ATTACHMENT A

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
SD.

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.

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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

[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.,	)	
	)	
Petitioner,	)	
	)	Civil Action No. 2001V38
v.	)	
	)	Habeas Corpus
FREDERICK HEAD, Warden,	)	
Georgia Diagnostic and	)	
Classification Prison,	)	
	)	
Respondent.	)	
	)	

FIRST AMENDMENT TO PETITION FOR WRIT OF HABEAS CORPUS[1]

Comes now Petitioner, Marion Wilson, Jr., by and through undersigned counsel, and, pursuant to O.C.G.A. §§ 9-14-41 et seq., amends his previously filed petition for a Writ of Habeas Corpus. Petitioner is an indigent person currently under sentence of death. Respondent is the Warden of the Georgia Diagnostic and Classification Prison in Jackson, Georgia.

[1] Petitioner reserves the right to further amend his Petition as investigation uncovers evidence pertinent to this proceeding. Petitioner is entitled to file this and subsequent amended petitions, and to be heard on the claims contained in such amended petitions. See O.C.G.A. §§ 9-11-15(a) and 9-11-81; Nelson v. Zant, 261 Ga. 358, 405 S.E.2d 250 (1991) (amendment as a matter of right before entry of pre-trial order); Clover Realty v. Todd, 237 Ga. 821, 229 S.E.2d 649 (1976) (same); Newbern v. Chapman Funeral Chapel, 158 Ga. App. 790, 282 S.E.2d 379 (1981) (amendment may be filed before entry of pretrial order without leave of court); Mitchell v. Forrester, 247 Ga. 622, 278 S.E.2d 368 (1981) (Civil Practice Act applies to habeas corpus proceedings); Johnson v. Caldwell, 229 Ga. 548, 192 S.E.2d 900 (1972) (same); see also Redd v. Zant, No. CV-85-133 (1988) (habeas petition amended four days before hearing); Cargill v. Kemp, 87-CV-1018 (1988) (habeas petition amended morning of hearing); Ross v. Kemp, No. 85-CV-3682 (1987) (same); Allen v. Kemp, No. 86-CV-565 (1987) (habeas petition amended day before hearing); Ingram v. Kemp, No. 85-CV-355 (1987) (habeas petition amended morning of hearing); Finney v. Kemp, No. 86-CV-597 (1987) (same); Hill v. Kemp, No. 85-CV-105 (1987) (same); Roberts v. Kemp, No. 84-CV-40 (1985) (same); Gilreath v. Kemp, No. 6201 (1984) (same); Connor v. Francis, No. 6335 (1984) (same); Jones/May v. Zant, No. 5822 (1983) (same); Crawford v. Zant, 90-CV-3993 (1992) (same).

inviting the jury to sentence Petitioner based on his gang association even though there was no evidence indicating that the Parks murder was gang-related.

13. Because a properly informed, unbiased jury would not have convicted Petitioner of murder or sentenced him to death, these errors and the many other errors attendant to Petitioner's trial deprived him of the fair and reliable proceedings guaranteed by law.

CLAIM ONE

PETITIONER IS INNOCENT OF THE CRIMES OF WHICH HE WAS CONVICTED AND SENTENCED TO DEATH, AND HIS EXECUTION WOULD BE A MISCARRIAGE OF JUSTICE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ANALOGOUS PROVISIONS OF THE GEORGIA CONSTITUTION.

14. All other claims and allegations in this Amended Petition are incorporated herein by this reference.

15. "In all cases habeas corpus relief shall be granted to avoid miscarriage of justice." O.C.G.A. §9-14-48(d). The Georgia Supreme Court has said that miscarriage of justice is

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

Valenzuela v. Newsome, 253 Ga. 793, 796, 325 S.E.2d 370 (1985).

16. The record of Petitioner's trial reveals that the State offered little evidence of Petitioner's conduct prior to or during the commission of the crimes. This evidence consisted of testimony of witnesses who observed the events prior to the crimes and an audio recording of Petitioner's interrogation by the Chief Deputy Sheriff of Baldwin County, Howard Sills, and Sheriff Bill Masse. Two witnesses -- Kenya and Chico Moseley -- testified that they saw Petitioner and co-defendant Robert Butts enter the victim's automobile at the Wal-Mart. The

audio recording of Petitioner's interrogation revealed only that Petitioner was in the back seat of the victim's car when Butts committed the crimes. Transcript p. 1588. There was no other account of Petitioner's conduct prior to or during the armed robbery and murder presented to the jury during the guilt/innocence phase.

17. The evidence that Petitioner participated in the commission of the crimes was therefore entirely circumstantial. Georgia law requires that when a case against a criminal defendant is entirely circumstantial, a conviction cannot be had if the circumstantial evidence supports a reasonable hypothesis of the defendant's innocence. Section 24-4-6 of the Georgia Code provides, "To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused." O.C.G.A. § 24-4-6 (emphasis added).

18. Section 24-4-6 has been interpreted to mean that when the circumstantial evidence supports more than one theory -- one consistent with guilt and another with innocence -- it does not exclude every other reasonable hypothesis and is therefore not sufficient to prove the defendant's guilt beyond a reasonable doubt. Carr v. State, 119 Ga. App. 540 (1969). And for nearly a century, other cases interpreting the statute have held that proven facts must be inconsistent with innocence to warrant a conviction on circumstantial evidence. See, e.g., Riley v. State, 1 Ga. App. 651 (1907).

19. Under Section 24-4-6, Petitioner could only have properly been convicted if the only possible inference from the circumstantial evidence of his conduct prior to or during the crimes is that he planned or participated in their commission. Said differently, as long as the circumstantial evidence was consistent with the hypothesis that Petitioner was merely present when the crimes occurred, the jury could not properly convict him on the murder charge.

20. The theory that Petitioner was merely present when the crimes occurred is perfectly reasonable in light of the circumstantial evidence. The testimony of the eye-witnesses shows simply that Petitioner was at the Wal-Mart with Robert Butts and that Petitioner entered the car with Butts and the victim. Petitioner's tape-recorded interview adds only that he was in the back seat of the car when the crimes occurred and that Butts had earlier told Petitioner that he wanted to rob someone. Petitioner in the audio recording stated: "I thought he was joking . . . . I didn't know he was for real." (Transcript p. 1607). Petitioner had explained that Butts did not make his statement on the day of the robbery.

21. Thus, the evidence presented at trial leads reasonably to the inference that Petitioner went along with Butts without any intention to encourage or assist in the commission of a crime and that he was in the back seat when Butts decided to make good on his earlier bravado.

22. The reasonableness of this hypothesis is only strengthened when additional evidence not presented to the jury during the guilt/innocence phase is considered. This evidence includes, but is not limited to, testimony from three jailhouse confidants and from Raphael Baker that Petitioner's co-defendant, Robert Butts, confessed to being the triggerman, and that Butts committed the murder after a spontaneous interaction between Butts and the victim that did not involve Petitioner; testimony from Sheriff Sills, which he provided at the Butts trial, that Butts was the one who possessed and concealed the murder weapon while Butts and Petitioner were at the Wal-Mart; testimony from Felicia Ray that Petitioner was talking to her while Butts was in the Wal-Mart with Parks and that Petitioner could not have been carrying a loaded shotgun; and testimony from Angela Johnson that the alleged murder weapon was found at the house she shared with Petitioner because Butts had come to her home the day after the murder with the weapon and told Petitioner to "hold it" for him.

23. Because the evidence of Petitioner's participation in the crimes was entirely circumstantial, and because the evidence was consistent with a reasonable hypothesis of Petitioner's innocence, O.C.G.A. § 24-4-6 precludes Petitioner from being convicted of the crimes for which he was sentenced to death. Trial counsel failed to use available law to argue persuasively that a directed verdict of not guilty was mandated.

24. Thus, Petitioner does not simply complain of procedural irregularities. Instead, Petitioner precisely fits into the narrow exception the Georgia Supreme Court has carved out for a miscarriage of justice. While the Georgia courts have yet to define the standard of proof required to show a miscarriage of justice, Petitioner's evidence makes it more likely than not that no reasonable juror would have convicted him or sentenced him to death. See Schlup v. Delo, 513 U.S. 298, 324 (1995).

25. The Georgia habeas corpus statute provides that "[I]n all cases, habeas corpus shall be granted to avoid a miscarriage of justice." O.C.G.A. § 24-4-6. The most respected scholar of Georgia habeas corpus practice and procedure, University of Georgia Law School Professor Donald E. Wilkes, has concluded that "the statutory language regarding a miscarriage of justice (1) furnishes an independent basis for granting relief, and (2) also furnishes a procedure which, like a showing of cause and prejudice, permits a court to consider the merits of a procedurally defaulted claim." See Donald E. Wilkes, Jr., State Postconviction Remedies and Relief, App. A, p. 408; § 1-13, at 31-32 (1996).

26. Thus, actual innocence is an independent, cognizable claim which may be remedied by habeas corpus relief in order to prevent a miscarriage of justice, and constitutes an exception to the bar to habeas litigation of claims which would otherwise be precluded by procedural default or res judicata. O.C.G.A. § 9-14-48(d).

27. Most of the Georgia case law concerning the miscarriage of justice focuses on the use of miscarriage as a mechanism to cure procedural default in instances of alleged constitutional error. See, e.g., Gavin v. Vasquez, 261 Ga. 568, 407 S.E.2d 756 (1991); Black v. Hardin, 255 Ga. 239, 336 S.E.2d 754 (1985). However, the language of the statute does not so limit the use of the miscarriage of justice clause. See O.C.G.A. § 9-14-48(d).

28. To the contrary, as Professor Wilkes has indicated, the broad language of the statute, Georgia case law, and the law of other states support the notion that a miscarriage of justice can also be the basis for an independent claim under habeas. See Donald E. Wilkes, Jr., State Postconviction Remedies and Relief § 1-13, at 31-32, §3-3 (1996).

29. First, the statute uses broad and open language, and on its face does not limit the use of the miscarriage of justice clause in any way. Second, Georgia case law also permits the miscarriage of justice clause to be used to prevent the punishment of innocent persons, regardless of the existence of an attendant constitutional error. The "plain example" or a miscarriage of justice cited by the Georgia Supreme Court in Valenzuela – "a case of mistaken identity" – includes no requirement that a specific constitutional violation resulted in the erroneous determination of guilt. Valenzuela, 253 Ga. at 796, 325 S.E.2d at 374. As the Court observed,

> we must not become so engrossed in the searching out of procedural faults which sometimes intrude in convicting the guilty that we forget the core purpose of the writ [of habeas corpus]-which is to free the innocent deprived of their liberty...[as] necessary to avoid a miscarriage of justice.

Id.

30. While habeas is not normally the avenue in which guilt and innocence is to be litigated, habeas must remain available to avoid a miscarriage of justice. O.C.G.A. § 9-14-48(d). If a miscarriage of justice can be prevented by litigating guilt or innocence under habeas where

there is substantial new evidence of actual innocence, then habeas is the correct avenue in which to prevent such a miscarriage of justice.

31. The use of Georgia's habeas law to rectify clear miscarriages of justice is also consistent with the practice in other states. While historically it was understood that postconviction relief could not be granted solely on a free-standing claim of innocence, that blanket restriction has been eroding in the states since the early 1920's. Neely v. State, 292 Ark. 465, 730 S.W.2d 898 (1987); In re Kirschke, 53 Cal. App. 3d 405, 125 Cal Rptr. 680 (1975). The trend across the country is to give relief under the writ of habeas corpus for a claim of actual innocence is supported by new evidence. See, e.g., Callier v. Warden, 111 Nev. 976, 901 P.2d 619 (1995); Casida v. Deland, 866 P.2d 599 (Utah App. 1993); Talton v. Warden, 33 Conn. App. 171, 634 A.2d 912 (1993); Stewart v. State, 830 P.2d 1159, 275 Cal. Rptr. 729 (1991); Valenzuela, 253 Ga. 793, 325 S.E.2d 370 (1985); In re Gallegos v. Turner, 17 Utah 2d 273, 409 P.2d 386 (1965).

32. Many of these states do not even provide relief to rectify a "miscarriage of justice" in their habeas statutes, as does Georgia, but judicially grant an independent habeas claim where new evidence supports actual innocence. See, e.g., Callier, supra; Summerville v. Warden, 229 Conn. 397, 641 A. 2d 1356 (1994); In re Clark, 5 Cal. 4th 750, 855 P.2d 729, 21 Cal. Rptr. 2d 509 (1993).

33. Even if this Court were to require that a constitutional error must be alleged in order to pursue relief under the writ of habeas corpus, Petitioner has suffered a constitutional error. The punishment of an innocent person violates the cruel and unusual punishment clause of the United States and Georgia constitutions. Moreover, if an innocent person is punished for a crime, that person's constitutional due process rights to liberty and life have necessarily been violated. Id.

34. Society recoils at State execution of an innocent person. Such a barbaric act is "at odds with contemporary standards of fairness and decency," Spaziano v. Florida, 468 U.S. 447, 465 (1984), and would be "bound to offend even hardened sensibilities." Rochin, 342 U.S. at 172. As Judge Learned Hand recognized, our justice system is "haunted by the ghost of the innocent man." Charles E. Silberman, Criminal Violence Criminal Justice 262 (1978); see also Pulley v. Harris, 465 U.S. 37, 68 (1984) ("The execution of someone who is completely innocent . . . [is] the ultimate horror case.") (Brennan, J., dissenting) (quoting John Kaplan, The Problem of Capital Punishment, 1983 U. Ill. L. Rev. 555, 576) (internal quotations omitted). "The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering." Furman v. Georgia, 408 U.S. 238, 279 (1972) (Brennan, J., concurring).

35. The "natural abhorrence civilized societies feel at killing" an innocent person (Ford, 477 U.S. at 409), requires that the law remove that possibility as much as is humanly possible. Society's abhorrence at the idea of executing an innocent person finds expression in the United States Supreme Court's Eighth Amendment and Fourteenth Amendment jurisprudence. First, as a matter of substantive Fourteenth Amendment law, "no person can be punished criminally save upon proof of some specific criminal conduct." Schad v. Arizona, 111 S. Ct. 2491, 2497 (1991). And, of course, that proof must be beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307 (1979).

36. Additionally, as a matter of substantive Eighth Amendment law, "a person who has not in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used may not be sentenced to death." Cabana v. Bullock, 474 U.S. 376, 386 (1986). If such a sentence is imposed the "Eighth Amendment violation can be adequately remedied by any court that has the power to find the facts and vacate the sentence," and "prevent the execution." id. at

386, 390; Tison v. Arizona, 481 U.S. 137 (1987); Enmund v. Florida, 458 U.S. 782 (1982). The most basic equitable principle is that courts must prevent fundamental miscarriages of justice. McClesky v. Zant, 111 S. Ct. 1454, 1471 (1991). To execute Petitioner for a killing that the State of Georgia now says was done by another without the slightest evidence that Petitioner intended that a killing take place or in any way assisted in the killing would effect not only a disproportionate sentence, but also a fundamental miscarriage of justice that this Court has the power and duty to avert.

CLAIM TWO

PETITIONER WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ANALOGOUS PROVISIONS OF THE GEORGIA CONSTITUTION, AND STRICKLAND v. WASHINGTON, 466 U.S. 668 (1984).

37. All other allegations in this Amended Petition are incorporated herein by this reference.

38. Counsel's unreasonable actions and omissions at the guilt and sentencing phases of Petitioner's trial prejudiced the outcomes of both phases.

39. Petitioner was denied his right to the effective assistance of counsel at his capital trial and appeal in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §1, ¶¶ 1, 2, 11, 12, 14, and 17 of the Constitution of the State of Georgia. See Strickland v. Washington, 466 U.S. 668 (1984); Williams v. Taylor, 529 U.S. 362 (2000); Turpin v. Christenson, 269 Ga. 226, 497 S.E.2d 216 (1998); Turpin v. Lipham, 270 Ga. 208, 216, 510 S.E.2d 32, 40 (1998).

Counsel's ineffectiveness includes, but is not limited to, the following:

CLAIM ELEVEN

MISLEADING ARGUMENT AND MISCONDUCT BY THE PROSECUTION AND ITS AGENTS DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL IN VIOLATION OF ART. I, § 1, ¶¶ 1, 2, 11, 12, 14 & 17 OF THE CONSTITUTION OF THE STATE OF GEORGIA AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

92. All other claims and allegations in this Amended Petition are incorporated herein by this reference.

93. The prohibition against cruel and unusual punishment imposed by the Georgia and United States Constitutions requires that the capital trial and sentencing proceeding be fair and reliable. See, e.g., Sermons v. State, 262 Ga. 286, 417 S.E.2d 144 (1992); Gardner v. Florida, 430 U.S. 349 (1977); Woodson v. North Carolina, 428 U.S. 280 (1976). A death sentence predicated in part on evidence or argument which is materially inaccurate violates due process and the prohibition against cruel and unusual punishments. See Johnson v. Mississippi, 406 U.S. 578 (1988); Duest v. Singletary, 907 F.2d 472, 483 (11th Cir. 1992); Devier v. Zant, 3 F.3d 1445 (11th Cir. 1993). At Petitioner's trial, the prosecution argued during the sentencing phase that Petitioner fired the shotgun that killed Donovan Parks; in the later trial of Petitioner's co-defendant, Butts, however, the same prosecutor argued that Butts fired the shotgun. To execute Petitioner on the basis of this record violates his rights under Art. I, § 1, ¶¶ 1, 2, 11, 14 & 17 of the Constitution of the State of Georgia, and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

94. Petitioner's rights to due process and a fair trial were violated by improper and prejudicial remarks by the prosecution in its opening statement to the jury and in its closing arguments in both the guilt/innocence phase and sentencing phase of trial. For example, the

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appeal, counsel rendered constitutionally ineffective assistance of counsel and Petitioner was prejudiced thereby. Williams, 87 F.3d at 1210.

prosecution implored the jurors to place themselves in the position of the victim, argued matters outside the evidence, engaged in highly prejudicial theatrics by brandishing the murder weapon, and made other statements calculated to inflame the jury's passions so that they would render a verdict and sentence based on emotion and not the facts and law.[14]

95. Petitioner's rights to association, due process, and a fair trial were further violated by the prosecution's use of highly inflammatory evidence pertaining to gang activity without any evidentiary basis for linking the Parks murder with gang activity, as required under Dawson, supra.

96. Petitioner's rights to due process and a fair trial were further violated when the prosecutor sought a sentence of death based solely on the argument that Petitioner fired the shotgun blast that killed the victim, when in fact the prosecutor believed, and had compelling evidence to believe, that Petitioner's co-defendant, Robert Butts, was the triggerman. This misconduct was confirmed when the same prosecutor tried, convicted, and obtained a death sentence against Butts, based solely on the argument that he was the triggerman.

97. The prosecution suppressed information favorable to the defense, in that it was exculpatory, incriminating of another, or would suggest bias or motivation to fabricate on the part of prosecution witnesses, and the materiality of the suppressed information undermines confidence in the outcome of Petitioner's trial, and Petitioner's direct appeal, in violation of Brady v. Maryland, 373 U.S. 667 (1965), Kyles v. Whitley 514 U.S. 419 (1995) and Castell v. State, 250 Ga. 776 (1983), aff'd 252 Ga. 418 (1984). The Prosecution took advantage of Petitioner's ignorance of the undisclosed favorable information by arguing to the jury that which it knew or should have known to be materially inaccurate and/or misleading. United States v.

[14] To the extent trial counsel failed adequately to object to these improper actions and comments and seek a mistrial or other relief, or to otherwise preserve objections to these comments and actions, counsel was ineffective and Petitioner was prejudiced thereby.

Sanfilippo, 564 F. 2d 176, 179 (5th Cir. 1977). The Prosecution allowed its witnesses to convey a false impression to the jury, and there is a reasonable likelihood that the false impression affected the jury. Giglio v. United States, 405 U.S. 150 (1972). A death sentence resting on inaccurate or misleading testimony knowingly presented by the state is an infringement on the accused's Fifth, Sixth, Eighth, and Fourteenth Amendment rights. Kitchens v. State, 160 Ga. App. 492, 287 S.E.2d 316 (1982); Burke v. State, 205 Ga. 656, 54 S.E. 350 (1949); Giglio v. United States, 405 U.S. 150 (1972).[15]

CLAIM TWELVE

THE UNIFIED APPEAL PROCEDURE VIOLATED PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE ANALOGOUS PROVISIONS OF THE GEORGIA CONSTITUTION.

98. All other claims and allegations in this Amended Petition are incorporated herein by this reference.

99. On its face and as applied to Petitioner's case, O.C.G.A. §17-10-36 (Unified Appeal Procedure) denied Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, § I, ¶¶ I, II, XI, XIV, and XVII of the Georgia Constitution of 1983.

100. The Unified Appeal Procedure, (hereinafter "UAP"), requires the trial court to hold "conferences" with the defendant, defense counsel and the prosecutor at various stages throughout the course of a capital case. At each conference, the court makes inquiries of counsel as to whether the defense will raise various issues at that particular stage of the proceeding, and further inquiries of the defendant as to whether he waived issues which have been discussed and

[15] To the extent that Petitioner's counsel failed to argue, develop, or present these issues, failed to adequately preserve objections thereto, or failed to effectively litigate these issues on direct appeal, Petitioner's counsel rendered ineffective assistance, and Petitioner was prejudiced thereby.

ATTACHMENT D

I'm not conceding that point, I want that crystal clear. Could it have been Wilson, this defendant? Yeah. And that's all they're going to argue, I anticipate, when they get up here. And I'm telling you right now, it was these two that were there. We can prove it. It was one of these two, but it could have been either one. Okay?

The law. What is the law in this state? Well, clearly, the man that pulled the trigger is guilty of murder. And all that other stuff. That's so crystal clear, I don't even want to belabor the point. But what about the other fellow? Whether it was Butts or Wilson. Works both ways. Is that person guilty? And, again, because I say this, I'm not -- I'm not conceding 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. But what is the law? The law in those books. Judge Prior will tell you what it is. Parties to a crime. He will tell you this. He will tell you that every party to a crime may be charged with and convicted of the commission of the crime. So if you are a party to the crime, you can be charged with it and they were both charged with it, and you can be convicted, found guilty of it, which is what the State is asking you to do right here. And he will charge you and define it for you. Our law that you are sworn to uphold, which makes common

o'clock at night. We've got Thursday, the 28th; Friday, the 29th; Saturday, March 30th; Sunday, April 1st until Monday, April 2nd at 3:15 when he was arrested across the street at Maxine Blackwell's office. Five days. For five days, he was out there solving the crime for the police. The man that helped us. Yeah, police. Sheriff Sills, you're investigating the crime. Let me tell you what happened, man. Butts killed -- blew the man's brains out on the side of the -- side of the road. I can tell you that. I'll help you. I'm not involved in this thing. It was horrible. You heard all that, didn't you? Five days. Five days, walking around, knowing the man's brains were blown out on the side of the road, that either he did it or his co-defendant did.

All he wants to do -- he's -- all he wants to do is save his own skin. When I go through this, everything he says, he lies. We have constant lies. And then he'll admit something after he's been caught in a lie. And the State can prove it. He's got one goal, save his own skin.

His statement that you heard from his lips, his lies, his lies. Let's call it the Wal Mart lie. Sheriff Sills -- and I want to get these exact words. You heard it yourself. Sheriff Sills, were you in the Wal Mart? The defendant, Marion Murdock Wilson, "No, I wasn't in it. I

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. Either way you cut it, either way you hold this case up and look at it, look at it through a microscope, look at it anyway you want, he is guilty either way.

Count one is called malice murder and I'll tell you off the top of my head. With malice aforethought caused the death of another human being, Donovan Corey Parks, by shooting him with a deadly weapon, a rifle -- a shotgun. Excuse me. And we proved that.

What's malice aforethought? And, again, the court will tell you all malice aforethought -- a person commits murder when with malice aforethought he causes the death of another human being. And I want you to hear these words. I won't read the whole thing, but you'll hear some of these words from Judge Prior, we expect. You'll hear about the deliberate intention, unlawfully, to take away the life of another human being. And that's what happened here. Whether he pulled it or his co-defendant, they helped each other. They deliberately had the intent to take away the life of Donovan Corey Parks and snuff it out right there.

You'll hear about where all the circumstances of the killing show an abandon and malignant heart. And yes, it

speaks and he is guilty of malice murder whether he pulled the trigger or whether the other man pulled the trigger. They're both guilty of malice murder.

Count two, felony murder. And it's one death. I don't want to mislead you. It's one death. There's two ways to commit murder under Georgia Law, malice murder and felony murder. Those are the only two ways. And both apply here. Both apply. Okay? Count two, felony murder talks about the indictment. Unlawfully, while in the commission of a felony, to-wit -- in other words, that's going to describe the felony -- armed robbery, did cause the death of Donovan Corey Parks, a human being, by shooting the said Donovan Corey Parks with a shotgun, a deadly weapon. Was this a felony murder? The court will charge you a person also commits the crime of murder -- and this is felony murder -- when in the commission of a felony, that person causes the death of another human being, irrespective of malice. And the court will charge you that under our law, armed robbery, which is the underlying felony here is -- armed robbery is a felony.

So in other words, if you're committing a murder in the commission of another felony and the underlying felony here is armed robbery, irrespective of malice, whether you had malice aforethought or not, you are guilty of felony murder. And he is along with his

sleeve there, looking for somebody to kill. Now, which case is more -- which scenario would you rather have? This is precisely why we have this law. I don't care if it was that close, a speck too short. We have that law to protect us from people just like this defendant here, exactly what he did.

Two more things -- three more. I'll leave you with three thoughts -- four. The tie. I want you to picture this in your mind. I want you to picture this in your mind. The victim -- here's the car facing you and here's the victim, Donovan Corey Parks, driving. Here's Butts sitting in the front passenger seat. 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. Here he is. This is how it is. Here's the defendant, back seat behind the driver. The tie. Remember the tie. Ladies and gentlemen, I wear a tie to work every day. When I get off work or I got back to the office, as all men, I love to loosen my tie. I don't know of anybody that tightens it up. I'm not going to rip my tie. But chokes himself with it. But you've seen it. We loosen our tie. Okay. How was that tie found? It was found on the victim with the knot -- I'm not going to rip it -- but with the knot up here -- first of all, over the collar, up here on this side and

tied so tight there -- tied so tight that that EMT -- do you remember this -- he couldn't undo it. It was so tight around him that he had to take a pair of scissors and snip it off. And he snipped it right beside the knot. And it was so tight -- remember he said this -- he couldn't get that scissors, like this. He couldn't get it between the tie and the shirt. It was that tight. Remember he demonstrated. He had to wiggle it up with this hand here and pull the top with this hand so he could get leverage and get his finger under it so he could snip it right there. Who choked him? When Murdock gave the signal to Butts or when Butts gave the signal to Murdock that this thing was fixing to go down, who choked him? 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 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

nine yards. That's one.

Two. Think about this. That Torrance Harvey fellow, the guy we flew down from New York. Remember him. He was an important enough witness, the State -- we're going to fly him down from New York. We need that jury to hear what he's got to say. Because these two guys went to Atlanta and Raphael Baker was the defendant's cousin. You saw him on the stand. And just using plain, old fashioned common sense in a case of this nature, one cousin ain't going to want to testify against his other cousin. You could see it with your own eyes. Torrance Harvey was a roommate of Raphael Baker and I guess he'd have a motive to be on the defendant's side too, but he -- you saw -- that was an intelligent man right there. And remember when he was describing the two of them there. He was describing both of them. Butts, the co-defendant. What was he doing? How did he describe Butts? He was just sitting there. Didn't say a word. Something was bothering that man. Something was bothering that man. He couldn't even talk he was bothered so much about it. And what was the defendant doing? Was the defendant bothered there? No. He was doing all the talking, all the planning. It was him that was talking about the chop shop. Do you know where a chop shop is? Whose cousin did they go visit? They didn't go visit Butts' cousin; they

visited that man's cousin, Raphael Baker, to look for the chop shop to get rid of the car. And it was that man doing all the talking. Hey, who comes to your house at two o'clock in the morning? Let me ask you that. You know where a chop shop is? We've got a hot car here. Need to get rid of it. Who's doing all the planning, finding and scheming? That man right there, the defendant, Marion Murdock Wilson. And the other guy had his head down. Something's bothering him. I'll tell you what's bothering him. One of two things was bothering him. One of two things. And I don't know which one. But we know one of these two things was bothering him. Either (a) he had just watched that man right there blow Donovan Corey Parks' brain out and that was bothering him, or, (b) he'd been talked into it by that man to blow Donovan Corey Parks' brains out and that was bothering him. One of those two things happened and it doesn't matter which one of those two things happened, either one, this defendant is guilty of all six counts.

Two more things and I'm done. I want to show you one thing on the video tape. If you'll bear with me one second to set it up. As Mr. Robinson is setting that up, I want you to take a good look at that video tape. Clearly this gun -- neither of these guys went back to the car that night. Neither of them went back to their

BAILIFF: The jury wants to know could they get a small blackboard or some kind of marker board that they could write on. I don't know whether there's anything available.

THE COURT: We don't have one, Capt. Combs. I'm sorry.

MR. BRIGHT: We don't have a chalkboard. I think we have something.

THE COURT: If y'all can come up with something, that's fine.

Is that it?

MR. BRIGHT: Yes, sir. We've got here like a piece of tile. It has markers and erasers. This is fine with us.

MR. O'DONNELL: That's fine.(Whereupon, the board was sent out to the jury at 1:51 P.M.)

THE COURT: All right, gentlemen, we'll be at ease.

3:21 P.M.:

THE COURT: Ladies and gentlemen, those of you in the courtroom, please give me your attention. I've been informed that the jury has reached a verdict. Those of you here in the courtroom have a perfect right to be here and I want you to be here, if you want to be. At the same time, you have no right to create any problem

ATTACHMENT E

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.

MW 7360

3357

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.

MW 7379

3375

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

MW 7382

3378

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.

MW 7386

3389

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.

MW 7402

3393

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 F

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

MARION WILSON, JR., Petitioner,	)	
vs.	)	Civil Case No. 5:10-CV-00489-MTT
CARL HUMPHREY, Warden, Georgia Diagnostic Prison, Respondent.	)	

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

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COUNSEL FOR MR. WILSON

inference of arbitrarily doled-out death is now patent—only forty-three people were executed in the United States in 2011. U.S. Dep't of Justice, Bureau of Justice Statistics, *Capital Punishment, 2010 – Statistical Tables* (dated Dec. 2011) at p. 2, *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2236 (last visited Feb. 29, 2012). And, as it stands, since 1987, only three non-triggermen in the United States have been "struck by lightning"—sentenced and executed without the requisite culpability. *See* Trigilio & Casadio, *supra*, at 1403-04. The Court must not allow Mr. Wilson to become the fourth.

III. THE PROSECUTION'S FLIP-FLOPPING THEORY OF THE CRIME TO OBTAIN AN UNRELIABLE CAPITAL SENTENCE VIOLATED MR. WILSON'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION

> ***"The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the rights of people as expressed in the laws and give those accused of crime a fair trial." —Justice William O. Douglas***[112]

Mr. Wilson is entitled to a new sentencing hearing because the prosecutor unconstitutionally and unethically used flip-flopping theories of the crime in order to impose death sentences on both Mr. Wilson and his co-defendant. This violated

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[112] *Donnelly v. DeChristoforo*, 416 U.S. 637, 648-49 (1974) (Douglas, J., dissenting).

Mr. Wilson's constitutional rights, including his rights under the Sixth,[113] Eighth and Fourteenth Amendments to the United States Constitution.

As discussed above, only a single shot was fired on the night in question. *See Butts v. State*, 546 S.E.2d 472, 477 (Ga. 2001). During Mr. Wilson's sentencing hearing, the prosecutor, Fred Bright, argued to the jury that Mr. Wilson himself was the triggerman—that Mr. Wilson fired that single shot. Mr. Bright emphasized to the jury that Mr. Wilson "took that shotgun and fired it," Dkt. 10-6, Resp. Ex. 21C at 2483:10-11 (Wilson Trial Tr.); that Mr. Wilson "shot and killed Donovan Corey Parks," *id.* at 2480:9; and that Mr. Wilson "blew his brains out," *id.* at 2476:24. The prosecutor then described in graphic detail how Mr. Wilson fired fifty pellets into the victim's head, creating "a hole in the back of his head, to leave him there on the ground with his brains—in a pool of blood with his brains—that's his brains right there—with his brains splattered on the ground." *Id.* at 2483:15-19. After painting this gruesome picture, Bright then asked the jury to "[p]icture [Mr. Wilson] for what he did there." *Id.* at 2483:22. Thus, the prosecutor asked the jury to picture Mr. Wilson pulling the trigger of the shotgun, sending the fatal shotgun blast into the victim's head. There is no doubt Mr. Bright

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[113] This section focuses on the Eighth and Fourteenth Amendment violations. To the extent trial and appellate counsel did not raise this issue, they were deficient in violation of the Sixth Amendment.

used this argument in order to maximize Mr. Wilson's culpability and increase the likelihood of obtaining a death sentence.

Only a year later, the very same prosecutor won a conviction and death sentence against Mr. Wilson's co-defendant, Robert Butts, this time singing a different song. During the Butts trial, Mr. Bright presented multiple witnesses—witnesses whose testimony he had successfully argued *to exclud*e from Mr. Wilson's trial—who testified that *Mr. Butts* fired that single fatal shot. *See* Introduction and Statement of Fact, *supra*; *see also* Part IV, *infra*. These two positions—that both Mr. Wilson and Mr. Butts were each the triggerman who fired a single shot—are obviously contradictory; a single gunshot fired by a single person killed Donovan Parks. Yet, Mr. Wilson and Mr. Butts were each convicted and sentenced to death based on the argument that he was the one who fired the single shot. Mr. Bright used contradictory and irreconcilable theories of the crime in order to maximize the culpability of each defendant, changing the color of his stripes to suit the necessities of the prosecution.[114]

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[114] This is perhaps unsurprising, given that, as discussed *supra* note 108, Mr. Bright was the most zealous death-penalty prosecutor in Georgia, exercising his vast discretion to seek capital sentences in the majority of his death-eligible cases regardless of individual culpability. *See* Sonji Jacobs, *A Matter of Life or Death: Where Cases Diverge*, Atlanta J.-Const., Sept. 24, 2007, *available at* http://www.ajc.com/metro/content/metro/stories/deathpenalty/daytwo/DPCIRCUITS_0924.html (last visited Jan. 25, 2012).

This type of prosecutorial flipping-flopping is unconstitutional, unethical, and incompatible with societal notions of fundamental fairness and justice. Because such inconsistencies undermine the reliability of sentences, they create an unacceptable risk that the death penalty is being administered in an arbitrary or capricious manner, or as a result of whim or mistake, contrary to the Eighth Amendment to the United States Constitution. Moreover, the use of inconsistent theories violates a prosecutor's a duty under the Fourteenth Amendment to ensure integrity and fairness in the legal process. Based on this unethical and unconstitutional prosecutorial conduct, this Court must grant Mr. Wilson habeas relief comporting with notions of fundamental fairness, justice, and reliability.[115]

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[115] The Superior Court of Butts County refused to consider this argument (based on its whole-cloth adoption of the State's proposed order), concluding that the claim was procedurally barred. *See* Habeas Order at 7. For the reasons stated at Part V, *infra*, this is not so. As Mr. Wilson was convicted one year prior to Mr. Butts, it would have been impossible for Mr. Wilson to raise this argument in the trial court. And to the extent Mr. Wilson's appellate counsel failed to raise this issue on appeal, their performance was ineffective and caused prejudice to Mr. Wilson. Furthermore, as discussed in Part IV, *infra*, if the evidence and claims reveal that constitutional errors "'probably resulted in the conviction of one who is actually innocent'" or that the state court process "'has probably resulted'" in capital punishment for one who is "'actually innocent'" no procedural default can prevent relief for the Petitioner. *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989) (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). The claim is thus properly before the Court.

A. Prosecutorial Flip-Flopping in a Death Penalty Sentencing Hearing Violates the Eighth Amendment to the United States Constitution

A prosecutor's use of inconsistent and irreconcilable theories of a crime in a death penalty sentencing hearing renders any resulting death sentence unreliable. It is therefore contrary to the prohibition on cruel and unusual punishment imposed by the Eighth Amendment to the United States Constitution.

1. The prohibition against cruel and unusual punishment imposed by the United States Constitution protects Mr. Wilson from unreliable administration of the death penalty

The United States Supreme Court has made clear that the death penalty must be treated differently from all other punishments, recognizing that "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Thus, because the death penalty is "qualitatively different from a sentence of imprisonment, however long," *id.*, courts must ensure a heightened standard of reliability to guarantee that the penalty of death is not administered arbitrarily or capriciously, considering both the reliability of the outcome and the fairness of the process by which it was reached. *See Johnson v. Mississippi*, 486 U.S. 578, 586-87 (1988) (outcome of death sentence based on inaccurate information found unreliable); *Turner v. Murray*, 476 U.S. 28, 35-36 (1986) (vacating death sentence

where procedure created unacceptable risk of unreliable conviction); *California v. Ramos*, 463 U.S. 992 (1983).

"The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special need for reliability in the determination that death is the appropriate punishment in any capital case." *Johnson*, 486 U.S. at 584 (internal quotation marks and citations omitted). This is well-rooted in the Supreme Court's capital jurisprudence. "[A]ccurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." *Gregg v. Georgia*, 428 U.S. 153, 190 (1976). A death sentence predicated in part on evidence or argument that is materially inaccurate violates the prohibition against cruel and unusual punishment. *See Johnson*, 486 U.S. at 585.

The need to ensure reliability goes beyond the guarantee of procedural fairness; the Supreme Court has held sentences unreliable, and thus contrary to prohibitions against cruel and unusual punishment, in situations in which post-sentence occurrences render the determination unreliable. For example, in *Johnson v. Mississippi*, a Mississippi jury sentenced the defendant to die based on three aggravating factors, which included a previous felony conviction in New York. 486 U.S. at 581-82. After he was sentenced in Mississippi, a New York court set aside this prior conviction. *Id.* at 582. The Supreme Court unanimously

held that the sentence obtained using the inaccurate information violated the Eighth Amendment. *Id.* at 585-86; *see also Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O'Connor, J., concurring), *id.* at 429 (White, J., concurring); *id.* at 435 (Blackmun, J., dissenting) (all assuming that an Eighth Amendment claim would exist upon compelling proof of innocence even in the absence of procedural unfairness).

2. It is contrary to the heightened reliability standards in death penalty cases for prosecutors to use inconsistent and irreconcilable theories of a crime in a capital sentencing hearing

The Eighth Amendment requires heightened reliability in death sentences, and cannot tolerate a death sentence secured through reliance on irreconcilable theories of the crime used to maximize culpability. Because one of the two irreconcilable theories is necessarily false, there is an unacceptable risk that the sentence is being arbitrarily, capriciously, or mistakenly administered, thus violating the United States Constitution.

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. *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"). The

conclusion that a defendant did, in fact, pull the trigger increases his or her culpability, and thus the likelihood of a death sentence. *See Butts*, 546 S.E.2d at 485 (noting that whether Mr. Wilson's co-defendant, Robert Butts, was himself the triggerman was relevant to Mr. Butts's culpability for the crime). 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.

A death sentence reached using irreconcilable arguments regarding relative culpability is inherently unreliable. If two defendants are sentenced to death relying on irreconcilable theories, one of these determinations is necessarily based on incorrect information. Accordingly, the use of irreconcilable theories of culpability is "fundamentally unfair, for it necessarily creates the potential for . . . a false conviction or increased punishment on a false factual basis for one of the accuseds." *In re Sakarias*, 106 P.3d 931, 944 (Cal. 2005). Given this inherent unreliability, it cannot comport with the amplified needs for reliability and fair process in death penalty determinations. Indeed, to impose a sentence of death under such untrustworthy circumstance is nothing more than an invitation for this ultimate punishment to be "'wantonly'" and "'freakishly'" imposed. *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990) (quoting *Gregg*, 428 U.S. at 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)).

B. Due Process Mandates That Mr. Wilson Receive "Fundamental Fairness" in His Sentencing Hearing

The requirement of "fundamental fairness" is "embodied in the Due Process Clause of the Fourteenth Amendment." *In re Winship*, 397 U.S. 358, 369 (1970) (Harlan, J., concurring). Due process requires "fairness, integrity, and honor in the operation of the criminal justice system, and in its treatment of the citizen's cardinal constitutional protections." *Moran v. Burbine*, 475 U.S. 412, 467 (1986) (Stevens, J., dissenting). Thus, due process protects the accused from actions violating "'fundamental conceptions of justice which lie at the base of our civil and political institutions,' and which define 'the community's sense of fair play and decency.'" *United States v. Lovasco*, 431 U.S. 783, 790 (1977) (citations omitted).

While fundamental fairness is not easily defined, clear Supreme Court precedent dictates that a fair trial is a basic right guaranteed to every defendant as a part of due process. *Turner v. Louisiana*, 379 U.S. 466, 471-72 (1965). Due process applies equally to proceedings determining guilt and to those determining penalties. *See Green*, 442 U.S. at 97. The courts must ensure that the procedures used to sentence Mr. Wilson comported with notions of fundamental fairness. They did not.

1. Prosecutors have a responsibility to ensure fundamental fairness and the integrity of the legal process by treating trials as quests for truth and not adversarial sporting contests

Drawing on concepts of fundamental fairness, the Supreme Court has made certain that prosecutors, as representatives of the State, have a responsibility to ensure fairness and integrity in the legal process. *See, e.g.*, *Berger v. United States*, 295 U.S. 78, 88 (1935), *overruled on other grounds*, *Stirone v. United States*, 361 U.S. 212 (1960). As Justice Douglas noted, "[t]he function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the rights of people as expressed in the laws and give those accused of crime a fair trial." *Donnelly v. DeChristaforo*, 416 U.S. at 637, 648-49 (1974) (Douglas, J., dissenting). Likewise, "[t]he criminal trial should be viewed not as an adversarial sporting contest," *United States v. Kattar*, 840 F.2d 118, 127 (lst Cir. 1988), but as a truth-seeking forum in which the prosecutor strives to uncover the actual facts surrounding the commission of a crime, *United States v. Wade*, 388 U.S. 218, 256 (1967) (White, J., dissenting in part and concurring in part). This is because the prosecutor's role "transcends that of an adversary," *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985), creating a concomitant "duty to refrain from improper methods calculated to produce a wrongful conviction," *Berger*, 295 U.S. at 88.

2. Prosecutorial conduct that is incompatible with fundamental fairness violates due process and is inconsistent with ethical standards and norms

The Supreme Court has recognized an array of prosecutorial conduct that is "inconsistent with the rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). For example, prosecutors cannot deliberately and knowingly present false evidence or misrepresent the truth to a jury. *Id.* at 112-13; *Miller v. Pate*, 386 U.S. 1, 6-7 (1967) (prohibiting presentation of false and inconsistent argument on appeal); *Burke v. State*, 54 S.E.2d 350, 352 (1949). Similarly, prosecutors have a duty to correct false testimony, or testimony that creates a false impression. *Giglio v. United States*, 405 U.S. 150, 153-54 (1972); *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Likewise, prosecutorial suppression of evidence material to either guilt or sentencing deprives a defendant of due process. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This is true regardless of the good or bad faith of the prosecution, because "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Id.* at 87.

This view of the prosecutorial function permeates not only the relevant legal precedent, but also the ethical standards of the profession. For example, under the

Model Rules of Prof'l. Conduct R. 3.8 cmt. 1,[116] "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, [and] that guilt is decided upon the basis of sufficient evidence . . . ." Accordingly, "[t]he duty of the prosecutor is to seek justice, not merely to convict." ABA Standards for Criminal Justice 3-1.2(c) (3d ed. 1993).[117] Thus, consistent with legal precedent, ethical standards and norms prohibit certain prosecutorial actions. For example, prosecutors cannot knowingly make false or misleading statements to the court or offer false evidence. Model Rules of Prof'l. Conduct R. 3.3; *id.* at cmts. 2, 5; *see also* ABA Standards for Criminal Justice 3-2.8(a) (advising prosecutors not to misrepresent fact or law to the court); *id.* at 3-5.6(a) (advising prosecutors not knowingly to offer, or to fail to withdraw, false evidence).

This ethical responsibility of the prosecutor carries over into the penalty phase: "[a]s a minister of justice, the prosecutor also has the specific obligation to

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[116] The ABA Model Rules of Professional Conduct are available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html (last visited Jan. 26, 2012).

[117] The ABA Standards for Criminal Justice Prosecution Function are available at http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf (last visited Jan. 26, 2012).

see that the convicted defendant continues to be accorded procedural justice and that a fair sentence is imposed upon the basis of appropriate evidence . . . ." ABA Standards for Criminal Justice 3-6.2 cmt. Accordingly, in the sentencing process, the ABA advises prosecutors to "assure that a fair and informed judgment is made on the sentence and to avoid unfair sentence disparities." ABA Standards for Criminal Justice 3-6.1(a). Thus, in the penalty phase of a capital case, the prosecutor has a duty to seek an appropriate sentence based on *reliable* and *truthful* information.

3. It is a violation of due process for prosecutors to use inconsistent and irreconcilable theories of a crime in death penalty sentencing hearings

When a prosecutor uses wholly inconsistent arguments to sentence two men to die, it is an affront to the "solemn purpose" of the criminal justice system, which is intended not to tack more and more skins on the wall, but to "ascertain the truth." *Estes v. Texas*, 381 U.S. 532, 540 (1965). Applying bedrock due process principles rooted in two centuries of Supreme Court jurisprudence, courts have concluded that the use of inconsistent, irreconcilable theories to sentence two defendants to death violates due process. *See Stumpf v. Mitchell*, 367 F.3d 594 (6th Cir. 2004), *rev'd in part, vacated in part, Bradshaw v. Stumpf*, 545 U.S. 175 (2005), *aff'd on remand, Stumpf v. Houk*, 653 F.3d 426 (6th Cir. 2011) (affirming that use of inconsistent theories in the sentences of two capital cases is a due

process violation);[118] *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000); *Drake v. Kemp*, 762 F.2d 1449 (11th Cir. 1985) (Clark, J., concurring); *In re Sakarias*, 106 P.3d 931 (Cal. 2005).[119] Indeed, in a capital sentencing proceeding, "it is well established that when no new significant evidence comes to light a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime." *Thompson v. Calderon*, 120 F.3d 1045, 1058 (9th Cir. 1997), *rev'd on other grounds*, 523 U.S. 538 (1998).

To illustrate, it is unquestioned that fundamental fairness prevents the State from excluding evidence relied on to convict a co-defendant. *Green*, 442 U.S. at 97 ("Perhaps most important, the State considered the testimony sufficiently reliable to use it against [the co-defendant], and to base a sentence of death upon it."). But the opposite is unavoidably also true. "[F]or a sovereign State

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[118] The Supreme Court concluded that inconsistent theories did not violate due process with respect to a *guilty plea*. *See Bradshaw*, 545 U.S. at 187. The Court, however, requested that the Sixth Circuit clarify whether the petitioner was entitled to resentencing on these grounds, expressly acknowledging the relevance of inconsistent theories to sentencing. *Id.* On remand, the Sixth Circuit held that due process is violated where two defendants are sentenced to death on inconsistent theories. *Stumpf*, 653 U.S. at 436. Rehearing *en banc* was granted in this matter on October 26, 2011, and no further opinions have issued.

[119] *See also* Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 Calif. L. Rev. 1423 (2001); Michael Q. English, *A Prosecutor's Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or Due Process Violation*, 68 Fordham L. Rev. 525 (1999); Steven F. Shatz & Lazuli M. Whitt, *The California Death Penalty: Prosecutors' Use of Inconsistent Theories Plays Fast and Loose with the Courts and the Defendants*, 36 U.S.F. L. Rev. 853 (2002); Barry Tarlow, *Limitations on the Prosecution's Ability to Make Inconsistent Arguments in Successive Cases*, 21 Champion 40 (1997).

represented by the same lawyer to take flatly inconsistent positions in two different cases—and to insist on the imposition of the death penalty after repudiating the factual basis for that sentence—surely raises a serious question of prosecutorial misconduct." *Jacobs v. Scott*, 513 U.S. 1067, 115 S. Ct. 711, 712 (1995) (Stevens, J., dissenting from denial of application for a stay of execution). Thus, as observed by Justice Stevens, "it would be fundamentally unfair to execute a person on the basis of a factual determination that the State has formally disavowed." *Id.*

Where a prosecutor relies on and then later repudiates evidence in sequential capital cases, this reduces the justice system to mere gamesmanship and affronts a "'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Medina v. California*, 505 U.S. 437, 445 (1992) (quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958)). Indeed, "[e]ven if our adversary system is 'in many ways, a gamble,' that system is poorly served when a prosecutor, the state's own instrument of justice, stacks the decks in his favor. The State's duty to its citizens does not allow it to pursue as many convictions as possible without regard to fairness and the search for truth." *Smith*, 205 F.3d at 1051 (quoting *Payne v. United States*, 78 F.3d 343, 345 (8th Cir. 1996)).

C. The Prosecutor's Inconsistent and Irreconcilable Theories of the Crime "Stacked the Deck" Against Mr. Wilson and Deprived Him of His Rights Under the United States Constitution

When the prosecutor in Mr. Wilson's trial argued that Mr. Wilson was the triggerman, and then presented evidence irreconcilable with this theory at Mr. Butts's trial, he created an unacceptable risk that Mr. Wilson's death sentence was unreliable and "stacked the deck" in the State's favor. Notwithstanding the circumstantial nature of the case, the State argued that the identity of the triggerman was not relevant to the guilt/innocence phase of the trial because Mr. Butts and Mr. Wilson could be convicted under the law of parties to a crime without identifying the shooter. Dkt. 9-14, Resp. Ex. 18A at 1153:21-1154:1 (Wilson Trial Tr.). In order to convict Mr. Wilson at the guilt/innocence phase, the State was not required to prove who actually fired the shotgun, and any inconsistencies regarding the identity of the triggerman did not give rise to a constitutional deprivation. Thus, it is not surprising that during the *guilt* phase of Mr. Wilson's trial the prosecutor took the position that "the State [could not] prove who pulled the trigger in this case." Dkt. 10-1, Resp. Ex. 20A at 1815:15-16 (Wilson Trial Tr.).

However, during the *sentencing* phase of Mr. Wilson's trial, where the issue of who pulled the trigger *was* material to culpability—to whether the jury believed

that Mr. Wilson's conduct warranted a death sentence—Mr. Bright pitched another story to the jury:

> And, yes, ladies and gentlemen, show [Mr. Wilson] the exact – give him, grant him the exact same amount of mercy that he granted Donovan Corey Parks *when he blew his brains out* on the side of the road.

Dkt. 10-6, Resp. Ex. 21C at 2476:21-24 (Wilson Trial Tr.) (emphasis added).

> He shot a man, he lived; shot a man again, he lived and testified against him, and he did his best when *he finally shot and killed Donovan Corey Parks*.

Id. at 2480:7-9 (emphasis added).

> *[Mr. Wilson] 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. So first, a hole, not just a wound, a hole in the back of his head, to leave him there on the ground with his brains – in a pool of blood with his brains – that's his brains right there – with his brains splattered on the ground. And there are those pellets in the man's head. *That's what he did. That's what I want you to picture him doing. Not just sitting there like he has the whole trial. Picture him for what he did there.*

Id. at 2483:10-22 (emphasis added). These remarks, based on *no* record evidence[120] and running contrary to Butts's confessions (which confessions were known to the prosecutor), leave no doubt as to the State's position that it was Mr.

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[120] Mr. Wilson's counsel's failure to police such highly prejudicial and unfounded statements is further evidence of their ineffectiveness.

Wilson who fired the single shot that killed Mr. Parks. Instead of arguing as he had in the guilt phase that it was uncertain and did not matter who pulled the trigger, Mr. Bright based his sentencing argument on the theory that Mr. Wilson, in fact, was the triggerman.

The following year, Mr. Bright changed his tune, arguing and offering evidence at the Butts trial that Mr. Butts pulled the trigger. *See, e.g.*, App. A (Butts Trial Tr.) at 1263:6-18. At the Butts trial, the State presented the testimony of Angela Johnson, who testified that two days after the murder she saw Mr. Butts give Mr. Wilson a shotgun. *Id.* at 1799:10-17, 1801:19-25. According to the prosecution, this shotgun was the gun Mr. Butts used to kill Donovan Parks. *Id.* at 1268:2-19. Then the prosecutor presented two witnesses—Horace Clarence May and Gary Randall Garza—both of whom testified that Mr. Butts confessed to pulling the trigger. *Id.* at 2058:15-22 (testimony of May); *id.* at 2113:8-12, 2113:23-2114:4 (testimony of Garza).

Mr. Bright, of course, had vigorously and successfully opposed the defense efforts to present Mr. May and Mr. Garza's testimony at the guilt/innocence phase of Mr. Wilson's trial. Dkt. 9-19, Resp. Ex.19C at 1794:21-1800:12 (Wilson Trial Tr.). While the State noted repeatedly that it was not required to prove whether Mr. Butts actually fired the single shot that killed the victim, App. A (Butts Trial Tr.) at 2600:1-6, during closing arguments at Mr. Butts's trial, Mr. Bright stated

that the State had proven just that, *id.* at 2604:10-19 ("We proved – and we don't have to – but 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."). In fact, in restating these "cold, hard facts" on appeal, the Supreme Court of Georgia found that "Butts . . . fired one fatal shot to the back of Parks's head with the shotgun." *Butts*, 546 S.E.2d at 477.

Because the prosecution presented evidence at the Butts trial that directly contradicted statements made by the prosecution in Mr. Wilson's sentencing hearing, either Mr. Bright's own statements were false or the testimony presented at Mr. Butts's trial was perjured. Because the prosecutor could not have believed that each of these theories of the crime was true, his conduct was akin to situations in which the prosecution presents false or misleading evidence. Instead of abiding by his duty to seek truth and ensure fairness of process, the prosecutor stacked the deck in his favor, disregarding truth and urging an increase in culpability based on a false factual basis. These actions undermine the integrity of the judicial process, do not comport with fundamental notions of fairness and justice, and treat trials like sporting contests rather than searches for truth.

Moreover, the prosecution fatally infected the sentencing determination, in which the jury attempted to weigh mitigating factors against the circumstances of the crime, by factually misstating the defendant's culpability in that crime. Given

the heightened due process available to death penalty defendants, in which the court must "guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake," *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring), a death sentence handed out under such circumstances cannot stand.

Furthermore, the prosecutor's use of irreconcilable theories rendered the death sentence unreliable. Because accurate sentencing information is an "indispensable prerequisite to a reasoned determination of whether a defendant shall live or die," *Gregg v. Georgia*, 428 U.S. 153, 190 (1976), and because the jury determination in the instant case was based in part on the inaccurate premise that it was Mr. Wilson and not Mr. Butts who fired the fatal shot—a premise the prosecutor himself later contradicted—there is an unacceptable risk that the determination was made mistakenly. Because the prosecutor thus used an unfair process to sentence a man to death based in part on inaccurate information, it is necessary and appropriate for the Court to grant relief.

IV. MR. WILSON IS INNOCENT OF THE CRIMES OF WHICH HE WAS CONVICTED AND SENTENCED TO DEATH AND HIS EXECUTION WOULD VIOLATE THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

> ***"Nothing could be more contrary to contemporary standards of decency, or more shocking to the conscience, than to execute a person who is actually innocent." – Justice Harry Blackmun.***[121]

Under the Eighth Amendment to the United States Constitution, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The execution of an innocent person epitomizes the gratuitous and pointless infliction of pain and suffering that the Eighth Amendment forbids. Moreover, when an innocent person is punished for a crime, his constitutional due process rights to liberty and life have necessarily been violated. U.S. Const. amend. V ("nor shall any person be . . . deprived of life, liberty, or property, without due process of law"); U.S. Const. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); *see also Furman v. Georgia*, 408 U.S. 238, 241 (1972) (Douglas, J., concurring) ("That the requirements of due process ban cruel and unusual punishment is now settled."). The Georgia courts' refusal to adjudicate the merits

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[121] *Herrera v. Collins*, 506 U.S. 390, 430 (1993) (Blackmun, J., dissenting) (citations omitted).

ATTACHMENT G

IN THE SUPREME COURT
OF GEORGIA

MARION WILSON, JR.
APPELLANT

v.

THE STATE OF GEORGIA
APPELLEE

CASE NO: S99P0651

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acts while committed as a juvenile are sealed from the record and are no longer admissible as evidence in aggravation. Individually and cumulatively, this unreliable testimony can not be said not to have played a role in the jury's decision to vote for the death penalty.

The admission of this evidence during the sentencing phase of the trial constitutes reversible error.

XXI. THE COURT ERRED IN FAILING TO GRANT A DIRECTED VERDICT OF ACQUITAL AND A MOTION FOR NEW TRIAL AS THE EVIDENCE DID NOT ESTABLISH THAT MR. WILSON COMMITTED THE MURDER OR THAT HE INTENDED THE VICTIM'S DEATH.

Because Mr. Wilson did not commit the murder or intend the victim's death, he cannot be convicted of murder and the death penalty is disproportionate to the crime and constitutes cruel and unusual punishment. The most important issue at both phases of Mr. Wilson's trial was the extent of his involvement in the crime. Mr. Wilson gave a statement to the police admitting that he rode in the victim's car with his co-defendant Butts, and that he remained in the car when Butts robbed and killed the victim. Mr. Wilson denied, and there is no evidence to contradict him, that he participated in any way in planning the crime, that he knew that Butts was going to shoot the victim, or that he intended that any harm come to the victim.

The jury's resolution of the intent issue was derailed at the guilt/innocence phase by an improper jury charge on aiding and abetting (a claim raised in Mr. Wilson's first supplement to his motion for a new trial and herein incorporated by reference), and by the introduction of improper evidence of the victim's character, as discussed more fully separately. At the penalty phase, the jury's consideration of the extent of Mr. Wilson's involvement in the crime was

derailed yet again by the introduction of improper and highly prejudicial evidence regarding gangs, as discussed more fully separately.

There was very little evidence that Mr. Wilson possessed the requisite intent to support a murder conviction. The central issue at the guilt/innocence phase of the trial was the extent of Mr. Wilson's participation in the planning and commission of the crime. Because he was not the triggerman, if he did not participate in the planning of the crime, then there was insufficient evidence to convict him of malice murder. The State presented no direct evidence that Mr. Wilson participated in the murder. Indeed, the district attorney admitted that "the State cannot prove who pulled the trigger in this case." (T. 1815). The State presented no evidence that there was any plot or plan to kill the victim or even to steal his car. Instead, the State attempted to show that Mr. Wilson accompanied his co-defendant Butts into the Wal-Mart store, making him present when Butts first encountered the victim on the night of the crime. This, according to the State's theory, would show that Mr. Wilson participated in planning the crime. The evidence that Mr. Wilson went into the Wal-Mart was conflicting at best, and certainly insufficient to support a murder conviction. Chassica Manson, the cashier who rang up the victim's purchases, testified that she could not recall who was in line behind the victim. (T. 1354). Kenya Mosley testified that she saw the victim, Butts, and Mr. Wilson in the store. (T. 1362). However, there were serious questions about her credibility because Ms. Mosley also testified that there was a fourth man with them, and that this mysterious fourth man--whom no one else saw--got in the car with the victim, Butts, and Mr. Wilson. (T. 1382). Chico Mosley, Kenya Mosley's brother, was with Kenya and contradicted her testimony. He testified that he saw Mr. Wilson only on the outside of the store. (T. 1397). He did not see Mr. Wilson with the victim inside the store. (T. 1400). The conclusion from the credible evidence was that Mr. Wilson did not enter the store.

It is well established that a person who is present at a crime is not liable for the crime unless there is "evidence of his aiding and abetting the actual perpetrator of the crime, or other evidence of his having participated in the felonious design of the actual perpetrator." Tanner v. State, 161 Ga. 193, 130 S.E. 64, 67 (1925); Hicks v. United States, 150 U.S. 442 (1893). See also Brooks v. State, 128 Ga. 261, 57 S.E. 483, 484 (1907) ("Mere presence and participation" is not sufficient unless the defendant "participated in the felonious design of the person killing"); Bullard v. State, 263 Ga. 682, 436 S.E.2d 647, 650 (1993) (presence at the crime coupled with silent approval and concealment after the fact does not constitute aiding and abetting sufficient to convict for murder). Because Mr. Wilson did not aid or abet in the commission of the crime, there is insufficient evidence to support a murder conviction. Jackson v. Virginia, 443 U.S. 307 (1979).

The Eighth Amendment to the U.S. Constitution bars imposition of the death penalty unless the defendant's participation in the crime was "major" and he acted "with reckless indifference to human life." Tison v. Arizona, 481 U.S. 137, 158 (1987). In Tison, there was evidence that the defendants went to a prison to help their father escape. They took with them firearms, and, they admitted, they were willing to kill if they had to. After the escape, their father killed several people while the defendants were nearby, but the defendants did not participate in the killings. Tison, 481 U.S. at 144-145. On these facts, the Supreme Court found that the defendants' participation was "major" and--when they gave firearms to their father, a convicted murderer, so he could escape from jail--that they acted with "reckless indifference" to human life.

Here, the State's case--apart from the actual cause of death and other scientific evidence--was devoted to showing what Mr. Wilson and Butts did after the crime had been committed.

There was virtually nothing about what they did before the crime occurred. There was substantial evidence--including Mr. Wilson's own statement--that he was an active participant in the post-crime attempt to dispose of the victim's car and the murder weapon. On the other hand, there was no direct evidence that Mr. Wilson actively participated in planning or carrying out the crime.

Mr. Wilson's conviction and sentence violated his rights to equal protection, due process, a fair trial, a reliable determination of punishment, and freedom of expression and association, pursuant to the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution; Article I, Section I, paragraphs 1, 2, 3, 11, 12, 14, and 17 of the Georgia Constitution; Tison v. Arizona, 481 U.S. 137, 158 (1987), Enmund v. Florida, 458 U.S. 782 (1982), Jackson v. Virginia, 443 U.S. 307 (1979), Hicks v. United States, 150 U.S. 442, 14 S.Ct. 144 (1893), Fleming v. Kemp, 748 F.2d 1435 (11th Cir. 1984), and other applicable law. Mr. Wilson should therefore be granted a new trial.

XXII. THE TRIAL COURT ERRED IN CHANGING PRESIDING JUDGES DURING THE PENDENCY OF THE TRIAL.

This case was assigned to Superior Court Judge Hulane E. George on June 28, 1996. (R. 16). Pre-trial hearings were held on March 21, 1997, June 26, 1997, September 10, 1997, October 3, 1997, October 9, 1997, and October 17, 1997. Judge William A. Prior replaced Judge Hulane E. George after the October 3, 1997 motion hearing for health reasons. Judge Prior presided over the October 9, 1997 and October 17, 1997 motion hearings, the jury selection, trial and the sentencing phase.

ATTACHMENT H

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

MARION WILSON, JR.,	)	
	)	
Petitioner,	)	
	)	**Civil Action No. 2001-V-38**
v.	)	
	)	**Capital Habeas Corpus**
DERRICK SCHOFIELD,	)	
Warden, Georgia Diagnostic	)	
and Classification Prison,	)	
	)	
Respondent.	)	
	)	

PETITIONER'S POST-HEARING BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

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In addition, trial counsel's ineffectiveness prior to and during Mr. Wilson's trial resulted in numerous waivers that crippled his motion for a new trial and his direct appeal. *See, e.g.*, *Wilson v. State*, 271 Ga. at 814, 815, 817, 820, 821, 823 (noting various waivers). Because appellate counsel was handcuffed by trial counsel's deficient performance, Mr. Wilson's direct appeal was doomed. These failures, alone and in combination, fell below an objective standard of reasonableness and actually prejudiced Mr. Wilson. The Writ must issue.

HI. THE PROSECUTION'S FLIP-FLOPPING THEORY OF THE CRIME DEPRIVED MR. WILSON OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL IN VIOLATION OF ART. I, § 1, ¶¶ 1, 2, 11, 12, 14 & 17 OF THE CONSTITUTION OF THE STATE OF GEORGIA AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Wilson is entitled to a new sentencing hearing because the prosecutor unconstitutionally and unethically used flip-flopping theories of the crime in order to impose death sentences on both Mr. Wilson and his co-defendant. This violated Mr. Wilson's rights under the Eighth and Fourteenth Amendments to the United States Constitution and analogous provisions of the Georgia Constitution.

During Mr. Wilson's sentencing hearing, the prosecutor, Fred Bright, argued to the jury that Mr. Wilson himself was the triggerman. Mr. Bright stated that Mr. Wilson "took that shotgun and fired it," Wilson Trial Tr. 2483:10-11; that Mr. Wilson "shot and killed Donovan Corey Parks," *id.* at 2480:9; and that Mr. Wilson "blew his brains out," *id.* at 2476:24. The prosecutor then described in graphic detail how Mr. Wilson fired fifty pellets into the victim's head, creating "a hole in the back of his head, to leave him there on the ground with his brains – in a pool of blood with his brains – that's his brains right there – with his brains splattered on the ground." *Id.* at 2483:10-19. After painting this gruesome picture, Bright then asked the jury to "picture [Mr. Wilson] for what he did there." *Id.* at 2483:22. Thus, the prosecutor asked the jury

to picture Mr. Wilson pulling the trigger of the shotgun, sending fifty pellets into the victim's head. There is no doubt Mr. Bright used this argument in order to maximize Mr. Wilson's culpability and increase the likelihood of a death sentence.

Only a year later, the very same prosecutor changed his story, and won a conviction and death sentence against Robert Earl Butts, Jr. using a different theory. During the Butts trial, Mr. Bright presented multiple witnesses – witnesses whose testimony he had successfully argued to exclude from Mr. Wilson's trial – who testified that *Mr. Butts* fired that fatal shot. These two positions – that both Mr. Wilson and Mr. Butts were each the triggerman who fired a single shot – are obviously contradictory; a single gunshot fired by a single defendant killed Donovan Parks. Yet, each man was convicted and sentenced to death based on the argument that he fired the single shot. Mr. Bright used contradictory and irreconcilable theories of the crime in order to maximize the culpability of each defendant, changing the color of his stripes to suit the necessities of the prosecution.

As numerous courts, judges, and commentators have concluded, this type of prosecutorial flipping-flopping is unconstitutional, unethical, and incompatible with societal notions of fundamental fairness and justice[79] and it violates Supreme Court precedent and ethical standards

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[79] *See, e.g., Stumpf v. Mitchell*, 367 F.3d 594 (6th Cir. 2004), *rev'd in part, remanded in part, Bradshaw v. Stumpf*, 125 S. Ct. 2398 (2005); *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000), *cert. denied*, 531 U.S. 985 (2000); *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997), *rev'd on other grounds*, 523 U.S. 538 (1998); *In re Sakarias*, 35 Cal. 4th 140, 25 Cal. Rptr. 3d 265 (2005); *see also Jacobs v. Scott*, 513 U.S. 1067 (1995) (Stevens, J., dissenting from denial of application for a stay of execution); *Drake v. Kemp*, 762 F.2d 1449 (11th Cir. 1985) (Clark, J., concurring). For commentary, see Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 Cal. L. Rev. 1423 (2001); Michael Q. English, *A Prosecutor's Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or Due Process Violation*, 68 Fordham L. Rev. 525 (1999); Steven F. Shatz & Lazuli M. Whitt, *The California Death Penalty: Prosecutors' Use of Inconsistent Theories Plays Fast and Loose with the Courts and the Defendants*, 36 U.S.F. L.

(Footnote continued)

dictating that prosecutors have a duty under the Fourteenth Amendment to ensure integrity and fairness in the legal process. Additionally, because such inconsistencies undermine the reliability of sentences, they create an unacceptable risk that the death penalty is being administered in an arbitrary or capricious manner, or as a result of whim or mistake, contrary to the Eighth Amendment to the United States Constitution and equivalent provisions of the Georgia Constitution. Accordingly, based on this unethical and unconstitutional prosecutorial conduct, this Court must grant Mr. Wilson habeas relief comporting with notions of fundamental fairness, justice, and reliability.

A. Prosecutorial Flip-Flopping In A Death Penalty Sentencing Hearing Violates The Fourteenth Amendment To The United States Constitution And Analogous Provisions Of The Georgia Constitution.

When the State presents inconsistent and irreconcilable theories of a crime in different proceedings in order to maximize culpability, this action violates the guarantees of due process found in the Fourteenth Amendment to the United States Constitution and analogous provisions of the Constitution of the State of Georgia. When viewed in conjunction with both precedent and ethical standards governing the duties of prosecutors, it is apparent that Mr. Wilson's death sentence is unconstitutional.

1. Due Process Mandates That Mr. Wilson Receive "Fundamental Fairness" In His Sentencing Hearing.

The requirement of "fundamental fairness" is "embodied in the Due Process Clause of the Fourteenth Amendment . . . ." *In re Winship*, 397 U.S. 358, 369 (1970) (Harlan, J., concurring). Due process requires "fairness, integrity, and honor in the operation of the criminal justice system, and in its treatment of the citizen's cardinal constitutional protections." *Moran v.*

Rev. 853 (2002); Barry Tarlow, *Limitations on the Prosecutor's Ability to Make Inconsistent Arguments in Successive Cases*, 21 Champion 40 (1997).

Burbine, 475 U.S. 412, 467 (1986) (Stevens, J., dissenting). Thus, due process protects the accused from actions violating "'fundamental conceptions of justice which lie at the base of our civil and political institutions,' and which define 'the community's sense of fair play and decency.'" *United States v. Lovasco*, 431 U.S. 783, 790 (1977) (citations omitted).

While fundamental fairness is not easily defined, the Supreme Court has determined that a fair trial is a basic right guaranteed to every defendant as a part of due process. *Turner v. Louisiana*, 379 U.S. 466, 471-72 (1965). Due process applies equally to proceedings determining guilt and to those determining penalties. *See Green v. Georgia*, 442 U.S. 95, 97 (1979). The language of the Georgia Constitution mirrors the federal Due Process Clause, and affords even greater protection than does federal due process. *Fields v. Rockdale County, Georgia*, 785 F.2d 1558, 1561 n.4 (11th Cir. 1986); *Suber v. Bulloch County Bd. of Educ.*, 722 F. Supp. 736, 744 (S.D. Ga. 1989). Under both constitutions, this Court must ensure that the procedures used to sentence Mr. Wilson comported with notions of fundamental fairness.

a. Prosecutors Have A Responsibility To Ensure Fundamental Fairness And The Integrity Of The Legal Process By Treating Trials As Quests For Truth And Not Adversarial Sporting Contests.

Drawing on concepts of fundamental fairness, the Supreme Court has repeatedly concluded that prosecutors, as representatives of the State, have a responsibility to ensure fairness and integrity in the legal process. *See, e.g., Berger v. United States*, 295 U.S. 78, 88 (1935). Thus, as Justice Douglas noted, "[t]he function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the rights of people as expressed in the laws and give those accused of crime a fair trial." *Donnelly v. DeChristoforo*, 416 U.S. 637, 648-49 (1974) (Douglas, J., dissenting). Likewise, "[t]he criminal trial should be viewed not as an adversarial sporting contest . . . ,"

United States v. Kattar, 840 F.2d 118, 127 (1st Cir. 1988), but as a truth-seeking forum in which the prosecutor strives to uncover the actual facts surrounding the commission of a crime. *United States v. Wade*, 388 U.S. 218, 256 (1967) (White, J., concurring). Accordingly, in death penalty sentencing hearings, prosecutors have a "duty to refrain from improper methods calculated to produce a wrongful conviction." *Berger*, 295 U.S. at 88.

b. Prosecutorial Conduct That Is Incompatible With Fundamental Fairness Violates Due Process And Is Inconsistent With Ethical Standards And Norms.

The Supreme Court has recognized an array of prosecutorial conduct that is "inconsistent with the rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). For example, prosecutors cannot deliberately and knowingly present false evidence or misrepresent the truth to a jury. *Id.* at 112-13; *Miller v. Pate*, 386 U.S. 1, 6-7 (1967); *Burke v. State*, 205 Ga. 656, 659, 54 S.E.2d 350, 352 (1949); *Kitchens v. State*, 160 Ga. App. 492, 493, 287 S.E.2d 316, 317 (Ct. App. 1981). Similarly, prosecutors have a duty to correct false testimony, or testimony that creates a false impression, presented at trial. *Giglio v. United States*, 405 U.S. 150, 153-54 (1972); *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Likewise, prosecutorial suppression of evidence material to either guilt or sentencing deprives a defendant of due process. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Castell v. State*, 250 Ga. 776, 781, 301 S.E.2d 234, 241 (1983), *aff'd*, 252 Ga. 418, 314 S.E.2d 210 (1984). This is true regardless of the good or bad faith of the prosecution, because "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady*, 373 U.S. at 87.

This view of the prosecutorial function permeates not only the relevant legal precedent, but also the ethical standards of the profession. For example, under both the ABA Model Rules of Professional Conduct and the Georgia Rules of Professional Conduct, Rule 3.8, comment 1,

"[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." This special duty exists because, as a representative of the sovereign, the prosecutor must make decisions that affect the public interest, and such decisions should be "fair to all." ABA Model Code of Professional Responsibility EC 7-13 (1981); Rules of the State Bar of Georgia, Cannon of Ethics, Rule 3-107 (deleted Jan. 1, 2001). Accordingly, "[t]he duty of the prosecutor is to seek justice, not merely to convict." ABA Standards for Criminal Justice 3-1.2(c) (3d ed. 1993)[80]; *see also* National District Attorneys Association, National Prosecution Standards 1.1 (2d ed. 1991) ("The primary responsibility of prosecution is to see that justice is accomplished."). Thus, consistent with legal precedent, ethical standards and norms prohibit certain prosecutorial actions. For example, prosecutors cannot knowingly make false or misleading statements to the court or offer false evidence. ABA Model Rules of Professional Conduct and Georgia Rules of Professional Conduct, Rule 3.3; *id.* at cmts. 2, 5; *see also* ABA Standards for Criminal Justice 3-2.8(a) (advising prosecutors not to misrepresent fact or law to the court); *id.* at 3-5.6(a) (advising prosecutors not knowingly to offer, or to fail to withdraw, false evidence).

This ethical responsibility of the prosecutor carries over into the penalty phase; "[a]s a minister of justice, the prosecutor also has the specific obligation to see that the convicted defendant continues to be accorded procedural justice and that a fair sentence is imposed upon the basis of appropriate evidence . . . ." ABA Standards for Criminal Justice 3-6.2, commentary; *see also*, National District Attorney Association, National Prosecution Standards 88.4 ("To the

[80] The ABA Standards for Criminal Justice, Prosecution Function are available at http://www.abanet.org/crimjust/standards/pfunc_blk.html#1.2 (last visited Oct. 10, 2005).

extent that the prosecution becomes involved in the sentencing process, it should seek to assure that a fair and informed judgment is made and that unfair sentence disparities are avoided."). Accordingly, in the sentencing process, the ABA advises prosecutors to "assure that a fair and informed judgment is made on the sentence and to avoid unfair sentence disparities." ABA Standards for Criminal Justice 3-6.1(a). Thus, in the penalty phase of a capital case, the prosecutor has a duty to seek an appropriate sentence based on reliable and truthful information.

2. It Is A Violation Of Due Process For Prosecutors To Use Inconsistent And Irreconcilable Theories Of A Crime In Death Penalty Sentencing Hearings.

A prosecutor's reliance on flip-flopping theories of a crime deprives the defendant of his or her due process right to "fundamental fairness" under the United States and Georgia Constitutions. It is the duty of the prosecutor to seek justice; use of irreconcilable prosecutorial arguments is "inconsistent with the principles of public prosecution and the integrity of the criminal trial system." *In re Sakarias*, 35 Cal. 4th 140, 159, 25 Cal. Rptr. 3d 265, 281 (2005), *petition for cert. filed* (U.S. June 30, 2005) (No. 05-5114). Such conduct "reduce[s] criminal trials to mere gamesmanship and rob[s] them of their supposed purpose of a search for truth." *Drake v. Kemp*, 762 F.2d 1449, 1479 (11th Cir. 1985) (Clark, J. concurring).

Judge Clark of the Eleventh Circuit articulated this principle in *Drake v. Kemp*, in which the prosecution presented irreconcilable theories of a crime at separate trials. *Id.* at 1470 (Clark, J., concurring). While the majority did not address this issue, instead vacating the conviction on other grounds, *id.* at 1461 n.17, Judge Clark stated in his concurrence that this conduct was "inherently unfair" and violated the "fundamental fairness essential to the very concept of justice." *Id.* at 1479 (Clark, J., concurring). Because the prosecutor could not believe that each of the irreconcilable theories of the crime he or she presented was true, Judge Clark concluded that the situation was akin to those in which the prosecution presented false or misleading

evidence, stating, "[t]he state cannot divide and conquer in this manner. . . . This distortion rendered [the defendant's] trial fundamentally unfair." *Id.* This principle was reiterated in Justice Stevens' dissent to the Supreme Court's denial of certiorari in *Jacobs v. Scott*, in which the Fifth Circuit rejected the defendant's argument that the prosecutor's use of inconsistent theories entitled him to a new trial. *Jacobs v. Scott*, 31 F.3d 1319 (5th Cir. 1994), *cert. denied*, 513 U.S. 1067 (1995). Justice Stevens, dissenting, concluded that use of inconsistent positions by the prosecution was "deeply troubling" and "fundamentally unfair":

> [F]or a sovereign State represented by the same lawyer to take flatly inconsistent position in two different cases – and to insist on the imposition of the death penalty after repudiating the factual basis for that sentence – surely raises a serious question of prosecutorial misconduct. In my opinion, it would be fundamentally unfair to execute a person on the basis of a factual determination that the State has disavowed.

Jacobs, 513 U.S. at 1067 (Stevens, J., dissenting).

Numerous courts have adopted Justice Stevens' position. In *Thompson v. Calderon*, 120 F.3d 1045, 1059 (9th Cir. 1997), *rev'd on other grounds sub nomine Calderon v. Thompson*, 523 U.S. 538 (1998), a majority of the *en banc* Ninth Circuit held that prosecutorial flip-flopping may violate due process. The prosecutor in *Thompson* secured a conviction against one co-defendant on the theory that he acted alone, killing the victim to conceal a rape, and then against a second co-defendant on the theory that both defendants participated in a murder, which the prosecutor alleged the defendants committed because the victim was interfering with one defendant's attempts to reconcile with his ex-wife. *Id.* at 1055-58. Relying on cases establishing the duties of prosecutors to refrain from violations of due process, the court concluded that prosecutors have a duty to seek truth. *Id.* at 1058-59. Thus, "[f]rom these bedrock principles, it is well established that when no new significant evidence comes to light a prosecutor cannot, in

order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime." *Id.* at 1058.

Similarly, in *Smith v. Groose*, the Eighth Circuit held that due process prohibits a state from using inconsistent and irreconcilable factual theories to secure convictions against multiple defendants, concluding that such use "constituted 'foul blows'" and "fatally infected" the conviction. 205 F.3d 1045, 1051 (8th Cir. 2000) (citations omitted). In the case, the prosecutor tried members of two gangs, each of which independently burglarized a home on the same night, for the murder of the occupants of the burglarized home. *Id.* at 1047-48. At the first trial, the prosecutor entered statements attributing the murders to one gang, and, at a later proceeding, entered statements by the same witness attributing the murder to the other gang. *Id.* The Eighth Circuit concluded that the use of "inherently factually contradictory theories violates the principles of due process," and is contrary to the state's duty to seek the truth. *Id.* at 1052.

> Even if our adversary system is "in many ways, a gamble," *Payne v. United States*, 78 F.3d 343, 345 (8th Cir. 1996), that system is poorly served when a prosecutor, the state's own instrument of justice, stacks the decks in his favor. The State's duty to its citizens does not allow it to pursue as many convictions as possible without regard to fairness and the search for truth.

Id. at 1051.

Relying on these cases, the California Supreme Court recently held that it violates fundamental fairness when the state

> attribute[s] to two defendants, in separate trials, a criminal act only one defendant could have committed. By doing so, the state necessarily urges conviction or an increase in culpability in one of the cases on a false factual basis, a result inconsistent with the goal of the criminal trial as a search for truth.

In re Sakarias, 35 Cal. 4th at 155-56, 25 Cal. Rptr. 3d at 278. Because one of the inconsistent theories is necessarily false, such convictions or sentences are unreliable. *Id.* at 158-59, 25 Cal. Rptr. 3d at 281. Therefore, the government, "by taking a formal position inconsistent with the

guilt or culpability of at least one convicted defendant . . . has cast doubt on the factual basis for the conviction . . . . As both of two irreconcilable theories of guilt cannot be true, 'inconsistent theories render convictions unreliable.'" *Id.* (quoting *Stumpf v. Mitchell*, 367 F.3d 594, 613 (6th Cir. 2004).

While the United States Supreme Court has not specifically addressed this issue, it recently remanded a case involving inconsistent prosecutorial arguments to the Sixth Circuit. In *Bradshaw v. Stumpf*, 125 S. Ct. 2398 (2005), the State of Ohio appealed a decision of the Sixth Circuit vacating Stumpf's conviction and death sentence for a murder during the course of a robbery. *Stumpf v. Mitchell*, 367 F.3d at 596-97. While he plead guilty to the murder, Stumpf argued that his co-defendant, Welsey, fired the fatal shot. *Id.* at 598. Conversely, the prosecution argued that Stumpf was the triggerman, and a panel sentenced to him to death. *Id.* at 598-99. Later, at Welsey's trial, the prosecutor presented evidence that Welsey himself pulled the trigger. *Id.* at 597-98. The Sixth Circuit held that the prosecutor's use of inconsistent theories voided Stumpf's guilty plea. *Id.* at 618. On appeal, the Supreme Court concluded that because Stumpf could be convicted regardless of whether he fired the deadly shot, "the precise identity of the triggerman was immaterial to Stumpf's conviction for aggravated murder." *Bradshaw v. Stumpf*, 125 S. Ct. at 2407. However, while the Court held that the inconsistencies were immaterial to the conviction, the Court did not conclude that they were immaterial to the sentence:

> The prosecutor's use of allegedly inconsistent theories may have a more direct effect on Stumpf's sentence, however, for it is at least arguable that the sentencing panel's conclusion about Stumpf's principal role in the offense was material to its sentencing determination.

Id. at 2407-08. Therefore, because the identity of the triggerman was material to the sentencing determination, the Court remanded the case for a determination of whether Stumpf was entitled to a new sentencing hearing. *Id.* at 2408.

Because use of irreconcilable theories creates an unacceptable risk that a sentence was based on false evidence, it undermines public faith in the judicial process. "For the government's representative, in the grave matter of a criminal trial, to 'chang[e] his theory of what happened to suit the state' is unseemly at best." *In re Sakarias*, 35 Cal. 4th at 159, 25 Cal. Rptr. 3d at 281 (citations omitted). Thus, even jurists who have not found a constitutional error in inconsistent positions have found it "disturbing to see the Justice Department change the color of its stripes to such a significant degree . . . depending on the strategic necessities of separate litigations." *Kattar*, 840 F.2d at 127. Because such conduct fails to "inspire public confidence in our criminal justice system," *Thompson*, 120 F.3d at 1072 (Kozinski, J., dissenting), relief in this case is warranted.

B. Prosecutorial Flip-Flopping In A Death Penalty Sentencing Hearing Violates The Eighth Amendment To The United States Constitution And Analogous Provisions Of The Georgia Constitution.

A prosecutor's use of inconsistent and irreconcilable theories of a crime in a death penalty sentencing hearing renders any resulting death sentence unreliable. Therefore, it is contrary to the prohibition on cruel and unusual punishment imposed by the Eighth Amendment to the United States Constitution and Article I, § 1, ¶ XVII of the Georgia Constitution.

1. The Prohibition Against Cruel And Unusual Punishment Imposed By The Georgia And United States Constitutions Protects Mr. Wilson From Arbitrary, Capricious, Or Mistaken Administration Of The Death Penalty.

The United States Supreme Court has concluded that the death penalty must be treated differently from all other punishments, recognizing that "[d]eath, in its finality, differs more from

life imprisonment than a 100-year term differs from one of only a year or two." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Thus, because the death penalty is "qualitatively different from a sentence of imprisonment, however long," *id.*, courts must ensure a heightened standard of reliability to guarantee that the penalty of death is not administered arbitrarily or capriciously, considering both the reliability of the outcome and the fairness of the process by which it was reached. *See Johnson v. Mississippi*, 486 U.S. 578, 586-87 (1988) (outcome of death sentence based on inaccurate information found unreliable); *Turner v. Murray*, 476 U.S. 28, 35-36 (1986) (vacating death sentence where procedure created unacceptable risk of unreliable conviction).

"The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special need for reliability in the determination that death is the appropriate punishment in a capital case." *Johnson*, 486 U.S. at 584 (internal quotation marks omitted). "[A]ccurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." *Gregg*, 428 U.S. at 190. A death sentence predicated in part on evidence or argument that is materially inaccurate violates the prohibition against cruel and unusual punishment. *See Johnson*, 486 U.S. at 585.

The need to ensure reliability goes beyond the guarantee of procedural fairness; the Supreme Court has held sentences unreliable, and thus contrary to prohibitions against cruel and unusual punishment, in situations in which post-sentence occurrences render the determination unreliable. For example, in *Johnson v. Mississippi*, a Mississippi jury sentenced the defendant to die based on three aggravating factors, which included a previous felony conviction in New York. 486 U.S. at 581-82. After he was sentenced in Mississippi, a New York court set aside

this prior conviction. *Id.* at 582. The Supreme Court unanimously held that the sentence obtained using the inaccurate information violated the Eighth Amendment. *Id.* at 585-86. *See also Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O'Connor, J., concurring), *id.* at 429 (White, J., concurring), *and id.* at 435 (Blackmun, J., dissenting) (all assuming that an Eighth Amendment claim would exist upon compelling proof of innocence even in the absence of procedural unfairness).

2. It Is Contrary To The Heightened Reliability Standards In Death Penalty Cases For Prosecutors To Use Inconsistent And Irreconcilable Theories Of A Crime In A Sentencing Hearing.

The Eighth Amendment requires heightened reliability in death sentences, and cannot tolerate a death sentence secured through reliance on irreconcilable theories of the crime used to maximize culpability. Because one of the two irreconcilable theories is necessarily false, there is an unacceptable risk that the sentence is being arbitrarily, capriciously, or mistakenly administered, thus violating the United States and Georgia Constitutions.

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. *Green v. Georgia*, 442 U.S. at 97 (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"). The conclusion that a defendant did, in fact, pull the trigger increases his or her culpability, and thus the likelihood of a death sentence. *See Butts v. State*, 273 Ga. at 771, 546 S.E.2d at 485 (noting that whether Mr. Wilson's co-defendant, Robert Butts, was the triggerman was relevant to Mr. Butts' culpability for the crime). 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.

A death sentence reached using irreconcilable arguments regarding relative culpability is inherently unreliable. If two defendants are sentenced to death relying on irreconcilable theories, one of these determinations is necessarily based on incorrect information. Accordingly, the use of irreconcilable theories of culpability is "fundamentally unfair, for it necessarily creates the potential for . . . a false conviction or increased punishment on a false factual basis for one of the accuseds." *In re Sakarias*, 35 Cal. 4th at 159-60, 25 Cal. Rptr. 3d at 281-82. Given this inherent unreliability, it cannot comport with the amplified needs for reliability and fair process in death penalty determinations.

C. The Prosecutor's Inconsistent And Irreconcilable Theories Of The Crime "Stacked the Deck" Against Mr. Wilson And Deprived Him Of His Rights Under The United States And Georgia Constitutions.

When the prosecutor in Mr. Wilson's trial argued that Mr. Wilson was the triggerman, and then presented evidence irreconcilable with this theory at Mr. Butts' trial, he deprived Mr. Wilson of his right to a fundamentally fair sentencing proceeding and created an unacceptable risk that his death sentence was unreliable.

Notwithstanding the circumstantial nature of the case, the State argued that the identity of the triggerman was not relevant to the guilt/innocence phase of the trial because Mr. Butts and Mr. Wilson could be convicted under the law of parties to a crime without identifying the shooter. Wilson Trial Tr. 1153:21-1154:1.[81] Therefore, as in *Bradshaw v. Mitchell*, in order to convict Mr. Wilson at the guilt/innocence phase, the State was not required to prove who actually fired the shotgun, and any inconsistencies regarding the identity of the triggerman did

[81] Nonetheless, the jury could not sentence Mr. Wilson to death unless there was evidence from which they could conclude beyond a reasonable doubt that Mr. Wilson "in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used." *Cabana*, 474 U.S. at 386; *see also Enmund*, 458 U.S. at 797. As discussed at Part I(A), *supra*, in this case the jury had insufficient evidence from which it could conclude as such.

not give rise to a constitutional deprivation. Thus, it is not surprising that during the guilt phase of Mr. Wilson's trial the prosecutor took the position that "the State [could not] prove who pulled the trigger in this case." Wilson Trial Tr. 1815:15-16.

However, during the sentencing phase of Mr. Wilson's trial, where the issue of who pulled the trigger *was* material to culpability, Mr. Bright pitched another story to the jury:

> And, yes, ladies and gentlemen, show [Mr. Wilson] the exact – give him, grant him the exact same amount of mercy that he granted Donovan Corey Parks *when he blew his brains out* on the side of the road.

Id. at 2476:21-24 (emphasis added).

> He shot a man, he lived; shot a man again, he lived and testified against him, and he did his best when *he finally shot and killed Donovan Corey Parks*.

Id. at 2480:7-10 (emphasis added).

> *[Mr. Wilson] 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. So, first a hole, not just a wound, a hole in the back of his head, to leave him there on the ground with his brains – in a pool of blood with his brains – that's his brains right there – with his brains splattered on the ground. And there are those pellets in the man's head. *That's what he did. That's what I want you to picture him doing. Not just sitting there like he has the whole trial. Picture him doing what he did there.*

Id. at 2483:10-22 (emphasis added). These remarks, based on *no* record evidence and running contrary to the Butts confessions, clearly state that it was Mr. Wilson who fired the single shot that killed Mr. Parks. Instead of arguing as he had in the guilt phase that it was uncertain and did not matter who pulled the trigger, Mr. Bright based his sentencing argument on the theory that Mr. Wilson, in fact, was the triggerman.

The following year, Mr. Bright changed his tune yet again, arguing and offering evidence at the Butts trial that Mr. Butts pulled the trigger. *See, e.g.*, Butts Trial Tr. 1263:6-18. At the Butts trial, the State presented Angela Johnson, who testified that two days after the murder she saw Mr. Butts give Mr. Wilson a shotgun. *Id.* at 1799:10-17, 1801:19-25. According to the

prosecution, this shotgun was the gun Mr. Butts used to kill Donovan Parks. *Id.* at 1268:2-19. Then the prosecutor presented two witnesses – Horace Clarence May and Gary Randall Garza – both of whom testified that Mr. Butts confessed to pulling the trigger. *Id.* at 2058:15-22 (testimony of May); *id.* at 2113:8-12, 2113:23-2114:4 (testimony of Garza).

Mr. Bright, of course, had vigorously and successfully opposed the defense efforts to present Mr. May and Mr. Garza's testimony at the guilt/innocence phase of Mr. Wilson's trial. Wilson Trial Tr. 1794:21-1800:12. While the State noted repeatedly that it was not required to prove whether Mr. Butts actually fired the shot, Butts Trial Tr. 2600:1-6, during closing arguments at Mr. Butts' trial, Mr. Bright stated that the State had proven just that. *Id.* at 2604:10-19 ("We proved – and we don't have to – but 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."). In fact, in restating these "cold, hard facts" on appeal, the Supreme Court of Georgia found that "Butts . . . fired one fatal shot to the back of Parks's head with the shotgun." *Butts*, 273 Ga. at 761, 546 S.E.2d at 477.

Because the prosecution presented evidence at the Butts trial that directly contradicted statements made by the prosecution in Mr. Wilson's sentencing hearing, either Mr. Bright's own statements were false or the testimony presented at Mr. Butts' trial was perjured. Because the prosecutor could not have believed that each of these theories of the crime was true, his conduct was akin to situations in which the prosecution presents false or misleading evidence. Instead of abiding by his duty to seek truth and ensure fairness of process, the prosecutor "stack[ed] the deck" in his favor, *Smith*, 205 F.3d at 1051, disregarding truth and urging an increase in culpability based on a false factual basis. These actions undermine the integrity of the judicial

process, do not comport with fundamental notions of fairness and justice, and treat trials like sporting contests rather than searches for truth.

Moreover, the prosecution fatally infected the sentencing determination, in which the jury attempted to weigh mitigating factors against the circumstances of the crime, by factually misstating the defendant's culpability in that crime. Given the heightened due process available to death penalty defendants, in which the court must "guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake," *Eddings*, 455 U.S. at 118 (O'Connor, J., concurring), a death sentence handed out under such circumstances cannot be allowed to stand.

Furthermore, the prosecutor's use of irreconcilable theories rendered the death sentence unreliable. Because accurate sentencing information is an "indispensable prerequisite to a reasoned determination of whether a defendant shall live or die," *Gregg*, 428 U.S. at 190, and because the jury determination in the instant case was based in part on the inaccurate premise that it was Mr. Wilson and not Mr. Butts who fired the fatal shot – a premise the prosecutor himself later contradicted – there is an unacceptable risk that the determination was made mistakenly. Because the prosecutor thus used an unfair process to sentence a man to death based in part on inaccurate information, it is necessary and appropriate for the Court to grant relief.

IV. THE DEATH SENTENCE IN THIS CASE IS DISPROPORTIONATE PUNISHMENT, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ANALOGOUS PROVISIONS OF THE GEORGIA CONSTITUTION.

Mr. Wilson did not pull the trigger of the gun that killed Donovan Parks. Under *Enmund v. Florida*, 458 U.S. 782 (1982), and *Cabana v. Bullock*, 474 U.S. 376 (1986), a death sentence is excessive and disproportionate in a case where, as here, the defendant neither killed the victim,

Exhibit K

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

ROBERT EARL BUTTS, JR.,

Plaintiff,

vs.

HILTON HALL, Warden, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,

Defendants.

CIVIL ACTION

FILE NO. 2002-V-638

DEPOSITION OF

FREDRIC D. BRIGHT

March 8, 2007

10:40 a.m.

121 North Wilkinson Street
Milledgeville, Georgia

Renda K. Cornick, CCR-B-909

BROWN Reporting INC.
1740 Peachtree St, N.W.
Atlanta, GA 30309
404-876-8979

RESPONDENT EXHIBIT 7

Parks' brains on the side of road.

A. That's what it says right there. But I am curious what the rest of the argument is.

Q. Why is that?

A. I know how my mind works. I very well could have argued in Wilson that he was the -- I will do it this way, do you want to know -- I wasn't there. Who do I think pulled the trigger, I think based on the evidence probably it was Butts. Having said that, I think that quite candidly he was not the one that was calling the shots that day, where we are going, what we are going to do, was Wilson. Wilson almost talked him into it. I am not saying I did argue that, I am just curious what the rest of my argument was on the Wilson trial. Having said that, though, these words speak for themselves. I clearly said what I said there.

Q. You are referring to the words in Exhibit 2.

A. Correct.

Q. Leading up to that you talked about how Wilson had shot this Mexican fellow in the butt.

A. Correct.

Q. And shot Robert Louis Underwood four or five times.

judgment?

A. What would be the basis for his objection?

Q. That you are accusing two different people of being the trigger man in the sentencing phase.

A. I am not so sure that I argued -- I would be curious to see what the rest of my argument was on Wilson. Let me answer it this way. I am a prosecutor, I make arguments, I am not there. I do have an opinion as to who I think probably was the trigger man which was Butts. Am I a hundred-percent positive, no, I base it on evidence. In this case I realize both were essentially pointing the finger at the other as the trigger man. The law under parties to a crime, if two codefendants help each other commit a crime, the word is aid or abet is in the code, you can be charged with or convicted of a crime. I realize in a death penalty that being part of the crime is not enough. You have to either under Edmund v Florida to kill, attempt to kill or intend to kill. You don't have to be the trigger man but you have to do one of those three things, kill yourself, intend to kill or attempt to kill.

I am not so sure I argued in Wilson that he was the trigger man. I know we talked about the gangs, I know I talked about the evidence, I know I

efforts which I believe was Tom O'Donnell and Phil Carr were the attorneys for Wilson.

Q. Then in the Butts trial, you had the three, you called the three inmates to directly testify about conversations they had with Mr. Butts.

A. Yes.

Q. Based on that evidence being presented, you felt that there was, Butts was the trigger man?

A. Yes. Butts, in my opinion Butts was probably the trigger man, yes. Again, we present the evidence to the jury and it is up to the finders of fact to make that determination.

Q. Do you know if Mr. Westin was present during Mr. Wilson's trial?

A. Honestly, I can't recall. He would obviously know better than I would. I can't recall. I cannot recall if he was or was not.

Q. Do you know if Ms. Montford Ford was present during Mr. Wilson's trial at all?

A. I am so focused when I try a case I honestly couldn't tell you who is in there. It is common in a case like that to have members in the audience, courtroom is open to the public, any member of the public is welcome to watch it. Whether or not Mr. Westin or Ms. Montford Ford watched it, I

Exhibit L

IN THE SUPERIOR COURT FOR THE COUNTY OF BUTTS

STATE OF GEORGIA

ROBERT EARL BUTTS
PETITIONER

-VS-

C.A. NO. 2002-V-638

HILTON HALL, WARDEN,
GEORGIA DIAGNOSTIC &
CLASSIFICATION PRISON,
RESPONDENT.

HABEAS CORPUS
EVIDENTIARY HEARING

TRANSCRIPT OF PROCEEDINGS

IN THE ABOVE CAPTIONED CASE, HEARD BEFORE THE HONORABLE PENNY HAAS FREESEMANN, JUDGE, EASTERN JUDICIAL CIRCUIT, SITTING BY DESIGNATION IN BUTTS COUNTY SUPERIOR COURT

SEPTEMBER 11, 12, AND 13, 2007

APPEARANCES:

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ORIGINAL

VOLUME THREE

MARIE W. HARVIL
CCR B-955

made it -- could Butts have been the shooter? Yes. Those were my exact words to the jury. I mean, I was candid about it, open. I told the jury in Wilson could this man, your client, Butts, have been the shooter? I told them yes. I did. Those are my words to that same jury.

Q And then --

A When the law, does it make a difference who pulled the trigger? Of course it does. But the law figuratively, the law, at least as to the guilt/innocence, the law figuratively puts the hand, the gun in both their hands. I know that, when I say figuratively, I'm the one and I go pull the trigger and you help me commit the crime, we're both guilty of murder. Now, I realize in the sentencing phase of a death penalty case we've got to go one step beyond. That's Edmond v. Florida. We've got to show that the, in order to get a death penalty, the defendant has to either kill; attempt to kill, or intend to kill, or be the prime mover. That's --

Q Are you finished?

A Yes.

Q Okay. What's the mere presence construction?

A If you're merely present at the scene of the crime, you're not guilty of the crime itself. You've got to do some act.

Q Was there a mere presence instruction in Wilson?

A When I say I don't know, the record would speak for

Usually, I will tell you this, in a death penalty case, which is unique by its own definition, it usually will be the shooter, it usually will be. I've had -- it usually will be the shooter. The law allows -- and again I go back to Edmond. Kill, attempt to kill, intend to kill or be the prime mover, those are the words from Edmond v. Florida.

And if one is in this case, Mr. Butts was the shooter, and there's evidence that he was. And Mr. Wilson was the prime mover, calling the shots, where they're going, what they're doing, disposing the car, ordering Butts to do the shooting. These were Butts's words, as I recall, as it came out through Horace May or Sean Derrick Holcomb, that, yeah, he pulled the trigger, that's because Wilson told him to do it. That would justify and authorize and support the death penalty against Wilson and Butts.

So, in answer to your question, yes, usually it's going to be the shooter. But if you had one that was not the shooter, which could be Wilson in this case, but he's the prime mover in it, he's the one that intended to kill and was the prime mover. That supports the death penalty, and yes, I would be authorized to seek it. I don't seek the death penalty on every murder case but when you say it's your practice, I look at all the aggravation and all the mitigation, as to whether or not the death penalty is warranted in a particular case.

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

MARION WILSON, JR.,	*	
	*	CIVIL ACTION NO.
Petitioner,	*	2019-HC-12
	*	
v.	*	HABEAS CORPUS
	*	
BENJAMIN FORD, Warden, Georgia Diagnostic and Classification Center,	*	
	*	
Respondent.	*	

ORDER

This is Petitioner Marion Wilson's second habeas petition before this Court. His first petition was filed in 2001 and denied in 2008. In the current successive petition, Petitioner argues two claims: (1) that the prosecutor made false or misleading arguments at Petitioner's trial regarding his culpability in the murder of Donovan Parks; and (2) that he is not eligible for the death penalty because he did not kill, attempt to kill or intend to kill Donovan Parks. These claims were previously raised by Petitioner and found by this Court to be barred under state law. As Petitioner has submitted not new law or facts with regard these claims, this Court is procedurally barred from reviewing them and the instant petition is DISMISSED.

Filed 6/20/2019 at 10:08 a.m.
Lindsay Hunt
Deputy Clerk, Butts Superior Court

Petitioner previously raised the claim that the prosecutor, Fred Bright, made a false and misleading argument to the jury that Petitioner was the triggerman in the murder of Parks. *See* Respondent's Attachment C, pp. 43-45; Respondent's Attachment H, pp. 135-51. This Court previously found this claim was procedurally defaulted as Petitioner did not raise this claim on appeal to the Georgia Supreme Court and Petitioner had failed to establish cause and prejudice to overcome that default. (Respondent's Attachment A, pp. 6-9, citing *Black v. Hardin*, 255 Ga. 239 (1985); *Valenzuela v. Newsome*, 253 Ga. 793 (1985); O.C.G.A. § 9-14-48(d); *White v. Kelso*, 261 Ga. 32 (1991)).

Also, in his first state habeas petition, Petitioner alleged that he is not eligible for the death penalty because he did not kill, attempt to kill or intend to kill Donovan Parks. (Respondent's Attachment C, pp. 5-12; Respondent's Attachment G, pp. 71-74). This Court found the Georgia Supreme Court had denied this claim on direct appeal, (*Wilson*, 271 Ga. 813), and therefore the claim was res judicata and barred from the Court's review. (Respondent's Attachment A, pp. 3-6, citing *Elrod v. Ault*, 231 Ga. 750 (1974); *Gunter v. Hickman*, 256 Ga. 315 (1986); *Roulain v. Martin*, 266 Ga. 353 (1996)).

Issues previously raised may not be relitigated in habeas corpus if there has been no change in the facts or the law or a miscarriage of justice. *Bruce v. Smith*, 274 Ga. 432, 434 (2001); *Gaither v. Gibby*, 267 Ga. 96, 97 (1996); *Gunter v. Hickman*, 256 Ga. 315 (1986); *Elrod v. Ault*, 231 Ga. 750 (1974). Petitioner alleges that he has new facts in the form of testimony from Mr. Bright that Mr. Bright believed Co-Defendant Robert Butts was the triggerman. However, Mr. Bright conceded at trial that he could not establish who pulled the trigger and even asked the jury to assume it was Butts for a portion of his argument. (T. 1816, 1821, 1830, 1832-39). Additionally, Mr. Bright has consistently argued and testified that Petitioner

was either the triggerman or a party to the crime, and was the instigator of the crimes. *Compare* Petitioner's Attachments K and L with T. 1839. This Court finds there is no new law or facts as to these claims and they are barred from this Court's review and the instant petition is DISMISSED.

Insofar as this successive petition raises new claims not previously subsumed in Petitioner's prior arguments, they are DISMISSED under O.C.G.A. § 9-14-51.

As this Court is able to determine from the face of the pleadings that the claims in this petition are barred from this Court's review, the petition is dismissed without the necessity of a hearing. *See Collier v. State*, 290 Ga. 456 (2012).

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

SO ORDERED, this 26 day of June, 2019.

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

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