No. 5216

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

DEFENDANT HENRY W. SKINNER'S THIRD MOTION FOR DNA TESTING

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DEFENDANT HENRY W. SKINNER'S THIRD MOTION FOR DNA TESTING

Pursuant to Article 64.03, Tex. Code Crim. Proc. Ann. art. 64.03(a) (Vernon Supp. 2010), Defendant Henry W. Skinner ("Mr. Skinner"), an indigent prisoner confined on Death Row at the Polunsky Unit of the Texas Department of Criminal Justice, Correctional Institutions Division, respectfully moves for DNA testing of certain items of forensic evidence, as set forth more fully below.

I. Mr. Skinner's Case Urgently Calls for DNA Testing.

For more than a decade, Mr. Skinner has unsuccessfully pursued forensic DNA testing that would resolve longstanding and troubling questions about who committed the crimes for which he was convicted. Mr. Skinner has consistently maintained that he did not kill Twila Busby and her sons Elwin Caler and Randy Busby. Physical evidence from the crime scene, witness accounts, and expert testimony all indicate that Mr. Skinner was so severely impaired at the time of the murders—as a result of extreme intoxication from drugs and alcohol—that he would have lacked the physical and mental coordination to perform even simple tasks, let alone murder three people in the manner to which the evidence here points. Forensic DNA testing has a strong likelihood of confirming Mr. Skinner's claim of innocence. Even the evidence presented at trial raised disturbing doubts about whether Mr. Skinner could have murdered the victims, and,

since that time, substantial new evidence has been uncovered that adds substantial additional weight to his innocence claim.

The Texas Legislature's decision in 2001 to create a vehicle for wrongfully convicted prisoners to seek post-conviction DNA testing reflects its view that reliable verdicts are indispensable to the integrity of the criminal justice system. Since it originally enacted that statutory scheme, the Legislature from time to time has made changes to strengthen it. Just this year, persuaded that the provision under which Mr. Skinner had been denied access to DNA testing in 2009 was frustrating, rather than promoting, the vindication of potential claims of innocence, the Legislature removed it from the DNA testing statute altogether. *See* Certain Pretrial and Post-Trial Procedures and Testing in a Criminal Case, 82d Leg., 2011 R.S., ch. 14 § 5, 2011 Tex. Sess. Law Serv. Ch. 278 (H.B. 1573) (Vernon) (amending Tex. Code Crim. Proc. Ann. art. 64.01); *see also infra*. In light of that dramatic change, which has just become effective, there is no longer any justification for denying Mr. Skinner the DNA testing he has so long sought.

Texas's post-conviction DNA testing statute imposes a number of conditions that a convicted person seeking testing must satisfy. *See* Tex. Code Crim. Proc. Ann. art. 64.03(a) (Vernon Supp. 2010). We will demonstrate below that Mr. Skinner meets each of these criteria. The pivotal issue we address first is the requirement imposed by art. 64.03(a)(2)(A)—whether Mr. Skinner can show by a preponderance of the evidence that, had exculpatory results been obtained through DNA testing, he would not have been prosecuted or convicted. After our detailed discussion of the evidence and why it compels a finding that art. 64.03(a)(2)(A) has been satisfied, we will address the other relevant requirements in the statute. Finally, we will

explain why Mr. Skinner's prior unsuccessful motions for forensic DNA testing do not bar the present action.

A. Even the Evidence Presented at Trial Left Troubling Questions About Whether Mr. Skinner Could Have Committed the Murders.

Mr. Skinner was convicted of murdering his girlfriend, Twila Busby, and her sons, 22-year-old Elwin Caler and 20-year-old Randy Busby, at the home they all shared in Pampa, Texas. The murders occurred on New Year's Eve, December 31, 1993.

The evidence on which Mr. Skinner was convicted was entirely circumstantial. His conviction was based primarily on the fact that he was present in the house when the murders occurred, that he had the blood of two of the victims on his clothes (Tr. 28:1109), that he managed to walk to the house of a neighbor, Andrea Reed, shortly after the murders, and that, while there, he told Reed that he might have "kicked" Twila Busby to death, (Tr. 26:501), a method of attack not supported by any of the physical evidence.[1] There were no eyewitnesses to the murders themselves, there was no physical evidence showing that Mr. Skinner had handled any of the possible murder weapons, and there was no evidence of a motive.

The jury's guilty verdict does not erase the fact that substantial evidence presented at trial cast doubt on Mr. Skinner's guilt. 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.) 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

[1] We cite the Reporter's Record of testimony at Mr. Skinner's trial as "Tr.," with volume and page number.

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; State's Ex. 48 at 2.) Somehow, the murderer was able to change weapons and stab Caler several times before Caler could fend off the attack or flee. (Tr. 28:1193-95.) The killer then methodically 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.)[2] By their very nature, these acts demanded considerable presence of mind and physical coordination.

Mr. Skinner has never disputed that he 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 especially the abundant evidence that he was completely incapacitated by the extreme quantities of alcohol and codeine he had consumed earlier that evening.

The last person to see Ms. Busby and Mr. Skinner before the murders was Howard Mitchell, an acquaintance of theirs who was hosting a New Year's Eve party that evening at his house, located several blocks from the Busby residence. After talking to both Ms. Busby and Mr. Skinner on the phone at around 9:30 p.m., Mitchell drove to the Busby residence at about 10:15 p.m. with the intention of giving them a ride to his party. (Tr. 26:575-76.) 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

[2] Mr. Skinner sustained a deep cut to his right hand that night. While the cut appeared to be a defensive wound, the State at trial attempted to explain it away by contending that it must have been accidentally self-inflicted when Mr. Skinner's hand slid down the knife blade when his first attempt to stab the sleeping Randy Busby struck Randy's shoulder blade. (*See, e.g.*, Tr. 28:1203.) However, the absence of Mr. Skinner's blood on Randy's bedding proved that assertion unlikely. (*See* Tr. 28:1132-35).

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. At trial, Ms. Reed's testimony was harmful to Mr. Skinner's case, and may well have tipped the balance in favor of conviction. But, shortly after trial, Ms. Reed recanted that trial testimony and gave a full and true account of what really happened at her home on the night of the murders. Her true testimony provides strong exculpatory evidence concerning Mr. Skinner's extreme incapacitation on the night in question. At trial, Ms. Reed generally described Mr. Skinner as able to perform certain functions inconsistent with the defense theory that Mr. Skinner had been too impaired by alcohol and drugs to have committed the murders. For example, Ms. Reed stated at trial that Mr. Skinner "somehow" got into her house, even though she warned him that she would call the police if he did not leave (Tr. 26:491), and once inside was able to take off his shirt and lay it over the back of a chair (Tr. 26:493), heated and bent sewing needles to suture the cut in his hand (Tr. 26:494), went to the bathroom on his own (Tr. 26:496), and threatened to kill her if she called the police (Tr. 26:497), all of which was of course damaging to the defense. But, even so, Ms. Reed admitted on cross examination that Mr. Skinner was "f***** up" from both alcohol and drugs (Tr. 26:515), he talked about things that she knew had never happened (Tr. 26:522), he at times seemed unaware of where he was or who he was talking to, sometimes calling Ms. Reed "Twila"

(Tr. 26:522, 26:526), and he told a number of inconsistent and largely incoherent stories about what had happened that evening (Tr. 26:494, 26:500), including that he had been stabbed several times and "gut shot" (Tr. 26:491), neither of which was true.

Dr. William Lowry, a toxicologist experienced in the effects of alcohol and drugs on human performance, provided expert testimony that Mr. Skinner was too impaired by the alcohol and codeine in his system to have committed the murders. Blood was drawn from Mr. Skinner after he was arrested. Dr. Lowry's undisputed analysis of that blood 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. While the State had some success in getting Dr. Lowry to admit that a habitual abuser of alcohol and drugs would have more tolerance to those subjects and that he (Dr. Lowry) was surprised by some of the things Ms. Reed said Mr. Skinner did when he got to her house (statements we now know not to be true), it offered no testimony to rebut Dr. Lowry's conclusions.

In addition, Joe Tarpley, an occupational therapist specializing in hand injuries, testified 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 and less than half of what would be expected of a normal right-handed person. (Tr. 29:1317-18.) This disability 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 been sober. (Tr. 29:1316, 29:1318-19.)

There was also disturbing evidence presented at trial that Twila Busby's uncle, Robert Donnell, might well have been the real murderer—a possibility that the prosecution failed even to consider, much less investigate or disprove. The defense presented evidence 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.)

Thus, while the jury ultimately returned a verdict of guilty, there was, even at the trial, evidence casting considerable doubt on whether Mr. Skinner was—indeed, *could* have been—the real killer. Evidence developed since Mr. Skinner's trial raises the level of doubt to full-scale alarm that the jury's verdict may very well have been wrong.

B. The Evidence Developed Since Trial Shows that Mr. Skinner Was Not the Real Killer.

It has been sixteen years since Mr. Skinner was convicted. In that time, substantial evidence has been uncovered which shows that Mr. Skinner did not commit the murders and that it is highly likely Robert Donnell or some unknown intruder did.

1. All the Incriminating Aspects of Andrea Reed's Testimony at Trial Were False.

In testimony Andrea Reed gave in open court during Mr. Skinner's federal habeas proceeding, she acknowledged that her trial testimony against Mr. Skinner had been false in many important particulars, namely:

1. As noted above, Ms. Reed testified at trial that she had prohibited Mr. Skinner from entering her house and that he somehow got in anyway. That testimony was particularly critical, because it indicated that he was able to perform a feat requiring considerable dexterity and presence of mind only minutes after the murders occurred. That testimony, as it turns out, was false. (EH at I:228.[3]) Ms. Reed admitted in the federal proceeding that, in fact, she had made up that account because she was afraid the police would charge her as an accessory if she told the truth. The truth was that Mr. Skinner was only able to get into her house with her assistance. After she first became aware that he was "banging on the side of the trailer," Ms. Reed went outside, where she "ended up helping him up the porch steps and into [her] front room." (*Id.*) Contrary to the false impression left by her trial testimony, Mr. Skinner was unable to walk up the steps on his own. (*Id.* at I:228-29.) He stumbled and fell over backwards trying to climb up the porch stairs and had to lean on Ms. Reed's arm even to get up the steps and into the house. (*Id.* at II:270-71.)

2. Ms. Reed's trial testimony that, after Mr. Skinner was inside her house, he took off his shirt and laid it over the back of a chair was also false. The truth was that he could not

[3] We cite the transcript of the evidentiary hearing in Mr. Skinner's federal habeas proceeding as "EH," followed by the volume and page number. Petitioner's Exhibits from that hearing are cited as "EH PX," with number.

take his shirt off without her assistance, and it was she, not he, who laid it over the back of the chair. *(Id.* at I:229.)

3. Ms. Reed's trial testimony that Mr. Skinner heated sewing needles and attempted to bend them was also false. It was Ms. Reed who tried to heat and bend the needles; Mr. Skinner's coordination was too impaired to perform such acts. (*Id.* at I:230.)

4. Ms. Reed's trial testimony that Mr. Skinner went from the dining room to the bathroom on his own was also false. In fact, when Mr. Skinner needed to go to the bathroom, it was necessary for Ms. Reed to help him walk down the hall and get back to the living area. *(Id.* at I:230-31.) Mr. Skinner was almost completely unable to keep his balance. (*Id.* at II:272.)

5. Ms. Reed's trial testimony that Mr. Skinner threatened to kill her if she called the police was likewise false. While Mr. Skinner told her that she should not call anybody, "he never said that he would kill me" (*id.* at I:231), and she never felt threatened by Mr. Skinner at any time while he was in her home that night. (*Id.* at II:266.) She was not worried that he was a threat to Twila either. (*Id.* at II:278.)

6. Ms. Reed testified at trial that of all the fanciful stories Mr. Skinner told her on the night of the murders while he was at her house, the only one he made her swear to keep secret was the story that he believed he had kicked Twila Busby to death. (Tr. 26:528.) That, too, was a lie. Not once, but "several times," Mr. Skinner made Ms. Reed swear not to tell; "[e]very story" Mr. Skinner told her "he would whisper the same thing, don't ever tell anybody." (EH at I:231.) He told her "a whole lot of stories" that night, (*id.* at II:277), and was generally acting "[p]retty much irrational." (*Id.* at II:281.)

Thus, what was perhaps the most damaging testimony presented against Mr. Skinner at his trial—Andrea Reed's description of the feats Mr. Skinner was able to perform when he

showed up at her house shortly after the murders, and his alleged hush-hush confession that he might have kicked Twila to death[4]—was false. To be sure, the federal magistrate judge failed to credit Ms. Reed's testimony in the context of Mr. Skinner's federal habeas proceeding, in which her testimony was presented to support a claim that the prosecution had coerced her to give false testimony. Although the magistrate judge cited several witnesses as "contradicting" Ms. Reed's testimony, those witnesses' testimony necessarily spoke only to the question of whether Ms. Reed had been coerced by agents of the State to give her trial testimony, *not* whether her trial testimony was false (a subject concerning which none of those witnesses could have first-hand knowledge). *See Skinner v. Quarterman*, No. 2:99-CV-45, 2007 WL 582808, at *16 (N.D. Tex. Feb. 22, 2007) (not designated for publication). And even the testimony of those witnesses who said that Andrea Reed had told them at the time that Mr. Skinner had burst into her house and threatened her is not inconsistent with Ms. Reed's testimony that she was initially afraid to say anything different, out of fear that she would be charged as an accessory.

Perhaps most important, in assessing Andrea Reed's credibility, the federal court failed to take into account the fact that her federal habeas testimony about Mr. Skinner's condition is far more consistent with, *and therefore corroborated by*, the scientific evidence presented by Dr. Lowry that around midnight Mr. Skinner was barely able to stand or walk, and with Howard

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[4] District Attorney John Mann placed heavy emphasis on this testimony in his closing argument to the jury:

> We find Mr. Skinner back at Andrea Reed's house before we arrest him, having told her all these different stories about what happened. And then he gets down to the last one and the important one, and says, 'I want you to swear to God that you will not tell anybody and I'll tell you the truth about what happened.' She says, 'You know me, I don't talk out of school.' And he says, 'I think I killed Twila.' Or in Andrea's words, 'That's when he told me he thought he had killed Twila.'

(Tr. at 30:1547-48.)

Mitchell's eyewitness testimony that 90 minutes earlier Mr. Skinner was so intoxicated that he could not be awakened from a near-comatose sleep. Nor did the federal court weigh the important fact that Andrea Reed had *no motive* to change her testimony, other than her concern that her false testimony had the unintended result of sending an innocent man to the execution chamber. To the contrary, Ms. Reed had every incentive *not* to disavow her trial testimony, since she faced the real threat that she would be prosecuted for perjury if she did.[5]

2. Evidence Developed After Trial Points Strongly to Robert Donnell as the Likely Killer.

During Mr. Skinner's federal habeas proceeding, substantial new and dramatic evidence was presented showing a far greater likelihood than the jury heard at trial that Robert Donnell was the actual killer.

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[5] Mr. Skinner's original state habeas application was accompanied by an affidavit from Andrea Reed recanting her trial testimony. Shortly after that pleading was filed, then District Attorney John Mann called Ms. Reed before a grand jury. A document eventually produced by the State under the Open Records Act purports to be a transcript of that appearance; it shows that, after Ms. Reed invoked her right to counsel, Mr. Mann threatened to charge her with perjury if she did not withdraw her affidavit:

> Do you understand that by signing whatever it was they had you sign that they got you to confess to having committed the felony of aggravated perjury? Did this lawyer you want, Mr. Losch [Mr. Skinner's original habeas counsel], tell you that he was setting you up to take a fall for aggravated perjury by giving this statement that you gave recently? Is that really what you want to do? Just rely on Mr. Losch who has now gotten you to commit—having—admit having committed the felony? If that's what you want to do, that's your privilege.

See Exhibit 7 to Application for Post-Conviction Writ of Habeas Corpus Pursuant to Art. 11.071, V.A.C.C.P., *Ex parte Skinner*, No. 5216-3 (31st District Court of Gray County, Texas) (March 1, 2010) (hereinafter "2010 State Habeas App."). At the federal evidentiary hearing, Ms. Reed admitted that she was concerned about the threat of felony charges (EH at I:18), asked for and was appointed a public defender to advise her *(id.* at I:19), and then went ahead, in the face of these threats, to testify that she had lied at trial in each of the important respects described above. In these circumstances, there would be no reason for Ms. Reed to persist in her recantation testimony if it were not true.

For example, the testimony of Debra Ellis further undermines confidence in Mr. Skinner's guilt. Ms. Ellis lived next door to Donnell and had known him for about three years at the time of the murders. (EH at I:34.) Ms. Ellis testified that Donnell was a "[v]ery big guy," who owned a gun and carried a knife. (*Id.* at I:28.) He "was not a nice person," he drank heavily, and his temper worsened when he had been drinking. (*Id.* at I:30.) Ms. Ellis had seen him threaten at least one person in her own presence. (*Id.* at I:28.) Donnell also frightened his wife, Willie Mae Gardner, by pushing her and yelling at her; on one such occasion, Ms. Ellis saw him grab his wife by the throat and lift her off her feet up against the wall. (*Id.* at I:49-50.) On another occasion, Ms. Gardner told Ms. Ellis, while still traumatized from the incident, that Donnell choked her and put a gun to her head, threatening to blow it off. (*Id.* at I:49.)[6] Donnell also owned and regularly wore a tan windbreaker jacket like that found next to Twila Busby's body after her murder. (*Id.* at I:30-31.)

Ms. Ellis was present when Donnell was informed by the police that his niece and both her sons had been brutally slain. All he said was, "okay." (*Id.* at I:39.) Donnell "was not upset," "had not been crying," and "acted like it was . . . [j]ust an ordinary normal day for him." (*Id.* at I:26.) He showed "no emotion at all" in response to the shocking news of the triple murder of his own relatives. (*Id.* at I:46.) His response was so unusual that it made Ms. Ellis wonder at the time if he was involved in the crime. (*Id.* at I:44.)

Most startling of all was the fact that Donnell, within days of the murders, literally dismantled his vehicle in order to give it a fanatically thorough cleaning. Donnell's vehicle was

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[6] In 1996, Ms. Gardner filed for divorce from Donnell, alleging that he was a heavy drinker with an "unpredictable and ungovernable" temper who abused her verbally and threatened her with bodily injury. Donnell did not contest these charges; he was killed in a highway accident before the divorce became final.

"an old-beat up truck," a small pickup of Japanese make. (*Id.* at I:23.) There was "[n]othing special" about this "plain Jane truck;" it was a "clunker." (*Id.*) Nonetheless, Ms. Ellis saw Donnell, on a day very shortly after the murders when it was "cold outside," stripping the interior of his truck down to the metal floorboards and giving it a vigorous cleaning. (*Id.*) He "had taken all the carpet out of the truck," and "was out there with one of these big old five-gallon buckets," containing a solution of "Pine Sol" or something that smelled like it. (*Id.*) Donnell's intense activity drew Ms. Ellis's attention because Donnell was normally anything but fastidious about his truck; not only had she never seen him clean it this thoroughly before, she had never seen him clean it *at all* in the several years she had lived next door. (*Id.* at I:24.) Donnell spent "a few hours" at the task, which involved taking "everything out of the truck," "all the seats and everything." (*Id.* at I:23.) "Anything that would come out of the truck, he took out . . . ." (*Id.* at I:23-24.) After Donnell had removed everything above the floorboards, he scrubbed the entire interior of the truck cab with the Pine Sol solution and then hosed it out thoroughly. (*Id.*) Although he replaced the seats, he never put the carpet back in. (*Id.* at I:24.) Within two weeks of giving his unremarkable pickup truck this "extensive cleaning," Donnell then repainted it, using "'a paint brush and a spray can.'" (*Id.* at I:26, I:42.)

James Hayes, an acquaintance of both Twila Busby and Donnell, testified at the federal habeas hearing that he too had seen Donnell act violently from time to time and, in fact, that Donnell had once grabbed him and cut his shirt with a knife. (*Id.* at I:56; I:62-63.) He also testified that the relationship between Twila and Donnell was often turbulent and that she sometimes asked for Mr. Hayes's help in making peace between them. (*Id.* at I:58 (Twila would phone Mr. Hayes when she and Donnell were arguing; at her request, Mr. Hayes would come

over and "[t]ell [Donnell] to leave"), *id.* at I:60 (Twila and Donnell argued when they got drunk).) At least once, Twila sought Mr. Hayes's help after Donnell "had tried to molest her." (*Id.* at I:64.)

Vickie Broadstreet, a close friend of Twila's, likewise described Donnell as a "scary" man who drank regularly. (*Id.* at I:74.) She had seen Donnell with a knife and was afraid of him. (*Id.* at I:74-75.) Ms. Broadstreet revealed that Twila had once confided in her that she and Donnell were involved in a sexual relationship and that Donnell was jealous of Twila's romantic relationships with other people. (*Id.* at I:76.)

These witnesses' accounts mutually reinforce and add important details to the testimony of the witnesses called by Mr. Skinner's defense counsel at trial to advance their theory that the authorities should have regarded Donnell as a likely suspect. Defense counsel thought it important to ask Howard Mitchell's daughter Sara, for example, about Donnell's carrying a gun and a knife in his truck and sometimes on his person. (Tr. at 29:1281.) Sara Mitchell was able to testify only as to what others told her about Donnell's weapons; witnesses like Debbie Ellis and James Hayes, by contrast, would have provided firsthand accounts. (*See* EH at I:28 (Ellis); *id.* at I:57, 62-63 (Hayes).) Similarly, Sara Mitchell testified at trial that Donnell was "intoxicated, very" at the party. (Tr. at 29:1281.) Ms. Ellis was able at the federal hearing to add the important addendum that Donnell's notorious temper worsened when he drank. (EH at I:30.) Likewise, evidence that the violent, threatening Donnell was sexually involved with Twila and jealous of her other romantic involvements places Sara Mitchell's testimony that Donnell was "stalking" Twila at the party (Tr. at 29:1281-82) into an ominous new context. If, as Sherry Baker, another defense witness, testified at trial, Twila did not like the fact that Donnell was "belligerent and demanding," it is entirely possible that what Donnell was demanding was sexual access that Twila was no longer as interested in providing once she was in a steady relationship

with Mr. Skinner. Had they heard this testimony, the jury could readily have inferred from Donnell's acts of life-threatening physical violence against his wife that he could just as easily have exploded in alcohol-fueled violence against Twila—and in the process left his favorite jacket lying next to her body.

Finally, the picture of Donnell, after showing *no emotion whatsoever* when informed that his niece and her two sons had all been slaughtered in their home, then energetically dismantling his "plain Jane" pickup within days of the murders and subjecting it to a manic scrubbing with astringent cleaner, down to the bare metal floorboards, would leave any reasonable juror wondering what Donnell was going to such lengths to conceal or eradicate.

3. Dr. Lowry Would Have Been Even More Certain in His Trial Testimony Had He Known All the Relevant Facts.

The federal evidentiary hearing also showed that, prior to trial, Mr. Skinner's trial counsel had failed to provide their toxicology expert, Dr. Lowry, with important information that would have bolstered his testimony—in particular, the blood spatter analysis showing that Elwin Caler was in his mother's presence when she was being beaten with the ax handle, and medical records showing that Mr. Skinner believed he was allergic to codeine and therefore would have avoided using it intentionally. Furthermore, at the time of trial, Dr. Lowry was aware only of what Andrea Reed had told the police, shortly after Mr. Skinner was arrested, about Mr. Skinner's condition during the three hours he had been in her house and had no way of knowing that those statements were false. By the time of Mr. Skinner's federal habeas proceeding, however, Dr. Lowry was aware of the truth about each of these matters and testified that, had he known them at trial, he would have been able to state with far greater certainty that Mr. Skinner lacked the capacity to commit the murders.

(a) The blood spatter analysis

As noted above, blood spatter analysis presented at trial showed that Elwin Caler was in the same room when his mother was being beaten. (Tr. 24:216-17, 28:1211; State's Ex. 48 at 2.) Dr. Lowry testified at the federal habeas hearing that his trial testimony would have been significantly strengthened had he known of this evidence, because it meant that the killer had to have had the strength and agility to deal with two of the victims in the same room at the same time. Dr. Lowry confirmed that this information would have solidified his opinion that Mr. Skinner could not have committed the murders. (EH at II:309 (evidence that the killer had to deal with two of the victims in the same room at the same time "would have bolstered" his opinion that Mr. Skinner, due to his "inebriated state," could not have been the assailant); *id.* ("Now, where he's allegedly beating someone in the same room with a young man that's 6 - 2, 3, whatever, and weighs 230 pounds, I cannot imagine how anybody being sober can do that, unless they're pretty agile, but in an inebriated state, *it floors me, it's beyond my comprehension*.") (emphasis added).)[7]

Even Mr. Skinner's trial counsel agreed at the federal evidentiary hearing that Officer Burroughs's conclusions were favorable to the defense and could have bolstered Dr. Lowry's opinion that Mr. Skinner was too incapacitated by alcohol and codeine to have committed the murders. Mr. Comer concurred that "if Caler and Twila Busby were in the same room at the same time, the murderer would have [to have] dealt with them both at the same time." (*Id.* at I:107.) He found it "reasonable" to conclude that evidence that Mr. Skinner "would have had to

[7] It is worth noting that Dr. Lowry, now deceased, came from a law enforcement background. He was a former FBI Special Agent who had worked both in the Bureau's central crime laboratory in Washington, D.C. and in its Birmingham, Alabama field office. Dr. Lowry's integrity was unimpeachable, and his grave concern that Mr. Skinner's case presents a serious risk of a miscarriage of justice deserves great weight.

have murdered both of them in the same room at approximately the same time" would have "bolstered the defense that Mr. Skinner was too intoxicated" to have been the assailant. (*Id.*)

Evidence that Elwin Caler was present when his mother was being beaten also directly contradicts the prosecution's theory of the case. Mr. Mann needed to discount for the jury—in a manner consistent with the notion that Mr. Skinner was the murderer—the inconvenient fact that Mr. Skinner's bloody handprint was found very near the floor on the door frame in Randy and Elwin's bedroom. The logical inference was that it was made by a man who was literally falling-down drunk. To combat that inference, Mr. Mann concocted the theory that one of Mr. Skinner's victims had knocked him down. Randy Busby had been killed in his bunk, making him unavailable for that role, so Mr. Mann scripted the following scenario:

> The evidence points to a man that went to this back bedroom back here and found those boys on that bunk bed *asleep* and was so drunk and so full of himself and his abuse history that this young man [Caler], I submit to you, a logical deduction of the evidence shows, became aware of what was going on up here and that's how Henry Skinner's palm print got 18 inches above the floor *when Elwin Caler came out of that bottom bunk.*

(Tr. at 30:1607-08 (emphasis added).)

Had counsel affirmatively and effectively used the Burroughs blood spatter analysis, the jury would have known that Mr. Mann's strained attempt to explain away Mr. Skinner's handprint was nonsense. And if that explanation was untenable, then the only plausible explanation for the handprint near the floor in the boys' bedroom was that Mr. Skinner was indeed falling-down drunk when he tried to make his way out of the house—another fact highly supportive of Dr. Lowry's opinion that Mr. Skinner was in a stuporous state and could not have committed the murders.

(b) Mr. Skinner's belief that he was allergic to codeine

As noted above, it was undisputed at trial that, at the time of the murders, Mr. Skinner not only had a blood alcohol content nearly triple the Texas legal intoxication limit, but he also had codeine in his system at twice the normal therapeutic dosage. (Tr. 29:1356-58, 29:1369, 30:1464-65.) What Dr. Lowry did not know when he testified at trial about the effects these drugs would have on Mr. Skinner, though, was evidence showing that Mr. Skinner on one occasion had suffered what appeared to be an allergic reaction to codeine and medical records confirming that Mr. Skinner thereafter consistently avoided being prescribed codeine by reporting that he was allergic to it. *See* 2010 State Habeas App. at Exhibits 8 (affidavit of Lori Brim), 9 (medical records). Dr. Lowry testified at the federal habeas hearing that this information would also have greatly strengthened his trial testimony. First, he would have been able to tell the jury that if Mr. Skinner was in fact allergic to codeine, he would have been even more impaired than a normal person because he would have been experiencing some of the symptoms of an allergic reaction, such as nausea and difficulty breathing. (EH at II:305-06.) More important, however, regardless of whether Mr. Skinner was actually allergic to codeine, the evidence that he *thought* he was would have provided Dr. Lowry with a powerful tool to counter the State's argument that Mr. Skinner had built up a tolerance to the effects of codeine through his years of using that drug. (*Id.* at II:306-07; III:834-39.)

At trial, one of the State's principal attacks on Dr. Lowry's testimony was the argument that Mr. Skinner likely had a greater-than-normal tolerance for codeine. For example, the district attorney asked Dr. Lowry a number of questions designed to show that different people show different responses to the same dose of a narcotic drug like codeine. (Tr. at 30:1449-50.) Using the synthetic narcotic hydrocodone as an example, Mr. Mann was able, through adroit cross-examination, to get Dr. Lowry to acknowledge that a regular user of such a drug "would have a

less of a response because of the degree of tolerance developed by the extended use of the drug." (*Id.* at 30:1453.) Dr. Lowry was effectively able to counter the argument that Mr. Skinner had, through years of alcohol abuse, built up a tolerance to alcohol by pointing out that the amounts of codeine found in Mr. Skinner's system and its synergistic interaction with alcohol would have incapacitated him regardless of his tolerance for alcohol. (*See id.* at 30:1462.) But what Dr. Lowry was unable to counter was the false impression created for the jury that Mr. Skinner had also built up a tolerance to *codeine* through years of drug abuse. That left Mr. Mann free to dismiss Dr. Lowry's testimony during closing arguments as being "directed to persons of non-tolerance." (*Id.* at 30:1553.)

Thus, trial counsel's failure to learn and take advantage of the information readily available to them regarding Mr. Skinner's possible allergy to codeine went to the very heart of both the defense theory and the prosecution's counter-theory. Dr. Lowry's trial testimony that Mr. Skinner had ingested quantities of alcohol and codeine that would have left a normal person comatose was largely undisputed. The only explanation for the jury's verdict is that the jurors must have believed the State's contention that this evidence was irrelevant because Mr. Skinner was not a "normal person" but someone who, through years of drug abuse, had built up a tolerance to codeine that negated its synergistic effect with alcohol. Had the jury been made aware of the scientific truth that Mr. Skinner could not have built up a tolerance to codeine by *avoiding* it, no matter how much he might have abused other drugs, it is likely that the verdict would have been different.

(c) Andrea Reed's false statements

As with Andrea Reed's false testimony about Mr. Skinner's statements to her on the night of the murder, her false testimony about Mr. Skinner's physical condition was also devastating to the defense. The prosecution specifically and effectively used Ms. Reed's testimony about Mr.

Skinner's physical and mental condition in the hours immediately after the crime to rebut Dr. Lowry's testimony that Mr. Skinner was too impaired to have committed the murders. Had Andrea Reed testified truthfully, however, Dr. Lowry's testimony would have been unassailable.

Dr. Lowry recalled in the federal habeas proceeding how Ms. Reed's false testimony had been used against him on cross examination. (EH at II:297-98.) Dr. Lowry admitted that he was "very much surprised" by how Ms. Reed's description of Mr. Skinner's condition suggested that he might in fact have had "the presence of mind [and] the physical ability . . . to carry out three murders." (*Id.* at II:299.) Dr. Lowry, when confronted by the prosecutor with Ms. Reed's statements, had found it difficult to square them with his opinion about Mr. Skinner's incapacitation. (*Id*.) Dr. Lowry confirmed that if Ms. Reed had testified truthfully at trial, and had recounted the descriptions she offered before the federal habeas court, her testimony would have made a difference in his opinion. Not only would it have "confirmed" his estimation that Mr. Skinner was not capable of carrying out the murders in his incapacitated state and would have "bolstered [his] opinion" in that regard, (*id.*), but it would have made it impossible for the prosecution to undermine his testimony by drawing attention to the difference between his expert opinion as to Mr. Skinner's condition at the time of the murders and Andrea Reed's testimony—now known to be false—regarding the tasks he could perform when he got to her house.[8]

[8] In an affidavit initially prepared for Mr. Skinner's state habeas case, Dr. 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." 2010 State Habeas App. at Exhibit 10, ¶ 6.) He felt "even more strongly" about that view when he learned of the information, described above, that he had not known when he testified at trial. (*Id.*)

4. Dr. Lowry's Opinion Is Corroborated by the More Recent Opinion of Eminent Toxicologist Dr. Harold Kalant.

In order to assure that Dr. Lowry does not stand alone in his assessment of "scientific fact," Mr. Skinner's present counsel provided information from the trial record regarding Mr. Skinner's blood alcohol and codeine levels to Dr. Harold Kalant, professor emeritus at the University of Toronto and one of the world's foremost experts on the effects of alcohol and drugs on the human body. To eliminate the risk that his opinion could be influenced by Dr. Lowry's conclusions, Dr. Kalant was not shown any of Dr. Lowry's testimony other than a short excerpt describing how Dr. Lowry had conducted his retrograde analysis of Mr. Skinner's likely alcohol and codeine levels during the nine hours before his blood was drawn at 5:30 a.m.

As Dr. Kalant's declaration, *see* Exhibit 1 attached hereto, shows, he reaches independently much the same conclusions as Dr. Lowry. His only area of disagreement is that Dr. Lowry *underestimated* both Mr. Skinner's blood alcohol and blood codeine levels at midnight. In the case of alcohol, Dr. Kalant believes that Dr. Lowry erred in failing to take into account scientific studies, including one by Dr. Kalant himself, showing that more active liver enzymes in heavy drinkers like Mr. Skinner cause them to eliminate alcohol at a faster rate than moderate drinkers. (*See id.* at ¶ 3.) Taking the higher elimination rates of heavy drinkers into account, Dr. Kalant calculates that Mr. Skinner's blood alcohol content was likely around .264 % at midnight and as high as .334% at 9:30 p.m., the equivalent of having two-thirds to four-fifths of a standard 25 oz. bottle of vodka in his body. (*See id.* at ¶ 4.) Dr. Kalant concludes that Dr. Lowry also used a codeine elimination rate that was too low in light of current research. According to Dr. Kalant's recalculations, Mr. Skinner's codeine level would have been .66 mg/l at midnight and 1.35 mg/l at 9:30 p.m.—numbers that are more than 65% higher than what Dr. Lowry calculated. (*Id.* at ¶ 5.)

Dr. Kalant agrees with Dr. Lowry that alcohol and codeine enhance each other's effects, and he also agrees that a heavy drinker and drug abuser is likely to have more tolerance, and therefore better body function, than a moderate drinker and drug user. (*Id.* at ¶ 6.) Even with these qualifications, however, Dr. Kalant's conclusions, reached independently, are remarkably similar to Dr. Lowry's:

> [A] moderate drinker with alcohol and codeine levels in the ranges Mr. Skinner appears to have been in at midnight would almost certainly be comatose, and in some cases be near death or even dead, while a heavy drinker would more likely be stuporous but possibly rousable at such levels. Even if the heavy drinker were rousable, however, *he would not be lucid at such levels, meaning he would not be able to assess correctly where he was or have a clear and accurate grasp of reality*. I would not be surprised if the heavy drinker were able to move about somewhat, but *he would be very confused and badly impaired, and would have difficulty standing or walking in a coordinated manner*.

(*Id.* at ¶ 7 (emphasis added).) Thus, Dr. Kalant adds considerable weight to the conclusion that, even though Mr. Skinner had a history of heavy drinking, he was still far too impaired by the massive quantities of alcohol and blood in his system to have committed the murders.

C. The DNA Testing That the State Has Conducted to Date Raises More Questions Than It Answers.

A review of the limited DNA testing that the State has performed in this case to date confirms that none of that testing cements Mr. Skinner's guilt—indeed, the results, and the inexplicable failure to test certain key items, simply contribute to the grave uncertainty that full DNA testing could resolve.

As noted, the trial evidence showed that Twila Busby was strangled by her assailant and then beaten with an ax handle found at the scene, that Elwin Caler received multiple stab wounds to his chest, and that Randy Busby was stabbed repeatedly in the back. The evidence also showed that at some point around the time of the murders, Mr. Skinner sustained a cut to his

hand. As a result of these multiple injuries, copious blood stains and other biological evidence were found by the police throughout the house where the murders occurred.

Prior to trial, the State chose to conduct DNA testing on just four items. At trial, the State's DNA expert testified that swaths cut from Mr. Skinner's shirt contained blood from both Twila Busby and Mr. Skinner, and that swaths cut from his pants contained blood from Twila Busby, Elwin Caler and Mr. Skinner. She also testified that the blood on the blanket belonged to Randy Busby, the hair on Randy's body was likewise his, and that the hair on the blanket belonged to Elwin Caler. These results tend to show that Mr. Skinner came into contact with Twila Busby and Elwin Caler after they were injured. They do not indicate how that contact occurred and do not show that Mr. Skinner inflicted their injuries.

In 2000, former District Attorney John Mann, responding to questions raised in the media regarding Mr. Skinner's possible innocence, decided to have additional DNA material tested. Ignoring repeated requests by Mr. Skinner's post-conviction counsel to participate in the testing process to insure its validity, Mann unilaterally arranged for GeneScreen, a private laboratory in Dallas, Texas, to test certain additional items selected by Mann alone. Once again, the items selected did not include all the available DNA evidence.

GeneScreen reported its results to the District Attorney in four separate reports. The first, dated August 24, 2000, reported as follows:

> Twila Busby is included as a contributor of the profile obtained from the blood on the cover of the blue notebook, the hair from the back of Twila Busby, the hair from the left hand of Twila Busby, and the hair from the ax handle. [Mr.] Skinner is included as a contributor to the profile from the cigarette butt. Twila Busby and [Mr.] Skinner are included as contributors to the mixed profile from the hair from the right hand of Twila Busby. The profile from the gauze with bloodstain is from an unknown male individual. The profile of the cassette tape with blood is a mixture of two unknown individuals. No conclusion could be reached concerning the hair from the living room, the hair from the abdomen of Twila Busby, the hair from the cassette tape, and the hair from the back bedroom door.

See Motion of Petitioner Henry W. Skinner for Forensic Testing, *State v. Skinner*, No. 5216 (31st District Court of Gray County, Texas) (October 9, 2001) (hereinafter "First DNA Testing Motion"), at Exhibit 5.

The second GeneScreen report, dated September 20, 2000, solely addressed additional testing performed on blood flakes on the hair found in Twila Busby's right hand. It concluded that Twila Busby herself was the contributor of that blood. *See* First DNA Testing Motion at Exhibit 6.

The third GeneScreen report, dated October 2, 2000, was identical to the first report except that it added an additional paragraph describing the likelihood that the mixed profile of the DNA found on the hair from Twila Busby's right hand was from Twila and Mr. Skinner, as opposed to the possibility that someone other than Mr. Skinner was the second contributor. *See* First DNA Testing Motion at Exhibit 7.

Because the GeneScreen testing performed up to this point had been incapable of determining the source of the hair shafts themselves, John Mann asked GeneScreen to subject those hairs to mitochondrial testing, a form of analysis that examines the mitochondria within the cells of the hair shaft. The fourth and final GeneScreen report, dated February 6, 2001—after Mann had left office—contradicted Mann's assertion that the hairs themselves came from Mr. Skinner. Specifically, the final GeneScreen report reached the following conclusions:

> Based on the results of this testing, the mitochondrial DNA (mtDNA) sequence obtained from the #1 hair from the victim's right hand, hair samples from T. Busby, the #5 hair from the paper towel around the cassette tape, the #1 hair on the tape found on back bedroom door and the #2 hair on the tape found on back bedroom door are consistent with the profile from the known blood sample from the victim Twila Busby. Neither Twila Busby nor a maternal relative of Twila Busby can be excluded as the potential contributor of these hairs. This profile is unique in the FBI database of 4052 individuals.

> [Mr.] Skinner is excluded as a potential contributor to these hairs. The profile from the hair from the living room and the #2 hair from the victim's right hand was inconclusive.

See First DNA Testing Motion at Exhibit 8. Because Robert Donnell was the brother of Twila Busby's mother, he was a "maternal relative" of Twila Busby and, therefore, could not be ruled out as a possible contributor of the #1 hair in Twila's right hand.

The GeneScreen testing raised more questions than it answered. For example, while the August 24, 2000 and the October 4, 2000 reports conclude that Twila Busby and Mr. Skinner were both contributors to a "mixed genetic profile" taken from a hair in Twila Busby's right hand, they also indicate that the markers found in this material matching Twila's DNA profile were strong but those matching Mr. Skinner's were "faint." In neither of these two reports was the nature of the material found on the hair disclosed, but apparently it was *not* blood because, in the September 20, 2000 report, GeneScreen indicated that "blood flakes" taken from this same hair came solely from Twila Busby and that the genetic markers in these blood flakes were inconsistent with Mr. Skinner's DNA. And the February 6, 2001, report concluded that one of the hairs found in Twila's right hand was her own, and test results on a second hair found in her hand were inconclusive. The February 6 report is the first to indicate that more than one hair was found in Twila's right hand, but is silent on whether either of the hairs tested mitochondrially was the same hair as the one from which DNA material had been obtained for the testing reported on in the earlier reports.

GeneScreen did not test all the DNA material Mann sent to have tested. For example, although GeneScreen was provided with the "Dalchem" rape kit specifically used to collect DNA material from Twila Busby's vagina during her autopsy, no results from any DNA testing of the vaginal swabs appears in GeneScreen's reports. Similarly, GeneScreen was provided with Twila Busby's fingernail clippings, but no test results from this material appear in the reports.

GeneScreen was not provided with several additional items that could yield important results. For example, Mann sent to GeneScreen known DNA samples from only Twila Busby and Mr. Skinner. No comparison was made to the known DNA of the other two victims, Randy Busby and Elwin Caler, or to the DNA of other possible suspects. Nor was GeneScreen provided the two knives found at the scene (one or both of which were almost surely used to stab Elwin Caler and Randy Busby). Nor was GeneScreen provided a bloody dish towel and a man's jacket containing hairs, blood and perspiration, both of which were found near Twila Busby's body.

II. Mr. Skinner Satisfies All the Requirements Under Article 64 for DNA Testing.

A. The Requirements of Art. 64.03(a)(2)(A) Are Satisfied Because the DNA Evidence, if Tested, Could Establish Mr. Skinner's Innocence.

Art. 64.03(a)(2)(A) requires that "the convicted person establish[] by a preponderance of the evidence that . . . the person would not have been convicted if exculpatory results had been obtained through DNA testing . . . ." The Court of Criminal Appeals has interpreted this provision as follows:

> The legislative history of Chapter 64 makes it very clear that the Legislature intended the foregoing language from Article 64.03(a)(2)(A) to mean a reasonable probability exists that exculpatory DNA results will prove a convicted person's innocence. This does not, as some opponents of Chapter 64 suggest, require convicted persons to prove their innocence before a convicting court may order DNA testing under Article 64.03. It merely requires convicted persons to show a reasonable probability exists that exculpatory DNA tests would prove their innocence.

Kutzner v. State, 75 S.W.3d 427, 438-39 (Tex. Crim. App. 2002).

As the foregoing review of the evidence shows, it is doubtful that Mr. Skinner is the person who should have been convicted of the murders of Twila Busby and her sons. Especially disturbing is the fact that there is DNA evidence in this case that has never been tested. That

evidence, if tested, could—and, Mr. Skinner adamantly maintains, *would*—establish his innocence. At a minimum, together with the other evidence discussed above, it would certainly create a "reasonable probability" that Mr. Skinner is innocent—the standard established by the CCA for relief under the statute.

Mr. Skinner has asked, and continues to ask, for DNA testing of seven items: (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 DNA testing. Below, we explain why DNA testing of these items very likely will produce relevant results that resolve the question whether Mr. Skinner is innocent or guilty.

Testing the vaginal swabs could yield important results because, when Ms. Busby's body was found, her shirt was 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 attacked her. The State's failure to test these swabs is inexplicable, and indeed raises serious questions about whether the State, too, believes that such testing will produce results that point to someone other than Mr. Skinner.

The same is true of Ms. Busby's fingernail clippings. It is reasonable to believe, based on the nature of her injuries, that Ms. Busby struggled with her attacker. That being the case, it is highly likely that her fingernail clippings could yield the presence of the assailant's DNA.

Similarly, the medical examiner acknowledged that the hairs found in Ms. Busby's 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 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.) Eliminating that inference would prove that Mr. Skinner's injury was a defensive wound, consistent with his claim of innocence.

The bloody dish towel could have been used by the killer to wipe blood from his hands.

Finally, the ownership and presence of the windbreaker jacket found next to Ms. Busby's body has never been explained. It is similar to one that Debra Ellis testified she often saw Donnell wearing, (EH I:30), it was Donnell's size—not Mr. Skinner's—and it contained hairs and sweat stains that, if tested, could identify its owner.

Exonerating test results on all or a combination of these items could prove Mr. Skinner's innocence. If the jacket turns out to be Donnell's and his DNA is found under Twila Busby's fingernails, that alone would establish beyond a reasonable doubt that Donnell, not Mr. Skinner, was the murderer. The presence of Donnell's DNA on other objects, such as the knives or the cup towel, would only add further confirmation to that conclusion. Even if Donnell's DNA is not found, if the *same* DNA profile is found on more than one item from the crime scene (if a single DNA profile is found say, *both* on the weapons *and* under Ms. Busby's fingernails), and that profile does not belong to Mr. Skinner, that result would foreclose convicting Mr. Skinner of the murders.

Thus, there are numerous different ways in which the results of DNA testing on these never-tested items of evidence could conclusively prove Mr. Skinner's longstanding claim of actual innocence. For all these reasons, the Court should conclude that Mr. Skinner has met the requirements of art. 64.03(a)(2)(A).[9]

B. Mr. Skinner Meets the Other Requirements Set Out in Chapter 64 for Obtaining DNA Testing.

Mr. Skinner also satisfies the remaining statutory conditions for obtaining DNA testing under Chapter 64, as follows.

First, this motion is not made to unreasonably delay the execution of Mr. Skinner's sentence or the administration of justice. *See* Tex. Code Crim. Proc. Ann. art. 64.03(a) (Vernon Supp. 2010). As explained above, the change in law that enabled Mr. Skinner to bring this

[9] Mr. Skinner's supporting evidence is relevant and probative here notwithstanding the fact that some of it was presented in federal habeas proceedings without leading to relief from his conviction. To take one example, as Mr. Skinner has explained, the prosecution's key witness, Andrea Reed, has recanted all the most damaging parts of her trial testimony. It is true that Ms. Reed testified in the federal evidentiary hearing in Mr. Skinner's case, and that he was ultimately denied relief. But Mr. Skinner's constitutional claim in that proceeding (related to Ms. Reed's testimony) was that her testimony was coerced by prosecutorial and police misconduct. Almost all the testimony the State presented on that issue at the federal hearing was offered to deny that Ms. Reed had been coerced or intimidated, rather than to support her original trial testimony. The fact that the district court ultimately rejected Mr. Skinner's claim, therefore, does not diminish the support Ms. Reed's detailed recantation provides to Mr. Skinner's assertion that he was too incapacitated by alcohol and codeine to have committed the murders. Likewise, Mr. Skinner presented additional evidence in the federal habeas proceeding about other violent conduct and startlingly suspicious post-crime behavior by alternative suspect Robert Donnell. In that proceeding, that evidence was offered in support of a claim that Mr. Skinner's trial counsel performed ineffectively in not discovering and presenting those facts to the jury. The federal district court found that trial counsel's investigation into Donnell satisfied minimum professional standards—the deficient performance prong of a *Strickland* claim—but the court pointedly did *not* refuse to credit any of the evidence Mr. Skinner presented about Donnell. Simply put, the fact that the federal habeas courts ruled against Mr. Skinner on the constitutional claims to which this evidence related does not mean that the evidence has no persuasive value in the context of a claim of actual innocence supporting a request for DNA testing. To the contrary, taken together these facts raise powerful and troubling doubts about Mr. Skinner's guilt—doubts that could be dispelled by the DNA testing he has diligently sought for more than a decade.

motion was the Texas Legislature's decision earlier this year to remove the "fault" provision from Chapter 64. *See* Section III(1)(b)(2)(a), *infra*. The reformed statute did not take effect until September 1, 2011. Thus, September 1 was the very earliest date Mr. Skinner could initiate this proceeding. This motion is dated, and is being submitted to the Court by express delivery, on September 2, 2011. Nothing about Mr. Skinner's conduct with respect to the present action supports a finding that Mr. Skinner has acted to unreasonably delay the execution of his sentence or the administration of justice.

We note that although Mr. Skinner faces a November 9 execution date, that date was set without notice to Mr. Skinner's undersigned counsel. Had we been given notice that the Court was contemplating setting an execution date and been given an opportunity to be heard on that question, we could have asked the Court either to defer setting a date altogether or to set it to afford sufficient time for the present litigation and any DNA testing to take place prior to the scheduled execution. In any event, it is possible that the requested DNA testing can be performed between now and November 9 if the Court grants this motion promptly. More important, even if completion of the testing were to require some short postponement of Mr. Skinner's November 9 execution date, that minimal delay would not be unreasonable under the terms of Chapter 64, given the public's interest in ensuring that an innocent man is not executed.

Second, art. 64.01(a) provides that a motion for DNA testing under Chapter 64 be "accompanied by an affidavit, sworn to by the convicted person, containing statements of fact in support of the motion." Inasmuch as Mr. Skinner filed such an affidavit with his First Motion and the pertinent facts set forth therein have not materially changed, we refer the Court to that affidavit and adopt it herein by reference, along with all the other exhibits filed with the First and

Second Motions. For the Court's convenience, a copy Mr. Skinner's affidavit is attached hereto as Exhibit 2.

Third, there has never been any dispute that "identity was or is an issue in [Mr. Skinner's] case." *See* art. 64.03(a)(1)(B). As this Court has previously acknowledged, the sole defense raised on Mr. Skinner's behalf at trial was that he was not the person who killed the victims. *See* Order on Defendant's Second Motion for DNA Testing at 1, *State v. Skinner*, No. 5216 (31st Jud. Dist. Ct. Gray Cnty., Tex. Dec. 6, 2007) (finding that "[i]dentity was an issue in the trial of [Mr.] Skinner's case").

III. Neither of the Prior Decisions Holding that Mr. Skinner Was Not Entitled to DNA Testing Under Art. 64.03 Bars This Court from Granting Such Testing Now.

This is Mr. Skinner's third motion in state court for forensic DNA testing.[10] Both of his earlier motions seeking the same relief were ultimately unsuccessful. Since that time, however, there have been developments in both the facts and the law, as explained in greater detail below, that urgently support a decision to order the requested testing. Before we turn to the particulars of how Mr. Skinner's initial motions were turned aside, and why those rationales no longer apply, we will address two more general theories this Court previously invoked in denying Mr.

[10] It is worth noting that, in addition to having litigated this issue continuously since 2001, Mr. Skinner made numerous informal attempts to obtain DNA testing even before the Texas Legislature added Chapter 64 to the Code of Criminal Procedure. The first such attempt was in 2000, when in three separate letters Mr. Skinner's post-conviction counsel asked then District Attorney John Mann for the opportunity to participate on a joint basis with the testing that Mann unilaterally initiated with GeneScreen. All those requests were ignored. On December 28, 2000, three days before Mann's successor Richard Roach took office, Mr. Skinner's counsel wrote to Roach asking for the opportunity to meet with him "to restore integrity to the manner in which this matter has been handled." Roach agreed to the meeting and provided Mr. Skinner's counsel with the GeneScreen reports, but ultimately declined counsel' s request that the remainder of the DNA evidence be tested.

Skinner's second motion under Chapter 64, as those would presumably apply to the present motion as well.

A. There Is No General Principle Barring Successive Motions Under Chapter 64.

In denying Mr. Skinner's second motion for DNA testing, this Court invoked two different but interrelated grounds connected to Mr. Skinner's previous unsuccessful attempt to obtain the same relief. First, this Court found Mr. Skinner's second motion barred by the "law of the case" doctrine, treating the decision on his first motion as an absolute bar to reconsidering whether Texas's statute entitled Mr. Skinner to DNA testing. *See* Order on Defendant's Second Motion for DNA Testing at 2, ¶ 5, *State v. Skinner*, No. 5216 (31st Jud. Dist. Ct. Gray Cnty., Tex. Dec. 6, 2007).

Second, this Court read selected opinions of the Court of Criminal Appeals ("CCA") as holding that a court may *only* entertain a second or successive motion under Chapter 64 where the movant shows that he was denied effective assistance of counsel in an earlier Chapter 64 proceeding. *Id*. at 2, ¶ 6. In this Court's view, the fact that Mr. Skinner made no such allegation doomed his motion. For the reasons set out below, both these conclusions were mistaken, and the Court should not follow the same path in resolving the present motion.

1. The "Law of the Case" Doctrine Does Not Bar the Present Motion.

No authority supports the view that the law of the case doctrine absolutely barred this Court from considering Mr. Skinner's second motion under Chapter 64. In the first place, it should be noted that the law of the case doctrine is not an absolute limitation on a court's power, but instead a discretionary "expression of good sense and wise judicial practice." *Carpa, Inc. v. Ward Foods, Inc.*, 567 F.2d 1316, 1320 (5th Cir. 1978), *overruled on other grounds, Copper Liquor Inc. v. Adolph Coors, Co.*, 701 F.2d 542 (5th Cir. 1983); *see also Messenger v. Anderson*, 225 U.S. 436, 444 (1912) (Holmes, J.) (the law of the case doctrine "merely expresses the

practice of courts generally to refuse to reopen what has been decided, not a limit on their power"). Furthermore, this discretionary rule has two well-recognized exceptions, both applicable here: when there has been a change in the law and when there has been a change in facts. *See, e.g., Mendenhall & CMI Corp. v. Barber-Greene Co.*, 26 F.3d 1573, 1582-83 (Fed. Cir. 1994) ("[i]ntervening changes in applicable authority" can justify reconsideration); *Rodgers v. Comm'n for Lawyer Discipline*, 151 S.W.3d 602, 609 (Tex.App. - Fort Worth 2004, pet. denied) (law of case doctrine "does not apply if 'a later stage of litigation presents different parties, different issues, or more fully developed facts'"); *Houston v. Harris*, 192 S.W.3d 167, 171-72 (Tex. App. - Houston 2006) (law of case doctrine does not apply where record is more fully developed than during the previous decision). As the federal courts have described the same principle, the doctrine does not apply when "an intervening change in the controlling law dictates a different result or if the [prior] appellate decision is clearly erroneous and, if implemented, would work an egregious result." *Johnson v. Uncle Ben's Inc.*, 965 F.2d 1363, 1370 (5th Cir. 1992); *see e.g., United States v. Becarra*, 155 F.3d 740, 752-53 (5th Cir. 1998); *North Mississippi Commc's, Inc. v. Jones*, 951 F.2d 652, 656 (5th Cir. 1992); *see also United States v. Harris*, 531 F.3d 507, 513 (7th Cir. 2008) (the law of the case doctrine allows a court to reconsider a prior ruling when there is "'a change in, or clarification of, law that makes clear that the earlier ruling was erroneous.'") (citation omitted).

Each of these exceptions applies here. Mr. Skinner is asserting that the legal landscape changed after the denial of his second motion for DNA testing, when the Texas Legislature removed from Chapter 64 the provision under which Mr. Skinner had been denied such testing. And, to the extent that the CCA's decision upholding this Court's denial of Mr. Skinner's first motion for DNA testing in 2003 continues to have any force or effect, the federal habeas

proceedings following that decision resulted in a more fully developed factual record regarding the implications of the post-trial DNA testing performed by GeneScreen at the district attorney's request. *See infra*. Finally, under all the circumstances presented here, it is plain that the prior ruling denying DNA testing was erroneous and risks the grave injustice of executing a potentially innocent prisoner. For all these reasons, the law of the case doctrine does not bar consideration of the present motion.

2. The CCA Has Entertained Successive Chapter 64 Motions, Including in This Very Case, Without Imposing Any Requirement That the Movant Show That He Was Denied Effective Assistance of Counsel in Litigating an Earlier Motion.

This Court also concluded that it could not entertain Mr. Skinner's second DNA testing motion because it read the CCA effectively to have ruled that the *only* circumstance in which a second, or successive, Chapter 64 motion may be heard is where the convicted person did not receive effective assistance of counsel in connection with an earlier Chapter 64 motion. In fact, the relevant decisions of the CCA hold, without qualification, that successive Chapter 64 motions *are* permissible—and, indeed, the CCA adjudicated Mr. Skinner's appeal of this Court's denial of his second motion for DNA testing without any suggestion that that motion should have been barred simply because it was successive. In light of the existing case law and the sequence of events that followed this Court's denial of Mr. Skinner's second motion, this Court can no longer maintain its former view.

In *Ex parte Baker*, 185 S.W.3d 894 (Tex. Crim. App. 2006), and *Ex parte Suhre*, 185 S.W.3d 898 (Tex. Crim. App. 2006), both decided the same day, the CCA ruled that a person claiming that he had been denied effective assistance by counsel appointed to represent him in a Chapter 64 proceeding could not obtain relief on that claim in a post-conviction habeas corpus proceeding brought under Article 11.07 of the Code of Criminal Procedure. In *Baker*, however,

the court noted that the convicted person was not without an avenue of relief if he had, in fact, been denied effective representation in a Chapter 64 proceeding:

> Although we need not decide whether another remedy is available in a case in which an *[sic]* convicted person did not receive adequate assistance of counsel in a Chapter 64 proceeding, we may observe that, in some cases, a convicted person may get relief from defective representation by counsel through appeal under that chapter. *We also see that Chapter 64 does not prohibit a second, or successive motion for forensic DNA testing, and that a convicting court may order testing of material that was not previously tested "through no fault of the convicted person, for reasons that are of a nature that the interests of justice require DNA testing."*

Baker, 185 S.W.3d at 897-98 (quoting Art. 64.01(b)(1)(B) (emphasis added). The opinion in *Suhre* likewise concludes by quoting with approval the second sentence above from *Baker*. *See Suhre*, 185 S.W.3d at 899.

While it is true that both *Baker* and *Suhre* happened to involve instances in which the movant claimed that his attorney in a prior Chapter 64 proceeding had performed deficiently, nothing in either opinion supports the view that Chapter 64 permits successive motions *only* in such circumstances. Nor does anything in the text of Chapter 64 itself warrant such an attenuated reading of these opinions. Indeed, by following its general statement that Chapter 64 does not prohibit successive motions with a quotation from Art. 64.01(b)(1)(B), the CCA made it plain that a successive Chapter 64 motion would lie *whenever* "the interests of justice require DNA testing." *Baker*, 185 S.W.3d at 897-98 (quoting Art. 64.01(b)(1)(B)); *Suhre*, 185 S.W.3d at 899.

Courts interpreting the CCA's successive-motion language in *Baker* and *Suhre*, have agreed with Mr. Skinner's reading of those cases. In *In re Birdwell*, 224 S.W.3d 864, 865 (Tex. App. - Waco 2007), the State argued that a convicting court had no ministerial duty to act on a Chapter 64 motion that had previously been denied *twice*. The Court of Appeals disagreed. Citing *Baker* and *Suhre*, the court held that the convicting court was required to consider the

movant's successive motion on the merits. In that case, Birdwell made no claim that he had been denied effective assistance of counsel in connection with either of his earlier Chapter 64 motions. *See generally id.*; *see also Bates v. State*, 315 S.W.3d 598, 600 (Tex. App. - Houston [1st Dist.] 2010) ("We agree that Chapter 64 does not prohibit a second, or successive, motions for forensic DNA testing." (citing *Baker*)). Other courts of appeals agree.[11] *See, e.g.*, *In re Adeleke*, No. 2-08-160-CV, 2008 WL 4052999, at *1 (Tex. App. - Fort Worth Aug. 29, 2008) (not designated for publication) (noting that "Chapter 64 does not prohibit the filing of a second or successive motion for DNA testing" and conditionally granting a writ of mandamus instructing trial court to rule on prisoner's Article 64 motion (citing *Baker*)); *In re Rodriguez*, No. 08-06-00334, 2007 WL 687648, at *1 (Tex. App. - El Paso March 8, 2007) (not designated for publication) (reviewing a movant's *second* motion for DNA testing and noting that "[t]he Texas Court of Criminal Appeals recently held in dicta that 'Chapter 64 does not prohibit a second, or successive, motion for forensic DNA testing . . .'" (quoting *Baker*)).

And, as noted, without citing *Baker* or *Suhre*, the CCA reached the merits of Mr. Skinner's appeal of this Court's denial of his second Chapter 64 motion. The question of whether Chapter 64 forecloses a successive motion for DNA testing unless it asserts that the movant received ineffective assistance of counsel in an earlier Chapter 64 proceeding was before the CCA, as it was briefed by both parties. The court nevertheless resolved Mr. Skinner's appeal

[11] In addition, in numerous cases, courts, including the CCA, have mentioned in passing that a movant's request for DNA testing was not his first such motion, and then proceeded to examine the merits without further attention to that fact. *See, e.g.*, *Willis v. State*, No. PD-1741-07, 2008 WL 383062, at 1* (Tex. Crim. App. Feb. 13, 2008) (per curiam) (vacating and remanding Court of Appeals's decision upholding denial of capital prisoner's *second* motion for DNA for adjudication on the merits in light of new legal authority) (not designated for publication); *Chavez v. State*, No. 01-06-00357, 2007 WL 4465539, at *4 (Tex. App. - Houston [1st Dist.] Dec. 20, 2007) (examining the merits of movant's *second* motion for DNA testing under Article 64) (not designated for publication).

without even so much as hinting that his second Chapter 64 motion was barred because it lacked such an allegation.

For all these reasons, it would be error for this Court to hold that, in the absence of a claim of prior ineffective assistance of counsel, a successive motion under Chapter 64 is automatically barred.

B. Neither of the Prior Decisions of the CCA Denying DNA Testing to Mr. Skinner Retains Any Legal or Factual Force.

1. The CCA's 2009 Decision Denying DNA Testing Has Been Overturned by the Texas Legislature.

On July 30, 2007, Mr. Skinner filed a second motion for DNA testing with this Court.[12] This Court denied Mr. Skinner's second motion for DNA testing on December 7, 2007, and he appealed. On appeal, the CCA addressed only this Court's holding that Mr. Skinner had failed to meet the "no-fault-of-the-convicted-person" requirement of art. 64.01 (b)(1)(B). *Skinner v. State,* 293 S.W.3d 196, 200 (Tex. Crim. App. 2009). That section required a convicted person requesting testing that was available at the time of trial to show that the testing was not previously performed "through no fault of the convicted person, for reasons that are of a nature such that the interests of justice require DNA testing." Tex. Code Crim. Proc. Ann. art. 64.01(b)(1)(B) (Vernon Supp. 2010), repealed June 17, 2011. The CCA construed this section as barring DNA testing altogether for any convicted person who had declined to seek DNA testing before trial as a matter of legal strategy. Because it viewed Mr. Skinner's trial counsel as having made such a strategic decision not to seek DNA testing prior to trial, the CCA concluded that Mr.

[12] As the Court will recall, Mr. Skinner's initial motion for DNA testing had been denied by the CCA in 2003, and his second motion identified legal and factual developments since that 2003 decision that warranted a different result.

Skinner was at "fault" within the meaning of the statute and that DNA testing was, therefore, unavailable under Chapter 64. *See Skinner*, 293 S.W.3d at 202.

During its 2011 regular session earlier this year, the Texas Legislature reexamined whether it was appropriate to limit the availability of post-conviction DNA testing under Chapter 64 based on the defendant's perceived "fault" in not having previously pursued such testing. It concluded that such a sweeping prohibition presented an intolerable risk of incarcerating—or even executing—wrongfully convicted prisoners. Accordingly, a bill moved swiftly through the Legislature that stripped the "fault" provision from the statute altogether. The proposal received overwhelming support[13] and was signed into law by Governor Perry on June 17, to take effect on September 1.

The Texas Legislature's emphatic decision to excise the "fault" provision from Chapter 64 means that a defendant's pretrial decisions with respect to conducting forensic testing may no longer constitute a basis for denying him that testing after conviction. That profound change in Chapter 64 upends the CCA's 2009 decision denying Mr. Skinner's second motion for DNA testing. The CCA's decision rests in its entirety on Mr. Skinner's purported "fault" in not having pursued such testing prior to trial. *See, e.g.*, *Skinner*, 293 S.W.3d at 202. Under the amended

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[13] There was not a single dissenting vote on this proposal (SB 122) in either the Criminal Justice Committee of the Texas Senate or the Criminal Jurisprudence Committee of the Texas House. *See* Texas Legislature Online, History, Bill SB 122, Legislative Session 82(R), http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=SB122 (last accessed August 31, 2011). The bill passed the full Texas Senate by a 31-0 vote on third reading. *See* Senate Journal, Eighty-Second Legislature—Regular Session. Austin, Texas Proceedings, April 6, 2011, at 955, *available at* http://www.journals.senate.state.tx.us/sjrnl/82r/pdf/82RSJ04-06-F.PDF#page=13 (last accessed August 31, 2011). It then passed the full House by a 145-4 vote (with one member not voting). *See* House Journal, Eight-Second Legislature, Regular Session, Proceedings, May 20, 2011, at 4364, *available at* http://www.journals.house.state.tx.us/hjrnl/82r/pdf/82RDAY81FINAL.PDF#page=2 (last accessed August 31, 2011).

version of Chapter 64, however, it is no longer relevant *why* DNA testing was not previously undertaken. After September 1, 2011, the central focus is on whether such testing holds out a genuine chance of exculpating the convicted defendant. Accordingly, the CCA's adverse decision on Mr. Skinner's second motion for DNA testing in 2009 is no bar to granting the relief requested here.

2. The CCA's 2003 Decision Denying DNA Testing, to the Extent It Was Not Altogether Superseded by Its 2009 Decision, Has Been Overtaken by Subsequent Development of the Law and the Factual Record.

As the Court will recall, Mr. Skinner filed his first motion for DNA testing in 2001, very shortly after the Texas Legislature first made such proceedings available to convicted persons in Texas.[14] This Court denied that motion, and the CCA ultimately affirmed. *See Skinner v. State*, 122 S.W.3d 808, 811 (Tex. Crim. App. 2003).

As discussed in greater detail below, that CCA decision was fundamentally mistaken in its view of certain key facts. Moreover, as a matter of law, its approach to art. 64.03(a)(2)(A) was dramatically out of step with subsequent developments in the CCA's own case law applying that provision. These two issues—whether the bases on which the CCA denied DNA testing in its 2003 *Skinner* decision were factually and legally sound—were squarely before the CCA when Mr. Skinner's case returned there four years later, on his appeal of this Court's denial of his *second* DNA testing motion.

It is therefore highly significant that the CCA, in its 2009 opinion affirming the denial of Mr. Skinner's second motion for DNA testing, was completely silent about its earlier decision. *See Skinner*, 293 S.W.3d at 199-209. The factual and legal underpinnings of the CCA's 2003

[14] Mr. Skinner's first motion sought DNA testing of the same items he seeks to have tested here, with one exception: Now aware that multiple hairs were found in the right hand of Twila Busby, he seeks also to test any such hairs that were not consumed by previous DNA testing.

decision were directly challenged by Mr. Skinner's briefs in the second appeal. Nevertheless, rather than rely on or defend its prior ruling that Mr. Skinner had failed to satisfy art. 64.03(a)(2)(A), the court resolved the case by concluding that the "fault" provision required denial of Mr. Skinner's second motion for DNA testing. If the CCA had concluded that its original decision remained well-founded on the law and the facts, there was no reason for it to say anything more than that in affirming this Court's denial of Mr. Skinner's second motion. The 2009 *Skinner* decision thus can only be read as a tacit acknowledgment that the CCA's earlier opinion was no longer sustainable and was superseded by the rationale of the later decision.

The CCA's unwillingness in 2009 to take the easy path and simply adopt the rationale of the 2003 decision is understandable, given the factual and legal flaws in that decision we discuss below.

(a) The CCA's Rationale for Denying DNA Testing Was Subsequently Shown To Be Factually Mistaken.

The reasoning by which the CCA denied Mr. Skinner's appeal of this Court's denial of his first motion for DNA testing was undermined by factual error. The CCA based its decision on two factual assumptions regarding the post-trial DNA testing conducted by GeneScreen at the request of the District Attorney: (1) that GeneScreen's testing showed the presence of Mr. Skinner's DNA in a *mixture* with Ms. Busby's DNA on a hair found in her hand, and (2) this *mixture* came about "probably during the time when [Ms. Busby] was struggling for her life." *Skinner,* 122 S.W.3d at 811. Subsequent developments showed that both assumptions were groundless.

As an initial matter, it is useful to review the GeneScreen reports on which the CCA based its assumptions. The court relied on and quoted from the GeneScreen reports of August 24, 2000 and October 2, 2000, both of which provided the results of nuclear DNA testing of selected

items of evidence submitted by the District Attorney and contained identical language regarding the hair found in Ms. Busby's hand: "Twila Busby and Henry Watkins Skinner are included as contributors to the mixed profile from the hair from the right hand of Twila Busby." *See* First DNA Testing Motion at Exhibit 5, page 3; *id*. at Exhibit 7, page 3. A review of those reports shows, however, that in this mixed profile, Mr. Skinner's alleles at most points of comparison were "faint," while Ms. Busby's were strong at every point. *See id.* Since nuclear testing is incapable of testing the hair itself, and can only test DNA found on or attached to the hair (such as skin attached to or saliva on the surface of the hair), the faintness of Mr. Skinner's alleles compared to Ms. Busby's strongly suggests that the hair was hers, but that it had likely picked up faint traces of Mr. Skinner's DNA from perfectly benign contact, such as lovemaking, sharing a hair brush or towel, or any other innocent method by which persons who live together might exchange DNA. It certainly does not warrant the sweeping conclusion that this "mixed profile"—which admits of an innocent explanation—constituted such overwhelming evidence of Mr. Skinner's guilt of the triple murder that it could not possibly be overcome by exculpatory DNA testing results from other items of evidence.

The CCA also failed to consider the last of the four GeneScreen reports, dated February 6, 2001. *See* First DNA Testing Motion at Exhibit 8. That report shows the results of mitochondrial testing of the hairs found in Twila Busby's right hand. Unlike nuclear testing, which can only test biological material attached to a hair, mitochondrial testing is performed on the hair itself. The February 6 report reveals for the first time that the hair in question, labeled throughout the reports as FOR2689-011D, was actually *two* hairs, respectively denominated -011D-1 and –011D-2. The February 6 report also concludes that Twila Busby or one of her maternal relatives (which would have included her uncle, alternative suspect Robert Donnell) was the contributor

of the hair labeled –011D-1 but that the results of the testing on the hair labeled –011D-2 were "inconclusive." *Id*. at page 3. Thus, the February 6 report, on its face, should have alerted the CCA that its inference regarding Mr. Skinner's DNA association with the hair or hairs found in Twila Busby's right hand was suspect.

In any event, as noted above, after the CCA affirmed this Court's denial of Mr. Skinner's first art. 64.03 motion, a court order in Mr. Skinner's federal habeas action allowed him to obtain GeneScreen's bench notes. Those bench notes were subsequently reviewed by Dr. William Shields, a DNA expert at the State University of New York at Syracuse. In particular, Dr. Shields studied the GeneScreen documents relating to the mitochondrial testing; based on that careful review, he submitted an affidavit in Mr. Skinner's federal habeas proceeding. *See* Defendant's Second Motion for DNA Testing, *State v. Skinner*, No. 5216 (31st District Court of Gray County, Texas) (July 30, 2007) (hereinafter "Second DNA Testing Motion") at Exhibit 2. Dr. Shields also testified in the federal habeas evidentiary hearing. Relevant portions of his testimony appear at Second DNA Testing Motion, Exhibit 3.

For present purposes, the vitally important conclusion compelled by Dr. Shields' affidavit and testimony is that, while GeneScreen might have been justified in characterizing the result of the testing of hair –011D-2 as "inconclusive" in the sense that it could not conclusively identify the contributor of that hair,[15] nevertheless some conclusions could and should have been drawn—namely, that both Twila Busby and Mr. Skinner could be *excluded* as contributors of that hair, as could both of Twila Busby's sons. *See* First DNA Testing Motion at Exhibit 8. This conclusion has important ramifications here. Since the hair in question was found clutched in

[15] The results were likely inconclusive because of contamination of the sample during testing. For this reason, Mr. Skinner is seeking testing of any remaining hairs or fragments of hairs that were found in Ms. Busby's hand.

Twila Busby's hand and apparently did *not* come from any of the four residents of the home, the very real possibility arises that it was not just a random hair picked up off the floor but instead was pulled from the person who attacked her.

(b) The CCA Subsequently Modified Its Approach to Applying Art. 64.03 in *Raby v. State*

Two years after the CCA's 2003 *Skinner* decision, it issued an opinion that in several key respects demonstrated a different approach to the question of how art. 64.03(a)(2)(A) should apply here. In *Raby v. State*, No. AP-74,930 (Tex. Crim. App. 2005) (not designated for publication),[16] the court granted requests for further DNA testing primarily because the nature of the attack suggested the possibility that the attacker might have left some of his DNA on the victim and items found at the crime scene. *Id.*, slip. op. at 8. At trial, Raby was convicted and sentenced to death for murdering a woman in her home. Raby—like Mr. Skinner here—was acquainted with the victim and had been in her home on several prior occasions. The evidence at trial showed that the perpetrator had entered the victim's home through a window and stabbed her with a knife. Witnesses placed Raby near the house at the time of the murder and stated that he had entered the house through the same window on previous occasions. Moreover, Raby signed a written statement in which he confessed to having a knife, entering the victim's home, struggling with her, and leaving her in a pool of blood. The voluntariness and truthfulness of this statement were not disputed at trial. Indeed, Raby's attorney admitted the killing and relied on an elements defense. The CCA affirmed Raby's conviction on appeal and denied state habeas corpus relief.

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[16] Because the *Raby* decision was not designated for publication, it has no *precedential* value but may still be cited and relied up for its *persuasive* value. *See* Tex. R. App. P. 47.7 (citation of unpublished Ct. App. opinions).

Notwithstanding the substantial evidence of Raby's guilt, the CCA thereafter granted his Chapter. 64 motion for DNA testing. It determined that further DNA testing was warranted for four primary reasons. First, the CCA agreed that the likelihood of a struggle between the victim and the perpetrator could yield exculpatory DNA evidence. The court relied on the affidavit of Dr. Elizabeth Johnson, former head of the Harris County crime lab, who explained that "'[i]t is common in cases of direct assault with a knife that there will be a struggle in which biological material from the attacker can be transferred to the fingernails of the victim,' and that '[i]f found, large clumps of skin under the nails would indicate considerably more contact than could be explained by the transfer of DNA by an innocent handshake or common use of a towel.'" *Raby*, No. AP-74,930, slip op. at 6.

Second, the CCA was persuaded by Dr. Johnson's statement in her affidavit that the crime lab's blood typing results suggested that the fingernails might hold blood other than that belonging to Raby or the decedent, thus warranting further testing. *Id.*, slip. op. Third, the mere *possibility* that the perpetrator might have injured himself and wiped his own blood on the decedent's underwear could yield probative evidence as to the attacker. *Id.*, slip. op. The ability to isolate DNA of individual persons despite the possible mixing of the victim's blood and any blood that the perpetrator may have left on the underwear, therefore, warranted DNA testing.

Finally, and critical to the CCA's ultimate decision that *Raby* was distinguishable from its prior interpretations of art. 64.03(a)(2)(A) dating back to *Kutzner v. State*, 75 S.W.3d 427 (Tex. Crim. App. 2002), was the fact that the murder occurred in a private residence, thereby likely limiting the available suspects and the number of items to be tested. *Id.*, slip. op. In *Kutzner*, previously viewed as the seminal case in art. 64.03 proceedings, the CCA had denied DNA testing of hairs found on or near the victim because the presence of another person's hair would

not have exonerated Kutzner but only "mudd[ied] the waters." *Kutzner*, 75 S.W.3d at 439. The *Raby* court distinguished *Kutzner* by pointing out that:

> In *Kutzner,* the murder involved *[sic]* in a real-estate office with public access and a victim who had an active lifestyle. If DNA from other people had been found, it would not have exculpated the applicant, as DNA from numerous others would be expected. In the present case, however, the crime scene was a private home, and the victim was ill and rarely left the house or had contact with anyone other than her grandsons. There are a maximum of four items to be tested and few suspects for comparison. The waters would not be muddied by exculpatory DNA evidence.

Raby, No. AP-74,930, slip op. at 7.

Noting particularly the existence of other persons who had access to the home through the window from which it was determined the perpetrator entered,[17] the CCA concluded that if testing identified the DNA of another person on the victim's underwear and nightshirt and under her fingernails, a reasonable probability would exist that Raby was innocent, and that such probability was sufficient to entitle Raby to DNA testing of the requested evidence under Chapter 64.

The circumstances surrounding Mr. Skinner's requests for DNA testing are strikingly similar to those in *Raby* and entitle him at least as forcefully to the requested forensic testing. In Mr. Skinner's case, as in *Raby*, the victim's fingernail clippings were collected and preserved at the autopsy but have never been tested. Also as in *Raby*, there was likely a struggle between victim and attacker, as indicated by the fact that the attacker had to subdue Ms. Busby by choking her. During that struggle, she could well have scratched the perpetrator's head, face or arms. As the CCA agreed in *Raby*, such a situation would result in the transfer of DNA in a manner inconsistent with mere innocent contact and warrants DNA testing.

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[17] This case likewise involves other possible suspects, including especially Robert Donnell.

Additionally, as discussed in further detail *supra*, evidence revealed after the CCA issued its 2003 *Skinner* decision indicates that the hairs found on Ms. Busby's right hand belonged to someone *other than* Ms. Busby or Mr. Skinner. Just as in *Raby*, where blood typing suggested that the fingernails might hold blood other than Raby's or the decedent's, so too does the exclusion of both Ms. Busby and Mr. Skinner as the source of at least one of the hairs in Ms. Busby's hand suggest that scrapings from her fingernails might also hold DNA material from a third party, warranting further DNA testing of the fingernails.

Moreover, here, as in *Raby*, there are certain blood-spotted items from the crime scene, never tested, that may reveal blood or other DNA material belonging to the perpetrator. In particular, the crime scene in this case included a bloody cup towel and a man's windbreaker, stained with blood and sweat and containing human hairs. In addition, there are two knives—one found on the front porch and a second recovered from a plastic bag in the living room along with the cup towel and windbreaker. It is quite possible that the perpetrator cut himself, perhaps on one or both of the knives during hurried and forceful attacks, which likely involved struggles with any one of the three victims, or was scratched by one of the victims. Either would have drawn blood which could have transferred to the knives, towel, or windbreaker, and despite possible co-mingling with the victims' blood, should be tested to determine the presence of DNA of a third party. As the CCA correctly reasoned in *Raby*, the possibility that the perpetrator's blood might be present on objects at the scene because of possible injury to the attacker warrants testing of those items.

Finally, the deaths of the victims in this case occurred in a private home, a fact that, according to *Raby*, also weighed in favor of granting testing. Although the court did mention that the victim in *Raby* was ill and rarely left the house, the crucial distinguishing factor was that

the victim in *Raby* was not killed in a public space, as was the victim in *Kutzner*, who was found in a real estate office. Here also, the victims were attacked in their home. Therefore, like the crime scene in *Raby*, there are a limited number of items to be tested and few suspects for comparison. Accordingly, the waters would not be muddied, but rather clarified, if exculpatory DNA test results were obtained in this case evidence.

The CCA's 2003 *Skinner* decision also cannot be reconciled with *Raby* on one final ground. In *Raby*, the court *denied* testing of one particular hair found on the victim's hand. Raby requested that the hair be tested using new technology to determine whether the hair might belong to one of the victim's grandsons. In denying this request, the court reasoned that the presence of DNA material from persons who lived with the decedent, even when found in the victim's hand, "would not be remarkable," *Raby*, No. AP-74,930, slip op. at 7, as "the presence of hair *from a resident* is not strong evidence of involvement in the crime." *Id.* at 8 n.12 (emphasis added).

This rationale is directly at odds with the reasoning underlying the CCA's view in 2003 that Mr. Skinner could not meet art. 64.03(a)(2)(A)'s requirement that he demonstrate a reasonable probability that he would not have been convicted had DNA testing produced exculpatory results. As discussed above, the *only* rationale on which the CCA based its conclusion was the supposed presence of a mixture of Ms. Busby's and Mr. Skinner's DNA on a human hair found in Ms. Busby's right hand. The court erroneously determined that the mere presence, even faintly, of the DNA of Mr. Skinner, a resident of the home, on a hair in Ms. Busby's hand constituted *conclusive evidence* of Mr. Skinner's guilt. By the time it decided *Raby*, the CCA's appreciation of the significance—or lack thereof—of such material from a crime scene had evolved to the point where it correctly concluded that where the victim is killed in her

home, the presence of the DNA of another *resident of the home* on the victim's body has *no evidentiary value as a matter of law.* As the court reasoned in *Raby*, as a resident of the home "it would be highly unusual if [his] hair was *absent*." *Id.*, slip. op. at 7 (emphasis added).

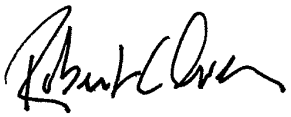
For all the foregoing reasons, the CCA's 2003 *Skinner* decision does not foreclose the relief sought here.

IV. Conclusion

As we have set out in detail, even at the time of trial there was substantial evidence that Mr. Skinner lacked the physical and mental ability to commit this triple murder. Since that time, additional evidence has come to light that further—and dramatically—casts doubt on Mr. Skinner's guilt of the crime for which Texas intends to put him to death on November 9. DNA testing could resolve those doubts. In these circumstances, the interests of justice demand it.

The present motion for DNA testing under Article 64.03 should be granted without delay.

Respectfully submitted,



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Counsel for Defendant

Dated: September 6, 2011

Exhibit 1

No. _____

Ex Parte HENRY W. SKINNER	)	IN THE 31ST JUDICIAL DISTRICT FOR GRAY COUNTY, TEXAS

DECLARATION OF DR. HAROLD KALANT

I, Harold Kalant, hereby declare under penalty of perjury that:

1. I am Professor Emeritus of Pharmacology and Toxicology at the University of Toronto and Director Emeritus of Biobehavioral Research with the Addiction Research Foundation of Ontario (now a division of the Centre for Addiction and Mental Health). I have an M.D. with additional training in Internal Medicine and a Ph.D. in Pathological Chemistry, with a post doctorate in biochemistry. I have worked with individuals struggling with dependence on alcohol and other drugs since the 1950's, have written extensively on issues of alcohol and drug abuse, and am recognized internationally as a authority on the study of drug dependency and toxicity. I was appointed by the Governor General of Canada to the first board of the Canadian Centre on Substance Abuse, have served on the extra-mural research advisory board for the National Institute on Drug Abuse and chaired the intramural research advisory board of the National Institute on Alcohol Abuse and Alcoholism in the United States, and chaired the World Health Organization's Working Group on Cannabis and Health (1994-1998). I have received numerous honors and awards for my work, including the Distinguished Scientist Award from the American Society of Addiction Medicine, the Annual Research Award of the Research Society on Alcoholism (USA) and the Eddy Medal of the College on Problems of Drug Dependence

(USA), and am an elected Fellow of the Academy of Science of the Royal Society of Canada. A copy of my *curriculum vitae* is attached.

2. I have reviewed certain documents that I understand were entered as exhibits in Henry W. Skinner's capital murder trial in 1995, including:

a. A report from the Crime Laboratory of the Texas Department of Public Safety dated January 31, 1994 stating that Mr. Skinner's blood alcohol content in the sample taken from him on the night of the murders was 0.11 grams per 100ml of blood (sometimes stated as a blood alcohol content, or BAC, of 0 .11%):

b. A report from the same laboratory dated March 24, 1994, showing that Mr. Skinner's codeine level in the same blood sample was 0.11 mg/l.

c. An excerpt from Dr. William Lowry's testimony at Mr. Skinner's trial showing how, using the foregoing crime lab reports, he calculated Mr. Skinner's blood alcohol and codeine content at various times during the nine-hour period preceding the time when the blood sample was taken.

d. Defendant's Exhibit 13-A, labeled Henry W. Skinner Blood Alcohol Profile, which I understand to have been Dr. Lowry's graphical depiction of Mr. Skinner's blood alcohol content during that nine-hour period, showing that his blood alcohol content at 12:00 midnight was approximately 0.21% and at 9:30 p.m. was approximately 0.24%; and

e. Defendant's Exhibit 14-A, labeled Henry W. Skinner Blood Codeine Profile, which I understand to have been Dr. Lowry's graphical depiction of Mr. Skinner's blood codeine content during that nine-hour period, showing Mr. Skinner's blood codeine content at midnight was approximately 0.4 mg/l and at 9:30 p.m. was approximately 0.7 mg/l.

3. After reviewing this material, and having been informed that Mr. Skinner was a heavy drinker and habitual abuser of alcohol since he was a teenager, I believe that Dr. Lowry underestimated Mr. Skinner's blood alcohol concentration (BAC) throughout that night. Dr. Lowry used a BAC reduction rate of approximately .017% per hour, which is close to the modal value (the most frequently encountered value in a population) for a healthy moderate drinker but usually underestimates significantly the rate of a heavy drinker. Research, including some done by me, has shown that because the liver enzymes that operate to eliminate alcohol from the bloodstream are

more active in heavy drinkers, the BAC reduction rate in heavy drinkers is typically higher than that of moderate drinkers. See, e.g., H. Kalant, G. Sereny, R. Charlebois: Evaluation of tri-iodothyronine in the treatment of acute alcoholic intoxication, New England Journal of Medicine, vol. 267, pp. 1-6 (1962); W. Neuteboom, A.W. Jones: Disappearance rate of alcohol from the blood of drunk drivers calculated from two consecutive samples, Forensic Science International, vol. 45, pp. 107-15 (1990). These studies found that the BAC reduction rate for heavy drinkers averaged 23 mg/100ml per hour and values ranging up to 35 mg/100ml per hour or more were frequent.

4. Using elimination rates more typical of a heavy drinker, I would expect Mr. Skinner's blood alcohol level to have been somewhere in the ranges shown on the following table:

Assumed Elimination Rate	BAC at 5:30 a.m. (%)	BAC at Midnight (%)	BAC at 9:30 p.m. (%)
20 mg/100ml/hr.	.110	.220	.270
25 mg/100ml/hr.	.110	.247	.310
30 mg/100ml/hr.	.110	.275	.350

Thus, if Mr. Skinner's elimination rate were at the midpoint of the range for heavy drinkers found in the studies mentioned above, or about .28 mg/100ml/hr., then Mr. Skinner's BAC at midnight would have been approximately 0.264 %, and his BAC at 9:30 p.m. would have been approximately 0.334%. These numbers are significantly higher than the .210 and .245 estimated by Dr. Lowry. For a male of Mr. Skinner's height (about 5'9") and weight (160 lbs.), a BAC of 0.264 % would mean that he had in his body (i.e., absorbed into his bloodstream and distributed throughout his body) the equivalent of 15-6 ounces of vodka, or about two-thirds of a standard 25-ounce bottle. A BAC of 0.350 % would indicate a body content of 20.7 ounces, the equivalent of a little over four-fifths of a bottle.

5. I believe that Dr. Lowry also underestimated the amount of codeine that Mr. Skinner had in his bloodstream earlier in the evening. Dr. Lowry used an elimination half-life (i.e., the time

required for elimination of one-half of the amount present at any given time) of 2.8 hours, while I believe a rate of one-half per 2.2 hours is more consistent with scientific literature (see, for example, I. Kim, A.J. Barnes, J.M. Oyler *et al.*: Plasma and oral fluid pharmacokinetics and pharmacodynamics after oral administration of codeine, Clinical Chemistry, vol. 48, pp. 1486-1496, 2002). Using the latter rate, Mr. Skinner's blood codeine content at midnight would have been 0.66 mg/l and at 9:30 p.m. would have been 1.35 mg/l, both of which are very high concentrations and in some persons would have been lethal.

6. I agree with Dr. Lowry's conclusion that the mixing of alcohol and codeine has a synergistic effect that enhances the effect of both. Thus, a person showing a BAC of 0.265 % who had also taken codeine would in fact be more impaired than the BAC level itself would indicate. While the synergistic effect is well-known, it is difficult to quantify the effect because the dangers posed by combining alcohol and codeine prohibit conducting empirical studies in this area with human subjects.

7. While heavy drinkers have a BAC reduction rate higher than that of moderate drinkers, they also have greater tolerance to alcohol. Therefore, a heavy drinker would typically be able to function better than a moderate drinker at the same BAC. For example, a moderate drinker with alcohol and codeine levels in the ranges Mr. Skinner appears to have been in at midnight would almost certainly be comatose, and in some cases be near death or even dead, while a heavy drinker would more likely be stuporous but possibly rousable at such levels. Even if the heavy drinker were rousable, however, he would not be lucid at such levels, meaning he would not be able to assess correctly where he was or have a clear and accurate grasp of reality. I would not be surprised if the heavy drinker were able to move about somewhat, but he would be very confused and badly impaired, and would have difficulty standing or walking in a coordinated manner.

I hereby declare under penalty of perjury under the laws of the United States of America and the State of Texas that the foregoing is true and correct to the best of my knowledge and belief.

Harold Kalant

Harold Kalant

Dated February 16, 2010

CURRICULUM VITAE

May 4, 2009

Name: Harold KALANT
Date of Birth: November 15, 1923
Birthplace: Toronto, Canada
Citizenship: Canadian
Married: Oriana Josseau - July 22, 1948

Academic Degrees:

M.D., University of Toronto	(1945)
B.Sc. (Med.), Toronto	(1948)
Ph.D., Pathological Chemistry, Toronto	(1955)

Post-Doctoral Fellowship:

Biochemistry, University of Cambridge, England (1955-56)

Military Service:

Royal Canadian Army Medical Corps (1943-47)

Post-Graduate Medical Training:

Internal Medicine, 3 years residency at:

Saskatoon Veterans' Hospital	(6 months)
Toronto General Hospital	(1 year)
Hospital del Salvador, Santiago, Chile	(1.5 years)

Other Clinical Experience:

Part-time attending physician, Bell Clinic for Alcohol Problems, Toronto (1952-55)

Current Positions: Professor Emeritus (Pharmacology), University of Toronto

Director Emeritus (Biobehavioral Research), Addiction Research Foundation

Division of Centre for Addiction and Mental Health

Positions Held: (Previous)

1956-59 -	Biochemistry Section Head, Defence Research Medical Laboratories, Toronto
1959-64 -	Associate Professor, Department of Pharmacology, University of Toronto
-	Assistant Research Director, Alcoholism and Drug Addiction Research Foundation of Ontario, Toronto
1964-89 -	Professor, Department of Pharmacology, University of Toronto
1964-79 -	Associate Research Director (Biological Studies), Addiction Research Foundation of Ontario, Toronto
1979-89 -	Director, Biobehavioral Research (4 sections), Addiction Research Foundation of Ontario, Toronto

Honours:

Alpha Omega Alpha Honorary Medical Society	(1942)
Cody Silver Medal, Medicine	(1945)
Starr Medal for Research, University of Toronto	(1955)
Jellinek Memorial Award for Research on Alcoholism (jointly with R.E. Popham), Amsterdam	(1972)
Raleigh Hills Foundation International Gold Medal Award for excellence in research on alcoholism	(1981)
Fellowship in the Royal Society of Canada	(1981)
4th Annual Research Award, Research Society on Alcoholism, U.S.A.	(1983)
Upjohn Award, Pharmacological Society of Canada	(1985)
Nathan B. Eddy Award, Committee on Problems of Drug Dependence	(1986)
President-Elect, International Society for Biomedical Research on Alcoholism	(1989)
First Honorary Fellow, Society for the Study of Addiction (U.K.)	(1994)
Distinguished Scientist Award, American Society of Addiction Medicine	(1995)
Mark Keller Memorial Lecturer, NIH (USA)	(2001)
Isaacson Memorial Award for Research on Addiction (USA)	(2004)

Membership in Scientific Societies:

Biochemical Society (U.K.)	(1956-78)
Pharmacological Society of Canada	(1965- 2008)
Canadian Society for Pharmacology and Therapeutics	(2008-)
American Association for the Advancement of Science	(1968-93)
College on Problems of Drug Dependence, U.S.A.	(1978-)
International Society for Biomedical Research on Alcoholism (member of founding committee)	(1981-)
President	(1990-94)
Immediate Past President	(1994-98)
Foreign Corresponding Member, Société de Biologie, France	(1993-)

Membership in Advisory Bodies:

Scientific Advisory Board, North American Association of Alcoholism Programs	(1961-1970)
Scientific Advisory Board, International Council on Alcoholism and Addiction (Lausanne)	(1972-1975)
Expert Panel on Drugs of Dependence, World Health Organization (Geneva)	(1978-1984)
Grants Review Committee, Non-Medical Use of Drugs Directorate (Ottawa)	(1970-1972)
Grants Review Committee, National Institute on Alcoholism and Alcohol Abuse, U.S.A.	(1970-1974)
Scientific Advisory Board, Addiction Research Foundation, Palo Alto, California - member	(1974-1977)
- chairman	(1977-1982)
Banting Research Foundation	(1976-1980)
Comité des Centres de Recherche, Fonds F.C.A.C., Gouvernement de Québec	(1983-1984)
Chairman, Board of Scientific Counselors, NIAAA	(1983-1988)
Extramural Advisory Board, NIAAA (USA)	(2006-)
Canadian Centre on Substance Abuse, Ottawa - appointed to first Board by Governor-General in Council	(1989-1993)
Extramural Research Advisory Board, N.I.D.A.	(1990-1992)
Chairman, WHO Committee on Cannabis and Health	(1994-1998)
Health Canada, Scientific Advisory Committee on Medical Marijuana Research – Chairman	(2004-2006)
Invited witness on cannabis and health, committees of Senate and House of Commons, Canada	(various)
ISBRA Council of Past Presidents	(2008-)

Editorial Functions:

Associate Editor - Canadian Journal of Physiology and

Pharmacology	(1975-1981)
Pharmacology Field Editor - Journal of Studies on Alcohol	(1983-1992)
Member, Editorial Boards of:	
- Alcohol	
- Alcoholism: Clinical and Experimental Research	
- Biochemical Pharmacology	(1968-1999)
- Drug and Alcohol Dependence	(1975-1995)
- Electroencephalography & Clinical Neurophysiology	(1977-1984)
- Journal of Studies on Alcohol	(1992-2004)
- Medical Biology	(1974-1984)
- Neuroscience and Biobehavioral Reviews	(1977-1988)
- Pharmacology, Biochemistry and Behavior	
- Progress in Neuro-Psychopharmacology	
- Psychopharmacology	(1974-1999)
- Research Advances in Alcohol and Drug Problems	

Theses Supervised:

1965	R.A. Hickie: "Influence of divalent cations on some membrane properties of normal and malignant cells"	Ph.D.
	Y. Israel: "Studies on the biochemical effects of ethanol"	Ph.D.
1966	W. Grose: "Neurotropic drugs and cerebral acetylcholine"	M.Sc.
	I. Ockenden: "The inhibition of cephalosporin β-lactamase by cloxacillin, with special reference to the development of an assay system for cloxacillin"	M.Sc.
	K.J. Ryan: "A method for determining the electrical properties of synaptic vesicles"	M.Sc.
1968	A.E. LeBlanc: "Methodological studies on the measurement of ethanol intoxication and acquired tolerance in rats"	M.Sc.
1969	K.J. Ryan: "Electrophoretic properties of subcellular particles involved in synaptic transmission"	Ph.D.
1970	G. Bustos: "Studies on the production of fatty liver induced by ethanol"	Ph.D.
	K.L. Hepburn: "Effects of ethanol on discrimination behaviours in rats"	M.Sc.

1971	R.G. Perrin: "Effects of ethanol, tetrahydrocannabinol, and procaine on electrical activity of the brain in the intact cat"	M.Sc.
	M.D. Willinsky: "Pharmacological studies on $^{\Delta 1}$-trans-tetrahydrocannabinol in the rat"	Ph.D.
1972	K.A. O'Brien Fehr: "Studies on methods of administration of Δ^1-trans-tetrahydrocannabinol in the rat"	M.Sc.
1972	A.E. LeBlanc: "Behavioral and pharmacological variables in the development of ethanol tolerance"	Ph.D.
1973	F. Finkelberg: "Pituitary mechanisms in ethanol self-selection"	Ph.D.
	D.W. Haist: "Isolation and characterization of rat liver alcohol dehydrogenase"	M.Sc.
	A.J. Siemens: "Acute and chronic metabolic interactions of delta^1-tetrahydrocannabinol and other drugs"	Ph.D.
1974	J.W. Clark: "Ethanol tolerance and release of cerebral cortical acetylcholine in vitro"	M.Sc.
1977	K.A. O'Brien Fehr: "The behavioral toxicity of cannabis in the rat"	Ph.D.
1978	N. Rangaraj: "Effects of alcohol, amphetamine and stress on rat brain ($Na^+ + K^+$)-ATPase"	M.Sc.
1979	G.I. Sunahara: "Effect of ethanol on stimulated acetylcholine release in vitro from rat cortical and hippocampal tissue"	M.Sc.
1980	R.F. Mucha: "Behavioral factors in tolerance to morphine in the intact organism"	Ph.D.
1983	A. Stiglick: "Residual effects of chronic cannabis administration on behavior in the rat"	Ph.D.
	D.D. Walczak: "Biochemical correlates of alcohol tolerance: role of cerebral protein synthesis"	Ph.D.

1985	G.M. Spinosa: "An investigation of the role of Angiotensin II in voluntary ethanol intake"	M.Sc.
	W.D. Hutchison: "Effects of chronic ethanol treatment on levels of immunoreactive-β-endorphin in rat brain regions"	M.Sc.
1986	M.B. Speisky: "Effects of vasopressin on alcohol tolerance: sites of action and neurochemical correlates"	Ph.D.
1987	S.J. Mihic: "Methodological issues in the measurement of $(Na^+ + K^+)$-ATPase"	M.Sc.
1988	M.J.K. Walker: "Motivational properties of spontaneous withdrawal"	M.Sc.
1989	M. Singh: "Role of pharmacokinetic factors in Pavlovian conditioned tolerance/cross-tolerance to various hypothermic agents"	M.Sc.
1992	S. J. Mihic: "Comparative studies of sedative action and tolerance on $GABA_A$ receptor-mediated chloride influx in brain"	Ph.D.
1993	M.J.K. Walker: "Naloxone-induced antinociception: Characteristics and mechanism of a non-opioid form of stress-induced antinociception"	Ph.D.

PUBLICATIONS: Books

1. "Experimental Approaches to the Study of Drug Dependence", H. Kalant and R.D. Hawkins (eds.), University of Toronto Press, xvi + 237 pp. (1969)

2. "Drugs, Society and Personal Choice", H. Kalant and O.J. Kalant, General Publishing Co., Toronto, xii + 160 pp. (1971)

3. "Drogues, Société et Option Personnelle", H. Kalant and O.J. Kalant, Les Editions La Presse, Montréal, 215 pp. (1973)

4. "Stoffbruk, Samfunn, Personlig Valg", H. Kalant and O.J. Kalant, Olaf Norlis Forlag, Oslo, 165 pp. (1974)

5. "Amphetamines and Related Drugs - Clinical Toxicity and Dependence", O.J. Kalant and H. Kalant, Addiction Research Foundation of Ontario, Toronto, xviii + 210 pp. (1974)

6. "Research Advances in Alcohol and Drug Problems", Vol. 1, R.J. Gibbins, Y. Israel, H. Kalant, R.E. Popham, W. Schmidt and R.G. Smart (eds.), John Wiley & Sons, New York (1974)

7. "Alcoholic Liver Pathology", J.M. Khanna, Y. Israel and H. Kalant (eds.), Addiction Research Foundation of Ontario, Toronto, 369 pp. (1975)

8. "Research Advances in Alcohol and Drug Problems", Vol. 2, R.J. Gibbins, Y. Israel, H. Kalant, R.E. Popham, W. Schmidt and R.G. Smart (eds.), John Wiley & Sons, New York (1975)

9. "Research Advances in Alcohol and Drug Problems", Vol. 3, R.J. Gibbins, Y. Israel, H. Kalant, R.E. Popham, W. Schmidt and R.G. Smart (eds.), John Wiley & Sons, New York (1976)

10. "Research Advances in Alcohol and Drug Problems", Vol. 4, Y. Israel, F.B. Glaser, H. Kalant, R.E. Popham, W. Schmidt and R.G. Smart (eds.), Plenum Press, New York (1978)

11. "Research Advances in Alcohol and Drug Problems", Vol. 6, Y. Israel, F.B. Glaser, H. Kalant, R.E. Popham, W. Schmidt and R.G. Smart (eds.), Plenum Press, New York (1981)

12. "Research Advances in Alcohol and Drug Problems", Vol. 7, R.G. Smart, F.B. Glaser, Y. Israel, H. Kalant, R.E. Popham and W. Schmidt (eds.), Plenum Press, New York (1983)

13. "Cannabis and Health Hazards", Proceedings of an ARF/WHO Scientific Meeting on Adverse Health and Behavioral Consequences of Cannabis Use. K.O'B. Fehr and H. Kalant (eds.), Addiction Research Foundation, Toronto, Canada, 843 pp. (1983)

14. "Research Advances in Alcohol and Drug Problems", Vol. 8, R.G. Smart, H.D. Cappell, F.B. Glaser, Y. Israel, H. Kalant, R.E. Popham, W. Schmidt and E.M. Sellers (eds.), Plenum Press, New York (1984)

15. "Principles of Medical Pharmacology, 4th Edition, H. Kalant, W.H.E. Roschlau and E.M. Sellers (eds.), Department of Pharmacology, University of Toronto, xvi + 954 pp. (1985)

16. "Research Advances in Alcohol and Drug Problems", Vol. 9, H.D. Cappell, F.B. Glaser, Y. Israel, **H. Kalant**, W. Schmidt, E.M. Sellers and R.G. Smart (eds.), Plenum Press, New York and London (1986).

17. "Principles of Medical Pharmacology", 5th Edition, **H. Kalant** and W.H.E. Roschlau (eds.), Department of Pharmacology, University of Toronto. B.C. Decker Publ. Co. (1989)

18. "Tobacco, Nicotine, and Addiction. Report prepared for the Royal Society of Canada".

P.B.S. Clarke, W.A. Corrigall, R.G. Ferrence, M.L. Friedland, **H. Kalant**, L.T. Kozlowski, Royal Society of Canada, Ottawa (1989).

19. "Research Advances in Alcohol and Drug Problems", Vol. 10, L.T. Kozlowski, H.M. Annis, H.D. Cappell, F.B. Glaser, M.S. Goodstadt, Y. Israel, **H. Kalant**, E.M. Sellers and E.R. Vingilis (eds.), Plenum Press, New York (1990).

20. "Advances in Biomedical Alcohol Research - Proceedings of the Fifth ISBRA/RSA Congress", **H. Kalant**, J.M. Khanna and Y. Israel (eds.), Pergamon Press, Oxford (1991)

21. "Windows on Science - ARF 40th Anniversary Lecture Series", P.G. Erickson and **H. Kalant** (eds.), Addiction Research Foundation, Toronto, 1992.

22. "Principles of Medical Pharmacology", 6th Edition, **H. Kalant** and W.H.E. Roschlau (eds.), Department of Pharmacology, University of Toronto. Oxford University Press, New York, 1997.

23. "The Health Effects of Cannabis", **H. Kalant**, W.A. Corrigall, W. Hall and R.G. Smart (eds.), Centre for Addiction and Mental Health, Toronto, 1999.

24. "Principles of Medical Pharmacology", 7th edition, **H. Kalant,** D. Grant and J. Mitchell (eds.). Elsevier (Canada) Publishing, Toronto, 2006.

OTHER PUBLICATIONS: Journal articles, book chapters, reports

Dr. Kalant has authored over 380 journal articles, book chapters and scholarly reports. A complete list is available on request.

Exhibit 2

No. 5216

Ex Parte HENRY W. SKINNER	)	IN THE 31ST JUDICIAL DISTRICT FOR GRAY COUNTY, TEXAS

AFFIDAVIT OF PETITIONER HENRY W. SKINNER

On this the 14th day of September, 2001, came on before me Henry Watkins Skinner, who on his oath deposed and said as follows:

1. My name is Henry Watkins Skinner and I have been convicted of capital murder and sentenced to death in the above-captioned case in connection with the murders of Twila Busby, Elwin Caler and Randolph Busby. I submit this affidavit in support of the motion for forensic testing being filed on my behalf by my attorneys.

2. I understand that there exists within the custody of this Court, the Pampa Police Department, the Gray County Sheriff's Department and/or the District Attorney's Office various pieces of biological material that can be subjected to DNA testing, specifically (1) vaginal swabs taken from Ms. Busby at the time of her autopsy and contained as part of a rape kit, (2) fingernail clippings taken from Ms. Busby at her autopsy, (3) biological material on a knife found on the front porch of the victims' home, (4) biological material on a knife found in a plastic bag in the living room of the victims' home, (5) biological material on a dish towel found in the same plastic bag, and (6) the blood and hairs on a jacket found next to Ms. Busby's body.

3. This material was secured by law enforcement in relation to the offense that is the basis of the above referenced conviction and was in the possession of the state during the trial of this offense.

It was not previously tested in part because DNA testing was not technologically capable of providing probative results and in part because of the ineffective assistance of my trial counsel in asking for such testing. I further believe that, given the potential for exculpatory results, the interests of justice require this DNA testing.

4. I understand that the evidence in question still exists in a condition making DNA testing possible. Identity was and is an issue in this case. I believe that if the evidence in question had been tested prior to my trial and, if exculpatory results had been obtained, I would not have been prosecuted or convicted. I am not making this request for DNA testing to unreasonably delay the execution of sentence or the administration of justice. I am willing to pay for the testing at private laboratories, which should help avoid the backlog at the laboratory of the Texas Department of Public Safety.

5. I submit this affidavit as required by Art. 64.01(a) V.A.C.C.P and without intent to waive my right against self-incrimination.

Under the pain and penalty of perjury, I swear that the foregoing is true and correct to the best of my knowledge and belief. I give this statement of my own free will.

[signature] 9/14/01
Henry W. Skinner

Subscribed and sworn to
before me on this the
14 day of September, 2001.

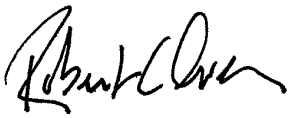
Richard McKee
Notary Public for the State of Texas

NOTARY PUBLIC STATE OF TEXAS
RICHARD MCKEE
Commission Expires 5-28-2003

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