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Kathryn A. Harrington
Washington University School of Law

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Ghosts of Innocent Men: Necessary Implications of *Skinner v. Switzer*

Kathryn A. Harrington*

INTRODUCTION

Two chicken thighs, a double bacon cheeseburger, fried catfish, onion rings, French fries, a salad with ranch dressing, and a milkshake.[1] Forty-seven minutes were left when Hank Skinner's last meal was interrupted in dramatic fashion.[2] The Supreme Court had issued a stay of execution pending resolution of his petition for certiorari.[3] Untested DNA evidence exists, and questions about Skinner's guilt in a 1993 New Year's Eve triple murder remain.[4] In

* J.D. Candidate (2012), Washington University Law School; B.A., Psychology (2006), Duke University. Special thanks to Lindsay Herf, Attorney/DNA Case Manager at the Arizona Justice Project, to *Journal* members Matthew Schoonover and Laura Vaughn for their fantastic edits and encouragement, and to Joanne, Neil, Joe, Maggie, and Harry Harrington.

1. Eamon McNiff, *Down to His Final Meal, Hank Skinner Granted Stay of Execution in Texas Murder Case*, ABCNEWS.GO.COM (Mar. 25, 2010), http://abcnews.go.com/TheLaw/hank-skinner-minute-stay-execution-supreme-court-texas/story?id=10200157.

2. Brian Rosenthal, *U.S. Supreme Court Rules in Favor of Hank Skinner, Medill Innocent Project*, THE DAILY NORTHWESTERN (Mar. 8, 2011), http://www.dailynorthwestern.com/u-s-supreme-court-rules-in-favor-of-hank-skinner-medill-innocence-project-1.2508424.

3. Order in Pending Case, Order List 559 U.S., Skinner v. Switzer, (No. 09-9000) (09A743) (Mar. 24, 2010), *available at* http://www.scotusblog.com/wp-content/uploads/2010/03/Skinner-stay-order-3-24-10.pdf.

4. *See* Complaint ¶¶ 11–21, Skinner v. Switzer, No. 2:09-CV-00281-J (N.D. Tex. Nov. 27, 2009). Skinner was convicted with circumstantial evidence. *Id.* ¶ 13. Robert Donnell, the victim's uncle, was never investigated as an alternate suspect despite evidence that Donnell stalked the victim on the night of the murder, and that a windbreaker jacket found at the crime scene was very similar to one that he owned. *Id*. Further, Skinner's physical ability to commit a triple murder was questionable due to the large amounts of alcohol and codeine that he had ingested on the night of the murders. *Id*. Moreover, Skinner sustained a prior injury that affected the use of his right hand. *Id*. This fact made it more unlikely that Skinner had the ability to forcefully stab three victims to death with his right hand. *Id*. A key witness recanted her previous statements implicating Skinner, Petition for Writ of Certiorari, Skinner v. Switzer, 130 S. Ct. 3323 (2010) (No. 09-9000), 2010 WL 2101867 at *9 n.5, and jurors now doubt their initial decision to convict Skinner, Rachel Cicurel et al., *Hank Skinner Death Penalty Case: Texas Jurors Reconsider Verdict*, POLITICS DAILY (Jan. 5, 2011) ("Five say they might have

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March 2011, the Supreme Court recognized Skinner's right to sue under 42 U.S.C. § 1983 for access to untested DNA evidence.[5] Skinner's § 1983 suit is pending in federal court in Texas.[6] He awaits the decision on death row.[7]

Skinner was convicted of capital murder in March 1995 in Gray County, Texas.[8] His conviction was affirmed on direct appeal and he was sentenced to death.[9] Skinner has repeatedly requested that DNA testing be performed on seven potentially probative items of crime scene evidence.[10] Testing has yet to occur, but his execution date has been set multiple times.[11]

Skinner's case is not unusual.[12] DNA evidence is routinely collected from crime scenes nationwide and is largely regarded as the

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had reasonable doubt at the time of the trial if they had known then what they know now. Seven are calling for DNA testing of all the evidence so they can be certain they convicted the right man."), *available at* http://www.politicsdaily.com/2010/06/09/hank-skinner-death-penalty-case-texas-jurors-reconsider-verdict/.

5. Skinner v. Switzer, 131 S. Ct. 1289 (2011). The Court recognized the right to file a civil suit for access to DNA evidence, but a Texas federal court will decide his case on the merits and will determine whether or not Skinner actually receives access to the evidence. *See id*.

6. Amanda Buck, *Death Date is Set: Former County Man on Death Row in Texas*, MARTINSVILLE BULLETIN (Aug. 5, 2011), http://www.martinsvillebulletin.com/article.cfm?ID=29556.

7. *Id.* Skinner's execution date, originally for March 24, 2011 was reset to November 9, 2011. *See id*. On November 7, 2011, the Texas Court of Criminal Appeals stayed his November 9 execution date pending an analysis of how newly enacted Texas DNA law (SB 122) affects Skinner. *Skinner gets Stay to Determine if He'll get DNA Testing*, THE AGITATOR (Nov. 7, 2011), http://www.theagitator.com/2011/11/07/skinner-will-get-dna-testing/; *see also infra*, AFTERWORD. This Note discusses the narrow issue of whether DNA evidence requests are cognizable under § 1983 or whether they should be confined to Habeas Corpus. Updates concerning the Skinner case that are outside the scope of this issue are discussed *infra* AFTERWARD.

8. Skinner was convicted of killing his girlfriend Twila Busby and her two sons, Elwin Caler and Randy Busby, on December 31, 1993. Brief for Petitioner, *Skinner* v. Switzer, 130 S. Ct. 3323 (argued Oct. 13, 2010) (No. 09-9000), 2010 WL 2937558 at *2. Skinner admits that he was present in the home during the murders but asserts that because he was heavily intoxicated from alcohol and codeine he lacked the physical ability to commit a triple murder. *Id.* at *2-3.

9. Skinner v. State, 956 S.W.2d 532, 535 (Tex. Crim. App. 1997).

10. Complaint, *supra* note 4, ¶¶ 21–31. Skinner requested the DNA evidence through Chapter 64 motions, federal and state habeas discovery provisions, and in telephone conferences with the State. *Id*. ¶¶ 21–31. For a list of the seven items Skinner requested, see *infra* note 56. Skinner has also requested DNA testing under SB 122. *See infra* AFTERWORD.

11. *See supra* notes 6, 7, 113–20 and accompanying text.

12. Skinner is the not the first potentially innocent man on Texas's death row. *Kevin Cooper Fact Sheet*, FREE KEVIN COOPER, http://www.savekevincooper.org/Scripts/Data

most probative evidence available.[13] DNA evidence, however, is neither automatically nor routinely tested.[14] Permission to test the evidence is conditioned upon satisfying the specific procedural requirements of each state's post-conviction DNA access statute[15] and is often denied.[16] Because Texas denied his requests, Skinner sought permission to access the DNA evidence under § 1983.[17] DNA testing under § 1983 was his last chance.[18]

Libraries/upload/kevincooper_fact_sheet.pdf (last visited Feb. 10, 2012) ("In 2004, Texas executed Cameron Todd Willingham for the arson deaths of his two daughters. We now know that Mr. Willingham was innocent."). Nor is Texas the only state where the execution of an innocent man has occurred. *Id*. ("In 2009, as a result of an investigation of the State of North Carolina's Crime Laboratory, two former FBI agents concluded that false forensic evidence had been used, and exonerating evidence hidden from the defense, in 280 criminal cases over 16 years. In three of those cases men were executed before the truth was uncovered."). And in California, Kevin Cooper, a man that the Ninth Circuit has called potentially "innocent" sits on death row. *Id*. Cooper was convicted of murder in 1985. *Id*. Accusations were made that the prosecution planted Cooper's blood on the crime scene evidence and DNA tests show that this likely occurred. *Id*. The prosecution's expert has since withdrawn the DNA evidence and has admitted that the DNA evidence used to support his guilt had been contaminated in his laboratory. *Id*. Despite the fact that all the evidence used to convict Cooper has now been discredited, California still plans to execute Cooper. *Id*. Further, Chromosomal Laboratories, Inc., an Arizona DNA lab, has offered to retest the DNA evidence in Cooper's case for free. Telephone Interview with Jim Bentley, DNA Analyst, Chromosomal Labs., Inc. (Feb. 2, 2011). Like Texas in the *Skinner* case, California refuses to release the evidence for further testing. *Id*.

13. Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2316 (2009).

14. *Access to Post-Conviction DNA Testing*, INNOCENCE PROJECT, http://www.innocence project.org/Content/Access_To_PostConviction_DNA_Testing.php (last visited Nov. 13, 2011). Even in cases where DNA evidence is available and would definitively prove guilt or innocence, some state statutes still deny testing. *Id.*; *see also* Michael P. Luongo, Note, *Post-Conviction Due Process Right to Access DNA Evidence*, 29 TEMP. ENVTL. L. & TECH. J. 127, 133–36 (2010) (explaining how various state statutory requirements severely limit a prisoner's ability to secure post-conviction DNA testing).

15. Forty-eight states have statutes that govern access to DNA evidence. *Access to Post-Conviction DNA testing*, *supra* note 14. Only Massachusetts and Oklahoma do not have post-conviction DNA access statutes. *Id*. For a more complete discussion of each state's specific post-conviction DNA statute, see *Reforms by State*, INNOCENCE PROJECT, http://www. innocenceproject.org/news/LawView2.php (last visited Feb. 10, 2012).

16. *Osborne*, 129 S. Ct. at 2316–17 (explaining that the availability of DNA evidence alone is not enough to ensure that it will be tested because states may impose statutory requirements that restrict a prisoners ability to secure testing).

17. *See generally infra* Part I.C.1.

18. The stay would have been revoked and Skinner executed if the Supreme Court did not recognize DNA evidence requests under § 1983. *See* Transcript of Oral Argument, Skinner v. Switzer, 130 S. Ct. 3323 at 6:4-10 (argued Oct. 13, 2010) (No. 09-9000), 2010 WL 3999615. Developments in Texas law have now allowed Skinner a chance to pursue DNA testing under SB 122. *See infra* AFTERWORD.

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Skinner v. Switzer asked the Supreme Court to decide "whether *Heck* [Heck v. Humphrey, 512 U.S. 477 (1994)] bars § 1983 actions brought by convicted persons seeking access to evidence for DNA testing."[19] The Supreme Court held that *Heck* did not.[20] *Heck* bars from § 1983 all claims that "necessarily imply" the invalidity of the underlying conviction and confines them to writs of habeas corpus.[21] The same issue was before the Supreme Court in *District Attorney's Office v. Osborne*, but it was left unanswered.[22] Though *Osborne* sidelined the issue, eight circuits had defined the habeas exception to § 1983 DNA evidence requests prior to the Court's March 2011 ruling.[23] Circuits were split—two limited DNA evidence requests to habeas while six recognized the claim under § 1983.[24]

The split illustrated a familiar tension—that of allocating the new opportunity afforded by DNA evidence and that of preserving the necessary finality of state criminal convictions.[25] Striking a definitive balance between the two was a line that the *Osborne* Court was reluctant to draw.[26] Because *Osborne* found that nearly every state addressed the post-conviction DNA issue adequately and effectively,[27] it declined to interfere.[28] In *Skinner*, however, the Supreme Court drew the line to uniformly include DNA evidence requests under § 1983.[29] This was the correct decision. The Equal Protection Clause prohibits the ability of circuit-specific procedural technicalities to bar access to potentially probative DNA evidence.[30]

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19. Petition for Writ of Certiorari, *supra* note 4, at 25.
20. Skinner v. Switzer, 131 S. Ct. 1289, 1298 (2011).
21. For a more complete explanation of the *Heck* test, see *infra* notes 83–88 and accompanying text.
22. *See infra* notes 93–94 and accompanying text.
23. *See generally infra* Part I.B.3.
24. *See generally infra* Part I.B.3.
25. *See* Dist. Att'y's Office v. Osborne, 129 S. Ct. 2308, 2322 (2009).
26. *Id*. at 2323.
27. *Id*. at 2316; *see also supra* note 15.
28. 129 S. Ct. at 2320–23.
29. Skinner v. Switzer, 131 S. Ct. 1289, 1293 (2011); *see also* Editorial, *Death, DNA and The Supreme Court*, N.Y. TIMES, Oct. 17, 2010, at A34.
30. *See Death, DNA and the Supreme Court, supra* note 29 ("But to disqualify Mr. Skinner now from obtaining the testing would elevate game-playing over truth-seeking and ignore the need to ensure, best as possible, that the right person has been convicted. Testing such evidence should not be left to a strategic decision; it should be standard in a serious criminal investigation.").

But for the more than 3,000 U.S. death row inmates,[31] the Supreme Court in *Skinner* should have gone further.[32] A federal constitutional right for death row inmates with set execution dates to test any available, untested DNA evidence should be established.[33] If a man is set to die when potentially probative DNA evidence exists in a testable condition, then the criminal justice system must speak loudly and uniformly in favor of new opportunity.[34] If state post-conviction statutes deny DNA analysis, especially at no additional cost to the state,[35] then the statute is neither adequate nor effective for its death row inmates.[36] Finality is not served, and state deference not deserved, if answerable questions are purposefully left unanswered when the execution occurs.[37]

Part I of this Note briefly describes the history of DNA evidence in the criminal justice system, examines the relevant state and federal statutes governing post-conviction relief, and outlines the case law leading to the *Skinner* issue. Part I concludes with a discussion of *Skinner*'s procedural history and the specific arguments made for and against recognizing DNA evidence requests under § 1983. Part II analyzes the circuit split over § 1983 DNA evidence requests and argues that the Supreme Court correctly recognized the claim under *Heck.* Skinner's ability to establish a valid § 1983 claim based on a procedural due process violation is analyzed and alternative

31. *Death Row Inmates by State and Size of Death Row by Year*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year (last visited Feb. 10, 2012).

32. *See generally infra* Part III.

33. *Death, DNA and The Supreme Court*, *supra* note 29 ("In an age when DNA technology can help identify the guilty and avoid grave miscarriages of justice, states should not be allowed to block testing of available biological evidence before executing someone.").

34. *Id.* ("There is a value in criminal law to the finality of verdicts and not permitting prisoners endless legal challenges to their convictions. The state should not execute prisoners. But since it does, the justices should be more concerned with the finality of executing someone when untested DNA evidence might shed light on his culpability and the state cannot be completely certain of his guilt.").

35. An Arizona DNA lab volunteered to test the seven items that Skinner requested free of cost. Telephone Interview with Jim Bentley, *supra* note 12.

36. Justice Sandra Day O'Connor has called the execution of an innocent man a "constitutionally intolerable event." *Fact Sheet*, *supra* note 12.

37. *Id.* ("Public confidence in the proper administration of the death penalty depends on the integrity of the process followed by the state.").

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arguments to secure DNA testing are suggested.[38] Part III proposes a federal constitutional right for state death row inmates to test any available DNA evidence at the time their execution date is set.

I. HISTORY

A. What's Your Bloodsworth: DNA in the Criminal Justice System

In 1923, Judge Learned Hand stated that "[o]ur [criminal] procedure has been always haunted by the ghost of the innocent man convicted."[39] In 1989, DNA testing first brought that ghost to light.[40] And the ghosts keep coming.[41] To date, DNA has exonerated seventeen capital defendants nationwide.[42] The first was Maryland death row inmate Kirk Bloodsworth, who was exonerated by DNA testing in 1993.[43] Texas's first death row DNA exoneration occurred fifteen years later in 2008.[44]

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38. *See infra* Part II.

39. McKithen v. Brown, 481 F.3d 89, 91–92 (2d Cir. 2007) (quoting United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923)). For an overview of DNA exonerations in the United States, see Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2006).

40. *See* Gross et al., *supra* note 39; *see also Know the Cases: Gary Dotson*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Gary_Dotson.php (last visited Nov. 13, 2011). Gary Dotson was convicted of rape in 1979. *Id*. In 1988, DNA testing of the semen stain positively excluded Dotson as the perpetrator. *Id*. Dotson was exonerated on August 14, 1989, after serving eight years in prison. *Id*.

41. As of February 10, 2012, DNA results have been responsible for 289 inmate exonerations. *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited Feb. 10, 2012). In well over a third of these exonerations, DNA evidence has also led to the identification of the true culprit. *Id*. In addition to exonerating inmates and identifying culprits, DNA evidence has excluded over tens of thousands of criminal suspects from further investigation. *Id*.

42. Seventeen is the current number as of February 10, 2012. *The Innocence List*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row (last visited Feb. 10, 2012). In order for DNA to be considered responsible for the exoneration, the Innocence Project requires that DNA play a role in the reversal, be crucial to the prisoner's defense, and help identify the true perpetrator. *Id.* As of February 7, 2012, a total of 140 death row inmates have been exonerated through various means. *Innocence and the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/innocence-and-death-penalty#inn-st (last updated Feb. 7, 2012).

43. TIM JUNKIN, BLOODSWORTH: THE TRUE STORY OF THE FIRST DEATH ROW INMATE EXONERATED BY DNA (2004); *see also Innocence Cases: 1984–1993*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/innocence-cases-1984-1993 (last visited Feb. 10, 2012).

DNA testing in the criminal justice system began in the mid-1980s.[45] Testing techniques are constantly evolving[46] and now allow for complete or partial DNA profiles to be constructed from most items of crime scene evidence containing biological material.[47] The DNA profile extracted from the evidence is referred to as the "source DNA."[48] Once identified, the suspect's DNA is collected and

Kirk Bloodsworth was convicted of rape and murder in 1993. *Id.* He spent nine years in prison before DNA evidence revealed his innocence. *Id*.

44. *See Innocence Cases: 2004–Present*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/innocence-cases-2004-present#130 (last visited Feb. 10, 2012). Michael Blair was convicted of murder and sentenced to death in 1994. *Id*. He was exonerated in May 2008. *Id*. He remains in prison for life on other charges. *Id*.

45. Luongo, *supra* note 14, at 130. While an intensive discussion of forensic DNA analysis is beyond the scope of this Note, see *DNA Forensics*, HUMAN GENOME PROJECT INFO., http://www.ornl.gov/sci/techresources/Human_Genome/elsi/forensics.shtml (last updated June 16, 2009), for a more detailed overview of DNA analysis in the criminal justice system. For specific examples of how DNA evidence has exonerated wrongfully convicted inmates, see generally *Know the Cases*, INNOCENCE PROJECT, http://www.innocenceproject.org/know/ (last visited Feb. 10, 2012).

46. Restriction Fragment Length Polymorphim (RFLP) testing was the first DNA testing technique used in the criminal justice system and could conclusively exclude suspects. Luongo, *supra* note 14, at 130. In order to create a DNA profile, RFLP required large amounts of genetic material to exist on properly preserved pieces of crime scene evidence. *Id*. at 130 n.32. Polymerase Chain Reaction (PCR) is an alternative technique that allows for DNA profiles to be created from biological material that is either too small or too degraded for RFLP. *Id*. at 130. PCR can definitively exclude a suspect and can match a suspect to the source DNA with a ninety-five percent statistical certainty. *Id*.

The PCR technique advanced into Short Tandem Repeat (STR), *id.*, which is now the standard DNA forensic technique. Osborne v. Dist. Att'y's Office, 129 S. Ct. 2308, 2315 n.3 (2009). To date, STR is the most discriminating testing technique available and became popular in the mid to late 1990s. *See* Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1659 (2008). STR testing has since developed into Y-STR (STR testing on the Y chromosome only) and mini-STR (examining an even smaller portion of the STR locus). *Mini-STR Testing*, DNA DIAGNOSTICS CTR., http://www.forensicdnacenter.com/dna-ministr.html (last visited Feb. 10, 2012). Mini-STR testing dramatically increases the sensitivity of DNA detection on crime scene evidence and allows for scientists to create DNA profiles from very small, degraded, or compromised samples. *Id*. Previously untestable DNA samples may now be analyzed with mini-STR technology. *Id*.

Finally, mitochondrial DNA (mtDNA) is a unique technique in that it tests DNA from the mitochondria of the cell as opposed to the nucleus. Luongo, *supra* note 14, at 131. Thus, mtDNA can be used to test biological items that do not have a nucleus, such as hair, teeth, or bones. *Id*. However, mtDNA cannot conclusively match a suspect with the source. *Id*.

47. *See* NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, USING DNA TO SOLVE COLD CASES 19–21 (2002), *available at* http://www.ncjrs.gov/pdffiles1/nij/194197.pdf; Norman C. Bay, *Old Blood, Bad Blood, and Youngblood: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 WASH. U. L. REV. 241, 279 (2008).

48. *See Forensic DNA Fundamentals for the Prosecutor: Be Not Afraid*, AM.

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compared to the source.[49] A favorable comparison results in a "match."[50] If the suspect's DNA profile does not match the source, then the suspect is "excluded."[51] If neither a match nor a definitive exclusion results, then DNA tests are "inconclusive."[52] When DNA from multiple contributors (for instance, both the victim and the perpetrator) is identified, the source is said to contain a "mixed profile."[53] If properly preserved, DNA evidence may remain available for future comparisons and can be subjected to more advanced testing techniques.[54]

The testing technique, condition of the source DNA, and the certainty of the match are significant factors that determine the probative value of the DNA test results.[55] Under § 1983, Skinner requested access to seven items, all of which may contain potentially probative biological material, and six of which have never been tested.[56]

B. Necessary Implications: Success Under § 1983

1. Post-Conviction Statutory Relief

Three statutory remedies for post-conviction relief were at issue in *Skinner*. First, Chapter 64 of the Texas Code of Criminal Procedure (Chapter 64) governs access to post-conviction DNA evidence for all

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PROSECUTORS RESEARCH INST. 13–14 (2003), *available at* http://www.ndaa.org/pdf/forensic_dna_fundamentals.pdf.

49. *Id*. at 13.

50. *See id*. The certainty of the match depends on the testing technique and the amount and condition of the recovered biological material found on the source. *Id*. at 13–14.

51. *See* NAT'L INST. OF JUSTICE, *supra* note 47, at 5–6.

52. *Interpreting DNA Test Results*, DNA INITIATIVE, http://www.dna.gov/audiences/victim/know/interpreting (last visited Nov. 13, 2011).

53. *See DNA Profiling*, BERICON, http://www.bericon.co.uk/go/our-services/dna-biology/dna-profiling/ (last visited Jan. 5, 2012).

54. *See id*. at 3.

55. *See generally Forensic DNA Fundamentals for the Prosecutor: Be Not Afraid*, *supra* note 48, at 7–15.

56. Complaint, *supra* note 4, ¶ 36. Skinner requested testing on the vaginal swabs from victim Twila Busby, Busby's fingernail clippings, a knife found on the front porch, a knife and a dishtowel found in a plastic bag in the living room, a windbreaker jacket found in the living room next to Busby's body, and hairs found in Busby's hands. *Id.* The hairs have been tested, but the results were inconclusive. *Id*. ¶¶ 18–19.

Texas prisoners.[57] Additionally, all state prisoners have two federal remedies—a writ of habeas corpus, 28 U.S.C. §§ 2241–2255, and a civil rights claim under § 1983.[58]

Texas enacted Chapter 64 in April 2001.[59] The statute conditions DNA testing on the prisoner's ability to meet certain requirements.[60] Two requirements were relevant in *Skinner*.[61] First, prisoners must establish by a preponderance of the evidence that they "would not have been convicted if exculpatory results had been obtained through DNA testing."[62] Second, prisoners must show that the failure to previously test the evidence was due to "no fault of the convicted person, for reasons that are of a nature such that the interests of justice require DNA testing."[63]

Habeas relief is limited to attacks on the conviction or legality of the confinement.[64] Section 2254 requires that prisoners be in custody in violation of the Constitution, laws, or treaties of the United States and that they first exhaust all available state court remedies.[65]

57. TEX. CODE CRIM. PROC. ANN. art. 64 (West 2010). *See infra* AFTERWARD for a discussion of the recent changes made to Texas Post-Conviction DNA law. This Note, however, analyzes the law as it was in effect for Skinner.

58. Heck v. Humphrey, 512 U.S. 477, 491–92 (1994) (Souter, J., concurring).

59. CRIM. PROC. art. 64. As of the date the brief was submitted, there had been twenty-three DNA exclusions and eighteen DNA exonerations under Chapter 64. Brief for Tarrant County Criminal District Attorney, et al. as Amici Curiae in Support of Respondent, Skinner v. Switzer, 130 S. Ct. 3323 (2010) (No. 09-9000), 2010 WL 4114159 at *18.

60. Chapter 64 grants post-conviction DNA testing only if the items remain untested because DNA testing was either unavailable, technologically incapable of providing probative results, or if the items can now be retested using more advanced DNA testing technology. CRIM. PROC. art. 64.01(b)(1)(A)-(B), (2). Texas prisoners may file successive Chapter 64 motions, there is no statute of limitations, and any convicted prisoner may file a motion. Brief for Respondent, Skinner v. Switzer, 130 S. Ct. 3323 (argued Oct. 13, 2010) (No. 09-9000), 2010 WL 3559537 at *41.

61. *See supra* notes 113–18 and accompanying text.

62. CRIM. PROC. art. 64.03(a)(2)(A).

63. *Id*. art. 64.01(b)(1)(B).

64. Preiser v. Rodriguez, 411 U.S. 475, 484 (1973) ("It is clear, not only from the language [of the statute] but also from the common-law history of the writ, that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody.").

65. *Id*. at 483. A prisoner has not exhausted state court remedies if he may still raise his claim under any statute in state court. *Id*.

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Primarily, the exhaustion requirement preserves federal-state comity.[66]

A § 1983 civil rights suit is the broader of the two federal remedies[67] and provides relief for constitutional violations at the hands of state officials.[68] State prisoners must establish two elements under § 1983: "that defendants deprived [them] of a federal constitutional right; and that defendants acted under color of state law."[69]

Three major differences exist between the two federal remedies. First, habeas requires that prisoners exhaust all available state court remedies;[70] state remedies need not exhausted before a prisoner may file a § 1983 claim.[71] Second, res judicata does not bar habeas claims but does preclude § 1983 claims.[72] Finally, habeas relief is reserved solely for allegations of unlawful conviction or confinement, whereas § 1983 may be used to challenge any constitutional violation, except

66. For a discussion of the state's unique role in the criminal justice system, see *id*. at 490–500.

67. *See* Dist. Att'y's Office v. Osborne, 129 S. Ct. 2308, 2318 (2009).

68. 42 U.S.C. § 1983 (2006) in full:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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.

69. Savory v. Lyons, 469 F.3d 667, 670 (7th Cir. 2006) (quoting Lekas v. Briley, 405 F.3d 602, 606 (7th Cir. 2006)).

70. 28 U.S.C. § 2254(b)(1) (West 2010); Skinner v. Quarterman, No. 2:00-CV-0045, 2007 WL 582808, at *6 (N.D. Tex. Feb. 22, 2007).

71. Wilkinson v. Dotson, 544 U.S. 74, 84 (2005) (explaining that § 1983 does not require exhaustion because it does not invalidate the conviction and thus does not infringe upon federal-state comity).

72. Preiser v. Rodriguez, 411 U.S. 475, 497 (1973). Texas has potentially viable res judicata and *Rooker-Feldman* arguments against Skinner's § 1983 claim. Report and Recommendation to Grant Defendant's Motion to Dismiss § 1983 Complaint at 12, Skinner v. Switzer, No. 2:09-CV-00281-J at 40 (N.D. Tex. Jan. 15, 2010) [hereinafter Report and Recommendation]. Skinner did not initially assert a constitutional challenge against Chapter 64. *Id*. at 6. Texas argues that Skinner's delayed attempt to bring a constitutional challenge is barred by either the res judicata or *Rooker-Feldman* doctrines. *See id*. at 12. For more information regarding the potential res judicata and *Rooker-Feldman* implications on Skinner's § 1983 claim, see *id*. at 1–12. The Supreme Court later ruled that the *Rocker-Feldman* doctrine does not bar Skinner's claim. 131 S. Ct. 1239, 1297 (2011).

those that challenge the lawfulness of the conviction or confinement.[73]

Exactly which claims sufficiently challenge a conviction so as to be limited to habeas relief is a difficult question.[74] The answer is made more difficult because most habeas claims will, on their face, satisfy the elements required by § 1983.[75] To preserve the distinct nature of habeas relief in the face of this overlap, the Supreme Court has explicitly exempted certain claims from § 1983 and confined them to habeas.[76]

2. Supreme Court Carve-Outs: Habeas Exceptions to § 1983

The Supreme Court first addressed the statutory overlap in *Preiser v. Rodriguez*.[77] Under § 1983, three prisoners claimed that the deprivation of good-time credits violated their due process rights.[78] While the Court recognized that the claims fell within the plain language of § 1983,[79] it nonetheless held that the sole federal remedy rested in a writ of habeas corpus.[80] The Court stated that the relief sought by the prisoners—immediate release from custody due to application of the good time credits—was of the traditional habeas nature.[81] This, coupled with the fact that habeas provided the specific relief requested—release from confinement—convinced the Court that habeas was the exclusive remedy.[82]

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73. *See Preiser*, 411 U.S. at 484–86.

74. Evidence of this difficulty is illustrated by the circuit split surrounding DNA evidence requests under § 1983. *See infra* Part I.B.3.

75. Durr v. Cordray, 602 F.3d 731, 735 (6th Cir. 2010).

76. *See Wilkinson*, 544 U.S. at 81–82 (explaining that the habeas-§ 1983 distinction derived from the need to "ensure that state prisoners use only habeas" when they directly or indirectly attack the duration of their confinement).

77. *See Preiser*, 411 U.S. at 475.

78. *Id*. at 478. The appellate court consolidated the three cases and recognized the claims under § 1983. *Id*. at 482.

79. *See id*. at 489.

80. *Id.* at 500 ("What is involved here is the extent to which § 1983 is a permissible alternative to the traditional remedy of habeas corpus. . . . [W]e hold today that when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.").

81. *Id*. at 487; *see also supra* note 64.

82. *Preiser*, 411 U.S. at 489–90.

Washington University Open Scholarship

In *Heck v. Humphrey*, the Supreme Court defined the habeas exception to § 1983 in the context of claims for monetary damages premised on unlawful convictions.[83] Unlike in *Preiser*, the relief requested in *Heck* was not of the traditional habeas nature nor was the remedy sought available through habeas proceedings.[84] Nevertheless, the Court held that such claims were not cognizable under § 1983.[85] The much-cited *Heck* test was announced: "whether a judgment in favor of the plaintiff would *necessarily imply* the invalidity of his conviction or sentence; if it would, [then] the [§ 1983] complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated."[86] Conversely, if a judgment for the plaintiff on the § 1983 claim would not *necessarily imply* the invalidity of the conviction, then the § 1983 claim may proceed.[87] Because a court cannot award monetary damages for unlawful confinement without also necessarily implying the unlawfulness of the conviction or confinement, Heck's claim was excluded from § 1983.[88]

The habeas exception to § 1983 was applied to state criminal procedures in *Wilkinson v. Dotson*.[89] The Supreme Court held that claims challenging state parole procedures were cognizable under § 1983.[90] *Dotson* applied the *Heck* test and found that because

83. 512 U.S. 477 (1994).

84. *Id.* at 481 (citations omitted). Because Heck's claim did not fit within the specific language of or fall under the traditional function of habeas, his claim was not automatically confined to habeas under *Preiser*. *Id.* at 481–82.

85. *Id.* at 483.

86. *Id.* at 487 (emphasis added).

87. *Id.*

88. *Id.*

89. 544 U.S. 74 (2005).

90. *Id.* at 76, 81–82. In reaching this conclusion, *Dotson* traced the Supreme Court's history defining the habeas exception:

> *Preiser* found an implied exception to § 1983's coverage where the claim seeks . . . 'core' habeas corpus relief, i.e., where a state prisoner requests present or future release. *Wolff* [Wolff v. McDonnell, 418 U.S. 549 (1974)] makes clear that § 1983 remains available for procedural challenges where success in the action *would not necessarily* spell immediate or speedier release for the prisoner. *Heck* specifies that a prisoner cannot use § 1983 to obtain damages where success *would necessarily* imply the unlawfulness of a (not previously invalidated) conviction or sentence. And *Balisok* [Edwards v. Balisok, 520 U.S. 641 (1997)] . . . demonstrates that habeas remedies do

success on state parole challenges would neither "necessarily spell speedier release" nor "imply the invalidity of their convictions," the claims were valid under § 1983.[91] Notably, *Dotson* established that a prisoner's underlying motivation for filing a § 1983 claim is irrelevant.[92]

The Supreme Court in *Osborne* was asked to define the habeas exception to § 1983 in the context of post-conviction DNA evidence requests but declined the opportunity.[93] In a 5–4 decision, the Court instead dismissed Osborne's § 1983 claim on the basis that there exists no freestanding post-conviction *substantive* due process right to access DNA evidence.[94] The Court stated that because convicted prisoners no longer possess full liberty interests, a state operating in the post-conviction context need not comply fully with substantive due process and may impose certain conditions on DNA testing rights.[95] A *procedural* due process right to access DNA evidence, however, was not foreclosed.[96] The Court explained that if a state chooses to provide post-conviction rights, then the state may not arbitrarily deny access to those rights.[97] Thus, if a prisoner shows state post-conviction remedies to be fundamentally inadequate,

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not displace § 1983 actions where success in the civil rights suit would not necessarily vitiate the legality of a (not previously violated) state confinement.

Id. at 81 (citation omitted).

91. *Id.* at 82.

92. *See id*. at 78, 91. The state argued that because the prisoners believed that success under § 1983 would eventually lead to a speedier release, it was a collateral attack on the duration of confinement and should be confined to habeas. *Id*. at 78. *Dotson* rejected this argument and stated that this was a "jump from a true premise [that prisoners likely believed success under § 1983 would bring earlier release] to a faulty conclusion [that habeas is their sole avenue for relief]." *Id*.

93. Dist. Att'y's Office v. Osborne, 129 S. Ct. 2308, 2316, 2319 (2009).

94. *Id*. at 2320–23 (explaining that because Osborne had not first utilized the state's post-conviction procedures and shown them to be inadequate, he had not yet suffered from any constitutional violation at the hands of state officials).

95. *Id*. at 2320 ("[W]hen a State chooses to offer help to those seeking relief from convictions [due process] does not dictat[e] the exact form such assistance must assume." (quoting Pa. v. Finley, 481 U.S. 551, 559 (1987))).

96. *Id*. at 2322; Skinner v. Switzer, 131 S. Ct. 1289, 1293 (2011) ("*Osborne* rejected the extension of a substantive due process to this area and left slim room for the prisoner to show that the governing state law denies him procedural due process."); *see also* Brandon L. Garrett, *DNA and Due Process*, 78 FORDHAM L. REV. 2919, 2927 (2010) (explaining that a procedural due process right to access DNA evidence is still available after *Osborne*).

97. Garrett, *supra* note 96, at 2923, 2938–39.

Washington University Open Scholarship

unfair, or arbitrary, then a federal court may intervene under § 1983 on procedural due process grounds.[98]

3. The Way It Was: § 1983 Circuit Split

The Fourth and Fifth Circuits in *Harvey v. Horan* and *Kutzner v. Montgomery County* respectively dismissed DNA evidence requests under § 1983.[99] The Fourth Circuit held that *Heck* barred such requests because DNA tests would "necessarily imply" the invalidity of the conviction or sentence.[100] Petitioner Harvey reasoned that because the outcome of the DNA test was unknown, and could in fact be inculpatory, his request for DNA evidence did not "necessarily imply" the invalidity of his conviction.[101] The Fourth Circuit denied Harvey's request because it reasoned that such claims would "set the stage" for a later attack on the conviction.[102] Similarly, *Kutzner* held that because DNA access requests are "so intertwined" with the conviction, they belonged exclusively in habeas.[103] Neither circuit has readdressed the issue since the Supreme Court decided *Dotson*, which eliminated a prisoner's subjective intent from the *Heck* analysis.[104]

The other six circuits that have considered the issue have reached the opposite conclusion.[105] The reasoning for each circuit is largely

98. *Osborne*, 129 S. Ct. at 2320 ("[T]he question is whether consideration of Osborne's claim within the framework of the State's procedures for postconviction relief 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. . . .'" (quoting Medina v. California, 505 U.S. 437, 446 (1992))).

99. Harvey v. Horan, 278 F.3d 370, 377 (4th Cir. 2002); Kutzner v. Montgomery Cnty., 303 F.3d 339, 340–41 (5th Cir. 2002).

100. *Harvey*, 278 F.3d at 374.

101. *Id*. at 375.

102. *Id.* at 378. "Harvey is seeking access to DNA evidence for one reason and one reason only—as the first step in undermining his conviction. He believes that the DNA test results will be favorable and will allow him to bring a subsequent motion to invalidate his conviction." *Id*. at 375.

103. *Kutzner*, 303 F.3d at 340–41.

104. Report and Recommendation, *supra* note 72, at 11; *see also supra* note 92 and accompanying text (discussing Dotson's elimination of the subjective inquiry).

105. *See* Durr v. Cordray, 602 F.3d 731, 736 (6th Cir. 2010); Grier v. Klem, 591 F.3d 672, 679 (3d Cir. 2010); McKithen v. Brown, 481 F.3d 89, 99 (2d Cir. 2007); Savory v. Lyons, 469 F.3d 667, 672 (7th Cir. 2006); Osborne v. Dist. Att'y's Office, 423 F.3d 1050, 1054 (9th Cir. 2005), *rev'd on other grounds*, 129 S. Ct. 2308 (2009); Bradley v. Pryor, 305 F.3d 1287, 1290 (11th Cir. 2002).

the same.[106] A prisoner's § 1983 request for DNA evidence passes the *Heck* test because success on the claim does not "necessarily imply" the invalidity of the conviction.[107] Successful requests only provide access to DNA evidence.[108] Once tested, DNA results may be inculpatory or inconclusive and have no effect on the conviction.[109] Even if the DNA results prove to be exculpatory, prisoners must still file entirely separate lawsuits in order to then challenge the conviction.[110] These circuits acknowledged that a prisoner's subjective intent has no place in the *Heck* analysis.[111] Even if the prisoner's ultimate motive is to challenge the conviction, and even if DNA results enable the prisoner to later do this, the claim is still cognizable under § 1983 because the request for evidence, independently and objectively, does not necessarily invalidate the conviction.[112]

C. Stay-ing Alive: Skinner's Fight

1. Skinner Procedure

When Skinner's conviction was affirmed on appeal, potentially probative DNA evidence remained untested.[113] Skinner filed two Chapter 64 motions requesting that DNA testing be performed on seven evidentiary items.[114] The first motion was denied because

106. *Dotson* has proven especially influential: "Every Court of Appeals to consider the question since *Dotson* has decided that because access to DNA evidence similarly does not 'necessarily spell speedier release,' it can be brought under § 1983." Dist. Att'y's Office v. Osborne, 129 S. Ct. 2308, 2318 (2009) (quoting Wilkinson v. Dotson, 544 U.S. 74, 82 (2005)).

107. *See, e.g.*, *Durr*, 602 F.3d at 736; *Grier*, 591 F.3d at 678; *McKithen*, 481 F.3d at 102–03; *Bradley*, 305 F.3d at 1291.

108. *See Durr*, 602 F.3d at 736; *Savory*, 469 F.3d at 672; *Osborne*, 423 F.3d at 1054; *Bradley*, 305 F.3d at 1291.

109. *See Durr*, 602 F.3d at 736; *McKithen*, 481 F.3d at 102–03; *Osborne*, 423 F.3d at 1054.

110. *See Durr*, 602 F.3d at 736; *McKithen*, 481 F.3d at 103; *Osborne*, 423 F.3d at 1054–55.

111. *Grier*, 591 F.3d at 677 (stating that *Dotson* "determined that hope was not sufficient to bar a § 1983 claim if that hope could not be realized without further proceedings"); *see also* Harvey v. Horan, 278 F.3d 370, 383 (4th Cir. 2002) (King, J., concurring in part and concurring in judgment) ("A prisoner's underlying rationale . . . for bringing his § 1983 suit is not relevant under *Heck*. The applicable standard is an objective one . . . .").

112. *McKithen*, 481 F.3d at 103.

113. Skinner v. State, 122 S.W.3d 808, 810 (Tex. Crim. App. 2003).

114. *Id.* at 811; Skinner v. State, 293 S.W.3d 196, 199 (Tex. Crim. App. 2009). See *supra* note 56 for a list of the seven items that Skinner requested to test. *See infra* AFTERWORD for a

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Skinner could not establish by a preponderance of the evidence that he "would not have been convicted if exculpatory results [on the additional requested items] had been obtained through DNA testing."[115] Texas believed that the existing evidence against Skinner was, despite any possible revelations from additional DNA testing, enough to support the conviction.[116] His second motion was denied because he could not show that the evidence remained untested at the time of trial through "no fault" of his own.[117] At trial, defense counsel strategically did not request that all available biological items be tested.[118] Skinner did not appeal either denial.[119] In addition to his Chapter 64 motions, Skinner filed state and federal habeas petitions requesting that the evidence be tested, both of which were denied.[120]

On November 27, 2009, Skinner filed his § 1983 claim in federal court alleging that Texas's refusal to grant him access to the DNA evidence violated his civil rights.[121] The Fifth Circuit denied

discussion of the recent changes made to Texas Post-Conviction DNA law.

115. TEX. CODE CRIM. PROC. ANN. art. 64.03(a)(2)(A) (West 2010); 122 S.W.3d at 811. To meet this standard, Texas requires the defendant to prove that there is a reasonable probability that he is innocent. *Id.* Because there was evidence to prove that Skinner was present in the home during the commission of the crime, the court held that even with additional exculpatory DNA evidence, Skinner could not meet the "reasonable probability of innocence" standard. *Id*.

116. *Id*. Skinner was convicted largely on circumstantial evidence because the DNA results on the select items that Texas chose to test proved only what Skinner had already admitted—that he was present in the home on the night of the crime. Petitioner's Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari, Skinner v. Switzer, 130 S. Ct. 3323 (2010) (No. 09-9000), 2009 WL 6492277 at *3-4; *see, e.g.*, Complaint, *supra* note 4, ¶¶ 13–18.

117. CRIM. PROC. art. 64.01(b)(1)(B); 293 S.W.3d at 201–03.

118. 293 S.W.3d at 202–03. At trial, defense counsel argued that the prosecution had run a "shoddy investigation" and the State's decision not to test all available biological items played to this theme. *Id*. at 203.

119. Report and Recommendation, *supra* note 72, at 3. Had Skinner appealed the Chapter 64 denials, he would have had to petition the United States Supreme Court for a writ of certiorari. *Id*.

120. Skinner v. Quarterman, No. 2:99-CV-0045, 2007 WL 582808, at *1-2 (N.D. Tex. Feb. 22, 2007). Skinner's first state habeas petition was filed on March 26, 1998, but was dismissed because it was untimely. *Id*. at *1. Skinner's first federal habeas claim was filed on February 5, 1999, but was stayed in order to allow Skinner to first present the claim in state court. *Id*. Skinner filed his second state habeas claim on February 27, 2001, but it was dismissed because he had a pending federal petition. *Id*. Skinner was then allowed to proceed in federal court without first exhausting his state habeas remedies for fear that his claims would be time barred. *Id*. at *2. He filed an amended habeas petition in federal court on December 2, 2002. *Id*. This petition was denied on appeal in July 2009. Skinner v. Quarterman, 576 F.3d 214 (5th Cir. 2009).

121. Complaint, *supra* note 4, ¶ 1.

Skinner's § 1983 claim in accordance with *Kutzner*.[122] On February 12, 2010, Skinner filed a petition for writ of certiorari.[123] The Supreme Court accepted the case on May 24, 2010[124] and heard arguments later that year on October 13.[125] On March 7, 2011 the Supreme Court granted Skinner the right to sue for access to DNA evidence under § 1983.[126] A federal court in Texas will decide whether Chapter 64 is procedurally inadequate and consequently, whether Skinner will receive access to the DNA evidence.

2. May it Please the Court

Skinner argued that *Heck* does not bar DNA evidence requests under § 1983 because access to the evidence does not necessarily imply the invalidity of his conviction.[127] The *Heck* test, Skinner argued, considers only the immediate consequences of success on the § 1983 suit; if Skinner receives the DNA evidence, the conviction remains intact.[128] Skinner asserted that even exculpatory DNA results would not invalidate his conviction because in that scenario, he would then seek executive clemency.[129] Moreover, Skinner argued that his underlying motivation for requesting access to the DNA evidence is irrelevant in light of *Dotson*.[130] Skinner maintained that if motivation alone was enough to confine a claim to habeas, then the

122. Skinner v. Switzer, 363 F. App'x 302 (5th Cir. 2010).

123. Petition for Writ of Certiorari, *supra* note 4, at *1.

124. Skinner v. Switzer, 364 F. App'x 113 (5th Cir. 2010), *cert. granted*, 130 S. Ct. 3323 (2010).

125. Transcript of Oral Argument, *supra* note 18, at *1. Greg Coleman, former Texas Solicitor General and the appellate attorney who argued the case on behalf of Lynn Switzer, died in a plane crash on Nov. 23, 2010. Mary Alice Robbins, *Plane Crash Claims Life of Former Texas Solicitor General Greg Coleman*, TEXAS LAWYER (Nov. 24, 2010), http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1202475339472. University of Texas Law Professor Robert Owen argued the case on behalf of Skinner. *Faculty Profiles*, THE UNIVERSITY OF TEXAS SCHOOL OF LAW, http://www.utexas.edu/law/faculty/profile.php?id=owenrc (last visited Nov. 13, 2011).

126. Skinner v. Switzer, 131 S. Ct. 1289, 1298 (2011).

127. Brief for Petitioner, *supra* note 8, at *10-17.

128. *Id*. at *16-18.

129. Petitioner's Reply Brief, Skinner v. Switzer, 130 S. Ct. 3323 (2010) (No. 09-9000), 2010 WL 3806525 at *10 ("It is well established in Texas and elsewhere that clemency is a form of executive mercy that does not invalidate the underlying conviction.").

130. *See* Transcript of Oral Argument, *supra* note 18 at 3:15-22, 22:7-12.

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writ would be stretched far beyond its traditional common-law roots.[131]

Skinner contended that allowing DNA evidence requests under § 1983 is consistent with federal–state comity.[132] He noted that the Court took state interests into account when it first articulated the *Heck* test.[133] Skinner also noted that *Osborne* further cemented the state's primary role in the criminal justice system by requiring prisoners to first show state procedures to be inadequate before a procedural due process claim under § 1983 may be heard in federal court.[134] Alternatively, Skinner argued that even if the Court found it necessary to reformulate the *Heck* test as it applies to DNA evidence requests,[135] the Court was compelled to adhere to stare decisis and congressional intent when considering his case.[136]

In order to ultimately secure access to the DNA evidence from the Texas federal court, Skinner must succeed on the merits.[137] At oral argument, and what will likely constitute his argument on remand, Skinner asserted that Chapter 64 violated his procedural due process rights.[138] *Osborne* stated that prisoners with state-created liberty interests may seek federal relief if they have been denied a

131. Petition for Writ of Certiorari, *supra* note 4, at *23-24. Skinner argued that excluding from § 1983 claims that only "set the stage" for future attacks on the conviction would consequently broaden habeas to include claims of a nature far beyond the writ's traditional purpose. *Id*.; *see also supra* note 64 for a discussion of the common law origins of habeas corpus.

132. Brief for Petitioner, *supra* note 8, at *33.

133. *Id*. at *34 ("[T]he Court has 'already placed the States' important comity considerations in the balance, weighed them against the competing need to vindicate federal rights without exhaustion, and concluded that prisoners may bring their claims without fully exhausting state-court remedies so long as their suits, if established, would not necessarily invalidate state-imposed confinement.'" (quoting Wilkinson v. Dotson, 544 U.S. 74, 84 (2005))).

134. *Id*. ("Under *Osborne*, a state prisoner who brings a due process challenge to the adequacy of state DNA testing procedures cannot prevail without first having tried to invoke those procedures."); Skinner v. Switzer, 131 S. Ct. 1289, 1293 (2011).

135. During oral arguments, Justice Antonin Scalia remarked that the *Heck* test could be reformulated in order to bar claims that do not necessarily imply the invalidity of the conviction but that are brought solely "to demonstrate . . . the invalidity of the judgment." Transcript of Oral Argument, *supra* note 18, at 43:15-17.

136. Brief for Petitioner, *supra* note 8, at *35-37.

137. *See supra* notes 68–69 and accompanying text.

138. Transcript of Oral Argument, *supra* note 18, at 11:7-25–12:1-11.

fundamentally fair procedure at the state court level.[139] Skinner stated that Chapter 64 creates a liberty interest and argued that his ability to vindicate that interest was arbitrarily denied.[140] In essence, Skinner asserted that Chapter 64 is unconstitutional "'as construed' by the Texas courts."[141] Specifically, Skinner took issue with the no-fault provision: "the Texas Court of Criminal Appeals construed the statute to completely foreclose any prisoner who could have sought DNA testing prior to trial but did not from seeking testing under [Chapter 64]."[142] Skinner argued that this provision is fundamentally unfair because it provides no exception to the rule.[143]

Texas countered that Skinner's § 1983 claim would lose on the merits because Chapter 64 is constitutional, both facially and as applied.[144] *Osborne* mandates that all post-conviction procedural due process claims be made in the context of state-created liberty interests.[145] While Texas conceded that Chapter 64 creates a state liberty interest in proving innocence, Texas also highlighted that Chapter 64 requires prisoners to first assert their innocence.[146] Thus, Texas reasoned that Skinner cannot simultaneously utilize Chapter 64 (assert innocence, which goes to the conviction and thus is confined to habeas) and also maintain that he was not attacking the conviction under § 1983.[147]

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139. Brief for Petitioner, *supra* note 8, at *29 ("[*Osborne*] left the federal courthouse door open to those prisoners who possess a state-created liberty interest in proving their innocence through new evidence, but are deprived by state officials of fundamentally fair procedures necessary to vindicate that interest.").

140. Transcript of Oral Argument, *supra* note 18, at 13:7-18, 24:2-9, 54:4-56:18.

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

142. Transcript of Oral Argument, *supra* note 18, at 52:6-11.

143. Brief for Petitioner, *supra* note 8, at *7.

144. Brief for Respondent, *supra* note 60, at *40-41 ("[A]rticle 64 contains all the key elements for 'a good DNA access law' recommended by the Innocence Project."). *See generally Access to Post-Conviction DNA Testing*, *supra* note 14.

145. Brief for Respondent, *supra* note 60, at *28.

146. *Id*. ("Skinner's asserted procedural due process right is completely bound up in and dependent upon this claimed state-law liberty interest in showing his innocence.").

147. *Id*. at *31 ("The article 64 procedure Skinner is attacking is itself inseparable from questions about Skinner's guilt or innocence and the conduct of the underlying trial."); *see also* Transcript of Oral Argument, *supra* note 18, at 42:17-22 ("But there are really only two results in article 64. One is a ruling that you probably would not have been convicted. Or two, I reject your request for a ruling that you probably would not have been convicted. And that's what he got. It is a motion that goes to the core of the conviction itself.").

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Assuming arguendo that Chapter 64's no-fault provision is procedurally unconstitutional, Texas maintained that DNA evidence requests under § 1983 are barred by *Heck*.[148] Texas argued that *Heck's* "necessarily implies" language is not a "magic words test" in which the inquiry begins and ends.[149] Rather, Texas insisted that *Heck* requires a full examination of the connection between the § 1983 claim and the conviction.[150] Because Texas viewed Skinner's DNA request as "inextricably" connected to his conviction, his claim was barred by *Heck*.[151] Moreover, because the relief sought was relief that could be granted through habeas discovery provisions, Texas reasoned that the claim must be confined exclusively to habeas.[152]

Finally, Texas argued that reading *Heck* to bar only those claims with immediate consequences on the conviction would frustrate the purpose of the habeas exception.[153] Specifically, Texas worried that limiting the *Heck* bar would abolish state court deference in the criminal system, undermine finality by permitting collateral attacks on the conviction, and open the floodgates to unnecessary § 1983 litigation.[154] Texas argued that because the habeas exception to § 1983 was created to ensure that states retain final control over all criminal procedures affecting the conviction,[155] providing prisoners

148. Brief for Respondent, *supra* note 60, at *28.

149. Transcript of Oral Argument, *supra* note 18, at 32:25-33:2 ("I disagree that the two words 'necessarily implies' are in fact sort of the end of the battle and the end of the test.").

150. Brief for Respondent, *supra* note 60, at *21-23.

151. *Id*. at *26–29 (explaining that the relief sought, DNA evidence, has a "material bearing on his conviction" and cannot be separated from his dependent Chapter 64 claim asserting innocence). The Supreme Court dismissed these concerns. Skinner v. Switzer, 131 S. Ct. 1289, 1298–1300 (2011)

152. *Id*. at *29; *see also* Transcript of Oral Argument, *supra* note 18, at 45:5-8.

153. *See* Brief for Respondent, *supra* note 60, at *41-47 (allowing DNA evidence requests under § 1983 would allow prisoners to re-litigate state court determinations in federal courts).

154. *Id*. at *47. Texas argues:

> Certainly, Skinner advances no limiting principle to restrict this new § 1983 cause of action to [Chapter] 64 proceedings (or similar proceedings under analogous state DNA statutes). Instead, any time a state court denies a prisoner access to discovery in a state postconviction proceeding, he will have placed in his back pocket a future § 1983 lawsuit after losing all other avenues to invalidate his conviction.

Id.

155. *See supra* note 66.

with alternative routes to attack the conviction and allowing federal courts to re-litigate the claim under § 1983 cannot be correct.[156]

II. ANALYSIS

The Supreme Court in *Skinner* correctly recognized DNA evidence requests under § 1983.[157] Because *Dotson* stripped the *Heck* test of all subjective inquiries,[158] the rationale for denying DNA evidence requests under § 1983 is no longer sound.[159] Accordingly, the Fifth Circuit's holding in *Kutzner* was overruled and a district court in Texas will decide whether Skinner will receive access to the DNA evidence under § 1983.[160]

The Supreme Court recognized the fallacies in the Fourth and Fifth Circuits.[161] Both incorrectly applied the *Heck* test because, rather than evaluating the immediate consequence that success on the § 1983 claim would have on the conviction, both circuits considered the effect of *exculpatory* DNA test results on the conviction.[162] Essentially, *Harvey* and *Kutzner* applied *Heck* to the wrong facts. They asked whether exculpatory DNA test *results*, rather than mere *access* to DNA evidence, would invalidate the conviction.[163] The other six circuits correctly recognized that *Heck* considers only the *immediate* consequences that success under § 1983 would have on

156. Brief for Respondent, *supra* note 60, at *26–29.

157. Skinner v. Switzer, 131 S. Ct. 1289, 1298 (2011). The Supreme Court hinted at this possibility during oral arguments. *See* Transcript of Oral Argument, *supra* note 18, at 49:23-25, where Justice Ruth Bader Ginsburg remarked, "It's given here that this evidence would not necessarily demonstrate the invalidity of the conviction. . . ."

158. *See supra* note 92 and accompanying text.

159. *See supra* notes 100–02 (explaining how the motivationally based "setting the stage" rationale was used to reject DNA evidence requests under § 1983).

160. *Skinner*, 131 S. Ct. at 1296 ("the question below was 'not whether [Skinner] will ultimately prevail' on his procedural due process claim [and receive access to the evidence] but whether his complaint was sufficient to cross the federal court's threshold.") (internal citations omitted).

161. *Id.* at 1293 ("Success in the suit gains for the prisoner only access to the DNA evidence, which may prove exculpatory, inculpatory, or inconclusive. In no event will a judgment that simply orders DNA test 'necessarily impl[y] the unlawfulness of the State's custody.'").

162. *See supra* notes 100–03 and accompanying text.

163. *See supra* notes 100–03 and accompanying text.

Washington University Open Scholarship

the conviction and understood motivation to be irrelevant.[164] Even though hindsight may show that success on the § 1983 claim was the precursor to a later DNA exoneration, this possibility is not enough to preclude the claim under *Heck* as it currently stands.[165]

Heck bars § 1983 claims *only if* the specific relief requested would necessarily imply the invalidity of the conviction.[166] Notably, the *Heck* Court did not set the threshold at "imply" but included "necessarily" as a significant qualifier: "[W]e were careful in *Heck* to stress the importance of the term 'necessarily.'"[167] Because access to DNA evidence alone neither implies, let alone *necessarily* implies anything about the conviction, DNA access requests cannot be barred by *Heck*.[168] The only fact that granting access to DNA evidence necessarily implies is that biological material found at the crime scene exists.[169]

Texas's rationale for denying § 1983 DNA evidence requests was unconvincing because it was based on a faulty assumption.[170] Texas worried that granting DNA evidence requests under § 1983 would provide prisoners with a federal vehicle to pursue collateral attacks on state court convictions.[171] This argument assumed that Skinner's claim attacked the conviction, but at the time Skinner made his argument, that determination had not been made.[172] The only way that § 1983 could undermine state court deference is if DNA evidence requests were determined to both attack the conviction and

164. *See supra* notes 105–12 and accompanying text.

165. During oral arguments, Justice Anthony Kennedy remarked, "[I]f we were going to adhere to *Dotson* and still rule for you [Texas] . . . there has to be some slightly different qualification." Transcript of Oral Argument, *supra* note 18, at 42:10-12.

166. *See supra* notes 86–87 and accompanying text.

167. Skinner v. Switzer, 131 S. Ct. 1289, 1298–99 (2011) (quoting Nelson v. Campbell, 541 U.S. 637, 647 (2004)).

168. The Supreme Court will likely agree on this point. See Transcript of Oral Argument, *supra* note 18, at 46:3-5, where Justice Elena Kagan states that DNA evidence is a "tool that [Skinner] hopes will lead to a quicker release, although it has no certainty at all of doing so."

169. TEX. CODE CRIM. PROC. ANN. art. 64.03(a)(1)(A)(i) (West 2010) (explaining that a court may only grant access to DNA evidence if it exists in testable condition).

170. *See supra* notes 153–56 and accompanying text.

171. *See supra* notes 153–56.

172. *See supra* note 93 and accompanying text (explaining that though the Supreme Court has been presented with the issue, it had not yet decided whether *Heck* bars DNA evidence requests under § 1983). Of course, it later ruled that *Heck* does not bar DNA evidence requests, thereby invalidating the argument. *Skinner*, 131 S. Ct. at 1296.

also allowed to proceed under § 1983.[173] *Heck*, however, precludes that possibility because it bars all claims that would necessarily affect the conviction from § 1983.[174] And in hindsight, the *Skinner* Court also precludes this possibility.[175]

Nor does the breadth of § 1983 relief alter the scope of habeas relief.[176] This argument assumed that the choice between § 1983 and habeas is mutually exclusive, but *Heck* shows that it is not.[177] This assumption creates the converse of the initial argument: should *Heck* bar a claim under § 1983, then habeas would become unduly broadened to include claims that only indirectly challenge the conviction.[178] Because this consequence conflicts with the purpose for the habeas distinction—to ensure that habeas relief remains limited to clear attacks on the conviction—it cannot be correct.[179]

Skinner, however, still must succeed on the merits under § 1983 in Texas federal court before he will receive access to the DNA evidence. At oral arguments, Skinner argued that the Chapter 64 no-fault provision is unconstitutional as construed because it does not provide an exception to the rule.[180] Challenging the constitutionality of Chapter 64 is difficult because the law is facially constitutional and satisfies the National Innocence Project's recommendations for an effective post-conviction DNA access statute.[181] As *Osborne*

173. *See supra* notes 74–76 and accompanying text (explaining that habeas is the sole remedy for attacks on the conviction).

174. *See supra* notes 86–87 and accompanying text.

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

176. *See supra* notes 64–73 and accompanying text (the two statutes provide different remedies for different wrongs and failure to qualify under one statute does not ensure that relief is available under the other).

177. *See supra* notes 84–85 and accompanying text (demonstrating that petitioner Heck was denied relief under both habeas and § 1983).

178. *See supra* note 131 and accompanying text (recognizing that under Texas's reading of *Heck*, exclusion under § 1983 would mean inclusion under habeas). Because this would mean that a claim not directly challenging the conviction [request for DNA evidence] would be recognized under habeas, it cannot be correct. *See supra* note 73 and accompanying text (habeas is reserved only for claims that attack the conviction).

179. *See supra* notes 64, 76 and accompanying text (explaining the purpose of habeas and the rationale for the habeas exception to § 1983).

180. *See supra* notes 138–43 and accompanying text.

181. The National Innocence Project has identified key elements that should be included in all DNA access laws in order to ensure that prisoners have ample access to test the DNA evidence that may prove their innocence. *See Access to Post-Conviction DNA testing, supra*

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acknowledged, each state has the right to set its own requirements for post-conviction relief independent of substantive due process concerns.[182] Failure to meet state-imposed requirements, as Texas alleged happened here, may properly extinguish the claim.[183]

Whether Texas arbitrarily denied Skinner the chance to prove his innocence under Chapter 64 will be decided on remand.[184] If the Texas district court agrees that the blanket no-fault provision is arbitrary as construed, then Skinner will receive access to the DNA evidence.[185]

In any event, DNA testing should have been performed years ago.[186] Texas erred in dismissing both Chapter 64 motions, and Skinner should have appealed both denials.[187] The first motion was denied because Skinner could not establish by a preponderance of the evidence that he "would not have been convicted if exculpatory results on the requested items had been obtained through DNA testing."[188] If, however, multiple items of crime scene evidence excluded Skinner as the DNA contributor, or if the source profile matched an alternative suspect, then Skinner's guilt necessarily would be called into question.[189] Texas was too quick to presume that DNA testing of an additional seven items of crime scene evidence would not cast doubt on Skinner's conviction.[190] Ironically, the

note 14. Chapter 64 incorporates the recommended elements. *See supra* note 144 and accompanying text.

182. *See supra* note 95 and accompanying text.

183. *See* Transcript of Oral Argument, *supra* note 18, at 54:2-8 ("The statute [Chapter 64] gives the conditions under which a petitioner can seek DNA evidence, and it said you didn't meet those conditions.").

184. *See* Skinner, 131 S. Ct. at 1300.

185. *See supra* notes 96–98 and accompanying text.

186. Indeed, under current Texas law SB 122, enacted in June 2011, Skinner would have had the right to test the DNA evidence. *See infra* AFTERWORD.

187. *See supra* notes 113–19 and accompanying text.

188. *See supra* notes 115–16 and accompanying text.

189. *See* Dist. Att'y's Office v. Osborne, 129 S. Ct. 2308, 2337 (2009) (Stevens, J., dissenting) ("DNA evidence has led to an extraordinary series of exonerations . . . [even] in cases where the convicted parties confessed their guilt and where the trial evidence against them appeared overwhelming."); *see also id.* at 2337 n.9 (citing Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 109 (2008)) (documenting that in 50 percent of DNA exoneration cases courts had commented on the defendant's likely guilt and in 10 percent had characterized the evidence of guilt as "overwhelming").

190. "But it is, of course, *always* the case that a convicted person who is later exonerated by DNA testing has first been found guilty, often on 'ample' evidence. And it is frequently the

Court's holding here supports Skinner's § 1983 argument that access to the DNA evidence (let alone exculpatory test results) would not necessarily imply the invalidity of his conviction.[191]

Skinner's second Chapter 64 motion was improperly denied because he was never at fault for his trial counsel's refusal to request DNA testing.[192] Rather than attack the no-fault provision as fundamentally unfair,[193] Skinner should have appealed the initial classification.[194] The same assertions made at oral arguments could have sufficed.[195] To be fundamentally fair and adequate, the no-fault provision must distinguish between passive failures to request testing and affirmative denials of presented opportunities to test specific items of evidence.[196] Only the latter should be sufficient to warrant the Chapter 64 no-fault bar.[197] Because Skinner was never personally presented with the opportunity to refuse DNA testing on any item, he should not have been denied testing on the no-fault ground.[198] Had Skinner successfully appealed either of these two denials, he would have avoided the risk of dismissal for failure to state a claim under § 1983 or of losing on the merits on remand.[199]

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case that, before exonerating DNA results are obtained, prosecutors and courts characterize the evidence of guilt as 'overwhelming[].'" Petitioner's Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari, *supra* note 116, at *4.

191. *See supra* note 127 and accompanying text. Texas denied Skinner's request for testing under Chapter 64 because it felt that additional DNA testing would not affect his conviction. *See supra* notes 115–16. Now, Texas argues that the DNA evidence would affect his conviction and thus must be barred from § 1983. *See supra* notes 148–51.

192. Transcript of Oral Argument, *supra* note 18, at 54:20-55:15.

193. *See supra* notes 140–43 and accompanying text.

194. *See supra* note 119 and accompanying text.

195. *See generally* Transcript of Oral Argument, *supra* note 18.

196. *Id*. at 55:13-15 ("I have always felt it was intuitively, especially unfair to accuse [Skinner] of laying behind a log when there is no log to lie behind.").

197. *Id*.

198. *Id*. at 55:1-4 ("[S]o that to the extent the Court of Criminal Appeals portrayed Mr. Skinner as making a choice, that's . . . not accurate because he didn't make the choice."). Texas should remedy the provision to require trial attorneys to warn prisoners that foregoing testing at the trial stage will bar subsequent requests under the Chapter 64 no-fault provision. *See generally Fix the System*, INNOCENCE PROJECT, http://www.innocenceproject.org/fix/Priority-Issues.php (last visited Nov. 13, 2011) (explaining that denying DNA tests due to trial counsel's failure to request testing inhibits the delivery of justice). This would better ensure that prisoners do in fact make affirmative and informed decisions that the state can later argue definitely establishes the prisoner's fault. See *id.*

199. *See supra* notes 68–69, 181 and accompanying text.

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III. PROPOSAL

Fundamental fairness dictates that any and all properly preserved DNA evidence relevant to guilt be tested before a man is put to death.[200] DNA's track record on death row alone is enough to support the enunciation of a federal constitutional right to test DNA evidence in these special circumstances.[201] Each new DNA exoneration gives clarity to the harsh reality that individuals are wrongfully convicted.[202] DNA evidence is the preeminent tool available to the criminal justice system,[203] and the Court cannot continue to allow states to ignore its potential.[204] The argument for state court deference in the criminal justice system is strong.[205] But deference is no longer deserved if states continue to deny DNA testing at the risk of executing innocent men.[206]

Osborne stated that the creation of a federal right to test DNA evidence would be premature because states were dealing with DNA adequately and effectively.[207] But, as illustrated by Texas's denial in *Skinner*, federal interference is now necessary.[208] Skinner repeatedly requested DNA testing.[209] Testing was to be done at his own expense.[210] Questions about his guilt remain.[211] For Texas to deny Skinner this opportunity at no cost to itself, and instead set a date for

200. *See Death, DNA and The Supreme Court*, *supra* note 29, at A34.

201. *See supra* note 42 and accompanying text.

202. *See supra* note 41 and accompanying text.

203. *See* Dist. Att'y's Office v. Osborne, 129 S. Ct. 2308, 2316 (2009).

204. *See supra* note 14 (explaining that state post-conviction DNA access statutes continue to deny DNA access requests even when guilt is uncertain and testing would provide the answer).

205. *See supra* note 66.

206. *See* Editorial, *Still Cruel, Less Usual*, N.Y. TIMES, Dec. 31, 2010, at A22 ("The irreversible punishment of death requires a foolproof justice system, but growing numbers of DNA exonerations in recent years suggest that it is far from that.").

207. *See supra* notes 27–28 and accompanying text.

208. *See Still Cruel, Less Usual*, *supra* note 29, at A22 (stating that though *Osborne* denied a federal constitutional right to post-conviction DNA testing, *Skinner* "is a chance for course correction"). Further evidence that Chapter 64 was arbitrary and unfair is the June 2011 enactment of SB 122. *See infra* AFTERWORD.

209. *See supra* note 10.

210. Complaint, *supra* note 4, ¶ 2; *see also supra* note 35.

211. *See supra* note 4 and accompanying text.

his execution, personifies injustice.[212] At worst, DNA tests would be inconclusive and Skinner's conviction would stand.[213] At best, an innocent man is spared his life.[214] At absolute, the most probative evidence available would be called upon to serve the system.[215]

Enunciation of a federal constitutional right for death row inmates to access untested DNA evidence alleviates the concerns that Texas articulated in proposing to confine DNA evidence requests to habeas.[216] First, the scope of the right is limited to the relatively few and manageable number of inmates convicted of a capital offense.[217] The right can require prisoners to first assert their innocence[218] and can be limited to those cases where identity is at issue.[219] Finally, the right may only be invoked in the smaller subset of capital cases where DNA evidence actually exists in a testable condition.[220]

Second, the right conserves rather than exhausts resources.[221] *Skinner* alone illustrates the extensive resources necessary to litigate a post-conviction right to test DNA evidence.[222] The cost of a DNA analysis is cheaper than this expense, both for the state and for the defendant.[223] Had Skinner been able to invoke an automatic right to

212. *See supra* notes 30, 33 and accompanying text.
213. *See supra* note 109 and accompanying text.
214. *See supra* note 42 and accompanying text.
215. *See supra* notes 13, 37 and accompanying text.
216. *See supra* notes 153–56 and accompanying text.
217. See *supra* note 31 and accompanying text.
218. *See* Myrna S. Raeder, *PostConviction Claims of Innocence*, 24 CRIM. JUST. 14, 15 (Fall 2009).
219. The most common source of wrongful convictions stems from witness misidentification. *Fix the System*, *supra* note 198. DNA evidence remedies this problem because it can prove with "near certainty" that the suspect was the true perpetrator. Dist. Att'y's Office v. Osborne, 129 S. Ct. 2308, 2316 (2009).
220. Only 5 to 10 percent of all criminal cases involve DNA evidence. *The Causes of Wrongful Conviction*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/ (last visited Feb. 10, 2012).
221. The argument that allowing DNA requests under § 1983 would unduly lengthen the post-conviction process fails to recognize the parallel ability of such a right to *shorten* post-conviction procedures. Brief for the National Crime Victim Law Institute as Amicus Curiae Supporting Respondent, Skinner v. Switzer, 130 S. Ct. 3323 (2010) (No. 09-9000), at 12–14.
222. Skinner has been litigating his case for over sixteen years. *See supra* notes 8–10, 113–25 and accompanying text.
223. *See Still Cruel, Less Usual*, *supra* note 206, at A22 ("Death rows and executions are expensive, and cash-strapped states seem more willing to investigate alternatives."); *see also Financial Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/costs-death-penalty#financialfacts (last visited Feb. 10, 2012) (stating that each

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test DNA evidence, litigation would have concluded when his original execution date was set on October 20, 2009.[224] Further, death row inmates could be required to fund the tests, thereby eliminating state costs in enforcing the right.[225]

Third, this right facilitates rather than delays the delivery of justice.[226] DNA tests ensure, to the best of the criminal system's ability, that the right man is brought to justice.[227] If DNA shows that the incarcerated man is not the true culprit, then justice demands further investigation before any execution may occur.[228] Capital defendants could be given one chance to invoke the right and could be required to waive all future appeals or requests for DNA testing if results are inconclusive or inculpatory.[229]

Fourth, such a right does not unduly disrupt principles of federal-state comity.[230] States are free to preempt the invocation of the federal right by granting DNA evidence requests for death row inmates under state post-conviction statutes.[231] Moreover, the Supreme Court can properly review state court decisions on constitutional issues.[232]

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death sentence costs Texas about $2.3 million). In comparison, Skinner's DNA tests would cost approximately $7,500. Telephone Interview with Jim Bentley, *supra* note 12. Bentley's lab volunteered to perform the STR analysis on the seven pieces of Skinner evidence for free. *Id*. Bentley stated that each piece of crime scene evidence costs approximately $850.00 to test and that each reference sample (DNA sample from the suspects and victims) costs roughly $425.00 to obtain. *Id*.

224. Petition for Writ of Certiorari, *supra* note 4, at *5.

225. Prisoners can secure funding from the 2004 Federal Justice For All Act, 18 U.S.C. § 3600 (West 2011), which allocates various justice-related funding to any state that grants DNA testing access to inmates claiming innocence. *Access to DNA Testing*, INNOCENCE PROJECT, http://www.innocenceproject.org/fix/DNA-Testing-Access.php (last visited Nov. 13, 2011). Further, a DNA lab in Arizona has offered to test DNA evidence in certain cases (Skinner and Kevin Cooper) for free. *See supra* note 35.

226. *See* Dist. Att'y's Office v. Osborne, 129 S. Ct. 2308, 2312 (2009).

227. *See id*.

228. *See supra* notes 33–34.

229. Duchess, Comment to *Hank Skinner Set for Feb. 24th Execution*, LIFE ON THE ROW (Dec. 12, 2009, 1:19AM), http://lifeontherow.proboards.com/index.cgi?board=sex&action=display&thread=3198.

230. *See supra* notes 66, 205–06 and accompanying text.

231. *See supra* note 15 and accompanying text.

232. *See generally* Blakely v. Washington, 542 U.S. 296 (2004); Apprendi v. New Jersey, 530 U.S. 466 (2000).

CONCLUSION

DNA testing is simultaneously applauded for its unique ability to identify the true culprit and shunned for its consequential ability to upset the status quo.[233] With each new DNA exoneration, the applause gets louder.[234] The law must respond to the noise and recognize the need to test available DNA evidence.[235] The *Skinner* Court necessarily recognized DNA evidence requests under § 1983, and the Texas federal court should hold that the Chapter 64 no-fault provision is procedurally inadequate.[236] In fact, Texas's June 2011 enactment of SB 122, which amends and rectifies the flaws in Chapter 64, is adequate evidence that Chapter 64, as it was in effect for Skinner, was unconstitutionally arbitrary.[237]

But Skinner's fate should not be left to the court's determination.[238] More is required in the special circumstances of capital cases because the answer to uncertainty cannot be ultimate finality. All reasonable avenues of inquiry must be exhausted when the alternative is a wrongful execution.[239] On balance, this need enormously outweighs the state's interest in determining what *Heck's* "necessarily implies" language permits.[240] It would be ironic indeed to, in the interest of finality, deliberately deny the ability to ever conclusively know.[241] The only way to extinguish the ghost is to let DNA bring it to life.[242]

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233. *See* Dist. Att'y's Office v. Osborne, 129 S. Ct. 2308, 2316 (2009).

234. In 2010 alone, DNA exonerated twenty-nine inmates. *Innocence Network Exonerations—2010*, INNOCENCE NETWORK, http://www.innocencenetwork.org/docs/innocence-network-exonerations-2014-2010 (last visited Nov. 13, 2011).

235. For a discussion of reforms needed in the criminal justice system, see *Stopping Wrongful Convictions Before They Happen*, INNOCENCE PROJECT, http://www.innocenceproject.org/fix/ (last visited Nov. 13, 2011).

236. *See supra* notes 157, 165, 168 (comments made at oral arguments suggested correctly that the Court would recognize DNA evidence requests under § 1983).

237. *See infra* AFTERWORD.

238. *See supra* notes 187–98 (discussing why Skinner's DNA request should have been granted under Chapter 64); *see also supra* note 200 (arguing that DNA must be tested before a man is put to death).

239. *See supra* notes 33–34.

240. *See supra* notes 205–06 and accompanying text.

241. *See supra* note 34.

242. *See supra* note 39 and accompanying text.

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AFTERWORD

Skinner's § 1983 suit for access to the DNA evidence is still pending in federal court in the Northern District of Texas Amarillo Division.[243] Despite this pending suit, Texas reset Skinner's execution date to November 9, 2011.[244]

Meanwhile, Texas signed SB 122 into law on June 17, 2011. The Act amends the flaws in Chapter 64 and among other improvements, renders the Chapter 64 no-fault bar used against Skinner moot.[245] SB 122 went into effect in on September 1, 2011, and days later Skinner filed a SB 122 motion for DNA testing. On November 2, 2011, his motion was denied.[246] The denial was appealed to the Texas Court of Criminal Appeals, which issued a stay of execution on November 7, 2011, this time to decide whether to award Skinner DNA testing under SB 122.[247] On November 21, 2011, his SB 122 motion was denied for the second time.[248]

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243. David Protess, *Texas to Condemned Man: Execution First, DNA Later*, HUFFINGTON POST (Oct. 4, 2011), http://www.huffingtonpost.com/david-protess/texas-to-condemned-man-ex_b_994272.html

244. *See supra* note 7 and accompanying text.

245. Press Release, Texas Senator Rodney Ellis, Legislation to Expand Access to Post-Conviction DNA Sent to the Governor (May 20, 2011) (explaining that "[r]ecent court decisions and an exoneration" exposed flaws in the state's DNA law and that "SB 122 will help fix those gaps."), *available at* http://www.ellis.senate.state.tx.us/pr11/p052011a.htm. The legislation requires post-conviction DNA testing would be granted if: [1] the biological evidence was not previously tested; or [2] the biological evidence was previously tested, but can be subjected to newer testing techniques that provide a reasonable likelihood that the results will be more accurate and probative than the previous test results."). *Id.* SB 122 removes the language in Chapter 64 that imposes the no fault bar and allows testing of any DNA evidence that was not previously tested, regardless of the reason. *See* SB 122 in full, *available at* http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/SB00122F.pdf#navpanes=0.

246. *The Case of Hank Skinner, The Case*, HANKSKINNER.ORG, http://www.hankskinner.org/hs/hs.php?en,denied (last updated Dec. 10, 2011).

247. Order in Pending Case, Skinner v. Texas, (No. 5216) (Nov. 7, 2011), *available at* http://www.hankskinner.org/hs/hs.php?en,denied; Mike Riggs, *Stay of Execution Granted for Hank Skinner Pending a DNA Test*, REASON.COM (Nov. 7, 2011), http://reason.com/blog/2011/11/07/stay-of-execution-granted-for-hank-skinn; *Skinner Gets Stay*, *supra* note 7.

248. Trial Court Findings on Defendant's Third Motion for DNA Testing Pursuant to TEX. CODE CRIM. PROC. ANN. ART. 64.03 (Nov. 21, 2011), *available at* http://www.hankskinner.org/hs/hs.php?en,legal#dna.

As of publication, no new execution date has been set and the fate of Hank Skinner is still unknown.[249]

249. For future developments in the Skinner case see generally *The Case of Hank Skinner*, HANKSKINNER.ORG, available at http://www.hankskinner.org/ (last updated Dec. 10, 2011).

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