No. 09-9000

In The
Supreme Court of the United States

HENRY W. SKINNER,

Petitioner,

vs.

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

PETITIONER'S REPLY BRIEF

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QUESTION PRESENTED
(CAPITAL CASE)

May a convicted prisoner seeking access to biological evidence for DNA testing assert that claim in a civil rights action under 42 U.S.C. § 1983, or is such a claim cognizable only in a petition for writ of habeas corpus?

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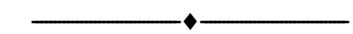
INTRODUCTION

Rather than focus on the narrow question presented, Respondent spends much of her brief reciting her version of the facts of this case, apparently hoping to convince the Court with this one-sided presentation that Mr. Skinner is probably guilty and therefore the legal issue he presents is not worthy of the Court's time. (*See generally* Brief for Respondent ("RB") at 4-9, 35-37, 50-54.) Respondent's tendentious account of the facts omits numerous gaps, contradictions, and inconsistencies in the State's case against Mr. Skinner, and ignores the genuine and substantial questions about his guilt that could be conclusively and quickly resolved by DNA testing. But Mr. Skinner has already addressed these issues in detail (*see* Petition for Writ of Certiorari at 7-14; Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari at 3-4; *see also* Application for Stay of Execution Pending Consideration of Petition for Writ of Certiorari at 2-9, 18-22) and space limitations preclude repeating that discussion here. More to the point, the Court granted review to settle whether a prisoner may bring via 42 U.S.C. § 1983 a due process challenge to a state's DNA testing procedures as applied in his case, and it is to that question that we will devote this Reply.



ARGUMENT

I. In Her Struggle to Bring This Case Within the *Heck* Exception, Respondent Misstates This Court's Precedents and Distorts the Impact Mr. Skinner's Claims Would Have on His Conviction.

The so-called *Heck* exception to the general rule that § 1983 suits lie to challenge any denial of constitutional rights by a state officer can be stated simply: If success on a state prisoner's § 1983 claim would "necessarily imply" the invalidity of his underlying conviction or sentence, then the claim may be pursued only in habeas. *See Heck v. Humphrey,* 512 U.S. 477, 486-87 (1994). (*See also* Brief for Petitioner ("PB") at 11-12.) Conversely, claims that, if successful, would *not* "necessarily imply" that the underlying conviction or sentence is invalid may proceed via § 1983. *See Heck*, 512 U.S. at 486-87.

Respondent does not ask this Court to overturn the rule in *Heck* or to fashion a different one for cases such as this.[1] Rather, she purports to embrace *Heck* and its progeny (*see, e.g.*, RB at 20) and labors to show why those cases bar Mr. Skinner's procedural due process claims for access to DNA evidence. In that effort, she distorts both the *Heck* test itself and

[1] Thus, for example, Respondent does not attempt to rebut Mr. Skinner's argument that principles of *stare decisis,* comity, and separation of powers counsel the Court not to adopt a different rule for cases seeking access to DNA evidence. (*See* PB at 33-37.)

the impact that success on Mr. Skinner's § 1983 claims would have on his underlying conviction. In addition, she resorts to a barrage of arguments about the merits of Mr. Skinner's civil rights lawsuit – issues never reached by the district court – that would be relevant only in the event of a reversal and remand, if then.

A. Respondent Misstates the *Heck* Exception.

After paying lip service to *Heck*'s "necessarily implies" test (*see* RB at 20), Respondent ignores that straightforward rule and instead switches indiscriminately among a number of alternative formulations – all being variations on the esoteric and ill-defined notion that Mr. Skinner's § 1983 case is barred because it is "inextricably connected" to a potential future attack on his conviction (RB at 26; *see also id.* (*Heck* applies because the § 1983 claims are "necessarily bound up" with attacking his conviction); *id.* at 29 (*Heck* applies because Mr. Skinner seeks evidence that may have a "material bearing" on his conviction); *id.* at 32 (the § 1983 claims are "inextricably intertwined with questions about the validity of his conviction and the conduct of the trial"); *id.* at 33 (the § 1983 claims are "inextricable from an attack on the evidence supporting the conviction and the conduct of the trial"); *id.* at 34 (if Mr. Skinner's claims succeed, the validity of his conviction will be "conditionally called into doubt")). Indeed, at every point where Respondent actually attempts to measure Mr. Skinner's

claims against the supposed *Heck* standard, she uses one of these alternative formulations.

Respondent eschews use of the actual *Heck* standard apparently because she knows she cannot meet it. Instead, in the guise of being true to *Heck,* Respondent effectively embraces the "first step" test the Fourth Circuit applied in *Harvey v. Horan,* 278 F.3d 370, 375 (4th Cir. 2002), and the substantively identical "intertwined" test the Fifth Circuit innovated in *Kutzner v. Montgomery County,* 303 F.3d 339, 341 (5th Cir. 2002). Neither of those approaches, however, survives the plain implication of this Court's decision in *Wilkinson v. Dotson,* 544 U.S. 74 (2005): that there is a difference between a suit that would *itself*, if successful, necessarily imply the invalidity of the underlying conviction and one that, regardless of how it is characterized, merely seeks a ruling that might or might not ultimately prove useful in some separate proceeding to challenge the conviction. And the courts of appeals have given precisely that commonsensical reading to *Dotson* as applied in this context. (*See* PB at 21-23) (citing decisions uniformly rejecting the *Kutzner* approach in light of *Dotson*); *see also Harvey v. Horan,* 285 F.3d 298, 309 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc) (characterizing as "inescapable" the conclusion that a "claim of a right of access to evidence is not one that in any respect" implies that the claimant's custody is unlawful). After *Dotson*, *Heck* cannot be read to bar a § 1983 claim seeking only access to DNA evidence.

Yet in the face of the plain language of *Heck* and *Dotson,* Respondent insists that Mr. Skinner's claim is barred by the Court's existing precedents. Indeed, she suggests that the precedent most like – and fully dispositive of – this case is *Heck* itself. (*See* RB at 20 ("*Heck* is the only time the Court has considered a putative § 1983 claim by a prisoner relating to the conduct of a trial and the evidence presented (as well as allegedly wrongly withheld) at the trial.").) In *Heck*, however, the prisoner sought monetary damages for the prosecutors' misconduct in producing an invalid conviction at trial; the Court understandably concluded that awarding such damages would require a finding necessarily implying that the prisoner's conviction had been wrongly obtained. *See Heck*, 512 U.S. at 483, 490. There is nothing remotely similar about this case, in which Mr. Skinner alleges nothing about the conduct of his trial and in which success would provide him access to DNA evidence for testing and nothing more.

Respondent even contends that her position is consistent with *Dotson,* which she attempts to distinguish by arguing that the prisoners in that case were challenging facially unconstitutional parole procedures and seeking a new hearing, whereas Mr. Skinner has never facially challenged Texas's DNA testing statute and the federal court could not order a new hearing under that statute. (RB at 32.) These differences, however, are immaterial to the question presented. The relevant point of *Dotson* – a point fatal to Respondent's position – is that a § 1983 case is not

barred merely because the prisoner may use success in that case as a first step toward the ultimate relief from his sentence which he hopes to obtain in a separate action.[2]

B. Respondent Distorts the Impact That Success on Mr. Skinner's Claims Would Have on His Underlying Conviction.

Having adopted an overly loose interpretation of the relevant legal standard, Respondent compounds the error by offering an analysis of the facts that greatly overstates the effect success on Mr. Skinner's § 1983 claims would have on his underlying conviction.

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[2] Respondent also argues that Mr. Skinner's claims are like those in *Edwards v. Balisok*, 520 U.S. 641 (1997) (*see* RB at 32), where this Court held that a prisoner could not bring a claim for damages and declaratory relief under § 1983 based on allegations that his good time credits had been denied at a hearing in which the hearing officer excluded all exculpatory evidence and was biased and deceitful. In *Edwards*, however, the proceeding about which the prisoner complained in federal court was the very one in which his good time credits were denied; therefore a finding that the hearing officer had wrongly excluded evidence and was biased necessarily implied that the denial of the credits was invalid. *See Edwards*, 520 U.S. at 647 (stating that due process requirements for prison disciplinary proceedings "are not so lax as to let stand the decision of a biased hearing officer who dishonestly suppresses evidence of innocence"). Here, in contrast, the proceedings about which Mr. Skinner complains are not the ones in which his conviction or sentence were rendered.

Respondent recognizes that Mr. Skinner is not bringing a stand-alone claim against Respondent, but instead has challenged the constitutionally deficient procedures by which the Texas Court of Criminal Appeals ("CCA") refused to permit DNA testing under Texas's post-conviction DNA testing law, Article 64 of the Texas Code of Criminal Procedure ("art. 64"). In an effort to convert Mr. Skinner's legitimate challenge to procedurally deficient procedures into an attack on his underlying conviction, Respondent mischaracterizes the provisions of art. 64 beyond recognition. Most notably, she asserts that "[t]he art[.] 64 right exists only by virtue of an assertion in 'the convicting court' that the conviction is invalid." (RB at 31.) Art. 64 provides nothing of the kind.

The only provisions of art. 64 that even touch on the question of the defendant's factual guilt, much less the legal validity of his conviction, are:

- art. 64.03(a)(2)(A), which requires a convicted person seeking testing to show by a preponderance of the evidence that he "would not have been convicted if exculpatory results had been obtained through DNA testing," Tex. Code Crim. Proc. Ann. art. 64.03(a)(2)(A) (Vernon 2006 & Supp. 2009), and
- art. 64.04, which provides that if DNA testing is ordered and results are obtained, "the convicting court shall 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 not have been convicted," *id.* art. 64.04.

A showing under the former provision falls far short of implying that the prisoner's underlying conviction is invalid. Under this provision, a court must *assume* that the DNA test results will be exculpatory. *See Routier v. State*, 273 S.W.3d 241, 257 (Tex. Crim. App. 2008) ("[W]e must assume (without deciding, of course) that the results of all of the post-conviction DNA testing . . . would prove favorable to her."). There is, of course, no assurance that they will be exculpatory – nor could there be, prior to testing.

The latter provision comes into play only if DNA testing has been ordered *and* results – exculpatory or not – have been obtained. In that event, the convicting court must hold a hearing and determine whether it is reasonably probable that, had these results been available at trial, the defendant would not have been convicted. Of course, such a finding will depend on the nature of the results. And, even if the results are so exculpatory that such a finding is made, that *still* does not invalidate the movant's underlying conviction or even imply its invalidity. Because art. 64.04 does not give the convicting court authority to overturn a conviction, the prisoner still must bring a habeas proceeding to challenge the conviction. *See, e.g.*, *Ard v. State*, 191 S.W.3d 342, 344 (Tex. App. 2006) (stating that art. 64 "allows a convicted person to obtain a certain type of evidence that can then be used in a state or federal habeas corpus proceeding").

If, as Respondent suggests, "it is dubious whether there is a cognizable federal [habeas] claim for actual innocence" (RB at 30 n.8), then the prisoner would be left trying to find some way, subject to the procedural restrictions of habeas, to use the convicting court's art. 64.04 finding to support a claim in federal or state court that his trial was constitutionally defective. Indeed, even if Mr. Skinner obtained a favorable art. 64.04 probability finding *and* this Court were to endorse actual innocence as a valid ground for habeas relief, a determination that his conviction was invalid still would be far from assured.[3]

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[3] In support of its argument that art. 64 proceedings address the validity of the underlying conviction, Respondent cites *Hutson v. Quarterman*, 508 F.3d 236 (5th Cir. 2007), in which the Fifth Circuit held that art. 64 proceedings constitute "other collateral review" under 28 U.S.C. § 2244(d)(1) for purposes of determining when the one-year statute of limitations for federal habeas petitions begins to run. *Hutson* held that, because art. 64 proceedings could play an important role in the state post-conviction review process, interests of comity required giving those proceedings a full opportunity to run their course. *See Hutson*, 508 F.3d at 239-40. But the court did not hold that a prisoner could obtain invalidation of his conviction through art. 64 proceedings alone – nor could it have, given the plain language of the statute. Furthermore, as Mr. Skinner has pointed out, other circuits have reached a different conclusion with regard to whether proceedings under similar DNA testing statutes in other states toll the federal statute of limitations. (*See* PB at 30-31); *see also Price v. Pierce*, No. 08-1401, 2010 WL 3189427, at *6-7 (7th Cir. Aug. 13, 2010) (discussing circuit court decisions examining the tolling effect of state DNA statutes and declining to follow *Hutson*). Indeed, perhaps the best explanation for the Fifth Circuit's *Hutson* holding that an art. 64

(Continued on following page)

Furthermore, Respondent's argument ignores the very real possibility that if Mr. Skinner ultimately obtains relief from his death sentence, it will come in the form of executive clemency rather than through judicial invalidation of his conviction. *See, e.g.*, *Routier*, 273 S.W.3d at 259 n.76 (noting that, where DNA testing results obtained pursuant to art. 64 motion are insufficient to meet high habeas standard, "[it] does not render the DNA testing useless" because prisoner "may still present such evidence to the executive branch . . . in the form of a clemency petition"). It is well established in Texas and elsewhere that clemency is a form of executive mercy that does not invalidate the underlying conviction. *See, e.g.*, *Groseclose v. Plummer,* 106 F.2d 311, 313 (9th Cir. 1939) (addressing the effect of a Texas pardon); *Dixon v. McMullen,* 527 F. Supp. 711, 716-19 (N.D. Tex. 1981) (same); *Watkins v. State,* 572 S.W.2d 339, 341-42 (Tex. Crim. App. 1978) (same); *see also In re Sang Man Shin,* 206 P.3d 91, 92-97, 98 (Nev. 2009) (canvassing case law nationwide concerning the effect of a pardon on an underlying conviction and concluding that "the effect of the pardon does not erase the historical fact of the conviction").

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proceeding will toll the federal habeas statute of limitations is that it was influenced by the same court's erroneous reasoning, expressed in *Kutzner* and this case, that any proceeding that could constitute the first step toward a future collateral attack on a conviction is, itself, a collateral attack.

Thus, when the Court penetrates the thicket of Respondent's "inextricably intertwined" rhetoric and actually examines Texas's procedures for DNA testing and the avenues available for judicial or executive relief, it can only conclude that Mr. Skinner's § 1983 claims would not, even if successful, necessarily imply that his conviction is invalid. He will only have succeeded in gaining access to evidence so that it can be tested – just the first step on an arduous path toward his ultimate goal of relief from his conviction. That result falls far short of triggering the *Heck* exception.[4]

[4] Respondent's contention that Mr. Skinner's effort to secure DNA testing "falls within the core of habeas" (RB at 26 (citation and internal quotation marks omitted)), is also hard to square with the Justice for All Act, H.R. 5107, 108th Cong. (2004), enacted by Congress in 2004. In adopting that statute, which created a vehicle for federal prisoners to seek DNA testing and provided incentives for States to enact comparable DNA testing statutes, Congress conspicuously did not place those provisions into the federal habeas statutes. Nor did Congress choose, in crafting that Act, to condition a prisoner's right to seek DNA testing on the availability of a remedy in federal habeas, impose a statute of limitations for seeking testing, or foreclose successive requests for testing. Congress's treatment of post-conviction DNA testing in the Justice for All Act refutes any notion that it considers litigation over access to DNA testing to lie at the "core" of habeas corpus.

II. Many of Respondent's Arguments Have No Bearing on the Issue Before the Court.

Respondent devotes several pages to defending the CCA's decisions denying Mr. Skinner DNA testing and speculating about the lengths to which the district court purportedly would have to go in order to sustain Mr. Skinner's procedural due process challenge. (*See* RB at 34-40.) Putting aside Respondent's skewed characterization of the evidence,[5] this entire line of argument is irrelevant to the narrow issue on which the Court granted certiorari. The question presented by this case in its present posture is not whether the CCA properly weighed the evidence or even, as Mr. Skinner alleges, acted in such a way as to deny Mr. Skinner fundamental due process rights. Rather, the issue now before the Court is whether *Heck* bars Mr. Skinner from even making those arguments in a federal § 1983 action. Respondent will have a full opportunity on remand to defend the CCA's "reasonable probability" and "no fault" findings against Mr. Skinner's claim of constitutional error.

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[5] *See Dist. Att'y's Office v. Osborne*, 129 S. Ct. 2308, 2337 (2009) (Stevens, J., dissenting) (noting that DNA evidence has led to exonerations not only in cases where the evidence of guilt was weak but also in cases where, prior to DNA testing, it appeared "overwhelming"); *see also id*. at 2337 n.9 (citing Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 109 (2008)).

III. This Court Has Already Struck a Balance Between Habeas and § 1983 That Properly Accommodates the Interests of Comity and Federalism.

Respondent complains that if the Court permits Mr. Skinner to pursue his procedural due process claim via § 1983 rather than habeas, it will "disrupt the state-federal balance Congress has implemented and this Court has striven to maintain, by allowing post-conviction evidentiary attacks on state court convictions without any of the restrictions . . . imposed on such attempts." (RB at 41-42.) But these concerns depend entirely on Respondent's inaccurate characterization of Mr. Skinner's civil action as an "attack[ ] on [a] state court conviction[ ]" (*id.*; *see also id*. at 42 (calling Mr. Skinner's suit a "collateral attack" and accusing him of seeking federal intervention "to upset [his] state court conviction" (citation omitted)); *id.* at 43 (insisting that Mr. Skinner seeks to undo a "'state criminal adjudication[ ]' " (citation omitted))). Respondent ignores this Court's explicit recognition that when it formulated the *Heck* test, it "already placed the States' important comity considerations in the balance, weighed them against the competing need to vindicate federal rights without exhaustion, and concluded that prisoners may bring their claims without fully exhausting state-court remedies so long as their suits, if established, would not necessarily invalidate state-imposed confinement." *Dotson*, 544 U.S. at 84. Because Mr. Skinner's procedural due process claim, if successful, would not

"necessarily invalidate [his] state-imposed confinement," *id.*, it poses none of the threats to comity against which Respondent warns.

Equally important, the concern claimed by Respondent and several *amici* that the law should not encourage a state prisoner to make an "end run" around state proceedings by taking his complaint to federal court in the first instance, is in no way implicated by cases like Mr. Skinner's. To have a colorable federal due process claim against state officials for denying him DNA testing under provisions of state law, a state prisoner must first attempt to invoke those provisions. *See Dist. Att'y's Office v. Osborne*, 129 S. Ct. 2308, 2321 (2009). Thus, *Osborne* itself forecloses the "end run" feared by Respondent and *amici*.

Respondent also wrongly accuses Mr. Skinner of "grievously misread[ing] *Osborne*" by finding in that decision recognition of "a separate [§] 1983 suit attacking state-court determinations under the applicable state . . . statutes." (RB at 44.) Mr. Skinner does not suggest that the Court in *Osborne* promised a federal forum in which state prisoners routinely could re-litigate whether those state-court determinations were correct. Instead, Mr. Skinner understands *Osborne* to have narrowly limited prisoner challenges to a state's failure to allow post-conviction access to DNA evidence to those rare instances in which the state has denied fundamental fairness when applying

its own procedures.[6] Recognizing that aspect of *Osborne* does not "eviscerate" that decision (RB at 44) but simply harmonizes *Osborne*'s "support for the primacy of state procedures in DNA testing" (*id*.) with the long-standing legal principle that procedural due process requirements pertain where liberty interests are created by state law.[7]

Respondent and the supporting *amici* offer a farrago of "harmful practical consequences" that they imagine will result if the Court allows Mr. Skinner's claim to proceed under § 1983. (*See, e.g.*, RB at 45) (claiming variously that such a holding would "undermine finality," "promote inefficiency," and "increase costs"); *id.* at 45-48.) These speculations are unfounded. For example, Respondent complains that "a proliferation of new suits" can be expected to

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[6] Mr. Skinner is not alone in his reading of *Osborne*. The Third Circuit, for example, has agreed that "[t]he [*Osborne*] Court . . . envisioned a plaintiff like Grier, who availed himself of state procedures without success and [then] claims a due process violation precisely because of that failure." *Grier v. Klem*, 591 F.3d 672, 679 (3d Cir. 2010).

[7] In *Osborne*, the United States appeared as *amicus curiae*, urging the Court not to recognize any substantive due process right to post-conviction DNA testing (and declining to address the *Heck* issue common to both *Osborne* and Mr. Skinner's case). *See generally* Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Dist. Att'y's Office v. Osborne*, 129 S. Ct. 2308 (2009) (No. 08-6), 2008 WL 5451774. If the United States viewed the holding Mr. Skinner requests as undermining in any way the ruling it sought and obtained in *Osborne*, the Solicitor General would have joined Respondent's chorus of *amici* here. The Government's silence speaks for itself.

deluge the federal courts if Mr. Skinner should prevail. But, as Mr. Skinner has pointed out, no such "proliferation" has materialized to date, notwithstanding the recognition by the substantial majority of federal circuits that the *Heck* exception does not apply to such suits. (PB at 31-32); *see also* Colin Starger, *The DNA of an Argument: A Case Study in Legal Logos*, 99 J. Crim. L. & Criminology 1045, 1050 (2009) (finding only 21 cases published or available on Westlaw nationwide between 2000 and 2008 in which a prisoner sought post-conviction DNA testing via a § 1983 action).[8] In addition, this Court's decision in *Osborne* has greatly circumscribed the opportunity for filing such claims, and Congress has given the federal courts numerous tools with which to speedily identify and dismiss insubstantial claims by prisoner plaintiffs and impose sanctions to deter misuse of the legal process. (*See* PB at 32 (citing statutes).) Respondent and *amici* have not shown that these provisions are inadequate to the task. Nor have they shown that the alternative – depriving potentially innocent prisoners of any meaningful means to challenge a state's denial of DNA testing, no

[8] Respondent and *amici* even go so far as to suggest that a holding for Mr. Skinner on the *Heck* issue would open the gate to "free roving postconviction discovery efforts" – such as demands to analyze voice recordings – "under the guise of § 1983 lawsuits." (RB at 48.) Again, the ruling Mr. Skinner is seeking here has been the law in most circuits for a good part of the last decade, and Respondent and her *amici* point to no evidence that it has spawned any – much less a proliferation of – such lawsuits.

matter how arbitrarily or unfairly its procedures may have been applied – is justified by the minimal burden such cases have imposed on the federal courts to date. Similarly, Respondent's complaint that allowing such suits would "promote inefficiency" by "encourag[ing] piecemeal litigation of claims that should be adjudicated holistically in one habeas proceeding" (RB at 46) once again blurs the key distinction upon which this Court's *Heck* jurisprudence rests. Claims for access to evidence, as such, cannot be adjudicated at all in a habeas proceeding – "holistically" or otherwise – because the only claims cognizable in habeas are those through which a prisoner "seeks either 'immediate release from prison,' or the 'shortening' of his term of confinement." *Dotson*, 544 U.S. at 79 (citation omitted). Because Mr. Skinner's due process claim does not fit that description, Respondent's criticism is inapposite.

IV. Mr. Skinner's § 1983 Action Is Not Jurisdictionally Barred by the *Rooker-Feldman* Doctrine.

Respondent substantially overstates the reach of the *Rooker-Feldman* doctrine and wrongly asserts that it bars Mr. Skinner's due process claim. As this Court emphasized in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005), the *Rooker-Feldman* doctrine is narrow in scope and has been applied too broadly in the past by lower federal courts. As the Court said in *Exxon*, "[i]f a federal plaintiff 'present[s] some independent claim, albeit

one that denies a legal conclusion that a state court has reached in a case to which he was a party . . . , then there is jurisdiction,'" notwithstanding *Rooker-Feldman*. *Id.* at 293 (second and third alteration in original) (citation omitted). In short, this Court made it plain in *Exxon* that *Rooker-Feldman* does not bar a federal action merely because it follows state proceedings involving a similar – or indeed, as in *Exxon*, the identical – dispute.

Rooker-Feldman is not applicable here because Mr. Skinner's claims – while growing out of the CCA's decisions denying his art. 64 motions – were never litigated or decided by the CCA. The only issue litigated in state court – whether Mr. Skinner was entitled to DNA testing under Texas's art. 64 – was entirely a state law issue. A federal constitutional issue arose only because the CCA's decisions regarding that state law issue turned out to be so arbitrary and unreasonable as to deny Mr. Skinner's federal due process rights. The questions raised by Mr. Skinner's § 1983 action are, to be sure, closely related to the state court rulings, but Respondent admits – indeed complains (RB at 17) – that they were never addressed or decided in those rulings. Because Mr. Skinner's due process claims were not litigated in state court, it necessarily follows that the district court's consideration of those claims cannot constitute review of a state court decision; thus, none of the

limits the *Rooker-Feldman* doctrine is designed to enforce are implicated here.[9]

Whether Mr. Skinner's claims *should* have been litigated in state court is an entirely separate question. Even if they should have been, the failure to do so at most raises *res judicata* or other preclusion issues, which are not jurisdictional. *See Exxon,* 544 U.S. at 293 (holding that federal court claim presented, at most, preclusion issues and that "[p]reclusion, of course, is not a jurisdictional matter"). The district court has already held that *res judicata* does not bar

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[9] This result is particularly appropriate where, as here, there exists considerable doubt as to whether the CCA would have even entertained his federal constitutional claim as part of the art. 64 proceeding. *See Cervantes v. City of Harvey*, 373 F. Supp. 2d 815, 819-20 (N.D. Ill. 2005) (finding *Exxon*'s "independent claim" exception to apply where "there was no 'reasonable opportunity' to raise the claim in . . . state court"). While the issue has apparently never been addressed by the CCA, decisions of Texas's intermediate appellate courts suggest that a constitutional challenge to art. 64 procedures cannot be brought in an art. 64 proceeding itself but must be brought in a separate habeas proceeding. *See, e.g.*, *Chavez v. State*, 132 S.W.3d 509, 510 (Tex. App. 2004) (finding no jurisdiction to review prisoner's due process claim during appeal of unsuccessful art. 64 motion, because such claim "amounts to a request for habeas relief"); *Evans v. Eldridge*, No. 13-08-00634-CV, 2009 WL 2462893, at *3 (Tex. App. Aug. 13, 2009) (relying on Fifth Circuit's *Kutzner* analysis to determine that due process challenge to art. 64 procedures was cognizable exclusively in a habeas corpus proceeding); *but see Christ v. State*, No. 14-08-00902-CR, 2009 WL 5227884, at *1-2 (Tex. App. Sept. 1, 2009) (entertaining in an art. 64 proceeding facial due process challenge to art. 64 without addressing jurisdiction to do so).

the claims alleged in Mr. Skinner's complaint. (*See* Joint Appendix ("JA") at 40.) To the extent other preclusion issues remain, they may be addressed by that court on remand.

Finally, accepting Respondent's *Rooker-Feldman* argument would render the decision in *Osborne* a Catch-22, for no prisoner could do what *Osborne* expressly directs – "try[ ]" the state's procedures before "complain[ing] that they do not work in practice," 129 S. Ct. at 2321 – without forfeiting his right to seek a remedy in federal court if those procedures proved constitutionally defective. Surely the law does not require such a perverse result.[10]

[10] Nor does Respondent's contention that Mr. Skinner should have sought review in this Court after the CCA denied his art. 64 motions merit consideration. As discussed above, it is questionable whether the CCA would have entertained such a due process challenge during those proceedings; had it determined that the challenge had to be brought in habeas, such a ruling would, in turn, have blocked Mr. Skinner from bringing his due process claims to this Court. *See, e.g.*, *Street v. New York*, 394 U.S. 576, 582 (1969) (unless a federal question was decided by the state court, the Supreme Court "ha[s] no power to consider it." (citing 28 U.S.C. §§ 1257(2), 1257(3)). Furthermore, Respondent, in essence, is arguing that Mr. Skinner should have fully exhausted every last step of his state-court remedies before filing a § 1983 action in federal court, a requirement this Court expressly rejected long ago. *See Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 500-50 (1982); *see also Osborne*, 129 S. Ct. at 2321 (citation omitted).

V. Respondent's Plea for Dismissal of the Writ as Improvidently Granted Has No Merit.

Lacking any persuasive basis for arguing that this case falls within the *Heck* exception, Respondent advances two procedural issues in a last-ditch attempt to persuade the Court to dismiss the writ as improvidently granted. (RB at 50-53.) But Respondent has already had a full opportunity to – and did – raise these issues prior to the certiorari grant. And the Court, after re-listing the petition no fewer than five times, took them into account before ultimately granting the writ. This resolves the matter. The Court should not be deterred from now deciding the question presented. *See Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 521, 559 (1957) (Harlan, J., concurring in part and dissenting in part) ("[O]nce certiorari has been granted a case should be disposed of on the premise that it is properly here, in the absence of considerations appearing which were not manifest or fully apprehended at the time certiorari was granted.").

Nor do Respondent's alleged procedural issues have any merit. The question presented comes to the Court unburdened by collateral issues because the district court swiftly dismissed Mr. Skinner's lawsuit solely on *Heck* grounds, before Respondent even joined issue by answering the complaint, and the Fifth Circuit summarily affirmed based on its own well-settled view of *Heck*. The single legal question on which the ruling below turned remains the subject of a longstanding circuit conflict which the Court previously agreed to resolve but did not reach. *See*

Osborne, 129 S. Ct. at 2919. At most, Respondent's complaints relate to matters which might properly be the subject of further litigation on remand once this Court resolves the threshold *Heck* issue, but none of them affect either this Court's power to decide the question presented or the wisdom of using this case to do so. To defer again resolution of an issue now twice fully briefed and argued – on which guidance is much needed[11] – would be a poor use of the Court's judicial resources.

Respondent's accusations that there exists a "disconnect between [Mr. Skinner's] complaint and his current arguments" (RB at 50) and that he has sued the wrong party and changed his fundamental theory of liability (*id.* at 52-53) are baseless. Mr. Skinner alleged at length in his complaint the manner in which the CCA had acted arbitrarily and unconstitutionally in upholding Respondent's refusal to grant him access to the requested evidence. (*See* JA at 14-17, 18-20.) Further, he attributed Respondent's refusal to provide him access to the requested evidence to her reliance on those court decisions. (*Id.* at 20.) Mr. Skinner has advanced that theory consistently in this case. *See, e.g.*, Brief in Support of Plaintiff's

[11] Although supporting Respondent in virtually every other respect, *amicus curiae* National District Attorneys Association urges the Court to *decline* Respondent's invitation to dismiss the writ as improvidently granted, arguing that the Court should "provide clarity that is needed throughout the country." (Brief of *Amicus Curiae* National District Attorneys Association at 30 n.15.)

Motion for Preliminary Injunction, *Skinner v. Switzer*, No. 2:09-CV-00281-J-BB (N.D. Tex. Nov. 30, 2009) (Dkt. 8) at 30-31 (alleging that "[t]he CCA's failure to grant [the requested DNA testing in Mr. Skinner's initial art. 64 proceeding] . . . so lacks any justification that it 'can properly be characterized as arbitrary,' [and thus] violates due process"); *id*. at 45 (alleging that the CCA's finding that the statute's 'no-fault' provision justified upholding Respondent's denial of testing in Mr. Skinner's second art. 64 proceeding was "both arbitrary and unreasonable"). The record thus belies Respondent's claim that Mr. Skinner has tried to work any "bait and switch" on this Court.

Finally, Respondent's claim that "Switzer is not the appropriate defendant" for Mr. Skinner's civil action (RB at 52-53) likewise misses the mark. Mr. Skinner sued Ms. Switzer, now the head of the office that prosecuted him at trial, because she is the state official who has custody of the evidence he seeks to have tested. *See Grier v. Klem*, 591 F.3d 672, 676 n.4 (3d Cir. 2010) (district attorney, as custodian of the evidence, is proper defendant in § 1983 action seeking DNA testing). Her role in this case thus is analogous to that of the prison official named as the respondent in a habeas action: While said official typically had no role in the constitutional violations that resulted in the prisoner's allegedly unlawful incarceration, he or she is nevertheless the appropriate defendant as custodian of the prisoner. *Cf.* 28 U.S.C. § 2243 (stating that a writ or show-cause order in a federal

habeas proceeding "shall be directed to the person having custody of the person detained"). At the same time, however, Mr. Skinner has consistently recognized that, after *Osborne*, his only federally enforceable right is to procedural due process in the application of Texas's DNA testing statute to the circumstances of his case. That right was denied by the CCA's arbitrary rejection of Mr. Skinner's art. 64 motions, a violation only perpetuated by Respondent's reliance on those decisions in continuing to refuse access to the evidence in her possession. Thus, the Court need not be detained by Respondent's suggestion that Mr. Skinner might have sued the wrong party.

CONCLUSION

For the reasons stated herein and in Mr. Skinner's initial brief, the judgment of the Court of Appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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