W96-39973-J(A)

Ex parte	§	In The
	§	
	§	Criminal District Court No. 3
	§	
Darlie Lynn Routier	§	of Dallas County, Texas

RESPONDENT'S RESPONSE TO APPLICANT'S POST APPLICATION MOTION FOR ACCESS TO STATE'S PHYSICAL EVIDENCE.

Respondent, the State of Texas, through its Criminal District Attorney for Dallas County, requests that this Court deny Applicant's Post-Application Motion For Access To State's Physical Evidence, and would show the following:

1.

Applicant is not entitled to access to the physical evidence in this case at this time. Article 11.071 "establishes the procedures for an application for a writ of habeas corpus in which the applicant seeks relief from a judgment imposing a penalty of death." Tex. Code Crim. Proc. Ann. art. 11.071, § 1 (Vernon Supp. 2002); *see Ex parte Davis*, 947 S.W.2d 216, 221, 223 (Tex. Crim. App. 1996)(McCormick, P.J., concurring)(majority op.)(noting that "Article 11.071 now contains the exclusive procedures for the exercise of this Court's Original habeas corpus jurisdiction in death penalty cases"). Article 11.071, section 9 authorizes the trial court to order "affidavits, depositions, interrogatories, and evidentiary hearings" to resolve fact issues *after* the application and the Respondent's response are filed. Tex. Code Crim. Proc. Ann. art. 11.071, § 9

(Vernon Supp. 2002).[1] Thus, pursuant to section 9, this Court does not have authority to grant Applicant's request for access to and testing of the physical evidence prior to designating unresolved material fact issues. In that regard, this Court can more effectively determine the propriety of Applicant's request after reviewing Applicant's *actual* allegations and the Respondent's response. Accordingly, her Motion should be denied because it is premature under the statute applicable to this proceeding.

Moreover, there is no general right of discovery in criminal cases in Texas. *See, e.g., Kinnamon v. State*, 794 S.W.2d 84, 91 (Tex. Crim. App. 1990), *overruled on other grounds by Cook v. State*, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994); *see also Bracy v. Gramley*, 520 U.S. 899, 904 (1997)(noting that habeas applicants have no general right of discovery in federal court). The discovery statute germane to criminal cases applies only prior to or during *trial*. *See* Tex. Code Crim. Proc. Ann. art. 39.14(a) (Vernon Supp. 2002). Furthermore, the United States Constitution does not grant discovery rights in criminal cases. *See, e.g., Weatherford v. Bursey*, 429 U.S. 545, 559-60 (1977). Applicant cites no

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1 Specifically, Article 11.071, Section 9 provides:

> If the convicting court determines that controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist, the court shall enter an order . . . designating the issues of fact to be resolved and the manner in which the issues shall be resolved. To resolve the issues, the court may require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection.

Tex. Code Crim. Proc. Ann. art. 11.071, §9 (Vernon Supp. 2002).

fact specific authority supporting her claim that she is entitled to discovery or testing of the State's evidence at this time. Accordingly, as Applicant is not yet entitled to resolution of controverted fact issues under Article 11.071, and because the law applicable to criminal cases does not provide for discovery of the State's evidence or testing of that evidence, her motion should be denied.

2.

In any event, Applicant has wholly failed to show that discovery and testing are necessary in this case. Rather, Applicant's motion and supporting affidavits show that she is merely conducting a blind fishing expedition in an attempt to retry the case differently from her trial counsel. *See Calderon v. United States District Court*, 98 F.3d 1102, 1106 (9th Cir. 1996) (noting that habeas applicants may not use discovery for "fishing expeditions to investigate mere speculation", *cert. denied*, 520 U.S.1233 (1997).

Applicant first claims she should be allowed to conduct a "microscopic examination" of the nightshirt she wore on the night of the murders. Applicant fails to mention in her motion that her experts have had access to the nightshirt on two previous occasions and have in fact obtained samples from that shirt. (Motion at 3; RR.37: 2821-23; Affidavit of J. Stephen Cooper attached to Applicant's motion). While the affidavits of Applicant's experts state "we determined that additional testing was required to identify the source of . . . defects" on the nightshirt, the affidavits are conclusory and do not state any factual basis for the conclusion, what favorable result might be expected, or why a favorable result

might be expected. (Affidavit of Terry Laber at ¶ 6.c; Affidavit of Barton Epstein at ¶6.c). While Applicant's motion alleges this testing will explain a "discrepancy" in the trial testimony, her motion does not state facts that show a discrepancy. (Motion at 3).

Applicant also claims she should be allowed to examine window screen fragments recovered from a knife found at the crime scene. Again, Applicant fails to mention in her motion that her experts previously conducted a microscopic examination of this evidence. (RR.37: 2821-23). Her experts do not state why further microscopic examination might yield a favorable result, nor do they state what specific type of test they might perform that has not been previously performed. (Affidavit of Terry Laber at ¶12.b-c; Affidavit of Barton Epstein at ¶6.a-b).

Finally, Applicant claims she should be allowed to conduct "chemical testing" on "*all* carpet, tile and other flooring samples" removed from the crime scene. (Motion at 4). Applicant admits that this testing would destroy a portion of the State's evidence. (Affidavit of Terry Laber at ¶ 13; Affidavit of Barton Epstein at ¶ 9). The motion and affidavits do not identify the chemical test to be performed. Moreover, the affidavits do not identify a particular favorable result expected, nor do they demonstrate why a favorable result might be expected.

Applicant's discovery requests demonstrates that she is operating under the misapprehension that merely impeaching the State's trial evidence is sufficient to sustain the claims in her writ application. In fact, Applicant must adduce

affirmative evidence of innocence to support her actual innocence claims. *See Ex parte Franklin*, 72 S.W.3d 671, 677-78 & n.8 (Tex. Crim. App. 2002)(citing *Schlup v. Delo*, 513 U.S. 298, 324 (1995)).

In this proceeding, Applicant is presumed guilty because a jury found her guilty. *Schlup*, 513 U.S. at 326 n.42. Her right to discovery is extremely limited (if indeed it exists at all). *See, e.g., Weatherford v. Bursey*, 429 U.S. 545, 559-60 (1977); *Kinnamon v. State*, 794 S.W.2d 84, 91 (Tex. Crim. App. 1990). Furthermore, it must be remembered that habeas corpus is not a vehicle by which criminal defendants may retry their cases. Rather, habeas corpus is a means for Applicant to raise constitutional claims that cannot otherwise be presented in the direct appeal. *See Ex parte Davis*, 947 S.W.2d 216, 225 & n.7 (Tex. Crim. App. 1996)(McCormick, P.J., concurring)(majority op.). Because her conclusory affidavits do not demonstrate what tests are to be performed, why affirmative evidence of innocence might be obtained, or what that evidence would be, Applicant has not demonstrated that she should be allowed access to and testing of the State's evidence.

PRAYER

Respondent prays that this Court deny Applicant's Post Application Motion for Access to State's Physical Evidence; or, in the alternative only, postpone a ruling until Respondent has had an opportunity to file its original response to Applicant's Application for Writ of Habeas Corpus.

Respectfully submitted,

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I hereby certify that a true copy of the foregoing was served on Applicant's Counsel of Record, Steven Losch, 906 Delia Drive, Longview, Texas 75601, by United States Mail on August 28, 2002, and Richard Smith, 2100 McKinney Avenue, Suite 1100, Dallas, Texas 75201-6911, by United States Mail on August 28, 2002.

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