No. 09-9000

In The
Supreme Court of the United States

HENRY W. SKINNER,

Petitioner,

v.

LYNN SWITZER, DISTRICT ATTORNEY FOR THE 31ST JUDICIAL DISTRICT OF TEXAS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICI CURIAE BRIEF OF TARRANT COUNTY CRIMINAL DISTRICT ATTORNEY, ET AL., IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Joe Shannon, Jr. is the Criminal District Attorney for Tarrant County, Texas. The other *amici* joining in this brief are district or county attorneys in Texas. Texas district and county attorneys are statutorily required to participate in judicial proceedings under Chapter 64, Texas Code of Criminal Procedure, which authorizes a person convicted of a crime to file a motion in the convicting court to obtain DNA evidence for testing. *In re Guerra*, 235 S.W.3d 392, 407 n. 54 (Tex. App. – Corpus Christi 2007, no pet.) ("'The attorney representing the State' means the Attorney General, district attorney, criminal district attorney, or county attorney.") (citing TEX. CRIM. PROC. CODE ANN. art. 20.03 (Vernon 2005)). In this case, after twice unsuccessfully invoking Chapter 64 and pursuing a direct appeal and federal habeas, Petitioner Henry Skinner filed a federal civil rights suit seeking injunctive and declaratory relief based on 42 U.S.C. Section 1983 against District Attorney Lynn Switzer in her official capacity to obtain access to DNA evidence for testing.

The result sought in this case by Petitioner would allow persons to seek postconviction access to DNA evidence by initiating federal civil rights actions based on 42 U.S.C. Section 1983 even though statutory and constitutionally adequate state procedures with direct judicial involvement and oversight already exist. These actions would re-examine, in a federal civil case, issues and evidence already reviewed or which could have been raised in state criminal

proceedings and/or federal habeas. This would effectively result in multiplicious litigation. In the event the Court rules in Petitioner's favor, prosecutors could be named as defendants in future suits, as was done in this case. Defending such actions would result in expense for legal representation and other litigation costs to Texas counties or the State of Texas. Procedural and substantive legal issues relating to accrual of the cause of action, proper defendant, types of damages and relief permitted, and immunity would arise and require resolution by the federal courts.

SUMMARY OF THE ARGUMENT

Section 1983 actions should not be available to convicted persons where a facially constitutional postconviction DNA testing statute exists that provides for full judicial (trial and appellate) review. Chapter 64 (entitled "Motion for Forensic DNA Testing"), Texas Code of Criminal Procedure (hereinafter "Ch. 64") is such a statute. Ch. 64 is evolving through legislative action to meet the needs of the judicial system. It is working – not only is it facially constitutional as a result of built-in procedural protections and rights, but the available statistics also show that motions are being granted, sometimes resulting in exoneration, and therefore it is being applied in a constitutionally appropriate manner. The Texas Court of Criminal Appeals ultimately decides Ch. 64 DNA motions and federal and state habeas relief is

available for DNA testing. Petition for writ of certiorari is also available to challenge the rulings of the state and federal courts. Allowing Skinner's claim would set a precedent that would consume time and resources of District Attorneys – they would be distracted by having to litigate these suits – and financial resources of counties or states to hire more staff would have to be expended. Unless the state attorney general undertakes the defense of these suits or a District Attorney's staff is sufficiently large or experienced in federal litigation, counties could be faced with the expense of hiring private law firms for representation of the civil rights defendants. There would be a multitude of difficult issues to resolve relating to both substantive and procedural law. Defending civil suits in federal courts involving postconviction DNA testing would distract Texas prosecutors from performing their traditional functions and statutory duties. Section 1983 suits filed for the purpose Skinner did would also delay justice for the victims.

Henry Skinner has had more than adequate due process, effective representation and extensive judicial review of the evidence in his case by state and federal courts. Allowing him to proceed with a Section 1983 suit to obtain additional DNA testing, "outside the process," as the Court said in *District Attorney's Office for the Third Judicial District v. Osborne*, 129 S. Ct. 2308, 2319 (2009), would set a precedent that would have far reaching consequences for prosecutors and federal courts. *Osborne*, *id*. at 2323. It would

provide persons convicted in Texas with a federal action to seek DNA testing regardless of the crime committed, the sentence imposed or when the conviction occurred. The Texas Legislature did not include a limitations period or restriction on the number of motions for postconviction DNA testing that a convicted person could file under Ch. 64. The Texas statute is not limited to capital offenses or to convicted persons who are still incarcerated. Persons who long since have served their sentences and have been released from confinement could still file Section 1983 suits after filing *unsuccessful* Ch. 64 motions. Section 1983 does not generally have an exhaustion requirement. Allowing Section 1983 to be used to obtain DNA testing could prompt the filing of large numbers of Chapter 64 motions in state courts as a vehicle to get to federal court with Section 1983 suits. Both state and federal courts would then have to review and adjudicate such claims. It would effectively, and as a practical matter, allow convicted persons who been unsuccessful in direct appeals, habeas actions and postconviction DNA testing applications to use Section 1983 as a "last resort" to take "one more shot" at challenging their convictions or sentences.

ARGUMENT

The question presented in this case is whether Petitioner Henry Skinner can use Section 1983 to obtain postconviction DNA testing. The Texas prosecutors who have joined in this brief concur with and

adopt the arguments of counsel of record for District Attorney Lynn Switzer relating to this issue and agree that the decision below should be affirmed on the grounds set out in Switzer's brief. Those arguments are ably and correctly made in Switzer's brief and will not be repeated in this *amici* brief. There are additional reasons for affirming the Fifth Circuit's decision that are addressed in this brief.

I. Chapter 64, Texas Code of Criminal Procedure, Provides for Adequate Procedural Due Process.

Petitioner's Complaint (¶¶32, 35) alleges that District Attorney Switzer violated his due process rights under the Fourteenth Amendment and subjected him to cruel and unusual punishment in violation of the Eighth Amendment:

> By refusing to release the biological evidence for testing, and thereby preventing Plaintiff from gaining access to exculpatory evidence that could demonstrate he is not guilty of capital murder, Defendant has deprived Plaintiff of his liberty interests in utilizing state procedures to obtain reversal of his conviction and/or obtain a pardon or reduction of his sentence. . . .

Nothing DA Switzer did or did not do prevented Petitioner from "utilizing state procedures" or caused the statute to be applied by the courts in a manner that denied him due process.

Chapter 64 is effective in achieving exonerations in appropriate cases and meets constitutional due process requirements, both facially and in its application to Henry Skinner. Petitioner Skinner filed two (2) motions for postconviction DNA testing utilizing Chapter 64, Texas Code of Criminal Procedure. *Skinner v. State of Texas*, 122 S.W.3d 808 (Tex. Crim. App. 2003); *Skinner v. State of Texas*, 293 S.W.3d 196 (Tex. Crim. App. 2009)

In *District Attorney's Office for the Third Judicial District v. Osborne*, 129 S. Ct. 2308, 2319 (2009), the Court found that (1) the Alaska general postconviction relief statute was not facially unconstitutional and (2) Osborne had not properly invoked state procedure and therefore could not show that, "as applied," he had been denied procedural due process. Skinner does not claim that Ch. 64 is facially unconstitutional and cannot show that "as applied" to him, the procedure under Ch. 64 resulted in a denial of due process. Ch. 64 is facially constitutional and is equivalent to and includes the same or similar provisions as 18 U.S.C. Section 3600 (2004 Innocence Protection Act), the federal postconviction DNA testing statute.

The issue relating to the claim by Skinner of an unconstitutional application of Ch. 64 in his case is whether the courts which decided his cases failed to utilize or incorrectly used the procedures set forth in the statute or arbitrarily denied testing (for reasons that were fundamentally unfair or illogical and disregarded whether testing, if done, would have had a reasonable probability of developing evidence that

could realistically show that he was innocent). Skinner has not claimed any facial deficiency nor has he clearly specified what procedures were not afforded him or convincingly demonstrated why grounds identified by the courts which reviewed his Ch. 64 motions were arbitrary or illogical. He apparently contends District Attorney Switzer's denial of his requests to gain access to or test DNA is the constitutional tort on which his Section 1983 claim is based. Switzer was not obligated to voluntarily give Skinner access to DNA evidence or to test DNA evidence after his conviction. Ch. 64 affords convicted inmates access to DNA for postconviction testing through a comprehensive judicial process.

Switzer was not required or obligated to give Skinner access to DNA evidence or to test DNA evidence because the trial court and Court of Criminal Appeals decided he was not entitled to access or testing. The results and grounds are reported in the following cases:

Skinner v. State of Texas, 122 S.W.3d 808, 811 (Tex. Crim. App. 2003):

> Article 64.03(a)(2)(A) requires the convicted individual to establish by a preponderance of the evidence that a reasonable probability exists that he or she would have not been prosecuted or convicted if exculpatory results had been obtained through DNA testing . . . . . [T]he presence of a third party's DNA at the crime scene would not constitute affirmative evidence of innocence.

> See *Bell*, 90 S.W.3d at 306. The standard required by this Court to grant testing under Chapter 64 is affirmative evidence of innocence. *Kutzner*, 75 S.W.3d at 438-439.

Skinner v. State of Texas, 293 S.W.3d 196, 197 (Tex. Crim. App. 2009):

> At appellant's trial, some evidence was tested for DNA, and some was not. State and federal district courts have both found that defense counsel had a reasonable trial strategy for not requesting the testing of the untested items. Some of the remaining items were subsequently tested. Appellant now requests testing of items that still remain untested. We hold that, in the usual case, the interests of justice do not require testing when defense counsel has already declined to request testing as a matter of reasonable trial strategy.

[In addition to his trial defense counsel, Petitioner was represented by no less than four (4) attorneys for the direct appeal of his conviction, state and federal habeas and Ch. 64 motions.]

The federal postconviction DNA testing statute (18 U.S.C. Section 3600) (approved in *Osborne*, at 2317) includes procedures similar to those found in Ch. 64. The Texas statute is even less restrictive than the federal statute. Section 3600:

> (1) requires the movant to assert that he is actually innocent;

(2) imposes a time limit for submitting a motion (within 36 months of conviction);

(3) requires exhaustion of state remedies for requesting DNA testing;

(4) requires the movant to identify a theory of defense not inconsistent with a defense at trial and which would establish the actual innocence of the movant.

Texas Ch. 64 contains none of the foregoing restrictions. Both statutes provide for filing of a motion for DNA testing with the convicting court and allow appointment of counsel and testing, both at government cost upon a showing of indigency. Art. 64.02 requires that within 60 days of receipt of the motion from the court, the attorney representing the state shall "deliver the evidence to the court" or "explain in writing to the court why the state cannot deliver the evidence to the court." Art. 64.02(b) also permits the court to proceed if the response period for the state's attorney to respond has expired, regardless of whether the state's attorney has responded. Art. 64.04 requires the convicting court to hold a hearing and make a finding as to whether, had the results been available during the trial of the offense, it is reasonably probable that the person would have not been convicted. Art. 64.05 permits appeal from the convicting court "in the same manner as an appeal of any other criminal matter, except that if the convicted person was convicted in a capital case and was sentenced to death, the appeal is a direct appeal to the court of criminal appeals."

In *Thompson v. Fernandez*, No. 10-10029, 2010 WL 3279158, *3 (11th Cir. Aug. 20, 2010), the Eleventh Circuit recently analyzed the Florida postconviction DNA testing statute as follows:

> First, Thompson fails to make the "difficult" showing that Rule 3.853 [Fla.R.Crim.P.] (2010) is facially invalid because Rule 3.853 contains similar requirements and limitations imposed by other DNA-testing statues, [sic] including the postconviction statute upheld in *Osborne*, 129 S.Ct. at 2317-18, 2320-21. . . . Specifically, both Rule 3.853 and the statute upheld in *Osborne* (1) require the claimant to make a sufficient showing that the additional DNA testing could demonstrate his actual innocence, (2) exempt the claim from applicable time limits, and (3) provide a successful claimant access to additional DNA testing. Compare Fla. R.Crim.P. 3.853 with *Osborne*, 129 S.Ct. at 2117-18, 2320-21 (describing the Alaska postconviction statute). Moreover, the federal postconviction DNA-access statute, 18 U.S.C. Sec. 3600, which *Osborne* cites with approval, overlaps with Rule 3.8.53 by requiring the prisoner to assert that (1) he is actually innocent, (2) the evidence sought has not been previously tested for DNA or that subsequent DNA testing techniques could produce a more definitive result, and (3) the prisoner's identity was a disputed issue at trial. Compare Fla.R.Crim.P. 3.853, with 18 U.S.C. § 3600. Accordingly, we conclude that Thompson has failed to show that Rule 3.853

> "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." *Osborne*, 129 S.Ct. at 2321 (quotation marks omitted).

Chapter 64 is sufficient in this respect and, as it seems the majority in *Osborne* required, a convicted person would be required to show how he had been denied procedural due process. It is not however necessary to invoke Section 1983 to assert the claim that the Ch. 64 was applied erroneously in a particular case since that judicial determination may be reviewed on appeal under current state and federal procedures.

Since Chapter 64 of the Texas Code of Criminal Procedure was first enacted and became effective in 2001, the Texas Legislature has provided inmates in Texas with two (2) separate provisions for additional postconviction forensic testing: Chapter 64 and Article 11.07 of the Texas Code of Criminal Procedure. Art. 11.07 was enacted by the legislature in 2007 and essentially provides for testing of non-DNA evidence in non-death penalty habeas cases. If Petitioner's argument that he is entitled to pursue a Section 1983 action is accepted, that would arguably mean that, by enacting postconviction evidence testing statutes (Ch. 64 and Art. 11.07), the Texas legislature also created an opportunity to bring "as applied" procedural due process Section 1983 causes of action for both DNA and non-DNA (toxicology, fingerprint

analysis, ballistics, drug chemical analysis, etc.) testing. Ch. 64 allows DNA testing in both felony and misdemeanor cases regardless of whether the convicted person is still serving a sentence or has been released and discharged. As described below, these statutes have been amended to meet needs of the court system, prosecutors and convicted defendants in preventing wrongful convictions. As a result, these laws are more than adequate to provide procedural due process and are better suited to accommodate appropriate postconviction DNA testing than Section 1983. Ch. 64 has been effective in the Texas criminal justice system to allow review and exoneration in appropriate cases and has evolved to address practical issues relating to postconviction DNA testing. Ch. 64 has been amended twice, in 2003 and 2007. These changes have been made to clarify the statute and to respond to judicial interpretations of its provisions.

Chapter 64 of the Texas Code of Criminal Procedure essentially provides a mechanism for a convicted person to request postconviction DNA testing if he or she can demonstrate:

a. there is evidence that is in a condition making DNA testing possible;

b. identity is or was at issue; and

c. there is a 51% chance (preponderance of evidence) that the person would not have been convicted if the DNA testing result was exculpatory.

II. Texas Legislature has Continued to Enhance Chapter 64 Postconviction DNA Testing Procedures.

Since Ch. 64 was enacted in 2001, the Texas Legislature has responded to the following issues identified by the courts and others relating to DNA testing requests under the statute:

- **Preservation of Biological evidence.**

  Resolution: At the same time Ch. 64 was created, Article 38.39 (now Article 38.43) of the Texas Code of Criminal Procedure was enacted to ensure preservation of evidence containing biological material. Added by Acts 2001, 77th Leg., ch. 2, § 1, eff. April 5, 2001.

- **Article 64.01.** DNA testing previously conducted in a case.

  Resolution: Ch. 64 allows for new DNA testing even if prior testing of that evidence was conducted if newer testing techniques would provide "more accurate and probative results." TEX. CRIM. PROC. CODE ANN. art. 64.01(b)(2) (Vernon 2006).

- **Article 64.01.** Convicted person previously filed a motion for DNA testing and wants to file a new one.

  Resolution: Ch. 64 "does not prohibit a second, or successive motion for forensic DNA testing." *Ex parte Baker*, 185 S.W.3d 894, 897 (Tex. Crim. App. 2006).

- **Article 64.01.** The original version of the statute required appointment of counsel if the defendant requested it. Ch. 64 motions frequently have no merit. (Examples: request to test gunshot residue; all evidence has been destroyed or deteriorated; offense not conducive to DNA testing (e.g., theft)).

  Resolution: Amendment in 2003 requiring the defendant to show "reasonable grounds for a motion to be filed." Acts 2003, 78th Leg., ch. 13, § 1, eff. Sept. 1, 2003.

- **Article 64.01.** Timely appointment of counsel by trial courts.

  Resolution: Amendment in 2007 that the trial court must appoint counsel "not later than the 45th day after" determining reasonable grounds exist for a motion to be filed. Acts 2007, 80th Leg., ch. 1006, § 2, eff. Sept. 1, 2007.

- **Article 64.011.** Guardian or other legal representative authorized to file Ch. 64 motion for convicted person unable to file motions due to age or incompetency.

  Resolution: Article 64.011 enacted. Acts 2003, 78th Leg., ch. 13, § 2, eff. Sept. 1, 2003.

- **Article 64.02.** The State timely provides the court with a list of evidence.

  Resolution: The State must now comply with Article 64.02 within 60 days after the motion is served on the State. Acts 2007, 80th Leg., ch. 1006, § 3, eff. Sept. 1, 2007.

- **Article 64.03.** The standard ("preponderance of the evidence that a reasonable probability exists") revised.

  Resolution: Removed "reasonable probability" to clarify. Acts 2003, 78th Leg., ch. 13, § 3, eff. Sept. 1, 2003.

- **Article 64.03.** The Court of Criminal Appeals held that a confession was sufficient to prove identity and therefore bar DNA testing. *See Bell v. State*, 90 S.W.3d 301, 308 (Tex. Crim. App. 2002) ("Appellant confessed to the murder. His identity was not at issue."). Lower courts found that identity was not at issue if a defendant admitted he was with the victim at the time of the alleged assault and later pleaded not guilty. *See Morris v. State*, 110 S.W.3d 100, 103 (Tex. App. – Eastland 2003, pet. ref'd).

  Resolution: Legislature amended Article 64.03 to include provision that "the convicting court is prohibited from finding that identity was not an issue in the case solely on the basis of that plea, confession, or admission." Acts 2007, 80th Leg., ch. 1006, § 4, eff. Sept. 1, 2007.

- **Article 11.65**. Timely Release of exonerated persons. A postconviction application for writ of habeas corpus alleging actual innocence based on exculpatory forensic evidence testing is decided by the Texas Court of Criminal Appeals.

> ***Resolution:*** Article 11.65 of the Texas Code of Criminal Procedure authorized bond for persons with pending applications for writ of habeas corpus. Added by Acts 2003, 78th Leg., ch. 197, § 1, eff. June 2, 2003.

Article 11.07 of the Texas Code of Criminal Procedure was also amended by the Legislature in 2007 to add "additional forensic testing" for non-DNA evidence as one of the evidentiary tools a trial court can order while resolving a postconviction application for writ of habeas corpus. This provision provides a procedure for testing non-DNA evidence in addition to Ch. 64 for DNA testing. Acts 2007, 80th Leg., ch. 1006, § 1, eff. Sept. 1, 2007. The Legislature obviously recognized the need for forensic evidence testing in postconviction habeas proceedings in addition to postconviction DNA testing under Chapter 64. Art. 11.07(3)(d) provides for court appointment of counsel. Although this provision does not specifically provide for testing DNA evidence, postconviction habeas applicants can still obtain DNA testing through Art. 11.07 since counsel (appointed or retained) for the habeas applicant under that provision would be ethically bound (and not prohibited by Art. 11.07) to undertake any appropriate measure, including filing of a motion under Ch. 64. Also, court appointed counsel under Art. 11.071 (Procedure in Death Penalty Case) for a writ of habeas corpus application in a death penalty case would be under the same obligation in view of the requirement under Section 3(a) to "investigate . . . the factual and legal grounds" for the application which would include seeking

testing of DNA and non-DNA evidence. TEX. CRIM. PROC. CODE ANN. art. 11.071, § 3(a) (Vernon 2005). A postconviction habeas applicant under Art. 11.07 or Art. 11.071 can therefore obtain both DNA and non-DNA evidence testing. Ch. 64, Art. 11.07 and Art. 11.071 effectively provide access to DNA evidence.

In summary, Texas statutory postconviction DNA testing procedures work because the Legislature has had nine (9) years to hone Chapter 64 and address issues that have arisen during that time period. As shown above, the Legislature has actively revised Chapter 64 and other relevant statutes to ensure that a convicted persons is not deprived of access to forensic testing when reasonable grounds show that he or she would not have been convicted had such testing resulted in exculpatory evidence.

III. Survey of Texas Prosecutors Shows Chapter 64 is Effective in Permitting DNA Testing and Achieving Exonerations.

The Texas Task Force on Indigent Defense (TTFID)[1] and the Texas District & County Attorneys

[1] The Task Force on Indigent Defense (http://www.courts.state.tx.us/tfid/) is a standing committee of the Texas Judicial Council and was established by the 77th Legislature (2001) to provide technical support to assist counties in improving their indigent defense systems, and to direct the comptroller to distribute funds, including grants, to counties to provide indigent defense services. The Texas Judicial Council is the policy-making body for the state judiciary and was created in 1929 by

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Association (TDCAA)[2] undertook a survey of district attorneys in 2010 to collect data pertaining to Ch. 64 motions filed since Ch. 64 was enacted in 2001. The report of that survey is included in Appendix 1 to this Brief. The counties of the 75 district attorneys who responded included 82.5 percent of the state's population. The report's conclusion, in part, states:

> Legislators approved Senate Bill 3 during 2001's 77th legislative session. This bill required the Texas Department of Public Safety to conduct DNA tests for convicted persons in certain cases. The DNA tests conducted excluded 23 convicted persons, as self reported by the counties, or 20.9 percent of tested cases. Another 21 cases, or 19.1 percent, were inconclusive. The remaining 66 cases, or 60 percent, confirmed the conviction as the convicted person's DNA was included by the test. Overall there were 18 exonerations resulting from the 1023 motions for DNA testing filed and ruled upon by the courts, or 1.8 percent.

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the 41st Legislature to continuously study and report on the organization and practices of the Texas judicial system. (http://www.courts.state.tx.us/tjc/tjchome.asp).

[2] The Texas District and County Attorneys Association (http://www.tdcaa.com/about) is a non-profit organization providing technical assistance to the prosecution community and related criminal justice agencies and serves as a liaison between prosecutors and other organizations in the administration of criminal justice.

The letter (dated March 16, 2010) by TTFID and TDCAA explaining the survey to those contacted and Tarrant County's response to the survey are included as Appendix 2 to this Brief. In Tarrant County, for example, approximately 150 motions for postconviction DNA testing under Chapter 64 (including 128 requests for counsel to assist in filing Ch. 64 motions) have been filed in the criminal courts during the period from April 5, 2001 (effective date of statute) through April, 2010. Eighteen (18) motions for DNA testing were granted in Tarrant County cases. As of September 1, 2010, DNA tests pursuant to these motions have concluded with one (1) exoneration and nine (9) confirmations of guilt. Three (3) tests were pending as of September 1, 2010 and five (5) had been determined to be inconclusive. Tarrant County also had one request under Article 11.07 (pertaining to postconviction habeas procedures in non-death penalty cases), Texas Code of Criminal Procedure, for DNA testing. (Counsel appointed under Art. 11.07 filed a Ch. 64 motion.) That request is currently pending before the trial court. The provision for postconviction forensic (non-DNA) testing was added to Article 11.07 in 2007.[3] (*See* discussion of Art. 11.07 above in II above.)

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[3] Texas Code of Criminal Procedure, Chapter 11 (Habeas Corpus), Art. 11.07 in relevant part, provides (italics added) that:

> Sec. 1. This article establishes the procedures for an application for writ of habeas corpus in which the

(Continued on following page)

applicant seeks relief from a felony judgment imposing a penalty other than death.

. . .

(d) *If the convicting court decides that there are controverted, previously unresolved facts* which are material to the legality of the applicant's confinement, it shall enter an order within 20 days of the expiration of the time allowed for the state to reply, designating the issues of fact to be resolved. To resolve those issues *the court may order* affidavits, depositions, interrogatories, *additional forensic testing*, and hearings, as well as using personal recollection. The state shall pay the cost of additional forensic testing ordered under this subsection, except that the applicant shall pay the cost of the testing if the applicant retains counsel for purposes of filing an application under this article. *The convicting court may appoint an attorney* or a magistrate to hold a hearing and make findings of fact. An attorney so appointed shall be compensated as provided in Article 26.05 of this code. It shall be the duty of the reporter who is designated to transcribe a hearing held pursuant to this article to prepare a transcript within 15 days of its conclusion. *After the convicting court makes findings of fact* or approves the findings of the person designated to make them, *the clerk* of the convicting court *shall immediately transmit to the Court of Criminal Appeals*, under one cover, the application, any answers filed, any motions filed, transcripts of all depositions and hearings, any affidavits, and any other matters such as *official records used by the court in resolving issues of fact*.

(e) For the purposes of Subsection (d), "additional forensic testing" does not include forensic DNA testing as provided for in Chapter 64.

IV. Petitioner's Claim of "As Applied" Denial of Due Process Is Not Supported by Law or the Undisputed Facts of This Case.

Skinner has not asserted that Ch. 64 is facially unconstitutional but only that, as applied in his case, he was denied procedural due process. He appealed both cases in which his Ch. 64 motions were denied and both times, the Texas Court of Criminal Appeals affirmed the denial. *Skinner v. State of Texas*, 122 S.W.3d 808 (Tex. Crim. App. 2003); *Skinner v. State of Texas*, 293 S.W.3d 196 (Tex. Crim. App. 2009) In neither instance did he file a petition for writ of certiorari in this Court.

Texas Ch. 64 is at least equivalent to the federal statute approved in *Osborne*, is a judicial procedure and cannot be applied by a prosecutor in a manner to deny procedural due process. *Osborne*, *supra* at 2317. Texas criminal courts decide postconviction DNA motions. Ch. 64 permits appeal of trial and intermediate court rulings and decisions to Court of Criminal Appeals after which there can be a direct appeal on writ of certiorari to this Court. A Texas district attorney does not "apply" Ch. 64 but simply responds pursuant to the requirements of the statute to the filing of the motion and therefore is not a proper defendant in a Section 1983 suit any more than he or she would be for not complying (in a manner that a defendant wanted) with a ruling of a court under any other provision of the Code of Criminal Procedure. If Ch. 64 provided that a district attorney had a particular function or duty not subject to court review, the

district attorney could arguably be made a Section 1983 defendant if the failure to act or abuse of discretion violated the defendant's procedural due process. That is not the case here.

Title 42 U.S.C. Section 1983 "has two basic requirements: (1) state action that (2) deprived an individual of federal statutory or constitutional rights." *Harajli v. Huron Twp.*, 365 F.3d 501, 505 (6th Cir. 2004); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 947 (1982). Since a Texas prosecutor does not apply the statute and therefore cannot cause a denial of procedural due process, a suit under Section 1983 against a prosecutor for postconviction DNA testing is subject to dismissal for failure to state a claim (since there would be no "state action" by the prosecutor) under Rule 12(b)(6), Federal Rules of Civil Procedure, Skinner has not identified how Switzer violated his procedural due process other than responding to his requests in manner consistent with two prior court rulings. Skinner's suit is in fact premised on Switzer's action (or inaction) that was consistent with a court ruling: "As a result of the decisions of the CCA [Texas Court of Criminal Appeals] denying Plaintiff postconviction DNA testing under Art. 64, the Defendant has refused and continues to refuse to make available to Plaintiff any DNA material for testing." (Complaint, ¶ 31) Under Ch. 64, it is a court that grants or denies access to DNA evidence, not the prosecutor.

Procedural due process protects the individual against arbitrary government action. *Wolff v.*

McDonnell, 418 U.S. 539, 558 (1974). To demonstrate a violation of his procedural due process rights, a plaintiff must establish that: (1) he possesses a protected liberty or property interest; and (2) the procedures utilized in his circumstances were inadequate. *See Hennigh v. City of Shawnee*, 155 F.3d 1249, 1253 (10th Cir. 1998). An "as-applied challenge" requires an analysis of the facts of a particular case to determine whether the application of a statute, even one constitutional on its face, deprived the individual to whom it was applied of a protected right. *Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 174 (2nd Cir. 2006). Ch. 64 clearly provides that, consistent with the procedures set forth in the statute, the judge of the convicting court (not the district attorney) decides whether a defendant is entitled to access to DNA evidence. Petitioner has not shown that Switzer "applied" the statute to him and Respondent's Brief clearly sets out reasons why the rulings of the trial court and Court of Criminal Appeals were not arbitrary or capricious or otherwise applied Ch. 64 in an unconstitutional manner in his case.

V. Allowing Section 1983 Action to Obtain DNA Testing Would Result in Burdensome Litigation.

There would be a substantial burden incurred by prosecutors and counties (e.g. need for hiring additional legal staff or law firm) to defend Section 1983 suits by convicted defendants that would likely result from a ruling in Skinner's favor. Texas district

attorneys who would be sued under Section 1983 for postconviction DNA cannot necessarily assume or expect that the Texas Attorney General will undertake their representation in those cases even though the Attorney General's Office has traditionally represented the State in federal postconviction habeas actions and suit against a district or county attorney in an official capacity would in actuality be a suit against the State. *Echols v. Parker,* 909 F.2d 795, 801 (5th Cir. 1990) (holding that a Texas district attorney is a state official when instituting criminal proceedings to enforce state law); *Quinn v. Roach*, 326 Fed.Appx. 280 (5th Cir. 2009); *Will v. Mich. Dep't of State Police,* 491 U.S. 58, 71 (1989) (clarifying that suits against state officials in their official capacity are no different from suits against the state itself).

Petitioner Skinner only briefly discusses the added burden to the courts that would result from allowing Section 1983 suits for postconviction DNA testing. It is important to recognize that the Prison Litigation Reform Act of 1995, Section 101(a), 42 U.S.C. Section 1997e(a) is not a cure-all for sifting through the civil suits that would be filed to circumvent habeas restrictions. There would be a substantial added burden on federal judges in screening *pro se* pleadings under the PLRA and 28 U.S.C. Section 1915A where there is an extensive litigation history and substantial trial, appellate and habeas records. Service of summons on the defendant(s) and filing of responsive pleadings or Rule 12(b) motions could occur in many cases. It would seem unlikely that the

courts would or could grant Rule 12(b)(6) motions and dismiss cases since the pleadings would be taken as true under Rule 12(b) and the courts might be hesitant to consider records outside the pleadings. *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 340 (5th Cir. 2008) (finding that because a 12(b)(6) "review is limited to his complaint and its proper attachments, we may not consider any additional evidence or pleadings.") A case may be dismissed for failure to state a claim "only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations." *Bulger v. United States Bureau of Prisons*, 65 F.3d 48, 49 (5th Cir. 1995). A dismissal for failure to state a claim is reviewed *de novo*. *Black v. Warren*, 134 F.3d 732, 733 (5th Cir. 1998). "Due process is inevitably a fact-intensive inquiry." *Krimstock v. Kelly*, 306 F.3d 40, 51 (2nd Cir. 2002); *Connecticut v. Doehr*, 501 U.S. 1, 10 (1991) ("[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.") It would seem that federal judges screening cases and deciding Rule 12(b)(6) motions would have to relax the rule restricting consideration to the complaint itself and documents attached to it and necessarily review court records in the related criminal proceedings. Such analysis would seem at best to be time consuming. In cases in which the plaintiff was a *pro se* inmate, it is unlikely that a federal judge could easily identify and obtain the relevant records for review other than by ordering the defendant prosecutor to file the appropriate court records from the criminal case(s).

Would federal judges be inclined in a Section 1983 action regarding DNA testing to appoint counsel as in federal habeas proceedings? If a postconviction DNA testing Section 1983 case is not dismissed under the PLRA or Section 1915A screening or under Rule 12(b)(6), it would then be necessary for the defendant(s) to file responsive pleadings, asserting any affirmative defenses and, unless the appropriate defendant is willing to concede a constitutional violation and agree to injunctive and/or declaratory relief, file a motion for summary judgment seeking dismissal of the action. What would a Rule 56 motion for summary judgment on the merits need to address? Would it be more cost effective to simply proceed to a bench trial? A bench trial would of necessity have to re-examine the legal grounds and evidentiary support for prior rulings of state and federal courts. In this case, Petitioner's counsel also filed a motion for preliminary injunction. Rule 65, Federal Rules of Civil Procedure, requires a hearing before a preliminary injunction is issued. This litigation would undoubtedly entail significant expenditure of resources and be time consuming to federal courts and local or state government.

Allowing a Section 1983 suit to be filed after postconviction denials of request for DNA testing would require district courts to determine whether a plaintiff's procedural due process rights, when considered within the framework of the state's procedures for postconviction relief, were violated. This may be no easy chore for the federal court and would

likely require review of state criminal court records and the expenditure of time of prosecutors and state court personnel for the federal court to be able to even screen a *pro se* complaint under the PLRA. "Defending" even a well-pled Section 1983 based on denial of postconviction access to DNA evidence would necessarily require, at minimum, defense counsel to review the factual allegations, court records and documents submitted with the complaint and citation to cases relating to the underlying prosecution (appeals and state and federal habeas) for completeness. It is unlikely that a federal judge could even preliminarily determine that there was a reasonable basis to conclude that a plaintiff's procedural due process rights were violated due to the manner in which the state postconviction DNA statute was applied in a plaintiff's case on the basis of the complaint alone.

VI. Allowing Section 1983 Action to Obtain DNA Testing Would Require Resolution of Numerous, Difficult Legal Issues.

A. ***Accrual of cause of action***. An unresolved question is when a cause of action (based on a constitutional tort) would accrue or the statute of limitations begins to run on a postconviction DNA testing Section 1983 if a prosecutor denied a request for "agreed" testing. If there is no "free standing" right, as the Court decided in *Osborne*, there can be no violation by the prosecutor. The prosecutor cannot be faulted for denying a right that does not exist. Plaintiff's Complaint (¶31) states:

> As a result of the decisions of the CCA denying Plaintiff post-conviction DNA testing under Art. 64, the Defendant has refused and continues to refuse to make available to Plaintiff any DNA material for testing. Her most recent refusal was in a telephone conference with Plaintiff's counsel on November 25, 2009.

What Petitioner was trying to allege in the foregoing that is relevant to the cause of the alleged injury and the date of the injury is unclear. In *Savory v. Lyons*, 469 F.3d 667, 673 (7th Cir. 2006), the Court, in affirming dismissal of the Section 1983 action as barred by the statute of limitations, found that: "The district court determined that the relevant accrual date was July 7, 1998, the date on which the Illinois circuit court denied Savory's request for DNA testing under Illinois law." The Court of Criminal Appeals denied Skinner's second Ch. 64 motion on September 23, 2009. *Skinner v. State of Texas*, 293 S.W.3d 196 (Tex. Crim. App. 2009). His previous Ch. 64 motion was denied by the Court of Criminal Appeals on December 10, 2003. *Skinner v. State of Texas*, 122 S.W.3d 808 (Tex. Crim. App. 2003). It seems that a Section 1983 action based on the 2003 decision of the Court of Criminal Appeals would be barred by limitations but that Petitioner could bring about another cause of action by filing a subsequent Ch. 64 motion and pursuing it to conclusion in the Court of Criminal Appeals which is exactly what Skinner did, in effect re-starting the statute of limitations. In *Spencer v. Lee*, 864 F.2d 1376 (7th Cir. 1989) (en banc), cert.

denied, 494 U.S. 1016 (1990), the Court determined that the use of court proceedings (to safeguard the detention and mental commitment process) did not elevate the process to that of "state action" for Section 1983 purposes. It appears that there is no "state action" under the facts of this case that would serve as a basis for a Section 1983 claim.

As noted, Ch. 64 does not limit the number of motions for postconviction DNA testing that can be filed. Allowing a Section 1983 action to be used to obtain postconviction DNA testing would enable a convicted person to effectively appeal every decision of the Court of Criminal Appeals regarding postconviction DNA testing in a criminal case to a federal district court as a civil case. Petitioner's reference to Switzer's refusal of access to DNA evidence "in a telephone conference with Plaintiff's counsel" implies that such refusal constituted an actionable injury. Even though Texas has enacted a formal procedure in Chapter 64, including the requirement for filing of a written motion in the convicting court, it appears that Skinner is alleging that he could trigger a constitutional violation or re-start the limitations period by a simple phone call to the District Attorney – even after his Ch. 64 motion(s) were denied. The District Attorney's merely not agreeing to voluntarily make DNA evidence available for testing or not testing DNA evidence is not an application of the state statute.

B. ***Proper Defendant.*** It is not clear who the proper defendant parties might be in a postconviction

DNA testing Section 1983 action where an affirmative injunction is sought. The DNA sought for testing may not be in the actual physical possession of the prosecutor's office. If all that is necessary is access to DNA evidence, declaratory relief would not seem appropriate or necessary in conjunction with the injunctive relief. Skinner asked for injunctive and declaratory relief in his complaint and filed a separate "Motion For Preliminary Injunction" asking that the court issue:

> a preliminary injunction declaring that Defendant's continued withholding of the evidence violates his constitutional rights and requiring Defendant to release the evidence enumerated in the Complaint's Prayer for Relief to Mr. Skinner in order that such evidence can be subjected to forensic DNA testing.

Claims like Skinner's would likely raise numerous, difficult questions of procedural and substantive law for the courts and officials involved that will be expensive to litigate. Skinner claims that Ch. 64 was arbitrarily applied against him, but DA Switzer did not apply the statute. Indeed, she is entitled to withhold DNA evidence where the Texas criminal courts denied Skinner's Ch. 64 motions. As to the limitations question, Skinner asserts that his claim accrued when the Court of Criminal Appeals ruled on his Ch. 64 motion appeal. This would however mean that: (1) Skinner has arguably sued the wrong defendant and (2) *Rooker-Feldman* would bar his claim. *Rooker*

v. Fidelity Trust Co., 263 U.S. 413, 415-416 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983).

C. ***Damages – Compensatory and Punitive.*** Section 1983 authorizes actual/compensatory damages as well as punitive damages for a constitutional violation. Skinner is not seeking damages but unless the Court decides that compensatory and punitive damages cannot be sought in a postconviction DNA testing Section 1983 action, it seems likely that at least some *pro se* plaintiffs will seek both types of damages against anyone whom they believe might have prevented access to DNA evidence and sue prosecutors, investigators and laboratory staff in their individual (personal) capacities. There would seemingly be no procedural bar to include a claim for damages. Absolute prosecutorial immunity would not necessarily be extended to bar damage claims against investigators, crime lab staff and other non-prosecutorial officials.

D. ***Prosecutorial Immunity.*** Another question that seems to not have been resolved is whether a prosecutor's decision to deny a request for postconviction DNA access or testing is clearly prosecutorial in nature. The pendency of a judicial proceeding is logically related to the determination whether a prosecutor's "activities [are] intimately associated with the judicial phase of the criminal process, and thus [are] functions to which the reasons for absolute immunity apply with full force." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); *Cousin v. Small*, 325 F.3d

627, 636 (5th Cir. 2003). In reality, simply being named as a defendant often causes distraction from the defendant's normal duties. As this Court has observed, " . . . permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). It is almost inevitable that plaintiffs would sue officials and employees other than prosecutors who will not have absolute immunity and will have to invoke qualified immunity.

E. ***Eleventh Amendment Immunity.*** Eleventh Amendment immunity shields state officials from official capacity suits. *Krainski v. Nevada ex rel. Board of Regents of Nevada System of Higher Education*, ___ F.3d ___, 2010 WL 2991397, at *3 (9th Cir. 2010) A narrow exception exists "where the relief sought is prospective in nature and is based on an ongoing violation of the plaintiff's *federal* constitutional or statutory rights." The doctrine of *Ex parte Young* allows a suit against a state official to go forward, notwithstanding the Eleventh Amendment's jurisdictional bar, only where the suit seeks prospective injunctive relief in order to end a continuing federal law violation. *Ex parte Young,* 209 U.S. 123 (1908); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73 (1996). In *Savory v. Lyons*, 469 F.3d 667, 673 (7th Cir. 2006), the Court held that the state's failure to release physical evidence for postconviction DNA

testing was not a continuing violation. It appears that the type of suit brought by Skinner may be barred by the Eleventh Amendment.

Allowing traditional civil rights suits to obtain DNA testing in addition to state statutory DNA testing procedures and federal habeas would place DNA testing "outside the process," which the majority in *Osborne* recognized and rejected:

> The criminal justice system . . . is a time-tested means of carrying out society's interest in convicting the guilty while respecting individual rights. That system, like any human endeavor, cannot be perfect. DNA evidence shows that it has not been. But there is no basis for Osborne's approach of assuming that because DNA has shown that these procedures are not flawless, DNA evidence must be treated as categorically outside the process, rather than within it. That is precisely what his §1983 suit seeks to do, and that is the contention we reject.

Osborne, *supra* at 2323. That is also precisely what Skinner's Section 1983 suit seeks to do.

CONCLUSION

For the reasons above and those set out in Respondent's Brief, the decision of the Fifth Circuit should be affirmed.

Respectfully submitted,

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Counsel for Amici Curiae

September 16, 2010

APPENDIX 1

TO: Cory Pomeroy, General Counsel for State Senator Robert Duncan

FROM: Jim Bethke, Executive Director, Texas Task Force on Indigent Defense

and

Rob Kepple, Executive Director, Texas District and County Attorneys Association

RE: POST-CONVICTION DNA TESTING SURVEY

DATE: September 13, 2010

In response to Senator Duncan's request for information concerning the effectiveness of Senate Bill 3 (77th R.S., 2001), Texas' post-conviction DNA testing law, we are providing you with this summary of the information collected by the Public Policy Research Institute at Texas A&M University.

Background

Legislators approved Senate Bill 3 authored by Senator Duncan during 2001's 77th legislative session. The bill created Chapter 64, Code of Criminal Procedure, to establish a procedure for post-conviction forensic DNA testing. SB 3 authorized a convicted person to ask a court for a DNA test, require the court to order a test if certain conditions were met, and require courts to appoint and compensate attorneys for indigent defendants seeking to file such motions if certain conditions are met, and allow appeals of court decisions relating to DNA tests.

Since the passage of the bill there has been a dearth of comprehensive information on its impact and the extent of its use. There is no single point of contact for collecting such information and so we have not known how many applications for relief have been filed, litigated, and granted or denied. It was with this in mind that Senator Duncan's office asked the Task Force on Indigent Defense (Task Force) to help determine the impact of the law. The Task Force partnered with the Texas District and County Attorneys Association to develop a survey instrument to send to each elected district attorney in the state since we thought they would be in the best position to compile and report the information. A survey was sent out in March 2010 to the state's 154 district attorneys and responses have been received from April through August 2010. The Public Policy Research Institute at Texas A&M sent out and collected the results of the eight-question survey. The survey instrument is included as Appendix 1.

Respondents

Of the 154 district attorneys in the state, 75 returned surveys, for a response rate of 48.7 percent. The 75 district attorneys cover 107 of the 254 counties in Texas or 82.5 percent of the residents (20.5 million of 24.8 million). Texas has 18 counties containing over 250,000 residents, and 11 of those returned their surveys, including the top six counties by population: Harris, Dallas, Tarrant, Bexar, Travis and Collin. Additionally, Texas has one district attorney covering

both Webb and Zapata counties, which have a combined population of 255,474. Table 1 provides the population and response status for all district attorneys serving populations above 250,000.

Table 1: Responses from District Attorneys in counties with over 250,000 residents

County	2009 Population[1]	Response Provided
Harris	4,070,989	Yes
Dallas	2,451,730	Yes
Tarrant	1,789,900	Yes
Bexar	1,651,448	Yes
Travis	1,026,158	Yes
Collin	791,631	Yes
El Paso	751,296	
Hidalgo	741,152	Yes
Denton	658,616	Yes
Fort Bend	556,870	
Montgomery	447,718	
Williamson	410,686	Yes
Cameron	396,371	Yes
Nueces	323,046	
Brazoria	309,208	
Galveston	286,814	Yes

[1] Population data for 2009 from US Census Bureau, State and County Quickfacts, http://quickfacts.census.gov/qfd/states/48000.html

Bell	285,787	
Lubbock	270,550	
Webb & Zapata	255,474	Yes

The mean population for the jurisdictions of the 75 respondents was 237,174 in 2009 and ranged from 6,109 (Crosby County) to 4,070,989 (Harris County). The majority of the respondents represent rural counties. Table 2 shows the population distribution for the respondents.

Table 2: Respondent population distribution

	Count	Percent of Respondents	Percent of Counties in Texas
Rural (Under 50,000)	53	62.4%	76%
Mid Sized (50,000-250,000)	20	23.5%	17%
Urban (250,000+)	12	14.1%	7%

Although mid-sized and urban jurisdictions are overrepresented in the responses, these areas are most likely to have the bulk of Chapter 64 motions for post-conviction forensic DNA testing. Note that 16 of the responding district attorneys have jurisdictions covering multiple rural counties.

Results[2]

The respondents reported a collective total of 929 requests for counsel to assist in filing Chapter 64 motions for post-conviction forensic DNA testing submitted by convicted persons since January 1, 2001. The average number was 14. Dallas County had the maximum with 500, which was also an extreme outlier in the survey. Tarrant County had the next highest reported number at 128. There were 33 respondents who reported no instances.

Next, respondents provided the number of Chapter 64 motions received and detailed the sources. The district attorneys reported having received 1132 motions between January 1, 2001 and April 2010. Over half were filed by court-appointed counsel. Table 3 gives the origination breakdown. The results are also split into the three population categories discussed above.

Table 3: Total number of Chapter 64 motions received by county size

	Ch. 64 Motions Received	Filed By Court-Appointed Counsel	Filed Pro Se	That Fell Into Neither Category
Rural	60	12	48	2
Mid Sized	90	16	73	2
Urban	982	581	313	34

[2] Appendix 1 contains all responses.

Total	1132	609	434	38
Percent of Motions Received		53.8%	38.3%	3.4%

Urban counties, by far, had the highest collective number of motions received and motions filed by court appointed counsel. Overall Pro Se filings were higher in urban counties; however defendants were much more likely to file their motions Pro Se in rural and mid-sized counties than in urban counties.

Most requested Chapter 64 motions were denied. The total number granted was 125, which is 11 percent of those requested. Almost two-thirds (65.6%) of those granted were filed by court appointed counsel. Table 4 describes motions granted.

Table 4: Total number of Chapter 64 motions granted by county size

	Ch. 64 Motions Granted	**Filed By Court-Appointed Counsel**	**Filed Pro Se**	**That Fell Into Neither Category**
Rural	8	7	6	1
Mid Sized	4	3	12	1
Urban	113	72	17	17
Total	125	82	35	19
Percent of Motions Received		65.6%	28%	15.2%

Urban counties received the bulk of the 125 granted Chapter 64 motions. They received 90.4 percent of those filed.

It is important to note a data discrepancy in the self reported figures. The question "how many chapter 64 motions for post-conviction forensic DNA testing has your jurisdiction received" was reported to be 1132. Question 3 then inquired on the number granted, which was 125, then Question 4 asked how many have been denied, which was 897. This is a total of 1023 cases (granted plus denied), which is not the same as the total number of motions from Question 2. The 110-motion discrepancy may be the result of motions that are pending before courts or withdrawn by petitioners. It could also be due to the nature of the survey since most do not have a tracking system in place and many counties noted that they used estimates, not records, to report this information.

Additional reasons for the discrepancy were noted by Dallas County and Collin County. Dallas County commented on Question 4: *Please note that the trial court "dismissed" the Chapter 64 motions in 12 cases, which are not included in the above answer to question 4.* Collin County noted for Question 5: *Two of the seven appeals are pending.* Therefore, we believe the lack of coherent standards on recording and reporting are the most likely causes of the incongruities.

Respondents reported 898 Chapter 64 motions for post conviction forensic DNA testing have been denied since January 1, 2001. Assuming a total of 1,023

requests that have been ruled upon (summation of 125 granted and 898 denied), 87.8 percent of requests are denied and 12.2 percent granted. Table 5 reports the number and percentage of motions denied.

Table 5: Chapter 64 motions requested, granted and denied by county size

	Ch. 64 Motions Requested	Ch. 64 Motions Granted	Ch. 64 Motions Denied	Percent Ch. 64 Motions Denied
Rural	64	8	56	87.5%
Mid Sized	81	4	77	95.1%
Urban	878	113	765	87.1%
Total	1023	125	898	87.8%

Urban and rural counties slightly deviated from the total rate of Chapter 64 motion denials. Midsized counties had the only statistically significant denial rate at 95.1 percent.

If a defendant has a motion denied by the district court, the defendant can appeal the decision. The respondents indicated there were appeals following 265 denials, or 29.5 percent of total motions denied. Table 6 shows the number of appeals filed and granted.

Table 6: Appeals process by county size

	Ch. 64 Motions Denied	Ch. 64 Denials Appealed	Percent of Denials Appealed	Ch. 64 Appeals Granted	Percent of Appeals Granted
Rural	56	12	21.4%	5	41.7%
Mid Sized	77	19	24.6%	0	0%
Urban	765	234	30.6%	5	2.1%
Total	898	265	29.5%	10	3.8%

Rural counties appealed 21.4 percent of issued denials and were granted 41.7 percent of those appeals. Midsized counties filed slightly more appeals than rural counties, but did not receive any. Urban counties filed the most and were largely responsible for the total

Once the convicted persons were granted their Chapter 64 motions for post-conviction forensic DNA testing, 20.1 percent of the tests excluded the convicted person. Table 7 shows the results for Chapter 64 DNA testing.

Table 7: Chapter 64 Results and Outcomes

	Number of Inclusions	Number of Exclusions	Number Found Inconclusive	Number Exonerated
Rural	6	0	2	0
Midsized	2	1	1	1
Urban	58	22	18	17
Total	66	23	21	18

The DNA tests resulted in the exclusion of 23 people. These 23 exclusions resulted in 18 exonerations: 17 from urban counties and one from a midsized county. The survey results do not explain this discrepancy.[3] The net result is that a total of 1.8 percent of the original 1023[4] Chapter 64 motions received and ruled upon resulted in exoneration.

The lab work for Chapter 64 motions was conducted by the Texas Department of Safety (DPS), a DPS affiliated lab, or a private lab with no affiliation to a given jurisdiction. The respondents reported using the DPS or DPS affiliated lab in 114 cases and a private lab in 23 cases, i.e. a DPS or affiliated lab conducted 83.2 percent of post-conviction forensic DNA tests. Table 8 elaborates on the breakdown of lab use.

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[3] As mentioned earlier, this discrepancy between exclusions and exonerations may indicate pending court cases or related delays, but the specific cause of the discrepancy could not be determined using existing survey data.

[4] As noted in Table 3's discussion, there is a difference in total motions reported. If 1132 Chapter 64 motions are used, then the result is 1.6 percent of cases result in exoneration.

Table 8: Type of Lab used

	Total Number of Ch. 64 DNA Test	Number of Ch. 64 analyzed at DPS or Affiliated Lab	Percent of Ch. 64 analyzed at DPS or Affiliated Lab	Number of Ch. 64 analyzed at Private Lab	Percent of Ch. 64 analyzed at Private Lab
Rural	23	21	91.3%	2	8.7%
Midsized	4	2	50%	2	50%
Urban	110	91	82.7%	19	17.3%
Total	137	114	83.2%	23	16.8%

The urban lab usage clearly drove the total, because those district attorneys had over three times the amount of requests as the rural and midsized counties combined. Urban counties relied on private labs for 17.3 percent of their analyses.

Conclusion

Legislators approved Senate Bill 3 during 2001's 77th legislative session. This bill required the Texas Department of Public Safety to conduct DNA tests for convicted persons in certain cases. The DNA tests conducted excluded 23 convicted persons, as self reported by the counties, or 20.9 percent of tested cases. Another 21 cases, or 19.1 percent, were inconclusive. The remaining 66 cases, or 60 percent, confirmed the conviction as the convicted persons DNA was included by the test. Overall there were 18 exonerations resulting from the 1023 motions for DNA testing filed and ruled upon by the courts, or 1.8 percent. It is also important to note that DNA testing may be done outside the Chapter 64 procedures. This would include testing done by the agreement of the parties or on the district attorney's own initiative. The total number of DNA exonerations in Texas from all sources currently stands at 40.

Appendix 1: Survey Instrument and Responses

Questionnaire For Texas Counties Regarding Chapter 64, Code of Criminal Procedure, Motions For Post-Conviction Forensic DNA Testing

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Question 1: How many **REQUESTS FOR COUNSEL** to assist in filing CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING have been submitted by convicted persons in your jurisdiction since **January 1, 2001**?

Number of Requests for Counsel: 929

Question 2: How many CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING has your jurisdiction **RECEIVED** since **January 1, 2001**? Of those received, how many of those were filed on behalf of inmates by court-appointed counsel, how many were filed pro se, and how many fell into neither of these two categories?

# of Ch. 64 Motions Received	# Filed By Court-Appointed Counsel	# Filed Pro Se	# That Fell Into Neither Category
1132	609	434	37

Question 3: Of those CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING filed, how many have been **GRANTED** in your jurisdiction since **January 1, 2001**? Of those granted,

how many of those were filed on behalf of inmates by court-appointed counsel, how many were filed pro se, and how many fell into neither of these two categories?

# of Ch. 64 Motions Granted	# Filed By Court- Appointed Counsel	# Filed Pro Se	# That Fell Into Neither Category
125	**82**	**35**	**19**

Question 4: Of those CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING filed, how many have been **DENIED** in your jurisdiction since **January 1, 2001**?

Number of Ch. 64 Motions Denied: 897

Question 5: How many of the CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING denied by your district court(s) were appealed? Ultimately granted?

Number of Denials Appealed: 265
Number of Appeals Granted: 10

Question 6: How many CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING resulted in "Inclusion" of the inmate? "Exclusion"? Found "Inconclusive"?

# of Inclusions	# of Exclusions	# Found Inconclusive
66	23	21

Question 7: How many CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING ultimately resulted in the exoneration of the inmate?

Number of Inmates Ultimately Exonerated: 18

Question 8: How many of the CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING were done by a Texas Department of Safety (D.P.S.) Lab or by another lab contractually affiliated to do lab work for your jurisdiction? How many were done by a private lab with no affiliation with your jurisdiction?

# of Ch. 64 Motions by D.P.S. or Affiliated Lab	**# of Ch. 64 Motions by a Private Lab**
114	23

----Thank you for participating in this questionnaire----

APPENDIX 2

[LOGO]

TEXAS TASK FORCE ON INDIGENT DEFENSE
205 West 14th Street, Suite 700
Tom C. Clark Building (512)936-6994
P.O. Box 12066, Austin, Texas 78711-2066
Fax: (512)475-3450

CHAIR:
THE HONORABLE SHARON KELLER
Presiding Judge, Court of Criminal Appeals

VICE CHAIR:
THE HONORABLE OLEN UNDERWOOD

DIRECTOR:
MR. JAMES D. BETHKE

March 16, 2010

Joe Shannon, Jr.
Criminal District Attorney
401 W. Belknap St.
Fort Worth, TX 76196-0201

Re: Questionnaire on Post-Conviction DNA Testing

Dear Mr. Shannon,

Since the passage of Texas' statutes on post-conviction forensic testing (Chapter 64, CCP) there has been plenty of information – and misinformation – shared about just how many applications for relief have been filed, litigated, and granted or denied. At this point, there is no single point of contact for that

information. This would be good information to have when we talk about just how often relief is granted under Chapter 64.

We are inviting you to participate in a research project to study CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING (hereinafter referred to as "Ch. 64 Motions"). Along with this letter is a short questionnaire that asks a variety of questions about Ch. 64 Motions in your jurisdiction and instructions for completing and returning it. The Public Policy Research Institute at Texas A&M is assisting us in compiling the information so please return the questionnaire to them in the pre-addressed stamped envelope.

We hope you will take the time to complete this questionnaire and return it. Your participation is voluntary. Regardless of whether you choose to participate, please let us know if you would like a summary of the findings. To receive a summary, please contact the Task Force on Indigent Defense at the contact listed below.

If you have any questions or concerns about completing the questionnaire or about participating in this study, please contact Austin Shell at the Task Force on Indigent Defense via email (Austin.Shell@courts.state.tx.us) or by telephone (512-463-2508).

Warmest regards,

/s/ Jim Bethke
Jim Bethke
Director
Task Force on Indigent Defense

/s/ Rob Kepple
Rob Kepple
Executive Director
Texas District and County Attorneys Association

County/Counties being completed for: Tarrant County

Survey Instructions

Please read these instructions carefully and completely because it is important that they be followed exactly.

- **Complete the following survey questions to the best of your knowledge and ability.**
- **Please take your time and be accurate in completing these survey questions.**
- **Please ensure the data entered for these survey questions is accurate because it will be incorporated into a much larger report.**
- **Once complete, please return the questionnaire in the enclosed business reply envelope.** You may also mail the survey back to the address below:

  The Public Policy Research Institute
  Texas A&M University
  4476 TAMU
  College Station, TX 77843-4476

If you have any questions or concerns regarding these instructions, completing the survey questions, or about participating in this study, contact us at the Task Force on Indigent Defense via email (Austin.Shell@courts.state.tx.us) or by telephone (512-463-2508).

Please return the questionnaire by April 1, 2010.

THANK YOU.

County/Counties being completed for: Tarrant County

Contact Information Sheet

---

1. **Which county or counties is this questionnaire being completed for?**
   Tarrant

2. **Name, email, phone number, and address of the individual or individuals completing this questionnaire.**
   Stephen W. Condor
   401 W. Belknap
   Fort Worth, TX 76196-0201

   817-884-1687
   sconder@tarrantcounty.com

THANK YOU.

County/Counties being completed for: Tarrant County

Questionnaire For Texas Counties Regarding Chapter 64, Code of Criminal Procedure, Motions For Post-Conviction Forensic DNA Testing

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Question 1: How many **REQUESTS FOR COUNSEL** to assist in filing CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING have been submitted by convicted persons in your jurisdiction since **January 1, 2001?**

Number of Requests for Counsel: 128

NUMBER CASES COUNSEL APPOINTED: 115

Question 2: How many CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING has your jurisdiction **RECEIVED** since **January 1, 2001?** Of those received, how many of those were filed on behalf of inmates by court-appointed counsel, how many were filed pro se, and how many fell into neither of these two categories?

# of Ch. 64 Motions Received	# Filed By Court-Appointed Counsel	# Filed Pro Se	# That Fell Into Neither Category
150	48	99	3 (Innocence project)

NOTE: In many cases, appointed counsel litigated defendant's previously filed DNA motions.

Question 3: Of those CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING filed, how many have been **GRANTED** in your jurisdiction since **January 1, 2001?** Of those granted, how many of those were filed on behalf of inmates by court-appointed counsel, how many were filed pro se, and how many fell into neither of these two categories?

# of Ch. 64 Motions Granted	# Filed By Court-Appointed Counsel	# Filed Pro Se	# That Fell Into Neither Category
18	10	6	2 (Innocence project)

Question 4: Of those CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING filed, how many have been **DENIED** in your jurisdiction since **January 1, 2001?**
Number of Ch. 64 Motions Denied: 112

Question 5: How many of the CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING denied by your district court(s) were appealed?
Ultimately granted?
Number of Denials Appealed: 31
Number of Appeals Granted: 0

County/Counties being completed for: Tarrant County

Question 6: How many CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING resulted in "Inclusion" of the inmate? "Exclusion"? Found "Inconclusive"?

# of Inclusions	# of Exclusions	# Found Inconclusive
9	1	5

*3 cases are currently involved in further testing.

Question 7: How many CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING ultimately resulted in the exoneration of the inmate? Number of Inmates Ultimately Exonerated: 1

Question 8: How many of the CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING were done by a Texas Department of Safety (D.P.S.) Lab or by another lab contractually affiliated to do lab work for your jurisdiction? How many were done by a private lab with no affiliation with your jurisdiction?

# of Ch. 64 Motions by D.P.S. or Affiliated Lab	# of Ch. 64 Motions by a Private Lab
16	2

– Thank you for participating in this questionnaire –