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§ IN THE 180th DISTRICT COURT

§ OF

WILLIAM DARIN IRVAN,
Applicant

§ HARRIS COUNTY, TEXAS

STATE'S RESPONSE TO MOTION TO COMPEL

Respondent, the State of Texas, by and through its Assistant District Attorney for Harris County, files this, its Response to the "Motion to Compel the State to Allow Evidence in Their Sole Possession to be Subjected to Forensic Testing at the Expense and Direction of the Defendant" (hereinafter "Motion to Compel") filed by William Darin Irvan (hereinafter "the applicant"), and in support thereof would show the following:

I.

The applicant is confined pursuant to the judgment and sentence of the 180th District Court of Harris County, Texas, in cause number 864928 (the primary case), where the applicant was convicted of capital murder and sentenced to death.

The applicant's direct appeal is currently pending in the Court of Criminal Appeals. *Irvan v. State*, No. AP-74,853.

The applicant's initial application for writ of habeas corpus pursuant to TEX. CRIM. PROC. CODE art. 11.071 has not yet been filed.

II.

The applicant William Darin Irvan has moved this Court to compel the State to allow him to subject evidence to forensic testing, with such evidence currently in the possession of the Harris County District Clerk's Office and the Harris County Sheriff's Office. The applicant has also

moved this Court to order the collection of raw evidentiary samples from a non-party, namely Jack Shadbolt.

Respondent will address each of the applicant's requests in turn hereinbelow:

III.

1. **Fingernail scrapings from left and right hands of complainant.** The applicant seeks testing on fingernail scrapings from the complainant's left and right hands on the basis that the scrapings would yield epithelial cells of her attacker. However, this evidence was already subjected to forensic testing by Orchid Cellmark, as evidenced by its November 18, 2002 report; the samples are identified as FOR2224-018 and FOR224-019 (SX 70). William Joseph Watson, lab director at Orchid Cellmark, Nashville, testified at trial that these samples were analyzed along with other evidence in the case; there was no testimony that Orchid Cellmark was able to develop a DNA profile foreign to the complainant (XXIII R.R. at 6, 74-78). The DNA found under the complainant's fingernails was consistent with her own (XXIII R.R. at 234). Since this evidence has already been subjected to DNA testing, and because Orchid Cellmark was unable to develop a foreign profile from the evidence, there is no need to subject the evidence to further testing.

Furthermore, there is no need for this evidence to be tested because, in light of the DNA evidence admitted at trial, the applicant cannot show a reasonable probability that he would not have been convicted if the results of this testing had been available prior to trial. Forensic evidence admitted at trial demonstrated that the applicant's DNA profile matched the DNA recovered from the complainant's rectal swab and smear and vaginal swab stick (SX 70, 71). The applicant did not present evidence at trial that he and the complainant had ever engaged in consensual sexual intercourse. Therefore, even if additional testing of the fingernail scrapings

were to develop an unknown DNA profile, the applicant cannot show that such new evidence would have made a substantive difference at trial, nor can he should that it would support an actual innocence claim in the instant habeas proceeding.

2. Hair evidence. The applicant seeks testing related to three articles of hair evidence: (1) a hair with a root recovered from the complainant's left fingernail scrapings; (2) a hair recovered from a knife at the crime scene; and (3) a hair recovered from the wheel of a vacuum cleaner.

Based on the testimony elicited at trial, there were apparently four hairs recovered from the complainant's fingernail scrapings; only one of these was tested by Orchid Cellmark (SX 69)(XXIII R.R. at 70-72, 167-188). Orchid excluded the complainant, the applicant, and Timothy Darden as possible contributors of the hair; furthermore, defense counsel cross-examined Watson at length about the fact that the hair had not been compared with suspect Jack Shadbolt's DNA profile (XXIII R.R. at 70-72, 167-188).

There is no indication that a hair recovered from the knife found at the crime scene was ever subjected to DNA analysis. However, it is important for the Court to note the condition of the evidence and its location at the crime scene: the blood-stained knife was found underneath a pair of shorts, lying on shag carpet (SX 24, 25, 26)(XX R.R. at 26-28).

The applicant also wants further testing and analysis performed on the hair recovered from the wheel of the vacuum cleaner found at the crime scene. Again, it is important to note the condition of the evidence and its location: the vacuum cleaner was also stained with blood, lying next to the complainant's body, its cord wrapped around her, and all on blood-soaked shag carpeting (SX 27-32)(XX R.R. 31-38). The hair recovered from the vacuum cleaner has been

previously subjected to DNA analysis and the complainant and the applicant were both excluded as donors (SX 71).

The applicant cannot show that any further testing on the hair evidence listed above would be exculpatory. Specifically, the applicant has already been eliminated as a contributor of the hairs recovered from the fingernail scrapings and the vacuum cleaner, and it is just as likely that the applicant would be excluded as a contributor to any hair recovered from the bloody knife. State's witness Watson testified at trial that "hair is basically ubiquitous. You find it everywhere. If it matches, it can be significant. If it does not match, it doesn't necessarily mean that it is or is not significant" (XXIII R.R. at 72-73). Furthermore, hair is everywhere in carpet, anyone who walks through a carpeted room can leave hair behind, and hair certainly sticks to bloody surfaces. (XXIII R.R. at 73).

The applicant seeks comparison of these hairs with Jack Shadbolt's DNA profile. Jack Shadbolt, the complainant's husband, lived with the complainant and her daughter in the house that later became the crime scene in this case (XIX R.R. at 34). Therefore, Shadbolt's hair should be found throughout the house, particularly in the carpet. Likewise, it is not unreasonable to expect that sticky, bloody objects (including fingernails) would pick up Shadbolt's hair. The possibility that Shadbolt's hair might be consistent with the hairs referenced above does not mean that the applicant would not have been convicted at trial, nor does it show the applicant's actual innocence.

3. **Blood-stained newspaper.** The applicant seeks additional testing of a blood stain found on newspaper recovered from the crime scene. However, two pieces of newspaper stained with blood, identified as FOR2224-025 and FOR2224-026, have already been subjected to DNA analysis by Orchid Cellmark (SX 70, 71)(XXIII R.R. at 80). Orchid Cellmark was unable to reach a conclusion concerning the origin of the DNA found on these items (SX 70, 71)(XXIII

R.R. at 80). The applicant fails to show that any further testing of these two pieces of newspaper would yield different results.

4. **Paint scraping.** The applicant seeks further analysis of paint scrapings (which he identifies as paint scrapings recovered from a wall at the crime scene); specifically, the applicant requests that the DNA profile obtained from the paint scrapings be compared with Jack Shadbolt's DNA profile. *See Applicant's Motion at 4.* This evidence was previously tested by Orchid Cellmark, and Orchid determined that both the applicant and the complainant were excluded as having contributed to this evidence based on a partial DNA profile (SX 71)(XXIII R.R. at 217).

However, this evidence – which the applicant attributes to the crime scene – appears to have actually been collected from the applicant's own home. At trial, the defense called Detective Roger Wedgeworth, who testified that during the course of their investigation, officers collected evidence from the house where the applicant lived at the time of the offense (XXIV R.R. at 90-91). Specifically, the applicant was known to enter his home by crawling in and out of a window; officers investigated the scene and found what they believed to be a droplet of blood on the windowsill (XXIV R.R. at 91-92). The area had been painted over, so the paint was scraped off and sent to Orchid Cellmark for testing (XXIV R.R. at 92-93). During his trial, Wedgeworth consulted the Orchid Cellmark report (SX 71) and read that the applicant and the complainant "can be excluded as having contributed the genetic profile found in the paint scrapings, the partial profile" (XXIV R.R. at 93-94).

Although these paint scrapings, recovered at the applicant's home, could have further implicated him in the offense had they yielded the DNA profile of the applicant or the complainant, the presence of any foreign DNA profile would not tend to exculpate the applicant.

The applicant fails to identify any other paint scrapings to be tested. This evidence has already been subjected to DNA testing, and the applicant fails to show that further DNA testing is necessary or would be beneficial.

IV.

In all things, the applicant fails to show that any further forensic testing or DNA analysis is necessary in this case with respect to the evidence listed in the applicant's Motion to Compel. The applicant fails to show that he would not have been found guilty had such further testing or analysis been available prior to trial. Further, the applicant fails to show that such results would establish his actual innocence or lead to a different outcome of the proceeding.

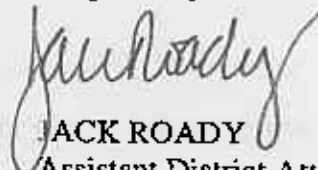
Therefore, Respondent respectfully requests that the applicant's Motion to Compel be denied in all respects.

V.

Service has been accomplished by sending a copy of this instrument to the applicant's habeas counsel by electronic mail on July 26, 2005, and by hand delivery on July 27, 2005.

SIGNED this 26th day of July, 2005.

Respectfully submitted,



JACK ROADY
Assistant District Attorney
Harris County, Texas
1201 Franklin, 6th Floor
Houston, Texas 77002
(713) 755-6657
Texas Bar ID #24027780