No. 21A43

IN THE

Supreme Court of the United States

RICK RHOADES,
Plaintiff-Appellant,

v.

ANA MARTINEZ, HONORABLE,
Defendant-Appellee.

On Application for a Stay of Execution

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

1. Should this Court grant a stay of execution where the stay applicant seeks to raise jurisdictionally and time barred challenges to a state court's interpretation of state law, where the lower courts properly found there was no merit to the claims, and where the equities heavily favor the state?

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BRIEF IN OPPOSITION

Defendant-Appellee respectfully submits this brief in opposition to the application for a stay of execution filed by Rick Rhoades.

Plaintiff-Appellant Rick Rhoades was convicted and sentenced to death almost thirty years ago for the murder of brothers Charles and Bradley Allen. Rhoades is scheduled to be executed after 6:00 p.m. (Central Time) tonight, September 28, 2021. Rhoades has repeatedly and unsuccessfully challenged his conviction and sentence in state and federal court, including litigating claims alleging the prosecution exercised peremptory strikes in a racially discriminatory manner. *Rhoades v. Davis*, 914 F.3d 357, 376–83 (5th Cir. 2019); *Rhoades v. State*, 934 S.W.2d 113, 123–25 (Tex. Crim. App. 1996).

Rhoades filed a civil rights complaint pursuant to 42 U.S.C. § 1983 in the district court alleging that Defendant-Appellee Judge Ana Martinez[1] violated his rights to due process and equal protection by finding the state trial court lacked jurisdiction to rule on his motion requesting the release of juror information. ROA.29–30 (citing Tex. Code Crim. Proc. art. 35.29).[2] Judge Martinez moved to dismiss Rhoades's complaint, and the district court granted

[1] Defendant-Appellee is the Honorable Judge Ana Martinez of the 179th District Court of Harris County, Texas.

[2] "ROA" refers to the record on appeal filed in the court below.

the motion. Pet'r's App. B. Thereafter, the district court denied Rhoades's motion for a stay of execution. ROA.140.

The district court dismissed Rhoades's complaint and denied Rhoades's motion for a stay of execution. The district court properly concluded Rhoades's complaint was subject to dismissal because Judge Martinez was entitled to sovereign immunity and because Rhoades's claims were barred by the *Rooker/Feldman*[3] doctrine. Pet'r's App. B at 9–17. Additionally, Judge Martinez showed that Rhoades's claims improperly called on a federal court to exercise mandamus authority over a state court, and the claims were subject to dismissal based on abstention and limitations.

Rhoades appealed the district court's judgment to the Fifth Circuit, which affirmed the dismissal of Rhoades's complaint. The Fifth Circuit held Rhoades's claims were barred under the *Rooker/Feldman* doctrine. Pet'r's App. A at 4–5. The Fifth Circuit also properly denied Rhoades's request for a stay of execution, noting that Rhoades's *Batson*[4] claims were considered and rejected during his habeas proceedings and that the prosecution used twelve of its fourteen peremptory strikes against white veniremembers—the two Black

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[3] *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415 (1923) (holding that the jurisdiction of the district court is strictly original); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 476, 482 (1983) (holding a United States district court has no authority to review final judgments of a state court in judicial proceedings).

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

veniremembers as to whom the prosecutor exercised peremptory strikes were stricken for race-neutral reasons. *Id.* at 5.

Rhoades now requests a stay of execution. However, Rhoades fails to identify any error in the Fifth Circuit's opinion, let alone a compelling one warranting this Court's attention. He also fails to satisfy his burden to justify a stay of execution. Rhoades is disentitled to a stay of execution because the equities weigh heavily against him. Rhoades was convicted of capital murder and sentenced to death almost thirty years ago, yet he waited until the eve of the setting of his execution to seek access to juror information from the prosecution's office for the purpose of litigating an abusive *Batson* claim despite having unsuccessfully raised such claims in state and federal court. Rhoades cannot justify a stay of execution after having failed to seek the juror information for decades. Moreover, Rhoades cannot justify a stay where the juror information he seeks could not reveal a meritorious *Batson* claim. Therefore, this Court should deny Rhoades's application for a stay of execution.

STATEMENT OF THE CASE

I. Facts Concerning Rhoades's Murder of Charles and Bradley Allen

> On the morning of September 13, 1991, the bodies of brothers Charles and Bradley Allen were discovered by a neighbor. Almost a month later, Rhoades was arrested leaving the scene of an unrelated school burglary. While in custody for the burglary, Rhoades gave the police a written statement admitting to killing Charles and Bradley Allen.

> In that statement, Rhoades related his activities on release from prison in Huntsville, Texas less than 24 hours before the murders occurred. Instead of reporting to his assigned halfway house in Beaumont, Rhoades travelled to Houston by bus. After an unsuccessful search for his parents, he went to an apartment complex where he had previously lived and proceeded to have several beers. In his statement, Rhoades recalled wandering around the neighborhood and encountering Charles Allen outside of his home around 2:30 a.m. After a quarrel, Charles entered his house. Believing he was planning to retrieve a gun, Rhoades went into the house after him. Rhoades picked up a small metal bar from a weight bench and entered the kitchen, where Charles Allen grabbed a knife. The men began fighting and Rhoades recounted hitting Charles Allen with the bar several times until he dropped the knife. At that point, Rhoades grabbed the knife and stabbed him a number of times. Bradley Allen entered shortly thereafter and started trying to punch Rhoades, who stabbed Bradley Allen with the knife. Rhoades took some cash and clean clothing, because his clothes had been bloodied. He saw on the news later that morning that the two men had died. In his statement, Rhoades mentioned that he had not told anyone about the murders and it had been "bothering [him] ever since." Rhoades claimed he could have outrun the police officer who arrested him for the school burglary, but was "tired of running" so decided to tell the police about the murders while in custody.

Rhoades v. Davis, 914 F.3d at 362.

II. Facts Relevant to Punishment and the Sentencing Phase of Trial

> During the punishment phase of the trial, the State presented evidence of Rhoades's Naval court-martial for unauthorized absences and other previous criminal convictions including convictions for burglary and auto theft. The State also presented Rhoades as a danger to other prisoners, proffering evidence that when Rhoades was an inmate in an Indiana prison, prison officials had recovered a shank and a razor blade from his cell. Between 1986 and 1990 Rhoades stacked up various arrests and convictions for auto theft, possession of a prohibited weapon, theft, burglary, and carrying a weapon. During the punishment phase, Rhoades's trial counsel presented the testimony of Patricia

> Spenny, Rhoades's birth mother; Donna and Ernest Rhoades, Rhoades's adoptive parents; Meyer Proler, an assistant professor of physiology and neurology at the Baylor College of Medicine; Novella Pollard, Rhoades's teacher in his prison GED program; and Windel Dickerson, a psychologist.

Id.

III. Course of State and Federal Proceedings

Rhoades was convicted and sentenced to death for the murder of brothers Charles and Bradley Allen. The Texas Court of Criminal Appeals (TCCA) affirmed Rhoades's conviction and sentence on direct appeal. *Rhoades v. State*, 934 S.W.2d at 129. The TCCA later denied Rhoades's first state habeas application. *Ex parte Rhoades*, No. WR-78,124-01, 2014 WL 5422197, at *1 (Tex. Crim. App. Oct. 1, 2014).

Rhoades then filed a federal habeas petition, which the district court denied. *Rhoades v. Davis*, No. H-14-3152, 2016 WL 8943327, at *21 (S.D. Tex. July 20, 2016). The Fifth Circuit granted Rhoades's application for a certificate of appealability as to three of his claims, *Rhoades v. Davis*, 852 F.3d 422, 436 (5th Cir. 2017), and later affirmed the district court's denial of federal habeas relief, *Rhoades v. Davis*, 914 F.3d at 383, *cert. denied*, 140 S. Ct. 166 (2019).

In January 2021, the Harris County District Attorney's Office indicated it would ask the state trial court to enter an order setting Rhoades's execution date. Pet'r's App. B at 4. Rhoades requested access to juror information that was in the prosecuting office's possession and later filed a motion pursuant to

Texas Code of Criminal Procedure article 35.29. Pet'r's App. B at 5. Judge Martinez found the court lacked jurisdiction to consider Rhoades's motion. Pet'r's App. B at 7. Rhoades then sought leave to file in the TCCA a petition for a writ of mandamus, which the TCCA denied. *In re Rhoades*, No. WR-78,124-02, 2021 WL 2964454, at *1 (Tex. Crim. App. July 14, 2021).

Rhoades also filed in state court a subsequent application for a writ of habeas corpus and a motion for a stay of execution. The TCCA dismissed Rhoades's subsequent application and denied his motion for a stay of execution. *Ex parte Rhoades*, No. WR-78,124-03, 2021 WL 4269984, at *1 (Tex. Crim. App. Sept. 20, 2021).

Rhoades filed in the federal district court a civil rights complaint alleging Judge Martinez deprived him of his rights to due process and equal protection. ROA.29–30. Rhoades also filed a motion for a stay of execution. ROA.114. The district court dismissed Rhoades's complaint and denied the motion for a stay of execution. Pet'r's App. B at 17; ROA.140. Rhoades appealed the district court's dismissal of his complaint and requested a stay of execution. The Fifth Circuit affirmed the dismissal of Rhoades's complaint and denied the motion for a stay of execution. Pet'r's App. A at 4–5.

REASONS FOR DENYING A STAY

Rhoades's complaint alleged Judge Martinez denied his rights to due process and equal protection by finding the state trial court lacked jurisdiction

to rule on the merits of his motion seeking access to juror information. The district court dismissed the complaint and denied Rhoades's motion for a stay of execution because Judge Martinez was entitled to sovereign immunity and Rhoades's claims were barred by the *Rooker/Feldman* doctrine. The Fifth Circuit affirmed, finding Rhoades's claims were barred under *Rooker/Feldman*.

Rhoades fails to show error in the lower courts' dismissal of his complaint, and he fails to satisfy his burden of establishing an entitlement to a stay of execution. First, the lower courts properly found Rhoades's claims were jurisdictionally barred. Moreover, Rhoades's claims improperly requested that a federal court exercise mandamus jurisdiction over a state court. Additionally, Rhoades's claims were subject to dismissal on abstention and limitations grounds. Rhoades cannot show an entitlement to a stay of execution on the basis of barred and meritless claims. Importantly, Rhoades does not identify any compelling reason justifying this Court's attention. Sup. Ct. R. 10; Sup. Ct. R. 14.1(h). Second, Rhoades is not entitled to a stay of execution in light of his demonstrable failure to diligently seek juror information. He was convicted almost thirty years ago and did not seek the information via Article 35.29 until the eve of the setting of his execution date. Lastly, the juror information Rhoades seeks could not form the basis of a meritorious *Batson* claim. Rhoades cannot justify a stay of execution where the equities weigh so

heavily against him. Therefore, this Court should deny Rhoades's application for a stay of execution.

ARGUMENT

I. The Standard Governing Stay Requests

"Filing an action that can proceed under § 1983 does not entitle [Rhoades] to an order staying an execution as a matter of course."[5] *Hill*, 547 U.S. at 584. A request for a stay "is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id*. (citing *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004)). Rhoades must satisfy all the requirements for a stay, including a showing of a significant possibility of

[5] While the district court and Fifth Circuit properly found Rhoades failed to justify a stay of execution, Judge Martinez notes the federal district courts were traditionally without jurisdiction under § 1983 to stay executions. *See Beets v. Texas Bd. of Pardons and Paroles*, 205 F.3d 192, 193 (5th Cir. 2000) ("This court has twice held that federal courts lack jurisdiction under § 1983 to stay executions."). To be sure, this Court has allowed stays to issue in § 1983 actions challenging the method of execution, *see Gutierrez v. Saenz, et al.*, 141 S. Ct. 1260, 1261 (2021), *Hill v. McDonough*, 547 U.S. 573, 580 (2006), and challenges to a state's postconviction procedures for DNA testing, *Skinner v. Switzer*, 562 U.S. 521, 529 n.6 (2011), and the Fifth Circuit has found a federal court has jurisdiction to grant a stay of execution in a § 1983 action that does not imply the invalidity of the plaintiff's conviction or sentence, *Young v. Gutierrez*, 895 F.3d 829, 831 (5th Cir. 2018). However, to the extent Rhoades's claims can be construed as challenging the validity of his conviction or seeking a permanent stay of execution based on speculation that the juror information he sought might form the basis of a *Batson* claim, this Court is without jurisdiction to grant such relief. *See In re Pruett*, 784 F.3d 287, 290 (5th Cir. 2015).

success on the merits. *Id.* (citing *Barefoot v. Estelle*, 463 U.S. 880, 895–96 (1983)). When a stay of execution is requested, a court must consider:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). "In a capital case, the movant is not always required to show a probability of success on the merits, but he must present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities[,] i.e., the other three factors[,] weighs heavily in favor of granting a stay." *Garcia v. Castillo*, 431 F. App'x 350, 355 (5th Cir. 2011) (cleaned up).

A federal court must also consider "the State's strong interest in proceeding with its judgment" and "attempt[s] at manipulation," as well as "the extent to which the inmate has delayed unnecessarily in bringing the claim." *Nelson*, 541 U.S. at 649–50. Indeed, "there is a strong presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Id.* at 650.

II. Rhoades Is Not Entitled to a Petition for a Writ of Certiorari.

While primarily seeking a stay of execution, Rhoades seeks a stay for the purpose of filing a petition for a writ of certiorari. To the extent that declining

to issue a stay is a compelling reason for certiorari review, *see* Sup. Ct. R. 10, review of such a decision is deferential and should only be overturned "when the lower court[has] clearly abused [its] discretion." *Dugger v. Johnson*, 485 U.S. 945, 947 (1988) (O'Connor, J., dissenting). Notably, Rhoades identifies no relevant split among the courts or any other reason amplifying the need for this Court's review. Sup. Ct. R. 14.1(h). As discussed below, Rhoades is not entitled to a stay of execution. For the same reasons, he is not entitled to a writ of certiorari as to his meritless claims.

III. The Fifth Circuit Properly Held Rhoades's Claims Were Jurisdictionally Barred and that He Was Not Entitled to a Stay of Execution.

Rhoades filed a civil rights complaint asserting a denial of his rights to due process and equal protection. ROA.29–30. The district court dismissed the complaint and denied Rhoades's motion for a stay of execution, and the Fifth Circuit affirmed. Pet'r's App. A at 4–5; Pet'r's App. B at 17. Rhoades now seeks a stay of execution in this Court. As discussed below, this Court should deny Rhoades's application for a stay of execution.

A. The lower courts properly found Rhoades's claims are jurisdictionally barred.

The district court properly held it was without subject matter jurisdiction over Rhoades's complaint. Pet'r's App. B at 17. First, as the district court and Fifth Circuit held, Rhoades's claims are barred by the

Rooker/Feldman doctrine. Pet'r's App. A at 4–5; Pet'r's App. B at 13–17. Additionally, his claims improperly requested a federal court to exercise mandamus authority over a state court, *see Pruett v. Choate*, No. H-17-2418, 2017 WL 4277206, at *5 (S.D. Tex. Sept. 25, 2017) ("The only relief Pruett seeks is an order compelling Texas officials to comply with what Pruett sees as the requirements of [state law], or to act so as to allow Pruett to independently effectuate his rights under [state law]. Regardless of how Pruett chooses to characterize this relief, it is, at its core, mandamus."). Moreover, as the district court concluded, Judge Martinez is entitled to sovereign immunity. Pet'r's App. at 9–13. Rhoades is, consequently, disentitled to a stay of execution because he cannot make a strong showing that he is likely to succeed on the merits of claims seeking relief that the Court lacks jurisdiction to grant. *See Nken*, 556 U.S. at 434.

1. Rhoades's claims are barred under *Rooker/Feldman*.

The district court properly held it was without jurisdiction because Rhoades's claims were barred under the *Rooker/Feldman* doctrine, Pet'r's App. B at 13–17, which bars a federal court from entertaining collateral attacks on state court judgments, *United States v. Shepherd*, 23 F.3d 923, 924 (5th Cir. 1994). As discussed below, the Fifth Circuit properly affirmed on that basis. Pet'r's App. A at 4–5.

"If the district court is confronted with issues that are 'inextricably intertwined' with a state judgment, the court is 'in essence being called upon to review the state-court decision,' and the originality of the district court's jurisdiction precludes such a review." *Shepherd*, 23 F.3d at 924 (quoting *Feldman*, 460 U.S. at 482 n.16) (footnote omitted). A federal court does not have subject matter jurisdiction over challenges to state court decisions arising out of judicial proceedings, even where the plaintiff alleges the state court's action was unconstitutional. Pet'r's App. B at 14 (citing *Musslewhite v. State Bar of Texas*, 32 F.3d 942, 946 (5th Cir. 1994)). While a federal court has subject matter jurisdiction over general constitutional attacks that do not require review of a final state court judgment, such an attack cannot be heard if it is "inextricably intertwined" with the state court judgment. Pet'r's App. B at 15; *see Liedtke v. State Bar of Texas*, 18 F.3d 315, 317–18 (5th Cir. 1994). A claim is inextricably intertwined with a state court's judgment where "the District Court is in essence being called upon to review the state court decision." Pet'r's App. B at 15 (quoting *Feldman*, 460 U.S. at 482 n.16); *see Turner v. Cade*, 354 F. App'x 108, 111 (5th Cir. 2009).

Rhoades's claims were inextricably intertwined with the state court judgment. Pet'r's App. B at 15–17. Rhoades's argument regarding the nature of his claim and the relief he seeks is at times circular and contradictory. But the bottom line is simple: the state trial court found it lacked jurisdiction over

Rhoades's Article 35.29 motion. Pet'r's App. A at 2. Rhoades disagrees. He now seeks to have this Court require the state court to agree with his interpretation of state law. This, a federal court cannot do. Pet'r's App. A at 4 (describing Rhoades's effort to avoid dismissal as "word play" because, "[s]tripped of its able advocate's clothing, Rhoades asked the district court to determine that Judge Martinez incorrectly applied state law"); Pet'r's App. B at 16.

Indeed, the entire basis of Rhoades's complaint was his allegation that he had a right to a ruling by the state trial court on his Article 35.29 motion (i.e., that Judge Martinez was *required* to find the state trial court had jurisdiction) and that he was entitled to the juror information. Pet'r's App. B at 16; Pet. Cert. at 28 ("Rhoades'[s] request in this [§] 1983 action was for the federal court to find only that due process entitles him [to] a decision from the state court on whether he is entitled to access to the materials."). But as the district court found, Judge Martinez did rule on the motion by finding the court lacked jurisdiction to reach its merits. Pet'r's App. B at 16. This was clearly an adjudication of the motion based on state law,[6] and a favorable ruling in federal

[6] The state trial court's judgment that it lacked jurisdiction to rule on the merits of Rhoades's motion was a pure matter of state law beyond a federal court's ability to disregard or overturn. Pet'r's App. B at 16; *see Cornejo v. County of San Diego*, 504 F.3d 853, 855 n.3 (9th Cir. 2007); *Lowell v. Poway Unif. Sch. Dist.*, 90 F.3d 367, 370–71 (9th Cir. 1996) ("To the extent that the violation of a state law amounts to the deprivation of a state-created interest that reaches beyond that guaranteed by the federal Constitution, [§] 1983 offers no redress."). And in any event, as discussed below, Judge Martinez's jurisdictional ruling was correct as a matter of state law.

court as to Rhoades's claims would require a holding that Judge Martinez incorrectly applied it. Rhoades's request for a federal court to find that Judge Martinez erred in her conclusion that the state trial court lacked jurisdiction to consider his Article 35.29 motion is improper because it sought to have a federal court require a state court do—i.e., find it had jurisdiction—what it found state law did not allow.[7] *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."); Pet'r's App. B at 16 ("Rhoades'[s] lawsuit necessarily acts as a challenge to Judge Martinez's jurisdictional decision."). This is the *definition* of inextricably intertwined. Pet'r's App. A at 4 ("[A] declination to rule for want of jurisdiction cannot be reframed as a denial of due process rooted in the state law rule.").

For the same reason, Rhoades's challenge to Judge Martinez's ruling, if successful, would effectively nullify the state court judgment. *See Lance v. Dennis*, 546 U.S. 459, 463 (2006) (noting the "aggrieved litigant cannot be permitted to do indirectly what he no longer can do directly") (quoting *Rooker*, 263 U.S. at 416). Rhoades's effort to conceal the true nature of his claims and

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[7] Notably, the TCCA's denial of Rhoades's motion for leave to file a petition for a writ of mandamus supports—at the very least implicitly—the conclusion that Judge Martinez appropriately interpreted state law in finding the court lacked jurisdiction over Rhoades's motion. *In re Rhoades*, 2021 WL 2964454, at *1.

the relief he requests fails to save his claims from dismissal. Pet'r's App. A at 4. Rhoades's complaint sought relitigation in federal court of his state-court request for access to juror information, which was plainly barred under *Rooker/Feldman*.[8] *See Liedtke*, 18 F.3d at 317–18 ("Liedtke's request for declaratory and injunctive relief, stripped to essentials, is an attack on the judgment of the state court."); *Reed v. Swilley*, 266 F. App'x 336, 337 (5th Cir. 2008) (per curiam) (affirming dismissal of lawsuit for lack of jurisdiction under *Rooker/Feldman* because the action essentially sought review of the state court's denial of a petition for writ of mandamus).

The Fifth Circuit also correctly concluded that Rhoades's reliance on *Skinner* was unfounded. Pet'r's App. A at 4–5 (describing the differences between *Skinner* and this case as "fundamental"). Unlike in *Skinner*, where the plaintiff "target[ed] as unconstitutional the Texas statute [the TCCA's decisions] authoritatively construed," 562 U.S. at 532, Rhoades challenged the state trial court's conclusion *in his case* that it lacked jurisdiction to consider

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[8] *See Reusser v. Wachovia Bank, N.A.*, 525 F.3d 855, 859 (9th Cir. 2008) (holding the *Rooker/Feldman* doctrine applies where the plaintiff does not directly contest the merits of a state court decision, but files an action that constitutes a "de facto" appeal from a state court judgment); *Noel v. Hall*, 341 F.3d 1148, 1158 (9th Cir. 2003) ("Once a federal plaintiff seeks to bring a forbidden de facto appeal . . . , that federal plaintiff may not seek to litigate an issue that is 'inextricably intertwined' with the state court judicial decision from which the forbidden de facto appeal is brought."); *Doe & Associates Law Offices v. Napolitano*, 252 F.3d 1026, 1030 (9th Cir. 2001) ("Where the district court must hold that the state court was wrong in order to find in favor of the plaintiff, the issues presented to both courts are inextricably intertwined.").

the merits of his motion. Skinner did not merely "point" to a state statute, Pet. Cert. at 26, he alleged it violated due process, *Skinner*, 562 U.S. at 532. Unlike Skinner, Rhoades does *not* allege Article 35.29 is unconstitutional, nor does he allege that jurisdictional limits on Texas trial courts are unconstitutional. Pet'r's App. A at 4–5. Rhoades's sole focus when discussing the purported merit of his claims on the state courts' application of state law—and his disagreement with the state courts' decisions in his case—only underscores the fact that his claims are inextricably intertwined with state law and belies his reliance on *Skinner*. Pet. Cert. at 29–32. Thus, *Skinner* is inapposite. *Id.*; *see Wade v. Monroe County District Attorney*, 800 F. App'x 114, 119 (3d Cir. 2020) ("Unlike the claim in *Skinner*, Wade contends that the [state court] misinterpreted the DNA statute in his case specifically, and in doing so, violated his procedural due process rights."); *Cooper v. Ramos*, 704 F.3d 772, 780 (9th Cir. 2012) (distinguishing *Skinner* because the plaintiff challenged the adverse state court decision and "articulate[d] no general challenge to the statute"); *Alvarez v. Attorney General for Fla.*, 679 F.3d 1257, 1263–64 (11th Cir. 2012).

Moreover, *Skinner* involved a challenge to Texas's *postconviction* DNA testing statute, which a trial court has jurisdiction to consider even after a conviction is final. *See Skinner*, 562 U.S. at 527 (citing Tex. Code Crim. Proc. art. 64); *see State v. Patrick*, 86 S.W.3d 592, 595 (Tex. Crim. App. 2002) ("When

a conviction has been affirmed on appeal and the mandate has issued, general jurisdiction is not restored in the trial court. The trial court has special or limited jurisdiction to ensure that a higher court's mandate is carried out and to perform other functions specified by statute, such as finding facts in a habeas corpus setting, or as in this case, determining entitlement to DNA testing.") (footnotes omitted). Rhoades challenges Judge Martinez's ruling on his Article 35.29 motion, which does not imbue a trial court with ongoing general jurisdiction. *See In re Rhoades*, 2021 WL 2964454, at *1.[9]

Again, Rhoades's complaint raised neither a procedural due process challenge to Article 35.29 nor a constitutional challenge to the jurisdictional limits under state law to a state court's consideration of an inmate's motion filed after the court loses jurisdiction over the case. Rhoades attempts to elide this critical and obvious distinction by insisting he only asked the district court to find his constitutional rights were violated because the state courts denied him a decision on the merits of his motion. Pet. Cert. at 28. But the trial court *ruled on his motion* and found it could not reach its merits because it lacked jurisdiction to do so. *See* Pet'r's App. B at 16. And while Rhoades insists his claim does not challenge the state court's decision but instead asserts the

[9] Rhoades relies heavily on Judge Yeary's dissent from the denial of leave to file a petition for a writ of mandamus for the proposition that the trial court had jurisdiction or a ministerial duty to rule on the merits of the motion, Pet. Cert. at 12, but that was not the opinion of the TCCA.

manner in which a state-created right was made available violated due process, Pet. Cert. at 24, he has not explained how that is so. Pet'r's App. A at 4. Despite Rhoades's effort to argue to the contrary, he plainly sought to have the district court hold the state court improperly found it lacked jurisdiction. *Id*. This was not an appropriate or cognizable constitutional claim. Consequently, *Skinner* is inapposite, and the district court lacked jurisdiction over Rhoades's claims.

2. Rhoades's complaint improperly requested mandamus relief.

Similarly, Rhoades's complaint improperly sought mandamus relief. That is, dissatisfied with the state trial court's ruling that it lacked jurisdiction to rule on his Article 35.29 motion and the TCCA's denial of his request for leave to file a mandamus petition, Rhoades sought to have the federal district court compel Judge Martinez to do what he believed the TCCA should have required her to do. Consequently, Rhoades's lawsuit was an improper request for mandamus relief by way of a federal court appeal of Judge Martinez's and the TCCA's rulings. *See Moye v. Clerk, DeKalb Cty. Superior Court*, 474 F.2d 1275, 1276 (5th Cir. 1973) ("[A] federal court lacks the general power to issue writs of mandamus to direct state courts and their judicial officers in the performance of their duties where mandamus is the only relief sought."); *Pruett*, 2017 WL 4277206, at *5.

The Fifth Circuit in *Pruett* found the district court's holding that the plaintiff's lawsuit sought mandamus relief "well taken," *Pruett v. Choate*, 711 F. App'x 203, 206 nn.9, 10 (5th Cir. 2017), because without a meritorious due process claim, the lawsuit improperly sought to have a federal court command the state court to properly enforce state law. *Id.* at 206 n.10. As the district court found here, Rhoades's complaint failed to allege a violation of federal law. Pet'r's App. B at 12–13. Consequently, "stripped of a meritorious due-process claim," *Pruett*, 711 F. App'x at 206 n.10, Rhoades's civil rights action was nothing but a mandamus petition in disguise, *see Ramirez v. McCraw*, 715 F. App'x 347, 350 (5th Cir. 2017) (finding the district court "accurately analyzed" the plaintiff's request for "an injunction requiring the defendants to release the biological material on which he asks for DNA testing" as tantamount to an impermissible writ of mandamus); *Mount v. Court of Criminal Appeals*, No. H-17-3056, 2017 WL 6761860, at *2 (S.D. Tex. Nov. 20, 2017) (finding the plaintiff's request for the federal court to, *inter alia*, order the state court to "honor the DNA motion [he] sent them" was an improper request for mandamus relief).

The district court properly concluded it lacked subject matter jurisdiction over Rhoades's complaint, and Rhoades cannot show he is likely to succeed on the merits of jurisdictionally barred claims. Therefore, this Court should deny Rhoades's application for a stay of execution.

B. Judge Martinez is entitled to sovereign immunity.

The district court also properly held it lacked jurisdiction because Judge Martinez is entitled to sovereign immunity.[10] Pet'r's App. B at 9–13. Indeed, federal courts are courts of limited jurisdiction, *Gunn v. Minton*, 568 U.S. 251, 256 (2013), and Rhoades bore the burden of establishing the district court had subject matter jurisdiction, *see In re FEMA Trailer Formaldehyde Pros. Liab. Litig.*, 668 F.3d 281, 286 (5th Cir. 2012). A suit brought against a state official acting in his or her official capacity is akin to a suit against the State itself. *See, e.g., Hafer v. Melo*, 502 U.S. 21, 25 (1991). A state district judge, like Judge Martinez, is "undeniably" a state official for purposes of sovereign immunity. Pet'r's App. B at 10; *see Holloway v. Walker*, 765 F.2d 517, 525–26 (5th Cir. 1985). A narrow exception to sovereign immunity exists where (1) the suit is brought against a state officer acting in her official capacity, (2) the plaintiff seeks prospective relief that will redress ongoing conduct, and (3) the complaint alleges a violation of federal law. Pet'r's App. B at 11.

Rhoades sued Judge Martinez in her official capacity. Pet. Cert. at 3. But as the district court found, there is no ongoing violation. Pet'r's App. B at 12. And although Rhoades attempted to characterize the relief he sought as declaratory and prospective, his complaint was based on the allegation that

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[10] The Fifth Circuit declined to address the issue of sovereign immunity. Pet'r's App. A at 5.

Judge Martinez's *past* ruling on his Article 35.29 motion denied him his constitutional rights.[11] Pet'r's App. B at 12. Consequently, Rhoades failed to establish an exception to sovereign immunity. Pet'r's App. B at 12. Moreover, the district court held Rhoades failed to show Judge Martinez violated his constitutional rights by finding the state trial court lacked jurisdiction over his Article 35.29 motion. Pet'r's App. B at 12–13. Therefore, the district court properly dismissed Rhoades's complaint because Judge Martinez was entitled to sovereign immunity and the court was without subject matter jurisdiction. Pet'r's App. B at 13. For the same reasons, Rhoades's claims cannot justify a stay of execution. *See Booker v. Koonce*, 2 F.3d 114, 116 (5th Cir. 1993) ("A claim against a defendant who is immune from suit is frivolous because it is based upon an indisputably meritless legal theory.").

IV. Rhoades's Complaint Was Subject to Dismissal on the Grounds of Abstention and Limitations and Because It Failed to State a Facially Plausible Claim for Relief.

The district court dismissed Rhoades's complaint for lack of subject matter jurisdiction and declined to consider whether Rhoades's complaint should be dismissed for failing to state a claim upon which relief could be granted. Pet'r's App. B at 17. The Fifth Circuit also declined to reach these issues. Pet'r's App. A at 5. As Judge Martinez showed, the complaint was also

[11] For the same reasons, Judge Martinez was entitled to judicial immunity. *See* ROA.87.

dismissible on abstention and limitations grounds. Additionally, Rhoades's claims are plainly meritless.

A. Rhoades's complaint was subject to dismissal based on the abstention doctrine.

To the extent Rhoades alleged an ongoing violation of his rights, his complaint was subject to dismissal based on the abstention doctrine. *See Younger v. Harris*, 401 U.S. 37 (1971). The *Younger* abstention doctrine requires a federal court to decline to exercise jurisdiction over a suit where three factors are met: (1) the dispute involves an ongoing state judicial proceeding; (2) an important state interest in the subject matter of the proceeding is implicated; and (3) the state proceedings afford an adequate opportunity to raise constitutional challenges.[12] *Wightman v. Tex. Supreme Ct.*, 84 F.3d 188, 189 (5th Cir. 1996). First, Rhoades contended the state court proceedings were ongoing. ROA.103. Second, the State has an important interest in the enforcement of its laws. *See Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 12–13 (1987). Third, Rhoades had the opportunity to raise his constitutional challenges in the state court proceedings. Thus, to the extent Rhoades's

[12] The *Younger* abstention doctrine is subject to three exceptions: (1) the state court proceeding was brought in bad faith or to harass the plaintiff; (2) the state statute is "flagrantly and patently violative" of the Constitution; or (3) application of the doctrine was waived. *Younger*, 401 U.S. at 49, 53. None of the exceptions apply here.

complaint was founded on an allegation of an ongoing violation of his rights, the *Younger* abstention doctrine barred his suit.

B. Rhoades's complaint was barred by limitations.

Claims brought via § 1983 are best characterized as personal injury actions and are therefore subject to a state's personal injury statute of limitations. *See Wilson v. Garcia*, 471 U.S. 261, 279 (1985);[13] *Walker v. Epps*, 550 F.3d 407, 412–14 (5th Cir. 2008). Texas's limitations period is two years. Tex. Civ. Prac. & Rem. Code § 16.003(a) (West 2021). While state law provides the applicable limitations period, federal law determines when the limitation period accrues. *Willis v. Nelson*, 56 F.3d 1386, 1995 WL 337909, at *2 (5th Cir. 1995). "An injury accrues when a plaintiff first becomes aware, or should have become aware, that his right has been violated." *Reed v. Goertz*, 995 F.3d 425, 431 (5th Cir. 2021), *pet. cert. filed,* No. 21-442.

Rhoades's complaint alleged he was harmed by Judge Martinez's ruling that the state trial court lacked jurisdiction over his Article 35.29 motion because, without the juror information he sought, he cannot develop a *Batson* claim. ROA.28. But Rhoades raised *Batson* claims on direct appeal, *Rhoades v.*

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[13] Congress enacted 28 U.S.C. § 1658, which overturned *Wilson* by imposing a four-year statute of limitations for civil actions, but that limitations period applies only to causes of action that arise under Federal statutes that were enacted after December 1, 1990. *See Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382–83 (2004).

State, 934 S.W.2d at 123–25, and again in his federal habeas proceedings, *Rhoades v. Davis*, 914 F.3d at 376–82. Indeed, Rhoades noted in his federal habeas petition—filed on March 31, 2015—that the state court records did not include demographic information of the venire. Pet. 48 n.14, *Rhoades v. Stephens*, No. 4:14-CV-3152 (S.D. Tex.), ECF No. 13.

Rhoades argued in the courts below that his limitations period did not commence at the earliest until February 4, 2021, when the prosecuting office informed him that it had juror information in its possession. ROA.107. However, this argument elides the fact that decades passed after Rhoades's trial—while he was presumably aware that he lacked the juror information he now seeks—before even asking the prosecuting office to disclose it. To the extent Rhoades might argue he was unaware of the relevance of a comparative analysis until this Court discussed such an approach in *Miller-El II*,[14] the argument would be baseless because the concept of a comparative analysis was recognized even before Rhoades's trial. *See Young v. State*, 826 S.W.2d 141, 144 (Tex. Crim. App. 1991) (en banc) ("[W]e would urge defense counsel to make comparisons as part of his rebuttal evidence either during his cross-examination of the State's attorney or during the *Batson* hearing, as suggested in *Tompkins*, because the trial judge's findings are accorded great deference

[14] *Miller-El v. Cockrell*, 545 U.S. 231 (2005) (*Miller-El II*).

upon appellate review."). Moreover, *Miller-El II* was issued in 2005, during the pendency of Rhoades's state habeas proceedings.

Rhoades's choice to wait until the prosecuting office evinced an intent to seek the setting of an execution date should not delay accrual of his limitations period. *See King-White v. Humble Independent School Dist.*, 803 F.3d 754, 762 (5th Cir. 2015) ("'[A] claim accrues and 'the limitations period begins to run the moment the plaintiff becomes aware that he has suffered an injury *or has sufficient information to know that he has been injured*.'") (quoting *Spotts v. United States*, 613 F.3d 559, 574 (5th Cir. 2010)) (emphasis added). Because Rhoades's complaint was time-barred, his application for a stay of execution should be denied.

C. Rhoades's claims are facially meritless.

Rhoades fails to identify any controlling precedent showing he has a constitutionally protected right to require the state court to find it had jurisdiction to rule on the merits of his Article 35.29 motion or to compel the state court to find he showed good cause for disclosure of juror information. And as the district court found, Rhoades cited no controlling support for the notion that there exists an absolute, freestanding right to disclosure of juror

information.[15] Pet'r's App. B at 12–13. Therefore, as discussed below, Rhoades's claims were facially meritless.

The bases of Rhoades's complaint were his allegations that Judge Martinez denied him his right to due process and equal protection by concluding the state trial court was without jurisdiction to consider his Article 35.29 motion and that Article 35.29 created a right to a process that he must be allowed to utilize. ROA.29. As the district court and Fifth Circuit found, however, Rhoades's entire complaint was founded on the erroneous notion that Judge Martinez did not rule on his motion. Pet'r's App. A at 4; Pet'r's App. B at 16; *see* Appellant's Br. 21, *Rhoades v. Martinez*, No. 21-70007 (5th Cir. Sept. 22, 2021) ("Defendant's decision to not make a decision denied Rhoades the procedural due process he was due, which includes both a decision from her court and also a decision on appeal."). Indeed, Judge Martinez *did* rule by finding the state trial court lacked jurisdiction. Pet'r's App. A at 4 ("[A] declination to rule for want of jurisdiction cannot be reframed as a denial of due process rooted in the state law rule."); Pet'r's App. B at 16. Rhoades cites no support for the conclusion that Judge Martinez was constitutionally

[15] Rhoades states this was an alternative claim, Pet. Cert. at 28 n.8, but he does not raise it in his petition. It is, therefore, waived. Moreover, as Judge Martinez showed in the court below, such a claim was plainly meritless. Appellee's Br. 32–34, *Rhoades v. Martinez*, No. 21-70007 (5th Cir. Sept. 24, 2021).

obligated to find the state court had jurisdiction to consider the merits of Rhoades's motion.

Further, Rhoades failed to raise a plausible procedural due process or equal protection claim. As discussed above, Rhoades did not allege Article 35.29 is facially unconstitutional. And insofar as he alleged Article 35.29 was a state-created right that begat a liberty interest in demonstrating an infirmity in his conviction, Rhoades failed to show the existence of an underlying right to disclosure of juror information for a comparative analysis that triggers due process protection. Pet'r's App. B at 13; *see Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 463 (1981). Additionally, Article 35.29 does not imbue Rhoades with a state-created right to demonstrate his innocence—the underlying *Batson* claim Rhoades wishes to litigate is not about innocence at all. *See District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68–69 (2009). And importantly, this Court has explained that a State has "more flexibility in deciding what procedures are needed in the context of postconviction relief" and that due process does not dictate the form of such assistance. *Id*. at 69.

Indeed, due process does not require a state trial court to find jurisdiction where it does not exist. *See Howlett By and Through Howlett v. Rose*, 496 U.S. 356, 372 (1990) ("When a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, we must act with utmost

caution before deciding that it is obligated to entertain the claim. . . . The States thus have great latitude to establish the structure and jurisdiction of their own courts."); *Medina v. California*, 505 U.S. 437, 444 (1992) ("[I]t has never been thought that [decisions under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure.") (alteration in original) (quoting *Spencer v. Texas*, 385 U.S. 554, 564 (1967)); *Medina*, 505 U.S. at 446 (a state procedural limitation "is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental") (quoting *Patterson v. New York*, 432 U.S. 197, 201–02 (1977)). Rhoades neither acknowledges this Court's precedent *greatly* constraining a federal court's ability to disregard a state court's jurisdictional limits, nor does he cite to any precedent supporting his assertion that a federal court can do so. Yet the basis of Rhoades's complaint was that Judge Martinez *had* to find she had jurisdiction to consider the merits of his motion. Indeed, the entire basis of Rhoades's claims rests on his own assessment of state law. Pet. Cert. at 29–33. But his disagreement with the state courts regarding the contours of their jurisdiction does not support the conclusion that there exists a constitutional right to impel a state court to find it had jurisdiction where it found it did not. *See Medina*, 505 U.S. at 444.

Stated another way, the state trial court's conclusion that it lacked jurisdiction to consider the merits of Rhoades's motion—decades after his conviction became final and long after his state habeas proceedings concluded—did not violate Rhoades's constitutional rights. Neither Article 35.29 nor the jurisdictional limits on Texas courts are "fundamentally inadequate" simply because Rhoades failed to seek the juror information until twenty-five years after his conviction was final and seven years after his state habeas proceedings concluded. *See Osborne*, 557 U.S. at 69.

Even if a federal court could question Judge Martinez's conclusion that the state trial court lacked jurisdiction to consider the merits of Rhoades's motion, the Court would find no error. Indeed, state court precedent shows Judge Martinez appropriately found she lacked jurisdiction to consider the merits of Rhoades's motion and that Rhoades was not treated differently than similarly situated individuals. First, none of the cases on which Rhoades relied for the assertion that the state trial court was obligated to rule on the merits of his Article 35.29 motion were in an unmoored procedural context—i.e., filed post-finality and unconnected to any pending litigation—like his. *See, e.g., Green v. State*, No. AP-77,088, 2020 WL 1540426, at *1 (Tex. Crim. App. March 30, 2020) (direct appeal); *Gonzalez v. State*, No. AP-77,066, 2017 WL 782735, at *1 (Tex. Crim. App. March 1, 2017) (direct appeal); *In re Middleton*, No. 04-15-00062-CR, 2015 WL 1004233, at *1 (Tex. App.—San Antonio March 4, 2015)

(mandamus proceeding connected to a pending direct appeal); *Falcon v. State*, 879 S.W.2d 249, 250 (Tex. App.—Houston [1st Dist.] 1994) (direct appeal). Nor were any of the cases in the context of a subsequent state habeas proceeding.[16]

Rhoades makes the sweeping assertion that he was treated uniquely when compared to the inmates in the forty-eight other reported cases involving Article 35.29. Pet. Cert. at 11, 23, 29. Yet Rhoades acknowledges that only three of the cases may even remotely resemble his, i.e., where a motion was filed post-finality. Pet. Cert. at 29. That is, Rhoades acknowledges *forty-five* of the state court decisions do not show the state court's jurisdictional decision in his case was arbitrary. But even then, Rhoades is incorrect because the three cases on which he relies do not contradict Judge Martinez's decision.

In *In re Green*, No. WR-62,574-05, 2015 WL 5076812, at *1 (Tex. Crim. App. Aug. 26, 2015), the TCCA held a petition for leave to file a writ of mandamus in abeyance where the inmate sought to unseal a volume of the trial transcript. The TCCA ordered the trial court to answer *in the first place* whether, *inter alia*, the volume contained personal information about jurors. *Id*. While Rhoades asserts Green's conviction became final in February 2014, Pet. Cert. at 30, Green was granted habeas corpus relief on January 28, 2015,

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[16] Even if Rhoades had filed a subsequent state habeas application raising a *Batson* claim prior to filing his Article 35.29 motion, the trial court would not have had jurisdiction unless the TCCA first determined the application satisfied the abuse-of-the-writ requirements. Tex. Code Crim. Proc. art. 11.071 § 5(c).

so that he could file an out-of-time petition for discretionary review in the TCCA. Op., *Ex parte Green*, No. WR-62,574-03 (Tex. Crim. App. Jan. 28, 2015). The TCCA refused Green's petition for discretionary review on June 17, 2015,[17] months after he filed his Article 35.29 motions in the trial court.[18] The TCCA denied Green's motion for leave on November 4, 2015.[19] The TCCA's unreasoned order denying leave is far from elucidating as to whether Rhoades was treated differently than similarly situated individuals when the state trial court concluded in his case that it lacked jurisdiction to consider the merits of his motion. Yet Rhoades seems to interpret the TCCA's silent denial of leave to file a mandamus petition as an authoritative construction of Article 35.29. It goes without saying that this reading of *In re Green* is more than it can bear.

Even assuming *arguendo* the TCCA's actions in *In re Green* (i.e., requesting a response from the trial judge and denying leave) were inconsistent with the state courts' decisions in Rhoades's case, he could still not show arbitrariness. Rhoades analogizes the state trial court's jurisdictional

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17 https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=9cf694b4-a028-436b-bed3-997b3f281c29&coa=coscca&DT=PDR%20DISP&MediaID=003c7506-a012-47ac-8fee-cf6100433c2f

18 *See* https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=d74551fb-d058-40f0-89bb-f32f67d4b494&coa=coscca&DT=RECORD&MediaID=77e421f5-a9c3-41a3-b6fc-a08160e58b64

19 https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=96be86b1-196c-4f5f-9b32-8aa04a11d3e3&coa=coscca&DT=ACTION%20TAKEN&MediaID=e5a24aac-ca70-4caf-a464-069ecfde221c

decision to a procedural bar that is not regularly followed. Pet. Cert. at 11. But this Court has found a state procedural rule consistently and regularly followed where it is applied "[i]n the vast majority of cases." *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989). Rhoades's failure to identify any, let alone many, cases in which inmates in the same procedural posture as his were treated differently precludes him from showing arbitrariness.

Rhoades also relies on the appellate court's opinion in *Hazlip* for the proposition that a Texas trial court has jurisdiction over an Article 35.29 motion after a conviction is final, despite the fact that the court did not address whether the trial court had jurisdiction. *Hazlip v. State*, No. 09-14-00477-CR, 2015 WL 184043, at *1 (Tex. App.—Beaumont Jan. 14, 2015) (dismissing appeal for want of jurisdiction because "[a] trial court may disclose juror information in certain circumstances, but the statute that authorizes the trial court's action does not expressly authorize an appeal of an adverse ruling on a request that is made in a closed case"). Nothing in *Hazlip* indicates on exactly what basis the trial court rejected the Article 35.29 motion or that the appellate court found the trial court had jurisdiction over it. *Id*. Rhoades's inference from the court's silence does not reveal an authoritative construction of state law or arbitrariness.

Lastly, Rhoades relies on the appellate court's opinion *In re Fain*, No. 02-12-00499-CV, 2012 WL 6621784, at *1, 1 n.2 (Tex. App.—Fort Worth Dec. 20,

2012) (dismissing for want of jurisdiction petition for a writ of mandamus seeking access to sealed juror information). In that case, the court explained, "[j]urisdiction to grant relief from a *final* felony conviction rests exclusively with the [TCCA] through a petition for a writ of habeas corpus under article 11.07 of the code of criminal procedure. Thus, we conclude that *we have no jurisdiction* in this original proceeding in which relator seeks the record from his criminal trial for the purpose of challenging his *final* felony conviction." *Id*., at *1 (emphasis added, citations omitted). Rhoades baselessly interprets this *dismissal for lack of jurisdiction due to the finality of the inmate's conviction* as supportive of his assertion that he was treated differently when his motion was denied for lack of jurisdiction.

Rhoades's claims rest entirely on these three cases—the unreasoned, silent denial of leave in *In re Green* and the dismissals for want of jurisdiction in *Hazlip* and *In re Fain*—for the proposition that the Texas state courts have arbitrarily denied him access to a state-created right. Pet. Cert. at 29. But as discussed above, Rhoades fails to identify any clear precedent supporting his interpretation of state law. Indeed, Rhoades does not reckon with the TCCA's repeated exhortations that, once "a conviction has been affirmed on appeal and mandate has issued, general jurisdiction is not restored to the trial court."[20]

[20] Rhoades has not explained, for instance, how a trial court's ruling on an Article 35.29 motion—long after a conviction has been affirmed and the state habeas

Staley v. State, 420 S.W.3d 785, 795 (Tex. Crim. App. 2013) ("A trial court can obtain post-conviction jurisdiction over a case under many statutes, for example, to set the date of execution, conduct DNA testing, or, as here, determine whether an inmate is competent to be executed.") (citations omitted); *see Ex parte White*, 506 S.W.3d 39, 51 (Tex. Crim. App. 2016) ("*Patrick* and its progeny further contradict the notion that a court can be required by constitutional principles to consider claims under a remedial statute that are not authorized by the language of that statute."); *Patrick*, 86 S.W.3d at 595; *see also In re Cash*, No. 06-04-00045-CV, 2004 WL 769473, at *1 (Tex. App.—Texarkana Apr. 13, 2004, orig. proceeding) ("In general, . . . [a trial court] does not have a duty to rule on free-floating motions unrelated to currently pending actions. In fact, it has no jurisdiction to rule on a motion when it has no plenary jurisdiction coming from an associated case.").

There was nothing arbitrary about the state courts' rulings in Rhoades's case. Perforce, he fails to show he was denied a state-created right or a liberty interest or that he was denied equal protection, and his claims were plainly

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proceedings have concluded—could be intended to carry out the higher court's mandate. *See Patrick*, 86 S.W.3d at 594 ("The trial court has special or limited jurisdiction to ensure that a higher court's mandate is carried out[.]"). Indeed, a trial court would be without jurisdiction to consider a *Batson* claim raised in a subsequent habeas application without authorization by the TCCA to do so. Tex. Code Crim. Proc. art. 11.071 § 5(c). On the other hand, a trial court's setting an execution date and determining an inmate's competency to be executed *are* in furtherance of a higher court's mandate. *Patrick*, 86 S.W.3d at 595.

without merit. Therefore, this Court should deny Rhoades's application for a stay of execution.

V. A Stay of Execution Would Further Delay Enforcement of a Long Final Judgment and the Equities Weigh Heavily Against a Stay of Execution.

Lastly, Rhoades failed to justify a stay where it would further delay enforcement of a long final judgment. As discussed above, Rhoades's claims have no chance of succeeding on the merits, nor does Rhoades present a substantial case or a serious legal question. The "fundamental" difference between Rhoades's claims and those in *Skinner* belie his argument that there is a significant possibility this Court will reverse the Fifth Circuit's well-reasoned opinion. Pet'r's App. A at 4. Moreover, as discussed below, Rhoades failed to show the victims would not be substantially harmed by a stay, that the public interest favors a stay, or that the balance of equities tilts in his favor. Therefore, this Court should decline to stay Rhoades's execution.

First, Rhoades's claims are plainly dilatory. *See Hill*, 547 U.S. at 584. As discussed above, Rhoades argued his claims were not time-barred because he raised them months after he was told by the prosecuting office that it had juror information in its possession. ROA.107. Even assuming the claims are not time-barred, Rhoades's failure to seek the juror information until after the prosecuting office expressed an intent to seek the setting of an execution date disentitles him to a stay of execution. And as the district court noted, Rhoades

fails to show what diligent efforts he has made to obtain the juror information.[21] Pet'r's App. B at 5. As the district court appropriately observed, Rhoades failed to show he would be unable to confirm through investigative means the racial identity of the one juror whose race he allegedly does not know. *Id.*

Second, Rhoades fails to show he would be substantially harmed without a stay, that the public interest favors a stay, or that the balance of equities favors a stay because the comparative analysis Rhoades purports to wish to conduct could not uncover a meritorious *Batson* claim.[22] As the district court noted, the comparative analysis Rhoades wishes to engage in requires the racial identity of only one juror, and the prosecutor stated the juror information in his possession did not indicate the race of that juror. Pet'r's App. B at 5–6. Moreover, the prosecutor at Rhoades's trial stated twelve of the State's fourteen peremptory strikes were against white veniremembers, a statement the trial court agreed with. *See Rhoades v. Davis*, 914 F.3d at 381. The two other veniremembers the prosecutor struck, Berniece Holiday and Gregory

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[21] Rhoades's initial federal habeas counsel stated more than six years ago she attempted to obtain the files of Rhoades's previous attorneys, but they did not have their files. Pet. Cert. at 16 n.2.

[22] It also bears repeating that Rhoades has no right to compel the state court to find it has jurisdiction over his Article 35.29 motion. Rhoades cannot satisfy his burden under *Hill* where he has no right to any additional process in state court regarding his request for juror information.

Randle, were Black and were struck for race-neutral reasons. *Rhoades v. Davis*, 914 F.3d at 377. In light of that, Rhoades cannot identify any as-of-yet unidentified stricken veniremember whom the prosecutor might have struck for racially discriminatory reasons. Pet'r's App. A at 5. Moreover, the Fifth Circuit conducted a thorough "side-by-side" comparison of Ms. Holiday and Mr. Randle with white jurors who served, a comparison that is more powerful than the bare statistics that Rhoades seeks to develop.[23] *Rhoades v. Davis*, 914 F.3d at 381. The Fifth Circuit concluded Rhoades's claim that Ms. Holiday and Mr. Randle were subject to disparate questioning was belied by the record and that the race-neutral reasons proffered by the prosecutor for striking Ms. Holiday were not "sincere[ly]" challenged by Rhoades. *Id.* at 382. Rhoades simply cannot justify a stay of execution considering the utter implausibility that any juror information he could obtain would result in his raising a meritorious *Batson* claim.

Importantly, Rhoades could only make use of juror information by way of a subsequent state habeas application or a successive federal habeas petition. Rhoades has not shown that the TCCA would find a *Batson* claim raised in a subsequent state habeas application would satisfy article 11.071

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[23] Contrary to Rhoades's assertion, the Fifth Circuit did not reject his *Batson* claim "largely because [he] was not able to present a thorough juror comparison." Pet. Cert. at 16–17.

§ 5. And a successive federal habeas petition raising such a claim would be indisputably barred. 28 U.S.C. § 2244(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.").

As discussed above, Rhoades's claims are jurisdictionally barred, time-barred, and meritless. For the same reasons, Rhoades cannot show he will be irreparably harmed if denied a stay of execution. *See Walker v. Epps*, 287 F. App'x 371, 375 (5th Cir. 2008) ("[T]he merits of his case are essential to our determination of whether [a prisoner] will suffer irreparable harm if a stay does not issue."). In the end, Rhoades waited decades to seek juror information after unsuccessfully litigating *Batson* claims at trial, on direct appeal, and in federal court. Rhoades cannot justify a stay of execution after such a delay. His failure to diligently pursue his rights precludes him from showing that equity favors a stay of execution. *See Pruett*, 711 F. App'x at 208 ("Pruett has failed to present even a substantial case on the merits. Given that factor, alongside the significant litigation and re-litigation in both state and federal court, Pruett is not entitled to a stay."). Therefore, this Court should deny Rhoades's application for a stay of execution.

CONCLUSION

Rhoades fails to identify any error in the Fifth Circuit's opinion, and he fails to justify his request for a stay of execution. Rhoades's application for a stay of execution should be denied.

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