OCTOBER TERM 2019

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RAY JEFFERSON CROMARTIE,
Petitioner,
v.

BRADFIELD SHEALY, Southern Judicial Circuit District Attorney;
RANDA WHARTON, Clerk of Superior Court, Thomas County;
GEORGIA DEPARTMENT OF CORRECTIONS; and
BENJAMIN FORD, Warden, Georgia Diagnostic and Classification Prison,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

--- CAPITAL CASE ---

EXECUTION SCHEDULED FOR
7:00 P.M., WEDNESDAY, NOVEMBER 13, 2019

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November 12, 2019

CAPITAL CASE

QUESTIONS PRESENTED

In *Skinner v. Switzer*, 562 U.S. 521 (2011), this Court held that a prisoner who has been denied access to DNA testing under a state statute may bring an action under 42 U.S.C. § 1983, alleging that the state statute, as "authoritatively construed" by the state courts, denied him procedural due process. *Id.* at 530-32. Since *Skinner* was decided, the lower federal courts have struggled to determine under what circumstances such a suit has merit or is likely to succeed.

That question is of critical importance now. Petitioner Cromartie, a Georgia prisoner under sentence of death, has brought an action of the kind recognized in *Skinner*. If his suit is likely to succeed, a stay should be granted. If a stay is not granted, an innocent man may be executed. The questions presented are as follows:

1. What standards should a district court apply in determining whether to grant relief on a claim under *Skinner*?

2. Did the lower courts err in dismissing the complaint and denying a stay of execution?

RELATED PROCEEDINGS IN LOWER FEDERAL COURTS

Middle District of Georgia, *Cromartie v. Shealy et al.*, No. 7:19-CV-181. Judgment entered October 28, 2019.

Eleventh Circuit Court of Appeals, *Cromartie v. Shealy et al.*, No. 19-14268. Judgment entered October 30, 2019; rehearing en banc denied November 8, 2019.

Middle District of Georgia, *Cromartie v. Warden Georgia Diagnostic and Classification Prison*, No. 7:14-CV-39. Judgment entered May 10, 2017.

Eleventh Circuit Court of Appeals, *Cromartie v. GDCP Warden*, No. 17-12627. Judgment entered March 26, 2018.

United States Supreme Court, *Cromartie v. Sellers*, No. 18-5796. Judgment entered December 3, 2018.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ray Cromartie respectfully requests that a writ of certiorari issue to review the United States Court of Appeals for the Eleventh Circuit's denial of Mr. Cromartie's appeal.

OPINIONS BELOW

The opinion of the court of appeals affirming the district court's dismissal of the complaint and denying the motion for stay of execution (A1–A32) is reported as *Cromartie v. Shealy*, No. 19-14268, 2019 WL 5588745 (11th Cir. Oct. 30, 2019) (hereafter "Panel Op."). The order of the court of appeals denying the petition for rehearing en banc (A33) is unreported. The order of the district court dismissing the complaint and denying the motion for stay of execution (A34–49) is reported as *Cromartie v. Shealy*, No. 7:19-CV-181, 2019 WL 5553274 (M.D. Ga. Oct. 28, 2019) (hereafter "DCO").

JURISDICTION

The court of appeals issued its opinion affirming the district court's dismissal of the complaint and denying the motion for stay of execution on October 30, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

O.C.G.A. § 5-5-41 is a lengthy statute that is appended hereto at A50–53. *See* Supreme Ct. Rule 14(f).

STATEMENT OF THE CASE

A. The Police Investigation

On the evening of Thursday, April 7, 1994, a single assailant shot Dan Wilson, the clerk at the Madison Street Deli in Thomasville, Georgia. *See* App. 980.[1] Mr. Wilson survived the shooting. Surveillance video of the cash register area captured a view of the assailant (but not the shooting itself), although the assailant's face was covered up to his nose. App. 1030; ROA[2] 3192. He wore a dark knit hat and a dark-colored hooded sweatshirt. *Id.* Police also recovered a fired cartridge casing from the floor. App. 1304.

On April 8, 1994, the morning after the shooting, police received a call from a man named David McRae, who lived one block from the store. He noticed a black knit cap and dark green hooded sweatshirt in his yard that he had not seen there before;

[1] Citations to "App." refer to the Appendix that was filed in the district court below and that is part of the record on appeal.

[2] Petitioner cites as "ROA" the state court Record on Appeal in a related action for petition for writ of habeas corpus in Butts County, Georgia.

police retrieved the items. App. 1044. At trial, it was the State's theory that the shooter had worn and discarded the cap and sweatshirt. App. 1137-40.[3]

In the early-morning hours of April 10, 1994, clerk Richard Slysz was shot twice and killed at the Junior Food Store in Thomasville. App. 1098-1106. Witnesses described seeing two men at or around the store at the time of the shooting. App. 1452-53. Police recovered two fired cartridge casings found on the floor near the deceased, App. 1652, two beer cans that had apparently been dropped outside the store, App. 1633, a piece of cardboard from a Budweiser beer case, App. 1633, and a box of cigarettes found near the deceased. App. 1872.

On the evening of April 12, 1994, a shootout broke out at a housing development in Thomasville. Gary Young testified that he fired a gun during the shootout. App. 1156, 1171. Young attempted to hide the gun later that night by tossing it near adjacent railroad tracks. App. 1070.

The following day, April 13, 1994, police detained and questioned Carnell Cooksey. App. 1070, 1332. Cooksey told them where Young had thrown the gun, and Cooksey implicated Mr. Cromartie in the two convenience store shootings. App. 1051, 1055, 1058. Police arrested Mr. Cromartie that same day. They also arrested two alleged co-conspirators in the Junior Food Store shooting, Corey Clark and Thaddeus Lucas, as well as Young. Investigators collected shoes and various items of clothing from the suspects.

[3] Terrell Cochran and Keith Reddick testified in state habeas proceedings in this case that, on the night of the Madison Street Deli shooting, they saw Gary Young running from the area of the Madison Street Deli wearing a dark colored hooded sweatshirt. App. 505-06.

Police recovered the firearm that Young had thrown near the railroad tracks. App. 1323. A ballistics analysis of the gun and the fired cartridge casings from the two crime scenes revealed that the gun—a Raven Arms .25 caliber semiautomatic pistol—had been used to shoot both Mr. Wilson and Mr. Slysz. App. 1709-16. Young admitted that the gun was his, and that he had fired it at the housing development. App. 1159, 1409.

B. Evidence Adduced at Trial

In September 1997, Mr. Cromartie stood trial alone for the Madison Street Deli and Junior Food Store shootings.[4] The evidence that Mr. Cromartie committed the Madison Street Deli shooting consisted almost entirely of inculpatory statements allegedly made by him to Young, as well as testimony by Cooksey that he had seen Young hand his gun to Mr. Cromartie. During state habeas proceedings, however, Cooksey testified that he, in fact, never saw Young hand a gun to Mr. Cromartie. App. 488. There was no physical evidence tying Mr. Cromartie to the Madison Street Deli shooting, there were no witnesses to the shooting, and the surveillance video was of too poor quality to identify the shooter.

As for the Junior Food Store shooting, the key testimony came from the alleged co-conspirators, Lucas and Clark. Lucas testified that he drove Clark and Mr.

[4] Lucas received a twenty-year sentence for robbery, with ten years to serve in custody. App. 1495. That sentence was concurrent with another identical sentence on an unrelated assault case. *Id.* Clark received a twenty-five-year sentence for robbery and hindering apprehension. App. 1556. He was paroled in 2005, after serving slightly more than ten years of his sentence. Young was initially charged in the Madison Street Deli shooting, ROA 3228, but those charges were later dropped, ROA 3227. His charge for being a felon in possession of a firearm was also dropped despite his admission to possessing and firing the gun. ROA 3227.

Cromartie to the Junior Food Store so that they could steal beer. He had no idea that either of them had a gun. App. 1514. He waited for them in a nearby parking lot, *id.*, and then drove them from the scene of the crime. App. 1512.[5]

Clark testified that both he and Mr. Cromartie went into the Junior Food Store. App. 1565. Clark stated that Mr. Cromartie walked to the counter at the front of the store while Clark went to the cooler at the back of the store to get the beer. *Id.* According to Clark, he then heard two shots, and Mr. Cromartie instructed him to run to the front of the store to attempt to open the cash register. App. 1566. Clark claimed that he did. App. 1567. Meanwhile, according to Clark, Mr. Cromartie—who was already standing at the front of the store—ran to the back of the store and took two twelve-packs of Budweiser. App. 1567. Clark explained that, when they ran from the store, one of the two packs of beer ripped open and several beers fell on the ground. App. 1567. Clark testified that he picked up several beers and they fled. App. 1568. The State also presented evidence that: (1) a fingerprint found on a piece of cardboard outside the Junior Food Store was Mr. Cromartie's, App. 1812; and (2) a footprint in the mud near the store was from an Adidas shoe, and that Mr. Cromartie had Adidas shoes. App. 1720.[6]

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[5] Young, Lucas, Clark and Cooksey were all long-time friends. App. 1117, 1560. Mr. Cromartie was related to Young and Lucas, but was a newcomer to the area. App. 1507. Last week, Lucas approached counsel for Mr. Cromartie and then signed a sworn affidavit, attesting that Clark admitted shooting Mr. Slysz. (A54–57).

[6] Although this physical evidence shows that Mr. Cromartie was *present* at the Junior Food Store, no physical evidence established that he shot the victim, touched the gun, or even went inside the store. The State's primary evidence that Mr. Cromartie was the shooter came from Corey Clark's testimony. Clark had clear motive to lie: to convince investigators that he was not the shooter, he had to convince them that Mr. Cromartie was.

On September 26, 1997, the jury convicted Mr. Cromartie of malice murder and related charges.[7] After a brief penalty-phase hearing, the jurors debated Mr. Cromartie's fate over three days. Press reports indicated that the jurors were initially deadlocked six-to-six over whether to sentence Mr. Cromartie to death or life imprisonment without the possibility of parole. *See* App. 358. The jury ultimately reached a verdict and sentenced Mr. Cromartie to death. Before trial, the District Attorney had offered Mr. Cromartie a plea deal to life with the possibility of parole, which, at that time, would have resulted in parole eligibility after seven years. App. 418.

C. Evidence Adduced at the State Court Evidentiary Hearing

After advances in DNA testing procedures made possible testing of numerous items of evidence recovered from the crime scenes, Mr. Cromartie moved for DNA testing under O.C.G.A. § 5-5-41(c). The state trial court held an evidentiary hearing on Mr. Cromartie's motion for post-conviction DNA testing on June 24, 2019. At the hearing, the parties stipulated to the chain of custody over the physical evidence, the authenticity of the record on appeal, and photographs of the physical evidence taken by Mr. Cromartie's counsel. App. 79. The State did not present any evidence at the hearing.

Carnell Cooksey testified at trial that Mr. Cromartie had admitted the Junior Food Store shooting to him, but at the state habeas evidentiary hearing he testified that the admission never occurred. App. 488. While the state habeas court did not find Cooksey's recantation credible, when he was detained Cooksey was under pressure to implicate someone, and Mr. Cromartie was the logical choice.

[7] The jury was not asked to consider felony murder.

Randell Thomas Libby, Ph.D., was qualified as an expert in the area of forensics and human molecular genetics. *See* App. 50. Dr. Libby described current DNA technology, noting that modern Polymerase Chain Reaction (PCR)-based Short Tandem Repeat (STR) technology permits the testing of extraordinarily small quantities of DNA with highly accurate results. App. 57. Dr. Libby explained that current testing can be conducted on less than 50 picograms[8] of DNA, an almost unimaginably minute amount of biological material. This was not possible at the time of Mr. Cromartie's trial in 1997. Dr. Libby testified that the newer, advanced DNA processes are accepted as having verifiable certainty in the scientific/genetics community. *Id.* at 58.

Dr. Libby explained that DNA testing has changed dramatically over the years. Older DNA tests have "been replaced by much more efficient systems," and each incremental development "has been a progression in the improvements in the efficiency of extracting DNA from samples which are expected to contain low quantities of DNA." App. 59. Technological developments since the time of trial have sharply increased the chances of recovering and testing "low quantity DNA such as touch DNA." *Id.* Dr. Libby described how older, "primitive" methods of testing have been replaced by "a much more intense laser beam [that] provides more, greater sensitivity and detection." *Id.* at 60. He explained that the very recent development

[8] A picogram is "10 to the minus 12th," *id.* at 57, or 0.000000000001 grams, *id.* at 54.

of probabilistic algorithms has significantly enhanced the ability to evaluate complex DNA mixtures—samples containing DNA from multiple people. *Id.* at 61.

Dr. Libby testified that the ability to detect small quantities of DNA, including from degraded DNA samples, is probably about "one thousand times" greater today than it was in 1994 or 1995. App. 62.

Dr. Libby further testified that "touch DNA" (the ability to obtain a DNA profile from a very small amount of skin cells left simply by touching an item with one's bare hands or other skin) first became an accepted procedure in 2006 or 2007 but was still not refined, and did not become more developed until 2010 or 2011. App. 81, 82. In any event, this technology was not available at the time of Mr. Cromartie's trial.

Dr. Libby explained that the interpretation of complex DNA mixtures utilizing "probabilistic genotyping" has "really been only the last couple of years, so it's been very recently." App. 83. Moreover, had small quantities of DNA been subjected to testing utilizing old technology, the samples would have been consumed and no result would have been achieved. *Id.* at 96.

Dr. Libby testified about the feasibility of testing the physical evidence that was collected in this case and never tested. Dr. Libby offered his expert opinion as to the DNA testing of the following evidence:

- Fired Cartridge Casing from the Madison Street Deli: When asked whether it was "possible to get DNA off of a fired cartridge casing," Dr. Libby answered, "Oh, absolutely yes." *Id.* at 65; *see also* App. 276-78 (Defense Exs. 13-15). Dr. Libby recommended that "one of the more advanced forms, present-day forms, of STR testing be done [o]n this item." App. 66.

- Fired Cartridge Casings from the Junior Food Store: Dr. Libby recommended the same testing as to the two cartridge casings from the Junior Food Store shooting. *Id.* at 68; *see also* App. 300-05 (Defense Exs. 29-34 (photos of shell casings)).

- Black Knit Cap Found Near Madison Street Deli: The parties stipulated that this item and the next item (a green hooded sweatshirt) were found by David McCrae in his yard at 229 West Monroe Street, approximately one block from the Madison Street Deli, the morning after the shooting. App. 70. At trial, the State presented evidence and argument that this was the clothing worn by the shooter on the surveillance video. Dr. Libby testified that the cap should be tested for autosomal DNA—epithelial cells—that could reveal the cap's "habitual wearer." *Id.* at 71; *see also* App. 274-75 (Defense Exs. 11-12). Depending on the quantity of DNA present, it could be a "touch DNA" analysis. If hairs were recovered, they could be tested for autosomal DNA (if a telogen root was present) or for mitochondrial DNA if no root was present. App. 71.

- Green Hooded Sweatshirt Found Near Madison Street Deli: The sweatshirt was found with the cap and was presumptively worn by the Madison Street Deli shooter. Dr. Libby also recommended that the green hooded sweatshirt be tested for habitual wearer status. App. 71; *see also* App. 271-73 (Defense Exs. 8-10). Depending on the quantity of DNA present, it could be a "touch DNA" analysis. He recommended specific regions, including the pocket area where the shooter might have concealed the firearm. App. 71.

- Firearm Recovered Near Train Tracks: Dr. Libby recommended that several areas of the firearm be tested for touch DNA, including the slide, the trigger, the trigger guard, the handle (grips), and the magazine. App. 73.

- Package of Cigarettes Found Near Deceased at Junior Food Store: Dr. Libby recommended that this item be tested for the presence of DNA, as the shooter could have been the person to knock the cigarette package to the ground. App. 69.

- Additional Clothing for Purposes of Reference Samples: Dr. Libby testified at some length regarding the development of reference samples from the victim, from Mr. Cromartie, and from other potential suspects in the case (Clark, Young, and Lucas). *See* App. 74-79; *see also* App. 308, 333-50 (Defense Exs. 37, 45-62). Dr. Libby testified that much of this testing

would be conducted with "very sensitive tests particularly for low-level contact DNA." App. 79.

Laura Schile was qualified as an expert in forensic science and crime scene analysis. App. 118, 120. Ms. Schile has an extensive background in crime scene analysis, evidence handling, trace comparison, serology, blood spatter, and hair comparison. *Id.* at 114, 116. She worked for the Texas Department of Public Safety as a criminalist, traveled to over 100 crime scenes, and worked on homicide cases (including capital cases) as an expert for both the prosecution and the defense. *Id.* at 116-17.

Ms. Schile opined on what *meaning* a particular DNA result would have. For example, she testified that, if DNA evidence were recovered from a fired cartridge casing expended during one of the murders, the resulting DNA profile would likely have originated from the person who loaded the cartridges into the magazine. App. 124-25, 135.

With respect to the black knit cap and green hooded sweatshirt recovered near the Madison Street Deli shooting, Ms. Schile noted that the State offered these items at trial to suggest that the Madison Street Deli shooter was wearing them at the time of the crime. *Id.* at 127. Ms. Schile opined that DNA could reveal the wearer of those items. *Id.* at 126-27.

Ms. Schile explained the phenomenon of "blowback," which relates to the projection of blood from an entry wound on a gunshot victim back towards the direction of the gun that fired the bullet. App. 127-28. Ms. Schile explained that

examination of the clothing of various people in the case could reveal the blood of either victim, implicating that person as the likely shooter. *Id.* at 137.

As to the killing for which Mr. Cromartie is on death row—the Junior Food Store shooting—Ms. Schile observed that the State had offered no physical or scientific evidence whatsoever to establish who shot the victim. App. 130-31.

D. Relevant Procedural History

Mr. Cromartie's conviction and sentence were upheld on direct review. *Cromartie v. State*, 514 S.E.2d 205, 209 (Ga. 1999), *cert. denied*, *Cromartie v. Georgia*, 528 U.S. 974 (1999). He later filed a petition for a writ of habeas corpus in the Butts County Superior Court, which was denied. After the Georgia Supreme Court denied a certificate of probable cause to appeal, this Court denied certiorari. *Cromartie v. Chatman*, 134 S. Ct. 1879 (2014).

In March 2014, Mr. Cromartie filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Georgia. On March 31, 2017, the district court denied habeas relief and a certificate of appealability. On January 3, 2018, a single judge of the Eleventh Circuit Court of Appeals also denied a certificate of appealability. On March 26, 2018, a panel of the Eleventh Circuit denied Mr. Cromartie's motion for reconsideration by a vote of 2-1. On December 3, 2018, this Court denied certiorari. *Cromartie v. Sellers*, 139 S. Ct. 594 (2018).

Mr. Cromartie filed his Extraordinary Motion for New Trial and Postconviction DNA Testing and a Motion for Preservation of Evidence in the Thomas County Superior Court on December 28, 2018. After hearing evidence from the defense only,

on September 16, 2019, the Superior Court of Thomas County denied Mr. Cromartie's motion for new trial and DNA testing. *State v. Cromartie*, No. 94-CR-328, Order.

Mr. Cromartie timely filed a request for a discretionary appeal and a motion for a stay of execution in the Georgia Supreme Court. On October 25, 2019, the Georgia Supreme Court denied the requests for a stay and for a discretionary appeal.

On October 22, 2019, Mr. Cromartie filed a complaint under 42 U.S.C. § 1983 in the United States District Court for the Middle District of Georgia. On October 24, 2019, he moved for a stay of execution in the district court. On October 28, 2019, the district court dismissed the complaint and denied the request for a stay. DCO.

Mr. Cromartie immediately appealed the district court's ruling. On October 29, 2019, Mr. Cromartie filed an emergency motion for stay of execution and brief on appeal in the Eleventh Circuit. On October 30, 2019, the Eleventh Circuit affirmed the district court's dismissal of the complaint and denied the stay motion. Panel Op.

The Eleventh Circuit has adopted what it terms a "comparative approach" to review of claims under *Skinner*. Panel Op. at *6. Under that approach, the court "need only look at the plain text of the statute" to decide such claims. *Id.* at *8. All that the Eleventh Circuit does is to compare the statutory provisions adopted by any state "to those that the [Supreme] Court had already approved in *[District Att'y's Office for the Third Judicial District v.] Osborne*[, 557 U.S. 52 (2009)]." *Id.* at *6. Applying that "comparative approach," the panel found no problem with the procedures outlined in the Georgia statutes. *Id.* at *6-9.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHAT STANDARDS A DISTRICT COURT SHOULD APPLY IN RULING ON CLAIMS UNDER *SKINNER*.

This case presents fundamental questions concerning the scope and import of this Court's decision in *Skinner*. It is now broadly recognized that DNA testing is valuable not only for convicting the guilty, but also for exonerating innocent people who were wrongly convicted.[9] As part of that recognition, many states have enacted statutes providing in some fashion for post-conviction DNA testing. *See District Atty's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 79 n.2 (2009) (Alito, J., concurring). In *Osborne*, this Court denied a claim that there was a free-standing right under the United States Constitution to such testing. *Id.* at 68, 71. At the same time, this Court also recognized that state prisoners have a liberty interest in state DNA testing procedures. *Id.* at 68. In *Skinner*, this Court confirmed that a state prisoner may bring an action under 42 U.S.C. § 1983, alleging that the state statute, as "authoritatively construed" by the state courts, has deprived her of due process. *Skinner*, 562 U.S. at 532.

Thus, *Skinner* opened a door to federal court challenges to state procedures in this area of critical importance both to state prisoners and state justice systems. The question remains whether the opening of the door was illusory, or whether due process in fact compels states that choose to provide a mechanism for DNA testing to

[9] According to the Innocence Project, there have been 367 DNA exonerees to date in the United States. https://www.innocenceproject.org/dna-exonerations-in-the-united-states (last visited November 9, 2019).

make such a mechanism meaningful. *Skinner* itself has little to say on these questions, so the lower federal courts have had to wrestle with them with little guidance. It is not clear what a winning *Skinner* claim would look like, or even what allegations will survive a motion to dismiss. This Court should grant certiorari to give guidance to the lower courts on these important questions.

Here, the lower courts treated *Skinner* as a virtual nullity. According to the district court, the only question under *Skinner* is whether a particular state's procedures are similar to those upheld in *Osborne*, DCO 14, or are otherwise "commonplace in postconviction DNA statutes." *Id.* at 14 n.9. The Eleventh Circuit agreed. Panel Op. at *6. This analysis is so truncated as to be virtually meaningless. If the only question is whether the words of the statute appear similar to words in other statutes, then this Court may as well overturn *Skinner* and be done with it. *Skinner*, after all, held that a prisoner may challenge the state's statute as "authoritatively construed" by the state's courts. *Skinner*, 562 U.S. at 532.

Not all federal courts have adopted such a pro forma analysis. In *LaMar v. Ebert*, 681 F. App'x 279 (4th Cir. 2017) (unpublished), the court reversed the district court's dismissal of a pro se complaint under 28 U.S.C. § 1915A. The court found that the plaintiff had stated a plausible complaint under *Skinner*, where he had alleged that, although Virginia had "created a pathway to obtain DNA testing," it unfairly "restricted that pathway by refusing to afford a successful plaintiff habeas corpus relief," and had denied testing requests in a manner that "'deprived [him] of his liberty interests in utilizing state procedures to obtain reversal of his conviction

and/or to obtain a pardon or reduction of his sentence.'" *Id.* at 289 (record citations omitted). In a subsequent appeal, the court of appeals reversed the district court's grant of summary judgment because the plaintiff's allegation that "these 'limits' in the statute render the right to DNA testing hollow," stated a claim of a procedural due process violation. *LaMar v. Ebert*, 756 F. App'x 245, 251 (4th Cir. 2018) (unpublished).[10]

The truncated "comparative approach" embraced by the Eleventh Circuit is inconsistent with *LaMar*, but enabled the Eleventh Circuit to issue a published opinion affirming dismissal of the complaint in a matter of hours after the notice of appeal had been filed. No doubt it would not have acted in such haste but for the pending execution. But it was also only able to act in such haste because it never really troubled itself to consider the details of Mr. Cromartie's claim about the way in which the Georgia statute operates, by using the abbreviated "comparative approach."

The lower courts need guidance about how to review a *Skinner* claim, when such a claim can be dismissed, and when such a claim is meritorious, or at least meritorious enough to proceed to an actual determination of the merits.[11] This Court should grant certiorari to provide such guidance.

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[10] *See also Wilson v. Marshall*, No. 2:14-cv-1106-MHT-SRW, 2018 WL 5074689, at *13-15 (M.D. Ala. Sept. 14, 2018) (while the statutory provisions might appear reasonable, as they interacted with each other and had been construed by the state's courts, they could "create[] a 'Catch 22'" that operated to preclude the prisoner from actually obtaining DNA testing), *adopted*, 2018 WL 5046077 (M.D. Ala. Oct. 17, 2018).

[11] Mr. Cromartie also seeks a stay of execution. *See* Emergency Mot. for Stay of Execution (being filed concurrently with this petition). As discussed in the motion for stay, one of the requirements for a stay is a showing of likely success on the merits. In the context of a complaint under 42 U.S.C.

II. THIS COURT SHOULD GRANT CERTIORARI TO CORRECT THE ERRORS COMMITTED BY THE LOWER COURTS IN DISMISSING THE COMPLAINT AND DENYING A STAY OF EXECUTION.

A. Introduction

A motion to dismiss under Rule 12(b)(6) tests the adequacy of the complaint against the standard set forth in Rule 8: "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The question on a motion to dismiss is "'not whether [Cromartie] will ultimately prevail' on his procedural due process claim, but whether his complaint [is] sufficient to cross the federal court's threshold." *Skinner*, 562 U.S. at 529-30 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)) (citing *Swierkewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002)).

The court reviewing a motion to dismiss takes the factual allegations of the complaint as true and construes them in the light most favorable to the plaintiff. *Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1262-63 (11th Cir. 2004). The complaint must state a facially plausible claim; this is satisfied "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009).

Mr. Cromartie alleged a procedural due process violation stemming from the restrictions that the Georgia DNA testing statute, as authoritatively construed by the

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§ 1983, that stay factor should be found where the complaint states a claim on which relief can be granted. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006) (citing *Barefoot v. Estelle*, 463 U.S. 880, 895-96 (1983)).

Georgia courts, has placed on his ability to obtain DNA testing that could prove his innocence of capital murder. In *Skinner*, this Court ruled that such a claim may proceed under 42 U.S.C. § 1983:

> Skinner does not challenge the adverse [state court] decisions themselves; instead, he targets as unconstitutional the Texas statute they authoritatively construed. . . . [A] state-court decision is not reviewable by lower federal courts, but a statute or rule governing the decision may be challenged in a federal action. Skinner's federal case falls within the latter category. There was, therefore, no lack of subject-matter jurisdiction over Skinner's federal suit.

Skinner, 562 U.S. at 532-33 (footnotes omitted).

The type of challenge that may proceed under *Skinner* is a "facial challenge to Alabama's DNA law both directly, and as that statute has been authoritatively construed by Alabama courts in cases that are unrelated to her motion for DNA testing." *Wilson*, 2018 WL 5074689, at *11. That is exactly the type of challenge that Mr. Cromartie brought here. *See* Compl. ¶¶ 44-45, 47-48. The substantive standard under *Skinner* is whether the post-conviction relief procedures were "fundamentally inadequate to vindicate the substantive rights provided." *Osborne*, 557 U.S. at 69.

B. Section 5-5-41, as Authoritatively Construed by the Georgia Courts, Deprived Mr. Cromartie of Due Process.

Section 5-5-41(c) purports to grant convicted Georgia defendants a mechanism by which they can obtain DNA testing of critical biological evidence collected in their cases. "Modern DNA testing can provide powerful new evidence unlike anything known before. . . . [T]here is no technology comparable to DNA testing for matching tissues when such evidence is at issue. DNA testing has exonerated wrongly convicted people . . . ." *Osborne*, 557 U.S. at 62 (citations omitted). Consequently, Mr. Cromartie

has a "liberty interest in demonstrating his innocence with new evidence under state law." *Id.* at 68.

Section 5-5-41 contains a large number of hurdles that applicants must overcome if they are to obtain DNA testing. Many of these are at least facially reasonable. But two have been used to create almost insuperable barriers: (1) the conjoined requirements that a post-trial movant show why the motion is brought more than 30 days after trial, O.C.G.A. § 5-5-41(a), with the specific requirement that an applicant for DNA testing show that the "motion is not made for the purpose of delay," § 5-5-41(c)(7)(D); and (2) the requirement to show a "reasonable probability that the petitioner would have been acquitted" if the results of the testing had been available at trial. § 5-5-41(c)(3)(D). A complaint, like Mr. Cromartie's, alleging that a state's DNA testing procedures "render the right to DNA testing hollow," is not subject to dismissal under Rule 12(b)(6). *LaMar*, 756 F. App'x at 251; *Wilson*, 2018 WL 5074689 at *14-15.

In seeking to justify dismissal of the complaint, the lower courts relied heavily on *Osborne*. *See* DCO 13-14 (characterizing Mr. Cromartie's claim as "nearly identical" to that in *Osborne*); Panel Op. at *6. There is no question that Mr. Cromartie must satisfy the substantive standard set forth in *Osborne*, i.e., he must show that the procedures under section 5-5-41(c) "are fundamentally inadequate to vindicate the substantive rights provided." *Osborne*, 557 U.S. at 69. But Mr. Cromartie's claim is significantly different from Osborne's.

Unlike Osborne, who "attempted to sidestep state process through . . . a federal lawsuit," *Osborne*, 557 U.S. at 71, Mr. Cromartie attempted to avail himself of the state process. In that respect, Mr. Cromartie, like Skinner, "is better positioned to urge in federal court 'the inadequacy of the state-law procedures available to him in state postconviction relief.'" *Skinner*, 562 U.S. at 530 n.8 (quoting *Osborne*, 557 U.S. at 71). Moreover, Osborne sought to establish a "freestanding right" to DNA testing directly under the Due Process Clause. *Osborne*, 557 U.S. at 61, 72-73. Since Mr. Cromartie does not seek to establish such a right, *Osborne* does not foreclose Mr. Cromartie's claim.

Moreover, the Eleventh Circuit's analysis, while purportedly based on *Osborne*, is in fundamental tension with *Skinner*. The Eleventh Circuit approached the issue as though the only relevant consideration is the words in the statute, and whether those words appear to provide for a process that does not violate fundamental fairness. Panel Op. *6. But Mr. Cromartie's claim, like Skinner's, is not just about the words of the statute. The "comparative approach," as applied by the panel, amounts to taking a snapshot from 35,000 feet of existing state procedures. In the real world, this approach renders *Skinner* meaningless—*Skinner* could just as well have been decided the other way, for all the difference that it makes.

Asking how the state's procedures, as authoritatively construed by the state's courts, actually work produces a very different type of analysis. The lower courts never meaningfully addressed that question. For the reasons that follow, the statute

so construed does raise arbitrary and fundamentally unfair barriers to obtaining DNA testing.

1. The timing requirements, as construed by the Georgia courts, create fundamentally unfair barriers.

The execution of an innocent person is the quintessential miscarriage of justice. *Schlup v. Delo*, 513 U.S. 298, 324-35 (1995). In recognition of that fact, the Georgia legislature adopted the post-conviction DNA testing statute, O.C.G.A. § 5-5-41(c), in 2003 (well after the 1997 trial in this case). The General Assembly's intent in enacting the statute was to provide death-sentenced prisoners like Mr. Cromartie an opportunity to obtain and present exculpatory DNA evidence. When it was presented as Senate Bill 119 on May 27, 2003, it was described as a bill "to provide for post-conviction requests for DNA testing in cases where a person is sentenced to death," where "DNA testing may be exculpatory." *See* Georgia Bill History, 2003 Reg. Sess. S.B. 119 (Ga. Gen. Assem. May 27, 2003). The statute was introduced by Lieutenant Governor Mark Taylor and Senator David Adelman. Commenting on the bill, Senator Adelman stated, "It's about doing what is right." *See* Melissa T. Rife, *Peach Sheets – Criminal Procedure*, 20 Ga. St. U. L. Rev. 119, 119 & n.2 (2003). The bill was drafted by the Prosecuting Attorneys' Counsel, the Georgia Bureau of Investigation, the Georgia Innocence Project, and the Georgia Association of Criminal Defense Lawyers. *Id.* at 120.

In the first decision of the Georgia Supreme Court interpreting the statute after its enactment, two dissenting Justices elaborated on the General Assembly's intent:

> Recognizing that errors in the criminal justice system may lead to the execution of innocent persons, the legislature enacted OCGA § 5-5-41(c) to help insure that only those who are actually guilty will be put to death at the hands of the State. . . .
>
> In providing for this process, the Georgia legislature was responding to a national concern about innocent persons being wrongfully convicted and newly available DNA testing that could right those previous wrongs. . . .
>
> [A] careful examination reveals the legislature's clear intent to insure a fair process by which our criminal justice system could take advantage of the great advances in DNA technology.

Crawford v. State, 597 S.E.2d 403, 406 (Ga. 2004) (Fletcher, C.J., & Benham, J., dissenting).[12]

The DNA testing Mr. Cromartie seeks is based on developments in testing methods that only became available after 2003. App. 59-63, 81-83, 95-96. Moreover, if an attempt had been made to test the material before the technology developed, such an attempt would have destroyed the evidence without producing any meaningful results. *Id.* at 96. As shown in Section 2, *infra*, it is reasonably likely that this testing would lead to Mr. Cromartie's acquittal of the Madison Street Deli shooting, and of malice murder, or at least to a different sentencing outcome, with respect to the Junior Food Store case.

The timing requirements that the Georgia courts have read into the statute, however, make it virtually impossible for a prisoner to find the only "right" time to seek DNA testing. The specific timing requirement of the DNA statute is that the

[12] The majority in *Crawford* did not address the legislature's intent or the dissent's treatment of it. The majority instead simply found that DNA testing in Crawford's case could not be exculpatory. *Crawford*, 597 S.E.2d at 404-06.

request not be "made for the purpose of delay." O.C.G.A. § 5-5-41(c)(7)(D). Just making that showing does not really matter, however, because the Georgia courts have construed the DNA testing statute as incorporating an additional requirement that the applicant be "diligent." *Bharadia v. State*, 774 S.E.2d 90, 94 n.5 (Ga. 2014) (finding that the diligence requirement of § 5-5-41(a) is incorporated into § 5-5-41(c)). And the Georgia courts have construed diligence as requiring the applicant to seek DNA testing *as soon as possible*. *Ford Motor Co. v. Conley*, 757 S.E.2d 20, 30 (Ga. 2014); *Drane v. State,* 728 S.E.2d 679, 683 (Ga. 2012).

Furthermore, the Georgia legislature prescribed that a person convicted of a crime—including those sentenced to death—could only ever file one extraordinary motion for new trial (hereafter "EMNT") seeking DNA testing. *See* O.C.G.A. § 5-5-41(b) ("[O]nly one such extraordinary motion shall be made or allowed."). Yet it also offered as a ground for postconviction testing that DNA testing could be sought in the event that technological developments allow for testing that was not previously possible. O.C.G.A. § 5-5-41(c)(3)(B) ("[T]he technology for the [DNA] testing was not available at the time of trial.").

Because a defendant may only file one EMNT *ever*,[13] it is logical that a defendant would pursue such a remedy only when all evidence has been discovered, all arguments marshaled, and when the forensic science for DNA testing has advanced to make the most effective use of the biological evidence. It is absurd and

[13] *See, e.g.*, *Richards v. State*, 563 S.E.2d 856, 858 n.1 (Ga. 2002).

arbitrary to both allow a defendant to wait until the technology to conduct DNA testing has developed, but then deny him for waiting. Yet that is exactly how the Georgia courts have construed the statute.

As applied to DNA testing, this combination of requirements is fundamentally unfair. As established by Dr. Libby's unchallenged testimony, DNA testing of the items at issue was not available at the time of trial or even later when section 5-5-41(c) was enacted. The science has been rapidly evolving to enable testing of more and more minute traces of material, including touch DNA, and of samples containing biological material from more than one person. The effect of the Georgia Supreme Court's rulings is to place applicants between an arbitrarily constructed Scylla and Charybdis—if they seek DNA testing too soon, the sample will be consumed without producing meaningful results, App. 96, but if they wait a day too long they will be precluded from obtaining DNA testing for lack of "diligence."

DNA testing—with the ability to scientifically include or exclude a person as the source of biological material associated with a crime—is unlike other evidence, as Georgia recognized in enacting section 5-5-41(c). The requirement that applicants show their motions were not filed for the purpose of delay is appropriate. But by adding the diligence requirement as it has been construed, the Georgia Supreme Court has placed an arbitrary and fundamentally unfair burden that is almost impossible for any applicant to meet.

Ignoring Georgia Supreme Court decisions like *Bharadia* and *Drane*, the Eleventh Circuit asserted that under the Georgia statutes, "a prisoner need not

pursue DNA testing until the technology has advanced enough to do some good." Panel Op. at *8. In fact, *Drane* says that a movant must "act without delay," 728 S.E.2d at 683, which rules out waiting for technological advances.

The Eleventh Circuit thought that the "fact that DNA testing was [previously] not advanced enough to render a meaningful result in a prisoner's case would satisfy" any timeliness requirement. Panel Op. at *8. It read two sections of the statute as supporting its conclusion—section 5-5-41(c)(3)(B), which allows for testing based on advances in technology, and section 5-5-41(c)(7)(C), allowing for re-testing with more discriminating tests (assuming of course that there is anything left to re-test).

But the panel overlooked other aspects of the (admittedly Byzantine) Georgia statute. As discussed above, the ability to obtain DNA testing under section 5-5-41(c) is "[s]ubject to the provisions of subsections (a) and (b) of this Code section." O.C.G.A. § 5-5-41(c)(1). Section 5-5-41(a) includes a diligence requirement, *see Bharadia*, 774 S.E.2d at 93, and that diligence requirement is satisfied only if the movant "act[s] without delay." *Drane*, 728 S.E.2d at 683.[14]

[14] The Eleventh Circuit speculated that a prisoner could file more than one DNA motion, and then file a successive state habeas petition if the second or subsequent DNA motion revealed exculpatory evidence. Panel Op. at *8 n.9. This is wrong as a matter of Georgia law for several reasons. First, every DNA motion, whether or not accompanied by an EMNT, must meet the standards for an EMNT, because section 5-5-41(c) incorporates section 5-5-41(a). Second, a prisoner actually has limited ability to file multiple DNA motions. *See* O.C.G.A. § 5-5-41(c)(4)(A) (movant must state that he has not requested or obtained DNA testing before). Third, under Georgia law, a claim based on "new evidence that would be admissible at the defendant's criminal trial and that materially affects the question of the defendant's guilt or innocence is a proper subject of an extraordinary motion for new trial," not a habeas petition. *Mitchum v. State*, No. S19A0554, 2019 WL 4924049, *2 (Ga. Oct. 7, 2019). Finally, even if what the Eleventh Circuit suggested were in the realm of possibility, that would not change the fact that an attempt to use the statute to test the material before the technology had advanced would have destroyed any biological evidence without producing any meaningful results, while waiting until after the technology advances precludes testing because of a supposed lack of "diligence."

The Eleventh Circuit missed the way in which the various provisions of the statute discussed above, as construed by the Georgia courts, have made it impossible for a person who wants to have small samples of biological material tested ever to find the "right" time to ask for testing in the real world in which the technology is always changing. The interest in avoiding delay is met by the specific provision of section 5-5-41(c)(7)(D). But the Georgia courts have piled additional requirements on top of that provision, and interpreted them in a way that leaves applicants with an untenable choice between seeking testing prematurely and having the sample consumed, or waiting "too long" and having the request for testing denied. This "render[s] the right to DNA testing hollow." *LaMar*, 756 F. App'x at 251.

2. Georgia arbitrarily applies the reasonable probability of a different outcome requirement.

Section 5-5-41(c)(3)(D) requires a court to find a reasonable probability of an acquittal before DNA testing can be ordered. As construed by the Georgia Supreme Court, section 5-5-41(c) precludes testing on this ground if the evidence presented at trial was "overwhelming." *Crawford*, 597 S.E.2d at 405. This requirement has resulted in a totally subjective review of the trial evidence, with no meaningful assessment of the weaknesses in that evidence or the manner in which DNA test results could offset the trial evidence and change the entire evidentiary picture. As construed by the Georgia Supreme Court, that provision effectively precludes testing to establish innocence, and further precludes testing to establish innocence of the death penalty.

Here, DNA testing could have revealed that the bullet fired at the Madison Street Deli crime was loaded into the gun by Young, and that clothing discarded a block away was worn by Young. If such evidence was not material as to whether the owner of the gun (Young) was also the shooter, what evidence would be?

DNA testing could also have shown that Clark loaded the fatal bullets into the murder weapon; handled the magazine; touched the trigger, the grips, and the slide; and handled a cigarette pack found next to the decedent's body. If such evidence was not material as to whether Clark actually shot the decedent, what evidence would be?

Under the Georgia statute, as construed in *Crawford*, none of that mattered because the evidence at trial was supposedly "overwhelming." The panel ruled that materiality requirements in general are valid, and therefore the Georgia statute's materiality requirement is valid. Panel Op. at *9. This ignores what *Skinner* requires the reviewing court to look at—how the requirement has been authoritatively construed by the state courts.

As the dissenting Justices in *Crawford* pointed out, the majority opinion effectively eviscerated the statute: "In eviscerating OCGA § 5-5-41, the majority has made it far less likely that this statute will serve its laudable purposes, and far more likely that the execution of innocent people will occur." *Id.* at 408 (Fletcher, C.J., dissenting). The General Assembly had intended that section 5-5-41(c) would permit defendants to "take advantage of the great advances in DNA technology." *Id.* at 406. As construed by the Georgia Supreme Court, however, the statute no longer serves its "laudable purposes." The problem is not that the statute contains a materiality

requirement, but that the construction of the statute in *Crawford* gives a green light to ignore the powerfully exculpatory impact of DNA testing merely by reciting that the evidence of guilt was "overwhelming."

The Eleventh Circuit indicated that section 5-5-41(c)(3)(D) is just a materiality requirement like those under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Strickland v. Washington*, 466 U.S. 668 (1984). Panel Op. at *9. This is erroneous. The materiality requirement of the statute was given an "overwhelming evidence" gloss in *Crawford*. This "overwhelming evidence" concept is even less applicable to DNA testing than to other types of claims. If Corey Clark's testimony is part of the "overwhelming evidence" that Mr. Cromartie was the shooter, but DNA testing reveals that Clark handled the murder weapon and loaded the bullets that killed the decedent, how could a reasonable person continue to give weight to Clark's testimony? If Gary Young's testimony is part of the "overwhelming evidence," but DNA testing reveals that Young not only owned the murder weapon but also wore the clothing most likely worn by the shooter, how could a reasonable person continue to give weight to Young's testimony? By turning a blind eye to such questions, the Georgia courts have made what purports to be a reasonable materiality requirement into an insuperable barrier.

3. The requested DNA testing may well prove powerfully exculpatory.

The undisputed evidence presented at the evidentiary hearing demonstrated that DNA testing may well be powerfully exculpatory, and that without such testing it is indeed "far more likely" that the execution of an innocent person will result. For

example, the perpetrator of the Madison Street Deli shooting wore a dark hooded sweatshirt and a dark knit cap, as depicted in the still image from the surveillance video. *See* App. 282. The State called David McRae as a witness at trial; he was the property owner who discovered the items in his yard the morning after the shooting. App. 1044. Investigators sent the items to the FBI for analysis and the State offered evidence at trial to convince the jury that the shooter wore these items. *See* Pretrial Motion Transcript (10/1/96) at 32, App. 1137-40. These items of physical evidence are likely to yield a DNA profile of the person who was wearing them when he shot Dan Wilson, before discarding them in Mr. McRae's yard. App. 71, 126-27.

Mr. Cromartie submitted expert testimony that these items can be tested to yield a profile of the person who wore them. App. 71. Realistically, there are three possibilities—the DNA profile will be of Gary Young, Mr. Cromartie or some third person. If DNA testing revealed that the habitual wearer of these items was either Young (the owner of the weapon used) or Mr. Cromartie, it would be extremely incriminating for the one and exculpatory for the other. Much of the evidence against Mr. Cromartie came from Young himself. If Young was not only the owner of the gun but also the wearer of clothing worn by the shooter on the night of the offense, it is reasonably probable that Mr. Cromartie would have been acquitted.

The only way to support a conclusion that exculpatory DNA evidence on these items would be immaterial is by rejecting (without any apparent basis) the State's trial theory that this clothing had been worn by the shooter. Following *Crawford*, that is exactly what the state trial court did. Left unasked was the crucial question—

whether there is a reasonable likelihood that such evidence would have changed the verdict with respect to Mr. Cromartie's conviction of the Madison Street Deli shooting or his death sentence.

Regarding the fired cartridge casings collected from both the Madison Street Deli and the Junior Food Store, Mr. Cromartie presented evidence that advances in DNA technology have made it possible to lift DNA evidence from them and that the presence of DNA belonging to someone else (particularly Clark and/or Young) would have made a difference to the jury. It is particularly important to know whether Corey Clark handled the murder weapon *and loaded the fatal bullets*. While it may be possible that Clark loaded the gun and then handed it to Mr. Cromartie or allowed him to take it, evidence that Clark loaded the gun, contrary to his testimony, would drastically change the case, making it far more likely that Clark not only loaded the gun but also fired it. Test results showing that Clark loaded the gun would make it reasonably probable that Mr. Cromartie would have been acquitted of malice murder.

The only way to avoid the potentially exculpatory effect of this kind of evidence is that set forth in *Crawford*—just cite the trial evidence as "overwhelming" and ignore what DNA testing could actually tell us about the evidence. After all, the critical portions of the trial evidence came from people like Young and Clark—the very people whom DNA testing could implicate as the primary actors in these crimes.

Plaintiff's allegations concerning the fundamental unfairness of Georgia's DNA testing statute, as authoritatively construed by the Georgia Supreme Court,

state a claim on which relief can be granted. This Court should grant certiorari to consider the question presented and grant a stay of execution.

CONCLUSION

For all of the reasons set forth above and in Mr. Cromartie's other submissions to this Court, this Court should grant the writ of certiorari and stay Mr. Cromartie's execution pending its consideration of his case.

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