

# High court hears arguments on 'retrying' with new DNA testing

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## STORY HIGHLIGHTS

- Texas death row inmate seeks new DNA testing on old crime scene evidence
- Henry "Hank" Skinner, supporters claim he is innocent of 1993 killings
- Justices focus on whether inmates can go around usual federal appeal route
- Sotomayor: Texas' case is that Skinner had one shot at testing and refused it

**Washington (CNN)** -- Supreme Court justices cast a skeptical eye at a Texas death row inmate's novel efforts to have new DNA testing on old crime scene evidence in an effort to prove his innocence.

The justices heard arguments Wednesday over the issue of "actual innocence" and what forum capital prisoners can use to assert their constitutional rights were violated.

At issue is whether convicted triple murderer Henry "Hank" Skinner has a basic federal civil right to have forensic evidence reviewed late in the appeals process. His supporters say if he loses this case, an innocent man could be put to death. The state says he is not entitled to testing of evidence that was not analyzed before his 1995 trial.

The inmate's claims for new testing "don't make much sense," Justice Antonin Scalia said to Skinner's lawyer. "You had the opportunity to raise that in the state court, and now you are retrying what the state court did decide" against the prisoner.

The justices had issued a stay just 45 minutes before Skinner's scheduled March 24 execution. The court now will decide the larger constitutional questions. Federal appeals courts have split on the issue in recent years.

Skinner, 48, was convicted of the New Year's Eve 1993 killings of his live-in girlfriend and her two adult sons in the Texas Panhandle town of Pampa. He strongly denies any involvement and claims re-testing would prove his innocence and determine the real killer.

Prosecutors maintain forensic evidence gathered at the scene and witness statements point to Skinner.

Skinner admits he was at the crime scene at the time of the crimes, but claims he was passed out on the couch from a combination of vodka and codeine.

A female friend of Skinner's who lived four blocks away testified at his trial that he walked to her mobile home and told her that he may have kicked Twila Busby to death, although evidence did not show she had been kicked. The neighbor has since recanted parts of her testimony.

Authorities followed a blood trail from the crime scene to the female friend's home and found Skinner in the closet, authorities said. He was "wearing heavily blood-stained jeans and socks and bearing a gash on the palm of his right hand," according to the Texas attorney general's summary of the case.

Also found stabbed to death were Elwin "Scooter" Caler, 22, and Randy Busby, 20, both of whom were developmentally disabled.

Skinner's attorney have in the past presented what they call compelling evidence pointing to another man -- an uncle of the victims -- who may have committed the murders.

Oral arguments in the case stayed away from the specifics of the crime and subsequent trial. The focus was strictly on whether inmates can go around the usual federal appeal route to make what is called a "1983" claim, named after part of the civil rights statute dealing with alleged due process violations at trial. The traditional venue is a "habeas" proceeding, where a variety of issues over an inmate's conviction and incarceration can be raised.

Prosecutors argue having a second judicial forum to press one's appeal would tie up the courts, delay justice, and give inmates free rein to "game" the system. Defendants say the current route to get post-conviction DNA is so narrow that they deserve a chance to make these larger, more basic constitutional arguments, apart from the fact-specific requirements of a habeas hearing.

Robert Owen, a University of Texas law professor who is representing Skinner, told the court that state law "created a wholesale classification that said everybody who falls into Mr. Skinner's situation who did not ask for testing at trial is forever foreclosed from getting testing." He said his client deserves "a meaningful opportunity to pursue the liberty interest he has under state law in trying to secure release based on innocence."

Justice Sonia Sotomayor noted a high court ruling last year strictly limiting when inmates could seek DNA testing post-conviction. That decision, she said meant "if you had an opportunity to ask for it [at trial] and gave it up, that you lost."

She summarized the state's case against Skinner by noting, "What the court said was, this DNA testing was available then. You could have gotten it. Strategically, your trial attorney chose not to, and so that disqualifies you from seeking it now."

Chief Justice John Roberts took the point further.

"You want the biological evidence because by refusing to turn it over, [the district attorney] prevented you from gaining access to exculpatory evidence that could demonstrate he is not guilty of capital murder," he said, "which is usually what habeas corpus is for: To show you are not guilty of what you are in prison for."

Skinner had sued local District Attorney Lynn Switzer for access to the biological material. Her lawyer Gregory Coleman said Skinner was engaged in "artful pleading" to drag out his appeals in the face of a conviction that was later judged to be fair and complete.

Justice Elena Kagan spoke for several colleagues when she asked what institutional harm would it be for Skinner to seek a federal civil rights hearing. "The prisoner is seeking a tool that he hopes will lead to a quicker release, although it has no certainty at all of doing so."

Scalia noted a perhaps easier showing for some relief in such a civil rights claim, than in a habeas proceeding. "In habeas you would have to show that indeed, it would justify a different outcome in the trial," he said. "Whereas here, he says I don't have to show that, I just want the evidence" and that he has a basic right to get it.

Skinner talked with CNN in an exclusive interview recently from death row at the Polunsky Correctional Institution in Livingston. He told Correspondent Kate Bolduan his request was simple: "All the district attorney has got to do is turn over the evidence and test it, and let the chips fall where they may. If I'm innocent I go home, if I'm guilty I die. What's so hard about that?"

Texas has executed more prisoners than any state since 1976, when the high court allowed executions to resume. Sixteen condemned inmates have died by lethal injection at the state's Huntsville prison since January. An execution scheduled for Thursday was delayed indefinitely after the high court intervened.

Recently, questions have swirled in Texas regarding the 2004 execution of Cameron Todd Willingham for a fire that killed his three daughters, and allegations he was not guilty of the murders.

On March 19, Perry issued a posthumous pardon for Timothy Cole, who was serving a 25-year sentence for aggravated sexual assault when he died in prison from an asthma attack. After his death, DNA tests established his innocence, and another man confessed to the crime.

Death penalty opponents frame the Skinner case in sweeping terms and say a ruling expected in a few months will have major implications for death row prisoners nationwide who seek further evidence testing.

"It's a win-win for the justice system. If he turns out to be guilty, we have the certainty of that fact with objective DNA science prior to the time that we carry out the ultimate punishment," said Nina Morrison, a senior attorney with the Innocence Project, which is helping appeal the Skinner sentence. And if he's not guilty, obviously that's something that we, and surely the state, would want to know prior to the time that an irrevocable penalty of execution is carried out."

Her group says 258 people nationally been exonerated through post-conviction testing -- people who were found guilty by a unanimous jury and sent to prison or death row, but were later exonerated or proven innocent by DNA.

The Supreme Court case is Skinner v. Switzer (09-9000).