

Nos. 19-922 and 19A-826

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 Superior Court Of Georgia,
Jackson County**

—◆—
**BRIEF IN OPPOSITION TO PETITION
FOR CERTIORARI AND IN OPPOSITION
TO MOTION FOR STAY OF EXECUTION**

—◆—
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**CAPITAL CASE
QUESTIONS PRESENTED**

- I. Whether this Court should grant certiorari to review a state court's decision which was based on an interpretation of a state statute and thereby rested on independent and adequate state law grounds?
- II. Whether this Court should grant certiorari to review Petitioner's mere disagreement with the state trial court's application of Georgia's post-conviction DNA statute to the facts of Petitioner's case?

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OPINIONS BELOW

The decision of the Georgia Supreme Court in the criminal direct appeal is published at 275 Ga. 11 (2002) and is Petitioner's Appendix D.

The decision of the state habeas court is not published, but is included in Petitioner's Appendix E.

The decision of the Georgia Supreme Court reinstating Petitioner's death sentence is published at 286 Ga. 365 (2010) and is included in Petitioner's Appendix F.

The decision of the Eleventh Circuit Court of Appeals is unpublished but reported at 706 Fed. Appx. 565 (2017) and is included in Petitioner's Appendix G.

The decision of the Jackson County Superior Court denying Petitioner's extraordinary motion for new trial is included in Petitioner's Appendix A.

The Georgia Supreme Court's denial of Petitioner's application to appeal the denial of his extraordinary motion for new trial is included in Petitioner's Appendix B and the denial of the motion for reconsideration is included in Petitioner's Appendix C.



**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

The Eighth Amendment to the United States Constitution provides:

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

The Fourteenth Amendment, Section I, of the United States Constitution provides in relevant part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law
. . . .

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

(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.

* * *

(c) (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.

* * *

(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.



INTRODUCTION

Alleging due process and equal protection violations, Petitioner Donnie Cleveland Lance challenges the trial court's denial of his extraordinary motion for new trial and DNA testing, which is governed by O.C.G.A. § 5-5-41. Lance alleges a due process violation in that he claims the trial court did not properly apply the statute when analyzing his claim by imposing additional requirements and not considering all the evidence in the case. He also alleges an equal protection claim arguing that non-death penalty defendants are treated differently than death penalty defendants under the statute. Lance's claims are not factually supported by the record, which shows instead that the trial court adhered to the state statute in reviewing

Lance's claims. Instead, Lance's claims are simply a request for this Court to conduct factbound alleged error correction of the application of a state statute. Certiorari review should be denied.

◆

STATEMENT OF THE CASE

A. Trial and direct appeal (1999-2002)

Twenty years ago, in 1999, Lance was convicted in the Superior Court of Jackson County, Georgia of the 1997 malice murders of his ex-wife Joy Lance and Dwight "Butch" Woods. *Lance v. State*, 275 Ga. 11, 560 S.E.2d 663, n.1 (2002). He was also found guilty of burglary and possession of a firearm during the commission of a crime. *Id.* Following the sentencing phase of trial, Lance was sentenced, *inter alia*, to death. The Georgia Supreme Court affirmed the convictions and sentences. *Id.*

The evidence against Lance, although circumstantial, was overwhelming. On direct appeal, as quoted by the trial court in denying the extraordinary motion for new trial and DNA testing (PA 2-4),¹ the Georgia Supreme Court found the evidence at trial established the following:

The bodies of the victims were discovered in Butch Wood's home on November 9, 1997. Butch had been shot at least twice with a

¹ Respondent has cited to Petitioner's Appendix denoted as "PA" followed by the page number.

shotgun and Joy had been beaten to death by repeated blows to her face. Expert testimony suggested they had died earlier that day, sometime between midnight and 5:00 a.m. The door to Wood's home had imprints consistent with size 7 1/2 EE Sears "Diehard" work shoes. Joy's father testified he told appellant Joy was not at home when appellant had telephoned him looking for Joy at 11:55 p.m. on November 8. A law enforcement officer testified he saw appellant's car leave appellant's driveway near midnight. When questioned by an investigating officer, Lance denied owning Diehard work shoes; however, a search of Lance's shop revealed an empty shoe box that had markings showing it formerly contained shoes of the same type and size as those that made the imprints on Wood's door, testimony by Sears personnel showed that Lance had purchased work shoes of the same type and size and had then exchanged them under a warranty for a new pair, and footprints inside and outside of Lance's shop matched the imprint on Butch Wood's door. Officers also retrieved from a grease pit in Lance's shop an unspent shotgun shell that matched the ammunition used in Wood's murder.

Joe Moore testified he visited Lance at his shop during the morning of November 9, 1997, before the victims' bodies were discovered. Referring to Joy, Lance told Moore that "the bitch" would not be coming to clean his house that day. Lance stated regarding Butch Wood that "his daddy could buy him out of a bunch

of places, but he can't buy him out of Hell." Lance also informed Moore that Joy and Butch were dead. Moore disposed of several shotgun shells for Lance, but he later assisted law enforcement officers in retrieving them. The State also presented the testimony of two of appellant's jail mates who stated appellant had discussed his commission of the murders.

The State also presented evidence that appellant had a long history of abuse against Joy, including kidnapping, beatings with his fist, a belt, and a handgun, strangulation, electrocution or the threat of electrocution, the threat of burning with a flammable liquid and of death by a handgun and with a chainsaw, the firing of a handgun at or near her, and other forms of physical abuse. Several witnesses testified that appellant had repeatedly threatened to kill Joy if she divorced him or was romantically involved with Butch, and that Lance had also beaten and threatened to kill Butch's wife and several other persons related to Joy. A relative of Joy testified that Lance once inquired how much it would cost to "do away with" Joy and Butch. Towana Wood, who was Butch's former wife, and Joe Moore testified about an invasion of Butch's home committed by Joe Moore and appellant in 1993. The invasion was prompted in part by appellant's belief that Butch was romantically involved with Joy. In the 1993 incident,

appellant kicked in a door to the home, entered carrying a sawed-off shotgun, and loaded the chamber of the shotgun.

Lance, 275 Ga. at 12-13.

As also noted by the trial court (PA 4-5), on appeal reinstating Lance's sentence following the erroneous grant of state habeas corpus relief, the Georgia Supreme Court found the evidence established the following:

[Lance] had repeatedly threatened to kill [Joy] himself, and he had once inquired of a relative about what it might cost to hire someone to kill her and Butch Wood. Lance kicked in the door of Butch Wood's home in 1993 armed with a shotgun, loaded a shell into the chamber of the shotgun, and then fled only after a child in the home identified and spoke to Joe Moore, Lance's friend who was accompanying Lance that night.

Shortly before midnight on November 8, 1997, Lance called Joy Lance's father, asked to speak to her, and learned that she was not at home. Shortly afterward, a passing police officer noticed Lance's automobile leaving his driveway. . . . Lance later told a fellow inmate that he "felt stupid" that he had called Joy Lance's father before the murders, and Lance

bragged to the inmate that “he hit Joy so hard that one of her eyeballs stuck to the wall.”

Hall v. Lance, 286 Ga. 365, 366, 687 S.E.2d 809, 811 (2010).²

B. State habeas proceeding (2003-2009)

Lance filed his state habeas petition in 2003. He raised 29 claims for relief, many containing sub-claims, one of which alleged only a perfunctory claim of innocence. Represented by current counsel, Lance had six years between the filing of his petition and the evidentiary hearing to request DNA testing. During that extended time period, when DNA testing was clearly available, **Lance never made a request to have any evidence tested.**

At the four-day state habeas evidentiary hearing, Lance submitted 44 affidavits, testimony of live witnesses (including four experts), and 264 exhibits. He filed a 107-page brief, which included a two-sentence argument of innocence.

The state habeas court found Lance’s claim of innocence was not cognizable in habeas, but vacated the death sentence on a separate claim. The Warden appealed and Lance cross-appealed. *See Hall v. Lance*, 286 Ga. 365 (2010). In his cross-appeal, Lance alleged the habeas court erred in finding his claim of innocence

² The evidence showed the murder of Joy Lance was extremely brutal and vicious—she was beaten in the face beyond recognition. Butch Wood was shot in the back.

was not reviewable. The Georgia Supreme Court held Lance had waived this claim **as it was not briefed**. *Id.* at 378. The Court “reversed and reinstated Lance’s death sentence.” *Id.*

C. Federal habeas proceedings (2010-2017)

The federal habeas court denied habeas relief on December 22, 2015. Lance **never requested DNA testing of any evidence**. The Eleventh Circuit affirmed the denial of federal habeas relief. *Lance v. Warden*, 706 Fed. Appx 565 (11th Cir 2017) (unpublished), *cert. denied*, 139 S. Ct. 511 (2019).

D. EMNT Proceeding (2019-2020)

On April 26, 2019, after all his appeals were exhausted and an execution order was imminent, Lance filed an extraordinary motion for new trial and a request for DNA testing pursuant to O.C.G.A. § 5-5-41 in the criminal trial court. The trial court found that Lance’s motion complied with O.C.G.A. § 5-5-41(c)(3) and (c)(4) and scheduled a hearing. (PA 8). The trial court held the hearing on July 31, 2019 to determine whether DNA testing should be granted.

On September 30, 2019, following the hearing and briefing by both parties, the trial court denied Lance’s request for DNA testing and his extraordinary motion for new trial finding that Lance had not established that the DNA testing would, in reasonable probability, have led to a different result at trial in light of all the

evidence and that Lance had failed to show his filing was not for the purpose of delay. Lance timely filed an application for discretionary appeal with the Georgia Supreme Court. On December 2, 2019, the Court denied the request to appeal, (PA 25-26), and on January 13, 2020 denied Lance's motion for reconsideration (PA 27-28).



REASONS FOR DENYING THE PETITION

I. The trial court's factbound application of long-standing state law requirements governing extraordinary motions for new trial and DNA testing presents no issue warranting this Court's exercise of its certiorari jurisdiction.

With regard to both questions presented, Lance seeks certiorari review of the trial court's decision applying a state statute to the specific facts of his case. The clear state law basis for the trial court's denial of his extraordinary motion for new trial and request for DNA testing establishes that this decision rests on an adequate and independent state law ground, authorizing the denial of this petition for a writ of certiorari under this Court's longstanding precedent.

In *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945), this Court held, "[t]his Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." The Georgia Supreme

Court's interpretation and application of a state statute to the particular facts of Lance's case³ constitutes an adequate and independent state ground which warrants the denial of this petition for a writ of certiorari. *See Herb*, 324 U.S. 117 (1945).

II. The trial court's denial of the extraordinary motion for new trial and DNA testing was based on a proper application of a state statute and presents no issue warranting this Court's exercise of its certiorari jurisdiction.

Lance alleges that the trial court did not comply with the state statute and imposed two additional requirements—a “compelling” showing of actual innocence⁴ and due diligence. He alleges these additional “requirements” denied him due process. The record, in contrast, shows that the trial court did not impose additional non-statutory requirements on Lance and his current challenge to the trial court's holding does not raise a constitutional issue, but merely challenges the implementation of a state statute to the specific facts of this case. The claim does not warrant certiorari review.

³ This Court has also repeatedly emphasized that it does not grant certiorari to “review specific facts.” *See United States v. Johnson*, 268 U.S. 220, 227 (1925) and *Texas v. Mead*, 465 U.S. 1041 (1984).

⁴ Although repeatedly cited by Lance, the word “compelling” does not appear in the trial court's order.

A. The state court properly reviewed the totality of the evidence as required by the state statute.

To obtain DNA testing after he was afforded a hearing in compliance with O.C.G.A. § 5-5-41(c)(6)(A), Lance had to meet all the requirements of O.C.G.A. § 5-5-41(c)(7), which included establishing that: his motion was not for the purpose of delay (c)(7)(D); the evidence sought to be tested is material to the crime and aggravating circumstances (c)(7)(G); and “[t]he 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” (c)(3)(D). Applying the statute, the trial court found Lance had failed to meet these requirements. Lance implies that the statute mandates the trial court to grant DNA testing if he meets any of the other requirements of O.C.G.A. § 5-5-41(c), but that is an improper reading of the statute. The statute has conjunctive requirements, and no one requirement supersedes another. The claim—a factbound application of a state statute—does not present a constitutional question; nor does the record support the allegations that form the basis of Lance’s claims.

Lance argues that the trial court required him to make “a compelling showing of actual innocence in order to meet the standard of demonstrating a likelihood that the DNA evidence would have resulted in a different verdict,” which is not mandated by statute. (Petition, p. 11). Even a cursory reading of the trial court’s

order establishes that this was not the analysis utilized by the trial court. In direct accordance with the statute, as to each item of evidence, the trial court repeatedly and properly applied O.C.G.A. § 5-5-41(6)(E) and denied the testing based on “a reasonable probability of a different verdict in light of all the evidence in the case.” (See PA 8, 9, 13, 14, 15).⁵ The trial court clearly did not apply a “compelling evidence” requirement not set forth by statute.

Moreover, Lance fails to show the use of the word “compelling” by the trial court created a standard in violation of his due process rights. The statute requires the court to analyze whether the proposed DNA results would create a reasonable probability of acquittal in light of all the evidence in the case. The trial court clearly utilized this standard and Lance points to no precedent by this Court showing how the trial court’s overall analysis of this prong violated his due process rights.

A nearly identical claim was raised in *DA’s Office v. Osborne*, 557 U.S. 52 2308 (2009), and was rejected by the Court. Osborne sought DNA testing and the Alaska courts denied his request. Osborne filed a § 1983 action in federal court, and ultimately the

⁵ The trial court also concluded that Lance had not established O.C.G.A. § 5-5-41(c)(7)(G)—“a prima facie showing that the evidence sought to be tested is material to the issue of . . . aggravating circumstances. . . .” (PA 23). The court again found that “even if the DNA results came back in a manner most favorable to Defendant, there is not reasonable likelihood of a different result in light of all the other evidence in the case.” *Id*

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. The Supreme 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.” *Id.* The court held that a state prisoner had no “free-standing right to DNA testing evidence” under the due process clause in federal court. *Id.* at 72-73. Additionally, and pertinent to Lance’s claim before this Court, the Supreme Court held that Osborne failed to prove that the Alaska procedures for postconviction 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 (1992) (internal quotation marks omitted)).⁶

B. The state court properly found Lance’s motion was for the purpose of delay as prohibited by state statute.

Lance also alleges that the trial court imposed a due diligence requirement on him that is not contained in the state statute. The trial court’s order shows, however, that the trial court addressed due diligence as a factor in considering whether Lance had established

⁶ Although Lance cites to *Osborne*, he fails to set forth this standard.

that he was not filing the motion simply for the purpose of delay, which is expressly prohibited by statute. The trial court did not impose any non-statutory requirements.

As correctly found by the trial court, before the Court could grant DNA testing, O.C.G.A. § 5-5-41(c)(7)(D) required Lance to “*establish* that the motion has not been filed for the purpose of delay.” (PA 17).⁷ In analyzing this requirement, the trial court found that “DNA testing has been possible for decades,” including seven years prior to Lance’s trial. (PA 18). Similarly, reviewing the different testing methods as well as the collection method Lance sought to use, the trial court found that all were available years before Lance’s requested motion for DNA testing. (PA 18-19). The trial court also noted that the newer statistical analysis methods Lance sought, probabilistic genotyping software, which is program for formulating statistics in DNA analysis (not a testing method) was being used by 2017 and therefore had also been available to Lance for at least two years. (PA 19).

⁷ Lance asserts that “he provided the required statement of his counsel that the motion was not ‘filed for the purpose of delay’” and “[n]othing more should have been required.” (Petition, p. 14). As correctly noted by the trial court, prior to obtaining a hearing on his motion for DNA testing, O.C.G.A. § 5-5-41(c)(4)(A) required Lance to merely *state* that the motion for DNA testing was not filed for the purpose of delay. (PA 17). But, before the Court could grant DNA testing, O.C.G.A. § 5-5-41(c)(7)(D) required Lance to “*establish* that the motion has not been filed for the purpose of delay.” *Id.* See also *Crawford v. State*, 278 Ga. 95, 97, 597 S.E.2d 403, 404 (2004).

The trial court found that Lance “has known about the physical evidence since the time of his 1999 trial and has been continuously represented in his post-conviction proceedings.” (PA 21). The court further found that, as the proper venue to raise the claim was in the trial court, Lance could have raised the claim at any time over the past 20 years. The court concluded:

Defendant failed to exercise due diligence by waiting to file this motion until all other litigation was completed and the final petition for writ of certiorari to the US Supreme Court was denied. Therefore, **Defendant has not established that the motion was not filed for the purpose of delay.**

(PA 22) (emphasis added).

Lance argues that the due diligence is not a requirement and the trial court erred in considering that factor, however, as found by the trial court, although O.C.G.A. § 5-5-41(c)(7) does not speak to due diligence:

O.C.G.A. § 5-5-41(c)(1) states that an extraordinary motion for new trial is subject to the provision of subsection (a), which requires a petitioner to show “some good reason” for the delay if the motion was made outside of a period of 30 days from the entry of judgment. The statute provides that this reason shall be judged by the Court. *Id.* The Georgia Supreme Court has explained that this kind of good reason “exist only where the moving party exercised due diligence but, due to circumstances beyond its control, was unable to

previously discover the basis of the claim it now asserts.”

(PA 17). *See also Ford Motor Co. v. Conley*, 294 Ga. 530, 539, 540-41, 757 S.E.2d 20, 30 (2014) (“*regardless of the basis for an extraordinary motion for new trial*” and “*before considering the merits of the [untimely] motion,*” “OCGA § 5-5-41(a) requires the moving party to show a ‘good reason’ why the motion was not filed during the 30-day period after the entry of judgment.”)⁸ Because the trial court denied Lance’s extraordinary motion for new trial based on the denial of the DNA testing, the two analyses are intertwined and that factor was properly considered by the trial court in finding Lance had not shown his motion was not filed for the purpose of delay.⁹ Because this was part of the statutory requirements, Lance failed to show a due process violation. *See Osborne, supra*. More to the point, Lance’s argument is simply a request for factbound error correction.

⁸ It is clear from the plain language of the statute and the appellate court’s interpretation of this statute that the legislature was concerned with defendants delaying requests for DNA testing, which this Court has held in the federal arena is constitutionally sound. *See Osborne, supra*.

⁹ There is no “purpose” for the delay requirement in a non-death penalty case, so there has to be some type of diligence component to be considered.

1. Lance established no basis for his delay.

At no point, in the 22 years since his crimes, has Lance requested DNA testing. The only argument Lance makes for his failure to seek testing until immediately prior to the scheduling of his execution is that the DNA testing methods he requested only became available in recent years. This pretext does not suffice to establish no undue delay or “good reason” to excuse the untimely filing of his request for DNA testing under state law. Moreover, Lance fails to show this considerations violations any due process rights. *See Osborne, supra.*

First, Lance presented no proof that he was unable to present his extraordinary motion for new trial and request for DNA testing prior to 2019. Second, as found by the trial court (PA 21-22), the proper venue for seeking DNA testing has always been in the trial court through O.C.G.A. § 5-5-41, which Lance could have pursued at any time. Third, although Lance has argued that some of the requested DNA testing methods may not have been available until recently, the methods he is relying upon (touch DNA testing, the Bardole Method, mitochondrial DNA testing, and Y-STR) were available years before he filed his extraordinary motion. Finally, Lance argues that he was not required to ask for DNA testing until the science reached the most optimal point of use. Again, no part of O.C.G.A. § 5-5-41, or state case law holds that a defendant can sit on his evidence waiting for science to advance. If a Lance could overcome the “delay requirement” by merely

asserting there was new and/or better technology available, it would render the diligence component a nullity. As acknowledged by Lance “technology is constantly advancing and will always continue to evolve.” (Brief, p. 15).

2. The trial court properly applied the state statute and found the motion was filed for the purpose of delay.

The trial court properly applied Georgia’s statute and concluded that Lance had failed to establish that his extraordinary motion and request for testing were not filed for the purpose of delay based on its findings that: the testing methods Lance sought to employ had been available for years; the items he sought testing on had been known to him for at least 22 years; and Lance waited until the completion of his appeals, knowing his execution warrant was imminent, to file. The proper application of a state statute to the specific facts of this case does not warrant certiorari review.

III. Georgia’s statute does not violate equal protection or due process and presents no issue warranting this Court’s exercise of its certiorari jurisdiction.

Lance conflates two arguments in his second question presented. First, he takes issue with the evidence cited by the trial court in denying his request for testing. This part of Lance’s argument asks this Court for mere factbound error correction of an application of

state law. The second part of his argument is that the courts, based on the statute, allegedly treat death penalty offenders differently than non-death penalty offenders in violation of equal protection and due process. This second portion of Lance's argument is neither borne out by the statute or the specific facts of this case and certiorari review is not warranted.

A. The Court should not grant certiorari to review a claim of factbound error correction of the trial court's order applying a state statute.

Although Lance takes issue with the facts cited by the trial court in denying his motion alleging that the trial court did not consider the entire record, but only those facts favorable to conviction. Yet, the facts cited and relied upon in the court's order do not equate with all the facts reviewed by the trial court. As set forth above, the trial court, repeatedly throughout its order, noted that it was considering "all the evidence" in direct accordance with the state statute. (*See* PA 8, 9, 13, 14, 15). This issue presents no issue, and, particularly, no constitutional issue, for review.

Moreover, again in *Osborne*, the Court determined similar requirements in the Alaska and federal procedures were not unconstitutional. Similar to Georgia's statute requiring a reasonable probability of acquittal, in Alaska, the postconviction DNA procedures required that the evidence would "raise a reasonable probability that the applicant did not commit the offense."

Osborne, supra, at 70. Thus, Lance has not proven Georgia’s statute “offends the traditions or conscience of our people” or violates a “recognized principle of fundamental fairness.” *Medina*, 505 U.S. at 446; *see also Alvarez v. AG for Fla.*, 679 F.3d 1257, 1266 n.2 (2012).

B. The Court should not grant certiorari to review a claim that raises no federal constitutional issues.

Lance also argues that because O.C.G.A. § 5-5-41(c) (3)(D) requires an assessment of whether “[t]he 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,” and does not address sentence, it violates equal protection and due process of a capital defendant. However, since the statute applies equally to both death penalty and non-death penalty offenders, requiring both to show a reasonable probability of acquittal, there is no equal protection violation.¹⁰ This claim presents no issue worthy of certiorari review.



¹⁰ Also, in finding Lance failed to show O.C.G.A. § 5-5-41(c)(7)(G)—materiality—the trial court had to consider whether Lance “has made a prima facie showing that he evidence sought to be tested is material to the issue of the petitioner’s . . . aggravating circumstances.” (PA 23).

CONCLUSION

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

Respectfully submitted.

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