No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2009

HENRY W. SKINNER,
Petitioner,

-v-

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

PETITION FOR WRIT OF CERTIORARI

PETITIONER IS SCHEDULED TO BE EXECUTED ON FEBRUARY 24, 2010

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QUESTION PRESENTED
(CAPITAL CASE)

For ten years, Henry W. Skinner has sought access to DNA testing that could prove him innocent of the murders that landed him on Death Row. After the Texas courts arbitrarily turned back his diligent attempts to take advantage of state statutes affording such relief, he sued in federal court under 42 U.S.C. § 1983 to vindicate his due process right to "'fundamental fairness in [the] operation'" of Texas's scheme. *Dist. Att'y's Office v. Osborne*, 129 S. Ct. 2308, 2320 (2009) (citation omitted). The district court dismissed Mr. Skinner's § 1983 suit solely on the ground that his claim sounded only in habeas corpus, and the Fifth Circuit summarily affirmed. The question presented is the same one the Court granted certiorari in *Osborne* to decide, but left unresolved:

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

LIST OF PARTIES

The Petitioner, Henry Watkins Skinner, is a Texas death row prisoner at the Polunsky Unit of the Texas Department of Criminal Justice, Correctional Institutions Division.

The Respondent, Lynn Switzer, is the District Attorney for the 31st Judicial District of Texas.

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Petitioner Henry Watkins Skinner ("Mr. Skinner" or "Petitioner"), by counsel, respectfully asks this Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the dismissal of Mr. Skinner's 42 U.S.C. § 1983 civil rights claim as barred by *Heck v. Humphrey*, 512 U.S. 477 (1994).

OPINIONS BELOW

The Fifth Circuit's decision, *Skinner v. Switzer*, No. 10-70002, 2010 WL 338018 (5th Cir. Jan. 28, 2010) is reproduced at App. A. The district court's decision, including the magistrate judge's report and recommendation, *Skinner v. Switzer*, No. 2:09-CV-0281, 2010 WL 273143 (N.D. Tex. Jan 20, 2010), is reproduced at App. B.

JURISDICTION

The Judgment below was entered on January 28, 2010. No rehearing petition was filed. Petitioner invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

This case turns on two sets of statutes. The first, 42 U.S.C. § 1983, states in relevant part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

> shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Civil Action for Deprivation of Rights, 42 U.S.C.A. § 1983 (West 2010).

The other relevant statutes, 28 U.S.C. §§ 2241-2255, which govern federal habeas corpus proceedings, are attached hereto at App. C due to their length.

INTRODUCTION

The Court granted certiorari only last term on the very question presented here—only to leave that question undecided. In *Dist Att'y's Office v. Osborne,* 129 S. Ct. 2308 (2009), the Court granted review to determine, as a threshold matter, whether a prisoner can seek post-conviction DNA testing through a civil rights action under 42 U.S.C. § 1983 and, if so, whether the prisoner in that case was entitled to prevail on the merits. After observing that the former question was a "difficult" one, the Court found it unnecessary to resolve it because of the manner in which it disposed of the second issue. *Osborne,* 129 S. Ct. at 2319. The circumstances that prompted the Court to grant certiorari on the threshold issue in *Osborne* persist today. This case provides the Court with the opportunity to provide further, much-needed guidance about where the boundary lies between 42 U.S.C. § 1983 and the habeas corpus statutes, and to do so in the much-litigated area of post-conviction DNA testing.

Certiorari is warranted for four reasons. First, the circuit courts of appeals are—and have long been—in direct conflict on this important and recurring issue. Several circuits, contrary to the view taken by the Fifth Circuit in Petitioner's case, have held that a § 1983 action is the proper vehicle for a convicted person to use in

seeking access to evidence for DNA testing. The conflict has manifested itself again in the eight months since *Osborne* was decided. Only this Court can resolve that stark divide.

Second, certiorari is warranted because the decision below appears to collide with this Court's pre-*Osborne* precedent fixing the boundary between prisoner civil rights actions and federal habeas corpus. By accepting review, this Court can prevent further erosion of that clear dividing line, in which the Court has invested significant effort to maintain.

Third, this case presents an important and much-litigated legal issue worthy of the Court's consideration. As noted, this case implicates the delicate relationship between the habeas corpus statutes and § 1983. But it also touches on the recurring and relevant issue of the importance of DNA testing in exonerating the innocent and the urgent need for the Nation's federal courts to treat such claims uniformly. Under the current circuit split, lower courts' treatment of federal civil rights suits for access to DNA evidence post-conviction is profoundly unequal. Prisoners in the First, Second, Third, Ninth, and Eleventh Circuits can proceed with such actions, while those in the Fourth and Fifth Circuits find the courthouse doors altogether closed to such claims.

Finally, this case presents the issue for resolution clearly and discretely. The courts below decided this case solely on the ground that it could not be brought as a § 1983 action, giving this Court the opportunity to address this important question without being required to address other issues, as was the case in *Osborne*. At the

same time, though, the Court can be confident that it is addressing this legal issue in a case where, should the Court allow his § 1983 action to proceed, the petitioner has a genuine prospect of prevailing on the merits and, perhaps, ultimately proving his innocence.

STATEMENT OF THE CASE

A. Mr. Skinner's Conviction and Post-Conviction Proceedings

Mr. Skinner is confined on death row in Texas. He was convicted by a jury and sentenced to death by the 31st Judicial District Court of Gray County, Texas, in 1995 for the murders of his live-in girlfriend Twila Busby and her sons Elwin Caler and Randy Busby. The conviction and sentence were upheld on direct appeal by the Court of Criminal Appeals of Texas ("CCA"). *Skinner v. State*, 956 S.W.2d 532, 546 (Tex. Crim. App. 1997).

On March 26, 1998, Mr. Skinner initiated habeas corpus proceedings in state court pursuant to Article 11.071 of the Texas Code of Criminal Procedure, alleging that the conduct of his trial resulted in the denial of certain federal constitutional rights. That action was ultimately dismissed by the CCA on grounds that the state courts would not consider his claims while they were also pending in federal court. *See Ex parte Skinner*, No. 20,203-03 (Tex. Crim. App. Jan. 27, 1999) (not designated for publication); *Ex parte Skinner*, No. 20,203-04 (Tex. Crim. App. Oct. 10, 2001) (not designated for publication).

Mr. Skinner federal petition for writ of habeas corpus was filed in the Northern District of Texas on February 4, 1999. That petition was ultimately

denied on February 22, 2007. *See Skinner v. Quarterman*, No. 2:99-CV-0045, 2007 WL 582808, at *1 (N.D. Tex. Feb. 22, 2007) (not designated for publication), *aff'd*, 576 F.3d 214 (5th Cir. 2009). After granting a certificate of appealability on two issues, *see Skinner v. Quarterman*, 528 F.3d 336, 345-46 (5th Cir. 2008), the Fifth Circuit affirmed the denial of habeas corpus relief on July 14, 2009. *Skinner v. Quarterman*, 576 F.3d 214, 216 (5th Cir. 2009). On November 25, 2009, Mr. Skinner filed a petition for writ of certiorari in this Court. (*See* Petition for Writ of Certiorari, *Skinner v. Thaler*, No. 09-7784 (*petition for cert. filed* Nov. 25, 2009).) That petition is set for conference on February 19, 2010.

On October 20, 2009, without giving Mr. Skinner's attorneys any notice or an opportunity to be heard, the convicting court entered an order directing that Mr. Skinner be executed by intravenous injection on February 24, 2010. (*See* Petitioner's Application for Stay of Execution (filed with this Petition).)

B. Mr. Skinner's Efforts to Obtain Access to Evidence Using State Procedures

Long before filing this case in federal court, Mr. Skinner attempted several times to obtain access to physical evidence that might exonerate him and in each instance was denied relief. Beginning as early as 2000, Mr. Skinner made several requests of each of the district attorneys who, over time, came into office—including Respondent Switzer—asking for the opportunity to subject certain as-yet untested physical evidence to DNA testing. All of those requests were ignored or denied.

Mr. Skinner also twice attempted to obtain access to the requested DNA evidence through Chapter 64 of the Texas Code of Criminal Procedure, which allows

prisoners to seek post-conviction DNA testing, *see* Tex. Code Crim. Proc. Ann. art. 64.01(b) (Vernon 2006 & Supp. 2009). Mr. Skinner's motions under Article 64, however, were both ultimately denied. His first motion—under an earlier version of Texas's post-conviction DNA testing statute—was denied because the CCA engaged in an arbitrary and capricious reading of test results obtained by the District Attorney when he unilaterally sent certain evidence to a private lab for limited DNA testing in 2000. *See Skinner v. State*, 122 S.W.3d 808, 811 (Tex. Crim. App. 2003) ("*Skinner I*").[1] *See also Collins v. Harker Heights, Texas*, 503 U.S. 115, 128 (1992) (arbitrary governmental action can be a denial of due process).

When Mr. Skinner, newly armed with detailed information rebutting the court's previous distortion of the facts, brought a second DNA testing motion, the CCA abandoned the rationale of its first decision and instead shifted to a new justification—that Texas's statute should be read to foreclose DNA testing for any prisoner who could have asked for such testing prior to trial but did not. *Skinner v. State*, 293 S.W.3d 196, 202 (Tex. Crim. App. 2009) ("*Skinner II*"). This decision was also irrational when applied to Mr. Skinner, given that Texas had no post-conviction DNA testing statute at the time of his trial and that Mr. Skinner had

[1] The court concluded that even if Mr. Skinner obtained exonerating results from the DNA testing he sought, they could not overcome the fact that the lab had found a mixed profile of Twila Busby's and Mr. Skinner's DNA on a hair found in Ms. Busby's hand because, the court irrationally reasoned, that mixture "probably" occurred "during the time when she was struggling for her life." *Skinner I*, 122 S.W.3d at 811. Furthermore, the court relied on this extra-judicial evidence without giving Mr. Skinner an opportunity to question it in an adversarial proceeding. (*See* Complaint at ¶¶ 23-25, *Skinner v. Switzer*, No. 2:09-CV-0281, 2010 WL 273143 (N.D. Tex. Jan. 20, 2010).)

never knowingly waived his right to have the DNA evidence tested.[2] More than that, this rationale requires the defendant who wishes to exercise his constitutional right to put the State to its burden of proof—including the innocent defendant who might nevertheless have had occasion to leave his own DNA at the scene—to forever waive the opportunity to prove his innocence by DNA testing.

C. Mr. Skinner's Reasons for Seeking Access to DNA Evidence

Mr. Skinner has always maintained that he is innocent of the crimes of which he was convicted and since his conviction has tirelessly pursued access to the untested physical evidence. Testing of that evidence is particularly critical in light of recent evidence that further, and dramatically, casts doubt on Mr. Skinner's guilt.

The murders for which Mr. Skinner was convicted occurred on New Year's Eve 1993 in the home he shared with the victims in the small town of Pampa, Texas. The victims' injuries show that whoever murdered them must have possessed considerable strength, balance and coordination. Twila Busby was first manually strangled so forcefully that her larynx and the hyoid bone on the right side of her neck were broken. (Tr. 28:1186-87.)[3] She was then struck with an ax or pick handle fourteen times, so hard that fragments of her unusually thick skull were driven into her brain. (Tr. 28:1171-72, 28:1181-82, 28:1186, 28:1189, 28:1209.)

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[2] *Cf.* Innocence Protection Act, 18 U.S.C.A. § 3600(a)(3)(A)(i) (West 2010) (a prisoner's having declined to pursue DNA testing prior to trial will bar a request for post-conviction testing *only* if the prisoner himself knowingly and voluntarily waived that right *and* if the waiver occurred after the enactment of the statute making post-conviction testing possible).

[3] "Tr." refers to the state court trial transcript.

While attacking Ms. Busby, the perpetrator had to contend with the presence of her six-foot, six-inch, 225-pound son, Elwin Caler, who, blood spatter analysis showed, was in the immediate vicinity of his mother as she was being beaten. (Tr. 24:216-17, 28:1211.) Somehow, the murderer was able to change weapons and stab Caler several times before he could fend off the attack or flee. (Tr. 28:1193-95.) The killer then went to the bedroom shared by the two sons and stabbed to death Randy Busby, who was lying face down in the top bunk of his bed. (Tr. 24:119, 24:134.) By their nature, these were the acts of a person possessing considerable presence of mind and physical coordination.

Mr. Skinner undoubtedly was inside the house when these brutal attacks occurred. Yet there is substantial reason to doubt that Mr. Skinner could have committed the murders, given the abundant evidence that he was completely incapacitated by the extreme quantities of alcohol and codeine he had consumed earlier that evening. Howard Mitchell, an acquaintance who was holding a New Year's Eve party several blocks away, drove to the Busby residence at about 10:15 p.m. that evening with the intention of giving both Mr. Skinner and Ms. Busby a ride to his party. When Mitchell got there, however, he found Mr. Skinner unconscious on the couch, with a vodka bottle near him on the floor. (Tr. 26:575-77, 26:605.) Mitchell tried to wake Mr. Skinner by jerking his arm forcefully and shouting at him, but Skinner remained unconscious and "kind of comatose." (Tr. 26:606-08, 26:611.) After waiting fifteen minutes, during which time Mitchell "never s[aw] him move at all," Mitchell left Skinner on the couch and took only Ms.

Busby to the party. (Tr. 26:611.) Mitchell testified that it would have been impossible for anyone in Mr. Skinner's condition to have recovered sufficiently to commit three murders only ninety minutes later. (Tr. 26:608, 26:622.)

Mr. Skinner's condition was also observed shortly *after* the murders by Andrea Reed, an acquaintance who lived a few blocks away. Ms. Reed has testified that around midnight Mr. Skinner knocked on her door and asked to be let in. She described him as being so drunk he couldn't even climb the few steps into her trailer house, falling over backwards when he tried to do so. (R. II:148, II:150-51.)[4] Once Ms. Reed got him inside, Mr. Skinner was, according to Ms. Reed, incoherent and too impaired to perform even such simple tasks as going to the bathroom or removing his shirt.[5] (R. II:148, II:153-55.)

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[4] "R." refers to the transcript of Mr. Skinner's federal habeas corpus hearing.

[5] Ms. Reed testified differently—and incorrectly, as she later explained—at trial. There, she said that Mr. Skinner entered her house on his own, against her will, and that while there he was able to perform simple tasks without her assistance. At the federal evidentiary hearing, however, Ms. Reed admitted—in the face of threats by the State that she could be prosecuted for perjury if she changed her testimony—that she lied at trial because she was afraid she would be charged as an accessory if she had told the truth about having helped Mr. Skinner into her house. The federal magistrate judge who heard Ms. Reed's recantation testimony failed to credit it, *see Skinner v. Quarterman,* 2007 WL 582808, at *15-16. However, at least that portion of Ms. Reed's later description of Mr. Skinner's condition was more consistent with the other undisputed evidence about the extreme degree of Mr. Skinner's intoxication on the night of the crime than the version to which she testified at trial. In any event, the fact that Ms. Reed was willing to make that post-trial recantation, even after being threatened by the District Attorney with perjury charges if she persisted in changing her testimony, only contributes to the troubling, unresolved questions about whether Mr. Skinner could have committed the murders.

Dr. William Lowry, a toxicologist experienced in the effects of alcohol and drugs on human performance, gave expert testimony that Mr. Skinner was too impaired by alcohol and codeine in his system to have committed the murders. Blood was drawn from Mr. Skinner after he was arrested and taken into custody. Dr. Lowry's analysis of that sample showed that as of midnight, Mr. Skinner's blood alcohol level was .21 percent—almost three times the drunk driving standard in Texas—and his blood codeine level was .4 mg/l—two and a half times the normal therapeutic dose. (Tr. 29:1356-58, 29:1369, 30:1464-65.) Dr. Lowry testified that combining these two substances produces a synergistic effect that greatly increases the potency of each. (Tr. 29:1354, 29:1360-61, 30:1462-63.) In Dr. Lowry's opinion, at midnight Mr. Skinner was at best in a "stuporous" condition—such that it would have required all of his physical and mental agility just to stand—and therefore he could not have caused the deaths of the three victims.[6] Dr. Lowry felt even more convinced of that opinion when he learned years after the trial that blood spatter evidence showed Elwin Caler to have been in the room when his mother was murdered and that Mr. Skinner had previously avoided codeine because he thought he was allergic to it. As Dr. Lowry said at that time, "it has been difficult for me to live" with the results of the trial because "I have never known a verdict of the jury

[6] Additionally, an occupational therapist specializing in hand injuries testified at trial that, as a result of an injury to Mr. Skinner's right hand sustained six months before the murders, his grasping strength in that hand was half that of his left hand and less than half of what would be expected of a normal right-handed person. (Tr. 29:1317-18.) This would have made it unlikely that Mr. Skinner could have grasped Twila Busby's throat with enough force to break her larynx and hyoid bone even if he had not been massively intoxicated by alcohol and codeine. (Tr. 29:1316, 29:1318-19.)

to be so at variance with what I believe to be scientific fact." (Affidavit of Dr. William T. Lowry, appended to Mr. Skinner's First Amended Petition for Writ of Habeas Corpus at Ex. 8, ¶ 6, *Skinner v. Quarterman,* 2:99-CV-0045 (N.D. Tex., Feb. 22, 2007).)

There is also troubling evidence in this case that Twila Busby's uncle, Robert Donnell, was the real murderer—a possibility that the prosecution failed to investigate or even consider. Evidence was presented by the defense at trial that Donnell was a hot-tempered ex-con who had sexually molested a girl, grabbed a pregnant woman by the throat, and kept a knife in his car. (Tr. 26:615-18, 26:619; 29:1281, 29:1296, 29:1300-01.) Donnell was present, drunk, at Mitchell's New Year's Eve party. During the short time Twila Busby was there, Donnell stalked her, making crude and annoying sexual remarks. (Tr. 26:619-20, 29:1277, 29:1281.) Mitchell "sensed that [Donnell] would be a danger," and when Twila asked Mitchell to take her home from the party, which he did around 11:15 p.m., he noticed that she was "fidgety and worried." (Tr. 26:618, 26:629.) When Mitchell returned to his party, Donnell was no longer there. (Tr. 26:629; 29:1289.) Mitchell later told law enforcement that he believed that Donnell could have murdered Twila. (Tr. 26:623.)

The evidence presented at trial of Donnell's possible involvement only scratched the surface of what was available and could have been presented. Mr. Skinner showed in his federal habeas proceeding that his trial counsel stopped their investigation of him without having a strategic justification for doing so, and thus failed to discover far more troubling information. (*See* Petition for Writ of *Certiorari*

at 27-29, *Skinner v. Thaler*, No. 09-7784 (*petition for cert. filed* Nov. 25, 2009).) That information included testimony by Debra Ellis, who as of the time of the murders had lived next door to Donnell for three years. (R. I:34.) She testified that Donnell was a "[v]ery big guy," who drank heavily, had a temper that worsened when he was drinking, and regularly threatened to harm people with whom he had a disagreement. (R. I:28-30.) Ms. Ellis saw Donnell grab his wife by the throat and lift her off the floor, and was told by his wife, while she was still hysterical from the incident, that on another occasion Donnell had put a gun to her head and threatened to blow it off. (R. I:49-50.) Ms. Ellis, who was also present when police informed Donnell that his niece and both her sons had been murdered, said he showed "no emotion at all" in response to the shocking news, (R. I:39), acting like it was "[j]ust an ordinary normal day." (R. I:26.) Most significant, Ms. Ellis testified that within a day or two after the murders, Donnell dismantled the inside of his "old beat up truck" and gave it an hours-long, almost fanatical cleaning that included removing both the carpet and the seats and scouring the metal interior with an astringent solution. (R. I:23-24.)

Mr. Skinner is asking that seven items be tested: (1) vaginal swabs taken from Twila Busby at the time of her autopsy; (2) Twila Busby's fingernail clippings; (3) a knife found on the front porch of the Busby house; (4) a knife found in a plastic bag in the living room of that house; (5) a dishtowel also found in that bag; (6) a windbreaker jacket found in the living room next to Ms. Busby's body; and (7) any

hairs found in Ms. Busby's hands that have not been destroyed by previous testing. Depending on the results, testing of these items could prove his innocence.

Testing the vaginal swabs could yield important results because Ms. Busby was found with her shirt pulled up and her pants unzipped. (Tr. 24:229.) The medical examiner found erythema, or reddening of the skin, around her vaginal area, indicating recent sexual activity. (Tr. 28:1206.) The identity of the person with whom she had sex shortly before her murder could shed important light on who might have attacked her. The failure of the State to test these swabs is inexplicable. The same is true of Ms. Busby's fingernail clippings, which, if she struggled with her attacker, could yield the presence of his DNA. Similarly, the medical examiner acknowledged that the hairs found in her right hand could have come from her murderer. (Tr. 28:1216.) The knives, either of which could have been used to kill Ms. Busby's two sons, could likewise yield the DNA of the person who used them. In addition, the *absence* of Mr. Skinner's blood on those knives would disprove the prosecution's theory that the profusely bleeding cut in the palm of Mr. Skinner's hand was not a defensive wound but instead was self-inflicted when the knife he used to kill Randy Busby first struck Busby's shoulder blade, causing Mr. Skinner's hand to slide down the blade. (*See* Tr. 28:1203.) The bloody dish towel could have been used by the killer to wipe blood from his hands. And the ownership and presence of the windbreaker jacket next to Ms. Busby's body has never been explained. It is similar to one Robert Donnell was often seen wearing,

(R. I:30), was Donnell's size, and contained hairs and sweat stains that, if tested, could identify its owner.

Thus, while Mr. Skinner was convicted of capital murder, there are disturbing and unresolved questions about the accuracy of the jury's verdict. Exculpatory DNA results, when coupled with the evidence described above and more fully in the Stay Application, could show that Mr. Skinner is innocent. Such results could also identify the true killer. Moving forward with Mr. Skinner's execution despite the existence of potentially critical DNA evidence that has remained untested "'transgresses any recognized principle of fundamental fairness in operation,'" *Osborne*, 129 S. Ct. at 2320 (quoting *Medina v. California*, 505 U.S. 437, 446, 448 (1992)). The case before the Court will not establish Mr. Skinner's innocence, or at this stage even give him access to the DNA evidence, but it would at least give him the opportunity to persuade a federal court that the State's refusal to give him access to DNA testing has violated his rights under the Due Process clause, a necessary first step toward possible exoneration.

D. Mr. Skinner's § 1983 Claim

Mr. Skinner filed his § 1983 suit in federal district court on November 27, 2009. Mr. Skinner alleged that he possesses state-created, constitutionally protected liberty and life interests in seeking state habeas relief or clemency with exculpatory DNA evidence. Accordingly, he alleged, Respondent's continued refusal to provide such evidence for DNA testing denied him due process and access to the courts and threatened him with cruel and unusual punishment. Mr. Skinner

sought a preliminary and permanent injunction requiring Ms. Switzer to provide him access to the requested evidence for the purpose of performing DNA testing.

E. The District Court's Determination

On January 20, 2010, the district court issued an order[7] dismissing Mr. Skinner's action and finding, *inter alia*,[8] that his Complaint failed to state a claim upon which relief could be granted. After briefly discussing *Heck* and *Wilkinson v. Dotson*, 544 U.S. 74 (2005), the court found itself bound by *Kutzner v. Montgomery County*, 303 F.3d 339 (5th Cir. 2002), to conclude that Mr. Skinner's § 1983 claim was barred by *Heck*. The court noted that *Kutzner* had not yet been overruled by the Fifth Circuit despite this Court's arguably inconsistent intervening decision in *Dotson* and would, therefore, bind other Fifth Circuit panels. Considering itself similarly bound, the court held that "plaintiff Skinner's § 1983 claims are cognizable only in habeas corpus." *See* App. B at 6.

F. The Fifth Circuit's Decision Below

Mr. Skinner immediately filed an appeal under 28 U.S.C. § 1291 and asked that it be expedited. Before accepting any briefing, the panel issued an unpublished opinion summarily affirming the district court. *See* App. B. The panel disposed of the appeal based on *Kutzner* and *Richards v. Dist. Att'y's Office*, No. 09-10144, 2009

[7] On January 15, 2010, the magistrate judge to whom the case was assigned issued a Report and Recommendation that Petitioner's Complaint be dismissed, which the district court adopted in its entirety. *See* App. B at 1.

[8] The court also held that Mr. Skinner's claims were not barred by the *Rooker-Feldman* doctrine or *res judicata*. *See* App. B at 2-5, 6-7. Respondent did not appeal these determinations.

WL 4716025 (5th Cir. Dec. 10, 2009) (not designated for publication), which, like *Kutzner*, held that "an action by a prisoner for post-conviction DNA testing is not cognizable under § 1983 and must instead be brought as a petition for writ of habeas corpus." App. B.

REASONS THE COURT SHOULD GRANT REVIEW

As noted in the introduction, the same considerations that motivated the Court to grant certiorari in *Osborne* still exist today. Indeed, as will be shown below, the rift between the circuits has only intensified, making the need for this Court's guidance even more urgent.

I. Review Will Allow This Court to Finally Resolve the Longstanding Conflict Among the Circuits on the Question Whether *Heck* Bars a Prisoner's § 1983 Action That Seeks Access to Evidence for DNA Testing.

The so-called *Heck* doctrine is designed to eliminate any overlap between suits that can be brought by prisoners under 42 U.S.C. § 1983 and those that can be brought under the federal habeas corpus statutes. *Heck* draws the dividing line by instructing that a prisoner in state custody may not sue under § 1983 to challenge the fact or duration of his confinement, relegating that limited category of prisoner suits instead to the province of habeas corpus. *See Heck v. Humphrey*, 512 U.S. 477, 481 (1994). The *Heck* Court's precise formulation of the operative rule was as follows:

> [T]he district court must consider whether a judgment in favor of the plaintiff would *necessarily imply the invalidity of his conviction or sentence*; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already

> been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed in the absence of some other bar to the suit.

Id. at 487 (first emphasis added).

This Court has addressed the scope of the *Heck* rule on numerous occasions for various types of prisoner actions. In the sixteen years since *Heck*, however, the lower courts continue to be hopelessly split in their interpretation of the phrase "necessarily imply," particularly as it applies to post-conviction suits seeking access to evidence for DNA testing.

That precise issue was first addressed at the court of appeals level in 2002 by the Fourth Circuit in *Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002), in which a panel majority held that *Heck* barred a prisoner's § 1983 suit even though the only relief sought was access to evidence for DNA testing. *Id.* at 374. The court reasoned that the plaintiff planned "to set the stage for a future attack on his confinement," *id.* at 378, and that intention was enough to meet the "necessarily implies" test set forth in *Heck*.[9] In that same year, in *Kutzner*, the Fifth Circuit,

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[9] The panel decision in *Harvey* on this issue was not unanimous. Judge King disagreed with the majority's reasoning that an action for DNA testing met the "necessary implication" test of *Heck*. As Judge King said, "[a]lthough Harvey might use the evidence, at some future date, to initiate a separate action challenging his conviction, future exculpation is not a necessary implication of Harvey's claim in this case." *Harvey*, 278 F.3d at 382-83 (King, J., concurring in part and dissenting in part). Furthermore, Judge Luttig of that court, while concurring in the denial of rehearing *en banc* in *Harvey* on the basis that an intervening change in state law had rendered Harvey's claim moot, expressed the view in a separate opinion that the panel majority had committed "fairly clear[ ]" error in holding that *Heck* would *(cont'd)*

relying on *Harvey*, reached the same conclusion, asserting that Kutzner's § 1983 claim for access to DNA evidence sought to "'set the stage for a future attack on [the prisoner's] confinement.'" 303 F.3d at 341 (alteration in original) (citation omitted). The Fifth Circuit viewed the plaintiff's claim as "'so intertwined'" with an attack on his confinement that its "success would 'necessarily imply' revocation or modification of confinement." *Id.* at 341 (citation omitted).

Just one month later, however, the Eleventh Circuit specifically rejected the reasoning outlined in *Harvey* and *Kutzner*, finding instead that nothing in the result sought by a plaintiff seeking only production of DNA evidence for testing "necessarily demonstrates or even implies that his conviction is invalid." *Bradley v. Pryor*, 305 F.3d 1287, 1290 (11th Cir. 2002).

The courts of appeals were thus split when this Court decided *Wilkinson v. Dotson*, 544 U.S. 74 (2005), a case which, although not involving a claim for post-conviction access to evidence, articulated the principle that a prisoner's § 1983 claim is not barred by the *Heck* doctrine even where the claim is intended as a first step toward obtaining a reduction in sentence. *See* Section III, *infra*, discussing *Dotson*. As this Court later noted in *Osborne, see* 129 S. Ct. at 2318, every circuit court of appeals that has considered the *Heck* issue in the context of a § 1983 action for DNA testing since *Dotson* has taken that opinion's lesson to heart and concluded that because a successful action for DNA testing would be, at most, only the first step in

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(cont'd from previous page)
bar a § 1983 action for DNA testing. *Harvey v. Horan*, 285 F.3d 298, 304, 307 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc).

a long and uncertain process to win release, it does not "necessarily imply" the invalidity of the prisoner's conviction or sentence.

The first to do so was the Ninth Circuit in *Osborne*. *See Osborne v. Dist. Att'y's Office*, 423 F.3d 1050 (9th Cir. 2005), *rev'd on other grounds*, 129 S. Ct. 2308 (2009). The Seventh and Second Circuits soon followed suit. *See Savory v. Lyons*, 469 F.3d 667, 672 (7th Cir. 2006) ("We find the Eleventh and Ninth Circuits' interpretation and approach to be more consistent with [Supreme Court precedent]"); *McKithen v. Brown*, 481 F.3d 89, 99 (2d Cir. 2007) ("We today join the Seventh, Ninth, and Eleventh Circuits, and district courts in the First and Third Circuits, agreeing with them that a claim seeking post-conviction access to evidence for DNA testing may properly be brought as a § 1983 suit.").

The fact that this Court did not resolve the *Heck* issue in *Osborne*, despite having granted certiorari to do so, gave the Third Circuit little pause when it took up the question only last month. That court likewise joined the Second, Seventh, Ninth, and Eleventh Circuits in holding that, after *Dotson*, it is clear that § 1983 is an appropriate vehicle by which a prisoner can obtain post-conviction DNA testing.[10] *See Grier v. Klem*, No. 06-3551, 2010 WL 92483, at *5 (3d Cir. Jan. 12, 2010).

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[10] The question of whether the *Heck* doctrine applies to prisoner § 1983 claims seeking DNA evidence has also arisen at the district court level in circuits that have yet to weigh in on the issue. *See, e.g.*, *McDaniel v. Suthers*, No. 08-cv-00223-WDM-MEH, 2008 WL 4527697, at *6-7 (D. Colo. Oct. 2, 2008) (noting circuit split and finding prisoner claim under § 1983 for DNA testing was not *Heck* barred), *aff'd*, 335 F. App'x 734 (10th Cir. Oct. 2, 2009); *Breest v. N.H. Att'y Gen.*, 472 F. Supp. 2d 116, 120 (D.N.H. 2007) (same).

The Fifth Circuit, though, stands steadfast in its position that *Heck* bars § 1983 actions for DNA testing. Indeed, in *Richards v. Dist. Att'y's Office*, No. 09-10144, 2009 WL 4716025 (5th Cir. 2009), decided only a month and a half before its decision in this case, the court went so far as to label any argument to the contrary as "frivolous" and potentially deserving of sanctions. *See id.* at *1 (dismissing appeal as frivolous in light of *Kutzner*, penalizing plaintiff with two strikes for purposes of 28 U.S.C. § 1915(g), and issuing sanction warning). Most notably, the Fifth Circuit has failed even to consider the impact of this Court's decision in *Dotson* on these cases, a fact noted below by the district court. *See Skinner v. Switzer*, No. 2:09-CV-0281, 2010 WL 273143, at *7 (N.D. Tex. Jan. 20, 2010) ("The Fifth Circuit has not ever discussed the *Dotson* decision in the context of its application to post-conviction requests for DNA evidence."), *aff'd*, 2010 WL 338018 (5th Cir. Jan. 28, 2010).

Bound by *Kutzner*, district courts throughout the Fifth Circuit have reflexively dismissed § 1983 actions seeking access to evidence for DNA testing. *See, e.g.*, *id.* at *7; *Davis v. Quarterman*, No. 4:09-CV-003-Y, 2009 WL 1033646, at *2 (N.D. Tex. Apr. 17, 2009); *Richards v. Dist. Att'y's Office*, No. 4:08-CV-468-Y, 2009 WL 136927, at *1 (N.D. Tex. Jan. 20, 2009); *Crum v. Foti*, No. 08-57-C, 2008 WL 4297055, at *2 (M.D. La. Sept. 16, 2008); *Gilkey v. Livingston*, Nos. 3:06-CV-1903-D, 3:06-CV-1904-D, 3:06-CV-1905-D, 2007 WL 1953456, at *5 (N.D. Tex. June 27, 2007); *Leviege v. Hamlin*, No. 3:06-CV-1721-N, 2006 WL 3478400, at *2 (N.D. Tex. Dec. 1, 2006).

Thus, in the eight months since this Court issued its decision in *Osborne*, the courts of appeals have addressed the issue three times, once by the Third Circuit in *Grier*, and twice by the Fifth Circuit in *Richards* and this case. Their conflicting decisions show that the rift remains as deep as ever and requires resolution by this Court.

II. The Fifth Circuit's Application of *Heck* to § 1983 Claims for DNA Testing Is Inconsistent with This Court's Precedent.

Review is also warranted because the decision below seems on its face to conflict with *Heck* and its progeny. As discussed *supra*, *Heck* itself held that a prisoner is required to bring his claim in habeas, as opposed to an action under 42 U.S.C. § 1983, only where such claim would "necessarily imply the invalidity of [a criminal] conviction or sentence." *Heck*, 512 U.S. at 487. According to this Court, such actions were barred because "habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release . . . ." *See id.* at 481 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 488-490 (1973)).

Against this background, the Court in *Dotson* took up the case of two prisoners who challenged in a § 1983 action Ohio's retroactive application of new guidelines regarding parole eligibility, the effect of which were to delay the dates when the plaintiffs would became eligible for parole. After a thorough review of its jurisprudence in this area, this Court reaffirmed the *Heck* test that a prisoner's § 1983 suit was barred, and had to be brought in a habeas petition, only if "success in that action would necessarily demonstrate the invalidity of confinement or its

duration." *Dotson*, 544 U.S. at 81-82 (emphasis added); *see also id.* at 74 ("Section 1983 remains available for procedural challenges where success *would not necessarily* spell immediate or speedier release for the prisoner" (citing *Wolff v. McDonnell*, 418 U.S. 539 (1994))). Turning to the facts before it, this Court reasoned that success for Dotson did not mean immediate release from confinement or a shorter prison stay; it meant "at most new eligibility review, which at most will speed *consideration* of a new parole application." *Id.* at 82. Moreover, "[s]uccess for Johnson [the second prisoner] means at most a new parole hearing at which Ohio parole authorities may, in their discretion, decline to shorten his prison term." *Id.* Accordingly, this Court found that the prisoners' claim did not lie at the core of habeas corpus and held that a § 1983 action *was* the proper vehicle to challenge the parole board's retroactive application of its regulations. *Id.* at 84-85.

As with the plaintiffs' claims in *Dotson*, success on Mr. Skinner's suit "*would not necessarily* spell [his] immediate or speedier release." *See id.* at 81-82 (emphasis added). If Mr. Skinner prevails, the District Attorney will only be required to release evidence to him for DNA testing. The results of such testing could prove to be exculpatory, inconclusive, or inculpatory. Even if the results are exculpatory, Mr. Skinner's release from prison is in no way guaranteed. He would have to bring subsequent, independent proceedings (e.g., state habeas corpus proceedings or clemency proceedings) and satisfy still other strict standards for obtaining relief before securing release. Thus, the Fifth Circuit's ruling that Mr. Skinner cannot

pursue DNA testing in a § 1983 action is contrary to the precedents of this Court, a conflict that will persist unless corrected.

Not only does the Fifth Circuit's *Kutzner* rule unduly restrict the scope of § 1983, but it also necessarily and impermissibly has the effect of broadening the scope of federal habeas. Section 1983 encompasses a wide variety of claims for redress of civil rights violations. *See Dotson*, 544 U.S. at 79 (describing § 1983's "broad scope"). Accordingly, the limited exception to § 1983 jurisdiction outlined in *Heck* is a narrow one, designed only to preserve the specific role of habeas corpus relief. *See, e.g., Savory*, 469 F.3d at 672. Recognizing the danger in upsetting the delicate balance between claims cognizable under the habeas corpus statute and those claims cognizable under § 1983, Justice Scalia explained:

> It is one thing to say that permissible habeas relief, as our cases interpret the statute, includes ordering a "quantum change in the level of custody," *Gram v. Broglin*, 922 F.2d 379, 381 (C.A. 7 1991) (Posner, J.), such as release from incarceration to parole. It is quite another to say that the habeas statute authorizes federal courts to order relief that neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody.

Dotson, 544 U.S. at 86 (Scalia, J., concurring). Thus, over time, this Court has carefully circumscribed the *Heck* exception to make sure it does not swallow the rule. *See Dotson*, 544 U.S. at 79 (noting that the "implicit exception from § 1983's otherwise broad scope" . . . covers only those "actions that lie 'within the core of habeas corpus'") (citation omitted).

But the Fifth Circuit's approach to § 1983 cases, as exemplified by this case, would do exactly that. By its adherence to *Kutzner*, the Fifth Circuit ignores the limitation on habeas relief carefully constructed by this Court and by implication

expands the reach of habeas well beyond its historical role. The Fifth Circuit, in barring Mr. Skinner's (and similar) claims, demands that prisoners employ the habeas writ to seek all manner of relief that "neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody" as mandated by the habeas statute. *Dotson*, 544 U.S. at 86 (Scalia, J., concurring). Placing such claims within the province of habeas corpus "utterly sever[s] the writ from its common-law roots." *Id.* Absent intervention by this Court, the Fifth Circuit's view as to where to draw the line between § 1983 and habeas could be read to require that any claims designed to "set the stage" for possible release from incarceration—including even claims for access to the tools needed to draft legal papers—must be brought in habeas. Indeed, courts in the Fifth Circuit have already begun to move in this absurd—yet foreseeable—direction. *See, e.g., Cruz v. Bennett*, No. H-05-1954, 2005 WL 2000703, at *2 (Aug. 17, 2005) (relying on *Kutzner* to bar § 1983 claim seeking access to appellate slip opinions).

Accordingly, Petitioner respectfully urges the Court to grant certiorari to avoid further erosion by the Fifth Circuit of the boundary between 28 U.S.C. § 2254 and 42 U.S.C. § 1983.

III. This Case Presents An Important Legal Issue That Should Be Resolved By This Court.

A. This Case Raises a Recurring and Highly Relevant Issue in the General Debate Concerning the Role of Post-Conviction DNA Testing in the Criminal Justice System.

The specific issue raised in this case, i.e., whether *Heck* bars § 1983 actions brought by convicted persons seeking access to evidence for DNA testing, continues to be a relevant and recurring question throughout the federal courts. As noted above, since *Osborne*, the issue has arisen in at least three separate cases at the court of appeals level. *See Grier*, 2010 WL 92483, at *3-5; *Richards*, 2009 WL 4716025, at *1; *Skinner*, 2010 WL 338018, at *1.

It is inevitable that convicted persons will continue to seek access to DNA evidence. As this Court has recognized, "[m]odern DNA testing can provide powerful new evidence unlike anything known before . . . [and] DNA testing has exonerated wrongly convicted people, and has confirmed the convictions of many others." *Osborne*, 129 S. Ct. at 2316. The increasing potential for DNA to exonerate individuals is particularly vital in death penalty cases, where testing could potentially prevent the execution of a factually innocent person.

Additionally, DNA testing not only serves the interests of the innocent but also provides much needed closure to victims and their families by either confirming the conviction or, in the event of exoneration, positively identifying the actual perpetrator. *See* Kathryn M. Turman, *Understanding DNA Evidence: A Guide for Victim Service Providers*, U.S. Department of Justice, Office of Justice Programs, Office for Victims of Crime (April 2001), *available at*

http://www.ojp.usdoj.gov/ovc/publications/bulletins/dna_4_2001/welcome.html ("[S]howing [crime victims] how DNA technology can empower the search for truth" can "strengthen [their] confidence in the judicial process."). Moreover, where an individual has been wrongly convicted, DNA testing serves the greater public interest by both exonerating an innocent person and, in many situations, removing from society an individual who would likely victimize others. *See, e.g.*, Justice for All Act of 2004: Hearing on the Importance of the Bloodsworth Program Before the S. Comm. on the Judiciary, 111th Cong. (2009) (testimony of Professor Keith A. Findley, President, Innocence Network (quoting a Minnesota prosecutor's comment that systematic application of forensic DNA testing to "convictions that were obtained before DNA testing was widespread" will "serve important interests in promoting public confidence in the criminal justice system and seeing that justice is done," as "[n]obody is served by a wrongful conviction")). Granting certiorari will allow this Court to prescribe a clear answer to the question of the manner in which a convicted person may request access to such DNA evidence.

B. The Court's Resolution of the Question Presented in This Case Will Inform the Federal Courts' Treatment of Other Forms of Relief Sought Under § 1983.

The issue presented in this case implicates other issues beyond the scope of relief in the form of DNA testing, including other kinds of evidentiary requests and challenges by prisoners to various actions taken by state officials. *See, e.g.*, *Summers v. Eidson*, 206 F. App'x 321, 323 (5th Cir. 2006) (applying *Kutzner* to bar a § 1983 claim for access to non-scientific evidence); *Cruz*, 2005 WL 2000703, at *2

(applying *Kutzner* to bar § 1983 suit seeking notice of disposition of appellate decisions). Although this case specifically involves the question of relief in the form of access to physical evidence, any clarification that the Court provides, particularly as to the correct interpretation of *Heck*'s "necessarily implies" test, will, of course, usefully inform the inferior federal courts' exercise of § 1983 jurisdiction over other types of relief.

C. This Case Gives the Court an Opportunity to Ensure Uniform Treatment of Prisoners' Federal Claims.

This case also allows the Court to ensure that all prisoners, regardless of their geographic location, retain equal rights under federal law to seek redress for the state's denial of access to physical evidence. This Court has long defined justice as treating like cases in like fashion. *See, e.g., City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985) (stating that "equal protection of the laws . . . is essentially a direction that all persons similarly situated should be treated alike" (internal quotations marks and citation omitted)). Under the current legal landscape, prisoners' claims will receive vastly different treatment—dispositively so—depending on where they file their federal claims. With five circuits allowing § 1983 claims for DNA testing, two circuits rejecting them, and the remainder as yet undecided, prisoners within those jurisdictions allowing such civil rights claims have continued (and will continue) to file them, while other, similarly-situated prisoners in other jurisdictions will be forced to proceed via the much more restrictive requirements of habeas corpus, if such an option is even available.

The practical effect of the varied positions regarding *Heck*'s applicability to post-conviction DNA testing claims is that factually identical law suits filed in, for example, the Second Circuit and the Fifth Circuit respectively, will be treated completely different under the same federal law. This result cannot stand. A convicted person's ability to seek relief under federal law should not be so arbitrarily determined. Whatever rule the Court might ultimately adopt for processing such claims, granting certiorari will allow this Court to guarantee uniform treatment of federal claims raised by prisoners in different circuits, thus allowing the courts below to handle those claims more expeditiously.

IV. This Case Squarely Presents the Discrete but Important Issue of Whether *Heck* Bars a Prisoner's § 1983 Action Seeking Access to Evidence for DNA Testing.

In addition to resolving the specific conflict among the circuits as to the applicability of *Heck* to post-conviction claims seeking access to evidence under § 1983, this case provides the Court with a uniquely advantageous vehicle for deciding this issue, unencumbered by any other legal questions that would normally accompany these types of cases. The district court has already determined that Mr. Skinner's claims are not barred by the *Rooker-Feldman* doctrine or *res judicata*, *see* App. B at 2-5, determinations that were not appealed by Respondent. The claims, therefore, are not otherwise jurisdictionally barred or precluded from review. Nor is this Court being asked to wrestle with the merits of Mr. Skinner's underlying claims—on which he has a reasonable prospect of succeeding when reviewed carefully by the district court on remand—making this case in its present posture a

simple and streamlined vehicle for resolving this important and recurring threshold legal issue.[11]

That is not to say, however, that this case is merely an academic exercise. This is a life-or-death case brought by a possibly innocent man whose guilt or innocence can be determined by DNA testing and whose circumstances fall within the window for § 1983 relief left open by *Osborne*. As explained *supra*, Mr. Skinner, unlike the petitioner in *Osborne*, has "use[d] the process provided to him by the State [and] attempted to vindicate the liberty interest that is now the centerpiece of his claim," *Osborne*, 129 S. Ct. at 2321, an omission on Osborne's part that weighed heavily in this Court's rejection of his procedural due process claim. As such, Mr. Skinner has made no "attempt to sidestep the process through a new federal lawsuit," *id.*, and, thus, cannot be similarly faulted. Therefore, Mr. Skinner's as-applied challenge to Texas's procedures may be accurately evaluated by the district court on remand "within the framework of the State's procedures for post-conviction relief." *Id.* at 2320.

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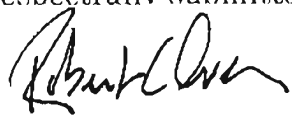
[11] The procedural posture of this case is much like that in *Nelson v. Campbell*, 541 U.S. 637 (2004), at the time the Court granted certiorari in that case. There, three days before his scheduled execution, Nelson filed a § 1983 claim in the district court alleging that Alabama's "cut down" procedure for gaining access to his veins violated the Eighth Amendment. As in this case, Nelson's claim was dismissed by the lower courts on *Heck* grounds. This Court issued a stay and granted certiorari to decide the important threshold questions of whether methods of execution could be challenged in a § 1983 action. *See id.* at 639-40. The Court ultimately answered that question in the affirmative, reversed, and remanded for consideration of the underlying issue of whether Alabama's procedures violated Nelson's constitutional rights. *Id.* at 646.

Consequently, granting review here will allow the Court to finish what it started when it agreed to hear *Osborne*, namely, to provide clear, unequivocal guidance to the lower courts regarding the applicability of *Heck* to prisoner claims for post-conviction DNA testing. Moreover, in addition to resolving the circuit split, a favorable decision will allow Mr. Skinner to pursue a claim that has a reasonable prospect of success but is otherwise foreclosed in the Fifth Circuit. Hence, the interests of justice weigh heavily in favor of granting certiorari in this case.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant certiorari to review the judgment of the Fifth Circuit.

Respectfully submitted,



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Dated: February 12, 2010

APPENDIX A

Decision Below of the United States
Court of Appeals for the Fifth Circuit

Skinner v. Switzer, No. 10-70002,
2010 WL 338018 (5th Cir. Jan. 28, 2010)

Slip Copy, 2010 WL 338018 (C.A.5 (Tex.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 2010 WL 338018 (C.A.5 (Tex.)))

United States Court of Appeals,
Fifth Circuit.
Henry W. SKINNER, Plaintiff-Appellant,
v.
Lynn SWITZER, District Attorney for the 31st Judicial District of Texas, Defendant-Appellee.
No. 10-70002.

Jan. 28, 2010.

Robert Charles Owen, Esq, Owen & Rountree, L.L.P., Austin, TX, Douglas George Robinson, Skadden, Arps, Slate, Meagher & Flom, L.L.P ., Washington, DC, for Plaintiff-Appellant.

Mark D. White, Sprouse Shrader Smith, P.C., Amarillo, TX, for Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas, No. 2:09-CV-0281.

Before SMITH, WIENER, and OWEN, Circuit Judges.

PER CURIAM: FN*

FN* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

*1 Henry Skinner, convicted of capital murder and sentenced to death, FN2 appeals the dismissal of his complaint under 42 U.S.C. § 1983 in which he asserts that the defendant district attorney's refusal to allow him access to biological evidence for purposes of forensic DNA testing violates his Fourteenth Amendment right to due process and his Eighth Amendment right to be free from cruel and unusual punishment. The district court adopted the report and recommendation of the magistrate judge and granted defendant's motion to dismiss.

FN2.*See* Skinner v. Quarterman, 576 F.3d 214 (5th Cir.2009), *petition for cert. filed* (Nov. 23, 2009) (No. 09-7784).

Execution is set for February 24, 2010. Skinner moves to expedite the appeal and proposes an expedited briefing schedule to which the defendant does not object. In his motion, Skinner acknowledges that the law of this circuit is contrary to the position taken in his complaint; he refers specifically to the binding authority of *Kutzner v. Montgomery County*, 303 F.3d 339 (5th Cir.2002), and to the unpublished but persuasive opinion in *Richards v. District Attorney's Office*, No. 09-10144, 2009 U.S.App. LEXIS 26947 (5th Cir. Dec. 10, 2009) (per curiam) (unpublished). In both of those cases, this court held that an action by a prisoner for post-conviction DNA testing is not cognizable under § 1983 and must instead be brought as a petition for writ of habeas corpus.

Skinner suggests that, as an alternative to receiving full briefing on an expedited basis, this court can dispose of the appeal on the basis of *Kutzner* and *Richards*. This would allow Skinner to seek relief expeditiously in the Supreme Court in light of the scheduled execution.

We agree with that suggestion. The judgment is AFFIRMED. The motion to expedite the appeal is DENIED as unnecessary. The mandate shall issue forthwith.

C.A.5 (Tex.),2010.
Skinner v. Switzer
Slip Copy, 2010 WL 338018 (C.A.5 (Tex.))

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APPENDIX B

Decision Below of the United States District Court for the Northern District of Texas (Including Magistrate Judge's Report and Recommendation)

Skinner v. Switzer, No. 2:09-CV-0281, 2010 WL 273143 (N.D. Tex. Jan. 20, 2010)

Slip Copy, 2010 WL 273143 (N.D.Tex.)
(Cite as: 2010 WL 273143 (N.D.Tex.))

United States District Court,
N.D. Texas,
Amarillo Division.
Henry Watkins SKINNER, Plaintiff,
v.
Lynn SWITZER, District Attorney, 31st Judicial District of Texas, Defendant.
No. 2:09-CV-0281.

Jan. 20, 2010.

Robert C. Owen, Owen & Rountree, Austin, TX, Douglas Robinson, Skadden Arps Slate Meagher & Flom, Washington, DC, Maria Cruz Melendez, Skadden Arps Slate Meagher & Flom LLP, New York, NY, for Plaintiff.

Mark D. White, Sprouse Shrader Smith, Amarillo, TX, Lynn Switzer, Pampa, TX, for Defendant.

ORDER OVERRULING OBJECTIONS, ADOPTING REPORT AND RECOMMENDATION, GRANTING DEFENDANT'S MOTION TO DISMISS, and DISMISSING 1983 COMPLAINT

MARY LOU ROBINSON, District Judge.

*1 Plaintiff HENRY WATKINS SKINNER has filed with this Court a cause of action under Title 42 U.S.C. 1983. On January 15, 2010, the United States Magistrate Judge issued a Report and Recommendation in this cause, recommending therein that defendant's motion to dismiss be granted and plaintiff's complaint be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and *Kutzner v. Montgomery County*, 303 F.3d 339 (5th Cir.2002). The same day the Report and Recommendation was issued, plaintiff filed objections to it, admitting that while the *Kutzner* and its progeny are binding upon this Court, the caselaw is incorrect in light of Supreme Court precedent. Plaintiff represents he intends to make no further objections before the expiration of the fourteen-day objection deadline.

The undersigned United States District Judge has made an independent examination of the record in this case and has considered the objections made by petitioner to the Report and Recommendation. The objections filed by petitioner are without merit and are hereby OVERRULED. The Magistrate Judge's Report and Recommendation is hereby ADOPTED. Defendant's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is GRANTED, and the 1983 complaint is DISMISSED.

IT IS SO ORDERED.

REPORT AND RECOMMENDATION TO GRANT DEFENDANT'S MOTION TO DISMISS AND TO DISMISS 1983 COMPLAINT

CLINTON E. AVERITTE, United States Magistrate Judge.
Before the Court is plaintiff's complaint, alleging a cause of action under Title 42 U.S.C. 1983 and asserting that defendant's refusal to allow him access to biological evidence for purposes of forensic DNA testing violates his Fourteenth Amendment right to due process and his Eighth Amendment right to be free from cruel and unusual punishment. For the reasons set forth, the undersigned recommends to the United States District Judge that defendant's motion to dismiss be GRANTED and that plaintiff's complaint be DISMISSED.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, defendant, and the Court of Criminal Appeals have adequately set forth the procedural background of this case. *See Skinner v. State*, 956 S.W.2d 532 (Tex.Crim.App.1997); (*Complaint*, document # 1, cause 2:09-CV-281, filed by plaintiff on Nov. 27, 2009; *Motion to Dismiss*, document # 28, cause 2:09-CV-281, filed by defendant on Dec. 29, 2009). For the purposes of these findings, conclusions, and recommendation, however, the following summation is provided.

Plaintiff Henry Skinner was convicted in the 31st District Court of Gray County, Texas, of the offense of

capital murder as a result of his having committed multiple murders during one criminal episode. The jury sentenced plaintiff to death. He is currently scheduled to be executed by the State of Texas on February 24, 2010.

Because of procedural issues not relevant to this § 1983 proceeding, the merits of Skinner's state habeas claims were never addressed during state habeas corpus proceedings. Skinner did present claims in a federal habeas corpus action filed in this Court, which resulted in a determination that his conviction and death sentence were constitutional and federal habeas corpus relief was denied. *See Skinner v. Dretke,* cause 2:99-CV-45 (judgment issued Feb. 22, 2007). The Fifth Circuit Court of Appeals affirmed this Court's denial of federal habeas corpus relief. *See Skinner v. Quarterman,* 576 F.3d 214 (5th Cir.2009). Plaintiff filed a petition for a writ of certiorari in the case on November 23, 2009, which is pending before the Supreme Court.

*2 By this lawsuit, plaintiff seeks, for purposes of conducting DNA testing, access to biological evidence recovered from the scene of the murders and never before tested. Although the evidence has not been previously tested, it is not newly discovered evidence, but was available to plaintiff at the time of trial. Plaintiff does not contend the results of any DNA testing would in fact be exculpatory, but contends the results might be exculpatory. In seeking this evidence post-conviction, plaintiff filed two motions in Texas courts, in 2001 and in 2007, for DNA evidence pursuant to Article 64.01 of the Texas Code of Criminal Procedure. The state trial court denied both of those motions, and the Texas Court of Criminal Appeals (CCA) affirmed both denials. *See* Skinner v. State, 293 S.W.3d 196 (Tex.Crim.App.2009); *Skinner v. State,* 122 S.W.3d 808 (Tex.Crim.App.2003). Plaintiff did not seek relief from either of the CCA's denials of the Article 64.01 motions by petitioning the United States Supreme Court for a writ of certiorari.

II.

THE ALLEGATIONS

By his complaint, plaintiff asks the Court to require defendant to release certain items of biological evidence for DNA testing. Plaintiff alleges he is entitled to obtain certain biological evidence, which he lists with specificity, for DNA testing and that the withholding of the evidence violates his due process rights under the Fourteenth Amendment and his right to be free from cruel and unusual punishment under the Eighth Amendment to the United State Constitution. Less than one month after filing his complaint and motion for preliminary injunction, plaintiff filed a Notice of Recent Relevant Authority, in which he acknowledged relevant Fifth Circuit caselaw that appears to require this Court to dismiss plaintiff's complaint for failing to raise a cognizable § 1983 claim. (*Plaintiff's Notice of Recent Relevant Authority,* document # 23, cause 2:09-CV-281, filed by plaintiff on December 22, 2009). By his Notice, plaintiff suggests the Court dismiss the case pursuant to the screening provisions of the Prison Litigation Reform Act.

In response to the complaint, defendant has filed a motion to dismiss, urging four grounds for dismissal:

1. The Court lacks subject matter jurisdiction under the *Rooker-Feldman* doctrine to rule on plaintiff's claims and should therefore dismiss the complaint under rule 12(b)(1) of the Federal Rules of Civil Procedure;

2. The Court is bound by *Heck v. Humphrey,* 512 U.S. 475, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994) as interpreted in *Kutzner v. Montgomery County,* 303 F.3d 339 (5th Cir.2002) and should therefore dismiss the complaint under rule 12(b)(6) of the Federal Rules of Civil Procedure;

3. Plaintiff's complaint presents claims that are essentially identical to several prior claims decided against plaintiff at the state and federal levels and should therefore be dismissed pursuant to 28 U.S.C. § 1738; and

4. The complaint is in essence an improper, successive petition for habeas corpus relief and should therefore be dismissed pursuant to 28 U.S.C. § 2244(b)(3-4).

III.

JURISDICTION

*3 Notwithstanding plaintiff's notice of Recent Rele-

vant Authority, this Court must, prior to discussing the merits of the case, determine if it has jurisdiction. *Lance v. Coffman*, 549 U.S. 437, 438, 127 S.Ct. 1194, 1196, 167 L.Ed.2d 29 (2007). Defendant contends the *Rooker-Feldman* doctrine precludes this Court from obtaining jurisdiction over this case. That doctrine bars federal district courts from exercising "appellate jurisdiction over state-court judgments, which Congress has reserved to [the Supreme] Court." *Verizon Md., Inc. v. Pub. Serv. Com'n of Md.*, 535 U.S. 635, 644 n. 3, 122 S.Ct. 1753, 1759, 152 L.Ed.2d 871 (2002). The Court clarified the scope of the doctrine in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005). In that case, the Court established "[t]he *Rooker-Feldman* doctrine ... is confined to cases of the kind from which the doctrine acquired its name: cases brought 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, 125 S.Ct. at 1521-22.

Research has not uncovered any Fifth Circuit guidance directly on point. The Second Circuit, however, has discussed *Rooker-Feldman* in the context of a case where a prisoner sought access to DNA evidence via a ¶ 1983 claim. *See McKithen v. Brown* 481 F.3d 89 (2d Cir.2007). In that case, the court, relying on *Exxon*, determined the state-court decision denying plaintiff access to DNA evidence did not *cause* injury to constitutional rights. *Id.* at 98. Rather, the injury existed before the state court entered its judgment and was "simply ratified, acquiesced in, or left unpunished by the state court." *Id.* (internal quotation omitted).

The Sixth Circuit, however, in evaluating a factually similar situation, reached a different conclusion. In *In re Smith*, an unpublished decision, the court, likewise relying on *Exxon*, held a ¶ 1983 plaintiff was barred by the *Rooker-Feldman* doctrine from seeking DNA evidence. No. 07-1220, 2009 WL 3049202 at * 3 (6th Cir. Sept.24, 2009). The plaintiff in *In re Smith* complained the *state trial court* incorrectly denied his motions for access to DNA evidence. *Id.* The Sixth Circuit concluded this was a complaint of an injury caused by the state-court judgment and which sought review and rejection of that judgment, and, as such, was barred by *Rooker-Feldman*. *Id.*

Plaintiff's claims for relief are limited to those asserted in his complaint and the only causes of action asserted in his complaint are that defendant Switzer violated his Fourteenth and Eighth Amendment rights. The issue is made more difficult, however, because it is not clear from plaintiff's pleadings whether he is attempting to assert other claims. It may be that plaintiff is attempting to assert at least two different theories of relief: (1) that defendant's actions violated his constitutional rights (as contained in his complaint) and (2) that the state court's actions in applying the state DNA testing statute violated his constitutional rights (not asserted in his complaint). The first of these claims is similar to those in *McKithen*, while the second is more similar to those in *In re Smith*. As such, the first of these claims is not barred by the *Rooker-Feldman* doctrine, but the second, if in fact it is being asserted, very well may be barred.

A. Issues Not Precluded by the Rooker-Feldman Doctrine

*4 "A claim which is not raised in the complaint ... is not properly before the court." *Cutrera v. Bd. of Supervisors*, 429 F.3d 108, 113 (5th Cir.2005). Thus, the Court's analysis must begin with and is determined by the particular causes of action plaintiff brings in his complaint. In his complaint, plaintiff identified two causes of action, *i.e.*, that defendant deprived plaintiff of (1) his right to due process of law under the Fourteenth Amendment and (2) his right to be free from cruel and unusual punishment under the Eighth Amendment. (*Complaint*, document # 1, ¶ ¶ 33, 35, cause 2:09-CV-281, filed by plaintiff on Nov. 27, 2009). Critically, plaintiff's *complaint* does not challenge the constitutionality of Article 64 of the Texas Code of Criminal Procedure nor does it ask this Court to review the application of Article 64 by the CCA's judgments denying him access to the DNA evidence. While plaintiff does, in various other pleadings, complain about the decisions of the CCA, he has not set out a specific cause of action challenging those decisions, as discussed in detail *infra*.[FN1]

FN1. In fact, plaintiff, at page 3 of plaintiff's response to defendant's motion to dismiss, he affirmatively states that he does not complain of injuries caused by any state court judgment. (*Plaintiff's Response to Defendant's Motion to Dismiss*, pg. 3, document # 37, cause 2:09-CV-281, filed by plaintiff on January 6, 2010). At page 4, plaintiff against

> reiterates that the injury of which he complains, that is, the refusal of the defendant district attorney to provide access to DNA evidence, existed prior to the state court proceedings and, therefore, his injury could not have been caused by those proceedings. (*Id.*, pg. 4). At page 6 of his response, plaintiff states that he "in no way" requests this Court to review or reject any state court judgments and further states that whether the state court judgments are valid or invalid, his constitutionally protected rights were violated by defendant's refusal to provide access to the requested evidence. (*Id.*, pg. 6).

Any injuries caused by defendant's refusal to release DNA evidence predate and are not caused by the CCA's decisions to not grant plaintiff access to the biological evidence. As in the *McKithen* case, the state-court decision denying plaintiff access to the evidence did not, in fact, *cause* the injury of which plaintiff initially complains. *See* McKithen, 481 F.3d at 98. Moreover, plaintiff affirmatively disclaims he is claiming any injury caused by the state court judgment. (*See* plaintiff's response to defendant's motion to dismiss). Because plaintiff is not "complaining of injuries caused by [the] state-court judgment[ ]" and does not seek review of those judgments, review of the claims for relief set out in the complaint is not barred by *Rooker-Feldman*. *See* Exxon Mobil Corp., 544 U.S. at 284, 125 S.Ct. at 1521-22.

B. Issues Likely Precluded by the Rooker-Feldman Doctrine

Ordinarily, the Court would not address claims which the plaintiff has not properly pled. As set forth above, the undersigned finds plaintiff to only have alleged those causes of action set out at paragraphs VII and VIII of his complaint. Since these findings, conclusions, and recommendations will be subject to review by the District Judge, the undersigned has included a review of the additional arguments plaintiff has set out in his pleadings even though such claims were not identified as specific claims for relief. The reasoning in *In re Smith* would seem to apply to the arguments plaintiff makes that the state court's actions in applying the state DNA testing statute violated his constitutional rights. In his Response to Defendant's Motion to Dismiss, plaintiff contends Article 64 of the Texas Code of Criminal Procedure is unconstitutional *as applied* to his case. (*Plaintiff's Response to Defendant's Motion to Dismiss*, pgs. 9, 13, document # 37, cause 2:09-CV-281, filed by plaintiff on January 6, 2010). These allegations appear to directly challenge the state court action, and by making them, plaintiff includes an argument that the *Texas Court of Criminal Appeals* violated his due process rights by incorrectly applying the state statute. By 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*. *See* Exxon Mobil Corp., 544 U.S. at 284, 125 S.Ct. at 1521-22. If the CCA 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.

*5 Those claims, however, are not further addressed because plaintiff has not raised them as a claim for relief and has not sought to amend his complaint to assert them. For purposes of this Report and Recommendation, the undersigned finds no such claims to be asserted. *See Cutrera,* 426 F.3d at 113.

The undersigned also finds that paragraph 31 of the complaint, in which plaintiff states "[a]s a result of the decisions of the CCA denying Plaintiff post-conviction DNA testing under Art. 64, the Defendant has refused and continues to refuse to make available to Plaintiff any DNA material for testing," not to state an additional cause of action or claim for relief. (*Complaint,* document # 1, ¶ 31, cause 2:09-CV-281, filed by plaintiff on Nov. 27, 2009). The Court notes this paragraph is not under the paragraphs plaintiff identifies in his complaint as claims for relief. (Paragraphs VII and VIII). Moreover, paragraph 31 appears merely to be a chronological statement that defendant has continually refused to release this evidence both before and following the CCA's denial of plaintiff's Article 64 motions. To the extent plaintiff contends otherwise, the Court does not believe this singular, vague statement can properly be read as directly challenging the CCA's decisions because if it were so read, plaintiff would be taking mutually exclusive positions, i.e. as set forth in footnote 1, plaintiff, in response to the motion to dismiss, affirmatively states the injury of which he complains existed prior to any state court decision and that he does not complain of injuries caused by a state court judgment.

Consequently, if the undersigned is correct in the determination of the claims presented, no *Rooker-Feldman* bar is present. If, however, the undersigned is incorrect and plaintiff is asserting any additional claims that the application of Article 64 by the CCA deprived him of due process, then it would appear he is complaining of an injury caused by the state court judgment and defendant's motion to dismiss based upon the *Rooker-Feldman* doctrine has considerable merit and the issue would have to be revisited. At this stage, plaintiff has not formally asserted these other claims in his complaint as causes of action and the Court will not further address plaintiff's contention regarding the improper application of Article 64 by the Texas courts.

IV.

Application of Kutzner

Defendant next contends plaintiff fails to state a claim upon which relief may be granted. Citing the *Kutzner* decision, issued by the Fifth Circuit in 2002, defendant contends plaintiff's claims are not cognizable under § 1983 and must be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Plaintiff agrees the *Kutzner* decision is binding upon this Court. (*Plaintiff's Notice of Recent Relevant Authority,* document # 23, cause 2:09-CV-281, filed by plaintiff on December 22, 2009).

In *Heck v. Humphrey,* the Supreme Court emphasized that a petition for a writ of habeas corpus is the exclusive remedy for a state prisoner challenging the fact or duration of his confinement. 512 U.S. 481, 114 S.Ct. at 2369, 129 L.Ed.2d 383. In evaluating § 1983 suits, the Court instructed district courts to "consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; it if would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Id.* at 487, 114 S.Ct. at 2372.

*6 Thereafter, the Fifth Circuit evaluated a § 1983 claim seeking to compel the production of biological evidence for DNA testing. *See Kutzner,* 303 F.3d at 340. In that case, the plaintiff contended that state officials refused to release biological evidence for DNA testing and thereby prevented him "from gaining access to exculpatory evidence which could exclude him as a perpetrator" of the offense for which he was convicted. *Id.* at 340. Applying *Heck,* the court held such a claim was not cognizable in a § 1983 action. Rather, the court pointed to 28 U.S.C. § 2254 as the proper statute for bringing such a claim:

> claims seeking to attack the fact or duration of confinement, as well as claims which are "so intertwined" with attacks on confinement that their success would "necessarily imply" revocation or modification of confinement, must be brought as habeas corpus petitions and not under § 1983. *Martinez v. Texas Court of Criminal Appeals,* 292 F.3d 417, 423 (5th Cir.2002). Under *Martinez,* 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.

Three years after the *Kutzner* opinion, the Supreme Court issued *Wilkinson v. Dotson,* 544 U.S. 74, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005). In that case, the Court evaluated its caselaw regarding the difference between claims cognizable under § 1983 and claims cognizable in habeas corpus.

The *Dotson* court found the § 1983 action, involving parole proceedings, should be allowed to proceed as a § 1983 action. *See id.* Although *Dotson* did not involve a request for evidence for DNA testing, circuit court of appeals have interpreted the language in *Dotson* to allow a prisoner to bring a claim for biological evidence for DNA testing as a § 1983 claim, as opposed to the Fifth Circuit's approach requiring a prisoner to bring such a claim as a habeas corpus petition. *See McKithen v. Brown,* 481 F.3d 89, 103 (2d Cir.2007) (holding "even if success for the plaintiff might well make it *more likely* that the plaintiff, in a subsequent proceeding, may eventually be able to make a showing that his conviction was unlawful and even if a plaintiff's ultimate motive is to challenge his conviction[,] a post-conviction claim for access to evidence is cognizable under § 1983" (internal citations omitted)); *Savory v. Lyons,* 469 F.3d 667 (7th Cir.2006); *Osborne v. District Attorney's Office,* 423 F.3d 1050 (9th Cir.2005), *rev'd on other grounds,*---

U.S. ----, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009). Additionally, the Eleventh Circuit's position, established before *Dotson* was issued, is in agreement with that taken by the Second, Seventh, and Ninth Circuits. *See Bradley v. Pryor*, 305 F.3d 1287, 1292 (11th Cir.2002) (holding a request for post-conviction DNA evidence may be brought under 1983 because if a prisoner were successful in such a suit, "the conviction and sentence will not be called into question, since the only thing [the prisoner] will have secured is access to evidence").[FN2]

> FN2. In her Reply Brief in support of her motion to dismiss, defendant contends other courts appear to have sided, post-*Dotson*, with the Fifth Circuit's position in *Kutzner*. The cases cited by defendant, however, fail to discuss how post-conviction requests for DNA evidence should be brought (under 42 U.S.C. 1983 or 28 U.S.C. 2254), which is the issue at the heart of *Kutzner*. *See Young v. Philadelphia County Dist. Attorney's Office*, no. 09-1668, 2009 WL 2445084 (3d Cir. Aug.11, 2009) ("[Plaintiff] notes the circuit split over whether requests for post-conviction DNA testing are properly brought under 1983 or in habeas proceedings. We have not yet answered this question, nor need we do so today."); *McDaniel v. Suthers*, No. 08-1400, 2009 WL 1784000 (10th Cir. June 24, 2009) (discussing the merits of a post-conviction request for DNA evidence brought in a 1983 suit).

*7 The Fifth Circuit has not ever discussed the *Dotson* decision in the context of its application to post-conviction requests for DNA evidence. It has, however, cited the *Kutzner* case after *Dotson* was decided in a case involving a post-conviction request for DNA evidence-indicating *Kutzner* remains the law in this circuit. *See Richards v. District Attorney's Office*, No. 09-10144, 2009 WL 4716025 at *2 (5th Cir. Dec.10, 2009). Even were this Court to question the validity of *Kutzner* after *Dotson*, it recognizes that only the Fifth Circuit may overrule its own law, and even though there is an intervening Supreme Court decision in this case, there is also a latter Fifth Circuit decision. *See United States v. Short*, 181 F.3d 620, 623-24 (5th Cir.1999) (noting that panels on the Fifth Circuit are bound by the precedent of previous panels).

Based upon the foregoing, there is no reason not to apply *Kutzner*. In considering whether *Kutzner* applies, the undersigned notes that the Supreme Court expressly left the *Heck* issue open when it decided *Osborne*, ---U.S. ----, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009). In fact, the Supreme Court, while acknowledging that the Courts of Appeals had applied *Dotson* to allow 1983 DNA lawsuits, specifically declined to address the issue of *Heck v. Humphrey*. It now appears the Fifth Circuit will address the viability of *Kutzner* in light of *Dotson* and *Osborne*. (*See Plaintif's Notice of Recent Relevant Authority*, document # 23, cause 2:09-CV-281, filed by plaintiff on December 22, 2009).

This Court must follow the law established in *Kutzner* and hold that plaintiff Skinner's 1983 claims are cognizable only in habeas corpus. *See Kutzner*, 303 F.3d at 341. As such, plaintiff fails to state a claim in his 1983 complaint upon which relief may be granted and his complaint should be dismissed on such grounds.[FN3] Because the Court recommends the dismissal of the case for failure to state a claim upon which relief may be granted, it foregoes further discussion of other grounds for dismissal at this time.

> FN3. Plaintiff contends the Court should dismiss this case under 28 U.S.C. 1915A, which requires a court to dismiss a case if, upon initial screening, the case fails to state a claim upon which relief may be granted. This case, however, in which defendant has filed responsive pleadings, plaintiff has answered such pleadings, and defendant has filed responses to plaintiff's answer, is clearly far beyond the screening stage, making 1915A no longer applicable.

Although the Court declines further discussion of other grounds for dismissal urged by the defendant, there are two issues which the undersigned identifies in the event the District Judge finds them to be cognizable. First, there is no freestanding substantive due process right to DNA evidence. *Osborne*, 129 S.Ct. at 2322-23. Were the District Judge to find *Kutzner* did not bar this lawsuit, then that issue would be presented as to any consideration of the merits.

Second, defendant's *res judicata* arguments have not

been addressed. If the undersigned is correct in the determination that plaintiff's claims are limited to those identified in his complaint, then neither *res judicata* nor *Rooker-Feldman* bar the consideration of the case. If, however, plaintiff is in fact asserting the additional claims as discussed in section III of this Report and Recommendation, *res judicata* would be an issue.

V.

RECOMMENDATION

*8 It is the RECOMMENDATION of the United States Magistrate Judge to the United States District Judge that the 42 U.S.C. ? 1983 filed by plaintiff HENRY WATKINS SKINNER be DISMISSED for failure to state a claim upon which relief may be granted and that the motion to dismiss filed by defendant LYNN SWITZER be GRANTED.

VI.

INSTRUCTIONS FOR SERVICE

The United States District Clerk is directed to send a copy of this Report and Recommendation to each party by the most efficient means available.

IT IS SO RECOMMENDED.

ENTERED this 15th day of January, 2010.

N.D.Tex.,2010.
Skinner v. Switzer
Slip Copy, 2010 WL 273143 (N.D.Tex.)

END OF DOCUMENT

APPENDIX C

Federal Habeas Corpus Statutes

28 U.S.C. §§ 2241-2255

CHAPTER 153—HABEAS CORPUS

HISTORICAL AND STATUTORY NOTES

Codifications

The table of sections for chapter 153 was amended by Pub.L. 95–598, Title II, § 250(b), Nov. 6, 1978, 92 Stat. 2672, effective June 28, 1984, pursuant to Pub.L. 95–598, Title IV, § 402(b), Nov. 6, 1978, 92 Stat. 2682, as amended by Pub.L. 98–249, § 1(a), Mar. 31, 1984, 98 Stat. 116; Pub.L. 98–271, § 1(a), Apr. 30, 1984, 98 Stat. 163; Pub.L. 98–299, § 1(a), May 25, 1984, 98 Stat. 214; Pub.L. 98–325, § 1(a), June 20, 1984, 98 Stat. 268, set out as an Effective and Applicability Provisions note preceding section 101 of Title 11, Bankruptcy, by adding:

"2256. Habeas corpus from bankruptcy courts.".

Section 402(b) of Pub.L. 95–598 was amended by section 113 of Pub.L. 98–353, Title I, July 10, 1984, 98 Stat. 343, by substituting "shall not be effective" for "shall take effect on June 28, 1984", thereby eliminating the amendment by section 250(b) of Pub.L. 95–598, effective June 27, 1984, pursuant to section 122(c) of Pub.L. 98–353, set out as an Effective and Applicability Provisions note under section 151 of this title.

Section 121(a) of Pub.L. 98–353 directed that section 402(b) of Pub.L. 95–598 be amended by substituting "the date of enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984 [i.e. July 10, 1984]" for "June 28, 1984". This amendment was not executed in view of the prior amendment to section 402(b) of Pub.L. 95–598 by section 113 of Pub.L. 98–353.

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 112, 63 Stat. 105; Sept. 19, 1966, Pub.L. 89–590, 80 Stat. 811; Dec. 30, 2005, Pub.L. 109–148, Div. A, Title X, § 1005(e)(1), 119 Stat. 2741; Jan. 6, 2006, Pub.L. 109–163, Div. A, Title XIV, § 1405(e)(1), 119 Stat. 3477; Oct. 17, 2006, Pub.L. 109–366, § 7(a), 120 Stat. 2635; Jan. 28, 2008, Pub.L. 110–181, Div. A, Title X, § 1063(f), 122 Stat. 323.)

HISTORICAL AND STATUTORY NOTES

References in Text

Section 1005(e) of the Detainee Treatment Act of 2005, referred to in subsec. (e)(2), probably means Pub.L. 109–148, Div. A, Title X, § 1005, Dec. 30, 2005, 119 Stat. 2740, which is set out in a note under 10 U.S.C.A. § 801 note. Pub.L. 109–163, Div. A, Title XIV, Jan. 6, 2006, 119 Stat. 3474, also enacted a "Detainee Treatment Act of 2005", see Short Title note under 42 U.S.C.A. § 2000dd and Tables, but that Act contains no section 1005(e).

Effective and Applicability Provisions

2006 Acts. Pub.L. 109–366, § 7(b), Oct. 17, 2006, 120 Stat. 2635, provided that: "The amendment made by subsection (a) [amending this section] shall take effect on the date of the enactment of this Act [Oct. 17, 2006], and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001."

Treaty Obligations not Establishing Grounds for Certain Claims

Pub.L. 109–366, § 5, Oct. 17, 2006, 120 Stat. 2631, provided that:

"(a) **In general.**—No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.

"(b) **Geneva conventions defined.**—In this section, the term 'Geneva Conventions' means—

"(1) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, done at Geneva August 12, 1949 (6 UST 3114);

"(2) the Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, done at Geneva August 12, 1949 (6 UST 3217);

"(3) the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316); and

"(4) the Convention Relative to the Protection of Civilian Persons in Time of War, done at Geneva August 12, 1949 (6 UST 3516)."

§ 2242. Application

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

(June 25, 1948, c. 646, 62 Stat. 965.)

§ 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

(June 25, 1948, c. 646, 62 Stat. 965.)

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the

court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

(June 25, 1948, c. 646, 62 Stat. 965; Nov. 2, 1966, Pub.L. 89-711, § 1, 80 Stat. 1104; Apr. 24, 1996, Pub.L. 104-132, Title I, §§ 101, 106, 110 Stat. 1217, 1220.)

§ 2245. Certificate of trial judge admissible in evidence

On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

(June 25, 1948, c. 646, 62 Stat. 966.)

§ 2246. Evidence; depositions; affidavits

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

(June 25, 1948, c. 646, 62 Stat. 966.)

§ 2247. Documentary evidence

On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

(June 25, 1948, c. 646, 62 Stat. 966.)

§ 2248. Return or answer; conclusiveness

The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.

(June 25, 1948, c. 646, 62 Stat. 966.)

§ 2249. Certified copies of indictment, plea and judgment; duty of respondent

On application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of them as may be material to the questions raised, if the petitioner fails to attach them to his petition, and same shall be attached to the return to the writ, or to the answer to the order to show cause.

(June 25, 1948, c. 646, 62 Stat. 966.)

§ 2250. Indigent petitioner entitled to documents without cost

If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

(June 25, 1948, c. 646, 62 Stat. 966.)

§ 2251. Stay of State court proceedings

(a) **In general.**—

(1) **Pending matters.**—A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

(2) **Matter not pending.**—For purposes of this section, a habeas corpus proceeding is not pending until the application is filed.

(3) **Application for appointment of counsel.**—If a State prisoner sentenced to death applies for

appointment of counsel pursuant to section 3599(a)(2) of title 18 in a court that would have jurisdiction to entertain a habeas corpus application regarding that sentence, that court may stay execution of the sentence of death, but such stay shall terminate not later than 90 days after counsel is appointed or the application for appointment of counsel is withdrawn or denied.

(b) No further proceedings.—After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

(June 25, 1948, c. 646, 62 Stat. 966; Mar. 9, 2006, Pub.L. 109–177, Title V, § 507(f), 120 Stat. 251.)

HISTORICAL AND STATUTORY NOTES

Application to Pending Cases

Pub.L. 109–177, Title V, § 507(d), Mar. 9, 2006, 120 Stat. 251, provided that:

"(1) In general.—This section and the amendments made by this section [enacting 28 U.S.C.A. § 2265, amending 28 U.S.C.A. §§ 2251, 2261, and 2266, and repealing 28 U.S.C.A. § 2265] shall apply to cases pending on or after the date of enactment of this Act [Mar. 9, 2006].

"(2) Time limits.—In a case pending on the date of enactment of this Act [Mar. 9, 2006], if the amendments made by this section [enacting 28 U.S.C.A. § 2265, amending 28 U.S.C.A. §§ 2251, 2261, and 2266, and repealing 28 U.S.C.A. § 2265] establish a time limit for taking certain action, the period of which began on the date of an event that occurred prior to the date of enactment of this Act [Mar. 9, 2006], the period of such time limit shall instead begin on the date of enactment of this Act [Mar. 9, 2006]."

§ 2252. Notice

Prior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such State as the justice or judge at the time of issuing the writ shall direct.

(June 25, 1948, c. 646, 62 Stat. 967.)

§ 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

(June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 113, 63 Stat. 105; Oct. 31, 1951, c. 655, § 52, 65 Stat. 727; Apr. 24, 1996, Pub.L. 104–132, Title I, § 102, 110 Stat. 1217.)

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the

merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

(June 25, 1948, c. 646, 62 Stat. 967; Nov. 2, 1966, Pub.L. 89–711, § 2, 80 Stat. 1105; Apr. 24, 1996, Pub.L. 104–132, Title I, § 104, 110 Stat. 1218.)

HISTORICAL AND STATUTORY NOTES

Senate Revision Amendments

Senate amendment to this section, Senate Report No. 1559, amendment No. 47, has three declared purposes, set forth as follows:

"The first is to eliminate from the prohibition of the section applications in behalf of prisoners in custody under authority of a State officer but whose custody has not been directed by the judgment of a State court. If the section were applied to applications by persons detained solely under authority of a State officer it would unduly hamper Federal courts in the protection of Federal officers prosecuted for acts committed in the course of official duty.

"The second purpose is to eliminate, as a ground of Federal jurisdiction to review by habeas corpus judgments of State courts, the proposition that the State court has denied a prisoner a 'fair adjudication of the legality of his detention under the Constitution and laws of the United States.' The Judicial Conference believes that this would be an undesirable ground for Federal jurisdiction in addition to exhaustion of State remedies or lack of adequate remedy in the State courts because it would permit proceedings in the Federal court on this ground before the petitioner had exhausted his State remedies. This ground would, of course, always be open to a petitioner to assert in the Federal court after he had exhausted his State remedies or if he had no adequate State remedy.

"The third purpose is to substitute detailed and specific language for the phrase 'no adequate remedy available.' That phrase is not sufficiently specific and precise, and its meaning should, therefore, be spelled out in more detail in the section as is done by the amendment."

1966 Acts. Senate Report No. 1797, see 1966 U.S. Code Cong. and Adm. News, p. 3663.

References in Text

Section 408 of the Controlled Substances Act, referred to in subsec. (h), is classified to section 848 of Title 21, Food and Drugs.

Approval and Effective Date of Rules Governing Section 2254 Cases and Section 2255 Proceedings for United States District Courts

Pub.L. 94–426, § 1, Sept. 28, 1976, 90 Stat. 1334, provided: "That the rules governing section 2254 cases in the United

States district courts and the rules governing section 2255 proceedings for the United States district courts, as proposed by the United States Supreme Court, which were delayed by the Act entitled 'An Act to delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court' (Public Law 94–349), are approved with the amendments set forth in section 2 of this Act and shall take effect as so amended, with respect to petitions under section 2254 and motions under section 2255 of title 28 of the United States Code filed on or after February 1, 1977."

Postponement of Effective Date of Proposed Rules Governing Proceedings Under Sections 2254 and 2255 of this Title

Rules and forms governing proceedings under sections 2254 and 2255 of this title proposed by Supreme Court order of Apr. 26, 1976, effective 30 days after adjournment sine die of 94th Congress, or until and to the extent approved by Act of Congress, whichever is earlier, see section 2 of Pub.L. 94–349, set out as a note under section 2074 of this title.

CROSS REFERENCES

Rules Governing Section 2254 Cases in the United States District Courts are set out ante, following the Rules of Procedure of the Judicial Panel on Multidistrict Litigation.

§ 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

(June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 114, 63 Stat. 105; Apr. 24, 1996, Pub.L. 104–132, Title I, § 105, 110 Stat. 1220; Jan. 7, 2008, Pub.L. 110–177, Title V, § 511, 121 Stat. 2545.)

HISTORICAL AND STATUTORY NOTES

References in Text

Section 408 of the Controlled Substances Act, referred to in text, is classified to section 848 of Title 21, Food and Drugs.

Approval and Effective Date of Rules Governing Section 2254 Cases and Section 2255 Proceedings For United States District Courts

Pub.L. 94–426, § 1, Sept. 28, 1976, 90 Stat. 1334, provided: "That the rules governing section 2254 cases in the United States district courts and the rules governing section 2255 proceedings for the United States district courts, as proposed by the United States Supreme Court, which were delayed by the Act entitled 'An Act to delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court' (Public Law 94–349), are approved with the amendments set forth in section 2 of this Act and shall take effect as so amended, with respect to petitions under section 2254 and motions [sections 2254 and 2255 of this title] under section 2255 of title 28 of the United States Code filed on or after February 1, 1977."

Postponement of Effective Date of Proposed Rules and Forms Governing Proceedings Under Sections 2254 and 2255 of this Title

Rules and forms governing proceedings under this section and section 2254 of this title proposed by Supreme Court order of Apr. 26, 1976, effective 30 days after adjournment sine die of 94th Congress, or until and to the extent approved by Act. of Congress, whichever is earlier, see section 2 of Pub.L. 94–349, set out as a note under section 2074 of this title.

CROSS REFERENCES

Rules Governing Section 2255 Proceedings in the United States District Courts are set out ante, following the Rules Governing Section 2254 Cases in the United States District Courts.

[§ 2256. Omitted]

HISTORICAL AND STATUTORY NOTES

Codifications

This section as added by Pub. L. 95–598, Title II, § 250(a), Nov. 6, 1978, 92 Stat. 2672, effective June 28, 1984, pursuant to Pub. L. 95–598, Title IV, § 402(b), Nov. 6, 1978, 92 Stat. 2682, as amended by Pub. L. 98–249, § 1(a), Mar. 31, 1984, 98 Stat. 116; Pub. L. 98–271, § 1(a), Apr. 30, 1984, 98 Stat. 163; Pub. L. 98–299, § 1(a), May 25, 1984, 98 Stat. 214; Pub. L. 98–325, § 1(a), June 20, 1984, 98 Stat. 268 [set out as an Effective and Applicability Provisions note preceding section 101 of Title 11, Bankruptcy], read as follows:

§ 2256. Habeas corpus from bankruptcy courts

A bankruptcy court may issue a writ of habeas corpus—

(1) when appropriate to bring a person before the court—

(A) for examination;

(B) to testify; or

(C) to perform a duty imposed on such person under this title; or

(2) ordering the release of a debtor in a case under title 11 in custody under the judgment of a Federal or State court if—

(A) such debtor was arrested or imprisoned on process in any civil action;

(B) such process was issued for the collection of a debt—

(i) dischargeable under title 11; or

(ii) that is or will be provided for in a plan under chapter 11 or 13 of title 11; and

(C) before the issuance of such writ, notice and a hearing have been afforded the adverse party of such debtor in custody to contest the issuance of such writ.

Section 402(b) of Pub. L. 95–598 was amended by section 113 of Pub. L. 98–353 Title I, July 10, 1984, 98 Stat. 343, by substituting "shall not be effective" for "shall take effect on June 28, 1984", thereby eliminating the amendment by section 250(a) of Pub. L. 95–598, effective June 27, 1984, pursuant to section 122(c) of Pub. L. 98–353, set out as an Effective and Applicability Provisions note under section 151 of this title.

Section 121(a) of Pub. L. 98–353 directed that section 402(b) of Pub. L. 95–598 be amended by substituting "the date of enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984 [i.e. July 10, 1984]" for "June 28 1984". This amendment was not executed in view of the prior amendment to section 402(b) of Pub. L. 95–598 by section 113 of Pub. L. 98–353.

Prior Provisions

A prior section 2256, added Pub. L. 95–144, § 3, Oct. 28, 1977, 91 Stat. 1220, which related to jurisdiction of proceedings relating to transferred offenders, was transferred to section 3244 of Title 18, Crimes and Criminal Procedure, by Pub. L. 95–598, Title III, § 314(j), Nov. 6, 1978, 92 Stat. 2677.