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 Supreme Court of Georgia

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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

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January 28, 2020

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REPLY BRIEF FOR PETITIONER

Petitioner moved for DNA testing in April 2019, roughly contemporaneously with the State of Georgia's recognition of a new probabilistic genotyping DNA testing methodology with the capacity to recognize and test "touch" DNA samples with greater sensitivity than methods previously available. The Georgia state courts denied petitioner access to testing in a way that deprives him of his liberty interest, protected under the Fourteenth Amendment of the federal Constitution, to demonstrate his innocence with new evidence under state law. *Dist. Attorney's Office v. Osborne*, 557 U.S. 52, 68 (2009) (Roberts, C.J.).

Try as it might, the State of Georgia cannot avoid the constitutional implications of the extra-statutory hurdles to DNA testing it has erected by calling the petition, over and over, "simply a request for factbound error correction." *See, e.g.*, Resp. to Pet. for Cert. at 19. Georgia's effort to mask the significant constitutional issue at stake cannot survive scrutiny. What the State has done in petitioner's case is to unconstitutionally limit DNA testing to instances where, in the words of the Superior Court, the applicant meets "a heavy burden to bring forward convincing and detailed proof of his innocence." Pet. App. 15. In other words, a defendant under the standard Georgia is applying, can only access the tool needed to prove his innocence, namely, modern DNA testing, if he proves he is innocent before the testing even occurs.

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The State also attempts to obscure the legal and constitutional merits of the petition by emphasizing the brutal nature of the crime. Even the Superior Court "agree[d] with Defendant that his identity as the perpetrator [of these brutal acts] was perhaps the most significant issue at trial." Pet. App. 22-23. So whether the petitioner is in fact the individual who committed the brutal crime is exactly the issue that DNA testing—which was unavailable 20 years ago when petitioner was tried—could now elucidate. And, as the State is aware, the grim recitation of facts it repeats, *see* Resp. to Pet. for Cert. at 6-10, relies on multiple witnesses who have subsequently recanted their trial testimony.[1] But the key element is that the petitioner's entitlement to testing to prove his innocence should not turn on whether the underlying

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[1] For example, the State's recitation of facts references that "[t]he State also presented the testimony of appellant's jail mates who stated appellant had discussed his commission of the murders." Resp. to Pet. for Cert. at 8. One of those jail mates, Frankie Shields testified on habeas that he had fabricated this testimony at trial in exchange for promises that the Department of Corrections would give him a more favorable prison assignment. Supp. App. 1-2, 5-7. Evidence was also adduced on habeas that the second jail mate, Morgan Thompson a/k/a Frank Morton, also gave untrue negative testimony against petitioner at trial in exchange for getting out of prison. Supp. App. 3-5. Likewise, the State's factual recitation includes a statement that "[a] relative of Joy testified that Lance once inquired how much it would cost to 'do away with' Joy and Butch." Resp. to Pet. for Cert. at 8. That witness, Marty Love, has also recanted this testimony, telling the State Board of Pardons and Paroles that "[t]hat just wasn't something Donnie would have ever said or done. I never heard Donnie say that." Supp. App. 8-9.

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crime was brutal, or the nature of the criminal defendant's character, so-called "history of abuse" or how sympathetic the State and the Georgia courts found the petitioner to be. Rather, it rests on whether the State has afforded the petitioner the due process rights every criminal defendant enjoys to demonstrate his innocence with new evidence, once that state determines to grant a DNA testing procedure as Georgia has done here.

ARGUMENT

I. Petitioner's Request Was Timely As The TrueAllele™ Technology Was Not Available Previously.

Petitioner filed an extraordinary motion for new trial for one purpose—to use TrueAllele™, a new probabilistic genotyping system for DNA testing adopted by the Georgia Bureau of Investigation in 2019, to test shell casings, wood fragments, and latent fingerprints from the crime. The State does not contest in its Response that the trace amounts of DNA contained on these objects could only be tested with the most up-to-date testing methodologies.

The State contends that petitioner could have raised his DNA testing claim "at any time over the past 20 years," but chose to wait "until immediately prior to the scheduling of his execution." Resp. to Pet. for Cert. at 18, 20. This contention is simply false. The entirety of petitioner's request, filed on April 26, 2019, rests on the development of the new TrueAllele™ technology, which the Georgia Bureau of Investigation only adopted in the past year.

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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).

Petitioner theoretically could have filed a motion asserting his innocence at any point over the past 20 years, but such a motion without evidentiary support would have been futile. Once the TrueAllele™ technology was accepted in the State of Georgia, petitioner wasted no time seeking the testing of evidence from his case. Filing a motion to use new technology adopted that same year by the State is hardly "sit[ting] on his evidence waiting for science to advance." Resp. to Pet. for Cert. at 20. Simply put, the evidence did not exist previously. To suggest that petitioner should have filed a motion, years earlier, without any evidentiary support and before the development of the sophisticated DNA testing methodologies that now exist and that are capable of testing the objects at issue would be illogical.

The State further contends that the "pretext" of TrueAllele™ only recently becoming available "does not suffice to establish no undue delay" for the filing of his motion. Resp. to Pet. for Cert. at 20. O.C.G.A. § 5-5-41(c)(7)(D) provides that "[t]he Court shall grant the motion for DNA testing if" it is established that "[t]he motion is not made for purposes of delay." Noticeably missing from the statute is a "good reason" requirement—misapplied by the Superior Court. Petitioner's request for DNA testing could not possibly have been made for purposes of delay because the TrueAllele™ technology, the basis for the request, did

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not exist and was not adopted by the State previously. Even applying the standard that petitioner show "'some good reason' for delay if the motion was made outside of a period of 30 days from the entry of judgment," that the Superior Court grafted onto the statute (Appendix A at App-17), the record shows that the earliest reference to the use of TrueAllele™ in Georgia was in 2017, *see* Pet. App. 19, as the State acknowledges, Resp. to Pet. for Cert. at 17, and was not adopted by Georgia's Bureau of Investigation until 2019—way beyond 30 days from the entry of judgment in 1999.

The State's reasoning is circular—it contends that petitioner should have filed his motion years ago but neglects to recognize that the technology upon which his motion relies was not adopted by the State until 2019. As this Court has recognized, "[m]odern DNA testing can provide powerful new evidence unlike anything known before." *Osborne*, 557 U.S. at 62. To say that petitioner should have filed his motion for testing 20 years ago is to ignore the developing science that makes modern DNA testing the powerful tool it now is to avoid executing the innocent.

II. The Georgia Courts Erected a New, Unconstitutional Hurdle to the DNA-Testing Statute.

Under O.C.G.A. § 5-5-41(c)(7), the court must grant a motion for DNA testing if the petitioner shows that the evidence to be tested is available, the chain of custody of the evidence is sufficient, the requested DNA test would provide results that are reasonably

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more discriminating or probative than previous test results, the identity of the perpetrator was a significant issue, the testing employs a scientific method of verifiable certainty, and the petitioner made a prima facie showing that the evidence is material to the issue of his identity, an aggravating circumstance, or a similar transaction. Petitioner sufficiently made the required showings.

But rather than granting his motion, as required by statute, the Superior Court created new requirements: (1) that petitioner must demonstrate actual innocence prior to testing, and (2) that petitioner must demonstrate due diligence in the timing of his filing. Neither requirement exists in the statute; instead, the Georgia courts hindered petitioner's access to TrueAllele™ testing by adding new requirements to his statutory and procedural due process rights[2] to the testing.

The Superior Court ostensibly analyzed whether a reasonable probability existed of a different verdict, while presuming the DNA evidence would favor petitioner. But, in explaining the "heavy burden" on the petitioner, the Superior Court explained that he must "bring forward convincing and detailed proof of his innocence." (App-16).

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[2] While the State correctly notes that no standalone federal right to DNA testing exists, what does exist is a "liberty interest [under the Fourteenth Amendment due process clause] in demonstrating [petitioner's] innocence with new evidence under state law." *Osborne*, 557 U.S. at 68.

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Such a burden is not required under the statute, which only requires "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 of the case." O.C.G.A. § 5-5-41(c)(3)(D).[3] Likewise, Justice Souter, considering "reasonable probability," stated:

> The Court rightly cautions that the standard intended by ["reasonable probability"] does not require defendants to show that a different outcome would have been more likely than not with the suppressed evidence . . . . Instead, the Court restates the question . . . as whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence" in the outcome.

Strickler v. Greene, 527 U.S. 263, 297–98 (1999) (Souter, J., concurring in part and dissenting in part) (internal citations omitted).

Rather than considering petitioner's "reasonable probability" of innocence, however, the Superior Court demanded that petitioner prove his actual innocence. That court noted that "[t]he jury had no residual doubt as to its verdict" based upon the evidence at trial, but

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[3] Under Georgia law, the Superior Court was required to assume that the result of DNA testing would be consistent with petitioner's contention. *Crawford v. State*, 278 Ga. 95, 96-97 (2004).

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failed to consider what doubt the jury may have had assuming that the DNA evidence was favorable to petitioner. Pet. App. 15. The court failed to review all evidence of the case, instead cursorily listing that it had reviewed all evidence, but omitting to mention in its analysis the prosecution's offering of knowingly false testimony, the fact that petitioner did not own the shoe in the size that caused the print, and that petitioner had an established borderline IQ and dementia. The court only mentioned evidence in support of the conviction.

In addition to actual innocence, the Superior Court grafted a due diligence requirement onto the statute. The words "due diligence" never appear in the statute. The statute merely provides that the motion cannot be filed "for purposes of delay." By adding a "due diligence" prong, the court not only created an extra-statutory requirement, but fundamentally misinterpreted the intent of the statute, which is to allow for further DNA testing in accordance with the advancement of technology. To require due diligence forces petitioners to consider what kind of testing technology may be developed in the future, and then to file a motion in advance of that technology. The Georgia statute only allows for the filing of one motion for DNA testing—further compounding the issue. The "for purposes of delay" language created by the legislature instead lowered the bar to require petitioners to only demonstrate that they did not wait to bring their new evidence after the technology was adopted. The Superior Court's interpretation is illogical.

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Regardless of the convoluted way in which the Georgia courts effectively rewrote the statute to unconstitutionally impose additional hurdles infringing petitioner's liberty interest in proving his innocence, the answer is simple: the statute requires the court to grant the extraordinary motion for new trial so long as the petitioner satisfies the requirements. By injecting additional requirements of actual innocence and due diligence beyond the statutory requirements, the petitioner has been placed in a catch-22 position. The best evidence of his actual innocence and diligence is what he seeks to present—DNA testing. He cannot present that evidence, however, without DNA testing first proving his innocence and due diligence. This cannot be what the legislature intended and, more importantly, it is not consistent with petitioner's "liberty interest in demonstrating his innocence with new evidence under state law." *Osborne*, 557 U.S. at 68.

III. The Georgia Courts' Denial of DNA Testing Was Not Based on Adequate and Independent State Law Grounds.

Contrary to the State's contention that this case is merely the application of state law to a particular set of facts, the Georgia courts' denial of petitioner's request for TrueAllele™ testing constituted a burden on access of the state law DNA testing right that violates the Due Process Clause. The Georgia courts, by requiring petitioner to prove actual innocence to gain permission to conduct DNA testing with TrueAllele™, created an extra-statutory burden in violation of due process.

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In further contrast to the State's assertions, this petition does not involve the standard application of a Georgia law to a particular set of facts; rather, what is at issue is the burdening of state law rights with requirements that render them unfair and that strip away the liberty interest that a criminal defendant has in accessing them. Petitioner recognizes that no ubiquitous right to DNA testing exists. However, he does have "a liberty interest [under the Fourteenth Amendment due process clause] in demonstrating his innocence with new evidence under state law," *Osborne*, 557 U.S. at 68, once a state chooses to create such a DNA testing right. The Fourteenth Amendment "imposes procedural limitations on a State's power to take away protected entitlements." *Id.* at 67 (citing, *e.g.*, *Jones v. Flowers,* 547 U.S. 220, 226–39 (2006)). Here, petitioner simply wants to have DNA testing conducted—a right provided for by Georgia statute—yet denied in application. Given the stakes, petitioner should be afforded that right.

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CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted this 28th day of January, 2020.

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SUPPLEMENTAL APPENDIX

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Letter from M. Love to Georgia State Board of Pardons & Parole (Jan. 20, 2020) Supp.App.8

Appendix A

TRANSCRIPT EXCERPTS

**IN THE SUPERIOR COURT
OF BUTTS COUNTY
STATE OF GEORGIA**

No. 03-V-490

DONNIE CLEVELAND LANCE,
Petitioner,
v.
WILLIAM TERRY, Warden,
Georgia Diagnostic & Classification Prison,
Respondent.

August 28-30, 2006

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* * *

[419] A. They can't travel.

Q. All right. Did you meet with David Cochran and Tim Madison before you testified that day?

A. Yes, sir.

Q. I'm going to show you a transcript, Mr. shields. It's Petitioner's Exhibit 210 and I think you have page 34 open there in front of you; is that right?

A. Yes, sir.

Q. Okay. If you look at line 15 of the transcript, it says, And did David Cochran or any law enforcement officials make any promises to you? Do you see that?

A. Yes.

Q. And you said, No, sir. ·Is that what you said?

A. Yes.

Q. And was that the testimony you gave in August. 1998?

A. Yes, sir.

Q. And was that testimony false?

A. Yes, sir.

Q. And what had they told you they would do?

A. Mr. Madison said that he would get in touch with the Department of corrections, and David Cochran had done -- that he'd so-called said been to Jackson county CI and talked to the warden.

Q. All right. Let me ask you to turn to page 36. Okay. If you'd take a look at the bottom of that page? You're [420] talking there about what you're saying Donnie told you; right? Are you telling the court what you're saying Donnie told you?

A. It don't say that right there.

Q. Okay. Look at line 23. It says, Now, what did he say he'd done once he left the trailer? Where did he go?

A. Yes, sir.

Q. Answer: He went up through the trailer park up toward Dee Marlow's store and went back to his shop. Did he tell you why he went back to the shop?

Answer: To get -- to call somebody to bring him some clothes because his clothes were full of blood and everything. Do you see that?

A. Yes, sir.

Q. Is that testimony that you gave?

A. Yes, sir.

Q. And Donnie Lance hadn't really told you those things, had he?

A. No, sir. said he'd been accused of them things.

Q. All right. And did you say that Donnie went up to Dee Marlow's store because that's where you figured he would have gone?

A. Yes, sir.

Q. And let me show you something else on page 37. In line 10 it says, Did he say who he called after he got back to his shop? Line 12. He said his father. Line 13. Did he tell you what type of weapon he used to shoot the man and to beat

* * *

[426] A. Yes, sir.

Q. When were you and Morgan Thompson in the same part of the jail?

A. '97.

Q. Okay. Did you have any contact with him in 1998, other than the day y'all rode in the car together?

A. We was in the holding cell together.

Q. Where?

A. At the Jackson County jail.

Q. was that before you were going to be driven to the trial?

A. Yes.

Q. And what happened there?

A. He asked me what I was getting for testifying and I told him nothing. And he said he was going to get turned loose after the trial.

Q. And did you understand that to mean he thought he was going to get loose, turned loose after he testified against Donnie?

A. That he was getting out of prison.

Q. And did you understand that to be that he was saying he was going to get turned loose because of giving the testimony against Donnie?

A. Yes, sir.

Q. Did he have a copy of his statement with him?

* * *

[430] Q. And this was the guy that was thin and had blonde hair

A. Yes.

Q. Okay. what did Morgan Thompson tell you about whether Donnie Lance had confessed to him?

A. That he had talked stuff out of Donnie, but he did not get everything out of Donnie. So I took it he was just like me, that Donnie hadn't said nothing, you know.

Q. And did Morgan Thompson tell you he had been promised something?

A. That he was getting out.

Q. All right. Now, when you would be transported back to Jackson County after the trial on the three days you went over to Monroe, where were you put in Jackson County?

A. Looked like a closet.

Q. Was it a holding cell?

A. No, it wasn't a holding cell. I thought it was a closet.

Q. Okay. Were you ever in a holding cell?

A. No. There wasn't no holding cell over there.

Q. Okay. were you in a holding cell at the courthouse in Walton County?

A. No. Now, there was a holding cell in Jackson county. There ain't no holding cell where we was at in Walton county. It was a closet.

* * *

[449] lie? Answer: Certain things about it. Where I said I was promised something, I was never promised nothing. I never was promised to be transferred. Do you see that?

A. Yes, sir.

Q. Mr. Shields, you testified falsely on this day, didn't you?

A. Yes.

Q. And you had been promised something and what you said in the letter to the paper was true; is that right?

A. Yes, sir.

Q. Why did you testify falsely in April of 2000?

A. Because I knowed that David could pick up the phone and have me moved again, or Tim Madison.

Q. Let me ask you this, Mr. Shields. Why are you choosing to tell the truth now?

A. Too many folks' lives have been disrupted. Too much going on with this. It needs to be -- the truth needs to be told. Too many lives have just been disrupted because of this.

Q. And are you worried at all about what will happen to you from telling the truth here today?

A. I got to face whatever happens.

Q. And do you feel like you're facing any risks as a result of telling the truth here today?

A. I've been facing risks ever since this started, you know. One thing about my record will show you, whatever I do * * *

[454] south Georgia. And one thing I know about the prison system, unless you give them a reason to transfer you, you're not going nowhere.

THE COURT: Okay. All right. I'll look into it.

MR. BOSWELL: I just have one more question, Mr. Shields.

BY MR. BOSWELL

Q. Did Donnie Lance ever confess to you that he murdered Joy Lance and Butch Wood?

A. No, sir.

Q. Thank you, Mr. Shields. The State's attorney will have some questions for you.

THE COURT: Okay. Cross?

MS. WHITE: Yes, Your Honor.

CROSS-EXAMINATION

BY MS. WHITE:

Q. Good afternoon, Mr. Shields.

A. How you doing?

Q. So what you're here to testify today is that the three previous occasions when you've been called to testify in court, today you're saying you lied all three of those occasions?

A. Yes, ma'am.

Q. And now after a few years you've just decided to tell the truth?

* * *

Appendix B

January 20, 2020

State Board of Pardons and Parole
2 Martin Luther King, Jr. Drive SE
Suite 458, Balcony Level, East Tower
Atlanta, Georgia 30334

To the Board of Pardons and Parole,

I am Joy Love's first cousin. My father, Jerry Love, and Joy's father, Jack Love, are brothers. I grew up with Donnie and Joy and knew them both well. My family lived near Joys' family. All of the Loves lived near each other.

I testified in the trial about some things Donnie said to me about Butch and Joy. I don't remember the details of that conversation now but the truth is that Donnie never asked me to kill Joy. He did say Butch was being mean to his kids. We were drinking and just talking. He never asked me to hire someone to kill Joy and Butch either. That just wasn't something Donnie would have ever said or done. I never heard Donnie say that.

Donnie's main concern was always his kids which was why he got angry at Butch in the first place. He didn't think Butch was treating the kids right and he knew Butch didn't treat Joy right. Donnie knew how much the kids loved Joy and, even though they ended up divorced, I just can't see him taking her from the kids.

ML [Handwritten initials]

[Redacted text]

[Redacted text]

I don't know if her issues with drugs had anything to do with her getting killed or if it was Donnie who killed her. Drugs have always been a big problem in Jackson County and I've had my own issues with them. People in the drug world can do some pretty horrible things and I've wondered over the years if that had anything to do with why Joy and Butch were killed. I've heard all sorts of rumors about who killed them but I wasn't there so I don't know.

I loved Joy and her death was horrible. I hate what happened to Joy and Butch but I don't think Donnie should be executed for it. I do know that I never thought Donnie would kill Joy and am not sure I believe it now but even if he did, I have to forgive him. If God forgave me I have to forgive Donnie and I do. If he is executed, the kids would be left without him and both of their parents would be dead. Even when Joy and Donnie were not together as a couple they still seemed to be together as parents for the kids. If he were in prison, they could still visit him and have a dad.

Sincerely,

s/Marty Love [Handwritten signature]

Marty Love

ML I support the kids with their wishes. [Handwritten note]