

No. 19-____

In the

Supreme Court of the United States

DONNIE CLEVELAND LANCE,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

**On Petition for Writ of Certiorari
to the Supreme Court of Georgia**

PETITION FOR WRIT OF CERTIORARI

**CAPITAL CASE
IMMINENT EXECUTION SCHEDULED
JANUARY 29, 2020 at 7:00 P.M.**

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January 23, 2020

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QUESTIONS PRESENTED

A Georgia trial court sentenced petitioner Donnie Cleveland Lance to death for the murders of Joy Lance and Dwight (“Butch”) Woods, Jr. despite no physical evidence directly connecting petitioner to the crime and no DNA testing of the physical evidence. The lack of testing may have been reasonable in 1999, when petitioner was tried and convicted, but in 2019 the Georgia Bureau of Investigation adopted the TrueAllele™ system of probabilistic genotyping for DNA testing—a now widely available system that could be used to test the shotgun shells, wood fragments, and latent fingerprints recovered from the crime scene. Testing could exonerate petitioner and point to the real perpetrator.

Georgia law provides a right to DNA testing in the context of an extraordinary motion for new trial. O.C.G.A. § 5-5-41(c). Petitioner has met the statutory requirements to avail himself of this right. Nonetheless, the Georgia state courts have denied testing by imposing additional arbitrary procedural and substantive requirements that are not contained in the statute. This departure from ordinary procedures and denial of petitioner’s statutory right has deprived him of constitutional due process and equal protection. If this Court does not intervene, petitioner will be executed on January 29, 2020.

The questions presented are:

1. Was petitioner denied due process and equal protection under the Fourteenth Amendment by the state courts’ imposition of extra-statutory

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requirements that petitioner present “convincing and detailed evidence of his innocence” and demonstrate “due diligence” before obtaining DNA testing critical to determining whether Petitioner is innocent.

2. Did the Georgia court violate petitioner’s rights under the Eighth and Fourteenth Amendments by evaluating the impact of favorable DNA results by reference only to a reading of the evidence actually presented at the trial favorable to the State rather than by reviewing the entire record, including the habeas record, in an objective manner and by requiring that the evidence would result in acquittal as opposed to considering broader sentencing implications?

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ORDERS AND OPINIONS BELOW

The unpublished September 30, 2019 Order of the Superior Court of Jackson County, Georgia, Denying Petitioner's Extraordinary Motion for New Trial is attached as Appendix A.

The December 2, 2019, Order of the Supreme Court of Georgia denying Petitioner's Application to Appeal is attached as Appendix B. The January 13, 2020 Order of the Supreme Court of Georgia denying Petitioner's Motion for Reconsideration is attached as Appendix C.

The decision of the Supreme Court of Georgia in *Lance v. State*, 275 Ga. 11 (2002), affirming Petitioner's conviction and death sentence on direct appeal is attached as Appendix D.

The 2009 decision of the Superior Court of Butts County, Georgia granting Petitioner's habeas corpus petition and ordering a new trial on sentencing is attached as Appendix E.

The decision of the Supreme Court of Georgia reversing the grant of habeas relief in Petitioner's favor, *Hall v. Petitioner*, 687 S.E.2d 809 (Ga. 2010), is attached as Appendix F.

The decision of the Eleventh Circuit affirming the denial of Petitioner's federal habeas corpus petition is attached as Appendix G. *Lance v. Warden*, 706 F. App'x 565 (11th Cir. 2017).

This Court's denial of Petitioner's petition for certiorari issued last year over the objection of three Justices is attached as Appendix H. *Lance v. Sellers*,

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139 S. Ct. 511 (2019) (SOTOMAYOR, GINSBURG & KAGAN, JJ., dissenting).

The relevant statute O.C.G.A. § 5-5-41 is attached as Appendix I.

JURISDICTION

The decision of the Supreme Court of Georgia denying petitioner’s application for leave to appeal from the trial court’s denial of his request for DNA testing in conjunction with his extraordinary motion for new trial was entered on December 12, 2019. *See* Appendix B. This Court’s jurisdiction is invoked under 28 U.S.C. § 1257(a), as petitioner asserts a deprivation of his rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition invokes the Eighth and Fourteenth Amendments to the United States Constitution:

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

U.S. Const. amend. VIII.

“[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

U.S. Const. amend. XIV.

STATUTORY PROVISIONS INVOLVED

O.C.G.A. § 5-5-41, in pertinent part, provides:

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§ 5-5-41. Requirements as to extraordinary motions for new trial generally; notice of filing of motion; limitations as to number of extraordinary motions in criminal cases; DNA testing

...

(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;

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- (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.

...

- (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;

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(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.

...

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STATEMENT OF THE CASE

Petitioner Donnie Cleveland Lance has consistently maintained that he did not commit the murders of his former wife, Joy Lance, and Butch Wood, and that his execution for those murders would violate his constitutional rights. From the time the murders were discovered within hours of the crime, petitioner was the only person investigated as a suspect. Despite the lack of physical evidence connecting petitioner to the crime, he was tried, convicted and sentenced to death.¹

While no murder weapon was ever recovered, the evidence established that Butch Wood was shot by a shotgun and that Joy Lance was bludgeoned to death, presumably by the shotgun stock. Shotgun shell casings, wood fragments—presumably from the gun stock—which were found near the victim’s head, and latent fingerprints were recovered from the scene but were never tested for DNA. Recent developments in DNA testing methodology, however, now provide a basis for testing this evidence. In 2019, the Georgia Bureau of Investigation adopted the TrueAllele™ system of probabilistic genotyping for DNA testing and strongly promoted its use within the Georgia law

¹ Every court that has evaluated petitioner’s trial has agreed that he did not receive effective assistance of counsel and that the jury did not hear evidence of petitioner’s mental impairments, as members of this Court have previously recognized. *Lance v. Sellers*, 139 S. Ct. 511 (2019) (SOTOMAYOR, J., dissenting) (Appendix H). Nonetheless, his convictions and sentences have not been overturned, and petitioner is scheduled to be executed on January 29, 2020.

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enforcement community. The Georgia courts have also validated the use of this technology in 2019. Defendant's Extraordinary Motion for New Trial and for Post-Conviction Testing Pursuant to O.C.G.A. § 5-5-41(c), *State v. Lance*, Jackson County No. M-CR-98-000036 (Apr. 26, 2019), at App. 3 p. 9; Application for Appeal Denial of Extraordinary Motion for New Trial, *State v. Lance*, Jackson County No. 98-CR-0036 (Oct. 30, 2019), at 17. These new DNA testing methodologies now make it possible to collect and analyze subtle DNA samples from the physical evidence collected from the scene of the murders.

Petitioner accordingly filed a motion in 2019 seeking the right to test, among other things, the spent shell casings,² wood fragments, and latent fingerprints and supported that motion with expert testimony establishing the viability of such testing using TrueAllele™ and the other technologies.

Under Georgia law, the state courts were obligated to assume that the testing results would be favorable to petitioner. *Crawford v. State*, 278 Ga. 95, 96-97 (2004). In this case, that means that the evidence would, at a minimum, fail to connect petitioner to the evidence and would demonstrate that another person's DNA was on the evidence. The

² One of the shells casings found at the scene contained a fingerprint. The State called a latent print examiner as a witness at trial to testify about this print, despite the fact that there was insufficient number of points of identification to make a match (Trial. Tr. 10:10–12). It is apparent from the State's presentation at trial that they believed this print to have been left by the perpetrator of the crime.

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State's case has always focused on the assumption that petitioner was the sole perpetrator for these crimes. DNA test results that disprove that theory would undermine the central tenet of the case against petitioner and entitle him to a new trial.

The Superior Court of Jackson County found that petitioner's motion for DNA testing met the requirements for an evidentiary hearing included in O.C.G.A. § 5-5-41(c) and conducted that hearing on July 31, 2019. Petitioner presented the testimony of its DNA expert and other information relevant to his motion. The State offered no evidence of any kind.

After conducting the evidentiary hearing, the Superior Court found that petitioner had established that evidence was available to be tested, that the chain of custody for the evidence had been preserved, that the evidence had not previously been tested for DNA, and that there were viable scientific methods for testing the evidence. *See* App. A. The Superior Court also agreed with petitioner—rejecting the State's contention—that “his identity as the perpetrator of these crimes was perhaps the *most significant* issue at trial.” App. 22-23.

Despite these findings, the Superior Court denied petitioner's request for DNA testing, based on requirements that are not found anywhere in the DNA testing statute's carefully defined provisions. The Superior Court first imposed a “heavy burden [on petitioner] to bring forward convincing and detailed proof of his innocence” as a precondition to obtaining DNA testing. App. 15. In doing so, the court violated

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petitioner's constitutional due process rights, including the right to rely on the process authorized by O.C.G.A. § 5-5-41. Based on this new standard, the Superior Court held that petitioner had not established that favorable DNA evidence would "create a reasonable probability of a different verdict in light of all the evidence in the case." App. 13-15.

In addition, the Superior Court imposed an additional subjective requirement of "due diligence" in seeking testing rather than applying the more objective statutory standard that petitioner's motion was not filed for "purpos[es] of delay." App. 17-22. While paying lip service to the new technologies now available for DNA testing, the Superior Court suggested that petitioner could have sought DNA testing under earlier technologies, despite the lack of any evidence that such earlier technologies could reasonably have been applied to the evidence in this case.

The Supreme Court of Georgia denied petitioner's Application for Leave to Appeal without comment, *see* App. B, and subsequently denied petitioner's Motion for Reconsideration of the denial of the appeal, App. C.

The State has scheduled petitioner's execution for January 29, 2020. Executing petitioner without a fair investigation of the evidence, with new and validated testing procedures never before applied to this evidence, simply should not be allowed.

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REASONS THE PETITION
SHOULD BE GRANTED

I The Georgia Courts’ Self-Imposed, Extra-Statutory Requirements For DNA Testing Denied Petitioner Due Process And Equal Protection Of Law.

As this Court has noted, “DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty.” *Dist. Attorney’s Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 55 (2009). Because of its “potential to significantly improve both the criminal justice system and police investigative practices,” both the federal government and States have developed “special approaches to ensure that this evidentiary tool can be effectively incorporated into established criminal procedure—usually but not always through legislation.” *Id.*

The Georgia legislature enacted a statute providing that the courts “shall order” DNA testing if certain specific requirements are met by a defendant. But in this case, the state courts grafted additional, arbitrary requirements onto the statute that deny petitioner his right to the testing that the statute was intended to provide. Denying petitioner his statutory right to testing—in contravention of the statute’s plain text—will deprive petitioner of his life and liberty in clear violation of his due process rights.

Petitioner satisfied the requirements of Georgia law, O.C.G.A. § 5-5-41, and thus was entitled to have DNA testing conducted in his case as a matter of right. The Superior Court expressly found that the statutory

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requirements were met: the evidence was available; and the evidence had never been tested; the chain of custody was not contested; there were available methods for testing the evidence for DNA; and the identity of the perpetrator of the crime was a significant issue at the trial. But the Superior Court then imposed additional requirements to deny petitioner's right to obtain and present the DNA evidence: first, by requiring a compelling showing of actual innocence in order to meet the standard of demonstrating a likelihood that the DNA evidence would result in a different verdict; and second, by imposing a non-statutory due diligence requirement as a precondition to testing. Neither of these conditions is part of the statute. Imposing them defeats the very purpose of the statute—to provide access to potentially exculpatory DNA evidence that was not available at the time of a defendant's trial.

The Georgia legislature used careful and precise language in its authorization for DNA testing in a case such as this. Nothing in the statute imposes a “heavy burden”³ or proof of “convincing and detailed proof of his innocence”⁴ as a condition to obtaining the testing. That made-up requirement conflicts with the statutory text and, in effect, undermines the very purpose of the statute by requiring a demonstration of innocence before being entitled to the very evidence that could establish innocence. Petitioner sought to invoke his right to DNA testing based on expert

³ App. 15.

⁴ *Id.*

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testimony as to the viability of such testing on the available evidence, and those testing results are likely the most compelling evidence of innocence available.

Under Georgia law, the Superior Court was required to assume that the result of DNA testing would be consistent with petitioner's contention. *Crawford*, 278 Ga. at 96-97 (defendant seeking DNA testing must only "show" but not prove how hypothetical result would likely result either in acquittal or reduced sentence). In this case, an assumption of favorable results means both that petitioner's DNA would not be found on the evidence and that another person's DNA would be present.

Applying the required presumption, it would be inconceivable that petitioner would have been tried for the murders, much less that he would have been convicted.⁵ But before even allowing the testing, the Superior Court required petitioner to put forth compelling evidence of innocence. The testing is, of course, required to provide that evidence. This extra-statutory requirement of proof of innocence violated Petitioner's due process rights: "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545,

⁵ The Superior Court offered explanations why the presence of another person's DNA might be explained away but did not address the assumption that both petitioner's DNA would be absent and another person's DNA (not petitioner or the victims) would be present on shotgun shell casings and wood fragments.

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552 (1965)).

There is nothing in the Georgia statute that requires a showing of compelling evidence of innocence. The very purpose of the statute is to provide access to such evidence that is not otherwise available. For the courts below to have grafted this requirement onto the statute clearly deprived petitioner of his right to testing and exposes him to execution without ever determining the results of DNA testing that could establish his innocence.

The imposition of an extra-statutory requirement of compelling proof of innocence, adopted by the Superior Court on a one-off basis, also operated to deny petitioner his right to equal protection of the laws. “Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, ‘stand on an equality before the bar of justice in every American court.’” *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (citation omitted). Here, petitioner is being denied his right to DNA testing based on a standard that is not in the statute and may well not be applied to other defendants.

Similarly, in terms of timing of the motion, O.C.G.A. § 5-5-41(c)(7)(D) (emphasis added) provides that “[t]he Court *shall grant* the motion for DNA testing if” it has been established that “[t]he motion is not made for purposes of delay.” Here, petitioner provided the required statement of his counsel that the motion was not “filed for the purpose of delay,” a requirement that essentially tracks the language of

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Rule 11 of the Georgia Civil Practice Act that “[t]he signature of an attorney constitutes a certificate by him that he has read the pleading and that it is not interposed for delay.” O.C.G.A. § 9-11-11(a) (emphasis added). Nothing more should have been required.

Particularly in this circumstance, there can be no contention that petitioner’s motion was filed for delay. The testing procedures petitioner sought to invoke were only recently validated by the Georgia courts and the Georgia Bureau of Investigation. Petitioner offered detailed evidence regarding the evolution of DNA testing, including the fact that the State of Georgia recognized TrueAllele™ testing, which petitioner’s expert sought to employ, as a viable methodology in 2019. Defendant’s Extraordinary Motion for New Trial and for Post-Conviction Testing Pursuant to O.C.G.A. § 5-5-41(c), *State v. Lance*, Jackson County No. M-CR-98-000036 (Apr. 26, 2019), at App. 3 pp. 8-9. The State offered no evidence of any kind at the hearing, including no evidence of any other motive for petitioner to file his motion when he did. Under these facts, petitioner was entitled to the DNA testing as a matter of right under the statute.

Despite the absence of any evidence suggesting that the motion was filed “for purposes of delay,” however, the Superior Court improperly injected into its analysis the “good cause” provision of O.C.G.A. § 5-5-41(a). This provision deals only with why a motion for new trial was not filed within 30 days of the entry of judgment in the case, which occurred in petitioner’s case in 1999. There was no evidence presented from any source that the sophisticated type of DNA testing

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at issue here was available in 1999—in fact the only evidence in the record from petitioner’s expert witness established exactly the opposite. Nonetheless, the Superior Court used the “good cause” provision to effectively write the statutory language limited to “for purposes of delay” out of the statute, in degradation of petitioner’s due process right to invoke the procedures in the statute. In exchange, the Superior Court applied a heightened standard, barring any reliance on DNA testing if petitioner could have in due diligence filed a motion for DNA testing, of any kind, at an earlier stage in this case.

This conclusion assumes that DNA testing, and the technology behind it, is static. It is not. Denying petitioner the ability to rely on newly-validated and accepted testing procedures is the same as willfully closing one’s eyes to exonerating evidence. The Superior Court suggested that “[t]hough technology is constantly advancing and will always continue to evolve, the law also requires diligence in pursuing an extraordinary motion for new trial.” App. 19-20 (citing *Patterson v. State*, 228 Ga. 389, 390 (1971)). The Superior Court then went even further, reading the Georgia Supreme Court’s six-factor test in *Timberlake v. State*, 246 Ga. 488 (1980), for granting an extraordinary motion for new trial into the equation for determining a right to DNA testing. App. 21-22.

By substituting a highly subjective “due diligence” standard for the more limited standard of whether the motion was filed “for purposes of delay,” the Georgia courts denied petitioner the due process right to DNA testing to establish his innocence and violated his

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right to equal protection of the law. There can be no question that the Georgia legislature was aware of the heightened “due diligence” standard of *Timberlake* when it enacted the statute, but it used the more limited “purposes of delay” standard. By grafting the higher standard on petitioner’s motion, the lower courts denied him equal protection and due process, both of which “emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, ‘stand on an equality before the bar of justice in every American court.’” *Griffin*, 351 U.S. at 17 (citation omitted).

Although this Court has held that a criminal defendant does not have a substantive due process right to access potentially exculpatory DNA testing, petitioner “does . . . have a liberty interest in demonstrating his innocence with new [DNA] evidence under state law.” *Osborne*, 557 U.S. at 68, 72–74.⁶ “When . . . a State creates a liberty interest,” as Georgia has done with O.C.G.A. § 5-5-41, “the Due Process Clause requires fair procedures for its vindication—and federal courts will review the application of those constitutionally required procedures.” *Swarthout*, 562 U.S. at 220.

Petitioner was denied due process by virtue of the lower courts’ imposition of the due diligence

⁶ *Osborne* was not a capital case (and Alaska, where *Osborne* arose, does not authorize capital punishment). But the reasoning of *Osborne* extends to capital cases in which a defendant seeks the opportunity under the applicable statute to test DNA evidence. *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011).

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requirement. This Court should grant review to confirm the principles set forth in *Osborne*, including the bedrock principle that having granted petitioner the right to DNA testing under state law, the Georgia courts cannot arbitrarily strip that right away.

II. The Georgia Courts Violated Petitioner's Constitutional Rights By Imposing An Unreasonable And Inequitable Standard.

The DNA-testing statute requires the movant to show that favorable DNA results “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.*” O.C.G.A. § 5-5-41(c)(3)(D) (emphasis added). But it also instructs trial courts that DNA testing *must* be granted upon a showing that “[t]he 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.*” O.C.G.A. § 5-5-41(c)(7)(G) (emphasis added).

The Superior Court assessed the possible impact of favorable DNA evidence solely on the basis of the trial evidence offered by the prosecution and viewed that evidence in the light most favorable to the prosecution. *See* App. 7-11. Moreover, the trial court appears to have ignored the evidence presented in the state habeas proceedings that raised serious questions about the prosecution’s theory of the case and evidence.

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In summarizing the evidence “taken as a whole,” the Superior Court quoted at length from the Georgia Supreme Court’s 2002 decision affirming petitioner’s conviction, stating that the Georgia Supreme Court had “found the facts as follows.” App. 2-4. But in doing so, the Court seemingly overlooked the fact that the Georgia Supreme Court had expressly stated in its 2002 opinion that it was “[v]iewing all of the evidence adduced at the guilt/innocence phase in the light most favorable to the jury’s guilt/innocence phase verdicts . . .” App. 33. By relying on one-sided summaries, rather than an independent evaluation of the material then available to the Superior Court, the Court disregarded significant evidence available to it as of the date of the hearing that raised substantial questions about whether petitioner was in fact the perpetrator of the crimes. By way of example:

- The Court did not assess the evidence introduced during the habeas hearing that the prosecution had offered knowingly false testimony of the jailhouse snitch, Frankie Shields, despite focusing specifically on Petitioner’s alleged “confession” to “fellow inmates.” App. 106.
- While the Court discussed extensively the Diehard shoe print found at the scene, it did not discuss the evidence that the print could have been at the scene for months before the crimes. Moreover, we now know that the State was aware at trial that, as of the date of the crimes, petitioner no longer owned Diehard shoes of the size its expert testified

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caused the print. Motion to Supplement Application to Appeal Denial of Extraordinary Motion for New Trial, *Lance v. State*, Case No. S20D0423 (Ga. Nov. 8, 2019).

- The Court did not assess the likely impact of the evidence of Lance's dementia and borderline IQ on a jury's assessment of his ability to plan, execute, and cover-up the murders without leaving behind physical evidence, as the prosecution contended he had done.

For each of these areas, DNA evidence would materially assist petitioner. It would support petitioner's position, that petitioner was not involved in the crimes for which he was convicted and sentenced to death. The evidence certainly would have provided additional grounds for reasonable doubt as to petitioner's guilt, as well as grounds to question his culpability. Viewing the evidence through the prosecution's eyes as a vehicle for denying DNA testing, rather than assessing the evidence as a whole, renders the promise of Georgia's DNA statute wholly illusory in violation of petitioner's constitutional rights under the Fourteenth Amendment.

Perhaps most significantly, the Superior Court's one-sided view of the facts defeats the purpose of the statute authorizing DNA testing by ignoring critical evidence bearing on the question of how favorable DNA results would impact a jury's assessment of Petitioner's culpability. The trial court should have considered the possibility that DNA evidence could

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have led to a reduced sentence—as opposed to imposing a winner-takes-all acquittal standard that is not statutorily required. In *Crawford v. State*, 278 Ga. 95 (2004), the only decision applying the DNA-testing statute to a death-sentenced defendant, the Georgia Supreme Court construed the statute to authorize DNA testing when favorable results would have a likely impact on sentence. It denied relief in the case “because, even assuming the reality of the DNA testing results Crawford has hypothesized, such results would not in reasonable probability have led to Crawford’s acquittal, *or to his receiving a sentence less than death*, if they had been available at Crawford’s trial.” *Id.* at 99 (emphasis added). In petitioner’s case, however, the Superior Court ignored this critical aspect of the case, focusing solely on the issue of guilt/innocence.

Having made DNA testing available to those convicted of felonies, *see* O.C.G.A. § 5-5-41(c)(1), Georgia courts cannot disallow such testing for those capital defendants who can demonstrate that favorable test results would have had a likely impact on the jury’s decision to impose the death penalty. *See, e.g., Smith v. Murray*, 477 U.S. 527, 537-38 (1986) (acknowledging that concept of “‘actual’ . . . innocence” may be applied to errors with respect to the death penalty); *see also Sawyer v. Whitley*, 505 U.S. 333, 346-47 (1992) (defining “actual innocence of the death penalty” as exception to procedural default in federal habeas proceedings). Doing so violates both petitioner’s due process rights and his right to equal protection of the law.

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In *Beck v. Alabama*, 447 U.S. 625 (1980), disparate treatment between capital and non-capital defendants was critical to this Court's holding that due process was violated by a statute prohibiting the trial court, in a capital case, from giving the jury the opportunity to convict the defendant of a lesser included offense supported by the evidence, while providing that in non-capital cases the jury be so charged. Although the Court focused on the coercive effect this system would have on jurors limited to the options of convicting or acquitting the defendant for capital murder and the diminished reliability of the verdict, central to its decision was the differential treatment accorded capital and non-capital defendants under state law.

In reversing the grant of habeas corpus relief in *Hopkins v. Reeves*, 524 U.S. 88 (1998), on the ground that due process did not require a trial court to instruct the jury on lesser charges that did not constitute lesser included offenses under state law, this Court stressed the "equal protection" underpinnings of its due process analysis in *Beck*:

Beck is . . . distinguishable from this case in two critical respects. The Alabama statute prohibited instructions on offenses that state law clearly recognized as lesser included offenses of the charged crime, *and it did so only in capital cases*. Alabama thus erected an "artificial barrier" that restricted its juries to a choice between conviction for a capital offense and acquittal. Here, by contrast, the Nebraska trial court did not deny respondent

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instructions on any existing lesser included offense of felony murder; it merely declined to give instructions on crimes that are not lesser included offenses. In so doing, the trial court did not create an “artificial barrier” for the jury; *nor did it treat capital cases differently from noncapital cases*. Instead, it simply followed the Nebraska Supreme Court’s interpretation of the relevant offenses under State law.

Id. at 96 (emphasis added) (internal citations omitted).

The Georgia courts here imposed an unfair burden on defendants, one that the statute does not even authorize. *See* O.C.G.A. § 5-5-41. By requiring defendants to prove that DNA evidence would have led to an acquittal, but then favoring the State’s view of the evidence, defendants are prevented from putting forth one of the best arguments for innocence—DNA evidence to be collected through the requested testing procedures. This singular focus, which targets those most in need of the statute’s assistance, is grossly unfair. Petitioner urges the Court to grant certiorari to prevent the State of Georgia from executing him without allowing the fair consideration of DNA evidence that O.C.G.A. § 5-5-41 and due process requires.

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CONCLUSION**

Petitioner respectfully requests that the Court grant the petition for writ of certiorari.

Respectfully submitted this 23rd day of
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