

No. 5216

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| 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 WITHDRAW OR MODIFY EXECUTION DATE
TO PERMIT FULL AND FAIR CONSIDERATION
OF MOTION FOR FORENSIC DNA TESTING

Defendant HENRY W. SKINNER (“Mr. Skinner”), by counsel, respectfully moves the Court, pursuant to articles 43.141(d)(2), 43.141(e), and 64.02(a)(2) of the Texas Code of Criminal Procedure; the due process clause of the Fourteenth Amendment; the cruel and unusual punishments clause of the Eighth Amendment; and the due course of law guarantee of Art. I, Section 13 of the Texas Constitution; to withdraw its Order of July 27, 2011, setting Mr. Skinner’s execution for November 9, 2011, and to recall the warrant of execution issued in compliance with that Order. Vacating that November 9 execution date is necessary to permit full and fair consideration of Mr. Skinner’s third motion for forensic DNA testing, filed herewith. In the alternative only, Mr. Skinner respectfully moves the Court to modify his execution date by at least ninety (90) days, to the same end. In support of this request, Mr. Skinner would show the Court as follows. Motions for forensic DNA testing like Mr. Skinner’s often raise complex factual disputes; they can also present novel legal questions. Resolving such thorny issues fairly and accurately under an artificial time deadline, like a scheduled execution date, may well be impossible. At a minimum, rushing to decide such questions needlessly increases the risk of error and undermines public confidence in the reliability of the criminal justice system.

The Texas Legislature thus expressly anticipated that when a condemned prisoner who has been scheduled for execution moves for forensic DNA testing, the convicting court may well need to withdraw or modify that execution date to permit due consideration of the issues raised by the prisoner's motion. The Legislature accordingly provided in art. 43.141(d)(2), Tex. Code Crim. Proc. Ann. art. 43.141(d)(2) (Vernon Supp. 2010), that a trial court "may modify or withdraw [its] order . . . setting a date for execution in a death penalty case" where such a postponement is necessary to the resolution of "a motion for forensic testing of DNA evidence submitted under Chapter 64." *Id.*

For several reasons, it is appropriate that the Court withdraw Mr. Skinner's November 9 execution date. First, Mr. Skinner's third motion for DNA testing both implicates complex factual questions and calls on the Court to construe the very newly amended Chapter 64. Those circumstances alone would justify withdrawal of the pending November 9 execution date to permit the parties and the Court unhurried time to work through the issues presented by Mr. Skinner's motion. Moreover, Chapter 64 itself contemplates that as much as sixty days may pass before the Court is even in a position to rule on a motion for DNA testing. *See* Tex. Code Crim. Proc. Ann. art. 64.02(a)(2) (Vernon Supp. 2010) (the State is entitled to sixty days after being served with a motion for DNA testing to either deliver to the court the evidence the movant seeks to have tested, along with a description of its condition, or explain in writing why it cannot produce the evidence). There is nothing in the statute giving this Court explicit authority to shorten that time period. Thus, even assuming that on the same day this motion is filed, the Court issues its order directing the State to comply with art. 64.02(a)(2), the State would have at least until November 4 to comply with that order. That would leave this Court, as well as the Court of Criminal Appeals, just days to resolve the questions presented by his motion and any

response on the merits the State chooses to file. The Legislature could not have expected courts to have to move with such alacrity in deciding critically important issues, particularly when the movant is just days from being put to death. It is for precisely this reason that art. 43.141(d)(2) authorizes withdrawing an execution date to permit litigation over a DNA testing motion to proceed deliberately but without undue haste.

Finally, withdrawal of the November 9 execution date is appropriate because at the time the date was set, it may not have been evident to the Court that recent legislative changes had authorized Mr. Skinner to bring a new motion for forensic DNA testing, which would inevitably take additional time to resolve. Even if the Court in late July knew that the Texas Legislature had recently voted to remove from the statute the provision under which Mr. Skinner was previously denied DNA testing, the Court might not have been aware that those changes would not take effect until September 1, leaving inadequate time before the November 9 date for thoughtful consideration of a motion filed promptly after September 1.

In addition to the statutory basis for requesting this relief, Mr. Skinner respectfully urges that federal and state constitutional protections also require the Court to withdraw the pending execution date in order to give full and fair consideration to his third motion for DNA testing. Expediting the disposition of Mr. Skinner's motion simply to comply with an execution date that could easily be withdrawn or rescheduled would arbitrarily deny him the rights guaranteed by Chapter 64 in violation of federal due process, and thereby subject him to cruel and unusual punishment in violation of the Eighth Amendment. It would also risk frustrating the promise enshrined in Art. I, Sec. 13 of the Texas Constitution that "every person . . . shall have remedy by due course of law" for "an injury done him, in his lands, goods, person, or reputation." U.S. Const. art. 1, § 13.

For all the foregoing reasons, Mr. Skinner respectfully moves the Court to withdraw its Order setting his November 9 execution date, to recall the warrant of execution issued pursuant to that Order, and not to set a new execution date until proceedings on Mr. Skinner's third motion for DNA testing are complete. In the alternative only, Mr. Skinner asks that the Court modify the November 9 date for a period of at least ninety (90) days, to permit full and fair consideration of his third motion for DNA testing, or grant such other relief as law and justice require.

Respectfully submitted,



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Dated: September 2, 2011

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:

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