

Petitioner provided additional information regarding the nature of her State DNA proceedings and the relation of these proceedings to Petitioner's federal claim. Order at 3. Petitioner files this Motion for Reconsideration in order to provide the Court with the additional detail it seeks.

Respectfully, Petitioner's counsel must express our serious concern with the unfounded and reproachful tone of the Court's Order. First, counsel objects to the Order's implication that Petitioner's motion has no basis in law or fact and was made merely for purposes of delay.² To the contrary, Counsel brought Petitioner's motion with the utmost care and good faith, and firmly believes a stay is warranted in this action, both under the law set forth in *Rhines v. Weber*, 125 S.Ct. 1528 (2005), and supporting cases, and under the facts of Ms. Routier's case. In fact, as set forth in Petitioner's Motion, counsel believes there is a strong possibility that Ms. Routier's federal habeas petition is not even due, but counsel nonetheless filed Ms. Routier's petition on November 29, 2005 in an abundance of caution to ensure preservation of her federal claims. It could not be further from the truth to suggest that Petitioner's counsel are filing motions for the purposes of delay. Petitioner has vigorously sought to obtain DNA testing from the Texas state court since November 2003, and has already been prejudiced by the State court's delay in that action. Federal habeas proceedings are available precisely to guard against this type of State prejudice.

(Cont'd from preceding page)

almost two and a half years and the conclusion of which petitioner admits no rational person can predict, this Court will consider staying the cause." Order at 3.

² The Court stated that "it appears as if petitioner is more interested in staying this cause interminably than in expeditiously obtaining DNA testing of the items in question." Order at 3.

Second, counsel must rebut the assertion in the Order that Petitioner attempted to “circumvent the page limitations on motions in this Court’s Local Rules by submitting voluminous documents to this Court as ‘Exhibits’ to her motion and thereby compel this Court to undertake a detailed search of those voluminous documents for information supporting the relief requested in Petitioner’s motion.” Order at 2, n.1. This Court’s own Local Rules require Petitioner to submit an appendix with all supporting facts that are not in the record:

When allegations of fact not appearing on the record are relied upon in support of a motion, a summary of the facts relied upon with supporting affidavits and other pertinent documents then available shall be filed in an appendix, served and filed with the motion.

Local Rule CV-7(b). Counsel submitted this Appendix to ensure all facts set forth in Petitioner’s motion were contained in the Court’s record and to ensure compliance with the Local Rules.³

Finally, the Court criticized Petitioner for her total “fail[ure] to explain why she has failed to independently request funding for DNA testing on the items in question from this Court.” Order at 3. **But the Court itself acknowledges that “before [it] could grant such relief, petitioner would necessarily have to satisfy the ‘good cause’ standard for conducting discovery in a federal habeas corpus proceeding and explain why petitioner failed to seek and obtain similar testing during petitioner’s state habeas corpus proceeding.”** Order at 4. Indeed, Petitioner’s Motion is based on precisely that premise: that federal discovery and funding for DNA testing is not available to Petitioner when she has not yet exhausted her

³ Counsel’s paralegal called the Clerk’s Office on February 7, 2006, to discuss the proper format for the required Appendix. The Appendix was filed in the format suggested by the clerk.

remedies in State court.⁴ Should the State court ultimately deny all or a portion of Petitioner's motion for DNA testing, Petitioner will then pursue her right to discovery and funding in this Court. If this action is not stayed, however, and the State court action remains pending, Petitioner may lose her right to federal discovery — Petitioner is caught between the proverbial rock and hard place. In the alternative, should this Court be willing to consider Petitioner's motion for discovery at this venture, Petitioner would gladly file such a motion.

As discussed extensively in Petitioner's Motion for Stay and Abeyance, if DNA testing is ordered by the Texas state court under Article 64.01 of the Texas Code of Criminal Procedure, it will likely produce evidence that is not only relevant but critical to Petitioner's federal habeas claims of ineffective assistance of counsel for failure to investigate, denial of due process, and actual innocence. However, if Ms. Routier's federal habeas proceeding is not stayed while the Chapter 64 proceeding is pending, the federal habeas proceeding may be adjudicated prior to the conclusion of Ms. Routier's attempts to seek DNA testing in State court. If the State court Chapter 64 proceeding thereafter produces evidence that would support Ms. Routier's federal habeas claims, that evidence may be unavailable to Ms. Routier in further federal habeas proceedings, assuming subsequent petitions by Ms. Routier are not barred entirely.

Specifically, Ms. Routier is seeking an order from the State court allowing DNA testing on the following critical items of evidence from the crime scene: (1) blood, limb hairs, and possible saliva found on a tube sock in the alley behind the Routiers' home that was conclusively

⁴ Texas habeas corpus proceedings do not provide for DNA testing. Rather, a petitioner may seek DNA testing in a separate proceeding under Chapter 64 of the Texas Code of Criminal Procedure. This structure has put Petitioner in the awkward position where she stands today: the State court has denied Petitioner's motion for habeas corpus relief but is still reviewing Petitioner's statutory right to DNA testing under Chapter 64.

linked to the murders; (2) a bloody fingerprint on the living room coffee table, the source of which has been determined to be someone outside the Routier household; (3) pubic hair(s) found in the Routiers' kitchen; (4) blood on the nightshirt worn by Ms. Routier on the night of the murders; (5) an unidentified facial hair found at the scene; (6) blood stains and swabbings from the butcher knife used as a murder weapon; and (7) a partial rape test that, according to the State's trial testimony, was performed on Ms. Routier following the attacks. Counsel will discuss each item of evidence and its relevance to Petitioner's federal claims.

1. Testing of Limb Hairs, Blood and Saliva Found on a Tube Sock

Petitioner seeks DNA testing on human limb hairs that were recovered from a tube sock found in the alley behind Petitioner's residence on the morning of the murders. These hairs were not tested for DNA prior to trial because testing techniques were not sophisticated enough to yield a result. Today, these hairs may be subjected to mitochondrial testing that may identify their source. In addition – as the State's DNA expert testified at trial — faint DNA consistent with saliva was found on the toe of the sock. But this evidence was not developed by the State or by Petitioner's own trial counsel. A technique known as amylase mapping may reveal whether saliva is present on the sock, at which point the saliva may be tested for DNA to determine its source. If the saliva is Petitioner's, it supports her theory that an assailant used the sock to gag her. Petitioner has always maintained that an unknown intruder attacked her and murdered her sons. When she was examined after the attack, cuts were found on the inside of her mouth that were consistent with something being forced inside it, such as a gag.

Testing was conducted on some of the blood stains existent on the sock and the blood was conclusively determined to belong to both Damon and Devon Routier, thereby establishing that the sock was present at the time of the murders. But there are both drips and smears of

blood on the sock that were not tested. Through the additional testing Petitioner seeks, blood belonging to Petitioner and or an unknown assailant could be identified. If Petitioner's blood is found on the sock, it refutes the State's claim, which Petitioner denies, that Petitioner planted the sock in the alley after stabbing the children but before she wounded herself. If blood of an individual other than Petitioner and the children is found on the sock, it supports Petitioner's claim that an unknown assailant committed the murders. Either of these results supports Petitioner's claim of actual innocence. The lack of prior testing supports Petitioner's argument that she was provided with ineffective assistance of counsel, especially because the supposed lack of Petitioner's blood on the sock greatly strengthened the State's theory.

DNA tests on the limb hairs may demonstrate that the limb hairs belong to an as-yet unidentified individual who committed the murders and dropped the sock while fleeing the scene, as Petitioner claims. Moreover, if the DNA on these limb hairs matches the DNA from the pubic hair, facial hair or sources of blood Petitioner seeks to be tested (discussed below), it further strengthens Petitioner's claim that an unknown assailant committed the murders, establishing her actual innocence. The limb hair on the sock is a critical piece of evidence not previously tested by Petitioner's trial counsel, further demonstrating ineffective assistance.

2. Bloody Fingerprint on Living Room Coffee Table

The fingerprint on the living room table was left when an as-yet unidentified adult with blood on his finger touched the table. The State's experts have now excluded every person in the Routier household on the night of the murders, with the exception of Petitioner, as the source of this print. (A State expert testified at trial that the fingerprint belonged to a child – testimony that has now been abandoned.) Petitioner's own experts have excluded her as the source of the print. Thus, the fingerprint is the most critical evidence developed in Petitioner's case to date

that an intruder was present at the time of the attacks. The blood creating the fingerprint may be that of the intruder or mixed with that of the intruder. And, as Petitioner's DNA expert has explained to the State court, the intruder may have deposited oils from his finger in the blood while leaving the fingerprint. Y-chromosome testing (a form of DNA 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. If this testing establishes that the blood creating the fingerprint belongs to an unidentified individual, or is mixed with the blood or oils of an unidentified individual, Petitioner's conviction would be conclusively undermined. Moreover, the failure of Petitioner's trial counsel to conduct adequate testing on this fingerprint strengthens her claim of ineffective assistance.

3. Pubic Hair Found in Kitchen

At least one pubic hair recovered from the vicinity of Petitioner's kitchen was subjected to DNA testing prior to trial but did not yield a result. However, as Petitioner's DNA expert has explained to the State trial court, more advanced testing is available now than was available at the time of Petitioner's trial which will likely yield a DNA result on the pubic hair. If the hair belongs to an unknown individual – and particularly if it matches the DNA results of other testing Petitioner is seeking — it greatly strengthens her claim of actual innocence. It would also support Petitioner's claim that the intruder intended sexual assault. Petitioner testified at her trial that she was wearing underwear when she went to bed the night before the murders but she was not when she woke up during/after her attack, a fact the State disputes. Identifying the source DNA of the pubic hair, especially in conjunction with other DNA tests discussed herein, would greatly strengthen Petitioner's claim of actual innocence.

4. Nightshirt Worn By Petitioner on the Night of the Murders

Petitioner is seeking testing of multiple stains on the blood-soaked night shirt she wore on the night of the attacks. As with the tube sock, only certain samples from this night shirt were previously tested. There is a great deal of blood on this night shirt, and a DNA “map” of the night shirt is necessary in order to present a comprehensive picture of whose blood is where. The seemingly random samples taken by the State prior to trial are woefully incomplete. In addition, Terry Laber and Bart Epstein, the forensic experts hired by Petitioner’s original trial counsel, took approximately six cuttings from the nightshirt after the State selected its samples. These cuttings were never tested because Petitioner’s ultimate trial counsel abandoned Laber and Epstein’s work when he took over the case and declined to pursue their recommended testing or present their testimony at trial.

The limited DNA results produced by GeneScreen, the State’s DNA testing laboratory,⁵ were used as critical evidence against Petitioner during her trial. The State’s expert, Tom Bevel, testified that a spot of blood on the back of the nightshirt identified as a mix between Petitioner’s blood and Damon Routier’s was “cast off” the murder weapon and was consistent with Petitioner having stabbed Damon. C.R.R. Vol. 39, pp. 3345-56. The State’s expert claimed, incredibly, that drops of Petitioner’s blood landed exactly over the pin-sized drops of Damon’s blood, a theory Petitioner’s DNA expert strongly refutes, and that DNA mapping will more conclusively determine. The nightshirt simply was not tested sufficiently.

⁵ GeneScreen has since been renamed Orchid Cellmark.

In addition, it is possible that the perpetrator's DNA may be found on Petitioner's night shirt. Petitioner's DNA expert has explained to the State court that 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. 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 Petitioner. 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 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 Petitioner's trial, to differentiate male DNA from Petitioner's DNA, even if a DNA result cannot conclusively be obtained.

The failure of Petitioner's trial counsel to adequately test the night shirt, in conjunction with his firing of Terry Laber and Bart Epstein, supports her claim of ineffective assistance. Additionally, as argued in her federal habeas petition, the use of this suspect evidence to obtain Ms. Routier's conviction violated Ms. Routier's right to due process.

5. Unidentified Facial Hair Found at Scene

Petitioner seeks testing of an unidentified facial hair collected from the Routier household. This hair could provide the critical link to establish the presence of an intruder in the Routier home on the night of the murders. Petitioner's habeas counsel learned of the presence of this facial hair for the first time upon reviewing an exhibit to the State's response to Petitioner's motion for DNA testing, a January 7, 1997 GeneScreen report discussing the hair. This hair was not on the list of evidence collected from the Routier's house by the Rowlett Police Department.

Yet, the GeneScreen report lists a "facial hair," Specimen No. 5035, that "yielded a 01s80 result of 18, 28 *which is not consistent with any of the Routier family members tested.*"

Petitioner's habeas counsel requested samples of the facial hair so that it could be tested. First, the State represented that no samples existed. Then, counsel was told that the samples would have been consumed during testing. Finally, the State informed counsel that samples, comprised of dried extract, do in fact exist. Petitioner's expert has explained to the State court that the dried extract could be reconstituted and more sophisticated testing could obtain results unavailable in 1996-1997. At a minimum, the DNA extracts of the facial hair would be suitable for comparison with the other DNA samples Petitioner seeks to have tested. Comparing these various DNA samples may provide the critical evidence that someone other than Petitioner was present and committed these murders, thus greatly strengthening Petitioner's claim of actual innocence.

Petitioner's trial counsel was in possession of the GeneScreen report as he was preparing for Petitioner's trial. His failure to investigate the origin of this hair or the fact that it did not match anyone in the Routier family is evidence of his ineffective assistance and failure to investigate. Moreover, mention of this facial hair was conveniently omitted from the State's trial testimony, strengthening Petitioner's claim for violation of due process.

6. Blood Stains and Swabbings From Butcher Knife

The butcher knife recovered from the crime scene is a critical piece of evidence in Petitioner's case. Both the State and Petitioner agree that this knife was used in the murder of

Damon Routier and in the attacks on Petitioner.⁶ Petitioner's DNA expert has explained, as discussed above, that it is common for a perpetrator to cut himself while wielding a knife. Thus, the perpetrator's blood may also be on this knife. It is clear that the knife was not subjected to adequate testing: the State's laboratory, GeneScreen, tested four blood samples from the knife and found only Damon and Petitioner's blood. 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. The original testing was insufficient and faulty and additional DNA testing must be conducted to rectify this error.

The knife with blood remaining on it still exists, as do the extracts of the original DNA samples. DNA testing of the remaining blood on the knife, as well as more sophisticated and accurate testing that can be performed on the previous samples, may result in the identification of previously unknown DNA. If this DNA is of an unknown person — especially if it matches the DNA of other samples Petitioner seeks to test — Petitioner's claim of actual innocence would be greatly strengthened. Moreover, trial counsel's failure to adequately test the murder weapon in this case or to contest the State's results, especially when it was abundantly clear that the results of the State's tests could not be accurate, is evidence of trial counsel's ineffective assistance.

7. Partial Rape Exam Performed on Petitioner

Petitioner has asked the State for access to the partial rape kit performed on her at Baylor Hospital in order to test this evidence for DNA. In conjunction with Petitioner's Chapter 64

⁶ 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.

proceeding, Detective Patterson of the Rowlett Police Department was questioned by the State regarding the existence of a rape kit, and Patterson recalled that a rape kit had been discussed but not performed. A subsequent review of the trial testimony and Petitioner's medical records demonstrates, however, that a partial rape kit was performed. The following trial testimony is from Nurse Cotner, who tended to the Petitioner following the attacks:

- Q. Okay. Now, later on did you try to coordinate some type of rape exam?
- A. Yes, sir. I did.
- Q. Why was there a rape exam conducted. . . or going to be conducted?
- A. I don't know why it was brought up. I don't know if it – I don't know who decided to do that. One of the residents asked me how do we set up a rape exam for someone in the intensive care unit. And I called the emergency department and found out who the OB/GYN that was on call for the day was, and set that up through Dr. Santos and Dr. Gogel.
- Q. Okay. And, what did you say to her?
- A. I tried to – I asked her if she understood what we were going to do. Did she understand what a rape exam was? I explained to her that we didn't do a full rape kit at Baylor Hospital, because those are done at Parkland, but did she understand that it would be like, just a normal GYN exam. Was she okay with that. I had asked her, did she think she had been raped.
- Q. What was her response when you asked her that?
- A. She told me something like, "Well, when I woke up I felt pressure down there."

C.R.R. Vol. 31, pp. 1029-30. Detective Patterson also testified that Petitioner said she had felt "some pain," and Patterson asked her if she would submit to a rape test. C.R.R. Vol. 4 pp. 198-99. Patterson testified that the result of this test was negative. *Id.* Petitioner's medical records from that OB/GYN exam show that "cultures" were taken and sent for testing, "including wet smear." But Petitioner has never seen the results of this test.

Petitioner's DNA expert recommends that the results of this OB/GYN exam be tested for DNA if the results can be located. Particularly with technology that has been developed since

Petitioner's trial — such as Y-chromosome testing — these tests may reveal male DNA evidence even if a standard rape test is negative. Sexual assault has long been suggested as a potential motive of an intruder in this case, and evidence of a sexual assault would conclusively undermine Petitioner's conviction.

FOR THESE REASONS, Petitioner respectfully requests that the Court reconsider its order denying her motion to stay and hold in abeyance her federal habeas proceeding pending the conclusion of her state DNA testing proceedings. Every reason articulated by the Court for denying the motion has been addressed. There are no grounds in equity or law to deny Petitioner's motion to stay and abey.

Respectfully submitted this 17th day of April, 2006.

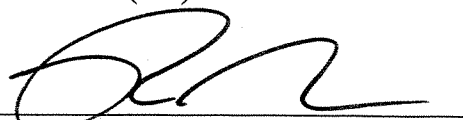
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By


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Certificate of Conference

The undersigned hereby certifies that he personally conferred with Ms. Carla Eldred, Assistant Attorney General and Attorney-in-Charge for the Respondent, on April 17, 2006, and Ms. Eldred informed me that Respondent was opposed to the relief sought by this motion.



Richard A. Smith

Certificate of Service

I, Richard A. Smith, hereby certify that the foregoing motion was served on the Attorney General for the State of Texas, Counsel for Respondent, by mailing the motion on April 17th, 2006, with first class postage affixed to Carla Eldred, Esquire, Chief, Postconviction Litigation Division, P.O. Box 12548, Austin, Texas 78711-2548.



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