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

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Mark D. White*
Andrew Sefzik
SPROUSE SHRADER SMITH P.C.
701 S. Taylor, Suite 500
P.O. Box 15008
Amarillo, Texas 79105-5008
(806) 468-3300
(806) 373-3454 fax
mark.white@sprouselaw.com
andrew.sefzik@sprouselaw.com

*Counsel of Record for Respondent and Member of the Bar of this Court

QUESTION PRESENTED

(Capital Case)

Whether a convicted state prisoner, after failing to meet the requirements to gain access to biological evidence that was available at trial for DNA testing through the applicable state post-conviction statutes, may then seek such access through a 42 U.S.C. § 1983 action.

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STATEMENT OF THE CASE

I. Procedural background

Petitioner Henry W. Skinner ("Skinner") was convicted of capital murder in 1995 for the murders of his girlfriend, Twila Busby, and her two mentally challenged sons, Elwin Caler and Randy Busby, and sentenced to death. The conviction and sentence were upheld by the Texas Court of Criminal Appeals ("TCCA"). *Skinner v. State*, 956 S.W.2d 532 (Tex. Crim. App. 1997), *cert. denied*, 523 U.S. 1079 (1998). Skinner filed a state application for writ of habeas corpus in 1998 that the TCCA dismissed based upon the trial court's determination that it was untimely filed. Skinner filed an initial federal habeas petition in the United States District Court for the Northern District of Texas, Amarillo Division, (the "Northern District") in 1999 that was administratively closed in 2000, and stayed so that Skinner could return to state court to present his habeas claims after a change in Texas law. Skinner filed his second state habeas application in 2001 that the TCCA dismissed.

Skinner filed a motion to obtain post-conviction DNA testing in the 31st District Court, Gray County, Texas on October 9, 2001. The 31st District Court denied the motion and the TCCA affirmed the decision. *Skinner v. State*, 122 S.W.3d 808 (Tex. Crim. App. 2003). Skinner did not seek certiorari review.

Skinner filed an amended federal habeas petition in the Northern District in 2002. In connection with his federal habeas petition, Skinner filed a motion contending that additional DNA testing was necessary in order for him to prove that he had been prejudiced by his counsel's failure to ask for the testing prior to trial. On May 18, 2004, United States Magistrate Judge Clinton E. Averitte denied the request for additional DNA testing. On August 15, 2005, Skinner renewed his motion for additional DNA testing; and Magistrate Judge Averitte again denied the motion on October 4, 2005. Also in connection with Skinner's 2002 federal habeas petition, the Northern District partially granted Skinner's motion for discovery and allowed a deposition to be taken, and in November 2005 held an evidentiary hearing. Both parties filed post-hearing briefs and reply briefs.

Magistrate Judge Averitte issued a Report and Recommendation recommending that Skinner's 2002 application for a writ of habeas corpus be denied, finding that Skinner failed to make a substantial showing of the denial of a federal constitutional right on any of his claims. *Skinner v. Quarterman*, No. 2:99-CV-0045, 2007 WL 582808, at *43 (N.D. Tex. Feb. 22, 2007) (unpublished). United States District Judge Mary Lou Robinson adopted the report and recommendation of Magistrate Judge Averitte. *Id.* at *1. The Northern District then denied Skinner's application for certificate of appealability. *Skinner v. Quarterman*, No. 2:99-CV-0045, 2007 WL 1953503 (N.D. Tex. Jul. 2, 2007)

(unpublished). The United States Court of Appeals for the Fifth Circuit granted the certificate of appealability in part and denied in part. *Skinner v. Quarterman*, 528 F.3d 336 (5th Cir. 2008). The Fifth Circuit ultimately affirmed. *Skinner v. Quarterman*, 576 F.3d 214 (5th Cir. 2009), *cert. denied*, --- S.Ct ----, No. 09-7784, 2010 WL 680586 (Mar. 1, 2010).

Skinner filed a second motion to obtain post-conviction DNA testing in the 31st District Court, Gray County, Texas on July 30, 2007. The 31st District Court also denied the second motion and the TCCA again affirmed the decision. *Skinner v. State*, 293 S.W.3d 196 (Tex. Crim. App. 2009). Skinner did not seek certiorari review.

On November 27, 2009, Skinner filed a 42 U.S.C. § 1983 action in the Northern District and moved for a preliminary injunction requesting that Respondent Lynn Switzer, District Attorney for the 31st Judicial District of Texas, ("Switzer") release materials for post-conviction DNA testing. Switzer moved for dismissal on several grounds and opposed the injunction. The Northern District dismissed Skinner's § 1983 action; and the Fifth Circuit affirmed the dismissal. *Skinner v. Switzer*, No. 2:09-CV-0281, 2010 WL 273143 (N.D. Tex. Jan. 20, 2010), *aff'd*, No. 10-70002, 2010 WL 338018 (5th Cir. Jan. 28, 2010) (per curiam). Skinner now seeks certiorari review.

II. Facts of the crime

In its opinion granting a certificate of appealability in part, the Fifth Circuit summarized the evidence of Skinner's capital crime as follows:

> In March 1995, a jury convicted Skinner of murdering his girlfriend, Twila Busby, and her two mentally retarded sons, Randy Busby and Elwin Caler, on New Year's Eve of 1993. Twila, Randy, and Elwin were strangled, bludgeoned, and stabbed in their house shortly before midnight.
>
> At midnight, a police officer found Elwin, in bloodstained undershorts, sitting on the porch of a neighbor's house with stab wounds under his left arm and on his right hand and stomach. He was taken to a hospital and died shortly thereafter. Investigating Elwin's stabbing, the police went to the home where he lived with Twila, Randy, and Skinner. The police noticed a trail of blood on the ground running from the front porch to the fence line, a blood smear on the glass storm door, and a knife on the front porch. They found Twila dead on the living room floor. She had been strangled into unconsciousness, then beaten on the head with a blunt object at least fourteen times. A bloodstained axe handle and plastic trash bag containing a knife and bloody towel lay nearby. She exhibited signs of recent sexual intercourse. In a bedroom, officers found Randy dead in an upper bunk. His body was lying face down, and he had been stabbed three times in the back.
>
> On the door frame between the bedroom and a utility room, officers found a bloody hand print roughly two feet above the floor. Bloody prints were also found on the door knob of the door connecting the utility room to the kitchen and on the doorknob of the utility room door opening to the backyard. The prints were Skinner's.
>
> Suspecting Skinner, the police sought and found him at 3:00 a.m. in the house of Andrea Reed, his former girlfriend, standing in a closet wearing heavily bloodstained jeans and socks and bearing a gash on the palm of his right hand. DNA testing showed that blood on Skinner belonged to Twila and Elwin. Skinner appeared intoxicated, and a toxicology test taken at 5:48 a.m. revealed alcohol and codeine.

Skinner was arrested, and in a statement to police he claimed not to recall much of what had transpired that evening.

At trial, the night's happenings were filled in by others. A friend, Howard Mitchell, went to Twila's and Skinner's home around 10:30 p.m. to give them a ride to his New Year's Eve party. When he arrived, Mitchell found Skinner passed out on the couch, apparently drunk. Unable to wake Skinner, Mitchell left with Twila for the party, where she was followed around by her drunken uncle, Robert Donnell, who made rude sexual advances toward her. Twila quickly became agitated by Donnell and had Mitchell take her back home. Mitchell dropped her off between 11:00 and 11:15 p.m. and left without going inside.

The trail of witnesses runs cold during the fateful hour before midnight but picks up thereafter. At midnight, roughly at the same time the police officer found Elwin, Reed answered a knock at the door of her trailer, which was about four blocks from Skinner's home. Skinner stood outside the door in blood-soaked shirt and pants and wearing socks but no shoes; he told Reed he had been stabbed and shot. He removed his shirt, but Reed could find no injuries except for the cut on the palm of his hand, which she bandaged for him. Skinner stayed with Reed for roughly three hours until the police arrived to apprehend him.

Reed testified that Skinner appeared intoxicated and disoriented and made many inconsistent statements about the causes of his injury and the course of events. Reed tried to call police, but Skinner threatened to kill her [and her children] if she did. Skinner eventually offered to tell Reed what really had happened if she would promise not to tell anyone; she promised, and Skinner told her he thought he had kicked Twila to death.[1] In a later statement to police, he claimed he woke up

[1] Reed's trial testimony and federal habeas corpus evidentiary hearing testimony differed. Petitioner claims that Reed's evidentiary hearing testimony is the true testimony. *Petition for Writ, p. 9 n.5.* There were, however, several witnesses called at the evidentiary hearing to rebut her testimony there, and to corroborate that Reed's trial testimony was in fact accurate—that Skinner had told Reed on the night of the murders that Skinner thought he had killed Twila and that Skinner had threatened to kill Reed and her children. *Skinner v. Quarterman*, No. 2:99-CV-0045, 2007 WL 582808, at *9-10 (N.D. Tex. Feb. 22, 2007) (unpublished) . Regardless, Reed's testimony was not so critical that Skinner could not have been convicted without it and there were numerous witnesses and pieces of evidence that supported the State's case against Skinner. *Id.* at *15.

> on the couch to find someone standing over him with a knife and that he ran out of the house. He also guessed that Twila might have killed her sons and cut him with a knife, but he claimed not to remember plainly.[2]

Skinner v. Quarterman, 528 F.3d 336, 339-40 (5th Cir. 2008).

REASONS FOR DENYING THE WRIT OF CERTIORARI

The Court should deny certiorari review because Skinner's § 1983 action—even if cognizable—is barred by limitations. Additionally, even if Skinner were allowed to test additional items of evidence, no item of evidence exists that would conclusively prove that Skinner did not commit murder. State and federal courts alike have determined that Skinner's conviction and sentence were constitutional. Finally, Texas has post-conviction procedures in place to allow individuals to access evidence for DNA testing and Skinner failed to meet the applicable standards under those procedures.

I. A § 1983 action is barred by limitations

Skinner fails to explain his lack of diligence in not filing a § 1983 action until his execution became imminent. Skinner claims that he began making requests to Gray County district attorneys as early as 2000 for access to crime scene evidence to subject it to DNA testing, and that all of those requests were ignored or denied. *Petition for Writ, p. 5.* Additionally, Skinner filed his first

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[2] He stated, "I think that Twila came home drunk and had a knife. I don't know if she stabbed the boys and then we got into a fight or [she] tried to stab me or what the hell happened. I just don't know. But I think she's the one that cut my hand. I think that." (footnote in original).

post-conviction motion in state court to obtain access to such evidence in 2001. The motion was denied and the TCCA affirmed the denial, *Skinner v. State*, 122 S.W.3d 808 (Tex. Crim. App. 2003), with Skinner failing to seek certiorari review.

Skinner claims that if his § 1983 action is allowed to proceed, he "has a genuine prospect of prevailing on the merits and, perhaps, ultimately proving his innocence." *Petition for Writ, p. 4.* Skinner, however, could not possibly prevail in a § 1983 action even if this Court were to create a rule that such a cause of action to obtain evidence post-conviction for DNA testing does exist.

Switzer did not file an answer in the Northern District because Skinner's suit was dismissed prior to the need to file one. *See* FED. R. CIV. P. 12(a)(4). Switzer, however, would assert several affirmative defenses, including immunity and statute of limitations. This Court can determine simply by Skinner's Petition and the pleadings below that he was aware as early as 2000 that the Gray County district attorneys were not going to provide him access to the evidence he seeks to subject to post-conviction DNA testing. *Petition for Writ, p. 5.* His § 1983 claim would therefore be barred by the applicable two-year statute of limitations in Texas because Skinner filed his § 1983 claim on November 27, 2009. *Owens v. Okure*, 488 U.S. 235, 240-41, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989); TEX. CIV. PRAC. & REM. CODE § 16.003.

It is appropriate for the Court to deny certiorari review in this case because Skinner's claim is destined to fail even if the Court determined that he has a cognizable § 1983 claim.

II. Additional DNA testing would not be outcome determinative

A petition for a writ of certiorari will only be granted for compelling reasons. *See* U.S. S.Ct. R. 10. The Court may want to address the question presented at some point, but this is not the appropriate case with which to address it. There was ample evidence in this case to find Skinner guilty of committing three murders, and certiorari review would be a futile exercise. The circumstances of this case are far different from those in *District Attorney's Office for the Third Judicial District v. Osborne*, --- U.S. ----, 129 S.Ct. 2308, 2320 (2009). That is—no physical evidence exists that would conclusively establish someone other than Skinner killed three people on New Year's Eve of 1993. This case is also quite different than *Osborne* because unlike Alaska, Texas has enacted legislation specifically addressing the issue of evidence requested post-conviction for DNA testing.

Petitioner claims that the circuit courts of appeals are split regarding the question presented. *Petition for Writ, pp. 2-3*. A disagreement among the circuits does not entitle Skinner to certiorari review, and is simply one factor the Court may consider. The Court has observed that "it is very important that we be

consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties . . . ." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S.Ct. 422, 67 L.Ed. 712 (1923). This Court does not sit for the benefit of the particular litigants. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 99 L.Ed. 897 (1955) (citations omitted). As explained by this Court:

> If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable. It has long been the Court's considered practice not to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied . . . . It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.

Clinton v. Jones, 520 U.S. 681, 690 n.11, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997) (internal quotations and citations omitted).

The precise facts of this case do not require the Court to formulate a rule of constitutional law. Skinner treats this case as though if he is allowed to test additional items of evidence, the testing will conclusively show that he is innocent. This is simply not correct. The evidence presented at trial overwhelmingly showed Skinner's guilt; and his conviction and sentence have been upheld every step of the

way. Furthermore, DNA evidence often fails to provide "absolute proof" of anything. *Osborne*, 129 S.Ct. at 2327 (Alito, J., concurring).

> DNA evidence creates special opportunities, risks, and burdens that implicate important state interests. Given those interests-and especially in light of the rapidly evolving nature of DNA testing technology-this is an area that should be (and is being) explored through the working of normal democratic processes in the laboratories of the States.

Id. at 2326 (citation omitted).

The Texas Court of Criminal Appeals, in its decision upholding the denial of Skinner's second motion for post-conviction DNA testing, stated that:

> [I]f trial counsel declined to seek testing as a matter of reasonable trial strategy, then post-trial testing would not usually be required by the interests of justice. To hold otherwise would allow defendants to "lie behind the log" by failing to seek testing because of a reasonable fear that the results would be incriminating at trial but then seeking testing after conviction when there is no longer anything to lose.

Skinner v. State, 293 S.W.3d 196, 202 (Tex. Crim. App. 2009) (emphasis in original).

"DNA testing alone does not always resolve a case. Where there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent." *Osborne*, 129 S.Ct. at 2316. The Fifth Circuit stated that there was ample evidence that Skinner was the murderer. *Skinner v. Quarterman*, 576 F.3d 214, 219 (5th Cir. 2009), *cert. denied*, --- S.Ct ----, 2010 WL 680586 (Mar. 1, 2010).

The items Skinner seeks to test were available to him for testing at the time of his trial. In fact, some items were subject to DNA testing while others were not, even though available. The litigation in this case, that spans more than a decade, reveals that the decision not to have additional items tested was a trial strategy that was appropriate under the facts and circumstances of the murders underlying Skinner's conviction. *Skinner v. Quarterman*, No. 2:99-CV-0045, 2007 WL 1953503, at *3 (N.D. Tex. July 2, 2007) (unpublished). The Fifth Circuit stated that "[c]onducting its own DNA test [on the crime scene evidence not tested by the state] would also have deprived the defense of its primary argument at trial that the government conducted a shoddy investigation." *Skinner v. Quarterman*, 528 F.3d 336, 341 (5th Cir. 2008). Additionally, that "Skinner's counsel made an informed, strategic decision that DNA testing was at least as likely to incriminate Skinner as to exonerate him and that additional testing was a gamble not worth taking." *Id.* at 342.

Even if Skinner was granted access to the evidence he seeks to subject to DNA testing, the results of such testing would not prove, or even tend to prove, Skinner's innocence of the crimes for which he was convicted. In other words, even if DNA found at the scene of the murders did match someone other than Skinner, it would not exonerate him. Indeed, Skinner does not contend that the results of any DNA testing would in fact be exculpatory. Skinner's Petition is

inconsistent regarding his expectations of results of additional DNA testing. At one point, Skinner states that "**[d]epending on the results**, testing of these items **could** prove his innocence;" and he repeatedly couches possible results in terms of "could" and "might." *Petition for Writ, p. 13* (emphasis added). Later, Skinner states that his "guilt or innocence can be determined by DNA testing," *id., p. 29*, which is entirely false.

Skinner asks this Court to create a post-conviction constitutional right under § 1983 to access crime scene evidence in order to conduct DNA testing—but even if the Court were to do so—its decision is not necessary for Skinner's case. Additional DNA testing in this case would not affirmatively prove anything. This is not a case where the proverbial "smoking gun" that would clear Skinner's name exists in the items of evidence that were not previously subjected to DNA evidence. A jury weighing the precise facts of this case—and the alternative theories and defenses laid out in Skinner's Petition—determined that Skinner committed three murders. The Court should deny certiorari.

III. Skinner essentially wants a new trial

Skinner—being proved guilty after a fair trial—does not have the same liberty interests as a free man. *Osborne*, 129 S.Ct. at 2320. "Given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty." *Id.* (quoting *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464,

101 S.Ct. 2460, 69 L.Ed.2d 158 (1981)). Skinner's due process rights are not parallel to a trial right, and are instead analyzed in light of the fact that he has already been found guilty at a fair trial. *Id.* After being found guilty, he has only a limited interest in post-conviction relief. *Id.*

Texas has flexibility in deciding what procedures are needed in the context of post-conviction relief. *Id.* Due process does not dictate the exact form that states must follow when choosing to offer relief from convictions. *Id.* (citing *Pennsylvania v. Finley*, 481 U.S. 551, 559, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987)). Only if a state's post-conviction relief procedures are fundamentally inadequate to vindicate the substantive rights provided may they be upset. *Id.* The infractions that violate fundamental fairness fall into a very narrow category; because beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. *Medina v. California*, 505 U.S. 437, 443, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992).

> The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order . . . [I]t has never been thought that decisions under the Due Process Clause establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure.

Id. at 443-44 (internal quotation marks and citation omitted).

Skinner's Petition goes beyond the question presented and reads as though he is attempting at this stage to convince this Court that he was wrongfully convicted and did not receive a fair trial. Skinner states that "while [he] was convicted of capital murder, there are disturbing and unresolved questions about the accuracy of the jury's verdict." *Petition for Writ, p. 14.*

First, this Court recently denied certiorari review of Skinner's appeal in his federal habeas action where it was determined that Skinner's conviction and death sentence were constitutional. *Skinner v. Quarterman*, 576 F.3d 214 (5th Cir. 2009), *cert. denied*, --- S.Ct ----, 2010 WL 680586 (Mar. 1, 2010). Additionally, "[f]ederal courts are not forums in which to relitigate state trials." *Herrera v. Collins*, 506 U.S. 390, 401, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) (citing *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983)). Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears. *Id.* at 399. The guilt or innocence determination in state criminal trials is "a decisive and portentous event." *Id.* at 401 (citing *Wainwright v. Sykes*, 433 U.S. 72, 90, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977)). "Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens." *Id.* Innocence or guilt must be determined in some sort of a judicial proceeding in any system of criminal justice. *Id.* at 398.

"Finality is essential to both the retributive and the deterrent functions of criminal law." *Calderon v. Thompson*, 523 U.S. 538, 555, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998). "Without finality, the criminal law is deprived of much of its deterrent effect." *Id.*

Skinner was convicted in a fair trial and his conviction has been upheld. There is no indication that should the additional items of evidence Skinner seeks to subject to DNA testing be tested, that the testing will affirmatively show that Skinner did not murder three people. It is not absolutely necessary for the Court to consider questions of a constitutional nature for a decision in this case. Certiorari review is therefore not warranted and should be denied.

IV. Texas has post-conviction procedures for obtaining evidence for DNA testing

Skinner's claim must be analyzed within the framework of Texas's procedures for post-conviction relief. *Osborne*, 129 S.Ct. at 2320. Chapter 64 of the Texas Code of Criminal Procedure provides an avenue in Texas for convicted prisoners to obtain post-conviction DNA testing of biological material in certain circumstances. Texas's statutory requirement that post-conviction testing results be exculpatory is not met if the DNA evidence would "merely muddy the waters." *Watkins v. State*, 155 S.W.3d 631, 633 (Tex. App.—Texarkana 2005, no pet.). Instead, the evidence must tend to prove the defendant's innocence. *Rivera v. State*, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002).

"Federal courts may upset a State's post-conviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." *Osborne*, 129 at 2320. There is nothing fundamentally inadequate about Texas's post-conviction procedures. Indeed, the Texas statute contains all of the "key elements" that the Innocence Project recommends should be "included in a good DNA access law." *See* The Innocence Project, Fact Sheets, http://www.innocenceproject.org/Content/304.php (last visited Mar. 11, 2010). For instance, unlike in many states, DNA testing is not restricted to a certain class of inmate. *See* TEX. CODE CRIM. PROC. ANN. art. 64.01 (people convicted of any crime may apply). There is no restriction that an individual is currently serving time. *See id.* (anyone with a criminal record may apply). Additionally, there are no time limits for requesting DNA testing or any procedural hurdles or sunset provisions that restrict access. *See id.*

To obtain post-conviction DNA testing in Texas, the convicted person must establish that unaltered evidence is available for testing; that identity was an issue in the case; that by a preponderance of the evidence a reasonable probability exists that he would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing; and that the request is not to delay the execution of the sentence. *Prible v. State*, 245 S.W.3d 466, 467-68 (Tex. Crim. App. 2008) (citing TEX. CODE CRIM. PROC. ANN. art. 64.03(a)). The legislative

history of Chapter 64 shows that the Texas Legislature intended to provide post-conviction DNA testing in instances where the testing would very clearly establish the convicted person's innocence. *Blacklock v. State*, 235 S.W.3d 231, 232-33 (Tex. Crim. App. 2007); *Rivera v. State*, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002).

Skinner pursued such avenue to obtain post-conviction DNA testing by filing two separate motions in the 31st Judicial District Court of Texas, and such testing was denied, with the denials upheld by the Texas Court of Criminal Appeals. Skinner failed to seek certiorari review of either denial. Additionally, Skinner affirmatively disclaimed in the Northern District that he was alleging that any injury was caused by state court judgments denying him access to the evidence he seeks. *Skinner v. Switzer*, No. 2:09-CV-0281, 2010 WL 273143 at *5 (N.D. Tex. Jan. 20, 2010), *aff'd*, No. 10-70002, 2010 WL 338018 (5th Cir. Jan. 28, 2010) (per curiam).

Despite this affirmative disclaimer, Skinner states that his "as-applied challenge to Texas's procedures may be accurately evaluated by the district court on remand . . . ." *Petition for Writ, p. 29.* This is precisely the type of argument the Northern District stated would likely be barred by the *Rooker-Feldman* doctrine as asserted in Switzer's motion to dismiss. *Skinner*, 2010 WL 273143, at *4-5. The Northern District determined that Skinner's complaint did not directly assert an as applied challenge to Chapter 64, but that in Skinner's response to

Switzer's motion to dismiss, Skinner contended that Chapter 64 is unconstitutional as applied to his case. *Id.* at *4. The Northern District stated that such an allegation appears to directly challenge the state court action and was an argument that the TCCA violated Skinner's due process rights by incorrectly applying the state statute. *Id.* The court went on to say that "[b]y directly pointing to a state court's actions as a source of injury, and by asking the Court to review such state court actions, plaintiff raises claims likely barred by *Rooker-Feldman*." *Id.* (citing *Exxon Mobil Corp.*, 544 U.S. 280, 284, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005)). The Northern District also stated that "[i]f the [Texas Court of Criminal Appeals] did indeed incorrectly and unconstitutionally apply Article 64 of the Texas Code of Criminal Procedure, the proper relief for plaintiff would have been to appeal the judgment directly to the United States Supreme Court." *Id.*

If Skinner was going to make a procedural due process claim, he should have sought certiorari review of the trial court's denials of his motions for post-conviction access to biological evidence for DNA testing, but he failed to do so. His failure to do so until now, when his execution is imminent, only evidences his attempt to manipulate the legal system in order to delay execution of his sentence.

CONCLUSION

For these reasons, Respondent Switzer respectfully requests that the Court deny Skinner's Petition for Writ of Certiorari.

Respectfully submitted,

Mark D. White

Mark D. White*
Andrew Sefzik
SPROUSE SHRADER SMITH P.C.
701 S. Taylor, Suite 500
P.O. Box 15008
Amarillo, Texas 79105-5008
(806) 468-3300
(806) 373-3454 fax
mark.white@sprouselaw.com
andrew.sefzik@sprouselaw.com

ATTORNEYS FOR RESPONDENT

*Counsel of Record for Respondent and Member of the Bar of this Court

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March, 2010, I served Respondent's Brief in Opposition to Petition for Writ of Certiorari in the above styled and numbered cause on all parties required to be served pursuant to Supreme Court Rule 29, by delivering a copy by third-party commercial carrier for next day delivery to:

Robert C. Owen
OWEN & ROUNDTREE, L.L.P.
P.O. Box 40428
1920 Newning
Austin, Texas 78704

Douglas G. Robinson
SKADDEN ARPS SLATE MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005-2111

Maria Cruz Melendez
SKADDEN ARPS SLATE MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036-6522

Counsel for Petitioner

Mark D. White

Mark D. White
Counsel of Record for Respondent and
Member of the Bar of this Court