Nos. 18-9745 and 18A1345

In the

Supreme Court of the United States

Marion Wilson, Jr.,
Petitioner,

v.

Benjamin Ford, GDCP Warden,
Respondent.

On Petition for Writ of Certiorari to the
Baldwin County Superior Court

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether this Court should deny certiorari as to a state court's decision that was based solely upon adequate and independent state law grounds.

2. Whether this Court should deny certiorari for fact-bound error-correction in a state court decision based solely on state law.

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STATEMENT OF THE CASE

A. Procedural History

Petitioner, Marion Murdock Wilson, Jr., was tried before a jury October 27, 1997 through November 7, 1997 and convicted of the malice murder of Donovan Parks, the felony murder of Donovan Parks, the armed robbery of Donovan Parks, hijacking a motor vehicle, possession of a firearm during the commission of a crime, and possession of a sawed-off shotgun. *Wilson v. State*, 271 Ga. 811 (1999).[1] At trial, the State argued that Petitioner was either the triggerman or a party to the crime. Petitioner's defense theory was that he was merely present at the murder scene. The jury rejected Petitioner's theory, finding him guilty of malice murder. *Wilson*, 271 Ga. at 811.

In the sentencing phase of trial, Petitioner's trial counsel introduced evidence that Co-Defendant Robert Butts had claimed to be the triggerman. (Respondent's Appendix, pp. 8-17). Further, in their sentencing phase closing argument, trial counsel repeatedly argued that Butts was the person that actually shot Donovan Parks and Petitioner was not the triggerman. (Respondent's Appendix, pp. 18-24). Trial counsel reminded the jury that the District Attorney admitted he

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

References to the trial transcript are denoted as "T."

References to the attachments to this pleading are denoted as "Respondent's Appendix" with the corresponding page number taken from the lower right hand corner.

was not sure who pulled the trigger, (Respondent's Appendix, p. 20), and that the Sheriff had stated, in an audio-taped interview with Butts that was played for the jury, that Butts shot Donovan Parks. (Respondent's Appendix, p. 22; *see also* pp. 6-7).

Again, the jury rejected Petitioner's mere presence argument and found as a statutory aggravating circumstance that Petitioner committed the offense of murder while engaged in the commission of another capital felony, armed robbery, and recommended a sentence of death. *Wilson*, 271 Ga. at 811-12. Following that mandatory recommendation, the trial court sentenced Petitioner to death on November 7, 1997. *Id.*[2]

In affirming Petitioner's convictions and sentences, the Georgia Supreme Court summarized the facts of the case as follows:

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

[2] Butts was also convicted of malice murder, sentenced to death, and executed on May 4, 2018.

> Mart parking lot. Butts's automobile was among the vehicles remaining in the lot overnight. Based upon the statements of witnesses at the Wal-Mart, Wilson was arrested. A search of Wilson's residence yielded a sawed-off shotgun loaded with the type of ammunition used to kill Parks, three notebooks of handwritten gang "creeds," secret alphabets, symbols, and lexicons, and a photo of a young man displaying a gang hand sign.
>
> Wilson gave several statements to law enforcement officers and rode in an automobile with officers indicating stops he and Butts had made in the victim's automobile after the murder. According to Wilson's statements, Butts had pulled out a sawed-off shotgun, had ordered Parks to drive to and then stop on Felton Drive, had ordered Parks to exit the automobile and lie on the ground, and had shot Parks once in the back of the head. Wilson and Butts then drove the victim's automobile to Gray where they stopped to purchase gasoline. Wilson, who was wearing gloves, was observed by witnesses and videotaped by a security camera inside the service station. Wilson and Butts then drove to Atlanta where they contacted Wilson's cousin in an unsuccessful effort to locate a "chop shop" for disposal of the victim's automobile. Wilson and Butts purchased two gasoline cans at a convenience store in Atlanta and drove to Macon where the victim's automobile was set on fire. Butts then called his uncle and arranged a ride back to the Milledgeville Wal-Mart where Butts and Wilson retrieved Butts's automobile.

Wilson v. State, 271 Ga. at 812-13, *cert denied*, *Wilson v. Georgia*, 531 U.S. 838 (2000), *reh'g denied*, 531 U.S. 1030 (2000).

Petitioner filed his first state habeas corpus petition on January 19, 2001. A two-day evidentiary hearing was held on February 22-23, 2005. At that hearing, 129 exhibits were tendered by Petitioner; he presented 9 witnesses live and the affidavits of 33 witnesses, including 6 experts. The record ultimately comprised 5,679 pages. On December

1, 2008, the state habeas court denied relief. (Respondent's Appendix, pp. 25-67). The Georgia Supreme Court denied Petitioner's certificate for probable cause to appeal. (Respondent's Appendix, p. 69). This Court denied certiorari review on December 6, 2010. *Wilson v. Terry*, 562 U.S. 1093 (2010).

Petitioner then filed a federal habeas corpus petition on December 15, 2010. On December 19, 2013, the district court denied relief. *Wilson v. Humphrey*, No. 5:10-CV-489, 2013 U.S. Dist. LEXIS 178241 (M.D. Ga. Dec. 19, 2013). On December 15, 2014, the Eleventh Circuit affirmed the denial of habeas relief. *Wilson v. Warden*, 774 F.3d 671, (11th Cir. 2014). Petitioner applied for certiorari review and this Court granted, vacated, and remanded the case to the Eleventh Circuit on the issue of how federal courts review state decisions under federal law. *Wilson v. Sellers*, ___ U. S. ___, 138 S. Ct. 1188 (2018).

On remand, the Eleventh Circuit reviewed the state habeas court's decision as directed by the Supreme Court and again denied relief. *Wilson v. Warden*, 898 F.3d. 1314 (11th Cir. 2018). Petitioner again applied for certiorari review from this Court on March 12, 2019. That petition was denied May 28, 2019. *Wilson v. Ford*, 587 U.S. ___ (2019).

B. Extraordinary Motion for New Trial Proceedings

Six days prior to the denial of certiorari review, on May 22, 2019, Wilson sought an extraordinary motion for new trial and post-conviction DNA testing pursuant to O.C.G.A. § 5-5-41. On May 30, 2019, the trial court denied the motion finding that Wilson had failed to meet the requirements of O.C.G.A. § 5-5-41(c)(3)(D) — that "the

requested DNA testing would raise a reasonable probability that the Petitioner *would have been acquitted* if the results of the DNA testing had been available at the time of the conviction, *in light of all the evidence in the case.*" (Respondent's Appendix, pp. 79, 81-86) emphasis in original). The trial court also found that Petitioner could not show "the identity of the perpetrator, was, or should have been, a significant issue in the case" as required by O.C.G.A. § 5-5-41(c)(3)(C). *Id.* at 86-87. The trial court further found that Wilson's motion was filed for the purpose of delay. *Id.* at 87-88. On June 14, 2019, Wilson filed an application for discretionary appeal in the Georgia Supreme Court. The Georgia Supreme Court denied Petitioner's application to appeal on June 20, 2019. *Wilson v. State*, Case No. S19W1323 (June 20, 2019).

APPLICABLE LAW

"This Court lacks jurisdiction to entertain a federal claim on review of a state court judgment 'if that judgment rests on a state law ground that is both independent of the merits of the federal claim and an adequate basis for the court's decision.'" *Foster v. Chatman*, U.S. , 136 S. Ct. at 1746 (2016), quoting *Harris v. Reed*, 489 U.S. 255, 260, 109 S. Ct. 1038 (1989).

O.C.G.A. § 5-5-41(a):

> **(a)** When a motion for a new trial is made after the expiration of a 30 day period from the entry of judgment, some good reason must be shown why the motion was not made during such period, which reason shall be judged by the court. In all such cases, 20 days' notice shall be given to the opposite party.
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> ***

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

(A) Evidence that potentially contains deoxyribonucleic acid (DNA) was obtained in relation to the crime and subsequent indictment, which resulted in his or her conviction;
(B) The evidence was not subjected to the requested DNA testing because the existence of the evidence was unknown to the petitioner or to the petitioner's trial attorney prior to trial or because the technology for the testing was not available at the time of trial;
(C) The identity of the perpetrator was, or should have been, a significant issue in the case;
(D) The requested DNA testing would raise a reasonable probability that the petitioner would have been acquitted if the results of DNA testing had been available at the time of conviction, in light of all the evidence in the case;

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(4) The petitioner shall state:
(A) That the motion is not filed for the purpose of delay;

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

Emphasis added.

REASONS FOR DENYING THE PETITION

After 22 years of extensive litigation, Petitioner, for the first time, requested DNA testing on a piece of evidence introduced at trial—the victim's neck tie. Petitioner alleges that if he can establish that his DNA is not on the neck tie, it would establish that he took no part in the murder of Donovan Parks and therefore would establish that he would have been acquitted. The trial court properly reviewed and denied Petitioner's motion in accordance with O.C.G.A. § 5-5-41.

This Court has held on numerous occasions that a state court judgment which rests on an independent and adequate state-law ground presents no federal question for adjudication by this Court in a petition for a writ of certiorari. *See, e.g., Foster v. Chatman*, __ U.S. __, 136 S. Ct. 1737, *10 (2016) ("This Court lacks jurisdiction to entertain a federal claim on review of a state court judgment 'if that judgment rests on a state law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision.'") (quoting *Harris v. Reed*, 489 U.S. 255, 260, 109 S. Ct. 1038 (1989)). The review Petitioner seeks is of the trial court's denial of his extraordinary motion for new trial and motion for DNA testing under O.C.G.A. § 5-5-41. The clear state law basis for the trial court's denial of Petitioner's extraordinary motion for new trial establishes that this decision rests on an adequate and independent state law ground, authorizing the denial of this petition for a writ of certiorari under this Court's longstanding precedent. *See Herb v. Pitcairn*, 324 U.S. 117, 125 (1945) ("This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on

adequate and independent state grounds."). What is more, Petitioner is requesting this Court perform a purely factbound analysis of his request for a motion for new trial, which this Court's own rules do not favor. *See* Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.") Consequently, Petitioner's request for certiorari review should be denied.

I. Certiorari review should be denied as the state court's denial of Petitioner's motion for DNA testing without a hearing is based on independent and adequate state law grounds.

Petitioner asks this Court to grant certiorari to review the trial court's implementation of state law in denying his motion for DNA testing without a hearing. Petitioner alleges that the trial court erred in not allowing him to reply to the State's response and in denying his motion without holding a hearing. State law is clear that the trial court was not required to wait for a reply from Defendant or hold a hearing.

O.C.G.A. § 5-5-41(c)(3)(c)(5) and (6)(A) are as follows:

> **(5)** The motion shall be served upon the district attorney and the Attorney General. The state shall file its response, if any, within 60 days of being served with the motion. The state shall be given notice and an opportunity to respond at any hearing conducted pursuant to this subsection.
>
> **(6) (A)** If, after the state files its response, if any, and the court determines that the motion complies with the requirements of paragraphs (3) and (4) of this subsection, the court shall order a hearing to occur after the state has filed its

> response, but not more than 90 days from the date the motion was filed.

The statute does not provide for a reply from Petitioner; and the trial court did not err in not waiting on Petitioner to submit a reply to the State's response brief.

The statute is also clear that if the trial court finds that Petitioner failed to establish paragraphs 3 and 4 of subsection (c), a hearing is not required. In the instant case, citing *Crawford v. State*, 278 Ga. 95 (2004), the trial court found Defendant had failed to meet these requirements and denied Defendant's motion without a hearing. (Respondent's Appendix, p. 81). In *Crawford*, the Georgia Supreme Court held:

> ...paragraph (3) requires that the Defendant "show" certain things, including how the possible results of the requested DNA testing would in reasonable probability have led to the Defendant's acquittal if those hypothetical results had been available at the time of the Defendant's original trial. O.C.G.A. § 5-5-41 (c) (3). Requiring a Defendant to "show" a possible DNA testing result and to "show" the relevance of that hypothetical result is not tantamount to requiring the Defendant to "prove" the hypothetical result will be obtained through actual testing. However, if the DNA testing results hypothesized in a Defendant's motion, even when assumed valid, would not in reasonable probability have led to the Defendant's acquittal if those results had been available at trial, a hearing on the Defendant's motion requesting DNA testing would be unnecessary.

Crawford, 278 Ga. at 97.

In the instant case, the trial court found that even if the testing was conducted and Co-Defendant Butts's DNA was on the neck tie, but

Defendant's was not, it still would not result in an acquittal. (Respondent's Appendix, p. 82).

Further, Petitioner claims his due process rights were violated when he was not afforded this alleged mandatory hearing. In addition to being inaccurate under state law, it is also a mischaracterization of federal law. As this Court has held, "[a]s state collateral proceedings are not a constitutional right, but one provided by the individual state, due process rights are limited to the law governing those state procedures." *See Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Ross v. Moffitt*, 417 U.S. 600 (1974). The Court explained that, when such state procedures are provided, they need "only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." *Ross*, 417 U.S. at 611, 616. Petitioner was clearly afforded the right to file his motion and arguments with the trial court. "[W]hen a State chooses to offer help to those seeking relief from convictions," due process does not "dictat[e] the exact form such assistance must assume." *Pennsylvania*, 481 U.S. at 559. Petitioner's "due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief." *DA's Office v. Osborne*, 557 U.S. 52, 690 (2009)

As the denial of the hearing and responses to the motions are solely questions of state law procedure and the denial based on state law grounds, this claim does not warrant certiorari review.

II. Certiorari review should be denied as the state court's denial of Petitioner's request for DNA testing was based on independent and adequate state law grounds.[3]

As an initial matter, it must be pointed out that, "Once a Petitioner has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears." *Herrera v. Collins*, 506 U.S. 390, 399 (1993). "Thus, in the eyes of the law, [P]etitioner does not does not come before the Court as one who is 'innocent,' but, on the contrary, as one who has been convicted by due process of law of [three] brutal murders." *Id.* at 400. Petitioner's convictions and sentences have been exhaustively reviewed for the past 20 years in both state and federal court and found to be constitutionally sound.

A. The trial court properly found Petitioner failed to meet the requirements of O.C.G.A. §5-5-31(c)(3)(D).

The trial court found that Petitioner failed to meet the requirements of O.C.G.A. § 5-5-31(c)(3)(D)—that "the requested DNA testing would raise a reasonable probability that the Petitioner *would have been acquitted* if the results of the DNA testing had been available at the time of the conviction, *in light of all the evidence in the case.*" (Respondent's Appendix, pp. 81-86) (emphasis in the original). The

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[3] The trial court also found that Petitioner's filing was for the purpose of delay, but as it is clear that the denial is supported by these two grounds (either of which alone would be grounds to deny the motion), Respondent has not addressed the requirement that Petitioner must state that his pleading is not for the purpose of delay. However, contrary to Petitioner's claim, he has never been prevented from seeking DNA testing, (Petition, p. 22), not even since 2007 when the testimony from Mr. Bright on which he relies was given.

court found that even if the neck tie was tested and was found to have Butts's DNA on it but not Petitioner's DNA, this "would not acquit [Petitioner]." *Id.* at 82. The trial court's ruling was based on: its factual finding that Petitioner was wearing gloves on the night of the murder; and "in light of the evidence that establishes Petitioner's guilt." *Id.* at 82-83.[4]

As found by the trial court, it was established by video-taped evidence and eyewitness testimony that Petitioner had on gloves on the night of the murder. (Respondent's Appendix, p. 82). Accordingly, the lack of his DNA or the presence of Butts's DNA on the tie would neither show that Petitioner did not touch the neck tie nor acquit Petitioner.

As to the facts establishing Petitioner's guilt, the trial court relied on the facts as summarized by the Georgia Supreme Court on direct appeal, which are set forth above, and further relied on the following by the court:

> Viewed in the light most favorable to the verdict, we find that the evidence introduced at trial was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that Wilson was guilty of the crimes of which he was convicted and to find beyond a reasonable doubt the existence of a statutory aggravating circumstance. *Jackson v. Virginia*, 443 U.S. 307 (99 S. Ct. 2781, 61 L. Ed. 2d 560) (1979); O.C.G.A. § 17-10-30(b)(2). The State was not required to prove that Wilson was "the triggerman" in order to prove him guilty of malice murder. Even assuming

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[4] The trial court also took note of the quick adjudication of guilt and the jurors' post-trial statements as to the assuredness of their conclusion of guilt. (Respondent's Appendix, p. 86).

> 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*. []

(Respondent's Appendix, p. 83, quoting *Wilson*, 271 Ga. at 812-13) (emphasis added). *See also Tison v. Arizona*, 481 U.S. 137 (1987); *Enmund v. Florida*, 458 U.S. 782 (1982).

Petitioner also argues that even if the testing did not preclude a finding of guilt, it could have precluded a sentence of death. The trial court found that this was not the standard, but that instead, Petitioner has to show "[t]he requested DNA testing would raise a reasonable probability that the Petitioner would have been *acquitted*...." (Respondent's Appendix, p. 84, quoting O.C.G.A. § 5-5-41(c)(3)(D) (emphasis in original)). This is clearly a correct recitation and application of the statute.

However, ignored by Petitioner, is the fact that the trial court went on to hold that "even if the testing was conducted and Butts's DNA was on the tie, in light of the evidence presented at trial, there is no reasonable probability of a different sentencing verdict." (Respondent's Appendix, p. 84). In making this finding, the trial court relied on the extensive evidence submitted in aggravation.

The trial court found that the record established that, "during the penalty phase of trial, the State called a number of witnesses in aggravation of punishment to show that, although Defendant was only 21, he had an extensive, violent criminal history." (Respondent's Appendix, p. 84).

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

(Respondent's Appendix, pp. 84-85, quoting *Wilson v. Humphrey*, 2013 U.S. Dist. LEXIS 178241, at *41 n.13).

The trial court further noted that Chief Judge Carnes of the Eleventh Circuit felt compelled to right a special concurrence in Petitioner's appeal with regard to Petitioner's criminal history.

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

(Respondent's Appendix, p. 85, quoting *Wilson v. Warden*, 774 F.3d at 683 (vacated on other grounds)).

As set forth above, the evidence as introduced during the trial showed Petitioner was the leader of the Milledgeville Folks Gang (Respondent's Appendix, pp. 1-2), and went with Butts to Walmart in Butts's car. The two men parked the car and went inside the Walmart together with a loaded sawed off shotgun, following closely behind Parks through Walmart and through the check-out line. They followed the victim to his car, asked for a ride they did not need, immediately took the victim to Felton Drive and executed him in the middle of the road. *Wilson*, 271 Ga. at 812-13. Within minutes, a dispassionate Petitioner is seen on video-tape wearing gloves and purchasing gas for the stolen car. (T. 1427, 1451). Petitioner admitted to going to his cousin in an attempt to locate a chop shop to sell the car. *Wilson*, 271 Ga. 812-13. He also admitted to burning the victim's car and the murder weapon was found in his house under his bed. *Id.* Also, as noted by the trial court, there was extensive evidence in aggravation, including Petitioner having shot two other people previously, one just to find out what it felt like to shoot someone. (Respondent's Appendix, pp. 84-85).

The trial court, relying solely on state statutory law, concluded "[t]here is no reasonable probability that Petitioner would have been acquitted if the results of the DNA testing had been available at the time of the conviction, *in light of all the evidence in the case*" or not sentenced to death." (Respondent's Appendix, p. 86 (emphasis in the

original)). This case presents no federal issue warranting this Court's certiorari review.

B. The trial court properly found Petitioner failed to meet the requirements of O.C.G.A. §5-5-31(c)(3)(C).

The trial court also found that Petitioner could not show "the identity of the perpetrator, was, or should have been, a significant issue in the case" as required by O.C.G.A. § 5-5-41(c)(3)(C). (Respondent's Appendix, p. 86).

Defendant never asserted he was not at the murder scene. Instead, as found by the trial court, "[t]he question posed by Defendant at trial was who actually held the gun and fired the fatal shot into Parks's head." *Id.* Defendant continues to make the argument to this Court that he was not the triggerman and was not a party to the crime. However, as found by the trial court, "[t]hat issue was addressed on direct appeal." *Id.*, citing *Wilson*, 271 Ga. at 813 (the "State was not required to prove Defendant triggerman for malice murder, sufficient evidence showed 'he intentionally aided or abetted the commission of the murder or that he intentionally advised, encouraged, or procured another to commit the murder to support a finding of guilt'").

Defendant further asserts that the State argued that Defendant pulled Parks out of the car by his tie, forced him to the ground and shot him. He argues if Defendant's DNA is not on the tie, it establishes that Defendant did not pull Parks out of the car by the tie, did not shoot Parks, and was not a party to the crime.

First, as found by the trial court, Defendant was seen wearing gloves immediately following the murder. The lack of his DNA on the

neck tie therefore means nothing. Even if the tie has Butts's DNA on it, it does not preclude one person from forcing Parks from the car and another person subsequently or previously pulling the tie as well.

Secondly, the State's argument at trial was not based solely on the scenario cited by Defendant. The neck tie was not critical to the State's argument. The State was explicitly clear throughout arguments that it could not establish who pulled the trigger killing Parks, but, regardless, Defendant was guilty of murder as a party to the crime. For instance, in the guilt phase closing arguments of Defendant's trial, the District Attorney conceded that either Defendant or Co-Defendant Butts was the triggerman. (T., p. 1816 ("I'm not conceding that this man was not the trigger man. I want that crystal clear. He could have been the trigger man; Butts could have been the trigger man."); T., p. 1821 ("... knowing the man's brains were blown out on the side of the road, that either he did it or his Co-Defendant did."); T., p. 1830 ("Whether he was the trigger man or whether he was a party to the crime, and he aided and abetted and helped his Co-Defendant."); T., p. 1832 ("... and he is guilty of malice murder whether he pulled the trigger or whether the other man pulled the trigger."); T., p. 1836 ("And one of the two had to have that sawed-off shotgun in their arms. Could have been Butts. Very well could have been Butts. Might have been Wilson, but let's assume it was Butts."); T., pp. 1837-1838 ("Whether he pulled the gun or not, he helped the whole nine yards."); T., p. 1839).

Mr. Bright further argued in the guilt phase of closing of Petitioner's trial:

> [Torrance Harvey] was describing [Petitioner and Butts]. 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 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; ...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.... Either (a) he had just watched that man right there blow Donovan Corey Parks' brains 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.

(Respondent's Appendix, p. 68).

Clearly, the jury, in an hour and half, found that Defendant was guilty of intentionally and maliciously murdering Donovan Parks and rejected Defendant's claim and trial counsel's presentation and arguments that he was merely present at the scene. The trial court properly denied Defendant's motion based on state law and this case presents no issue for this Court's review.

III. The trial court's factbound application of long-standing state law requirements governing extraordinary motions for new trial presents no issue warranting this Court's exercise of its certiorari jurisdiction.

In addition to seeking review of the trial court's decision applying a state statute, Petitioner is requesting this Court perform a purely factbound analysis of innocence, which this Court's own rules do not favor. *See* Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.") Consequently, Petitioner's request for certiorari review should be denied.

The granting of certiorari in this case is clearly unwarranted, as the record demonstrates that Petitioner is merely seeking to have this Court "correct a state court judgment." As this Court explained in *Herb*, "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb*, 324 U.S. at 125-26. To review the state court decision which is clearly based solely on state law grounds, would result in the issuance of a mere advisory opinion by this Court and therefore, certiorari should be denied.

CONCLUSION

For the reasons set out above, this Court should deny the petition and Petitioner's accompanying motion for stay of execution.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2019, I served this brief on all parties required to be served via email properly addressed upon:

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