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## COMMENT

### Can Section 1983 Help To Prevent the Execution of Mentally Retarded Prisoners?

Texas death-row inmate Henry Skinner, having long maintained his innocence, asked federal courts to order new DNA testing of preserved crime-scene evidence. In March 2011, the U.S. Supreme Court held that Skinner need not seek DNA testing through a petition for habeas corpus, and could assert his claim in a civil action under 42 U.S.C. § 1983 instead.<sup>1</sup>

Habeas corpus is the federal statutory remedy for unlawful detention pursuant to a state court judgment.<sup>2</sup> State prisoners seeking release on constitutional grounds typically petition for habeas relief. The federal habeas statute requires prisoners to exhaust all available state remedies first,<sup>3</sup> and it bars federal courts from granting relief unless state courts acted unreasonably when they previously heard the claim.<sup>4</sup> But a state prisoner's unlawful detention is also a "deprivation" of his rights under color of state law, for which 42 U.S.C. § 1983 would seem to authorize remedies.<sup>5</sup> Section 1983 has

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1. *Skinner v. Switzer*, 131 S. Ct. 1289, 1296 (2011).
  2. *See* 28 U.S.C. § 2254(a) (2006).
  3. *Id.* § 2254(b)(1)(A).
  4. *Id.* § 2254(d). Though it actually bars federal relief in many cases instead of permitting it after deferential review of state court conclusions, this restriction is conventionally described as a requirement of "deference." *See, e.g., Berghuis v. Thompkins*, 130 S. Ct. 2250, 2265 (2010).
  5. *See Preiser v. Rodriguez*, 411 U.S. 475, 488 (1973); *see also* 42 U.S.C. § 1983 ("Every person who, under color of any statute . . . of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .").

no requirements of exhaustion and deference.<sup>6</sup> Thus, to prevent prisoners from using the civil rights statute as an end run around the habeas statute, the Court has established a boundary between the two.

In *Skinner*, the Court relied on precedent holding that a claim must be brought exclusively in habeas if “judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.”<sup>7</sup> Actions that would not necessarily imply the invalidity of the conviction or sentence, even if they succeeded, are “allowed to proceed” under § 1983 instead.<sup>8</sup> The majority reasoned that *Skinner* would only obtain DNA testing if he prevailed and that DNA testing could just as easily incriminate as exonerate him.<sup>9</sup> Thus, because granting *Skinner* the remedy he sought would not necessarily invalidate his sentence or conviction, the Court held that his claim was cognizable under § 1983 and did not need to be raised in a habeas petition.<sup>10</sup>

But *Skinner* had previously sought DNA testing in state court and lost.<sup>11</sup> And if testing yielded his desired result, his conviction would surely rest on shaky ground. Thus, the dissent feared that *Skinner* could have far-reaching consequences, positioning 42 U.S.C. § 1983 as an alternative avenue to federal post-conviction relief—without the habeas statute’s “proper respect for state functions.”<sup>12</sup> Justice Thomas complained that the Court had provided a “roadmap for any unsuccessful state habeas prisoner to relitigate his claim under § 1983.”<sup>13</sup> Envisioning a flood of litigation, he asked, “What prisoner would not avail himself of this additional bite at the apple?”<sup>14</sup>

This Comment identifies a new role for § 1983 in post-conviction litigation. Many prisoners may try to use § 1983, and it may prove generally valuable in imposing greater fairness and uniformity in state post-conviction proceedings.<sup>15</sup>

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6. See *Wilkinson v. Dotson*, 544 U.S. 74, 79 (2005).

7. *Skinner v. Switzer*, 131 S. Ct. 1289, 1298 (2011) (quoting *Heck v. Humphrey*, 512 U.S. 477, 487 (1994)).

8. *Id.* (quoting *Heck*, 512 U.S. at 487).

9. See *id.*

10. *Id.*

11. See *Skinner v. State*, 293 S.W.3d 196 (Tex. Crim. App. 2009); *Skinner v. State*, 122 S.W.3d 808 (Tex. Crim. App. 2003).

12. *Skinner*, 131 S. Ct. at 1303 (Thomas, J., dissenting) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 491 (1973)).

13. *Id.*

14. *Id.*

15. See Justin F. Marceau, *Challenging the Habeas Process Rather than the Result*, 69 WASH. & LEE L. REV. 85 (2012).

But it is a particularly good fit for a group that desperately needs a new pathway to relief: mentally retarded death-row inmates.<sup>16</sup>

In theory, under *Atkins v. Virginia*,<sup>17</sup> persons with mental retardation may not be executed. In practice, they can be. Ineffective trial counsel may fail to recognize mental retardation or properly develop a claim. State-law definitions of mental retardation may be confusing or inconsistent with clinical science. A meritorious claim asserted in habeas may be dismissed because it is procedurally defective.<sup>18</sup> Indeed, these obstacles may be mutually reinforcing. The consequence is that mentally retarded persons can rather easily end up being executed even though the Constitution forbids it. The failure of habeas to prevent the deaths of death-ineligible offenders is a serious moral and constitutional problem that demands a solution.

I argue that *Skinner* invites § 1983 challenges to deficient state procedures for adjudicating mental retardation. Such actions could bring meritorious *Atkins* claims into federal court outside the deferential habeas framework. I focus on Texas, not only because it is by far America's most active death penalty jurisdiction,<sup>19</sup> but also because its state-law standard for mental retardation is unusually arbitrary and clinically unsound.<sup>20</sup> I will (1) analyze *Skinner*'s importance; (2) describe how Texas wrongly evaluates *Atkins* claims and why meritorious claims often fail; and (3) explain how a civil rights action might work and might help.

## I. SKINNER

There were two holdings in *Skinner*, which together make clear that state procedural rules in capital cases are susceptible to § 1983 challenges.

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16. Advocates prefer "intellectually disabled" to "mentally retarded" because of the stigma associated with the latter term. The former American Association on Mental Retardation (AAMR) is now the American Association on Intellectual and Developmental Disabilities. See *About Us*, AAIDD, [http://www.aamr.org/content\\_2383.cfm?navID=2](http://www.aamr.org/content_2383.cfm?navID=2) (last visited Oct. 19, 2011). Reluctantly, for the sake of consistency with relevant case law, this Comment uses the outdated term.
  17. 536 U.S. 304 (2002).
  18. See Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 CORNELL L. REV. 329, 330 (2010).
  19. *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> (last visited Dec. 12, 2011).
  20. For a state-by-state overview of the implementation of *Atkins*, see Carol S. Steiker & Jordan M. Steiker, *Atkins v. Virginia: Lessons from Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 DEPAUL L. REV. 721, 724-29 (2008). See also *infra* note 57.

First, Skinner's claim was not jurisdictionally barred by the *Rooker-Feldman* doctrine.<sup>21</sup> By federal statute, only the U.S. Supreme Court has appellate jurisdiction over state court judgments.<sup>22</sup> Thus, federal district courts have no jurisdiction to review state court judgments.<sup>23</sup> *Rooker* and *Feldman* bar actions in which "[t]he losing party in state court filed suit in a U.S. District Court after the state proceedings ended, complaining of an injury caused by the state court judgment and seeking federal-court review and rejection of that judgment."<sup>24</sup>

Skinner moved for post-conviction DNA testing under a Texas statute authorizing it if the prisoner met certain conditions.<sup>25</sup> He lost when the Texas Court of Criminal Appeals found that he failed to meet those conditions.<sup>26</sup> He then filed his § 1983 action against the district attorney who had custody of the evidence he wanted to test, alleging a due process violation. Thus, Skinner appeared to be challenging an adverse decision of Texas's highest criminal court in federal district court—precisely what *Rooker-Feldman* disallows. His attorneys clarified, however, that he was challenging Texas's "post-conviction statute 'as construed' by the Texas courts," rather than the adverse judgment itself.<sup>27</sup> Thanks to this maneuver, Skinner cleared the *Rooker-Feldman* bar.<sup>28</sup>

*Rooker-Feldman* is surely relevant to post-conviction litigation under § 1983, for there is only a reason for a federal suit if the state court judgment is adverse. But *Skinner* shows how to steer clear of it: challenge the rule that governs the decision, not the decision itself.

The second holding was that Skinner need not petition for the writ of habeas corpus and could instead seek remedies under 42 U.S.C. § 1983. Its

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21. See *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923).

22. See 28 U.S.C. § 1257 (2006) ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . .").

23. See *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 292 (2005).

24. *Skinner v. Switzer*, 131 S. Ct. 1289, 1297 (2011).

25. *Id.* at 1295 (citing TEX. CODE CRIM. PROC. ANN. art. 64.01(b) (Vernon Supp. 2010)).

26. *Id.* (citing *Skinner v. State*, 293 S.W.3d 196, 200 (Tex. Crim. App. 2009)).

27. *Id.* at 1296.

28. *Id.* at 1297-99. Skinner's § 1983 complaint was perhaps deliberately unclear in pleading which state actor was responsible for the alleged constitutional violation. Texas invoked *Rooker-Feldman*, leading the district court to note this ambiguity. See *Skinner v. Switzer*, No. 2:09-CV-0281, 2010 WL 273143, at \*5 (N.D. Tex. Jan. 20, 2010) (finding that Skinner had raised some claims not barred by the doctrine but might have also "assert[ed] additional claims" that would be barred). Thus, the prominence of *Rooker-Feldman* may be in part a contingent feature of this particular lawsuit.

simple logic was discussed above. A habeas petition is the proper way to challenge the fact or duration of one's confinement,<sup>29</sup> or to advance collateral claims that "necessarily imply the invalidity of [one's] conviction or sentence."<sup>30</sup> An action seeking DNA testing, if successful, simply yields testing, which does not "necessarily" invalidate a conviction because its results are uncertain.<sup>31</sup>

Technically, then, *Skinner* straightforwardly applied existing precedent.<sup>32</sup> But Skinner's suit differed from other post-conviction claims that the Court has previously found cognizable under § 1983. Those actions have challenged state parole proceedings,<sup>33</sup> prison disciplinary proceedings that result in the loss of good-time credits,<sup>34</sup> and the particular drug cocktail used in a lethal injection.<sup>35</sup> If successful, those § 1983 actions would yield new administrative proceedings or execution protocols, which might, in turn, result in a prisoner being released earlier or killed by a different method. Either way, their ultimate outcome would be consistent with the initial sentence. Skinner's § 1983 action, however, falls just one step short of challenging the original judgment itself. If Skinner is ultimately successful in his § 1983 action, he only gets DNA testing. But if the DNA testing "succeeds," his conviction and sentence will be effectively invalidated.<sup>36</sup>

Even if it merely applied precedent, therefore, *Skinner* brought 42 U.S.C. § 1983 one step closer to the goal that capital post-conviction litigants usually seek to achieve through habeas: overturning the death sentence.

## II. ACTUALIZING ATKINS

In *Atkins* litigation, Texas death-row inmates with plausible claims of mental retardation have an exceedingly difficult task. *Atkins* left it to the states to define mental retardation,<sup>37</sup> and Texas botched it.

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29. *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973).

30. *Heck v. Humphrey*, 512 U.S. 477, 487 (1994).

31. *Skinner*, 131 S. Ct. at 1298-99.

32. *See id.* at 1298 ("Measured against our prior holdings, *Skinner* has properly invoked § 1983.").

33. *Wilkinson v. Dotson*, 544 U.S. 74 (2005).

34. *Wolff v. McDonnell*, 418 U.S. 539 (1974).

35. *Hill v. McDonough*, 547 U.S. 573 (2006).

36. He would still need to file a habeas petition using the new evidence if the prosecutor did not agree to his release.

37. *See Atkins v. Virginia*, 536 U.S. 304, 317 (2002).

The *Atkins* holding relied on a trend of new state laws prohibiting the execution of mentally retarded persons.<sup>38</sup> Many of them used the American Association on Mental Retardation's (AAMR) definition of mental retardation, which had three prongs: (1) significantly subaverage intellectual functioning; (2) related limitations in adaptive behavior; and (3) manifestation before age eighteen.<sup>39</sup> Before *Atkins*, the Texas legislature had passed such a bill, but Governor Rick Perry vetoed it.<sup>40</sup>

Defining a legal bright line between persons who are and are not mentally retarded is undoubtedly difficult. IQ is the most common standard measure of intellectual functioning.<sup>41</sup> Different IQ tests produce varying scores; every IQ score has a built-in margin of error; and, because IQ scores are relative, old scores are lower than they appear because humanity performs better on IQ tests over time.<sup>42</sup> Thus, even using the most widely accepted objective metric, the boundary between intellectual disability and intellectual normality will always be hazy. Yet *Atkins* at least relied on a widely accepted clinical definition.<sup>43</sup> Many states then implemented it by statute, but Texas did not.<sup>44</sup>

The Texas Court of Criminal Appeals (CCA) tried to fill the void. The CCA held that the AAMR definition, codified elsewhere in Texas statutes, would

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38. See *id.* at 314-17.

39. *Id.* at 308 n.3. Though the AAMR is now the AAIDD, its definition of mental retardation remains essentially the same. See *FAQ on Intellectual Disability*, AAIDD, [http://www.aamr.org/content\\_104.cfm](http://www.aamr.org/content_104.cfm) (last visited Oct. 25, 2011).

40. See *Ex parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004).

41. See, e.g., Marko Wilke et al., *Bright Spots: Correlations of Gray Matter Volume with IQ in a Normal Pediatric Population*, 20 *NEUROIMAGE* 202, 202 (2003).

42. The rise in IQ scores over time is known as the "Flynn Effect," and its practical import in capital cases is that old IQ scores should be adjusted downward. See James R. Flynn, *Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect*, 12 *PSYCHOL. PUB. POL'Y & L.* 170 (2006). Courts have varying, if generally circumspect, attitudes toward its use. Compare *Walker v. True*, 399 F.3d 315, 322-23 (4th Cir. 2005) (finding lower court error in failing to consider Flynn Effect evidence), with *Neal v. State*, 256 S.W.3d 264, 273 (Tex. Crim. App. 2008) ("We have previously refrained from applying the Flynn effect, . . . noting that it is an 'unexamined scientific concept' . . ." (quoting *Ex parte Blue*, 230 S.W.3d 151, 166 (Tex. Crim. App. 2007))). For an extensive and favorable discussion of the Flynn Effect in a federal death penalty case, see *United States v. Hardy*, 762 F. Supp. 2d 849, 857-62 (E.D. La. 2010).

43. See *supra* notes 38-39 and accompanying text.

44. For the details, see Sarah Gail Tuthill, Comment, *The Texas-Size Struggle To Implement Atkins v. Virginia*, 14 *TEX. WESLEYAN L. REV.* 145 (2007).

govern *Atkins* claims unless the Texas legislature decided otherwise.<sup>45</sup> At the same time, however, it noted that limitations in adaptive behavior are “subjective,” and that *Atkins* claims are prone to dueling expert testimony.<sup>46</sup> As a result, the CCA listed “evidentiary factors” to aid the factfinder in evaluating mental retardation.<sup>47</sup> These factors include whether the person’s family and friends thought he was mentally retarded during childhood; whether he formulates and executes plans; whether he responds appropriately to stimuli and coherently to questions; whether he lies effectively; and whether his capital crime required forethought and “complex execution of purpose.”<sup>48</sup>

These “*Briseno* factors” are simply made up.<sup>49</sup> They diverge wildly from the clinical definition of mental retardation that they ostensibly illuminate. For instance, mental retardation is defined by adaptive limitations, or what a person cannot do, but *Briseno* asks whether he *can* plan, lie, and answer questions.<sup>50</sup> This focus on strengths rather than limitations prejudices the defendant. Unless a person is so severely intellectually disabled as to be almost nonfunctioning, the State will always be able to point to some clinically irrelevant thing he does well as “evidence” that he is not mentally retarded.<sup>51</sup> What a person’s friends thought about his mental capabilities, moreover, has no bearing on the underlying reality. And perhaps most important, asking whether the defendant’s crime required forethought invites reflection on the offense’s brutality rather than the offender’s cognitive limitations. That juries often decide *Atkins* claims at trial in Texas simply exacerbates these flaws, as

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45. *Ex parte Briseno*, 135 S.W.3d at 8 (discussing the AAMR definition and section 591.003(13) of the Texas Health & Safety Code); see TEX. HEALTH & SAFETY CODE ANN. § 591.003(13) (West 2010).

46. *Ex parte Briseno*, 135 S.W.3d at 8.

47. *Id.*

48. *Id.* at 8-9.

49. See, e.g., Kovarsky, *supra* note 18, at 353 (“no scientific or clinical content”); Steiker & Steiker, *supra* note 20, at 728 (“not grounded in professional practice or guidelines”).

50. See John H. Blume, Sheri Lynn Johnson & Christopher Seeds, *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL’Y 689, 712 (2009).

51. See, e.g., *Neal v. State*, 256 S.W.3d 264, 274 (Tex. Crim. App. 2008) (noting that defendant wrote a poem depicting himself as a lion); *Hall v. State*, 160 S.W.3d 24, 31 (Tex. Crim. App. 2004) (en banc) (noting that defendant taught a coworker how to bag groceries and “ordered his own meal (fried catfish) and appeared to utilize eating utensils in a normal manner”).

jurors often believe that a person who is “really” mentally retarded should appear more far severely disabled than he will.<sup>52</sup>

While the *Briseno* factors were originally framed as a way to distinguish mental retardation from personality disorder,<sup>53</sup> they have essentially become the definition of mental retardation in Texas capital cases. In adjudicating and reviewing *Atkins* claims, Texas courts routinely test evidence against them.<sup>54</sup> The U.S. Court of Appeals for the Fifth Circuit described the *Briseno* factors as “definitions of mental retardation” under Texas law.<sup>55</sup> The consequence is that Texas makes it very difficult for a person who is truly clinically mentally retarded to be found legally mentally retarded in a capital case.<sup>56</sup>

As a result, many death-row prisoners leave Texas courts with strong *Atkins* claims.<sup>57</sup> The odds that a federal court will take corrective action are

52. See, e.g., Marcus T. Boccaccini et al., *Jury Pool Members’ Beliefs About the Relation Between Potential Impairments in Functioning and Mental Retardation: Implications for Atkins-Type Cases*, 34 LAW & PSYCHOL. REV. 1 (2010); Andrea D. Lyon, *But He Doesn’t Look Retarded: Capital Jury Selection for the Mentally Retarded Client Not Excluded After Atkins v. Virginia*, 57 DEPAUL L. REV. 701 (2008). Though defendants may move for a pre-trial judicial hearing, the *Atkins* issue is a question of fact that often goes to the jury. See, e.g., *Williams v. State*, 270 S.W.3d 112 (Tex. Crim. App. 2008). There is no right to jury determination of an *Atkins* claim, however, so a judge will decide it when it is raised in state or federal habeas. See *Ex parte Briseno*, 135 S.W.3d at 10; see also *Schiro v. Smith*, 546 U.S. 6, 7-8 (2005) (holding that there is no federal right to a jury determination of an *Atkins* claim because *Atkins* left implementation to the states).
53. *Ex parte Briseno*, 135 S.W.3d at 8.
54. See, e.g., *Ex parte Woods*, 296 S.W.3d 587, 611 (Tex. Crim. App. 2009) (finding it significant that defendant’s teachers did not consider him mentally retarded); *Ex parte Modden*, 147 S.W.3d 293, 296 (Tex. Crim. App. 2004) (“We will review the record and apply the criteria we adopted in *Briseno*.”).
55. *Moreno v. Dretke*, 450 F.3d 158, 164 (5th Cir. 2006).
56. See MARK D. CUNNINGHAM, EVALUATION FOR CAPITAL SENTENCING 24 (2010) (stating that Texas takes a “far more restrictive view of the behavioral features of death-excludable mental retardation”). Of course, as some courts have noted in rejecting *Atkins* claims, *Atkins* does not require that the legal definition of mental retardation match the clinical one or that courts defer to psychologists. See, e.g., *United States v. Bourgeois*, C.A. No. C-07-223, slip op. at 47-48 (S.D. Tex. May 19, 2011). But it is entirely possible for courts to rely on their own independent judgment rather than clinicians’, while still evaluating *Atkins* claims in a fashion consistent with the widely agreed-upon meaning of mental retardation. See, e.g., *United States v. Davis*, 611 F. Supp. 2d 472 (D. Md. 2009).
57. A handful of other states also rely upon a judicial definition of mental retardation in the absence of legislative action. See, e.g., *Ex parte Smith*, No. 1080973, 2010 WL 4148528, at \*4 (Ala. Oct. 22, 2010) (noting that “the Alabama legislature has not yet enacted legislation” implementing *Atkins*). And the CCA is not the only state court to err by considering an offender’s capacity for untruthfulness and criminal behavior in evaluating his *Atkins* claim.

slim. First, procedural obstacles may get in the way. Prisoners have only a one-year period to file a federal habeas petition,<sup>58</sup> and they have no right to appointed counsel.<sup>59</sup> Inept counsel may have failed to raise the claim at trial or in state habeas, precluding the prisoner from raising it in federal habeas.<sup>60</sup>

Second, even if a prisoner brings a procedurally valid federal *Atkins* claim, the federal habeas statute's restriction of federal courts' remedial powers may sweep *Briseno*'s faults under the carpet. Relief may not be granted in federal habeas unless the state court judgment was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."<sup>61</sup> Thus, when *Atkins* claims get past procedural hurdles and into federal court, the question is whether the Texas courts unreasonably applied *Atkins* in determining that the prisoner is not mentally retarded.<sup>62</sup>

As long as federal post-conviction *Atkins* litigation remains exclusively within habeas, then, *Briseno* will only be evaluated under this deferential framework, if at all. Consequently, despite its deep and obvious flaws, the de facto rule governing mental retardation claims in Texas capital cases has not really faced direct constitutional scrutiny in federal court.

### III. A WAY FORWARD

Fortunately for the integrity of the system, *Skinner* provides a basic blueprint to challenge *Briseno* under § 1983 instead. This strategy offers an alternative for prisoners whose federal *Atkins* claims, while meritorious, are procedurally defective or unlikely to succeed under deferential review.

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*See, e.g., Morrison v. State*, 583 S.E.2d 873, 876 (Ga. 2003). Yet the *Briseno* factors seem unique in their formality, detail, and consistent application.

58. *See* 28 U.S.C. § 2244(d)(1) (2006).
59. There is generally no federal constitutional right to appointed counsel for discretionary post-conviction proceedings, whether in capital or noncapital cases. *See Murray v. Giarratano*, 492 U.S. 1, 10 (1989); *Wainwright v. Torna*, 455 U.S. 586, 586 (1982) (*per curiam*); *Ross v. Moffitt*, 417 U.S. 600, 610 (1974).
60. *Cf.* 28 U.S.C. § 2254(e)(2) (strictly limiting a federal habeas petitioner's ability to develop the factual basis for a claim through an evidentiary hearing).
61. *Id.* § 2254(d)(1).
62. *See Williams v. Taylor*, 529 U.S. 362, 407 (2000) (O'Connor, J.) ("[A] state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case.").

### A. *The Skinner Model*

Say that a Texas death-row prisoner sues in federal court to invalidate the rule under which Texas courts found him not to be mentally retarded. He might seek a temporary injunction preventing the warden from carrying out his execution—in effect, a stay of execution—until a new *Atkins* hearing is held under a different rule. Is his claim cognizable under § 1983?

Under *Skinner*, the answer is yes. In Texas, as in other states, prisoners asserting *Atkins* claims have the burden of proving that they are mentally retarded.<sup>63</sup> If the prisoner's action succeeds, the state court judgment that he is not mentally retarded would be invalidated. But the death sentence itself would not, for the prisoner has simply restored the status quo ante. He is presumptively not mentally retarded until he proves otherwise. He may be entitled to a new hearing on mental retardation, but that new hearing is just like DNA testing: it cannot “necessarily” invalidate his sentence because its results are uncertain.

Texas might point out that if the prisoner's action succeeds, it is prohibited from effectuating its death sentence until rehearing of the *Atkins* claim. But this concern applies equally well to *Skinner*, where it never came up. If *Skinner* ultimately prevails in his § 1983 suit, and Texas's denial of access to DNA testing is found to have violated his constitutional rights, then his sentence also cannot be executed until DNA testing occurs. If mere delay invalidates a death sentence, *Skinner* should have come out the other way.

Thus, our prisoner should not have trouble stating a cognizable claim under § 1983. At first glance, though, he may have a *Rooker-Feldman* problem. Like *Skinner*, the prisoner is suing in response to an unfavorable state court judgment. *Skinner* circumvented this issue by challenging not the judgment, but the rule governing it. Here, however, the governing rule is *Briseno*, a state court decision. *Skinner*'s easy avoidance of *Rooker-Feldman*—challenging the statute, authoritatively construed by the judgment, not the judgment—becomes trickier when there is no statute, but instead a judicially created rule. Fortunately, there are good solutions.

First, *Rooker-Feldman* only applies when the “losing party in state court” alleges injury arising from the adverse state court judgment.<sup>64</sup> *Briseno* is the state court decision injurious to our prisoner, but he is not a party to it. He complains not of the judgment itself, but of its application as a rule in another case. Thus, *Rooker-Feldman* would not bar his claim. It might still seem

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63. *Ex parte Briseno*, 135 S.W.3d 1, 12 (Tex. Crim. App. 2004).

64. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291 (2005).

unusual that judicial action would form the basis for a § 1983 claim. The action under color of state law that gives rise to the prisoner's complaint, however, is not *Briseno*, but his detention under sentence of death. He is not suing the judge but the prison warden or some other executive official responsible for his detention.<sup>65</sup> The question is merely whether judicial action can give rise to the constitutional violation, to which the answer is: of course.

Second, our prisoner might mimic *Skinner* in a slightly different fashion by arguing that the use of the *Briseno* factors in his case is actually the authoritative construction of a statute. *Briseno*, after all, purported to hold that Texas will "follow" the AAMR definition, which was codified in section 591.003(13) of the Texas Health and Safety Code, in adjudicating *Atkins* claims.<sup>66</sup> The *Briseno* factors were just evidentiary aids employed in service of the statutory definition—meaning that, whenever they are used, they might be said to construe the statute itself.

Either way, *Rooker-Feldman* should not jurisdictionally bar his claim.

### B. The Claim

The prisoner can state a cognizable claim under 42 U.S.C. § 1983, over which a federal district court has subject-matter jurisdiction. But what is the claim? He might plead that the *Briseno* factors violate the Eighth Amendment's ban on cruel and unusual punishments or the Due Process Clause of the Fourteenth Amendment.<sup>67</sup>

The Eighth Amendment claim would, of course, rely heavily on *Atkins*. While *Atkins* authorized the state-by-state free-for-all that produced *Briseno*, its thrust is that the Eighth Amendment prohibits the execution of persons with

65. Section 1983 actions are commonly brought against executive officials to enjoin them from implementing another actor's unconstitutional scheme. *Cf. Reynolds v. Sims*, 377 U.S. 533, 537, 541 (1964) (seeking injunction against future elections until legislature reapportioned itself). The statute also contemplates actions for declaratory relief against judges. See 42 U.S.C. § 1983 (stating that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable"); see also *Kampfer v. Scullin*, 989 F. Supp. 194, 201 (N.D.N.Y. 1997) (explaining this provision). A judge is absolutely immune from suits for damages arising from actions taken in his judicial capacity in matters over which he has jurisdiction. *Stump v. Sparkman*, 435 U.S. 349, 355-56, 363-64 (1978). Venue may be an important consideration in choosing which executive official to sue.

66. *Ex parte Briseno*, 135 S.W.3d at 8; see *supra* note 45 and accompanying text.

67. The Eighth Amendment is incorporated against Texas by the Fourteenth Amendment. The prisoner might also advance a separate procedural due process claim.

mental retardation.<sup>68</sup> One federal appeals court has recently pointed out that the discretion afforded to states by *Atkins* is limited: states may only “enforce” the prohibition on executing the mentally retarded, not undermine it.<sup>69</sup> Thus, if a procedure for adjudicating mental retardation claims “necessarily will result in the execution of the mentally retarded,” it violates the Eighth Amendment.<sup>70</sup> *Briseno* is such a procedure because it is simply too arbitrary to identify who is actually mentally retarded. The claim might also rely on the basic principle of Eighth Amendment jurisprudence that cruel and unusual punishments are defined by society’s “evolving standards of decency.”<sup>71</sup> The majority of post-*Atkins* implementing statutes suggests a national consensus against executing mentally retarded persons, especially those who satisfy the clinical definition of mental retardation.

The prisoner might also advance a due process challenge, as *Skinner* did.<sup>72</sup> The Supreme Court has previously derived special procedural requirements for death penalty cases from the Due Process Clause.<sup>73</sup> Here, one might simply argue that *Briseno* is arbitrary, and that the gravity of the circumstances requires greater accuracy than *Briseno* affords in determining who is mentally retarded. Or, more narrowly, the prisoner might argue that *Briseno*’s actual holding—that Texas will apply its statutory definition of mental retardation to *Atkins* claims—gives *Atkins* claimants a liberty interest in being evaluated according to this definition.<sup>74</sup> The factfinder’s use of the *Briseno* factors, which obscure the statutory definition itself, arbitrarily deprives the prisoner of this liberty interest.<sup>75</sup>

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68. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

69. See *Hill v. Schofield*, 608 F.3d 1272 (11th Cir. 2010) (holding unconstitutional Georgia’s requirement that mental retardation be proven beyond a reasonable doubt), *rev’d sub nom.* *Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011) (en banc).

70. *Id.* at 1274.

71. *Atkins*, 536 U.S. at 312 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

72. *Skinner v. Switzer*, 131 S. Ct. 1289, 1296 (2011).

73. See, e.g., *Simmons v. South Carolina*, 512 U.S. 154 (1994) (establishing that a capital defendant is entitled to jury instruction on ineligibility for parole when his future dangerousness is at issue in sentencing).

74. *Skinner* argued that the Texas post-conviction DNA testing statute gave prisoners who had not sought DNA testing at trial a liberty interest in obtaining it on collateral review, but that the statute as authoritatively construed by the CCA made it effectively impossible for these prisoners to obtain testing, thus depriving them of the liberty interest they had been granted. *Skinner*, 131 S. Ct. at 1296.

75. *Cf. Wolff v. McDonnell*, 418 U.S. 539, 556-58 (1974) (holding that prisoners may not be arbitrarily deprived of their statutory liberty interest in good-time credits).

Whether these claims might succeed is uncertain. But, even if § 1983 actions cannot ultimately topple *Briseno*, they can still achieve important benefits. *Briseno* can be undone by legislative action any day. New litigation might draw attention to the problem. It also opens up the possibility of evidentiary hearings that may help the prisoner. And it might at least compel the federal judiciary to assess *Briseno* directly, affording a full and fair hearing to an important federal constitutional question.

## CONCLUSION

The intersection of habeas corpus and 42 U.S.C. § 1983 lies deep in the procedural weeds, but it has grave human consequences.

On June 21, 2011, Texas executed Milton Mathis. Though Texas courts found him not to be mentally retarded, he probably was. He had scored 62 and 64 on IQ tests while incarcerated, well below the threshold for mental retardation of 70.<sup>76</sup> Yet no federal court ever reached the substantial merits of his *Atkins* claim, which was caught in a bizarre procedural snafu that led to its dismissal.<sup>77</sup> If the constitutional prohibition against executing mentally retarded persons is to have real meaning, federal courts must actually be able to prevent such executions. With habeas as his only federal recourse, Milton Mathis was killed.

Texas law virtually guarantees that there will be another Milton Mathis, and soon. After *Skinner*, perhaps § 1983 could provide the relief the Constitution demands.

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76. *In re Mathis*, 483 F.3d 395, 397 (5th Cir. 2007).

77. *Mathis v. Thaler*, 616 F.3d 461, 465-66, 476 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 1574 (2011).