OCTOBER TERM 2019

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RAY JEFFERSON CROMARTIE,
Petitioner,
v.

BRADFIELD SHEALY, Southern Judicial Circuit District Attorney;
RANDA WHARTON, Clerk of Superior Court, Thomas County;
GEORGIA DEPARTMENT OF CORRECTIONS; and
BENJAMIN FORD, Warden, Georgia Diagnostic and Classification Prison,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

--- CAPITAL CASE ---

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

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November 12, 2019

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14268

D.C. Docket No. 7:19-cv-00181-MTT

RAY JEFFERSON CROMARTIE,

Plaintiff-Appellant,

versus

BRADFIELD SHEALY, RANDA WHARTON, GEORGIA DEPARTMENT OF CORRECTIONS, and GDCP WARDEN,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

(October 30, 2019)

Before ED CARNES, Chief Judge, MARTIN, and ROSENBAUM, Circuit Judges.

ED CARNES, Chief Judge:

Ray Jefferson Cromartie was convicted of murdering Richard Slysz during an armed robbery committed more than twenty-five years ago. As punishment for

that crime, he is scheduled to be executed on October 30, 2019, at 7:00 p.m. On October 22, 2019, he filed a 42 U.S.C. § 1983 complaint in federal district court claiming that Georgia's postconviction DNA statute, Ga. Code Ann. § 5-5-41(c), is unconstitutional. Two days later, he filed a motion to stay his execution so that the district court could consider his § 1983 complaint.

On October 29, the district court issued a cogent opinion dismissing Cromartie's complaint and denying his motion for a stay of execution. Cromartie appeals those rulings and asks this Court to issue an emergency stay of execution pending the resolution of his appeal. We affirm the district court and deny his emergency motion for a stay of execution as moot.

I. FACTS AND PROCEDURAL HISTORY

A. Cromartie's Crimes

On April 7, 1994, Cromartie went to the Madison Street Deli in Thomasville, Georgia. Cromartie v. State, 514 S.E.2d 205, 209 (Ga. 1999). He was carrying a .25 caliber pistol that he had borrowed earlier that day from his cousin, Gary Young. Id. He walked behind the counter to where the store clerk, Dan Wilson, was washing dishes, and shot him in the face. Id. After trying and failing to open the cash register, he left empty-handed. Id. Wilson suffered a severed carotid artery but fortunately he survived. Id. The next store clerk Cromartie shot would not be so fortunate.

The following day Cromartie asked Young and Carnell Cooksey if they saw the news. Id. He told Young that he had shot Wilson. Id. He also asked Cooksey if he was "down with the 187," which meant robbery, and he talked about a Junior Food Store with "one clerk in the store and they didn't have no camera." Id. Cooksey said he was not interested. Doc. 1-2 at 13.[1]

Cromartie found some people who were. On April 10, Thaddeus Lucas agreed to drive Cromartie and Corey Clark to a store so they could steal beer. Cromartie, 514 S.E.2d at 209. While in the car, Cromartie had Lucas drive past the closest open store and go instead to the Junior Food Store. Id. Once they were there, Cromartie instructed Lucas to park at a nearby apartment complex and wait while he and Clark went into the store. Doc. 1-2 at 15.

Richard Slysz was the clerk on duty and when the two entered the store he was sitting on a stool behind the register. Id. Cromartie shot him twice. Id. The first shot entered below his right eye, but left him alive and conscious. Cromartie, 514 S.E.2d at 209. Cromartie's second shot hit Slysz in his left temple. Id. The two shots to his head sealed Slysz's fate. He lingered for a short while but died. Id.

[1] We take "judicial notice of the state and federal court proceedings in which [Cromartie] was convicted or attacked his conviction." Cunningham v. Dist. Attorney's Office, 592 F.3d 1237, 1255 (11th Cir. 2010).

As Slysz lay dying or dead, Cromartie and Clark tried and failed to open the cash register. Id. They fled, but not before Cromartie grabbed two 12-packs of Budweiser beer. Id. A clerk in a convenience store across the street heard the shots and saw two men fitting the general descriptions of Cromartie and Clark run from the store. Id. at 209–10. Cromartie was carrying the beer. Id. at 210. While they fled, one of the packs of beer tore open outside the store and some of the cans fell to the ground. Id. A passing motorist saw the two men run from the store and appear to drop something. Id. Clark would later testify that he gathered all but two of the cans before he and Cromartie got into Lucas' car. Doc. 1-2 at 16.

Cooksey testified that when Cromartie and the other two men met up with him after the shooting, they had a muddy pack of beer. Cromartie, 514 S.E.2d at 210. He recounted how Cromartie boasted about shooting the clerk twice. Id. In a muddy field next to the store the police found a portion of a Budweiser beer carton, two cans of beer, and a shoeprint. Doc. 1-2 at 17. It was identified as a possible match for Cromartie's shoes, but not for Young's, Clark's, or Lucas'. Id. The beer carton had Cromartie's thumb print on it. Id. A police canine unit tracked Cromartie's and Clark's scents to the nearby apartment complex where Cromartie had told Lucas to wait. Id. And a firearms expert determined that the .25 caliber pistol that Cromartie had borrowed from Young fired the bullets that had seriously wounded Wilson and killed Slysz. Cromartie, 514 S.E.2d at 210.

B. Criminal Trial and Direct Appeal

Cromartie was indicted in Thomas County, Georgia on one count of malice murder, one count of armed robbery, one count of aggravated battery, one count of aggravated assault, and four counts of possessing a firearm during the commission of a crime. Id. at 209 n.1. Young, Cooksey, Lucas, and Clark testified as prosecution witnesses at Cromartie's trial.[2] Id. at 210, 213; Cromartie v. Georgia, No. 2000-v-295, slip op. at 53–77 (Butts Cty. Sup. Ct. Oct. 9, 2012). On September 26, 1997, the jury found him guilty of all counts, and five days later it recommended a sentence of death. Cromartie, 514 S.E.2d at 209 n.1. The trial court sentenced Cromartie to death for the malice murder, to life imprisonment for the armed robbery, and for his other crimes to lesser terms of imprisonment, all of which were to be served consecutively. Id. The court denied Cromartie's motion for a new trial. Id.

[2] Several individuals who testified against Cromartie at trial changed or recanted their testimony during his first state habeas proceeding. See Notice of Filing, Cromartie v. Warden, GDCP, No. 7:14-cv-00039 (M.D. Ga. July 15, 2014), ECF 23-37 at 54–77 (state habeas court describing testimony and new evidence in order denying state habeas petition); id. ECF 24-9 (state habeas court denying motion to reconsider after reviewing the changed testimony of Gary Young). But the state habeas court concluded that the recantations and other changes in testimony were not reliable. Id. ECF 24-9; see also In re Davis, 565 F.3d 810, 825 (11th Cir. 2009) ("[R]ecantation testimony 'upsets society's interest in the finality of convictions, is very often unreliable and given for suspect motives, and most often serves merely to impeach cumulative evidence rather than to undermine confidence in the accuracy of the conviction.'") (quoting Dobbert v. Wainwright, 468 U.S. 1231, 1233–34 (1984) (Brennan, J., dissenting)); United States v. Santiago, 837 F.2d 1545, 1550 (11th Cir. 1988) ("[R]ecantations are viewed with extreme suspicion by the courts.").

The Georgia Supreme Court affirmed Cromartie's convictions and sentences on March 8, 1999. Id. at 215. He filed a motion for reconsideration, which the court denied. Notice of Filing, Cromartie v. Warden, GDCP, No. 7:14-cv-00039 (M.D. Ga. July 7, 2014), ECF 18-31. The United States Supreme Court denied his petition for certiorari, Cromartie v. Georgia, 528 U.S. 974 (1999), and his petition for rehearing, Cromartie v. Georgia, 528 U.S. 1108 (2000).

C. First Order Setting Execution

On April 19, 2000, the Thomas County Superior Court issued an order setting Cromartie's execution for the week of May 9 through May 16, 2000. Notice of Filing, Cromartie, No. 7:14-cv-00039, ECF 19-3. Cromartie filed a motion for a stay of execution in both the superior court and the Georgia Supreme Court. Id. ECF 19-4, 19-9. Both of those motions were denied. Id. ECF 19-6, 19-12. Cromartie's execution was, however, automatically stayed when he filed a state habeas petition four days before the week of his scheduled execution. See id. ECF 19-13.

D. State Habeas Petition

Cromartie filed a habeas petition in the Butts County Superior Court on May 5, 2000, id. ECF 19-14, and amended it on December 9, 2005, id. ECF 20-22. The court held an evidentiary hearing on August 12 through 14, 2008. Id. ECF 21-24.

It denied his petition in an eighty-six page order on February 9, 2012. Id. ECF 23-37.

After Gary Young, a trial witness, recanted some of his testimony Cromartie filed a motion to reconsider the denial of his state habeas petition. Id. ECF 23-42. The court reopened discovery so that Young could be deposed. Id. ECF 23-44, 23-45, 23-47. On October 9, 2012, the court found that Young's recantation was unreliable and denied Cromartie's motion to reconsider. Id. ECF 24-9; see supra note 2. He filed in the Georgia Supreme Court an application for a certificate of probable cause to appeal the February 9 order that denied his habeas petition and the October 9 order that denied his motion for reconsideration. Id. ECF 24-10. The Georgia Supreme Court denied his application, id. ECF 24-14, and the United States Supreme Court denied his petition for a writ of certiorari, Cromartie v. Chatman, 572 U.S. 1064 (2014).

E. Federal Habeas Petition

Cromartie filed a habeas petition in the Middle District of Georgia on March 20, 2014, and amended it on June 22, 2015. Petition for Writ of Habeas Corpus, Cromartie, No. 7:14-cv-00039, ECF 1, 62. The district court denied the habeas petition and declined to issue a certificate of appealability on any of his claims. Cromartie v. Warden, No. 7:14-cv-00039, 2017 WL 1234139, at *43–44 (M.D. Ga. Mar. 31, 2017). The district court thereafter denied Cromartie's Rule 59

motion to alter or amend the judgment. Order, Cromartie, No. 7:14-cv-00039, ECF 84.

Cromartie then filed in this Court an application for a certificate of appealability, which we denied. Cromartie v. GDCP Warden, No. 17-12627, 2018 WL 3000483, at *1 (11th Cir. Jan. 3, 2018); see also Order, Cromartie, No. 17-12627, ECF 26 (denying motion for reconsideration). The United States Supreme Court denied certiorari on December 3, 2018. Cromartie v. Sellers, 139 S. Ct. 594 (2018).

F. Extraordinary Motion for a New Trial & Postconviction DNA Testing

On December 28, 2018, Cromartie filed a motion in the Thomas County Superior Court asking for a new trial and DNA testing on various items that had been introduced as evidence during his trial. Doc. 11 ¶ 27. He contended that two advancements in DNA technology — the ability to test "touch DNA" and probabilistic genotyping — could reveal that one of his accomplices was the actual triggerman. Doc. 1-2 at 31–32. Cromartie does not deny being involved in the robbery in which Slysz was murdered but contends that he did not fire the shots.[3] Doc 11 ¶ 23 n.5.

[3] Cromartie conceded in the district court that the ability to test touch DNA "first became an accepted procedure in 2006 or 2007," but argued that it was "not refined, and did not become more developed until 2010 or 2011." He also stated that probabilistic genotyping, the other type of DNA testing he sought to conduct, became available "within the last two years." He makes the same statements on appeal.

After the court held an evidentiary hearing, it issued an order denying Cromartie's motion on September 16, 2019. Doc. 1-2 at 3–36. The court concluded that (1) even if the DNA testing showed what Cromartie alleged it would, the results would not establish a reasonable probability that the verdict would have been different, and (2) he could not show that his motion was not filed for the purpose of delaying his execution. Id. On October 25, 2019, the Georgia Supreme Court denied Cromartie's application for a discretionary appeal. Cromartie v. State, Case No. S20D0330 (Ga. Oct. 25, 2019).

G. Second Order Setting Execution

On October 16, 2019, the Thomas County Superior Court issued an order setting Cromartie's execution for the week of October 30 through November 6, 2019. Doc. 7 at 5 n.1. The Georgia Department of Corrections scheduled it for October 30 at 7:00 p.m. Id. at 1. Cromartie moved in the Georgia Supreme Court for a stay of the execution pending his appeal of the trial court's order denying his request for DNA testing. Cromartie, Case No. S20D0330. That court dismissed his motion for a stay as moot because it denied his application for a discretionary appeal. Id.

On October 24, 2019, Cromartie filed in the Thomas County Superior Court an emergency motion to recall the order setting the execution period, a motion that has been denied. He also filed in the Butts County Superior Court a second state

habeas petition, which has also been denied. And he filed with the Georgia State Board of Pardons and Paroles a request for a 90-day stay of his execution, which the Board denied. The Board also sua sponte considered commuting his sentence but declined to do so upon a review of all the facts and circumstances of his case.

H. Cromartie's 42 U.S.C. § 1983 Complaint

On October 22, 2019, Cromartie filed in the United States District Court for the Middle District of Georgia a 42 U.S.C. § 1983 complaint, which is the subject of this appeal. In that complaint, he alleged that Georgia's procedure for determining whether a prisoner is entitled to postconviction DNA testing violates his Fourteenth Amendment right to due process and his First and Fourteenth Amendment right to access the courts.[4] Two days after filing his complaint, Cromartie filed a motion for a stay of his execution so that the district court could consider his claims.

The defendants filed a motion to dismiss on October 25, contending both that the district court lacked subject matter jurisdiction and that Cromartie had failed to state any claims upon which relief could be granted. Cromartie filed a response and an amended complaint on October 28. On October 29, the district

[4] Cromartie's complaint also stated in passing that the State's refusal to allow the DNA testing he wants violates his Eighth Amendment rights. The district court correctly dismissed this claim because it amounted to nothing more than a conclusory allegation. See Oxford Asset Mgmt., Ltd. v. Jaharis, 297 F.3d 1182, 1188 (11th Cir. 2002).

court dismissed Cromartie's complaint and denied his motion for a stay, finding that he failed to state a claim upon which relief could be granted and that he acted with "unjustified delay in filing [his] action." This is Cromartie's appeal.

II. STANDARD OF REVIEW

We review de novo the grant of a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Alvarez v. Att'y Gen., 679 F.3d 1257, 1260–61 (11th Cir. 2012). "Like the district court, we are required to accept the factual allegations in the complaint as true and construe them in the light most favorable to the plaintiff." Id. at 1261.

We review the denial of a motion for a stay of execution for abuse of discretion. Muhammad v. Sec'y, Fla. Dep't of Corr., 739 F.3d 683, 688 (11th Cir. 2014). "A district court abuses its discretion if, among other things, it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous." Long v. Sec'y, Dep't of Corr., 924 F.3d 1171, 1176 (11th Cir. 2019) (quotation marks omitted).

A court may grant a stay of execution only if the moving party shows that "(1) he has a substantial likelihood of success on the merits, (2) he will suffer irreparable injury unless the injunction issues, (3) the injunction would not substantially harm the other litigant, and (4) if issued, the injunction would not be adverse to the public interest." Id. at 1175.

III. DISCUSSION

A. Cromartie's Facial Procedural Due Process Claim

Cromartie claims that Georgia's procedure for determining whether a prisoner is entitled to postconviction DNA testing is facially unconstitutional under the Fourteenth Amendment's Due Process Clause.

1. The Framework for Evaluating Cromartie's Claim

The Supreme Court established a framework for evaluating claims like Cromartie's in District Attorney's Office for the Third Judicial District v. Osborne, 557 U.S. 52 (2009). Osborne, an Alaska prisoner, filed a § 1983 suit claiming that the Due Process Clause gave him a right to access crime scene evidence for DNA testing, and the district court granted summary judgment in his favor. Id. at 60–61. The Ninth Circuit affirmed after concluding that prisoners have a right to access DNA evidence in postconviction proceedings that is analogous to a criminal defendant's right to material exculpatory evidence before trial under Brady v. Maryland, 373 U.S. 83 (1963). Osborne, 557 U.S. at 61.

The Supreme Court reversed. Id. at 61–62. It acknowledged that if state law entitles prisoners to challenge their convictions on the ground of actual innocence, they have a "liberty interest" in doing so that is protected by the Due Process Clause. Id. at 68. The Court cautioned, however, that a prisoner's liberty interest is "limited" compared to a criminal defendant's because the prisoner "has already

been found guilty at a fair trial." Id. at 68–69. As a result, the state has "more flexibility in deciding what procedures are needed in the context of postconviction relief" than it does in deciding what procedures are needed in a criminal trial. Id. at 69.

With that distinction in mind, the Supreme Court set out this test: A state's procedure for accessing postconviction DNA testing violates due process if it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, or transgresses any recognized principle of fundamental fairness in operation." Id. (quotation marks omitted). Put another way, "[f]ederal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." Id. The Court has since made clear that this is a difficult standard to meet, stressing that "Osborne severely limits the federal action a state prisoner may bring for DNA testing" and "left slim room for the prisoner to show that the governing state law denies him procedural due process." Skinner v. Switzer, 562 U.S. 521, 525 (2011). Those of us on the lower courts have paid attention. Every court of appeals to have applied the Osborne test to a state's procedure for postconviction DNA testing has upheld the constitutionality of it. See, e.g., Morrison v. Peterson, 809 F.3d 1059, 1067–69 (9th Cir. 2015) (holding California's procedure constitutional); Alvarez, 679 F.3d at 1266 n.2 (holding Florida's constitutional);

McKithen v. Brown, 626 F.3d 143, 152 (2d Cir. 2010) (holding New York's constitutional); Tevlin v. Spencer, 621 F.3d 59, 71 (1st Cir. 2010) (holding Massachusetts' constitutional); Cunningham v. Dist. Attorney's Office, 592 F.3d 1237, 1261 (11th Cir. 2010) (holding Alabama's constitutional).

Though it has made clear that a prisoner will seldom be able to meet the Osborne test, the Supreme Court has "attempted neither to define exactly the level of process required to satisfy the fundamental fairness standard nor to specify the process due." Cunningham, 592 F.3d at 1261. But Osborne gives guidance. The Court held in that case there was "nothing inadequate" about Alaska's procedure for several reasons. Osborne, 557 U.S. at 69–70. The Alaska procedure "provide[d] a substantive right to be released on a sufficiently compelling showing of new evidence that establishe[d] innocence." Id. at 70. It "exempt[ed] such claims from otherwise applicable time limits." Id. It "provide[d] for discovery in postconviction proceedings," and "that . . . discovery procedure [was] available to those seeking access to DNA evidence." Id. The Supreme Court discussed limits that Alaska imposed on postconviction relief claim evidence, such as requiring that it be "newly available," "sufficiently material," and "diligently pursued." Id. Those limits were constitutional, the Court reasoned, because they were "similar to those provided for . . . by federal law and the law of other States" and were "not

inconsistent with the traditions and conscience of our people or with any recognized principle of fundamental fairness." Id. (quotation marks omitted).[5]

Those new availability, materiality, and diligence requirements are not the only ones that the Supreme Court approved in Osborne. It also noted approvingly that the federal statute governing postconviction DNA testing — which it referred to as a "model for how States ought to handle the issue" — as well as several state statutes, required "a sworn statement that the applicant is innocent." Osborne, 557 U.S. at 63. Other state statutes "require[d] the requested testing to have been technologically impossible at trial" or "den[ied] testing to those who declined testing at trial for tactical reasons." Id. (citations and quotation marks omitted). The Court explained that those laws "recognize[d] the value of DNA evidence but also the need for certain conditions on access to the State's evidence." Id. The Court's discussion "clearly implie[d], if it [did] not actually hold, that such limitations are permissible" under the Due Process Clause. Cunningham, 592 F.3d at 1261.

Using the framework that Osborne established, this Court has held that Alabama's and Florida's procedures for postconviction DNA testing are

[5] The Court also noted that in addition to Alaska's statutory procedure, the Alaska Court of Appeals had "suggested that the State Constitution provides an additional right of access to DNA," which in certain cases might act as a "failsafe" for those who could not satisfy the statutory requirements. Id. "The Court did not suggest, however, that [this alternative] was essential" when concluding that Alaska's procedure was constitutionally adequate. Cunningham, 592 F.3d at 1263.

constitutional. See Alvarez, 679 F.3d at 1266 n.2 (Florida); Cunningham, 592 F.3d at 1269 (Alabama).[6] In doing so, we explained that because the Supreme Court "did not define a level of process necessary to satisfy the fundamental fairness standard," we were left to compare Alabama's and Florida's procedures to those that the Court had already approved in Osborne. Cunningham, 592 F.3d at 1262–63; see also Alvarez, 679 F.3d at 1266 n.2. We explained that "Osborne itself invites such a comparative approach, describing key elements of Alaska's process as both 'similar' to other state and federal statutes and also 'not inconsistent' with fundamental fairness." Id. at 1263. We apply that comparative approach here.

2. Analyzing Georgia's Procedure

Section 5-5-41 of the Georgia Code sets out the procedure that a prisoner may use to challenge his conviction based on postconviction DNA testing. It allows the prisoner to file two motions: an extraordinary motion for a new trial and a motion for postconviction DNA testing. Ga. Code Ann. § 5-5-41(a)-(c). The two motions are generally, but not always, filed together. See Gary v. Warden, Ga. Diagnostic Prison, 686 F.3d 1261, 1276 (11th Cir. 2012) ("A motion for DNA

[6] Cunningham addressed whether Alabama's "general procedures for postconviction relief [were] constitutionally adequate to secure any limited liberty interest [the plaintiff] may have [had] in seeking DNA evidence that might prove his innocence." 592 F.3d at 1262. Alabama now has a postconviction DNA testing statute. Ala. Code § 15-18-200. This Court has not yet addressed the constitutionality of that statute.

testing under O.C.G.A. § 5-5-41(c) is generally filed in conjunction with an extraordinary motion for a new trial pursuant to O.C.G.A. § 5-5-41(a).").

What makes an extraordinary motion for a new trial extraordinary is the time at which it is filed. Normally, Georgia prisoners must file a motion for a new trial within 30 days of the entry of judgment. Ga. Code Ann. § 5-5-40(a). But in limited circumstances, a prisoner can file a motion after those 30 days have expired. To do so, the prisoner must show that there is a "good reason" for the delay. Id. § 5-5-41(a). And the Georgia Supreme Court has held that "[g]ood reason exists only where the moving party exercised due diligence but, due to circumstances beyond [his] control, was unable previously to discover the basis for the claim [he] now asserts." Bharadia v. State, 774 S.E.2d 90, 93 (Ga. 2015) (quotation marks omitted) (some alterations in original).[7]

A motion for postconviction DNA testing comes with its own set of requirements. A prisoner must show, among other things, that: (1) the reason he did not have the DNA testing done for trial is that he either did not know about the evidence then, or the testing was not technologically available; (2) the "identity of the perpetrator was, or should have been, a significant issue in the case;" and (3)

[7] When evaluating a facial challenge to the constitutionality of a state postconviction DNA testing statute, we analyze the statute as authoritatively construed by the state's courts. See Skinner, 562 U.S. at 531–32; Kennedy v. Louisiana, 554 U.S. 407, 425 (2008) ("Definitive resolution of state-law issues is for the States' own courts . . . ."); Blue Cross & Blue Shield of Ala., Inc. v. Nielsen, 116 F.3d 1406, 1413 (11th Cir. 1997) (explaining that "[t]he final arbiter of state law is the state supreme court").

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." Ga. Code Ann. § 5-5-41(c)(3)(B)–(D). In addition, the prisoner must state that the motion was "not filed for the purpose of delay" and that the requested DNA testing had not already been ordered in an earlier proceeding. Id. § 5-5-41(c)(4).

If the prisoner meets those requirements, he is entitled to a hearing on the motion within 90 days. Id. § 5-5-41(c)(6)(A). At the hearing, both sides "may present evidence by sworn and notarized affidavits or testimony" and may submit additional legal memoranda or evidence for up to 30 days after the hearing concludes. Id. § 5-5-41(c)(6)(C), (D).

The court is required to grant the motion for DNA testing if it determines that the prisoner has met all of the requirements we have discussed, and that: (1) the evidence is available in a condition that would permit testing; (2) the evidence has been subject to a chain of custody; (3) 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;" (4) the motion was not filed "for the purpose of delay;" (5) the "identity of the perpetrator of the crime was a significant issue in the case;" (6) the requested testing "employs a scientific method that has reached a scientific state of

verifiable certainty;" and (7) the prisoner has "made a prima facie showing that the evidence sought to be tested is material to the issue of the [prisoner]'s identity as the perpetrator." Id. § 5-5-41(c)(7). The prisoner may appeal a ruling denying his motion and the State may appeal a ruling granting it. Id. § 5-5-41(c)(13).

Georgia's procedure is substantially similar to the one that the Supreme Court approved in Osborne. Like Alaska's, it provides prisoners with an avenue to challenge their convictions based on DNA evidence showing that they are innocent. Osborne, 557 U.S. at 64; Westmoreland v. Warden, 817 F.3d 751, 753–54 (11th Cir. 2016). Like Alaska's, it allows prisoners to file the motion after the otherwise applicable time limit has expired. Osborne, 557 U.S. at 64. Like Alaska's, it requires that the prisoner show he acted with due diligence and without the purpose of delay. Id. Like Alaska's, it requires that the evidence or the requested testing be newly available. Id. And like Alaska's, it requires that the evidence be material enough to undermine the verdict. Id.[8]

[8] In Georgia, the prisoner must show that the requested DNA testing "would raise a reasonable probability that [he] would have been acquitted if the results of the DNA testing had been available at the time of the conviction, in light of all the evidence in the case." Ga. Code Ann. § 5-5-41(3)(D); see also id. § 5-5-41(c)(7)(G). In Alaska, the prisoner must show that the evidence he seeks to have tested is "sufficiently material." Osborne, 557 U.S. at 70. Unlike Georgia, Alaska imposes a more demanding standard if the prisoner files more than a year after the conviction becomes final, requiring in that circumstance that the prisoner "set[] out facts supported by evidence that is admissible and . . . establishes by clear and convincing evidence that the applicant is innocent." Id. at 64 (quoting Alaska Stat. § 12.72.020(b)(2)).

There are some differences. The Georgia statute has one requirement that Alaska's does not: the prisoner must show that the identity of the perpetrator is a significant issue in the case. Ga. Code Ann. § 5-5-41(c)(3)(C). But the federal statute for postconviction DNA testing has a similar requirement, see 18 U.S.C. § 3600(a)(7), and the Osborne Court approved of that statute, calling it a "model for how States ought to handle the issue" of postconviction DNA testing. Osborne, 557 U.S. at 63; see also Alvarez, 679 F.3d at 1266 n.2 (explaining that the Osborne Court "endorsed" the federal statute). Which may be why Cromartie does not argue that the Georgia statute is fundamentally unfair because it requires that identity be an issue.

And Alaska's statute offers discovery whereas the Georgia statute, at least on its face, does not. Osborne, 557 U.S. at 64. But, once again, the federal statute for postconviction DNA testing, which the Supreme Court blessed in Osborne, also does not provide for discovery (it only requires the government to provide the prisoner with a limited inventory). See 18 U.S.C. § 3600(b)(1)(C). And that may, once again, be why Cromartie doesn't argue that the failure to explicitly provide for discovery renders the Georgia statutory procedure fundamentally unfair.

There are ways the Georgia procedure is more favorable to prisoners than the Alaska or federal procedures. For example, in Georgia a prisoner is entitled to a hearing on his motion if he meets the requirements for filing, and he is also

expressly entitled to an appeal. Ga. Code. Ann. § 5-5-41(c)(6)(A), (c)(13). Under the Alaska and federal procedures the prisoner is not. See Alvarez, 679 F.3d at 1266 n.2 (making the same points about Florida's procedure compared to the Alaska and federal procedures). And in Georgia, the government must respond within 60 days to the prisoner's motion seeking postconviction DNA testing, while the federal statute merely says it should respond within "a reasonable time period." Compare Ga. Code Ann. § 5-5-41(c)(5), with 18 U.S.C. § 3600(b)(1)(B); see also Alvarez, 679 F.3d at 1266 n.2 (making the same point about Florida's procedure).

3. Cromartie's Arguments

Despite the similarity between Georgia's procedures and the ones endorsed in Osborne, Cromartie argues that Georgia's are fundamentally unfair for two reasons. First, he takes issue with Georgia's requirement that a prisoner show he acted with due diligence in filing his motion. According to him, that requirement means a prisoner must seek DNA testing on the physical evidence in his case "as soon as possible," even if the DNA testing that exists at that time is not technologically advanced enough to provide meaningful results. We don't see it that way.

In discussing the due diligence requirement, the Georgia Supreme Court has stated that a prisoner must show that he "exercised due diligence but, due to circumstances beyond [his] control, was unable previously to discover the basis for

the claim [he] now asserts." Ford Motor Co. v. Conley, 757 S.E.2d 20, 30 (Ga. 2014). The fact that DNA testing was not advanced enough to render a meaningful result in a prisoner's case would satisfy that standard.

If there were any doubt about how Georgia's due diligence standard operates when it comes to DNA testing, we need only look at the plain text of the statute to rule out Cromartie's interpretation. Section 5-5-41(c)(3)(B) requires a prisoner to show that the evidence he wants tested "was not subjected to the requested DNA testing because the existence of the evidence was unknown to the petitioner . . . prior to trial or because the technology for the testing was not available at the time of trial." (Emphasis added.) And § 5-5-41(c)(7)(C) provides that if the evidence was already tested, the prisoner must show that "the requested DNA test would provide results that are reasonably more discriminating or probative of the identity of the perpetrator than prior test results." Reading those provisions together, a prisoner need not pursue DNA testing until the technology has advanced enough to do some good. Or he could seek DNA testing at the time of trial and then again if the technology improved enough to offer a more promising result, which is to say, would be "reasonably more discriminating or probative." Ga. Code Ann. § 5-5-41(c)(7)(C). All that the due diligence standard requires is, as it says, that the prisoner act with the diligence that is due under the circumstances. Which is an

established principle of law. See Cromartie v. Shealy, No. 7:19-cv-00181-MTT, slip op. at 14 n.8 (M.D. Ga. Oct. 28, 2019).[9]

Second, Cromartie takes issue with Georgia's requirement that the favorable DNA testing results create a reasonable probability that he would have been acquitted had those results been available at trial. See Ga. Code Ann. § 5-5-41(c)(3)(D); see also Crawford v. State, 597 S.E.2d 403, 404 (Ga. 2004). He argues that because the Georgia Supreme Court has held that a prisoner cannot make that showing if the evidence presented at trial was overwhelming, the requirement "has resulted in a totally subjective review of the trial evidence, with no meaningful assessment of the weaknesses in that evidence or the manner in which DNA test results could offset the trial evidence and change the entire evidentiary picture." We disagree.

[9] Cromartie argues that the diligence requirement is especially problematic because Georgia allows a prisoner to file only one extraordinary motion for a new trial. Ga. Code Ann. § 5-5-41(b) (emphasis added). But because Cromartie has filed only one extraordinary motion for a new trial, that limitation does not affect him; it has no relevance to his case.

This argument of his does risk confusing motions for new trial with motions for postconviction DNA testing. The two are distinct. See White v. State, 814 S.E.2d 447, 451 (Ga. Ct. App. 2018) (noting a motion for postconviction DNA testing may be filed before any extraordinary motion for a new trial); see also State v. Clark, 615 S.E.2d 143, 145–46 (Ga. Ct. App. 2005) (reviewing a motion for postconviction DNA testing that was filed without an accompanying extraordinary motion for a new trial). Cromartie has not pointed to any Georgia decision holding that a prisoner cannot file multiple motions for postconviction DNA testing. Nor has he pointed to any decision holding that if a prisoner obtains favorable DNA results after he has already filed his one extraordinary motion for a new trial, he cannot file a state habeas petition seeking relief based on those results.

The first problem with Cromartie's argument is that the Supreme Court has already approved of this type of materiality standard in Osborne. 557 U.S. at 64. We will follow what the Supreme Court said.

The second problem with Cromartie's argument is that it is at odds with stacks of precedent accepting and applying "reasonable probability" standards like this one in a number of other contexts. See, e.g., Kyles v. Whitley, 514 U.S. 419, 433 (1995) ("[F]avorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.") (quotation marks omitted); United States v. Olano, 507 U.S. 725, 734 (1993) (stating that for a court to correct unpreserved error, the "the error must have been prejudicial: It must have affected the outcome of the district court proceedings"); Strickland v. Washington, 466 U.S. 668, 695 (1984) ("When a defendant challenges a conviction [based on ineffective assistance of counsel], the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt."). To hold, as Cromartie insists, that the reasonable probability of a different result standard is "totally subjective" and allows "no meaningful assessment of the weaknesses in [the] evidence," would upend decades of precedent related to Brady and Strickland issues.

B. Cromartie's As-Applied Due Process Claim

In his complaint, Cromartie states in passing that he also "challenges the constitutionality of § 5-5-41(c) . . . as applied by the Georgia courts." There are three problems with that.

First, to the extent Cromartie made an as-applied challenge in his complaint, he expressly disavowed it in his reply to the State's motion to dismiss. There, he stated: "Plaintiff brings a facial challenge, not an as-applied challenge." Doc. 10 at 6. Given that disavowal, any as-applied argument that Cromartie might have is waived. See United States v. Phillips, 834 F.3d 1176, 1183 (11th Cir. 2016) (explaining that "when a defendant waives an argument in the district court, we cannot review it") (emphasis omitted).

Second, even if the argument were not waived, it is foreclosed by this Court's precedent. See Alvarez, 679 F.3d at 1262–64 (holding that a prisoner's as-applied procedural due process claim attacking the state court's application of that state's DNA access procedure to the facts of his case is barred in these circumstances by the Rooker-Feldman doctrine).

Third, the claim as Cromartie presented it amounts to an assertion that the state court misapplied state law. See Doc. 10 at 14–18 (arguing that the Georgia court arbitrarily applied § 5-5-41(c)(3)(D)'s reasonable probability requirement in his case). But a state court's misapplication of state law, without more, does not

violate the federal Constitution. See, e.g., Wilson v. Corcoran, 562 U.S. 1, 5 (2010) (per curiam) ("[I]t is only noncompliance with federal law that renders a State's criminal judgment susceptible to collateral attack in the federal courts."); Snowden v. Hughes, 321 U.S. 1, 11 (1944) ("Mere violation of a state statute does not infringe the federal Constitution."); Gissendaner v. Comm'r, Ga. Dep't of Corr., 794 F.3d 1327, 1333 (11th Cir. 2015) (noting that there is "a long line of Supreme Court decisions holding that a violation of state procedural law does not itself give rise to a due process claim"); cf. Estelle v. McGuire, 502 U.S. 62, 67–68 (1990) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.").

For each of those reasons, the district court properly dismissed Cromartie's as-applied claim.

C. Cromartie's Right to Access the Courts Claim

Cromartie also contended in his complaint that postconviction access to evidence for DNA testing is necessary to vindicate his First and Fourteenth Amendment right to access the courts. But he "neglected to make these arguments in [his] initial brief on appeal, and our precedent unambiguously provides that issues that are not clearly outlined in an appellant's initial brief are deemed abandoned." Al-Amin v. Smith, 511 F.3d 1317, 1336 (11th Cir. 2008) (quotation

marks and brackets omitted); see also Tanner Advert. Grp., L.L.C. v. Fayette Cty., 451 F.3d 777, 785 (11th Cir. 2006) (en banc).

Even if he had not abandoned his claim, it fails on the merits. This Court has held that to violate a person's right to access the courts, there must be "actual injury." Cunningham, 592 F.3d at 1271. That actual injury requirement "derives from the constitutional doctrine of standing" and "reflects the fact that the very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong." Id. (quotation marks omitted).

To show actual injury, the plaintiff must "have an underlying cause of action the vindication of which is prevented by the denial of access to the courts." Id. Cromartie has suggested two. He says that the potentially exculpatory DNA evidence could be used to challenge his conviction and death sentence in a motion for a new trial or to obtain executive clemency. Neither proffered cause of action will support an access to the courts claim.

To begin with, Cromartie's argument that the alleged inadequacy of Georgia's procedure for postconviction DNA testing has prevented him from being able to challenge his conviction or sentence "essentially mirrors" his procedural due process claim. Cunningham, 592 F.3d at 1272. Because we have concluded that Georgia's postconviction DNA procedure complies with due process

requirements, "it follows that it does not improperly interfere with [Cromartie's] right of access to the courts." Id. That Cromartie has not succeeded in obtaining potentially exculpatory evidence under the state's constitutionally adequate procedures is not a denial of his right to access the courts. Id.

Cromartie's argument about executive clemency fares no better. The Supreme Court has held that there is no federal constitutional right to executive clemency. See Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981). As a result, executive clemency "cannot be a basis for an access to courts claim." Cunningham, 592 F.3d at 1272.

Because Cromartie has failed to identify a cause of action that meets the actual injury requirement for a claimed denial of access to the courts, the district court was right to dismiss his access to the courts claims for lack of subject matter jurisdiction.

IV. CONCLUSION

We **AFFIRM** the district court's decision dismissing Cromartie's § 1983 complaint and denying his motion for a stay of execution, and we **DENY** as moot the emergency motion for a stay of execution he filed in this Court.[10]

[10] In stating its reasons for denying Cromartie's "requests for declaratory and injunctive relief, including a stay," the district court relied in part on its conclusion that Cromartie "unjustifi[ably] delay[ed] in filing this action." In light of our determination that Cromartie failed to state a claim upon which relief could be granted, there is no need for us to reach that issue.

MARTIN, Circuit Judge, concurring in the judgment:

The Majority opinion correctly sets out the precedent that binds our decision here. I therefore concur in its judgment.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

October 30, 2019

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 19-14268-P
Case Style: Ray Jefferson Cromartie v. Bradfield Shealy, et al
District Court Docket No: 7:19-cv-00181-MTT

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call David L. Thomas at (404) 335-6171.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jenifer L. Tubbs
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14268-P

RAY JEFFERSON CROMARTIE,

Plaintiff - Appellant,

versus

BRADFIELD SHEALY, Southern Judicial Circuit District Attorney,
RANDA WHARTON, Clerk of Superior Court Thomas County,
GEORGIA DEPARTMENT OF CORRECTIONS,
WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON

Defendants - Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: ED CARNES, Chief Judge, MARTIN and ROSENBAUM, Circuit Judges

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

November 08, 2019

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 19-14268-P
Case Style: Ray Jefferson Cromartie v. Bradfield Shealy, et al
District Court Docket No: 7:19-cv-00181-MTT

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas
Phone #: (404) 335-6171

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

RAY JEFFERSON CROMARTIE,	:	
	:	
Plaintiff,	:	
	:	
VS.	:	
	:	**CIVIL ACTION NO. 7:19-CV-181 (MTT)**
BRADFIELD SHEALY, Southern Judicial Circuit District Attorney; RANDA WHARTON, Clerk of Superior Court Thomas County, GEORGIA DEPARTMENT OF CORRECTIONS; BENJAMIN FORD, Warden, Georgia Diagnostic and Classification Prison,	:	
	:	
Defendants.	:	

ORDER

Ray Jefferson Cromartie is scheduled to be executed on October 30, 2019[1] for the April 10, 1994 murder of store clerk, Richard Slysz. *Cromartie v. State*, 270 Ga. 780, 781 n.1, 514 S.E.2d 205, 209 n.1 (1999). He has filed a 42 U.S.C. § 1983 action[2] in which he raises due process and access to courts claims stemming from the state court's denial of his extraordinary motion for new trial and request for DNA testing pursuant to O.C.G.A. § 5-5-41(c). Doc. 1. Specifically, Cromartie alleges his due

[1] On October 16, 2019, the Superior Court of Thomas County entered an order setting the seven-day window during which the execution of Ray Jefferson Cromartie may occur to begin at noon, October 30, 2019 and to end seven days later at noon on November 6, 2019. Docs. 1; 8; Oct. 16, 2019 Press Release, Office of the Att'y Gen., http://law.georgia.gov/press-releases.

[2] Cromartie also moved for leave to proceed without prepayment of the filing fee or security therefor pursuant to 28 U.S.C. § 1915(a). Doc. 2. As it appears Cromartie is unable to pay the cost of commencing this action, his application to proceed *in forma pauperis* is hereby **GRANTED**.

process rights have been violated because O.C.G.A. § 5-5-41(c), as construed by the Georgia Supreme Court, violates fundamental fairness. (Doc. 4 at 19). He also argues that Georgia's restrictive procedure for obtaining access to DNA testing under O.C.G.A. § 5-5-41(c), and the Georgia Supreme Court's interpretation thereof, deprive him of his fundamental right to access the courts. (Doc. 1 at 23).

Cromartie requests "[a] declaratory judgment that O.C.G.A. § 5-5-41(c), as applied by the Georgia Supreme Court, is unconstitutional"; "[a] preliminary and permanent injunction requiring Defendants to produce and release for DNA testing" ten various items of evidence; and (3) "[a] preliminary and permanent injunction prohibiting Defendants from executing [him] until they can do so in a way that does not violate his rights." Doc. 1 at 25-26.

Cromartie also moved to stay his execution pending disposition of his 42 U.S.C. § 1983 action. Doc. 6.

Defendants have moved to dismiss Cromartie's complaint. Doc. 9. Cromartie has responded to the motion to dismiss (Doc. 10) and filed an amended complaint (Doc. 11).

I. FACTUAL AND PROCEDURAL HISTORY

A. Facts

The Georgia Supreme Court summarized the facts of this case in Cromartie's direct appeal:

> Cromartie borrowed a .25 caliber pistol from his cousin Gary Young on April 7, 1994. At about 10:15 p.m. on April 7, Cromartie entered the Madison Street Deli in Thomasville and shot the clerk, Dan Wilson, in the face. Cromartie left after unsuccessfully trying to open the cash register. The tape from the store video camera, while too indistinct to conclusively identify Cromartie, captured a man fitting Cromartie's general description

> enter the store and walk behind the counter toward the area where the clerk was washing pans. There is the sound of a shot and the man leaves after trying to open the cash register. Wilson survived despite a severed carotid artery. The following day, Cromartie asked Gary Young and Carnell Cooksey if they saw the news. He told Young that he shot the clerk at the Madison Street Deli while he was in the back washing dishes. Cromartie also asked Cooksey if he was "down with the 187," which Cooksey testified meant robbery. Cromartie stated that there was a Junior Food Store with "one clerk in the store and they didn't have no camera."
>
> In the early morning hours of April 10, 1994, Cromartie and Corey Clark asked Thaddeus Lucas if he would drive them to the store so they could steal beer. As they were driving, Cromartie directed Lucas to bypass the closest open store and drive to the Junior Food Store. He told Lucas to park on a nearby street and wait. When Cromartie and Clark entered the store, Cromartie shot clerk Richard Slysz twice in the head. The first shot which entered below Slysz's right eye would not have caused Slysz to immediately lose consciousness before he was hit by Cromartie's second shot directed at Slysz's left temple. Although Slysz died shortly thereafter, neither wound caused an immediate death. Cromartie and Clark then tried to open the cash register but were unsuccessful. Cromartie instead grabbed two 12–packs of Budweiser beer and the men fled. A convenience store clerk across the street heard the shots and observed two men fitting the general description of Cromartie and Clark run from the store; Cromartie was carrying the beer. While the men were fleeing one of the 12–packs broke open and spilled beer cans onto the ground. A passing motorist saw the two men run from the store and appear to drop something.
>
> Cooksey testified that when Cromartie and his accomplices returned to the Cherokee Apartments they had a muddy case of Budweiser beer and Cromartie boasted about shooting the clerk twice. Plaster casts of shoe prints in the muddy field next to the spilled cans of beer were similar to the shoes Cromartie was wearing when he was arrested three days later. Cromartie's left thumb print was found on a torn piece of Budweiser 12–pack carton near the shoe prints. The police recovered the .25 caliber pistol that Cromartie had borrowed from Gary Young, and a firearms expert determined that this gun fired the bullets that wounded Wilson and killed Slysz. Cromartie's accomplices, Lucas and Clark, testified for the State at Cromartie's trial.

Cromartie v. State, 270 Ga. 780, 781-82, 514 S.E.2d 205, 209-10 (1999).

B. Procedural History

On September 26, 1997, a jury found Cromartie guilty of malice murder, armed robbery, aggravated battery, aggravated assault, and four counts of possession of a firearm during the commission of a crime. *Id*. at 781 n.1, 514 S.E.2d at 209 n.1. On October 1, 1997, the jury sentenced Cromartie to death for the murder. *Id*.

The Georgia Supreme Court affirmed his conviction and sentence on April 2, 1999. *Cromartie*, 270 Ga. at 781, 514 S.E.2d at 209. The United States Supreme Court denied his petition for certiorari on November 1, 1999. *Cromartie v. Georgia*, 528 U.S. 974 (1999).

Cromartie filed a Petition for Writ of Habeas Corpus in the Superior Court of Butts County, which was denied following an evidentiary hearing. Doc. 1 at 11. The Georgia Supreme Court denied Cromartie's certificate of probable cause application and the United States Supreme Court denied his petition for writ of certiorari. *Cromartie v. Chatman*, 572 U.S. 1064 (2014).

Cromartie filed a 28 U.S.C. § 2254 petition in this Court on March 20, 2014. *Cromartie v. Warden, Georgia Diagnostic and Classification Prison*, 7:14-cv-39-MTT (M.D. Ga.). On March 31, 2017, the Court denied habeas relief and both this Court and the Eleventh Circuit denied a certificate of appealability. Id. at Doc. 81; *Cromartie v. GDCP Warden*, No. 17-12627 (11th Cir.). On December 3, 2018, the United States Supreme Court denied certiorari. *Cromartie v. Sellers*, 2018 WL 4191087, at *1 (U.S. 2018).

On December 28, 2018, Cromartie filed an Extraordinary Motion for New Trial and Postconviction DNA Testing and a Motion for Preservation of Evidence in the

Thomas County Superior Court. Doc. 1 at 12. Following a June 24, 2019 evidentiary hearing, the court denied Cromartie's motion for DNA testing and new trial on September 16, 2019. Docs. 1-2; 1-3; 1-4; 1-5; 1-6; 1-7.

Cromartie filed an application for discretionary appeal to the Georgia Supreme Court and a motion to stay his execution. *Cromartie v. State*, S20D0330 (Ga. Sup. Ct.) That Court denied both the application and motion to stay on October 25, 2019. *Id*.

II. ANALYSIS

A. Motion to Dismiss Standard of Review

The Federal Rules of Civil Procedure require that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To avoid dismissal pursuant to Fed. R. Civ. P. 12(b)(6), a complaint must contain sufficient factual matter to "'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "At the motion to dismiss stage, all well-pleaded facts are accepted as true, and the reasonable inferences therefrom are construed in the light most favorable to the plaintiff." *Garfield v. NDC Health Corp*., 466 F.3d 1255, 1261 (11th Cir. 2006) (internal quotation marks and citation omitted). However, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679 (quoting Fed. R. Civ. P. 8(a)(2)). "[C]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." *Oxford Asset Mgmt., Ltd*., 297 F.3d at 1188. The complaint must "give the defendant fair notice of what the ... claim is and

the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (internal quotation marks and citation omitted). Where there are dispositive issues of law, a court may dismiss a claim regardless of the alleged facts. *Marshall Cnty. Bd. of Educ. v. Marshall Cnty. Gas Dist*., 992 F.2d 1171, 1174 (11th Cir. 1993).

In order to state a claim for relief under § 1983, a plaintiff must allege that: (1) an act or omission deprived him of a right, privilege, or immunity secured by the Constitution or a statute of the United States; and (2) the act or omission was committed by a person acting under color of state law. *Hale v. Tallapoosa Cty*., 50 F.3d 1579, 1581 (11th Cir. 1995). If a litigant cannot satisfy these requirements, or fails to provide factual allegations in support of his claim or claims, then the complaint is subject to dismissal. *See Chappell v. Rich*, 340 F.3d 1279, 1282-84 (11th Cir. 2003) (affirming the district court's dismissal of a § 1983 complaint because the plaintiff's factual allegations were insufficient to support the alleged constitutional violation).

B. Prerequisites for Injunctive Relief

A court may grant declaratory or injunctive relief, including a stay of execution, only if the moving party establishes that: "(1) he has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the stay would not substantially harm the other litigant; and (4) if issued, the injunction would not be adverse to the public interest." *Price v. Comm'r, Dep't of Corr*., 920 F.3d 1317, 1323 (11th Cir. 2019) (citation omitted). "The 'first and most important question' regarding a stay of execution is whether the [plaintiff] is substantially likely to succeed on the merits of his claims.'" *Id*. (citation omitted).

C. The Court's Jurisdiction

Cromartie alleges that the Defendants' refusal to release the biological evidence for DNA testing violates his right to due process and right to access the courts.[3] Doc. 1 at 4. Generally, a 42 U.S.C. § 1983 complaint is the proper vehicle for Cromartie to raise his due process and access to courts challenges to Georgia's postconviction DNA statute, O.C.G.A. § 5-5-41(c). *Skinner v. Switzer*, 562 U.S. 521, 525 (2011).

Cromartie "challenges the constitutionality of § 5-5-41(c) both on its face and as applied by the Georgia courts." Doc. 1 at 4. Cromartie's "as applied" challenge "attacks the state court's application of [Georgia's] DNA access procedures to the facts of his case." *Alvarez v. Att'y Gen. for Fla*., 679 F.3d 1257, 1263 (11th Cir. 2012). The success of his "as applied" challenge "would 'effectively nullify' the state court's judgment." *Id*. at 1264 (citation omitted). In other words, his "as applied" challenge "would succeed 'only to the extent that the state court wrongly decided'" to disallow DNA testing. *Id*. (citation omitted). Thus, his "as applied" challenge is barred by the *Rooker/Feldman*[4] doctrine. *Id*. (finding that an "as applied" challenge to Florida's postconviction DNA statute was barred by *Rooker-Feldman* because (1) the state court rendered judgment before the federal action was commenced; (2) the plaintiff in the federal action was the state-court losing party; (3) the plaintiff complained of injuries

[3] Cromartie also alleges that the Defendants' refusal to allow DNA testing violates his Eighth Amendment right to be free from cruel and unusual punishment. Doc. 1 at 4. Beyond this conclusory allegation, however, he provides no further support for this argument. *See Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002) (finding dismissal appropriate when only conclusory allegations presented).

4 The *Rooker-Feldman* doctrine derives from *Rooker v. Fidelity Trust Co*., 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). "The doctrine is a jurisdictional rule that precludes the lower federal courts from reviewing state court judgments." *Alvarez*, 679 F.3d at 1262 (citation omitted).

caused by the state court's judgment; and (4) the plaintiff's claim invited the federal court to review and reject the state court's judgment).

Rooker-Feldman does not, however, bar the federal court from exercising subject matter jurisdiction over Cromartie's challenge to the facial constitutionality of O.C.G.A. § 5-5-41(c). *Skinner*, 562 U.S. at 530-32. Thus, the Court may consider Cromartie's arguments to the extent he generally "challenges, as denying him procedural due process, [Georgia's] postconviction DNA statue 'as construed' by the [Georgia] courts." *Id*. at 530.

D. Failure to Name Proper Parties

Cromartie originally named Bradfield Shealy, District Attorney for the Southern Judicial Circuit, and Randa Wharton, Clerk of the Superior Court of Thomas County, as the Defendants in his 42 U.S.C. § 1983 action. (Doc. 1). In its motion to dismiss, Defendants alleged that while Shealy and Wharton may be the proper parties for his § 1983 due process and access to courts claims, neither has custody of Cromartie or the authority to forestall his execution (Doc. 6).

O.C.G.A. § 17-10-38 (b) provides that the trial court must direct the "defendant to be delivered to the Department of Corrections for execution of the death sentence . . . ." The Superior Court of Thomas County has issued an execution order for Cromartie. Oct. 16, 2019 Press Release, Office of the Att'y Gen., http://law.georgia.gov/press-releases. Thus, the Department of Corrections is the only party that can be enjoined to prevent his execution. Accordingly, for his motion to stay execution, Cromartie originally failed to join the proper parties.

In response to the Defendants' motion to dismiss, Cromartie filed an amended

complaint naming both the Georgia Department of Corrections and Benjamin Ford, Warden of the Georgia Diagnostic and Classification Prison. Doc. 11.

E. Inexcusable Delay

The Defendants do not address the consequences of Cromartie's delay in seeking relief in this Court,[5] but the Court must. The Supreme Court has instructed courts to consider "the extent to which the inmate has delayed unnecessarily in bringing" an action before granting a stay. *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004).

Both Cromartie's § 1983 action (Doc. 1) and his motion to stay execution (Doc. 6) were filed within days of his October 30, 2019 scheduled execution. In his § 1983 action, Cromartie asks the Court to issue a "preliminary and permanent injunction prohibiting Defendants from executing [him] until they can do so in a way that does not violate his rights." Doc. 1 at 26; *Rutherford v. Crosby*, 438 F.3d 1087, 1092 (11th Cir. 2006) (stating that when a plaintiff's "execution is imminent, there is no practical difference between denying a stay on equitable grounds and denying injunctive relief on equitable grounds in a § 1983 lawsuit.), *vacated on other grounds, Rutherford v. McDonough*, 547 U.S. 1204 (2006). Of course, Cromartie "is not entitled to a stay of execution 'as a matter of course' simply because he brought a § 1983 claim." *Long v. Sec'y, Dep't of Corr.*, 924 F.3d 1171, 1176 (11th Cir. 2019) (citations omitted).

Before it can grant Cromartie's preliminary injunction or stay, the Court "must 'consider not only the likelihood of success on the merits and the relative harms to the

[5] This is a bit odd because the Superior Court of Thomas County relied, in part, on Cromartie's inexcusable delay when it denied his motion for new trial and request for DNA testing. Doc. 1-2 at 29-35.

parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim.'" *Long*, 924 F.3d at 1176 (quoting *Nelson*, 541 U.S. at 649-50). "There is a 'strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" *Id*. (quoting *Nelson*, 541 U.S. at 650). According to the Supreme Court,

> [c]ourts should police carefully against attempts to use such challenges as tools to interpose unjustified delay. Last-minute stays should be the extreme exception, not the norm, and the last-minute nature of an application that could have been brought earlier, or an applicant's attempt at manipulation, may be grounds for denial of a stay.

Bucklew v. Precythe, 139 S. Ct. 1112, 1134 (2019); see also *Dunn v. Price*, 139 S. Ct. 1312, 1312 (2019) (citing *Gomez v. United States*, 503 U.S. 653, 654 (1992) (vacating stay of execution because of the "last-minute nature of" the application).

Cromartie's case is not an "extreme exception" that warrants a stay. *Bucklew*, 139 S. Ct. at 1134. Cromartie raises due process and access to courts claims stemming from the state court's September 16, 2019 denial of his extraordinary motion for new trial and request for DNA testing. Cromartie filed his extraordinary motion for new trial and motion for DNA testing in the Superior Court of Thomas County on December 28, 2018, more than twenty-one years after he was convicted. Doc. 1 at 12; *Cromartie*, 270 Ga. at 781 n.1, 514 S.E.2d at 209 n.1.

Cromartie has been represented by counsel throughout his criminal proceedings. Doc. 1-2 at 174-75. Current counsel was appointed by this Court in 2014. *Id*. at 169. All of the evidence that Cromartie now seeks to test existed and was known to counsel prior to his trial. *See* Doc. 1-2 at 183-86. DNA test results have been admissible in Georgia courts since 1990, seven years before Cromartie's trial. *Caldwell v. State*, 260

Ga. 278, 393 S.E.2d 436 (1995). Nevertheless, Cromartie apparently did not seek DNA testing pretrial. See Doc. 1-2 at 31. Additionally, although Georgia's post-trial DNA statute, O.C.G.A. § 5-5-41, was enacted in 2003, Cromartie did not pursue DNA testing until fifteen years later.

Cromartie alleges in his complaint "that DNA testing has changed dramatically over the years." Doc. 1 at 14. The Court agrees. But Cromartie's complaint also reveals that the DNA testing he wants has been available for years. For example, he says that "touch DNA (the ability to obtain a DNA profile from a very small amount of skin cells left simply by touching an item with one's bare hands or other skin)" was available as early as 2006 or 2007 and was further refined in 2010 and 2011—at least seven years before he filed his state action seeking DNA testing. Doc. 1 at 15. Even the "probabilistic genotyping," which "significantly enhances the ability to evaluate complex DNA mixtures—samples containing DNA from multiple people"—has been available for a least a "couple of years" prior to Cromartie filing his request for DNA testing. Doc. 1 at 15.

Furthermore, it seems that Cromartie's challenge to the facial constitutionality of Georgia's DNA statute could have been made at any time after the enactment of the statute in 2003. *See Dist. Att'y Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, (2009) (finding that a plaintiff need not "exhaust state-law remedies" before filing a 42 U.S.C. § 1983 action but plaintiff could not complain that "procedures [that] are adequate on their face" do not work in practice if he had not filed a state action); *Cunningham v. Dist. Att'y Office for Escambia Cty.*, 592 F.3d 1237, 1274 (11th Cir. 2010) (citation omitted) (stating "where state procedures for postconviction relief [are]

inadequate on their face," a plaintiff's "failure to properly pursue state-law remedies [is] excused").

In short, Cromartie's "need for a stay of execution is directly attributable to his own failure to" timely seek DNA testing in the state courts or to timely challenge the facial constitutionality of Georgia's DNA access procedures. *In re Hutcherson*, 468 F.3d 747, 749-50 (11th Cir. 2006). Thus, his delay provides additional grounds for denying Cromartie's motion to stay execution (Doc. 6) and his request for "preliminary and permanent injunction prohibiting Defendants from executing" him (Doc. 1 at 26). See *Dunn v. Ray*, 139 S. Ct. 661, 661 (2019) (quoting *Gomez*, 503 U.S. at 654 (1992) (vacating stay granted by Eleventh Circuit because of the "'last-minute nature of [the] application to stay execution'"); *Bucklew*, 139 S. Ct. at 1134 (citations omitted) (affirming Eighth Circuit's denial of a stay and stating that "'last-minute nature of an application'" could be "'grounds for denial of stay'"); *Price*, 139 S. Ct. at 1312 (quoting *Gomez*, 503 U.S. at 654) (vacating stay granted by Eleventh Circuit due to the "'last minute nature of [the] application to stay execution'").

F. Challenges to O.C.G.A. § 5-5-41

i. Due Process Claim

There is no "freestanding right to access DNA evidence." *Osborne*, 557 U.S. at 73. It is Cromartie's "burden to demonstrate the inadequacy of [Georgia's] procedures for postconviction relief." *Cunningham*, 592 F.3d at 1262 (citation omitted). The "State's process for postconviction relief is constitutionally adequate unless it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgresses any recognized principle of fundamental

fairness in operation.'" *Id*. at 1260 (citation omitted). Put simply, O.C.G.A. § 5-5-41(c) is constitutional so long as it comports with fundamental fairness. This Court's ability to interfere with a State's procedures for postconviction relief is limited. The Court "may upset [Georgia's] postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." *Osborne*, 557 U.S. at 69.

Cromartie argues that "[s]ection 5-5-41(c), as construed by the Georgia Supreme Court violates fundamental fairness in at least two ways." Doc. 1 at 19. First, he argues that the requirements that a defendant show that the request for "DNA testing was not made for the purpose of delay, § 5-5-41(c)(7)(D)," and that his request for a new trial was made diligently or "as soon as possible" under § 5-5-41(a) is fundamentally unfair.[6] Doc. 1 at 19-20. Second, he argues that the Georgia Supreme Court's interpretation of O.C.G.A. § 5-5-41(c)(3)(D)[7], which requires a court to find a reasonable probability of acquittal before DNA testing can be ordered, is fundamentally unfair because it precludes testing when the evidence of guilt presented at trial was overwhelming. Doc. 1 at 21 (citing *Crawford v. State*, 278 Ga. 95, 97, 597 S.E.2d 403, 405 (2004)).

Both arguments are foreclosed by *Osborne*, in which the Supreme Court found "nothing inadequate about the procedures Alaska has provided to vindicate its state

[6] O.C.G.A. § 5-5-41(c)(7)(D) provides that the court shall grant the motion for DNA testing if it determines, inter alia, that "the motion is not made for the purpose of delay." O.C.G.A. § 5-5-41(a) provides that "[w]hen a motion for new trial is made after the expiration of a 30 day period from entry of judgment, some good reason must be shown why the motion was not made during such period. . . ."

[7] O.C.G.A. § 5-5-41(d)(3)(D) provides that a motion for DNA testing "shall show or provide" that '[t]he requested DNA testing would raise a reasonable probability that the [plaintiff] 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."

right to postconviction relief . . . ." 557 U.S. at 69. The Court noted that Alaska's procedures for postconviction DNA testing, "are not without limits." *Id*. at 70. Alaska's procedures, similar to Georgia's, require the evidence to be "newly available," "diligently pursued,"[8] and "sufficiently material."[9] *Id*. The Court held the procedures, as limited by these requirements, "are not inconsistent with the 'traditions and conscience of our people' or with 'any recognized principle of fundamental fairness.'" *Id*. (citations omitted); *See Cunningham*, 592 F.3d at 1263 (upholding district court's dismissal of complaint, citing *Osborne*, and noting that a State's "procedures will pass muster if they compare favorably with Alaska's"). Cromartie cites no authority for the proposition that procedures and limitations found in O.C.G.A. § 5-5-41, as interpreted by the Georgia

[8] Cromartie alleges that the '[b]y adding the diligence requirement as it has been construed, the Georgia Supreme Court has placed an arbitrary and fundamentally unfair burden that is almost impossible for any applicant to meet." Doc. 10 at 15. It seems that diligence requirements are fairly standard in statutes addressing postconviction relief. *Osborne*, 557 U.S. at 69. Georgia simply requires that a defendant seeking an extraordinary motion for new trial "act without delay." *Drane v. State*, 291 Ga. 298, 304, 728 S.E.2d 679, 683 (2012) (citation omitted). "'The obvious reason for this requirement is that litigation must come to an end.'" *Id*. (citation omitted). There is nothing fundamentally unfair in requiring a party to "act without delay" in seeking DNA testing of evidence that was available pretrial. *Id*. This "requirement ensures that cases are litigated when the evidence is more readily available to both the defendant and the State, which fosters the truth-seeking process." *Id*.

[9] Citing *Crawford*, Cromartie argues that the Georgia Supreme Court has interpreted O.C.G.A. 5-5-41(c) to preclude DNA testing when the evidence presented at trial was "'overwhelming.'" 278 Ga. at 97, 597 S.E.2d at 405. According to Cromartie, "this requirement has resulted in a totally subjective review of the trial evidence, with no meaningful assessment of the weaknesses in that evidence or the manner in which DNA test results could offset the trial evidence and change the entire evidentiary picture." Doc. 10 at 16. Just as with the diligence requirement, it seems "materiality" requirements are commonplace in postconviction DNA statutes. *Osborne*, 557 U.S. at 69. On its face O.C.G.A. § 5-5-41(c)(3)(D) requires the state court to consider "in light of all the evidence in the case," whether "DNA testing would raise a reasonable probability that the [plaintiff] would have been acquitted if the results of DNA testing had been available at the time of conviction." This is exactly the analysis undertaken by the Georgia Supreme Court in *Crawford* when it found that, even assuming favorable test results came from DNA tests, the evidence tested "related only peripherally, if at all, to [Crawford's] case, and there was, therefore, not a reasonable likelihood of a different outcome at trial, especially given the overwhelming evidence of Crawford's guilt presented at trial. *Id*. at 98, 597 S.E.2d at 406. This interpretation in no way "effectively precludes testing to establish innocence." Doc. 10 at 16. It is merely a materiality requirement, which the Supreme Court has found constitutional. *Osborne*, 557 U.S. at 69.

Supreme Court, have been found to violate fundamental fairness.[10]

ii. Access to Courts Claim

Cromartie argues that "Georgia's restrictive procedures for obtaining access to DNA testing under O.C.G.A. § 5-5-41(c), and the Georgia Supreme Court's interpretation thereof" deprive him of the fundamental right to access the courts. Doc. 1 at 23. This claim is foreclosed by binding Eleventh Circuit precedent. *See Alvarez*, 679 F.3d at 1265-66; *Cunningham*, 592 F.3d at 1271-73.

To establish a violation of the constitutional right of access to the courts under the Due Process Clause, "'a prisoner must show an actual injury.'" *Alvarez*, 679 F.3d at 1265. To show actual injury, Cromartie must have "'a colorable underlying claim for which he seeks relief.'" *Alvarez*, 679 F.3d at 1266. Cromartie's right of access to the courts claim is premised on his procedural due process challenge to O.C.G.A. § 5-5-41(c). Having concluded that Georgia's postconviction procedure for DNA testing is

[10] Just as the Court was finalizing its Order, Cromartie filed a last-minute brief and an amended complaint. Docs. 10; 11. In the brief, he further explains his facial challenge to Georgia's postconviction DNA statute. Doc. 10 at 11-22. But, much of Cromartie's brief contains "as applied" due process challenges, in which Cromartie attacks the state court's denial of his motion for DNA testing. *See* Doc. 10 at 14 ("As established by Dr. Libby's unchallenged testimony, DNA testing . . . was not available at the time of trial . . . ."); Doc. 10 at 16 ("The undisputed evidence presented at the evidentiary hearing demonstrated that DNA testing may well be powerfully exculpatory . . . ."); Doc. 10 at 19 ("Regarding the fired cartridge casings . . . DNA technology have made it possible to lift DNA evidence . . . ."). As explained above, these "as applied" challenges are not properly before the Court. Also, Cromartie relies heavily on a *Wilson v. Marshall*, 2018 WL 5074689 (M.D. Ala. 2018), in which the plaintiff's allegations that called into question the facial constitutionality of Alabama's postconviction statute survived a motion to dismiss. *Id*. at *14. That case is both non-binding and distinguishable. The Court found Alabama's post-conviction DNA statute created a "Catch 22" because it required the plaintiff to demonstrate that the DNA evidence was in good enough condition to yield reliable and accurate test result, without allowing the plaintiff access to the evidence. *Id*. Georgia's statute creates no such dilemma. Additionally, the Alabama statute at issue provided that the state court "**may** order forensic DNA testing" if certain conditions were met. *Id*. (citations omitted) (emphasis added). The district court found this "permissive" language "may provide no guarantee of any due process at all for one who qualifies." *Id*. In contrast, Georgia's statute contains mandatory language: "The court **shall** grant the motion for DNA testing if it determines that the [plaintiff] has met the requirements. . . ." O.C.G.A. § 5-5-41(c)(7). The plaintiff in *Wilson* survived a motion to dismiss because, on its face, the Alabama statute did "not actually guarantee any process by which a [plaintiff] could be entitled to DNA testing." *Id*. at *15. That simply is not the case with Georgia's statute.

consistent with due process, "it follows that it does not improperly interfere with [Cromartie's] right of access to the courts." *Cunningham*, 592 F.3d at 1272. This claim must, therefore, be dismissed.

III. CONCLUSION

Cromartie's 42 U.S.C. § 1983 action is dismissed for failure to state a claim. His requests for declaratory and injunctive relief, including a stay, are denied due to his unjustified delay in filing this action, and because he has not shown a substantial likelihood of success on the merits.

For these reasons, the Court **GRANTS** Defendants' motion to dismiss (Doc. 9) and **DENIES** Plaintiff's motion to stay execution (Doc. 6).

SO ORDERED, this 28th day of October, 2019.

S/ Marc T. Treadwell
MARC T. TREADWELL, JUDGE
UNITED STATES DISTRICT COURT

West's Code of Georgia Annotated
Title 5. Appeal and Error (Refs & Annos)
Chapter 5. New Trial
Article 3. Procedure

Ga. Code Ann., § 5-5-41

§ 5-5-41. Motion made after time expires; extraordinary motion for new trial; DNA tests

Effective: July 1, 2015
Currentness

(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.

(b) Whenever a motion for a new trial has been made within the 30 day period in any criminal case and overruled or when a motion for a new trial has not been made during such period, no motion for a new trial from the same verdict or judgment shall be made or received unless the same is an extraordinary motion or case; and only one such extraordinary motion shall be made or allowed.

(c)(1) Subject to the provisions of subsections (a) and (b) of this Code section, a person convicted of a felony may file a written motion before the trial court that entered the judgment of conviction in his or her case for the performance of forensic deoxyribonucleic acid (DNA) testing.

(2) The filing of the motion as provided in paragraph (1) of this subsection shall not automatically stay an execution.

(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.

(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.

(B) The motion shall be heard by the judge who conducted the trial that resulted in the petitioner's conviction unless the presiding judge determines that the trial judge is unavailable.

(C) Upon request of either party, the court may order, in the interest of justice, that the petitioner be at the hearing on the motion. The court may receive additional memoranda of law or evidence from the parties for up to 30 days after the hearing.

(D) The petitioner and the state may present evidence by sworn and notarized affidavits or testimony; provided, however, any affidavit shall be served on the opposing party at least 15 days prior to the hearing.

(E) The purpose of the hearing shall be to allow the parties to be heard on the issue of whether the petitioner's motion complies with the requirements of paragraphs (3) and (4) of this subsection, whether upon consideration of all of the

evidence there is a reasonable probability that the verdict would have been different if the results of the requested DNA testing had been available at the time of trial, and whether the requirements of paragraph (7) of this subsection have been established.

(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.

(8) If the court orders testing pursuant to this subsection, the court shall determine the method of testing and responsibility for payment for the cost of testing, if necessary, and may require the petitioner to pay the costs of testing if the court determines that the petitioner has the ability to pay. If the petitioner is indigent, the cost shall be paid from the fine and bond forfeiture fund as provided in Article 3 of Chapter 21 of Title 15.

(9) If the court orders testing pursuant to this subsection, the court shall order that the evidence be tested by the Division of Forensic Sciences of the Georgia Bureau of Investigation. In addition, the court may also authorize the testing of the evidence by a laboratory that meets the standards of the DNA advisory board established pursuant to the DNA Identification Act of 1994, Section 14131 of Title 42 of the United States Code, to conduct the testing. The court shall order that a sample of the petitioner's DNA be submitted to the Division of Forensic Sciences of the Georgia Bureau of Investigation and that the DNA analysis be stored and maintained by the bureau in the DNA data bank.

(10) If a motion is filed pursuant to this subsection the court shall order the state to preserve during the pendency of the proceeding all evidence that contains biological material, including, but not limited to, stains, fluids, or hair samples in the state's possession or control.

(11) The result of any test ordered under this subsection shall be fully disclosed to the petitioner, the district attorney, and the Attorney General.

(12) The judge shall set forth by written order the rationale for the grant or denial of the motion for new trial filed pursuant to this subsection.

(13) The petitioner or the state may appeal an order, decision, or judgment rendered pursuant to this Code section.

Credits

Laws 1873, p. 47, § 1; Laws 2003, Act 37, § 1, eff. May 27, 2003; Laws 2011, Act 67, § 1-2, eff. May 11, 2011; Laws 2012, Act 684, § 5, eff. May 1, 2012; Laws 2015, Act 98, § 3-4, eff. July 1, 2015.

Formerly Code 1863, § 3645; Code 1868, § 3670; Code 1873, § 3721; Code 1882, § 3721; Civil Code 1895, § 5487; Penal Code 1895, § 1064; Civil Code 1910, § 6092; Penal Code 1910, § 1091; Code 1933, § 70-303.

Notes of Decisions (210)

Ga. Code Ann., § 5-5-41, GA ST § 5-5-41

The statutes and Constitution are current through acts passed during the 2019 Session of the General Assembly. Some statute sections may be more current, see credits for details. The statutes are subject to changes by the Georgia Code Commission.

End of Document

AFFIDAVIT OF THADDEUS LUCAS

State of Georgia
County of Chatham

I, Thaddeus Lucas, having been duly sworn or affirmed do hereby say:

1. My name is Thaddeus Lucas. I am over the age of eighteen and competent to testify to the truth of the matters contained herein.

2. I was a witness in Ray Jefferson Cromartie's capital murder trial in Thomasville, GA in 1997. Mr. Cromartie was my co-defendant but I pled guilty to robbery and hindering apprehension in the case and did not go to trial. I served 10 years in prison.

3. As I testified at trial, I took my brother (Ray Jeff Cromartie) and Corey Clark to the Junior Foods store on the night of the murder because they wanted to steal some beer. I had

no idea that anyone had a gun or planned to shot anyone in the store. I stayed in the car and didn't see what happened in the store.

4. While I did not see what happened in the Junior Food store, I later overheard Corey Clark tell Gary Young that he shot the clerk in the face. I heard Corey say this to Gary just before the shooting that happened at the Cherokee apartments. I think we were in Tina Washington's apartment when I heard Corey say that he shot the clerk to Gary Young.

5. I have not wanted to talk about this before. I have not told anyone what Corey said about shooting the clerk because I was worried that it would ruin my life more

than it already has. I served 10 years in prison for this and I didn't think saying anything about it would change the situation for Ray or Corey and so I just tried to put the whole thing behind me.

6. But over the last couple of weeks I have read about the case in the news and it has made me very angry because the story is not the truth of what really happened. I know that some of my own past statements and being quiet about this helped hide the truth. But I keep hearing that Jeff Gonaskie is the shooter and I know that is probably not true. I don't know for certain what happened that night because I wasn't in the store, but I know what I heard Corey say about it to bury that he shot the Clerk.

7. I don't know if this information is helpful, I always thought what ~~[illegible]~~ I heard Corey say about shooting the clerk was hearsay and could not be used. But I still wanted to say what happened before it was too late.

FURTHER AFFIANT SAITH NAUGHT

Thaddeus Lucas

THADDEUS LUCAS

Sworn to and subscribed to before me this 6th day of November, 2019 by Thaddeus Lucas.

[illegible]

NOTARY PUBLIC, STATE OF GEORGIA

NOTARY PUBLIC GEORGIA CHATHAM COUNTY EXPIRES Feb. 12, 2020