DNA ISSUE

Texas Court of Criminal Appeals
Appellant's motion for rehearing

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AUSTIN, TEXAS
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No. AP-77,046

IN THE COURT OF CRIMINAL APPEALS OF TEXAS AT AUSTIN

HENRY W. SKINNER,
Appellant

v.

THE STATE OF TEXAS,
Appellee

On Appeal from the Finding Under Tex. Code Crim. Proc. art. 64.04 by the 31st District Court of Gray County

APPELLANT'S MOTION FOR REHEARING

ROBERT C. OWEN
Texas Bar No. 15371950

DOUGLAS G. ROBINSON

Counsel for Appellant

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MOTION FOR REHEARING

By his counsel and pursuant to Tex. R. App. Proc. 79.1, Henry W. Skinner asks that the Court rehear its decision of October 5, 2022, in his appeal ("the Opinion").[1] The Opinion affirmed the trial court's finding that, had the DNA testing results obtained in post-conviction proceedings been available during Mr. Skinner's trial, it is not "reasonably probable that [Mr. Skinner] would not have been convicted." Tex. Code Crim. Proc. art. 64.04; *see* Opinion at 37. Rehearing is required because the Opinion effectively substitutes a novel construction of art. 64.04, one that demands a movant make an affirmative demonstration of actual innocence, in place of the statute's plain language, under which a movant need show only that the post-conviction DNA results would have been sufficient to raise a reasonable doubt in the mind of at least one juror. The Court's construction of art. 64.04 is so far out of keeping with the plain language of art. 64.04 as to violate Mr. Skinner's federal and state constitutional rights to due process.

[1] *Skinner v. State*, ___S.W.3d___, 2022 WL 5056917 (Tex. Crim. App., October 5, 2022).

1) Due process limits this Court's power to construe Ch. 64.

Chapter 64 of the Code of Criminal Procedure provides a procedure through which a convicted person can obtain DNA testing and then use the results from that testing in other proceedings to secure a new trial, executive clemency, or some other relief from his conviction. While Texas had no federal constitutional duty to create such a framework, having done so it may not apply and enforce the provisions of Ch. 64 in a manner that violates fundamental fairness. *See District Attorney's Office for the Third Judicial District v. Osborne*, 554 U.S. 52, 69 (2009); *Skinner v. Switzer*, 562 U.S. 521 (2011); *Elam v. Lykos*, 470 F. App'x 275, 276 (5th Cir. 2012) ("While there is no freestanding right for a convicted defendant to obtain evidence for post-conviction DNA testing, Texas has created such a right, and, as a result, the state provided procedures must be adequate to protect the substantive rights provided."); *Emerson v. Thaler*, 544 F. App'x 325, 327 (5th Cir. 2013) ("Although states are under no obligation to provide mechanisms for postconviction relief, when they choose to do so, the procedures they create must comport with due process and provide litigants with a fair opportunity to assert their state-created rights.").

2) The plain language of art. 64.04 would permit a favorable finding based solely on the tendency of the DNA results, in conjunction with other evidence in the case, to raise a reasonable doubt about the defendant's guilt.

Art. 64.04 entitles Mr. Skinner to a favorable finding if he shows that, "had the [DNA testing] results been available during the trial of the offense, it is *reasonably probable* that [he] *would not have been convicted*." (Emphasis added). Two things are significant about the language the Legislature chose to frame this test. First, art. 64.04 incorporates the standard of "reasonable probability," *i.e.,* a probability less than a preponderance of the evidence, but sufficient to undermine confidence in the outcome. *See Strickland v. Washington*, 466 U.S. 668, 693-94 (1984); *see also Cox v. State*, 389 S.W.3d 817, 819 (Tex. Crim. App. 2012) (quoting *Strickland*); *see also*, *e.g.*, *Bouchillon v. Collins*, 907 F.2d 589, 595 (5th Cir. 1990) ("reasonable probability" imposes "a lower burden of proof than the preponderance standard"); *Aviles v. State*, 2006 WL 2403308 (Tex. App. – Houston (14th Dist.), 2006) at *1 (same).

Second, under art. 64.04 the question is not whether the newly available DNA results affirmatively and conclusively exculpate the defendant. Instead, the issue is whether it is reasonably likely that he "would not have been convicted." *Id*. This language instructs a court

weighing the existence of such a "reasonable probability" to focus on whether, in light of the newly available DNA results and the other evidence admitted at trial, a reasonable juror might have harbored reasonable doubt about the defendant's guilt, and thus "would not have ... convicted" him.

Thus, as written, art. 64.04 requires a reviewing court to ask not whether the newly available DNA results eliminate the possibility of the defendant's guilt, but simply whether, taken together with all the other evidence in the case, they are sufficient to raise reasonable doubt about the defendant's guilt. And it requires a favorable finding even if the defendant's showing of that degree of doubt falls *below* a preponderance of the evidence, as long as his showing undermines confidence in the verdict. This is the only interpretation of the key language – "reasonable probability" and "would not have been convicted" – that makes sense within the framework of a criminal trial.[2]

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[2] The Legislature clearly could have conditioned a favorable finding under art. 64.04 on a showing of innocence, as it has limited the availability of other relief elsewhere. *See*, *e.g.*, Tex. Civ. Practice and Remedies Code, § 103.001(2)(B) (making certain compensation and benefits available to a person who has obtained habeas relief "based on a court finding or determination that the person is actually innocent of the crime for which the person was sentenced"). The plain language of art. 64.04 clearly shows that the Legislature did not intend to go that far with respect to post-conviction DNA testing.

3) The Opinion allows a trial court to substitute its own subjective determinations about the credibility of witnesses and the weight to be accorded their testimony for the perspective of a hypothetical reasonable juror.

The Opinion endorses the convicting court's construction of art. 64.04, under which it evaluated the evidence in terms of its own subjective credibility choices among competing expert witnesses, rather than asking how a lay juror would have responded to the testimony that tended to raise doubts about Mr. Skinner's guilt. In making its findings, the convicting court repeatedly arrogated to itself such core jury functions as assessing witness credibility and deciding how much weight to assign particular evidence, and this Court endorsed those findings uncritically. *See, e.g.*, Opinion at 25 (reciting that "[t]he convicting court found that the testimony provided by the State's witnesses was more credible than [that] provided by Appellant's expert witnesses"); *id.* at 32 (echoing the convicting court's view that "the MtDNA profiles on three hairs did not, standing alone, convey any meaningful information about [alternative suspect Robert Donnell's] potential involvement (if any) in the offense," *cf.* Record 174 (¶ 66.C(5)) (essentially identical language in the convicting court's findings)). Nowhere in its findings did the convicting court mention, much less consider, how the evidence could look

to a reasonable juror, and the Opinion adopts the same blinkered construction of art. 64.04.

This construction of art. 64.04 departs so far from the plain language as to violate due process. As in other contexts involving informed speculation about the potential effect of evidence on a jury, a reviewing court must set aside the question of whether the court itself credits the evidence and ask instead whether a reasonable juror *could* do so.

The Supreme Court's application of the "reasonable probability" prejudice standard in *Strickland v. Washington*, 466 U.S. 668 (1984) sets an instructive example. At a post-conviction evidentiary hearing, the prosecution called as a witness the state-court judge who had presided at Washington's trial and was, under Florida law, the ultimate sentencer in the case. *Id*. at 678. The judge testified that the never-before-presented mitigating evidence that was the focus of Washington's ineffective assistance claim "would not have altered his determination that Washington deserved the death penalty." *Washington v. Strickland*, 693 F.3d 1243, 1249 (5th Cir. 1982) (*en banc*). The Supreme Court, however, expressly declared that the trial judge's testimony about his subjective

response to the evidence was "irrelevant to the prejudice inquiry." *Id*. at 700. That holding compels the conclusion that a reviewing court examining whether some changed circumstance is likely to have altered the outcome at trial may not rely on its own subjective view of the weight of the evidence, but instead must ask what view a reasonable juror might take. Given the Legislature's choice to couch the art. 64.04 inquiry in terms of whether the jury would still have unanimously convicted the defendant in the face of exculpatory DNA test results, the convicting court's insistence on substituting its own judgment, and this Court's embrace of those conclusions, violate due process.

4) <u>In upholding the art. 64.04 finding, this Court stamped with approval the convicting court's failure to consider the collective impact of the DNA test results.</u>

The convicting court's findings failed to consider the collective impact of the DNA test results in weighing whether they created a reasonable probability that the jury would not have convicted Mr. Skinner. *See*, *e.g*., 2018 CR at 137 ("The Court has reviewed whether *any of the reported DNA testing results* would have made it reasonably probable that [Mr.] Skinner would not have been convicted, and the answer is 'No.'") (emphasis added). In upholding the convicting court's

art. 64.04 finding, this Court duplicated the error. That, too, violated due process. Nothing in the statute places a burden on the movant to show that a particular DNA testing result, standing alone, would have produced the necessary reasonable probability of non-conviction. There is no reason to believe the Legislature intended such piece-by-piece parsing of the DNA testing results. Engrafting that requirement onto art. 64.04 also violated due process.

5) The Court has construed art. 64.04 to foreclose a favorable finding for the defendant unless DNA test results clearly point to his innocence, an approach that violates due process because it is impossible to square with the language of the statute.

The Opinion reflects a construction of art. 64.04 under which a defendant must do more than show that DNA test results would have left a juror harboring reasonable doubt about his guilt. Instead, both the convicting court and this Court treat art. 64.04 as requiring the defendant affirmatively to prove that he is completely exonerated by the DNA results.

For example, this Court endorsed the convicting court's view treating as insignificant the fact that the three hairs recovered from Twila Busby's hands have the same mtDNA profile as Twila Busby and

her maternal relatives, including alternative suspect Robert Donnell.[3] *See* Opinion at 32 ("standing alone," these results "had little probative value"). As the Opinion argues at 32-33 and n. 26, those hairs *could* have been picked up off the floor, and *could* have originated with Twila or one of her sons. True enough, but they could also have come from *Donnell*, and that inference is supported by the two reports from DPS's trace analyst Lan Bundy, a professional trained in visual hair comparisons. Bundy, after examining these three hairs under magnification, opined that they were "visually different" from the known hair samples collected from the victims at autopsy. The Court dismisses this evidence as irrelevant because it does not *prove* that the hairs came from someone other than the victims. *See* Opinion at 30-31. But proof is not what Art. 64.04 requires. The evidence that Bundy, a trained expert in the field, had reported after careful examination a visual difference between the suspect hairs and that of any of the victims, yet carried the same MtDNA as the victims – especially when coupled with the other evidence presented at trial about Donnell and his suspicious conduct on the night

[3] *See* AOB at 24-30; and Appellant's Supp. Br. at 16 for a more detailed discussion of this finding.

of the murders – is more than enough to cause a reasonable juror to be concerned that maybe the wrong man is on trial. That concern equals reasonable doubt about the State's case against Mr. Skinner. Rather than consider the tendency of the MtDNA evidence, in conjunction with other evidence, to raise reasonable doubt, the Court rules out the possibility with the observation that "no other information … suggest[ed] that these three hairs were deposited during the commission of the capital offense or that they came from someone other than the victims." Opinion at 33. Again, this demand for proof from Mr. Skinner affirmatively implicating someone else as the killer far exceeds the crystal-clear requirements of art. 64.04 as written by the Legislature, and thus violates due process.

Exactly the same is true of the Court's treatment of the evidence that a dishtowel found at the crime scene contained third-party DNA and tested positive for the presence of blood. *See* AOB at 31-35. The DNA testing results would have provided the defense with the following argument: The towel was found in a black garbage bag in the same room where Twila Busby was killed. The place where it was found and the fact that it had Twila Busby's blood on it suggest the possibility that the

murderer used that towel to wipe Ms. Busby's blood from his hands after he killed her, and that he then put the towel in the garbage bag with the intention of disposing of it later. *See* AOB at 34; Appellant's Supp. Br. at 17-19.

The convicting court deemed this evidence "not helpful" to Mr. Skinner "because no evidence was presented … to show that any of the extraneous alleles were deposited at the time of the crime or who the extraneous alleles might have belonged to." Opinion at 29-30. This Court took the same view. *Id*. Here, again, the Court construed art. 64.04 to demand something more than evidence that could credibly support reasonable doubt. Instead, by the Court's reading, art. 64.04 demanded that Mr. Skinner actually prove when and by whom the extraneous alleles were deposited on the dishtowel. Construing art. 64.04 to require such affirmative proof of actual innocence is such an extreme departure from what that article actually requires as to violate due process.[4]

[4] The Court also found that the reanalysis of the DNA results from the dishtowel was unfavorable to Mr. Skinner because "the result was inconclusive regarding whether [he] contributed his DNA to side one of the dishtowel." Opinion at 30. That statement betrays a fundamental misunderstanding of the basic science involved, and thus also amounts to a due process violation. At the 2018 evidentiary hearing, all the experts agreed that in the context of STRmix results, "inconclusive" does *not* mean simply that the person in question can neither be included nor excluded as a contributor to a given sample. Rather, it means that *no meaningful results were obtained*, often

Another example is the Court's treatment of Mr. Skinner's argument that if he had killed the victims, at least some of the bloodstains in the house would have contained a mixture of his blood and theirs. This inference flows directly from the nature of the victims' injuries and the State's theory about how the crimes unfolded. Both male victims sustained wounds involving full penetration of a six-inch knife blade in an area of the body that would have bled profusely.[5] It would be logical for a reasonable juror to expect the perpetrator to have had the

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because the quality of the underlying biological sample was so poor. Every witness at the evidentiary hearing testified that "inconclusive" results – especially those with an LR within an order of magnitude of 1 – reflect not just uncertainty but *the absence of any informative information at all*. *See* Appellant's Supp. Br. at 19 (explaining the misleading and confusing use of "inconclusive" in connection with STRmix results).

[5] Mr. Caler, wearing only undershorts, was stabbed at least twice in his torso. One stab wound, to his anterior abdomen, produced such a large opening that his small bowel protruded through it. Tr. 28:1192. A second wound was to his chest under his left arm. At that location, the six-inch knife blade penetrated as much as seven inches into Mr. Caler's body, piercing his lung and heart and nearly exiting through his back. *Id.* at 28:1193. *See* DX 27. To inflict that injury, therefore, the knife would have to have penetrated Mr. Caler's body *beyond* the base of the blade, bringing the assailant's hand into direct contact with Mr. Caler's bloody wound. Furthermore, the "v" shape of the wound indicated to the medical examiner that the knife was twisted after penetrating Mr. Caler's chest cavity, which she found full of blood. Tr. 28:1193. Randy Busby was stabbed three times while lying face down in bed. *See* DX 9. Two of the wounds did not penetrate his chest cavity, Tr. 28:1197, but the third (and fatal) wound went through his rib cage and a lung, cutting the lower tip of his heart. *Id.* at 28:1198. The knife was apparently twisted after penetrating Mr. Busby's body. *Id.* at 1197. The medical examiner testified that the bloody knife found on the porch was consistent with both Mr. Caler's and Mr. Busby's injuries. *Id.* at 28:1196, 1199. According to the State, while Mr. Skinner was stabbing Mr. Busby, his hand slipped onto the blade of the knife and was badly cut.

victims' blood on the hand with which he held the knife. The fact that no blood from any of the victims was found mixed with Mr. Skinner's on either of the door knobs leading out the back of the house would have provided the defense with a powerful basis in the physical evidence to argue that Mr. Skinner was not the person who killed them.

A single reference to this extraordinary fact appears in the Opinion: a footnote acknowledging that at the 2014 hearing, Mr. Skinner's expert Dr. Heinig testified that if he had killed the victims, one would have expected to find his DNA mixed with theirs in scrapings from door knobs and the back door. Opinion at 27 n. 18. This Court's response – that "evidence presented at the two hearings significantly undermined Heinig's assertion" – is unsupported by any citation to the record. *Id.* In fact, no testimony from any witness at the two hearings meaningfully disputed this commonsense inference, and the convicting court's findings are silent on the point.[6] The Court likewise violated due process by

[6] The only response the convicting court offered was this conclusory statement in the last paragraph of its findings:

> The Court finds that the DNA testing results from both doorknobs and back door do not help Skinner because they are consistent with the State's evidence at trial showing that Skinner exited Twila's house through the back door on his way to Andrea Reed's home.

failing to address this key point and/or rejecting Mr. Skinner's argument on the basis of no evidence whatsoever.

Nor does the Opinion anywhere address the significance of the DNA test results showing that – as the State's own expert Dr. Budowle ultimately conceded – the bloodstains on the blanket that covered Randy Busby, and through which he was stabbed to death, contained only his own DNA and not Mr. Skinner's. *See* Appellant's Supp. Br. at 23-28. Mr. Skinner indisputably sustained a deep cut to his right hand on the night of the murders, to which the defense might have pointed as evidence that Mr. Skinner was a victim in the crime. To block that argument, the prosecution theorized that Mr. Skinner injured himself when his knife struck Randy Busby's shoulder blade as he inflicted the first of Mr. Busby's three stab wounds. *See* Tr. 28:1203; *see also* Tr. 30:1557 (prosecutor's closing argument).

If that were true, Mr. Skinner's blood should be present on the surface of the blanket through which the knife was stabbed, because his

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See Record 183 (¶ 102). But it was never disputed, either at trial or at the art. 64.04 hearing, that Mr. Skinner exited the house through the back doors (as evidenced by his palm print on one of the doorknobs, *see* Tr. 27:913). The point the convicting court completely missed is that when Mr. Skinner exited the house, he left only his *own* blood, and not that of any of the *victims*, on the back doors.

wounded hand bled profusely (ultimately requiring eight stitches to close, *see* DX 28 at MEDS-40). Yet DNA testing on the blanket showed no blood from Mr. Skinner. *See* AOB at 29-31; Appellant's Supp. Br. at 22-29; Appellant's Supp. Reply Br. at 7-9.

The absence of Mr. Skinner's DNA on the blanket covering Mr. Busby's body is yet another DNA test result that, had it been available at the time of trial, would have provided the defense with another basis in the physical evidence for arguing that Mr. Skinner was not the murderer. But the convicting court completely ignored this evidence, as did this Court, in its art. 64.04 calculus, no doubt for the same reason that it didn't prove Mr. Skinner's innocence. That rationale, too, departed so far from the art. 64.04 standard as to violate due process.

The foregoing examples suffice to make the point: where DNA test results support defense arguments for reasonable doubt but are not enough to show conclusively that someone else committed the crime, the Court has adopted a construction of art. 64.04 that treats those results as irrelevant. Its analysis in Mr. Skinner's case is consistent with its construction of art. 64.04 in other cases. *See*, *e.g.*, *Dunning v. State*, 572 S.W.3d 685, 694 n. 11, 697 n. 22 (Tex. Crim. App. 2019) (suggesting in a

sexual assault case that any DNA test result other than one conclusively excluding the defendant would fail to satisfy art. 64.04 because it would "merely mudd[y] the waters," and dismissing as "merely the defense's argument" the possibility that "the presence of third-party DNA" might show "an alternate perpetrator").

Finding that post-conviction DNA test results deserve no exculpatory weight despite their significant potential to strengthen the argument for reasonable doubt – as both the convicting court and this Court did here, on the view that some of the results do not conclusively show Mr. Skinner's actual innocence by implicating someone else in the murders – violates due process. Consider *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, which forbid State suppression of exculpatory or impeaching information. A *Brady* violation requires relief where it is reasonably likely that the disclosure of the suppressed information would have led to a different outcome. *See*, *e.g.*, *Kyles v. Whitley*, 514 U.S. 419 (1995). This is, of course, *the very same standard* the Texas legislature chose for art. 64.04. New, even strong, exculpatory evidence often does not prove innocence outright and thus may not definitively forecast an acquittal. Likewise, new impeaching evidence often only adds more

doubt, as by undermining the credibility of a key prosecution witness but leaving other inculpatory evidence untouched. Yet courts regularly sustain *Brady* claims in such circumstances, without suggesting that the evidence is immaterial because it does not affirmatively prove the defendant's innocence. *See*, *e.g.*, *Kyles*, 514 U.S. at 434 ("a showing of [*Brady*] materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant)"); *id*. at 453-54 (granting relief under *Brady* despite acknowledging that even if the suppressed evidence had been disclosed, the State's remaining evidence was legally sufficient to convict).

The inescapable conclusion is that in the art. 64.04 context, just as in the *Brady* context, a reviewing court must focus on the capacity of the evidence to leave jurors with reasonable doubt about the defendant's guilt, rather than its capacity to persuade them conclusively of his innocence. For that reason, this Court cannot uphold the convicting court's findings on the theory that the post-conviction DNA test results

in this case merely "muddy the waters" as to Mr. Skinner's possible guilt. To do so is fundamentally unfair and contrary to the central place the burden of proof beyond a reasonable doubt occupies in our legal tradition. *See Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) (requiring jury to find that a criminal charge has been proven beyond a reasonable doubt "reflects … a profound judgment about the way in which law should be enforced and justice administered.") (internal quotation marks omitted); *cf*. Carrie Sperling and Kimberly Y.W. Holst, *Do Muddy Waters Shift Burdens?*, 76 Md. L. Rev. 629 (2017) (arguing that the prevalence of the "muddying the waters" metaphor in Texas decisions applying Ch. 64 has had destructive consequences). Indeed, "muddied waters" are the very definition of reasonable doubt, and invoking that formula to justify upholding an adverse finding under art. 64.04 violates due process.

CONCLUSION AND PRAYER FOR RELIEF

As set out above, the Court's construction of art. 64.04 departs so far from the statutory text as to violate due process. Accordingly, reconsideration is warranted. Mr. Skinner prays that the Court grant rehearing and reverse the judgment below.

Respectfully submitted,

/s Robert C. Owen
ROBERT C. OWEN

DOUGLAS G. ROBINSON

Attorneys for Henry W. Skinner