SCHOOL OF LAW

THE UNIVERSITY OF TEXAS AT AUSTIN

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March 11, 2010

The Honorable Rick Perry
Governor of Texas
c/o Office of the General Counsel
1100 San Jacinto Street, Suite 412
Austin, Texas 78701

RE: Request for 30-day reprieve for **Henry W. Skinner**, scheduled to be executed on Wednesday, March 24, 2010, at 6 p.m.

Dear Governor Perry:

By this letter, we respectfully request that you exercise your authority to grant a 30-day reprieve of execution to our client Henry W. Skinner, and order the DNA testing that Mr. Skinner has unsuccessfully pursued for more than a decade, and which could resolve longstanding and troubling questions about his possible innocence.

As set forth more fully below, since his arrest in the early morning hours of January 1, 1994, Mr. Skinner has always and consistently maintained that he did not commit the crimes for which he was convicted. Physical evidence from the crime scene, witness accounts, and expert testimony all demonstrate that Mr. Skinner was so severely impaired at the time of the murders as a result of his extreme intoxication from drugs and alcohol that he would have lacked the physical and mental coordination even to perform simple tasks, let alone these three murders. Forensic DNA testing has a very strong likelihood of either confirming or disproving his claim of innocence. Indeed, even the evidence presented at Mr. Skinner's trial raised disturbing doubts about whether he could have murdered the victims, and since that time substantial new evidence has been uncovered that supports Mr. Skinner's claim of innocence.

1. 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 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 are the acts of a person possessing considerable presence of mind and physical coordination.

Mr. Skinner undoubtedly was inside the house when these brutal attacks occurred—a fact he has never disputed. Yet, there is substantial reason to doubt that Mr. Skinner could have committed the murders, given 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 Ms. Busby and Mr. Skinner 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 forcefully and

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[1] "Tr." refers to the Reporter's Record of testimony at Mr. Skinner's trial.

[2] While the prosecution contended that the deep cut Mr. Skinner sustained to his right hand that night was not a defensive wound but rather was accidentally self-inflicted when his hand slid down the knife blade while stabbing Randy Busby in the shoulder blade (*see, e.g.,* Tr. 28:1203), the absence of Mr. Skinner's blood on Randy's bedding proved that assertion unlikely (*see* Tr. 28:1132-35).

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 extremely poor physical and mental condition 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), which was not 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, 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 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 reasonable 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.

2. The Evidence Developed Since Trial Shows that Mr. Skinner Was Not the True Killer.

It has been fifteen 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 did.

a. 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 Tr. 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 take his shirt off without her assistance, and it was she, not he, who laid it over the back of the chair. (EH Tr. 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. (EH Tr. 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. (EH Tr. 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," (EH 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 Tr. 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

[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.

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 completely false. To be sure, the federal magistrate judge failed to credit Ms. Reed's testimony in the context of that 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, however, 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 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]

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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.' He thought he had kicked her to death.

(Tr. at 30:1547-48.)

[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:

b. 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.

For example, the testimony of Debra Ellis would have been particularly powerful before the jury. Ms. Ellis lived next door to Donnell and had known him for about three years at the time of the murders. (EH Tr. 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

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> 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.

(Ex. 7 at 761.) At the federal evidentiary hearing, Ms. Reed admitted that she was concerned about the threat of felony charges (EH I:18), asked for and was appointed a public defender to advise her (EH 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 with her recantation testimony if it were not true.

[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.

for him." (*Id.* at I:26.) He showed "no emotion at all" in response to the shocking news of the triple murder. (*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 an almost fanatically thorough cleaning. Donnell's vehicle was "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, shortly after the murders 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.) Perhaps most shocking, 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 Tr. 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 Tr. 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 into an ominous new context. (Tr. at 29:1281-82.) 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.

c. 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. 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.

1) 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 Tr. 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 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." (EH Tr. at I:107.) He found it "reasonable" to conclude that evidence that Mr. Skinner "would have had to 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 the boys' 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).)

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[7] It is worth noting that Dr. Lowry is no bleeding heart. He is a former FBI Special Agent, who worked both in the Bureau's central crime laboratory in Washington, D.C. and in its Birmingham, Alabama field office. Dr. Lowry's integrity is unimpeachable, and his grave concern that Mr. Skinner's case presents a serious risk of a miscarriage of justice deserves great weight.

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 nonsense, 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.

2) 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, (*see* Affidavit of Lori Brim, attached as Ex. 8), and medical records confirming that Mr. Skinner thereafter consistently avoided prescriptions for codeine by reporting that he was allergic to it. (*See* Ex. 9.) 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 Tr. 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.

3) 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 Tr. 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.

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." (Ex. 10 at ¶ 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.*)

Dr. Lowry's statements – the words of a former FBI man – stand as a chilling warning that absent your intervention, Governor, Texas may be about to execute an innocent man.

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 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 (attached as Appendix 1) 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 the effects of each other, 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.

3. There Is DNA Evidence That, If Tested, Could Establish Mr. Skinner's Innocence.

As the foregoing review of the evidence shows, Mr. Skinner is not the person who should have been convicted of the murders of Twila Busby and her sons. Equally disturbing, however, 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.

To date, Mr. Skinner has asked 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 testing. According to the State, all these items still exist; they are in a condition that would permit forensic DNA testing to be performed; and an appropriate chain of custody has been maintained to safeguard their integrity. 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 failure of the State to test these swabs is inexplicable.

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, (R. I:30), it was Donnell's size, and it contained hairs and sweat stains that, if tested, could identify its owner.

Thus, exonerating test results on all or a combination of these items could prove Mr. Skinner's innocence. For example, 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 effectively prove Mr. Skinner's innocence. Thus, there are several 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.

Mr. Skinner's case has understandably attracted a great deal of public attention in recent weeks. While Texans undoubtedly support capital punishment, they insist that it be reserved for those who are clearly guilty. Their view is reflected in comments like those of former Bexar County District Attorney 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.
>
> …

> 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?

Sam Millsap, "DNA Testing Works, But Not If We Fail to Utilize It," HOUSTON CHRONICLE (March 10, 2010) (Appendix 2). As former District Attorney Millsap aptly put it, none of the potential objections to such testing "outweigh the potential horror of executing an innocent man." *Id*. The editorial board of the Dallas Morning News has taken the same commonsensical view. *See* EDITORIAL, "Three Capital Cases Illustrate How Tactics Trump Truth," THE DALLAS MORNING NEWS (February 27, 2010) (Appendix 3) (criticizing "how legal jousting has become more important than pure justice" in several recent high-profile Texas capital cases, and urging that in Mr. Skinner's case in particular, the "[f]acts in the case indicate" that "testing should be ordered on evidence that hasn't undergone DNA analysis").

There is precedent in your own record for granting our request. Frances Newton, a death row inmate claiming innocence, was temporarily reprieved from execution in December 2004. Newton, convicted in the 1987 shooting of her husband and children, contended that re-testing of gunpowder residue on the skirt she was wearing at the time of the murders, and of the gun used in the murders, would clear her. When that testing did not prove her innocent, however, a new execution date was set and swiftly carried out. Your action in granting that reprieve to Frances Newton, Governor Perry, both gave a potentially innocent prisoner a chance to vindicate her claim, and ensured that no lingering doubts about her guilt would remain after her execution. Perhaps equally important, before granting the reprieve in *Newton*, you observed that "[a]fter a lengthy review of the trial transcript, appellate court rulings and clemency proceedings," you personally saw "no evidence of innocence" – yet, and wisely in our view, you agreed to grant the additional time necessary for the scientific testing, saying, "Justice delayed in this case is not justice denied." Precisely the same would be true here.

The *Newton* case is in many important respects indistinguishable from Mr. Skinner's: both defendants claimed to be innocent, and in both cases scientific testing could conclusively establish or foreclose that claim. Indeed, there are only two obvious differences between the cases, and both favor Mr. Skinner's request. First, Ms. Newton wanted to *re*-test evidence that had already been subjected to scientific analysis, while Mr. Skinner seeks to have DNA evidence tested that has never before been tested at all. Second, the evidence in *Newton* ultimately turned out to have been improperly stored and contaminated, while in Mr. Skinner's case the State itself has averred that the evidence is in appropriate condition for DNA testing.

Similarly instructive is *McGinn*, which arose under former Governor Bush's administration in 2000. In that case, a death row inmate facing imminent execution insisted that DNA testing would prove him innocent. Governor Bush granted a reprieve so that such testing could go forward. He did so despite the fact that the Board of Pardons and Paroles had recommended *against* postponing the execution for that purpose. In explaining his reasoning, Governor Bush emphasized that it was "very valid, very important" to use DNA testing where it "can help in [determining] innocence or guilt, particularly in death penalty cases."[8] The testing was promptly undertaken; it confirmed McGinn's guilt, and he was executed shortly thereafter.[9]

For all the foregoing reasons, Governor Perry, we urge you to follow the same sensible path you followed in the *Newton* case in 2004, and which former Governor Bush had blazed in the *McGinn* case in 2000: take the time necessary to be *scientifically* certain of Mr. Skinner's guilt before permitting him to be executed. That is a judicious and deliberate decision that all Texans – in whose name Mr. Skinner will otherwise be put to death on March 24 – will understand and support.

We are grateful for your consideration of these requests and stand ready to answer any questions or provide any additional information you or your staff may require.

Respectfully submitted,

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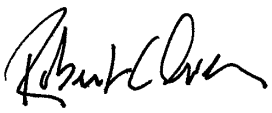
By: 

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[8] Quoted in Richard A. Oppel, Jr., with Frank Bruni, "The 2000 Campaign: The Texas Governor; Bush Expects to Grant His First Reprieve To Killer-Rapist on Texas' Death Row," THE NEW YORK TIMES (June 1, 2000).

[9] McGinn sought re-testing of evidence that had already been DNA-tested, asserting that advances in testing since the time of his trial could yield conclusive results from what had previously been inconclusive. Unlike McGinn (and Newton), Mr. Skinner is asking for forensic testing that has *never been performed* on key items of evidence.