OCTOBER TERM 2019

No. 19-6570

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

--- CAPITAL CASE ---

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

LEIGH SKIPPER
Federal Defender
LOREN STEWART*
AREN ADJOIAN
Federal Community Defender Office
for the Eastern District of Pennsylvania
The Curtis – Suite 545-West
601 Walnut Street
Philadelphia, PA 19106
(215) 928-0520
Loren_Stewart@fd.org
Aren_Adjoian@fd.org
*Counsel of Record (member of the Bar of
the United States Supreme Court)

November 13, 2019

Petitioner Ray Cromartie files this Reply in support of his Petition for a Writ of Certiorari in this capital case. This Court should grant the writ to resolve the important questions presented.

ARGUMENT

THE TRUNCATED "COMPARATIVE APPROACH" EMBRACED BY THE ELEVENTH CIRCUIT AND SOME OF ITS SISTER COURTS IS INCONSISTENT WITH *OSBORNE* AND *SKINNER*.

As explained in Mr. Cromartie's opening brief, the Eleventh Circuit has adopted what it terms a "comparative approach" to review of claims under *Skinner v. Switzer*, 562 U.S. 521 (2011). Some of the Eleventh Circuit's sister courts have also approvingly applied this "comparative approach." For example, in *McKithen v. Brown*, the Second Circuit upheld New York's post-conviction DNA testing requirements because they were more lenient than the Alaska procedures blessed in *Osborne*. 626 F.3d 143, 153-154 (2d Cir. 2010). And, in *In re Smith*, the Sixth Circuit issued an alternative ruling on the merits that Michigan's post-conviction DNA testing procedures passed constitutional muster because they were more comprehensive than the Alaska scheme. *In re Smith*, No. 07-1220, 2009 WL 3049202, at *4 (6th Cir. Sept. 24, 2009).

But an examination of the statutory provisions is only part of the analysis required by *Osborne*. The only test established in *Osborne* provides that "the question is whether . . . [a] [s]tate's procedures for postconviction relief 'offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgress[] any recognized principle of fundamental fairness in operation.'" *Osborne*, 557 U.S. at 69 (citing *Medina v. California*, 505 U.S. 437, 446

(1992)); *see also id.* at 90 (Stevens, J., dissenting) (noting that there remained "serious questions whether the State's procedures are fundamentally unfair in their operation"). This second prong cannot be addressed by a cursory review of the statutory text. It requires federal courts to review how state courts construe and apply the state testing schemes. This case gives the Court an opportunity to do so, an opportunity not present in *Osborne* because Osborne had not availed himself of the state court remedy available. 557 U.S. at 71.

Moreover, this "comparative approach" ignores *Skinner*. In *Skinner*, this Court reiterated that there is room for a state prisoner to show that a state's DNA testing procedures deny him procedural due process. *Skinner*, 562 U.S. at 525. The Court held that a prisoner may bring a Section 1983 claim challenging the state's statute as "authoritatively construed" by the state's courts. *Id.* at 532. *Skinner* did not provide further guidance as to how lower courts should analyze such claims. What is evident from *Osborne* and *Skinner*, though, is that a reviewing court cannot simply consider the four corners of the state's DNA testing statutes. Instead, it must also examine the impact on fundamental fairness of the state courts' authoritative construction of those statutes. The truncated "comparative approach" leaves no room for such an examination and is therefore improper.

Only through a more scrutinizing analysis can a court determine whether a state's post-conviction relief procedures are "fundamentally inadequate to vindicate the substantive rights provided." *See Osborne*, 557 U.S. at 69. That analysis looks very different. For example, in *LaMar v. Ebert*, 681 F. App'x 279 (4th Cir. 2017)

(unpublished), the Fourth Circuit reversed the district court's dismissal of a pro se complaint under 28 U.S.C. § 1915A. The Fourth Circuit recognized that Virginia had created a right to DNA testing but then restricted the pathway to vindicate that right, because favorable DNA results could not be used to obtain relief from his conviction. *Id.* at 289. This analysis is more consistent with *Osborne* and *Skinner*. Similarly, in *Wilson v. Marshall*, No. 2:14-cv-1106-MHT-SRW, 2018 WL 5074689, at *13-15 (N.D. Ala. Sept. 14, 2018), *adopted*, 2018 WL 5046077 (N.D. Ala. Oct. 17, 2018), the district court denied a motion to dismiss a *Skinner* complaint. The court explained that under *Skinner*, a plaintiff may pursue a challenge to state 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." *Id.* at *11. Applying this approach, the court asked whether, even if the statutory provisions appeared reasonable, they interacted with each other and had been construed by the state's courts in a way that "created a 'Catch 22'" which operated to preclude the prisoner from actually obtaining DNA testing. *Id.* at *13-15.

Respondents claim that the "truncated" review based on the Court's approval of the Alaska scheme in *Osborne* is a "logical" approach—"comparing apples to apples." Resp. Br. 13. That conclusion is misguided. First, the *Osborne* court admitted "there [was] some uncertainty in the details of Alaska's newly developing procedures for obtaining postconviction access to DNA" and that Osborne "[could] hardly complain that [Alaska's procedures] [did] not work in practice" because he had not tried them. *Osborne*, 557 U.S. at 70-71. Thus, the *Osborne* court was unable to reach

the question of whether those procedures "transgress[ed] any recognized principle of fundamental fairness in operation." *Id.* at 69. Second, if the district court and Eleventh Circuit had considered how O.C.G.A. § 5-5-41 operates or is authoritatively construed by state courts, as they were required to, the lower courts would have seen that the Georgia and Alaska statutes are not apples to apples—they are apples to oranges—as set forth more fully in Mr. Cromartie's opening brief. In *Osborne*, the Court was not able to address the very issue with which the lower courts struggle consistently – the question of whether the state court procedures comport with fundamental fairness. This case presents the opportunity for the Court to do so, to settle this question once and for all, and lend its guidance to the lower courts.

This Court should grant certiorari to correct the improper "comparative approach" being applied by the lower courts and provide guidance to lower courts about how to review *Skinner* claims.

Respectfully submitted,

LOREN STEWART*
AREN ADJOIAN
Federal Community Defender Office
for the Eastern District of Pennsylvania
The Curtis – Suite 545-West
601 Walnut Street
Philadelphia, PA 19106
(215) 928-0520
Loren_Stewart@fd.org
Aren_Adjoian@fd.org
*Counsel of Record (member of the Bar of the United States Supreme Court)

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