

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

DARLIE LYNN ROUTIER,

Petitioner,

v.

**NATHANIEL QUARTERMAN,
Director, Texas Department of
Criminal Justice Institutional
Division,**

Respondent.

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NO. SA-05-CA-1156-RF

CAPITAL CASE

PETITIONER’S FIRST MOTION FOR DISCOVERY

Petitioner, DARLIE LYNN ROUTIER, by and through her counsel, respectfully requests pursuant to Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts, that she be:

(a) provided access to physical evidence currently in the custody of the state trial court or the crime laboratories that conducted DNA and other forensic analysis of various items of evidence before her trial,

(b) allowed to examine that evidence and conduct appropriate additional forensic testing and analysis of the evidence, including but not limited to DNA testing, and

(c) provided fingerprint database information concerning certain unidentified fingerprints taken from, or found at, the crime scene.

In support of this request, Ms. Routier sets forth the following:

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The Factual and Legal Context in Which This Request Is Made

As the Petition for Writ of Habeas Corpus sets forth in detail, Ms. Routier was convicted of capital murder and sentenced to death for the murder of her two sons, Devon and Damon, in the early morning hours of June 6, 1996. From the moment she placed a frantic call to 911 to the present, Ms. Routier has unswervingly maintained that an unknown intruder broke into her house, fatally stabbed her sons, and inflicted a near-fatal neck wound on her – and that she is innocent of the crime for which she was convicted.

The relevant factual context is this. On the night of the assault, Ms. Routier and her sons, Devon and Damon, had fallen asleep in the family room, where they had earlier been watching television. C.R.R. Vol. 44, p. 4865:9-21.¹ Ms. Routier's husband, Darin Routier, was sleeping upstairs in the couple's bedroom with their youngest son, 8-month-old Drake. As recounted in her trial testimony, Ms. Routier recalls being awakened by Damon hitting her right shoulder and saying "Mommy," then seeing a man walk from the family room couch into the kitchen. C.R.R. Vol. 44, p. 4867:24-4868:16. Ms. Routier got up from the couch, then heard the sound of breaking glass. C.R.R. Vol. 44, p. 4868:11-12. She motioned for Damon to stay behind her, then followed the man into the kitchen and saw him going into the utility room. C.R.R. Vol. 44, p. 4868:12-16. Ms. Routier turned on the lights in the kitchen, then realized there was blood on her. C.R.R. Vol. 44, p. 4869:2-5, 9-12. Walking further, she saw a knife lying on the floor inside the entrance of the utility room. C.R.R. Vol. 44, p. 4869:13-17. Ms. Routier picked up the knife and placed it on the kitchen counter, then saw that both Devon and Damon had been stabbed, and screamed for her husband. C.R.R. Vol. 44, p. 4869:18-4870:2-20.

¹ C.R.R. refers to the "Corrected" Reporter's Record, adopted on September 7, 2000.

Notwithstanding Ms. Routier's account and the grave neck wound she suffered,² a local police investigator formed the impression during his initial observation of the crime scene that Ms. Routier had staged the crime scene, that there was no intruder, and that Ms. Routier had killed her children and self-inflicted her own wound. C.R.R. Vol. 34, pp. 2196:6-9, 2197:4-14. The prosecution presented circumstantial evidence to support this theory at trial.

For these reasons, the pivotal issue at trial was whether an intruder or Ms. Routier committed the crime. As the prosecutor framed the issue in argument to the jury:

The only issue is who did it? Identity. And it comes down to this: It's either going to be some unknown intruder who came into the house and committed a horrible murder or it's going to be the defendant.

C.R.R. Vol. 46, pp. 5212:23-5213:2.

In her habeas petition, Ms. Routier has asserted three claims to which the discovery she seeks is relevant: (1) ineffective assistance of counsel for failing to investigate and rebut the physical evidence upon which the state's case turned (Claim A.2); (2) the denial of due process associated with the misleading expert testimony concerning the physical evidence (Claim B.1.c); and (3) the violation of the Eighth Amendment associated with executing Ms. Routier because she is innocent (Claim D). The central issue that underpins all these claims is Ms. Routier's innocence. The discovery she seeks is likely to support these claims by demonstrating that her account of the attack by an unknown male intruder is true, and/or that key pieces of the circumstantial evidence relied on by the prosecution were misleading or false. The discovery will thus likely demonstrate that failure of her lawyers at trial to investigate and develop this evidence was prejudicial, that the prosecution's presentation of false and misleading

² Surgery on the night of the attack revealed that the slash wound across Ms. Routier's throat had penetrated all the way to, but not through, the sheath of her carotid artery. C.R.R. Vol. 30, p. 795-96; *see* Exhibit 2 (Defendant's Trial Exhibit 90).

circumstantial evidence was material, and that there is sufficient evidence of Ms. Routier's innocence to preclude her execution.

The Standards Governing Discovery

Under Habeas Corpus Rule 6(a), the District Court is vested with discretion to determine the scope and extent of discovery in a habeas proceeding. Rule 6(a), following 28 U.S.C. § 2254. The Rule provides that the Court may authorize a party to conduct discovery for "good cause." *Id.*; *Bracy v. Gramley*, 520 U.S. 899 (1997); *East v. Scott*, 55 F.3d 996, 1001 (5th Cir. 1995). Good cause for requested discovery is established "when the Petitioner alleges specific facts (1) which, if proven, would entitle [her] to relief and (2) that give the Court reason to believe that the Petitioner may, if the facts are fully developed, be able to demonstrate that [s]he is entitled to relief." Order Granting Amended Motion to Allow Petitioner to Conduct Discovery with Memorandum in Support and Motion to Secure the Services of a DNA Laboratory, *Blair v. Johnson*, MO-99-CA-091 at 5 (W.D. Tex. Oct. 29, 1999, Order) (*citing Bracy, supra*) (the "Blair Order," attached as Exhibit 1).

Where the Petitioner shows good cause, "it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *Bracy*, 520 U.S. at 909 (*quoting Harris v. Nelson*, 394 U.S. 286, 295 (1969)). The denial of discovery is an abuse of discretion if the discovery requested is "indispensable to a fair, rounded, development of the material facts." *East*, 55 F.3d at 1001 (internal citations omitted).

Courts in this jurisdiction and in the Fifth Circuit have found good cause to authorize discovery in habeas proceedings where the Petitioner did not have access to material evidence at trial. *E.g.*, *Blair Order* at 6; *East*, 55 F.3d at 1001-02. Further, habeas courts have found good cause to order evidentiary DNA testing and re-testing when called for under the particular circumstances – especially when new evidence may be available due to technological

advancements in DNA testing. *Blair* Order at 6. *See also Chambers v. Beard*, No. 3:06-0980, 2007 WL 2301089 (M.D. Pa. Aug. 9, 2007) (finding good cause, where petitioner's conviction was supported only by circumstantial evidence, to allow petitioner who claimed actual innocence and ineffective assistance of counsel to conduct DNA and forensic testing on previously tested and untested evidence due to advances in DNA and forensic testing technology); *Christian v. Bissen*, No. 04-00743 DAE-LEK, 2007 WL 1294422 (D. Haw. May 1, 2007) (*vacated in part on other grounds by Christian v. Bissen*, No. 04-00743 DAE-LEK, 2007 WL 2712923 (D. Haw. Sept. 12, 2007)) (petitioner's plausible arguments that DNA testing could support actual innocence argument involving third person present at crime scene sufficient to establish good cause for discovery); *Cherrix v. Braxton*, 131 F.Supp.2d 756 (E.D. Va. 2001) (finding good cause to allow petitioner who claimed actual innocence and ineffective assistance of counsel to conduct DNA testing on previously tested evidence due to advances in DNA testing technology).

There Is Good Cause to Grant the Discovery Ms. Routier Requests

As Ms. Routier points out in her habeas petition, the state's case against her was strained. The crime scene investigator, who believed within minutes of his arrival at the scene that Ms. Routier had staged the crime, could not specify any particular basis for his hunch. Petition at 6. The forensic expert, who testified that the blood of Ms. Routier's children found on her night shirt was "cast off" from the knife as she wielded it against the children, could not explain how these cast-off stains were mixed with Ms. Routier's own blood. Petition at 7. And most tellingly – in light of the testimony of the state's pathologist that Damon could not have lived for more than 9 minutes after being stabbed, the evidence that the 911 call lasted 5 minutes and 44 seconds, and that when paramedics arrived at the end of that call, Damon lived another 1 minutes and 10 seconds – Ms. Routier would have had only 2 minutes and 6 seconds to stab both boys, stage the entire crime scene in the house, run down the alley behind her house to leave a tube

sock that had blood stains from both boys and her own skin cells on it, then cut her own throat before she commenced the 911 call – tasks that could not possibly have been accomplished in that amount of time. Petition at 10-12.

In the Texas Court of Criminal Appeals' recent decision requiring limited DNA testing, the court recognized that these facts made the case against Ms. Routier not significantly more plausible than her own case:

[T]he State's theory is hardly unassailable. As the appellant points out in her brief, it would have been difficult for her to have staged the scene as the State contends, in the order in which she would have had to proceed, and in the limited time she would have had to do it. Even crediting the State's own evidence in the case, the jury was confronted with two competing theories of what happened in the house that night, neither of which is wholly consistent with the circumstantial evidence.

Routier v. State, ___S.W.3d ___, 2008 WL 2486417, *12 (Tex.Crim.App. 2008).

For these reasons, the Court of Criminal Appeals recognized that the DNA testing that it ordered could well have shifted the balance between the prosecution theory and the defense case. In ordering DNA testing of a facial hair and a pubic hair found in the Routier house, together with one of the blood stains on the tube sock found in the alley, the bloodstains on the night shirt that the state previously tested, and blood flakes on the outer part of the door leading from the utility room to the garage, *id.* at *5-6, *7, *8, *9, *10, the Court of Criminal Appeals recognized that this testing had the potential of corroborating Mr. Routier's account of what happened:

[W]hen we combine the presence of the hairs with the blood evidence, a clearer circumstantial picture begins to emerge corroborating the appellant's story of an unknown intruder. Blood from an unknown third party male on the tube sock, the night shirt (mixed with the appellant's own blood), and on the outer part of the door leading from the utility room to the garage -- especially if it can be said that the blood was contributed by the same unknown party who left the facial and pubic hairs -- places that unknown party at the scene at the time of the killings, and supports the appellant's account that he fled through the utility room and out of the house by way of the garage.

Id. at *11. The Court of Criminal Appeals also held that the effect of such corroboration would likely have changed the outcome of Ms. Routier's trial:

We think that adding DNA evidence that would corroborate the appellant's account of an unknown intruder to the evidentiary mix could readily have tipped the jury's verdict in the appellant's favor. In our estimation, DNA evidence showing that an unknown intruder -- indeed, the same unknown intruder -- had left blood on the night shirt and the door from the utility room to the garage, along with a facial hair and a pubic hair, would more likely than not have caused the jury to harbor a reasonable doubt as to the appellant's guilt and decline to convict her.

Id. at *12.

These conclusions are equally applicable to the additional DNA testing that Ms. Routier seeks in this Court. As detailed in subsequent sections of this motion, Ms. Routier seeks DNA testing of more blood stains and limb hairs on the tube sock, DNA testing of the many previously untested bloodstains on the night shirt, DNA testing of a bloody fingerprint in the house, DNA testing of blood stains from the butcher knife apparently used by the assailant, and DNA testing of extractions taken from the Routiers' garage window and window screen.³ As we explain, *infra*, testing of these items using current technology could well produce evidence of an unknown male's DNA – perhaps the same unknown male. Such results, as the Court of Criminal Appeals noted with respect to the items it ordered to be tested, “would more likely than not have caused the jury to harbor a reasonable doubt as to the appellant's guilt and decline to convict her.” *Id.* at *12.

As detailed herein, Ms. Routier requests one other item for forensic and DNA testing: to determine whether there is saliva on the tube sock and whether, by DNA testing, that saliva is

³ As the Court of Criminal Appeals noted, the defense contended that the assailant cut a window screen in the garage to enter and exit the house. *Routier v. State*, 2008 WL 2486417, *12. The prosecution presented evidence suggesting that the screen had been cut with a bread knife found in the house, providing what the Court of Criminal Appeals characterized as the strongest circumstantial evidence, *id.*, that Ms. Routier had staged the crime scene. Biological samples were taken from the garage window and screen but yielded no DNA results in 1996.

hers. Ms. Routier suffered cuts in and around her mouth on the night of the attack and has insisted throughout her case that the tube sock was used by the unknown perpetrator to cover her mouth or to gag her. *See, e.g.*, C.R.R. Vol. 44, pp. 4885:17 - 4886:5. If the sock was indeed used on her mouth, it is likely that Ms. Routier deposited her saliva on the sock during the attack. The presence of Ms. Routier's saliva on the tube sock, in addition to the injuries she sustained around her mouth, would tend to show that she was the victim rather than the perpetrator of this attack.

Finally, Ms. Routier seeks access to two other items in order to conduct other kinds of forensic analysis. Both of these matters involve evidence that the prosecution may well have misrepresented at trial. The first is a bloody fingerprint taken from a glass sofa table between the Routiers' family room and kitchen. At trial, the State's fingerprint witness testified that the fingerprint could not be identified, but that it was "small" and "consistent with having been left by a five or six year old child." C.R.R. Vol. 35, pp. 2269:24-2270:5. In state habeas proceedings, both the state's fingerprint expert and independent fingerprint experts established that this bloody fingerprint is not that of a child and is not that of anyone within Routier household or any of the emergency or law enforcement personnel at the crime scene. *See* discussion, *infra*. Accordingly, Ms. Routier seeks the results that the state can obtain by running this fingerprint through all available fingerprint databases. As with the DNA testing, any identification of this print as belonging to a male outside the Routier family will provide powerful corroboration of Ms. Routier's account.

The other item of evidence that Ms. Routier seeks to have tested is the fragments of material found on the bread knife in the Routiers' kitchen. At trial, the state trace evidence expert found that these fragments were consistent with the window screen in the Routiers'

garage. The significance of this evidence at trial was characterized in the following manner by the Court of Criminal Appeals in its recent DNA testing decision:

The circumstantial evidence most detrimental to the appellant's account of an unknown intruder involved a window screen in the garage that had been cut open. The State's [sic] argued that the appellant cut the screen herself to make it appear to be the intruder's means of ingress and egress. A bread knife was found in the knife block on the kitchen counter from which a trace evidence analyst observed microscopic residue from the cut screen. It is highly implausible that an unknown intruder would have somehow gained entry to the house, stolen the knife, exited the house, cut the screen, and then entered the house again, making sure to return the knife to the block before attacking the appellant and her children.

Routier v. State, 2008 WL 2486417, *12. As we demonstrate herein, however, there is a good deal of uncertainty as to whether the material found on the knife was in fact residue from the cut screen. Getting access to this residue and having it definitively tested may well result in negating "[t]he circumstantial evidence most detrimental to [Ms. Routier's] account of an unknown intruder." *Id.*

In sum, all the evidence that Ms. Routier seeks to test is evidence that testing may well show would have corroborated her account and discounted the already-strained account of the crime by the prosecution. Such evidence would substantiate that Ms. Routier was prejudiced by her trial lawyers' unreasonable failure to seek such testing, that the prosecution's misrepresentation of some of the evidence was material, and that she is innocent. Accordingly, Ms. Routier has shown good cause for the discovery she seeks. She has "give[n] the Court reason to believe that [she] may, if the facts are fully developed, be able to demonstrate that [s]he is entitled to relief." *Blair Order* at 5.

The Equities Favor the Discovery Ms. Routier Seeks

In state post-conviction proceedings, Ms. Routier diligently sought access to and testing of all the evidence she seeks to test in this motion. As noted in the habeas Petition at 22-23,

Ms. Routier repeatedly moved the state trial court for the right to gain access to and test the evidence, including the following:

- Expedited Motion for Access to State's Physical Evidence, May 29, 2002
- Renewed Request for Access to State's Evidence, July 2, 2002
- Post-Application Motion for Access to State's Evidence, July 17, 2002
- Second Renewed Request for Access to State's Evidence, July 29, 2003
- Motion for Reconsideration, November 3, 2003
- Motion for Forensic DNA Testing, November 4, 2003
- Renewed Motion for Testing of Physical and Biological Evidence and Request for an Evidentiary Hearing, January 23, 2004
- Applicant Darlie Lynn Routier's Supplemental Motion for Post-Conviction DNA Testing, filed on January 28, 2005
- Applicant Darlie Lynn Routier's Motion for Discovery Regarding Pre-Trial DNA Testing Results, filed on January 28, 2005

The trial court did not grant Ms. Routier's motions for access to any of the state's evidence, nor did it allow any sort of forensic testing. The trial court issued its Findings of Fact on August 4, 2004, ruling that the petition should be denied. The Texas Court of Criminal Appeals agreed, denying Ms. Routier's petition for a writ of habeas corpus on December 1, 2004.

Only after being pressed by Ms. Routier did the trial court finally rule on the DNA motions, denying them on January 25, 2007. Finally, on June 18, 2008, the Court of Criminal Appeals overturned the trial court's order and required limited DNA testing, continuing to deny DNA testing, however, for the majority of items for which Ms. Routier sought testing, on the basis of state law requirements that preclude post-conviction DNA testing where the defense

team at trial failed to avail itself of the testing that was available at the time of trial. *Routier v. State*, 2008 WL 2486417, *4.

In these circumstances, Ms. Routier has done all she can to gain access to and test the evidence that is the subject of this motion. The restrictions that state law applies to post-conviction DNA testing have no place in federal habeas proceedings, for those restrictions would impair a petitioner's ability to make a substantial showing of prejudice on a claim – as here – that trial counsel provided ineffective assistance by failing to seek DNA testing. That very failure precluded much of the DNA testing Ms. Routier sought in the state courts. It must be allowed here, for such testing is “indispensable to a fair, rounded, development of the material facts.” *East v. Scott*, 55 F.3d at 1001 (internal citations omitted).

The Discovery Ms. Routier Seeks

I. DNA Testing and DNA-Related Discovery

Ms. Routier seeks DNA testing on the following items of biological evidence:

1. Untested blood stains from a tube sock found in the alley behind the Routier household, which previous DNA testing has already established is connected to the crime;
2. Additional untested biological material on the tube sock, including possible human saliva;
3. Human limb hairs from the tube sock that were not tested prior to trial;
4. Previously tested blood stains from the tube sock, which can be re-tested with greater accuracy than the testing performed prior to trial;
5. Untested blood stains from the night shirt worn by Ms. Routier on the night of the attacks;
6. A bloody fingerprint left on the living room coffee table, the source of which has been determined to be someone outside the Routier household;
7. Blood stains and swabbings from the butcher knife used as a murder weapon; and

8. DNA extractions taken by the Southwestern Institute of Forensic Sciences (SWIFS) from the Routiers' garage window and window screen.⁴

Each of these items is described in detail below. Ms. Routier also reserves the right to seek DNA testing on those items of evidence ordered to be tested by the Texas Court of Criminal Appeals on June 18, 2008 if testing does not proceed as contemplated in the court's order. *See Routier v. State*, 2008 WL 2486417.

In addition, Ms. Routier seeks access to the case file, intake reports, records, notes, photographs, and other documents related to pre-trial DNA testing in the possession of the State, SWIFS, and Orchid Cellmark (formerly known as GeneScreen).

A. DNA Testing on Specific Items of Evidence.

Ms. Routier seeks DNA testing on certain items of biological evidence collected from the crime scene. As set forth in the attached affidavit of Ms. Routier's DNA expert, Dr. Elizabeth Johnson, attached as Exhibit 2. DNA testing on this evidence may prove – as Ms. Routier has consistently claimed – that a third party intruder is responsible for the attacks on the Routier family. This testing is likely to produce evidence that is not only relevant but critical to Ms. Routier's federal habeas claims of ineffective assistance of counsel for failure to investigate, denial of due process, and actual innocence and, therefore, this evidence will allow Ms. Routier to show that she is entitled to habeas relief.

1. Untested blood stains from the tube sock found in the alley.

There is no question that a tube sock found in the alley behind the Routier home was used in the attacks, as the sock contained blood stains from both Damon and Devon Routier. *See* C.R.R. Vol. 38, p. 3124:16-24. Certain portions of the sock were tested by GeneScreen prior to trial, and the blood of both Devon and Damon Routier was found. *See* Exhibit 3 (GeneScreen

⁴ Ms. Routier has also moved the Texas Court of Criminal Appeals for reconsideration of DNA testing on Items 3, 4, and 6. Ms. Routier's pending Motion for Rehearing was filed on July 17, 2008.

Report, December 2, 1996 at 2) (test results of Specimen No. 5013). Upon examination of the photographs of the sock, however, and consultation with Dr. Johnson, it is evident that not all portions of the sock were tested. *See* Exhibit 4 (photos showing multiple blood stains on the sock); Exhibit 2 (Johnson Affidavit) ¶ 12.

The Texas Court of Criminal Appeals granted Ms. Routier's motion to re-test a single blood stain on the tube sock that was tested prior to trial and did not yield a result, but denied the motion under Chapter 64 of the Texas Code of Criminal Procedure as to the sock's untested blood stains. *Routier v. State*, 2008 WL 2486417, *6. However, that state statute limiting the availability of DNA testing has no application here. There is good cause under Rule 6(a) for testing of the previously untested stains because fully developing these facts may demonstrate that Ms. Routier is entitled to relief. *See Blair* Order at 5.

The untested blood stains can be subjected to newer and more sophisticated testing techniques that are likely to yield probative results. Johnson Affidavit ¶¶ 10, 12. The untested blood stains also can be isolated or "cleaned" using technology that was not available in 1996 at the time of Ms. Routier's trial. *Id.* ¶10(d). The DNA "map" of the tube sock – which will be incomplete unless all the blood stains present on the sock are subjected to testing – provides a crucial link to the unknown attacker in Ms. Routier's case. *See id.* ¶ 12.

Further, the presence of Ms. Routier's blood on the sock would strongly support her innocence of the attacks. The State contended at trial that Ms. Routier stabbed her two boys, ran outside to plant the sock in the alley, came back inside, then stabbed herself. Petition at 10-12. If Ms. Routier's blood is found on this sock, this would demonstrate that she was already bleeding when the sock was deposited – negating the State's theory of the staged crime scene because there was no blood found between the house and the alley to suggest that Ms. Routier

was bleeding outside. The presence of Ms. Routier's blood on this sock would therefore demonstrate that the sock was used in a crime against her, not one committed by her own hand. Testing of the untested blood stains from the tube sock is therefore vital to demonstrate that Ms. Routier is entitled to habeas relief under her actual innocence claim. Moreover, the failure of Ms. Routier's trial counsel to adequately test all blood stains on the tube sock supports her claim of ineffective assistance.

2. Additional untested biological material on the tube sock.

Ms. Routier suffered cuts in and around her mouth on the night of the attack and has consistently maintained that the tube sock was used by the unknown perpetrator to cover her mouth or to gag her. *See, e.g.*, C.R.R. Vol. 44, pp. 4885:17 - 4886:5. If the sock was used on her mouth, it is likely that Ms. Routier deposited her saliva on the sock during the attack. The presence of Ms. Routier's saliva on the tube sock, in addition to the injuries she sustained around her mouth, would demonstrate that she was a victim rather than the perpetrator of the attacks.

Although the tube sock found in the alley behind Ms. Routier's residence was examined for blood stains and skin cells, the sock was not tested for the presence of saliva residue. *See* C.R.R. Vol. 38, pp. 3124:16-3127:9. But, the sock did yield a faint result of DNA from Ms. Routier that was consistent with either her skin cells or saliva. C.R.R. Vol. 38, pp. 3144-46 (testimony of GeneScreen's Judith Floyd).

Utilizing improved technology, an amylase mapping procedure can be performed on the sock to determine if saliva stains do in fact exist on the sock. Johnson Affidavit ¶ 12. Amylase is an enzyme found in high levels of saliva and the presence of amylase on the tube sock would indicate that the sock was used as a gag. *Id.* Further, if saliva stains are found to exist on the sock, then those stains can be excised and subjected to DNA typing. *Id.*

The discovery of saliva stains on the sock and possible DNA recovery from those stains would confirm Ms. Routier's insistence that she was attacked by an unknown intruder and gagged during the attack. There is good cause for this testing, which would allow Ms. Routier to demonstrate her actual innocence and substantiate her claim of ineffective assistance of counsel.

3. Human limb hairs from the tube sock.

Ms. Routier seeks DNA testing on human limb hairs that were recovered from the tube sock. The hairs were microscopically examined by SWIFS prior to trial and were simply identified as human limb hairs. C.R.R. Vol. 37, p. 2838:18-24. The hairs were not sent to GeneScreen for DNA testing, apparently because testing techniques at the time were not sophisticated enough to yield a result. Today, these hairs may be subjected to mitochondrial testing that may identify their source. Johnson Affidavit ¶P 10(c), 13.

The limb hairs can be subjected to new STR testing methods if the hairs contain a root. *Id.* ¶ 13. Nuclear DNA is found within the root of a hair. *Id.* If the hairs do not contain a root – which is likely in the case of human limb hairs – genetic information may be obtained through mitochondrial DNA testing, which was not widely available prior to Ms. Routier's trial. *Id.* Even if the limb hairs do not contain a root, mitochondrial testing would determine whether the donor of the limb hairs was someone outside the Routier family. *Id.*

If DNA tests demonstrate that the limb hairs found on the tube sock belong to an as-yet unidentified individual, those results would provide critical evidence that an intruder was in the Routier home on the night of the attacks and is responsible for the murders. If, as the trial record indicates, the assailant used the tube sock during the murders, DNA evidence deposited on the sock by that individual may reveal his identity. DNA testing of the limb hairs is therefore critical to establishing Ms. Routier's claim of actual innocence.

4. Previously tested blood stains from the tube sock.

Five blood stains from the sock were tested before trial and returned results – three of the stains matching Devon’s DNA and two matching Damon’s – but the Texas Court of Criminal Appeals denied Ms. Routier’s motion to re-test those stains under Chapter 64 Texas Code of Criminal Procedure standards. *Routier v. State*, 2008 WL 2486417, *6. The Court of Criminal Appeals granted testing as to only a single blood stain on the tube sock, a stain that was previously tested and did not yield a result. *Id.* The Court of Criminal Appeals’ ruling depended on state rules that do not govern here. Ms. Routier seeks to have these five previously tested blood stains re-tested for DNA evidence utilizing improved technology under the federal standard for good cause. *E.g., Blair* Order at 5.

Newer and more sensitive DNA testing techniques – including Y-STR testing that can detect the existence of unidentified Y-chromosome DNA in the previously tested blood stains – may well be able to distinguish previously undetected donors, including the DNA of the unidentified male assailant. Johnson Affidavit ¶ 12. Y-chromosome STR testing was not available in 1996. *Id.* ¶ 10(b). This technology can provide results that are more accurate and probative than GeneScreen’s results in 1996 and the Y-STR testing method stands a better chance of revealing the DNA of an unknown intruder mixed with previously tested blood stains. *Id.* ¶ 12.

As with Ms. Routier’s night shirt, *infra*, newer Y-chromosome STR technology testing on the previously tested areas of the tube sock will provide results that are more accurate and probative than the results at the time of trial. *Id.* The Y-STR testing method therefore stands a better chance of revealing the DNA of an unknown intruder and demonstrating that Ms. Routier is entitled to relief under her actual innocence claim. There is good cause for re-testing the previously tested blood stains on the tube sock with these improved techniques.

5. Untested blood stains from Ms. Routier's night shirt.

Ms. Routier seeks testing of multiple stains on the blood-soaked night shirt that she wore on the night of the attacks. The Texas Court of Criminal Appeals granted Ms. Routier's motion to re-test areas of the night shirt that were tested prior to trial. *Routier v. State*, 2008 WL 2486417, *8. Applying the standards under Chapter 64 of the Texas Code of Criminal Procedure, however, the Court denied Ms. Routier's motion to test previously untested areas of the night shirt. *Id.* The state procedural rules do not apply to this proceeding. See discussion, *supra*. Ms. Routier seeks to have the remaining areas of the night shirt tested with DNA testing technology that has improved since trial in 1996 under the federal standard for good cause. *E.g.*, Order, *Blair* Order at 5.

As with the tube sock, only certain samples from the night shirt were previously tested. Large portions of the night shirt are literally soaked in blood. See Exhibit 5. Thorough DNA testing, including DNA "mapping" procedures, of the night shirt is necessary in order to present a comprehensive picture of whose blood is where. Johnson Affidavit ¶ 10, 14. This is vital to Ms. Routier's habeas proceeding because the limited DNA results produced by GeneScreen, the State's DNA testing laboratory, were used as critical evidence against Ms. Routier during her trial. The State's expert, Tom Bevel, testified that a spot of blood on the back of the night shirt identified as a mix between Ms. Routier and Damon Routier's blood was "cast off" the murder weapon and was consistent with Ms. Routier having stabbed her son. C.R.R. Vol. 39, pp. 3345-56. The State's expert claimed, incredibly, that tiny drops of Ms. Routier's blood somehow landed precisely on top of the pin-sized drops of Damon's blood, a theory Dr. Johnson will strongly refute, and that DNA mapping will more conclusively determine. Johnson Affidavit ¶ 10, 14. The night shirt simply was not tested sufficiently.

In addition, it is possible that the perpetrator's DNA may be found on the night shirt. *Id.* ¶ 14. It is common for attackers who use a knife in an assault to cut themselves in the process, particularly with the type of force used against Damon and Devon Routier. *Id.* ¶¶ 14, 16. If the perpetrator of this crime were in fact bleeding, it is likely that he deposited his own blood on the night shirt when he came into contact with Ms. Routier.

But the night shirt was never tested sufficiently to determine whether it contained an unknown person's blood. Additional tests must be performed to identify all of the DNA on the night shirt, including, perhaps, that of the perpetrator. Moreover, the night shirt can now be subjected to Y-chromosome testing – which was not available at the time of Ms. Routier's trial – to differentiate male DNA from Ms. Routier's DNA, even if a DNA result cannot conclusively be obtained. *Id.* ¶¶ 10(b); 14.

The failure of Ms. Routier's trial counsel to adequately test the night shirt supports her claim of ineffective assistance. Additionally, as argued in her federal habeas petition, the use of this suspect blood spatter evidence to obtain Ms. Routier's conviction violated Ms. Routier's right to due process. *See* Petition at 33, 36.

6. Bloody fingerprint on living room coffee table.

The police recovered a latent fingerprint on a glass coffee table in the room where the attacks occurred. The fingerprint, which was introduced at trial as State's Exhibit 85 I and 85J, was left when an as-yet unidentified adult with blood on his finger touched the table. A State expert testified at trial that the fingerprint belonged to a child. After trial, however, the State's experts excluded every person in the Routier household on the night of the murders as the source of this print, with the exception of Ms. Routier. Petition at 19-20. Ms. Routier's own post-trial experts, along with an independent expert retained by ABC News, have excluded her as the

source of the print. *Id.* Thus, the fingerprint is the most critical evidence developed in Ms. Routier's case to date that an intruder was present at the time of the attacks.

The blood in the fingerprint may belong to the unknown perpetrator, but it more likely belongs to one of the victims and the fingerprint belongs to the unknown perpetrator. Even if the blood originated from one of the victims, however, it is possible that the person who left the fingerprint may have transferred a sufficient amount of his own DNA to be detectable as a component in a DNA mixture. Johnson Affidavit ¶ 15. Swabbings of touched objects often yield the DNA profile of the person who has done the touching. *Id.* Y-chromosome testing may be conducted on this print to differentiate between male and female DNA in the bloody fingerprint, thereby conclusively establishing that the print belongs to a male outside the Routier household. *Id.* ¶¶ 10(b), 15.

DNA deposited from the bloody fingerprint of an unknown individual would exclude Ms. Routier as the perpetrator of the crime, entitling her to relief under her actual innocence claim. The failure of Ms. Routier's trial counsel to conduct adequate testing on this fingerprint also strengthens her claim of ineffective assistance.

7. Blood stains and swabbings from the butcher knife used as a murder weapon.

Like the tube sock and night shirt discussed above, it appears that random blood samples were tested from the butcher knife found in the Routiers' kitchen, but not all blood deposits on the knife were tested. The butcher knife is an indisputably critical piece of evidence in Ms. Routier's case. Both the State and Ms. Routier agree that this knife was used in the murder of Damon Routier and in the attacks on Ms. Routier herself.⁵

⁵ The State contended that Ms. Routier used this knife to inflict her own injuries as part of a staged crime scene; Ms. Routier has always maintained that an intruder entered her house and stabbed her and her two boys using the knife taken from the kitchen.

All of the blood stains on the knife should be tested, and any samples collected from the knife in the form of swabbings or DNA extracts should be tested or re-tested. Johnson Affidavit ¶ 16. Critically, it is common for the perpetrator of a crime to cut himself while wielding a knife. *Id.* ¶¶ 14, 16. The force of impact often causes the attacker's hand to slide down the handle, resulting in contact with the knife at the point where the handle meets the blade. *Id.* ¶ 16. It is possible that an unknown attacker cut himself during the attacks and his DNA has been undetected to date because of insufficient testing on the knife.

Similarly, STR testing, and Y chromosome testing in particular, is a significant advancement that could be applied to the DNA extracts from the knife to obtain much more information than was possible in 1996. *Id.* It is much more likely today to identify the DNA of an unknown male outside the Routier line, even in a mixed DNA sample, than under the DQ alpha and DS180 systems used in 1996. *Id.* ¶ 10.

Additional questions surround the stains on the butcher knife. Prior to trial, GeneScreen tested four blood samples from the knife and found only Damon and Ms. Routier's blood. Exhibit 6 (Jan. 7, 1997 GeneScreen report) (Specimen Nos. 5048-5051). Devon Routier's blood was not found on the knife. If this knife was in fact the only murder weapon, it is highly unlikely that none of Devon's blood remained on it. In light of the lack of Devon's blood on the knife, it is either questionable that the knife was the only weapon used in the attacks, or the original DNA testing was insufficient and additional testing should be conducted to rectify this error. Either way, there is good cause to allow Ms. Routier to conduct re-testing on the knife because the results of that testing likely will allow her to demonstrate she is entitled to relief under her ineffective assistance of counsel and actual innocence claim.

8. DNA extractions from garage window and window screen.

Prior to trial, SWIFS tested three items of evidence for the presence of human DNA that did not yield a result: evidence listed as items “1-window screen,” “47-window” and “33g-garage door outside.” Exhibit 7 (Nov. 1, 1996 Report from Southwestern Institute of Forensic Sciences to Greg Davis, Dallas County District Attorney Office), Page 4. Because no DNA was detected from these extractions, testing apparently stopped at this point.

Ms. Routier sought and was granted DNA testing on item 33-g (garage door outside) at the State level. *Routier v. State, supra*, 2008 WL 2486417, *10. This item of evidence is a canister of what was described as dried blood flakes collected from the door of the Routier home between the utility room and the garage. Items 1 (window screen) and 47 (window) have never been tested. Although the SWIFS report is unclear, it appears that the window screen and window referred to in the report are the screen and window from the Routiers’ garage, which were collected as evidence by the Rowlett police department. C.R.R. Vol. 37, p. 2892:8-11. Ms. Routier has always maintained that the attacker fled through the garage, and this window was the attacker’s likely point of exit.

Advances in DNA testing techniques may reveal human DNA on the garage screen and window where SWIFS was unable to do so. Samples that were once deemed to contain no human DNA quite often give results if the DNA extracts are taken through an amplification process. Johnson Affidavit ¶ 10(d), 18. The DNA extracts at SWIFS should be amplified and the testing completed using current STR testing methods. *Id.* ¶ 18. If testing reveals a third party’s DNA on the garage screen and window, this is strong evidence that an unknown intruder exited the house through that window and Ms. Routier’s version of events is correct. And if the crime scene officers and other persons in the Routier household are excluded as the source of this

DNA, this evidence may well demonstrate that Ms. Routier is entitled to relief due to her actual innocence.

B. Discovery Regarding Pre-Trial DNA Testing.

Ms. Routier also moves the Court to allow discovery regarding the results of DNA testing performed prior to her trial. Specifically, Ms. Routier requests the right to review, inspect, and copy materials related to DNA testing of the evidence in her case, including but not limited to the case file, intake reports, records, notes, photographs, and other documents in the possession of the State, Southwestern Institute of Forensic Sciences (SWIFS), and Orchid Cellmark (formerly known as GeneScreen).

A thorough evaluation of the evidence in Ms. Routier's case, including an adequate determination of what biological evidence should be tested, is impossible without access to the data that underlies the State's original testing results. Johnson Affidavit ¶ 19. The only information the State has provided to Ms. Routier's counsel regarding the DNA testing in her case is a final DNA report from SWIFS dated November 1, 1996 and two final DNA reports from GeneScreen dated December 2, 1996 and January 7, 1997. Exhibit 7 (Nov. 1, 1996 Report from Southwestern Institute of Forensic Sciences to Greg Davis, Dallas County District Attorney Office); Exhibit 3 (Dec. 2, 1996 GeneScreen Laboratory Report – Forensic Identity); Exhibit 6 (Jan. 7, 1997 GeneScreen Laboratory Report – Forensic Identity). The SWIFS and GeneScreen reports reference items of evidence that may be critical to Ms. Routier's case – however, the reports are not detailed enough for Ms. Routier to determine whether testing is warranted. For example:

- *Window screen and window.* The SWIFS report refers to items of evidence “1: Window Screen” and “47: Window.” Exhibit 7, Pages 1, 2. The SWIFS report indicates that “[n]o human DNA was detected from DNA extraction on items 1-window screen, 47-window or

33g-‘garage door outside.’” *Id.*, Page 4.⁶ Although the SWIFS report is not clear, the window and window screen – which were the only window and screen submitted to SWIFS – were most likely the window and screen from the Routier garage. C.R.R. Vol. 37, p. 2892:8-11. Ms. Routier has always maintained that the garage window was the intruder’s point of exit after the attacks and the State collected the garage window and screen as evidence from the crime scene. If the attacker did exit through the garage window, it is highly likely the attacker left some biological material on the window. SWIFS was unable to detect any human DNA on the window or the screen in 1996, however, and thus apparently did not forward these items on to GeneScreen for DNA testing. It is quite possible that human DNA that was not detected by SWIFS in 1996 could be detected today by re-testing this sample using more sophisticated technology. Johnson Affidavit ¶ 18. But the SWIFS report is not detailed enough even to know what type of evidence was collected from the window and screen.

- *Items 31T-carpet, 51-chair stain and 28-dish towel.* Similarly, the SWIFS report indicates that “no DQ alpha amplification product was obtained on items 31T-carpet, 51-chair stain or 28-dish towel.” It appears that DNA testing on these items stopped at that point and no further information is known. It is similarly possible, however, that additional information could be gathered today that was not available under the testing techniques in place before Ms. Routier’s trial. The three samples for which testing was stopped after the amplification process may have had no DQ alpha amplification product due to the presence of inhibitors in the samples, and successful DNA typing could be obtained through modern “clean up” techniques. Johnson Affidavit ¶ 10(d).

⁶ Ms. Routier sought testing in State court on the flakes from the garage door listed in the SWIFS report. DNA testing on these flakes was recently granted by the Texas Court of Criminal Appeals. *Routier v. State, supra*, 2008 WL 2486417, *10.

- *Unidentified facial hair belonging to a non-family member.* The January 7, 2007 GeneScreen report references an unidentified facial hair that yielded a result “which [was] not consistent with any of the Routier family members tested.” Exhibit 6, Page 2. The report does not contain any more information about the hair: for example, where the hair was found, what color it was, or what type of facial hair it was. The Texas Court of Criminal Appeals granted Ms. Routier’s request to re-test this facial hair using newer techniques in order to compare it to other biological evidence. *Routier v. State, supra*, 2008 WL 2486417, *9. But without more information about evidence of type – which could be the critical link to establish the presence of an unidentified intruder – Ms. Routier cannot meet her burden to show the good cause required for discovery.

A review of these simplistic reports raises an obvious question: What other evidence did SWIFS and GeneScreen review that is not mentioned in the reports? As Dr. Johnson explains in her affidavit, the DNA reports provided by the State represent the end product of an extremely detailed process. Johnson Affidavit ¶ 21. Laboratory notes from these agencies have not been provided to Ms. Routier’s counsel, nor have detailed descriptions of the evidence been made available.⁷ As a result, Ms. Routier is left with an incomplete picture of the evidence that was tested in her case. At minimum, Dr. Johnson believes that SWIFS and Orchid Cellmark have intake reports, photographs, a case file, and laboratory notes on file from Ms. Routier’s case. *Id.* ¶ 22-23. With Dr. Johnson’s assistance, Ms. Routier will be able to supplement the scant information in her possession and develop a complete picture of the biological evidence collected and examined by the State.

⁷ Ms. Routier sought access to these underlying discovery materials in conjunction with her state habeas petition and her motion for DNA testing under Chapter 64 of the Texas Code of Criminal Procedure. The trial court denied Ms. Routier’s motion for DNA testing without ruling on Ms. Routier’s petition for discovery.

Ms. Routier's request for the discovery underlying these DNA testing results is both warranted and necessary. This is not a fishing expedition – Dr. Johnson's review of similar documents in other appellate cases has revealed potentially exculpatory evidence within DNA analysts' unreported bench notes. *Id.* ¶ 22. Because the identity of the perpetrator is the key issue in Ms. Routier's case, she is severely prejudiced by being denied access to this underlying information, which may contain evidence of an unknown attacker's DNA.

II. Other Forensic Testing

In addition to the DNA-related testing set forth above, Ms. Routier also requests the following discovery and non-DNA forensic testing.

A. Fingerprint analysis

State's Exhibits 85-I and 85-J are two lifts of a bloody fingerprint taken from a glass sofa table between the Routier family room and the kitchen. The person who left the print would have had to do so while the blood was still wet, meaning that it is intimately connected with the murders of Ms. Routier's sons. At trial, the State's witness testified that the fingerprint could not be identified, but that it was "small" and "consistent with having been left by a five or six year old child." C.R.R. Vol. 35, pp. 2269:24-2270:5. The State's post-conviction fingerprint expert reports he has excluded, as possible sources of the print, all of the paramedics, police, and other persons who were known to have been at the crime scene between the time the murders were reported and the time the print was collected – except for Darlie. *See* State's Writ Exhibit 2, at ¶ 3. Yet an independent fingerprint analyst, working for ABC News, has affirmatively excluded Darlie as the source of Exhibit 85-J, and the renowned forensic anthropologist Richard Jantz has testified by affidavit that the fingerprint is consistent with that of a currently-unidentified adult. *See* Exhibit 8 (Lohnes Affidavit); Exhibit 9 (Jantz Affidavit).

Obviously, if the fingerprint on State's Exhibit 85-J was not made by any member of the Routier family or any of the people who responded to Darlie's 911 call, it had to have been made by an intruder. Ms. Routier's post-conviction counsel have repeatedly requested that the State submit the print to the FBI's Integrated Automated Fingerprint Identification System ("IAFIS"), but the State has declined to do so. Ms. Routier therefore requests that the fingerprint lifts on State's Exhibit 85-I and 85-J be submitted to IAFIS for analysis and possible identification.

Likewise, Ms. Routier also requests the same type of discovery regarding two other unidentified fingerprints that were taken from the door of the Routiers' utility room, leading into the garage. State's Exhibits 85-F and 85-G were collected four inches and six inches, respectively, above the handle of the door. C.R.R. Vol. 34, pp. 2004:16-2008:1. Like the unidentified print from the glass sofa table, the print reflected in Exhibit 85-G was also left in blood. C.R.R. Vol. 34, p. 11-25. At trial, the state's witness testified that he could not make any identification of Exhibits 85-F and 85-G. C.R.R. Vol. 35, pp. 2266:12-2268:2. Because these unidentified fingerprints are intimately connected to the crime scene, appearing exactly where Ms. Routier testified the intruder had left the house, their identification could conclusively establish the presence of an outside assailant. Thus, Ms. Routier requests that the fingerprints reflected on State's Exhibits 85-F and 85-G also be submitted to IAFIS for analysis and possible identification.

B. Bread knife debris analysis

One of the key items of evidence discussed at Ms. Routier's trial was a piece of microscopic debris found on a bread knife in the knife block of the Routier kitchen. The prosecution claimed that this debris was identical to fibers from the window screen in the garage, showing that the bread knife had been used to cut open the window screen. C.R.R. Vol. 45, pp. 5529:16-5230:2. Since an intruder could not "somehow get in the house and then take the

knife out and then cut the window,” the State argued that this meant Darlie had cut the window screen herself, as part of her efforts “to fake the crime scene.” *Id.* The entire basis for this claim was the testimony of Charles Linch, an expert from SWIFS who testified that the debris on the bread knife was “consistent” with material from the garage window screen and, therefore, likely was the instrument used to create the “T-shaped defect in it.” C.R.R. Vol. 37, p. 2892:15. Linch testified:

Q. Bottom line, from this comparison of the black rubbery material and the glass rods on the window screen and on this knife, what does that say to you as a trace evidence analyst?

A. I couldn’t tell the difference between this debris and the debris found on the knife and, therefore, the knife could have been used to cause the cut, defect.

Q. Okay. It’s certainly - are you saying that the material that you found on this knife blade is consistent with the material that makes up this screen right here?

A. That’s right.

Q. You couldn’t see any difference?

A. That’s right.

C.R.R. Vol. 37, pp. 2926:17-2927:6.

This Court will already be familiar with the work of Mr. Linch from the habeas corpus proceedings in the Michael Blair case, where Linch’s trial testimony matching hair samples to both the victim and the defendant was conclusively refuted by subsequent analysis. *See Blair v. Johnson*, MO-99-CA-091 (W.D. Tex.).⁸ In the present case, no definitive tests were conducted to determine the source of the fiber found on the bread knife. Instead, Linch could testify only that the fiber was “consistent” with material from the garage screen window. *See C.R.R.*

⁸ Linch also misidentified hair found in the present case. Linch originally opined that a hair found in the garage window screen was “consistent” with Darlie’s hair. *See C.R.R. Vol. 37 p. 2849:1-6.* In fact, DNA testing determined that he was wrong, and that the source of the hair was actually a police officer who had been present at the crime scene. *See C.R.R. Vol. 37, pp. 2850:9-14.*

Vol. 37, pp. 2862:11-2863:2. The forensic experts engaged by Ms. Routier's original defense counsel recommended that definitive testing be conducted on the fiber, but her substitute trial counsel ignored that recommendation, and no such testing was conducted – leaving Lynch's testimony completely un rebutted. *See* Labor Affidavit ¶ 6b. With that forensic testing, a key piece of the State's staged crime scene theory may well have been invalidated.

Lynch himself has now confirmed that further testing of the debris recovered from the bread knife could determine whether the debris really is consistent with material from the actual window screen. *See* Exhibit 10 (Lynch Affidavit) ¶ 8. Lynch avers that the fiberglass rod fragment recovered from the bread knife is located at either the Bexar County Forensic Laboratory or at SWIFS. *Id.* ¶ 9. The cut window screen was admitted into evidence as State's Exhibit 42-A, and should therefore still be in the custody of the Dallas County clerk's office. Ms. Routier therefore requests that discovery be granted as to the exact location of the material, and that appropriate forensic testing – such as the Fourier Transform Infrared Microscopy method recommended by Mr. Lynch – be conducted to determine whether the debris from the bread knife actually matches the material from the window screen.

C. Night shirt analysis

The blood-soaked night shirt worn by Ms. Routier on the night of the murders is another key item of evidence that was never subjected to the testing recommended by the forensic experts engaged by her original defense counsel. Prosecution witness Tom Bevel testified that blood spatter on the back of the nightshirt was consistent with “cast off” stains that would have been flung off the knife when Darlie brought it overhead in a stabbing motion. C.R.R. Vol. 39, p. 3357:10-3358:1. Bevel conducted his own testing while wearing a similar shirt, and explained his findings to the jury by saying “I was able, multiple times, to get bloodstains that were the same size, location, with the long axis up and down in that area and on other areas of the back of

the [test] shirt.” C.R.R. Vol. 39, p. 3358:3-6. Thus, the State used Bevel’s testimony as a direct, physical link between Darlie and the stabbing of her children.

Bevel maintained this testimony despite admitting that the tiny stains he described as “cast-off” on the back of Darlie’s nightshirt – which were supposedly flung off of the knife when she was stabbing her children – contained the blood of both Darlie *and* the boys. C.R.R. Vol. 39, pp. 3344:17-3346:8. That admission completely contradicted the State’s theory that Darlie inflicted her own wounds after stabbing the boys, unless millimeter-sized blood drops from her own self-inflicted wounds later, quite miraculously, flew over her shoulders and landed directly on top of the boys’ millimeter-sized drops of blood. C.R.R. Vol. 39, pp. 3354:9-11, 3488:14-21, 3490:23-3491:5, 3547:20-3549:8.

Contrary to Bevel’s testimony, Laber and Epstein concluded in the fall of 1996 that Darlie’s nightshirt indicated only minimal areas of blood spatter, and that the critical areas of spatter had never been subjected to genetic testing. Bevel explained to the jury that one explanation for the lack of blood spatter was that Damon’s and Devon’s blood was covered by direct hits of Darlie’s blood from her self-inflicted wounds. But in Laber’s opinion, that interpretation required an extremely unlikely sequence of events. Laber and Epstein recommended that the critical areas of blood staining be tested. *See* Laber Affidavit ¶ 12a. Such testing could have shown that the blood stains on the back of the nightshirt Ms. Routier wore were *not* “cast-off” from the murder weapon being used in a stabbing motion. But Ms. Routier’s substitute counsel ignored that advice, and the jury never heard evidence from such testing.

The night shirt was admitted into evidence as State’s Exhibit 120, and is still in the possession of the Dallas County clerk’s office. Ms. Routier requests that the Court grant her discovery into the specific location and condition of the nightshirt, and that appropriate forensic

testing be conducted to determine whether the blood stains on the back of the shirt were actually consistent with “cast-off” drops from the murder weapon.

CONCLUSION

Accordingly, Ms. Routier respectfully requests that the Court enter an order requiring Respondent to provide access to the following items for the purposes noted:

1. The tube sock found in the alley behind Ms. Routier’s house, for the purpose of DNA testing of all previously untested blood stains;
2. The tube sock found in the alley behind Ms. Routier’s house, for the purpose of determining the presence of human saliva on the sock and DNA testing of such saliva;
3. The human limb hairs found on the tube sock found in the alley behind Ms. Routier’s house, for the purpose of DNA testing;
4. The tube sock found in the alley behind Ms. Routier’s house, for the purpose of new DNA testing of blood stains previously tested;
5. The night shirt worn by Ms. Routier the night of the offense, State’s Exhibit 120 at trial, for the purpose of DNA testing of all previously untested blood stains;
6. The bloody fingerprint left on the living room coffee table, State’s Exhibits 85-I and 85-J at trial, for the purpose of DNA testing;
7. The butcher knife identified as the murder weapon, along with blood stains and swabbings taken from the knife, for the purpose of DNA testing;
8. Swabbings or other extractions of material from the garage window and screen, in whatever form, identified in the 11/1/96 SWIFS report as items 1 and 47, for DNA testing;
9. All written or computer-generated-or-stored materials related to DNA testing of the evidence in Ms. Routier’s case, including but not limited to the case file, intake reports, records, notes, photographs, and other documents in the possession of the State, Southwestern Institute of Forensic Sciences (SWIFS), and Orchid Cellmark (formerly known as GeneScreen), for the purpose of review, inspection, and copying;

10. Data reports from the FBI's Integrated Automated Fingerprint Identification System ("IAFIS") and any other fingerprint identification system available to Respondent, concerning the fingerprints in State's Exhibits 85-I, 85-J, 85-F, and 85-G;
11. The debris recovered from the bread knife in the Routiers' kitchen and the cutting from the window screen, State's Exhibit 42-A at trial, for the purpose of necessary testing to determine whether the debris from the bread knife actually matches the material from the window screen; and
12. The night shirt worn by Ms. Routier the night of the offense, State's Exhibit 120 at trial, for the purpose of inspection and appropriate forensic analysis of the bloodstains asserted to be cast off from the murder weapon.

DATED: August 20, 2008.

Respectfully submitted,

/s/ Richard A. Smith

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CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that he personally conferred with Tomee Morgan Heining, counsel for the Respondent, on August 20, 2008, and Ms. Heining informed me that Respondent was opposed to the relief sought by this motion.

/s/ Richard A. Smith

Richard A. Smith

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing motion was served on the Attorney General for the State of Texas, Counsel for Respondent, on August 20, 2008, via ECF filing and by mailing a copy of the instrument, with first class postage affixed to:

Tomee Morgan Heining, Esquire
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/s/ Richard A. Smith

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