No. 18-9746 and 18A1346

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
Georgia Supreme Court

BRIEF IN OPPOSITION TO THE PETITION AND THE REQUEST FOR A STAY OF EXECUTION

Christopher M. Carr
Attorney General
Beth A. Burton
Deputy Attorney General
Sabrina D. Graham
Senior Assistant Attorney General

Office of the Georgia
Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 656-3499
bburton@law.ga.gov
Counsel for Respondent

CAPITAL CASE

QUESTIONS PRESENTED

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

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE

A. Facts of the Crimes

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-Mart parking lot. Butts's automobile was among the vehicles remaining in the lot overnight. Based upon the statements of witnesses at the Wal-Mart, Wilson was arrested. A search of Wilson's residence yielded a sawed-off shotgun loaded with the type of ammunition used to kill Parks, three notebooks of handwritten gang "creeds," secret alphabets, symbols, and lexicons, and a photo of a young man displaying a gang hand sign.
>
> Wilson gave several statements to law enforcement officers and rode in an automobile with officers indicating stops he and Butts had made in the victim's automobile after the murder. According to Wilson's statements, Butts had pulled out a sawed-off shotgun, had ordered Parks to drive to and then stop on Felton Drive, had ordered Parks to exit the automobile and lie on the ground, and had shot Parks once in the back of the head. Wilson and Butts then drove the victim's

> automobile to Gray where they stopped to purchase gasoline. Wilson, who was wearing gloves, was observed by witnesses and videotaped by a security camera inside the service station. Wilson and Butts then drove to Atlanta where they contacted Wilson's cousin in an unsuccessful effort to locate a "chop shop" for disposal of the victim's automobile. Wilson and Butts purchased two gasoline cans at a convenience store in Atlanta and drove to Macon where the victim's automobile was set on fire. Butts then called his uncle and arranged a ride back to the Milledgeville Wal-Mart where Butts and Wilson retrieved Butts's automobile.

Wilson v. State, 271 Ga. 811, 812-13 (1999).

B. Proceedings Below

Petitioner was tried before a jury October 27, 1997 through November 7, 1997 and convicted of the malice murder of Donovan Parks, the felony murder of Donovan Parks, the armed robbery of Donovan Parks, hijacking a motor vehicle, possession of a firearm during the commission of a crime, and possession of a sawed-off shotgun. (R. 13-15, 966).[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. (T. 2389-94; 2396-97, 2404). Further, in their sentencing phase closing argument, trial counsel repeatedly argued

---

[1] Citations to the trial record are denoted as "R" and citations to the trial transcript are denoted as "T."

that Butts was the person that actually shot Donovan Parks and Petitioner was not the triggerman. (T. 2487-88, 2499, 2501, 2505-06). Trial counsel reminded the jury that the District Attorney admitted he was not sure who pulled the trigger, (T. 2499), and that the Sheriff had stated, in an audio-taped interview with Butts that was played for the jury, that Butts shot Donovan Parks. (T. 2500, 2504; *see also* 2349, 2353).

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. (R. 964, 968).[2]

Petitioner filed a direct appeal with the Georgia Supreme Court. As part of that appeal, Petitioner alleged that he did not "commit the murder or intend the victim's death," and therefore his death sentence was unconstitutional. (Respondent's Appendix, pp. 102-05).[3] The Georgia Supreme Court denied this claim and affirmed Petitioner's convictions and sentences on November 1, 1999. *Wilson v. State*, 271

---

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

[3] Respondent's Appendix is attached to this pleading and is comprised of Respondent's Attachments submitted in the habeas court below, two of Petitioner's Attachments (K and L) and the habeas court's June 20, 2019 Order.

Ga. 811, 812-13 (1999), *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. In his amended petition, Petitioner raised the claim that the prosecutor argued Petitioner was the triggerman although he had "evidence to believe" and "believed" that Co-Defendant Butts was actually the triggerman. (Respondent's Appendix, p. 58, ¶ 96). Petitioner also alleged in his amended petition that he did not kill, attempt to kill or intend to kill Donovan Parks. (Respondent's Appendix, pp. 49-56).

On December 1, 2008, the state habeas court denied relief. (Respondent's Appendix, pp. 1-44). The Georgia Supreme Court denied Petitioner's certificate for probable cause to appeal. (Respondent's Appendix, p. 46). 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. Again, Petitioner raised the claim of prosecutorial misconduct with regards to closing arguments. (Respondent's Appendix, pp. 79-98). In finding the state habeas court reasonably concluded this claim was procedurally defaulted, the federal district court found the issue could have been raised on direct appeal and that the state court reasonably held Petitioner had not established cause or prejudice to overcome the default. *Wilson v. Humphrey*, 2013 U.S. Dist. LEXIS 178241, 18-19 (M.D. Ga., December 19, 2013). In making this finding, the court noted, "[Petitioner's] argument that the prosecutor

misled the jury and used "'wholly inconsistent arguments to sentence two men to die' is weak at best." *Id.* at 26. The federal court found:

> The jury was well aware from the beginning of Wilson's trial that either Wilson or Butts could have fired the shot that killed Parks. The prosecutor readily acknowledged this at the outset and he acknowledged the same in Butts's trial. Contrary to Wilson's assertion, this is not a "flip-flopping" theory of the crime or "irreconcilable theories of the crimes."

Id. at 27.

Petitioner also raised his *Enmund v. Florida*, 458 U.S. 782 (1982) claim (that he did not kill, attempt to kill or intend to kill) in his federal petition. The district court noted "it took the jury less than two hours" to find Petitioner guilty of malice murder, which the trial court defined, in part, as unlawfully and intentionally killing without justification and the same amount of time "to find that the murder was committed while Wilson was engaged in the commission of an armed robbery." *Id.* at 185. The district court then noted the Georgia Supreme Court's summarization of the facts and its determination that the facts "supported the verdict and sentence." *Id.* at 185-86. The court then concluded, Petitioner "has not presented evidence to overcome these factual findings." *Id.* at 186.

On December 19, 2013, the district court denied relief. *Wilson v. Humphrey*, 2013 U.S. Dist. LEXIS 178241 (M.D. Ga., Dec. 19, 2013). This claim was not raised on appeal in the Eleventh Circuit.

On June 5, 2019, an execution order was signed setting Petitioner's execution for June 20, 2019. On, June 18, Petitioner filed a second state habeas petition. On June 20, 2019, the state habeas court dismissed that petition, (Respondent's Appendix, pp. 134-36), and the

Georgia Supreme Court denied Petitioner's application to appeal on 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).

Res judicata "prevents the re-litigation of all claims which have already been adjudicated, or which could have been adjudicated, between identical parties or their privies in identical causes of action." *Odom v. Odom*, 291 Ga. 811, 812 (1) (2012); *Hall v. Lance*, 286 Ga. 365, 687 (2010)). Absent a showing of new facts or new law or a miscarriage of justice the res judicata bar may not be removed. *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).

O.C.G.A. § 9-14-48(d) states:

> The court shall review the trial record and transcript of proceedings and consider whether the petitioner made timely motion or objection or otherwise complied with Georgia procedural rules at trial and on appeal and whether, in the event the petitioner had new counsel subsequent to trial, the petitioner raised any claim of ineffective assistance of trial counsel on appeal; and absent a showing of cause for noncompliance with such requirement, and of actual prejudice, habeas corpus relief shall not be granted. In all cases habeas corpus relief shall be granted to avoid a miscarriage of justice.

REASONS FOR DENYING THE PETITION

Two days prior to his scheduled execution, Petitioner Marion Wilson filed a second state habeas petition alleging: (1) that the prosecutor made false or misleading arguments at his trial; 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. Petitioner previously raised his prosecutorial misconduct claim in his first state habeas petition, where the habeas court found it was barred by the state law of procedural default. (Respondent's Appendix, p. 135, citing Respondent's Appendix, pp. 9-12). Petitioner first raised his claim regarding his alleged ineligibility for the death penalty on direct appeal to the Georgia Supreme Court and it was denied on the merits. (Respondent's Appendix, pp. 6-9, citing Wilson, 271 Ga. 813). When this same claim was subsequently raised in Petitioner's first state habeas petition, the state habeas court found it was barred by the doctrine res judicata. *Id.* Acknowledging this procedural history and its prior holdings, the state habeas court found these two claims, raised again in Petitioner' second petition, were barred from review based on state law as Petitioner had failed to show any change in the law of facts and dismissed the successive petition. (Respondent's Appendix, pp. 134-36). Because this dismissal was based solely on state law, this Court should deny the petition for writ of certiorari.

I. Certiorari review should be denied as the state court's finding of res judicata regarding Petitioner's prosecutorial misconduct claim rests on an independent and adequate state law ground.

Two days before his scheduled execution, Petitioner filed a successive habeas petition alleging that District Attorney Fred Bright made false or misleading arguments at his trial regarding Petitioner's culpability in the murder of Donovan Parks. This claim was previously raised in Petitioner's first state habeas proceeding and was determined to be procedurally defaulted by the state habeas court. *See* Respondent's Appendix, pp. 9-12, 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). The Georgia Supreme Court, denying Petitioner's application to appeal, affirmed that procedural default finding.

In his successive petition, Petitioner alleged to have new evidence to circumvent the bar. He argued that Mr. Bright's 2007 deposition testimony from Co-Defendant Butts's habeas proceedings, in which Mr. Bright testified that he believed Butts to be the triggerman, is new evidence, which could not previously have been used to support this claim. Mr. Bright's 2007 testimony, relied upon by Petitioner, was:

> Who do I think pulled the trigger, I think based on the evidence probably it was Butts. Having said that, I think that quite candidly he was not the one that was calling the shots that day, where we are going, what we are going to do, was Wilson. Wilson almost talked him into it.

(Respondent's Appendix, p. 127).

Mr. Bright's subsequent habeas testimony at Butts's evidentiary hearing was the same. He testified before the before the habeas court in 2007:

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

(Respondent's Appendix, p. 133).

Likewise, Mr. Bright argued in the guilt phase of closing at Petitioner's trial, just as he subsequently testified in Butts's post-trial proceedings:

> [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).

Additionally, Mr. Bright was consistent throughout Petitioner's trial and in subsequent proceedings that he did not know who pulled the trigger.[4] As found by the habeas court in the first state habeas proceeding, in the guilt phase closing arguments of Petitioner's trial, Mr. Bright conceded that either Petitioner or Co-Petitioner Butts was the triggerman. *See, e.g.*, Respondent's Appendix, p. 61 ("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."); p. 62 ("... knowing the man's brains were blown out on the side of the road, that either he did it or his Co-Defendant did."); p. 63 ("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."); p. 64 ("... and he is guilty of malice murder whether he pulled the trigger or whether the other man pulled the trigger."); p. 65 ("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

---

[4] Moreover, it would have been improper for Mr. Bright to express his personal beliefs to the jury. *Woods v. State*, 275 Ga. 844, 848 (2002), citing Standard 3-5.8 (b) of the ABA Standards of Criminal Justice Relating to the Prosecution Function, which provides that "the prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant."

Wilson, but let's assume it was Butts."); pp. 66-67 ("Whether he pulled the gun or not, he helped the whole nine yards."); p. 68).[5]

Consequently, in this second state habeas action, the state court dismissed Petitioner's second state habeas petition as his claim was barred by the state law of res judicata.[6] (Respondent's Appendix, p. 135-36, citing *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)). The Georgia Supreme Court agreed and denied Petitioner's application for a certificate of probable cause to appeal.

As Petitioner's claim was decided on an adequate and independent state law ground, he fails to present an issue worthy of this Court's jurisdiction. *See, e.g., Foster*, 136 S. Ct. 1737, *10 (2016) ("This Court lacks jurisdiction to entertain a federal claim on review of

---

[5] The jury found Petitioner guilty of malice murder in approximately one hour and a half. (Respondent's Appendix, p. 69). In fact, when trial counsel spoke to the jurors after the trial, some of the jurors commented on how quickly they were able to reach a unanimous decision as to Petitioner's guilt. (Respondent's Appendix, p. 73 ("There wasn't any question that he was guilty."; p. 75 "Evidence was overwhelming.")).

[6] Additionally, Petitioner's claim was denied on another adequate and independent state law ground—procedural default as it was determined to be defaulted in his first state habeas action. See Respondent's Appendix, pp. 9-12, 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). Given the double bar, certiorari review should be denied.

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*, 489 U.S. at 260).

II. Certiorari review should be denied as the state court's finding of res judicata regarding Petitioner's *Enmund* claim constituted an independent and adequate state law ground.

In dismissing Petitioner's *Enmund* claim in his second state habeas petition, the habeas court found this claim had previously been raised and denied by the Georgia Supreme Court and previously found to be barred by res judicata in Petitioner's first state habeas proceeding:

> 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 [Appendix, pp. 49-56]; Respondent's [Appendix pp. 102-105]). 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 [Appendix, pp. 6-9], citing *Elrod v. Ault*, 231 Ga. 750 (1974); *Gunter v. Hickman*, 256 Ga. 315 (1986); *Roulain v. Martin*, 266 Ga. 353 (1996)).

(Respondent's Appendix, p. 135).[7]

---

[7] Petitioner asserts he can overcome the bars of his claims based on a miscarriage of justice. However, "[t]he miscarriage of justice exception applies where a petitioner is 'actually innocent' of the crime of which he was convicted." *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992). Petitioner's "new evidence" does not come close to this extremely rare exception.

On direct appeal, Petitioner alleged "[b]ecause [Petitioner] did not commit the murder or intend the victim's death, he cannot be convicted of murder and the death penalty is disproportionate to the crime and constitutes cruel and unusual punishment." (Respondent's Appendix, p. 102). The Georgia Supreme Court rejected this claim finding "that the evidence introduced at trial was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that [Petitioner] was guilty of the crimes of which he was convicted and to find beyond a reasonable doubt the existence of a statutory aggravating circumstance." *Wilson*, 271 Ga. 813. The Georgia Supreme Court further held that, "[e]ven assuming that [Petitioner] 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." *Id.*

Thereafter, when Petitioner raised this claim in his first state habeas proceeding, (Respondent's Appendix, pp. 49-56), the habeas court found the issue was barred from its review under the doctrine of res judicata. (Respondent's Appendix, pp. 6-9, citing *Elrod v. Ault*, 231 Ga. 750 (1974); *Gunter v. Hickman*, 256 Ga. 315 (1986); *Roulain v. Martin*, 266 Ga. 353 (1996)).

As with the prosecutorial misconduct claim, Petitioner alleges that Mr. Bright's testimony in Co-Defendant Butts's 2007 habeas proceedings establishes a new fact to overcome the state procedural bar to his *Enmund* claim. In addition to that portion of Mr. Bright's testimony that he believed Butts may have been the triggerman, Petitioner selectively quotes Mr. Bright's testimony concerning whether

it mattered who pulled the trigger. The entirety of Mr. Bright's testimony was that in the guilt phase of trial it does make a difference who pulled the trigger, but the law puts the gun in both Petitioner's and Butts's hands. (Respondent's Appendix, p. 132). Explaining further, Mr. Bright testified about the requirements of *Enmund* and if one person was the triggerman and the other was the prime mover directing the other to commit the murder, as he believed Petitioner's role to be, the death penalty was authorized for both. *Id.* at 133.

As set forth above, the habeas court properly determined that Mr. Bright's testimony is not new evidence to overcome the state procedural bar to this claim. The Georgia Supreme Court agreed and denied Petitioner's application for a certificate of probable cause to appeal. As this claim was also denied on an adequate and independent state law grounds, it also failed to present an issue worthy of this Court's jurisdiction. *See, e.g., Foster*, supra.

CONCLUSION

For the reasons set out above, this Court should deny the petition and Petitioner's request for stay. Respectfully submitted.

Respectfully submitted.

/s/*Beth Burton*

Christopher M. Carr
Attorney General
Beth A. Burton
Deputy Attorney General
Sabrina D. Graham
Senior Assistant Attorney General

Office of the Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 656-3499
bburton@law.ga.gov
Counsel for Respondent

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Pleading, prior to filing the same, by emailing, properly addressed upon:

Marcia A. Widder
Georgia Resource Center
marcy.widder@garesource.org

Brian Kammer
brian.s.kammer@gmail.com

This 20th day of June, 2019.

s/Beth Burton
BETH BURTON
Deputy Attorney General