No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2009

HENRY W. SKINNER,
*Petitioner,*

-v-

LYNN SWITZER, DISTRICT ATTORNEY FOR THE 31ST JUDICIAL DISTRICT OF TEXAS
*Respondent.*

# PETITIONER'S APPLICATION FOR STAY OF EXECUTION PENDING CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI

**PETITIONER IS SCHEDULED TO BE EXECUTED ON FEBRUARY 24, 2010**


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TO THE HONORABLE ANTONIN SCALIA, CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

Petitioner Henry Watkins Skinner ("Mr. Skinner" or "Petitioner") hereby applies, pursuant to Sup. Ct. R. 23, for a stay of his impending execution while the Court considers his Petition for Writ of Certiorari ("Certiorari Petition"), which is being filed simultaneously with this application. A stay is necessary because Mr. Skinner is scheduled to be executed by the State of Texas after 6 p.m. C.S.T. on Wednesday, February 24, 2010.

Mr. Skinner brought this suit to obtain an injunction requiring Respondent, the District Attorney for the Texas judicial district in which Mr. Skinner was convicted of capital murder, to produce certain forensic evidence for DNA testing. As is shown below, there is a substantial possibility that Mr. Skinner—as he has consistently maintained since his arrest—is innocent of the crimes of which he was convicted. This is also a case in which important biological evidence that could conclusively establish Mr. Skinner's guilt or innocence has never been DNA tested, and in which Mr. Skinner's repeated and diligent requests for such testing were wrongfully denied by Respondent and the Texas courts. Mr. Skinner's Certiorari Petition raises the important issue whether a prisoner from whom crucial DNA evidence is being withheld in violation of due process can vindicate his rights by suing in federal court under the Civil Rights Act—an issue on which the circuit courts of appeals are clearly divided and on which the Court granted certiorari in *Dist. Att'y's Office v. Osborne,* 129 S. Ct. 2308 (2009), only to resolve that case on

other grounds. Under these circumstances, the equities weigh heavily in favor of staying Mr. Skinner's execution until the Court can address that issue in this case.

## I.

## Stay Decisions Below

In compliance with Sup. Ct. R. 23.3, Petitioner sought a stay from both the the Court of Appeals and the District Court below, both of which denied the request. Those orders are attached hereto at App. A and App. B, respectively. The Order Setting Date of Execution and Death Warrant issued by the 31st Judicial District of Texas are attached at App. C and App. D, respectively.

## II.

## Factual Background

In order to weigh the equities properly, it is important for the Court to understand that this is a case involving a prisoner who may actually be innocent of the crimes for which he is scheduled to die in less than two weeks—and whose actual innocence could possibly be established through DNA testing that has never been performed. For this reason, we begin our discussion with factual background to provide a context against which to apply the usual standards for issuing a stay.

### A. There Is a Reasonable Possibility that Mr. Skinner Is Innocent.

Mr. Skinner was convicted of murdering his girlfriend, Twila Busby, and her two young-adult sons, Elwin Caler and Randy Busby, on New Year's Eve 1993 in the home that they all shared in the small town of Pampa, Texas.

The victims' injuries show that whoever murdered them must have possessed considerable strength, balance and coordination. Twila Busby was first manually strangled so forcefully that her larynx and the hyoid bone on the right side of her neck were broken. (Tr. 28:1186-87.)[1] She was then struck with an ax or pick handle fourteen times, so hard that fragments of her unusually thick skull were driven into her brain. (Tr. 28:1171-72, 28:1181-82, 28:1186, 28:1189, 28:1209.) While attacking Ms. Busby, the perpetrator had to contend with the presence of her six-foot, six-inch, 225-pound son, Elwin Caler, who, blood spatter analysis showed, was in the immediate vicinity of his mother as she was being beaten. (Tr. 24:216-17, 28:1211.) Somehow, the murderer was able to change weapons and stab Caler several times before he could fend off the attack or flee. (Tr. 28:1193-95.) The killer then went to the bedroom shared by the two sons and stabbed to death Randy Busby, who was lying face down in the top bunk of his bed. (Tr. 24:119, 24:134.) By their nature, these are the acts of a person possessing considerable presence of mind and physical coordination.

Mr. Skinner undoubtedly was inside the house when these brutal attacks occurred. Yet, there is substantial reason to doubt that Mr. Skinner could have committed the murders, given the abundant evidence that he was completely incapacitated by the extreme quantities of alcohol and codeine he had consumed earlier that evening. Howard Mitchell, an acquaintance who was holding a New Year's Eve party several blocks away, drove to the Busby residence at about 10:15

[1] "Tr." refers to the state court trial transcript.

p.m. that evening with the intention of giving both Mr. Skinner and Ms. Busby a ride to his party. When Mitchell got there, however, he found Mr. Skinner unconscious on the couch, with a vodka bottle near him on the floor. (Tr. 26:575-77, 26:605.) Mitchell tried to wake Mr. Skinner by jerking his arm forcefully and shouting at him, but Skinner remained unconscious and "kind of comatose." (Tr. 26:606-08, 26:611.) After waiting fifteen minutes, during which time Mitchell "never s[aw] him move at all," Mitchell left Skinner on the couch and took only Ms. Busby to the party. (Tr. 26:611.) Mitchell testified that it would have been impossible for anyone in Mr. Skinner's condition to have recovered sufficiently to commit three murders only ninety minutes later. (Tr. 26:608, 26:622.)

Mr. Skinner's condition was also observed shortly *after* the murders by Andrea Reed, an acquaintance who lived a few blocks away. Ms. Reed has testified that around midnight Mr. Skinner knocked on her door and asked to be let in. She described him as being so drunk he couldn't even climb the few steps into her trailer house, falling over backwards when he tried to do so. (R. II:148, II:150-51.)[2] Once Ms. Reed got him inside, Mr. Skinner was, according to Ms. Reed, incoherent and too impaired to perform even such simple tasks as going to the bathroom or removing his shirt.[3] (R. II:148, II:153-55.)

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[2] "R." refers to the transcript of Mr. Skinner's federal habeas corpus hearing.

[3] Ms. Reed testified differently—and incorrectly, as she later explained—at trial. There, she said that Mr. Skinner entered her house on his own, against her will, and that while there he was able to perform simple tasks without her assistance. At the federal evidentiary hearing, however, Ms. Reed admitted—in the face of threats by the State that she could be prosecuted for perjury if she changed her *(cont'd)*

Dr. William Lowry, a toxicologist experienced in the effects of alcohol and drugs on human performance, gave expert testimony that Mr. Skinner was too impaired by alcohol and codeine in his system to have committed the murders. Blood was drawn from Mr. Skinner after he was arrested and taken into custody. Dr. Lowry's analysis of that sample showed that as of midnight, Mr. Skinner's blood alcohol level was .21 percent—almost three times the drunk driving standard in Texas—and his blood codeine level was .4 mg/l—two and a half times the normal therapeutic dose. (Tr. 29:1356-58, 29:1369, 30:1464-65.) Dr. Lowry testified that combining these two substances produces a synergistic effect that greatly increases the potency of each. (Tr. 29:1354, 29:1360-61, 30:1462-63.) In Dr. Lowry's opinion, at midnight Mr. Skinner was at best in a "stuporous" condition—such that it would have required all of his physical and mental agility just to stand—and therefore he could not have caused the deaths of the three victims.[4] Even many years later, Dr.

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testimony—that she lied at trial because she was afraid she would be charged as an accessory if she had told the truth about having helped Mr. Skinner into her house. The federal magistrate judge who heard Ms. Reed's recantation testimony failed to credit it, *see Skinner v. Quarterman*, No. 2:99-CV-0045, 2007 WL 582808, at *15-16 (N.D. Tex. Feb. 22, 2007), *aff'd*, 576 F.3d 214 (5th Cir. 2009). However, at least that portion of Reed's later description of Mr. Skinner's condition was more consistent with the other undisputed evidence about the extreme degree of Mr. Skinner's intoxication on the night of the crime than the version to which she testified at trial. In any event, the fact that Ms. Reed was willing to make that post-trial recantation, even after being threatened by the District Attorney with perjury charges if she persisted in changing her testimony, only contributes to the troubling, unresolved questions about whether Mr. Skinner could have committed this crime.

[4] Additionally, an occupational therapist specializing in hand injuries testified at trial that, as a result of an injury to Mr. Skinner's right hand sustained six months before the murders, his grasping strength in that hand was half that of his left hand
*(cont'd)*

Lowry said that "it has been difficult for me to live" with the results of the trial because "I have never known a verdict of the jury to be so at variance with what I believe to be scientific fact." (Affidavit of Dr. William T. Lowry, appended to Mr. Skinner's First Amended Petition for Writ of Habeas Corpus at Ex. 8, ¶ 6, *Skinner v. Quarterman,* 2:99-CV-0045 (N.D. Tex. Feb. 22, 2007.)

There is also troubling evidence in this case that Twila Busby's uncle, Robert Donnell, was the real murderer—a possibility that the prosecution failed to investigate or even consider. Evidence was presented by the defense at trial that Donnell was a hot-tempered ex-con who had sexually molested a girl, grabbed a pregnant woman by the throat, and kept a knife in his car. (Tr. 26:615-18, 26:619; 29:1281, 29:1296, 29:1300-01.) Donnell was present, drunk, at Mitchell's New Year's Eve party. During the short time Twila Busby was there, Donnell stalked her, making crude and annoying sexual remarks. (Tr. 26:619-20, 29:1277, 29:1281.) Mitchell "sensed that [Donnell] would be a danger," and when Twila asked Mitchell to take her home from the party, which he did around 11:15 p.m., he noticed that she was "fidgety and worried." (Tr. 26:618, 26:629.) When Mitchell returned to his party, Donnell was no longer there. (Tr. 26:629; 29:1289.) Mitchell later told law enforcement that he believed that Donnell could have murdered Twila. (Tr. 26:623.)

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and less than half of what would be expected of a normal right-handed person. (Tr. 29:1317-18.) This would have made it unlikely that Mr. Skinner could have grasped Twila Busby's throat with enough force to break her larynx and hyoid bone even if he had not been massively intoxicated by alcohol and codeine. (Tr. 29:1316, 29:1318-19.)

The evidence presented at trial of Donnell's possible involvement only scratched the surface of what was available and could have been presented. Mr. Skinner showed in his federal habeas proceeding that his trial counsel stopped their investigation of him without having a strategic justification for doing so, and thus failed to discover far more troubling information. (*See* Petition for Writ of *Certiorari* at 27-29, *Skinner v. Thaler,* No. 09-7784 (*petition for cert. filed* Nov. 25, 2009).) That information included testimony by Debra Ellis, who as of the time of the murders, had lived next door to Donnell for three years. (R. I:34.) She testified that Donnell was a "[v]ery big guy," who drank heavily, had a temper that worsened when he was drinking, and regularly threatened to harm people with whom he had a disagreement. (R. I:28-30.) Ms. Ellis saw Donnell grab his wife by the throat and lift her off the floor, and was told by his wife, while she was still hysterical from the incident, that on another occasion Donnell had put a gun to her head and threatened to blow it off. (R. I:49-50.) Ms. Ellis, who was also present when police informed Donnell that his niece and both her sons had been murdered, said he showed "no emotion at all" in response to the shocking news, (R. I:39), acting like it was "[j]ust an ordinary normal day." (R. I:26.) Most significant, Ms. Ellis testified that within a day or two after the murders, Donnell dismantled the inside of his "old beat up truck" and gave it an hours-long, almost fanatical cleaning that included removing both the carpet and the seats and scouring the metal interior with an astringent solution. (R. I:23-24.)

### B. The DNA Testing Mr. Skinner Has Requested Could Prove His Innocence.

Mr. Skinner is asking that seven items be tested: (1) vaginal swabs taken from Twila Busby at the time of her autopsy; (2) Twila Busby's fingernail clippings; (3) a knife found on the front porch of the Busby house; (4) a knife found in a plastic bag in the living room of that house; (5) a dishtowel also found in that bag; (6) a windbreaker jacket found in the living room next to Ms. Busby's body; and (7) any hairs found in Ms. Busby's hands that have not been destroyed by previous testing. Depending on the results, testing of these items could prove his innocence.

Testing the vaginal swabs could yield important results because Ms. Busby was found with her shirt pulled up and her pants unzipped. (Tr. 24:229.) The medical examiner found erythema, or reddening of the skin, around her vaginal area, indicating recent sexual activity. (Tr. 28:1206.) The identity of the person with whom she had sex shortly before her murder could shed important light on who might have attacked her. The failure of the State to test these swabs is inexplicable. The same is true of Ms. Busby's fingernail clippings, which, if she struggled with her attacker, could yield the presence of his DNA. Similarly, the medical examiner acknowledged that the hairs found in her right hand could have come from her murderer. (Tr. 28:1216.) The knives, either of which could have been used to kill Ms. Busby's two sons, could likewise yield the DNA of the person who used them. In addition, the *absence* of Mr. Skinner's blood on those knives would disprove the prosecution's theory that the profusely bleeding cut in the palm of Mr. Skinner's hand was not a defensive wound but instead was self-inflicted

when the knife he used to kill Randy Busby first struck Busby's shoulder blade, causing Mr. Skinner's hand to slide down the blade. (*See* Tr. 28:1203.) The bloody dish towel could have been used by the killer to wipe blood from his hands. And the ownership and presence of the windbreaker jacket next to Ms. Busby's body has never been explained. It is similar to one Robert Donnell was often seen wearing, (R. I:30), was Donnell's size, and contained hairs and sweat stains that, if tested, could identify its owner.

Thus, while Mr. Skinner was convicted of capital murder, there are disturbing and unresolved questions about the accuracy of the jury's verdict. Furthermore, there is significant biological evidence that has never been DNA tested, and, if tested could yield answers to those questions. It is in this context that Mr. Skinner respectfully asks the Court to consider his application for a stay.

## III.

## Standards for Issuing a Stay

The Court's standards for issuing a stay pending consideration of a petition for writ of certiorari are well established. As then Chief Justice Burger said in *Araneta v. United States*, 478 U.S. 1301 (1986), a stay should issue if "(1) there is a reasonable probability that four Justices will vote to grant certiorari; (2) there is a fair prospect that a majority of the Justices will find the decision below erroneous;

and (3) a balancing of the equities weighs in the applicant's favor." *Id.* at 1303 (citing cases).[5]

For the reasons discussed below, this case readily meets those standards.

## IV.

### There Is a Reasonable Probability that Mr. Skinner Will Prevail on the Merits

The Certiorari Petition sets out in detail the compelling reasons why the questions presented warrant review on certiorari. For purposes of this application, it suffices to say that the precedent on which the Fifth Circuit relied in affirming the summary dismissal of this case, *Kutzner v. Montgomery County,* 303 F.3d 339 (5th Cir. 2002), gave an improperly broad reading to this Court's earlier decision in *Heck v. Humphrey,* 512 U.S. 477 (1994), appears difficult to harmonize with the Court's later decision in *Wilkinson v. Dotson,* 544 U.S. 74 (2005), and squarely conflicts with the decisions of the last five courts of appeals to have addressed this issue. *See Grier v. Klem,* No. 06-3551, 2010 WL 92483 (3d Cir. Jan. 12, 2010); *McKithen v. Brown,* 481 F.3d 89 (2d Cir. 2007); *Savory v. Lyons,* 469 F.3d 667 (7th

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[5] The Texas Department of Criminal Justice ("TDCJ"), is responsible for carrying out the order to execute Mr. Skinner on February 24. That TDCJ is not a party to this litigation is not an obstacle to enjoining it from carrying out the execution. The All Writs Act, which gives federal courts the power to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," 28 U.S.C.A. § 1651(a) (West 2010), allows the Court to enjoin third parties to the extent necessary to aid its jurisdiction. *See, e.g., United States v. N.Y. Tel. Co.,* 434 U.S. 159, 174 (1977) ("The power conferred by the [All Writs] Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice.").

Cir. 2006); *Osborne v. Dist. Att'y's Office,* 423 F.3d 1050 (9th Cir. 2005), *rev'd on other grounds,* 129 S. Ct. 2308 (2009); *Bradley v. Pryor,* 305 F.3d 1287 (11th Cir. 2002). Thus, the so-called "*Heck* issue" presented by this case plainly satisfies most of the considerations applied by this Court in determining whether to grant certiorari. *See* Sup. Ct. R. 10(a) & (c).

Petitioner further respectfully offers that the Court's grant of certiorari on the same issue in *Osborne* strongly suggests that it will do so again here. *See U.S. Postal Serv. v. Nat'l Ass'n of Letter Carriers,* 481 U.S. 1301, 1302 (1987) (Rehnquist, C.J., in chambers) (granting stay where issue presented in petition for certiorari had been previously granted in another case); *Araneta,* 478 U.S. at 1303-04 (fact that Court previously granted certiorari on the same issue in an earlier case but did not reach the issue there, strongly suggests that review will be granted in the case at bar). While the *Osborne* majority opinion concluded that it was unnecessary to resolve the issue in that case, it recognized the question as an important and "difficult" one deserving of the Court's attention in an appropriate case. *See Dist. Att'y's Office v. Osborne,* 129 S. Ct. 2308, 2319 (2009). Furthermore, six of the eight Justices who remain on the Court expressed their views on the issue in separate opinions in *Osborne*, dividing evenly on how it should be resolved. *See id.* at 2324-26 (Alito, J., joined by Kennedy and Thomas, JJ., concurring) (expressing the view that post-conviction DNA testing cannot be sought through a § 1983 claim); *id.* at 2331 n.1 (Stevens, J., joined by Ginsberg and Breyer, JJ., dissenting) (expressing the opposite view). Thus, taken together, the three opinions in *Osborne* provide

compelling evidence that, regardless of how they might come out on the merits, all of the Justices who participated in that case consider the issue an important one deserving of the Court's consideration.

*Osborne* also shows that there is at least a "fair prospect" of five votes to reverse the court of appeals in this case. As noted, Justice Stevens, joined by two other current Justices, have already expressed the view that § 1983 claims for post-conviction DNA testing are not barred by *Heck*. The two remaining votes could come from among the Chief Justice and Your Honor, both of whom expressed no view on the issue in *Osborne*, and Justice Sotomayor, who joined the Court after *Osborne* was decided.

While not immediately at issue given the posture of this case,[6] Mr. Skinner also assures the Court that he is not only likely to prevail on the issue *Osborne* left undecided, but also has a serious claim for DNA testing even under the narrow procedural due process standard laid down by the Court in *Osborne*. There the Court recognized that where a state has established a post-conviction right to seek reversal of a conviction or the reduction of a sentence, the procedures it provides for

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[6] The procedural posture of this case is much like that in *Nelson v. Campbell*, 541 U.S. 637 (2004), at the time the Court granted certiorari in that case. There, three days before his scheduled execution, Nelson filed a § 1983 claim in the district court alleging that Alabama's "cut down" procedure for gaining access to his veins violated the Eighth Amendment. As in this case, Nelson's claim was dismissed by the lower courts on *Heck* grounds. This Court issued a stay and granted certiorari to decide the important threshold questions of whether methods of execution could be challenged in a § 1983 action. *See id.* at 639-40. The Court ultimately answered that question in the affirmative, reversed, and remanded for consideration of whether Alabama's procedures violated Nelson's constitutional rights. *Id.* at 646.

securing that "liberty interest" must comport with "'fundamental fairness in operation.'" *Osborne*, 129 S. Ct. at 2320 (quoting *Medina v. California*, 505 U.S. 437, 448 (1992)). If he wins a remand, Mr. Skinner has a reasonable prospect of showing that Texas's procedures for post-conviction DNA testing, when applied to Mr. Skinner, did not meet that standard.

Here, Texas has created a liberty interest in proving innocence through a post-conviction process. *See Ex parte Baker*, 185 S.W.3d 894, 896 (Tex. Crim. App. 2006) (en banc) ("We have granted relief by post-conviction writs of habeas corpus to convicted persons who used favorable forensic DNA test results to prove actual innocence."); *Ex parte Blair*, No. AP-7594, 2008 WL 2514174, at *1-2 (Tex. Crim. App. June 25, 2008) (per curiam) (not designated for publication) (granting habeas relief after DNA evidence established that defendant would not have been convicted of capital murder had jury heard that evidence at trial). Texas courts have also held that it is a denial of due process to incarcerate or execute an innocent person. *See Ex parte Brown*, 205 S.W.3d 538, 544 (Tex. Crim. App. 2006).[7]

In *Osborne*, the Court faulted the petitioner for never having utilized Alaska's procedures for obtaining post-conviction testing. By contrast, Mr. Skinner *has* tried to take advantage of the Texas procedures—in fact, not once, but twice. On the first occasion, he was denied relief under an earlier version of Texas's post-

[7] Here, unlike the petitioner in *Osborne*, Mr. Skinner also has a life interest in proving his innocence for purposes of the State's executive clemency procedures. In *Osborne*, the Court was careful to note that its jurisprudence holding that a prisoner did not have a liberty interest in discretionary state clemency applied only to "noncapital" defendants. *See Osborne*, 129 S. Ct. at 2319.

conviction DNA testing statute because of an arbitrary and capricious reading by the Texas Court of Criminal Appeals ("CCA") of test results obtained by the District Attorney when he unilaterally sent certain evidence to a private lab for limited DNA testing in 2000. *See Skinner v. State,* 122 S.W.3d 808, 811 (Tex. Crim. App. 2003) ("*Skinner I*").[8] *See also Collins v. Harker Heights, Texas,* 503 U.S. 115, 128 (1992) (arbitrary governmental action can be a denial of due process). When Mr. Skinner—newly armed with detailed information rebutting the court's previous distortion of the facts—brought a second DNA testing motion, the CCA abandoned the rationale of its first decision and instead shifted to a new justification: that Texas's statute should be read to foreclose DNA testing for any prisoner who could have asked for such testing prior to trial, but did not. *Skinner v. State,* 293 S.W.3d 196, 202 (Tex. Crim. App. 2009) ("*Skinner II*"). This decision was also irrational when applied to Mr. Skinner, given that Texas did not have a post-conviction DNA testing statute at the time of his trial and that Mr. Skinner had never knowingly waived his right to have the DNA evidence tested.[9] More than that, this rationale

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[8] The court concluded that even if Mr. Skinner obtained exonerating results from the DNA testing he sought, they could not overcome the fact that the lab had found a mixed profile of Twila Busby's and Mr. Skinner's DNA on a hair found in Ms. Busby's hand, because, the court irrationally reasoned, that the mixture "probably" occurred "during the time when she was struggling for her life." *Skinner I,* 122 S.W.3d at 811. Furthermore, the court relied on this extra-judicial evidence without giving Mr. Skinner an opportunity to question it in an adversarial proceeding. (*See* Complaint at ¶¶ 23-25, *Skinner v. Switzer*, No. 2:09-CV-0281, 2010 WL 273143 (N.D. Tex. Jan 20, 2010), *aff'd*, No. 10-70002, 2010 WL 338018 (5th Cir. Jan. 28, 2010).)

[9] *Cf.* Innocence Protection Act, 18 U.S.C.A. § 3600(a)(3)(A)(i) (West 2010), (a prisoner's having declined to pursue DNA testing prior to trial will bar a request for post-conviction testing *only* if the prisoner himself knowingly and voluntarily *(cont'd)*

requires the defendant who wishes to exercise his constitutional right to put the State to its burden of proof to forever waive the opportunity to prove his innocence by DNA testing. Nor does the CCA's sweeping rationale contemplate any exception for an innocent defendant who, nevertheless, is in the unfortunate position of having been a resident of the house in which the crime occurred and, therefore, possibly having left DNA at the scene. The fact that this very issue provoked a vigorous debate between the concurring and dissenting opinions in *Osborne,* without resulting in a holding of the Court, demonstrates that this is at least a serious issue on which Mr. Skinner has a reasonable possibility of prevailing on remand. *Compare Osborne,* 129 S. Ct. at 2329-30 (Alito, J., concurring) ("When a criminal defendant, for tactical purposes, passes up the opportunity for DNA testing at trial, that defendant, in my judgment, has no constitutional right to demand to perform DNA testing after conviction."), *with id.* at 2336 n.8 (Stevens, J., dissenting) ("It bears remembering that criminal defendants are under no obligation to prove their innocence at trial; rather, the State bears the burden of proving their guilt.").

Thus, while the merits of Mr. Skinner's § 1983 claim for DNA testing remain to be litigated, in deciding whether to issue a stay, the Court can be assured that Mr. Skinner has, at a minimum, a reasonable possibility of prevailing on that claim in the event of a remand.

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waived that right *and* if the waiver occurred after the enactment of the statute making post-conviction testing possible).

For these reasons, Mr. Skinner respectfully submits that this case satisfies the first two standards of *Araneta* and turns now to a discussion of the equitable considerations that warrant the issuance of a stay.

## V.

## The Balance of Equities Tips Heavily in Petitioner's Favor

### A. Mr. Skinner Will Be Irreparably Injured if a Stay Is Not Granted.

It is beyond question that Mr. Skinner will suffer irreparable injury if a stay is not granted. Death by execution is the ultimate irreparable injury.

### B. Granting the Stay Will Not Substantially Harm Respondent or the State.

There will be no significant harm to Respondent or the State of Texas if the stay is issued. To be sure, a stay would result in some delay in carrying out the execution order, and the State has an undoubted "significant interest in enforcing its criminal judgments." *Nelson v. Campbell*, 541 U.S. 637, 650 (2004). However, fifteen years have passed since Mr. Skinner's conviction. In that context, the additional time necessary to decide this case would not constitute a substantial harm to Respondent or the State. Undoubtedly the threatened injury to Mr. Skinner outweighs any such potential damage to Respondent's interest in enforcing the judgment on February 24.

Furthermore, the State brought on itself any injury it might suffer from the issuance of a stay. Ten years ago Respondent's predecessor John Mann *himself* employed post-conviction DNA testing, by his own account, to see if he could "put a

few more nails in [Skinner's] coffin." (*See* Appendix to Brief in Support of Plaintiff's Motion for Preliminary Injunction at 4, *Skinner*, No. 2:09-CV-0281, 2010 WL 273143); *see also* discussion *infra* in Section IV.D. Had Mr. Mann not been so single-mindedly intent on justifying the conviction, and instead accepted Mr. Skinner's request to participate jointly in that testing, he could have forestalled the years of litigation, up to and including the present application for stay, that have ensued. Indeed, Respondent herself could have avoided the need for a stay by agreeing to Petitioner's request, made just prior to filing his Complaint in this case, that she produce the evidence for testing voluntarily. (*See* Complaint at ¶ 31, *Skinner*, No. 2:09-CV-0281, 2010 WL 273143.) Had she done so, the testing might well have been completed and the results known by now.[10] In these circumstances, Respondent has little basis for complaining that the State will suffer substantial harm if a stay is issued to give the Court time to consider Mr. Skinner's petition.

### C. Granting the Stay Would Serve the Public Interest.

The public has an interest in not executing innocent persons. DNA evidence has greatly enhanced the efficacy of truth-finding in criminal proceedings. *See Osborne*, 129 S. Ct. at 2316 ("Modern DNA testing can provide powerful new evidence unlike anything known before . . . . It is now often possible to determine

[10] Indeed, as this case shows, it is the State's opposition to post-conviction DNA testing, not the requests for testing themselves, that can frustrate the search for truth and finality. Such opposition diverts valuable resources, because "litigating post-conviction DNA applications often will be unnecessarily complex, expensive, and time consuming." Nat'l Inst. of Justice, U.S. Dep't of Justice Office of Justice Programs, *Postconviction DNA Testing: Recommendations for Handling Requests* 10 (1999), *available at* http://www.ncjrs.gov/pdffiles1/nij/177626.pdf.

whether a biological tissue matches a suspect with near certainty."). Although Texas has an undoubted interest in the finality of criminal convictions, the State's overall interests are promoted, not disserved, by allowing access to evidence for DNA testing in a case such as this one in which it could establish the innocence of a condemned prisoner. *See McKithen v. Brown*, 565 F. Supp. 2d 440, 484 (E.D.N.Y. 2008) (noting the minimal impact on finality from mere testing of DNA evidence); *Wade v. Brady*, 460 F. Supp. 2d 226, 248-49 (D. Mass. 2006) (noting same and arguing that even attacking the judgment of conviction does not seriously harm finality when DNA evidence raises concerns about the accuracy of the initial verdict).

The State has an interest as well in promoting public confidence in its criminal judgments—confidence that has been eroded by the numerous post-conviction exonerations in recent years, often in cases in which the courts had previously characterized the evidence of guilt as "overwhelming." *See Osborne*, 129 S. Ct. at 2337 n.9 (Stevens, J., dissenting). Enough of these exonerations have occurred to cause the public to expect that the State will no longer allow a person to be executed when there remains untested DNA evidence that could prove his innocence. Because this is such a case, granting a stay will promote public confidence in the judicial system.

### D. Petitioner Has Been Diligent in Pursuing His Claim for DNA Testing.

In *Nelson v. Campbell*, 541 U.S. at 649-50, this Court held that, in weighing the equities in a case like this, where a death-sentenced prisoner is seeking a stay

on the eve of his scheduled execution, a court "must consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim." *Id.* Here, Mr. Skinner has diligently and continuously pursued DNA testing for over ten years, and only recently did his efforts become ripe for presentation to a federal court in a § 1983 action.

Mr. Skinner was convicted in 1995, at a time when forensic DNA testing was relatively new.[11] As noted above, in 2000, five years after Mr. Skinner was convicted, then District Attorney John Mann, who had prosecuted Mr. Skinner, decided to try to silence national media speculation that Mr. Skinner might be innocent by sending certain biological evidence in the case to a private laboratory for testing. (*See, e.g.*, Appendix to Brief in Support of Plaintiff's Motion for Preliminary Injunction at 4, *Skinner*, No. 2:09-CV-0281, 2010 WL 273143 (appending Associated Press wire story stating that Mr. Mann made the decision to test after "recent media attention").) Mr. Skinner's repeated requests to participate in the selection of the items to be tested were ignored. (*See* Complaint at ¶¶ 14-21, *Skinner*, No. 2:09-CV-0281, 2010 WL 273143.) Those tests produced results that

[11] At trial, the State presented evidence of nuclear DNA testing of the type available at the time conducted on blood found on Mr. Skinner's clothes. That testing showed the blood was from Twila Busby and one of her sons, a result that was not noteworthy given that Mr. Skinner admits to having been at the scene when the crimes occurred. As the federal district court found in Mr. Skinner's federal habeas proceeding, mitochondrial testing was not available at the time of Mr. Skinner's trial. *See Skinner v. Quarterman*, 2007 WL 582808, at *33.

were inconclusive.[12] In 2001, Mr. Skinner asked Mann's successor to allow him to test the items he is now asking to be tested, and again his request was denied. (*See id.* ¶ 21A.)

Later that same year, the Texas legislature enacted Art. 64 of the Texas Code of Criminal Procedure to provide a mechanism for post-conviction DNA testing. On October 9, 2001—within months after the statute took effect—Mr. Skinner was in state court asking for DNA testing. As discussed *supra,* that effort was ultimately rejected by the CCA in a decision issued on December 10, 2003. *See Skinner I*, 122 S.W.3d at 813.

In the meantime, Mr. Skinner had filed a motion in his parallel federal habeas corpus proceeding seeking testing of the DNA material so that the results could be used to show that he had been prejudiced by his counsel's failure to have that material tested prior to trial. Ultimately the court denied the motion without prejudice to it being refilled if the Court determined that Mr. Skinner's trial counsel had been deficient in failing to ask for the testing. Then, in a decision issued in February 2007, the court denied Mr. Skinner's claim that counsel had performed deficiently, *see Skinner v. Quarterman,* No. 2:99-CV-0045, 2007 WL 582808, at *31-33 (N.D. Tex. Feb. 22, 2007), *aff'd*, 576 F.3d 214 (5th Cir. 2009), thus also effectively ending his quest to obtain DNA testing in that proceeding.

---

[12] Those test results, on items unilaterally selected by the District Attorney, shed little new light on Mr. Skinner's guilt or innocence. Of the seven items Mr. Skinner is now asking to have tested, only one—hairs found clutched in Twila Busby's hand—were previously tested, and the results of that test were deemed by the lab to be "inconclusive," perhaps as a result of sample contamination during the testing.

However, shortly thereafter, on July 30, 2007, Mr. Skinner filed his second motion for DNA testing in state court. It took until September 23, 2009 for the CCA to finally resolve that motion. *See Skinner II*, 293 S.W.3d at 209. A month later, on October 20, 2009, the convicting court issued an order setting Mr. Skinner's execution date for February 24, 2010. Because Mr. Skinner's counsel were not given notice of that order, they did not learn of it until November 5, 2009. They filed this action just three weeks later, on November 27.

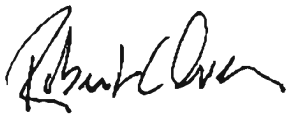
These facts show that Mr. Skinner has continuously and diligently sought DNA testing since 2000, even before Texas enacted procedures for attempting to secure such testing. Furthermore, while Mr. Skinner could not of course have anticipated this Court's decision in *Osborne*, that decision confirms the soundness of Mr. Skinner's strategy of first pursuing DNA testing in state court before testing the constitutionality of Texas's procedures in a § 1983 claim. *See Osborne*, 129 S. Ct. at 2321 (faulting Osborne for "not tr[ying] to use the process provided to him by the State or attempt[ing] to vindicate the liberty interest that is now the centerpiece of his claim"). Without question, then, Mr. Skinner has not "delayed unnecessarily" in pursuing his § 1983 claim for DNA testing. *See Nelson*, 541 U.S. at 650.

## VI.

## Conclusion

For all of the foregoing reasons, Mr. Skinner respectfully requests that the Court issue an order staying his impending execution until such time as it can consider and resolve the issue raised by his Certiorari Petition.

Respectfully submitted,



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*Counsel for Petitioner*

*Counsel of Record

Dated: February 12, 2010

# APPENDIX A

Order Below of the United States
Court of Appeals for the Fifth Circuit
Denying a Stay of Execution

# IN THE UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

**FILED**
February 8, 2010

Charles R. Fulbruge III
Clerk

No. 10-70002

HENRY W. SKINNER,

Plaintiff-Appellant,

versus

LYNN SWITZER,
District Attorney for the 31st Judicial District of Texas,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
No. 2:09-CV-0281

Before SMITH, WIENER, and OWEN, Circuit Judges.

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Henry Skinner, convicted of capital murder and sentenced to death,[1] is appealing the dismissal of his complaint under 42 U.S.C. § 1983 in which he asserts that the defendant district attorney's refusal to allow him access to biological evidence for purposes of forensic DNA testing violates his Fourteenth Amendment right to due process and his Eighth Amendment right to be free from cruel and unusual punishment. The district court adopted the report and recommendation of the magistrate judge and granted defendant's motion to dismiss. This court affirmed on the basis of binding circuit precedent. *Skinner v. Switzer*, No. 07-70017, 2010 WL 338018, at *1 (5th Cir. Jan. 28, 2010) (per curiam) (citing *Kutzner v. Montgomery County*, 303 F.3d 339 (5th Cir. 2002), as binding and *Richards v. District Attorney's Office*, No. 09-10144, 2009 U.S. App. LEXIS 26947 (5th Cir. Dec. 10, 2009) (per curiam) (unpublished), as persuasive).

Execution is set for February 24, 2010. On February 1, 2010, Skinner moved in the district court for a stay of execution pending appeal. On February 2, the district court dismissed the motion for want of jurisdiction.

Skinner moves this court for an injunction prohibiting the Texas Department of Criminal Justice from executing him until all appeals have been resolved. He acknowledges that the position he is taking is "squarely foreclosed in this circuit by *Kutzner*" and "that, according to longstanding precedent and practice of this Court, stays will not be granted for purposes of seeking relief from the Supreme Court on an issue as to which Fifth Circuit law is settled against the appellant, even when the Supreme Court has already granted certiorari on the same issue in another case" (citing *Kelly v. Quarterman*, 296 F. App'x 381, 382 (5th Cir.), *cert. denied*, 129 S. Ct. 444 (2008)). Skinner relies on the fact that the Supreme Court granted *certiorari* on the issue, but ultimately did not decide it, in *District Attorney's Office v. Osborne*, 129 S. Ct. 2308 (2009).

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[1] *See Skinner v. Quarterman*, 576 F.3d 214 (5th Cir. 2009), *petition for cert. filed* (Nov. 23, 2009) (No. 09-7784).

Skinner candidly "recognizes that it is unlikely that this Court will issue the stay requested by this Motion." He properly raises the issue here, nonetheless, to preserve it for possible Supreme Court consideration, citing SUPREME COURT RULE 23.

The motion, whether treated as a motion for stay of execution or a motion for injunction, is DENIED. The mandate has already issued.

# APPENDIX B

Order Below of the United States District Court for the Northern District of Texas Denying a Stay of Execution

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

| | | |
|---|---|---|
| HENRY WATKINS SKINNER, | § | |
| | § | |
| Plaintiff, | § | |
| | § | |
| v. | § | 2:09-CV-0281 |
| | § | |
| LYNN SWITZER, | § | |
| District Attorney, | § | |
| 31st Judicial District of Texas, | § | |
| | § | |
| Defendant. | § | |

**ORDER DISMISSING PLAINTIFF'S MOTION FOR STAY OF EXECUTION**

Came for consideration Plaintiff Henry Watkins Skinner's Motion for Stay of Execution, filed February 1, 2010. The motion is DISMISSED for want of jurisdiction.

Plaintiff Skinner is scheduled to be executed on February 24, 2010 pursuant to his conviction in the 31st District Court of Gray County, Texas, of the offense of capital murder. In the above-numbered case, plaintiff sought relief under the Federal Civil Rights Act (42 U.S.C. § 1983). Plaintiff sought to compel defendant Switzer to make available for DNA testing certain evidence in her possession, which was obtained during the initial investigation of the underlying criminal case. Relying on *Kutzner v. Montgomery County*, 303 F.3d 336 (5th Cir. 2002), this Court dismissed plaintiff's § 1983 complaint on January 20, 2010. Plaintiff appealed to the United States Court of Appeals for the Fifth Circuit, which court, citing *Kutzner*, 303 F.3d at 339 and *Richards v. District Attorney's Office*, No. 09-10144, 2009 WL 4716025 (5th Cir. December 10, 2009), affirmed the District Court's Judgment. The Fifth Circuit issued its Opinion and Mandate on January 28, 2010. Plaintiff Skinner did not seek a stay of execution from this Court while his case was pending before this Court and did not seek a stay of

execution from the Fifth Circuit while his appeal was pending before that court. Plaintiff now seeks a stay of execution.

JURISDICTION

There is currently no case or controversy pending before the District Court, and plaintiff has not directed the Court to the basis upon which he contends this Court has jurisdiction to enter a stay. Instead, plaintiff references Rule 23 of the Rules of the Supreme Court of the United States and argues he must first seek relief in the lower courts before presenting a claim to the Supreme Court. Plaintiff also cites the All Writs Act. *See* 28 U.S.C. § 1651. Neither the All Writs Act nor Supreme Court Rule 23 confers jurisdiction on this Court. *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 33, 123 S.Ct. 366, 370, 154 L.Ed.2d 368 (2002) ("the All Writs Act does not confer jurisdiction on the federal courts"); *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 973 (5th Cir. 2000) ("only Congress may confer jurisdiction on the lower federal courts").

"The power to issue a stay of execution comes from [28 U.S.C.] § 2251, and the question is whether there is a pending or potential habeas corpus proceeding before the court." *Rosales v. Quarterman*, 565 F.3d 308, 311 (5th Cir. 2009). A district court has no power under § 2251 to stay execution when there is no pending habeas corpus proceeding. *Id.*; *Williams v. Cain*, 143 F.3d 949, 950 (5th Cir. 1998). In this case not only is there no pending habeas corpus proceeding, there is no pending § 1983 proceeding.

Accordingly, plaintiff's motion is DISMISSED for lack of jurisdiction.

IT IS SO ORDERED.

ENTERED this 2nd day of February, 2010.

MARY LOU ROBINSON
UNITED STATES DISTRICT JUDGE

# APPENDIX C

Order of the 31st Judicial District
Court of Gray County, Texas
Setting Date of Execution

No. 5216

| | | |
|---|---|---|
| THE STATE OF TEXAS | ][ | IN THE 31ST JUDICIAL |
| VS. | ][ | DISTRICT COURT OF |
| HENRY WATKINS SKINNER | ][ | GRAY COUNTY, TEXAS |

FILED
2009 OCT 26 AM 10 14
GRAY COUNTY, TEXAS
DISTRICT CLERK
DEPUTY

**ORDER SETTING DATE OF EXECUTION**

The Court hereby pronounces sentence against the Defendant, HENRY WATKINS SKINNER, as follows:

It is the order of the Court that the Defendant, HENRY WATKINS SKINNER, who has been adjudged to be guilty of capital murder, and whose punishment has been assessed at death, at any time after the hour of 6:00 p.m. on the 24th day of February, 2010, shall be executed by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the said HENRY WATKINS SKINNER is dead, with such execution procedure to be determined and supervised by the Director of the Institutional Division of the Texas Department of Criminal Justice.

The clerk of this court shall issue a death warrant in accordance with this sentence directed to the warden of the Institutional Division of the Texas Department of Criminal Justice at Huntsville and deliver such warrant to the Sheriff of Gray County to be delivered to said warden.

**SIGNED AND ENTERED** this 20th day of October, 2009.

Honorable Steven Emmert
Judge Presiding

# APPENDIX D

Death Warrant Issued by the 31st Judicial
District Court of Gray County, Texas

# DEATH WARRANT (WARRANT OF EXECUTION) CCP 43.15

#5216

THE STATE OF TEXAS — IN THE 31ST DISTRICT COURT

VS — OF

HENRY WATKINS SKINNER — GRAY COUNTY, TEXAS



TO: The Director of The Texas Department Of Criminal Justice, OR, in the case of his/her death, disability or absence, The Warden of the Huntsville Unit of the Texas Department of Criminal Justice, OR, in the event of the death, disability or absence of both the Director of the Texas Department of Criminal Justice and the Warden of the Texas Huntsville Unit of the Texas Department of Criminal Justice, To Any Such Person Appointed by the Board of Directors of the Texas Department of Criminal Justice: GREETINGS:

WHEREAS, on the 18th day of March, 1995 in the 31st Judicial District Court of Gray County, Texas, Henry Watkins Skinner was duly and legally convicted of the crime of Capital Murder, as fully appears in the Judgment of the said Court entered upon the minutes of said Court as follows, to wit: JUDGMENT ATTACHED.

WHEREAS, on the 20th day of October, 2009, the said Court pronounced sentence upon the said Henry Watkins Skinner in accordance with said judgment fixing the time for the execution of the said Henry Watkins Skinner to be at any time after the hour of 6:00 p m. on the 24th day of February, 2010, as fully appears in the sentence of the Court and entered upon the minutes of said Court as Follows, To Wit: SENTENCE ATTACHED, ORDER SETTING DATE OF EXECUTION AND MANDATE.

THESE ARE, THEREFORE, to command you to execute the aforesaid Judgment and Sentence at any time after the hour of 6:00 pm on the 24th day of February, A.D. 2010, by intravenous injection of substance or substances in a lethal quantity sufficient to cause death until the said Henry Watkins Skinner is dead.

HEREIN, Fail Not and make due return hereof in accordance with the Laws.

Issued under my hand and seal of Court at my office in the City of Pampa, Gray County, Texas this the 13th day of November, 2009.

Gaye Honderich

Gaye Honderich, District Clerk
Gray County District Courts
P.O. Box 1139
Pampa, Gray County, Texas 79066
By: _____

FILED
GRAY COUNTY, TEXAS
2009 NOV 24 PM 3:20
GAYE HONDERICH
DISTRICT CLERK
BY _____ DEPUTY

## OFFICER'S RETURN

Came to hand on the 13 day of Nov, 2009 at 2:32 o'clock P m. and executed on the 18 day of Nov, 2009 by delivering this warrant to the warden of the Institutional Division of the Texas Department of Criminal Justice.

Don Copeland
Sheriff/Constable, Gray County

By _____
Deputy

Return of the Director of The Texas Department of Corrections

Came to hand, on this the _____ day of _____, 20_____ and executed on the _____ day of _____, 20_____ by the death of : _____

DISPOSITION OF BODY: _____

DATE: _____
TIME: _____

Texas Department of Criminal Justice
By: _____

Rec'd by Nicole Boston for Brad Livingston. 11/18/09