CROMARTIE V. SHEALY: ESTABLISHING STANDARDS FOR POSTCONVICTION DNA EVIDENCE TESTING

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In *Cromartie v. Shealy*,[1] the Eleventh Circuit Court of Appeals affirmed the district court's decision to dismiss Cromartie's § 1983 complaint and deny his motion for a stay of execution.[2] The court also denied as moot Cromartie's emergency motion for a stay of execution.[3] Cromartie filed a motion asking for a new trial and DNA testing on various items that had been introduced into evidence in his trial.[4] In his motion, he contended that two new advancements in DNA technology would prove that one of his accomplices was the actual shooter.[5]

On April 7, 1994, Cromartie entered a deli carrying a .25 caliber pistol that he borrowed from his cousin, Gary Young.[6] Cromartie went behind the counter and shot the clerk in the face.[7] After failing to open the cash register, Cromartie left the deli empty-handed.[8] The clerk survived despite suffering a life-threatening injury.[9] The next day Cromartie told Young and Carnell Cooksey that he shot the clerk and asked them if they wanted to assist him in robbing a Junior Food Store.[10] Although neither accepted his offer, Cromartie convinced Thaddeus Lucas and Corey Clark to assist him in his plan.[11]

On April 10, Cromartie and Clark entered the Junior Food Store while Lucas waited in a car nearby.[12] Cromartie shot the store's clerk twice in the head, causing his death.[13] After once again failing to open the cash register, Cromartie and Clark fled the store after stealing two 12-packs of Budweiser Beer.[14] There were several eye-witnesses that saw Cromartie and Clark

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[1] Cromartie v. Shealy, No. 19-14268, 2019 WL 5588745, at *1 (11th Cir. Oct. 30, 2019).

[2] *Id.* at *10.

[3] *Id.*

[4] *Id.* at *3.

[5] *Id.*

[6] *Id.* at *1.

[7] *Cromartie*, 2019 WL 5588745 at *1.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Cromartie*, 2019 WL 5588745 at *1.

[14] *Id.*

running from the store.[15] A police canine unit tracked the men to an apartment complex near the store where they had been hiding.[16] A firearm expert determined that the gun used to shoot both clerks was the gun that Cromartie had borrowed from his cousin.[17]

Cromartie was indicted in Thomas County, Georgia on counts of malice murder, armed robbery, aggravated battery, aggravated assault, and possessing a firearm during the commission of a crime.[18] The jury found him guilty of all counts and recommended a sentence of death.[19] The trial court sentenced Cromartie to death for the malice murder, life imprisonment for the armed robbery, and various other lesser sentences for the other charges.[20] Cromartie filed a motion for a new trial; a motion for reconsideration; a petition to the Supreme Court for certiorari; and a petition for rehearing; all of which were denied.[21] On April 19, 2000, the Thomas County Superior Court issued an order that set his execution for the week of May 9, 2000.[22] Cromartie filed a motion for a stay of execution in both the superior court and the Georgia Supreme Court, both of which were denied.[23] His execution was automatically stayed when he filed a state habeas petition in the days before his scheduled execution.[24] The state conducted an evidentiary hearing and ultimately denied his habeas petition.[25] He then filed a motion for reconsideration with the Georgia Supreme Court, which was denied. The United States Supreme Court once again denied him certiorari.[26]

On December 28, 2018, Cromartie filed a motion for a new trial and DNA testing on various items that had been introduced as evidence during his trial.[27] He claimed that two major advancements in DNA testing, the ability to test "touch DNA" and probabilistic genotyping, could help prove that he was not the one who actually shot the clerk on April 10, 1994.[28] "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

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[15] *Id.*
[16] *Id.* at *2.
[17] *Id.*
[18] *Id.*
[19] *Cromartie*, 2019 WL 5588745 at *2.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Cromartie*, 2019 WL 5588745 at *3.
[26] *Id.*
[27] *Id.*
[28] *Id.*

motion was not filed for the purpose of delaying his execution."[29] The Georgia Supreme Court denied his application for a discretionary appeal.[30]

On October 16, 2019, Cromartie's execution was set for the week of October 30, 2019.[31] He filed for a stay of execution with the Georgia Supreme Court pending his appeal of the trial court's order denying his request for new DNA testing.[32] The court dismissed his motion to stay as moot because it had denied his application for a discretionary appeal.[33] On October 24, 2019, Cromartie filed for an emergency motion to recall the execution order, which was denied.[34] He also filed a second state habeas petition, which was denied.[35] He also filed with the Georgia State Board of Pardons and Paroles for a 90-day stay of his execution, which was denied.[36] On October 22, he filed a complaint in which "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."[37] He then filed a stay of execution so that the district court could consider his claims.[38] The district court dismissed his complaint and denied his motion for a stay of execution.[39]

The case came before the Eleventh-Circuit Court on appeal.[40] In its decision, the court explained that:

> [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.[41]

The Eleventh Circuit noted that the Supreme Court has ruled that if a state law allows citizens to challenge their convictions on the ground of actual

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[29] *Id.*
[30] *Id.*
[31] *Cromartie*, 2019 WL 5588745 at *4.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Cromartie*, 2019 WL 5588745 at *4.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.* (internal quotation marks and citation omitted).

innocence, they have a "liberty interest" that is protected by the Due Process Clause.[42] The Court stated, however, that a prisoner's "liberty interest" is limited compared to a criminal defendant because the prisoner has already been convicted at a fair trial.[43] The Supreme Court set out the following test in regards to postconviction DNA testing: "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."[44] The Court recognized that this is a difficult standard for a prisoner to meet.[45]

The Eleventh Circuit Court pointed out that the Supreme Court has neither attempted to define what level of process is required to satisfy the fundamental fairness standard, nor specified "the process due."[46] However, the Court provided some guidance in the *Osborne* case by stating there was "nothing inadequate" about the state of Alaska's procedures.[47] These procedures provided a substantive right to release if there was a sufficiently compelling showing of new evidence that establishes the prisoner's innocence and discovery in the postconviction proceeding was available to the side seeking the DNA evidence at the time of the original trial.[48] The Supreme Court also discussed how states may place limits on postconviction relief claim evidence, such as "newly available"; "sufficiently material"; and "diligently pursued."[49] Other states required that the testing was technologically unavailable at the time of the trial.[50] After discussing these views, the Eleventh Circuit adopted the "comparative approach."
Section 5-5-41 of the Georgia Code establishes the procedure that a prisoner must follow to challenge his or her conviction based on postconviction DNA testing.[51] The two motions a prisoner may file are: an extraordinary motion for a new trial and a motion for postconviction DNA testing.[52] It is the time when a prisoner files the motion that qualifies it as "extraordinary."[53] In

[42] *Id.* at *5.
[43] *Cromartie*, 2019 WL 5588745 at *5.
[44] *Id.* (internal quotation marks and citation omitted).
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Cromartie*, 2019 WL 5588745 at *5-6.
[50] *Id.* at *6.
[51] *Id.* at *6.
[52] *Id.*
[53] *Cromartie*, 2019 WL 5588745 at *6.

Georgia, prisoners must file within thirty days of the entry of their judgement, except in limited circumstances.[54]

In a motion for postconviction DNA testing, a prisoner must show:

> (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) 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.'[55]

The prisoner must also prove to the court that their motion was not filed for the purpose of delay and that the DNA evidence had not been ordered in an earlier proceeding.[56] If all these requirements are met, then the prisoner is entitled to a hearing within ninety days.[57]

The court is required to grant the prisoner's motion for DNA testing if all the requirements detailed above are met and:

> (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.[58]

Despite Georgia's requirements being in alignment with the Supreme Court's rulings, Cromartie argues that Georgia's procedures are

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[54] *Id.*
[55] *Id.* at *7 (citations omitted).
[56] *Id.*
[57] *Id.*
[58] *Id.* (internal quotation marks and citation omitted).

fundamentally unfair for two main reasons.[59] First, Cromartie objects to Georgia's requirement that he act with due diligence in filing his motion.[60] Cromartie argues that the requirement means that a prisoner must seek DNA testing as soon as possible, even if the testing that is available at the time is not advanced enough to provide meaningful results.[61] The Eleventh Circuit Court does not find his argument to be convincing.[62] To meet the due diligence requirement, the Georgia Supreme Court has stated a prisoner must show he "exercised due diligence but, due to circumstances beyond [his] control, was unable previously to discover the basis for the claim [he] now asserts."[63] The Eleventh Circuit noted that inadequate DNA testing technology would have satisfied the standard, because the standard only requires that a prisoner act with the due diligence required under the circumstances.[64]

Cromartie's second objection concerns Georgia's requirements that the favorable DNA testing results create a reasonable probability that he would have been acquitted at his trial had they been available at the time.[65] Cromartie argues that the Georgia Supreme Court has held that prisoners cannot make the required showing if there was overwhelming evidence presented against them at their trial.[66] Cromartie claims that the DNA evidence could have changed the outcome of the trial despite what other evidence was presented.[67] The Eleventh Circuit Court does not agree with Cromartie's argument.[68] The Eleventh Circuit noted that the Supreme Court has approved this type of materiality standard and that Cromartie's argument is at odds with the Court's precedent of applying the "reasonable probability" standard in similar cases.[69]

Cromartie also stated in his claim that postconviction access to DNA evidence testing "is necessary to vindicate his First and Fourteenth Amendment right to access the courts."[70] However, Cromartie failed to make these arguments in his initial brief on appeal, and the precedent of the court is to deem such arguments as abandoned.[71] Even if Cromartie's claim were

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[59] *Cromartie*, 2019 WL 5588745 at *8.
[60] *Id.* at *8.
[61] *Id.*
[62] *Id.*
[63] *Id.* (citation omitted).
[64] *Id.*
[65] *Cromartie*, 2019 WL 5588745 at *9.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.* at *10.
[71] *Cromartie*, 2019 WL 5588745 at *10.

not considered abandoned, the court states that it fails on its merits.[72] To violate a person's rights to access the courts, there must be actual injury, meaning the plaintiff must "have an underlying cause of action the vindication of which is prevented by the denial of access to the courts."[73] Cromartie argues that the potential exculpatory DNA evidence could be used to challenge his convictions and death sentence in a motion for a new trial or to obtain executive clemency.[74] The court states that since Georgia's postconviction DNA procedure complies with due process, it does not interfere with Cromartie's right of access to the courts.[75] The court also points to how the Supreme Court has ruled that there is no federal constitutional right to executive clemency.[76]

The Eleventh Circuit affirms the district court's decision to dismiss Cromartie's complaint and denies his motion for a stay of execution.[77] The court also denies as moot Cromartie's emergency motion for a stay of execution.[78]

In affirming the district court's decision, the Eleventh Circuit reaffirmed the Supreme Court's position on the circumstances in which postconviction DNA evidence testing can be conducted. Hopefully, this decision will help provide guidance to future courts in handling similar stay of execution appeals.

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[72] *Id.*
[73] *Id.* (internal quotation marks and citation omitted).
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Cromartie*, 2019 WL 5588745 at *10.
[78] *Id.*