

No. AP-76,675

IN THE COURT OF CRIMINAL APPEALS OF TEXAS
AT AUSTIN

HENRY W. SKINNER,
Appellant

v.

THE STATE OF TEXAS,
Appellee

ON APPEAL IN CAUSE NO. 5216 FROM THE DENIAL OF
THIRD MOTION FOR DNA TESTING BY THE
31ST DISTRICT COURT OF GRAY COUNTY

JOINT MOTION TO VACATE AND REMAND
FOR SUBMISSION OF AN AGREED PROPOSED ORDER
FOR FORENSIC DNA TESTING

Appellant HENRY W. SKINNER (“Mr. Skinner”), and Appellee THE STATE OF TEXAS, by counsel, jointly move the Court to vacate the judgment below and remand this cause to the 31st District Court of Gray, County for further proceedings, so that the parties may submit an agreed proposed order for forensic DNA testing pursuant to Chap. 64 of the Texas Code of Criminal Procedure. In support of which request, the parties state as follows.

Background

This is an appeal of an order denying a third motion for forensic DNA testing under Chap. 64 of the Code of Criminal Procedure (“Chap. 64”). Mr. Skinner was convicted and sentenced to death in 1995, and the judgment was affirmed on appeal. *Skinner v. State*, 956 S.W.2d 532 (Tex. Crim. App. 1997). Twice previously, Mr. Skinner unsuccessfully sought forensic DNA testing under Chap. 64. *See Skinner v. State*, 122 S.W.3d 808 (Tex. Crim. App. 2003); *Skinner v. State*, 293 S.W.3d 196 (Tex. Crim. App. 2009). Mr. Skinner’s third such motion was denied by the District Court on November 7, 2011. This Court stayed his execution to hear his appeal. The appeal has been briefed and the Court has heard argument.

Why A Remand Is Appropriate

The parties have reached an accord intended to resolve the dispute pending before this Court, which makes it unnecessary for the Court to address the issues presented by Mr. Skinner’s appeal.

Once jurisdiction has been returned to the convicting court, the parties agree to submit to the convicting court the stipulated proposed order attached hereto as Exhibit A. That order complies with Chap. 64 in securing the DNA testing requested by Mr. Skinner, and will also provide for additional DNA testing desired by the State.

WHEREFORE, the parties jointly request that the Court vacate the judgment below and remand the case to the 31st District Court of Gray County for further proceedings, at which time the parties will submit the stipulated proposed order attached hereto as Exhibit A.

Respectfully submitted,



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Dated: June 12, 2012.

Exhibit A

THE STATE OF TEXAS

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IN THE 31ST JUDICIAL

vs.

DISTRICT COURT OF

HENRY W. SKINNER

GRAY COUNTY, TEXAS

AGREED JOINT ORDER OF THE PARTIES FOR DNA TESTING

The parties have come to an agreement under which the Court will authorize DNA testing of evidence in this case under Chapter 64 of the Code of Criminal Procedure. Upon due consideration, the Court adopts the Agreed Joint Order of the Parties.

IT IS HEREBY ORDERED THAT:

1. Within 5 business days, the individuals or entities that currently house the following items must either send the items by Federal Express courier or else personally deliver those items to Texas Department of Public Safety (DPS) Laboratory, 1302 Mac Davis Lane, Lubbock, Texas, 79401. With respect to any item previously subjected to DNA testing, the custodian of said item must also send any DNA extracts remaining from such prior testing.
 - (1) Vaginal swabs taken from Twila Busby at the time of her autopsy [in possession of GeneScreen/Orchid Cellmark];
 - (2) Twila Busby's fingernail clippings obtained at the time of her autopsy [in possession of GeneScreen/Orchid Cellmark];
 - (3) Any hairs found in Twila Busby's hands that have not been destroyed by previous DNA testing [in possession of GeneScreen/Orchid Cellmark];
 - (4) A tape with bloody prints and hair found in boys' bedroom in doorway [in possession of GeneScreen/Orchid Cellmark];
 - (5) Blood standard of Henry W. Skinner [in possession of GeneScreen/Orchid Cellmark];

- (6) Blood standard of Twila Busby [in possession of GeneScreen/Orchid Cellmark];
- (7) Knife found on the front porch of the Busby house [in possession of Wheeler County court reporter];
- (8) Knife found in a black plastic bag in the living room of the Busby home [in possession of Wheeler County court reporter];
- (9) Dishtowel found inside black plastic bag in the living room [in possession of Wheeler County court reporter];
- (10) Door stop molding with bloody print [in possession of Wheeler County court reporter];
- (11) Set of door knobs taken from inner door [in possession of Wheeler County court reporter];
- (12) Set of door knobs taken from outer door [in possession of Wheeler County court reporter];
- (13) Stains (on gauze) from inner door knob [in possession of Gray County Sheriff's Office, evidence container #3];
- (14) Stains (on gauze) from outer door knob [in possession of Gray County Sheriff's Office, evidence container #3];
- (15) Carpet from entrance to kitchen [in possession of Gray County Sheriff's Office, evidence container #1];
- (16) Fingerhut card with bloody print [in possession of Gray County Sheriff's Office, evidence container #3];
- (17) Stains (on gauze) from back door [in possession of Gray County Sheriff's Office, evidence container #1];
- (18) Stains (on gauze) from upper area of outer front storm door [in possession of Gray County Sheriff's Office, evidence container #3];

- (19) Stains (on gauze) from lower area of outer front storm door [in possession of Gray County Sheriff's Office, evidence container #3];
- (20) Stains (on gauze) from inner front storm door [in possession of Gray County Sheriff's Office, evidence container #3];
- (21) Pair of light blue Wrangler jeans found in the boys' bedroom [in possession of Gray County Sheriff's Office, evidence container #2];
- (22) Tennis shoe found in the boys' bedroom [in possession of Gray County Sheriff's Office, evidence container #1];
- (23) Underwear of Elwin Caler [in possession of Gray County Sheriff's Office, evidence container #1];
- (24) Underwear of Randy Busby [in possession of Gray County Sheriff's Office, evidence container #2];
- (25) Blanket/comforter/bedspread off the boys' bedroom floor [in possession of Gray County Sheriff's Office, evidence container #Misc];
- (26) Mattress cover from upper bunk bed in the boys' bedroom [in possession of Gray County Sheriff's Office, evidence container #1];
- (27) Pillow case from upper bunk bed [in possession of Gray County Sheriff's Office, evidence container #1];
- (28) Sheet from upper bunk bed [in possession of Gray County Sheriff's Office, evidence container #1];
- (29) Pillow case from lower bunk bed in the boys' bedroom [in possession of Gray County Sheriff's Office, evidence container #1];
- (30) Two sheets from lower bunk bed [in possession of Gray County Sheriff's Office, evidence container #1];
- (31) Spatter stain (taken up on thread) from above the dresser in

the boys' bedroom [in possession of Gray County Sheriff's Office, evidence container #3];

- (32) Spatter stain (on gauze) from interior side of door in the boys' bedroom [in possession of Gray County Sheriff's Office, evidence container #3];
- (33) Spatter stain (on gauze) from the dresser in the boys' bedroom [in possession of Gray County Sheriff's Office, evidence container #3];
- (34) Second spatter stain (on gauze) from the dresser in the boys' bedroom [in possession of Gray County Sheriff's Office, evidence container #3];
- (35) Spatter stain (taken up on thread) from near hand print on the door frame by the dresser in the boys' bedroom [in possession of Gray County's Sheriff's Office, evidence container #3];
- (36) Spatter stain on piece of carpet piece cut from the boys' bedroom floor [in possession of Gray County's Sheriff's Office, evidence container #3];
- (37) Spatter stain on cassette holder from the boys' bedroom [in possession of Gray County's Sheriff's Office, evidence container #3];
- (38) Blood standard of Randy Busby [in possession of Gray County Sheriff's Office, evidence container #3];
- (39) Blood standard of Elwin Caler [in possession of Gray County Sheriff's Office, evidence container #3];
- (40) Swabs taken of knife found on the front porch [already in possession of DPS Laboratory, Lubbock, Texas].

- 2. Once all the items listed above have been received at the DPS laboratory in Lubbock, Texas, the laboratory shall provide written notice to counsel for both the State and Defendant at the addresses listed below in paragraph 5. The laboratory shall then provide counsel and/or DNA expert for Mr. Skinner a reasonable opportunity, not to exceed 10

business days, to visually examine the items to determine their condition and suitability for testing, in accordance with DPS procedures regarding contamination management.

3. As soon as possible thereafter, the DPS Laboratory will conduct Autosomal STR DNA testing on each of the items listed above. If it is determined that any sample will be consumed in its entirety during testing, or shall be consumed to a degree that is likely to preclude replicate testing by another laboratory, the DPS Laboratory will refrain from testing that item and will promptly notify the attorneys for both the State and the Defendant. The DPS Laboratory will take no further action on the item at issue until the parties reach an agreement about how to proceed. The same procedure shall apply to hair evidence, to the extent that the DPS Laboratory concludes that testing the root/tissue material of any item of hair evidence with STR DNA testing may preclude mitochondrial DNA testing of the hair evidence at a later date.
4. If a DNA profile is obtained on any item, the DPS Laboratory will compare the resulting DNA profile to existing, known biological samples from each of the following individuals:
 - (1) Henry W. Skinner
 - (2) Twila Busby
 - (3) Elwin Caler
 - (4) Randy Busby

Should a profile not match any of these individuals and contain sufficient DNA data to be eligible for submission to a DNA database, the DPS Laboratory will execute a profile search through CODIS (NDIS), as well as the Texas State DNA database (SDIS). The DPS Laboratory shall simultaneously provide to counsel for both parties a copy of any report(s) regarding the results of NDIS/SDIS searches, along with any identifying information the DPS Laboratory receives regarding any individual(s) identified through these searches.

5. The DPS Laboratory shall issue a report documenting the testing results and results of the DNA comparisons described above. A copy of the report shall promptly and simultaneously be provided to the Court, to the attorneys for the State, and to the Defendant through his counsel.

Court

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6. Within 10 business days of issuing the report, the DPS Laboratory in Lubbock, Texas will simultaneously provide to the attorneys for the State and to the Defendant through his counsel a copy of all data, in whatever form, created by the DPS Laboratory in the course of conducting the testing, including but not limited to bench notes. To the extent the data are in electronic form, the DPS Laboratory shall also provide counsel with (a) the data in a format accessible with software commercially available to the parties; or (b) the identity of the software necessary to access the data.
7. Within 15 business days after the parties receive from the DPS Laboratory the data created in the course of conducting the autosomal STR DNA testing, counsel shall confer to assess whether technology exists that would allow additional DNA testing that could produce potentially relevant results. If they determine that such additional testing is warranted, they shall make appropriate arrangements to have it performed and advise the Court accordingly. When the parties agree that all testing is complete, they shall provide notice to the Court.
8. No sooner than 45 days after all the data referred to in paragraph 6 have been provided to the parties, the Court shall hold a hearing to make the findings required by art. 64.04, Tex. Code Crim. Proc.
9. All costs for Autosomal STR DNA testing will be paid for by the Texas Attorney General's Office.
10. The State of Texas acknowledges that Mr. Skinner has also sought to have DNA testing performed on a windbreaker jacket collected at the crime scene and identified in the Pampa Police Department Evidence Log as item No. 005118 (Incident No. 99-09931). The State of Texas represents that its agents have conducted a thorough search in

attempting to locate this item of evidence and, as of the date of this Order, have not yet been able to locate it. If the State locates this item of evidence at any time, it shall immediately notify the Court and counsel for Mr. Skinner. If the State does not locate the jacket within 30 days of the entry of this Order, it shall, as of that date, provide to counsel for Mr. Skinner the names and contact information for all persons contacted by the State or its agents in attempting to locate this item of evidence. If the jacket remains missing by the date of the court hearing described in paragraph 8 of this Order, the parties will have the opportunity to call witnesses and present evidence at that hearing regarding the last known whereabouts of this item of evidence and the State's efforts to locate it.

11. No order will be entered setting an execution date in this case until at least 30 days after the conclusion of the hearing described in paragraph 8 of this Order.
12. This Order may be modified upon the joint agreement of the attorneys for the State and for the Defendant.

IT IS SO ORDERED.

SIGNED this _____ day of June, 2012.

Steven R. Emmert
Judge Presiding