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

BRIEF FOR RESPONDENT

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INTRODUCTION

DNA testing is a powerful technology with great potential to incriminate and convict the guilty as well as to acquit or exonerate the innocent. Society has recognized this power and nearly every state legislature, as well as Congress, has developed procedures and rules to govern its use in a variety of contexts, including in carefully defined circumstances as a means of attacking final state-court criminal convictions.

While the existence of these statutes attests to society's strong interest in rooting out and correcting the injustice of a wrongful conviction, there are also other societal interests legislatures have uniformly sought to weigh in the balance. The States have important interests in preserving the finality of valid convictions; avoiding the costs associated with defending successive, meritless challenges to convictions and sentences; creating reasonable and efficacious procedures for identifying meritorious requests for postconviction review; and wisely using their limited resources for reviewing, processing, and litigating evidentiary requests. Victims have a dignitary interest in justice and vindication without interminable delay caused by guilty prisoners' attempts to stave off punishment. And legislatures have also recognized that DNA evidence is merely one tool in evaluating guilt and innocence, that DNA is not always capable of proving (or disproving) innocence, and that its use postconviction should therefore be limited to circumstances in which there is a meaningful chance of demonstrating actual innocence.

In *District Attorney's Office for Third Judicial District* v. *Obsorne*, 129 S.Ct. 2308 (2009), the Court

affirmed that state legislatures are entitled to balance these interests in the first instance and declined to create a stand-alone constitutional right to obtain and test DNA evidence long after a criminal conviction has become final. The Court recognized that no State or the federal government has permitted unlimited postconviction DNA testing. It endorsed giving States wide latitude to devise their own statutory solutions to the problems presented by postconviction access to DNA evidence. And the Court rejected the invitation to sidestep and supplant state-law processes by declining to recognize a stand-alone parallel federal constitutional right to test DNA evidence postconviction for the purpose of attempting to prove innocence.

The Court made clear that state postconviction DNA procedures fit into the normal context of the interplay between state and federal remedies for prisoners seeking to attack their state-court convictions. Congress has decided that the States must have the primary role in adjudicating both postconviction challenges to state-court criminal judgments and postconviction attempts to procure evidence to support such challenges. Thus, the federal habeas statute supplements state remedies, but also imposes a number of restrictions and deference rules to accord the States (and the state courts) initial, primary, and deferred-to authority in this area. The Court, in turn, has implemented this congressional balance by holding that actions seeking to invalidate convictions must be brought in habeas, not under 42 U.S.C. §1983.

DNA-evidence claims are subject to those rules. "There is no basis for [the] approach of assuming that . . . DNA evidence must be treated as

categorically outside the process, rather than within it." *Osborne*, 129 S.Ct., at 2323. There is no "DNA is different" exception to existing rules for handling postconviction challenges to a conviction; that is "precisely . . . the contention" the court rejected in *Osborne*. *Ibid*.

Skinner, however, wants to undo *Osborne* and create a free-ranging action that sets up federal district courts as appellate tribunals second-guessing the decisions of state courts under state postconviction DNA evidence statutes. He would do so based on arguments never presented to the state courts or to this Court by petition for certiorari. He has not challenged the constitutionality of Texas's statute by its terms, but merely wishes to challenge how Texas state courts interpreted and applied that statute to his case. Specifically, he wishes to challenge the application of two statutory restrictions that deny him access to evidence, first, because testing the evidence could not cast any doubt on his conviction, and, second, because he made a strategic decision at trial not to test that evidence, a decision he has already unsuccessfully attacked through a federal habeas petition.

Skinner's claim is not cognizable under §1983 because it attacks his conviction and because it attempts to impermissibly turn the federal district court into an appellate tribunal reviewing the constitutionality of state court judgments. Allowing this claim to proceed would interfere with the States' ability to devise and apply their own systems for providing postconviction access to DNA evidence, undermine the federal scheme created and protected by the federal habeas statute, and proliferate

collateral, piecemeal, harassing lawsuits that waste state resources.

STATEMENT

Shortly before the stroke of midnight on New Year's Eve in 1993, Henry "Hank" Skinner savagely murdered his girlfriend, Twila Busby, and her two adult, developmentally disabled sons. Skinner was proven guilty of the murders based partly on DNA evidence, but also based on extraordinary amounts of other physical evidence, his own statements, and numerous witnesses' testimony. That is why state and federal courts have rejected his many previous unsuccessful attempts to claim that more DNA testing might somehow exculpate him. As the Court evaluates whether Skinner's asserted §1983 claims are cognizable under *Heck* v. *Humphrey*, 512 U.S. 477 (1994), and similar cases, it is important for the Court to understand the facts various state and federal courts have already reviewed several times in evaluating Skinner's DNA claims, and the tortuous history of how those claims have been repeatedly brought and rejected before they were ultimately renewed in the guise of a §1983 suit in federal district court.

In 1993, Twila Busby lived on East Campbell Street in Pampa, Texas, with her sons, 22-year-old Elwin Caler and 20-year-old Randy Busby. *Skinner* v. *State*, 956 S.W.2d 532, 535 (Tex. Crim. App. 1997). Randy, the more active of the two boys, enjoyed riding his bike around town, running track, and playing basketball for the Special Olympics. T.27.776.[1] Elwin, who went by the name Scooter,

[1] The transcript from Skinner's trial is cited as T.[Vol.].[Page]. The transcript from the evidentiary hearing in

had muscular dystrophy and serious diabetes that prevented him from being as active as Randy. T.27.771. The boys were well liked around town and were avid fans of the local high school football team, the Pampa Harvesters. T.27.764, 774.

Late in the summer of 1993, Skinner became romantically involved with Twila, making him an off-and-on resident at her house. Skinner was jealous of Twila's friendship with a man named Howard Mitchell, believing Twila would "run[] over there [to Mitchell's] and get[] drunk and screw[] up." HS.59A, at 4. Skinner told Mitchell that he would kill Twila if she were ever unfaithful to him. *Skinner*, 956 S.W.2d, at 535 n.3; T.26.531, 594.

Skinner was in Pampa on December 31, 1993. Around 9:30 p.m., Skinner and Twila called Mitchell to ask for a ride to his New Year's Eve party. *Skinner*, 956 S.W.2d, at 535. Mitchell came by sometime between 10:15 and 10:30 p.m. and found Skinner asleep on the couch with a partially consumed bottle of vodka nearby. T.26.576-577. Twila was apprehensive about leaving Skinner to go to Mitchell's, and she explained to Mitchell that she was "worried about '[i]f he [Skinner] wakes up and I'm gone, I'm in trouble,' you know, because he would be mad over it." *Id*., at 605. But, unable to rouse Skinner, Twila accompanied Mitchell to the party without Skinner. *Id*., at 577-578; T.29.1275-1276, 1400. At the party, Twila again worried that Skinner

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Skinner's federal habeas proceeding is cited as HT.[Vol.].[Page] and the exhibits from that hearing as HS.[#] or HD.[#] respectively. Respondent has requested permission to lodge these materials, as well as Skinner's briefing in the Court of Criminal Appeals on direct appeal and in his appeals of his article 64 motions.

"might be mad at her" for going to the party without him, T.29.1279, and Mitchell took Twila home between 11:00 and 11:15 p.m. *Skinner*, 956 S.W.2d, at 535.

Shortly after Twila arrived home, she and Skinner apparently got into a fight, as Skinner later intimated in a statement he gave to police. HS.59A, at 11 ("I think that Twila came home drunk and had that knife."). Although he claims to have no clear recollection of what happened, Skinner during the fight was cut on his right palm and later recalled that Twila was "the one that cut my hand. I think that." *Ibid*. Skinner strangled Twila into unconsciousness and then beat her with an ax handle at least 14 times, until her face and skull were severely fractured and deformed. *Skinner*, 956 S.W.2d, at 536; T.28.1171.

Skinner also fatally stabbed Elwin and Randy. While the precise timing was not clear, Skinner also scuffled with Elwin, cutting him with a knife several times on the arms and stomach. See T.24.85-86, 89-90. Skinner then drove the knife deep into Elwin's left side, puncturing his lung. Mortally wounded, Elwin staggered out the front door and went to a neighbor's house for help. Skinner murdered Randy in his bed, stabbing him in the back three times while he lay asleep on the top bunk of his bunk-bed. *Skinner*, 956 S.W.2d, at 536.

Police responding to a 911 call at around midnight discovered Elwin, wearing only his undershorts, slumped and unresponsive on a neighbor's porch. *Id*., at 535; T.24.82. While waiting for help to arrive, the neighbors wrapped a shawl around Elwin's shoulders to protect against the cold night and pressed a cloth against the deep stab wound in Elwin's side. T.24.56,

65, 82. Although immediately rushed to the hospital, Elwin died at 12:45 a.m. as a result of the knife wound. *Skinner*, 956 S.W.2d, at 535; T.28.1192-1194.

The police soon found a trail of Elwin's blood leading from the front of Twila's house. *Skinner*, 956 S.W.2d, at 536. They also noticed blood smeared on the inside of a glass pane in the front door to the covered porch. A bloody knife lay on the floor inside the porch. Inside the house, police discovered Twila's and Randy's bodies. Police also found a bloody handprint 24 inches above the floor on the frame of the door leading out of the boys' bedroom to a utility room. They found another bloody handprint on the door knob of the door leading from the kitchen to the utility room and another on the knob of the door leading from the utility room to the backyard. All three bloody handprints were Skinner's. *Id.*, at 535-536.

After murdering Twila and the boys, Skinner left by the back door—hence the handprints on the doors leading out back—and made his way on foot three-and-a-half blocks to the home of his former girlfriend, Andrea Reed. He arrived at Reed's trailer home just after midnight, right around the time police arrived to discover Elwin dying on the neighbors' porch. Skinner pounded on Reed's trailer. She told him to leave. He entered anyway, falsely telling her she needed to help him because he had been stabbed and shot. His arms, shirt, and pants were covered in blood. *Id.*, at 535. He wore blood-stained socks but no shoes. He had a bleeding cut on his right palm but was otherwise uninjured. He removed his shirt and hung it across a nearby chair. He told Reed to help him get cleaned up and stitch the cut on his hand. He attempted to heat and bend a number of

needles to stitch the cut, but the needles kept breaking. *Skinner* v. *State*, 293 S.W.3d 196, 198 (Tex. Crim. App. 2009). He cleaned the blood off his watch and hands. T.26.495.

Over the course of the next three hours, Skinner told Reed a number of inconsistent stories about what had happened. At one point, when Reed attempted to leave the room to call the police, Skinner stopped her and threatened to kill her and her children. *Skinner*, 956 S.W.2d, at 535-536; *Skinner* v. *Quarterman*, 2007 WL 582808, *9 (ND Tex. Feb. 22, 2007); T.26.496-500. Skinner eventually volunteered to tell Reed what had really happened, provided she would swear not to tell anyone. *Skinner*, 2007 WL 582808, *13; T.26.528. She agreed, and Skinner confessed that he thought he had kicked Twila to death. *Skinner*, 956 S.W.2d, at 536; T.26.501. Police arrived at Reed's home at around 3:00 a.m., where they found Skinner in a bedroom closet, still clad only in blood-stained socks and jeans. *Skinner*, 956 S.W.2d, at 536.

Police collected a large amount of physical evidence from the scene, including the knife left on the front porch, a black plastic trash bag containing a second knife, a towel with brownish stains on it, and a grey jacket near Twila's body. They also collected a number of prints as well as blood and hair samples. At Twila's autopsy, the authorities used a rape kit to collect specimens from Twila, a normal procedure performed in every suspected homicide involving a female victim. The medical examiner found "no evidence of sexual assault." T.28.1205-1206.

Before trial, authorities conducted DNA tests on (1) blood found on Skinner's shirt and pants; (2) blood found on the blanket on Randy's bed;

(3) hairs found on Randy's blanket; and (4) hairs found on Randy's back and cheek. The tests showed that Skinner's shirt contained blood from Twila and Skinner. Skinner's pants contained blood from Skinner, Elwin, and Twila. Those tests placed Skinner at the scene of the crime while it was occurring, a fact he has never disputed. The blood on the blanket was Randy's, the hair found on Randy was his own, and the hair on the blanket was Elwin's. *Skinner*, 956 S.W.2d, at 536; T.28.1135-1137.

At trial, Skinner and his attorney made an informed, strategic decision not to submit the available untested physical evidence to DNA testing. Rather than test the evidence, Skinner argued that the State's failure to test all the physical evidence reflected a shoddy investigation that left a reasonable doubt as to his responsibility for the murders. Skinner's counsel confirmed when he later testified in federal habeas proceedings that testing the remaining evidence would have been inconsistent with a major theme of Skinner's defense. See *Skinner*, 2007 WL 582808, *31; *Skinner* v. *Quarterman*, 528 F.3d 336, 341-342 (CA5 2008).

Skinner was convicted of capital murder, and the Texas Court of Criminal Appeals (CCA) affirmed Skinner's conviction on direct appeal. *Skinner*, 956 S.W.2d, at 546. Skinner's subsequent petition for certiorari was denied. 523 U.S. 1079 (1998). On direct appeal, Skinner did not request additional DNA testing or claim error by failure to do more testing. He challenged the sufficiency of the evidence, but only by arguing that there was insufficient evidence to prove he killed *three* people, as opposed to just two. See *Skinner*, 956 S.W.2d, at

536-537 ("Appellant concedes that the evidence is sufficient to prove that appellant killed both Twila and Elwin.").[2]

On March 26, 1998, Skinner filed a petition in Texas state court seeking a writ of habeas corpus, which the court dismissed as untimely. The CCA affirmed on December 2, 1998. Skinner filed a federal habeas petition on February 5, 1999. Those proceedings, however, were administratively closed and stayed in 2000 so Skinner could file a second state habeas petition due to a change in state law permitting consideration of previously untimely habeas applications. The CCA, however, later denied Skinner's second state habeas petition because of the pending federal habeas petition. See *Ex parte Skinner*, No. 20,203-04 (Tex. Crim. App. Oct. 10, 2001).

In 2000, Skinner began requesting access to evidence for the purpose of DNA testing. J.A. 14. In July 2000, then district attorney John Mann, responding to media reports about the case, voluntarily sent some of the untested physical evidence to a private lab in Dallas, called GeneScreen, for DNA testing. The lab testing was mixed, with both inculpatory and inconclusive results. *Skinner*, 2007 WL 582808, *30.

On October 9, 2001, Skinner filed his first postconviction motion for DNA testing under article 64 of the Texas Code of Criminal Procedure. *Skinner* v. *State*, 122 S.W.3d 808, 809-811 & n.2 (Tex. Crim. App. 2003). Skinner requested DNA testing of: (1) vaginal swabs from the rape kit; (2) fingernail

[2] Skinner's brief on direct appeal contains several similar concessions. Skinner Direct Appeal Br. 20, 22-23.

clippings from Twila; (3) the knife from the front porch; (4) the knife found in the plastic bag; (5) the dish towel found in the plastic bag; and (6) blood and hairs from the jacket near Twila's body. The district court held that Skinner failed to meet article 64's requirements in part because he failed to show that there was a reasonable probability the DNA tests would prove his innocence. *Id*., at 811.

The CCA affirmed, agreeing that Skinner failed to demonstrate "a reasonable probability existed that he would not have been prosecuted or convicted if the DNA test results were exculpatory." *Id*., at 813. Skinner did not argue to either the district court or the CCA that article 64 is unconstitutional or that the statute had been unconstitutionally applied. See *ibid*. Skinner did not petition for certiorari following that ruling.

Skinner revived his federal habeas proceedings with a second petition, asserting nine grounds for relief, including ineffective assistance of counsel premised on the failure to subject all available evidence to DNA testing. In connection with the habeas petition, Skinner also filed a motion requesting DNA testing, arguing it was needed to show prejudice from counsel's ineffective assistance. The magistrate judge denied the motion requesting postconviction DNA testing.

After an extensive three-day evidentiary hearing on November 16-18, 2005, the magistrate judge ultimately recommended denial of Skinner's petition, and the district court adopted the magistrate's report and recommendation. *Skinner*, 2007 WL 582808, *1. The Fifth Circuit affirmed. *Skinner* v. *Quarterman*, 576 F.3d 214 (CA5 2009), *cert. denied*, 130 S.Ct. 1689 (Mar. 1, 2010).

While that appeal was pending, Skinner filed a second motion in Texas state court seeking postconviction DNA testing under article 64. The district court denied the second article 64 motion on numerous grounds, including because Skinner's strategic decision not to test the available evidence at trial meant he could not show that the failure to test was "through no fault of" his own. Tex. Code Crim. Proc. art. 64.01; *Texas* v. *Skinner*, No. 5216 (41st Dist. Ct., Gray County, Tex. Dec. 4, 2007); *Skinner*, 293 S.W.3d, at 209. The court also found that Skinner's second motion failed to show he would not have been convicted had the evidence been tested and presented at trial. *Skinner*, No. 5216, at *3-*4.

Once again, the CCA affirmed. The appellate court agreed that Skinner could not satisfy the no-fault provision in article 64 because he had chosen not to test the evidence before trial. The Court noted that both state and federal courts had found that the decision not to test was a "reasonable trial strategy," *Skinner*, 293 S.W.3d, at 197, and concluded that without a showing of ineffective assistance the fault provision should bar article 64 relief to a prisoner who chose to forgo testing at trial. *Id*., at 202-203. The court also rejected Skinner's argument that additional postconviction evidence presented in the federal habeas proceeding could undermine the conclusion that Skinner had received effective assistance of counsel in, and therefore was at "fault" for, deciding pretrial not to test the evidence. *Id*., at 203-204. The court reviewed in detail the evidence presented at the trial, and in the federal habeas proceeding, and concluded that none of it could "call into question defense counsel's strategy to forego DNA testing." *Id*., at 204-206.

Skinner filed the underlying lawsuit, asserting under §1983 that the current district attorney, Lynn Switzer, was violating his constitutional rights "[b]y refusing to release the biological evidence for testing, and thereby preventing [Skinner] from gaining access to exculpatory evidence that could demonstrate he is not guilty of capital murder." J.A. 20-21. Skinner's complaint includes no claim or allegation that article 64 is unconstitutional or that the Texas courts unconstitutionally applied it to Skinner. In his briefing in the district court, Skinner confirmed that he "does not contend that the violations of his due process rights were caused by the adverse judgments of the Texas state courts," and asserted that he did not request that the district court "review or reject any state court judgments." Resp. Mot. Dismiss at 6.

The district court dismissed Skinner's complaint for failing to state a claim upon which relief can be granted. *Skinner* v. *Switzer*, 2010 WL 273143, *7-*8 (ND Tex. Jan. 20, 2010). The court based its ruling on *Kutzner* v. *Montgomery County*, 303 F.3d 339 (CA5 2002), which held that "a prisoner's request for DNA testing of evidence relevant to his prior conviction is 'so intertwined' with the merits of the conviction as to require habeas corpus treatment." *Id*., at 341. The district court also noted that if Skinner had alleged in his complaint that the Texas courts had unconstitutionally applied article 64, then the argument that the *Rooker-Feldman* doctrine deprived the court of jurisdiction would have "considerable merit." *Skinner*, 2010 WL 273143, *5.

The Fifth Circuit affirmed. *Skinner* v. *Switzer*, 2010 WL 338018, *1 (CA5 Jan. 28, 2010) (*per curiam*). This Court granted a stay of execution and subsequently granted a writ of certiorari.

SUMMARY OF ARGUMENT

The Court has held that the federal habeas statute, and the limitations placed on that remedy by Congress, must be preserved by preventing prisoners from challenging their convictions or sentences under 42 U.S.C. §1983. This rule protects interests of federal-state comity that are effectuated in the procedural, deference, and exhaustion standards Congress has written into the habeas statute. Beginning with *Preiser* v. *Rodriguez*, continuing through *Heck* v. *Humphrey*, and culminating most recently with a series of prison-discipline and parole cases, the Court has developed a doctrinal line that allows challenges to conditions of confinement to be brought under §1983, but requires attacks on convictions or sentences to be brought in habeas.

Contrary to Skinner's assertions, it is not how a claim is artfully pleaded that determines whether it implies the invalidity of the conviction. Rather, it is the substance of the claim and not only the relief specifically requested that determines whether the *Heck* bar applies. If any necessary component or allegation of the complaint implies that the conviction or sentence is invalid, the claim must be brought in habeas. The Court has never in any of these cases held that §1983 may be used to pursue an attack on a conviction, to gather evidence to support an attack on a conviction, or to challenge the procedures afforded by a State to gather evidence to support an attack on a conviction.

Although Skinner consistently refuses to define the constitutional right he seeks to invoke, or describe with any detail how that right was allegedly violated, his petition intimates, and his merits brief ultimately argues, that the Texas courts

unconstitutionally applied the state testing statute. That is not the claim Skinner pleaded in his complaint or pursued in the district court. In the district court, he argued that Switzer directly deprived him of his constitutional right to access DNA evidence.

In this Court, however, Skinner apparently concedes that *Osborne* ruled out any such claim, and so he now reformulates his argument to assert a violation of his constitutional right to fundamental fairness in the procedures by which the State denied his state-law claim. At bottom, however, Skinner's claim still attempts to use the federal courts to obtain discovery that he says is exculpatory—and therefore lies at the core of habeas because it has a material bearing on his conviction and is inseparable from his assertion that he is innocent.

The Texas postconviction-testing procedures and judicial application of those procedures are inseparable from the underlying issue of Skinner's guilt and conviction. Because there is no such thing as a freestanding procedural due process claim, any postconviction-testing right Skinner may have is necessarily bound up with his state-law right to use postconviction procedures to establish his innocence. The statutory procedure emanates from and exists solely in the context of a challenge to a conviction based on a claim of innocence.

The elements of the statute are inextricably intertwined with questions about the conduct of the trial and the weight of the evidence. Texas's testing statute requires a showing that the requested testing will show, to a reasonable probability, the convicted person's innocence. The statute also prevents defendants from strategically declining to

test DNA at the time of trial and then urging for the first time, postconviction, a right to test evidence. The Texas courts held that Skinner failed to meet *both* of these requirements. Each basis independently supported rejection of Skinner's requests for testing and each is inseparable from Skinner's trial and conviction.

Construed generously, the claims Skinner describes in his brief ask the federal courts to overrule the state-law requirement that testing is not available to those who made a strategic pretrial choice not to test and to reweigh de novo the overwhelming evidence supporting his conviction to conclude that testing could show a reasonable probability of his innocence. Skinner's claims effectively ask the federal court to evaluate the strength of the evidence on which he was convicted and to reexamine whether he should be bound to the strategic choices made by trial counsel. These claims, if permitted, would clearly imply the invalidity of his conviction. They are not only a proper subject for habeas, they in fact have already been made the subject of previous habeas claims by Skinner.

Allowing Skinner to proceed under §1983 would thwart Congress's careful balancing of delicate federal-state interactions and install the federal district courts as overseers of state-DNA-access procedures and proceedings. Congress has created a number of restrictions designed to limit federal interference in state and criminal matters, including deference and exhaustion requirements, which would be frustrated if a separate suit under §1983 were permitted every time a convicted person sought discovery for the purpose of testing evidence postconviction. Subjecting state procedures to federal

district court review, interpretation, and application would threaten to turn them into federal procedures, essentially installing the federal courts as overseers of all, ostensibly state-law, DNA-testing requests.

Skinner's claims are also barred by substantial jurisdictional and procedural impediments to the Court's consideration of Skinner's case. The *Rooker-Feldman* doctrine divested the federal district court of jurisdiction because Skinner is a two-time state-court loser and cannot ask a federal district court to overturn a final state-court judgment. Skinner's apparent challenges to the Texas courts' application of article 64 should have been raised in the Texas courts in the first instance, but were not, and could have been the subject of a petition for certiorari, but were not.

Further, the claims Skinner asserts now were not raised in the lower courts, and are, therefore, not properly before the Court. Skinner's complaint asserted no challenge to the substance of article 64 or the Texas courts' disposition of his claims under the statute. And, in any event, his current arguments do not state any conceivable claims against Lynn Switzer. To complain of an arbitrary or unconstitutional application of state law by the state courts, Skinner would have to have sued the Texas state courts who made those rulings, but he did not, because that would have only highlighted his insurmountable *Rooker-Feldman* problems. The combination of shifting contentions and the wrong defendant make this case a good candidate for dismissal as improvidently granted.

ARGUMENT

I. THE *HECK* RULE PROTECTS INTERESTS OF COMITY AND FEDERALISM BY REQUIRING ATTACKS ON CONVICTIONS TO BE BROUGHT IN HABEAS.

Both Congress and the Court have made great efforts to ensure that States and state courts will be the primary actors in handling postconviction challenges by state prisoners. Habeas proceedings are extraordinarily intrusive because they allow collateral review of state criminal judgments, and to limit that intrusiveness Congress has implemented through the habeas statute a number of restrictions designed to cabin federal interference, including an exhaustion requirement, a restriction on successive petitions raising the same claim, and deference rules that require federal district courts to defer to state court findings of both fact and law. 28 U.S.C. §§2244(b), 2255; see *Williams (Terry)* v. *Taylor*, 529 U.S. 362, 386, 404 (2000); *Williams (Michael Wayne)* v. *Taylor*, 529 U.S. 420, 436 (2000).

The Court, for its part, has "long recognized the principles of federalism and comity at stake when state prisoners attempt to use the federal courts to attack their final convictions." *Osborne*, 129 S.Ct., at 2324; see also *Williams (Michael Wayne)*, 529 U.S., at 436 (noting that the Court has been careful to "limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings"). The Court has developed the *Heck* rule in part to effectuate Congress's design by preventing claimants from escaping congressionally mandated safeguards merely by artfully pleading

claims under §1983 instead of in habeas. See *Heck* v. *Humphrey*, 512 U.S. 477 (1994).

The *Heck* rule limits the claims cognizable under §1983 to protect the function of and limitations on the federal writ of habeas corpus. See *Osborne*, 129 S.Ct., at 2318 ("[Section] 1983 must be read in harmony with the habeas statute."); *Heck*, 512 U.S., at 497 (Souter, J., concurring) (agreeing with the majority that the rule was designed to preserve "the habeas statute's policy . . . that state courts be given the first opportunity to review constitutional claims bearing upon a state prisoner's release from custody").[3]

The rule originated in *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), which confirmed that habeas, not §1983, is the only proper federal venue for "an attack by a person in custody upon the legality of that custody." *Id.*, at 500. The Court reasoned that, while §1983 applied on its face to the claims at issue, the habeas statute, which also clearly applied, should, as the more specific enactment, control. *Id*., at 489-491. In *Preiser*, and after, the Court has made clear that the purpose of the rule is to preserve "the core of habeas" and respect "considerations of federal-state comity." *Id.*, at 487, 490-491; accord *Nelson* v. *Campbell*, 541 U.S. 637, 643 (2004) ("[Section] 1983 must yield to the more specific federal habeas statute, with its attendant procedural and exhaustion requirements, where an inmate seeks injunctive relief challenging the fact of his conviction or the duration of his sentence.").

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[3] The need for this line-drawing was occasioned by prior judicial decisions that expanded the scope of both habeas and §1983. *Heck*, 512 U.S., at 491 (THOMAS, J., concurring).

Since *Preiser*, the Court has several times considered how to apply the rule to new situations. In *Heck*, the Court confirmed that this prohibition protecting the core of habeas extends to damages suits that "necessarily imply the invalidity of a conviction." 512 U.S., at 487. *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. *Ibid*. The Court held that, even though the plaintiff was not seeking directly to undo his conviction, the findings he sought would have "necessarily impl[ied]" the invalidity of his conviction and, consequently, the claim was not cognizable under §1983 at all. *Id.*, at 483.

All of the subsequent cases originated, like *Preiser*, in the context of attacks on procedures governing the serving or carrying out of a prison sentence—for good-time credits, parole, or internal prison disciplinary determinations. *Edwards* v. *Balisok*, 520 U.S. 641, 646-648 (1997); *Muhammad* v. *Close*, 540 U.S. 749, 750 (2004); *Nelson*, 541 U.S., at 642; *Wilkinson* v. *Dotson*, 544 U.S. 74, 78 (2005). Indeed, among the most common positive formulations of the *Preiser-Heck* rule is that §1983 allows prisoners to bring "challenge[s] to the conditions of a prisoner's confinement." See *Nelson*, 541 U.S., at 646-647 (citing *Muhammad*, 540 U.S., at 750).

Edwards established that a plaintiff's challenge to a deprivation of good-time credits is not cognizable under §1983 when it is based on procedural attacks that imply the invalidity of that ruling—specifically, allegations that the decisionmaker was biased and

deceitful.[4] 520 U.S., at 646-648. *Dotson* established that prisoners challenging state parole procedures based on claimed *ex post facto* and due process violations could do so in a §1983 suit because they sought merely a declaration that the procedures were unconstitutional and not to challenge the determinations in their particular cases. 544 U.S., at 82. The Court reasoned that there was no *Heck* bar because "the connection between the constitutionality of the prisoners' parole proceedings and release from confinement is too tenuous here." *Id.*, at 78.

The application of the *Heck* bar hinges not on whether a plaintiff can artfully plead around a direct attack on his conviction, but instead on the actual nature of the underlying claim asserted. See *Osborne*, 129 S.Ct., at 2325 (ALITO, J., concurring). Indeed, preventing evasion of the restrictions and limitations on habeas through artful pleading is one of the main purposes of the rule. See, *e.g.*, *Preiser*, 411 U.S., at 489-490. The test is thus not about "the actual immediate consequences of a successful suit." Skinner Br. 16. If that were true, *Heck* itself would have come out differently, but the Court definitively rejected the assertion that "the relief sought in a §1983 action dictates whether a state prisoner can proceed immediately to federal court." *Heck*, 512 U.S., at 497 (Souter, J., concurring); *id.*, at 481-482.

Instead, the inquiry looks to "the connection between [the claim asserted] and release from confinement." *Dotson*, 544 U.S., at 78. If any

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[4] In *Edwards*, the prisoner alleged that the hearing officer denied the prisoner the ability to present witness statements and lied in denying that no such statements were available. 520 U.S., at 644-645.

necessary component or allegation of the claim implies that the underlying conviction is invalid, then it is not cognizable. *Heck*, 512 U.S., at 481-482. In particular, when the claim directly challenges the underlying decision as arbitrary and flawed, it is not cognizable under §1983. *Edwards*, 520 U.S., at 646-648; *Heck*, 512 U.S., at 482-483 (disapproving §1983 claims founded on an alleged deprivation of rights caused by "reaching the wrong result").

The Court has never held that any prisoner may use a §1983 suit to gain access to evidence in the hopes of using it to support an attack on a conviction or to collaterally attack state courts' judgments under state postconviction relief statutes or state court discovery rulings made during the course of postconviction proceedings. *Osborne*, 129 S.Ct., at 2326 (ALITO, J., concurring) ("We have never previously held that a state prisoner may seek discovery by means of a §1983 action, and we should not take that step here.").

II. *HECK* BARS SKINNER'S CLAIMS.

A. Skinner's Claim Is That the Texas State Courts Arbitrarily Applied Texas's Postconviction DNA Testing Statute.

To analyze whether Skinner's claim is cognizable under §1983, it is crucial to understand the nature of that claim, the constitutional violation he asserts, and how it relates to his conviction. This is difficult because Skinner's complaint, petition, and brief are all vague in the extreme about the nature of his claim, and what little detail he has provided has changed from stage to stage of the litigation.

Skinner's petition and brief are full of language describing the claim generically as an "access to

evidence" claim or "DNA testing" claim. *E.g.*, Pet. 2-3, 14-16, 25, 28, 30; Skinner Br. 17, 20, 23, 25-26. But that does not reveal what his claim actually is, or on what conduct by a state actor it is based. Skinner's complaint describes the claim in this way:

> "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 to obtain a pardon or reduction of his sentence, all in violation of his right to Due Process of Law under the Fourteenth Amendment to the Constitution of the United States." J.A. 20-21.

Thus, in his complaint, Skinner asserted that his claim is that District Attorney Switzer's refusal to turn over "exculpatory" evidence violates his federal constitutional rights. Moreover, he took pains to insist that his claim was against Switzer and was not in any way a challenge to the rulings of the Texas courts on his article 64 motions. Skinner insisted in the district court that he was "in no way request[ing] that [the court] review or reject any state court judgments," but was only claiming that Switzer violated his constitutional rights by refusing to provide access to the requested evidence. Resp. Mot. Dismiss 6; see also *id.*, at 3 (asserting that he did not "complain of injuries caused by any state court judgment"). The district court concluded that Skinner had not raised the CCA's application of the statute "as a claim for relief" and noted that any such

claims, if raised, would likely be barred by the *Rooker-Feldman* doctrine. J.A. 33-34.

In his petition and merits briefing to this Court, however, Skinner has attempted to reframe his claim (when he describes it at all) as a claim that he was denied due process by the Texas courts' application of article 64. Pet. 6-7, 29; Skinner Br. 7 n.3, 29, 30. He has abandoned any claim of a freestanding violation caused by Switzer and expressly denies that his claim is like the *Brady*-related claim rejected by *Osborne*. Instead, he now roots his claim in his failed attempt to obtain relief under article 64. Skinner Br. 7 n.3, 19 n.6. Specifically, he now asserts that he was harmed by the decisions of the CCA, which he claims were "arbitrary and capricious" and "irrational," and he asserts that his §1983 claim would have accrued when the CCA made its decision. Skinner Br. 6; Pet. 6-7. His petition references "as-applied challenge[s] [that] may be accurately evaluated by the district court on remand." Pet. 29.

Thus, Skinner currently describes his claim as asserting that the Texas courts' application of article 64 was so arbitrary as to deny him meaningful access to state post-conviction relief—even though he expressly disavowed that claim in the district court. See *Lewis* v. *Casey*, 518 U.S. 343, 351 (1996). The CCA denied Skinner's first article 64 motion because it determined that, in light of the existing evidence against him, he could not show that there was a reasonable probability that further DNA testing would prove his innocence. *Skinner,* 122 S.W.3d, at 811. Skinner suggests that the CCA's evidence weighing was "arbitrary and capricious" and so denied him due process. Pet. 6. He argues that the court relied too heavily on selective test

results that were obtained by the former district attorney without the involvement of Skinner's postconviction counsel. *Ibid*.

The CCA denied the second article 64 motion because, since Skinner had chosen not to test the DNA evidence at trial, and since he was unable to establish that he had received ineffective assistance of counsel in making that decision, he could not make the required showing that the failure to test the evidence was "through no fault of" his own. *Skinner*, 293 S.W.3d, at 209. In arriving at that conclusion, the court reviewed extensively the evidence at trial, the evidence from Skinner's habeas proceeding, and the potential evidence from the requested testing, to conclude the fault provision applied because the "decision to forgo testing was a reasonable trial strategy." *Id*., at 203-209.

Skinner argues that the CCA's interpretation of article 64's "no fault" provision was "irrational," because it would require a defendant who chose strategically to "put the State to its burden of proof . . . to forever waive the opportunity to prove his innocence by DNA evidence." Pet. 7. He also states that he could not have knowingly waived his right to postconviction DNA testing during his trial because article 64 was not yet in place. *Id*., at 6-7.

Finally, it is important to note that Skinner has never claimed in any court that article 64 is unconstitutional by its terms. Instead, he effectively conceded below that the statute is constitutional on its face. See Resp. Mot. Dismiss 13 ("As in *Osborne*, the State's procedures appear adequate on their face . . . ." (internal quotation marks omitted)).

B. Skinner's Claim Attacks His Conviction and Is Not Cognizable Under §1983.

Skinner's claim is barred by *Heck* because it is inextricably connected to attacking his conviction. It is based on an asserted constitutional right that springs out of his claimed liberty interest in showing his innocence. The relief he seeks is "the discovery of evidence that has a material bearing on his conviction," an attempt that "falls within 'the core'" of habeas and is therefore not cognizable under §1983. *Osborne*, 129 S.Ct., at 2325 (ALITO, J., concurring). And, as presented in this Court, his claim is that state procedures as applied by the Texas state courts denied him a fair opportunity to establish his innocence, based on challenges to state court determinations about the evidence underlying his conviction and his strategic decisions at trial. J.A. 22; Skinner Br. 2, 6-7; Pet. 7, 14-15. Those attacks are necessarily bound up with attacking his conviction and therefore are barred by *Heck*.

1. If Skinner's Claim Were a Freestanding Claim Against Switzer, It Would Be Barred by Both *Osborne* and *Heck*.

It appears that Skinner has abandoned a claim that Switzer somehow directly violated his constitutional rights, as he alleged in his complaint. But, if he were continuing in this Court to assert a claim based solely on Switzer's conduct, it would be barred by both *Osborne* and *Heck*.

Before *Osborne*, prisoners seeking access to DNA evidence would often bring §1983 suits against district attorneys premised on "the principles that

motivated" *Brady* v. *Maryland*, 373 U.S. 83 (1963). See *Dist. Attorney's Office for Third Judicial Dist.* v. *Osborne*, 521 F.3d 1118, 1131 (CA9 2008). The claim was that the district attorney deprived the plaintiff of a constitutional right by refusing to turn over evidence that might show he was innocent. See, *e.g.*, *Derrickson* v. *Dist. Attorney of Delaware County*, 316 Fed. Appx. 132, 133 (CA3 2009); *Bradley* v. *King*, 556 F.3d 1225, 1229-1230 (CA11 2009); *Osborne*, 521 F.3d, at 1132. Similarly, if individuals had a freestanding, substantive-due-process right to access DNA evidence, see, *e.g.*, *McKithen* v. *Brown*, 481 F.3d 89, 107 n.17 (CA2 2007), then a district attorney who could provide access to DNA evidence would directly deprive the defendant of that right by refusing to do so.

In *Osborne*, however, the Court explained that "*Brady* is the wrong framework" for obtaining DNA evidence once an individual has already been convicted. *Osborne*, 129 S.Ct., at 2320. *Osborne* also held that an individual does not have a freestanding postconviction federal right to access DNA evidence. *Osborne*, 129 S.Ct., at 2322.[5] Given this framework, which was established by *Osborne* before Skinner filed his §1983 suit, Skinner cannot state a claim by asserting that Switzer's refusal to provide him access to DNA evidence is the cause of his harm. That is why, although he pleaded this sort of claim in his complaint, he has backed away from it

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[5] With that ruling, the Court in *Osborne* rejected the premise of those circuit court decisions that had held that §1983 could be used to assert a freestanding federal constitutional claim for access to DNA testing. See, *e.g., Harvey* v. *Horan*, 285 F.3d 298, 208-310 (CA4 2002) (Luttig, J.) (respecting denial of rehearing en banc).

in this Court in favor of challenging the Texas court's resolution of his article 64 proceedings.

Even if he had not abandoned the claim, and had *Osborne* not squelched any such freestanding claim, the claim would be barred by *Heck*. Discovery—access to evidence—cannot be had in a vacuum; it must be requested in connection with some substantive claim or right. See *Houston Bus. Journal, Inc.* v. *Office of the Comptroller of the Currency*, 86 F.3d 1208, 1213 (CADC 1996) ("The federal courts are not freestanding investigative bodies whose coercive power may be brought to bear at will in demanding documents from others."); *Osborne*, 129 S.Ct., at 2319 ("Process is not an end in itself."); *Olim* v. *Wakinekona*, 461 U.S. 238, 250 (1983) (same).

Instead, a §1983 claim for violation of procedural due process only can be made in the context of a state-created liberty interest. In this case, Skinner claims a liberty interest "in utilizing state procedures to obtain reversal of his conviction and/or to obtain a pardon or reduction of his sentence." J.A. 21; see also *Kentucky Dept. of Corrs.* v. *Thompson*, 490 U.S. 454, 463 (1989).[6] Skinner's asserted procedural due process right is completely bound up in and dependent upon this claimed state-law liberty interest in showing his innocence. His assertion of innocence is a necessary component of his claim, as is evident when he describes the alleged violation as

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[6] Respondent does not concede that any such liberty interest exists, but if one does it requires only minimal procedural safeguards. See *Ohio Adult Parole Authority* v. *Woodard*, 523 U.S. 272, 280-282 (Rehnquist, C.J.), 289 (O'Connor, J., concurring) (1998).

District Attorney Switzer's "preventing Plaintiff from gaining access to exculpatory evidence that could demonstrate he is not guilty of capital murder."[7] J.A. 20-21; see also *Obsorne*, 129 S.Ct., at 2325 (ALITO, J., concurring) (noting nearly identical allegation in Osborne complaint). Since Skinner is seeking "the discovery of evidence that has a material bearing on his conviction," a core habeas function, his claim is not cognizable under §1983. *Ibid*.

Further, the immediate relief Skinner seeks—access to evidence for the purposes of DNA testing—is relief that can be sought (and that, in fact, Skinner has already sought and been denied) in federal habeas.

Securing and presenting evidence in habeas has long been a part of procedure under the writ, and thus subsists comfortably in the core of habeas. From early on, American habeas courts "routinely allowed prisoners to introduce exculpatory evidence that was either unknown or previously unavailable to the prisoner." *Boumediene* v. *Bush*, 128 S.Ct. 2229, 2267 (2008). In the states, the practice was governed by statute, and many if not most allowed the securing and taking of evidence in the habeas proceeding: "[T]he court or judge on the return to the writ will hear evidence anew if justice require it, and for that purpose may summon the prosecuting witness, investigate the criminal charge, and discharge, let to bail, or recommit the prisoner, as may be just and legal." William Smithers Church, A Treatise on the

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[7] Despite what he asserts now, Skinner Br. 2, Skinner has not always maintained his innocence. On direct appeal, he conceded that there was sufficient evidence to show that he had murdered two of the victims. *Skinner*, 956 S.W.2d, at 536-537.

Writ of Habeas Corpus 270 (Bancroft-Whitney 2d ed. 1893); see also Rollin C. Hurd, A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus 277-285 (W.C. Little & Co. 2d ed. 1876) (collecting state statutes). And, since the enactment of the federal Habeas Corpus Act of 1867, the federal courts have been open to the consideration of evidence not in the trial record. See Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 ("The . . . judge shall proceed in a summary way to determine the facts of the case, by hearing testimony."); see also *Townsend* v. *Sain*, 372 U.S. 293, 311 (1963) ("this Court has consistently upheld the power of the federal courts on habeas corpus to take evidence relevant to claims of such detention.").[8]

At present, discovery in habeas is routine, albeit discretionary, and governed by a well-developed set of rules and limitations, which Skinner through this lawsuit seeks to circumvent. See Rules Governing Section 2254 Cases, Rule 6(a); *Bracy* v. *Gramley*, 520 U.S. 899, 904 (1997); *Harris* v. *Nelson*, 394 U.S. 286, 300 (1969). In short, securing access to evidence has long been, and is today, part of the core of habeas corpus. There is, therefore, no merit to Skinner's claimed concern that barring his suit under §1983 will threaten to impermissibly expand the scope of habeas. Skinner Br. 26-27; see *Dotson*, 544 U.S., at

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[8] A habeas petitioner must have a cognizable claim before discovery can be taken in support of it. Here, Skinner has already lost on his ineffective assistance of counsel claim, and it is dubious whether there is a cognizable federal claim for actual innocence. See *House* v. *Bell*, 547 U.S. 518, 554-555 (2006). But this does not change the fact that seeking access to evidence in the course of attacking a conviction is and has been a core habeas function.

78 (SCALIA, J., concurring). *Dotson* involved requested relief—new parole hearings—that was beyond the power of a federal district court to order in a habeas suit. *Dotson*, 544 U.S., at 78.

2. Skinner's Challenges to the Texas Courts' Application of Article 64 Depend on Attacking His Conviction.

Skinner's challenge to the Texas courts' application of article 64 is barred by *Heck* for all of the above-noted reasons a freestanding claim would be—it depends on his assertion of innocence and it seeks to uncover exculpatory evidence. Moreover, it is tied up with an attack on the validity of Skinner's conviction in specific ways that make triggering the *Heck* bar inescapable.

The article 64 procedure Skinner is attacking is itself inseparable from questions about Skinner's guilt or innocence and the conduct of the underlying trial. See *Hutson* v. *Quarterman*, 508 F.3d 236, 236 (CA5 2007) (*per curiam*) (holding that an article 64 filing tolls habeas deadlines because it is a "collateral review" of the conviction); *Price* v. *Pierce*, 2010 WL 3189427, *5-*6 (CA7 Aug. 13, 2010) (agreeing that article 64 proceedings seek collateral review of the conviction). The article 64 right exists only by virtue of an assertion in "the convicting court" that the conviction is invalid. Tex. Code Crim. Proc. arts. 64.02, 64.03, 64.04. It applies only to evidence "that was secured in relation to the offense that is the basis of the challenged conviction and was in the possession of the state during the trial of the offense." *Id.*, art. 64.01. If the motion is granted and testing is allowed, "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. Moreover, if that hearing is favorable to the convicted person, the court that hears the motion may release him on bail pending the conclusion of additional court or pardon proceedings. See *Hutson*, 508 F.3d, at 238-239.

Further, for Skinner to prove his claim of an unconstitutional application of article 64, Skinner would have to show the Texas courts erred in concluding that the testing he seeks has no potential to show that he should not have been convicted. He would also have to demonstrate that the Texas courts erred to the point of arbitrariness in concluding that Texas's statute does not permit testing for those who strategically decide not to seek it at trial, or that it is unconstitutional for a State to forbid testing to someone who strategically chose not to conduct it at trial. Both these attacks are inextricably intertwined with questions about the validity of his conviction and the conduct of the trial.

Skinner's claim is thus not like the one in *Dotson*, in which the prisoner argued that the state procedures were unconstitutional and sought a new hearing as relief. *Dotson*, 544 U.S., at 82. Skinner has never alleged that Texas's statute is unconstitutional by its terms; nor could a federal court order a Texas state court to hold a new article 64 hearing. Skinner's claim is instead like the one in *Edwards*, in which the prisoner argued that the state court's decision applying the state procedures was arbitrary, and sought to reverse and override that decision. *Edwards*, 520 U.S., at 648.[9] Further,

[9] Skinner is also wrong that *Dotson* somehow imposes a categorical rule that allows any sort of lawsuit that stops short of asking a federal district court to expressly declare the

because the challenge to the Texas court ruling under Texas's specific article 64 procedure is inextricable from an attack on the evidence supporting the conviction and the conduct of the trial, the analysis differs from that in the pre-*Osborne* cases that considered whether a freestanding federal constitutional right to DNA testing could be asserted in a §1983 suit. See, *e.g.*, *Harvey* v. *Horan*, 285 F.3d 298, 308-310 (CA4 2002) (Luttig, J., respecting denial of rehearing en banc).

a. Reweighing the Evidence Supporting the Conviction

Article 64 requires weighing the trial evidence to determine whether and how strongly it supports the conviction. The statute allows testing when a movant "establishes by a preponderance of the evidence that . . . the person would not have been convicted if exculpatory results had been obtained through DNA testing." Tex. Code Crim. Proc. art. 64.03. In this case, the Texas courts reviewed the evidence supporting the conviction, as the statute requires, and decided that the requested testing could not cast doubt on Skinner's conviction because it could not affect or undermine the overwhelming

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underlying conviction invalid. Skinner Br. 15-16. The Court in *Dotson* did not attempt to settle, and could not have settled, the question of how the *Heck* analysis applies to claims challenging the application of state postconviction procedures for accessing evidence in order to attack a conviction. Cf. *Osborne*, 129 S.Ct., at 2326 (ALITO, J., concurring) ("We have never previously held that a state prisoner may seek discovery by means of a 1983 action."). Moreover, *Dotson* itself did not prescribe a categorical rule, but a pragmatic analysis that considers how "tenuous" is the connection between the §1983 suit and release from confinement. *Dotson*, 544 U.S., at 78.

evidence of Skinner's guilt. *Skinner*, 122 S.W.3d, at 811. This conclusion about the weight of the evidence is what Skinner attacks in his petition as "arbitrary and capricious." Pet. 6.

Skinner thus now wants a federal district court to reweigh the evidence's tendency to support his conviction and override the Texas court's conclusion that there is no room for doubt. If he succeeds, the validity of his conviction will be conditionally called into doubt. Indeed, Skinner himself concedes that "[b]ecause materiality to the conviction is an element of a *Brady* claim, success on such a claim *does* necessarily imply the invalidity of the claimant's conviction—which . . . places *Brady* claims firmly at the traditional core of habeas corpus and precludes bringing them via §1983." Skinner Br. 16 n.9. But Skinner's claims similarly depend on asking the federal district court to (re)analyze whether the evidence sought is material to the conviction and overturn the Texas state courts' conclusion that the requested evidence could not materially affect the conviction. That question is inextricably, not "tenuous[ly]," connected to the validity of his conviction. *Dotson*, 544 U.S., at 78.

To make out the claim he wants to assert, Skinner would have ask the federal court to reweigh the evidence of his guilt against the possible results of the testing he seeks to determine whether a "reasonable probability exists that exculpatory DNA tests would prove [his] innocence." *Rivera* v. *State*, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002) (internal quotation marks omitted); see *Obsorne*, 129 S.Ct., at 2316 ("Where there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent."). He

would, moreover, have to demonstrate that the Texas courts were not just wrong, but so arbitrary in erring as to deny him due process. The overwhelming evidence of Skinner's guilt shows just how involved a federal district court would have to become in reweighing the evidence that supports his conviction, and how far a court would have to go to undermine the state courts' conclusion that the validity of the conviction could not be affected by further DNA testing because testing could at most "merely muddy the waters." *Rivera*, 89 S.W.3d, at 59 (internal quotation marks omitted).

On direct appeal, Skinner conceded that the evidence was sufficient to show he killed Twila and Elwin. *Skinner,* 956 S.W.2d, at 536-537. Skinner admits he was in the house during the murders. Skinner Br. 2. Skinner previously told Howard Mitchell he would kill Twila if she were ever unfaithful to him. *Skinner*, 956 S.W.2d, at 535 n.3; T.26.531, 594. Twila, on the night of her murder, was apprehensive about leaving Skinner at home, both before she left her house and while at Mitchell's house.

Skinner's first action after the murders was not to call police or seek help for Twila, Randy, and Elwin, but to flee to Andrea Reed's house, where he barged into her home covered in blood. Once there, he did not ask to be taken to the hospital but, instead, asked Reed to stitch his hand. Skinner then confessed to Reed that he thought he had killed Twila and threatened to kill Reed and her children if she called the police. *Skinner*, 2007 WL 582808, at *2-*3. He refused to allow Reed to contact Twila or anyone else. *Skinner*, 956 S.W.2d, at 535-536; T.26.499. When the police arrived later, Skinner hid in a closet, and when

told he was being arrested on outstanding warrants, replied, "Is that all?" T.25.361-362; T.27.789-790.

Skinner gave a statement to police on January 4, which was admitted at trial, in which he conceded he "might" have killed Twila. HS.59A, at 12 ("I can might [sic] even see maybe I might have killed her."). He also acknowledged that he thought Twila was the person who had cut his hand, not some third person, and intimated that he and Twila had been in a fight that night. *Id*., at 12 ("But I think she's the one that cut my hand. I think that.").

Tests on the blood on Skinner's clothes showed it belonged to Twila, Elwin, and Skinner. Skinner's bloody handprints were found on the frame of the door in the boys' bedroom and on the doorknobs of the doors leading from the kitchen to the utility room and out to the backyard. *Skinner*, 956 S.W.2d, at 535-536.

In response to this overwhelming evidence of guilt, Skinner argued he was too intoxicated to have committed the murders, submitting trial testimony from a toxicology expert. But "the facts of this case and the undisputed evidence of the acts [Skinner] did perform and was capable of performing [] directly contradict [the expert's] opinion." *Skinner*, 2007 WL 582808, at *25. Skinner indisputably was able to walk almost four blocks to Reed's house, and once there, enter her home uninvited, take off his shirt and drape it over a nearby chair, ask her to sew up his hand, heat and attempt to bend needles to use in stitching his cut hand, find and use the bathroom, clean the blood from his watch, and threaten to kill Reed and her children if she tried to call the police. See also HS.59A, at 18 (boasting to police that he was able to accomplish a great deal "mentally"

while drunk). That is why the jury that heard and weighed the evidence rejected Skinner's claims of incapacitation.

Skinner also pointed to a man named Robert Donnell as the possible killer, claiming that a jacket, "similar to one that Donnell routinely wore" was found near Twila's body. Skinner Br. 3. But the jacket found near Twila was not the same color as the one Donnell commonly wore. *Skinner*, 2007 WL 582808, at *27. And testimony at the federal habeas evidentiary hearing revealed that Twila had a consensual sexual relationship with Donnell and that tests on a rape kit can detect semen from consensual sex performed several days before the rape-kit samples were obtained. *Ibid.*; T.28.1046. Thus, any of Donnell's DNA that may have turned up on the jacket, which lay in a high traffic area in the house, or the rape kit samples would have, at most, "merely mudd[ied] the waters." *Rivera*, 89 S.W.3d, at 59.

In short, there is no escaping the fact that Skinner's claim would require a federal court to reweigh the evidence supporting the conviction, and that Skinner would be asking the federal courts to conclude not merely that the CCA was wrong, but that it was so wrong as to violate the Constitution when it concluded that the postconviction DNA testing Skinner sought could not cast sufficient doubt on his conviction to justify permitting the testing to go forward.

b. Attacking the Conclusion That Relief Was Barred by Skinner's Strategic Trial Decision Not to Test.

In addition to attacking the Texas courts' weighing of the evidence supporting the conviction,

Skinner would also have to attack their conclusion that testing is barred by the "no fault" provision of the statute because he deliberately chose not to test the DNA evidence at trial, and cannot show that choice was the product of ineffective assistance of counsel. *Skinner*, 293 S.W.3d, at 209.

When as in this case the evidence could have been tested at trial but was not, article 64 requires the movant to make a threshold showing that the failure to test was "through no fault of the convicted person." Tex. Code Crim. Proc. art. 64.01(b). The Texas courts have (quite reasonably) determined that this statutory language requires denying the motion when, as in this case, the movant made a reasonable strategic pretrial decision not to test. *Skinner*, 293 S.W.3d, at 209. The Court affirmed the constitutionality of a substantially similar requirement under Alaska law. *Osborne*, 129 S.Ct., at 2320-2321 (noting under Alaska's procedures, in which the Court saw "nothing inadequate," evidence must be "newly available" to qualify for testing); see also *id.*, at 2329 (ALITO, J., concurring) ("When a criminal defendant, for tactical purposes, passes up the opportunity for DNA testing at trial, that defendant, in my judgment, has no constitutional right to demand to perform DNA testing after conviction.").

Skinner claims, however, that the CCA's interpretation of article 64's "no fault" provision was "irrational," because the CCA's interpretation would require a defendant who chose strategically to "put the State to its burden of proof . . . to forever waive the opportunity to prove his innocence by DNA evidence." Pet. 6-7. In short, he asks the federal courts to enshrine in the Constitution a defense right

to sandbag the prosecution, take back reasonable strategic decisions made at trial, and override State efforts to hold defendants to the consequences of their choices at trial.

He also states that he could not have knowingly waived his right to postconviction DNA testing during his trial because article 64 was not yet in place. Pet. 6-7. But that argument ignores *Osborne*'s holding constitutional Alaska's requirement that any evidence to be tested was not previously available at trial. It also ignores that the Texas statute focuses on "fault," not "waiver"—the Texas statute, as construed by Texas courts, does not ask whether the prisoner "waived" at trial his postconviction right, but whether the failure to test at trial was attributable to the prisoner—i.e., his "fault." *Skinner*, 293 S.W.3d, at 197. In any event, neither argument was made to the Texas courts, nor even mentioned in his §1983 complaint.

The CCA's conclusion that Skinner was barred by the "no fault" provision is inextricably linked with a weighing of the evidence supporting his conviction. In deciding that Skinner was barred by the fault provision, the court reviewed the trial evidence, the federal habeas evidence, and the potential evidence from the requested testing, to conclude that he could not show any ineffective assistance in the strategic decision not to test at trial. *Skinner*, 293 S.W.3d, at 203-209.

Thus, to succeed on his attack in federal court, Skinner would again have to ask the federal district court to revisit the CCA's weighing of the evidence. He would also have to overturn the conclusion of the CCA, as well as the federal habeas court, that his counsel made a reasonable strategic decision not

to test. *Skinner*, 293 S.W.3d, at 209; *Skinner*, 2007 WL 582808, *31. In effect, Skinner is attempting to use §1983 as an alternative, and successive, means of reasserting his ineffective assistance claims, which were previously rejected. Regardless, his efforts to assert that kind of claim would necessarily imply the invalidity of his conviction. See, *e.g.*, *Johnson* v. *McElveen*, 101 F.3d 423, 423 (CA5 1996).[10]

3. Skinner Has Never Raised a Facial Challenge to Article 64 and Any Such Challenge Would Be Futile.

Finally, Skinner has never at any point argued that article 64 is unconstitutional by its terms. Instead, he effectively conceded below that the statute is constitutional on its face. See Resp. Mot. Dismiss 13 ("As in *Osborne*, the State's procedures appear adequate on their face . . . ." (internal quotation marks omitted)). In any event, any such claim would be futile because article 64 does not even remotely "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Osborne*, 129 S.Ct., at 2320 (quoting *Medina* v. *California*, 505 U.S. 437, 446 (1992)); *Parratt* v. *Taylor*, 451 U.S. 527, 542 (1981) ("[T]he existence of an adequate state remedy . . . avoids the conclusion that there has been any constitutional deprivation." (citation omitted)). Indeed, Texas's statute is more generous than the Alaska procedures upheld in *Osborne* and easily passes constitutional inquiry.

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[10] Importantly, Skinner would have to succeed on both arguments to succeed on his claims—either the reasonable-probability ground or the no-fault ground is fully independently to support the Texas courts' denial of testing.

Article 64 does not restrict the availability of testing; any convicted person may file a motion for DNA testing. See Tex. Code Crim. Proc. art. 64.01. There is no time limit on seeking testing. *Ibid*. The statute requires only "a reasonable probability [ ] that exculpatory DNA tests would prove innocence," *Rivera*, 89 S.W.3d, at 59, in contrast to Alaska's "clear and convincing evidence" standard, *Osborne*, 129 S.Ct., at 2317. Texas inmates seeking testing are "entitled to counsel." See *Winters* v. *Presiding Judge of Criminal Dist. Court*, 118 S.W.3d 773, 775 (Tex. Crim. App. 2003) (emphasis and citation omitted). Appeal is available and the statute has been liberally construed to allow successive motions for DNA testing. *E.g*., *Ex parte Lively*, 2007 WL 1783852 (Tex. Crim. App. June 20, 2007).

Further, article 64 contains all the key elements for "a good DNA access law" recommended by the Innocence Project. The Innocence Project, Fact Sheets, http://www.innocenceproject.org/Content/Access_To_PostConviction_DNA_Testing.php (last visited Sep. 7, 2010). The Texas statute also comports in all relevant respects with the Federal Innocence Project Act of 2004, which serves as a model for state DNA testing statutes. See *Osborne*, 129 S.Ct., at 2316-2317; Innocence Protection Act of 2004, §411, 118 Stat. 2279, codified in part at 18 U.S.C. §3600.

C. Allowing Skinner's Claim to Proceed Would Thwart the Interests That Motivate the *Heck* Rule.

Allowing Skinner to pursue his claim through §1983 rather than where he should, in habeas, would disrupt the state-federal balance Congress has implemented and this Court has striven to maintain,

by allowing postconviction evidentiary attacks on state court convictions without any of the restrictions the Court and Congress have imposed on such attempts.

Specifically, Skinner will be able to evade the statutory requirement of deference to state-court fact findings and legal rulings by mounting a *de novo* collateral attack on the state courts' determinations that the requested testing could have no reasonable potential to demonstrate his innocence and that he made a reasonable strategic decision not to test at trial. 28 U.S.C. §2254(d), (e). He will evade the exhaustion requirement by raising a due process claim—that he was denied due process by the application of the state article 64 procedure—that he never presented in any state court. 28 U.S.C. §2254(b); see Skinner Br. 30; see also *Rose* v. *Lundy*, 455 U.S. 509, 518 (1982) ("'It would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." (citation omitted)). He will also potentially escape the restriction on successive petitions by collaterally relitigating the ineffective-assistance claim that has already been rejected in federal habeas. 28 U.S.C. §2244. And, he will evade the one-year statute of limitations imposed by the statute.[11] 28 U.S.C. §2244(d).

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[11] Relatedly, there is no merit to Skinner's argument that affirmance would put prisoners in a difficult position in light of AEDPA's one-year statute of limitations. Skinner Br. 30-31. Instead, that statute of limitations is tolled by 28 U.S.C. §2244 while a prisoner uses article 64, as the Fifth Circuit has confirmed. See *Hutson*, 508 F.3d, at 236. This is just as Congress intended; the prisoner should pursue all state avenues

The Court should not give Skinner and those like him a free ranging right to probe state courts' evidentiary rulings in postconviction proceedings. Doing so would unleash an unprecedented "federal intrusion into state criminal adjudications" and seriously undermine "the States' interest in the integrity of their criminal and collateral proceedings." *Williams (Michael Wayne)*, 529 U.S., at 436.

It would also completely undermine *Osborne*'s statement that the state legislatures should be allowed to take the lead in developing systems and procedures to deal with the power of DNA testing. The States are entitled to determine the mechanism by which they will each "ensure the fair and effective use of [DNA] testing within the existing criminal justice framework." *Osborne*, 129 S.Ct., at 2316. Texas enacted article 64 to provide wrongly convicted persons access to testing that could establish their innocence. But Texas also imposed legitimate restrictions on that access, requiring a movant to show that he is not at fault for the failure to test previously available evidence and that testing could tend to show his innocence. *Skinner*, 293 S.W.3d, at 201; see House Research Organization Focus Report 76-26, DNA Evidence and Texas' Criminal Justice System, at 5-9 (Nov. 10, 2000) (discussing the vigorous debate surrounding the scope and nature of restrictions to postconviction DNA testing); House Research Organization, Bill Analysis, Tex S.B. 3, 77th Leg., R.S. (2001) at 2, 6 ("[The standard] would ensure that a favorable test would show that an

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for challenging his conviction (including attempts to access evidence to challenge that conviction), and only then proceed to federal court to assert in habeas any federal constitutional defects in the process afforded him by the State.

inmate was innocent, not merely muddy the waters in a case.").

Skinner grievously misreads *Osborne* when he suggests that the Court in that case somehow contemplated and approved a separate §1983 suit attacking state-court determinations under the applicable state post-conviction-testing statutes. Skinner Br. 29 (asserting that *Obsorne* "left the courthouse door open" to §1983 suits like Skinner's). Indeed, it would eviscerate *Osborne* if the Court's support for the primacy of state procedures in DNA testing were reinterpreted as an authorization to sidestep every state-court ruling on those same procedures through a subsequent §1983 suit. *See Osborne*, 129 S.Ct., at 2312. Nor does holding Skinner's claims noncognizable under §1983 leave him and those like him without recourse. Instead, his constitutional arguments could have been raised in the state court system and then reviewed by this Court on petition for writ of certiorari. See 28 U.S.C. §1257. Skinner took two appeals, but raised in neither any constitutional challenge, and never petitioned this Court for certiorari.

Skinner's §1983 claims are, at their core, merely an invitation to second-guess the Texas courts' interpretation and application of a constitutional Texas statute, to effectively "sidestep state process through a new federal lawsuit." *Osborne*, 129 S.Ct., at 2321. The Court should reject this attempt to "take the development of rules and procedures in this area out of the hands of legislatures and state courts shaping policy in a focused manner and turn it over to federal courts." *Id*., at 2312; see also *Smith* v. *Robbins*, 528 U.S. 259, 274-275 (2000) (recognizing

that States must have broad discretion in devising criminal justice rules).

Allowing Skinner's claim would also have a number of harmful practical consequences of the type the *Heck* rule is meant to prevent. It would undermine finality by permitting collateral relitigation, promote inefficiency through relitigation and piecemeal litigation, and increase costs by encouraging a proliferation of new suits challenging state court postconviction evidentiary and discovery determinations.

Skinner's proposed rule will undermine finality by reopening many settled rulings from both state and federal courts. In this case, Skinner seeks to relitigate:

- The state courts' direct-appeal determination that Skinner conceded the sufficiency of the evidence to show he had committed two of the murders;
- The state courts' weighing of the evidence under article 64 to conclude that the requested testing could not undermine the proof of his guilt;
- The state courts' determinations under article 64 that Skinner's reasonable strategic decision bars him from seeking article 64 relief; and,
- The federal habeas court's determination that he did not receive ineffective assistance of counsel when he made the strategic decision not to test the evidence he now wants tested.

In no other context can a litigant simply ignore what courts have previously ruled in other proceedings as Skinner seeks to do by claiming the right to seek discovery of DNA evidence in order to challenge his conviction not only under state law and in federal habeas but also separately under §1983.[12] And the Court has already rejected this approach. "[T]here is no basis for [the] approach of assuming that . . . 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*, 129 S.Ct., at 2323.

Skinner's rule will also encourage piecemeal litigation of claims that should be adjudicated holistically in one habeas proceeding. *Sanders* v. *United States*, 373 U.S. 1, 18 (1963) ("Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal ligation.") Prisoners could use a series of §1983 actions to assemble the pieces of an attack on their convictions before ever attempting to formally challenge their convictions in federal habeas proceedings.

Moreover, *guilty* prisoners will be able to multiply nuisance and delay through a rash of piecemeal §1983 suits. If Skinner's claim is allowed to proceed under §1983, there is no reason that he could not bring further §1983 lawsuits seeking to test other pieces of evidence. And future litigants, after pursuing state statutory remedies, could bring a

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[12] Habeas allows collateral attack on state-court criminal judgments, but only subject to important restrictions requiring deference and exhaustion, and prohibiting successive claims.

separate §1983 suit for each individual piece of evidence they wish to test.

These ills, moreover, will be multiplied through a wave of costly suits. "[R]equests for postconviction DNA testing are not cost free." *Osborne*, 129 S.Ct., at 2329 (ALITO, J., concurring). If Skinner's claims are accepted, there will be a proliferation of §1983 suits seeking access to DNA evidence based on alleged arbitrariness in state procedures, obliterating the efforts by the States (and the respect for those efforts Congress has written into the habeas statute) to balance these competing interests and conserve limited resources by allowing limited access to DNA evidence postconviction.

Finally, there will be no principled reason to limit these new claims to DNA evidence. Certainly, Skinner advances no limiting principle to restrict this new §1983 cause of action to article 64 proceedings (or similar proceedings under analogous state DNA statutes). Instead, any time a state court denies a prisoner access to discovery in a state postconviction proceeding, he will have placed in his back pocket a future §1983 lawsuit after losing all other avenues to invalidate his conviction. Artful pleading will allow escaping the *Heck* bar by claiming the plaintiff merely seeks discovery through an attack on the state courts' denial of that discovery and not to challenge the conviction. Cf. *Osborne*, 129 S.Ct., at 2325 (ALITO, J., concurring) ("The rules set forth in our cases and codified in AEDPA would mean very little if state prisoners could simply evade them through artful pleading.").

Any prisoner who seeks for example to perform additional postconviction voice analysis on a recording (*e.g.*, in a drug conspiracy case), but is

denied that discovery by the state postconviction court and the federal habeas court, could then bring a §1983 suit claiming that the state courts violated the Fourteenth Amendment by "preventing Plaintiff from gaining access to exculpatory evidence" and "depriv[ing] Plaintiff of his liberty interest in utilizing state procedures to obtain reversal of his conviction and/or to obtain a pardon or reduction of his sentence." J.A. 20-21. The gate would be open to freeroving postconviction discovery efforts under the guise of §1983 lawsuits. *Osborne*, 129 S.Ct., at 2325 (ALITO, J., concurring). The Court should avoid going down this path.

III. SKINNER'S CHALLENGES ARE JURISDICTIONALLY BARRED BY THE *ROOKER-FELDMAN* DOCTRINE.

In addition to being not cognizable, the §1983 claim Skinner now presents to this Court is one the district court had no jurisdiction to hear. The lower federal courts cannot second-guess final state court judgments, because 28 U.S.C. §1257 "vests authority to review a state court's judgment solely in [the Supreme] Court." *Exxon Mobil Corp.* v. *Saudi Basic Industries Corp.*, 544 U.S. 280, 292 (2005). The *Rooker-Feldman* doctrine effects this restriction by barring suits brought in federal district court "by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Id.*, at 284.

Skinner's claims that the Texas state courts violated his constitutional rights in denying his article 64 motions are barred by *Rooker-Feldman*. Clearly a "state-court loser[]," *Exxon Mobil Corp.*, 544 U.S., at 284, Skinner characterizes his harm, at least

in this Court, as a violation of procedural due process resulting from a fundamentally unfair application of article 64 by the state courts. Skinner Br. 6; see also *id*., at 29. He characterizes his claims as "as-applied challenges," Pet. 29, attacking evidence-weighing in the first article 64 proceeding as "arbitrary and capricious," Pet. 6, and arguing that the CCA's denial of his second article 64 motion was "irrational." Pet. 6-7. Skinner also asserts that his §1983 claims accrued when the CCA ruled. See Skinner Br. 6. By his own description, his alleged harm was caused by the state courts' judgments. *See In re Smith*, 349 Fed. Appx. 12, 15 (CA6 2009); *Skinner*, 2010 WL 273143, *4-*5.

Skinner's as-applied claims also readily satisfy the remaining two *Rooker-Feldman* requirements. By arguing that the state courts got their analysis of state law wrong in denying his article 64 motions, Skinner's claims directly invite federal-court review and reversal of the now final state court decisions. And he filed his §1983 suit only after the state courts had finally rejected his article 64 claims. See Skinner Br. 6. To complain in federal court of an unconstitutional application of article 64 by the Texas courts, Skinner should have sought a writ of certiorari from the CCA's denials of his article 64 motions or filed an application for writ of habeas corpus. He did neither, and there is no jurisdiction for a federal district court to hear his claims now.[13]

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[13] Nor should the Court give any credence to Skinner's claims in his petition that this case presents no *Rooker-Feldman* issues. Skinner told the district court his claims have no *Rooker-Feldman* problem because he was not challenging the state court's ruling, later encouraged the Court to take the case because it was a clean vehicle in which the district court had

IV. PROCEDURAL SNARES OF SKINNER'S OWN MAKING WOULD JUSTIFY DISMISSING THE CASE AS IMPROVIDENTLY GRANTED.

Skinner's refusal to clearly define his claims, and, "deliberate[] changing [of] positions according to the exigencies of the moment," create a disconnect between his complaint and his current arguments. *New Hampshire* v. *Maine*, 532 U.S. 742, 750-752 (2001) (citations omitted) (noting the threat to judicial integrity when a party's positions are "clearly inconsistent" and "would create 'the perception that [a] court was misled'"). These shortcomings of Skinner's own making call into question whether the Court should decide the case at all. Cf. *Canton* v. *Harris*, 489 U.S. 378, 384-385 (1989) (explaining that an inexact and contradictory presentation of the issues below may undermine the Court's examination of an issue).

Skinner originally argued that Switzer herself deprived him of his constitutional right to access DNA evidence, and he disclaimed any challenge to the state-court decisions. See Skinner Resp. Mot. Dismiss 6. He has now abruptly changed

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already determined *Rooker-Feldman* was not at issue, and then in his merits brief presented his claim as a claim left open by *Osborne* that challenges the application of Texas procedures—*i.e.*, the Texas state courts' article 64 rulings—to his case. *Skinner*, 2010 WL 273143, *3-*5; see also Switzer Br. in Opp. 17-18. The Court need not reward this strategy by pretending that Skinner's claims, as currently articulated, do not have insurmountable *Rooker-Feldman* problems. Instead, the Court "has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) (citations omitted).

tack. His brief makes not one single assertion of unconstitutional conduct against Lynn Switzer, and he purports instead to challenge the CCA's denials of his motions to obtain DNA evidence as "arbitrary and capricious" and "irrational." Pet. 6-7, 29. See Switzer Br. in Opp. 17 (noting that Skinner previously "affirmatively disclaimed" the claims he now seeks to present). Even if Skinner were permitted to reinvent his claims in this Court, his newly asserted as-applied challenge is a poor vehicle for the Court's consideration of the issues presented because Switzer is not the appropriate defendant.

A. Skinner Is Asserting New Claims and Arguments He Never Raised in the Lower Courts.

Skinner's complaint and his briefing in this Court state different contradictory claims. Skinner's complaint alleges Switzer's own actions violated his due process rights; it contains no as-applied challenges to the state-court article 64 decisions and, in the district court, Skinner responded to arguments that his claims were barred by *Rooker-Feldman* by expressly disclaiming that he was asserting any such as-applied challenge.

Once Skinner cleared the district court and *Rooker-Feldman*, he faced a new barrier because *Osborne* rules out any freestanding right to access DNA evidence. See *Osborne,* 129 S.Ct., at 2322-2323. So in response to *Osborne*, Skinner now suggests that he has been "denied his federal constitutional right to fundamental fairness in the process by which the State denied his state-law claim." Skinner Br. 30. But this is precisely the claim that he disavowed in the lower court proceedings and that the magistrate and the district court consequently declined to

consider. See J.A. 34. Although Skinner suggests that his "as-applied challenges may be accurately evaluated by the district court on remand," Pet. 29, as-applied challenges have never been a part of this case. The contradictions in this record make this a poor case to resolve the questions left by *Heck* and a good candidate for dismissal as improvidently granted. See, *e.g.*, *United States* v. *United Foods, Inc.*, 533 U.S. 405, 416-417 (2001) (refusing to consider a question not raised or addressed in the court of appeals below).

B. Switzer Is Not the Appropriate Defendant for Skinner's As-Applied Challenge.

Even if this Court overlooks Skinner's contradictory claims, the current posture of the case may make resolution of the question presented purely "advisory or academic." *Medellin* v. *Dretke*, 544 U.S. 660, 664 (2005); See also *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation.") If Skinner now wishes to bring an as-applied challenge to the state courts' determinations, he has not stated an adequate claim under §1983, because doing so would require a different defendant.

To state a valid claim under §1983, the plaintiff must allege that the defendant has deprived him of a federal right. 42 U.S.C. §1983. Lynn Switzer is the defendant (in her official capacity). Skinner's claims in his complaint against Switzer allege that she herself is violating his rights by refusing to provide access to evidence. See Resp. Mot. Dismiss 5 ("Mr. Skinner's injury is caused by the Defendant's refusal to provide requested access to the physical evidence

for DNA testing despite the fact that such testing might well produce exculpatory results—an injury that existed prior to the state court judgment."). But the theory underlying this claim was rejected in *Osborne*—there is no freestanding right to access DNA evidence that a district attorney can violate by refusing to provide access. *Osborne*, 129 S.Ct., at 2322-2323.

Recognizing this, Skinner in this Court attempts to attack the state's procedures. He has not challenged the facial constitutionality of article 64. See Resp. Mot. Dismiss 13 (explaining that, "[a]s in *Osborne*, the State's procedures appear 'adequate on their face.'"). Rather, he now claims that his alleged constitutional harm arises from how the CCA applied the statute, the argument that he expressly disavowed in the district court. See Pet. 6-7.

That alleged harm was not caused by Switzer. Because Skinner now wishes to assert that the allegedly arbitrary and capricious application of the statute to deny him testing deprived him of a constitutional right, the CCA would be the only appropriate defendant (but for the *Rooker-Feldman* bar). This is confirmed by his assertion that his claim accrued upon the CCA's decision. See Skinner Br. 6. See also *Savory* v. *Lyons*, 469 F.3d 667, 672 (CA7 2006) (noting that the plaintiff's §1983 claim accrued when "the Illinois circuit court denied Savory's request for DNA testing under Illinois law"). Nor did Switzer's acquiescence to the court's decision cause any constitutional harm or deprivation; she did not issue the state-court decisions Skinner now wishes to reverse and has done nothing but comply with court orders.

CONCLUSION

For these reasons, the judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

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