

BEFORE THE HONORABLE RICK PERRY
GOVERNOR OF THE STATE OF TEXAS

On Application for 30-Day Reprieve from
Execution of Death Sentence
In the Matter of Condemned Prisoner

HENRY WATKINS SKINNER

Execution Date: March 24, 2010

**APPENDICES TO
LETTER TO THE HONORABLE RICK PERRY**

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APPENDIX 1

Declaration of Harold Kalant, Ph.D.

No. _____

| | | |
|---------------------------|---|----------------------------------|
| |) | IN THE 31 ST JUDICIAL |
| Ex Parte HENRY W. SKINNER |) | 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

APPENDIX 2

Houston Chronicle editorial by former
Bexar County District Attorney Sam Millsap
(March 10, 2010)

Houston Chronicle

March 10, 2010

DNA testing works, but not if we fail to utilize it

By Sam Millsap

Last week, Gov. Rick Perry granted the state's first posthumous pardon to a man who was innocent of a crime for which he had spent 13 years in prison. DNA testing cleared Tim Cole of a rape he did not commit, but unfortunately it came too late — nine years after he had died in prison. The state must do everything it can to prevent this kind of tragedy from happening again.

On March 24, Texas plans to execute Henry Watkins Skinner even though untested DNA evidence could show we've got the wrong man. DNA testing could resolve doubts about Skinner's guilt in the 1993 Pampa slayings of his girlfriend and her two sons, but the state inexplicably has blocked that testing for more than a decade.

I'm not an advocate for Hank Skinner. I'm an advocate for the truth. If DNA tests could remove the uncertainty about Skinner's guilt — one way or the other — there's not a good reason in the world not to do it.

Some taxpayers may grumble at spending the public's money on DNA tests for individuals on death row. That argument doesn't hold water in Skinner's case. In 2000, the investigative journalists at the Medill Innocence Project offered to pay for the DNA tests. Ten years later, that offer still stands. There may be other objections to testing the evidence, but they don't outweigh the potential horror of executing an innocent man.

It is cases like Skinner's that ended my lifelong support for the death penalty. Any system driven by the decisions of human beings will produce mistakes. This is true even when everyone — judges, prosecutors and defense attorneys — is acting in good faith and working as hard as he or she can to get it right.

Tim Cole is only a recent example of the frailties in our criminal justice system. Several years ago, this newspaper argued persuasively that Ruben Cantu, a defendant I prosecuted who was put to death in 1993, may well have been innocent. Twenty years after Cantu's trial, my star witness recanted his trial testimony. Many people consider his recantation credible because he had nothing to gain by reversing his position except a whole lot of trouble.

That case brought home to me, in a way that nothing else could have, that the system we trust to determine who may live and who must die simply doesn't work in all cases. Other investigative stories have revealed that Texans Carlos DeLuna, who was executed in 1989, and Cameron Todd Willingham, executed in 2004, were almost certainly innocent.

Since 1973, 139 people in 26 states have been released from death row based on evidence of their innocence. Eleven of them were in Texas. Many of these people were freed because of DNA evidence. But DNA testing works only if we use it.

Skinner's execution date is just a few days away, but key pieces of evidence have never been tested, including two knives, one of which might be the murder weapon; a man's windbreaker, which had blood, sweat and hair on it and was found next to the victim's body; the victim's fingernails, which may have DNA evidence under them; and samples from a rape kit.

Skinner has steadfastly maintained his innocence, but his trial counsel did not seek DNA testing. His attorney also failed fully to investigate the potential involvement of another suspect. That man, a relative of Skinner's girlfriend, had a violent criminal history and an incestuous relationship with the victim. He had been seen stalking her at a party on the night of the murder and left the party shortly after she did. His whereabouts for the rest of the night remain a mystery.

This individual also wore a windbreaker like the one found at the murder scene. And the day after the crime, a neighbor says, he frantically scrubbed the interior of his pickup truck, removed the rubber floor mats and replaced the carpeting. DNA evidence may or may not implicate this alternate suspect, but we'll never be certain without testing.

Attorneys for Skinner have filed an appeal with the U.S. Supreme Court asking the court to stop Skinner's execution in order to decide whether prisoners can use the Civil Rights Act to compel post-conviction DNA testing. That's Skinner's last chance, and I hope the court intervenes. But frankly, I'd rather see Texas clean up its own house on this one. Before we send a man to his death, shouldn't we do everything in our power to be certain of his guilt?

Millsap, who served as Bexar County district attorney from 1982 to 1987, has practiced law in San Antonio for 35 years.

APPENDIX 3

Dallas Morning News editorial calling for
DNA testing in Mr. Skinner's case
(February 27, 2010)

Dallas Morning News

EDITORIAL

February 27, 2010

Three capital cases illustrate how tactics trump truth

Convicted killer Charles Dean Hood is getting a new day in court, but not for all the right reasons. The Texas Court of Criminal Appeals has granted him a new sentencing hearing, but that's beside the point.

The point is that Hood was convicted of murder in a scenario right out of *Desperate Housewives*. The Collin County judge who gazed out over the courtroom during the trial in 1990 would see a district attorney who had been in her bed. Their secret tryst – even though they had broken it off by trial time – represents such an obvious possibility of bias that any reasonable mind would tell the court to try the whole case again and keep it clean.

Appellate attorneys for Hood outed the affair in 2008, putting former District Attorney Tom O'Connell and former Judge Verla Sue Holland under oath. The Court of Criminal Appeals, however, refused on procedural grounds to grant a new trial based on complaints of corrupted justice.

The court did halt Hood's execution to take another look at the fairness of sentencing, and last week, judges ordered prosecutors back in court to re-do those proceedings.

Where does that leave the question of whether former lovers should have tried a case with a man's life at stake? The U.S. Supreme Court now is considering that, and fortunately so. Texans who care about justice can hope that a court well insulated from the political stickiness of the Hood case will finally take a clear-eyed view of what was going on in that courtroom.

No one is suggesting that the Hood jury got the question of guilt wrong; the evidence against him was overwhelming. But the courtroom is no place to tolerate little secrets when a life-and-death question hangs in the balance.

That position is supported in a petition to the Supreme Court by 21 former judges, prosecutors and other officials, including former FBI Director William Sessions and former Texas Gov. Mark White.

The Hood trial is one of three Texas capital murder cases lined up before the Supreme Court – all revealing how legal jousting has become more important than pure justice. All increasing our resolve that the death penalty should be abolished.

Earlier this month, a judge held up the execution of Hank Skinner in a 1993 triple murder out of the Panhandle. Again, procedure was at issue, this time the death warrant. The Supreme Court is being asked to take on the far more important issue of whether testing should be ordered on evidence that hasn't undergone DNA analysis. Facts in the case indicate that the answer is yes.

Finally, there's the case of Delma Banks, convicted in a 30-year-old murder near Texarkana. He awaits word from the Supreme Court on complaints that authorities hid the fact they used testimony from a paid police snitch and a shaky witness who was intensively coached.

The chess game continues, more a matter of tactics than truth-finding. That's no way for Texas to determine who lives and who dies.