

STATE OF TEXAS)	IN THE 31 ST JUDICIAL DISTRICT
)	
v.)	COURT IN AND FOR
)	
HENRY W. SKINNER,)	GRAY COUNTY, TEXAS
<i>Defendant</i>)	

**MOTION TO ORDER THE STATE
TO COMPLY WITH ART. 64.02(a)(2), V.A.C.C.P.**

Defendant HENRY W. SKINNER ("Mr. Skinner"), by counsel, respectfully moves the Court, pursuant to articles 64.03 and 64.02(a)(2) of the Texas Code of Criminal Procedure, to order the State to comply with the latter provision in responding to Mr. Skinner's third motion for forensic DNA testing, filed herewith. In support of that request, Mr. Skinner would show the Court as follows.

When the Texas Legislature added Chapter 64 to the Code of Criminal Procedure in order to provide for post-conviction DNA testing, it imposed a specific burden on the convicting court to determine whether the evidence that the movant seeks to have tested in a given case "still exists and is in a condition making DNA possible." Tex. Code Crim. Proc. Ann. art. 64.03(a)(1)(A)(i) (Vernon Supp. 2010). It further required the convicting court to determine whether that evidence "has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect." *Id.* art. 64.03(a)(1)(A)(ii).

To enable the Court to make these pivotal findings, the Legislature imposed a parallel duty on the prosecutor. Under art. 64.02(a)(2), "[o]n receipt of the motion, the convicting court *shall . . . require*" the State to take one of two actions in response to being served with a motion for forensic DNA testing. *Id.* art. 64.02(a)(2). According to the straightforward terms of the

statute, the State must either "deliver the evidence to the court, along with a description of the condition of the evidence," *id.* art. 64.02(a)(2)(A), or it must "explain in writing to the court why [it] cannot deliver the evidence to the court." *Id.* art. 64.02(a)(2)(B). The statute gives this Court no discretion to allow the State to substitute some other response for one of the only two options permitted by art. 64.02(a)(2).

Mr. Skinner has previously filed two motions for forensic DNA testing in this case. On neither occasion, to the best of undersigned counsel's knowledge, did the State "deliver . . . to the court" the items Mr. Skinner seeks to have subjected to DNA testing. Nor, as far as we know, did the State "explain in writing" why it could not do so. Indeed, the State filed no written response whatsoever to Mr. Skinner's initial motion for DNA testing. And, in replying to Mr. Skinner's second motion for DNA testing, the State simply included, under the heading "Uncontested Issues," this statement: "To the best of the State's information, knowledge, and belief, the items sought to be tested are still available for testing, the chain of custody is intact, and the items are in a condition to be tested although the State has not sought expert opinion in that regard." State's Reply to Convicted Person Henry Watkins Skinner's Subsequent Motion for DNA Testing at 3, *State v. Skinner*, No. 5216 (31st Jud. Dist. Ct. Gray Cnty., Tex. Nov. 20, 2007).

Chapter 64 directs the Court to require the State to either deliver the evidence to the Court, or to explain in writing why it cannot do so. The statute contains no exceptions to this requirement. In order to avoid any confusion about compliance with the statute's express mandate in this regard, particularly under the time pressure imposed by Mr. Skinner's scheduled November 9 execution, it is critically important that the Court strictly enforce the Legislature's plainly expressed will.

This is particularly true given the State's recent comments about the whereabouts and condition of the evidence Mr. Skinner seeks to have tested. As the Court is likely aware, Mr. Skinner has sued the District Attorney in federal court under 42 U.S.C. § 1983, alleging a deprivation of due process in the denial of his second motion for DNA testing. In that action, Mr. Skinner moved for leave to submit interrogatories to the District Attorney, to resolve any questions about the location and condition of the evidence he seeks to have DNA tested. Ordered to respond, the District Attorney filed a declaration on July 21, 2011, indicating that she presumes that some of the items Mr. Skinner seeks to have tested are in the custody of the 31st District Court, but that she "cannot verify their existence." *See* Exhibit 1 (Declaration of Lynn Switzer, *Skinner v. Switzer*, No. 2:09-CV-0281 (N.D. Tex., Amarillo)). With respect to the other items Mr. Skinner seeks to have tested, the District Attorney avowed that "at least some" of that evidence, including "Twila Busby's vaginal swabs and fingernail clippings," was "either at" a forensic laboratory "or in the evidence locker at the Gray County Sheriff's Department," and "[t]o the best of my knowledge" in a condition to be tested. *Id.*

The Texas Legislature evidently anticipated that a motion for forensic DNA testing might elicit a prosecutor's vague response that the evidence might be either in one place or possibly another, or the dubious claim that the prosecutor can't be sure about the condition of the evidence and isn't in a position to verify anything. And it acted to prohibit precisely such gamesmanship by giving the Court an unqualified statutory duty to direct the State to take the steps necessary to either produce the evidence sought to be tested, or explain in writing why it cannot do so. The District Attorney's recent evasiveness on this point makes it ever clearer why the Court must demand compliance with that provision of Chapter 64.

Wherefore, Mr. Skinner respectfully moves the Court to order the State to comply with art. 64.02(a)(2) of the Texas Code of Criminal Procedure.

Respectfully submitted,



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Counsel for Defendant

Dated: September 2, 2011

Exhibit 1

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

HENRY WATKINS SKINNER,
Plaintiff,

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§
§
§
§
§
§

V.

NO. 2:09-CV-0281

LYNN SWITZER,
Defendant.

DECLARATION OF LYNN SWITZER

Pursuant to 28 U.S.C. § 1746, I, Lynn Switzer, declare the following:

1. My name is Lynn Switzer. I am over 18 years of age, of sound mind, capable of making this declaration, have personal knowledge of the facts stated in it, and they are true and correct.

2. I serve as the District Attorney for the 31st Judicial District of Texas.

3. I have reviewed Skinner's motion for leave to serve interrogatories, as well as his response to our motion for summary judgment, in which he suggests that this case might be moot.

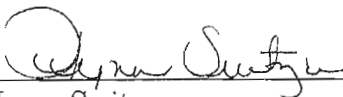
4. Some of the items that Skinner seeks for testing were admitted into evidence at his murder trial and are not in my custody. They are in the custody of the 31st District Court of Gray County, Texas. These items include the knife found on the front porch of the house where Skinner murdered Twila Busby and her two mentally disabled sons, the knife found in a plastic bag in the living room of that

house, the dishtowel found in that plastic bag, and the windbreaker jacket found on the living room floor. I have no access to these items, and I cannot verify their existence.

5. But at least some of the evidence that Skinner seeks for testing still exists and is in my custody, such as Twila Busby's vaginal swabs and fingernail clippings. That evidence is either at GeneScreen or in the evidence locker at the Gray County Sherriff's Department. To the best of my knowledge, such evidence is in a condition to be tested although I have not sought expert opinion on that question.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: July 21, 2011



Lynn Switzer
District Attorney for the 31st Judicial District

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of September, 2011, I caused to be served the foregoing motion by commercial, next-business-day delivery service on Lynn Switzer, District Attorney for Gray County, Texas, addressed as follows:

Lynn Switzer, Esq.
District Attorney
31st Judicial District of Texas
205 N. Russell Street
Suite 413
Pampa, TX 79065



Robert C. Owen