F96-39973-J

Darlie Lynn Routier	§	In the
	§	
	§	Criminal District Court No. 3
v.	§	
	§	
The State of Texas	§	of Dallas County, Texas

State's Response to Motion For Post-Conviction Forensic DNA Testing

The State of Texas, through the Criminal District Attorney of Dallas County, files this response to Routier's Motion for Post-Conviction Forensic DNA Testing pursuant to Article 64.02(2)(B) of the Texas Code of Criminal Procedure. The State requests that this Court deny the motion for several reasons.

Routier's request for testing should be denied because Routier cannot demonstrate that she would not have been convicted if exculpatory results were obtained from DNA testing. *See* Tex. Code Crim. Proc. Ann. art. 64.03(a)(2)(A)(Vernon Supp. 2004). Routier is not entitled to testing of certain items because she did not request—but was entitled to—DNA testing at the time of her trial. *See* Tex. Code Crim. Proc. Ann. art. 64.01(a)(1)(B)(Vernon Supp. 2004). She is not entitled to saliva-enzyme testing of a sock because Chapter 64 only authorizes DNA testing. Tex. Code Crim. Proc. Ann. 64.01 & 64.03 (Vernon Supp. 2004). Finally, Routier is not entitled to the mitochondrial DNA testing of hair she requests because such testing is not available under Chapter 64 of the Code of Criminal Procedure without the agreement of the State. *See* Tex. Code Crim. Proc. Ann. art. 64.03(c) (Vernon Supp. 2004).

Procedural Summary

A jury convicted Routier of the capital murder—murder of a child under 6—of her son Damon Routier and assessed a death sentence. The Court of Criminal Appeals affirmed the conviction in a unanimous opinion. *Routier v. State*, 112 S.W.3d 554 (Tex. Crim. App. 2003), *cert. denied*, 124 S. Ct. 2157 (2004). Concurrent with her direct appeal Routier attacked her conviction via writ of habeas corpus filed in this Court. This Court recommended that relief be denied on August 10, 2004, and this Court's Findings, Conclusions, and Recommendations have been transmitted to the Court of Criminal Appeals.

Routier filed a motion for DNA testing on November 4, 2003. This Court ordered the State to respond to Routier's DNA motion by October 22, 2004. On October 20, this Court granted the State's request for an extension of time to October 29, 2004.

Statement of Facts

The Court is familiar with the facts of the case because of the recent entry of the Court's findings fact and conclusions of law in Routier's Article 11.071 habeas corpus proceeding. As the Court of Criminal Appeals determined in the appeal of this case, "The evidence that supports the verdict shows that [Routier] stabbed and killer her two sons, Damon and Devon, while her husband and infant son were asleep upstairs in the house." *Routier*, 112 S.W.3d at 557 (footnote omitted).

The State notes initially that over 140 DNA tests were conducted prior to trial. (Exhibit A, SWIFS report of November 1, 1996; Exhibit B, GeneScreen Report of

December 2, 1996; Exhibit C, GeneScreen Report of January 7, 1997). Moreover, several methods of DNA testing, including STR testing, were available at SWIFS and GeneScreen prior to trial. (Exhibit A; RR.38: 3107; 3111-15; 3138).

Location and Condition of Evidence

Routier seeks testing of blood located on the jeans worn by her husband Darin on the night of the murders, limb hair found on the sock recovered outside her home, the sock itself, bloody fingerprints found on her coffee table, and pubic hairs recovered from the crime scene. (Motion at 1-2). The State requested that SWIFS, the Rowlett Police Department, GeneScreen, and the District Clerk's office locate any evidence in their possession.

Evidence That Was Located

SWIFS possesses the following items of evidence (or portions thereof), identified by SWIFS item number, relevant to Routier's motion:

Item No.	Description	Requested
5	Tapings from den (pertinent to pubic hair)	(motion at 2, 6, 10-11)
27	Cuttings from sock	(motion at 1, 5-6, 9-10)
n/a	Slide (of no. 27)	
n/a	Slides labeled "Linch sock I" and "Linch sock II"	
32	Cuttings from Darin's jeans	(motion at 1, 5, 8-9)

The Rowlett Police Department possesses the following items (or portions) of evidence relevant to Routier's motion:

Item No.	Description	Requested
546	Darin's blue jeans (SWIFS no. 32)	(motion at 1, 5, 8-9)
n/a	Cutting from jeans returned from GeneScreen	(motion at 1, 5, 8-9)

The District Clerk's Office possesses the following items of evidence, identified by exhibit number, relevant to Routier's motion:

Item No.	Description	Requested
SX 85i	fingerprint from coffee table	(motion at 2, 6, 10)
SX 85j	fingerprint from coffee table	(motion at 2, 6, 10)
SX 60	sock	(motion at 1, 5-6, 9-10)

GeneScreen (now known as Orchid/Cellmark) no longer possesses evidence from the case but does possess extracts from some evidence it tested. (Exhibit D, Letter from Orchid/Cellmark dated October 20, 2004).

Items That Were Not Located

Routier requests testing of fingerprints found on the coffee table from her living room and alleges that the table was seized as evidence. (Motion at 6). The Rowlett Police Department does not possess the table and did not seize it as evidence. (Exhibit E, Letter from Rowlett P.D. dated October 19, 2004). The District Clerk possesses the fingerprint lifts as noted above.

Custody of Evidence

The State requests that the various agencies retain custody of the evidence unless testing is ordered so that proper chain of custody and the integrity of the evidence can be maintained. Accordingly, the State has not delivered the evidence to the Court and submits this written explanation instead. *See* Tex. Code Crim. Proc. Ann. art. 64.02(2)(B)(Vernon Supp. 2004).

DNA Statutes

The following nine requirements must be met before this Court is required to order forensic DNA testing under Chapter 64:

1. the evidence still exists and is in a condition making DNA testing possible; and

2. the evidence was secured in relation to the offense that is the basis of the challenged conviction; and

3. the evidence was in the State's possession during the trial of the offense; and

4. the evidence has been subjected to a sufficient chain of custody; and

5. the evidence was not previously subjected to DNA testing because:

   a. DNA testing was not available; or

   b. DNA testing was available, but not technologically capable of providing probative results; or

   c. through no fault of the defendant, there are reasons that are of a nature such that the interests of justice require DNA testing; or

   d. although previously subjected to DNA testing, the evidence can be subjected to testing with newer techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the first test; and

6. identity was or is an issue in the case; and

7. the defendant establishes by a preponderance of the evidence that he would not have been convicted if exculpatory results had been obtained through DNA testing; and

> 8. the defendant establishes by a preponderance of the evidence that his request for DNA testing is not made to unreasonably delay the execution of his sentence or the administration of justice; and
>
> 9. the defendant executes an affidavit swearing to the statement of facts contained in the motion.

Tex. Code Crim. Proc. Ann. arts. 64.01 and 64.03 (Vernon Supp. 2004). This Court need not hold a hearing prior to ruling on Routier's motion. Routier has a statutory right to a hearing on her motion only if this Court orders DNA testing *and* the testing results are complete. Tex. Code Crim. Proc. Ann. art. 64.04 (Vernon Supp. 2004).

Application

DNA Testing Must Be Denied Because It Will Not Establish Routier's Innocence

First, Routier is not entitled to testing because she cannot meet the requirements of Article 64.03(a)(2)(A) and *Kutzner v. State* because DNA testing of the evidence in this case will not establish Routier's innocence of the capital murder of her son.

In order to obtain testing, Routier must prove by a preponderance of the evidence that she would not have been convicted in light of exculpatory DNA testing. Tex. Code Crim. Proc. Ann. art. 64.03(a)(2)(A)(Vernon Supp. 2004). This requires her to show that exclusionary DNA test results would completely exonerate her, rather than merely alter the outcome of the trial. *Kutzner v. State*, 75 S.W.3d 427, 437 (Tex. Crim. App. 2002). The trial court may not grant DNA testing if the DNA test result would merely "muddy the waters," rather than prove the defendant's innocence. *Id.* Here, any testing would only

"muddy the waters" because none of the evidence Routier wishes to test would prove her innocence.

Routier claims that the presence of her DNA or Damon's DNA on Darin's jeans would implicate Darin in the crime and exonerate her because it would contradict Darin's trial testimony and statements indicating that the blood on his jeans came from attempting to help Devon. (Motion at 7-9).

The testing of the bloodstains on Darin's jeans would simply show the identity of the contributors to the stains. The presence of Routier's DNA or that of her sons on Darin's jeans is merely consistent with Darin's known presence at the bloody crime scene and his actions in trying to resuscitate Devon, an act witnessed by the Rowlett Police. (RR.29: 311-12; RR.44: 4872-73). Routier admits in her Motion that Darin could have come into contact with her blood when he assisted her onto a stretcher and when he attempted to resuscitate Devon. (Motion at 8; RR.42: 4291; 4293-95; 4310). Darin could also have contacted Damon's blood—if he did—when helping Devon, because some of Damon's blood was found fairly close to Devon's body. (*See* SX 122, color-coded DNA diagram). There could be many explanations for the presence of Damon's blood on the jeans that have nothing to do with Routier's innocence or guilt. In fact, GeneScreen tested four stains cut from Darin's jeans prior to trial, three of which contained Routier's DNA. (See Exhibit B, GeneScreen report of 12/2/1996 at 2). The fourth stain did not return a profile. These results were available for inspection by the defense prior to trial. (RR.28:

12; Motion exhibit 1 ¶4). Thus, further DNA testing of Darin's jeans cannot implicate Darin in the murders or prove Routier did not stab her children to death.

Routier's argument rests on the premise that if Darin is implicated in the crime then she is exonerated. The testing she seeks cannot implicate Darin. Even if evidence at trial had implicated Darin, which it did not, it would have actually increased the State's chances of obtaining a conviction against Routier under the law of parties rather than exonerated her. *See* Tex. Penal Code Ann. §7.01(a)(Vernon 2003)(providing that a person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or both); Tex. Penal Code Ann. §7.02(a)(2)(Vernon 2003)(providing that a person is responsible for the criminal conduct of another if, acting with intent to promote or assist the commission of the offense he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense).

DNA testing of Darin's jeans simply cannot show that Routier *did not* participate in the murder of her sons Damon and Devon. Prior testing has connected those stains to Routier, who was bleeding during the crime and in Darin's presence. Darin's presence has never been a matter of dispute. Because such testing cannot exonerate Routier, it cannot be granted. *See, e.g., Kutzner.*

Likewise, any DNA testing of limb hairs found on the sock would not exonerate Routier. The sock was recovered outside the Routier home behind another home. Thus, the sock could have picked up limb hair from the outside environment completely

unrelated to the murders in Routier's home. On average, a person sheds 100 hairs *per day*. Andre A. Moenssens et. al, *Scientific Evidence in Civil and Criminal Cases* 570 (4th Ed. 1995). Because hair resists decay, it can persist in the environment for long periods. *See id.* at 567. Thus, the sock could have picked up one of countless hairs shed by persons in the neighborhood. Indeed, Charles Linch identified another hair on the sock as consistent with deer-family hair. (RR.37: 2839-41). Because the Routiers did not keep any deer in their home, the presence of the deer-family hair demonstrates that the sock contained hair evidence from outside the home, thus destroying the probative value of the hair evidence associated with the sock. Therefore, even if the limb hair on the sock produced a DNA profile unrelated to Routier, Darin, Damon, or Devon, that profile would not demonstrate Routier's innocence. *See, e.g., Kutzner*, 75 S.W.3d at 437-39 (holding that DNA testing of hair from crime scene was properly denied because it would only "muddy the waters"); *Jacobs v. State*, 115 S.W.3d 108, 113-14 (Tex. App.–Eastland 2003, pet. ref'd)(holding that DNA testing of hairs found in crime scene would not exonerate Jacobs if they revealed the profile of a person other than Jacobs or the victim); *Eubanks v. State*, 113 S.W.2d 562, 566 (Tex. App.–Dallas 2003, no pet)(holding that DNA test of pubic hair in rape kit would not prove Eubanks did not commit sexual assault of victim).

Similarly, testing of pubic hairs recovered from her home would not exonerate Routier. Nothing in the record demonstrates that any pubic hairs in the living room were associated with the murders. Numerous other adults (and a teen) were in the Routier home on the day of the murders, including Routier, Darin, Barbara Jovell, Halina Czaban, a

baby sitter, Routier's sister Dana, and a number of police and paramedics prior to the collection of evidence. Thus, a pubic hair that did not belong to Routier or Darin would not show that someone other than Routier murdered her children. *Kutzner*, 75 S.W.3d at 439 (denying testing of hairs found on victim's body because it would only "muddy the waters" and not show Kutzner did not commit the murder).

Routier's claims about DNA testing of the bloody fingerprints recovered from the coffee table also lack merit. Routier claims that DNA testing of the fingerprints would exonerate her if it revealed the DNA of a third party. (Motion at 10). The Court of Criminal Appeals rejected this concept in *Bell* when it noted that "[t]he presence of another person's DNA at the crime scene will not, without more, constitute affirmative evidence of . . . innocence." *See Bell v. State*, 90 S.W.3d 301, 305-306 (Tex. Crim. App. 2002). Indeed, in light of all the evidence of a staged crime scene, the presence of the DNA of an unidentified third party would tend to show that Routier had an *accomplice*, and actually increase the State's chances of obtaining a conviction under the law of parties. *See* Tex. Penal Code Ann. §7.01(a); Tex. Penal Code Ann. §7.02(a)(2); *see also State ex. rel Hill v. Greene*, 86 S.W.3d 592, 599 (Tex. Crim. App. 2002)(Cochran, J., dissenting)(noting that DNA test indicating presence of a third party would not exonerate defendant when other evidence demonstrates the defendant committed the criminal act). Accordingly, Routier must show more than the mere possible presence of a third party to obtain DNA testing; she must show that DNA results demonstrate that she *did not* participate in the offense. *See Bell*; *Thompson v. State*, 95 S.W.3d 469, 472-73 (Tex.

App.–Houston [1st Dist.] 2002, no pet.)(upholding denial of Chapter 64 testing of weapon recovered from crime because the absence of the victim's DNA on the weapon would not have shown Thompson was not guilty, because he was identified by the complainant and found near the crime scene shortly after the assault).

In *Kutzner*, the Court of Criminal Appeals upheld the trial court's denial of DNA testing in a death penalty case with far weaker facts showing the defendant's guilt than in Routier's case. Kutzner was connected to the crime because he possessed the brand of wire used to bind the victim, "tie-wraps" found on the body were similar to those found in his home and truck, tool marks on the tie-wraps from the body matched a tool he owned, and he gave property from the crime scene to witnesses. *Kutzner*, 75 S.W.3d at 436. Kutzner sought DNA testing of the victim's fingernail scrapings, a hair lodged in a tie-wrap on the victim's body, and a hair found on the victim's body. He also adduced evidence that the victim had a "tumultuous" relationship with her husband, that her husband may have possessed property taken from the crime scene, and that some of the State's forensic evidence—the tool mark testimony—was overstated at trial. *Id.* at 439-440. The State argued that DNA testing would only be significant if it inculpated Kutzner since an accidental scratch could put someone else's DNA under the victim's fingernails and because the hairs were found in the common area of an office where anyone's hair could be on the floor. The Court of Criminal Appeals agreed with the State and held that exculpatory results of such tests would only "muddy the waters" rather than show Kutzner did not commit the murder. *Id.* at 439.

The instant conviction is grounded on far stronger evidence than *Kutzner*. Routier called 911 and was found at the crime scene soon after the murders. While she claimed someone else committed the offenses, abundant physical evidence and testimony proved her multiple contradictory accounts were false. Other evidence from the crime scene included blood spatter evidence on Routier's nightshirt consistent with her stabbing her children. (RR.39: 3340-63). The window screen where the alleged "intruder" entered was cut with knife from *inside* the home. (RR.37: 2896-97; 2905-28; SX 117). A broken wine glass and in the kitchen were found on top of Routier's bloody footprints, even though she alleged that an intruder broke the glass when fleeing the scene before she walked into the kitchen. (RR.34: 2167-2217-18). A vacuum cleaner was moved back and forth through the blood on the kitchen floor, then tipped over and bled upon by Routier. (RR.34: 2218-19; RR.38: 3307-12; 3302-06; Exhibit B at 2). Routier's wounds were medically superficial and strikingly different than the savage penetrating wounds that killed her sons. (RR.30: 723-26; RR.40: 3673-74). The facts of the offense were unlike "normal" crime scenes. (RR.40: 3662-97). Over 140 tests performed prior to trial identified no DNA (other than Routier's or her sons') related to the crime. Further DNA testing would only "muddy the waters" because it cannot demonstrate that Routier did not wield the knife, nor prove her story an intruder committed the crime alone was true. Thus, testing should be denied. *See Kutzner*, 75 S.W.3d at 439.

The purpose driving Chapter 64—to remedy stranger misidentification through the use of DNA testing—is not implicated by the facts of this case. In most instances, DNA

evidence only indicates that a person was present at a given crime, not what their role in that crime was. At most, DNA results identifying persons other than Routier would do no more than show she did not commit the offense alone. This is not a defense to criminal conduct in Texas. *See* Tex. Penal Code Ann. §§7.01, 7.02. The State would have successfully prosecuted Routier for capital murder even if DNA testing had conclusively proved another person participated in the offense. The fact that Routier received the death penalty is not a factor in determining whether she is entitled to DNA testing because Chapter 64 only considers whether DNA results would affect the determination of guilt, not punishment. *See* Tex. Code Crim. Proc. Ann. art. 64.03(a)(2)(A)(Vernon Supp. 2004); Tex. Code Crim. Proc. Ann. art. 64.04 (Vernon Supp. 2004). Routier has failed to prove by a preponderance of the evidence that she would not have been convicted even if exculpatory DNA results existed. Accordingly, this Court should deny Routier's request for post conviction DNA testing.

Routier Has Not Shown She Is Without Fault For The Absence Of Prior DNA Testing

This Court should also deny testing of any previously untested hair and blood evidence because Routier failed to request that those items be tested prior to her trial. *See* Tex. Code Crim. Proc. Ann. art. 64.01(b)(1)(B)(Vernon Supp. 2004). Specifically, Routier requests DNA testing of limb hairs recovered from the sock, pubic hairs recovered from the crime scene, bloodstains from Darin's jeans, and bloody fingerprints from the coffee table. (Motion at 1-2). The record reflects that some hair evidence was successfully tested for DNA prior to trial. (RR.37: 2848-51). Thus, as DNA testing of hair

evidence was available at trial, but Routier's trial team chose not to seek testing of certain other hair evidence, the record and her motion affirmatively demonstrate she is at fault for the fact this evidence was not tested. Thus, to the extent the previously untested hair evidence Routier seeks to test was suitable for DNA testing at the time of trial, i.e. intact hair roots were present, she cannot now have it tested. *See Warren v. State*, 126 S.W.3d 336, 338 (Tex. App.–Dallas 2004, no pet.)(holding that supporting affidavit stating that evidence in possession of State at trial but not DNA tested insufficient to demonstrate that evidence not tested through no fault of the defendant).

Furthermore, to the extent Routier requests DNA testing of previously untested blood evidence, i.e. the fingerprints, the record is clear that RFLP and multiple PCR DNA techniques, including STR, were available at trial for the testing of bloodstains as small as a pinhead. (*See* RR.38: 3107; 3111-15; 3138). Thus, untested bloodstains—such as the remaining stains from Darin's jeans and the bloody fingerprints—also were testable prior to trial using a variety of methods, including the STR method Routier references in her motion. (Motion at 5; Motion Exhibit 2 ¶10, 11, 14).

Routier argues she is not at fault for the absence of DNA testing of some items because "[t]he determination of what items and samples were selected for testing . . . was made strictly by the State, without input from [her] or [her] trial counsel." (Motion at 3; Motion Exhibit 1 ¶4). The law was clear at the time of Routier's trial, however, that as a criminal defendant she had a constitutional right to the assistance of experts, including DNA experts, if their assistance was likely to be "a significant factor" at trial. *See Taylor*

v. State, 939 S.W.2d 148, 154 (Tex. Crim. App. 1996)(reversing conviction and holding that Taylor was entitled to DNA expert to assist him at trial). Indeed, her first trial team retained experts, who were consulted by her second trial team as well. Routier's experts interviewed SWIFS analysts, examined evidence later used at trial, collected samples from Routier's nightshirt,[1] and reviewed the microscopic fiber evidence. (RR.37: 2819-23). Given the broad access the defense team was given to the State's evidence prior to trial, it defies belief that DNA testing would not have been granted and conducted on other evidence if they had asked.

The fact that newer techniques of DNA testing exist does not allow Routier to test evidence that was not tested—but could have been—prior to trial. Chapter 64 authorizes testing with newer techniques only when the evidence was tested with less accurate prior techniques or if it was not tested because prior techniques were not capable of providing probative results. *See* Tex. Code Crim. Proc. Ann. art. 64.01(b)(1) & (2). Here, the trial record shows that hair and blood could have been tested using several techniques that would have revealed probative results. Thus, Routier is not now entitled to test was she chose not to test prior to her trial.

The record reveals that hairs with roots were capable of DNA testing at the time of trial, as were bloodstains. The record also demonstrates a request from Routier to test evidence for DNA would have been granted, and Routier does not argue otherwise.

---

1 To this day, Routier has never revealed the results of tests conducted by her experts on the nightshirt samples.

Accordingly, testing of any untested hairs with roots or blood should be denied. *See* Tex. Code Crim. Proc. Ann. art. 64.01(b)(1)(B)(Vernon Supp. 2004).

Saliva-Enzyme Testing is not Available Under Chapter 64

Routier also requests testing for the presence of saliva on the sock. (Motion at 9-10; Motion Exhibit 2 ¶12). Her motion, however, shows that this is a test for the presence of an enzyme found in saliva rather than a DNA test. (Motion Exhibit 2 ¶12). Routier claims that this testing would corroborate her argument at trial that an intruder used the sock to gag her during the offense. (Motion at 9-10). Chapter 64 does not provide for post conviction testing other than DNA testing. *See Skinner v. State*, 122 S.W.3d 808, 812 & n.4 (Tex. Crim. App. 2003); *see generally* Tex. Code Crim. Proc. Ann. art. 64.01 *et. seq.* (Vernon Supp. 2004)(providing for post conviction DNA testing); *State ex rel. Hill v. Greene*, 86 S.W.3d 592, 594-95 (Tex. Crim. App. 2002)(holding that trial court acts outside the narrow parameters of Chapter 64 are void). Thus, Routier cannot obtain such testing in this proceeding.

In *Skinner*, the defendant was convicted of the 1993 capital murder of Twila Busby and her two sons. Evidence seized from the crime scene included a plastic bag containing a knife and a "cup towel stained with a blood like substance." Fingerprints on the bag did not match Skinner's fingerprints. As part of his Chapter 64 DNA motion, Skinner requested that the trial court order the comparison of the unidentified fingerprints to those of an alleged suspect in the murders. The other suspect had pursued Busby in the hours prior to the crime, was known to carry a knife, and had a history of violence against

women. The trial court denied the request for DNA and fingerprint testing, and the Court of Criminal Appeals upheld the trial court's orders. The Court specifically noted that Chapter 64 did not encompass testing of fingerprint evidence. *See Skinner*, 122 S.W.3d at 811-12 & n.4.

The saliva-enzyme testing Routier requests is like the fingerprint testing requested by Skinner—it is not DNA testing. Chapter 64 provides a mechanism for DNA testing that can exonerate a defendant. It is not mechanism for attacking the credibility of a trial witness or enhancing the credibility of a defendant through generalized forensic testing. *See Manning v. State*, 2003 Tex. App. Lexis 9513 at *8 (Tex. App.–Houston [1st Dist.] 2003, pet. ref'd). As such, saliva-enzyme testing not authorized under Chapter 64, and Routier's request for such testing should be denied. *See Skinner*, 122 S.W.3d at 811-12 & n.4; *see also State ex. rel Hill v. Greene*, 86 S.W.3d at 594-95.

Mitochondrial DNA Testing Is Not Available Under Chapter 64

Finally, this Court should also deny any requests for mitochondrial DNA (mtDNA) testing. Some of the evidence Routier seeks to test may only be capable of providing results if subjected to mtDNA testing. This technique of testing examines DNA located in a different component of cells. *See Jacobs*, 115 S.W.3d at 111 n.3. For example, the limb hair found on the sock may only suitable for mtDNA testing if it has no root. (See Motion Exhibit 2 ¶11). Similarly, any remaining pubic hairs recovered from the crime scene may only be useful for mtDNA testing. (See Motion Exhibit 2 ¶14).

Routier is not entitled to mitochondrial mtDNA testing under Chapter 64, which provides, "[t]he court may order the test to be conducted by the Department of Public Safety (DPS), by a laboratory operating under a contract with the department, or, *on agreement of the parties*, by another laboratory." Tex. Code Crim. Proc. Ann. Art. 64.03(c) (Vernon Supp. 2004)(emphasis added). At this time, neither DPS, nor any lab under contract with DPS, conducts mtDNA testing. (See Exhibit F, Letter from DPS). Accordingly, under the plain language of Chapter 64, this Court cannot order mtDNA testing absent agreement by the State.

Significantly, mtDNA testing is not as accurate as nuclear DNA testing. "A single mitochondrion contains 37 genes in a circular mitochondrial DNA, compared with about 35,000 genes contained in the nuclear DNA." Comm. on Sci., Eng'g, & Publ. Policy, the Nat'l Acad. of Sciences, Scientific & Med. Aspects of Human Reprod. Cloning, 267 (2002)(cited in *Jacobs*, 115 S.W.3d at 111). Indeed, Routier's supporting affidavit notes that mtDNA testing cannot differentiate between Routier, Damon, or Devon because they all share the same maternal DNA. (Motion Exhibit 2 ¶11). Further, it was established at trial that the sock belonged to the Routiers, and therefore any limb hairs found on the sock likely belonged to Routier or Darin. Similarly, the pubic hairs were recovered from their home, and almost certainly belonged to them. Accordingly, the State will not agree to mtDNA testing. To the extent Routier's motion requests mtDNA testing, it should be denied.

THE STATE PRAYS that this Court Deny Routier's Motion for Post-Conviction DNA Testing.

Respectfully submitted,

Bill Hill
Criminal District Attorney
Dallas County, Texas

John R. Rolater, Jr.
Assistant District Attorney
Deputy Chief, Appellate Division
SBT#00791565
133 N. Industrial Blvd. LB-19
Dallas, Texas 75207-4399
214-653-3625
214-653-3643 fax

I certify that a copy of this document was served on Darlie Lynn Routier's counsel of record, Richard Burr, 906 E. Jackson, Hugo, Oklahoma, 74743 by placing a copy in the United State's Mail on October 29, 2004.

John R. Rolater, Jr.