No. 19-6570, 19A520

In the
Supreme Court of the United States

Ray Jefferson Cromartie,
Petitioner,

v.

Bradfield Shealy, Southern Judicial Circuit District Attorney, Randa Wharton, Thomas County Superior Court Clerk, Georgia Department of Corrections, and Benjamin Ford, Warden, GDCP,
Respondents.

On Petition for Writ of Certiorari to the
Court of Appeals for Eleventh Circuit and Motion for Stay of Execution

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner, Ray Jefferson Cromartie, who is scheduled for execution today, November 13, 2019, sought relief under 42 U.S.C. § 1983 and stay of execution based upon a facial attack of Georgia's postconviction DNA procedures codified in O.C.G.A. § 5-5-41.

The district court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. The Eleventh Circuit agreed with the district court's decision and also denied the stay of execution. The petition for writ of certiorari that followed raises the following questions:

1. Whether *DA's Office v. Osborne*, 557 U.S. 52 (2009) set the standard for reviewing a facial challenge to a state's postconviction DNA procedures.

2. Whether the federal court properly applied this Court's precedent in determining Petitioner's facial challenge to Georgia's postconviction DNA procedures failed to state a claim upon which relief could be granted.

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INTRODUCTION

On October 1, 1997, Ray Jefferson Cromartie was sentenced to death by a Thomas County jury for the armed robbery and murder of Richard Slyz. *Cromartie v. State*, 270 Ga. 780, 781 n.1 (1999). On October 22, 2019, Cromartie filed a 42 U.S.C. § 1983 complaint challenging Georgia's postconviction DNA procedures codified in O.C.G.A. § 5-5-41. Cromartie argued that O.C.G.A. § 5-5-41 both "facially and as-applied" violated his due process rights. Doc. 1 at 4. Pursuant to the holdings in *Skinner v. Switzer*, 562 U.S. 521 (2011), the district court correctly held that it lacked jurisdiction over Cromartie's "as-applied" challenge. App. 40. Next the district court examined Cromartie's facial challenge that the Georgia Supreme Court had unconstitutionally construed the diligence and materiality components of § 5-5-41. Pursuant to the holdings in *DA's Office v. Osborne*, 557 U.S. 52 (2009), the district court reasonably determined that Cromartie's challenge failed to state a claim upon which relief could be granted. App. 45-48.

The Eleventh Circuit examined O.C.G.A. § 5-5-41 and its corresponding case law, compared Georgia's procedures to those detailed and approved in *Osborne*, and agreed with the district court's determination. App. 1-29. Simply put, under the *Osborne* standard, Georgia's postconviction DNA procedures are "fundamentally fair" and provide a defendant a reasonable opportunity to obtain postconviction DNA testing.

STATEMENT OF THE CASE

A. Facts of the Crimes

1. Madison Street Deli Crimes

On April 7, 1994, Dan Wilson, the clerk of the Madison Street Deli was shot in the face as he was washing dishes in the back kitchen. Doc. 18-12 at 36, 111. He was shot with a .25 caliber handgun which testimony at trial showed Cromartie had borrowed from his cousin Gary Young. *Id.* at 63, 107-08. Wilson survived the attack. *Id.* at 61-64.

A surveillance video camera recorded the events proceeding the shooting of Wilson and captured an individual resembling Cromartie attempting unsuccessfully to open the cash register. *Id.* at 67-70, 84-87; Doc. 18-14 at 4.

Witnesses testified that Cromartie obtained Young's handgun prior to the Madison Street Deli shooting and Cromartie made statements implicating himself in the Madison Street Deli shooting to witnesses that testified at trial. Doc. 18-12 at 111; Doc. 18-13 at 46. Specifically, Carnell Cooksey testified that on the night of the Madison Street Deli shooting he saw Young give Cromartie his handgun, which Cooksey identified as the handgun shown at trial to be the weapon used in both convenience store shootings. Doc. 18-12 at 107-09, 115, 120-21. Cooksey also testified that Cromartie asked him if he was "down with the 187"—which was "slang for robbery"—and Cooksey told Cromartie he was not interested. *Id.* at 111.

In corroboration, Young testified that he gave the handgun to Cromartie identified as the weapon used in the Madison Street Deli shooting. Doc. 18-

13 at 28. Young also testified that Cromartie confessed to him that he shot the clerk at the Madison Street Deli.[1] *Id.* at 46-52.

2. Junior Food Store Crimes

Approximately two days later, nearly identical crimes were committed at the Junior Food Store—only this time the store clerk died as a result of being shot in the head. During the early morning hours of April 10, 1994, Thaddeus Lucas (Cromartie's step-brother) drove Cromartie and Corey Clark to the Junior Food Store located in Thomasville, Georgia, ostensibly for Cromartie and Clark to steal beer from the store. Doc. 18-15 at 82, 89. Lucas testified, corroborated by Clark's testimony, that after dropping Cromartie and Clark off near the side of the Junior Food Store, Cromartie instructed Lucas to wait for him and Clark at "Providence Plaza" apartments which was located nearby. *Id.* at 89, 139. Upon entering the store, Clark testified he walked to the beer cooler in the back of the store while Cromartie walked down the first aisle to the front cash register. *Id.* at 140.

As with the first victim, the store clerk Richard Slysz was shot twice in the head as he sat on a stool behind the register. *Id.* at 140-41. Clark testified he was "shocked" and the shots were "unexpected." *Id.* at 140. Ballistics tests confirmed that the same Raven .25 caliber pistol was used in both the Madison Street Deli and Junior Food Store shootings. Doc. 18-16 at 12-21.

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[1] Additionally, Katina Washington testified that Young gave his handgun to someone on the night of the Madison Street Deli shooting and Cromartie was there when that occurred. Doc. 18-15 at 39-40. However, because Washington did not see the hand-off she could not positively identify to whom Young gave his handgun. *Id.* at 41.

Clark testified that he saw Cromartie unsuccessfully attempt to open the cash register. Doc. 18-15 at 141-42. Clark then went behind the counter and tried to open the cash register while Cromartie went to the back of the store and stole two twelve packs of Budweiser beer from the store's cooler. Doc. 18-12 at 117; Doc. 18-15 at 142-43. Both men then fled the scene. Doc. 18-15 at 142. Clark testified that as Cromartie was fleeing the scene, one of the cases of Budweiser tore open, spilling beer cans onto the muddy ground. Doc. 18-15 at 143; *see also* Doc. 18-12 at 113, 134. Clark gathered all of the cans but two, got into Lucas' car at Providence Plaza with the beer, and all three men returned to the Cherokee Apartments. Doc. 18-15 at 143; *see also id.* at 90-91.

Walter Seitz,[2] who worked at the Jack Rabbit Foods store, which sat across a well-lit street from the Junior Food Store, corroborated Clark's testimony. Seitz explained that he had a clear view into the Junior Food Store and "never lost sight of the store" after he heard the gunshots. Doc. 18-15 at 25-27. He testified that he heard the gunshots, then saw a "light skinned black" person, which was shown at trial to be Cromartie, (*id.* at 147; Doc. 18-17 at 150-51), run from the front of the store "where the clerk was to the back of the store," then run from the store with "two twelve packs of beer" (Doc. 18-15 at 26-27). Following this individual, Seitz saw another male,

[2] Seitz called in the original complaint to the police regarding the Junior Food Store shooting. Doc. 18-13 at 22-23.

"darker in complexion and thinner"[3] exit the store in the same direction as the first male. *Id.* at 28-29.

William Taylor also corroborated Clark's testimony. Taylor testified that on the night of the crimes he was driving by the Junior Food Store and saw two black individuals come out of the Junior Food Store, run to the left of the store, "drop something perhaps and go back to pick it up." Doc. 18-12 at 133. Taylor stated he thought the item the individual was carrying was beer. *Id.* at 134.

On the same side of the store in which Taylor testified he saw the individuals drop what he thought was beer, the police found a footprint, which was identified as a possible match for Cromartie's shoes but not Young's, Clark's or Lucas' (Doc. 18-17 at 52-53), a couple of beers, and a portion of a Budweiser beer carton with Cromartie's thumb print, containing 15 points of comparison (Doc. 18-13 at 140-41, 148; Doc. 18-18 at 58). *See also id.* Doc. 18-13 at 18, 201-03; Doc. 18-15 at 207-10, 217-18; Doc. 18-17 at 150.

Law enforcement brought in the canine unit to track the perpetrators of the Junior Food Store crimes. The dogs tracked to the Providence Plaza apartments' parking lot where the trail ended. Doc. 18-13 at 204; Doc. 18-15 at 89, 139.

Finally, Cooksey testified that Cromartie confessed to him that he committed the murder at the Junior Food Store. Doc. 18-12 at 114.

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[3] Clark testified at trial that he was 6'2" and weighed 189 lbs. and was approximately the same size at the time of the crimes. Doc. 18-15 at 134. He also testified that he was taller and darker in skin tone than Cromartie. *Id.* at 142.

B. Proceedings Below

Cromartie was convicted in Thomas County of malice murder, armed robbery, aggravated assault, aggravated battery, and possession of a firearm during the commission of a crime. *Cromartie v. State*, 270 Ga. 780, 781 n.1 (1999). The jury recommended a sentence of death on October 1, 1997. *Id.* The Georgia Supreme Court affirmed Cromartie's convictions and death sentence on March 8, 1999. *Cromartie v. State*, 270 Ga. 780, *cert. denied, Cromartie v. Georgia*, 528 U.S. 974, 120 S. Ct. 419 (1999), *r'hrg. denied*, 528 U.S. 1108, 120 S. Ct. 855 (2000).

After decades of appeals, the United States Supreme Court denied Appellant's petition for writ of certiorari review of this Court's denial of federal habeas relief on December 3, 2018. *Cromartie v. Sellers*, 139 S. Ct. 594 (2018).

On December 27, 2018, Cromartie filed his extraordinary motion for new trial in Thomas County Superior Court and additionally sought DNA testing for the first time under O.C.G.A. § 5-5-41(c). The trial court held a hearing on Cromartie's motion and on September 16, 2019, the trial court denied Cromartie's request for DNA testing and extraordinary motion for new trial. Cromartie timely filed an application for discretionary appeal with Georgia Supreme Court on October 11, 2019. The Georgia Supreme Court summarily denied Cromartie's application on October 25, 2019.

Meanwhile an execution order was entered on October 16, 2019, setting Cromartie's execution for October 30, 2019 at 7:00 p.m. at the Georgia Diagnostic and Classification Prison. On October 30, 2019, the Georgia Supreme Court entered a provisional stay of execution because the trial court did not have jurisdiction to enter the warrant for execution. Two days later,

on November 1, 2019, the trial court signed and filed an execution order setting Cromartie's execution for November 13, 2019 at 7:00 p.m. at the Georgia Diagnostic and Classification Prison. Cromartie directly appealed the second execution order but the Georgia Supreme Court denied the appeal and the CPC application from the successive state habeas petition on November 5, 2019.

On October 22, 2019, Cromartie filed a 42 U.S.C. § 1983 complaint challenging Georgia's postconviction DNA procedures. Additionally, on October 24, 2019, Cromartie filed a corresponding motion to stay his execution scheduled for October 30, 2019. The district court granted Appellees' motion to dismiss the complaint and denied Appellant's request to stay his execution on October 28, 2019. App. 34-49.

Subsequently, Appellant filed a notice of appeal in the Eleventh Circuit Court of Appeals on October 28, 2019 and his brief in support on October 29, 2019. After the Georgia Supreme Court had entered its provisional stay of execution, on October 30, 2019, the Eleventh Circuit Court denied the motion for stay as moot and denied the appeal. App. 1-29. Two days later, on November 1, 2019, the trial court signed and filed an execution order setting Cromartie's execution for November 13, 2019. On November 6, 2019, Cromartie filed a petition for rehearing en banc and requested another stay of his execution pending that motion—both were denied on November 8, 2019. App. 32.

On November 12, 2019, Cromartie filed his current petition for writ of certiorari and motion for stay of execution. This response follows.

STATUTORY PROVISION INVOLVED

O.C.G.A. § 5-5-41 states:

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

(b) Whenever a motion for a new trial has been made within the 30 day period in any criminal case and overruled or when a motion for a new trial has not been made during such period, no motion for a new trial from the same verdict or judgment shall be made or received unless the same is an extraordinary motion or case; and only one such extraordinary motion shall be made or allowed.

(1) Subject to the provisions of subsections (a) and (b) of this Code section, a person convicted of a felony may file a written motion before the trial court that entered the judgment of conviction in his or her case for the performance of forensic deoxyribonucleic acid (DNA) testing.

(2) The filing of the motion as provided in paragraph (1) of this subsection shall not automatically stay an execution.

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

(A) Evidence that potentially contains deoxyribonucleic acid (DNA) was obtained in relation to the crime and subsequent indictment, which resulted in his or her conviction;

(B) The evidence was not subjected to the requested DNA testing because the existence of the evidence was unknown to the petitioner or to the petitioner's trial attorney prior to trial or because the technology for the testing was not available at the time of trial;

(C) The identity of the perpetrator was, or should have been, a significant issue in the case;

(D) The requested DNA testing would raise a reasonable probability that the petitioner would have been acquitted if the

results of DNA testing had been available at the time of conviction, in light of all the evidence in the case;

(E) A description of the evidence to be tested and, if known, its present location, its origin and the date, time, and means of its original collection;

(F) The results of any DNA or other biological evidence testing that was conducted previously by either the prosecution or the defense, if known;

(G) If known, the names, addresses, and telephone numbers of all persons or entities who are known or believed to have possession of any evidence described by subparagraphs (A) through (F) of this paragraph, and any persons or entities who have provided any of the information contained in petitioner's motion, indicating which person or entity has which items of evidence or information; and

(H) The names, addresses, and telephone numbers of all persons or entities who may testify for the petitioner and a description of the subject matter and summary of the facts to which each person or entity may testify.

(4) The petitioner shall state:

(A) That the motion is not filed for the purpose of delay; and

(B) That the issue was not raised by the petitioner or the requested DNA testing was not ordered in a prior proceeding in the courts of this state or the United States.

(5) The motion shall be served upon the district attorney and the Attorney General. The state shall file its response, if any, within 60 days of being served with the motion. The state shall be given notice and an opportunity to respond at any hearing conducted pursuant to this subsection.

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

(B) The motion shall be heard by the judge who conducted the trial that resulted in the petitioner's conviction unless the presiding judge determines that the trial judge is unavailable.

(C) Upon request of either party, the court may order, in the interest of justice, that the petitioner be at the hearing on the motion. The court may receive additional memoranda of law or evidence from the parties for up to 30 days after the hearing.

(D) The petitioner and the state may present evidence by sworn and notarized affidavits or testimony; provided, however, any affidavit shall be served on the opposing party at least 15 days prior to the hearing.

(E) The purpose of the hearing shall be to allow the parties to be heard on the issue of whether the petitioner's motion complies with the requirements of paragraphs (3) and (4) of this subsection, whether upon consideration of all of the evidence there is a reasonable probability that the verdict would have been different if the results of the requested DNA testing had been available at the time of trial, and whether the requirements of paragraph (7) of this subsection have been established.

(7) The court shall grant the motion for DNA testing if it determines that the petitioner has met the requirements set forth in paragraphs (3) and (4) of this subsection and that all of the following have been established:

(A) The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion;

(B) The evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect;

(C) The evidence was not tested previously or, if tested previously, the requested DNA test would provide results that are reasonably more discriminating or probative of the identity of the perpetrator than prior test results;

(D) The motion is not made for the purpose of delay;

(E) The identity of the perpetrator of the crime was a significant issue in the case;

(F) The testing requested employs a scientific method that has reached a scientific state of verifiable certainty such that the procedure rests upon the laws of nature; and

(G) The petitioner has made a prima facie showing that the evidence sought to be tested is material to the issue of the petitioner's identity as the perpetrator of, or accomplice to, the crime, aggravating circumstance, or similar transaction that resulted in the conviction.

REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit and the district court properly determined the standard announced in *Osborne* governed Cromartie's facial challenge to Georgia's postconviction DNA procedure.

After all of his appeals were exhausted, Cromartie filed an extraordinary motion for new trial and additionally sought DNA testing in state court under O.C.G.A. § 5-5-41.[4] After being denied DNA testing and a new trial in state court, Cromartie sought declaratory and injunctive relief in the district court under § 1983 challenging the Georgia Supreme Court's construction of § 5-5-41. The district court: (1) correctly determined that it lacked jurisdiction to review his "as-applied" challenge to § 5-5-41; (2) correctly determined that Cromartie's facial challenge to § 5-5-41 failed to plead a "claim upon which relief can be granted"; and (3) correctly denied the request for a temporary restraining order to stay his execution because he failed to show he could succeed on the merits of his underlying claim. App.

[4] The state trial court denied Cromartie's request for DNA testing and a new trial because Cromartie failed to establish "a reasonable probability that that the verdict would have been different" or that the motion was not filed for the "purpose of delaying his execution." App. 9.

38-49. Cromartie argues that this Court should grant certiorari review to "decide what standards a district court should apply in ruling" on facial challenges to a state's postconviction DNA procedures. Pet. brief at 13. As this Court has already set the standard in *Osborne*, which was correctly applied by the Eleventh Circuit and the district court, Cromartie's request presents nothing for this Court to review. Certiorari should be denied.

Cromartie also argues that *Skinner* opened the door for his facial challenge to Georgia's postconviction DNA procedures, but provided "little guidance" on the standard for evaluating the postconviction DNA procedures. Pet. brief at 14. Cromartie is correct as the only question before this Court in *Skinner* was whether a § 1983 complaint was the appropriate vehicle for a facial challenge to a state's DNA postconviction procedures. However, this Court had already set the standard of review in *Osborne,* which this Court specifically referenced in *Skinner*. *See Skinner*, 562 U.S. at 525 ("We note, however, that the Court's decision in *Osborne* severely limits the federal action a state prisoner may bring for DNA testing. Osborne rejected the extension of substantive due process to this area, [] and left slim room for the prisoner to show that the governing state law denies him procedural due process") (citation omitted).

Cromartie attempts to convolute the issue by arguing that *Skinner* did not give guidance on "what a winning *Skinner* claim would look like, or even what allegations will survive a motion to dismiss." Pet. brief at 14. First, if an appellation is to be given, it is an *Osborne* claim, not a *Skinner* claim. And *Osborne* set a clear standard: "the question is whether consideration of Osborne's claim within the framework of the State's postconviction relief procedures 'offends some [fundamental] principle of justice' or 'transgresses

any recognized principle of fundamental fairness in operation.'" *Osborne*, 557 U.S. at 53 (quoting *Medina v. California*, 505 U.S. 437, 446, 448, 112 S. Ct. 2572 (1992)).

Second, Fed. R. Civ. Pro. 12(b)(6) plainly states that to survive a motion to dismiss, a party must "state a claim upon which relief can be granted." If a claim clearly cannot survive the standard of review set out by this Court—in this case specifically the standard announced in *Osborne*—then it is not a claim upon which relief can be granted. The fact that the Eleventh Circuit also chose to compare the postconviction DNA procedures reviewed by this Court in *Osborne* is not proof of a "truncated" review as alleged by Cromartie, but a logical analysis of comparing apples to apples. Pet. brief at 15. Cromartie provides no cogent explanation as to why the *Osborne* standard is not sufficient to determine whether his facial challenge to Georgia's postconviction DNA procedures "state[s] a claim upon which relief can be granted." Fed. R. Civ. Pro. 12(b)(6).[5]

In sum, Cromartie fails to show that this Court has not already set standard to determine whether he failed to state a claim upon which relief could be granted. Certiorari review should be denied.

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[5] Cromartie argues that *Lamar v. Ebert*, 681 F. App'x 279 (4th Cir. 2017) is in conflict with the Eleventh Circuit's decision. This case is unpublished it has no precedential value. Moreover, the Fourth Circuit determined that the district court erred in dismissing the § 1983 complaint under 28 U.S.C. 1915A, which is a more lenient standard than Fed. R Civ. Proc. 12(b)(6), which is the standard under which Cromartie's § 1983 complaint was dismissed. App. 1-29.

II. The federal courts' fact-specific application of the *Osborne* standard does not present an issue for certiorari review.

Cromartie facially challenged Georgia's postconviction DNA procedures arguing that O.C.G.A. § 5-5-41 "as construed by the Georgia Supreme Court violates fundamental fairness in at least two ways." Doc. 1 at 19. As correctly noted by the district court, the two ways enumerated by Cromartie were: 1) "that the requirements that a defendant show that the request for 'DNA testing was not made for the purpose of delay, § 5-5-41(c)(7)(D),' and that his request for a new trial was made diligently or 'as soon as possible' under § 5-5-41(a) is fundamentally unfair"; and 2) "that the Georgia Supreme Court's interpretation of O.C.G.A. § 5-5-41(c)(3)(D), which requires a court to find a reasonable probability of acquittal before DNA testing can be ordered, is fundamentally unfair because it precludes testing when the evidence of guilt presented at trial was overwhelming." App. 46 (quoting Doc. 1 at 19-21). The district court reasonably determined that "both arguments are foreclosed" by this Court's decision in *Osborne*. *Id.* The Eleventh Circuit agreed, comparing Georgia's postconviction DNA procedures with those approved by this Court in *Osborne*, and affirmed the district court's dismissal of the complaint. App. 1-29.

Cromartie's disagreement with the federal court's decisions is nothing more than a request for this Court to conduct error correction of a fact-specific issue. What is more, his arguments criticizing the federal courts' decisions make little sense under the standard announced in *Osborne.* This Court was clear in *Osborne*, and later even in *Skinner*, that to prove a state's postconviction DNA procedures were fundamentally unfair was a high bar that required showing the procedures "offend[] some [fundamental] principle of justice' or 'transgresse[d] any recognized principle of fundamental fairness

in operation.'" *Osborne*, 557 U.S. at 53 (quoting *Medina*, 505 U.S. at 446). Cromartie does not even come close to showing that, as construed, Georgia's requirements of diligence and showing a reasonable probability of a different outcome offends or transgresses any principle of justice or fundamental fairness. Certiorari review should be denied.

A. The federal courts' examination of the diligence requirement complies with *Osborne.*

Osborne sought DNA testing and the Alaska courts denied his request. Osborne filed a § 1983 action in federal court, and ultimately the Ninth Circuit held that, *inter alia,* the State had an on-going duty to "disclose exculpatory evidence" even after conviction and granted the relief requested. *Osborne*, 557 U.S. at 61. This Court granted certiorari review to determine "whether [Osborne had] a right under the Due Process Clause to obtain postconviction access to the State's evidence for DNA testing."[6] *Id.* The court held that a state prisoner had no "freestanding right to DNA testing evidence" under the due process clause in federal court. *Id.* at 72-73. Additionally, and pertinent to Cromartie's claim before this Court, this Court held that Osborne failed to prove that the Alaska procedures for postconvcition DNA testing "'offend[ed] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgress[ed] any recognized principle of fundamental fairness in operation.'" *Id.* at 69 (quoting *Medina v. California*, 505 U.S. 437, 446, 448, 112 S. Ct. 2572 (1992) (internal quotation marks omitted)).

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[6] The Court also granted certiorari "to decide whether Osborne's claims could be pursued using § 1983" but ultimately declined to answer that question. *Id.* As state above, the Court later answered this question in *Skinner*.

Examining Cromartie's arguments, the district court concluded that Cromartie failed to prove that "O.C.G.A. § 5-5-41, as interpreted by the Georgia Supreme Court …violate[s] fundamental fairness." App. 47-48. In making this determination, the district court correctly pointed out that Alaska procedures, which were found to be constitutional, were "similar to Georgia's." *Id.* at 14. The Eleventh Circuit agreed. App. 12-21. Cromartie has failed to prove the court was in error. Although Cromartie attempts to distinguish *Osborne* on the grounds that Osborne had not sought state postconviction relief, he fails to show the Court did not perform the exact analysis required in his case.

Cromartie's first complaint was that the "undue delay" and diligence requirements,[7] as construed by the Georgia Supreme Court, are "fundamentally unfair" because a defendant may have to request DNA testing that will consume the DNA evidence before science has reached a stage to reveal quantifiable results. The district court rejected this argument explaining that the *Osborne* Court upheld a similar diligence requirement and that diligence and undue delay are "fairly standard in statutes addressing postconviction relief." App. 47 n.8.

Likewise, the Eleventh Circuit also found this requirement was similar to the provisions approved in *Osborne* and pointed out that Georgia's statute

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[7] The Eleventh Circuit provides a succinct explanation of O.C.G.A. § 5-5-41—correctly explaining that the first two subsections (a) and (b) concern extraordinary motions for new trial and subsection (c) provides the requirements for obtaining DNA testing. App. 16-21. As correctly pointed out by the court of appeals, the diligence requirement relates to the extraordinary motion for new trial and establishment of undue delay relates to the DNA request. Additionally, the request for DNA testing does not have to be accompanied by an extraordinary motion for new trial. App. 23 n. 9.

allowed for more than one round of DNA testing if "technology improved enough to offer a more promising result." App. at 22. The federal courts' decisions are sound. In *Osborne*, this Court examined the Alaska requirements at issue which included diligence, determined this requirement was "similar to those provided for DNA evidence by federal law and the law of other States."[8] *Osborne*, 557 U.S. at 70. Additionally, as pointed out by the district court, "[t]here is nothing fundamentally unfair in requiring a party to 'act without delay' in seeking DNA testing" because "[t]his 'requirement ensures that cases are litigated when the evidence is more readily available to both the defendant and the State, which fosters the truth-seeking process.'" App. 47 n.8 (quoting *Drane v. State*, 291 Ga. 298, 304 (2012)).

Cromartie's disagreement with the federal courts' decisions would essentially mean that a state could never have a diligence requirement in postconviction DNA procedures because science is constantly evolving and a defendant would have to wait until some unknown time for science to reach some unknown level of certainty and efficiency. But Cromartie fails to point to any law showing an individual has a fundamental right under the constitution to so delay DNA testing. In other words, Cromartie fails to show that federal courts wrongly decided either requiring a defendant to be diligent in bringing a postconviction motion for new trial or establishing that a motion was not made for delay purposes "offends" *any* "traditions or conscience of our people" or violates a "recognized principle of fundamental

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[8] The *Osborne* Court also examined the federal DNA postconviction statute, 18 U.S.C.S. § 3600, and held it withstood scrutiny. Regarding diligence and delay, § 3600(a)(10) requires that the motion be "made in a timely fashion." *Id.* at 70.

fairness." *Medina*, 505 U.S. at 446; *see also Alvarez*, 679 F.3d at 1266 n.2 ("inasmuch as [a state's] postconviction DNA access procedures either mirror or are more applicant-friendly than the Alaska and federal statutes endorsed in *Osborne*, [a state's] postconviction DNA access procedures plainly do not offend any principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, nor do they transgress any recognized principle of fundamental fairness in operation").

B. The federal court's examination of the materiality requirement complies with *Osborne.*

Likewise the federal courts rejected Cromartie's challenge to the Georgia Supreme Court's construction of the requirement that he establish his alleged DNA results would create a "reasonable probability" of a different outcome. § 5-5-41(c)(3)(D). Specifically, Cromartie argued, and still argues, that "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." Doc. 10 at 16.

The district court again correctly noted that this "materiality" requirement is "commonplace in postconviction DNA statutes." App. 47 n.9. The district court also examined the state law case, *Crawford v. State*, 278 Ga. 95 (2004), that Cromartie argued contained the unconstitutional construction. In doing so, the district court found the Georgia Supreme Court

conducted a standard materiality analysis[9] based on the facts of Crawford's case and did not construe the statute in a manner that "'preclud[ed] testing to establish innocence.'" Doc. 12 at 14 n.9 (quoting Doc. 10 at 16).

The Eleventh Circuit also "disagree[d]" with Cromartie's rendition of this requirement. First, the court pointed out that this Court had "already approved of this type of materiality standard in *Osborne*." App. 24. Second, the court noted that Cromartie's argument "is at odds with stacks of precedent accepting and applying 'reasonable probability' standards like this one in a number of other contexts." *Id.* Cromartie provides no argument refuting these points other than to generally complain that the court's examination was done from a "35,000 foot view." But Cromartie does not explain what more a court could do in determining that a general materiality standard, which requires a fact-specific allegation, offends or transgresses fundamental principles of justice.

Moreover, again in *Osborne*, the Court determined similar requirements in the Alaska and federal procedures were not unconstitutional. In Alaska,

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[9] Specifically, the court held:

> Upon our review of the trial record and the record of Crawford's extraordinary motion for new trial, we conclude the trial court did not err in concluding that Crawford's motion for DNA testing failed to set forth a showing that the requested DNA testing might have yielded results that in reasonable probability would have led to his acquittal if those results had been available at his original trial. We find that the trial court, after referencing discussions of Crawford's requests for DNA testing in other courts under other legal standards, properly weighed Crawford's hypothesized DNA testing results against the overwhelming evidence actually presented at Crawford's trial under the proper Georgia statutory standard. *See* O.C.G.A. § 5-5-41 (c) (3) (D).

Crawford, supra, at 97.

the postconviction DNA procedures required that the evidence be "be sufficiently material" and 3600(a)(6) required that the evidence was "not inconsistent with an affirmative defense presented at trial" and would "raise a reasonable probability that the applicant did not commit the offense." *Osborne, supra*, at 70. Notably, § 5-5-41(c) does not require that the evidence be consistent with a defense presented at trial but merely that "[t]he identity of the perpetrator was, *or should have been*, a significant issue in the case." O.C.G.A. § 5-5-41(c)(3)(C) (emphasis added).

Cromartie complains that the federal courts did not examine the construction of the statute by the Georgia Supreme Court. However, the federal courts did examine this and the district court specifically discussed *Crawford*. App. 47 n.9. Although Cromartie may disagree, he has not shown that the Georgia Supreme Court's analysis in *Crawford* is anything more than a fact-specific analysis. Thus, the federal courts did not err in determining Cromartie failed to prove that the "reasonable probability" requirement "offends the traditions or conscience of our people" or violates a "recognized principle of fundamental fairness."[10] *Medina*, 505 U.S. at 446; *see also Alvarez*, 679 F.3d at 1266 n.2.

[10] Additionally, Cromartie argues that precedent from a district court in Alabama and an unpublished opinion in the Fifth Circuit show the district court abused its discretion in determining he failed to state a claim. *See Wilson v. Marshall*, No. 2:14-cv-1106-MHT-SRW, 2018 WL 5074689 (N.D. Ala. Sept. 14, 2018), adopted, 2018 WL 5046077 (N.D. Ala. Oct. 17, 2018); *Harris v. Lykos*, No. 12-20160, 2013 WL 1223837 (5th Cir. Mar. 27, 2013) (unpublished). However, as neither case is factually similar, he has not shown any conflict among the courts.

Therefore, as Cromartie's clearly failed "to state a claim upon which relief can be granted," the district court correctly dismissed his complaint and the Eleventh Circuit properly upheld that decision. Fed. R. Civ. P. 12(b)(6). Cromartie has failed to show that the federal courts did not properly apply this Court's precedent or that this Court should grant certiorari review for mere error correction.[11]

[11] Cromartie also argues that "DNA testing may well prove powerfully exculpatory" in his case. Pet. brief at 27. Respondent disagrees and Cromartie's argument does not present an issue for certiorari review as is merely an implicit plea for this Court to order DNA testing which it rejected in *Osborne.* Additionally, Cromartie attaches an affidavit he Thaddaeus Lucas as part of his appendix; however, this affidavit was not presented to the federal courts in this proceeding.

CONCLUSION

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

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2019, I served this brief on all parties required to be served by mailing a copy of the brief to be delivered via email, addressed as follows:

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