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USA: 450th Texas execution nears as condemned man turns to Supreme Court on DNA question

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If the State of Texas has its way, it will execute Henry Watkins Skinner shortly after 6pm local time on 24 February 2010. This would be the 450th execution in Texas since judicial killing resumed in the USA in 1977. More than one in three of the nearly 1,200 men and women killed in US execution chambers over the past three decades have met their death at the hands of Texas executioners.

Such geographic disparity is just one aspect of the USA's capital justice system that should trouble even the most ardent advocates of the death penalty. Another is the number of errors in capital cases. More than 130 wrongful capital convictions have been uncovered in the USA since 1976, with DNA testing a substantial contributor to exoneration of the death row prisoner in 17 of these cases. Given such empirical evidence of error, one would hope that the state, even if it is yet to be persuaded to abandon the death penalty altogether, would leave no stone unturned before carrying out this irrevocable sentence.

Yet, as it has in a number of other cases, Texas is pressing ahead with its plan to kill Henry Skinner despite serious doubts about the reliability of his conviction. The case against Skinner remains circumstantial, proving only that he was present at the scene of the three murders in question, a fact that he has never disputed. He maintains, with expert and other evidence to support his claim, that he was too incapacitated by alcohol and codeine to have been able to carry out the killings. Since the 1995 trial, further evidence pointing to a possible alternative suspect has emerged and a key prosecution witness has recanted parts of her trial testimony.

The Medill Innocence Project at Northwestern University in Illinois – whose work has contributed to the release of 11 wrongfully convicted prisoners in the USA, including five on death row – has investigated the case and concluded that Henry Skinner's "guilt is questionable at best, and in fact he may well be innocent". The Project's Director, Professor David Protess, has written to the Texas Board of Pardons and Paroles that "in more than twenty years of investigating and researching possible wrongful convictions, I have rarely seen a case this circumstantial and shaky in which the prisoner was actually guilty".

Henry Skinner has for a decade been seeking DNA testing of a number of items from the crime scene which he maintains could support his claim of innocence. Texas is opposing such testing.

After the US Court of Appeals for the Fifth Circuit dismissed his habeas corpus petition in 2009, Henry Skinner brought an action under the Federal Civil Rights Act (42 U.S.C. § 1983) seeking to compel the local prosecutor to release the items in question for DNA testing. On 20 January 2010, the federal District Court dismissed the action on the grounds that it could only adjudicate the matter as a question brought in a habeas corpus petition. Skinner's lawyers immediately filed an appeal to the Fifth Circuit, which summarily affirmed the District Court's finding on 8 February. In a petition filed in the US Supreme Court on 12 February, Henry Skinner's lawyers are appealing for a stay of execution:

> "[I]t is important for the Court to understand that this is a case involving a prisoner who may actually be innocent of the crimes for which he is to die in less than two weeks – and whose actual innocence could possibly be established through DNA testing that has never been performed…

> It is beyond question that Mr Skinner will suffer irreparable injury if a stay is not granted. Death by execution is the ultimate irreparable injury… There will be no significant harm to… the State of Texas if the stay is issued".

A second petition filed with the Supreme Court on 12 February seeks to have the Justices take the case and answer the question as to whether a convicted prisoner seeking access to biological evidence for DNA testing may assert that claim in a civil rights action or only under a habeas corpus petition. The petition argues that the case provides the Supreme Court with the opportunity not only to provide the necessary guidance about "where the boundary lies between 42 U.S.C. § 1983 and the habeas corpus statutes", but also to ensure uniformity among the various federal judicial Circuits on the question of post-conviction DNA testing: "[L]ower courts' treatment of federal civil rights suits for access to DNA evidence post-conviction is profoundly unequal", the brief asserts; "Prisoners in the First, Second, Third, Ninth, and Eleventh Circuits can proceed with such actions, while those in the Fourth and Fifth Circuits find the courthouse doors altogether closed to such claims".

Meanwhile, the Texas Board of Pardons and Paroles is being urged to recommend that Governor Rick Perry commute Henry Skinner's death sentence or, at the very least, to recommend a 90-day reprieve so that Skinner has more time to pursue his claims.

Those who support the execution of Henry Skinner will likely point to the fact that the appeal courts have upheld the death sentence over a period of 15 years. Surely this shows the reliability of his conviction and the need to bring the case to its final conclusion, they may say. Yet the system has been proven fallible. An example of this systemic fallibility is provided in the letter to the Texas clemency board from Professor Protess, who recalls the case of Anthony Porter. The latter had been on death row for more than 16 years in Illinois, his conviction and sentence upheld by the courts and the state given the green light to execute the prisoner. Fifty hours from execution in 1999, Porter received a temporary stay. The Medill Innocence Project then uncovered Anthony Porter's wrongful conviction and he was subsequently released.

Texas should think again. This is a state where a number of prisoners have gone to the Huntsville lethal injection chamber despite serious doubts about their guilt. They include Cameron Willingham, executed in Texas in 2004 despite expert evidence that the fire which killed the victims was accidental rather than the result of arson.

Amnesty International unconditionally opposes the execution of Henry Skinner, regardless of his guilt or innocence, as it does all executions. This is a punishment that is incompatible with human dignity, as much of the world now recognizes. Indeed, since Henry Skinner was sent to death row in 1995, some 40 more countries have abolished the death penalty, bringing to 139 the number that have abolished judicial killing in law or practice.

International standards prohibit the execution of anyone where there is "room for an alternative explanation of the facts" in relation to their conviction. The refusal of the Texas authorities to allow DNA testing of crime scene evidence in a case where there are serious doubts about the prisoner's guilt plainly leaves the Texas authorities, and hence the USA, on the wrong side of this international safeguard as well as the global trend away from the death penalty.

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See also Amnesty International's Urgent Action, USA: DNA testing sought as Texas execution nears, 4 February 2010, http://www.amnesty.org/en/library/info/AMR51/013/2010/en.

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