

judging ineffectiveness as set forth in **Strickland, supra.** applies to the attorneys on direct appeal. Applicant would assert that the same issues that complain of the actions of trial counsel set forth the same reasons why direct appeal counsel was ineffective for not raising the issues on direct appeal.

CLAIM FOR RELIEF NUMBER TWENTY-ONE

APPLICANT WAS DEPRIVED OF HIS U.S. CONST. AMEND. V & XIV RIGHT TO DUE PROCESS AND THE RIGHT TO PRESENT A DEFENSE WHEN THE STATE BLOCKED HIS ABILITY TO HAVE ACCESS TO THE PHYSICAL EVIDENCE TO TEST AND RETEST FOR DNA.

CLAIM FOR RELIEF NUMBER TWENTY-TWO

APPLICANT WAS DEPRIVED OF HIS RIGHT TO HAVE POST CONVICTION TESTING OF THE BIOLOGICAL EVIDENCE IN THIS CASE PURSUANT TO ART. 64.03 V.A.C.C.P.

CLAIM FOR RELIEF NUMBER TWENTY-THREE

APPLICANT WAS DEPRIVED OF HIS STATE CONSTITUTIONAL RIGHT TO DUE PROCESS AND RIGHT TO PRESENT A DEFENSE BY DENYING HIM ACCESS TO THE BIOLOGICAL EVIDENCE BEING MAINTAINED BY THE STATE FOR THIS WRIT OF HABEAS CORPUS.

Applicant made a request to test some items within the sole control of the State, and

to retest some of the items of evidence that are in the sole possession and control by the State. Applicant filed a motion requesting such access, and he attached thereto an affidavit from the defense DNA expert Karen Scalise. See exhibit " L " attached hereto and incorporated herein for all intents and purposes.. Applicant would ask the Court to consider the entire affidavit, and the 10-11-05 affidavit enclosed also, as if they were set forth word for word in this writ as it is the best evidence of what it stands for.

The State sought to block Applicant's ability to test and/or retest any of the evidence see exhibit " M ". The trial Court accepted the State's position and denied Applicant access to said evidence, see Exhibit " N ", the Trial Court's Order..

Applicant's position is that this request should be construed as being a request dictated not only by the U.S. CONST. AMEND. XIV right to due process and the right to present a defense, but also pursuant to Art. 64.03 V.A.C.C.P.

Since the trial court that ruled on this motion was also the trial court that tried this case there would have been no doubt that this request was for post conviction DNA testing. In the case of **Watkins v. State**, 155 S.W.3d 631 (Tex. App.-Texarkana 2005) the court set forth the standard of review for a denial of DNA testing in a case such as this.

We review a trial court's denial of a motion for post-conviction DNA testing under a bifurcated process. **Rivera v. State**, 89 S.W.3d 55, 59 (Tex.Crim. App.2002) (citing **Guzman v. State**, 955 S.W.2d 85 (Tex.Crim.App.1997));see also **Green v. State**, 100 S.W.3d 344, 344

(Tex.App.-San Antonio 2002, pet. ref'd). We afford almost total deference both to the trial court's determination of historical fact and to its application of law-to-fact issues that turn on credibility and demeanor. **Rivera**, 89 S.W.3d at 59; **Green**, 100 S.W.3d at 344. But we review de novo all other application of law-to-fact issues. **Rivera**, 89 S.W.3d at 59; **Green** 100 S.W.3d at 344. This de novo review usually includes the ultimate issue in post-conviction DNA testing cases: i.e., whether "a reasonable probability exists that exculpatory DNA would prove ... innocence." **Rivera**, 89 S.W.3d at 59.

To obtain post-conviction DNA testing, the convicted person must establish by a preponderance of the evidence that a reasonable probability exists that he or she would not have been prosecuted or convicted if "exculpatory results had been obtained through DNA testing." *Id.* (citing TEX.CODE CRIM. PROC. ANN. art. 64.03(a)(1)(A)(i) & (2)(A)). This requirement is not a two-part test. "The convicted person is not required to show both that a reasonable probability exists that the person would not have been prosecuted and that the person would not have been convicted." S.J. OF TEX., 77th Leg., R.S. 995 (2001) (emphasis added), <<http://www.capitol.state.tx.us/sjml/77r/pdf/4-2.pdf>>, at *25. Exculpatory evidence is that "tending to establish a criminal defendant's innocence." BLACK'S LAW DICTIONARY 597 (8th ed.2004).

The statutory requirement that testing results be exculpatory is not met if the DNA evidence would "merely muddy the waters." Instead, the evidence must tend to prove the defendant's innocence. **Rivera**, 89 S.W.3d at 59 (citing **Kutzner v. State**, 75 S.W.3d 427, 439 (Tex.Crim.App.2002)). Stated differently, DNA testing must conclusively outweigh all other evidence of the convicted's guilt. **Rivera**, 89 S.W.3d at 59; **Thompson v. State**, 95 S.W.3d 469, 472 (Tex.App.-Houston [1st Dist.] 2002, pet. ref'd).

In the case of **Kutzner v. State**, 75 S.W. 2d 427 (Tex. Crim. App. 2002), the Court stated that the language of Art. 64.03 (a)(2)(A) did not contemplate a consideration of new post-trial information, but then the Court went on to consider the same anyway. See **Kutzner at p. (439)** Applicant would therefore ask this Court to consider Applicant's new evidence which is set forth within this Writ . It clearly shows that Applicant's writ evidence shows that there were two differed acts associated with the physical evidence on the deceased's body. There was the consensual sexual act between the complainant and Applicant, and there was the murder of the complainant. Therefore, the DNA which would come from areas of defense, as opposed to DNA which would have been deposited with the consensual act of intercourse. Further, the examination of the results of the State's DNA analysis by Karen Scalise shows that there was unidentified DNA evidence even within the State's findings. These unidentified sources were kept from the jury during the trial. The DNA , for example, under the victim's fingernails would likely be that of her attacker, and proof of the identity