No. 18-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

MARION WILSON, JR.,

Petitioner,

-v-

BENJAMIN FORD, Warden,

Respondent.

THIS IS A CAPITAL CASE

PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

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QUESTION PRESENTED FOR REVIEW

THIS IS A CAPITAL CASE

1) Are due process and the Eighth Amendment violated when a prosecutor knowingly argues falsehoods about the defendant's culpable acts in order to incite the jury to impose the death penalty?
2) Can the State of Georgia be permitted to execute a defendant where it lacked probative evidence that he killed, intended to kill, or engaged in conduct leading up to the murder that reflected reckless indifference, and where evidence obtained post-conviction demonstrates that the prosecutor engaged in misconduct in order to secure the death penalty?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2013

MARION WILSON, JR.,

Petitioner,

-v-

BENJAMIN FORD, Warden,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

Petitioner, Marion Wilson, Jr., respectfully petitions this Court to issue a Writ of Certiorari to review the judgment of the Supreme Court of Georgia, entered in the above case on June 20, 2019.

OPINIONS BELOW

The decision of the Supreme Court of Georgia, entered June 20, 2019, in Case No. S19W1377, denying Petitioner's appeal from the denial of habeas corpus relief, is unreported and attached as Appendix A. The underlying Superior Court decision in *Wilson v. Ford*, Butts Co. Superior Court Case No. 2019-HC-12, dated June 20, 2019, is unreported and attached hereto as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Georgia denying Petitioner's appeal from the denial of relief was entered on June 20, 2019. *See* Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257, Petitioner asserting a deprivation of his rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. "No person shall be … deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state...." U.S. Const. amend. VI. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law...." U.S. Const. amend. XIV § 1.

STATEMENT OF THE CASE

A. Relevant Facts[1]

In November 1997, a Baldwin County, Georgia, jury convicted Marion Wilson, Jr. and sentenced him to death for the murder of Donovan Parks, an off-duty state correctional officer who

[1] The transcript of the trial in *State v. Wilson*, Baldwin County Criminal Case No. 39249B, will be referenced as "T [page number]." Pretrial transcripts will be referenced as "PT ([date]) [page number]." The transcript of the trial in *State v. Butts*, Baldwin County Criminal Case No. 39183, will be referenced as "Butts T [page number]." The transcript of habeas corpus proceedings in *Wilson v. Hall*, Butts Co. Superior Court Case No. 2001-V-38, will be referenced as "HT [page number]." The transcript of habeas corpus proceedings in *Butts v. Hall*, Butts Co. Superior Court

was killed by a single shotgun blast on March 28, 1996, when Mr. Wilson was just 19 years old. The evidence showed that on the evening of March 28, 1996, Mr. Wilson's co-defendant, Robert Butts, solicited a ride from the victim, Donovan Corey Parks,[2] at a Milledgeville Walmart. Butts sat in the front passenger seat of the victim's car while Mr. Wilson sat in the back seat. *Wilson v. State*, 271 Ga. 811, 811-13 (1999). As Mr. Wilson later explained to police, Butts pulled a sawed-off shotgun and ordered the victim to turn over his wallet and exit the car. Butts then exited the passenger side, ordered the victim to lie down, and shot and killed him. *Id*.; *see also* T 1585-90, 1600-01. Butts was arrested after Mr. Wilson's statement to police.

In his initial statement to the police, Mr. Wilson admitted that he suspected Butts intended to rob "somebody," but had no idea that Butts intended to harm or kill anyone. Exhibit A at 1764-65. Mr. Wilson naively felt that because he did not actively participate in the robbery or murder he hadn't done anything wrong. *Id.* at 1781. Mr. Wilson did not contest his presence in the car with Butts and Mr. Parks before the murder, nor that he helped Butts dispose of the car and the murder weapon afterwards. *Id*. at 1782.

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

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Case No. 2002-V-638, will be referenced as "Butts HT [page number]." References to Exhibit page numbers will be to bate stamp numbers in the documents submitted as exhibits to the original state habeas petition below.

[2] According to evidence presented at Robert Butts' trial, Butts knew Mr. Parks. *See* Exhibit B (Butts T 1260).

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

Under Georgia's accomplice liability law, Mr. Wilson faced a murder conviction and three sentencing possibilities: life with parole eligibility; life without parole eligibility; or death. Based on his assessment of the evidence of Mr. Wilson's culpability relative to Butts', however, the prosecutor, Fred Bright, offered to allow Mr. Wilson to plead guilty in exchange for two consecutive, parolable life sentences, plus twenty years, with a possibility of parole after serving twenty years. PT (09/26/97) at 2-5. Wilson declined the offer. *Id*. at 6-8.[3]

Mr. Wilson went to trial in November 1997, asserting a "mere presence" defense based on Mr. Wilson's statements, as corroborated by Butts' confessions to jail inmates Garza, May, and Holcomb. To establish the admissibility of those confessions, however, defense counsel were required to—but did not—follow a simple procedure announced a year earlier in *Turner v. State*, 267 Ga. 149 (1996). *Wilson*, 271 Ga. at 814-15. As a result of counsel's failings, the prosecution convinced the trial court to exclude Butts' confessions in the culpability phase of trial. T 1794-1800.[4]

Although the prosecutor had sufficient evidence to establish that Mr. Wilson had knowledge of Butts' plans to commit a robbery and nonetheless got into the victim's car with him,

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[3] The prosecutor, by contrast, never offered Butts a deal, even though his attorney "begged" for one. Exhibit E at 1866.

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

the prosecutor's evidence that Mr. Wilson was actively engaged in the robbery and murder was underwhelming at best: the prosecutor had Mr. Wilson's statements in which Mr. Wilson admitted to knowing that Butts intended to rob someone that evening and had a weapon, though Mr. Wilson denied that he did anything more than remain seated in the back of the car while Butts forced Mr. Parks out of the car and shot and killed him; Mr. Wilson's actions after the murder in attempting to cover it up (looking for a chop shop in Atlanta to get rid of the car, burning the car, and hiding the shotgun under his bed); and the testimony of a single witness, Kenya Mosley, that Mr. Wilson, in contradiction to his statement, had gone into the Walmart with Butts,[5] although Ms. Mosley's testimony on this point was contradicted by others,[6] and she apparently was mistaken in her belief that a fourth man got into the victim's car with Mr. Parks, Mr. Wilson and Butts.[7]

At the guilt-innocence phase of trial, the prosecution argued that the identity of the triggerman was not relevant to the guilt/innocence phase of the trial because Butts and Mr. Wilson could be convicted under the law of parties to a crime without identifying the shooter. T 1153-54.

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

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

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

Therefore, in order to convict Mr. Wilson at the guilt/innocence phase, the prosecution 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." T 1815.

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

T 2476 (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*.

T 2480 (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*.

T 2483-84 (emphasis added).[8] It should be no surprise then that the jury, told by prosecutor Bright in no uncertain terms that Mr. Wilson fired the shotgun blast that killed Mr. Parks, imposed the ultimate penalty of death.

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[8] This perspective is also consistent with the view of Sheriff Howard Sills, who was in charge of the murder investigation. When Sheriff Sills was asked by Butts' attorney what he was honest about when interrogating Butts, he responded, "I was honest with him when I told him that

A year later, in the subsequent trial of Robert Butts, prosecutor Bright also sought the death penalty, because, he claimed, *Butts* was the actual shooter. Bright told the jurors at the conclusion of the guilt phase: "We proved—and we don't have to—we proved that the man that actually, in fact, pulled the trigger and blew out the brains of Donovan Corey Parks is the defendant, Robert Earl Butts, Jr." Butts T 2604 (Exhibit G); *see also* Butts T 1263 (Exhibit B) (prosecutor Bright telling jury in guilt phase opening statement that "you will hear some evidence from which you ... can conclude that the one that held the sawed-off shotgun, the one that aimed it at the back of the head of Donovan Corey Parks, and the one whose finger was on that trigger, that squeezed that trigger that sent that shot rifling down that barrel from about three feet away from the back of Donovan Corey Parks' head . . . you'll have some evidence from which you can conclude, is his [Butts'] finger"). And, in his summation in the penalty phase of Butts' trial, Bright used words strikingly similar to those he had used with Marion's jury:

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

Butts T 2909 (Exhibit I). Butts was also sentenced to death.

During Butts' trial, the prosecution relied on the same evidence he had managed to exclude from Mr. Wilson's culpability phase, calling Randy Garza to testify about statements made to him by Butts, with whom he shared a cell while Garza was awaiting a court date. According to Garza,

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he blew a man's brains out on Felton Drive." Butts T 2276 (Exhibit F). Meanwhile, no one—with the exception of Bright during the sentencing phase of Marion's trial—has actually claimed that Marion pulled the trigger, not even Butts. Butts even admitted that Mr. Wilson did not have possession of the weapon. Butts T 2490-1 (Exhibit H).

Butts told him that he entered the Walmart alone, that Butts was holding the shotgun "up his sleeve in a big jacket," and that Butts "actually pulled the trigger that killed [Parks]." Butts T 2113-14 (Exhibit J). Garza's account included details that could only have come from Butts. For example, Butts told Garza that he (Butts) had purchased a pack of gum in the Walmart.[9] Garza's statements were corroborated by Detective Russell Blenk and memorialized in a report written by Detective Blenk following an interview with Garza. HT 2968-72 (Exhibit C). Detective Blenk specifically noted that Butts told Garza that "Butts pulled a gun out of his sleeve," that Butts "shot [Parks] in the head and killed him," and that Marion "was in the back seat." HT 2971-72 (Exhibit C).

Circumstantial evidence further supports the conclusion that Butts, not Marion, planned and orchestrated the murder. As the Georgia Supreme Court pointed out in its opinion affirming Butts' conviction:

> The fact that Butts asked the victim for a ride, even though he had driven his own automobile to the store, shows that he was involved in the motor vehicle hijacking from the beginning. The evidence also suggested that Butts carried the shotgun with him in the store as he sought out a victim. Testimony at trial showed that Butts had worked with the victim previously, suggesting that Butts intended from the beginning to murder the victim in order to ensure the victim's silence.

Butts v. State, 273 Ga. 760, 771 (2001). The evidence was strong enough for the Georgia Supreme Court to conclude that after Mr. Parks was forced out of the car, "Butts then fired one fatal shot to the back of Park's head with the shotgun." *Butts*, 273 Ga. at 761.

Later, in Butts' state habeas proceedings, long after the close of evidence in Mr. Wilson's trial and state habeas case, Bright confirmed under oath that, contrary to the arguments he had propounded at Mr. Wilson's sentencing, he believed that Butts was the triggerman: "I do have an

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[9] Garza swore under oath that he had not obtained any of these details from Mr. Wilson. Butts T 2119, 2129, 2142 (Exhibit J).

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 the evidence . . . Who do I think pulled the trigger, I think based on the evidence probably it was Butts. . . in my opinion Butts was probably the trigger man, yes." Butts HT 2282, 2285, 2295 (Exhibit K). The "evidence" cited by Bright in support of his conclusion that Butts was the shooter presumably includes Butts' admissions to that effect.

In his testimony in Butts' habeas proceedings, furthermore, prosecutor Bright conceded that convincing the jury of the defendant's factual culpability for a homicide is critical to obtaining a death sentence: "Does it make a difference who pulled the trigger? Of course it does." Butts HT 575 (Exhibit L). Bright testified that in a case like this the death penalty is usually only sought for the shooter: "Usually, I will tell you this, in a death penalty case, which is unique by its own definition, it usually will be the shooter [for whom the death penalty is sought], it usually will be." *Id.* at 577 (Exhibit L). As Bright only belatedly conceded, contrary to his averments at Mr. Wilson's sentencing, the evidence shows that Robert Butts, *not* Marion Wilson, shot and killed Donovan Parks.

Today it is plain that, in light of the lack of evidence that Marion Wilson killed Donovan Parks, or even anticipated that he would be killed, neither law enforcement nor prosecutor Bright *ever* believed that he was the actual killer of Donovan Parks; the prosecutor could win a death sentence for Mr. Wilson only by falsely claiming that he was. Such conduct has no place in a criminal justice system that requires fundamental fairness and reliability in the infliction of capital punishment.

B. Proceedings Below

Mr. Wilson is a death-sentenced person in the custody of the State of Georgia under the terms of conviction and sentencing verdicts entered November 5 and 7, 1997, in the Superior Court

of Baldwin County, Georgia. Pursuant to these judgments, he received a sentence of death for one count of malice murder, life imprisonment for one count of armed robbery; twenty years' imprisonment for hijacking a motor vehicle; five years' imprisonment for possession of a firearm during the commission of a felony; and five years' imprisonment for possession of a sawed-off shotgun. Mr. Wilson was also convicted of felony-murder; that conviction was vacated by operation of law.

The Georgia Supreme Court affirmed Mr. Wilson's conviction and sentence of death on November 1, 1999. *Wilson v. State*, 271 Ga. 811 (1999). This Court denied Mr. Wilson's petition for certiorari review on October 2, 2000. *Wilson v. Georgia*, 531 U.S. 838 (2000).

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

On December 17, 2010, Wilson timely filed a federal habeas corpus petition in the United States District Court for the Middle District of Georgia. 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, a panel of the United States Court of Appeals for the Eleventh Circuit affirmed the district court's denial of habeas relief. *See Wilson v. Warden*, 774 F.3d 671 (11th Cir. 2014).

The Eleventh Circuit granted rehearing *en banc*, thereby vacating the panel opinion, to address the standard of review and, following briefing and argument, affirmed. *Wilson v. Warden*,

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

On March 8, 2018, Mr. Wilson petitioned this Court for a writ of certiorari (Supreme Court Case No. 18-8389). The petition was denied on May 28, 2019.

On June 5, 2019, the trial court issued a warrant for Mr. Wilson's execution, to be carried out between June 20 and June 27, 2019. Mr. Wilson's execution is currently scheduled for June 20, 2019.

On June 18, 2019, Mr. Wilson filed a Petition for Writ of Habeas Corpus in Butts County Superior Court. The petition was denied on June 20, 2019. *See* Appendix B. Mr. Wilson appealed to the Georgia Supreme Court, which denied a Certificate of Probable Cause to Appeal on June 20, 2019. *See* Appendix A. Clemency was denied on June 20, 2019. This Petition follows.

REASONS FOR GRANTING THE PETITION

I. The Prosecutor's Knowingly False and/or Misleading Argument to the Jury Rendered Mr. Wilson's Sentencing Fundamentally Unfair and Unreliable in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Analogous Provisions of the Georgia Constitution.

New intervening evidence that was not available until long after the evidence had closed in Mr. Wilson's state habeas proceedings demonstrates that the prosecutor engaged in argument before the sentencing jury he knew to be false and misleading as to Mr. Wilson's culpability in the

murder of Donovan Parks. As we now know from his admissions in the Robert Butts habeas proceeding, prosecutor Fred Bright did not believe that the evidence showed Marion Wilson to be the killer of Donovan Parks. Nevertheless, in order to score a death sentence, he was willing to cross ethical and constitutional lines to falsely portray Mr. Wilson to his sentencing jury as the murderer of Mr. Parks. The prosecutor's deliberately misleading argument to the jury constitutes a rank violation of Mr. Wilson's constitutional right to a fair and reliable sentencing proceeding. *See*, *e.g.*, *Mooney v. Holohan*, 294 U.S. 103 (1935); *Napue v. Illinois*, 360 U.S. 264 (1959); *Giglio v. U.S.*, 405 U.S. 150 (1972); *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). Relief is warranted.

"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 v. Mississippi*, 486 U.S. 578, 584 (1988) (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 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.

Relative culpability is critical in the penalty phase of a capital case, in which the jury weighs aggravating factors against mitigating factors to determine if a death sentence is appropriate. *See Green v. Georgia*, 442 U.S. 95, 97 (1979) (noting that whether the defendant was present at the time of the actual murder was "highly relevant to a critical issue in the punishment phase of the trial"); *see also Brady v. Maryland*, 373 U.S. 83, 87-88 (1963) (approving state court's grant of sentencing relief due to prosecutor's improper suppression of evidence that co-defendant confessed to shooting the victim, and noting that "[a] prosecution that withholds evidence . . .

which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant" in a "proceeding that does not comport with standards of justice"). The conclusion that a defendant did, in fact, pull the trigger increases his or her moral culpability, and thus the likelihood of a death sentence. *See Butts*, 273 Ga. at 771 (noting that whether Robert Butts was the triggerman was relevant to Mr. Butts' culpability for the crime). Moreover, a "prosecutor's use of allegedly inconsistent theories may have a more direct effect on [the defendant]'s sentence, . . . for it is at least arguable that the sentencing panel's conclusion about [the defendant]'s principal role in the offense was material to its sentencing determination." *Bradshaw v. Stumpf*, 545 U.S. 175, 187 (2005). If a jury is falsely led to increase a defendant's culpability, there is an unacceptable risk that the jury will mistakenly sentence that defendant to death.

Prosecutors are ostensibly held to a higher standard of conduct as officers of the court who must seek to ensure fair and reliable trials, not just obtain convictions at any cost. "While a prosecutor may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). A defendant is entitled to relief when a prosecutor's "comments so infect the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (internal quotation marks omitted).

Under *Brady v. Maryland* and its progeny, prosecutors violate fair trial rights by knowingly or negligently withholding exculpatory or otherwise material, favorable evidence from the defense, resulting in uninformed decision making by the jury. Deliberately propounding false and/or misleading information via materially inaccurate testimony *or* argument also results in a violation of fundamental fairness, mandating relief. *See*, *e.g.*, *Miller v. Pate*, 386 U.S. 1, 4-6 (1967) (repeated flagrant misrepresentation of the evidence during argument violated *Napue/Mooney*

rule); *U.S. v. Alzate*, 47 F.3d 1103, 1109-10 (11th Cir. 1995) (*Napue*/*Giglio* rule applies where prosecutor makes misleading factual representations to court and jury); *U.S. v. Bigeleisen*, 625 F.2d 203, 208 (8th Cir. 1980) ("misleading argument" can trigger *Napue/Giglio* violation).

In Mr. Wilson's case, prosecutor Bright's repeated material misrepresentations as to Mr. Wilson's culpability at sentencing subverted the foundation of the sentencing trial, preventing the factfinder from making a fully informed decision, thereby violating the Constitution's guarantee of fundamentally fair proceedings. A new sentencing trial is required if the prosecutor's misrepresentations "'could . . . in *any reasonable likelihood* have affected the judgment of the jury. . .'" *Giglio*, 405 U.S. at 154 (emphasis supplied) (quoting *Napue*, 360 U.S. at 271). Here, the prosecutor's own words -- "Does it make a difference who pulled the trigger? Of course it does," (Butts HT 575 (Exhibit L)) -- demonstrate that there is a strong likelihood that his misleading argument affected the deliberations.

II. Marion Wilson May Not Be Executed Because He Did Not Kill, Attempt to Kill, or Intend to Kill Donovan Parks, and His Involvement in the Events Leading Up to the Murder Was Not Active, Recklessly Indifferent, or Substantial.

Prosecutor Bright's belated admission that the evidence did not support Marion Wilson's culpability in the murder of Donovan Parks, as well as the need to avoid a miscarriage of justice, requires this Court to evaluate Mr. Wilson's claim that he is constitutionality ineligible for execution.[10] Bright's actions in this case fundamentally compromised the reliability and truth-

[10] In Georgia, "the writ must pass over procedural bars and the requirements of cause and prejudice, when that shall be necessary to avoid a miscarriage of justice." *Valenzuela v. Newsome*, 253 Ga. 793, 796 (1985); O.C.G.A. § 9-14-48(d). *See also Turpin v. Hill*, 269 Ga. 302, 303 (1998) (potential death ineligibility is grounds to excuse procedural bar); *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (Eighth Amendment "must draw its meaning from the evolving standards of decency that

seeking function of the trial process and will lead to the execution of one who is ineligible for capital punishment under the Eighth and Fourteenth Amendments. This claim in its present form could not reasonably have been raised in Mr. Wilson's previous trial or habeas proceedings because the courts did not have access to prosecutor Fred Bright's admissions that the state's evidence decisively pointed to Robert Butts, not Marion Wilson, as the murderer of Donovan Parks and away from Marion Wilson as having intended or anticipated that a homicide occur, or as participating substantially in the events leading up to the murder.[11] Those admissions demonstrate that the State has deliberately misled fact-finders since the time of Mr. Wilson's capital trial into believing otherwise.

This Court has repeatedly held that capital punishment must "be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)). Though the death penalty is not invariably unconstitutional, this Court has held that certain categories of defendants and crimes may not constitutionally be subjected to the death penalty:

> Applying this principle, [the Court] held in *Roper* and *Atkins* that the execution of juveniles and mentally retarded persons are punishments violative of the Eighth Amendment because the offender had a diminished personal responsibility for the crime. *See Roper*, supra, at 571-573, 125 S. Ct. 1183, 161 L. Ed. 2d 1; *Atkins*, supra, at 318, 320, 122 S. Ct. 2242, 153 L. Ed. 2d 335. The Court further has held that the death penalty can be disproportionate to the crime itself where the crime did not result, or was not intended to result, in death of the victim. In *Coker [v. Georgia]*, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982, for instance, the Court

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mark the progress of a maturing society."). The state courts were thus in error in dismissing this claim as *res judicata*.

[11] *See*, *e.g.*, *Smith v. Zant*, 250 Ga. 645, 651 (1983); *Turpin v. Todd*, 268 Ga. 820, 827 (1997) (state's concealment of factual predicate can constitute cause to excuse default of claim).

> held it would be unconstitutional to execute an offender who had raped an adult woman. . . . And in *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982), the Court overturned the capital sentence of a defendant who aided and abetted a robbery during which a murder was committed but did not himself kill, attempt to kill, or intend that a killing would take place. On the other hand, in *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987), the Court allowed the defendants' death sentences to stand where they did not themselves kill the victims but their involvement in the events leading up to the murders was active, recklessly indifferent, and substantial.
>
> In these cases the Court has been guided by "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions." *Roper*, 543 U.S., at 563, 125 S. Ct. 1183, 161 L. Ed. 2d 1; see also *Coker*, supra, at 593-597, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (plurality opinion) (finding that both legislatures and juries had firmly rejected the penalty of death for the rape of an adult woman); *Enmund*, 458 U.S. at 788, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (looking to "historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made").

Kennedy v. Louisiana, 554 U.S. 407, 420-21 (2008) (finding death penalty excessive in case of rape of a child).

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, nor attempted to kill the victim, nor intended that a killing take place or lethal force be used. Because, as prosecutor Bright belatedly admitted, there is no credible evidence pointing to Mr. Wilson as the shooter, and because there exists no other evidence that Mr. Wilson intended or anticipated that a murder would take place, or that his "involvement in the events leading up to the murder[] was active, recklessly indifferent, and substantial," *Kennedy*, U.S. at 421, Mr. Wilson's sentence is excessive and disproportionate to his culpability, and this Court must vacate it.

The Eighth Amendment prohibits both punishments that are barbaric and those that are excessive in relation to the crime. *Coker v. Georgia*, 433 U.S. 584, 592 (1977). Punishment is excessive if it either (1) "makes no measurable contribution to acceptable goals of punishment and

hence is nothing more than the purposeless and needless imposition of pain and suffering"; or (2) "is grossly out of proportion to the severity of the crime." *Id.* Applying this reasoning, this Court held in *Enmund* that the Eighth Amendment prohibits imposition of the death penalty on one "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Enmund*, 458 U.S. at 797.

In *Enmund*, the Supreme Court considered both the proportionality of the sentence to the crime and the sentence's contribution to the goals of punishment. Enmund, the defendant, was the driver in an armed robbery during which his co-defendants shot and murdered an elderly couple while Enmund himself waited in the car. *Enmund*, 458 U.S. at 784, 786. This Court determined that only a small minority of jurisdictions impose the death penalty solely for participation in a robbery during which a codefendant committed murder. *Id.* at 792-93. Moreover, after considering statistics regarding imposition of the death penalty under these circumstances, this Court concluded that "juries—and perhaps prosecutors as well—consider death a disproportionate penalty for those who [did not kill or attempt to kill or intend to kill]." *Id.* at 796. With this as a framework, this Court reasoned that Enmund's "culpability is plainly different from that of the robbers who killed," and did not justify imposition of the death penalty. *Id*. at 798.

Additionally, this Court reasoned that imposition of the death penalty against one who himself neither commits nor attempts to commit the murder, or lacks intent that a killing take place or lethal force be used, does not serve the acceptable goals of death sentences: retribution and deterrence. *Enmund*, 458 U.S. at 798-99. The likelihood of a robbery resulting in death is not substantial; death does not occur frequently enough "in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered as a justifiable deterrent to

the felony itself." *Id.* at 799 (citing Model Penal Code § 210.2, Comment, at 38 and n.96). Thus, the Court concluded that the imposition of the death penalty under such circumstances was "'nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Id*. at 798 (quoting *Coker*, 433 U.S. at 592). Furthermore, the Court rejected retribution as a justification for imposition of the death penalty to those who lack intent. *Id*. at 800. Because retribution depends on the defendant's degree of culpability, and because culpability is tied to moral guilt and intent, Enmund's "punishment must be tailored to his personal responsibility and moral guilt." *Id*. at 801. Therefore, because Enmund was only tangentially involved in the actual killing, "[p]utting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing d[id] not measurably contribute to the retributive end of ensuring that the criminal get his just desserts." *Id*.

> It is fundamental that "causing harm intentionally must be punished more severely than causing the same harm unintentionally." H. Hart, Punishment and Responsibility 162 (1968). Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the State treated them alike and attributed to Enmund the culpability of those who killed the [victims]. This was impermissible under the Eighth Amendment.

Id. at 798. *Enmund* established that a defendant's personal involvement must be substantial, greater than the actions of an ordinary aider and abettor to an ordinary felony murder such as Earl Enmund.

This Court elaborated on this holding in *Cabana v. Bullock*, 474 U.S. 376 (1986), and *Tison v. Arizona*, 481 U.S. 137 (1987). In *Cabana*, the Court determined that a jury finding on the issue of intent was unnecessary, holding that "if a person sentenced to death lacks the requisite culpability, the Eighth Amendment violation can be adequately remedied by any court that has the power to find the facts and vacate the sentence." *Id*. at 386. Thus, under *Cabana*, in order to impose the death sentence on a defendant, a court must determine that a defendant is "more than .

. . legally responsible for a killing as a matter of state law," by finding that "he himself [must have] . . . actually killed, attempted to kill, or intended that lethal force be used." *Id*. at 390. Absent this factual predicate, a state cannot impose a death sentence.

In *Tison*, this Court addressed a situation in which the defendants, while not the actual killers, were major participants in the murder.[12] Due to their degree of participation in the crime, the Court found their mental state highly culpable, concluding that, "reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result." *Tison*, 481 U.S. at 157. Thus, this Court held that major participation in the felony, combined with a reckless indifference to human life, sufficiently satisfied *Enmund's* culpability requirements. *Id*. at 158. That culpable mental state is not shown here, where the only actual evidence of Mr. Wilson's state of mind are his statements, in which he denied any intent to rob or kill, and denied any participation in the murder, and the prosecutor obtained the death penalty through his inflammatory and false argument.

Additionally, evolving standards of decency are decisively moving the country away from capital punishment for offenders like Mr. Wilson, and mandate this Court's substantive review of Mr. Wilson's claim. Since 1996, the year that Mr. Parks was killed, only three men nationwide have been executed as accomplices to felony murder, despite not being the actual killer in the

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[12] The defendants were brothers who assisted their father and his cellmate, both convicted killers, in an escape from prison. *Tison*, 481 U.S. at 139. After arming the prisoners and helping them escape, the brothers assisted the convicts by flagging down the family's car, guarding the family at gunpoint prior to their murders, and, after the murders, continuing to assist the felons in eluding law enforcement, ending in a shoot-out with police. *Id*. at 151-52. Moreover, the brothers admitted that they were "prepared to kill in furtherance of the prison break." *Id*.

crime for which they were convicted.[13] Of these three, two had confessed to committing other homicides, while the third had actively participated in a home invasion and child rape before his accomplice massacred a family of four.[14] Since the death penalty was reinstated in 1976, the state of Georgia has executed one person who did not directly kill the victim and that defendant, Kelly Gissendaner, was instrumental in planning her husband's murder and covering up the crime.[15] These "evolving standards of decency" caution against Mr. Wilson's execution in light of his diminished culpability. *Trop*, 356 U.S. at 101.

The Constitution requires that Mr. Wilson be judged for the culpability of his own actions, not the actions of Robert Butts. Mr. Wilson did not kill, attempt to kill, or intend to kill or that

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[13] *See* Death Penalty Info Center data: https://deathpenaltyinfo.org/those-executed-who-did-not-directly-kill-victim).

[14] Dennis Skillicorn was executed in Missouri in 2009 after participating in a kidnapping that led to murder. Prior to his execution, Skillicorn had been convicted of three other murders. *See* Jim Salter, *UPDATE: Missouri executes Dennis Skillicorn*, Missourian (May 20, 2009) https://www.columbiamissourian.com/news/update-missouri-executes-dennis-skillicorn/article_c457e704-e1f4-5d65-b6a7-0a79a60e7c86.html. Robert Thompson was executed in Texas in 2009 for his role in a convenience store robbery in which he shot a clerk who survived, and his accomplice shot a clerk who died. Thompson was alleged to have been involved in eight other robberies during the sentencing phase of his trial, several of which resulted in homicides. *See* Allan Turner, *Houston killer executed after Perry rejects panel's advice*, Houston Chronicle (Nov. 19, 2009) https://www.chron.com/news/houston-texas/article/Houston-killer-executed-after-Perry-rejects-1743147.php). Steven Hatch was executed in Oklahoma in 1996 after participating in a home invasion that occurred while a family of four was sitting down to dinner. The two men hogtied the parents and 16-year-old boy and forced them to listen while they raped the 12-year-old daughter before eating the meal that was still sitting on the dinner table. Hatch's accomplice then shot all four in the back. *See* Diane Plumberg, *Killer Executed for Couple's '79 Murder*, The Oklahoman (Aug. 9, 1996) https://oklahoman.com/article/2549248/killer-executed-for-couples-79-murder).

[15] Kelly Gissendaner was executed for planning her husband's murder and helping cover up the crime. *See* State Board of Pardons and Paroles, *News Release: Parole Board Denied Clemency for Kelly Renee Gissendaner* (Feb. 25, 2015) https://pap.georgia.gov/press-releases/2015-02-25/parole-board-denies-clemency-kelly-renee-gissendaner; American Bar Association, *Georgia* (Dec. 11, 2017) https://www.capitalclemency.org/state-clemency-information/georgia/.

lethal force be used. Like the defendant in *Enmund*, Mr. Wilson was, at most, tangentially involved for purposes of assessing factual culpability for the murder itself. Because he lacked intent, imposition of the death penalty would serve neither of the approved purposes of the death penalty. Mr. Wilson's individual conduct lacks the culpability necessary to justify retribution, and his lack of intent renders deterrence inapplicable. His culpability is plainly different and substantially lesser in comparison with Mr. Butts, and his sentence should also be different and lesser, based on Mr. Wilson's individual conduct and tied only to his own moral guilt. Accordingly, given Mr. Wilson's limited involvement in the crime, Mr. Wilson's death sentence violates the Eighth Amendment and must be vacated.

I. The Georgia Courts Should Not Be Permitted to Thwart Review of Mr. Wilson's Constitutional Claims for Relief.

The habeas court's finding that Mr. Wilson presented no new evidence or intervening law to justify his submission of two claims that were previously litigated and lost is flatly untrue. Prosecutor Fred Bright's sworn testimony, given in Robert Butts' state habeas proceedings years *after* the close of evidence in Mr. Wilson's state habeas case is new, admissible evidence bearing on both the issue of Bright's lack of candor to the tribunal and his misleading arguments in support of the death penalty, as well as bearing on the question of whether Mr. Wilson's state of mind and actions on the night of March 28, 1996, render him ineligible for execution under the Eighth Amendment. *See, e.g.*, *Conner v. Hall*, 645 F.3d 1277, 1293 (11th Cir. 2011) (Georgia procedural bar deemed ineffective where "at the time [an intervening decision was announced], Conner was several years post-hearing [though still pre-decision] and had no viable avenue for [introducing new evidence].").

Bright's newly available testimony shows that he knew he could not obtain a death sentence for Mr. Wilson solely on the available evidence showing that, while factually culpable

for Donovan Parks' murder under Georgia's party-to-the-crime law because Mr. Wilson may have known that Butts possessed a firearm and intended to rob somebody for money that night, and was present in the back seat of Donovan Parks' car when, as Bright and law enforcement believed, Robert Butts abruptly shot and killed Mr. Parks. (Indeed, Bright offered a parolable life plea to Mr. Wilson if he would agree to testify against Butts – an offer that a youthful Mr. Wilson tragically rejected.) Mr. Wilson might have received a fair sentencing trial if Bright had opted to go to the jury with the available, provable facts. However, in what Bright's testimony shows to be bad faith,[16] Bright instead chose to bias the sentencing verdict by brazenly injecting into the courtroom what he *knew* to be an unfounded accusation that Marion Wilson, not Robert Butts, brutally shot Mr. Parks in the head with a shotgun. *See*, *e.g.*, *Napue*, 360 U.S. at 269; *Miller*, 386 U.S. at 4-6.

Bright's testimony provides the factual predicate for Mr. Wilson's instant claim of prosecutorial misconduct—the knowing presentation of false or misleading information to the jury. *See Napue*, 360 U.S. at 269. In *Smith v. Zant*, *supra*, the Georgia Supreme Court held that new evidence showing that the state knowingly presented false testimony or allowed such to go uncorrected was cognizable in a successive habeas petition because it could not reasonably have

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[16] This would not be the first time Bright acted in bad faith in a criminal trial in order to bias the outcome. In two cases contemporaneous with Mr. Wilson's, Bright was found by this Court to have acted in bad faith in arguing to the jury that a murder was gang-related but offering no meaningful evidence to prove it. *See Alexander v. State*, 270 Ga. 346 (1998); *Hartry v. State*, 270 Ga. 596 (1999). Bright, in both cases, attempted to argue that the defendants and their cohorts were, specifically, members of the Folks gang. *See Alexander*, 270 Ga. at 348; *Hartry*, 270 Ga. at 598. And in both cases, where Bright failed to offer evidence of gang activity, this Court held that such statements were not made in good faith and injected materially inaccurate information into the courtroom, and so reversed the convictions. *See Alexander*, 270 Ga. at 350; *Hartry*, 270 Ga. at 599.

been raised previously. *Smith*, 250 Ga. at 651. The same result should attend the instant facts in Mr. Wilson's case.

Bright's testimony at the Butts' habeas proceeding further establishes prejudice—that there is a "'reasonable likelihood'" that his false and misleading argument could "'have affected the judgment of the jury.'" *Giglio.*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 271). Bright conceded that convincing the jury of the defendant's factual culpability for a homicide is critical to obtaining a death sentence: "Does it make a difference who pulled the trigger? Of course it does." Butts HT 575 (Exhibit L). Bright testified that in a case like this the death penalty is usually only sought for the shooter: "Usually, I will tell you this, in a death penalty case, which is unique by its own definition, it usually will be the shooter [for whom the death penalty is sought], it usually will be." *Id.* at 577 (Exhibit L).

Nor should *res judicata* be a bar to Mr. Wilson's claim that he is ineligible for execution under *Enmund v. Florida*. Not only was this claim properly before the courts in light of Bright's testimony making abundantly clear that his argument in favor of the death penalty was false and misleading, but the procedural bar of *res judicata* must fall before the miscarriage of justice that would result from executing Mr. Wilson on the record of this case, which demonstrates that insufficient evidence supports the death sentence. *See, e.g.*, *Walker v. Penn*, 271 Ga. 609, 611 (1999) ("While an issue actually litigated and decided on direct appeal is precluded from being relitigated on habeas corpus, a narrow exception has been carved where petitioner can show that the writ is necessary to avoid a miscarriage of justice."). Executing someone who is constitutionally ineligible for the death penalty constitutes a miscarriage of justice. *See, e.g.*, *Hill*, 269 Ga. at 303 ("In light of this Court's holding that the execution of the mentally retarded constitutes cruel and unusual punishment under the Georgia Constitution, . . . we find no error in

the habeas court's consideration of appellee's claim of mental retardation."). In Georgia, "[i]n all cases habeas corpus relief *shall be granted* to avoid a miscarriage of justice." O.C.G.A. § 9-14-48(d).

The state courts thus failed to adhere to longstanding Georgia precedent which permits revisitation of issues where new developments in the facts or law so warrant. In Georgia, intervening developments, including new facts, or changes or clarification of the law, even those not of constitutional dimension, enable Georgia habeas corpus courts to consider, on the merits, legal challenges that were previously unavailable to petitioners, even where petitioners previously raised the same error. *See*, *e.g.*, *Smith*, 250 Ga. at 651 (where state withheld predicate of false testimony claim, it was not available for litigation in prior habeas proceeding, and could be revisited in a subsequent habeas action after the prosecutor's misconduct was revealed); *Luke v. Battle*, 275 Ga. 370, 374 (2002) (intervening changes in law, including those which clarify existing law, render claim cognizable in habeas); *Johnson v. Zant*, 249 Ga. 812, 818 (1982) (previously unavailable facts warrant revisitation of claim); *Bruce v. Smith*, 274 Ga. 432, 435 (2001) (where petitioner previously raised jury instruction challenge, new subsequent case law permitted relitigation of claim, even though new legal developments were only jurisprudential in nature and not of constitutional magnitude); *Jarrell v. Zant*, 248 Ga. 492, 492 n.1 (1981) (intervening developments in state law since earlier habeas petition allowed habeas court to consider new challenge to jury instructions on the merits in second habeas petition); *Tucker v. Kemp*, 256 Ga. 571, 573 (1987) (recognizing exception to rule of res judicata "'in that habeas would likely be allowed if the law changed which might render a later challenge successful'") (quoting *Hammock v. Zant*, 243 Ga. 259, 260 n.1 (1979), citing *Stevens v. Kemp*, 254 Ga. 228 (1985)). The state

habeas court was thus wrong in finding that this claim was barred as previously adjudicated. *See* Appendix B at 2-3.

"[O]nly a 'firmly established and regularly followed state practice' may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim." *Ford v. Georgia*, 498 U.S. 411 (1991) (quoting *James v. Kentucky*, 466 U.S. 341, 348-51 (1984)). Clearly, as the cases above establish, the res judicata rule is routinely suspended in light of significant new developments in the law. Georgia's application of its procedural bar rule in this case is thus no bar to this Court's review. See also *Conner*, 645 F.3d at 1288 (finding application of Georgia's successor bar to mental retardation claims inadequate as inconsistently applied).

Furthermore, this Court, and the federal courts generally have long rejected the use of procedural obstacles by the state courts to evade federal jurisdiction and review. *Mullaney v. Wilbur*, 421 U.S. 684, 691, n. 11 (1975) (federal courts may reexamine "a state-court interpretation of state law when it appears to be an obvious subterfuge to evade consideration of a federal issue."). Here, where the emergence of significant and relevant new developments with respect to the epidemic of wrongful convictions in capital cases in particular, along with specific evidence that the key identifications underlying Mr. Johnson's conviction are completely unreliable, the state courts nonetheless seek to prevent this Court's review. This cannot stand:

> There are ... exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question. *See Davis v. Wechsler*, 263 U.S. 22, 24, 44 S. Ct. 13, 68 L.Ed. 143 (1923) (Holmes, J.) ("Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."). This case fits within that limited category.

Lee v. Kemna, 534 U.S. 362, 376 (2002).

In rejecting an asserted procedural bar in *Williams v. Georgia*, 349 U.S. 375, 383 (1955), this Court noted that it had jurisdiction to decide "whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right." In *Walker v. Martin*, 562 U.S. 307 (2011), this Court reaffirmed this principle, noting that "federal courts must carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights." *Id*. at 309. The Martin decision also cites Justice Kennedy's concurring opinion in *Beard v. Kindler*, 558 U.S. 53 (2009), for the proposition that "a state procedural ground would be inadequate if the challenger shows a 'purpose or pattern to evade constitutional guarantees.'" *Martin*, 562 U.S. at 321 (quoting *Kindler*, 558 U.S. at 65 (Kennedy, J., concurring)).

Here, for the state courts to now impose a bar to review is disingenuous and "exorbitant" in the extreme. *See Lee*, 534 U.S. at 376. The Georgia courts' efforts to thwart this Court's review are a flagrant violation of the Eighth and Fourteenth Amendments.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari in order to prevent Georgia from causing a blatant miscarriage of justice by executing Marion Wilson.

This 20th day of June, 2019.

Respectfully submitted,

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COUNSEL FOR MR. WILSON

APPENDIX A

SUPREME COURT OF GEORGIA
Case No. S19W1377

June 20, 2019

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

MARION WILSON, JR. v. BENJAMIN FORD, WARDEN.

Upon consideration of Wilson's application for a certificate of probable cause to appeal the dismissal of his second state habeas petition, the Warden's response, Wilson's reply, and the record in this case, the application is denied as lacking arguable merit because the claims are procedurally barred under Georgia law. See Supreme Court Rule 36.

Wilson's associated motion for a stay of execution is also denied.

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

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

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

, Clerk

APPENDIX B

IN THE SUPERIOR COURT OF 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 AM.
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

Prepared by:
Beth Burton
Deputy Attorney General
bburton@law.ga.gov

No. 18-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

MARION WILSON, JR.,

Petitioner,

-v-

BENJAMIN FORD, Warden,

Respondent.

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing document this day by U.S. Mail and/or electronic mail on counsel for Respondent at the following address:

Beth Burton, Esq.
Deputy Attorney General
bburton@law.ga.gov
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300

This 20th day of June, 2019.

Marcia A. Widder

_____
Attorney