No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

RICK ALLEN RHOADES,

Petitioner

v.

ANA MARTINEZ, HONORABLE,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX TO MOTION FOR STAY OF EXECUTION PENDING FILING, CONSIDERATION, AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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Appendix A – Order of the United States Court of Appeals for the Fifth Circuit, issued September 27, 2021

United States Court of Appeals for the Fifth Circuit

No. 21-70007

RICK ALLEN RHOADES,

Plaintiff—Appellant,

versus

ANA MARTINEZ, HONORABLE,

Defendant—Appellee.

Appeal from the United States District Court for the
Southern District of Texas
USDC No.4:21-CV-2422

Before HIGGINBOTHAM, HAYNES, and GRAVES, *Circuit Judges*.

PER CURIAM:*

Nearly thirty years ago, Rick Allen Rhoades was convicted in a Texas state court of capital murder and sentenced to death. Now scheduled for execution on September 28, 2021, he has exhausted his state court appeals

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4. Judge Graves concurs in the judgment only.

and habeas relief in the state and federal courts.[1] In 2019 this court denied Rhoades's petition for habeas relief[2] and the Supreme Court denied Rhoades's petition for a writ of certiorari.[3]

I

On January 21, 2021 the district attorney's office asked the Honorable Ana Martinez, the current judge of the 179th District Court of Harris County where Rhoades was convicted, to schedule Rhoades's execution. Then on March 10, 2021, two years after this court reviewed Rhoades's *Batson* challenge, Rhoades filed a motion before Judge Martinez under Texas Code of Criminal Procedure Article 35.29 seeking access to the juror cards and jury questionnaires from his 1992 trial in order to renew his *Batson* challenge.[4] Judge Martinez considered Rhoades's motion in at least three hearings. Enlisted to set a date of execution, she lacked jurisdiction to rule on the motion and set Rhoades's execution date.[5] Rhoades then sought mandamus relief from the Texas Court of Criminal Appeals, seeking an order directing

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[1] *Rhoades v. Davis*, 914 F.3d 357, 363, 383 (5th Cir. 2019).

[2] *Id.* at 383.

[3] *Rhoades v. Davis*, 140 S. Ct. 166 (2019).

[4] *Batson v. Kentucky*, 476 U.S. 79 (1986).

[5] "[A]t this point I struggle with jurisdiction and I believe this is not properly brought before the Court, so I'm not going to take on your motion at this moment."; "It is the Court's ruling that the Court does not have jurisdiction to make that determination on that matter and it is the Court's ruling today that the Court does not have jurisdiction to reconsider such request.

Judge Martinez to reach the merits of Rhoades's motion under Article 35.29.[6] The CCA denied Rhoades's motion for leave to file mandamus.[7]

Rhoades then filed the instant suit pursuant to 42 U.S.C. § 1983 against Judge Martinez. Rhoades alleges that Judge Martinez violated his rights under the due process and equal protection clauses of the Fourteenth Amendment by denying him a statutory right to access jury materials from his trial. The district court granted Judge Martinez's motion to dismiss and denied Rhoades's motion for a stay of execution. Rhoades appealed.[8]

II

Ultimately, in his § 1983 suit Rhoades requested that a United States District Court review a decision made by the state court on a matter of state law. He invoked a procedure provided by state law for obtaining juror materials. The state court, applying state law, found that it lacked jurisdiction over Rhoades's Article 35.29 motion. Invoking *Rooker-Feldman*—federal

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[6] Mandamus is the mechanism provided for by state law to address a trial court's action pursuant to article 35.29. *Falcon v. State*, 879 S.W.2d 249, 250 (Tex. App.—Hous. [1st Dist.] 1994, no pet.)

[7] *In re Rhoades*, No. WR-78,124-02, 2021 WL 2964454, at *1 (Tex. Crim. App. July 14, 2021).

[8] On August 9, 2021, while Rhodes's § 1983 suit was pending in federal court, he applied for a subsequent writ of habeas corpus in state court pursuant to Texas Code of Criminal Procedure 11.071 § 5 and for a motion to stay his execution to the Court of Criminal Appeals. He sought relief on three distinct bases, but he did not seek relief under his *Batson* claim. The Texas Court of Criminal Appeals dismissed his application for habeas relief and denied his motion for a stay. Texas Court of Criminal Appeals, No. WR-78,124-03, September 20, 2021. Rhoades has not sought permission to file a successive habeas petition in federal court and would be unable to do so on a *Batson* claim. 28 USC § 2244(b)(1).

district courts lack jurisdiction to entertain collateral attacks on state court judgments[9]—the federal district court here dismissed the suit.

III

Rhoades cannot evade this jurisdictional limit by "asserting. . . claims framed as original claims for relief," here recasting Judge Martinez's denial of relief as a denial of constitutionally secured due process.[10] This is word play: a declination to rule for want of jurisdiction cannot be reframed as a denial of due process rooted in the state law rule. Stripped of its able advocate's clothing, Rhoades asked the district court to determine that Judge Martinez incorrectly applied state law.[11] Although, *Skinner v. Switzer* read the reach of *Rooker-Feldman* narrowly, Rhoades's reliance here on *Skinner* is unfounded.[12] For Skinner, obtaining the DNA evidence would not necessarily imply the invalidity of his conviction, though it could lead to evidence that might or might not assist him. While the procedure is parallel to this case in some respects, the differences are fundamental. Skinner sued the District Attorney, as prescribed by the Texas statute, urging that her refusal to order DNA testing on these facts was unconstitutional, essentially a ministerial act.[13] Rhoades, however, challenged a judicial ruling—the ruling of the state judge on her power to decide the state court's jurisdiction—and then sought mandamus relief from the Texas Court of Criminal Appeals.

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[9] *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462, 483 (1983); *United States v. Shephard*, 23 F.3d 923, 924 (5th Cir. 1994).

[10] *Shephard*, 23 F.3d at 924.

[11] *See Pennhurst v. State Sch. And Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.").

[12] 562 U.S. 521, 531 (2011).

[13] *Id*. at 530.

That writ was denied.[14] Rhoades did not challenge the constitutionality or the interpretation of Article 35.29 in any court. The issue was solely the jurisdiction of Judge Martinez. Reviewing such a decision is "inextricably intertwined" with reviewing a state court decision, such that the district court is "in essence being called upon to review the state-court decision."[15] Accordingly, we need not reach the numerous other asserted barriers to this claim, such as sovereign immunity and *Younger* abstention.

And as this Court, in Rhoades's earlier appeal, fully considered and rejected Rhoades's *Batson* challenge, sans the missing racial identity of one seated juror and mindful that the government struck from its allotted fourteen peremptory challenges twelve white persons and that this court found sound basis in the record for the exclusions of two black veniremembers,[16] we affirm the district court and deny the motion for a stay of execution.

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[14] *In re Rhoades*, No. WR-78,124-02, 2021 WL 2964454, at *1 (Tex. Crim. App. July 14, 2021).

[15] *Shephard*, 23 F.3d at 924; *Ingalls v. Erlewine*, 349 F.3d 205, 209 (5th Cir. 2003).

[16] *Rhoades*, 914 F.3d at 381–83.

Appendix B – Order of the United States District Court for the Southern District of Texas, entered September 20, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICK ALLEN RHOADES,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. H-21-2422
	§	
HON. ANA MARTINEZ,	§	
	§	
Defendant.	§	

ORDER OF DISMISSAL

In 1992, a Texas jury convicted Rick Allen Rhoades of capital murder. Rhoades received a death sentence for his crime. The State of Texas has set Rhoades' execution for September 28, 2021.

Rhoades filed this lawsuit on July 28, 2021. (Docket Entry No. 1). Rhoades sues the Honorable Ana Martinez, the presiding judge of the 179th District Court of Harris County, in her official capacity. Rhoades' complaint alleges constitutional violations regarding access to material about the jurors who served at his trial.

Judge Martinez has moved to dismiss this case. (Docket Entry No. 6). For the reasons discussed below, the Court **GRANTS** Judge Martinez's motion to dismiss.

I. Background

Less than twenty-four hours after his release from prison, Rhoades killed Charles and Bradley Allen on September 13, 1991. Rhoades later confessed that, rather than traveling to his assigned half-way house, he took a bus to Houston. That same day, Rhoades met, fought with, and stabbed the two brothers. Rhoades then fled after stealing clothing and money. The police arrested Rhoades a month later as he left the scene of a school burglary.

In 1992, the State of Texas tried Rhoades in the 179th District Court of Harris County. A jury convicted Rhoades of capital murder and sentenced him to death.

A. Rhoades' Prior State and Federal Litigation

The instant lawsuit arises from Rhoades' belief that the prosecution violated *Batson v. Kentucky*, 476 U.S. 79 (1986), by exercising peremptory strikes in a discriminatory manner. This is not the first time that Rhoades has raised similar arguments. Rhoades first raised a *Batson* claim in his direct appeal nearly twenty-five years ago. *See Rhoades v. State*, 934 S.W.2d 113, 123 (Tex. Crim. App. 1996). Both the federal district court, *Rhoades v. Stephens*, No. 4:14-cv-03152 (S.D. Tex.), and the Fifth Circuit, *Rhoades v. Davis*, 914 F.3d 357 (5th Cir. 2019), subsequently addressed *Batson* claims on habeas review.

Rhoades' recent litigation arises from his argument that the Fifth Circuit analysis was deficient because it did not involve a sufficient comparative juror

analysis. In *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005), the Supreme Court allowed for a comparison between prospective jurors the prosecution struck and those it kept. *Id.* ("More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve . . . ."). A comparative juror analysis "comes into play in the final stage of the *Batson* inquiry for determining whether a prosecutor used a peremptory strike in a racially discriminatory manner." *Chamberlin v. Fisher*, 855 F.3d 657, 663-64 (5th Cir. 2017).

On federal habeas review, Rhoades raised a *Batson* claim based on the State's peremptory strikes against two prospective jurors. The Fifth Circuit engaged in a comparative juror analysis when considering Rhoades' *Batson* claim, but with some limitations. *See Rhoades*, 914 F.3d at 382. The Fifth Circuit recognized: "both parties acknowledge that the record on appeal is incomplete. We do not have a racial breakdown of the entire venire." *Id.* at 381. The record indicated that the State had used peremptory strikes against two African-American prospective jurors. *Id.* The record, however, did not specify the race of one of the jurors who had served at trial. *Id.* (observing that "the race of the final seated juror is not clear from the record").

The Fifth Circuit denied Rhoades' *Batson* claim. The Fifth Circuit found that one stricken juror was not "subjected to disparate questioning" and that "Rhoades offer[ed] no sincere challenge to most of the prosecutor's stated race-neutral reasons

. . . ." *Rhoades*, 914 F.3d at 382. The Fifth Circuit compared the second stricken juror with several jurors who served and found no evidence of discrimination. *See id.*

B. Recent State Court Proceedings

On January 21, 2021, the Harris County District Attorney's Office indicated that it would ask the trial court to set an execution date. (Docket Entry No. 1 at 9). Rhoades then began trying to get access to the juror cards and some of the jury questionnaires from his 1992 trial. Rhoades wanted material "to do a more thorough comparative analysis than it has been possible [to do] in the past." (Docket Entry No. 1, Exh. 1 at 8).

The State apparently informed Rhoades that it was in possession of some jury-selection material. The State turned over the jury material to the trial court for *in camera* review. (Docket Entry No. 1, Exh. 1 at 10). The State, however, indicated that it would only divulge the material pursuant to a motion filed under article 35.29 of the Texas Code of Criminal Procedure.

Article 35.29 authorizes the release of certain juror information to a party in the trial only after a showing of good cause:

> (a) Except as provided by Subsections (b) and (c), information collected by the court or by a prosecuting attorney during the jury selection process about a person who serves as a juror, including the juror's home address, home telephone number, social security number, driver's license number, and other personal information, is confidential and may not be disclosed by the court, the

> prosecuting attorney, the defense counsel, or any court personnel.
>
> (b) On application by a party in the trial, or on application by a bona fide member of the news media acting in such capacity, to the court for the disclosure of information described by Subsection (a), the court shall, on a showing of good cause, permit disclosure of the information sought.
>
> (c) The defense counsel may disclose information described by Subsection (a) to successor counsel representing the same defendant in a proceeding under Article 11.071 without application to the court or a showing of good cause.

Tex. Code Crim. Pro. art. 35.29.

On March 10, 2021, Rhoades filed a post-conviction motion under article 35.29 with the 179th District Court of Harris County, Judge Ana Martinez presiding. *State v. Rhoades*, No. 0612408 (179th Dist. Ct., Harris County, Tex.).[1] To complete the comparative juror analysis he has already advanced on federal habeas review, Rhoades needs to know the racial identity of one juror.[2] Rhoades told the state court

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[1] The record to date does not contain a copy of Rhoades' article 35.29 motion. The record before the Court does not disclose what other efforts Rhoades has made to obtain the needed information. Rhoades may be able to obtain the needed material outside article 35.29(b)'s disclosure provision. The statute allows "successor counsel representing the same defendant" to obtain the information from prior attorneys. One of the dissents from the Court of Criminal Appeals' decision counseled that Rhoades "could, and should, try to obtain the information he seeks from his former trial counsel . . . ." *In re Rhoades*, 2021 WL 2964454, at *1 (Tex. Crim. App. 2021) (Yeary, J., dissenting). Rhoades does not provide any information about why the statute's guidance on seeking prior counsel's files is inadequate to preserve his rights. The Court also observes that Rhoades has not indicated that he is unaware of the identity of the one juror whose race he does not know, meaning that he could likely obtain the desired information about race through investigative means.

[2] In a comparative juror analysis, "the questionnaires of the . . . non-selected jurors would have had no value to [an inmate], as comparative juror analysis calls for a comparison of the stricken juror to those jurors who were seated, not those who did not serve." *Riley v. Covello*, 2021 WL 2265895, at *7 (E.D. Cal. 2021); *see also Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) (comparing stricken African-American juror with "otherwise-similar nonblack" jurors who were "permitted to serve").

that he knew "the racial makeup of 11 of the 12 jurors but not of the twelfth one." (Docket Entry No. 1, Exh. 1 at 6). The prosecutor assured the state court that the remaining *Batson* material did not divulge the race of the one juror. (Docket Entry No. 1, Exh. 1 at 7).

Notwithstanding the narrow focus of what he still needs, Rhoades broadly requested that the State turn over all jury cards and questionnaires, some of which apparently contained notations amounting to attorney work product. Rhoades apparently hoped that the trial prosecutors had made notations that would support a renewed and broadened *Batson* claim. (Docket Entry No. 1, Exh. 1 at 7-8).

Judge Martinez considered Rhoades' motion in at least three hearings.[3] In a March 17, 2021, hearing, Rhoades argued that he needed the jury material to establish the race of trial jurors. The State countered that the remaining material did not specify the race of jurors. (Docket Entry No. 1, Ex. 1 at 8-9). Rhoades acknowledged that the information he requested did not specifically ask jurors to identify their race. (Docket Entry No. 1, Ex. 1 at 10). Rhoades, however, wished to examine the jury material because "the cards can reveal information about race"

[3] While the record contains the transcripts of two hearings, the discussion in those hearing suggests that other proceedings occurred in state court for which the parties have not provided transcriptions. (Docket Entry No. 1, Exh. 1 at 3) ("So we left it last week, attorneys, where the defense had filed motion for release of confidential juror information. The Court agreed to review the motion and take it under advisement and review some of the records.").

particularly when "the district attorney ha[s] made notes on the juror cards." (Docket Entry No. 1, Ex. 1 at 10).

Judge Martinez gave several reasons for refusing to turn over the jury material. First, Judge Martinez did not "see any legal reason why the defendant will get these records" given the comparative juror analysis performed by the Fifth Circuit. (Docket Entry No. 1, Exh. 1 at 4). Second, Judge Martinez expressed concern that the jury questionaries and cards contained notations made by the prosecutors that could constitute attorney work product. (Docket Entry No. 1, Exh. 1 at 5). Judge Martinez also observed that "the comparative analysis is not a requirement for the State Court anyway . . . ." (Docket Entry No. 1 at 14). Finally, Judge Martinez explained "at this point I struggle with jurisdiction and I believe this is not properly brought before the Court, so I'm not going to take on your motion at this moment." (Docket Entry No. 1 at 16).

Rhoades apparently filed a motion for Judge Martinez "to reconsider [the] March 17th, 2021 [decision] regarding the juror cards and the questionnaires." (Docket Entry No. 1, Exh. 2 at 3). In a hearing on March 26, 2021, Judge Martinez reiterated: "It is the Court's ruling that the Court does not have jurisdiction to make that determination on that matter and it is the Court's ruling today that the Court does not have jurisdiction to reconsider such request." (Docket Entry No. 1, Exh. 2

at 4). In that same hearing, Judge Martinez also entered an order setting Rhoades' execution for September 28, 2021.

Rhoades sought leave to file a writ of mandamus against Judge Martinez in the Texas Court of Criminal Appeals. Mandamus is available when the movant "has no adequate remedy at law" and "compel[s] . . . a ministerial act, not involving a discretionary or judicial decision." *In re Meza*, 611 S.W.3d 383, 388 (Tex. Crim. App. 2020). Over four dissenting justices, the Court of Criminal Appeals summarily denied Rhoades leave to file a mandamus on July 14, 2021. *In re Rhoades*, 2021 WL 2964454, at *1 (Tex. Crim. App. 2021). The Court of Criminal Appeals' order did not specify whether mandamus was unavailable because an adequate remedy remained at law for Rhoades, whether Rhoades requested relief that was not a ministerial act, or whether the appellate court agreed that Judge Martinez did not have jurisdiction to rule on his motion.

II. Rhoades' Complaint

Rhoades filed the instant lawsuit pursuant to 42 U.S.C. § 1983. Rhoades sues Judge Martinez in her official capacity. Rhoades argues that Judge Martinez's "actions have violated Rhoades' rights under the Due Process and Equal Protection clauses with the consequence he has been deprived of a full and fair opportunity to develop his claim pursuant to *Batson v. Kentucky*." (Docket Entry No. 1 at 14). Rhoades also argues that "Judge Martinez violated [his] right to due process and

equal protection by denying him what he is due under article 35.29 and what other similarly situated individuals have received: a decision on whether he demonstrated good cause for the disclosure of juror information." (Docket Entry No. 1 at 17). In essence Rhoades argues that he "has only asked this Court to find he is entitled to a ruling on the merits of the motion he filed in state court (i.e., a determination on whether he has demonstrated good cause) . . . ." (Docket Entry No. 7 at 3).

As relief, Rhoades asks this Court to issue a declaratory judgment that "Rhoades is entitled to a decision on whether he has demonstrated good cause for access to the juror information" and that "Rhoades is entitled to access materials essential to determining whether his rights under *Batson* were violated at his trial." (Docket Entry No 1 at 21).

III. Analysis

Judge Martinez has filed a motion to dismiss that raises three arguments: "(1) Judge Martinez is entitled to sovereign immunity; (2) this Court should abstain from exercising jurisdiction over this suit; and (3) Rhoades is time barred from bringing his claims." (Docket Entry No. 6 at 1). Judge Martinez moves for dismissal under Rule 12(b)(1) and (b)(6) of the Federal Rule of Civil Procedure.

A. Sovereign Immunity

Judge Martinez moves for dismissal under Fed.R.Civ.P. 12(b)(1) based on

sovereign immunity.[4] Federal courts possess limited jurisdiction. *Howery v Allstate Insurance Co*, 243 F3d 912, 916 (5th Cir 2001). Dismissal is appropriate "when the court lacks the statutory or constitutional power to adjudicate the claim." *In re FEMA Trailer Formaldehyde Products Liability Litigation (Mississippi Plaintiffs)*, 668 F3d 281, 286 (5th Cir 2012). Under Rule 12(b)(1), a party may challenge by motion the subject-matter jurisdiction of the court to entertain a claim. A motion to dismiss under Rule 12(b)(1) is properly granted when the plaintiff lacks standing or when the claims alleged are barred by immunity. *See High v. Karbhari*, 774 F. App'x 180, 182 (5th Cir. 2019). "For a 12(b)(1) motion, the general burden is on the party asserting jurisdiction." *Dickson v. United States*, 2021 WL 3721771, at *2 (5th Cir. 2021).

1. Eleventh Amendment Immunity

Judge Martinez moves for dismissal based on sovereign immunity. "Eleventh Amendment sovereign immunity bars private suits against nonconsenting states in federal court" and "prohibits suits against state officials or agencies that are effectively suits against a state." *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019). Texas criminal "district judges . . . are undeniably elected state officials"

[4] Judge Martinez also argues that she is entitled to judicial immunity. Absolute immunity generally protects judges from suits while acting in performance of their judicial duties. *See Nixon v. Fitzgerald*, 457 U.S. 731, 745-46 (1982). However, "judicial immunity does not bar claims for injunctive or declaratory relief in § 1983 actions." *Norman v. Texas Court of Criminal Appeals*, 582 F. App'x 430, 431 (5th Cir. 2014); *see also Holloway v. Walker*, 765 F.2d 517, 525 (5th Cir. 1985) ("Judicial immunity does not extend to suits for equitable and declaratory relief under section 1983."). Rhoades seeks declaratory relief, making judicial immunity unavailable.

for purposes of state sovereign immunity. *Clark v. Tarrant Cnty.*, 798 F.2d 736, 744 (5th Cir. 1986); *see also Bowling v. Roach*, 816 F. App'x 901, 903 (5th Cir. 2020). As a state official, Judge Martinez is entitled to sovereign immunity for any section 1983 claim against her in her official capacity.

2. No Exception Under *Ex Parte Young*

Rhoades does not oppose Judge Martinez's entitlement to sovereign immunity. Rhoades, however, argues that he can show an exception to sovereign immunity under *Ex parte Young*, 209 U.S. 123 (1908). *Ex parte Young* permits a lawsuit against state officials in their official capacities to proceed if the plaintiff meets a three-factor test. "Such a suit must: (1) be brought against state officers acting in their official capacities; (2) seek prospective relief that will redress ongoing conduct; and (3) allege a violation of federal law." *Texas Entertainment Association, Incorporated v. Hegar*, 2021 WL 3674034, at *6 (5th Cir. 2021); *see also Bowling* 816 F. App'x at 903.

Rhoades meets the first *Ex parte Young* factor because Judge Martinez is a state officer who acted in her official capacity. Rhoades' briefing provides contradictory perspectives on the second factor—whether he seeks relief that redresses ongoing conduct. *See Saltz v. Tenn. Dep't of Emp't Sec.*, 976 F.2d 966, 968 (5th Cir. 1992) (observing that "the relief sought must be declaratory or injunctive in nature and prospective in effect."). On one hand, Rhoades argues that

his case involves an ongoing violation of his rights because Judge Martinez did not rule on the merits of his article 35.29 motion. On the other, Rhoades admits that "[t]here is no ongoing state judicial proceeding involving whether Rhoades is entitled to a decision on his motion requesting access to juror information." (Docket Entry No. 7 at 6).

Rhoades is not currently engaged in any state court litigation asking for disclosure of *Batson* material. Despite Rhoades' characterization of his relief as declaratory and prospective, Judge Martinez is correct that "Rhoades makes clear that he believes his constitutional rights were violated by Judge Martinez when she previously declined to exercise jurisdiction over his Article 35.29 Motion. This singular past action does not suffice to demonstrate an ongoing violation of Rhoades' civil rights." (Docket Entry No. 6 at 6). Despite asking for declaratory relief, Rhoades' lawsuit alleges a past violation of his alleged federal rights. *See McSmith v. Engelhardt*, 2006 WL 3478162, at *3 (E.D. La. 2006) ("Neither damages, injunctive nor declaratory relief is available to be used as a vehicle for disgruntled litigants to reverse adverse judgments."). Because Rhoades' request for declaratory relief is retroactive in nature, he has not met the second *Ex parte Young* factor.

Finally, Rhoades has not made a strong showing that he can meet the third factor. Rhoades' complaint depends on showing that he has a constitutional right to the post-conviction disclosure of information necessary to support a comparative

juror analysis, and most particularly a right given effect under article 35.29. Rhoades has not cited any Supreme Court or the Fifth Circuit law creating an absolute right to disclosure of material for a comparative juror analysis, particularly when state law otherwise precludes disclosure of that material. *But see Boyd v. Newland*, 467 F.3d 1139, 1150 (9th Cir. 2006) (finding a due process "right to have access to the tools which would enable them to develop their plausible *Batson* claims through comparative juror analysis").[5] Rhoades, in essence, asks this Court to find in the first instance that such a right exists, and then find that the state court is violating that right. In the absence of a "a colorable constitutional claim," Rhoades cannot meet the third *Ex parte Young* factor. *Hall v. Texas Commission on Law Enforcement*, 685 F. App'x 337, 341 (5th Cir. 2017).

This case is subject to dismissal because Judge Martinez is entitled to sovereign immunity.

B. *Rooker/Feldman*

Judge Martinez alternatively moves for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure because this Court lacks jurisdiction under the *Rooker/Feldman* doctrine. A court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a

[5] The Fifth Circuit has not disapproved of finding that some material developed during jury selection, even if relevant under *Batson*, may be shielded by concerns such as the attorney work privilege doctrine, suggesting that no absolute constitutional right exists to access material relating to a *Batson* claim. *See Broadnax v. Lumpkin*, 987 F.3d 400, 407 (5th Cir. 2021).

Rule 12(b)(6) motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Gines v. D.R. Horton, Inc.*, 699 F.3d 812, 816 (5th Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Under the *Rooker-Feldman* doctrine, federal district courts lack jurisdiction to entertain collateral attacks on state court judgments. *Ingalls v. Erlewine* (*In re Erlewine*), 349 F.3d 205, 209 (5th Cir. 2003); *Davis v. Bayless*, 70 F.3d 367, 375-76 (5th Cir. 1995); *Liedtke v. State Bar of Texas*, 18 F.3d 315, 317 (5th Cir. 1994). The *Rooker-Feldman* doctrine thus deprives federal courts of subject matter jurisdiction in "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." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,* 544 U.S. 280, 284 (2005). Thus, a federal court does *not* have subject matter jurisdiction over "'challenges to state-court decisions in particular cases arising out of judicial proceedings,'" even in cases in which the challenges "'allege that the state court's action was unconstitutional.'" *Musslewhite v. State Bar of Texas*, 32 F.3d 942, 946 (5th Cir. 1994) (citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983)).

A federal court *does* have subject matter jurisdiction over general constitutional attacks which do not require review of a final state court judgment in a particular case. *Id.* However, even a general constitutional attack cannot properly

be heard in federal court if it is "inextricably intertwined" with a state court judgment. *Id.*; *In Re Erlewine*, 349 F.3d at 209; *Liedtke*, 18 F.3d at 318 (quoting *Eitel v. Holland*, 798 F.2d 815 (5th Cir. 1986)).[6] As the Supreme Court explained in *Feldman*, claims presented to a federal district court are inextricably intertwined with a state court's judgment when "the District Court is in essence being called upon to review the state court decision. This the District Court may not do." 460 U.S. at 482 n. 16. Simply, unsuccessful state court litigants "'may not obtain review of state court actions by filing complaints about those actions in lower federal courts cast in the form of civil rights suits.'" *Turner v. Cade*, 354 F. App'x 108, 111 (5th Cir. 2009) (quoting *Hale v. Harney,* 786 F.2d 688, 690-91 (5th Cir. 1986)).

Although Rhoades makes his claims in a civil-rights complaint, his arguments are intertwined with state court issues. *See Reed v. Terrell*, 759 F.2d 472, 473 (5th Cir. 1985) ("It is a well-settled principle that a plaintiff may not seek a reversal in federal court of a state court judgment simply by casting his complaint in the form of a civil rights action."). Rhoades sued because he wants a declaratory judgement that he had "a right to a ruling on his state court motion." (Docket Entry No. 7 at 4).

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[6] If adjudication of a claim in federal court would require the court to determine that a state court judgment was erroneously entered or was void, the claim is inextricably intertwined with the merits of the state court judgment. *Jordahl v. Democratic Party of Va.*, 122 F.3d 192, 202 (4th Cir. 1997). "[T]he fundamental and appropriate question to ask is whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that judgment." *Garry v. Geils*, 82 F.3d 1362, 1365 (7th Cir. 1996).

Judge Martinez, however, actually ruled and found she had no jurisdiction to reach the merits.[7]

Rhoades says that he only "asks this Court to find that the manner in which his state-created right to seek access to confidential juror information was made available to him did not satisfy the Due Process or Equal Protection Clauses." (Docket Entry No. 7 at 10). Only a state judge of competent jurisdiction could make that information available to him. Rhoades' lawsuit necessarily acts as a challenge to Judge Martinez's jurisdictional decision. Because "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law," this Court has no authority to overturn Judge Martinez's holding that she lacked jurisdiction. *Pennhurst v. State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 106 (1984); *see also Norman v. Texas Court of Criminal Appeals*, 582 F. App]x 430, 431 (5th Cir. 2014) (stating that an inmate's "disagreement with the state courts' interpretation of state law is not cognizable under § 1983"). At its core, Rhoades' complaint alleges "[j]udicial errors committed in state courts" and those errors "are for correction in the state court systems . . .; such errors are no business of ours." *Hale*, 786 F.2d at 691.

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[7] Rhoades' whole lawsuit—from his selection of Judge Martinez as a defendant to his argument that she should have ruled on his motion—operates under the presumption that Judge Martinez possessed jurisdiction to rule. The Court must respect Judge Martinez's interpretation of state law in deciding that she could not decide the merits of his motion. *See Smith v. Marvin*, 846 F. App'x 259, 261 (5th Cir. 2021) (finding that section 1983 is only available when a "plaintiff s[eeks] relief against a defendant who caused an injury that a court c[an] redress"); *Garcia v. City of McAllen, Texas*, 853 F. App'x 918, 921 n.2 (5th Cir. 2021) (stating that federal courts respect the "general interest in having matters of state law resolved by state courts.").

Accordingly, the *Rooker–Feldman* doctrine bars the pending section 1983 case because it is inextricably intertwined with the underlying state court decision,

C. Other Arguments

Judge Martinez also moves for dismissal under Rule 12(b)(6) based on *Younger v. Harris*, 401 U.S. 37 (1971) and the statute of limitations which governs this claim. Because of other rulings in this case, the Court does not reach Judge Martinez's remaining arguments.

IV. Conclusion

For the reasons discussed above, the Court **GRANTS** Judge Martinez's motion to dismiss. The Court will dismiss this case by separate order.

SIGNED at Houston, Texas, on this the 17 day of September, 2021.

DAVID HITTNER
United States District Judge

Appendix C – February 24, 2021 email from Counsel for the State to Counsel for Rhoades

From: **Reiss, Josh** REISS_JOSH@dao.hctx.net
Subject: RE: Rhoades
Date: February 24, 2021 at 1:55 PM
To: Newberry, Jeff jrnewber@Central.UH.EDU, Dow, David R DDow@Central.UH.edu
Cc: Rose, Brian ROSE_BRIAN@dao.hctx.net

JR

Jeff & David,

I have finally had a chance (post-storm) to go through the State's files. Within the files are (i) a copy of the juror cards and (ii) one prosecutor's copies of the questionnaires of members of the panel struck by the State.

As you are aware there are protections for juror confidentiality I need to follow, i.e., Government Code Section 62.0132 and CCP Article 35.29. In addition there is work product on the questionnaires that I am not willing to waive.

So, the short answer is that I will not permit review of these materials.

Based on this response, I anticipate that you will file a responsive motion with Judge Martinez. We are due to appear on March 12 for a status conference. However, if you want to appear earlier to address this matter I am pretty available except for next Thursday afternoon from 1-5.

Best,

JAR

-----Original Message-----
From: Reiss, Josh
Sent: Wednesday, February 3, 2021 1:21 PM
To: 'Newberry, Jeff' <jrnewber@Central.UH.EDU>
Subject: RE: Rhoades

Jeff,

I honestly do not know. I will need to check. Let me get back to you.

-----Original Message-----
From: Newberry, Jeff [mailto:jrnewber@Central.UH.EDU]
Sent: Wednesday, February 3, 2021 1:20 PM
To: Reiss, Josh <REISS_JOSH@dao.hctx.net>
Cc: Dow, David R <DDow@Central.UH.edu>
Subject: Rhoades

Josh,

Has the State maintained in its file copies of the juror questionnaires and juror cards from Rhoades' trial? If so, would you allow us to view them?

Thanks,
Jeff

Jeffrey R. Newberry
Legal Clinic Supervisor
University of Houston Law Center
Krost Hall #207
4604 Calhoun Rd.
Houston, TX 77204-6060
713-743-6843

Appendix D – Chart summarizing the forty-eight state court opinions which cite Article 35.29 of the Texas Code of Criminal Procedure

Case	Reporter information	Summary
Nugent v. State	No. 10-19-00258-CR, 2020 WL 7866843 (Tex. App.—Waco Dec. 30, 2020, no pet.)	35.29 motion filed in trial court. Issue raised on direct appeal. The court of appeals affirmed trial court's finding that there was not good cause for access.
Irsan v. State	No. AP-77,082, 2020 WL 5033440 (Tex. Crim. App. Aug. 25, 2020)	Irsan initially asked the CCA for the juror information, which told him to ask the trial court. He subsequently returned to the trial court. While there does not appear to be a written order saying the trial court found good cause, a supplemental clerk's record containing the juror information was filed in November 2020 (suggesting the trial court found good cause).
Green v. State	No. AP-77,088, 2020 WL 1540426 (Tex. Crim. App. Mar. 30, 2020)	Green first asked the CCA for the materials, which told him to ask the trial court. A supplemental clerk's record was later filed. No indication whether this supplemental record contained juror information or whether Green filed a 35.29 motion.
Johnson v. State	No. 02-19-00194-CR, 2020 WL 1057309 (Tex. App.—Fort Worth Mar. 5, 2020)	In this case, the State filed the 35.29 motion. The trial court found there was good cause. Johnson raised the issue on direct appeal. The court of appeals found there was not good cause for the disclosure to the state, but also found Johnson was not harmed by the error.
Onick v. State	No. 02-18-00356-CR, 2019 WL 1950063 (Tex. App.—Fort Worth May 2, 2019)	In this case, the State filed the 35.29 motion. The trial court found there was good cause. Onick raised the issue on direct appeal. The court of appeals found there was not good cause for the disclosure to the state, but also found Onick was not harmed by the error.
Falk v. State	No. AP-77,071, 2018 WL 3570596 (Tex. Crim. App. 2018)	Falk first asked the CCA for the materials, which told him to ask the trial court. A supplemental clerk's record was subsequently filed, but there is no indication whether this record contained juror information.

Colone v. State	No. AP-77,073, 2018 WL 2947887 (Tex. Crim. App. June 13, 2018)	Colone first asked the CCA for the materials, which told him to ask the trial court. A supplemental clerk's record was subsequently filed, but there is no indication whether this record contained juror information
Hall v. State	No. AP-77,062, 2017 WL 5622954 (Tex. Crim. App. Nov. 22, 2017)	Hall initially asked the CCA for the juror information, which told him to ask the trial court. It appears Hall asked the trial court and that the court found good cause because a supplemental clerk's record containing juror information was subsequently filed.
Brooks v. State	No. 05-16-00182-CR, 2017 WL 4785331 (Tex. App.—Dallas Oct. 24, 2017)	Brooks asked the trial court for access to juror information, and the trial court found there was not good cause. Brooks raised the issue on direct appeal, where the State argued a negative finding on a 35.29 motion was not appealable, but the court believed it was appealable (but did not reverse the trial court).
Everitt v. State	No. 01-15-01023-CR, 2017 WL 3389638 (Tex. App.—Houston [1st Dist.] Aug. 8, 2017, pet. ref'd)	Everitt asked the trial court for access, which found there was not good cause. He attempted to raise the issue on direct appeal, but the court of appeals did not decide the issue because Everitt had argued in the trial court he needed the materials to prepare for a motion for new trial hearing and the court of appeals had already found the trial court did not err in not convening a hearing on the motion for new trial.
Gonzalez v. State	No. AP-77,066, 2017 WL 782735 (Tex. Crim. App. Mar. 1., 2017)	Gonzalez first asked the CCA for the materials, which told him to ask the trial court. A supplemental clerk's records was subsequently filed, but there is no indication whether this record contained juror information.
In re Green	No. WR-62,574-05, 2015 WL 5076812 (Tex. Crim. App. Aug. 26, 2015)	After the mandate had issued on direct appeal, Green filed three 35.29 motions in the trial court. A written order was issued for only one, but it specifically said he hadn't shown good cause. For

		the other two, the judge simply wrote on the motions that juror information is confidential pursuant to 35.29. Green filed a mandamus in the CCA. The CCA asked the trial judge whether the records had confidential information and whether Green had filed a motion. After the response from the trial judge (explaining the requested materials contained juror information, Green had filed motions, and the trial court had denied them), the CCA denied Green leave to file his mandamus.
In re Middleton	No. 04-15-00062-CR, 2015 WL 1004233 (Tex. App.—San Antonio Mar. 4, 2015)	Middleton wanted jury information so could challenge a jury shuffle on direct appeal and filed a 35.29 motion in the trial court. Trial court found he hadn't shown good cause. Middleton filed a mandamus. The court of appeals denied relief because he hadn't shown he had a clear right to relief, which was the standard for mandamus.
Taylor v. State	461 S.W.3d 223 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd)	Taylor wanted jury information to challenge two jurors as not being registered to vote in his motion for new trial, and filed a 35.29 motion in the trial court. The trial court found there wasn't good cause. Taylor raised that the trial court abused its discretion in denying him access to the materials as a claim in his direct appeal brief. The court of appeals affirmed that he hadn't shown good cause for access.
Carver v. State (3 causes, same result)	No. 08-12-00300-CR, 2015 364171 (Tex. App.—El Paso Jan. 28, 2015, pet. ref'd) No. 08-12-00298-CR, 2015 WL 364255 (Tex. App.—El Paso Jan. 28, 2015, pet. ref'd)	From the opinions, it appears that Carver (pro se) first asked the court of appeals for the information and that court found he hadn't demonstrated good cause. (at *7, *11, *7, respectively). Furthermore, the Sep. 25, 2013 order from the court of appeals mentioned in the opinion does not mention a request ever being made to the trial court. Carver filed 3 petitions for discretionary review with the CCA,

	No. 08-12-00299-CR, 2015 WL 364291 (Tex. App.—El Paso Jan. 28, 2015, pet. ref'd)	but none addressed the issue about access to juror materials. (One PDR did have an issue about the record being incomplete, but juror materials were not mentioned.)
Hazlip v. State	No. 09-14-00477-CR, 2015 WL 184043 (Tex. App.—Beaumont Jan. 14, 2015, no pet.)	After mandate issued, Hazlip filed 35.29 motion and trial court found he had not demonstrated good cause. The intermediate court of appeals said in did not have jurisdiction to consider a direct appeal off of the trial court's order.
In re Ligon	No. 09-14-00337-CR, 2014 WL 5037229 (Tex. App.—Beaumont Oct. 8, 2014, orig. proceeding) No. 09-13-00389-CR, 2013 WL 5658610 (Tex. App.—Beaumont Oct. 16, 2013, orig. proceeding)	The two opinions from a single case do not appear to actually involve a 35.29 motion because one of these two opinions state the defendant didn't argue and the trial court didn't find there was good cause. Instead, the trial court just released information on two separate occasions. The District Attorney (Ligon) did not like that and filed a mandamus each time, both of which were granted.
Tate v. State	414 S.W.3d 260 (Tex. App.—Houston [1st Dist.] 2013, no pet.)	Tate filed 35.29 motion to prepare for a motion for new trial because he wanted to investigate what other jurors were affect by one juror's bias. The trial court granted motion, but then Tate never filed a motion for new trial.
Romero v. State	396 S.W.3d 136 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd)	Romero filed 35.29 motion while preparing a motion for new trial. The trial court found he hadn't shown good cause for access. On direct appeal, Romero claimed the trial court abused its discretion in denying him access, but the court of appeals agreed he had not demonstrated good cause for access.
In re Fain	No. 02-12-00499-CV (Tex. App.—Fort Worth Dec. 20,	It is not clear from the opinion whether Fain filed a post-mandate 35.29 motion, but it seems likely he did before filing a mandamus in the court of appeals. The

	2012, orig. proceeding)	court of appeals said that only the CCA had jurisdiction in the case and then dismissed the petition for want of jurisdiction.
Cardenas v. State	No. 13-09-353-CR, 2010 WL 3279489 (Tex. App.—Corpus Christi Aug. 19, 2020, no pet.)	Immediately after trial, Cardenas filed a 35.29 motion in the trial court, which found he had not demonstrated good cause for access. On direct appeal, Cardenas alleged the trial court abused its discretion by denying him access, but the court of appeals affirmed Cardenas did not meet his burden.
Pereida v. State	No. 13-09-345-CR, 2010 WL 2783743 (Tex. App.—Corpus Christi July 15, 2010, pet. ref'd)	Immediately after trial, Pereida filed a 35.29 motion in the trial court, which found he had not demonstrated good cause for access. On direct appeal, Pereida alleged the trial court abused its discretion by denying him access, but the court of appeals found the trial court did not abuse its discretion.
Minze v. State	No. 2-09-129-CR, 2010 WL 1006394 (Tex. App.—Fort Worth no pet.)	Soon after trial, Minze filed a 35.29 motion in the trial court, which found she had not demonstrated good cause for access. Minze raised a claim on direct appeal, and the court of appeals agreed she had not met her burden.
Cyr v. State	308 S.W.3d 19 (Tex. App.—San Antonio 2009 no pet.)	Soon after trial, Cyr filed a 35.29 motion in the trial court, which found he had not demonstrated good cause for access. Cyr raised a claim on direct appeal, and the court of appeals agreed he had not met his burden.
Castellano v. State	No. 04-06-00524-CR, 2007 WL 2935399 (Tex. App.—San Antonio Oct. 10, 2007, no pet.)	Immediately after trial, Castellano filed a 35.29 motion, and the trial court found he had not demonstrated good cause for access. He raised the issue again during a hearing on his motion for new trial. Again, the trial court found he had not demonstrated good cause. On direct appeal, the court of appeals agreed that he had not demonstrated good cause for access.
In re Powell	No. 2-07-102-CV, 2007 WL 1649661	After mandate, Powell filed a 35.29 motion in the trial court because he

	(Tex. App.—Fort Worth June 7, 2007, orig. proceeding)	believed one of the sealed volumes of the record contained a "major ruling" that constituted a "major error." The trial court found he had not demonstrated good cause. He filed a mandamus in the Fort Worth intermediate court of appeals, where the State argued that court did not have jurisdiction. The court said that because Powell said he was planning to file a motion for judgment nunc pro tunc and was not pursing proceedings in the already completed appeal, it did have jurisdiction. The court of appeals found the trial court did not err in denying the 35.29 motion.
Mitchell v. State	No. 09-05-316-CR, 2006 WL 3239890 (Tex. App.—Beaumont Nov. 8, 2006, pet. dism'd)	On direct appeal, he complained that the trial court erred in sealing documents. Because the record did not reflect he ever filed a 35.29 motion in the trial court, the court of appeals denied relief.
Lomax v. State	153 S.W.3d 582 (Tex. App.—Waco 2004)	During direct appeal, Lomax filed a motion in the court of appeals arguing the several items were missing from the record, including the jury strike lists. Lomax did not explain in his motion why he needed these records, but the court of appeals wrote it would order the trial court to have the lists included in the record if Lomax made the requisite showing of good cause.
Garza v. State	No. 04-02-00599-CR, 2003 WL 23008845 (Tex. App.—San Antonio Dec. 24, 2003, pet. ref'd)	After trial, Garza filed a 35.29 motion seeking to photocopy the jury list. The trial court denied the motion, finding he had not demonstrated good cause for access. On direct appeal, the court of appeals agreed he did not establish good cause.
Valle v. State	109 S.W.3d 500 (Tex. Crim. App. 2003)	While preparing for trial, Valle filed a 35.29 motion asking for access to the jury list. The trial court denied the motion. On appeal, Valle raised an ineffective assistance of counsel claim,

		arguing that his attorney was deficient in this regard. CCA found general explanation offered at trial was not sufficient to establish good cause. Furthermore, Valle gave no additional reason on appeal, so the court denied relief on his IAC claim.
Huckaby v. State	No. 2-01-301-CR, 2003 WL 21235588 (Tex. App.—Fort Worth May 29, 2003, pet. ref'd)	Huckaby filed a 35.29 motion after trial hoping to investigate about post-verdict conversation among jurors about the applicability of good time credit to a thirty-year sentence. Trial court found he had not demonstrated good cause for access to juror information. On direct appeal, the court of appeals affirmed.
Graham v. State	No. 04-00-00722-CR, 2002 WL 1803874 (Tex. App.—San Antonio Aug. 7, 2002 no pet.)	Graham filed a 35.29 motion seeking access to the jury list to investigate possible misconduct. The trial court found he had not demonstrated good cause. On direct appeal, the court of appeals agreed that he had not met his burden.
Esparza v. State	31 S.W.3d 338 (Tex. App.—San Antonio 2000 no pet.)	After trial, Esparza filed a 35.29 motion in the trial court to investigate possible juror misconduct to possibly raise an ineffective assistance of counsel claim (which would argue that trial counsel had a duty to investigate possible juror misconduct). Trial court found he had not demonstrated good cause for access. The court of appeals affirmed on direct appeal.
Mayo v. State	971 S.W.2d 464 (Tex. App.—Fort Worth 1998), *rev'd by* 4 S.W.3d 9 (Tex. Crim. App. 1999)	The issue in this case is whether the requirement that a juror be a resident of the county could be waived if a challenge for cause was not made during trial. In this case, Mayo only knew the juror at issue was an out-of-county resident because he filed a 35.29 motion in the trial court, which the trial court granted.
Thomas v. State	No. 04-95-00632-CR, 1996 WL 637806 (Tex.	After trial, Thomas filed a 35.29 motion in the trial court. The trial court found he had not demonstrated good cause for

	App.—San Antonio Nov. 6, 1996, pet. ref'd)	access and denied the motion. On appeal, the court of appeals found the trial court had not abused its discretion in so finding.
Hooker v. State	932 S.W.2d 712 (Tex. App.—Beaumont 1996 no pet.)	Hooker filed a 35.29 motion in the trial court arguing he needed access to juror information to investigate possible juror misconduct. Trial court denied his motion, finding he had not demonstrated good cause for access. On direct appeal, the court of appeals agreed he had not demonstrated good cause.
Smith v. State	No. 09-94-051-CR, 1996 WL 112153 (Tex. App.—Beaumont Mar. 13, 1996 pet. ref'd)	From opinion, it does not appear Smith filed a 35.29 motion. Instead he raised a claim arguing that he was unable to properly exercise challenges during voir dire because he did not have access to juror information. The court of appeals cited 35.29 in its explanation that there is no requirement under state law that a defendant at trial be given the information he wanted.
Saur v. State	918 S.W.2d 64 (Tex. App.—San Antonio 1996 no pet.)	From opinion, it does not appear this case involves a 35.29 motion. Instead, Saur complained on appeal his attorney should not have been required to surrender his juror information sheets after jury selection. Court of appeals found there was no error in requiring the attorney to return these sheets, which contained confidential juror information.
Maddox v. State	No. 14-93-00053-CR, 1995 WL 458950 (Tex. App.—Houston [14th Dist.] Aug. 3, 1995 pet. ref'd)	On appeal, Maddox complained the record was incomplete. Among the items he believed were missing was juror information. The court of appeals noted that the initial request must be made to the trial court. Because the record did not reflect he had ever made a 35.29 motion in the trial court, the court of appeals denied relief.
Falcon v. State	879 S.W.2d 249 (Tex. App.—	Falcon asked the court of appeals to include juror information in the record.

	Houston [1st Dist.] 1994, pet. ref'd)	The court of appeals explained that a 35.29 motion must first be made to the trial court, and if that request is denied, the defendant can challenge the ruling on mandamus. Because he had not presented a 35.29 motion to the trial court, the court of appeals overruled his motion.

Forty-eight opinions from Texas state courts cite article 35.29 of the Texas Code of Criminal Procedure. Two of those are the July 14, 2021 dissenting opinions off of the denial of Rhoades' motion for leave to file a petition for writ of mandamus, filed in the Texas Court of Criminal Appeals. Other than those and the three opinions noted immediately below (which do not involve 35.29 motions), the remainder of the forty-eight opinions are accounted for on the table above.

Perez Hernandez v. State, No. 13-16-00696-CR (Tex. App.—Corpus Christi-Edinburg May 16, 2019, pet. ref'd), cites the statute simply say juror information is confidential, but doesn't address a motion for access.

In re Fort Worth Star Telegram, 441 S.W.3d 847 (Tex. App.—Fort Worth Aug. 12, 2014, orig. proceeding), cites 35.29 only to discuss how "for good cause shown" has been defined in a variety of contexts.

In *Roberts v. State*, 978 S.W.2d 580 (Tex. Crim. App. 1998), article 35.29 is cited only in a concurring opinion. It is listed as one of many provisions in the code of criminal procedure the judge authoring the opinion believed had been rendered optional in light of a different opinion issued by the court because a defendant would never be able to establish noncompliance deprived him of a fair and impartial jury.

Appendix E – Transcript of March 17, 2021 hearing

REPORTER'S RECORD
VOLUME 3 OF 4 VOLUMES
TRIAL COURT CAUSE NO. 0612408

COURT OF CRIMINAL APPEALS NO. AP-71,595

THE STATE OF TEXAS	) IN THE DISTRICT COURT OF
	)
V.	) HARRIS COUNTY, TEXAS
	)
RICK ALLAN RHOADES	) 179TH JUDICIAL DISTRICT

EXECUTION ORDER HEARING

On the 17th day of March, 2021, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Ana Martinez, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by computerized stenotype machine.

Renee Reagan, Texas CSR No. 7573
Official Court Reporter, 179th District Court
1201 Franklin
Houston, Texas 77002

APPEARANCES

Mr. Joshua Reiss (Appearing via Zoom)
SBOT No. 24053738
Assistant District Attorney
Harris County District Attorney's Office
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Attorney for the State of Texas

* * * * * * * * * * *

Attorneys for the Defendant:

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University of Houston Law Center
4604 Calhoun Rd.
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Telephone: 713.743.2171

(Open court, defendant not present.)

THE COURT: The Court calls Case No. 0612408, the State of Texas versus Rick Allan Rhoades.

Can the parties please make their appearances?

MR. REISS: Joshua Reiss, the State of Texas.

MR. DOW: David Dow for Mr. Rhoades.

MR. NEWBERRY: And Jeff Newberry, also for Mr. Rhoades.

THE COURT: All right. So we left it last week, attorneys, where the defense had filed motion for release of confidential juror information. The Court agreed to review the motion and take it under advisement and review some of the records. So the Court has done that. After the review of the records and also a review of the several appeals that Mr. Rhoades had filed in state court and federal court, it is the understanding of this Court that currently this Court is under the mandate of affirmance from the Court of Criminal Appeals. And the order of that Court was for this Court to issue an execution date on Mr. Rhoades.

After looking at the motion from Mr. Rhoades on the release of confidential juror

information, the Court doesn't believe this motion is properly before the Court. I don't think there was any briefing as to the properness for that motion to be before this Court; but even if the motion was properly before the Court, the issue is that I don't see how the defendant has brought any legal reason as to why they get these records.

After the review that I did, I believe that this issue on the *Batson* challenge has been litigated several times previously -- and the parties can correct me if I'm wrong -- I believe from the Fifth Circuit opinion that was issued on January 28th, 2019. From what I can tell, the issue of the *Batson* challenge and the comparative analysis was litigated. The Court makes a note that Rhoades' counsel acknowledged that even though remand may not be necessary because we couldn't engage in our own comparative analysis, referring as to the briefing in the district court, I believe it was the State's suggestion that the Court could still do that. It seems that both the parties and the Court agreed that they could conduct their own comparative analysis and that's what the Court ruled on. So that is the first comment the Court would like to make. I don't see any legal reason why the defendant will get those records.

And even then, the second issue will be the redaction of those records and the work product exception. I don't think there is briefing on how the defendant will overcome *Guilder v. State*, which shows or rules that *Batson* doesn't really -- a *Batson* challenge doesn't really create an exception of work product. So therefore, at this point, the Court will not order the State to turn over those records and that's where the Court stands right now.

MR. DOW: Your Honor, may I be heard on that?

THE COURT: Yes, sir.

MR. DOW: It is true that the Fifth Circuit and the District Court did what comparative analysis was available through the record that we presented to them. However, that did not include looking at the juror questionnaires and/or the juror cards. And I believe the Fifth Circuit opinion from -- I believe it was 2019 specifically referenced how limited that comparative analysis was. Specifically, the juror cards, which I believe were in the materials that Mr. Reiss turned over to the Court, if I'm not mistaken, we believe they likely include the race of the veniremembers. Without those, we don't even know for sure the racial makeup of Mr. Rhoades' jury. We know

the racial makeup of 11 of the 12 jurors but not of the twelfth one. So respectfully, a comparative analysis was done but I believe the Fifth Circuit even noticed that was lacking.

Secondly, we do believe that even though this claim has been raised before, it is likely cognizable in a subsequent state habeas proceeding. We're going to make the argument to the Court of Criminal Appeals that because the case of *Miller-El vs. Dretke* was handed down after Mr. Rhoades files the initial stated habeas application, and that that case constitutes new law that will allow a State Court to consider this *Batson* claim, even though a version of it has already been raised.

The CCA has found in a 2008 case -- I believe *Arthur Williams* is the name of the case -- that *Miller-El vs. Dretke* does constitute new law to file a subsequent state habeas application pursuant to Article 11.071, Section 58. And so we believe that there is jurisdiction for this Court and the CCA to address a *Batson* claim, notwithstanding the fact that a version of it has been addressed already in the federal courts. And we do believe that it would be a lot more robust, given the materials that Mr. Reiss has provided to the Court. Now, obviously we haven't seen them. We don't

know what's in them. But we do think that they are the missing piece that the Fifth Circuit noted made the comparative analysis that it was able to conduct, not complete.

MR. REISS: Your Honor, may I reply to that?

THE COURT: Yes.

MR. REISS: I would just say that Your Honor can look at it, but based upon what has been represented, I do not believe that race was on any of the juror cards or any of the juror questionnaires. So if that was the reason for the request, it's not there.

MR. DOW: And if it's not on the juror card, you know, I'm just assuming, based on what we've seen from other counties, Your Honor -- and while the race being on the juror cards was something we would hope would be there, the questionnaires and the other demographic information on the cards is going to really greatly enhance what comparative analysis has been done to this point. I can't -- you know, obviously, I'm at a position right now where I didn't know that the juror cards might not have race. I don't know what demographic information is there. But I do know what the questionnaires have on them and I do know that even if Mr. Reiss doesn't have a complete set, that the

jurors that the State did not strike were, during voir dire, asked about their answers to these questionnaires. So even if we don't have the questionnaires for the jurors that weren't struck by the State, we do have some of their answers recorded in the transcript. So notwithstanding that -- and I have to, you know, assume that what Mr. Reiss is saying is true. He's seen the juror cards and I haven't. But even if that information is not there, we believe these documents contain information that is needed to do a more thorough comparative analysis than it has been possible in the past.

MR. REISS: Judge, if I may, very briefly?

THE COURT: Yes.

MR. REISS: I would just ask the Court to check my work. I do not see on any of the materials I have provided any references to race. I may have missed something but I don't think I have, Your Honor.

MR. DOW: Judge --

MR. REISS: If that was the genesis of the reason for the request, I'm just saying I am -- I am obligated to protect certain obligation -- information under the government code, things like social security numbers and such, and I am -- you know, I still do have

a work product privilege that I am invoking. But, again, I will -- if Your Honor orders me to spit these up in a redacted or unredacted form, I will do that. But if the purpose of the request was to advance a race-based *Batson* claim, I don't think the material's there but I ask the Court to just double-check my work.

THE COURT: Let me just, for the record, so we can clarify, what is the understanding -- or let me just ask Mr. Reiss: What are the records that you have in your possession?

MR. REISS: Sure. The documents that I have in my possession, and the ones that I have turned over to the Court in camera last week, are juror questionnaire/juror information forms. I don't know the number of pages, but looks like it's like 30 or 40 pages maybe. And I also provided to the Court copies of juror questionnaires and these are the copies of State's strikes that are the notes -- they appear to be of one prosecutor. And that, I can tell you -- let me count this very quickly. Judge, I show 14 questionnaires.

THE COURT: And, Mr. Dow or Mr. Newberry, was that the expectation of the records that you were inquiring or were you inquiring for additional records?

MR. DOW: Judge, if I might address that question, those are the records that we want and despite

the fact that the cards might not contain a box where the juror checked race, my experience from litigating *Batson* claims against the Harris County District Attorney's Office from other cases in this era -- not that Mr. Reiss has ever been involved in, so I don't want this to be taken as a comment about Mr. Reiss because he was not involved in the case.

MR. REISS: I appreciate that.

MR. DOW: My experience from litigating *Batson* claims against the Harris County District Attorney's Office in this era is that the cards can reveal information about race despite the fact that the potential jurors are not checking a box on race.

For example, in the case of Mariano Rosales, who I represented in a *Batson* challenge from Harris County, the district attorney had made notes on the juror cards when they were selecting the jury about the magazines that certain jurors were reading and subscribed to. And so in the case of one particular card that I remember, the prosecuting attorney had written *Ebony* magazine. *Ebony* magazine is overwhelmingly read by black people, not white people. The District Attorney's Office had made notes about the neighborhoods that jurors were living in and that jurors were living at that time, and they probably still are,

in largely racially segregated neighborhoods. So the fact that the cards don't contain a box where the juror indicates race does not mean that we are not going to be able to draw some inferences about whether the prosecutor was making decisions on the basis of its perception of the juror's race. That was exactly how we demonstrated the *Batson* claim in the Mariano Rosales case.

And simply to underscore the point that Mr. Newberry was making, we were not able to put any of that type of evidence in front of either the State Court or the federal court when this *Batson* claim was initially litigated and in part we were not able to because the law at the time the *Batson* claim was originally litigated did not permit us to. It didn't permit us to do this type of comparative examination of the background of the jurors. And so, we do believe that the information that Mr. Reiss has handed over to Your Honor is potentially useful to us, notwithstanding the absence of a box where jurors are checking their race.

THE COURT: Let me follow up, Mr. Dow, on the timeline. You're looking down in 2005; is that right?

MR. DOW: I think that that was right.

Yeah, there were two *Miller-El*s. I think the first one came down in 2005.

THE COURT: And, Mr. Rhoades -- and I understand it's not your team. I'm assuming you were not the attorneys, but Mr. Rhoades litigated the *Batson* challenge and the opinion that I have from the district court was from 2016. That's the one that goes up to the Court of Appeals from the Fifth Circuit and then that opinion came back in 2019.

So when you're saying that Mr. Rhoades -- when you're saying that *Miller* came after Mr. Rhoades started litigating the *Batson* challenge, I think there is an issue with your timeline because it looks like *Miller* was litigated -- I mean, came down in 2005. My understanding, from the communications with you and the State, is that these questionnaires that the State has in its possession have always been available unless there was something where the State didn't want to turn those over for an in-camera review years ago. But my understanding is that those records have been available and based on the fact that *Miller* was handed down back in 2005, I'm not sure I'm following your argument that you were not allowed to make that argument back then.

MR. DOW: Right. And as Your Honor knows, or may not know because the number of lawyers

that Mr. Rhoades has had has been complicated, but we did not take over this case until the case was in the Fifth Circuit. And at the time we took over the case, the federal court had in front of it the evidence that the federal court had in front of it. It did not include a comparative analysis in part I think -- and I'm obviously having to try to speculate as to Mr. Rhoades' previous lawyers' strategic thinking, but my best guess is that Mr. Rhoades' previous lawyer did not properly supplement the record -- (Audio distorted) within the -- the (Audio distorted).

THE REPORTER: Wait. Wait a minute.

THE COURT: Mr. Dow, hold on for a second because your connection is cutting off and our reporter is not able to understand. So go back to you weren't sure of the strategy.

MR. DOW: I'm sorry. My screen went out, too, so I couldn't see you. My apologies to everybody.

What I was saying is that the previous lawyer would not have had a reason to try to get the information from the District Attorney's Office and put it in the federal record because she would have been aware that that evidence had not been in front of the State Court. And because that evidence had not been in front of the State Court, the federal court would not

have been able to take it into consideration. The only opportunity to have a federal court take that information into consideration is to first give the State Court an opportunity to do so and as Mr. Newberry said, when the Texas Court of Criminal Appeals recognized that *Miller-El* provided a basis to return to state court, that is going to allow the State Court to take into consideration the evidence that has so far not been examined by any Court. So I'm not faulting Mr. Rhoades' previous counsel for not seeking the information that we are seeking at the present time because I think in the considered judgment of Mr. Rhoades' previous counsel, she would have concluded that there was no reason to try to get it in the federal record because the State Court hadn't looked at it and she was just appointed in federal court and did not have plans to return to state court.

THE COURT: With that regard, under *Miller*, the comparative analysis is not a requirement for the State Court anyway, so.

MR. DOW: It's certainly not a requirement, Judge, but it is an argument that the lawyers representing an inmate raising the *Batson* challenge are permitted -- are permitted to make in order to satisfy either the first or the third prong of

the *Batson* challenge, in other words, to show either that the prosecutor's reason for striking a particular juror or more than one juror was race based or in order to rebut the prosecutor's proffered race-neutral explanation for a challenged strike.

Does the State Court have to look at it? No, there's nothing that requires a State Court to look at it. But once *Miller-El* is established federal law, which it now is, if the State Court doesn't look at it, when we return to federal court, the federal court is in a position to grant relief on the basis of the conclusion that the State Court has not complied with federal law. So, obviously, there's no obligation on the part of the State Court to conduct the comparative analysis. But I also think that the Court of Criminal Appeals, since *Miller-El* has come down, has, in fact, engaged in a comparative analysis. And all that we're obligated to do as Mr. Rhoades' counsel before we can go back to federal court with the claim is give the State Court the opportunity to address that information. If the State Court doesn't, the State Court doesn't; but it then frees up the federal court to grant relief if it finds that the evidence of racially motivated strikes is present.

THE COURT: Mr. Reiss, do you have any

comments?

MR. REISS: I have nothing to add, Your Honor.

THE COURT: All right. So, Mr. Dow and Mr. Newberry, that very well may be the case but right now I believe this is a collateral issue through the mandate that this Court has. The mandate that this Court has is to set the execution date, so you will have to file the proper vehicle to get this before the Court and at that moment, the Court will at least give you the juror cards redacted if you want to argue on the work product issue. But at this point I struggle with jurisdiction and I believe this is not properly brought before the Court, so I'm not going to take on your motion at this moment. So we're still set for March 26th to set the execution date.

Again, if you want to file any other proper vehicle to get this motion before the Court, then I will consider it then.

MR. DOW: Thank you, Judge.

MR. REISS: Thank you, Your Honor.

THE COURT: Thank you. We're off the record.

(Hearing concluded.)

STATE OF TEXAS
COUNTY OF HARRIS

I, Renee Reagan, Official Court Reporter in and for the 179th District Court of Harris County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

WITNESS MY OFFICIAL HAND, this the 19th day of April, 2021.

/s/Renee Reagan
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