No. 21A43

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

RHOADES' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO HIS MOTION FOR STAY OF EXECUTION PENDING FILING, CONSIDERATION, AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

This is a capital case. Mr. Rhoades is scheduled to be executed today.

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Rick Rhoades filed his Motion for Stay of Execution Pending Filing, Consideration, and Disposition of Petition for Writ of Certiorari ("Stay") on September 27, 2021. Respondent filed her Brief in Opposition ("BIO") today. Rhoades now files this Reply to Respondent's Brief in Opposition.[1]

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[1] In this Reply, Rhoades responds only to those assertions made by Respondent he deems merit a reponse.

I. Contrary to Respondent's repeated assertion that Petitioner asked the federal court to grant mandamus relief, Petitioner requested declaratory relief alone, not a coercive remedy.

In its Brief in Opposition, Respondent asserts on no fewer than six occasions that "Rhoades[] . . . improperly requested mandamus relief" from the federal court. *See, e.g.*, BIO at ii, 2, 7, 11, 18, 19. The repetition of this mischaracterization of Rhoades' Complaint, however, does not make the assertion accurate. Rather, with respect to Rhoades' attempt to enjoy the process he was due under Article 35.29 of the Texas Code of Criminal Procedure, his § 1983 "Complaint asked the district court to issue a declaratory judgment that [he] was entitled to a decision on the merits of his motion filed in the state trial court." Plaintiff-Appellant's Br. 12, *Rhoades v. Martinez*, No. 21-7007 (5th Cir. Sept. 27, 2021) (citing ROA.30).[2] The injury he asserted, as discussed in the following section, was a violation of his Fourteenth Amendment right to due process. He did not ask the federal court to provide that process, for that court would have been unable to do so. But, relying on the integrity of the state courts to act in accordance with state law following a declaration by the federal court that he had not received the process he was due, Rhoades asked the federal court solely to grant that declaratory relief.

Neither Respondent nor the court below take issue with the proposition that a federal court has power to declare, in an action brought pursuant to § 1983, that a state has violated the plaintiff's right to due process by the manner in which it

[2] In this pleading, Rhoades cites to the record on appeal in the court of appeals according to that court's rule as ROA.[page number].

applied state law. Instead, both Respondent and the court below mischaracterize the relief Rhoades has consistently sought. Read properly, however, Rhoades' complaint asks the federal court to grant relief it has the power to grant.

II. Rhoades Complaint alleged that his right to procedural due process was violated by manner in which the state courts construed Article 35.29 in his case.

Throughout her Brief in Opposition, Respondent mischaracterizes Rhoades' Complaint as having asked the federal court to order Judge Martinez to find she had jurisdiction. As explained above, the Complaint did not ask the district court order Judge Martinez to do anything. Moreover, the Complaint did not ask the district court to make any determination regarding whether Judge Martinez had jurisdiction. Instead, the Complaint asked the district to find that Rhoades' right to due process had been violated by the manner in which the state courts had construed Article 35.29 in his case. Specifically, in the state court proceeding, the state courts construed the process afforded by Article 35.29 as being one that is available only to defendants in whose cases mandate has not issued.[3] It appears

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[3] In the portion of her Brief in Opposition that addresses *In re Green*, No. WR-62,574-05 (Tex. Crim. App. Aug. 26, 2015), Respondent, in this Court, has apparently shifted her position somewhat and seems to suggest that she does not believe mandate strips a trial court of 35.29 jurisdiction in all cases. BIO at 30-31 (discounting that mandate issued before the 35.29 motions were filed and instead emphasizing the date on which a petition for discretionary review was filed). This shift makes it difficult discern what event Judge Martinez believes strips a trial court of jurisdiction over an Article 35.29 motion. In the proceeding in the court of appeals, she argued the mandate having issued is what left her without jurisdiction. *See* Defendant-Appellee's Brief at 22, 41 (citing *State v. Patrick*, 86 S.@.3d 592 (Tex. Crim. App. 2002), and *Staley v. State*, 420 S.W.3d 785 (Tex. Crim. App. 2013). The mandate issued in Green's case on February 26, 2014, before Green filed his Article 35.29 motions. Stay at 30. The application does not claim his conviction became

that—and Respondent has yet to offer any counterexamples—this is the first time a Texas court has so construed Article 35.29.

The legislative history could not be clearer that the Legislature intended Article 35.29's process to be available to defendants during post-conviction proceedings. Specifically, the author of the bill which amended the statute in 2013 noted that post-conviction counsel had to apply to the court to get access for confidential juror information. Bill Analysis, Tex. S.B. 270, 83d Leg., R.S. (2013), *available at* https://capitol.texas.gov/tlodocs/83R/analysis/pdf/SB00270F.pdf#navpanes=0 ("In post-conviction capital defense cases, post-conviction counsel must apply to the trial court for access to juror information."). In other words, the Legislature believes the process is available to defendants after mandate has issued.

Moreover, the CCA's own actions in *In re Green*, No. WR-62-574-05 (Tex. Crim. App. Aug. 26, 2015) make clear that that court did not believe the trial court lacked jurisdiction to consider an Article 35.29 motion filed after mandate issued. *See supra* n.3. While Respondent now attempts to distinguish *Green*, what she cannot explain away is that two judges of the CCA made clear in proceedings in this case that they believe that the court did have jurisdiction over Rhoades' motion. *In re Rhoades*, No. WR-78,124-02, 2021 WL 2964454, at *1 (Tex. Crim. App. July 14, 2021) (Yeary, J., dissenting). Respondent has been unable to cite any cases to this

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final on that day as Respondent's Brief in Opposition asserts. *See* BIO at 30 ("Rhoades asserts Green's conviction became final in February 2014").

Court or any court that hold she did not have jurisdiction to consider Rhoades' motion. Notwithstanding the lack of any cases requiring her to do so (or even suggesting it was the correct decision), Judge Martinez found she did not have jurisdiction and dismissed Rhoades' motion without issuing a decision on its merits. (And, again, the record makes clear that the trial court, in fact, found that Rhoades had met his burden with respect to the juror card. Stay at 22.)

With this action began the ongoing violation of Rhoades' due process rights which he asked the federal court to issue a declaratory judgment about in his Complaint. Of course, there was an opportunity for the CCA to act in such a way as to bring that violation to an end. Specifically, the CCA could have ordered the trial court to reach a decision on the merits of Rhoades' motion. The CCA, however, did not do that. The result of the trial court's initial action, combined with the CCA's failure to correct that action, was that Article 35.29 was construed by the state courts in a way such that its processes are no longer available to defendants who file their Article 35.29 motions after mandate issues. The CCA offered no explanation for its failure to grant leave (and this Court should not interpret the CCA's unreasoned order as indicating the CCA affirmed Judge Martinez's decision despite Respondent's desire for the Court to do so). Because of this, Rhoades has been denied his state-created right to seek access to these juror materials. (Though Respondent now argues these materials are incapable of supporting a meritorious *Batson* claim, this Court is well-aware that a prosecutor's copy of these types of materials might contain evidence that demonstrates the challenges he made to the

venire at trial were based on racial animus. *Foster v. Chatman*, 136 S. Ct. 1737, 1748 (2016).)

This due process violation was the subject of Rhoades' Complaint. ROA.26-29. The Complaint did not ask the district court to analyze whether the trial court had jurisdiction. *See id.* The Complaint did not ask the district court to order the trial court to do anything. *See id.* The Complaint only asked the trial court to declare that the arbitrary manner in which the state courts construed Article 35.29—finding for the first time that its process is unavailable to defendants after mandate has issued—violated Rhoades' right to due process.

III. The Fifth Circuit's interpretation of the *Rooker-Feldman* doctrine is inconsistent with this Court's holding in *Skinner* and, if not corrected by this Court, will eviscerate the power of federal courts to protect the due process and equal protection guarantees implicit in protections provided by state law.

In *Skinner*, this Court observed that it has applied the so-called *Rooker-Feldman* abstention doctrine in only two cases (i.e., those that bear the doctrine's name). *See Skinner v. Switzer*, 562 U.S. 521, 531-32 (2011). The Court emphasized that the doctrine precludes an attack on an adverse state court judgment, and it is clear in context that this Court was addressing a state court merits-based decision.

Rhoades has not challenged a state court's decision. On the contrary, he has challenged the state courts' refusal to decide whether, under article 35.29, he has established good cause. As Petitioner has stressed, article 35.29 has been the subject in forty-eight reported Texas cases. His is the only one where the trial court declined even to address his entitlement to the information he sought and the CCA

subsequently declined to intervene. His complaint, therefore, is a quintessential claim to the process afforded by the state courts, and not to the state court decision itself (for there is no state court decision).

This Court's holding in *Skinner* dictates that a claim like that of Rhoades' is appropriately pursued in federal court under 42 U.S.C. § 1983. To be sure, Rhoades is complaining about *something* that took place in state court, but he is not complaining about the state court's holding or decision; he is complaining that his case, unlike most if not all other cases involving the same statute, was treated disparately and without due process.

The Fifth Circuit, however, in both this case and a litany of actions arising under § 1983, has invoked the *Rooker-Feldman* doctrine to bar the federal courts from addressing a due process challenge to state court procedures. Indeed, whereas this Court's own reliance on *Rooker-Feldman* has been exceedingly rare, the Fifth Circuit's invocation of the doctrine has been prolific. *E.g.*, *Richard v. Hoechst Celanese Chemical Group*, 355 F.3d 345, 350 (5th Cir. 2003); *Price v. Porter*, 351 F. App'x 925 (5th Cir. 2009); *Moore v. Texas Court of Criminal Appeals*, 561 F. App'x 427, 430-31 (5th Cir. 2014); *but see Burciaga v. Deutsche Bank National Trust Co.*, 871 F.3d 380 (5th Cir. 2017).

But the *Rooker-Feldman* doctrine, when appropriately cabined, does not stand in the way of a federal court's power to hold that a state court has violated an individual's due process rights in the manner it applied state law. The contrary view would empower state courts to act arbitrarily and to violate the due process

and equal protection guarantees without even the possibility of federal correction. Neither comity nor appropriate respect for state court tribunals requires such an outcome.

CONCLUSION

Mr. Rhoades respectfully requests that the Court stay his execution currently set for after 6:00 pm today, September 28, 2021, pending the filing, consideration, and disposition of his Petition for Writ of Certiorari.

Respectfully submitted,

s/ David R. Dow

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