Cause No. 9407130

STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
CHARLES DOUGLAS RABY	§	248TH JUDICIAL DISTRICT

COURT AMENDED FINDINGS

FINDINGS OF FACT PURSUANT TO ARTICLE 64.04 OF THE TEXAS CODE OF CRIMINAL PROCEDURE

This is a post-conviction capital case in which Petitioner Charles D. Raby was granted forensic DNA testing under Chapter 64 of the Texas Code of Criminal Procedure. As all pending DNA testing is now complete, this Court held an evidentiary hearing on January 16, 2009. Final arguments were heard on _____, 2009. Having heard arguments, read the parties' briefing, affidavit evidence, and other exhibits, reviewed the trial transcript, and considered the testimony of experts, including forensic DNA experts interpreting the DNA test results that have been obtained, this Court has concluded that the results are not favorable to Petitioner, and that had the DNA test results obtained under Chapter 64 been available in 1994, it is reasonably probable that Raby would have been prosecuted or convicted.

Standard under Article 64.04

1. 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.

Procedural History

1. On March 24, 1994, the defendant, Charles Douglas Raby, was indicted for the 1992 capital murder, cause number 9407130, of complainant Edna Mae Franklin (I Ct.R. at 5). The indictment alleged that the defendant 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 Ct.R. at 5).

2. On June 9, 1994, the defendant was found guilty of capital murder (IB Ct.R. 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 Ct.R. at – 525-37). Punishment was assessed at death by lethal injection in accordance with the jury's responses to the special issues (IB Ct.R. at 557-8).

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

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

5. On January 31, 2001, the Court of Criminal Appeals denied relief on the defendant'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).

6. On November 27, 2002, the United States District Court for the Southern District of Texas – Houston Division, dismissed all claims in the defendant's federal habeas petition. The federal district court also denied the defendant certificate of appealability (COA). *Raby v. Cockrell*, No. H-02-0349 (D.C. Tex. Nov. 27, 2002)(not designated for publication).

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

8. In 2002, the trial court denied the defendant's motion requesting post-conviction DNA testing.

9. On appeal from denial of Chapter 64 relief, the Court of Criminal Appeals granted DNA testing as to three items: (1) underwear, (2) fingernail clippings, and (3) shirt. *Raby v. State*, No. AP-74-930 (Tex. Crim. App. June 29, 2005)(not designated for publication).

10. The Court finds that the complainant's shirt, as referenced in the defendant's motion for post-conviction DNA testing, was not admitted into evidence at trial and attempts to locate the shirt for purposes of post-conviction DNA testing were unsuccessful. (Transcript of March 10, 2006 DNA hearing.)

11. 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 victim; 4) right and left hand fingernail clippings from victim; 5) vaginal, rectal, and oral swab pieces from victim; 6) defendant's blood sample; 7) blue/green panties from scene; and 8) pubic hair

from victim. (Transcript of Jan. 16, 2009 DNA Hearing at 31"22-32:1 here there after "Jan. T.")

12. 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 defendant'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.

(Jan. T. *State's Ex. 1, March 8, 2006 DPS Report).*[1]

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 victim's profile with no interpretable DNA profiles obtained from the carpet cutting (I Jan. 16, 2009 - *State's Ex. 2 and 3, April 4 and August 15, 2006 DPS reports*). The DNA testing did not reveal any mail DNA profiles (Jan. T. at 35:21-22).

13. At the defendant'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, and testing yielded the following results:

- quantitation results for human DNA were inconclusive in items 1-5 and 1-6; **24** The cellular components were then concentrated and quantified by

[1] "R.R." denotes the statement of facts from the defendant's capital murder trial; "Jan. 16, 2009" denotes the post-conviction DNA hearing; and, "Aug. 27, 2009" denotes the hearing concerning serology testing in the instant case.

an analyst to determine the amount of DNA in the sample. SERI used a system of quantification that quantified total human DNA and, separately, male DNA. The quantification process revealed that two of the fingernail clippings (1-5 and 1-6) from the decedent's left hand contained indications of low-level Y-chromosome DNA. (Jan. T. at 39:25–40:6).

- no male DNA detected in the right fingernail extracts (1-1, 2, 3 and 4) or from two of the fingernails extracts (1-7 and 1-8.)

- the ratio of male to female DNA for extracts 1-5 and 1-6 indicates 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.

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

14. The Court finds, based on the evidence elicited at the January 16, 2009 hearing, that the DNA detected on two of the complainant's left hand fingernail clippings may have originated from the outside of the complainant's fingernails based on the method in which the clippings were stored (I Jan. 16, 2009 at 79). STR technology is a forensic analysis that evaluates "STRs," which are specific DNA regions (loci) characterized by short repeat units. (Jan. T. at 32:8–15). STRs have become popular DNA markers because they are easily amplified by polymerase chain reaction (PCR). The PCR process increases the amount of DNA available for testing by making copies of DNA cells. (Jan. T. at 34:7–8). PCR is such a sensitive technology that DNA from very few cells can be analyzed and detected. (Jan. T. at 34:5–13). The PCR process therefore allows for more accurate DNA testing with less material. (Jan. T. at 34:2–13).

15. 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 applicant'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 excluded as contributors to the DNA profile from items 1-5 and 1-6 (I Jan. 16, 2009 - *State's Ex. 5 and 6, September 28, 2006 and April 3, 2007 SERI reports, respectively*). (Jan. T. at 48:20-25).

16. On January 16, 2009, the Court conducted a hearing regarding the results of the defendant's post-conviction DNA testing pursuant to Art. 64.04 during which Elizabeth Johnson, Ph.D. and Laura Gahn, Ph.D. testified.

17. On August 27, 2009, the Court conducted a hearing regarding the serology evidence in the instant case 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 of the Houston Police Department Crime Lab (HPD) in 1992 established that the defendant's blood type was O (XXXVIII R.R. – *State's Ex. 2;* I Aug. 27, 2009 – *State's Ex. 79*);

- the HPD Crime lab did not have a sample of the complainant's blood, and the complainant's blood type was unknown to HPD employee Joseph Chu when he performed serology testing in the instant case (I Aug. 27, 2009 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 – *State's Ex. 79*); and

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

18. Forensic serologist Patricia Hamby, M.S., reviewed Chu's serology work notes and offense report supplements in the instant case, submitted a report of her findings on May 26, 2009, and testified in the August 27, 2009 hearing regarding those findings (I Aug. 27, 2009 at 12-4; *State's Ex. 74-9*).

19. The Court finds, based on evidence elicited during the August 27, 2009 hearing, that Hamby used the terms "H" and "O" interchangeably in her report and testimony, intending that their meanings were equivalent (I Aug. 27, 2999 at 29-30).

20. Based upon her qualifications and prior experience, the Court finds credible and persuasive the findings/opinions of Patricia Hamby regarding the serology analysis performed in the instant cause, including the following regarding the analysis of the complainant's fingernail samples:

- 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;

- 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 cannot have come from the defendant who being blood type O had only H(O) activity or the complainant who had blood type B negative; and

- The A activity detected by Mr. Chu is foreign to both Charles Raby and Edna Franklin; therefore, the A activity is attributable to another unidentified source. (Aug. T. at 63:14–16, 70:19–24).

- the source for the A antigen activity detected on the right fingernail sample remains unknown;

- the defendant cannot be excluded as a contributor to the blood detected on the complainant's fingernails samples.

(I Aug. 27, 2009 at 10-1, 26, 29-39, 72; *State's Ex. 75-80*).

21. The Court finds credible and persuasive the opinion/finding of Patricia Hamby that a statement similar to the following should have been included in the police offense report: "The A and B activity detected in the right fingernail sample and the B activity detected in the left fingernail sample cannot have come from Raby, who being Blood Type O has only H(O) activity."

22. The Court finds credible and persuasive the additional opinion/finding of Patricia Hamby that, contrary to accepted practices within the forensic community, there was no statement in the police offense report that blood was not detected on the defendant's jacket or observed on the defendant's t-shirt (I Aug. 27, 2009 at 19-20).

23. The Court finds Patricia Hamby's findings/opinions regarding the serology evidence in the instant case more persuasive than those offered by Gary Harmor in his October 19, 2009 affidavit based on Hamby's familiarity with the HPD Crime Lab stemming from her participation in an independent audit of the Lab during which she reviewed the serology work performed in approximately 1000 HPD cases (I Aug. 27, 2009 at 11); *see also attached October 21, 2009 affidavit of Patricia Hamby.*

TRIAL EVIDENCE

24. The Court finds that, relevant to the instant Art. 64.04 findings, the following evidence was elicited during the defendant's capital murder trial:

- that the complainant lived in her house with her two grandsons, Eric Benge and Lee Rose, at the time of the instant offense (XXVII R.R. at 62-5, 159-160);

- that the complainant, a seventy-two year old female weighed approximately seventy-two pounds and was described as "undernourished" and "weak" at the time of her death; that the complainant was very frail and short of breath due to bronchitis; that the complainant had a lot of difficulty walking and spent most of her time in bed; and, that the complainant's grandson helped the complainant to and from the bathroom and with dressing (XXVII R.R. at 17, 79-80, 128, 146; XXVIII R.R. at 281-2; *State's Trial Ex. 2, 3, 6, 8, 9, 10, 10A, 40, 49 - photos of the complainant*);

- that the defendant was friends with the complainant's grandsons since 1989; that the defendant was in the complainant's house on quite a few occasions; and, that the defendant entered the complainant's house through two different bedroom windows on many occasions (XXVII R.R. at 65-6, 87, 128, 160-5);

- that, during a confrontation with the complainant a week before the instant offense, the complainant told the defendant to leave her house; that the complainant made it clear that she did not like the defendant, and that the defendant responded by getting mad and throwing a quart beer bottle to the ground (XXVII R.R. at 65-6, 87, 128, 160-5);

- that the complainant's house was messy or "in disarray" at the time of the instant offense, and Benge, admitted that he was a poor housekeeper (XXVII R.R. at 115, 168; *State's Trial Ex. 22, 41, 42, 43A, 59, 69 - scene photos*);

- that Edward Banks had been painting the complainant's house prior to the complainant's death (XXVII R.R. at 115, 128-9, 133, 166).

- that other males who were friends with Benge, 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 R.R. at 128-9, 133; XXVIII R.R. at 289);

- that, prior to leaving the complainant's house before 4:00 p.m., on the day of the instant offense, Benge nailed a screen onto his front bedroom window (XXVII R.R. at 90);

- that the complainant was alive when Benge and Rose left her at the house shortly before 4:00 p.m. on October 15, 1992; that the complainant followed Benge to the front of her house as he departed to lock the front door; and, that the complainant routinely locked all of the doors in her house (XXVII R.R. at 69-70, 77, 130-1);

- that the complainant's daughter, Linda McClain spoke to the complainant on the telephone from approximately 6:20 p.m. until 6:45 p.m. on the evening of the instant offense, and the complainant informed McClain that all of the doors in the complainant's house were locked (XXVIII R.R. at 280-1);

- that Benge returned at 10:00 p.m. on the evening of October 15th and discovered the complainant's body on the living room floor of her house, and Rose arrived at the scene soon after with friend John Phillips (XXVII R.R. at 67-83, 138-9; *State's Trial Ex. 10D, 43, 44, 52, 53 - scene photos*);

- that the complainant's front door and back door looking out to neighbor Leo Truitt's yard were open; that the screen to the front bedroom window was torn; and, that there was were two footprints on the bed directly under the window with the torn screen in the front bedroom (XXVII R.R. at 70, 77, 90-2, 94-8, 114)

- that the complainant had been stabbed and sustained blunt force trauma to her head; that the complainant's cause of death was multiple stab wounds to the chest and neck that perforated the complainant's heart and severed the complainant's jugular vein, carotid artery, and air pipe; and, that the stab wounds could have been inflicted by a pocketknife with a blade as

small as two inches (XXVII R.R. at 12-44; *State's Trial Ex. 10B, 10C, 11, 12, 50 - scene and autopsy photos);* and

- that it would not have taken much energy or strength of a person the size of the defendant to overpower the complainant (XXVIII R.R. at 331-2).

25. Additionally, the Court finds that the defendant 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 defendant recounted, *inter alia*, how he had been drinking beer, whiskey, and Mad Dog 20/20 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.

State's Trial Ex. 98.

26. The Court finds that the defense did not urge an exculpatory account of the instant offense at trial; that defense counsel Michael Fosher conceded in argument that there was a murder and the defendant admitted killing the complainant, but the offense did not rise to the level of capital murder because the State failed to prove that the offense was

committed in the course of robbery, aggravated sexual assault, or burglary of the complainant's home; that Fosher asked the jury to return a verdict of the lesser-included offense of murder; and, that, in his closing argument, defense counsel Felix Cantu asked the jury to conclude that the defendant killed the complainant and nothing more (XXX R.R. at 434-8, 442-4, 462).

27. On federal habeas appeal, the federal district court held that, given the defendant's testimony during the suppression hearing, the defendant's claim of a coerced and false confession failed. *Raby*, No. H-02-0349, slip op. at 7-11.

CONVICTING COURT'S AUTHORITY

28. The Court finds that TEX. CODE CRIM. PROC. art. 64.04 mandates that the convicting court examine the results of the DNA testing under Article 64.03, conduct a hearing, and then make a finding regarding the post-conviction DNA testing results.

29. The Court finds that the Court of Criminal Appeals has held that Chapter 64 of the Texas Code of Criminal Procedure 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. *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 testing was not within scope of Chapter 64).

30. The Court finds unpersuasive and not dispositive to the Court's findings under Art. 64.04 the information set forth in the applicant's proffered affidavits of defense counsel Felix Cantu, Paul Radelat, M.D., and Merry Alice Wilkin, and the offers of proof concerning Joseph Chu and Eric Benge, as these individuals were not involved in the post-conviction DNA testing process, conducted pursuant to Chapter 64. *See State v. Patrick*, 86 S.W.3d 592, 595 (Tex. Crim. App. 2002)(under explicit grant of jurisdiction to trial court pursuant to Chapter 64, trial court might legitimately order the appearance of witnesses involved in the post-conviction DNA process if such witnesses are deemed necessary for the trial court to make a finding under Art. 64.04).

31. Additionally, the Court finds unpersuasive the information set forth in the defendant's offers of proof concerning the alleged hearing testimony of Joseph Chu and Eric Benge based on their affidavits stating that the offers of proof do not accurately reflect the content of their testimony at the Art. 64.04 hearing. *See March 31, 2009 affidavits of Joseph Chu and Eric Benge.*

32. Similarly, the Court finds unpersuasive and not dispositive to the Court's Art. 64.04 determination the information set forth in the portion of Dr. Elizabeth Johnson's October 13, 2008 report labeled "Other Evidence Pertinent to Reasonable Doubt."

DNA TESTING RESULTS

33. The Court finds that Dr. Johnson concluded in her October 13, 2008 report regarding the post-conviction DNA testing conducted in the instant case, that the presence of the male profiles on the complainant's fingernails was potentially probative evidence in identifying the complainant's killer; that the post-conviction DNA testing results provided reasonable doubt for a jury considering the case; and, that the DNA testing results cast doubt on the question of whether the State convicted the right person for the instant offense. *October 13, 2008 report of Dr. Elizabeth Johnson.* Further, Dr. Johnson testified during the Art. 64.04 hearing that the results of DNA testing indicating the presence of weak and incomplete male DNA on two of the complainant's fingernails was "informative" or "potentially probative evidence" in identifying the complainant's killer (I Jan. 16, 2009 at 50-1, 87). Based on the evidence presented during the Art. 64.04 hearing, however, the Court finds that Dr. Johnson's conclusions regarding the significance of the instant post-conviction DNA testing results do not warrant a finding of favorability under Art. 64.04.

34. The Court finds that the results of post-conviction DNA testing are not favorable to the defendant based on the following evidence presented during the January 16, 2009 hearing:

- that the absence of the defendant's DNA on evidence subjected to post-conviction DNA testing did not warrant the conclusion that the defendant did not commit the instant offense (I Jan. 16, 2009 at 112);

- that there was no indication of when or how the low levels of DNA on the complainant's fingernails were deposited (I Jan. 16, 2009 at 80-1);

- Dr. Johnson's testimony that she could not definitively state that the male DNA detected on the complainant's fingernails during post-conviction testing proceedings originated from the complainant's assailant (I Jan. 16, 2009 at 93);

- that there were other possible sources for the male DNA detected on the complainant's fingernails than the complainant's assailant (I Jan. 16, 2009 at 94);

- that it was possible for an individual to obtain foreign DNA under their fingernails from daily contact (I Jan. 16, 2009 at 87);

- that the weak and incomplete male DNA on the complainant's fingernail clippings could have been deposited in a number of ways, including by the complainant's contact with various surfaces such as the floor of her house where her body was discovered or from contact with other male individuals who entered the complainant's house (I Jan. 16, 2009 at 80-1, 113);

35. The Court finds that the totality of the evidence, including the defendant's confession to the instant offense (*State's Trial Ex. 98*) and the following circumstantial evidence, present a strong case that the defendant committed the instant offense:

- the defendant's familiarity with the complainant, the complainant's home, and the defendant's prior confrontation with the complainant (XXVII R.R. at 65-6, 87, 128, 160-5);

- the trial testimony of Shirley Gunn, who lived within walking distance of the complainant, that the defendant came to her house at around 5:00 p.m. on the evening of the instant offense; that the defendant was wearing a jacket and smelled of alcohol; that the defendant used a pocketknife to clean his nails before leaving Gunn's house; and, that, before leaving Gunn's house at approximately 6:00 p.m., the defendant asked Gunn whether her son and the other man might be at "grandma's" house, meaning the complainant's house (XXVIII R.R. at 287-297);

- the trial testimony of Mary Alice Scott, who lived approximately 200 feet from the complainant's house, that she saw the defendant between 7:00 to 7:45 p.m. on the evening of the instant offense walking from her driveway into the street; that the defendant was wearing jeans and a dark jacket; and, that the jacket that the defendant was wearing on the evening of the instant offense was similar to a jacket that belonged to the defendant (XXVIII R.R. at 300-9, 326);

- the trial testimony of Martin Doyle that, at around 8:00 p.m. on the evening of the instant offense, he saw a white male of similar height and build as the defendant 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; that Doyle and Truitt drove down the street and intercepted the defendant; and, that Truitt asked the defendant what he was doing coming through his yard and then got back into his car (XXVIII R.R. at 313-321); and

- that the defendant fled from his girlfriend's home when he learned that the police wanted to question him regarding the complainant's death (XXVIII R.R. at 325).

36. The Court further finds that the trial testimony of Eric Benge, Shirley Gunn, Mary Alice Scott, and Martin Doyle corroborated several details of the defendant's confession, including that the defendant was drinking and carrying a pocket knife prior to the instant offense; the clothing that the defendant just wore prior to the instant offense; that the defendant exited from the complainant's house by the back door; and, that one of the complainant's neighbors confronted the defendant about jumping their fence after the instant offense.

37. The Court finds that the defendant cannot be excluded as a contributor to the blood detected on the complainant's fingernails. Accordingly, such evidence does not warrant a finding of favorability pursuant to Article 64.04. Moreover, such evidence, in addition to the inculpatory evidence elicited at trial, does not unquestionably establish the defendant's innocence. *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.").

DECISION

38. Due to typographical error the Court withdraws its December 19, 2012 findings and enters the instant amended findings of fact.

39. Respectfully, a single district judge does not have the benefit of conversations with other judges, with the give and take of exchange of ideas that a group of judges has in discussing law and fact, or with the enlightenment that a push and pull of good minds can bring. This Court must rely on its own judgment in applying the law to the facts. This Court must rely on its almost 30-years of experience with juries in criminal case. I make my findings based on seeing juries' strong reliance on confessions, especially when confessions are supported with witnesses who know the Applicant is heading to the descedent's home and witnesses who see the Applicant flee from the back of the home, in addition to photos of a home where it would not be unlikely for any dweller to pick up DNA from a source other than Applicant.

According, this Court finds that the jury would have made the same determination even with the new DNA and Serology evidence.

SIGNED the 11 day of Jan, 2013

PRESIDING JUDGE

DISTRICT COURT OF HARRIS COUNTY TEXAS

Court findings were amended due to typographical error on page 1.

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P13

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This is a post-conviction capital case in which Petitioner Charles D. Raby was granted forensic DNA testing under Chapter 64 of the Texas Code of Criminal Procedure. As all pending DNA testing is now complete, this Court held an evidentiary hearing on January 16, 2009. Final arguments were heard on _____, 2009. Having heard arguments, read the parties' briefing, affidavit evidence, and other exhibits, reviewed the trial transcript, and considered the testimony of experts, including forensic DNA experts interpreting the DNA test results that have been obtained, this Court has concluded that the results are favorable to Petitioner, and that had the DNA test results obtained under Chapter 64 been available in 1994, it is reasonably probable that Raby would not have been prosecuted or convicted.

Standard under Article 64.04

1. 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.

Procedural History

1. On March 24, 1994, the defendant, Charles Douglas Raby, was indicted for the 1992 capital murder, cause number 9407130, of complainant Edna Mae Franklin (I Ct.R. at 5). The indictment alleged that the defendant 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 Ct.R. at 5).

2. On June 9, 1994, the defendant was found guilty of capital murder (I Ct.R. 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 Ct.R. at – 525-37). Punishment was assessed at death by lethal injection in accordance with the jury's responses to the special issues (IB Ct.R. at 557-8).

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

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

5. On January 31, 2001, the Court of Criminal Appeals denied relief on the defendant'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).

6. On November 27, 2002, the United States District Court for the Southern District of Texas – Houston Division, dismissed all claims in the defendant's federal habeas petition. The federal district court also denied the defendant certificate of appealability (COA). *Raby v. Cockrell*, No. H-02-0349 (D.C. Tex. Nov. 27, 2002)(not designated for publication).

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

8. In 2002, the trial court denied the defendant's motion requesting post-conviction DNA testing.

9. On appeal from denial of Chapter 64 relief, the Court of Criminal Appeals granted DNA testing as to three items: (1) underwear, (2) fingernail clippings, and (3) shirt. *Raby v. State*, No. AP-74-930 (Tex. Crim. App. June 29, 2005)(not designated for publication).

10. The Court finds that the complainant's shirt, as referenced in the defendant's motion for post-conviction DNA testing, was not admitted into evidence at trial and attempts to locate the shirt for purposes of post-conviction DNA testing were unsuccessful. (Transcript of March 10, 2006 DNA hearing.)

11. 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 victim; 4) right and left hand fingernail clippings from victim; 5) vaginal, rectal, and oral swab pieces from victim; 6) defendant's blood sample; 7) blue/green panties from scene; and 8) pubic hair from victim. (Transcript of Jan. 16, 2009 DNA Hearing at 31"22-32:1 here there after "Jan. T.")

12. 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 defendant'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.

(Jan. T. *State's Ex. 1, March 8, 2006 DPS Report).*[1]

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 victim's profile with no interpretable DNA profiles obtained from the carpet cutting (I Jan. 16, 2009 - *State's Ex. 2 and 3, April 4 and August 15, 2006 DPS reports*). The DNA testing did not reveal any mail DNA profiles (Jan. T. at 35:21-22).

13. At the defendant'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, and testing yielded the following results:

- quantitation results for human DNA were inconclusive in items 1-5 and 1-6; **24** The cellular components were then concentrated and quantified by an analyst to determine the amount of DNA in the sample. SERI used a system of quantification that quantified total human DNA and, separately, male DNA. The quantification process revealed that two of the fingernail

[1] "R.R." denotes the statement of facts from the defendant's capital murder trial; "Jan. 16, 2009" denotes the post-conviction DNA hearing; and, "Aug. 27, 2009" denotes the hearing concerning serology testing in the instant case.

clippings (1-5 and 1-6) from the decedent's left hand contained indications of low-level Y-chromosome DNA. (Jan. T. at 39:25–40:6).

- no male DNA detected in the right fingernail extracts (1-1, 2, 3 and 4) or from two of the fingernails extracts (1-7 and 1-8.)

- the ratio of male to female DNA for extracts 1-5 and 1-6 indicates 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.

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

14. The Court finds, based on the evidence elicited at the January 16, 2009 hearing, that the DNA detected on two of the complainant's left hand fingernail clippings may have originated from the outside of the complainant's fingernails based on the method in which the clippings were stored (I Jan. 16, 2009 at 79). STR technology is a forensic analysis that evaluates "STRs," which are specific DNA regions (loci) characterized by short repeat units. (Jan. T. at 32:8–15). STRs have become popular DNA markers because they are easily amplified by polymerase chain reaction (PCR). The PCR process increases the amount of DNA available for testing by making copies of DNA cells. (Jan. T. at 34:7–8). PCR is such a sensitive technology that DNA from very few cells can be analyzed and detected. (Jan. T. at 34:5–13). The PCR process therefore allows for more accurate DNA testing with less material. (Jan. T. at 34:2–13).

15. 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 applicant'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 excluded as contributors to the DNA profile from items 1-5 and 1-6 (I Jan. 16, 2009 - *State's Ex. 5 and 6, September 28, 2006 and April 3, 2007 SERI reports, respectively*). (Jan. T. at 48:20-25).

16. On January 16, 2009, the Court conducted a hearing regarding the results of the defendant's post-conviction DNA testing pursuant to Art. 64.04 during which Elizabeth Johnson, Ph.D. and Laura Gahn, Ph.D. testified.

17. On August 27, 2009, the Court conducted a hearing regarding the serology evidence in the instant case 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 of the Houston Police Department Crime Lab (HPD) in 1992 established that the defendant's blood type was O (XXXVIII R.R. – *State's Ex. 2;* I Aug. 27, 2009 – *State's Ex. 79*);

- the HPD Crime lab did not have a sample of the complainant's blood, and the complainant's blood type was unknown to HPD employee Joseph Chu when he performed serology testing in the instant case (I Aug. 27, 2009 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 – *State's Ex. 79*); and

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

18. Forensic serologist Patricia Hamby, M.S., reviewed Chu's serology work notes and offense report supplements in the instant case, submitted a report of her findings on May 26, 2009, and testified in the August 27, 2009 hearing regarding those findings (I Aug. 27, 2009 at 12-4; *State's Ex. 74-9*).

19. The Court finds, based on evidence elicited during the August 27, 2009 hearing, that Hamby used the terms "H" and "O" interchangeably in her report and testimony, intending that their meanings were equivalent (I Aug. 27, 2999 at 29-30).

20. Based upon her qualifications and prior experience, the Court finds credible and persuasive the findings/opinions of Patricia Hamby regarding the serology analysis performed in the instant cause, including the following regarding the analysis of the complainant's fingernail samples:

- 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;

- 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 cannot have come from the defendant who being blood type O had only H(O) activity or the complainant who had blood type B negative; and

- The A activity detected by Mr. Chu is foreign to both Charles Raby and Edna Franklin; therefore, the A activity is attributable to another unidentified source. (Aug. T. at 63:14–16, 70:19–24).

- the source for the A antigen activity detected on the right fingernail sample remains unknown;

- the defendant cannot be excluded as a contributor to the blood detected on the complainant's fingernails samples.

(I Aug. 27, 2009 at 10-1, 26, 29-39, 72; *State's Ex. 75-80*).

21. The Court finds credible and persuasive the opinion/finding of Patricia Hamby that a statement similar to the following should have been included in the police offense report: "The A and B activity detected in the right fingernail sample and the B activity detected in the left fingernail sample cannot have come from Raby, who being Blood Type O has only H(O) activity."

22. The Court finds credible and persuasive the additional opinion/finding of Patricia Hamby that, contrary to accepted practices within the forensic community, there was no statement in the police offense report that blood was not detected on the defendant's jacket or observed on the defendant's t-shirt (I Aug. 27, 2009 at 19-20).

23. The Court finds Patricia Hamby's findings/opinions regarding the serology evidence in the instant case more persuasive than those offered by Gary Harmor in his October 19, 2009 affidavit based on Hamby's familiarity with the HPD Crime Lab stemming from her participation in an independent audit of the Lab during which she reviewed the serology work performed in approximately 1000 HPD cases (I Aug. 27, 2009 at 11); *see also attached October 21, 2009 affidavit of Patricia Hamby.*

TRIAL EVIDENCE

24. The Court finds that, relevant to the instant Art. 64.04 findings, the following evidence was elicited during the defendant's capital murder trial:

- that the complainant lived in her house with her two grandsons, Eric Benge and Lee Rose, at the time of the instant offense (XXVII R.R. at 62-5, 159-160);

- that the complainant, a seventy-two year old female weighed approximately seventy-two pounds and was described as "undernourished" and "weak" at the time of her death; that the complainant was very frail and short of breath due to bronchitis; that the complainant had a lot of difficulty walking and spent most of her time in bed; and, that the complainant's grandson helped the complainant to and from the bathroom and with dressing (XXVII R.R. at 17, 79-80, 128, 146; XXVIII R.R. at 281-2; *State's Trial Ex. 2, 3, 6, 8, 9, 10, 10A, 40, 49 - photos of the complainant*);

- that the defendant was friends with the complainant's grandsons since 1989; that the defendant was in the complainant's house on quite a few occasions; and, that the defendant entered the complainant's house through two different bedroom windows on many occasions (XXVII R.R. at 65-6, 87, 128, 160-5);

- that, during a confrontation with the complainant a week before the instant offense, the complainant told the defendant to leave her house; that the complainant made it clear that she did not like the defendant, and that the defendant responded by getting mad and throwing a quart beer bottle to the ground (XXVII R.R. at 65-6, 87, 128, 160-5);

- that the complainant's house was messy or "in disarray" at the time of the instant offense, and Benge, admitted that he was a poor housekeeper (XXVII R.R. at 115, 168; *State's Trial Ex. 22, 41, 42, 43A, 59, 69 - scene photos*);

- that Edward Banks had been painting the complainant's house prior to the complainant's death (XXVII R.R. at 115, 128-9, 133, 166).

- that other males who were friends with Benge, 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 R.R. at 128-9, 133; XXVIII R.R. at 289);

- that, prior to leaving the complainant's house before 4:00 p.m., on the day of the instant offense, Benge nailed a screen onto his front bedroom window (XXVII R.R. at 90);

- that the complainant was alive when Benge and Rose left her at the house shortly before 4:00 p.m. on October 15, 1992; that the complainant followed Benge to the front of her house as he departed to lock the front door; and, that the complainant routinely locked all of the doors in her house (XXVII R.R. at 69-70, 77, 130-1);

- that the complainant's daughter, Linda McClain spoke to the complainant on the telephone from approximately 6:20 p.m. until 6:45 p.m. on the evening of the instant offense, and the complainant informed McClain that all of the doors in the complainant's house were locked (XXVIII R.R. at 280-1);

- that Benge returned at 10:00 p.m. on the evening of October 15th and discovered the complainant's body on the living room floor of her house, and Rose arrived at the scene soon after with friend John Phillips (XXVII R.R. at 67-83, 138-9; *State's Trial Ex. 10D, 43, 44, 52, 53 - scene photos*);

- that the complainant's front door and back door looking out to neighbor Leo Truitt's yard were open; that the screen to the front bedroom window was torn; and, that there was were two footprints on the bed directly under the window with the torn screen in the front bedroom (XXVII R.R. at 70, 77, 90-2, 94-8, 114)

- that the complainant had been stabbed and sustained blunt force trauma to her head; that the complainant's cause of death was multiple stab wounds to the chest and neck that perforated the complainant's heart and severed the complainant's jugular vein, carotid artery, and air pipe; and, that the stab wounds could have been inflicted by a pocketknife with a blade as small as two inches (XXVII R.R. at 12-44; *State's Trial Ex. 10B, 10C, 11, 12, 50 - scene and autopsy photos);* and

- that it would not have taken much energy or strength of a person the size of the defendant to overpower the complainant (XXVIII R.R. at 331-2).

25. Additionally, the Court finds that the defendant 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 defendant recounted, *inter alia*, how he had been drinking beer, whiskey, and Mad Dog 20/20 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.

State's Trial Ex. 98.

26. The Court finds that the defense did not urge an exculpatory account of the instant offense at trial; that defense counsel Michael Fosher conceded in argument that there was a murder and the defendant admitted killing the complainant, but the offense did not rise to the level of capital murder because the State failed to prove that the offense was committed in the course of robbery, aggravated sexual assault, or burglary of the complainant's home; that Fosher asked the jury to return a verdict of the lesser-included offense of murder; and, that, in his closing argument, defense counsel Felix Cantu asked the jury to conclude that the defendant killed the complainant and nothing more (XXX R.R. at 434-8, 442-4, 462).

27. On federal habeas appeal, the federal district court held that, given the defendant's testimony during the suppression hearing, the defendant's claim of a coerced and false confession failed. *Raby*, No. H-02-0349, slip op. at 7-11.

CONVICTING COURT'S AUTHORITY

28. The Court finds that TEX. CODE CRIM. PROC. art. 64.04 mandates that the convicting court examine the results of the DNA testing under Article 64.03, conduct a hearing, and then make a finding regarding the post-conviction DNA testing results.

29. The Court finds that the Court of Criminal Appeals has held that Chapter 64 of the Texas Code of Criminal Procedure 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. *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 testing was not within scope of Chapter 64).

30. The Court finds unpersuasive and not dispositive to the Court's findings under Art. 64.04 the information set forth in the applicant's proffered affidavits of defense counsel Felix Cantu, Paul Radelat, M.D., and Merry Alice Wilkin, and the offers of proof concerning Joseph Chu and Eric Benge, as these individuals were not involved in the post-conviction DNA testing process, conducted pursuant to Chapter 64. *See State v. Patrick*, 86 S.W.3d 592, 595 (Tex. Crim. App. 2002)(under explicit grant of jurisdiction to trial court pursuant to Chapter 64, trial court might legitimately order the appearance of witnesses involved in the post-conviction DNA process if such witnesses are deemed necessary for the trial court to make a finding under Art. 64.04).

31. Additionally, the Court finds unpersuasive the information set forth in the defendant's offers of proof concerning the alleged hearing testimony of Joseph Chu and Eric Benge based on their affidavits stating that the offers of proof do not accurately reflect the content of their testimony at the Art. 64.04 hearing. *See March 31, 2009 affidavits of Joseph Chu and Eric Benge.*

32. Similarly, the Court finds unpersuasive and not dispositive to the Court's Art. 64.04 determination the information set forth in the portion of Dr. Elizabeth Johnson's October 13, 2008 report labeled "Other Evidence Pertinent to Reasonable Doubt."

DNA TESTING RESULTS

33. The Court finds that Dr. Johnson concluded in her October 13, 2008 report regarding the post-conviction DNA testing conducted in the instant case, that the presence of the male profiles on the complainant's fingernails was potentially probative evidence in identifying the complainant's killer; that the post-conviction DNA testing results provided reasonable doubt for a jury considering the case; and, that the DNA testing results cast doubt on the question of whether the State convicted the right person for the

instant offense. *October 13, 2008 report of Dr. Elizabeth Johnson.* Further, Dr. Johnson testified during the Art. 64.04 hearing that the results of DNA testing indicating the presence of weak and incomplete male DNA on two of the complainant's fingernails was "informative" or "potentially probative evidence" in identifying the complainant's killer (I Jan. 16, 2009 at 50-1, 87). Based on the evidence presented during the Art. 64.04 hearing, however, the Court finds that Dr. Johnson's conclusions regarding the significance of the instant post-conviction DNA testing results do not warrant a finding of favorability under Art. 64.04.

34. The Court finds that the results of post-conviction DNA testing are not favorable to the defendant based on the following evidence presented during the January 16, 2009 hearing:

- that the absence of the defendant's DNA on evidence subjected to post-conviction DNA testing did not warrant the conclusion that the defendant did not commit the instant offense (I Jan. 16, 2009 at 112);
- that there was no indication of when or how the low levels of DNA on the complainant's fingernails were deposited (I Jan. 16, 2009 at 80-1);
- Dr. Johnson's testimony that she could not definitively state that the male DNA detected on the complainant's fingernails during post-conviction testing proceedings originated from the complainant's assailant (I Jan. 16, 2009 at 93);
- that there were other possible sources for the male DNA detected on the complainant's fingernails than the complainant's assailant (I Jan. 16, 2009 at 94);
- that it was possible for an individual to obtain foreign DNA under their fingernails from daily contact (I Jan. 16, 2009 at 87);
- that the weak and incomplete male DNA on the complainant's fingernail clippings could have been deposited in a number of ways, including by the complainant's contact with various surfaces such as the floor of her house where her body was discovered or from contact with other male individuals who entered the complainant's house (I Jan. 16, 2009 at 80-1, 113);

35. The Court finds that the totality of the evidence, including the defendant's confession to the instant offense (*State's Trial Ex. 98*) and the following circumstantial evidence, present a strong case that the defendant committed the instant offense:

- the defendant's familiarity with the complainant, the complainant's home, and the defendant's prior confrontation with the complainant (XXVII R.R. at 65-6, 87, 128, 160-5);

- the trial testimony of Shirley Gunn, who lived within walking distance of the complainant, that the defendant came to her house at around 5:00 p.m. on the evening of the instant offense; that the defendant was wearing a jacket and smelled of alcohol; that the defendant used a pocketknife to clean his nails before leaving Gunn's house; and, that, before leaving Gunn's house at approximately 6:00 p.m., the defendant asked Gunn whether her son and the other man might be at "grandma's" house, meaning the complainant's house (XXVIII R.R. at 287-297);

- the trial testimony of Mary Alice Scott, who lived approximately 200 feet from the complainant's house, that she saw the defendant between 7:00 to 7:45 p.m. on the evening of the instant offense walking from her driveway into the street; that the defendant was wearing jeans and a dark jacket; and, that the jacket that the defendant was wearing on the evening of the instant offense was similar to a jacket that belonged to the defendant (XXVIII R.R. at 300-9, 326);

- the trial testimony of Martin Doyle that, at around 8:00 p.m. on the evening of the instant offense, he saw a white male of similar height and build as the defendant 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; that Doyle and Truitt drove down the street and intercepted the defendant; and, that Truitt asked the defendant what he was doing coming through his yard and then got back into his car (XXVIII R.R. at 313-321); and

- that the defendant fled from his girlfriend's home when he learned that the police wanted to question him regarding the complainant's death (XXVIII R.R. at 325).

36. The Court further finds that the trial testimony of Eric Benge, Shirley Gunn, Mary Alice Scott, and Martin Doyle corroborated several details of the defendant's confession, including that the defendant was drinking and carrying a pocket knife prior to the instant offense; the clothing that the defendant just wore prior to the instant offense; that the defendant exited from the complainant's house by the back door; and, that one of the complainant's neighbors confronted the defendant about jumping their fence after the instant offense.

SEROLOGY PROCEEDINGS

37. The Court finds that the defendant cannot be excluded as a contributor to the blood detected on the complainant's fingernails. Accordingly, such evidence does not warrant a

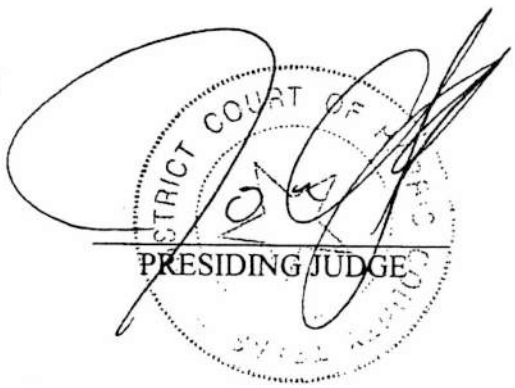
finding of favorability pursuant to Article 64.04. Moreover, such evidence, in addition to the inculpatory evidence elicited at trial, does not unquestionably establish the defendant's innocence. *See Ex parte Brown,* 205 S.W.3d 538, 546 (Tex. Crim. App. 2006)(in assessing "actual innocence" claims, 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.").

DECISION

38. Respectfully, a single district judge does not have the benefit of conversations with other judges, with the give and take of exchange of ideas that a group of judges has in discussing law and fact, or with the enlightenment that a push and pull of good minds can bring. This Court must rely on its own judgment in applying the law to the facts. This Court must rely on its almost 30-years of experience with juries in criminal case. I make my findings based on seeing juries' strong reliance on confessions, especially when confessions are supported with witnesses who know the Applicant is heading to the descedent's home and witnesses who see the Applicant flee from the back of the home, in addition to photos of a home where it would not be unlikely for any dweller to pick up DNA from a source other than Applicant.

According, this Court finds that the jury would have made the same determination even with the new DNA and Serology evidence.

SIGNED the 19th day of Dec, 2012



PRESIDING JUDGE

Cause No. 9407130

STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
CHARLES DOUGLAS RABY	§	248TH JUDICIAL DISTRICT

FINDINGS OF FACT PURSUANT TO ARTICLE 64.04 OF THE TEXAS CODE OF CRIMINAL PROCEDURE

This is a post-conviction capital case in which Petitioner Charles D. Raby was granted forensic DNA testing under Chapter 64 of the Texas Code of Criminal Procedure. As all pending DNA testing is now complete, this Court held an evidentiary hearing on January 16, 2009. Final arguments were heard on _____, 2009. Having heard arguments, read the parties' briefing, affidavit evidence, and other exhibits, reviewed the trial transcript, and considered the testimony of experts, including forensic DNA experts interpreting the DNA test results that have been obtained, this Court has concluded that the results are favorable to Petitioner, and that had the DNA test results obtained under Chapter 64 been available in 1994, it is reasonably probable that Raby would not have been prosecuted or convicted.

Standard under Article 64.04

1. 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.

Procedural History

1. On March 24, 1994, the defendant, Charles Douglas Raby, was indicted for the 1992 capital murder, cause number 9407130, of complainant Edna Mae Franklin (I Ct.R. at 5). The indictment alleged that the defendant 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 Ct.R. at 5).

2. On June 9, 1994, the defendant was found guilty of capital murder (IX Ct.R. at 557). The trial court charged the jury on the three methods of committing the instant offense as set

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forth in the indictment, and the jury returned a general verdict of guilt (IB Ct.R. at – 525-37). Punishment was assessed at death by lethal injection in accordance with the jury's responses to the special issues (IB Ct.R. at 557-8).

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

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

5. On January 31, 2001, the Court of Criminal Appeals denied relief on the defendant'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).

6. On November 27, 2002, the United States District Court for the Southern District of Texas – Houston Division, dismissed all claims in the defendant's federal habeas petition. The federal district court also denied the defendant certificate of appealability (COA). *Raby v. Cockrell*, No. H-02-0349 (D.C. Tex. Nov. 27, 2002)(not designated for publication).

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

8. In 2002, the trial court denied the defendant's motion requesting post-conviction DNA testing.

9. On appeal from denial of Chapter 64 relief, the Court of Criminal Appeals granted DNA testing as to three items: (1) underwear, (2) fingernail clippings, and (3) shirt. *Raby v. State*, No. AP-74-930 (Tex. Crim. App. June 29, 2005)(not designated for publication).

10. The Court finds that the complainant's shirt, as referenced in the defendant's motion for post-conviction DNA testing, was not admitted into evidence at trial and attempts to locate the shirt for purposes of post-conviction DNA testing were unsuccessful. (Transcript of March 10, 2006 DNA hearing.)

11. 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 victim; 4) right and left hand fingernail clippings from victim; 5) vaginal, rectal, and oral swab pieces from victim; 6) defendant's blood sample; 7) blue/green panties from scene; and 8) pubic hair from victim. (Transcript of Jan. 16, 2009 DNA Hearing at 31"22-32:1 here there after "Jan. T.")

12. 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 defendant'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.

(Jan. T. *State's Ex. 1, March 8, 2006 DPS Report).*[1]

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 victim's profile with no interpretable DNA profiles obtained from the carpet cutting (I Jan. 16, 2009 - *State's Ex. 2 and 3, April 4 and August 15, 2006 DPS reports*). The DNA testing did not reveal any mail DNA profiles (Jan. T. at 35:21-22).

13. At the defendant'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, and testing yielded the following results:

- quantitation results for human DNA were inconclusive in items 1-5 and 1-6; **24** The cellular components were then concentrated and quantified by an analyst to determine the amount of DNA in the sample. SERI used a system of quantification that quantified total human DNA and, separately, male DNA. The quantification process revealed that two of the fingernail

[1] "R.R." denotes the statement of facts from the defendant's capital murder trial; "Jan. 16, 2009" denotes the post-conviction DNA hearing; and, "Aug. 27, 2009" denotes the hearing concerning serology testing in the instant case.

clippings (1-5 and 1-6) from the decedent's left hand contained indications of low-level Y-chromosome DNA. (Jan. T. at 39:25–40:6).

- no male DNA detected in the right fingernail extracts (1-1, 2, 3 and 4) or from two of the fingernails extracts (1-7 and 1-8.)

- the ratio of male to female DNA for extracts 1-5 and 1-6 indicates 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.

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

14. The Court finds, based on the evidence elicited at the January 16, 2009 hearing, that the DNA detected on two of the complainant's left hand fingernail clippings may have originated from the outside of the complainant's fingernails based on the method in which the clippings were stored (I Jan. 16, 2009 at 79). STR technology is a forensic analysis that evaluates "STRs," which are specific DNA regions (loci) characterized by short repeat units. (Jan. T. at 32:8–15). STRs have become popular DNA markers because they are easily amplified by polymerase chain reaction (PCR). The PCR process increases the amount of DNA available for testing by making copies of DNA cells. (Jan. T. at 34:7–8). PCR is such a sensitive technology that DNA from very few cells can be analyzed and detected. (Jan. T. at 34:5–13). The PCR process therefore allows for more accurate DNA testing with less material. (Jan. T. at 34:2–13).

15. 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 applicant'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 excluded as contributors to the DNA profile from items 1-5 and 1-6 (I Jan. 16, 2009 - *State's Ex. 5 and 6, September 28, 2006 and April 3, 2007 SERI reports, respectively*). (Jan. T. at 48:20-25).

16. On January 16, 2009, the Court conducted a hearing regarding the results of the defendant's post-conviction DNA testing pursuant to Art. 64.04 during which Elizabeth Johnson, Ph.D. and Laura Gahn, Ph.D. testified.

17. On August 27, 2009, the Court conducted a hearing regarding the serology evidence in the instant case 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 of the Houston Police Department Crime Lab (HPD) in 1992 established that the defendant's blood type was O (XXXVIII R.R. – *State's Ex. 2;* I Aug. 27, 2009 – *State's Ex. 79*);

- the HPD Crime lab did not have a sample of the complainant's blood, and the complainant's blood type was unknown to HPD employee Joseph Chu when he performed serology testing in the instant case (I Aug. 27, 2009 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 – *State's Ex. 79*); and

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

18. Forensic serologist Patricia Hamby, M.S., reviewed Chu's serology work notes and offense report supplements in the instant case, submitted a report of her findings on May 26, 2009, and testified in the August 27, 2009 hearing regarding those findings (I Aug. 27, 2009 at 12-4; *State's Ex. 74-9*).

19. The Court finds, based on evidence elicited during the August 27, 2009 hearing, that Hamby used the terms "H" and "O" interchangeably in her report and testimony, intending that their meanings were equivalent (I Aug. 27, 2999 at 29-30).

20. Based upon her qualifications and prior experience, the Court finds credible and persuasive the findings/opinions of Patricia Hamby regarding the serology analysis performed in the instant cause, including the following regarding the analysis of the complainant's fingernail samples:

- 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;

- 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 cannot have come from the defendant who being blood type O had only H(O) activity or the complainant who had blood type B negative; and

- The A activity detected by Mr. Chu is foreign to both Charles Raby and Edna Franklin; therefore, the A activity is attributable to another unidentified source. (Aug. T. at 63:14–16, 70:19–24).

- the source for the A antigen activity detected on the right fingernail sample remains unknown;

- the defendant cannot be excluded as a contributor to the blood detected on the complainant's fingernails samples.

(I Aug. 27, 2009 at 10-1, 26, 29-39, 72; *State's Ex. 75-80*).

21. The Court finds credible and persuasive the opinion/finding of Patricia Hamby that a statement similar to the following should have been included in the police offense report: "The A and B activity detected in the right fingernail sample and the B activity detected in the left fingernail sample cannot have come from Raby, who being Blood Type O has only H(O) activity."

22. The Court finds credible and persuasive the additional opinion/finding of Patricia Hamby that, contrary to accepted practices within the forensic community, there was no statement in the police offense report that blood was not detected on the defendant's jacket or observed on the defendant's t-shirt (I Aug. 27, 2009 at 19-20).

23. The Court finds Patricia Hamby's findings/opinions regarding the serology evidence in the instant case more persuasive than those offered by Gary Harmor in his October 19, 2009 affidavit based on Hamby's familiarity with the HPD Crime Lab stemming from her participation in an independent audit of the Lab during which she reviewed the serology work performed in approximately 1000 HPD cases (I Aug. 27, 2009 at 11); *see also attached October 21, 2009 affidavit of Patricia Hamby.*

TRIAL EVIDENCE

24. The Court finds that, relevant to the instant Art. 64.04 findings, the following evidence was elicited during the defendant's capital murder trial:

- that the complainant lived in her house with her two grandsons, Eric Benge and Lee Rose, at the time of the instant offense (XXVII R.R. at 62-5, 159-160);

- that the complainant, a seventy-two year old female weighed approximately seventy-two pounds and was described as "undernourished" and "weak" at the time of her death; that the complainant was very frail and short of breath due to bronchitis; that the complainant had a lot of difficulty walking and spent most of her time in bed; and, that the complainant's grandson helped the complainant to and from the bathroom and with dressing (XXVII R.R. at 17, 79-80, 128, 146; XXVIII R.R. at 281-2; *State's Trial Ex. 2, 3, 6, 8, 9, 10, 10A, 40, 49 - photos of the complainant*);

- that the defendant was friends with the complainant's grandsons since 1989; that the defendant was in the complainant's house on quite a few occasions; and, that the defendant entered the complainant's house through two different bedroom windows on many occasions (XXVII R.R. at 65-6, 87, 128, 160-5);

- that, during a confrontation with the complainant a week before the instant offense, the complainant told the defendant to leave her house; that the complainant made it clear that she did not like the defendant, and that the defendant responded by getting mad and throwing a quart beer bottle to the ground (XXVII R.R. at 65-6, 87, 128, 160-5);

- that the complainant's house was messy or "in disarray" at the time of the instant offense, and Benge, admitted that he was a poor housekeeper (XXVII R.R. at 115, 168; *State's Trial Ex. 22, 41, 42, 43A, 59, 69 - scene photos*);

- that Edward Banks had been painting the complainant's house prior to the complainant's death (XXVII R.R. at 115, 128-9, 133, 166).

- that other males who were friends with Benge, 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 R.R. at 128-9, 133; XXVIII R.R. at 289);

- that, prior to leaving the complainant's house before 4:00 p.m., on the day of the instant offense, Benge nailed a screen onto his front bedroom window (XXVII R.R. at 90);

- that the complainant was alive when Benge and Rose left her at the house shortly before 4:00 p.m. on October 15, 1992; that the complainant followed Benge to the front of her house as he departed to lock the front door; and, that the complainant routinely locked all of the doors in her house (XXVII R.R. at 69-70, 77, 130-1);

- that the complainant's daughter, Linda McClain spoke to the complainant on the telephone from approximately 6:20 p.m. until 6:45 p.m. on the evening of the instant offense, and the complainant informed McClain that all of the doors in the complainant's house were locked (XXVIII R.R. at 280-1);

- that Benge returned at 10:00 p.m. on the evening of October 15th and discovered the complainant's body on the living room floor of her house, and Rose arrived at the scene soon after with friend John Phillips (XXVII R.R. at 67-83, 138-9; *State's Trial Ex. 10D, 43, 44, 52, 53 - scene photos*);

- that the complainant's front door and back door looking out to neighbor Leo Truitt's yard were open; that the screen to the front bedroom window was torn; and, that there was were two footprints on the bed directly under the window with the torn screen in the front bedroom (XXVII R.R. at 70, 77, 90-2, 94-8, 114)

- that the complainant had been stabbed and sustained blunt force trauma to her head; that the complainant's cause of death was multiple stab wounds to the chest and neck that perforated the complainant's heart and severed the complainant's jugular vein, carotid artery, and air pipe; and, that the stab wounds could have been inflicted by a pocketknife with a blade as small as two inches (XXVII R.R. at 12-44; *State's Trial Ex. 10B, 10C, 11, 12, 50 - scene and autopsy photos);* and

- that it would not have taken much energy or strength of a person the size of the defendant to overpower the complainant (XXVIII R.R. at 331-2).

25. Additionally, the Court finds that the defendant 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 defendant recounted, *inter alia,* how he had been drinking beer, whiskey, and Mad Dog 20/20 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.

State's Trial Ex. 98.

26. The Court finds that the defense did not urge an exculpatory account of the instant offense at trial; that defense counsel Michael Fosher conceded in argument that there was a murder and the defendant admitted killing the complainant, but the offense did not rise to the level of capital murder because the State failed to prove that the offense was committed in the course of robbery, aggravated sexual assault, or burglary of the complainant's home; that Fosher asked the jury to return a verdict of the lesser-included offense of murder; and, that, in his closing argument, defense counsel Felix Cantu asked the jury to conclude that the defendant killed the complainant and nothing more (XXX R.R. at 434-8, 442-4, 462).

27. On federal habeas appeal, the federal district court held that, given the defendant's testimony during the suppression hearing, the defendant's claim of a coerced and false confession failed. *Raby*, No. H-02-0349, slip op. at 7-11.

CONVICTING COURT'S AUTHORITY

28. The Court finds that TEX. CODE CRIM. PROC. art. 64.04 mandates that the convicting court examine the results of the DNA testing under Article 64.03, conduct a hearing, and then make a finding regarding the post-conviction DNA testing results.

29. The Court finds that the Court of Criminal Appeals has held that Chapter 64 of the Texas Code of Criminal Procedure 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. *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 testing was not within scope of Chapter 64).

30. The Court finds unpersuasive and not dispositive to the Court's findings under Art. 64.04 the information set forth in the applicant's proffered affidavits of defense counsel Felix Cantu, Paul Radelat, M.D., and Merry Alice Wilkin, and the offers of proof concerning Joseph Chu and Eric Benge, as these individuals were not involved in the post-conviction DNA testing process, conducted pursuant to Chapter 64. *See State v. Patrick*, 86 S.W.3d 592, 595 (Tex. Crim. App. 2002)(under explicit grant of jurisdiction to trial court pursuant to Chapter 64, trial court might legitimately order the appearance of witnesses involved in the post-conviction DNA process if such witnesses are deemed necessary for the trial court to make a finding under Art. 64.04).

31. Additionally, the Court finds unpersuasive the information set forth in the defendant's offers of proof concerning the alleged hearing testimony of Joseph Chu and Eric Benge based on their affidavits stating that the offers of proof do not accurately reflect the content of their testimony at the Art. 64.04 hearing. *See March 31, 2009 affidavits of Joseph Chu and Eric Benge.*

32. Similarly, the Court finds unpersuasive and not dispositive to the Court's Art. 64.04 determination the information set forth in the portion of Dr. Elizabeth Johnson's October 13, 2008 report labeled "Other Evidence Pertinent to Reasonable Doubt."

DNA TESTING RESULTS

33. The Court finds that Dr. Johnson concluded in her October 13, 2008 report regarding the post-conviction DNA testing conducted in the instant case, that the presence of the male profiles on the complainant's fingernails was potentially probative evidence in identifying the complainant's killer; that the post-conviction DNA testing results provided reasonable doubt for a jury considering the case; and, that the DNA testing results cast doubt on the question of whether the State convicted the right person for the

instant offense. *October 13, 2008 report of Dr. Elizabeth Johnson.* Further, Dr. Johnson testified during the Art. 64.04 hearing that the results of DNA testing indicating the presence of weak and incomplete male DNA on two of the complainant's fingernails was "informative" or "potentially probative evidence" in identifying the complainant's killer (I Jan. 16, 2009 at 50-1, 87). Based on the evidence presented during the Art. 64.04 hearing, however, the Court finds that Dr. Johnson's conclusions regarding the significance of the instant post-conviction DNA testing results do not warrant a finding of favorability under Art. 64.04.

34. The Court finds that the results of post-conviction DNA testing are not favorable to the defendant based on the following evidence presented during the January 16, 2009 hearing:

- that the absence of the defendant's DNA on evidence subjected to post-conviction DNA testing did not warrant the conclusion that the defendant did not commit the instant offense (I Jan. 16, 2009 at 112);
- that there was no indication of when or how the low levels of DNA on the complainant's fingernails were deposited (I Jan. 16, 2009 at 80-1);
- Dr. Johnson's testimony that she could not definitively state that the male DNA detected on the complainant's fingernails during post-conviction testing proceedings originated from the complainant's assailant (I Jan. 16, 2009 at 93);
- that there were other possible sources for the male DNA detected on the complainant's fingernails than the complainant's assailant (I Jan. 16, 2009 at 94);
- that it was possible for an individual to obtain foreign DNA under their fingernails from daily contact (I Jan. 16, 2009 at 87);
- that the weak and incomplete male DNA on the complainant's fingernail clippings could have been deposited in a number of ways, including by the complainant's contact with various surfaces such as the floor of her house where her body was discovered or from contact with other male individuals who entered the complainant's house (I Jan. 16, 2009 at 80-1, 113);

35. The Court finds that the totality of the evidence, including the defendant's confession to the instant offense (*State's Trial Ex. 98*) and the following circumstantial evidence, present a strong case that the defendant committed the instant offense:

- the defendant's familiarity with the complainant, the complainant's home, and the defendant's prior confrontation with the complainant (XXVII R.R. at 65-6, 87, 128, 160-5);

- the trial testimony of Shirley Gunn, who lived within walking distance of the complainant, that the defendant came to her house at around 5:00 p.m. on the evening of the instant offense; that the defendant was wearing a jacket and smelled of alcohol; that the defendant used a pocketknife to clean his nails before leaving Gunn's house; and, that, before leaving Gunn's house at approximately 6:00 p.m., the defendant asked Gunn whether her son and the other man might be at "grandma's" house, meaning the complainant's house (XXVIII R.R. at 287-297);

- the trial testimony of Mary Alice Scott, who lived approximately 200 feet from the complainant's house, that she saw the defendant between 7:00 to 7:45 p.m. on the evening of the instant offense walking from her driveway into the street; that the defendant was wearing jeans and a dark jacket; and, that the jacket that the defendant was wearing on the evening of the instant offense was similar to a jacket that belonged to the defendant (XXVIII R.R. at 300-9, 326);

- the trial testimony of Martin Doyle that, at around 8:00 p.m. on the evening of the instant offense, he saw a white male of similar height and build as the defendant 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; that Doyle and Truitt drove down the street and intercepted the defendant; and, that Truitt asked the defendant what he was doing coming through his yard and then got back into his car (XXVIII R.R. at 313-321); and

- that the defendant fled from his girlfriend's home when he learned that the police wanted to question him regarding the complainant's death (XXVIII R.R. at 325).

36. The Court further finds that the trial testimony of Eric Benge, Shirley Gunn, Mary Alice Scott, and Martin Doyle corroborated several details of the defendant's confession, including that the defendant was drinking and carrying a pocket knife prior to the instant offense; the clothing that the defendant just wore prior to the instant offense; that the defendant exited from the complainant's house by the back door; and, that one of the complainant's neighbors confronted the defendant about jumping their fence after the instant offense.

SEROLOGY PROCEEDINGS

37. The Court finds that the defendant cannot be excluded as a contributor to the blood detected on the complainant's fingernails. Accordingly, such evidence does not warrant a

finding of favorability pursuant to Article 64.04. Moreover, such evidence, in addition to the inculpatory evidence elicited at trial, does not unquestionably establish the defendant's innocence. *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.").

DECISION

38. Respectfully, a single district judge does not have the benefit of conversations with other judges, with the give and take of exchange of ideas that a group of judges has in discussing law and fact, or with the enlightenment that a push and pull of good minds can bring. This Court must rely on its own judgment in applying the law to the facts. This Court must rely on its almost 30-years of experience with juries in criminal case. I make my findings based on seeing juries' strong reliance on confessions, especially when confessions are supported with witnesses who know the Applicant is heading to the descedent's home and witnesses who see the Applicant flee from the back of the home, in addition to photos of a home where it would not be unlikely for any dweller to pick up DNA from a source other than Applicant.

According, this Court finds that the jury would have made the same determination even with the new DNA and Serology evidence.

SIGNED the 19th day of Dec, 2012

PRESIDING JUDGE

SUPPLEMENTAL

CERTIFICATE OF THE CLERK

THE STATE OF TEXAS — IN THE 248TH JUDICIAL DISTRICT COURT

COUNTY OF HARRIS — OF HARRIS COUNTY, TEXAS

I, Chris Daniel, District Clerk of Harris County, Texas, do hereby certify that the above and foregoing proceedings, instruments and other papers contained in Volume I Pages 1- 14 inclusive, to which this certification is attached and made a part thereof, are true and correct copies of all proceedings, instruments and other papers specified by Rule 51 (a) and matter designated by the parties pursuant to Rule 51 (b) in Cause No. 9407130, styled CHARLES DOUGLAS RABY vs. The State of Texas in said court.

GIVEN UNDER MY HAND AND SEAL of said Court, at office in Harris County, Texas on December 21, 2012.

DISTRICT COURT OF HARRIS COUNTY TEXAS

Chris Daniel
Harris County District Clerk

By: _____
L. Charles, Deputy