

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

March 11, 2026

Lyle W. Cayce
Clerk

No. 25-40623

RAYMOND E. LUMSDEN,

Plaintiff—Appellant,

versus

PAUL JOHNSON, *District Attorney,*

Defendant—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:21-CV-960

Before SMITH, HAYNES, and OLDHAM, *Circuit Judges.*

PER CURIAM:*

Raymond Lumsden, Texas prisoner #2109472, seeks to proceed *in forma pauperis* ("IFP") on appeal from the dismissal of his 42 U.S.C. § 1983 complaint. Although *pro se* filings are afforded liberal construction, *see Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993), when an appellant fails to identify any error in the district court's analysis, it is the same as he had not appealed that issue, *see Brinkmann v. Dallas Cnty. Deputy Sheriff Abner*,

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

813 F.2d 744, 748 (5th Cir. 1987).

Lumsden's IFP filings state only that the issues on appeal are "Abuse of Discretion in dismissing the case, Contradiction of Supreme Court Precedents." He has not adequately briefed any arguments challenging the district court's reasons for dismissing his complaint and has abandoned any challenge to the ruling. *See Yohey*, 985 F.2d at 224-25; *Brinkmann*, 813 F.2d at 748. Thus, he has failed to demonstrate that there is a nonfrivolous issue for appeal. *See Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983); *Carson v. Polley*, 689 F.2d 562, 586 (5th Cir. 1982).

Accordingly, the motion to proceed IFP is DENIED, and the appeal is DISMISSED as frivolous. *See Baugh v. Taylor*, 117 F.3d 197, 202 n.24 (5th Cir. 1997); 5TH CIR. R. 42.2.

Our dismissal of this appeal as frivolous counts as a strike for purposes of 28 U.S.C. § 1915(g). *See Adepegba v. Hammons*, 103 F.3d 383, 387-88 (5th Cir. 1996), *abrogated in part on other grounds by Coleman v. Tollefson*, 575 U.S. 532, 535-39 (2015). Lumsden is WARNED that if he accumulates three strikes, he will not be able to proceed IFP in any civil action or appeal while he is incarcerated or detained in any facility unless he is under imminent danger of serious physical injury. *See* 28 U.S.C. § 1915(g).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

RAYMOND E. LUMSDEN,
#2109472

VS.

PAUL JOHNSON

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CIVIL CASE NO. 4:21-CV-960-SDJ

ORDER OF DISMISSAL

The above-entitled and numbered civil action was referred to United States Magistrate Judge Bill Davis, who issued a Report and Recommendation (“the Report”) (Dkt. #34) concluding that Defendant Johnson’s Motion to Dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) should be denied in part and granted in part and the case dismissed with prejudice. Plaintiff filed Objections (Dkt. #35).

Plaintiff’s only objection is that the magistrate judge erred in recommending that his claims be dismissed under Federal Rule of Civil Procedure 12(b)(6), supposedly contrary to the precedent established in *Reed v. Goertz*, 598 U.S. 230 (2023), and *Gutierrez v. Saenz*, 145 S. Ct. 2258 (2025). But Plaintiff misunderstands the procedural posture of both cases. In *Reed*, the Court found that subject-matter jurisdiction existed because (1) Reed had standing, (2) the *Ex parte Young* doctrine allows suits for declaratory or injunctive relief against state officers in their official capacities, and (3) the *Rooker-Feldman* doctrine did not bar the claims. 598 U.S. at 957. In addition, the Court found that Reed’s claims were not barred by the statute of limitations. *Id.* In *Gutierrez*, the Court held that the plaintiff had standing to bring

his claims under 42 U.S.C. § 1983. 145 S. Ct. at 2265. Neither case was considered on the merits. Plaintiff fails to show that the Report is in error or that he is entitled to relief.

The Report of the Magistrate Judge, which contains proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration. Having made a *de novo* review of the objections raised by Plaintiff to the Report, the Court concludes that the findings and conclusions of the Magistrate Judge are correct. Therefore, the Court hereby adopts the findings and conclusions of the Magistrate Judge as the findings and conclusions of the Court.

It is accordingly **ORDERED** that Defendant Johnson's Motion to Dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) is **DENIED IN PART** and **GRANTED IN PART** and the case is **DISMISSED** with prejudice.

It is further **ORDERED** that all motions not previously ruled on are hereby **DENIED**.

So **ORDERED** and **SIGNED** this 16th day of September, 2025.


SEAN D. JORDAN
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

RAYMOND E. LUMSDEN,
#2109472

VS.

PAUL JOHNSON

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NO. 4:21-CV-960

**REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE**

Proceeding pro se, Texas prisoner Raymond E. Lumsden filed this civil-rights action under 42 U.S.C. § 1983 against Defendant Paul Johnson, the Criminal District Attorney of Denton County. Dkt. 1. The action was referred to me in accordance with 28 U.S.C. § 636 for findings of fact, conclusions of law, and a recommended disposition. The court will recommend that Johnson's motion to dismiss, Dkt. 18, be denied in part and granted in part.

FACTUAL AND PROCEDURAL BACKGROUND

I. Lumsden's Conviction, Direct Appeal, and Petitions for Habeas Corpus Relief

Lumsden was convicted by a Texas jury of aggravated sexual assault of a child, indecency with a child, and criminal solicitation of a minor and was sentenced to three life sentences. *Lumsden v. State*, No. 02-16-00366-CR, 564 S.W.3d 858, 866 (Tex. App.—Fort Worth 2018, pet. ref'd). One of the courts that considered his case summarized the facts as follows, using an alias for the victim:

Allison, who was almost nine years old at the time of the trial, testified that after her mother Kelly started dating Lumsden, they moved in with him. Allison had her own room at Lumsden's house.

On the night in question, Kelly went to bed early because she was not feeling well. Allison's brother David had also gone to bed. Allison stayed up late watching television with Lumsden. At one point, she went upstairs to grab a blanket and a pillow because she was really sleepy. She laid down beside Lumsden, who was sitting on the couch watching television. While Allison was laying on her back on the couch, Lumsden put his pointer finger under her purple and pink monkey pajamas and under her panties and touched her "privates." Allison said that Lumsden touched the outside of her private that she used to pee and that his pointer finger stayed still, which made her "[a] little uncomfortable." Lumsden touched

the inside of the part that Allison used to poop. Allison testified that Lumsden wanted her to touch "the thing he went pee with," but she said no. Allison became hungry and asked for red Jell-O, which Lumsden allowed her to have. Afterwards, Lumsden went to bed, and she slept on the couch because she was too tired to go upstairs to her room. Allison testified that the time on the clock reflected that it was midnight.

The next morning, after Kelly came downstairs and woke up Allison, Allison told her that Lumsden had touched her privates. Kelly then took Allison to the police station, and from there, the police escorted Kelly and Allison to the hospital. Allison told a nurse what Lumsden had done to her and underwent a physical exam. The following day, Allison recounted the touching to a forensic interviewer at the Children's Advocacy Center. . . .

....

. . . Nurse Carriker testified that she performed Allison's physical exam at 2:00 p.m. on March 11, 2015, which was approximately fourteen hours after the incident. Nurse Carriker explained that during the exam, she noted "generalized redness" that covered Allison's vaginal area and a tear or a cut "barely inside the anal opening at about 7:00." Nurse Carriker testified that the redness on Allison's vagina was consistent with Allison's statement that Lumsden had put his finger there Nurse Carriker swabbed Allison's mouth, vagina, anus, and fingernail area and combed through her hair to collect biological evidence.

....

Ashleigh Berg, an investigator with the Denton County Sheriff's Office, testified that she went to Lumsden's residence . . . to execute a search warrant. Berg found blankets and a pillow on the couch, which looked like it "was made up into a bed," and were consistent with Allison's statement. Berg also found an empty serving cup of Jell-O on the top of the trash can in the pantry in the kitchen and the pull-off lid was on the countertop in the kitchen, which she testified was consistent with Allison's statement. . . .

....

Christina Capt, who is a technical leader and a forensic DNA analyst with the University of North Texas Center for Human Identification, testified that the vaginal swabs that had been taken from Allison were used to develop an unknown Y STR profile. The buccal swabs from Lumsden were used to develop a known Y STR profile. Capt explained that the profile developed for Lumsden was compared

to the profile from Allison's vaginal swab, and "at all nine locations where we obtained data for the vaginal swab, there was an exact match with the alleles detected in Raymond Lumsden's profile." Capt testified that she was thus not able to exclude Lumsden from being a contributor to the unknown Y STR profile found in Allison's vaginal swabs. Capt further testified that six out of 10,000 people would have the same nine markers that were located in this case and that no other male contributors were detected on any of the items that were tested.

....

Lumsden admitted that he could not explain the DNA evidence. Lumsden testified that his son John did not sexually assault Allison and that none of his other patrilineal relatives were in his home on the night in question.

Lumsden v. State, No. 02-21-00012-CR, 2021 WL 4319602, at *1-2 (Tex. App.—Fort Worth Sept. 23, 2021, no. pet.) (mem. op.) (footnotes omitted) (quoting *Lumsden*, 564 S.W.3d at 866-67, 870-74).

Lumsden's direct appeal was unsuccessful, and the Texas Court of Criminal Appeals ("TCCA") refused his petition for discretionary review. *Lumsden*, 564 S.W.3d at 858. His pro se motion for rehearing was also denied, *see* <https://www.txcourts.gov/cca/> (No. PD-1378-18), as was his petition for a writ of certiorari, *Lumsden v. State*, 587 U.S. 990 (2019).

Lumsden filed three state applications for a writ of habeas corpus. *See* Dkt. 18 at 20-25 (exhibits 1-3 to Johnson's motion to dismiss). The first and second were "denied without written order . . . on the findings of the trial court without a hearing and on the [CCA]'s independent review of the record." *Id.* at 21, 23. The third was dismissed without a written order as a subsequent application in accordance with Texas Code of Criminal Procedure article 11.07, § 4(a)-(c). *Id.* at 25.

Lumsden also petitioned this court for a writ of habeas corpus under 28 U.S.C. § 2254. *Lumsden v. Director*, Civil Action No. 4:20-CV-713 (E.D. Tex.), Dkt. 1. That effort, too, was unsuccessful. *See id.*, Dkts. 55, 56.

2003, no pet.)); and (2) “Lumsden has not demonstrated by a preponderance of the evidence that, even if exculpatory results were obtained, there exists a greater than 50 percent likelihood that he would not have been convicted,” *Lumsden*, 2024 WL 853354, at *6.

Lumsden now seeks relief from this court. His complaint asserts that,

[a]s author[it]atively construed, Texas Statute 64.01 violates the Fourteenth Amendment of the Constitution. By refusing to provide for DNA Testing, as requested by Petitioner on three (3) instances, defendant has denied Petitioner his constitutional right to due process as assured under the Fourteenth Amendment. The State’s refusal to release the biological evidence for testing . . . deprived Lumsden of his liberty interests in utilizing state procedures to obtain reversal of his conviction and/or to obtain a pardon or reduction in his sentence. Lumsden hereby makes challenge [to] Texas’ postconviction DNA statute “as construed” by the Texas courts that have repeatedly refused DNA [t]esting even though Lumsden meets ALL of the requirements.

Dkt. 1 at 3. Lumsden seeks an injunction ordering new DNA testing and DNA testing of the previously untested samples. *Id.*

Johnson filed a motion to dismiss for want of jurisdiction and for failure to state a claim upon which relief can be granted. Dkt. 18. He argued that (1) sovereign immunity deprives the court of jurisdiction, (2) Lumsden’s claims are barred by the statute of limitations, (3) he has absolute immunity from suit, (4) Lumsden’s procedural-due-process claim fails as a matter of law, and (5) Lumsden is seeking an unauthorized writ of mandamus against a state official. *Id.* at 11–16; *see* Dkt. 20 (Lumsden’s response).

The court ordered additional briefing, Dkt. 27, on the issues of sovereign immunity, limitations, and the Supreme Court’s decision in *Reed v. Goertz*, 598 U.S. 230 (2023). Johnson filed a supplemental brief, Dkt. 29, Lumsden filed a response, Dkt. 30, and Johnson filed supplemental exhibits, Dkt. 31, to which Lumsden responded, Dkt. 32. Johnson concedes that sovereign immunity does not apply after *Reed* but argues that this case is distinguishable from *Reed* on the other points. Dkt. 29 at 6. Specifically, Johnson argues that, even in light of *Reed*, (1) Lumsden’s

claims are time-barred, (2) Lumsden fails to state a due-process violation, and (3) this court lacks subject-matter jurisdiction under the *Rooker-Feldman* doctrine.

After the close of briefing in this case, Lumsden filed a fifth state-court motion for post-conviction DNA testing. As before, the trial court denied the motion, and the court of appeals affirmed. *Lumsden v. State*, No. 02-25-00021-CR, 2025 WL 2007329, at *3-6 (Tex. App.—Fort Worth July 17, 2025, no. pet. h.)

LAW

I. Dismissal Standards

A. Jurisdictional challenges under Rule 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) authorizes a motion to dismiss for “lack of subject-matter jurisdiction.” “The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction”; in other words, “the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist.” *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

“A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case.” *Home Builders Ass’n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). The court may reach that conclusion based on “(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court’s resolution of disputed facts.” *Ramming*, 281 F.3d at 161.

When a Rule 12(b) motion raises a jurisdictional challenge in conjunction with other grounds for dismissal, the court must address the jurisdictional question first. *Id.* That requirement “prevents a court without jurisdiction from prematurely dismissing a case with prejudice.” *Id.*

B. Merits challenges under Rule 12(b)(6)

Rule 12(b)(6) provides for dismissal of an action for “failure to state a claim upon which relief can be granted.” When considering a Rule 12(b)(6) motion, the court generally may not look

beyond the pleadings and must accept all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff. *Scanlan v. Tex. A&M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003).

A complaint or other pleading must include a short and plain statement of the claim giving the defendant fair notice and showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint need not contain detailed factual allegations, but it must nonetheless provide more than labels and conclusions, and a “formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. Even if unlikely, the factual allegations in the complaint are assumed to be true, and to survive a motion to dismiss, they must “raise a right to relief above the speculative level” and “state a claim to relief that is plausible on its face.” *Id.* at 555, 570. A claim is facially plausible where the factual allegations allow the court to reasonably infer that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Facts that are merely consistent with a defendant’s liability are insufficient. *Id.*

A pro se complaint is held to a less stringent standard than a pleading drafted by a lawyer. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). And when addressing a Rule 12(b)(6) motion that targets a pro se complaint, the court must examine the entire complaint and any attachments. *Clark v. Huntleigh Corp.*, 119 F. App’x 666, 667 (5th Cir. 2005).

II. The Limited Right to DNA Testing and Chapter 64 of the Texas Code of Criminal Procedure

A prisoner does not have a freestanding federal constitutional right to obtain post-conviction DNA testing, and “[t]he [Supreme] Court has ‘rejected the extension of substantive due process to this area, [leaving] slim room for [a] prisoner to show that the governing state law denies him procedural due process.’” *Reed*, 598 U.S. at 235 (quoting *Skinner v. Switzer*, 562 U.S. 521, 525 (2011), and citing *Dist. Attorney’s Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 72 (2009)). In other words, “the Supreme Court [has] determined that there is no freestanding federal

substantive due process right to post-conviction DNA testing.” *Roddy v. Babin*, 795 F. App’x 299, 300 (5th Cir. 2020) (per curiam) (citing *Osborne*, 557 U.S. at 72–73).

A State may, however, create a statutory right to such testing. *Jackson v. Randolph*, 772 F. App’x 195, 196 (5th Cir. 2019) (per curiam); *Pruett v. Choate*, 711 F. App’x 203, 206 (5th Cir. 2017). “In Texas, a prisoner has a statutory right to move for post-conviction forensic DNA testing of evidence containing biological material pursuant to Chapter 64 of the Texas Code of Criminal Procedure.” *Sanchez v. Lumpkin*, No. EP-21-CV-308-KC, 2021 WL 6127512, at *2 (W.D. Tex. Dec. 28, 2021) (citing Tex. Code Crim. P. art. 64.01 and *Elam v. Lykos*, 470 F. App’x 275, 276 (5th Cir. 2012)).

In particular, article 64.01(a-1) of the Code permits a convicted person to file “a motion for forensic DNA testing of evidence that has a reasonable likelihood of containing biological material.” Such a motion requests testing of evidence that was in the State’s possession during trial and was either not previously tested or, although tested previously, can be tested with newer techniques that would provide more “accurate and probative” results. *Lumsden*, 2024 WL 853354, at *4 (citing Tex. Code Crim. P. art. 64.01(b)(2)(A) and *Holberg v. State*, 425 S.W.3d 282, 284 (Tex. Crim. App. 2014)). But a trial court may order testing under Chapter 64 only if (1) the evidence “still exists and is in a condition making DNA testing possible”; (2) the evidence “has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect”; and (3) the perpetrator’s “identity was or is an issue in the case.” *Id.* (quoting art. 64.03(a)(1)). To succeed on such a motion, a prisoner must “establish[] by a preponderance of the evidence” that he “would not have been convicted if exculpatory results had been obtained through DNA testing” and that “the request for the proposed DNA testing is not made to unreasonably delay the execution of sentence or administration of justice.” Tex. Code Crim. P. 64.03(a)(2).

DISCUSSION

I. Subject-Matter Jurisdiction

Johnson has abandoned some of his arguments, including his assertion of sovereign immunity. Dkt. 29. The court, however, must consider potential barriers to subject-matter jurisdiction *sua sponte*. *Wilkins v. United States*, 598 U.S. 152, 157 (2023).

Supreme Court precedent forecloses an assertion of sovereign immunity here, and it also confirms that Lumsden has standing to sue Johnson for the relief sought. Lumsden alleges the same injury-in-fact that the *Reed* petitioner did: “denial of access to the requested evidence.” 598 U.S. at 234. A more recent decision clarifies that standing exists even if the local prosecutor who had custody of the untested evidence had other reasons to deny DNA testing. *Gutierrez v. Saenz*, 145 S. Ct. 2258, 2268 (2025); *accord Wood v. Patton*, No. 25-70004, 2025 WL 2237942, at *3 (5th Cir. Aug. 6, 2025). And Lumsden’s suit for prospective injunctive relief against a state officer in his official capacity may proceed under the doctrine of *Ex parte Young*. *Reed*, 598 U.S. at 234 (citing *Ex parte Young*, 209 U.S. 123, 159–61 (1908)).

The only remaining jurisdictional question is whether the *Rooker–Feldman* doctrine bars the suit. It does not.

When it applies, *Rooker–Feldman* deprives federal district courts of subject-matter jurisdiction to review state-court judgments. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283–84 (2005); *see D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Tr. Co.*, 263 U.S. 413 (1923). A state trial court’s error “is to be reviewed and corrected by the appropriate state appellate court,” not a federal district court, and the “casting of a complaint in the form of a civil rights action cannot circumvent” that jurisdictional bar. *Liedtke v. State Bar of Tex.*, 18 F.3d 315, 317 (5th Cir. 1994). The doctrine also deprives federal courts of subject-matter jurisdiction where the “allegations are inextricably intertwined with the decision of the state courts.” *Guajardo v. State Bar of Tex.*, 803 F. App’x 750, 753 (5th Cir. 2020) (quotation marks and citation omitted).

But the doctrine has a narrow compass. Its operation is “confined to ‘cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.’” *Lance v. Dennis*, 546 U.S. 459, 464 (2006) (citing *Exxon Mobil*, 544 U.S. at 284). As one federal court of appeals has warned, “district courts should keep one thing in mind when *Rooker-Feldman* is raised: it will almost never apply.” *Behr v. Campbell*, 8 F.4th 1206, 1212 (11th Cir. 2021).

Reed illustrates that. The Supreme Court stated there that the *Rooker-Feldman* doctrine

prohibits federal courts from adjudicating cases brought by state-court losing parties challenging state-court judgments. But as this Court explained in *Skinner v. Switzer*, even though a ‘state-court decision is not reviewable by lower federal courts,’ a ‘statute or rule governing the decision may be challenged in a federal action.’ Here, as in *Skinner*, *Reed* does ‘not challenge the adverse’ state-court decisions themselves, but rather ‘targets as unconstitutional the Texas statute they authoritatively construed.’

598 U.S. at 234–35.

Johnson tries to distinguish this case from *Reed*, arguing that Lumsden does not assert a specific due-process violation but rather challenges the adverse rulings of the state courts. But as “‘the master of [his] complaint,’” Lumsden “gets to determine which substantive claims to bring.” *Royal Canin U.S.A., Inc. v. Wulschleger*, 604 U.S. 22, 35 (2025) (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398–99 (1987)). Parroting *Skinner*, Lumsden’s complaint challenges Chapter 64 “[a]s author[it]atively construed” by the Texas courts. Dkt. 1 at 3. And in his response to the motion to dismiss, Lumsden states that he “does not challenge the prosecutor’s conduct or the [state] Court’s decisions; instead, he challenges Texas’s postconviction DNA statute as ‘construed’ by the Texas Courts.” Dkt. 20 at 6. That makes *Rooker-Feldman* inapplicable. See *Reed*, 598 U.S. at 235; accord *Wood*, 2025 WL 2237942, at *3 n.8.

II. Johnson's Rule 12(b)(6) Arguments

Johnson argues that Lumsden's complaint is untimely and fails to state a claim. He is wrong on the first point and right on the second.

A. Limitations

Section 1983 claims are subject to the personal-injury statute of limitations of the State in which the cause of action arose. *Wallace v. Kato*, 549 U.S. 384, 387 (2007). The parties agree that, in Texas, that period is two years. Tex. Civ. Prac. & Rem. Code § 16.003(a); see *Reed*, 598 U.S. at 235. Federal law, however, determines when a claim accrues. *Moore v. McDonald*, 30 F.3d 616, 620–21 (5th Cir. 1994).

In *Reed*, the Supreme Court found that when a plaintiff alleges a due-process violation under Chapter 64 in a § 1983 action,

. . . the statute of limitations begins to run when the plaintiff has a complete and present cause of action. To determine when a plaintiff has a complete and present cause of action, the Court focuses first on the specific constitutional right alleged to have been infringed.

Here, the specific constitutional right allegedly infringed is procedural due process. A procedural due process claim consists of two elements: (i) deprivation by state action of a protected interest in life, liberty, or property, and (ii) inadequate state process. Importantly, the Court has stated that a procedural due process claim is not complete when the deprivation occurs. Rather, the claim is complete only when the State fails to provide due process.

598 U.S. at 235–36 (citations and quotation marks omitted). And when the plaintiff moves for rehearing in the TCCA, the day the State fails to provide due process is the day that the TCCA denies rehearing. *Id.* at 236.

Johnson again tries to distinguish *Reed*, arguing that the limitations period began to run for Lumsden when the state-court litigation of his first motion for DNA testing ended in 2019 and he did not appeal. Dkt. 29 at 7–10. He states that “[w]hether the statute of limitations began to run the day the trial court signed the order denying the motion on April 8, 2019, or the last day Lumsden could have motioned for an extension of time to appeal the order on May 23, 2019, this

complaint filed December 9, 20[21], was filed after either calculation of the statute of limitations had run on April 8, 2021, or May 23, 2021.” *Id.* at 9 n.3; *see also* Tex. Code Crim. Proc. art. 64.05 (providing that “[a]n appeal under this chapter is to a court of appeals in the same manner as an appeal or any other criminal matter, except that if the convicted person was convicted in a capital case and was sentenced to death, the appeal is a direct appeal to the court of criminal appeals”).

A court document submitted by a pro se prisoner is deemed to have been filed on the date the prisoner delivered it to prison authorities for mailing to the district court, regardless of when it is received by the court clerk. *Houston v. Lack*, 487 U.S. 266, 270–71 (1988). Here, that date is December 5, 2021—the date that appears on the declaration page of Lumsden’s petition. Dkt. 1 at 4. That would make the filing late if Johnson is correct that, under Chapter 64, the May 23, 2019, closing of Lumsden’s appeal window marked the end of the state-court litigation.

But Johnson is not correct. There is no limit on the number of times a plaintiff may seek post-conviction DNA testing under Chapter 64. *See generally* Tex. Code of Crim. Proc. ch. 64. And instead of denying them on procedural grounds, the state courts considered the appeals of Lumsden’s subsequently filed motions on the merits. *Lumsden*, 2025 WL 2007329, at *3–7; *Lumsden*, 2024 WL 853354, at *5–7; *Lumsden*, 2021 WL 4319602, at *7–12.

Furthermore, the court cannot determine what specific grounds Lumsden asserted in his first post-conviction motion for DNA testing, as neither party provided a copy of the motion. (Johnson provided only the trial-court order denying the motion, which states no specifics. Dkt. 18 at 27.) It is also unclear on the present record whether Lumsden made the same request in one or more of his subsequent motions for post-conviction DNA testing. Without more, the court cannot determine whether Lumsden had “a complete and present” cause of action after the trial court denied his first post-conviction motion for DNA testing. As a result, the court is not convinced that the “end of the state-court litigation” occurred when Lumsden failed to appeal the denial of

his first motion. Johnson has therefore failed to meet his burden to secure a limitations-based dismissal. *See Frame v. City of Arlington*, 657 F.3d 215, 239–40 (5th Cir. 2011).

B. Challenge to Chapter 64

“Although defendants do not have a federal constitutional right to postconviction DNA testing, if a state creates such a right—as Texas has done in Chapter 64—then the procedures to enforce that right must satisfy due process” *Pruett*, 711 F. App’x at 206; *accord Elam*, 470 F. App’x at 276. That said, “[i]f the request for testing is denied, an inmate cannot ‘mak[e] a direct challenge in federal court to that state-court denial[; instead], he may make a facial challenge to the statutes, rules, and interpretations on which the denial was based.’” *Resendez v. Silva*, 2025 WL 1414599, at *5 (S.D. Tex. Apr. 1, 2025) (quoting *Gutierrez v. Saenz*, 93 F.4th 267, 271 (5th Cir. 2024); *see Skinner*, 562 U.S. at 532 (explaining that even though a “state-court decision is not reviewable by lower federal courts,” a “statute or rule governing the decision may be challenged in a federal action”).

Federal courts should not presume that state criminal procedures are inadequate to deal with DNA evidence. *Gutierrez v. Saenz*, 565 F. Supp. 3d 892, 904 (S.D. Tex. Mar. 23, 2021) (citing *Osborne*, 557 U.S. at 73–74). A person asserting a post-conviction right to DNA testing is not asserting a right that is “parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief.” *Osborne*, 557 U.S. at 69.

In this case, the complaint alleged no facts in support of Lumsden’s challenge to Chapter 64. The challenge is based on conclusory allegations, *see* Dkt. 1 at 3, which would be reason enough to reject it. *Twombly*, 550 U.S. at 553–55; *see also Cutrera v. Bd. of Sup. of La. State Univ.*, 429 F.3d 108, 113 (5th Cir. 2005) (explaining that “[a] claim which is not raised in the complaint but, rather, is raised only in response to a motion for summary judgment is not properly before the court”); *Downs v. Liberty Life Assurance Co. of Boston*, No. 3:05-CV-0791R, 2005 WL 2455193, at *3 (N.D.

Tex. Oct. 5, 2005) (stating that “a court ruling on a Rule 12(b)(6) motion to dismiss ‘may not . . . take into account additional facts asserted in a memorandum opposing the motion, because such memoranda do not constitute pleadings under Rule 7(a)’” (quoting 2 Moore’s Federal Practice, § 12.34[2] (3d ed. 2005))).

In his reply to Johnson’s supplemental brief, however, Lumsden elaborates a bit, and the court will consider what he says there:

In effect, plaintiff has argued that the defendant’s denial of DNA Testing under Chapter 64, as was the case in *Skinner*, supra, violates his access-to-courts as well as his due process right to evidence and relief. For instance, and as cited in the Second Court of Appeals’ own ruling on appeal, adopted from the trial court’s adoption of the defendant’s Response to plaintiff’s Motion for DNA Testing, “the defendant failed to prove that identity was an issue in this case.” This, is in direct contradiction to clearly established [TCCA] precedent citing that, “A defendant who requests DNA testing can make identity an issue by showing that exculpatory DNA tests would prove his innocence. This is true even in cases where the victim knew the person she identified at trial as her attacker.” *Blacklock v. State*, 235 S.W.3d 231 (Tex. Crim. App. 2007).

Dkt. 30 at 6. Lumsden goes on to say that the statute’s requirement that identity was or is an issue, Tex. Code Crim. Proc. art. 64.03(a)(1)(C), is strictly adhered to by Texas courts to deny requests for DNA testing, Dkt. 30 at 8. He concludes that new DNA testing will prove “once and for all” that he was falsely convicted. *Id.* at 9.

The court liberally construes Lumsden’s reply as challenging Chapter 64’s identity requirement and the requirement that a defendant must prove by a preponderance of the evidence that he “would not have been convicted if exculpatory results had been obtained through DNA testing.” Tex. Code Crim. Proc. art. 64.03(a)(2)(A). Whether viewed as attacking the statute as applied to him or on its face, those challenges fail.

Supreme Court case law “severely limits the federal action a state prisoner may bring for DNA testing.” *Skinner*, 562 U.S. at 525. As already noted, the Court has “rejected the extension of

substantive due process to this area” and has “left slim room for the prisoner to show that the governing state law denies him procedural due process.” *Id.* (citation omitted).

In *Osborne*, the Supreme Court confirmed that a DNA-testing statute such as Chapter 64 would violate due process only if it “offend[ed] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, or transgress[ed] any recognized principle of fundamental fairness in operation.” 557 U.S. at 69 (quotation marks omitted). For that reason, “[f]ederal courts may upset a State’s postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided.” *Id.*

Lumsden’s challenge to Chapter 64’s identity requirement does not clear that bar. Article 64.03(a)(1)(C) states that “[a] convicting court may order forensic DNA testing under this chapter only if . . . the court finds that . . . identity was or is an issue in the case.” That restriction echoes the federal DNA-testing statute, which requires a convicting court to order DNA testing for an “applicant convicted following a trial” only if “the identity of the perpetrator was at issue in the trial.” 18 U.S.C. § 3600(a)(7). And as the Eleventh Circuit has noted, “the *Osborne* Court approved of that [federal] statute, calling it a ‘model for how States ought to handle the issue’ of postconviction DNA testing.” *Cromartie v. Shealy*, 941 F.3d 1244, 1255 (2019) (quoting *Osborne*, 557 U.S. at 63). Lumsden provides no basis to think that the Supreme Court would find a constitutional flaw in a provision of a state statute that follows the federal model it expressly approved.

Lumsden’s challenge to Chapter 64’s evidentiary requirement also fails. Article 64.03(a)(2) provides for DNA testing where a “convicted person establishes by a preponderance of the evidence” that he “would not have been convicted if exculpatory results had been obtained through DNA testing” and that the request was “not made to unreasonably delay the execution of sentence or administration of justice.” That standard is more lenient than its Alaskan counterpart considered in *Osborne*, which exempted a postconviction claim from time limits only if newly

discovered evidence, pursued with diligence, established by clear and convincing evidence that the defendant was innocent. 557 U.S. at 64. Yet the Supreme Court rejected a challenge to that statute. *Id.* at 75; *see also Reed v. Goertz*, 136 F.4th 535, 547 (5th Cir. 2025) (explaining that “Reed’s argument that it is unconstitutional to require the evidence to exculpate the movant . . . contravenes *Osborne*”); *Morrison v. Peterson*, 809 F.3d 1059, 1067–69 (9th Cir. 2015) (noting that California’s reasonable-probability requirement was also less stringent than Alaska’s clear-and-convincing standard approved in *Osborne*). That means article 64.03(a)(2) would likewise survive Supreme Court scrutiny.

That is true with respect to the statute as it was applied in Lumsden’s case. *See Lumsden*, 2025 WL 2007329, at *1–6 (most recent opinion recounting the facts and history of Lumsden’s efforts to obtain DNA testing). And to the extent Lumsden brings a facial challenge, he would face an even higher burden: to show that the statute always operates unconstitutionally. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) (explaining that “[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid”).

Because he has not even shown that the statute operated unconstitutionally in his case, he also cannot meet that higher burden. *See Reed*, 136 F.4th at 548 (rejecting a facial challenge to article 64.03(a)(2)(A)). And contrary to his suggestions, the statute does, in fact, result in orders for DNA testing. *See, e.g., Wolfe v. State*, 120 S.W.3d 368, 369 (Tex. Crim. App. 2003); *Lumsden*, 2025 WL 2007329, at *6–7 (discussing *Esparza v. State*, 282 S.W.3d 913 (Tex. Crim. App. 2009); *Blacklock*; and *Smith v. State*, 165 S.W.3d 361 (Tex. Crim. App. 2005)); *Jones v. State*, 161 S.W.3d 685, 687 (Tex. App.—Fort Worth 2005, no pet.); *Wright v. State*, No. 14-03-01060-CR, 2004 WL 502906, at *1 (Tex. App.—Houston [14th Dist.] 2004, pet. ref’d); *Baggett v. State*, 110 S.W.3d 704, 705 (Tex. App.—Houston [14th Dist.] 2003, pet. ref’d). That is another reason Lumsden’s facial challenge fails. *See Wood*, 2025 WL 2237942, at *4–5 (in rejecting an argument based on the

TCCA's "fifteen-year, unbroken string of denying DNA testing appeals in twenty-three cases," noting that "lower courts applying the CCA's construction of Chapter 64 *have* granted DNA testing during that period" (quotation marks omitted)).

III. Challenges Not Properly Presented

In referencing "access to the courts," "cruel and unusual punishments," and "equal rights," the response to Johnson's motion to dismiss suggests that Lumsden may have wanted to assert additional constitutional challenges. *See* Dkt. 20 at 3, 7, 8. Because those assertions are conclusory and have no footing in the complaint, they could not form a basis for relief at this stage. Lumsden has already been afforded full access to the courts, both state and federal, to pursue any claim he may have wanted to bring. He has just failed to demonstrate an entitlement to relief. *See Roddy v. Babin*, 523 F. Supp. 3d 891, 901-02 (M.D. La. Mar. 4, 2021).

RECOMMENDATION

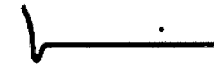
It is **RECOMMENDED** that Johnson's motion to dismiss, Dkt. 18, be **DENIED IN PART** and **GRANTED IN PART**. The motion should be denied to the extent it seeks a jurisdictional dismissal under Rule 12(b)(1). It should be granted to the extent it seeks relief under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Lumsden's complaint should be **DISMISSED WITH PREJUDICE**.

* * *

Within 14 days after service of this report, any party may serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). To be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*), *superceded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from 10 to 14 days).

So **ORDERED** and **SIGNED** this 7th day of August, 2025.



Bill Davis
United States Magistrate Judge