

Texas Death Row's Hank Skinner and the US Supreme Court - What About Post Conviction DNA Testing Under 42 USC §1983?

On Monday, May 24, 2010, the [U.S. Supreme Court granted the Petition for Writ of Certiorari](#) filed by Texas Death Row Inmate Hank Skinner. It's a case to watch, because it means that the High Court will hear Skinner's argument he has a right to pursue a civil claim, not a criminal one, regarding his continuing assertion that he is innocent of the crime for which he has been sentenced to death.

Savvy Appellate Counsel file Civil Rights Claim

What Hank Skinner's savvy defense attorneys have done is file a civil rights claim which argues that his constitutional rights have been violated because the State of Texas didn't allow him to test evidence that was not tested at trial. He's not arguing this as part of his *criminal* case (writ of habeas corpus); he's arguing it as a civil matter.

The [Fifth Circuit Court of Appeals already denied him, standing on past precedent and opining](#) that any violations of his constitutional rights to (1) due process and (2) protection against cruel and unusual punishment based upon "the defendant district attorney's refusal to allow him access to biological evidence" for purposes of forensic DNA testing need to be addressed in a petition for habeas corpus, not a petition for writ of certiorari.

What Hank Skinner wants is to test evidence for the absence of his DNA long after the jury trial is over

Skinner wants to test things that were left outside the courtroom during the jury trial that found him guilty and sentenced him to die. Professing his innocence of the crime, Hank Skinner wants the chance to take things in possession of the State of Texas, send them to a laboratory, and have the lab results show his DNA isn't on the stuff and therefore, he wasn't the killer. (If you want to read the background facts of the case, read them in [Skinner's own words in a Q and A he answers at the Texas Death Penalty Blog.](#))

What about the Evidence?

It's obvious from his arguments that not all the evidence found at the scene of the crime was tested for Hank Skinner's DNA. And, of course it's true that DNA testing has exonerated many who have been wrongfully accused in this country (often, thanks to the efforts of [The Innocence Project](#)).

Interestingly, the same day that the Supreme Court granted writ on the Skinner case, a [Wisconsin County Judge freed William Avery, 38, after DNA evidence showed that Mr. Avery did not kill](#) a Milwaukee prostitute 12 years ago. He had served 5 years of a 40 year sentence.

It's also true that failure to properly test the state's evidence has led to the execution of innocent men. Texas executed [Cameron Todd Willingham](#) in 2004; today, there are few that doubt that Mr. Willingham was innocent of the arson deaths of his children, and that faulty testing of the evidence (and failure of the system) was to blame.

What Happened at the Trial?

However, what I'm wondering is what happened during the criminal trial? Was this a defense attorney strategy back then -- to not dig too deep in the State's evidence bag, for fear that it would only reveal more evidence that could be used against the defendant?

Why didn't the defense counsel at the trial do this testing? Was it error? Or was it a conscious decision made in what was considered the best interests of their client at the time?

Concern Over Gamesmanship and the Jury Trial

1. In future cases, what if criminal defense attorneys make strategic decisions NOT to go into all the things that came from the criminal investigation. Is the *Skinner* case going to mean that years down the road, a whole new series of appeals will begin, based upon a constitutional need to go back and check that stuff then? Assuming so, then how can we protect against gamesmanship while allowing for legitimate claims?

2. What does this do to the respect of the jury that is inherent in our system? Already, we have seen mediation and other forms of ADR (Alternative Dispute Resolution) cast aside the constitutionally recognized sanctity of a trial by a jury of our peers in civil actions. What impact will Skinner have upon the criminal jury system over the years, if the U.S. Supreme Court agrees with Mr. Skinner's arguments?

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