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

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 after 6 o'clock p.m. central time tomorrow, September 28, 2021.

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QUESTION PRESENTED

Capital Case.

Petitioner, Rick Rhoades, filed a motion in state court seeking information from his capital murder trial in the sole possession of the State. That information is essential to determining whether the State violated Rhoades' right under *Batson v. Kentucky*. Rhoades' motion was filed pursuant to Article 35.29 of the Texas Code of Criminal Procedure, which provides, in relevant part, as follows:

> (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*.

(Emphasis added.)

Notwithstanding this statute, the trial court refused to determine whether Rhoades had shown good cause. Further, notwithstanding that state law specifies a writ of mandamus as the appropriate vehicle to challenge a trial court's refusal to rule on a motion that was properly before it, the Texas Court of Criminal Appeals, by a vote of five-to-four, refused Rhoades leave to file a petition that asked that court to order the trial court to determine whether Rhoades had shown good cause.

The foregoing facts give rise to the following question:

Where state law provides a categorical right to someone convicted of a crime (here, the right to obtain confidential information, upon a showing of good cause, necessary to assessing and pursuing a claim under *Batson*), and the state courts arbitrarily deny someone the protection of the state-created right, does federal jurisdiction lie under 42 U.S.C. 1983 to correct the due process violation notwithstanding any judicially-created abstention doctrines (including *Rooker-Feldman*)?

PARTIES TO THE PROCEEDING

Petitioner (plaintiff in the district court and plaintiff-appellant in the court of appeals) is Rick Allen Rhoades. Rhoades is currently incarcerated under a sentence of death at the Polunsky Unit of the Texas Department of Criminal Justice in Livingston, Texas. He is scheduled to be executed tomorrow, September 28, 2021.

Respondent the Honorable Ana Martinez (defendant in the district court and defendant-appellee in the court of appeals) is the presiding judge of the 179th District Court in Harris County, Texas. She is being sued in her official capacity.

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INTRODUCTION

Petitioner Rick Rhoades is scheduled to be executed by the State of Texas after 6 o'clock p.m. tomorrow, Tuesday, September 28, 2021.

Immediately upon learning in January 2021 that the District Attorney's Office planned to ask Respondent, the Honorable Ana Martinez, the presiding judge of the 179th District Court, to schedule Mr. Rhoades' execution, Counsel began the effort to obtain a copy of the juror questionnaires and cards necessary to investigate

and develop a claim to raise on Rhoades' behalf pursuant to *Batson v. Kentucky*. Specifically, because Rhoades' previous attorney had learned the attorney who represented Rhoades at his 1992 trial did not maintain a copy of these materials, Counsel sought these records from the District Attorney's Office. The assistant district attorney, who filed the motion for an execution date in the trial court, confirmed his office had maintained a copy of the juror cards from the entire venire and the juror questionnaires from the fourteen veniremembers whom the State had challenged during the jury selection phase of Rhoades' trial. That attorney informed Counsel that because these materials are confidential under Texas law, he could not release the materials to Rhoades' Counsel. That attorney wrote further in a February 24 email to Counsel that "[b]ased on this response I anticipate you will file a responsive motion with Judge Martinez." Appendix C.

The Texas Legislature specifically provided for the motion anticipated by the district attorney by promulgating Article 35.29 of the Texas Code of Criminal Procedure. Under Article 35.29, the juror materials maintained by a prosecuting attorney can be released only if the trial court finds a defendant has demonstrated good cause for access to the records. Accordingly, doing precisely what the district attorney anticipated, Counsel for Rhoades filed a motion pursuant to Article 35.29. However, instead of issuing a decision on whether Rhoades had demonstrated good cause for access to the materials, and despite the unequivocal language of the state law, Respondent held she did not have jurisdiction to reach the merits of the motion.

The trial court's action was arbitrary and violated Rhoades' federal constitutional right to due process. As this Court has observed in a related context (i.e., the context addressing whether a state procedural ground is independent and adequate such as to bar federal relief), state laws that are not "regularly followed" are arbitrary. *See, e.g.*, *Edwards v. Carpenter*, 529 U.S. 446, 450 (2000); *Ford v. Georgia*, 498 U.S. 411, 425 (1991); *see also Walker v Martin*, 562 U.S. 307 (2011); *Lee v. Kemma*, 534 U.S. 363 (2002). In this case, not only was the state court's disposition of Rhoades' article 35.29 motion not regular; it appears to have been unprecedented.

Attached to this Motion as Appendix D is a chart summarizing all of the forty-eight reported opinions from state courts in Texas involving Article 35.29. As that chart reveals, not a single reported opinion (besides the two dissenting opinions issued in this case) involves a trial court's finding it did not have jurisdiction to consider an Article 35.29 motion.[1]

Critically, the record of the hearing in the trial court held in connection with the motion Rhoades filed reveals how Respondent would have ruled had she believed she had jurisdiction: Respondent would have given Rhoades access to the juror cards. Appendix E at 16 ("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

[1] To be clear, most of the opinions involve an Article 35.29 motion which was filed before mandate issued on direct appeal. However, at least four (and perhaps five) of the opinions (i.e., the two dissenting opinions from *In re Rhoades*, as well as *In re Green*, *Hazlip v. State*, and perhaps *In re Fain*) involve a motion filed after mandate issued.

cards redacted if you want to argue on the work product issue"). Respondent could not have ordered this unless she found Rhoades had demonstrated good cause for access to the juror cards. *See* Tex. Code Crim. Proc. art. 35.29.

In accordance with state law, Counsel filed a motion in the Texas Court of Criminal Appeals ("CCA") seeking leave to file a mandamus petition, which would ask that court to order Respondent to make a decision on the merits of Rhoades' motion. Instead of addressing the petition, however, the CCA, without opinion and in a 5-4 decision, denied Rhoades leave to file the petition. This action, too, was arbitrary. Indeed, as two of the dissenting judges stressed, all of the reported decisions citing Article 35.29, demonstrate not only that Respondent had jurisdiction to consider the motion, but that she had a "ministerial duty to *rule*, *one* way or the *other*, on [the] motion." *In re Rhoades*, No. WR-78,124-02, 2021 WL 2964454, at **1** (Tex. Crim. App. July 14, 2021) (Yeary, J., dissenting).

The Texas Legislature enacted article 35.29 so that defendants like Rhoades could seek access to the materials at issue in this case and receive a decision from the trial court on whether they had shown good cause for that access. If the trial court had found Rhoades had not met this burden, precedent makes clear Rhoades could ask for that decision to be reviewed by the CCA. Respondent's decision to not rule on the merits of Rhoades' motion, however, coupled with the CCA's refusal to order her to do so, has had the effect of denying Rhoades both of these processes—and denying them uniquely to him. Every reported Article 35.29 case involving someone not named Rhoades has been treated differently by the state courts,

regardless of whether the motion was filed before or after the mandate issued. This type of erratic state court behavior violates Rhoades' due process and equal protection rights to receive equal and nonarbitrary treatment.

Accordingly, less than two weeks after the order from the CCA denying leave, Rhoades filed a Complaint pursuant to 42 U.S.C. § 1983 in the federal district court, alleging that his right to Due Process had been violated by the manner in which the state courts addressed the issue of whether he was entitled to access to confidential juror information. On September 20, the district court entered an opinion dismissing the complaint, believing Respondent was entitled to sovereign immunity and that the action was barred by the *Rooker-Feldman* doctrine. This morning, the court of appeals issued an order affirming the district court dismissal, similarly believing Rhoades complaint was barred by *Rooker-Feldman*. Neither court addressed the merits of Rhoades' due process argument.

The decision by the court of appeals renders this Court's decision in *Skinner v. Switzer* a nullity. If *Rooker-Feldman* applies in this case, then the Fifth Circuit's opinion leaves all Texas, Louisiana, and Mississippi defendants without a means by which to challenge, in federal court, violations of their Fourteenth Amendment right to Due Process inflicted by the state courts of those states construing state-created rights. Accordingly, Petitioner Rick Rhoades respectfully asks this Court to enter an order staying his execution pending the filing, consideration, and disposition of his Petition for Writ of Certiorari.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit denying Mr. Rhoades a stay of execution is not published. A copy is attached as Appendix A.

A copy of the opinion of the United States District Court for the Southern District of Texas dismissing Mr. Rhoades' complaint is attached as Appendix B.

STATEMENT OF JURISDICTION

This Court has jurisdiction to issue the relief requested pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourteenth Amendment of the United States Constitution states, in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law; not deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Rhoades' previous claim raised pursuant to *Batson*

Rhoades was convicted of capital murder and sentenced to death in the 179th District Court on October 8, 1992.

On September 7, 1993, Rhoades filed his direct appeal in the CCA, in which he raised, *inter alia*, a claim pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). Appellant's Br. 33-44, *Rhoades v. State*, No. AP-71,595 (Tex. Crim. App. Sept. 1, 1996). In his *Batson* claim, Rhoades argued that the State's use of peremptory strikes against Berniece Holiday and Gregory Randle were racially motivated and

that the State had failed to articulate sufficiently race-neutral reasons for the exercise of the strikes. *Id*.

On October 2, 1996, the CCA denied Rhoades relief, holding that the race-neutral reasons the State had provided were sufficient for the court to feel comfortable that a mistake had not been committed. *Rhoades v. State*, 934 S.W.2d 113, 124-25 (Tex. Crim. App. 1996). The Court did not compare the answers given by these jurors to the answers of potential jurors whom the State did not exercise challenges to remove. Critically, the CCA decision antedated this Court's decision in *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231 (2005), which specifically held that a comparative analysis is necessary to resolving a claim under *Batson*.

On March 31, 2015, Rhoades filed his federal habeas petition in the federal district court, raising, *inter alia*, a claim pursuant to *Batson*. Pet. Writ Habeas Corpus 47-56, *Rhoades v. Stephens*, No. 4:14-cv-03152 (S.D. Tex. Mar. 31, 2015), ECF No. 13. To have properly resolved the merits of Rhoades' *Batson* claim, the district court should have compared the jurors who had been struck by the prosecution to the other jurors who had not. *Miller-El II*, 545 U.S. at 241. The court should have also considered any other circumstances that bear upon the issue of racial animosity. *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008). The district court did not perform this comparison, however, because performing such a comparison

was not possible at the time because the record did not contain the necessary information, including the juror cards and questionnaires at issue in this Brief.[2]

On July 21, 2016, the district court denied Rhoades relief and granted Respondent's Motion for Summary Judgment, writing that Rhoades had not shown that the state court's assessment of the State's peremptory challenges used to remove Holiday and Randle from the pool was unreasonable. *Rhoades v. Davis*, No. 4:14-cv-03152, 2016 WL 8943327, at *18-20 (S.D. Tex. July 20, 2016).

On November 18, 2016, Rhoades filed an application for a certificate of appealability ("COA") in the court of appeals. On December 7, 2016, the court of appeals appointed undersigned Counsel to represent Rhoades. Until that day, neither Counsel nor anyone who works with him had represented Rhoades in any proceeding.

The court of appeals granted Rhoades a COA on his *Batson* claim (and other claims) on March 27, 2017. *Rhoades v. Davis*, 852 F.3d 422, 435-36 (5th Cir. 2017). Rhoades subsequently filed his appellate brief on May 8, 2017. Pet'r-Appellant's Br., *Rhoades v. Davis*, No. 16-70021 (5th Cir. May 8, 2017).

On January 28, 2019, the court of appeals affirmed the district court's decision denying Rhoades relief, writing that the state court's decision regarding Rhoades' *Batson* claim was not unreasonable, largely because Rhoades was not able

[2] The attorneys who drafted Rhoades' federal habeas petition contacted the attorneys who represented Rhoades previously, but none of these attorneys had maintained copies of the juror information. Petition for Writ of Habeas Corpus 48 n.14, *Rhoades v. Stephens*, No. 4:14-cv-03152 (S.D. Tex. Mar. 31, 2015).

to present a thorough juror comparison (because the record did not contain the juror cards and questionnaires). *Rhoades v. Davis*, 914 F.3d 357, 383 (5th Cir. 2019).

On October 7, 2019, this Court denied Rhoades' Petition for a Writ of Certiorari. *Rhoades v. Davis*, 140 S. Ct. 166 (2019).[3]

B. Rhoades' efforts in the state courts to gain access to the necessary juror information

On January 21, 2021, the district attorney's office indicated it intended to ask the state trial court to enter an order scheduling Rhoades' execution. On February 3, 2021, Counsel sent an email to the Assistant District Attorney, asking whether his office had maintained copies of the juror questionnaires and cards from Rhoades' 1992 trial. Appendix C.[4]

On February 24, 2021, that attorney informed the undersigned that the district attorney's office had maintained a copy of the juror cards and some of the questionnaires from Rhoades' 1992 trial; however, that attorney also informed Counsel he would make the juror information available to Rhoades' attorneys only

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[3] The Question Presented in the Petition did not relate to a claim raised pursuant to *Batson*.

[4] Both because the CCA has on at least one occasion found that a claim raised pursuant to *Miller-El II* can satisfy the criteria for filing a subsequent state habeas application (because that legal basis was not previously available), and because the juror information at issue could reveal information solely in the State's possession (e.g., notes revealing racial animosity motivated the State's challenges during jury selection) and thereby support a claim for which the factual basis was not previously available, Counsel intended to present any claim supported by the juror information in a state habeas application. *See* Tex. Code Crim. Proc. art. 11.071, § 5; Order, *Ex parte Williams*, Nos. WR-71,404-01, -02 (Tex. Crim. App. Apr. 29, 2009) (finding a claim pursuant to *Miller-El II* satisfied section 5 of Article 11.071); *but see* Order, *Ex parte Harris*, No. WR-59,925-02 (Tex. Crim. App. Sept. 5, 2012) (finding a claim pursuant to *Miller-El II* did not satisfy section 5).

pursuant to a motion filed by Rhoades under article 35.29 of the Texas Code of Criminal Procedure, which specifies that juror information collected by the district attorney is confidential and may not be disclosed unless the trial court finds there is good cause for the disclosure. Tex. Code Crim. Proc. art. 35.29; *see* Appendix C.

Accordingly, on March 10, 2021, Mr. Rhoades filed a motion pursuant to article 35.29, asking Judge Martinez—who now presides over the 179th District Court, which is the court in which Rhoades was convicted of capital murder and sentenced to death—to find good cause existed for his attorneys to be granted access to the information. Mot. for Release Conf. Juror Info., *State v. Rhoades*, No. 0612408 (179th Dist. Ct., Harris County, Tex. Mar. 10, 2021). Judge Martinez, however, did not issue an order on the motion resolving the question of whether Mr. Rhoades had demonstrated good cause. Instead, on March 17, the judge stated that she believed she lacked jurisdiction to consider the motion. Appendix E at 16 ("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").

It is clear—and indeed the district attorney did not dispute in the trial court—that, under state law, the motion Counsel filed was precisely the correct vehicle by which to ask for access to the juror information. *See, e.g.*, *Green v. State*, No. AP-77,088, 2020 WL 1540426, at *1 (Tex. Crim. App. Mar. 30, 2020) ("Appellant should first present his request for the disclosure of this information to the trial court"); *Gonzalez v. State*, No. AP-77,066, 2017 WL 782735, at *1 (Tex. Crim. App.

Mar. 1, 2017) (same). Notably, in litigation in these very proceedings, members of the CCA expressly observed that the trial court does possess jurisdiction over a motion like the one Rhoades filed. *See In re Rhoades*, No. WR-78,124-02, 2021 WL 2964454, at *1 (Tex. Crim. App. July 14, 2021) (Yeary, J., dissenting) ("a party seeking a good-cause disclosure should present his request under the statute in the first instance to the convicting court").

On March 25, Counsel filed a motion asking Judge Martinez to reconsider her March 17 ruling. Mot. Recons., *State v. Rhoades*, No. 0612408 (179th Dist. Ct., Harris County, Tex. Mar. 25, 2021). The trial court convened a hearing on March 26. At this hearing, the district attorney again did not contest Rhoades' argument that Judge Martinez had jurisdiction to act under article 35.29. Nevertheless, and despite the unequivocal language of the statute, Judge Martinez reiterated her belief she did not have jurisdiction to issue an order on the merits of Mr. Rhoades' motion raised pursuant to article 35.29. ROA.58[5] ("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.").

Believing Rhoades was entitled to a decision from the trial court on whether he had shown good cause for access to the juror information and that the trial court, in fact, had a ministerial duty to enter such an order, on April 26, 2021, Counsel

[5] In this pleading, citations to the record on appeal in the court of appeals are cited according to that court's Rule 28.2.2 as ROA.[page number].

sought relief from the Texas Court of Criminal Appeals, by filing a motion for leave to file a petition for a writ of mandamus. A petition for a writ of mandamus is the vehicle by which, under state law, a defendant should ask the CCA to direct a trial court to rule on a motion properly before it. *See Simon v. Levario*, 306 S.W.3d 318, 321 (Tex. Crim. App. 2009); *see also Rhoades*, 2021 WL 2964454 at *1 (Yeary, J., dissenting) (citing *Simon v. Levario*).[6]

Specifically, Rhoades' petition asked the CCA to order the trial court to reach the merits of Rhoades' motion for access to the juror information and determine whether he had presented good cause for such access. Rhoades did not ask the CCA to determine he had shown good cause, nor would it have been appropriate for him to have done so, because the statute requires the trial court to make that determination. On July 14, 2021, in a 5-4 decision, the CCA denied the motion for leave to file the petition without explanation. Although the majority simply issued an order without an accompanying opinion, the four dissenting judges wrote two separate dissenting opinions.

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[6] Had Judge Martinez found Rhoades had not met his burden (and, again, the record demonstrates she found the opposite), it appears a petition for a writ of mandamus would have also been the correct vehicle by which to challenge that decision. *Falcon v. State*, 879 S.W.2d 249, 250 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd); *see also In re Green*, No. WR-62,574-05, 2015 WL 5076812, at *1 (Tex. Crim. App. Aug. 26, 2015) (ordering Respondent to reply to mandamus petition and holding it in abeyance pending response); *In re Middleton*, No. 04-15-00062-CR, 2015 WL 1004233 (Tex. App.—San Antonio Mar. 4, 2015, orig. proceeding); *In re Powell*, No. 2-07-102-CV, 2007 WL 1649661 (Tex. App.—Fort Worth June 7, 2007, orig. proceeding). Had Judge Martinez addressed the merits of Rhoades' motion, and had the CCA then declined to rule on favor of Rhoades, the *Rooker-Feldman* abstention doctrine would indeed bar federal relief. However, that is not what happened in this case.

In his dissenting opinion, which was joined by Judge Richardson, Judge Newell indicated he believed the prudent course would have been to ask the judge why she did not believe she had the authority to rule on Rhoades' motion. *In re Rhoades*, No. WR-78,124-02, 2021 WL 2964225 at *1 (Tex. Crim. App. July 14, 2021) (Newell, J., dissenting). In a second dissenting opinion, which was joined by Judge Walker, Judge Yeary indicated he believed that Judge Martinez's opinion that she did not have jurisdiction to rule on Rhoades' motion seemed inconsistent with orders in other cases issued by the CCA. *Rhoades*, 2021 WL 2964454 at *1 (Yeary, J., dissenting). Judge Yeary indicated he believed the trial court had a ministerial duty to act on Rhoades' motion and wrote the court "should either grant leave to file the application and order the convicting court to render a ruling, or at least file and set the matter for a determination whether the convicting court is correct to conclude it presently lacks jurisdiction over the motion." *Id.*

C. Proceedings in the district court and court of appeals

Less than two weeks after the CCA denied Rhoades leave to file a petition for a writ of mandamus, on July 26, 2021, Rhoades filed his Complaint in the district court. ROA.4. The Complaint asked the district court to issue a declaratory judgment that either Rhoades was entitled to a decision on the merits of his motion filed in the state trial court; or Rhoades was entitled to access to the materials essential to determining whether his rights under *Batson* were violated at trial. ROA.30.

On August 31, Respondent filed a motion to dismiss Rhoades' complaint.

ROA.81. Rhoades responded on September 8. ROA.95. Because no order had yet been entered on the docket resolving the issues raised in Rhoades' complaint, on September 19, 2021, Counsel filed a motion to stay Rhoades' execution. ROA.114. On September 20, the district court entered an order granting Respondent's motion to dismiss, which purports to have been issued on September 17. ROA.119.

In the order granting Respondent's motion to dismiss, the district court suggested that Respondent found that Rhoades was not entitled to the juror information to which he sought access. ROA.125; ("Judge Martinez gave several reasons for refusing to turn over the jury material."). While the district court's order correctly quotes statements made by Judge Martinez during the hearing, those statements do not support the conclusion the district court has drawn from them. Rather, the transcript of the hearing makes it quite clear that, by the end of the hearing, Judge Martinez believed Rhoades *had* shown good cause for access to the materials and that she would release at least some of the materials to Rhoades if she determined she had the power to make a ruling on the merits of his motion:

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

ROA.48.

The district court granted Respondent's motion to dismiss because it believed Judge Martinez is entitled to sovereign immunity and that Rhoades' complaint was

barred by the *Rooker-Feldman* doctrine. Appendix B. In an order issued earlier today, the court of appeals affirmed the district court's decision that the complaint was barred by the *Rooker-Feldman* doctrine and, for that reason, denied Rhoades a stay of execution. Appendix A. (The court of appeals did not decide whether Judge Martinez is entitled to sovereign immunity or whether the doctrine announced in *Younger v. Harris* required the federal courts to abstain from considering Rhoades' complaint.)

What animates the Fifth Circuit's decision is a fundamental misunderstanding of what underlies Rhoades' complaint. That court (like the district court before it) characterized Rhoades' § 1983 action as one that asks the federal courts to review the merits of Judge Martinez's decision. Appendix A at 4 ("Stripped of its able advocate's clothing, Rhoades asked the district court to determine that Judge Martinez incorrectly applied state law.") That is not at all what Rhoades is asking, and had he done so, Rhoades concedes the *Rooker-Feldman* doctrine would apply. *See supra* n.6. What Rhoades asked, however, was for the federal courts to find that the arbitrary manner in which he was treated by the state courts deprived him of his right to Due Process. *Rooker-Feldman* does not bar a federal court from granting relief to the forty-ninth person who files a motion under state law and whose motion is treated differently from all of the forty-eight who came before him.

REQUEST FOR RELIEF

Rhoades requests that this Court issue an order staying his execution pending the filing and disposition of a Petition for Writ of Certiorari, which will raise the following question:

> Where state law provides a categorical right to someone convicted of a crime (here, the right to obtain confidential information, upon a showing of good cause, necessary to assessing and pursuing a claim under *Batson*), and the state courts arbitrarily deny someone the protection of the state-created right, does federal jurisdiction lie under 42 U.S.C. 1983 to correct the due process violation notwithstanding any judicially-created abstention doctrines (including *Rooker-Feldman*)?

I. The issue of whether Rhoades' suit is barred by *Rooker-Feldman* is an important question that warrants guidance from this Court.

A. Pursuant to *Skinner v. Switzer*, a claim that a state court construed a state created right in a manner that did not satisfy due process is cognizable in a 1983 action.

This Court's precedent makes clear that when a state law gives a right to an individual, the manner in which the state makes that right available to a particular individual must not run afoul of the dictates of the Due Process Clause of the Fourteenth Amendment. *District Attorney's Office v. Osborne*, 557 U.S. 52, 68 (2009) (quoting *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 463 (1981) (a "state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right"). To be sure, while the decision in *Osborne* made clear that a state-court defendant could bring, in federal court, a claim alleging that the manner in which a state made a state-created right available to him did not satisfy due process, the Court did not decide, in that

opinion, whether a 1983 action was the appropriate vehicle for such a claim. The Court answered that question two years later in its opinion issued in *Skinner v. Switzer*, 562 U.S. 521 (2011).

In *Skinner*, this Court addressed the case of a man who was convicted of capital murder in a Texas state court and who twice sought post-conviction DNA analysis in an attempt to prove his innocence. *Skinner*, 562 U.S. at 525-28. The state court, however, denied both of Skinner's requests for DNA analysis. *Id.* at 528-29.

After being denied access to the analysis in the state courts, Skinner filed a 1983 action in the federal district court. *Id.* His federal complaint alleged that Texas violated his Fourteenth Amendment right to due process by refusing to provide for the DNA testing he requested. *Id.* The district court dismissed Skinner's complaint because it believed that Skinner's claim was cognizable only in habeas (not in a § 1983 action). This court of appeals affirmed the district court's decision. *Id.* at 529.

This Court reversed the decision from the court of appeals. *Id.* Because Skinner's claim was dismissed, the issue before this Court was whether the complaint was sufficient to survive a motion to dismiss. *Id.* That required the Court to review both whether the claim was appropriate in a § 1983 action (as opposed to a habeas petition) and whether the complaint raised a claim upon which relief could be granted.[7] The Court found Skinner's complaint did raise such a claim, and could

[7] Neither the district court nor the court of appeals determined that Rhoades' claim should be brought instead in a habeas action, so that portion of *Skinner* is not addressed in this pleading.

therefore survive a Rule 12(b) motion to dismiss.

Notably, Skinner's argument was *not* that the Constitution guaranteed him access to the DNA collected by the State in connection with his case; nor was his argument that the DNA would categorically demonstrate his innocence. Rather, his argument paralleled that raised by Rhoades in the present action: Skinner pointed to a state statute which gives inmates a right to seek such analysis, and argued the State's denial of his right created by state law violated his right to Due Process. *Skinner*, 562 U.S. at 525-28.

Skinner's federal claim is virtually identical to Rhoades' claim. Just as the Texas Legislature gave Skinner a right to seek access to post-conviction DNA analysis, it gave Rhoades a right to seek access to confidential juror information. Specifically, the Legislature gave Rhoades the right to seek access to juror information "collected by . . . a prosecuting attorney during the jury selection process" of his trial. Tex. Code Crim. Proc. art. 35.29(a). Obtaining information collected by the prosecutor required Rhoades file a motion in the trial court demonstrating good cause for such access. *Id.* art. 35.29(b). If the trial court found he had not demonstrated good cause for access to the juror materials, he could then appeal that decision through a petition for a writ of mandamus. *Falcon*, 879 S.W.2d at 250. But the statute requires the trial court to determine whether the party seeking the information has shown good cause; and as indicated in Appendix D, in every other reported opinion from a Texas court citing Article 35.29, that is precisely what the trial court has done.

B. The order from the court of appeals finding Rhoades' suit is barred by the *Rooker-Feldman* doctrine renders this Court's decision in *Skinner* a nullity.

Writing for the majority in *Skinner*, Justice Ginsburg explained that "*Rooker-Feldman* [did] not bar Skinner's suit." *Skinner*, 562 U.S. at 531. It mattered not that the state court had decided issues that were closely related to the issue raised in Skinner's federal complaint. Quoting the opinion which she had authored for a unanimous court in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005), Ginsburg explained why *Rooker-Feldman* was no bar to Skinner's action: "If a federal plaintiff presents an independent claim, it is not an impediment to the exercise of federal jurisdiction that the same or a related question was earlier aired between the parties in state court." *Skinner*, 562 U.S. at 532 (internal quotation marks and alterations omitted) (quoting *Exxon Mobil*, 544 U.S. at 292-93). Skinner's suit was not barred because he did "not challenge the adverse CCA decisions themselves; instead, he target[ed] as unconstitutional the Texas statute they authoritatively construed." *Id.* at 532.

In precisely the same manner, Rhoades did not ask the district court to order Defendant to find she has jurisdiction to decide his motion or to find he has shown good cause for access to the material. He did not challenge that adverse decision itself. Instead, he asked the district court and the court of appeals to find that the manner in which his state-created right (i.e., the right to seek access to confidential juror information through article 35.29 of the Texas Code of Criminal Procedure) was made available to him did not satisfy the Due Process or Equal Protection

Clauses. No state court has addressed this independent issue, and, for that reason, his suit should not have been found to be barred by the *Rooker-Feldman* doctrine.

The court of appeals appears to have believed that Rhoades' complaint differs from the one filed Skinner in that Rhoades named a state court judge as the defendant rather than naming a district attorney. Appendix A at 4. But that distinction cannot make *Rooker-Feldman* applicable. The reason Skinner named the district attorney as the defendant in his suit was that the district attorney possessed the evidence he sought to have tested and nothing in state law prohibited the district attorney from turning the evidence over to Skinner. Rhoades' case is different. Under state law, the district attorney cannot turn over the juror information to Rhoades unless ordered to do so by the state trial court. Tex. Code Crim. Proc. art. 35.29; *see also Falcon*, 879 S.W.2d at 250 ("When article 35.29 uses the phrase 'the court,' it clearly refers to the trial court in which the trial at issue . . . has occurred."). For that reason, Rhoades' request in this 1983 action was for the federal court to find only that due process entitles him a decision from the state courts on whether he is entitled to access to the materials.[8] This Court held in *Skinner* that *Rooker-Feldman* did not preclude federal jurisdiction because Skinner was not asking the federal court to review a state court's decision as to whether

[8] To be clear, Rhoades' complaint did suggest the district court could find, in the alternative, that due process required Rhoades be given access to the materials, but the thrust of his complaint and the entirety of his argument in the court of appeals was that due process requires he be given a decision on the merits of his motion.

Skinner had received due process. Exactly the same circumstance is present here: No state court has been presented or decided the question of whether the arbitrariness with which the state courts handled Rhoades' Article 35.29 motion ran afoul of his right to Due Process.[9]

II. Rhoades' claim is meritorious: Respondent's decision in his case was arbitrary and wholly inconsistent with state law.

As noted above, forty-eight reported state court opinions cite Article 35.29. Only the two dissenting opinions issued in this case address a situation in which a trial court found she did not have jurisdiction to decide whether a defendant had demonstrated good cause for access to the juror information he sought. Although the record does not reveal why Respondent believed she did not have jurisdiction, the pleadings she filed in the court of appeals suggest she believes that a trial court does not have jurisdiction to consider an Article 35.29 motion after mandate has issued. Of course, the CCA did not offer this rationale, and if it had, its decision would still have been arbitrary. There appear to be only three reported decisions from Texas state courts that address Article 35.29 motions filed after mandate has issued. None find that a trial court is without jurisdiction to reach the merits of the motion.

Largely because it involves action by the CCA and not an intermediate court of appeals, *In re Green*, No. WR-62,574-05, 2015 WL 5076812 (Tex. Crim. App.

[9] The CCA has suggested a such a claim should be raised in a § 1983 action in federal court. *See Ex parte Murphy*, Nos. WR-63,449-01, -02, 2019 WL 1379859, at *2 (Tex. Crim. App. Mar. 25, 2019) (Richardson, J., concurring) ("Relator acknowledges he could file a 42 U.S.C. § 1983 cause of action in federal court.").

2015), is the most instructive of these three decisions. Johnny Green, Jr. was convicted of murder and sentenced to life in prison on August 26, 2011. *Green v. State*, No. 08-11-0317-CR, 2013 WL 6175127, at *1 (Tex. App—El Paso Nov. 22, 2013 pet. ref'd). The court of appeals affirmed the trial court's judgment (as reformed by that court) on November 22, 2013. *Id.* The court of appeals issued its mandate on February 26, 2014. Mandate, *Green v. State*, No. 08-11-00317-CR (Tex. App.—El Paso Feb. 26, 2014). [10] Green filed three separate 35.29 motions in the trial court, dated January 27, 2015; February 19, 2015; and March 12, 2015 (or eleven, twelve, and thirteen months after mandate issued). Respondent Judge's Response to Relator's Motion for Leave to File a Writ of Mandamus at 2, *Ex parte Green*, No. WR-62,574-05 (Tex. Crim. App. 2015).[11] On September 17, 2015, the trial court denied Green's third 35.29 motion on the merits (i.e., the trial court did not dismiss this third motion for want of jurisdiction). *Id.* The record does not reflect when the first two motions were denied, but it does reflect they, too, were denied on the merits (and not dismissed). *See id.*

On August 3, 2015, Green filed a mandamus petition in the CCA, which the

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[10] *Available at* https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=a666f4bf-9f4b-41e9-8d1b-5349d2371a63&coa=coa08&DT=Other&MediaID=59f10262-3b43-441e-b21e-8e8ab695035f.

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

Court interpreted as being a motion for leave to file the petition. *In re Green*, No. WR-62,574-05 (Tex. Crim. App. 2015).[12] On August 26, 2015, the CCA ordered the trial court to respond to Green's motion. Order, *In re Green*, No. WR-62,574-05 (Tex. Crim. App. Aug. 26, 2015).[13] Only after the trial court responded did the CCA deny Green's motion for leave to file a mandamus. The CCA's actions in the case of Johnny Green make clear that that court has found that a trial court, in fact, does have jurisdiction over a 35.29 motion after mandate issues. The CCA's actions also reveal that court believes a petition for a writ of mandamus is the proper mechanism by which to challenge a decision from the trial court finding the defendant has not met his burden of showing good cause. Consequently, the CCA's decision to not require Judge Martinez to rule on a motion which was properly brought before her—or even to reply to Rhoades' motion for leave—was arbitrary and violated Rhoades' right to procedural due process.

The second reported opinion dealing with an Article 35.29 motion filed after mandate issued is *Hazlip v. State*, No. 09-14-00477-CR, 2015 WL 184043 (Tex. App.—Beaumont Jan. 14, 2015, no pet.). After mandate issued, Hazlip filed an Article 35.29 motion in the trial court and the trial court found he had not

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[12] *Available at* https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=10d5f069-60bf-4dc8-bf70-6a54eda67e7e&coa=coscca&DT=RECORD&MediaID=5ac811e4-9075-4b15-a0ec-6bc1b8dc17c8.

[13] *Available at* https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=f1b67f6d-a6cd-490b-9979-f02c6da76c13&coa=coscca&DT=ORDER&MediaID=172bf3c7-41fd-4433-8367-afd80a8a7981.

demonstrated good cause for access. *Id.* The court of appeals found it did not jurisdiction to consider a direct appeal addressing whether the trial court had abused its discretion in so finding, but nothing in the opinion suggests the trial court did not have jurisdiction to make a decision on the merits of the motion. The decision in *Hazlip* that the intermediate court of appeals did not have jurisdiction to hear a direct appeal is not inconsistent with the CCA indicated was proper in *Green*, which is the decision can be challenged in a petition for writ of mandamus filed in the CCA.

The third reported opinion which appears to address an Article 35.29 motion filed after mandate issued is *In re Fain*, No. 02-12-00499-CV (Tex. App.—Fort Worth Dec. 20, 2012, orig. proceeding). It is not clear from the opinion whether Fain filed a post-mandate Article 35.29 motion, but it appears he likely did because he then filed a petition for a writ of mandamus in the intermediate court of appeals. In *Fain*, the intermediate court of appeals found that it did not have jurisdiction to consider the mandamus action because only the CCA had jurisdiction. *Id.* The *Fain* court did not hold the trial court lacked jurisdiction.

Simply put, as the four dissenting judges on the CCA indicated,[14] there is no basis in state law for Judge Martinez to have decided she did not have jurisdiction to rule on the motion. State law is clear that the motion Counsel filed was precisely the correct vehicle by which to ask for access to the juror information collected by

[14] As noted above, the 5-judge CCA majority simply denied Rhoades leave to file, but did not issue an opinion or elucidate the basis for its denial.

the State. *See, e.g.*, *Green v. State*, No. AP-77,088, 2020 WL 1540426, at *1 (Tex. Crim. App. Mar. 30, 2020) ("Appellant should first present his request for the disclosure of this information to the trial court."); *Gonzalez v. State*, No. AP-77,066, 2017 WL 782735, at *1 (Tex. Crim. App. Mar. 1, 2017) (same); *see also Rhoades*, 2021 WL 2964454, at *1 (Yeary, J., dissenting) (explaining the CCA "has held a party seeking a good-cause disclosure should present his request under the statute in the first instance to the convicting court"). Indeed, the numerous other state trial court decisions addressing the issue of good cause, and thereby examining an individual's right of access to this material, themselves reveal the arbitrariness of Judge Martinez's inaction, and the CCA's refusal to intervene.

The violation of Rhoades right to due process was compounded by the action of the CCA. As Judge Yeary recognized in his dissent, a "trial court has a ministerial duty to make a ruling on any motion that is properly brought before it." *Rhoades*, 2021 WL 2964454, at *1 (citing *Simon v. Levario*, 306 S.W.3d 318, 321 (Tex. Crim. App. 2009). The petition for writ of mandamus Counsel filed for Rhoades in the CCA did not ask the CCA to order Judge Martinez to decide Rhoades had shown good cause. It asked only for that court to order Judge Martinez to do that which she had a ministerial duty to do: make a decision on the merits of the motion. Instead of addressing the petition, the CCA, without opinion and in a 5-4 decision, denied Rhoades leave to file the petition.

III. This Court should find Rhoades is entitled to a stay of execution.

A stay of execution is warranted where there is: (1) a reasonable probability

that four members of the Court would consider the underlying issues sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; (2) a significant possibility of reversal of the lower court's decision; and (3) a likelihood that irreparable harm will result if no stay is granted. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983).

Mr. Rhoades satisfies these criteria. For the reasons explained above, a reasonable probability exists that four members of the Court would consider the underlying issues as presenting important questions that warrant guidance from this Court. There is a significant possibility this Court would find the decision from the court of appeals should be reversed because that decision is inconsistent with this Court's opinion in *Skinner*, and the reasoning of the court of appeals would permit the *Rooker-Feldman* doctrine to eviscerate the right state prisoners and defendants have to receive due process and equal protection when they seek redress under state law. Finally, Rhoades will suffer irreparable injury if a stay is not granted because he will be executed.

CONCLUSION

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

Respectfully submitted,

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