 2781, 61 L. Ed. 2d 560) (1979); O.C.G.A. § 17-10-30(b)(2). The State was not required to prove that Wilson was "the triggerman" in order to prove him guilty of malice murder. Even assuming that Wilson did not shoot the victim, there is sufficient evidence that he intentionally aided or abetted the commission of the murder or that he intentionally advised, encouraged, or procured another to commit the murder to support a finding of guilt. []

Wilson, 271 Ga. at 812-13.

Defendant also argues that this testing could have precluded a death sentence. (Motion, p. 23). However, under the current procedural posture, this is not the standard. Defendant must first show his "motion 'complies with the requirements of paragraphs (3) and (4)' of the statute." *Crawford*, 278 Ga. at 96 (emphasis added). The standard is "[t]he requested DNA testing would raise a reasonable probability that the petitioner would have been *acquitted*...." O.C.G.A. § 5-5-41(c)(3)(D). However, even if the testing was conducted and Butts's DNA was on the tie, in light of the evidence presented at trial, there is no reasonable probability of a different sentencing verdict.

As to sentencing, the record also establishes that, during the penalty phase of trial, the State called a number of witnesses in aggravation of punishment to show that, although Defendant was only 21, he had an extensive, violent criminal history. As found by the district court:

> [T]rial counsel learned that the State could potentially present 39 witnesses to testify about 27 aggravating circumstances during the sentencing phase of Wilson's trial. [] These aggravating circumstances included crimes Wilson committed as an adult while living in Baldwin County and his membership/leadership in a gang. [] Also included were numerous crimes Wilson committed, or was accused of committing, when he was a juvenile living with his mother in Glynn and McIntosh Counties. [] The number of witnesses in

> aggravation ultimately increased to 72 and the number of aggravating circumstances rose to 29. []

Wilson v. Humphrey, 2013 U.S. Dist. LEXIS 178241, at *41 n.13. The Court notes that Defendant's criminal history is so extensive it elicited a special concurrence from Chief Judge Carnes of the Eleventh Circuit:

> Wilson's wholehearted commitment to antisocial and violent conduct from the age of 12 on not only serves as a heavy weight on the aggravating side of the scale, it also renders essentially worthless some of the newly proffered mitigating circumstance evidence. ...For example, a number of Wilson's teachers signed affidavits, carefully crafted by his present counsel, claiming that Wilson was "a sweet, sweet boy with so much potential," a "very likeable child," who was "creative and intelligent," and had a "tender and good side." One even said that Wilson "loved being hugged." A sweet, sensitive, tender, and hug-seeking youth does not commit arson, kill a helpless dog, respond to a son's plea to quit harassing his elderly mother with a threat "to blow . . . that old bitch's head off," shoot a migrant worker just because he "wanted to see what it felt like to shoot someone," assault a youth detention official, shoot another man in the head and just casually walk off—all before he was old enough to vote. Without provocation Wilson shot a human being when he was fifteen, shot a second one when he was sixteen, and robbed and shot to death a third one when he was nineteen. ...

Wilson v. Warden, 774 F.3d at 683.

Thus, 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. In fact, following the guilt phase closing arguments, the jury found Defendant guilty of malice murder in approximately one hour and a half. (T. 1907). When trial

counsel spoke to the jurors after the trial, some of the jurors commented on how quickly they were able to reach a unanimous decision as to Defendant's guilt. (State's Attachment C); *see also* State's Attachment D, juror comment: "There wasn't any question that he was guilty."; State's Attachment E, juror comment: "Evidence was overwhelming.").

There is no reasonable probability that Defendant would have been acquitted if the results of the DNA testing had been available at the time of the conviction, *in light of all the evidence in the case*" or not sentenced to death. (Emphasis added).

B. O.C.G.A. § 5-5-41(c)(3)(C).

The Court also finds that Defendant failed to meet the requirements of O.C.G.A. § 5-5-41(c)(3)(C), which mandates that he show "the identity of the perpetrator, was, or should have been, a *significant* issue in the case." (Emphasis supplied). The identity of the perpetrators in this case was never a significant issue. The question posed by Defendant at trial was who actually held the gun and fired the fatal shot into Parks's head. That issue was addressed on direct appeal. *Wilson*, 271 Ga. at 813 (State was not required to prove Defendant triggerman for malice murder, sufficient evidence showed "he intentionally aided or abetted the commission of the murder or that

he intentionally advised, encouraged, or procured another to commit the murder to support a finding of guilt").

C. O.C.G.A. § 5-5-41(c)(4)(A)

The Court also finds that the motion is filed for the purpose of delay. Most telling, Defendant filed the current motion 22 years after his conviction, but only one day prior to the United States Supreme Court conferenced his petition for certiorari review.

Further, Defendant was tried in 1997. At the time, DNA testing was available, but not requested by Defendant. *See* Defendant's Exhibit B, pp. 3-4, ¶ 13. During his state habeas proceedings, lasting from 2001-2008, Defendant conducted discovery and hired experts, but never requested the testing of any items for potential DNA. Defendant's new expert states in his affidavit that during this time touch DNA was available to Defendant. *See* Defendant's Exhibit B, p. 4, ¶ 15 (touch DNA testing available, eleven years ago, in 2008).

In the federal district court proceedings, which lasted until 2014, Defendant requested the opportunity for a hearing and for discovery and for expert assistance to present his claims. However, he did not request DNA testing or present any experts to assert DNA testing should be conducted. Clearly, this testing was available at that time.

Defendant's own expert concedes that all the DNA testing Defendant now seeks has been available for years. *See* Defendant's

Appendix B. Yet, Defendant has never sought this testing. It is only now, once all his appeals have been completed and an execution warrant is imminent, that he seeks DNA testing.

CONCLUSION

Defendant's extraordinary motion for new trial is denied.

SO ORDERED, this __ day of _____, 2019.

_____
William A. Prior, Jr., Chief Judge
Ocmulgee Judicial Circuit

Prepared by:

Allison T. Martin
Chief Assistant District Attorney

CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2019, I served this brief by mailing a copy of the brief and proposed order, contemporaneously with or before filing, to be delivered by the United States Postal Service, addressed as follows:

Marcia A. Widder
Georgia Resource Center
303 Elizabeth Street
Atlanta, Georgia 30307

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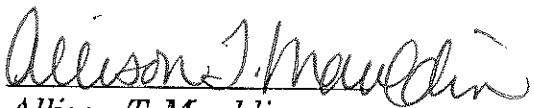

Allison T. Mauldin

Appendix G

GEORGIA RESOURCE CENTER
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May 29, 2019

Hon. William A. Prior, Jr., Chief Judge
Ocmulgee Judicial Circuit
P.O. Box 728
Madison, GA 30650
By email to: bonnerm@eighthdistrict.org and regular mail

Re: *State v. Marion Wilson*, Criminal Action No. 39249B

Dear Judge Prior:

Along with Brian Kammer, Esq., I represent the defendant, Marion Wilson, in the above-referenced matter, which is currently pending before your Honor by virtue of an Extraordinary Motion for New Trial filed on May 22, 2019. Yesterday, the State filed a response in opposition.

Please be advised that Mr. Wilson intends to file a reply brief in support of his motion. Because both Mr. Kammer and I currently have an intervening deadline of June 3, 2019, in a capital habeas case pending in the Southern District of Georgia (*King v. Warden*, No. 2:12-cv-00119 (S.D.Ga.)), we will plan to file our reply brief no later than two weeks from the date the State filed its opposition, *i.e.*, on or before June 11, 2019.

I appreciate your Honor's consideration of the foregoing.

Respectfully,

Marcia A. Widder

Marcia A. Widder
Counsel for Marion Wilson

cc: Beth Burton, Deputy Attorney General (by email)
Stephen Bradley, District Attorney (by email)
Brian S. Kammer, Esq. (by email)

Appendix H

IN THE SUPREME COURT OF GEORGIA

MARION WILSON, JR.,	)	
Applicant,	)	Case No. S19W1323
	)	
vs.	)	Baldwin County
	)	No. 39249B
STATE OF GEORGIA,	)	

EXECUTION SCHEDULED
JUNE 20, 2019 @ 7:00PM

CONSOLIDATED APPLICATION TO APPEAL DENIAL OF EXTRAORDINARY MOTION FOR NEW TRIAL AND MOTION FOR STAY OF EXECUTION

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TABLE OF CONTENTS

INTRODUCTION 3

PROCEDURAL HISTORY 10

FACTUAL BACKGROUND 13

REASONS TO GRANT THE APPLICATION 17

A. The Trial Court Erred in Denying the EMNT Without a Hearing, on the Basis of a Finding of Intentional Delay. 19

B. The Trial Court Erred in Finding That Mr. Wilson Failed to Show That the Identity of the Perpetrator Was, or Should Have Been, a Significant Issue in the Case. 19

C. The Trial Court Erred in Finding that the Requested DNA Testing Would Not Raise a Reasonable Probability That Mr. Wilson Would Have Been Acquitted or Received a Sentence Less Than Death if the Results of the DNA Testing Had Been Available at the Time of Trial. 21

1. The Proposed Testing is Reasonably Likely to Reveal Who Shot Donovan Parks. 22

2. In Light of the Evidence Presented, the DNA Evidence Raises a Reasonable Probability that Mr. Wilson Would Have Been Acquitted or Received a Sentence Less Than Death. 22

CONCLUSION 24

CERTIFICATE OF SERVICE 26

IN THE SUPREME COURT OF GEORGIA

MARION WILSON, JR.,	)	
Applicant,	)	Case No. S19W1323
	)	
vs.	)	Baldwin County
	)	No. 39249B
STATE OF GEORGIA,	)	

EXECUTION SCHEDULED
JUNE 20, 2019 @ 7:00PM

CONSOLIDATED APPLICATION TO APPEAL DENIAL OF EXTRAORDINARY MOTION FOR NEW TRIAL AND MOTION FOR STAY OF EXECUTION

Applicant, MARION WILSON, JR., respectfully petitions this Court for a stay of execution and leave to appeal, pursuant to O.C.G.A. § 5-6-35(a)(7), from the final judgment and Order Denying Defendant's Extraordinary Motion for New Trial ("EMNT") entered by the Superior Court of Baldwin County, Honorable William A. Prior, on May 30, 2019 (attached hereto as Appendix A) (hereinafter referred to as "Order").[1]

[1] The transcript of the trial in *Wilson v. State* will be referenced as "T [page number]." Pretrial transcripts will be referenced as "PT ([date]) [page number]." The transcript of the trial in *Butts v. State*, Baldwin County Criminal Case No. 39183, will be referenced as "Butts T [page number]." The transcript of habeas corpus proceedings in *Wilson v. Hall*, Butts Co. Superior Court Case No. 2001-V-38 will be referenced as "H [page number]."

This is a death penalty case. This Court, rather than the Court of Appeals, has jurisdiction of this appeal from the denial of an EMNT. *Crawford v. State*, 278 Ga. 95, 97 (2004).

Mr. Wilson will not reiterate the entire factual basis for his EMNT, but incorporates herein those allegations and the supporting evidence and testimony by this reference and by additional specific references to follow. This Application will address why the lower court's denial of the EMNT was erroneous and why this Court should grant Mr. Wilson's Application to Appeal.

INTRODUCTION

When Mr. Wilson and his co-defendant Robert Butts were convicted of malice murder and sentenced to death in separate trials conducted, respectively, in 1997 and 1998, science was not sufficiently advanced to permit forensic testing of minute quantities of deoxyribonucleic acid (DNA), such as epithelial cells left on evidence through touch. Thus, when the prosecutor argued at Mr. Wilson's trial that Mr. Wilson was guilty of malice murder and deserved the death penalty because he was the individual who pulled the victim, Donovan Parks, by his necktie from Mr. Parks's car, forced him to the ground, and shot him once in the head with a sawed-off shotgun—an argument based *solely* on the tightness and position of the necktie on the victim's neck, and the locations of Mr. Wilson and Butt in the car—there was

no means to test the validity of that claim by determining whose DNA, if any, is on the necktie.[2] Now there is.

Mr. Wilson accordingly moved below for DNA testing of State's Exhibit 11, the necktie worn by Mr. Parks and used by the prosecutor to convince the jury that Mr. Wilson was guilty of malice murder and to sentence him to death. The lower court denied the motion—without first conducting a hearing, in direct contravention of O.C.G.A. § 5-5-41(c) *et seq*., and, indeed, without even providing Mr. Wilson an opportunity to respond to the State's arguments against testing, in violation of Mr. Wilson's right to procedural due process under the state and federal constitutions. This Court's intervention is necessary to prevent a grave injustice.

Although only one of the defendants could have fired the shot that killed Mr. Parks, the prosecutor separately argued to each jury that the defendant they were trying was the shooter and accordingly deserved the death penalty. In Mr. Wilson's case, the necktie was critical to this argument. The prosecutor relied on it to argue that Mr. Wilson must have grabbed the victim by the tie to yank him out of the car

---

[2] According to the prosecutor, the position and condition of the necktie at the time Mr. Parks' was found lying in the road with a single shotgun blast to the head, implicated Mr. Wilson as an active participant in Mr. Donovan's murder because Mr. Wilson was sitting in the backseat of the victim's car and must have grabbed Mr. Parks by the tie to drag him from the car. Otherwise, according to the prosecutor, co-defendant Butts would have needed "fifteen foot arms" in order to reach "over the top of the roof of the car and over the side and through the window here, yanking it this way." T 1838. Of course, Butts could have simply walked around the car from the passenger side and yanked Mr. Parks from the car, as Mr. Wilson has consistently reported he did.

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.[3]

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.

---

[3] The tie, in fact, was *the* essential component in the prosecutor's claim that Mr. Wilson took an active role in the offense (as opposed to his active role in attempting to cover it up). The only evidence the prosecutor had, apart from the tie, was Mr. Wilson's admission that he knew that Butts planned to commit a robbery and had a weapon, proof that Mr. Wilson was in the back seat of Mr. Parks's car when he, Butts and Mr. Parks left the Walmart parking lot, and the testimony of a sole witness, Kenya Mosley who, in contradiction to the witnesses, testified that she saw both Mr. Wilson and Butts in the Walmart store when Mr. Parks was inside, T 1521-22, 1526—testimony discredited by other witnesses, who testified that Mr. Wilson remained outside the Walmart and Ms. Mosley's mistaken belief that she saw a fourth man also get into the victim's car. *See* Butts T 2277-78. Without the tie, and the argument prosecutor Bright spun with it, the State had no real evidence to counter Mr. Wilson's statement that he remained in the car. T 1588-89.

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.

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. O.C.G.A. § 5-5-41(c)(3)(C).

If the prosecutor's theory about what happened to the necktie is accurate, there is a strong likelihood that the tie contains skin cells of the person who grabbed it to pull Donavan Parks from the car and force him to the ground, where he was shot point blank in the head. If that DNA turned out to belong to Butts,[4] that new evidence would critically undermine a key piece of evidence supporting Mr. Wilson's conviction and sentence. To Mr. Wilson's knowledge, the necktie has never been tested for DNA. Indeed, the technology to test for such small quantities

[4] Pursuant to O.C.G.A. § 35-3-160(b) and (c), a sample of Butts's "blood, an oral swab, or a sample obtained from a noninvasive procedure taken for DNA . . . analysis" would have been taken by the State and analyzed, and the analysis stored in a DNA data bank for future comparison.

of DNA, such as that left by epithelial cells through touch, was not available at the time of Mr. Wilson's 1997 trial or even his state habeas proceedings. *See* Affidavit of Dr. Greg Hampikian, attached as Exhibit B to the EMNT (hereinafter "Hampikian Aff."), at 4-5. This case thus satisfies the requirements of O.C.G.A. § 5-5-41(c) *et seq.*

In the court below, Mr. Wilson urged the trial court to set aside his murder conviction and/or death sentence and order a new trial and/or sentencing hearing in the event that Butts's DNA proves to be present on SE 11 (or that Mr. Wilson's DNA is not be present on SE 11). *See*, *e.g.*, *Drane v. State*, 291 Ga. 298, 303 (2012) (trial court may grant new sentencing hearing where newly discovered evidence gives rise to reasonable probability of different verdict at capital sentencing); *Crawford*, 278 Ga. at 99 (relief available where DNA evidence favorable to defendant gives rise to reasonable probability of a different result at sentencing).

The motion for new trial was predicated on the anticipated results of the requested DNA testing. *See White v. State*, 346 Ga. App. 448, 448-49 (2018) ("[A] motion for DNA testing is a preliminary matter and will either precede or accompany any motion for a new trial predicated upon the discovery of exculpatory DNA evidence.").

The physical evidence has never, to Mr. Wilson's knowledge, been DNA tested. Advances in DNA technology now make it possible to develop DNA profiles

from minute quantities of DNA evidence. This would not have been possible during the time encompassing Mr. Wilson's arrest and trial in 1996-97. Through these new processes, it is possible to reliably test SE 11, the necktie, to see if Mr. Wilson's or Butts's DNA is on it—*i.e.* to corroborate or refute the State's theory of how the crime occurred. *See* Hampikian Aff.

Mr. Wilson has always maintained that he did not shoot or assault Mr. Parks or intend that he be harmed, and the identity of the person who laid hands on and shot Mr. Parks was a significant issue in the case. O.C.G.A. § 5-5-41(c)(3)(C) and *see* EMNT § IV(C) and (D). It is only by subjecting the evidence to DNA testing that Mr. Wilson can demonstrate that he did not assault the victim.

In support of the EMNT, and as required by O.C.G.A. § 5-5-41(c)(3), Mr. Wilson set forth in detail the evidence to be tested, when it was collected, and its present location. *See* EMNT § IV(A). Mr. Wilson also submitted in support of this motion the affidavit of Dr. Greg Hampikian, a preeminent geneticist and DNA expert with well over twenty years of experience in state-of-the-art DNA testing. *See* Exhibit B to the EMNT. Dr. Hampikian concludes that the DNA testing requested herein is possible and could reveal with certainty whether or not Mr. Wilson or Mr. Butts handled SE 11 on the night of the crime. *Id*.

Mr. Wilson also stated in the EMNT, filed May 22, 2019, that it was not filed for the purpose of delay and that no DNA testing had been requested or ordered at

Mr. Wilson's behest in any other proceeding in this case, O.C.G.A. § 5-5-41(c)(4), and that the advanced DNA testing methods that could ascertain a profile on an item such as a necktie did not exist at the time of trial, O.C.G.A. § 5-5-41(c)(3)(B). *See* EMNT at 6 and § IV(B) generally.

On May 28, 2019, the State filed its response. The next day, undersigned counsel notified the trial court by an electronically mailed letter that Mr. Wilson would reply to the State's response shortly. *See* Appendix B to this Application. On May 30, 2019, the trial court issued its order, drafted by the District Attorney's office, denying the EMNT, without providing Mr. Wilson any opportunity to reply to the State's response. *See* Order of May 30, 2019.

The trial court's actions violated the plain language of the statute as well as procedural due process under the Fourteenth Amendment to the United States Constitution. A full appeal to review these issues and, thereafter, remand for a hearing in the trial court are warranted.

PROCEDURAL HISTORY

On November 5, 1997, following a trial in the Superior Court of Baldwin County, Georgia, Marion Wilson, Jr., was convicted and sentenced to death for the 1996 murder of Donovan Parks. This Court affirmed on direct appeal. *Wilson v. State*, 271 Ga. 811 (1999). The United States Supreme Court denied Mr. Wilson's

petition for certiorari review on October 2, 2000. *Wilson v. Georgia*, 531 U.S. 838 (2000).

After the Supreme Court denied his petition for a writ of certiorari, Mr. Wilson sought state post-conviction relief alleging, *inter alia*, that his trial counsel had rendered ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984). The Superior Court of Butts County, Georgia ("state habeas court") denied Mr. Wilson's petition on December 1, 2008 (*Wilson v. Hall*, Butts Co. Superior Court Case No. 2001-V-38). This Court denied Mr. Wilson's Application for a Certificate of Probable Cause to Appeal (CPC) on May 3, 2010. The United States Supreme Court denied his subsequent petition for writ of certiorari on December 6, 2010. *Wilson v. Terry*, 562 U.S. 1093 (2010).

On December 17, 2010, Wilson timely filed a federal habeas corpus petition in the United States District Court for the Middle District of Georgia. Although recognizing significant errors in the state habeas court's analysis and findings as to the ineffective assistance of counsel claim, the district court nonetheless denied relief, finding no prejudice. *Wilson v. Humphrey*, No. 5:10-cv-489, 2013 U.S. Dist. LEXIS 178241 (M.D. Ga. Dec. 19, 2013). 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 *193. Mr.

Wilson's motion to alter or amend the judgment was denied on January 21, 2014. Mr. Wilson filed a timely notice of appeal on February 18, 2014.

On December 15, 2014, a panel of the United States Court of Appeals for the Eleventh Circuit affirmed the district court's denial of habeas relief. *See Wilson v. Warden*, 774 F.3d 671 (11th Cir. 2014). It ruled that it must assess the reasonableness of the summary CPC denial, rather than the underlying reasoned opinion of the state habeas court, and that because it could envision reasonable grounds for the CPC denial, habeas relief could not be granted. *Wilson*, 774 F.3d at 678 (quoting *Newland v. Hall*, 527 F.3d 1162, 1199 (11th Cir. 2008)).

The Eleventh Circuit granted rehearing *en banc*, thereby vacating the panel opinion, to address the standard of review and, following briefing and argument, affirmed. *Wilson v. Warden*, 834 F.3d 1227 (11th Cir. 2016). Mr. Wilson then petitioned the Supreme Court for certiorari review, and the petition was granted. On April 17, 2018, the Supreme Court reversed and vacated the Eleventh Circuit, and remanded the case for further proceedings. *Wilson v. Sellers*, 138 S. Ct. 1188 (2018). On August 10, 2018, the Eleventh Circuit panel issued its opinion on remand. *Wilson v. Warden*, 898 F.3d 1314, 1316 (11th Cir. 2018). The Eleventh Circuit again affirmed the district court's denial of Mr. Wilson's petition for a writ of habeas corpus. *Id*. Mr. Wilson petitioned for rehearing and rehearing en banc, which was denied on October 11, 2018.

On March 8, 2018, Mr. Wilson petitioned the Supreme Court for a writ of certiorari (Supreme Court Case No. 18-8389).

On May 22, 2019, Mr. Wilson filed his Extraordinary Motion for New Trial. The State responded on May 28, 2019, the same day Mr. Wilson's certiorari petition was denied. On May 29, 2019, Mr. Wilson electronically sent a letter to the trial court indicating his intention to reply. *See* Appendix B to this Application. On May 30, 2019, the trial court adopted the State's proposed order denying relief before Mr. Wilson had an opportunity to reply.

On June 5, 2019, the trial court issued a warrant for Mr. Wilson's execution, to be carried out between June 20 and June 27, 2019. *See* Appendix C to this Application. On June 6, 2019, Mr. Wilson filed a Notice of Appeal from the denial of EMNT relief. This Application follows.

FACTUAL BACKGROUND

Marion Wilson, Jr., was convicted and sentenced to death for the 1996 murder of Donovan Parks, an off-duty state correctional officer, in Baldwin County, Georgia. Wilson was nineteen years old at the time of the crime. The evidence showed that on the evening of March 28, 1996, Mr. Wilson's co-defendant, Robert

Butts, solicited a ride from the victim, Donovan Corey Parks,[5] at a Milledgeville Walmart. Butts sat in the front passenger seat of the victim's car while 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 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.

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

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.[6]

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.[7] Ultimately, Mr. Wilson was convicted and sentenced to death.

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

[7] 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.

As discussed above, the prosecutor in Mr. Wilson's 1997 trial had used the necktie to spin the story to Mr. Wilson's jury that Mr. Wilson, *not* Robert Butts, had pulled Donovan Parks' necktie tight around his neck, dragged him out of his car, forced him to the ground, and then shot him in the back of the head with a shotgun. *See*, *e.g.*, T. 1153, 1836-37, 2482-83. However, at Robert Butts' 1998 trial, the same prosecutor argued that Butts was not only the shooter but was in control of the events surrounding the crime. The prosecutor carefully explained that it was not credible to believe that the 6'1" Butts was in any way intimidated by 5'5" Marion Wilson, Jr., and that his larger size meant that he was capable of concealing a sawed-off shotgun in his sleeve. Butts T 2590-91. While the prosecutor had successfully prevented jail inmates Holcomb, May and Garza from testifying at Mr. Wilson's trial that Butts had admitted culpability in shooting Mr. Parks,[8] he called May and Garza as witnesses at Butts' trial and argued that they had credibly testified that Butts concealed the shotgun in his sleeve and then shot Mr. Parks. *See* Butts T 2051-89, 2109-48, 2590.[9] The prosecutor told Butts' jury: "We proved that the man that actually, in fact, pulled the trigger and blew out the brains of Donovan Corey Parks is the defendant, Robert Earl Butts, Jr." Butts T 2604. Subsequently, during Butts's

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[8] *See Wilson v. State*, 271 Ga. 811, 814 (1999).

[9] *See also Butts v. State*, 273 Ga. 760, 761 (2001).

state habeas proceedings, prosecutor Fred Bright testified that, based on the evidence, he believed that Butts in fact shot Mr. Parks. Butts HT 2282, 2285, 2295.

REASONS TO GRANT THE APPLICATION

The trial court denied a hearing and the EMNT on the grounds that Mr. Wilson had failed to show that his motion was not filed for purposes of delay (O.C.G.A. § 5-5-41(c)(4)(A)); that the identity of the perpetrator was, or should have been, a significant issue in the case (O.C.G.A. § 5-5-41(c)(3(C)); and that exculpatory evidence as to who handled SE 11 on the night of the crime would not raise a reasonable probability of a different result at either phase of Mr. Wilson's capital trial (O.C.G.A. § 5-5-41(c)(3)(D)).

The trial court did not even allow Mr. Wilson the opportunity to reply to the State's brief before signing the State's order denying the EMNT.

The trial court's actions violated the plain language of O.C.G.A. § 5-5-41(c). The statute clearly contemplates that "[i]f . . . 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." O.C.G.A. § 5-5-41(c)(6)(A). By judging the merits of Mr. Wilson's motion without the benefit of a hearing, the trial court ignored subsection (c)(6)(E) of the statute, which provides that the point of the hearing stage of proceedings 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 . . . subsection [(C)]."

In addition to violating the clear statutory mandate, the trial court, in so quickly dispatching the EMNT, without providing a hearing or even the opportunity to file a reply, denied Mr. Wilson minimal guarantees of due process of law under the state and federal constitutions. *See*, *e.g.*, *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976). Mr. Wilson had a due process right to be heard—a right enshrined in the statutory scheme but denied by the trial court.[10] Moreover, Mr. Wilson has a liberty interest in the right to a hearing afforded under the statute—an interest protected by the Fourteenth Amendment's due process clause. *See, e.g.*, *Wilkinson v.* Austin, 545 U.S. 209, 221 (2005) ("A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' . . . or it may arise from an expectation or interest created by state laws or policies . . . .") (citations omitted). Mr. Wilson clearly has an interest in the state's proper administration of O.C.G.A. § 5-5-41, which itself was amended to provide for DNA testing for the purpose of securing the interests in life and liberty of those for whom

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[10] "The fundamental requisite of due process of laws is the opportunity tobe heard." *Greene v. Lindsey*, 456 U.S. 444, 449 (1982) ("the fundamental requisite of due process of laws is the opportunity to be heard.") (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)); *Bishop v. Hall*, 305 Ga. 33, 34 (2019) ("A fundamental requirement of due process is 'the opportunity to be heard.' . . . 'It is an opportunity which must be granted at a meaningful etime and in a meaningful manner.'") (quoting *Grannis*, *supra*, and *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

DNA testing might prove exculpatory. *See, e.g.*, *Crawford*, 278 Ga. at 99-100 (Fletcher, J., dissenting)..

A. The Trial Court Erred in Denying the EMNT Without a Hearing, on the Basis of a Finding of Intentional Delay.

The trial court plainly erred in denying Mr. Wilson's EMNT because he had failed to show the EMNT was not filed for purposes of delay. Mr. Wilson clearly stated in his motion: "[T]his motion is not filed for the purpose of delay . . . ." EMNT at 6. *See also id.* at 25. That is all that was required at the initial stage of the proceedings. O.C.G.A. § 5-5-41(c)(4) requires the movant to state that the motion "is not filed for the purpose of delay; and . . . [t]hat 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." Mr. Wilson made that statement in his motion, and no elaboration on this point was required prior to a hearing. *See*, *e.g.*, *Crawford*, 278 Ga. at 97 ("[Statement of no intentional delay] prerequisite[] in paragraph (4) [is a] simple matter[] that require[s] no detailed explanation in a petitioner's motion.").

B. The Trial Court Erred in Finding That Mr. Wilson Failed to Show That the Identity of the Perpetrator Was, or Should Have Been, a Significant Issue in the Case.

Contrary to the trial court's finding, Mr. Wilson showed, *prima facie*, that the identity of the person who actually murdered Donovan Parks was a significant issue

at Mr. Wilson's trial and, especially, at sentencing. That it was significant is proven by the emphasis the prosecutor placed on this question, again, *especially* at sentencing, because the prosecutor knew he had to persuade the jurors that Marion Wilson was worthy of death, despite other aggravating evidence presented which related primarily to criminal activity Mr. Wilson allegedly perpetrated as a juvenile.[11]

There were no witnesses to the shooting of Donovan Parks, and the physical evidence did not offer clear answers to identify the shooter. The defense contended that Mr. Wilson was merely present at the scene and did not anticipate the crime.

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[11] The trial court dismisses the significance of potentially exculpatory DNA results in reliance on a concurring opinion from the Eleventh Circuit U.S. Court of Appeals addressing the Mr. Wilson's history of juvenile misconduct. *See* Order at 7. But that opinion relies on an inaccurate assessment of the State's case in mitigation that entirely ignored the evidence also presented to the jury that mitigated—and even disproved—the State's presentation of those offenses. For example, evidence showed that the "arson" referenced by Chief Judge Carnes involved Mr. Wilson and other young 12 year old boys starting a fire in an abandoned building because "they were cold, trying to keep warm." T 2031. Chief Judge Carnes's observation that, at the age of 15, Mr. Wilson shot a "migrant worker," Jose Valle, in the buttocks because he allegedly "wanted to see what it felt like to shoot somebody," simply ignored the testimony of Sheriff's Deputy Robert Hoyt that he did not know who shot Valle, that the victim had identified a different boy as the person who hit him over the head with a gun, and that Valle, too, did not know who had shot him. T 2037-43, 2062, 2115. Another witness testified he did not know who had shot Valle and had not heard Wilson say anything about wanting to see what it felt like to shoot someone. T 2088, 2091-92, 2095-96. The opinion also cites a discredited allegation that Mr. Wilson had shot a dog, even though a Glynn County Police officer, who never identified Wilson as the dog shooter, testified that a witness had identified another boy as the shooter and that this other boy, *not* Mr. Wilson, was then prosecuted for the shooting. T 1980-83, 1984. The trial court's reliance on this one-sided view of the aggravation thus is at odds with O.C.G.A. § 5-5-41(c)(3)D)'s directive that whether the "requested DNA testing would raise a reasonable probability" of a different outcome must be assessed "in light of all the evidence in the case . . . ."

Although the prosecutor initially conceded that he did not know who had shot Mr. Parks in cold blood, the prosecutor nevertheless insisted that Mr. Parks' necktie was a pivotal piece of evidence because, having been pulled tightly around Mr. Parks' neck, combined with Mr. Wilson's location in the back seat of the vehicle, it tended to show that Mr. Wilson, not Butts, had savagely pulled Parks out of his car, laid him on the ground and shot him in the head. The prosecutor further found it extremely urgent to preclude the testimony of witnesses who had purportedly heard Butts confess to having taken Mr. Parks out of the car and shot him (only to use those same witnesses when prosecuting Butts to paint Butts as the actual shooter worthy of a death sentence). It was especially critical to the state's effort to obtain a death sentence for Mr. Wilson that the jury believe that he, not Butts, had cold-bloodedly killed Mr. Parks, after first nearly strangling him with his tie.

Thus, identity of the actual murderer of Donovan Parks was very much in issue. Mr. Wilson has carried his burden as to this prong of the statute for purposes of meeting the threshold requirement for a hearing.

C. The Trial Court Erred in Finding that the Requested DNA Testing Would Not Raise a Reasonable Probability That Mr. Wilson Would Have Been Acquitted or Received a Sentence

Less Than Death if the Results of the DNA Testing Had Been Available at the Time of Trial.

1. The Proposed Testing is Reasonably Likely to Reveal Who Shot Donovan Parks.

Dr. Hampikian proposed that DNA testing of SE 11 can reveal a DNA profile of who handled the necktie on the night of the crime. EMNT Exhibit B at 5. The profile or profiles obtained can be compared with the DNA profiles of Mr. Wilson and Butts to determine which of them did or did not handle SE 11. *Id.*

2. In Light of the Evidence Presented, the DNA Evidence Raises a Reasonable Probability that Mr. Wilson Would Have Been Acquitted or Received a Sentence Less Than Death.

Had the proposed DNA testing been available at the time of trial, and had such testing shown that Mr. Wilson had not handled SE 11, or that Butts had, there is a reasonable probability that the jury would have credited the defense theory and acquitted Mr. Wilson of the charges, or at least the malice murder charge. With DNA evidence showing that Mr. Wilson, whom the state conceded was sitting in the back seat of Mr. Parks' vehicle, had not touched SE 11, the state's theory of the crime—a theory that posited an extremely brutal series of acts by Mr. Wilson, starting with his near strangulation of Mr. Parks with his own necktie—would have been refuted.

It would have suggested, moreover, that Mr. Wilson remained in the back of the car, as he told police, while Robert Butts came around to Mr. Parks' side of the vehicle, forcibly pulled him out of the car by his tie, laid him on the ground, and shot him point blank in the head with a sawed-off shotgun—as the prosecutor later argued to Butts' jury. As previously discussed, the necktie was the pivotal piece of evidence in Mr. Wilson's trial because the prosecutor argued that it was more likely that the person sitting behind Mr. Parks—Marion Wilson—was the person who could grab the tie so tightly around Mr. Parks's neck that it had to be cut off of him, and thereafter use it to drag Mr. Parks out of the car, lay him on the ground, and shoot him. This theory was especially pressed at sentencing because it was intended to convince the jury that Mr. Wilson, by these brutal acts, deserved death.

The trial court's fixation on the possibility that Mr. Wilson may have been wearing gloves at the time he purportedly grabbed Mr. Parks' necktie is insufficient to deny the EMNT outright without a hearing. While videotape at a convenience store purported to show Mr. Wilson wearing gloves while transacting a purchase, there is simply no evidence that he was wearing gloves at the time of the crime itself. Further, if Robert Butts's DNA is on the necktie, it stretches credibility to believe, as the State and trial court suggest, that the defendants jointly pulled Mr. Parks out of his car and onto the ground. A competent trial attorney could very clearly have used proof of Butts' having handled the tie to argue convincingly (to at least one

juror at sentencing, in particular) that Butts, not Wilson, was the sole factual perpetrator of the murder of Mr. Parks.

Had Mr. Wilson been acquitted of malice murder, and convicted only of felony murder, that may have constituted the prelude to a sentence less than death in that it would arguably have reflected an understanding that Mr. Wilson had not acted with malice but had merely been involved with the felony of armed robbery during which the murder, perpetrated by Robert Butts, occurred. Alternatively, regardless of whether the jury verdict at the guilt-innocence phase of trial remained the same, evidence conclusively showing that Mr. Wilson had not handled the necktie would have raised a reasonable probability that "at least one juror would have struck a different balance" at sentencing. *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).[12]

CONCLUSION

Mr. Wilson met the threshold requirements to obtain a hearing on his EMNT, and the trial court's order denying the EMNT without a hearing and without even the opportunity to reply to the State was arbitrary, in violation of O.C.G.A. § 5-5-41 § (c), and in violation of procedural due process under the Fourteenth Amendment to the United States Constitution. A full appeal of the lower court's order is

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[12] *See Crawford*, 278 Ga. at 99 (in EMNT proceedings on DNA testing issue, trial court may grant new sentencing where newly discovered evidence gives rise to reasonable probability of different verdict at capital sentencing).

warranted, and thereafter remand for a hearing on Mr. Wilson's motion. A stay of execution is warranted so that this Court can consider this Application without the pressure of an imminent execution date.

This 14th day of June, 2019.

Respectfully submitted,

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COUNSEL FOR MR. WILSON

Appendix A

IN THE SUPERIOR COURT OF BALDWIN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	*	
	*	Criminal Action No. 39249B
v.	*	
	*	
MARION WILSON, JR.,	*	
	*	
Defendant.	*	

ORDER DENYING DEFENDANT'S EXTRAORDINARY MOTION FOR NEW TRIAL

Defendant has filed an extraordinary motion for new trial and seeks DNA testing on a necktie introduced as evidence during his trial for the murder of Donovan Parks. O.C.G.A. § 5-5-41 allows the filing of an extraordinary motion for new trial outside the 30-day window for motion for new trials based on extraordinary circumstances. The Court finds that Defendant cannot establish: "the requested DNA testing would raise a reasonable probability that [Defendant] 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"; the identity of the perpetrator of the crimes was a significant issue at trial; or that his motion, filed at this late hour, is not for the purpose of delay. O.C.G.A. § 5-5-41(c)(3)(D). His motion is DENIED.

30th FILED IN OFFICE THIS
DAY OF May, 2019
DEPUTY CLERK SUPERIOR COURT
BALDWIN COUNTY, GEORGIA

PROCEDURAL HISTORY

Defendant, Marion Murdock Wilson, Jr., was tried before a jury October 27, 1997 through November 7, 1997 and convicted of the malice murder of Donovan Parks, the felony murder of Donovan Parks, the armed robbery of Donovan Parks, hijacking a motor vehicle, possession of a firearm during the commission of a crime, and possession of a sawed-off shotgun. (R. 13-15, 966). The jury found as a statutory aggravating circumstance that the offense of murder was committed while the offender was engaged in the commission of another capital felony, armed robbery, (R. 965), and, following the mandatory recommendation of the jury, the trial court sentenced Defendant to death on November 7, 1997. (R. 964, 968).[1] The Supreme Court of Georgia affirmed Defendant's convictions and sentences on November 1, 1999. *Wilson v. State*, 271 Ga. 811, 525 S.E.2d 339 (1999), *cert denied, Wilson v. Georgia*, 531 U.S. 838 (2000), *reh'g denied*, 531 U.S. 1030 (2000).

Defendant filed his state habeas corpus petition on January 19, 2001. On December 1, 2008, the state habeas court denied relief. The Georgia Supreme Court denied Defendant's certificate for probable

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[1] Defendant's co-defendant Robert Butts was also convicted of malice murder, sentenced to death and executed on May 4, 2018.

cause to appeal. The United States Supreme Court denied certiorari review on December 6, 2010. *Wilson v. Terry*, 562 U.S. 1093 (2010).

Defendant then filed a federal habeas corpus petition on December 15, 2010. On December 19, 2013, the district court denied relief. *Wilson v. Humphrey*, No. 5:10-CV-489, 2013 U.S. Dist. LEXIS 178241 (M.D. Ga. Dec. 19, 2013). The Eleventh Circuit Court of Appeals affirmed the denial of relief. *Wilson v. Warden*, 898 F.3d. 1314 (11th Cir. 2018). Defendant again applied for certiorari review on March 12, 2019. That petition was denied May 28, 2019. *Wilson v. Ford*, 587 U.S. ___ (2019).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

O.C.G.A. § 5-5-41(c) specifically governs requests for DNA testing and 5-5-41(c)(6)(A) necessitates defendants satisfy certain pre-requisites before a hearing is required. O.C.G.A. § 5-5-41(c) "requires a trial court to conduct a hearing *only* if a defendant's motion 'complies with the requirements of paragraphs (3) and (4)' of the statute." *Crawford*, 278 Ga. at 96 (emphasis added). After review, this Court finds that the Defendant cannot establish the necessary showing for O.C.G.A. § 5-5-41(c)(3)(C-D) and (c)(4)(A).

A. O.C.G.A. § 5-5-41(c)(3)(D).

The Court finds that Defendant failed to meet the requirements of O.C.G.A. § 5-5-41(c)(3)(D), that "the requested DNA testing would raise

a reasonable probability that the Defendant *would have been acquitted* if the results of the DNA testing had been available at the time of the conviction, *in light of all the evidence in the case.*" (Emphasis added). Assuming the tie was tested and determined to have Butts's DNA on it, this would not acquit Defendant. It was established by video-taped evidence and eyewitness testimony that Defendant had on gloves on the night of the murder. (T. 1450-51). Accordingly, the lack of his DNA or the presence of Butts's DNA on the tie would not acquit Defendant. This is true particularly in light of the evidence that establishes Defendant's guilt. On direct appeal, the Georgia Supreme Court found that the evidence at trial established the following facts:

> ... on the night of March 28, 1996, the victim, Donovan Corey Parks, entered a local Wal-Mart to purchase cat food, leaving his 1992 Acura Vigor parked in the fire lane directly in front of the store. Witnesses observed Wilson and Robert Earl Butts standing behind Parks in one of the store's checkout lines and, shortly thereafter, speaking with Parks beside his automobile. A witness overheard Butts ask Parks for a ride, and several witnesses observed Wilson and Butts entering Parks's automobile, Butts in the front passenger seat and Wilson in the back seat. Minutes later, Parks's body was discovered lying face down on a residential street. Nearby residents testified to hearing a loud noise they had assumed to be a backfiring engine and to seeing the headlights of a vehicle driving from the scene. On the night of the murder, law enforcement officers took inventory of the vehicles in the Wal-Mart parking lot. Butts's automobile was among the vehicles remaining in the lot overnight. Based upon the statements of witnesses at the Wal-Mart, Wilson was arrested. A search of Wilson's residence yielded a sawed-off

shotgun loaded with the type of ammunition used to kill Parks, three notebooks of handwritten gang "creeds," secret alphabets, symbols, and lexicons, and a photo of a young man displaying a gang hand sign.

Wilson gave several statements to law enforcement officers and rode in an automobile with officers indicating stops he and Butts had made in the victim's automobile after the murder. According to Wilson's statements, Butts had pulled out a sawed-off shotgun, had ordered Parks to drive to and then stop on Felton Drive, had ordered Parks to exit the automobile and lie on the ground, and had shot Parks once in the back of the head. Wilson and Butts then drove the victim's automobile to Gray where they stopped to purchase gasoline. Wilson, who was wearing gloves, was observed by witnesses and videotaped by a security camera inside the service station. Wilson and Butts then drove to Atlanta where they contacted Wilson's cousin in an unsuccessful effort to locate a "chop shop" for disposal of the victim's automobile. Wilson and Butts purchased two gasoline cans at a convenience store in Atlanta and drove to Macon where the victim's automobile was set on fire. Butts then called his uncle and arranged a ride back to the Milledgeville Wal-Mart where Butts and Wilson retrieved Butts's automobile.

Viewed in the light most favorable to the verdict, we find that the evidence introduced at trial was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that Wilson was guilty of the crimes of which he was convicted and to find beyond a reasonable doubt the existence of a statutory aggravating circumstance. *Jackson v. Virginia*, 443 U.S. 307 (99 S. Ct. 2781, 61 L. Ed. 2d 560) (1979); O.C.G.A. § 17-10-30(b)(2). The State was not required to prove that Wilson was "the triggerman" in order to prove him guilty of malice murder. Even assuming that Wilson did not shoot the victim, there is sufficient evidence that he intentionally aided or abetted the commission of the murder or that he intentionally advised, encouraged, or procured another to commit the murder to support a finding of guilt. []

Wilson, 271 Ga. at 812-13.

Defendant also argues that this testing could have precluded a death sentence. (Motion, p. 23). However, under the current procedural posture, this is not the standard. Defendant must first show his "motion 'complies with the requirements of paragraphs (3) and (4)' of the statute." *Crawford*, 278 Ga. at 96 (emphasis added). The standard is "[t]he requested DNA testing would raise a reasonable probability that the petitioner would have been *acquitted*...." O.C.G.A. § 5-5-41(c)(3)(D). However, even if the testing was conducted and Butts's DNA was on the tie, in light of the evidence presented at trial, there is no reasonable probability of a different sentencing verdict.

As to sentencing, the record also establishes that, during the penalty phase of trial, the State called a number of witnesses in aggravation of punishment to show that, although Defendant was only 21, he had an extensive, violent criminal history. As found by the district court:

> [T]rial counsel learned that the State could potentially present 39 witnesses to testify about 27 aggravating circumstances during the sentencing phase of Wilson's trial. [] These aggravating circumstances included crimes Wilson committed as an adult while living in Baldwin County and his membership/leadership in a gang. [] Also included were numerous crimes Wilson committed, or was accused of committing, when he was a juvenile living with his mother in Glynn and McIntosh Counties. [] The number of witnesses in

> aggravation ultimately increased to 72 and the number of aggravating circumstances rose to 29. []

Wilson v. Humphrey, 2013 U.S. Dist. LEXIS 178241, at *41 n.13. The Court notes that Defendant's criminal history is so extensive it elicited a special concurrence from Chief Judge Carnes of the Eleventh Circuit:

> Wilson's wholehearted commitment to antisocial and violent conduct from the age of 12 on not only serves as a heavy weight on the aggravating side of the scale, it also renders essentially worthless some of the newly proffered mitigating circumstance evidence. ...For example, a number of Wilson's teachers signed affidavits, carefully crafted by his present counsel, claiming that Wilson was "a sweet, sweet boy with so much potential," a "very likeable child," who was "creative and intelligent," and had a "tender and good side." One even said that Wilson "loved being hugged." A sweet, sensitive, tender, and hug-seeking youth does not commit arson, kill a helpless dog, respond to a son's plea to quit harassing his elderly mother with a threat "to blow . . . that old bitch's head off," shoot a migrant worker just because he "wanted to see what it felt like to shoot someone," assault a youth detention official, shoot another man in the head and just casually walk off—all before he was old enough to vote. Without provocation Wilson shot a human being when he was fifteen, shot a second one when he was sixteen, and robbed and shot to death a third one when he was nineteen. ...

Wilson v. Warden, 774 F.3d at 683.

Thus, 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. In fact, following the guilt phase closing arguments, the jury found Defendant guilty of malice murder in approximately one hour and a half. (T. 1907). When trial

counsel spoke to the jurors after the trial, some of the jurors commented on how quickly they were able to reach a unanimous decision as to Defendant's guilt. (State's Attachment C); *see also* State's Attachment D, juror comment: "There wasn't any question that he was guilty."; State's Attachment E, juror comment: "Evidence was overwhelming.").

There is no reasonable probability that Defendant would have been acquitted if the results of the DNA testing had been available at the time of the conviction, *in light of all the evidence in the case*" or not sentenced to death. (Emphasis added).

B. O.C.G.A. § 5-5-41(c)(3)(C).

The Court also finds that Defendant failed to meet the requirements of O.C.G.A. § 5-5-41(c)(3)(C), which mandates that he show "the identity of the perpetrator, was, or should have been, a *significant* issue in the case." (Emphasis supplied). The identity of the perpetrators in this case was never a significant issue. The question posed by Defendant at trial was who actually held the gun and fired the fatal shot into Parks's head. That issue was addressed on direct appeal. *Wilson*, 271 Ga. at 813 (State was not required to prove Defendant triggerman for malice murder, sufficient evidence showed "he intentionally aided or abetted the commission of the murder or that

he intentionally advised, encouraged, or procured another to commit the murder to support a finding of guilt").

C. O.C.G.A. § 5-5-41(c)(4)(A)

The Court also finds that the motion is filed for the purpose of delay. Most telling, Defendant filed the current motion 22 years after his conviction, but only one day prior to the United States Supreme Court conferenced his petition for certiorari review.

Further, Defendant was tried in 1997. At the time, DNA testing was available, but not requested by Defendant. *See* Defendant's Exhibit B, pp. 3-4, ¶ 13. During his state habeas proceedings, lasting from 2001-2008, Defendant conducted discovery and hired experts, but never requested the testing of any items for potential DNA. Defendant's new expert states in his affidavit that during this time touch DNA was available to Defendant. *See* Defendant's Exhibit B, p. 4, ¶ 15 (touch DNA testing available, eleven years ago, in 2008).

In the federal district court proceedings, which lasted until 2014, Defendant requested the opportunity for a hearing and for discovery and for expert assistance to present his claims. However, he did not request DNA testing or present any experts to assert DNA testing should be conducted. Clearly, this testing was available at that time.

Defendant's own expert concedes that all the DNA testing Defendant now seeks has been available for years. *See* Defendant's

Appendix B. Yet, Defendant has never sought this testing. It is only now, once all his appeals have been completed and an execution warrant is imminent, that he seeks DNA testing.

CONCLUSION

Defendant's extraordinary motion for new trial is denied.

SO ORDERED, this 30th day of May, 2019.

William A. Prior, Jr., Chief Judge
Ocmulgee Judicial Circuit

Prepared by:

Allison T. Martin
Chief Assistant District Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this Order Denying Defendant's Extraordinary Motion for New Trial to be delivered by the United States Postal Service with sufficient postage to insure delivery, addressed as follows:

Marcia A. Widder
Georgia Resource Center
303 Elizabeth Street
Atlanta, Georgia 30307

Beth Burton
Deputy Attorney General
Georgia Department of Law
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Atlanta, Georgia 30334

Brian Kammer
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Stephen A. Bradley
District Attorney
121 N. Wilkinson Street
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Milledgeville, Georgia 31061

This 30th day of May, 2019.

Clerk of Superior Court, Baldwin County
Chief Deputy
Ocmulgee Judicial Circuit

Appendix B

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May 29, 2019

Hon. William A. Prior, Jr., Chief Judge
Ocmulgee Judicial Circuit
P.O. Box 728
Madison, GA 30650
By email to: bonnerm@eighthdistrict.org and regular mail

Re: *State v. Marion Wilson*, Criminal Action No. 39249B

Dear Judge Prior:

Along with Brian Kammer, Esq., I represent the defendant, Marion Wilson, in the above-referenced matter, which is currently pending before your Honor by virtue of an Extraordinary Motion for New Trial filed on May 22, 2019. Yesterday, the State filed a response in opposition.

Please be advised that Mr. Wilson intends to file a reply brief in support of his motion. Because both Mr. Kammer and I currently have an intervening deadline of June 3, 2019, in a capital habeas case pending in the Southern District of Georgia (*King v. Warden*, No. 2:12-cv-00119 (S.D.Ga.)), we will plan to file our reply brief no later than two weeks from the date the State filed its opposition, *i.e.*, on or before June 11, 2019.

I appreciate your Honor's consideration of the foregoing.

Respectfully,

Marcia A. Widder

Marcia A. Widder
Counsel for Marion Wilson

cc: Beth Burton, Deputy Attorney General (by email)
Stephen Bradley, District Attorney (by email)
Brian S. Kammer, Esq. (by email)

Appendix C

IN THE SUPERIOR COURT OF BALDWIN COUNTY
STATE OF GEORGIA

THE STATE OF GEORGIA,	*	
	*	**CRIMINAL ACTION NO.**
v.	*	**39249B**
	*	
MARION WILSON, JR.,	*	
	*	
Defendant.	*	
	*	

ORDER

The Court having sentenced Defendant, Marion Wilson, Jr., on the 7th day of November, 1997, to be executed by the Department of Corrections at such penal institution as may be designated by said Department, in accordance with the laws of the State of Georgia, and;

The date for the execution of said Marion Wilson, Jr., having passed by reason of supersedeas incident to appellate review;

IT IS CONSIDERED, ORDERED, AND ADJUDGED by this Court, pursuant to O.C.G.A. § 17-10-40, that within a time period commencing at noon on the 20th day of June, 2019 and ending seven days later at noon on the 27th day of June, 2019, the Defendant, Marion Wilson, Jr., shall be executed by the Department of Corrections at such penal institution and on such a date and time within the aforementioned time period as may be designated by said Department in accordance with the laws of the State of Georgia.

54 FILED IN OFFICE THIS
DAY OF June, 2019
DEPUTY CLERK SUPERIOR COURT
BALDWIN COUNTY, GEORGIA

It is FURTHER ORDERED that the Clerk of the Superior Court of Baldwin County, Georgia shall record this order on the minutes of the court and shall cause a certified copy of this Order for execution of the original sentence to be served immediately to the Attorney General of Georgia, the Ocmulgee Judicial Circuit District Attorney, the Commissioner of the Georgia Department of Corrections, the Warden of the Georgia Diagnostic and Classification Prison, and Defendant's last known attorney of record.

This 5th day of June, 2019.

William A. Prior Jr.

WILLIAM A. PRIOR, JR.
CHIEF JUDGE, SUPERIOR COURT
OCMULGEE JUDICIAL CIRCUIT

IN THE SUPREME COURT OF GEORGIA

MARION WILSON, JR.,	)	
Applicant,	)	Case No. S19W1323
	)	
vs.	)	Baldwin County
	)	No. 39249B
STATE OF GEORGIA,	)	

CERTIFICATE OF SERVICE

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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Beth Burton
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This 14th day of June, 2019.

Marcia A. Widder

Attorney

No. S19W1323

In the
Supreme Court of Georgia

Marion Wilson, Jr.,
Applicant / Defendant,

v.

State of Georgia,
State.

BRIEF IN OPPOSITION TO APPLICATION FOR DISCRETIONARY APPEAL AND MOTION FOR STAY OF EXECUTION

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TABLE OF CONTENTS

STATEMENT OF THE CASE 1

ARGUMENT AND CITATION OF AUTHORITY 4

I. The trial court did not err in ruling without a reply or a hearing. 4

II. The trial court properly denied Defendant's motion. 6

A. The requested DNA testing would not acquit Defendant. 6

B. The identity of the perpetrator was and is not a significant issue in the case. 9

C. The statement that the motion was not filed for the purpose of delay was found to be false by the trial court. 11

CONCLUSION 14

STATEMENT OF THE CASE

Defendant, Marion Murdock Wilson, Jr., was tried before a jury October 27, 1997 through November 7, 1997 and convicted of the malice murder of Donovan Parks, the felony murder of Donovan Parks, the armed robbery of Donovan Parks, hijacking a motor vehicle, possession of a firearm during the commission of a crime, and possession of a sawed-off shotgun. (Trial Record, pp. 13-15, 966).[1] The jury found as a statutory aggravating circumstance that the offense of murder was committed while the offender was engaged in the commission of another capital felony, armed robbery, (R. 965), and, following the mandatory recommendation of the jury, the trial court sentenced Defendant to death on November 7, 1997. (R. 964, 968).[2]

Defendant's motion for new trial, as amended, was denied on December 18, 1998. (R. 970-71, 980-84). In affirming Defendant's convictions and sentences, this Court summarized the facts of the case as follows:

> The evidence at trial showed that on the night of March 28, 1996, the victim, Donovan Corey Parks, entered a local Wal-Mart to purchase cat food, leaving his 1992 Acura Vigor parked in the fire lane directly in front of the store. Witnesses observed Wilson and

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[1] The following abbreviations are used throughout this brief:

Trial Transcript – T, followed by page
Trial Record – TR followed by page
SCED: E-Filing System followed by page

[2] Defendant's co-defendant Robert Butts was also convicted of malice murder, sentenced to death, and executed on May 4, 2018.

> Robert Earl Butts standing behind Parks in one of the store's checkout lines and, shortly thereafter, speaking with Parks beside his automobile. A witness overheard Butts ask Parks for a ride, and several witnesses observed Wilson and Butts entering Parks's automobile, Butts in the front passenger seat and Wilson in the back seat. Minutes later, Parks's body was discovered lying face down on a residential street. Nearby residents testified to hearing a loud noise they had assumed to be a backfiring engine and to seeing the headlights of a vehicle driving from the scene. On the night of the murder, law enforcement officers took inventory of the vehicles in the Wal-Mart parking lot. Butts's automobile was among the vehicles remaining in the lot overnight. Based upon the statements of witnesses at the Wal-Mart, Wilson was arrested. A search of Wilson's residence yielded a sawed-off shotgun loaded with the type of ammunition used to kill Parks, three notebooks of handwritten gang "creeds," secret alphabets, symbols, and lexicons, and a photo of a young man displaying a gang hand sign.
>
> Wilson gave several statements to law enforcement officers and rode in an automobile with officers indicating stops he and Butts had made in the victim's automobile after the murder. According to Wilson's statements, Butts had pulled out a sawed-off shotgun, had ordered Parks to drive to and then stop on Felton Drive, had ordered Parks to exit the automobile and lie on the ground, and had shot Parks once in the back of the head. Wilson and Butts then drove the victim's automobile to Gray where they stopped to purchase gasoline. Wilson, who was wearing gloves, was observed by witnesses and videotaped by a security camera inside the service station. Wilson and Butts then drove to Atlanta where they contacted Wilson's cousin in an unsuccessful effort to locate a "chop shop" for disposal of the victim's automobile. Wilson and Butts purchased two gasoline cans at a convenience store in Atlanta and drove to Macon where the victim's automobile was set on fire. Butts then called his uncle and arranged a ride back to the Milledgeville Wal-Mart where Butts and Wilson retrieved Butts's automobile.

Wilson v. State, 271 Ga. 811, 812-13 (1999), *cert denied*, *Wilson v. Georgia*, 531 U.S. 838 (2000), *reh'g denied*, 531 U.S. 1030 (2000).

Defendant filed his state habeas corpus petition on January 19, 2001. A two-day evidentiary hearing was held on February 22-23, 2005. At that hearing, 129 exhibits were tendered by Defendant; he presented 9 witnesses live and the affidavits of 33 witnesses, including 6 experts. The record ultimately comprised 5,679 pages. On December 1, 2008, the state habeas court denied relief. (SCED, Record, pp. 95-138). This Court denied Defendant's certificate for probable cause to appeal. (SCED, Record, p. 140). The United States Supreme Court denied certiorari review on December 6, 2010. *Wilson v. Terry*, 562 U.S. 1093 (2010).

Defendant then filed a federal habeas corpus petition on December 15, 2010. On December 19, 2013, the district court denied relief. *Wilson v. Humphrey*, No. 5:10-CV-489, 2013 U.S. Dist. LEXIS 178241 (M.D. Ga. Dec. 19, 2013). On December 15, 2014, the Eleventh Circuit affirmed the denial of habeas relief. *Wilson v. Warden*, 774 F.3d 671, (11th Cir. 2014). Defendant applied for certiorari review and the Supreme Court granted, vacated, and remanded the case to the Eleventh Circuit on the issue of how federal courts review state decisions under federal law. *Wilson v. Sellers*, ___ U. S. ___, 138 S. Ct. 1188 (2018).

On remand, the Eleventh Circuit reviewed the state habeas court's decision as directed by the Supreme Court and again denied relief. *Wilson v. Warden*, 898 F.3d. 1314 (11th Cir. 2018). Defendant again applied for certiorari review from the United States Supreme Court on March 12, 2019. That petition was denied May 28, 2019. *Wilson v. Ford*, 587 U.S. ___ (2019).

Six days prior to the denial of certiorari review, on May 22, 2019, **22 years after his trial**, Applicant sought an extraordinary motion for new trial and post-conviction DNA testing pursuant to O.C.G.A. § 5-5-41 based on evidence and arguments presented at trial in 1997. (SCED, Record, pp. 15-68). This motion was properly denied on May 30, 2019. (SCED, Record, pp. 4-14).

ARGUMENT AND CITATION OF AUTHORITY

After 22 years of extensive litigation, Defendant, for the first time, requested DNA testing on a piece of evidence introduced at trial—the victim's neck tie. The trial court properly reviewed and denied Defendant's motion in accordance with O.C.G.A. § 5-5-41, and this Court should deny Defendant's application for a discretionary appeal.

I. The trial court did not err in ruling without a reply or a hearing.

Defendant alleges that the trial court erred in not allowing him to reply to the State's response and in denying his motion without holding a hearing. The statute is clear that the trial court was not required to wait for a reply from Defendant or hold a hearing.

O.C.G.A. § 5-5-41(c)(3)(c)(5) and (6)(A) are as follows:

> **(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.

The statute does not provide for a reply from Defendant; and the trial court did not err in not waiting on Defendant to submit a reply to the State's response brief.

The statute is also clear that if the trial court finds that Defendant failed to establish paragraphs 3 and 4 of subsection (c), a hearing is not required. In the instant case, citing *Crawford v. State*, 278 Ga. 95 (2004), the trial court found Defendant had failed to meet these requirements and denied Defendant's motion without a hearing. (SCED, Record, pp. 6-11). This finding is in accordance with the statute and Defendant's argument to the contrary has already been expressly rejected by this Court.

> …paragraph (3) requires that the Defendant "show" certain things, including how the possible results of the requested DNA testing would in reasonable probability have led to the Defendant's acquittal if those hypothetical results had been available at the time of the Defendant's original trial. O.C.G.A. § 5-5-41 (c) (3). Requiring a Defendant to "show" a possible DNA testing result and to "show" the relevance of that hypothetical result is not tantamount to requiring the Defendant to "prove" the hypothetical result will be obtained through actual testing. However, if the DNA testing results hypothesized in a Defendant's motion, even when assumed valid, would not in reasonable probability have led to the Defendant's acquittal if those results had been available at trial, a hearing on the

> Defendant's motion requesting DNA testing would be unnecessary.

Crawford v. State, 278 Ga. 95, 97 (2004).

In the instant case, the trial court found that even if the testing was conducted and Co-Defendant Butts's DNA was on the neck tie, but Defendant's was not, it still would not result in an acquittal. (SCED, Record, p. 7). The trial court did not err in denying the motion without a hearing.

II. The trial court properly denied Defendant's motion.

A. The requested DNA testing would not acquit Defendant.

The trial court found that Defendant failed to meet the requirements of O.C.G.A. § 5-5-31(c)(3)(D)—that "the requested DNA testing would raise a reasonable probability that the Defendant *would have been acquitted* if the results of the DNA testing had been available at the time of the conviction, *in light of all the evidence in the case.*" (SCED, Record, pp. 6-7) (emphasis in the original). The court found that even if the neck tie was tested and had Co-Defendant Butts's DNA was on it, "this would not acquit Defendant." *Id.* at 7. The trial court's ruling was based on: its factual finding that Defendant was wearing gloves on the night of the murder; and "in light of the evidence that establishes Defendant's guilt." (*Id.* at 7-8, citing T. 1450-51).[3] This

[3] The trial court also took note of the quick adjudication of guilt (SCED, Record, pp. 10-11, citing T. 1907), and the jurors' post-trial statements as to the assuredness of their conclusion of guilt. (SCED, Record, 141-152).

holding is supported by the record and this Court should deny discretionary review.

As found by the trial court, it was established by video-taped evidence and eyewitness testimony that Defendant had on gloves on the night of the murder. (SCED, Record, p. 7, citing T. 1450-51). Accordingly, the lack of his DNA or the presence of Butts's DNA on the tie would neither show that Defendant did not touch the neck tie nor acquit Defendant.

As to the facts establishing Defendant's guilt, the trial court relied on the facts as summarized by this Court on direct appeal, which are set forth above, and further relied on the following by this Court:

> Viewed in the light most favorable to the verdict, we find that the evidence introduced at trial was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that Wilson was guilty of the crimes of which he was convicted and to find beyond a reasonable doubt the existence of a statutory aggravating circumstance. *Jackson v. Virginia*, 443 U.S. 307 (99 S. Ct. 2781, 61 L. Ed. 2d 560) (1979); O.C.G.A. § 17-10-30(b)(2). The State was not required to prove that Wilson was "the triggerman" in order to prove him guilty of malice murder. Even assuming that Wilson did not shoot the victim, *there is sufficient evidence that he intentionally aided or abetted the commission of the murder or that he intentionally advised, encouraged, or procured another to commit the murder to support a finding of guilt*. []

(SCED, Record, p. 8, quoting *Wilson*, 271 Ga. at 812-13) (emphasis added). *See also Tison v. Arizona*, 481 U.S. 137 (1987); *Enmund v. Florida*, 458 U.S. 782 (1982).

Defendant also argues that even if the testing did not preclude a finding of guilt, it could have precluded a sentence of death. The trial court

found that this was not the standard, but that instead, Defendant has to show "[t]he requested DNA testing would raise a reasonable probability that the Defendant would have been *acquitted*…." (SCED, Record, p. 9, quoting O.C.G.A. § 5-5-41(c)(3)(D) (emphasis in original)). This is clearly a correct recitation and application of the statute.

The trial court went on, however, to hold that "even if the testing was conducted and Butts's DNA was on the tie, in light of the evidence presented at trial, there is no reasonable probability of a different sentencing verdict." (SCED, Record, p. 9). In making this finding, the trial court relied on the extensive evidence submitted in aggravation, (*id.* at 9-10), and properly concluded "[t]here is no reasonable probability that Defendant would have been acquitted if the results of the DNA testing had been available at the time of the conviction, *in light of all the evidence in the case*" or not sentenced to death." (SCED, Record, p. 11 (emphasis in the original)).

As set forth above, the evidence as introduced during the trial showed Defendant was the leader of the Milledgeville Folks Gang (T. 2246, 2250), and went with co-defendant Butts to Walmart in Butts's car. The two men parked the car and went inside the Walmart together with a loaded sawed off shotgun, following closely behind Parks through Walmart and through the check-out line. They followed the victim to his car, asked for a ride they did not need, immediately took the victim to Felton Drive and executed him in the middle of the road. *Wilson*, 271 Ga. at 812-13. Within minutes, a dispassionate Defendant is seen on video-tape wearing gloves and purchasing

gas for the stolen car. (T. 1427, 1451). Defendant admitted to going to his cousin in an attempt to locate a chop shop to sell the car. *Wilson*, 271 Ga. 812-13. He also admitted to burning the victim's car and the murder weapon was found in his house under his bed. *Id.* Also, as noted by the trial court, there was extensive evidence in aggravation, including Defendant having shot two other people previously, one just to find out what it felt like to shoot someone. (SCED, Record, pp 9-10). The trial court properly denied the motion on this basis.

B. The identity of the perpetrator was and is not a significant issue in the case.

The trial court also found that Defendant could not show "the identity of the perpetrator, was, or should have been, a significant issue in the case" as required by O.C.G.A. § 5-5-41(c)(3)(C). (SCED, Record, p. 11). This holding is also supported by the record.

Defendant never asserted he was not at the murder scene. Instead, as found by the trial court, "[t]he question posed by Defendant at trial was who actually held the gun and fired the fatal shot into Parks's head." *Id.* Defendant continues to make the argument to this Court that he was not the triggerman and was not a party to the crime. However, as found by the trial court, "[t]hat issue was addressed on direct appeal." *Id.*, citing *Wilson*, 271 Ga. at 813 (the "State was not required to prove Defendant triggerman for malice murder, sufficient evidence showed 'he intentionally aided or abetted

the commission of the murder or that he intentionally advised, encouraged, or procured another to commit the murder to support a finding of guilt'").

Defendant further asserts that the State argued that Defendant pulled Parks out of the car by his tie, forced him to the ground and shot him. (SCED, App. to Appeal, pp. 4-5). He argues if Defendant's DNA is not on the tie, it establishes that Defendant did not pull Parks out of the car by the tie, did not shoot Parks, and was not a party to the crime. *Id.* This argument is without merit.

First, as found by the trial court, Defendant was seen wearing gloves immediately following the murder. The lack of his DNA on the neck tie therefore means nothing. Even if the tie has Butts's DNA on it, it does not preclude one person from forcing Parks from the car and another person subsequently or previously pulling the tie as well.

Secondly, the State's argument at trial was not based solely on the scenario cited by Defendant. The neck tie was not critical to the State's argument. The State was explicitly clear throughout arguments that it could not establish who pulled the trigger killing Parks, but, regardless, Defendant was guilty of murder as a party to the crime. For instance, in the guilt phase closing arguments of Defendant's trial, the District Attorney conceded that either Defendant or Co-Defendant Butts was the triggerman. (See, e.g., T., p. 1816 ("I'm not conceding that this man was not the trigger man. I want that crystal clear. He could have been the trigger man; Butts could have been the trigger man."); T., p. 1821 ("… knowing the man's brains were blown out on

the side of the road, that either he did it or his Co-Defendant did."); T., p. 1830 ("Whether he was the trigger man or whether he was a party to the crime, and he aided and abetted and helped his Co-Defendant."); T., p. 1832 ("… and he is guilty of malice murder whether he pulled the trigger or whether the other man pulled the trigger."); T., p. 1836 ("And one of the two had to have that sawed-off shotgun in their arms. Could have been Butts. Very well could have been Butts. Might have been Wilson, but let's assume it was Butts."); T., pp. 1837-1838 ("Whether he pulled the gun or not, he helped the whole nine yards."); T., p. 1839). This argument was based on the evidence as a whole, as set forth above, establishing Defendant's guilt.

Clearly, the jury, in an hour and half, found that Defendant was guilty of intentionally and maliciously murdering Donovan Parks and rejected Defendant's claim and trial counsel's presentation and arguments that he was merely present at the scene. The trial court properly denied Defendant's motion on this basis as well.

C. The statement that the motion was not filed for the purpose of delay was found to be false by the trial court.

Finally, the trial court found that Defendant's motion was filed for the purpose of delay. (SCED, Record, p. 12). The trial court held, "[m]ost telling, Defendant filed the current motion 22 years after his conviction, but only one day prior to the United States Supreme Court conferencing his petition for certiorari review." *Id.*

Defendant argues that he must simply state in his pleading that his filing was not for the purpose of delay to satisfy O.C.G.A. § 5-5-41(c)(4)(A). Admittedly, Defendant's argument does have some support from this Court's precedent. In *Crawford*, this Court held:

> Crawford is correct in this argument insofar as it regards paragraph (4), which requires merely that a petitioner "state" that his or her motion for DNA testing is not being made for the purpose of delay and that the request for DNA testing is either being made for the first time *or*, if made previously in another court, has never been granted previously. O.C.G.A. § 5-5-41 (c) (4). These two prerequisites in paragraph (4) are simple matters that require no detailed explanation in a petitioner's motion.

Crawford, 278 Ga. at 97.

Yet, there is no law or principle that requires a court to accept a statement as true that is wholly belied by the record. Interpreting the law to the contrary makes this portion of the statute legally irrelevant. Moreover, such a reading would be contrary to O.C.G.A. § 5-5-41(a) which states, "[w]hen 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." The trial court in the instant case found there was no good reason established, but instead, the filing was solely for the purpose of delay.

Further, "[a]ttorneys are officers of the court and a statement to the court in their place is prima facie true and needs no further verification *unless the same is required by the court* or the opposite party." *Anthony v.*

State, 298 Ga. 827, 830 (2016) (emphasis added). Defendant's counsel's filing of the extraordinary motion for new trial should be held to the same standard. When statements are made to the court that are clearly blatant misrepresentations, the court should not have to accept them as fact. In the instant case, it is without question that the motion was filed for the purpose of the delay; everything belies the statement to the contrary.

As found by the trial court, when Defendant was tried in 1997, "DNA testing was available, but not requested by Defendant." (SCED, Record, p. 12, citing SCED, Record, pp. 49-50, ¶ 13). The trial court further found that although Defendant conducted discovery and hired experts during his state habeas proceedings, he "never requested the testing of any items for potential DNA" although the very testing he is requesting was available. (SCED, Record, p. 12, citing SCED, Record, p. 50, ¶ 15). The court also found that in the federal habeas proceedings, Defendant "requested the opportunity for a hearing and for discovery and for expert assistance," but "did not request DNA testing," which was available. (SCED, Record, p. 12).

Additionally, showing the dilatory tactics of Defendant's filing is the recent pattern and practice of Georgia death row inmates who have reached the conclusion of their appeals process to file an extraordinary motion for new trial in an attempt to delay their executions. As argued to the trial court, Ray Cromartie completed his appeals on December 3, 2018. He filed an extraordinary motion for new trial, three weeks late, on December 27, 2018, after 24 years of appeals. *State v. Cromartie*, 94-CR-328 (Thomas Co.

Superior Court). Donnie Lance completed his appeals on January 7, 2019. Once his counsel learned an execution warrant was imminent, an extraordinary motion for new trial was filed on April 26, 2019, after 20 years of appeals. *State v. Lance*, M-CR-98-0000036 (Jackson Co, Superior Court). Likewise, Defendant has waited until the completion of his appeals, for 22 years, to file the instant extraordinary motion for new trial. It is clear that these filings are solely for the purpose of delay.

CONCLUSION

WHEREFORE, for all the above and foregoing reasons, the State of Georgia respectfully requests that this Court deny Applicant's application to appeal the trial court's denial of Defendant's Extraordinary Motion for New Trial and his motion for stay of execution.

Respectfully submitted this 17th day of June, 2019.

/s/ Stephen Bradley
Stephen Bradley, District Attorney
Ocmulgee Judicial Circuit

/s/ Beth Burton
Beth Burton
Deputy Attorney General

CERTIFICATE OF SERVICE

I do hereby certify that I have this day electronically filed this pleading with the Georgia Supreme Court which will automatically send e-mail notification of such filing to the following attorney of record:

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Georgia Resource Center
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This 17th day of June, 2019.

/s/ Stephen Bradley
Stephen Bradley
District Attorney
Ocmulgee Judicial Circuit

Appendix J

IN THE SUPREME COURT OF GEORGIA

MARION WILSON, JR.,	)	
Applicant,	)	Case No. S19W1323
	)	
vs.	)	Baldwin County
	)	No. 39249B
STATE OF GEORGIA,	)	

EXECUTION SCHEDULED
JUNE 20, 2019 @ 7:00PM

REPLY BRIEF IN SUPPORT OF CONSOLIDATED APPLICATION TO APPEAL DENIAL OF EXTRAORDINARY MOTION FOR NEW TRIAL AND MOTION FOR STAY OF EXECUTION

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TABLE OF CONTENTS

I. The Trial Court's Denial of the EMNT Directly Contravened O.C.G.A. § 5-5-41, Which Required the Court to Conduct a Hearing to Address the Merits of the EMNT Once Basic Pleading Requirements Were Satisfied, as They Were Here. 3

II. Because Mr. Wilson Satisfied the Requirements of Paragraphs (3) and (4) of Subsection (c), He Was Entitled to a Hearing to Establish His Entitlement to DNA Testing....4

A. In Light of "All the Evidence in the Case," Favorable DNA Testing Would Create a Reasonable Probability of a Different Result. 5

B. The Prosecutor's Argument that Mr. Wilson Was the Shooter Was Critical to the Jury's Decision to Impose Death and Proof that Mr. Wilson Did Not Grab the Victim by the Tie Would Be Critical Evidence Establishing His Ineligibility for the Death Penalty. 8

C. The Trial Court Erred in Finding—Contrary to the EMNT's Allegations and the DNA Statute's Requirement That Such Issues Be Addressed at a Hearing—that The EMNT Was Filed for the Purpose of Delay. 11

CONCLUSION 13

CERTIFICATE OF SERVICE 14

IN THE SUPREME COURT OF GEORGIA

MARION WILSON, JR.,	)	
Applicant,	)	Case No. S19W1323
	)	
vs.	)	Baldwin County
	)	No. 39249B
STATE OF GEORGIA,	)	

EXECUTION SCHEDULED
JUNE 20, 2019 @ 7:00PM

REPLY BRIEF IN SUPPORT OF CONSOLIDATED APPLICATION TO APPEAL DENIAL OF EXTRAORDINARY MOTION FOR NEW TRIAL AND MOTION FOR STAY OF EXECUTION

Applicant, MARION WILSON, JR., respectfully submits this Reply Brief in support of his application to this Court for a stay of execution and leave to appeal, pursuant to O.C.G.A. § 5-6-35(a)(7), from the Baldwin County Superior Court's denial of his Extraordinary Motion for New Trial ("EMNT"). As set forth below, the Superior Court's denial of Mr. Wilson's EMNT was in direct contravention of the procedures set forth in O.C.G.A. § 5-5-41 ("DNA statute"), and wrong as a matter of fact and law. This Court, accordingly, should grant leave to appeal and a stay of execution to permit such appeal the consideration it is due.

I. The Trial Court's Denial of the EMNT Directly Contravened O.C.G.A. § 5-5-41, Which Required the Court to Conduct a Hearing to Address the Merits of the EMNT Once Basic Pleading Requirements Were Satisfied, as They Were Here.

The Legislature could not have been clearer in requiring the trial court to conduct a hearing on an EMNT requesting access to evidence for forensic deoxyribonucleic acid ("DNA") testing. The statute provides that the court "*shall* order a hearing to occur" if the court determines that the EMNT complies with paragraphs (3) and (4) of subsection (c). O.C.G.A. 5-5-41(c)(6)(A). If further explains the purpose of the required hearing:

> 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 that 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). The statute thus contemplates that questions concerning the factual basis of the pleadings will be addressed at a hearing conducted before the court and that disposing of the case on the basis of briefs is not appropriate.[1]

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[1] Respondent asserts that because the statute does not contemplate the filing of a reply brief in support of the EMNT, the trial court could not have abused its discretion in ruling without first providing Mr. Wilson the opportunity to file one. *See* State's Brief at 4-5. While it is true that the statute does not contemplate the filing of a reply, that is because it mandates that issues regarding the validity of the allegations be addressed at a hearing. "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). *See, e.g.*, *Wilkinson v. Austin*, 545 U.S. 209, 226 (2005) ("[A] fair opportunity for rebuttal . . . [is] among the most important procedural mechanisms

II. Because Mr. Wilson Satisfied the Requirements of Paragraphs (3) and (4) of Subsection (c), He Was Entitled to a Hearing to Establish His Entitlement to DNA Testing.

Mr. Wilson's EMNT alleges each of the specific pleading requirements of O.C.G.A. § 5-5-41(c)(3) and (4). Even though, at the pleading stage, Mr. Wilson was not required to *prove* his entitlement to testing—that proof is intended to be presented at the mandatory hearing the trial court denied—his allegations sufficiently met the statutory pleading requirements and, accordingly, mandated a hearing before the trial court. The trial court, in its May 30, 2019, Order, concluded that Mr. Wilson's EMNT failed to satisfy some of the required showings, to wit: (1) that DNA results favorable to Mr. Wilson "would raise a reasonable probability that the Defendant would have been acquitted if the results of the DNA testing had been available at the time of the conviction, in light of all the evidence the case"; (2) that such evidence would not have created "a reasonably probability of a different sentencing verdict"; (3) that the identity of the perpetrator was or should have been a significant issue in the case; and (4) that the EMNT was not filed for the purpose of delay. *See* Order at 3-10. The State defends each of these findings, although they are based on critical mistakes of fact and law.

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for purposes of avoiding erroneous deprivations."). Here, the trial court denied Mr. Wilson the process he was due by failing to conduct a hearing pursuant to O.C.G.A. § 5-5-41(c)(6)(A) *and* by denying the EMNT without providing him any opportunity to respond to the State's arguments.

A. In Light of "All the Evidence in the Case," Favorable DNA Testing Would Create a Reasonable Probability of a Different Result.

The DNA statute required Mr. Wilson to "show or provide" that "[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) (emphasis added). This Court has held that, in a case where the defendant has been sentenced to death, the statute also is satisfied where "the DNA testing results . . . would . . . in reasonable probability have led to . . . [the defendant's] receiving a sentence less than death, if they had been available at . . . trial." *Crawford v. State*, 278 Ga. 95, 99 (2004). Mr. Wilson satisfied these requirements, demonstrating in his motion the critical importance the prosecutor placed on the necktie in both the culpability and the sentencing phases of trial, in arguing that Mr. Wilson, contrary to his statement, was actively involved in the robbery and murder of Mr. Parks, and, at sentencing, that Mr. Wilson was in fact the shooter. The prosecutor's argument, alone, demonstrates the significance of the evidence and the potential exculpatory power of favorable DNA results. *See, e.g.*, *Banks v. Dretke*, 540 U.S. 668, 700 (2004) (granting relief on basis of prosecutor's suppression of impeachment evidence where "[t]he prosecution's penalty-phase summation . . . left no doubt about the importance the State attached to Farr's testimony. What Farr told the jury,

the prosecutor urged, was 'of the utmost significance' to show '[Banks] is a danger to friends and strangers, alike").

The evidence, moreover, of Mr. Wilson's guilt and culpability, apart from the necktie, was hardly overwhelming. 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 actively engaged in the robbery and murder was underwhelming at best: the prosecutor had Mr. Wilson's statements in which Mr. Wilson 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,[2] although Ms. Mosley's testimony on this point was contradicted by others,[3] and she apparently

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[2] 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.

[3] *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

was mistaken in her belief that a fourth man got into the victim's car with Mr. Parks, Mr. Wilson and Butts.[4]

Given the weaknesses in the State's case and the undeniable importance of the necktie to the prosecutor's arguments that Mr. Wilson should be found guilty of malice murder and sentenced to death, the trial court was simply wrong in concluding that favorable DNA testing would not create a reasonable probability of a different outcome. The trial court not only ignored the necktie's literal importance to the prosecutor's claims (the prosecutor discussed the tie at length in his opening and closing statements in the culpability phase of trial and spun it into "proof" that Mr. Wilson in fact shot Mr. Parks in urging imposition of the death penalty); the court also ignored other exculpatory evidence in the record, both from trial and from state habeas proceedings (and from Butt's trial and habeas proceedings), with respect to both Mr. Wilson's involvement in Mr. Parks' death and the state's case in aggravation, which establish that Butts was the main actor in the crime and the

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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.

[4] *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.

person who in fact shot Mr. Parks, and significant weaken the aggravated nature of the State's sentencing phase evidence. Indeed, the trial court's reliance on this Court's direct appeal findings, in assessing the sufficiency of the evidence supporting the convictions and death sentence under the standard of *Jackson v. Virginia*, 443 U.S. 307 (1979), by "view[ing the evidence] in the light most favorable to the verdict,"[5] is the opposite of the DNA statute's command. The trial court's analysis was consequently in violation of the DNA statute's directive to consider the potential impact of DNA testing "in light of all the evidence in the case."

B. The Prosecutor's Argument that Mr. Wilson Was the Shooter Was Critical to the Jury's Decision to Impose Death and Proof that Mr. Wilson Did Not Grab the Victim by the Tie Would Be Critical Evidence Establishing His Ineligibility for the Death Penalty.

The identity of the shooter was critical in this case. That's why prosecutor Fred Bright argued the significance of the necktie as proof that Mr. Wilson was the person who in fact shot Mr. Parks. As the prosecutor later explained in Butts' state habeas proceedings, convincing the jury of the defendant's factual culpability for a homicide is critical to obtaining a death sentence: "Does it make a difference who pulled the trigger? Of course it does." Butts HT 575. Bright testified that in a case like this the death penalty is usually only sought for the shooter: "Usually, I will tell

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[5] *Wilson v. State*, 271 Ga. 811, 813 (2000).

you this, in a death penalty case, which is unique by its own definition, it usually will be the shooter [for whom the death penalty is sought], it usually will be." *Id.* at 577 (Exhibit L). As Bright only belatedly conceded, contrary to his averments at Mr. Wilson's sentencing, the evidence shows that Robert Butts, *not* Marion Wilson, shot and killed Donovan Parks. Butts HT at 2282, 2285, 2295.

The prosecutor's views on the importance of identifying the shooter are consistent with case law, which has recognized that the shooter is often the most culpable of multiple defendants. Relative culpability is critical in the penalty phase of a capital case, in which the jury weighs aggravating factors against mitigating factors to determine if a death sentence is appropriate. *See Green v. Georgia*, 442 U.S. 95, 97 (1979) (noting that whether the defendant was present at the time of the actual murder was "highly relevant to a critical issue in the punishment phase of the trial"); *see also Brady v. Maryland*, 373 U.S. 83, 87-88 (1963) (approving state court's grant of sentencing relief due to prosecutor's improper suppression of evidence that co-defendant confessed to shooting the victim, and noting that "[a] prosecution that withholds evidence . . . which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant" in a "proceeding that does not comport with standards of justice"). The conclusion that a defendant did, in fact, pull the trigger increases his or her moral culpability, and thus the likelihood of a death sentence. *See Butts v. State*, 273 Ga.

at 771 (noting that whether Robert Butts was the triggerman was relevant to Mr. Butts' culpability for the crime). Moreover, a "prosecutor's use of allegedly inconsistent theories may have a more direct effect on [the defendant]'s sentence, . . . for it is at least arguable that the sentencing panel's conclusion about [the defendant]'s principal role in the offense was material to its sentencing determination." *Bradshaw v. Stumpf*, 545 U.S. 175, 187 (2005). If a jury is falsely led to increase a defendant's culpability, there is an unacceptable risk that the jury will mistakenly sentence that defendant to death.

Moreover, proof that Mr. Wilson was *not* the person who grabbed Mr. Parks by his necktie would also support the conclusion that the evidence against Mr. Wilson is insufficient to support the death penalty under *Enmund v. Florida*, 458 U.S. 782 (1982). As the Supreme Court of the United States has explained, a perpetrator of felony murder who himself did not kill, attempt to kill or intend that a killing occur and whose "involvement in the events leading up to the murder[] was [not] active, recklessly indifferent, and substantial," may not be subject to the death penalty. *Kennedy v. Louisiana*, 554 U.S. 407, 420-21 (citing *Enmund* and *Tison v. Arizona*, 481 U.S. 137 (1987)).

As such, it blinks reality for the trial court to have concluded that "identity" of the shooter was not an issue in the case.

C. The Trial Court Erred in Finding—Contrary to the EMNT's Allegations and the DNA Statute's Requirement That Such Issues Be Addressed at a Hearing—that The EMNT Was Filed for the Purpose of Delay.

The trial court also found that Mr. Wilson's only purpose in filing the EMNT was delay. In doing so, the trial court failed to follow the clear commands of the DNA statute and this Court, and reached the conclusion on the basis of pure speculation.

The DNA statute requires a defendant seeking DNA testing to "state" in the EMNT that "the motion is not filed for the purpose of delay." O.C.G.A. § 5-5-41(c)(4)(A). Mr. Wilson did so, several times. *See* EMNT at pp 6, 14, 25. No more was required. As this Court explained in *Crawford*, the "two prerequisites in paragraph (4) are simple matters *that require no detailed explanation in a petitioner's motion*." *Crawford*, 278 Ga. at 97. Without any actual evidence of the motivations for filing the EMNT (such as the importance of the untested necktie to the prosecutor's case at culpability and sentencing, and the overriding importance of determining the truth or falsity of the prosecutor's arguments), the State directly impugns the integrity of undersigned counsel in filing the EMNT with the required statement that it was not filed for the purpose of delay: "When statements are made to the court that are clearly blatant misrepresentations, the court should not have to accept them as fact. In the instant case, it is without question that the motion was

filed for the purpose of the delay; everything belies the statement to the contrary." State's Brief at 13.

The merits of Mr. Wilson's request for DNA testing are apparent and well documented in the EMNT and the application before this Court. Moreover, the State's arguments as to why Mr. Wilson could have sought DNA testing sooner are meritless. As Mr. Wilson has explained, both to the trial court and this Court, the science of DNA testing was *not* sufficiently advanced at the time of trial to permit meaningful testing of the tie. *See, e.g.*, EMNT at 4, Exhibit B to EMNT. The science of DNA testing was also not meaningfully advanced at the time of discovery in state habeas proceedings. *See* Scheduling Order, dated June 11, 2002 (setting deadline for rebuttal filings to September 3, 2002); HT 1 (evidentiary hearing conducted February 22 and 23, 2005). Nor could Mr. Wilson have sought DNA testing in federal habeas proceedings, where the barriers to obtaining discovery and presented new evidence are exceptionally high. *See, e.g.*, *Cullen v. Pinholster*, 563 U.S. 170, 185 ("Although state prisoners may sometimes submit new evidence in federal court, AEDPA's statutory scheme is designed to strongly discourage them from doing so.").

The trial court and State's assertions that the age of this case precludes an explanation for Mr. Wilson's request for DNA testing other than "delay" seeks to impose a diligence requirement on the DNA testing portions of O.C.G.A. § 5-5-41,

which does not apply, and which, in fact, is wholly inconsistent with the statute's provision that a litigant may file only one EMNT ever, *see* O.C.G.A. § 5-5-41(b)—a provision that encourages litigants to develop evidence supporting their innocence before using up their only opportunity under the statute to seek DNA testing.

CONCLUSION

For the reasons set forth above and in Mr. Wilson's Application for leave to appeal and for a stay of execution, Mr. Wilson respectfully requests that the Court stay Mr. Wilson's scheduled execution and grant leave to appeal to this Court, so that Mr. Wilson may demonstrate his entitlement to DNA testing that has the potential to prove his ineligibility for execution as well as proving that a jury hearing such evidence would likely not impose the death penalty.

This 18th day of June, 2019.

Respectfully submitted,

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IN THE SUPREME COURT OF GEORGIA

MARION WILSON, JR.,	)	
Applicant,	)	Case No. S19W1323
	)	
vs.	)	Baldwin County
	)	No. 39249B
STATE OF GEORGIA,	)	

CERTIFICATE OF SERVICE

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 18th day of June, 2019.

Marcia A. Widder

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Attorney

Appendix K

STATE BOARD OF PARDONS AND PAROLES

DENIAL OF COMMUTATION OF SENTENCE OF DEATH

WHEREAS: Upon the 7th day of November, 1997, a sentence of death was imposed on the defendant in the case of The State of Georgia v. Marion Wilson, Jr., EF 384422 Indictment Number 39249B before the Superior Court of Baldwin County; and,

WHEREAS: An order of the Superior Court of Baldwin County, dated the 5th day of June, 2019, directs that Marion Wilson, Jr., shall be executed by the Department of Corrections during a certain period of time commencing at noon on the 20th day of June, 2019, and ending at noon on the 27th day of June, 2019; and,

WHEREAS: The State Board of Pardons and Paroles having received, on behalf of Marion Wilson, Jr., an application for clemency requesting that the Board exercise its authority to enter orders staying the execution of Marion Wilson, Jr., as well as to commute said sentence of death to a sentence of life or life without parole; and,

WHEREAS: The State Board of Pardons and Paroles has reviewed and considered all of the facts and circumstances of the offender and his offense, the clemency application, argument, testimony, and opinion in support of clemency;

THEREFORE: Pursuant to the provisions of Article IV, Section II, Paragraph II (a) and (d) of the Constitution of the State of Georgia, by the Members of the State Board of Pardons and Paroles, **IT IS HEREBY ORDERED** that the clemency application on behalf of Marion Wilson, Jr., requesting his execution be stayed and that his sentence of death be commuted to a sentence of life or life without parole is **DENIED**.

For the State Board of Pardons and Paroles on this 30th day of June, 2019.

Terry E. Barnard
Chairman