76,970

No. AP76,970

In the
Court of Criminal Appeals
At Austin

No. 9407130
In the
248TH District Court
of
Harris County, Texas

CHARLES D. RABY
Appellant
V.
THE STATE OF TEXAS
Appellee

STATE'S BRIEF ON APPEAL

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STATEMENT OF THE CASE

On March 24, 1994, the appellant, Charles D. Raby, was charged by indictment with the offense of capital murder of complainant Edna Franklin in cause number 9407130. The indictment alleged that the appellant intentionally caused the death of the complainant in the course of committing and attempting to commit the offenses of robbery, aggravated sexual assault, or burglary of the complainant's home (I Tr. at 5).[1]

On June 9, 1994, the appellant was found guilty of capital murder (IB Tr. at 557). The trial court charged the jury on the three methods of committing the instant offense as set forth in the indictment, and the jury returned a general verdict of guilt (IB Tr. at 525-37). Punishment was assessed at death by lethal injection in accordance with the jury's responses to the special issues (IB Tr. at 557-8).

On March 4, 1998, the Court of Criminal Appeals affirmed the appellant's capital murder conviction. *Raby v. State*, 970 S.W.2d 1 (Tex. Crim. App. 1998).

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[1] "S.F." and "Tr." denote the statement of facts and the clerk's record from the appellant's capital murder trial; "Jan. 16, 2009 R.R." denotes the statement of facts from the Chapter 64 DNA hearing; "Aug. 27, 2009 R.R." denotes the statement of facts from the serology hearing; and "C.R." denotes the clerk's record from the Chapter 64 proceedings.

On November 16, 1998, the United States Supreme Court denied the appellant's petition for certiorari. *Raby v. Texas*, 525 U.S. 1003 (1998).

On January 31, 2001, the Court of Criminal Appeals denied relief on the appellant's first state habeas petition, cause number 9407130-A, adopting the trial court's findings of fact and conclusions of law. *Ex parte Raby*, No. 58,131-01 (Tex. Crim. App. Jan. 31, 2001)(not designated for publication).

On November 27, 2002, a federal district court dismissed all claims in the appellant's federal habeas petition. The federal district court also denied appellant certificate of appealability (COA). *Raby v. Cockrell*, No. H-02-0349 (D.C. Tex. Nov. 27, 2002)(not designated for publication).

On October 15, 2003, the Fifth Circuit Court of Appeals denied the appellant's application for COA. *Raby v. Cockrell*, No. 03-20129, 2003 WL 22348919 (5th Cir. Oct. 15, 2003). The Fifth Circuit also denied the appellant's motion for rehearing en banc.

In 2002, the appellant filed a motion for Chapter 64 DNA testing which the trial court denied. On June 29, 2005, the Court of Criminal Appeals overruled the trial court's denial of the appellant's Chapter 64 motion for DNA testing, granting the motion as to the complainant's underwear, fingernail clippings, and shirt. *Raby*

v. State, No. AP-74,930 (Tex. Crim. App. June 29, 2005)(not designated for publication).[2]

On January 16, 2009, the trial court heard testimony from State and defense experts regarding the results of DNA testing on evidence from the primary case. Additionally, on August 27, 2009, the State presented testimony from expert Patricia Hamby regarding the serology analysis and trial testimony of Houston Police Department (HPD) Crime Lab chemist Joseph Chu.

On January 11, 2013[3], the trial court entered amended findings concluding that the results of the post-conviction DNA testing were not favorable to the appellant (I C.R. at 2).[4]

The appellant filed a timely notice of appeal, and the trial court judge certified the appellant's right of appeal (I C.R. at 77).

STATEMENT OF PROCEDURAL HISTORY

The appellant filed his brief on April 24, 2013. The State's appellate brief was initially due on May 24, 2013. After obtaining extensions, the State's appellate brief is now due on July 22, 2013.

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[2] The shirt referenced in the appellant's 2002 motion for post-conviction DNA testing was not located during Chapter 64 proceedings. *See Appellant's Brief at p. 9, n. 13.*

[3] The trial court's January 11, 2013 amended findings were erroneously file-marked January 11, 2012 (I C.R. at 2-13).

[4] The trial court initially entered Article 64.04 findings on December 19, 2012 (I C. R. at 15). Due to a typographical error, the trial court entered amended findings on January 11, 2013 (I C. R. at 2).

STATEMENT OF FACTS

GUILT/INNOCENCE EVIDENCE

The complainant, seventy-two year old Edna Mae Franklin, lived with her two grandsons, Eric Benge and Lee Rose (XXVII S.F. at 62-4, 159). On Thursday, October 15, 1992, Benge left the complainant's house shortly before 4:00 p.m. with Rose (XXVII S.F. at 67-9). The complainant's daughter, Linda McClain, spoke to the complainant on the telephone until approximately 6:45 p.m. that evening (XXVIII S.F. at 281). At around 10:00 p.m., Benge returned home to find the front door of the complainant's house open and the lights extinguished (S.F. XXVII at 69-71). The back door of the house was open, and the family dogs were loose in the front yard (XXVII S.F. at 70-7). The complainant's house was ransacked and the contents of the complainant's purse emptied on the bedroom floor (XXVII S.F. at 78-80, 120-1; XXVIII S.F. at 189). Other personal items were scattered around the complainant's bedroom (XXVII S.F. at 79-80).

Benge found the complainant dead on the living room floor (XXVII S.F. at 75-6, 82). She was lying on her side with her legs in a spread eagle position (XXVII S. F. at 140-2). The complainant was nude from the waist down, her pants inside out, some ripped panties near her body, and the complainant's knee brace around her ankle (XXVII S.F. at 84, 110-1; XXVIII S.F. at 188). The complainant clutched hair in her right hand (XXVIII S.F. at 191; XXIX S.F. at 372-3). Also,

some loose hairs were in the complainant's left hand and on her body (XXVIII S.F. at 191-2). There was a blood smeared towel adjacent to the complainant's body (XXVIII S.F. at 190-1).

The complainant's death was attributed to two large cutting wounds to her neck and five stab wounds to the chest (XXVII S.F. at 16). Also, the complainant was severely beaten and possibly sexually assaulted (XXVII S.F. at 17-8, 37-8, 59). There was no injury to the complainant's genitalia, anus, rectal, or parietal areas, and no semen in the complainant's oral, rectal, or vaginal cavities (XXVII S.F. at 37, 58).

Benge and Rose were friends with the appellant for several years before the complainant's murder (XXVII S.F. at 62-5). Her grandsons often snuck the appellant into the complainant's home through the bedroom windows (XXVII S.F. at 65-6, 132). The complainant did not like the appellant, however, and she barred the appellant from her home about a week before her murder (XXVII S.F. at 66, 115, 161-3).

On the day of the instant offense, Benge nailed a screen to one of his bedroom windows that the appellant had previously used to enter the complainant's house (XXVII S.F. at 66, 90-1, 105-6). The screen was torn from the window and the window blinds were in disarray when Benge discovered the complainant's body (XXVII S.F. at 66, 90-1, 113-4, 116). Also, there were two footprints in the

middle of the bed located in front of the bedroom window (XXVII S.F. at 113-6). Police believed that the appellant entered the complainant's house through that window because a screwdriver was lying on the window ledge, and there was a fresh wood chip (XXVII S.F. at 89-92; XXVIII S.F. at 189).

Shirley Gunn testified at the appellant's capital murder trial that she lived within walking distance of the complainant, and the appellant came by her house at 5:00 p.m. on the evening of the instant offense looking for Gunn's son and another man (XXVIII S.F. at 290-3). The appellant was wearing a jacket (XXVIII S.F. at 293). The appellant smelled of alcohol and used a pocketknife to clean his nails (XXVIII S.F. at 293-4). Before the appellant left Gunn's house at 6:00 p.m., he asked whether her son and the other man might be at "grandma's" (XXVIII S.F. at 296-7). Gunn testified that the complainant was known as "grandma" (XXVIII S.F. at 290, 297).

Mary Alice Scott, who lived approximately 200 feet from the complainant's house, saw the appellant walking from her driveway into the street between 7:00 p.m. and 7:45 p.m. on the evening of the instant offense (XXVIII S.F. at 300-5). The appellant wore jeans and a dark jacket (XXVIII S.F. at 309).

Leo Truitt lived directly behind the complainant's house (XXVIII S.F. at 300). Martin Doyle testified at trial that at approximately 8:00 p.m. on the evening of the complainant's murder, a white male of similar build and height to the NO Bigger!

appellant walked from the rear to the front of Truitt's house and jumped Truitt's fence (XXVIII S.F. at 314-7).

Mary Gomez, the appellant's girlfriend, was with the appellant at her house that weekend when the appellant's mother telephoned to tell the appellant that the police wanted to talk to him in connection with the complainant's murder (XXVIII S.F. at 325). The appellant looked out the window, told Gomez that the police had arrived, and fled from the house through the back door (XXVIII S.F. at 325-7).

On October 19, 1992, police arrested the appellant (XXVIII S.F. at 198-9). The appellant confessed to the instant offense, stating that he was carrying a pocketknife that he used to clean his fingernails on the day of the complainant's murder. In his confession, the appellant recounted, *inter alia*, how he had been drinking beer, whiskey, and Mad Dog 20/20 that day and stated the following:

> I told Sergeant Allen that I had not been at Lee's house on Westford Street Thursday night. I was not telling the truth at first, because I was scared. I decided to tell the truth and get this over with.
>
> ***
>
> I drank the bottle of wine and then I walked over to Lee's house on Westford Street. Lee lives with his grandmother, Edna, and his cousin Eric. There is an old Volkswagen in the driveway at their house. I walked up to the front door. The front door has a screen type door in front of a wooden door. I knocked on the door. I did not hear anyone answer. I just went inside. I sat down for a little bit on the couch. I called out when I got inside but I did not hear anyone say anything. I heard Edna in the kitchen. I walked into the kitchen and grabbed Edna. Edna's back was to me and I just had my knife but I do not remember taking it out. We were in the living room when we went to the floor. I saw Edna covered in blood and underneath her. I went to

> the back of the house and went out the back door that leads to the back yard.
>
> Shortly after I had left Lee's house on Westford I was approached by a man and this man told me something like "I had better not catch you in my yard," "jumping his fences". Or something like that. I woke up later on the ground near the Hardy Toll Road and Crosstimbers. I walked home, on Cedar Hill from there. I remember feeling sticky and I had blood on my hands. I washed my hands off in a water puddle that is near the pipeline by the Hardy Toll Road. I do not remember what I did with my knife. The next day I knew I had killed Edna. I remembered being at her house and struggling with her and Edna was covered in blood when I left. I think I was wearing a black concert shirt, the blue jeans I'm wearing and my Puma tennis shoes. I also had on a black jacket.

(XXVIII S.F. at 275-9; *State's Trial Ex. 98 - Appellant's Statement*). Police recovered a black jacket that the appellant was wearing on the day of the instant offense from Gomez's house (XXVIII S.F. at 326; XXIX S.F. at 71, 384).

HPD chemist Joseph Chu testified that he obtained hair samples from the appellant after his arrest, but another HPD chemist examined the hair samples and hair evidence (XXIX S.F. at 394, 402). Also, Chu analyzed the appellant's blood sample to determine the blood type and compared the appellant's blood to the evidence (XXIX S.F. at 401-2). Chu testified that the result of the comparison of the appellant's blood to evidence was inconclusive (XXIX S.F. at 401-2).

PUNISHMENT EVIDENCE

The appellant was previously convicted for assault and robbery (XXXII S.F. at 70-1). One of the appellant's friends testified that the appellant was a very violent person with a bad reputation for being peaceful and law abiding. The appellant liked to fight when he did not get his way or was bored (XXXI S.F. at 29, 41-2, 49).

Also, the State presented testimony concerning the appellant's bad acts. When the appellant was a teenager, he and some of his friends stole beer and other items from a convenience store (XXXI S.F. at 33). During the robbery, the appellant struck the store clerk with a stick resembling a closet pole several times (XXXI S.F. at 33). When the appellant and his friends tried to hide at a girlfriend's house after the robbery and were told to leave, the appellant fought the girlfriend's brother-in-law (XXXI S.F. at 34-6). On one occasion, the appellant got into a fight with his sister's husband and beat the man with a fence board (XXXI S.F. at 37-8).

Karianne Wright, the appellant's former girlfriend, testified regarding her experiences with the appellant and his violent nature during the mid 1980s. When Wright was seven months pregnant, the appellant chased her down a public road, knocked her to the ground, and threatened to jump on her stomach while stating that he wished Wright's baby would die (XXXI S.F. at 7-8; XXXII S.F. at 233-4). Approximately one month later, the appellant threw a knife and fork at Wright

This is a lie

while she was holding her newborn child, hitting Wright in the head and causing her to bleed (XXXI S.F. at 8-9, 16; XXXII S.F. at 202-3).

Wright also testified that the appellant beat her three to five times a week during their relationship (XXXI S.F. at 36-7; XXXII S.F. at 189). Usually, the appellant demanded that Wright strip and perform oral sex on him after he beat her (XXXII S.F. at 189-90). The appellant struck Wright with his fists and called her insulting names (XXXII S.F. at 190-1). After Wright performed oral sex on the appellant, the appellant had sexual intercourse with Wright (XXXII S.F. at 191). The appellant beat Wright into compliance if she resisted his sexual demands (XXXII S.F. at 191-2).

Finally, Wright testified regarding the appellant's mannerisms when he talked about beating people. According to Wright, the appellant "would get a spark in his eye, a glow in his eye, as if violence to him was better than sex. There was nothing better. It was a power rush for him" (XXXII S.F. at 221).

In the late 1980s, the appellant accosted and beat a ten-year-old boy who was riding his bicycle on the sidewalk (XXXII S.F. at 74-7). The appellant told the child that the sidewalk belonged to him and the child could not travel on it (XXXII S.F. at 74-7). When the appellant's mother and stepfather tried to intervene, the appellant stabbed his stepfather in the neck with a long kitchen knife and knocked out his stepfather's front teeth (XXXII S.F. at 88, 92).

In 1986, Alicia Jordan discovered the appellant in her home with her son and ordered the appellant to leave (XXXII S.F. at 106-8). When Jordan tried to call the police after the appellant refused to leave her house, the appellant pulled the telephone out of the wall, punched Jordan, threw Jordan on the ground, and kicked Jordan (XXXII S.F. at 108).

In 1990, Paul Autry, a convenience store clerk, got into a fight with a young man who entered his store and stole some beer (XXXIII S.F. at 302, 305). While Autry and the man scuffled in the store parking lot, the appellant got out of a car and approached Autry with a knife (XXXIII S.F. at 305). Autry backed off, and the appellant and his companion left (XXXIII S.F. at 308).

The appellant was involved in some incidents while in custody at the Harris County Jail awaiting trial for the primary offense. On January 9, 1993, the appellant tried to cut a jailer with a shank constructed from a piece of steel tied to a broom handle (XXXIII S.F. at 328, 330-1). The appellant also told several jailers that he wanted to knife them and that he wanted to go to the hospital in order to attempt to escape (XXXIII S.F. at 331-2).

POST-CONVICTION DNA PROCEEDINGS

In February, 2006, the following items of evidence were submitted to the Texas Department of Public Safety Crime Lab (DPS):

1. brown carpet piece from scene;
2. blue pants from scene;

3. vaginal, rectal, and oral swabs from the complainant;
4. right and left hand fingernail clippings from the complainant;
5. vaginal, rectal, and oral swab pieces from the complainant;
6. appellant's blood sample;
7. blue/green panties from scene; and
8. pubic hair from the complainant.

The above-listed items were visually examined and presumptive tests applied to stains with these results:

- apparent blood was detected on the brown carpet piece, the blue pants, the right and left fingernail clippings and the blue/green panties;

- no apparent blood was detected on the vaginal swab piece, the rectal swab piece, or the oral swab piece;

- no apparent semen was detected on the brown carpet piece, the vaginal swab piece, the rectal swab piece, the oral swab piece, the blue pants or the blue/green panties;

- no analysis was performed on the appellant's blood sample or the victim's pubic hair sample; and

- no swabs were present in the vaginal, rectal or oral swab boxes. Two swab sticks were present in each of the vaginal, rectal and oral swab boxes. No analysis was performed on the sticks in the swab boxes.

(III Jan. 16, 2009 R.R - *State's DNA Ex. 1 - March 8, 2006 DPS Report).*

DPS extracted DNA from portions of the stains on the brown carpet piece, the blue pants, and, the blue/green panties, subjected it to Polymerase Chain Reaction (PCR) testing and determined that the DNA profiles detected on the complainant's blue/green panties cuttings and the blue pants cuttings were

consistent with the complainant's profile. No interpretable DNA profiles were obtained from the carpet cutting (III Jan. 16, 2009 R.R - *State's DNA Ex. 2 and 3 - April 4 and August 15, 2006 DPS reports*). NOT TRUE. MRS FRANKLYN WAS THE ONLY DNA FOUND.

At the appellant's request, the complainant's right and left hand fingernail clippings were forwarded to Serological Research Institute (SERI) for testing. There were four fingernail clippings from the right hand that SERI labeled 1-1, 1-2, 1-3, and 1-4, and four fingernail clippings from the left hand, designated 1-5, 1-6, 1-7, and 1-8. Human DNA was detected in the extracts from each of the right and left hand fingernail clippings with testing yielding the following results:

- quantitation results for human DNA were inconclusive in items 1-5 and 1-6;
- no male DNA detected in the right fingernail extracts 1-1, 2, 3 and 4, and extracts from left fingernails 1-7 and 1-8;
- the ratio of male to female DNA for extracts 1-5 and 1-6 indicated that autosomal short tandem repeats (STRs) would not be detected from the male donor; and
- the extracts from 1-5 and 1-6 may not respond to testing by male specific short tandem repeats (YSTRs) due to the low level of male DNA detected.

(III Jan. 16, 2009 R.R - *State's DNA Ex. 4 - June 2, 2006 SERI report*).

SERI then analyzed the extracts from two of the left hand fingernail clippings, items 1-5 and 1-6, for male specific short tandem repeats (YSTRs) and compared the results to the appellant's DNA profile with this result:

> The YSTR DNA genetic profile obtained from the combined DNA extracts (items 1-5 and 1-6) is a mixture of at least two individuals that is weak and incomplete. Charles Raby is not a contributor to the DNA profile from items 1-5 and 1-6.

The complainant's grandsons, Eric Benge and Lee Rose, were also excluded as contributors to the DNA profile from items 1-5 and 1-6 (III Jan. 16, 2009 R.R - *State's DNA Ex. 5 and 6 - September 28, 2006 and April 3, 2007 SERI reports, respectively*).

On January 16, 2009, the trial court conducted a hearing regarding the results of the appellant's Chapter 64 post-conviction DNA testing. The parties presented two experts during the hearing, Elizabeth Johnson, Ph.D. and Laura Gahn, Ph.D.

POST-CONVICTION SEROLOGY PROCEEDINGS

In his Chapter 64 motion, the appellant challenged the serology analysis and trial testimony of HPD chemist Joseph Chu. Accordingly, the trial court elected to examine the appellant's serology evidence and the effect, if any, that it might have on the appellant's claim of actual innocence.

On August 27, 2009, the trial court conducted a hearing regarding the appellant's serology evidence during which the following was established:

- the complainant's blood type was B negative as determined by analysis conducted pursuant to the complainant's 1992 autopsy, and serology testing conducted by Joseph Chu, HPD, in 1992 established that the appellant's blood type was O (*State's Trial*

Ex. 2 – Complainant's Autopsy Report; I Aug. 27, 2009 R.R. - *State's Serology Ex. 79 - offense report supplement*);

- the HPD Crime Lab did not have a sample of the complainant's blood, and the complainant's blood type was unknown to HPD analyst Chu when he performed serology testing in the instant case (I Aug. 27, 2009 R.R. at 38);

- a December 17, 1992 supplement to the police offense report stated that "blood having inconclusive typing result was detected on the [complainant's] fingernails." (I Aug. 27, 2009 R.R. - *State's Serology Ex. 79 - offense report supplement*); and

- HPD employee Chu testified on cross-examination during the appellant's 1994 capital murder trial that a comparison of the appellant's blood to evidence was inconclusive because Chu was unable to do any comparison (XXIX S.F. at 401-2).

Also, the State presented the testimony of forensic serologist Patricia Hamby, M.S., who reviewed Chu's serology work notes and offense report supplements and submitted a report of her findings (I Aug. 27, 2009 R.R. at 12-4; *State's Serology Ex. 75-9 - Hamby report, lab documents, and offense report supplements*). Hamby used the terms "H" and "O" interchangeably in her report and testimony, intending that their meanings were equivalent (I Aug. 27, 2009 R.R. at 29-30).

Hamby reached the ultimate conclusion that the appellant could <u>not</u> be excluded as a contributor to the blood detected on the complainant's fingernail samples in addition to the following:

- HPD lab notes reflected that A, B, and H(O) antigen activity were detected in the human blood on the complainant's right hand fingernail sample while B and H(O) activity were detected

in the human blood on the complainant's left hand fingernail sample;

- based on the serology testing results indicating A, B, and H(O) antigen activity on the right fingernail sample, the most likely source for that activity was an individual with AB blood type; however, the antigen activity detected could have been the result of a mixture of three individuals with blood types A, B and H(O), a mixture of three individuals with blood types AB, B and H(O), a mixture of two individuals – one with blood type AB and the other with blood type H(O), or a mixture of two individuals – one with blood type A and the other with blood type B;

- based on the serology testing results indicating B and H(O) antigen activity on the left fingernail sample, the most likely source for such activity was an individual with type B blood; however, such result could have been the result of a mixture of two individuals' blood - one with type B blood and the other with type O blood;

- the accepted practice would have been to report the ABO activity detected for each fingernail sample;

- Chu's reporting of the blood typing of the fingernail samples as "inconclusive" was contrary to and not supported by the recorded laboratory test results for the left and right fingernail samples;

- the A antigen activity detected in the right fingernail sample could not have come from the appellant who being blood type O had only H(O) activity or the complainant who had blood type B negative; and

- the source for the A antigen activity detected on the right fingernail sample remained unknown.

(I Aug. 27, 2009 R.R. at 10-1, 26, 29-39, 72; *State's Serology Ex. 75-80 - Hamby report, lab documents, and offense report supplements*).

SUMMARY OF THE ARGUMENT

In addition to post-conviction DNA testing conducted during the Chapter 64 proceedings, the trial court examined the propriety of HPD chemist Joseph Chu's serology analysis and related trial testimony. The trial court applied the correct legal standard in assessing the favorability of the appellant's post-conviction DNA testing results and then employed an actual innocence standard in its findings concerning the impact of the serology evidence on the appellant's conviction.

The trial court did not focus on the condition of the crime scene in determining favorability pursuant to TEX. CODE CRIM. PROC. art. 64.04. The trial court properly considered the appellant's confession as well as other evidence elicited at trial, including evidence corroborating the appellant's confession, in assessing favorability.

While the trial court properly excluded testimony proffered by the defense at the Article 64.04 hearing on the basis of relevance, any alleged error did not harm the appellant in light of his submission of affidavits from witnesses during the Chapter 64 proceedings.

REPLY TO POINT OF ERROR ONE

In his first ground for review, the appellant contends that the trial court applied an improper standard in determining favorability under Article 64.04. *Appellant's brief at 30.* Citing the final page of the trial court's findings of fact to support his claim, the appellant alleges that the trial court erroneously applied an actual innocence standard in determining the favorability of the appellant's post-conviction DNA testing results.

In reviewing a trial court's Chapter 64 ruling, the Court of Criminal Appeals affords "almost total deference" to a trial court's findings of historical fact and application-of-law-to-fact issues that turn on witness credibility and demeanor. The Court reviews de novo all other application-of-law-to-fact issues, including in the instant case, whether "it is reasonably probable that [the appellant] would not have been prosecuted or convicted" given the results of his post-conviction DNA testing. *Ex parte Gutierrez*, 337 S.W.3d 883, 890 (Tex. Crim. App. 2011); *Rivera v. State*, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002). The appellant filed his Chapter 64 motion for DNA testing in 2002; accordingly, his Chapter 64 proceedings are governed by the law in effect when the motion was submitted. TEX. CODE CRIM. PROC. ANN. art. 64.03 historical note (West 2006); *See* Acts 2001, 77th Leg., R.S., ch. 2, 2001 Tex. Gen. Laws 2 (amended 2003)(current version at TEX. CODE CRIM. PROC. ANN. art. 64.01 – 64.05 (West 2006 & West Supp. 2012)). The appellant's

post-conviction DNA proceedings were subject to a hearing and findings under the following version of Article 64.04:

> After examining the results of testing under Article 64.03, the convicting court shall hold a hearing and make a finding as to whether the results are favorable to the convicted person. For the purposes of the article, results are favorable if, had the results been available before or during the trial of the offense, it is reasonably probable that the person would not have been prosecuted or convicted.

Raby, No. AP-74,930, slip op. at 13 n.19; Acts 2001, 77th Leg., R.S., ch. 2, 2001 Tex. Gen. Laws 2 (amended 2003)(current version at TEX. CODE CRIM. PROC. art. 64.01 – 64.05 (West 2006 & West Supp. 2012)).

The record clearly reflects that the trial court applied the correct legal standard in assessing the favorability of post-conviction DNA testing results to the appellant's case. Under the heading "Standard under Article 64.04," the first page of the trial court's findings detail the standard used to assess favorability:

> In determining the favorability of the DNA results, i.e., whether Raby would have been prosecuted or convicted had the DNA evidence been available at trial, proof of innocence is not required under Chapter 64. Rather, the new DNA evidence need only establish a reasonable doubt so as to preclude a unanimous verdict. *Raby v. State*, No. AP-74,930, slip op. at 13 (Tex. Crim. App. Jun. 25, 2005)("If the court requires the appellant to show that DNA testing will absolutely prove his innocence, Article 64.04 would be rendered meaningless); *see also Smith v. State*, 165 S.W.3d 361 364 (Tex. Crim. App. 2005). In other words, this Court should determine that findings of fact are favorable to Raby if it is 51% more likely than not that at least one juror would refuse to convict had the DNA evidence been available at trial.

(I C.R. at 2). Contrary to the appellant's claim, the trial court specifically stated that it did not apply an innocence standard in gauging favorability. The trial court followed the guidelines set forth in the Court of Criminal Appeals' opinion reversing the trial court's initial denial of the appellant's motion for post-conviction DNA testing while also acknowledging that the appellant was not required to prove his innocence. *See Leal v. State*, 303 S.W.3d 292, 297 (Tex. Crim. App. 2010)(Article 64.03 requirement that convicted person establish "by a preponderance of the evidence that 'the person would not have been convicted if exculpatory results had been obtained through DNA testing....'" means that a defendant must establish a greater than 50% percent chance that he would not have been convicted if DNA testing revealed exculpatory results).

Reviewed in their totality, the trial court's January, 2013 findings actually addressed two issues: an Article 64.04 determination regarding the favorability of the appellant's post-conviction DNA testing and an examination of the propriety of HPD forensic chemist Joseph Chu's serology analysis and related trial testimony. The final page of the trial court's findings, which the appellant cites in support of the instant argument, reflects the trial court's application of an actual innocence standard to assess the impact of serology evidence presented by the parties during the Chapter 64 proceedings. *See Ex parte Brown,* 205 S.W.3d 538, 546 (Tex. Crim. App. 2006)(in assessing "actual innocence" claims, the trial judge "assesses

the witnesses' credibility, examines the 'newly discovered evidence,' and determines whether that 'new' evidence, when balanced against the 'old' inculpatory evidence, unquestionably establishes the applicant's innocence."); *Ex parte Elizondo,* 947 S.W.2d 202, 206 (Tex. Crim. App. 1994)("in evaluating a habeas claim that newly discovered or available evidence proves the applicant to be innocent of the crime for which he was convicted, our task is to assess the probable impact of the newly available evidence upon the persuasiveness of the State's case as a whole, we must necessarily weigh such exculpatory evidence against the evidence of guilt adduced at trial."); *see also Ex parte Thompson*, 153 S.W.3d 416, 428 (Tex. Crim. App. 2005)(Cochran, J., concurring)("Before an applicant could meet this [actual innocence] legal standard, he must show that the 'new' evidence satisfactorily rebuts or nullifies all of the State's primary inculpatory evidence from the 'old' trial"). The trial court found that the serology testimony and affidavits presented by the parties, which established that the appellant could not be excluded as a contributor to the blood detected on the complainant's fingernails, did not establish the appellant's innocence (I C.R. at 14).

Even assuming that the trial court did not apply the correct standard in its Article 64.04 determination, the trial court properly found that the DNA test results were not favorable to the appellant. During Chapter 64 proceedings, the only DNA testing result of any arguable significance concerned extracts from two of the

complainant's left hand fingernail clippings, items 1-5 and 1-6. The extracts were analyzed for male specific short tandem repeats, and it was determined that the YSTR DNA genetic profile obtained from the combined DNA extracts (items 1-5 and 1-6) was a mixture of at least two individuals that was weak and incomplete. In addition to the appellant, the complainant's grandsons were excluded as contributors to the detected genetic profile (III Jan. 16, 2009 R.R - *State's DNA Ex. 5 and 6 - September 28, 2006 and April 3, 2007 SERI reports, respectively*).

DNA test results establishing that the appellant's DNA was not on the complainant's fingernail scrapings do not warrant a favorability finding for several reasons. First, the trial evidence did not establish that the complainant was able to hit or scratch her assailant with her fingernails as she was attacked; accordingly, there is no evidence to support the appellant's theory that the complainant reacted to her assailant in a manner to facilitate the deposit of the attacker's DNA on the complainant's fingernails. The complainant was a seventy-two year old woman who weighed approximately seventy-two pounds at the time of her death (XXVII S.F. at 17). The assistant medical examiner who conducted the complainant's autopsy described the complainant as frail, weak and undernourished (XXVII S.F. at 19-20). Additionally, the complainant suffered from shortness of breath due to bronchitis; she had difficulty walking and spent most of her time in bed; and, she had to be assisted to the bathroom and with dressing (XXVII S.F. at 79-80, 146;

XXVIII S.F. at 281-2; *State's Trial Ex. 2, 3, 6, 8, 9, 10, 10A, 40, 49 - photos of the complainant*).

On the night of her murder, the complainant sustained blunt force trauma and stab wounds to the chest and neck which perforated the complainant's heart and severed her jugular vein, carotid artery, and wind pipe (XXVII S.F. at 16-44; *State's Trial Ex. 10B, 10C, 11, 12, 50 - scene and autopsy photos).* According to the appellant's confession, he entered the complainant's house and then grabbed her from behind while holding a knife (XXVIII S.F. at 275-9; *State's Trial Ex. 98 – Appellant's Statement*). The assistant medical examiner testified at trial that it was within reasonable medical probability that the complainant initially sustained the stab wounds to her chest, fractured ribs, and a contusion to her head before the appellant severed her windpipe (XXVII S.F. at 27). It is reasonable to conclude that the appellant took the complainant by surprise and severely wounded her with his initial attack. There is no indication in the appellant's confession that the complainant struggled during the attack. Evidence at trial established that it would not have taken much energy or strength for a person the size of the appellant, who was young and at least twice the size of the complainant, to overpower the very frail and elderly complainant (XXVIII S.F. at 331-2).

Second, courts have minimized the exculpatory value of the absence of a defendant's DNA from a victim's fingernail scrapings. In *Gutierrez*, 337 S.W.3d at

886, the Court of Criminal Appeals reviewed the denial of a capital defendant's Article 64.03 motion which included a request to test the complainant's fingernail scrapings. Similar to the instant capital offense, the complainant in *Gutierrez* was an eighty-five-year-old woman who was fatally beaten and stabbed by the defendant and his co-defendants. *Id.* The defendant was friends with the complainant's nephew who lived with the complainant. *Id.* The defendant ultimately gave police a statement admitting that he was at the scene but denying any participation in the complainant's killing. *Id.* at 887. In affirming the trial court's denial of the defendant's Article 64.03 motion, the Court of Criminal Appeals discounted the value of potential post-conviction DNA testing establishing the absence of the defendant's DNA on the complainant's fingernail scrapings. The Court held that, even if DNA was found in the complainant's fingernail scrapings, there was no way of knowing whether the DNA came from one of her assailants or the extent to which the complainant struggled during the murder. *Id.* at 900-1; *see also Rivera*, 89 S.W.3d at 60 (finding that the absence of the victim's DNA from underneath the defendant's fingernails would not have supported the probability of his innocence in light of defendant's confession which was corroborated by independent evidence).

Certainly a jury can consider the presence of an innocent individual's DNA on a murder victim's fingernail scrapings insufficiently exculpatory to warrant a

verdict of not guilty. In *Swearingen v. State*, 303 S.W.3d 728, 729 (Tex. Crim. App. 2010), the jury sentenced a capital defendant to death despite evidence presented at trial establishing the existence of a full male DNA profile on the complainant's fingernail scrapings that did not match the defendant's DNA. The defendant in *Swearingen* murdered a female complainant by strangling her with pantyhose during an aggravated sexual assault, kidnapping or attempted kidnapping and left her body in a forest where it was found approximately three weeks later. *Id.* at 731; *see also Prible v. State*, 245 S.W.3d 466, 470 (Tex. Crim. App. 2008)("without more, the presence of another person's DNA at the crime scene would not constitute affirmative evidence of the appellant's innocence" requiring relief under Chapter 64); *Bell v. State*, 90 S.W.3d 301, 306 (Tex. Crim. App. 2002)(holding that evidence of another's DNA, if found on hair, cigarette butt, and blood stained bath mat collected from crime scene, does not constitute affirmative exculpatory evidence).

Notwithstanding the instant post-conviction DNA test results, it is reasonably probable that the appellant would have been prosecuted or convicted for the primary offense. *See Raby*, No. AP-74-930, slip op. at 2 (Hervey, J., dissenting)(asserting that the appellant was not entitled to post-conviction DNA testing because, even with exculpatory DNA results, the evidence overwhelmingly demonstrates the defendant's guilt for the instant offense). During a suppression

hearing, the appellant conceded that his confession regarding the primary offense, where he admitted entering the complainant's house and then attacking her while holding a knife, was truthful and voluntary (XXV S.F. at 82-3; *State's Ex. 98 – Appellant's Statement*). In addition to the appellant's admissions, there was strong circumstantial evidence of the appellant's guilt. The appellant knew the complainant and was familiar with her home (XXVII S.F. at 65). The complainant's grandsons had been friends with the appellant for several years before the instant offense and often snuck the appellant him into the complainant's house through a bedroom window, including the bedroom window with a screen damaged on the night of the offense (XXVII S.F. at 65-6, 90-1, 113-116, 132, 161-3). When the appellant stopped at Shirley Gunn's residence on the evening that the complainant was killed, he asked whether her son and another man might be at the complainant's house, indicating that the appellant considered going to the complainant's house (XXVIII S.F. at 287-297).

Further, witnesses saw the appellant in the vicinity of the complainant's residence at the time of her murder. The complainant's daughter spoke to the complainant on the telephone from approximately 6:20 p.m. until 6:45 p.m. on October 15, 1992 (XXVIII S.F. at 280-1). Mary Alice Scott, who lived approximately 200 feet from the complainant's house, saw the appellant between 7:00 to 7:45 p.m. on the evening of the instant offense walking from her driveway

into the street. At around 8:00 p.m., Martin Doyle saw a white male of similar build and height as the appellant walk from the rear of Leo Truitt's property, which was located directly behind the complainant's house, jump Truitt's fence, and then gain access to the street (XXVIII S.F. at 313-321). Finally, the appellant fleeing from his girlfriend's house upon learning that the police wanted to talk to him about the complainant's murder indicated his culpability (XXVIII S.F. at 326-7).

Several details of the appellant's confession were corroborated by witness testimony. According to the appellant's confession, he carried a pocket knife on the evening of the primary offense (XXVIII S.F. at 275-9; *State's Trial Ex. 98 – Appellant's Statement*). Shirley Gunn saw the appellant that evening and testified that he carried a pocket knife with a two to three inch long blade (XXVIII S.F. at 292-4). The assistant medical examiner's trial testimony regarding the instrument that caused the complainant's wounds was consistent with the appellant's knife. Specifically, the assistant medical examiner testified that the complainant's stab wounds were inflicted by a knife with a sharp and blunt end, and the depth of the complainant's stab wounds were consistent with a two inch knife blade (XXVII R.R. at 35-6). Also, in his confession, the appellant stated that he was wearing a black jacket and drank beer, whiskey and then a bottle of wine before he went to the complainant's house (XXVIII S.F. at 275-9; *State's Trial Ex. 98 – Appellant's Statement*). Consistent with the appellant's confession, Shirley Gunn testified that

the appellant was wearing a jacket when he came to her house, and she smelled whiskey on the appellant's breath (XXVIII R.R. at 275-9, 292-4; *State's Trial Ex. 98 – Appellant's Statement*). Mary Alice Scott corroborated the appellant's description of the clothes he wore on the evening of the primary offense, stating that the appellant had on jeans and a dark jacket (XXVIII R.R. at 309). In his confession, the appellant stated that a man approached him after he left the complainant's house, and the man said that he did not want to catch the appellant in his yard jumping fences (XXVIII S.F. at 275-9; *State's Trial Ex. 98 – Appellant's Statement*). Additionally, the appellant woke up later that evening near the Hardy Toll Road which is located east of the crime scene (XXVIII S.F. at 275-9; *State's Trial Ex. 98 – Appellant's Statement*). Martin Doyle corroborated the appellant's statements concerning events and his movements following the primary offense. Doyle testified that he saw a white man of similar build to the appellant, walk through Leo Truitt's yard, jump the fence, and walk onto the road in a eastward direction which would have placed the appellant in the location of the Hardy Toll Road (XXVIII S.F. at 314, 318). Further, Doyle stated that Truitt approached the man and asked him what he was doing going through his yard which was consistent with the appellant's recitation of events (XXVIII S.F. at 320).

Based on the foregoing, the trial court did not apply an incorrect legal standard in finding that the Chapter 64 DNA testing results were not favorable to

the appellant. Further, the trial court did not err in finding that the results of the post-conviction DNA testing were not favorable to the appellant.

The appellant's first point of error is meritless and should be overruled.

REPLY TO POINT OF ERROR TWO

Based on the DNA and serology evidence presented during the Chapter 64 proceedings, the appellant contends that the trial court "erred in holding that no juror would harbor a reasonable doubt in this or any case" involving a confession and a messy house. *Appellant's brief at 38.* The appellant argues that the trial court mistakenly focused on the appellant's confession and the condition of the crime scene in its finding of non-favorability. Further, the appellant argues that the unusual occurrence of foreign DNA on the complainant's fingernails was probative as to the assailant's identity.

The appellant's second point of error is without merit. A review of the trial court's findings reveal that the court only once referenced the condition of the murder scene in its Article 64.04 findings, and the trial court drew no conclusions based on the cleanliness of the complainant's house. *See Finding of Fact 24* (I

C.R. at 9).[5] Further, the Court of Criminal Appeals has acknowledged the significance of a defendant's confession in reviewing a trial court's ruling for a Chapter 64 proceeding. In *Rivera*, 89 S.W.3d at 60, the Court of Criminal Appeals affirmed a trial court's decision to deny post-conviction DNA testing, holding that, even if negative test results from the complainant's rape kit and fingernail clippings supplied a weak exculpatory inference, that inference would not outweigh the defendant's confession.

The trial court considered much more than just the appellant's confession and the disarray of the murder scene in finding that the appellant's Chapter 64 DNA testing results were not favorable. Specifically, facts that the trial court considered included the following: that the appellant was familiar with the complainant and her residence; that the appellant had a recent confrontation with the complainant where she barred him from her residence; that the appellant was in the vicinity of the complainant's residence at the time of the complainant's killing; that the appellant carried a knife on the evening of the primary offense of a size consistent with the knife used to stab the complainant; that the appellant asked a witness whether her son and another man might be at the complainant's house that

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[5] In his brief, the appellant states that the trial court speculated regarding the likelihood of a resident in the complainant's house picking up DNA from a source other than the appellant because the complainant's house was messy at the time of the primary offense. *Appellant's brief at 42.* However, the appellant's recitation of the trial court's findings is misleading. The appellant is actually reciting portions of two different findings as if they were a single statement in the findings. *See Findings of Fact 24 and 39* (I C.R. at 9, 13).

evening; and, that the appellant fled when he learned that the police wanted to question him regarding the complainant's murder. *Trial Court's Findings 24 and 34* (I C.R. at 8, 13). Additionally, the trial court considered evidence that corroborated details of the appellant's confession, such as the testimony of the assistant medical examiner, Shirley Gunn, Mary Alice Scott and Martin Doyle. *Trial Court's Finding 36* (I C.R. at 13).

Contrary to the appellant's argument, the Court of Criminal Appeals, in reversing the trial court's initial denial of the appellant's Chapter 64 DNA testing, did not reject the trial court's consideration of the appellant's confession in determining Article 64.04 favorability. *Appellant's brief at 39*. Rather, the issue before the Court of Criminal Appeals on consideration of the trial court's denial of the appellant's Chapter 64 motion was whether the appellant's confession prevented him from establishing the issue of identity when the appellant had conceded that his confession was truthful and voluntary. *Raby*, No. AP-74,930, slip op. at 6.

Again citing the Court of Criminal Appeals' decision reversing the trial court's original denial of Chapter 64 DNA testing, the appellant argues that the trial court's reliance on the appellant's confession in entering a nonfavorability finding is precluded by inconsistencies between the appellant's confession and the other evidence. *But see Raby*, No. AP-74-930, slip op. at 20-1 (Hervey, J., dissenting)(noting

that totality of evidence presented "strong circumstantial case"). Specifically, the appellant contends that, inconsistent with the scene evidence, the appellant did not admit to entering the complainant's house through a window, stabbing the complainant, or wiping his hands at the scene. Contrary to the instant argument, the appellant's confession is self-serving and replete with mitigating statements – not surprising given that the appellant faced a capital murder charge. The appellant's omission of details from his confession does not make the statement any less reliable.

Further, in emphasizing inconsistencies in the appellant's confession and evidence, the appellant ignores inculpatory statements from his confession and the suppression hearing. The appellant asserted in his confession that he "decided to tell the truth and get this over with" (XXVIII S.F. at 275-9; *State's Trial Ex. 98 - Appellant's Statement)*. The appellant testified in his suppression hearing that his confession was true and given voluntarily (XXV S.F. at 82-3). In addition to an admission that he was present at the scene, the appellant essentially admitted that he killed the complainant with the following statements in his confession: that he grabbed the complainant from behind while holding a knife; that he was on the floor with the complainant, and the complainant was covered in blood; and, that the appellant knew that he killed the complainant and remembered being at the complainant's house, struggling with the complainant, and seeing the complainant

covered with blood when he left the complainant's house (XXVIII S.F. at 275-9; *State's Trial Ex. 98 – Appellant's Statement)*. Finally, the appellant's argument that his admission regarding cleaning his hands in a puddle after the killing was inconsistent with the scene evidence is not persuasive. Likely, the appellant cleaned himself twice, once at the scene and then in a puddle, and then omitted the gruesome detail of the first cleaning from his confession.

Finally, the appellant's argument that the trial court erred in not entering a favorability finding based on the rare occurrence of finding foreign DNA underneath fingernails is meritless. *Appellant's brief at 45.* The appellant cites scientific studies regarding the incidents of foreign DNA on fingernails through intimate and violent contact. *Appellant's Brief at 48-50.* The trial court considered the appellant's scientific studies in determining favorability. However, the testimony of the appellant's DNA expert at the Chapter 64 hearing undercut the significance of such studies. Dr. Johnson merely described the DNA testing results as "informative" or "potentially probative" in identifying the complainant's assailant (I Jan. 16, 2009 R.R. at 50-1, 87). Additionally, Dr. Johnson conceded that the male DNA on the complainant's fingernail clippings could have been deposited in a number of ways, including through contact with other male individuals who entered the complainant's house (I Jan. 16, 2009 R.R. at 80-1, 113). Evidence was presented at trial that other males who were friends with the

complainant's grandsons, including James Parks or "Crawdad," James Jordan, and John Phillips, gathered at the complainant's house on many occasions prior to the complainant's death (XXVII S.F. at 128-9, 133; XXVIII S.F. at 289). Dr. Johnson also admitted that there was no indication of when or how the low levels of DNA on the complainant's fingernails were deposited, and there were other possible sources for the male DNA than the complainant's assailant (I Jan. 16, 2009 at 80-1, 94). In short, Dr. Johnson was unable to conclude that the presence of weak and incomplete male DNA on two of the complainant's fingernails was sufficiently probative to warrant an Article 64.04 favorability finding.

Based on the foregoing, the appellant's second point of error is meritless and should be overruled.

REPLY TO POINT OF ERROR THREE

Finally, the appellant contends that the trial court erred in excluding evidence during the January 16, 2009 Article 64.04 evidentiary hearing. *Appellant's brief at 52.* The appellant complains that the trial court improperly excluded the testimony of pathologist Paul Radelat, M.D., the complainant's grandson Eric Benge, trial counsel Felix Cantu, and HPD chemist Joseph Chu as well as a portion of an affidavit submitted by the appellant's DNA expert, Dr. Johnson, relating to the analysis of serology evidence.

The appellant called Dr. Radelet as a witness at the January 16, 2009 Article 64.04 hearing. Dr. Radelat was not present and had no role in the complainant's autopsy or the scientific analysis of evidence relating to the appellant's case, including DNA testing. Dr. Radelat's proffered testimony concerned the following: the protocol for clipping the complainant's fingernails during her autopsy; whether there was a struggle between the complainant and her assailant; and the murder weapon (I Jan. 16, 2009 R.R. at 17-18). When Dr. Radelat began to testify regarding securing evidence at the scene, the State objected, and the appellant explained that Dr. Radelat intended to address the possible contamination of evidence (I Jan. 16, 2009 R.R. at 24). The trial court stated that the hearing was confined to the DNA testing results, and appellant's counsel could submit an affidavit from Dr. Radelat. Based on the trial court's ruling, counsel for the appellant then dismissed several witnesses, including Felix Cantu, Eric Benge, and Merry Welkin (I Jan. 16, 2009 R.R. at 46). Dr. Johnson testified during the Article 64.04 hearing regarding the results of post-conviction DNA testing. In the instant point of error, the appellant attacks the trial court's alleged exclusion of a portion of Dr. Johnson's affidavit relating to HPD chemist Chu's serology analysis (I Supp. C.R. at 153).

Following the Article 64.04 hearing, the appellant did not submit an additional affidavit from Dr. Radelat, electing to rely on his 2002 and 2008

affidavits previously filed with the appellant's Chapter 64 pleadings which offered the following opinions: that the complainant was not sexually assaulted; that the complainant was attacked from behind; that the complainant injured her assailant; that the complainant's blood fell onto the skin and clothing of her attacker; and, that the clippers used to collect the complainant's fingernail clippings were probably clean (I Supp. C.R. at 156-8, 163-5).

Also included in the appellant's Chapter 64 pleadings were the affidavits of Merry Wilkin and Felix Cantu. Merry Wilkin, the appellant's former girlfriend, testified at the appellant's capital murder trial and submitted an affidavit in 2002 discussing her trial testimony, the appellant's arrest and confession, and Wilkin's contact with trial counsel Felix Cantu (I Supp. C.R. at 212-8). The appellant's trial counsel, Felix Cantu, submitted an affidavit in 2009 regarding HPD chemist Chu's trial testimony, the police offense report supplement that Cantu reviewed relating to blood typing analysis, and information provided to him by habeas counsel (II Supp. C.R. at 495-6).

On March 25, 2009, habeas counsel submitted letters/offers of proof to the trial court outlining the anticipated testimony of HPD chemist Chu and Eric Benge, the complainant's grandson who lived with the complainant at the time of her death (II Supp. C.R. at 498-502). According to the offer of proof for Chu, he would have testified regarding the HPD Crime Lab documents that were provided to trial

counsel, his testimony at trial and whether his field of expertise included blood typing analysis (II Supp. C.R. at 498-9). According to the offer of proof for Benge, he would have testified regarding the appellant's confrontation with the complainant before her murder; that Benge had never seen the appellant use the front bedroom window to enter the complainant's house; and, that Benge told his girlfriend that he thought that the complainant's killer was someone who he owed money or a junkie (II Supp. C.R. at 501-2).

Subsequently, the State submitted affidavits for both Chu and Benge. In his March 31, 2009 affidavit, Chu stated that appellant's March 25, 2009 offer of proof did not accurately report Chu's anticipated testimony (III Supp. C.R. at 665). Similarly, Benge stated in his March 31, 2009 affidavit that the March 25, 2009 offer of proof did not accurately report Benge's anticipated testimony at the Article 64.04 hearing.[6]

Notwithstanding the appellant's claim, the instant point of error is without merit. The Court of Criminal Appeals has held that Chapter 64 authorizes the convicting court to order DNA testing and no more, expanding the jurisdiction of the trial court but only to the extent prescribed by statute. *See Wolfe v. State*, 120 S.W.3d 368, 372 (Tex. Crim. App. 2003)(holding that defendant's motion for appointment of independent expert to review results of post-conviction DNA

[6] The Harris County District Clerk's Office recently supplemented the record with Benge's March 31, 2009 affidavit.

testing was not within scope of Chapter 64, and trial court's refusal to appoint expert was not appealable); *State v. Patrick*, 86 S.W.3d 592, 594 (Tex. Crim. App. 2002)(once defendant's conviction was affirmed and the mandate issued, convicting court did not have jurisdiction to order forensic DNA testing of spermatozoa samples at defendant's expense once it was determined that defendant failed to meet Chapter 64 requirements to DNA testing at State expense). Under the effective version of Article 64.04, the trial court was tasked with determining whether the results of the appellant's post-conviction DNA testing were favorable to the appellant. DNA testing results are favorable "if, had the results been available before or during the trial of the offense, it is reasonably probable that the person would not have been prosecuted or convicted." *Raby*, No. AP-74,930, slip op. at 13 n.19; Acts 2001, 77th Leg., R.S., ch. 2, 2001 Tex. Gen. Laws 2 (amended 2003)(current version at TEX. CODE CRIM. PROC. ANN. art. 64.01 – 64.05 (West Supp. 2004)).

Contrary to the appellant's argument, an Article 64.04 hearing is not an invitation to a convicted defendant to present evidence that is more properly considered in a post-conviction habeas proceeding. *See State v. Holloway*, 360 S.W.3d 480, 484 (Tex. Crim. App. 2012)(at an Article 64.04 hearing, the convicting court must make a finding regarding "whether, had the results been available during the trial of the offense, it is reasonably probable that the person

would not have been convicted[,]" assuming that the jury or the judge presiding over the plea or court trial had known of the exculpatory evidence at the time of verdict). The inquiry is limited to a determination of a specific issue – the favorability of the post-conviction DNA testing results. *See Patrick*, 86 S.W.3d at 595 (if requirements for Chapter 64 DNA testing were satisfied and testing conducted, trial court might "legitimately order the appearance of witnesses involved in the testing process, if such appearance was deemed necessary for the trial court to make findings under Article 64.04"); *see also Kutzner v. State*, 75 S.W.3d 427, 439 (Tex. Crim. App. 2002)(Article 64.03(a)(2)(A) and its legislative history did not contemplate consideration of defendant's new post-trial information supporting theory that the complainant's husband was her assailant rather than the defendant).[7] The trial court did not abuse its discretion in excluding Dr. Radelat's testimony at the Article 64.04 hearing because his proposed testimony was not relevant to the trial court's determination of the favorability of post-conviction DNA testing results. TEX. R. EVID. 401; *Shuffield v. State*, 189 S.W.3d 782, 793 (Tex. Crim. App. 2006)(appellate court reviews trial court's decision to admit or exclude evidence under an abuse of discretion standard).

[7] In response to *Kutzner*, the Legislature amended and clarified Article 64.03. *See Smith v. State*, 165 S.W.3d 361, 363-5 (Tex. Crim. App. 2005)(recognized that *Kutzner* superseded by statute and holding that convicted person must prove that, had the results of the DNA test been available at trial, there is a 51% chance that he would not have been convicted).

Even assuming that the trial court erred in excluding testimony during the Article 64.04 hearing, any alleged error did not harm the appellant. While the trial court excluded Dr. Radelat's live testimony at the Article 64.04 hearing, the appellant was not prohibited from offering affidavits and other evidence supporting a finding of favorability regarding the appellant's post-conviction DNA testing. Chapter 64 and relevant caselaw do not preclude the presentation of evidence via affidavit. *See Rivera*, 89 S.W.3d at 59 (noting that Legislature provided for a hearing on the favorability of post-conviction DNA testing results because a convicted person would not have prior access to test results generated under Article 64.04 and in order to give the parties a forum to submit evidentiary matters relating to the test results). Specifically, the trial court instructed the appellant that she would allow counsel to submit Dr. Radelat's alleged testimony via affidavit. In the instant proceeding, the appellant submitted the affidavits of Dr. Radelat, Merry Wilkin, Felix Cantu, and Dr. Johnson, as well as other evidence for the trial court to consider in determining favorability of the applicant's post-conviction DNA testing results. While the trial court may have considered some evidence more persuasive than other evidence, the trial court's amended findings clearly reflect that the court considered the appellant's affidavit evidence as well as the appellant's briefing and other exhibits in determining favorability (I C.R. at 2).

Based on the foregoing, the appellant's third point of error is meritless and should be overruled.

CONCLUSION

It is respectfully submitted that the Court of Criminal Appeals should find meritless the appellant's points of error and uphold the trial court's Article 64.04 finding of nonfavorability.

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The undersigned attorney certifies that this computer-generated document has a word count of 10,268 words, based upon the representation provided by the word processing program that was used to create the document.

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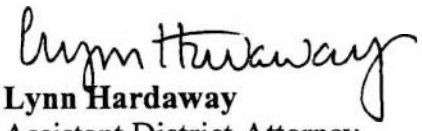

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No. AP-76,970

In the
Court of Criminal Appeals of Texas
At Austin

No. 9407130
In the 248th District Court
Of Harris County, Texas

CHARLES D. RABY
Appellant
V.
THE STATE OF TEXAS
Appellee

STATE'S MOTION TO PUBLISH

TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

COMES NOW THE STATE OF TEXAS, by and through the undersigned Assistant District Attorney, in accordance with Rules 10.1(a) and 47.2(b) of the Texas Rules of Appellate Procedure, and files this motion to publish, and, in support thereof, presents the following:

1. In the 248th District Court of Harris County, Texas, cause number 9407130, the appellant was convicted of capital murder in *The State of Texas v. Charles D. Raby.*

2. Based on the jury's answers to the special issues, the trial court sentenced the appellant to death.

3. On March 4, 1998, the Court of Criminal Appeals affirmed the appellant's capital murder conviction. *Raby v. State*, 970 S.W.2d 1 (Tex. Crim. App. 1998).

4. On January 31, 2001, the Court of Criminal Appeals denied relief on the appellant's initial state habeas petition, cause number 9407130-A, adopting the trial court's findings of fact and conclusions of law. *Ex parte Raby*, No. 58,131-01 (Tex. Crim. App. Jan. 31, 2001)(not designated for publication).

5. On June 29, 2005, the Court of Criminal Appeals overruled the trial court's denial of the appellant's Chapter 64 motion for DNA testing on appeal, granting the motion as to specific items of evidence. *Raby v. State*, No. AP-74,930 (Tex. Crim. App. June 29, 2005)(not designated for publication).

6. On January 11, 2013, the trial court entered findings concluding that the results of the Chapter 64 DNA testing were not favorable to the appellant.

7. On April 22, 2015, in an unpublished opinion, the Court of Criminal Appeals overruled the appellant's points of error and affirmed the trial court's findings that the results of the post-conviction DNA testing were not favorable to the appellant. *Raby v. State*, No. AP-76,970 (Tex. Crim. App. Apr. 22, 2015)(not designated for publication).

8. The State respectfully requests that the Court of Criminal Appeals' April 22, 2015 opinion be published under Rule 47.4 of the Texas Rules of Appellate Procedure. If published, this Court's opinion would provide crucial guidance for Texas courts in examining and determining the favorability of Chapter 64 post-conviction DNA testing results.

WHEREFORE, the State respectfully prays that the Court of Criminal Appeals grant the foregoing motion to publish the April 22, 2015 opinion in the instant case, and will publish the opinion in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been mailed to Sarah M. Frazier, appellant's attorney of record, at the following address on April 25, 2015:

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