

In the
Supreme Court of the United States

Donnie Cleveland Lance,
Petitioner,

v.

Benjamin Ford, GDCP Warden,
Respondent.

On Petition for Writ of Certiorari to the
Georgia Supreme Court

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

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CAPITAL CASE

QUESTIONS PRESENTED

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

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STATEMENT OF THE CASE

A. Trial Court Proceedings

Petitioner, Donnie Cleveland Lance, was indicted in 1998 on two counts of malice murder, two counts of felony murder, one count of burglary, two counts of possession of a firearm by a convicted felon, and one count of possession of a firearm during the commission of a crime. *Lance v. State*, 275 Ga. 11, 11, n1, 560 S.E.2d 663, 669 (2002). Lance was tried before a jury in 1999, and he was convicted of all charges. *Id.* The jury found five statutory aggravating circumstances and recommended two sentences of death for the murders of Sabrina Joy Lance and Dwight G. “Butch” Wood, Jr. *Id.* at 12. The trial court sentenced Lance to death on June 23, 1999. *Id.* at 11, n. 1.

B. Grand Jury Claim Not Raised On Direct Appeal

In his appeal to the Georgia Supreme Court, Lance did not raise the claim that his grand jury was unconstitutionally comprised or selected. The court affirmed the convictions and sentences. *Lance*, 275 Ga. 11 (2002), *cert denied*, 537 U.S. 1050 (2002), *rehearing denied*, 537 U.S. 1179 (2003).¹

C. Grand Jury Claim Raised In First State Habeas

Lance filed his first state habeas corpus petition in 2003. In his amended petition, filed in 2005, Lance specifically set forth a claim that the pool from which his grand jury was drawn was unconstitutionally composed

¹ Notably, O.C.G.A. § 9-14-42(b) directs:

The right to object to the composition of the grand or trial jury will be deemed waived under this Code section unless the person challenging the sentence shows in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence have otherwise become final.

and discriminatorily selected. (RA 3-4).² In those proceedings, Lance had three years for discovery before his three-day state habeas hearing. Ultimately, Lance's counsel deposed 15 individuals, submitted 44 affidavits, the testimony of live witnesses (including four experts), and 264 exhibits. And, although Lance specifically raised this same claim of an unconstitutionally composed and selected grand jury, he failed to present any evidence or argument to support the claim. Lance even conceded in his application to the Georgia Supreme Court that he did not investigate or offer any evidence in support. (PA 116).

Lance filed a post-hearing brief in February of 2008 and his reply brief in June of 2008, specifically noting that the district attorney who had prosecuted his case was under indictment. (RA 7 n. 1, 10, n. 4). Lance did not argue this fact in presenting his grand jury composition claim.

In 2009, relying on state law, the state habeas court found this claim to be procedurally defaulted because Lance had not raised it at trial or on appeal and had failed to show cause and prejudice or a miscarriage of justice to overcome that default. (RA 13-14 (citing *Black v. Hardin*, 255 Ga. 239 (1985); *Hance v. Kemp*, 258 Ga. 649 (1988); and O.C.G.A. § 9-14-48(d)). The state habeas court denied relief as to Lance's convictions, but granted relief as to his death sentences.

Respondent appealed the grant of relief. Lance cross-appealed, but did not challenge the state habeas court's procedural default ruling on the constitutionality of the composition of the grand jury. The Georgia Supreme Court affirmed each of the state habeas court's rulings except its grant of

² References are to Respondent's Appendix to this brief.

relief based on ineffective assistance of counsel at sentencing, which the Court reversed. *Hall v. Lance*, 286 Ga. 365 (2010), *cert. denied*, 561 U.S. 1026 (2010). Lance's death sentences were reinstated.

D. Grand Jury Claim Raised In Federal Habeas

Lance filed a federal habeas corpus petition again raising this exact claim—that the grand jury which indicted him was unconstitutionally composed and selected. (RA 17). The district court also found this claim to be procedurally defaulted. (RA 20). On December 22, 2015, the district court denied relief and the Eleventh Circuit Court of Appeals affirmed. *Lance v. Warden, Georgia Diagnostic & Classification Prison*, 706 Fed. Appx. 565 (11th Cir. 2017). Lance's unconstitutionally composed grand jury claim was not raised on appeal in the Eleventh Circuit. Lance's petition for writ of certiorari in this Court was denied on January 7, 2019. *Lance v. Sellers*, 139 S. Ct. 511 (2019).

E. Successive State Habeas

Lance filed a successive state habeas petition on December 18, 2019 again alleging that the grand jury in his case was unconstitutionally composed and selected.³ He did not allege that the composition of the grand jury was not a fair composition of the community, but that the district

³ To be clear, at the time of Petitioner's indictment, although there were 30,005 people in the county (approximately a third were under age 18), only 341 people made up the grand jury list. (PA 168).

attorney “handpicked” the grand jury members and “was picking jurors from the same church.” (PA 137).⁴ Lance alleged he has new evidence to support this claim including: 1) “concern[s]” of unnamed individuals who were recently interviewed in preparing for the clemency hearing;⁵ 2) the conviction and sentence of the prosecutor who tried his case; and 3) documents allegedly obtained from an Open Records Act request.

⁴ At the time of Lance’s indictment, O.C.G.A. § 15-12-40 stated:

(1) At least biennially...the board of jury commissioners shall compile, maintain, and revise a trial jury list of upright and intelligent citizens of the county to serve as trial jurors and a grand jury list of the most experienced, intelligent, and upright citizens of the county to serve as grand jurors. In composing the trial jury list, the board of jury commissioners shall select a fairly representative cross section of the intelligent and upright citizens of the county. In composing the grand jury list, the board of jury commissioners shall select a fairly representative cross section of the most experienced, intelligent, and upright citizens of the county.

(2) The grand jury list shall not exceed two-fifths of the number of citizens on the county's most recent trial jury list.

(3) Once filed, the lists so created shall constitute the body of trial and grand jurors for the county, respectively. Except as otherwise provided in this article, no new names shall be added to either list until those names originally selected have been completely exhausted or until a revised list has been properly created.

“[T]he statutory statement regarding revision of the grand jury list specifically is directory.” *State v. Parlor*, 281 Ga. 820, 821 (2007) (citing *Sealey v. State*, 277 Ga. 617 (2004); *Haden v. State*, 176 Ga. 304 (1933)); see also *McHan v. State*, 232 Ga. 470, 471 (1974).

⁵ Relying on his own investigator’s affidavit based on hearsay statements of unknown persons, Lance states in his “Question Presented” that the district attorney “handpicked” the grand jurors, yet, the record below does not bear this out.

After briefing by both parties, the state habeas court, applying state law, found that evidence was not “new” and was reasonably available to Lance when he raised the claim in his first state habeas proceeding. (RA 22-24). On January 25, 2020, the court concluded that the claim was now barred as res judicata as it had already been ruled upon previously and found to be procedurally defaulted. (RA 24).⁶

Lance argued that he did not think to investigate the grand jury composition, even though he previously raised it as a claim, and he should have been excused from not investigating the claim in timely manner. Lance’s rendition of the state’s procedural bars—ignorance is bliss—would render the state bars a nullity. As found by the state habeas court, (RA 22), Lance had to show the information he has now submitted to the court to support his claim was not previously available, not that he simply chose not to investigate. *See* O.C.G.A. § 9-14-51; *State v. Cusack*, 296 Ga. 534, 538 (2015) (“habeas relief could not be granted on Cusack’s second habeas petition” because his claim was reasonably available during his first state habeas proceeding).

The habeas court found that the unnamed sources were reasonably available as well as the documents, which could have been obtained at the

⁶ The state habeas court did not err in refusing to decide the merits of Lance’s claim. Lance alleges that there were “concerns” from unnamed individuals that the “prosecutor in [his] case, took improper and illegal actions in selecting grand jurors in Jackson County,” and these unnamed persons alleged “he was picking jurors from the same church.” (PA 137); yet, it is not the prosecutor that compiles the grand jury lists nor selects the jurors. Lance did not provide the state habeas court with the identities of the individuals that allegedly provided this information; and moreover, Lance’s claim would require large scale collusion among government officials, which he does not allege or argue.

time of trial under state statute (O.C.G.A. § 50-18-72(a)(6))⁷ or following the completion of his direct appeal under Georgia open records statute (O.C.G.A. § 50-18-70).⁸ The court also found the fact that the prosecutor from Lance's trial was convicted of a crime is irrelevant to his being able to raise a claim challenging the grand jury. (RA 23). And, by at least the time of the filing of his post-hearing brief and most certainly by the time of his federal habeas petition, Lance was aware that the prosecutor was being indicted. *See Id.*

Applying well-settled state-law precedent, the state habeas court dismissed the new petition finding the claim was barred as res judicata under state law. (RA 24).

⁷ The statute provides:

...when ordered by the judge of a court having jurisdiction over a case in which a challenge to the array of the grand or trial jury has been filed, The Council of Superior Court Clerks of Georgia, superior court clerk, or jury clerk shall provide data within the time limit established by the court for the limited purpose of such challenge. The Council of Superior Court Clerks of Georgia, superior court clerk, or jury clerk shall not be liable for any use or misuse of such data[.]

⁸ The Open Records Act provides for the inspection of government records. O.C.G.A. § 50-18-70. "Public disclosure is not required for records that are...Records of law enforcement, prosecution, or regulatory agencies in any *pending* investigation or prosecution of criminal or unlawful activity, other than initial police arrest reports and initial incident reports..." O.C.G.A. § 50-18-72(4) (emphasis added). However, "an investigation or prosecution shall no longer be deemed to be pending when all direct litigation involving such investigation and prosecution has become final or otherwise terminated..." *Id.* Thus, when his petition for certiorari was denied in 2003, Petitioner could have sought the same records to support his initial state habeas petition claims. *See Parker v. Lee*, 259 Ga. 195, 198, 378 S.E.2d 677 (1989); *Napper v. Ga. Television Co.*, 257 Ga. 156, 165, 356 S.E.2d 640 (1987).

APPLICABLE LAW

“This Court lacks jurisdiction to entertain a federal claim on review of a state court judgment ‘if that judgment rests on a state law ground that is both independent of the merits of the federal claim and an adequate basis for the court’s decision.’” *Foster v. Chatman*, U.S. , 136 S. Ct. at 1746 (2016), quoting *Harris v. Reed*, 489 U.S. 255, 260, 109 S. Ct. 1038 (1989).

O.C.G.A. § 9-14-48 (d):

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

O.C.G.A. § 9-14-51

All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of this state otherwise requires or unless any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

REASONS FOR DENYING THE PETITION

Certiorari review should be denied as the state court's dismissal of the successive petition due to a state procedural bar rests on an independent and adequate state law ground.

With his execution imminent, Lance filed a successive state habeas petition alleging for a second time that his grand jury was unconstitutionally composed and selected. In an attempt to overcome the state procedural bars to reasserting this claim, Lance alleged that he had new evidence. Relying solely on state law, the habeas court found that the evidence was not new, but was previously available to Lance, and the claim was now procedurally barred under the doctrine of res judicata and dismissed the petition. (RA 22-24). The Georgia Supreme Court, denying Petitioner's application to appeal, affirmed the state habeas court's finding that the claim was barred by state law. This finding, resting solely on an adequate and independent state law ground, presents no issue warranting certiorari review and the petition should be denied.

A. State Habeas Court's Findings Based on State Law

The state habeas court found that Lance's claim that his grand jury was unconstitutionally composed and selected "was previously raised in his first habeas petition to this Court." (RA 22-23). The court found that Lance had raised the claim in 2005, quoting from Lance's amended state habeas petition:

The grand jury and traverse jury in Petitioner's case were unconstitutionally composed, were the result of unconstitutional practices and procedures, and subsequently denied Petitioner his constitutional rights guaranteed under the Fifth, Sixth, and

Fourteenth Amendments to the United States Constitution and Article 1, §1, and ¶¶ 1, 2, 11 and 12 of the Georgia Constitution.

(RA 22-23).

The state habeas court noted that it had previously, in Lance's first state habeas proceeding, found this claim to be procedurally defaulted based on state law "as Petitioner did not raise this claim at trial or on appeal to the Georgia Supreme Court and Petitioner had failed to establish cause and prejudice or a miscarriage of justice to overcome that default." (RA 23 (citing *Black v. Hardin*, 255 Ga. 239 (1985); *Hance v. Kemp*, 258 Ga. 649 (1988) and O.C.G.A. § 9-14-48(d)). The court then found that the claim was now barred by the state law of res judicata as "issues previously raised may not be relitigated in habeas corpus if there has been no change in the facts or the law or a miscarriage of justice." (RA 23 (citing *Bruce v. Smith*, 274 Ga. 432, 434 (2001); *Gaither v. Gibby*, 267 Ga. 96, 97 (1996); *Gunter v. Hickman*, 256 Ga. 315 (1986); *Elrod v. Ault*, 231 Ga. 750 (1974)).

With regard to Lance's claim that he has new evidence to overcome the procedural bars, the state habeas court held the evidence was not new:

First, just as he recently did in preparing for clemency, Lance's counsel could have spoken to witnesses prior to or during trial or during the three years of discovery in the first habeas proceedings before this Court. Second, although the prosecutor's conviction and sentence do not provide cause to overcome the default as they did not prevent Petitioner from raising this claim, Petitioner was aware, at least by the time of his briefing in this Court, that the prosecutor was under indictment. Third, documents concerning the composition of the grand juries in Jackson County were available to Petitioner prior to trial (O.C.G.A. 50-18-72 (6)), and if not then, certainly in his first habeas proceeding before this Court when he first raised this claim. Once his direct appeal ended in 2003, he

was able to request the same records through the Open Records Act just as his did in 2019. *See* O.C.G.A. § 50-18-70.

(RA 23).

Lance has failed to show how the fact finding of the state habeas court, that this evidence was not new but was previously reasonably available, warrants review by this Court. Moreover, the state habeas court's fact finding was not incorrect as Lance failed to even argue that this evidence was not available through reasonable. Instead, he merely argues that he failed to investigate his claim when he pled it in his first state habeas petition.

B. The Case Presents No Federal Question

Because the state court's dismissal was based on a finding that the claim was doubly-barred under state law, this Court should deny the petition for writ of certiorari. This Court has held on numerous occasions that a state court judgment which rests on an independent and adequate state-law ground presents no federal question for adjudication by this Court in a petition for a writ of certiorari. *Foster*, 136 S. Ct. at 1746 (2016), quoting *Harris v. Reed*, 489 U.S. at 260 (1989). The state habeas court determined Lance's reassertion of his unconstitutionally composed grand jury claim was barred by the adequate and independent state law. This Court lacks jurisdiction to review this claim and the petition and the motion for stay of execution should be denied.

CONCLUSION

As the state court denied Lance's claim on adequate and independent state law bars, this Court should deny the petition and request for stay of execution. *See, e.g., Foster v. Chatman*, U.S. , 136 S. Ct. 1737, *10 (2016); "*Harris v. Reed*, 489 U.S. 255, 260, 109 S. Ct. 1038 (1989)). Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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This 29th day of January, 2020.

s/Beth Burton
BETH BURTON
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