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IN THE CRIMINAL DISTRICT COURT NO. 3
OF DALLAS COUNTY, TEXAS

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EX PARTE	)	**Writ No. W96-39973-J**
	)	**(Trial Court No. F96-39973-J)**
DARLIE LYNN ROUTIER	)	

APPLICANT DARLIE LYNN ROUTIER'S REPLY TO MOTION FOR POST-CONVICTION FORENSIC DNA TESTING

Applicant Darlie Lynn Routier, through undersigned counsel, respectfully files this reply to the State's Response to Motion For Post-Conviction Forensic DNA Testing, filed October 29, 2004 ("State's Response"). Applicant has satisfied her burden for such testing pursuant to Chapter 64 of the Texas Code of Criminal Procedure.

As this Court is aware, identity of the perpetrator is the fundamental issue in this case. Applicant has consistently maintained that she did not commit the crime for which she was convicted and that she and her two sons were savagely attacked by an unknown intruder. Indeed, the State's primary argument at trial was that there was no proof of an intruder inside the home, and consequently Applicant must have murdered her sons. Testing of critical hair and blood samples that were not tested prior to trial – or were tested but yielded inconclusive results – may establish the presence of an intruder in the Routier household on the night of the crimes and exonerate Ms. Routier.

Moreoever – as has been typical throughout Applicant's appeals[1] – testing of this evidence is severely overdue. Applicant filed her original motion in this matter on November 4, 2003, and did not receive a response from the State until late October 2004. Even then, the State produced its untimely response only after being ordered to do so by this Court on August 23, 2004. Presumably, this Court acted in response to Applicant's writ of mandamus filed August 16, 2004 with the Texas Court of Criminal Appeals, seeking an order compelling this Court to direct the State to respond as required under Article 64.02(2) of the Texas Code of Criminal Procedure. Due to the extreme delay in this matter Applicant has been forced to wait for more than a year for access to and testing of potentially exculpatory DNA evidence.

Notwithstanding its untimely response to Applicant's motion, the State still has failed to comply with the requirements of Chapter 64. Article 64.02(2) requires the State, upon order of this Court, to "(A) deliver the evidence to the court, along with a description of the conditions of the evidence; or (B) explain in writing to the court why the state cannot deliver the evidence to the court." Tex. Code Crim. Proc. Ann. art 64.02(2). Although the State has acknowledged that all evidence sought to be tested is available, with the exception of the Routiers' living room

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[1] In addition to her motion for forensic DNA testing under Chapter 64 of the Texas Code of Criminal Procedure, Applicant has consistently sought access to and testing of other critical items of evidence in this case. *See* Expedited Motion for Access to State's Physical Evidence, filed May 29, 2002; Renewed Request for Access to State's Evidence, filed July 2, 2002; Post-Application Motion for Access to State's Evidence, filed July 17, 2002; Second Renewed Request for Access to State's Evidence, filed July 29, 2003; and Renewed Motion for Testing of Physical and Biological Evidence and Request for an Evidentiary Hearing, filed January 23, 2004. The State has not turned over any evidence in its possession and this Court did not order it to do so. Nor did this Court respond to Applicant's numerous motions, with the exception of one ruling allowing Applicant to view – but not test -- evidence already in the Court's possession. On August 4, 2004, this Court issued its Findings of Fact and Conclusions of Law in response to Applicant's original writ of habeas corpus, effectively ruling on all outstanding evidentiary issues without a hearing. Applicant received neither access to this evidence nor a hearing to evaluate the merits of her claim that she is innocent of the crime for which she was convicted.

coffee table, the State has not produced this evidence to this Court. Rather, the State has "request[ed] that the various agencies retain custody of the evidence unless testing is ordered," with no explanation as to why the evidence cannot be delivered to the Court at this time. State's Response at 4. The State has shown blatant disregard for its statutory duties once again.

As set forth below, Applicant meets the requirements for post-conviction forensic DNA testing under Chapter 64. Accordingly, this evidence must be delivered to the Court for testing at a laboratory acceptable to both parties.

A. The Evidence Requested by Applicant Still Exists and Is In a Condition To Be Tested.

As the State's Response makes clear, the biological evidence sought by Applicant still exists and is suitable for some form of DNA testing. State's Response at 3-4, 17-18. The one exception is the glass coffee table from Applicant's living room that contained an unidentified bloody fingerprint. It appears that the Rowlett Police Department did not seize this coffee table as evidence. State's Response at 4 and Exhibit E. Because the coffee table cannot be located, Applicant requests access to the lifts from this bloody fingerprint, which may contain residue from the blood on the table. These lifts are in the possession of the District Clerk's Office. State's Response at 4.

B. Applicant Meets the Preponderance of the Evidence Standard Under Article 64.03(a)(2)(A).

Article 64.03(a)(2)(A) of the Texas Code of Criminal Procedure requires that, in order to obtain DNA testing, a convicted person must establish by a preponderance of the evidence that he would not have been convicted if exculpatory results had been obtained through such testing. The State contends that Applicant has not met this burden.

First, the State mischaracterizes the appropriate evidentiary standard under Article 64.03(a)(2)(A). The State relies heavily on *Kutzner v. State*, 75 S.W.3d 427 (Tex. Crim. App.

2002), in support of its argument. At the time *Kutzner* was decided by the Texas Court of Criminal Appeals, Article 64.03(a)(2)(A) required a convicted person to establish by a preponderance of the evidence that "a reasonable probability exists that the person would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing." *See Kutzner*, 75 S.W.3d at 432. The *Kutzner* court conducted an in-depth analysis of the legislative history of Chapter 64 and concluded that 64.03(a)(2)(A) "require[d] convicted persons to show a reasonable probability exists that exculpatory DNA tests would prove their innocence." *Id.* at 439. As the State characterizes this requirement, Applicant must "show that exclusionary DNA test results would **completely exonerate** her, rather than merely alter the outcome of the trial." State's Response at 6 (emphasis added).

The Texas Legislature amended Article 64.03(a), effective September 1, 2003, in direct response to *Kutzner*. The legislative history of these amendments makes clear that Applicant is *not* required to prove actual innocence:

> The Court's opinion in *Kutzner* highlighted the need for clarification by the Legislature as to how Chapter 64 is to be used....In order to make its intent clearer, H.B. 1011 makes the following changes to Article 64.03: (a) The bill clarifies that the standard of proof with regard to getting a DNA test is "preponderance of the evidence." By taking out the "reasonable probability" language, the intent is to clarify that the defendant does not have to meet two burdens. **Despite the reasoning in *Kutzner*, the Legislature did not intend for the defendant to have to prove "actual innocence" (a principle under habeas law) in order to meet his burden to have the test done. The defendant must prove that, had the results of the DNA test been available at trial, there is a 51% chance that the defendant would not have been convicted."**

Texas Bill Analysis, H.B. 1011, 78th Leg. (Tex. 2003) (emphasis added). Contrary to the State's position, Applicant does not have to show that exculpatory DNA test results would completely exonerate her. She must show only that there is a 51% chance she would not have been convicted at trial if this evidence were available.

Applicant easily meets this reduced burden. The identity of the perpetrator is the fundamental issue in this case, and the DNA testing in question may establish the presence of an as-yet unidentified third party in the Applicant's home on the night of the crime. This is especially true with respect to the limb hair and pubic hair samples. If the DNA from these hairs cannot be traced to anyone in the Routier household at or around the time of the crime, Applicant has affirmative evidence that an intruder was in her house.[2] With respect to the unidentified bloody fingerprint on Applicant's coffee table,[3] it is possible that the person who left this print may have transferred a sufficient amount of his *own* DNA to the surface of the table to be detectable as a component in a DNA mixture. Affidavit of Dr. Elizabeth A. Johnson ("Johnson Affidavit") at ¶13 (Exhibit 3 to Applicant's Motion).

Definitive evidence of an unknown party in the Routier home would have been critical to Applicant during trial – particularly since the State's case was premised on testimony that Applicant staged the crime scene and there was insufficient evidence of an intruder in her house. Moreover, Applicant's case is not comparable to a more common fact pattern like *Kutzner*, where evidence connects the defendant to a crime scene where he does not belong. *See* 75 S.W.3d at 436 (victim's body was discovered in her real estate office; electrical wire and tie wraps used to bind victim's body were traced to defendant; and note in defendant's handwriting was found in victim's office). The State actually suggests that Applicant's call to 911 – **and her presence in**

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[2] The State argues without support that nothing in the record connects the pubic hairs to the murders. State's Response at 9. To the contrary, these pubic hairs may be indicative of a sexual assault, which has been suggested as a potential motive of an intruder. *See* Applicant Darlie Lynn Routier's Motion For Forensic DNA Testing ("Applicant's Motion") at 10-11; C.R.R. Vol. 31, p. 2964:7-21; Vol. 44, p.4878:14-20.

[3] Applicant's fingerprint experts have definitively excluded Applicant and all other members of the Routier household as the source of this print. *See* Applicant Darlie Lynn Routier's Renewed Motion for Testing of Physical and Biological Evidence and Request for an Evidentiary Hearing, filed January 23, 2004, at 4.

her own home – is somehow indicative of the "far stronger evidence" against her. State's Response at 12. But it is consistent with Applicant's version of the facts – that an intruder attacked her and her two children – that Applicant was found in her own home, brutally injured and bleeding from a knife wound on her neck. It is also consistent that all DNA tests of blood samples performed prior to trial were attributable to Applicant or the two children, since all three were bleeding severely. On the other hand, definitive DNA evidence of an unknown person in Applicant's home, such as hair samples or residue left by a fingerprint, would corroborate Applicant's version of this crime.

The State concedes that DNA testing may establish the presence of an unknown third party in the Routier household, but contends that such evidence would show only that Applicant had an accomplice. State's Response at 10, 12-13 ("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...."). The State's argument is unjustifiable at best and borders on outrageous. There has been no prior suggestion that Applicant had an accomplice to her crime, nor does the evidence support this theory. Throughout Applicant's trial and appeal, there have been two theories of this crime: the State's theory that Applicant murdered her own children, staged the crime scene, and brutally self-inflicted her own wounds; and Applicant's consistent testimony that she and her two children were attacked by an unknown intruder. As the State itself argued in Applicant's trial:

> 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 that house and committed a horrible murder or it's going to be the defendant.

C.R.R. Vol. 46, pp. 5209:23 – 5210:2.

C. Applicant Had No Discretion Over DNA Testing Prior to Her Trial, And The Interests of Justice Require DNA Testing At This Time.

If the interests of justice so require, Applicant may request testing of DNA evidence that was available to be tested at the time of her trial but was not tested through no fault of her own. Tex. Code. Crim. Proc. Ann. art. 64.01(b)(1)(B). Applicant had no say over the items of biological evidence submitted for DNA testing prior to her trial. *See* Affidavit of Darlie Lynn Routier ("Routier Affidavit") at ¶4 (Exhibit 1 to Applicant's Motion). Moreover, Applicant was not even aware that DNA tests had been performed until immediately before her trial, when the State provided her counsel with the results of these tests. *Id.*

The State argues, somewhat speciously, that Applicant's trial counsel retained forensic experts who could have asked for testing of the evidence Applicant seeks to have tested now. Indeed, Applicant's *initial* trial counsel did retain two forensic experts – Terry Laber and Barton Epstein – who had the opportunity to review certain physical (but not biological) evidence in the State's possession. *See* Affidavit of Terry L. Laber at ¶5 (Exhibit 7 to First Application for Post-Conviction Writ of Habeas Corpus Pursuant to Texas Code of Criminal Procedure article 11.071 ("First Application")). Mr. Laber and Mr. Epstein concluded that several pieces of evidence were inconsistent with the State's theory of a staged crime scene and recommended that this evidence be analyzed. *Id.* at ¶11, 6. In October 1996, Applicant's ultimate trial counsel, Douglas Mulder, was hired to replace her original counsel. Mr. Mulder did not follow up on the critical recommendations of Mr. Laber and Mr. Epstein – instead, he terminated their involvement in Applicant's case. *Id.* at ¶9, 10; *see also* First Application at 45-53.

Applicant did not have a DNA expert to assist her at trial. Moreover, the only experts who arguably could have provided this support to Applicant – forensic analysts Terry Laber and Barton Epstein – were dismissed by Applicant's trial counsel. Applicant was not made aware

that DNA tests were being performed by the State until immediately before her trial. Routier Affidavit at ¶4. Neither Applicant, nor, it appears, Applicant's trial counsel, was consulted by the State regarding its selection of evidence for DNA testing. *Id.* The interests of justice require that Applicant have the opportunity to test these items of evidence now.

Importantly, the "interests of justice" analysis does not apply to evidence that was not tested because DNA testing was technologically incapable of providing probative results at the time of Applicant's trial. Tex. Code Crim. Proc. Ann. art. 64.01(b)(1)(A)(ii). The limb hairs from the tube sock in the alley were analyzed microscopically by the State's forensic expert, Charles Linch, but were not subjected to DNA testing. *See* Applicant's Motion at 5-6; C.R.R. Vol. 37, pp. 2835:10-25, 2836:24-2837:20. The DNA testing technology used by SWIFS and Gene Screen at the time of Applicant's trial was insufficient to yield a result, particularly if the limb hairs do not contain a root. *See* Johnson Affidavit at ¶11, 14. Similarly, Applicant is entitled to testing of evidence that, while previously tested for DNA, can be subjected to testing with newer techniques that are more likely to be accurate and probative than the results of the previous test. Tex. Code Crim. Proc. Ann. art. 64.01(b)(2). At least one of the pubic hairs gathered from Applicant's living room was tested for DNA and did not yield any DNA result. *See* Applicant's Motion at 3-4; C.R.R. Vol. 38, p. 3148:14-18, 3149:10:-3151:1. Due to more discriminating testing techniques, it is likely that DNA information that was unrecoverable in 1996 may be obtained from this evidence today. Johnson Affidavit at ¶14.

D. Mitochondrial DNA Testing Would Yield Probative Results And Is Permissible Under Chapter 64 With the State's Consent.

The State opposes mitochondrial DNA testing of any evidence in Applicant's case. State's Response at 17-18. Article 64.03 provides that, if Applicant meets the statutory requirements for post-conviction DNA testing, "**the court shall order that the requested**

forensic DNA testing be conducted. The Court may order the test to be conducted by the Department of Public Safety, 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. 64.03c (emphasis added). Pursuant to the mandatory language of Article 64.03, DNA testing **must** be performed if Applicant meets her burden.

Certain pieces of evidence Applicant seeks to have tested – namely, limb hairs from the tube sock in the alley and pubic hairs found in the Routiers' living room – may only yield probative results through mitochondrial DNA testing. *See* Johnson Affidavit at ¶11, 14. Applicant concedes that neither the Department of Public Safety nor any lab under contract with the Department offers mitochondrial DNA testing at this time. *See* State's Response at 18 and Exhibit F. Accordingly, the parties must reach agreement on a laboratory to perform such testing. Applicant is quite willing to discuss laboratory options with the State; Applicant is also aware that the State is not responsible for the cost of such testing. Tex. Code Crim. Proc. Ann. art. 64.03(d).

Notwithstanding the fact that Article 64.03c requires the parties to reach an agreement on this subject, the State opposes Applicant's use of mitochondrial DNA testing. First, Applicant cannot fathom why the State would contest such testing, particularly since the State is so confident that DNA testing will not yield exculpatory results. Second, the State's suggestion that mitochondrial DNA testing will not be probative because it will not distinguish among Applicant, Damon, and Devon only furthers Applicant's case. *See* State's Response at 18. Applicant believes that testing of this evidence will demonstrate the presence of an unidentified intruder in her house – a third party who will not have Applicant's gene sequence. Third, Chapter 64 contemplates that evidence should be analyzed following conviction using newer

techniques due to advancements in the field of DNA testing. Tex. Code Crim. Proc. Ann. art. 64.01(b)(2).

Applicant respectfully renews her request that this Court grant her motion for post-conviction forensic DNA testing under Chapter 64 of the Texas Code of Criminal Procedure. Applicant further requests that this Court compel the State to deliver the requested evidence, currently in the custody of the Rowlett Police Department, SWIFS, Orchid/Cellmark, and the District Clerk's Office, to this Court for testing at a laboratory acceptable to both parties.

DATED: December 15, 2004.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of Applicant Darlie Lynn Routier's Motion for Forensic DNA Testing to be served by first-class U.S. mail, postage prepaid, and facsimile upon the following on December 15, 2004:

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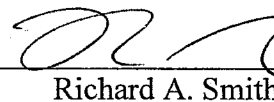

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