United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

May 04, 2020

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 20-10392 In re: Gary Barnes
USDC No.

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

Laney Lampard

By: _____
Laney L. Lampard, Deputy Clerk

Mr. Gary Wayne Barnes

20-10392

Mr. Gary Wayne Barnes
#318814
CID Ramsey Prison
1100 FM 655
Rosharon, TX 77583-0000

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 20-10392

In re: GARY WAYNE BARNES,

Movant

Motion for an order authorizing
the United States District Court for the
Northern District of Texas to consider
a successive 28 U.S.C. § 2254 application

Before JONES, CLEMENT, and HAYNES, Circuit Judges.

PER CURIAM:

Gary Wayne Barnes, Texas prisoner # 318814, moves for authorization to file a successive 28 U.S.C. § 2254 application seeking to challenge his 1981 convictions on three counts of aggravated rape and one count of burglary of a habitation. He contends that he relies on "newly discovered evidence" in the form of (i) an expert serologist's testimony and opinions given in a separate criminal case; (ii) 64 pages of documents concerning, among other things, rape kit samples and doctor notes from the examination of the victims; and (iii) the results of a May 2017 DNA test. As to certain of this evidence, Barnes argues that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), and engaged in prosecutorial misconduct by suppressing such evidence and that his counsel was ineffective for failing to discover it. Barnes also contends that he is actually innocent and seeks to raise several other claims that his convictions are constitutionally infirm.

To obtain authorization to file a successive § 2254 application, Barnes must make a prima facie showing that either (1) his claim "relies on a new rule of constitutional law" that was "made retroactive to cases on collateral review by the Supreme Court" and was previously unavailable or (2) "the factual predicate for the claim could not have been discovered previously" through due diligence, and the underlying facts, if proven, "would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2), (b)(3)(C). Barnes has failed to make the requisite showing.

Barnes also argues that he is actually innocent. To the extent that he raises a stand-alone actual innocence claim, this court "does not recognize freestanding claims of actual innocence on federal habeas review." *In re Swearingen,* 556 F.3d 344, 348 (5th Cir. 2009). Insofar as Barnes argues "actual innocence" as a gateway claim to raise his successive claims, he has not presented new evidence showing that it is more likely than not that no reasonable juror would have found him guilty of the charged offenses. *See Schlup v. Delo,* 513 U.S. 298, 327-29 (1995); *see also McQuiggin v. Perkins,* 569 U.S. 383, 386 (2013).

Accordingly, IT IS ORDERED that Barnes's motion for authorization to file a successive § 2254 application is DENIED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

April 16, 2020

#318814
Mr. Gary Wayne Barnes
CID Ramsey Prison
1100 FM 655
Rosharon, TX 77583-0000

No. 20-10392 In re: Gary Barnes

Dear Mr. Barnes,

We received and take no action on your IFP application as it is unnecessary in this type of case.

Your motion for authorization with attached exhibits has been filed and submitted to the Court. You will be notified once the Court issues its decision.

Sincerely,

LYLE W. CAYCE, Clerk
Claudia N. Farrington

By: _____
Claudia N. Farrington, Deputy Clerk
504-310-7706

PETITION FOR A WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2241

Instructions

1. **Who Should Use This Form.** You should use this form if
   - you are a federal prisoner and you wish to challenge the way your sentence is being carried out *(for example, you claim that the Bureau of Prisons miscalculated your sentence or failed to properly award good time credits)*;
   - you are in federal or state custody because of something other than a judgment of conviction *(for example, you are in pretrial detention or are awaiting extradition)*; or
   - you are alleging that you are illegally detained in immigration custody.

2. **Who Should Not Use This Form.** You should not use this form if
   - you are challenging the validity of a federal judgment of conviction and sentence *(these challenges are generally raised in a motion under 28 U.S.C. § 2255)*;
   - you are challenging the validity of a state judgment of conviction and sentence *(these challenges are generally raised in a petition under 28 U.S.C. § 2254)*; or
   - you are challenging a final order of removal in an immigration case *(these challenges are generally raised in a petition for review directly with a United States Court of Appeals)*.

3. **Preparing the Petition.** The petition must be typed or neatly written, and you must sign and date it under penalty of perjury. **A false statement may lead to prosecution.**

   All questions must be answered clearly and concisely in the space on the form. If needed, you may attach additional pages or file a memorandum in support of the petition. If you attach additional pages, number the pages and identify which section of the petition is being continued. Note that some courts have page limitations. All filings must be submitted on paper sized 8½ by 11 inches. **Do not use the back of any page.**

4. **Supporting Documents.** In addition to your petition, you must send to the court a copy of the decisions you are challenging and a copy of any briefs or administrative remedy forms filed in your case.

5. **Required Filing Fee.** You must include the $5 filing fee required by 28 U.S.C. § 1914(a). If you are unable to pay the filing fee, you must ask the court for permission to proceed in forma pauperis – that is, as a person who cannot pay the filing fee – by submitting the documents that the court requires.

6. **Submitting Documents to the Court.** Mail your petition and ____ copies to the clerk of the United States District Court for the district and division in which you are confined. For a list of districts and divisions, see 28 U.S.C. §§ 81-131. All copies must be identical to the original. Copies may be legibly handwritten.

   If you want a file-stamped copy of the petition, you must enclose an additional copy of the petition and ask the court to file-stamp it and return it to you.

7. **Change of Address.** You must immediately notify the court in writing of any change of address. If you do not, the court may dismiss your case.

IN THE SUPREME COURT OF THE

UNITED STATES

AO 242 (12/11) Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2241

UNITED STATES DISTRICT COURT

for the

IN RE:

Gary Wayne Barnes Sr.
Petitioner

v.

Director, Lori Davis
Respondent
(name of warden or authorized person having custody of petitioner)

Case No. _____
(Supplied by Clerk of Court)

PETITION FOR A WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2241

Personal Information

1. (a) Your full name: Gary Wayne Barnes Sr,
   (b) Other names you have used: none
2. Place of confinement:
   (a) Name of institution: Texas Department of Criminal Justice, Institutional Div.
   (b) Address: Ramesy Unit
   1100 FM, 655
   Rosharon, Texas 77583
   (c) Your identification number: #318814
3. Are you currently being held on orders by:
   ☐ Federal authorities ☒ State authorities ☐ Other - explain:
4. Are you currently:
   ☐ A pretrial detainee (waiting for trial on criminal charges)
   ☒ Serving a sentence (incarceration, parole, probation, etc.) after having been convicted of a crime
   If you are currently serving a sentence, provide:
   (a) Name and location of court that sentenced you: Criminal District Court Three Dallas County Texas.
   (b) Docket number of criminal case: F-80-16530 F-81-01105, F-81-01027, F-81-02518
   (c) Date of sentencing: Febuary 27, 1981, and Feb 25, 1981
   ☐ Being held on an immigration charge
   ☐ Other *(explain)*: no not applicable

Criminal convictions whwre the state used extraneous offenses without giveing the offenses report numbers of the evidence collection numbers as applied to each of the victims;
no evidence supports the convictions;

Decision or Action You Are Challenging

5. What are you challenging in this petition: Actual Innocence

- ☐ How your sentence is being carried out, calculated, or credited by prison or parole authorities (for example, revocation or calculation of good time credits)
- ☐ Pretrial detention
- ☐ Immigration detention
- ☐ Detainer
- ☐ The validity of your conviction or sentence as imposed (for example, sentence beyond the statutory maximum or improperly calculated under the sentencing guidelines)
- ☐ Disciplinary proceedings
- ☐ Other *(explain)*: actual Innocence the DNA evidence 'exculdes the petitioner and the victim did not make an identification of the petitioner and ther is a reasonable doubt >

6. Provide more information about the decision or action you are challenging:

(a) Name and location of the agency or court: Texas Court of Criminal Appeals of Texas at Austin , denied without a written order without consideration of

(b) Docket number, case number, or opinion number: 12, 658 22 23 24 and 25

(c) Decision or action you are challenging *(for disciplinary proceedings, specify the penalties imposed)*:

Writ of Habeas Corpus 11,07 Actual Innocence, Ineffective assistance of counsel, Brady violation in the withholding of the evidence, prosecutioral misconduct in the intentionally withholding the evidence , Due process violations

(d) Date of the decision or action: March 5, 2020, denial card filed in the Fifth circuit with writ attached; in a request to file 2254;

Your Earlier Challenges of the Decision or Action

7. **First appeal**

Did you appeal the decision, file a grievance, or seek an administrative remedy?

☑ Yes ☐ No

(a) If "Yes," provide:

(1) Name of the authority, agency, or court: Criminal District court Three in a Writ of Habeas Corpus, "newly discovered evidence ;

(2) Date of filing: January 4, 2018

(3) Docket number, case number, or opinion number: F-81-01105, F-81-01027, F-81-02518 & F-80-16530

(4) Result: Evidentiary Hearing

(5) Date of result: April 18, 2018

(6) Issues raised: Ineffective assistance, Brady Violations due process violatioons, prosecutorial misconduct , Actual Innocence and no eviidence to support the convictions as the state withheld the evidence, the prosecution spoke outside of the records of the evidence but nevered offered, admitted of presented the evidence, and never ask the victim to identify the petitioner;

The prosecution withheld the evidence of finger prints and did not admit the evidence on the recodrs, but made statements that the evidence connected the petitioner to the offenses, but did not admitt the proof;

(b) If you answered "No," explain why you did not appeal:

The petitioner had the same attorney at trial and the same for the the appeal, attorney did not raise any reversal errors.

8. **Second appeal** none

After the first appeal, did you file a second appeal to a higher authority, agency, or court?

☐ Yes ☒ No

(a) If "Yes," provide:

(1) Name of the authority, agency, or court: On direct appeal the attorney filed Fifth Judicial District of Dallas 600 Commerce Street, Suite 200 Dallas, Tx.

(2) Date of filing: March 31 1981

(3) Docket number, case number, or opinion number: 05-81-00-639-CR 05-81-00-640-CR 81-00-641-CR 05-81-00-642-CR

(4) Result: Affirmed convictions;

(5) Date of result: August 31 1982.

(6) Issues raised: Fundemental defective charge to the jury's on the use of aq deadly weapon being used, or exhibited in the commission of the charged offenses.

Ineffective assistance of attorney did not raise an of the issues to which he objected to at the trail stage, and did not make an objection, or raise the issues that the evidence was withheld not admitted or offered for a consideration of the jury's consideration, in the evidence proves, Innocences

(b) If you answered "No," explain why you did not file a second appeal:

The petitioner filed a motion for DNA testing, and the results excludes the petitioner, and newly discovered Documents shows that the state was in the knowledge of this evidence prior to the trial and withheld this informations and documents;

9. **Third appeal**

After the second appeal, did you file a third appeal to a higher authority, agency, or court?

☒ Yes ☐ No on June 6, 2019 the petitioner discovered newly discovered evidence in the office of the Dallas County

(a) If "Yes," provide:

(1) Name of the authority, agency, or court: District Attorney office, and filed the evidence in the office of the Dallas County Clerks office as newly discovered evidence.

(2) Date of filing: filed on August 9, 2019 and requested that the convict

(3) Docket number, case number, or opinion number: be vacated; CCA. No 12, 658, 22

(4) Result: 23 24 & 25. Denied without a written order;

(5) Date of result: October 18, 2019 and March 5, 2020

(6) Issues raised: Ictual Innocence support by DNA results DPS 11D-184098, which was not available at the date of the trials and the jury did not make its consideration and determination on this evidence, as the cut come of the trial would have been different based of the testing.

The petitioner presents newly discovered evidence that was not persented at the dates of the petitioners trials, of DNA evidence that was not availible at the trials for the jury's consideration, and the fact that the victim did not identify the petitioner, in light of the misstatements of the prosecution. that ~~the evidence connected the petitioner to the charged offenses.~~

(b) If you answered "No," explain why you did not file a third appeal:

On july 24, 2019 the petitioner gave testimony in a evidence hearing that the newly didscovered evidence of June 6, 2019 was mailed to the

10. **Motion under 28 U.S.C. § 2255** Dallas county clerk containing 64 pages of documents;

In this petition, are you challenging the validity of your conviction or sentence as imposed?

☒ Yes ☐ No

If "Yes," answer the following:

(a) Have you already filed a motion under 28 U.S.C. § 2255 that challenged this conviction or sentence?

☐ Yes ☒ No

If "Yes," provide:

(1) Name of court:

(2) Case number:

(3) Date of filing:

(4) Result:

(5) Date of result:

(6) Issues raised:

(b) Have you ever filed a motion in a United States Court of Appeals under 28 U.S.C. § 2244(b)(3)(A), seeking permission to file a second or successive Section 2255 motion to challenge this conviction or sentence?

☒ Yes ☐ No

If "Yes," provide: see attached results

(1) Name of court: Fifth Cirucit courts of Appeals

(2) Case number: 20-10392

(3) Date of filing: 4/4/20

(4) Result: application was denied with a review of records

(5) Date of result: 5/4/20

(6) Issues raised: Actual innocence, Inneffective assistance, Brady material violations, Due Process violations, Preoecutioral misconduct , in the intentional withholding of the 64 pages of forensic labobatory doucments that excluded the petitioner prior to trial , which was withheld.

At the dates of the trials the prosecution states on the records that the evidence is at the crime lab being tested that connected the petitioner to the charged offenses. This evidence was not delivered to the court was not admitted, or offered; ,(only now newly discovered sealed evidence)

(c) Explain why the remedy under 28 U.S.C. § 2255 is inadequate or ineffective to challenge your conviction or sentence: Petitioner filed request for second/ secussive petition based upon the newly discovered evidence, citing Brady Material violations, as the evidence was not persented or admitted. This evidence shows that the petitioner was excluded prior to the trial , in a laboratory speciment samples taken from the victims that the person that committed all three of the offenses was of a blood type of "(A)", and the petitioners , typing is "O" positive. These documents would have affected the juror's verdicts and the reason it was withheld.

11. **Appeals of immigration proceedings**

Does this case concern immigration proceedings?

☐ Yes ☒ No

If "Yes," provide:

(a) Date you were taken into immigration custody:

(b) Date of the removal or reinstatement order:

(c) Did you file an appeal with the Board of Immigration Appeals?

☐ Yes ☐ No

If "Yes," provide:

(1) Date of filing: n/a

(2) Case number: n/a

(3) Result:

(4) Date of result:

(5) Issues raised: n/a

(d) Did you appeal the decision to the United States Court of Appeals?

☒ Yes ☐ No

If "Yes," provide:

(1) Name of court: SUPREME COURT

(2) Date of filing: Aug, 4, 2020

(3) Case number: USCA 5 NO. 20-10392

Rejected without reading cover page 2241/2242 application;

(4) Result: NOTICE TO CHANGE THE HEADING AND REFILE

(5) Date of result: Aug 4, 2020

(6) Issues raised: Actual Innocence, no evidence to support a conviction and the victim has never made a positive identification of the petitioner. The petitioner was sentenced to a term of life, and has served 40 years on a crime that is unsupported by evidence as no evidence was offered, presented or admitted for the jury consideration. Had this evidence newly discovered evidence been presented the cotcome of the trial would be different;

12. **Other appeals**

Other than the appeals you listed above, have you filed any other petition, application, or motion about the issues raised in this petition? Texas court of criminal Austin, Texas

☒ Yes ☐ No 11.07 Writ of Habeas Corpus

If "Yes," provide:

(a) Kind of petition, motion, or application: 11.07 writ of Habeas corpus

(b) Name of the authority, agency, or court: Texas court of Criminal appeals Austin, Texas 12308 Austin Texas 78 208.

(c) Date of filing: Feb 4, 2018

(d) Docket number, case number, or opinion number: 12, 658, 22, 23, 24, &25

(e) Result: Remanded back to the trial court for hearings / denied

(f) Date of result: Oct, 18, 2019

(g) Issues raised: Actual innocence, ineffective assistance , Brady material violation in the withholding of the evidence, prosecutioral misconduct in the making statements of the evidence which is outside of the records that has never been offered admitted or presented for the jurys consideration in that the newly testing of the evidence does not connect the petitioner to any of the charged offenses. to which the prosecution stated that the petitioner was connected to the offenses. See, Testing results of May 17, 2017, filed in the state court on July 29, 2019 has Excluded petitioner in the DPS file hnumber LlD-184098. Texas department of Public Safety.

Grounds for Your Challenge in This Petition

13. State every ground (reason) that supports your claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground. Actual Innocence, in the case of F-81-01105 the state persented no evidence, the victim did not identify the petitioner;

GROUND ONE: The victim was never asked to make an identification of the petitioner, and the state clamied that the evidence was being tested at the southwest institute of froensic science lab , it was never produced the seroligist testing the evidence was not produced , and no evidence documents was admitted; , to support any of the convictions by collection numbers of offense report numbers for any of the evidence.

(a) Supporting facts *(Be brief. Do not cite cases or law.)*:

Petitioner was placed on trial for three offenses of July 4, 1980 by indictment charging three different offenses which required proof of different facts different essential elements and different supporting evidence for each offense as charged to the jury instruction of a reasonable doubt in premitting convictions. The prosecution spoke of the evidence , but did not give the offense report numbers, the evidence collection numbersas it applied to each of the victims, as evidence of one offense can not support all convictions.

(b) Did you present Ground One in all appeals that were available to you?

☐ Yes ☒ No evidence was sealed; only now is it newly discoveredl

GROUND TWO: Ineffective assistance of counsel, the attorney failed to interview any of the victims prior to the trials, as in has Questioning of each of the victims he asks we have never met?, each replied no. The attorney failed to review the evidence of each of the cases, failed to demand the evidence be offered, presented and Addmitted in the records.

(a) Supporting facts *(Be brief. Do not cite cases or law.)*:

No evidence was admitted at the trials, in the evidence collection numbers, or in the police report numbers, in the rape sample kits from each victim, and there was no 'objections'. The attorney did not call for the seroligits that was testing the evidence and none of the testing reports was offored, presented or admitted into evidence, showing that the petitioner was connected to the offenses. Had the attorney known that the victim in offense number F-81-01105 could not and did not identifypetitioner was a reason for severance, as petitioner is convicted no the testimony of the other victims.

(b) Did you present Ground Two in all appeals that were available to you?

☐ Yes ☒ No The DNA testing was not granted , avaiable until 2013 for convictions in Texas.

GROUND THREE: Prosecutioral misconduct, the evidence was intentionally withheld, as the prosecution states that the evidence was being tested that connected the petitioner to the to the charged offenses but this evidence was never offered presented or admitted. The documents reporting the evidence was withheld, not admitted in each of the victime names.

(a) Supporting facts *(Be brief. Do not cite cases or law.)*:

In the records of two trials the evidence was withheld, none of the evidence is offered, presented or was the evidence admitted, into evidence. Each of the cases has a different cause number, eeach of the cases has a different police report number and evidence collection numbers for each of the named victim. The TR, supports the facts that the evidence was intentionally withheld, as the petitioner is convicted , without the supporting evidence, for the jury consideration, and no objections is made;

(b) Did you present Ground Three in all appeals that were available to you?

☐ Yes ☒ No Due to the nature of the offenses the trial recdords was sealed, and only now is this information available to the pro-se petitioner;

GROUND FOUR: Due Process violations as the petitioner was deprived the right to a fair trial as the evidence was withheld intentionally .The prosecution misrepresents the physical evidence, in the withholding of the crime scence evidence that excludes the petitioner as the person that committed the offenses.

(a) Supporting facts *(Be brief. Do not cite cases or law.)*: Due process was violated in the prosecutions knowingly use of the false statement that the evidence being tested at the crime lab connects the petitioner to the charged offenses, with-out any supporting evidence the misconduct was sifficiently egregious that violated petitioners Due Process rights , in that the petitioners trial counsel was ineffective for not objecting to the conduct and that the state court did not reasonably apply the relevant law in finding other wise.The misrepresenting facts in the evidence ammount to substantial errors, impressed the jury's.

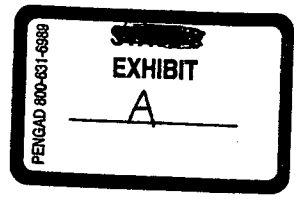
(b) Did you present Ground Four in all appeals that were available to you?

☐ Yes ☒ No the same trial attorney was appointed for the appeals in each of the cases.

14. If there are any grounds that you did not present in all appeals that were available to you, explain why you did not: The petitioner was not allowed to file a suppemantal appeal due to the fact that the same attorney at the two trials was the same attorney on appeals. (hybird repsentation)) the court cited;

Request for Relief

15. State exactly what you want the court to do: The conviction in F-81-01105 is unconstitutionall im firmes, not supported by evidence, of by the identification of the victim and is a void conviction , that has the effect to reverse all of the convictions as the jury virdict is grneral as the cases was trided togather, and the state used extaneous offenses, without giving instructions of the evidence in offense report numbers, or evidence collect numbers as the evidence has a collection number for each of the victims samples and the jury is left to guess which evidence pretains to which case in cause number. Order a new trial;



COURT OF APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

NOS. 05-81-00640-CR
05-81-00642-CR

GARY WAYNE BARNES, SR., FROM A DISTRICT COURT

APPELLANT

VS.

THE STATE OF TEXAS,

APPELLEE. OF DALLAS COUNTY, TEXAS

BEFORE CHIEF JUSTICE GUITTARD AND JUSTICES SPARLING AND VANCE
OPINION BY JUSTICE VANCE
AUGUST 31, 1982

Appeal is from two[1] convictions for aggravated rape, jury

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[1]Three cases were consolidated in a single proceeding. Since the same grounds of error were not urged in the third case it has been addressed in a separate opinion.

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assessed punishment in each case at confinement for life and imposition of a $10,000 fine. Appellant's grounds of error are overruled for the reasons stated.

FIRST GROUND: COURT'S CHARGE

Appellant contends, in both cases, that the charge was fundamentally erroneous in that it allowed conviction under a theory not supported by the evidence. The indictment[2] had alleged that the

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[2]The indictment in No. 05-81-00642-CR, in pertinent part, alleges that appellant did:

> [I]ntentionally and knowingly have sexual intercourse with E___R___, hereinafter styled Complainant, a female not his wife, without the consent of the Complainant, in that the Defendant threatened the Complainant, and the Defendant did intentionally and knowingly compel the Complainant to submit to the said act of suxual (sic) intercourse by threatening serious bodily injury and death to be imminently inflicted on the Complainant, by threatening her with a deadly weapon, to-wit: a firearm . . . .
> (Emphasis supplied).

The indictment in No. 05-81-00640-CR, in pertinent part, alleges that appellant did:

> [I]ntentionally and knowingly have sexual intercourse with Y___O___, hereinafter styled Complainant, a female not his wife, without the consent of the Complainant, in that the Defendant threatened the Complainant, and the defendant did intentionally and knowingly compel the Complainant to submit to the said act of sexual intercourse by threatening serious bodily injury and death to be imminently inflicted on the Complainant, by threatening her with a deadly weapon, to-wit: a firearm, ...
> (Emphasis supplied).

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aggravated rape had been committed "by threatening serious bodily injury[3] and death." In the abstract statement of the law, the

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[3]The charge gave the following definition:

> "Serious bodily injury" means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ.

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court does not include threat of death as an aggravating element.[4]

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[4]The charge provided:

> A person commits the offense of aggravated rape if he intentionally or knowingly commits the

offense of rape as hereinbefore defined, and he intentionally or knowingly compels submission to the rape by threat of serious bodily injury to be imminently inflicted on anyone.

Appellant contends that since the court did not include threat of death in the abstract statement of law that the court did not believe that a death threat had been made and was not supported by the evidence. When the charge is viewed as a whole, failure to include threat of death in the definitional part of the charge appears to be an inadvertent omission as opposed to a finding by the trial court that it was not supported by the evidence. The application paragraph[5] of the charge did contain both aggravating

---

[5]The application of the law to the facts in No. 05-81-00640-CR, is as follows:

> Therefore, if you believe from the evidence beyond a reasonable doubt that the defendant, Gary Wayne Barnes, Sr. in Dallas County, Texas on or about the 4th day of July , 1980, did intentionally or knowingly have sexual intercourse with Y____O____, a female not his wife, without the consent of said Y____O____, in that the Defendant threatened the said Y____O____, and the defendant did intentionally or knowingly compel the said Y____O____, to submit to the said act of sexual intercourse by threatening serious bodily injury or death to be imminently inflicted on the said Y____O____, by threatening her with a deadly weapon, to-wit: a firearm, you will find the defendant guilty as charged in the indictment.
> (Emphasis supplied).

The application of the law to the facts in No. 05-81-00642-CR, is as follows:

> Therefore, if you believe from the evidence beyond a reasonable doubt that the defendant, Gary Wayne Barnes, Sr., in Dallas County, Texas, on or about the 4th day of July, 1980, did intentionally or knowingly have sexual intercourse with E____R____,

> a female not his wife, without the consent of the said E___R___, in that the Defendant threatened the said E___R___, and the Defendant did intentionally or knowingly compel the said E___R___ to submit to the said act of sexual intercourse by threatening serious bodily injury or death to be imminently inflicted on the said E___R___, by threatening her with a deadly weapon, to-wit: a firearm, you will find the defendant guilty as charged in the indictment. (Emphasis supplied).

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elements of serious bodily injury and death. The record reflects that appellant made no objection to the charge at trial; therefore, only fundamental error in the charge may be considered on appeal. Henderson v. State, 617 S.W.2d 697, 698 (Tex. Crim. App. 1981). The Court of Criminal Appeals in Cumbie v. State, 578 S.W.2d 732 (Tex. Crim. App. 1979) detailed the instances when fundamental error occurs in the court's charge as follows:

> 1.) An omission from the court's charge of an allegation in the indictment which is required to be proved . . . .
>
> * * *
>
> 2.) [W]hen the charge . . . substitutes a theory of the offense completely different from the theory alleged in the indictment.
>
> * * *
>
> 3.) [W]hen the charge . . . authorizes conviction on the theory alleged in the indictment and on one or more other theories not alleged in the indictment.
>
> 4.) [W]hen the charge authorizes conviction for conduct which is not an offense, as well as for conduct which is an offense.

578 S.W.2d at 733-735.

In determining whether fundamental error is present, we must view the charge as a whole. White v. State, 610 S.W.2d 504, 507 (Tex. Crim. App. 1981) (En Banc). The application paragraph of the charge contains all the elements set out in the indictment; and provides

for conviction on only those theories set out in the indictment. We find no fundamental error, therefore, nothing is presented for review. Cumbie, supra. Ground of error one is overruled.

SECOND GROUND: JURY ARGUMENT

Appellant urges that the prosecutor in argument attacked the appellant through the actions of counsel when he commented ". . . just because someone stands up here in a nice soft mandy pandy demeanor to you . . . . "[6] This complained of argument occurred

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[6]The complete argument the prosecutor had made prior to the objection is as follows:

> May it please the Court. Ladies and gentlemen. In Mr. Byck's argument to you at the close of the testimony of guilt or innocence phase, he accused me in no uncertain terms of making an appeal to your emotions and I hope that I haven't done that. I don't like for people to sit here and blatantly appeal to mine. It is an insult to my intelligence and makes me mad and I didn't intend to do it to you either if I did, I am sorry. But emotions are a part and parcel of individual human beings, the facts of this case are not coldly logical and rational and you are under an oath, under a duty to base your verdict upon the facts of the case. I didn't create the facts of this case, he did and just because someone stands up here and says something in a nice, soft, mandy, pandy, demeanor, to you --
> (Emphasis supplied).

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during the State's opening argument on punishment. The argument does not reflect who the prosecutor was referring to when he said "just because someone stands up here and says something in a nice, soft, mandy, pandy, demeanor, to you," nor does it reflect as to whether he was referring to something that had occurred or something that might occur in the future. Before a jury argument will constitute

reversible error, it must be either extreme or manifestly improper or inject new and harmful facts into the record. DeBolt v. State, 604 S.W.2d 164, 169 (Tex. Crim. App. 1980). The argument complained of does not meet the test set out in DeBolt, supra; consequently, it cannot be regarded as reversible error. Furthermore, the complained of argument does not strike at the appellant over the shoulders of counsel. See Todd v. State, 598 S.W.2d 286, 296-297 (Tex. Crim. App. 1980). Ground of error two is overruled.

In addition to the appellant's attorney filing a brief in each case, the* appellant has filed a pro se brief. There is no right to hybrid representation. An examination of the contentions asserted in the pro se brief reveals no error that should be considered in the interest of justice. Rudd v. State, 616 S.W.2d 623, 625 (Tex. Crim. App. 1981).

Affirmed.

JOHN VANCE
JUSTICE

D.N.P.
RULE 207

F81-01027-J
F81-01105-J

THE STATE OF TEXAS	§	IN THE CRIMINAL
	§	
vs.	§	DISTRICT COURT NO. 3 OF
	§	
GARY WAYNE BARNES SR.	§	DALLAS COUNTY, TEXAS

STATE'S RESPONSE TO BARNES'S MOTION FOR POST-CONVICTION DNA TESTING

TO THE HONORABLE COURT:

THE STATE OF TEXAS, by and through the Criminal District Attorney of Dallas County, files this response to the motion for post-conviction DNA testing filed by Gary Wayne Barnes Sr. under Chapter 64 of the Texas Code of Criminal Procedure.

I. Summary of State's Position

These cases appear to qualify for additional post-conviction DNA testing under Chapter 64. Barnes was convicted of sexually assaulting two teenage girls at gunpoint after breaking into the home where they slept. The victims did not know Barnes before the attacks. A palm print identified as belonging to Barnes was recovered from the window through which the perpetrator entered the home. Barnes presented an alibi defense at trial.

DNA testing conducted in 2009 using STR analysis revealed that Barnes could not be excluded as a contributor to partial DNA profiles obtained from three vaginal smears collected from one of the victims. No male DNA was obtained from the

The State's response shall be filed with this Court no later than the 13th day of August, 2015.

Signed this ____ day of _____, 2015.

_____
Judge Gracie Lewis
Criminal District Court No. 3
Dallas County, Texas

vaginal smear collected from the other victim. Although the smears themselves were depleted during the analysis, the DNA extracts have been preserved and may be amenable to further DNA testing using Y-chromosome STR (Y-STR) analysis, which is capable of providing results that are more accurate and probative than the results of the previous test.

Accordingly, the State does not oppose Y-STR testing of the remaining DNA extracts from the four previously tested vaginal-smear slides. The State also does not oppose Y-STR testing, for comparison purposes, of the remaining DNA extracts from Barnes's buccal-swab standards.

II. Procedural Summary

Barnes was charged in two separate indictments with the aggravated rape of Y.O. (cause number F81-01027-J) and the aggravated rape of E.R. (cause number F81-01105-J). (C.R. 1: 3; C.R. 2: 3).[1] The cases were consolidated for trial, and on February 25, 1981, a jury found Barnes guilty of both offenses and assessed punishment at life imprisonment and a $10,000 fine in each case.[2] (C.R. 1: 18, 21-22; C.R. 2: 18, 21-22; R.R.: 189-90, 222-23). On August 31, 1982, the Dallas Court of Appeals affirmed Barnes's convictions in an unpublished opinion. (Exhibit A).

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[1] All citations are to the clerk's records ("C.R.") and reporter's record (R.R.) prepared in connection with Barnes's direct appeals in cause numbers 05-81-00640-CR and 05-81-00642-CR. "C.R. 1" refers to the clerk's record in cause number F81-01027-J, and "C.R. 2" refers to the clerk's record in cause number F81-01105-J.

[2] The same jury also convicted Barnes of a related offense of burglary of a habitation. (R.R.: 189). Barnes received a sentence of life imprisonment and a $10,000 fine for that conviction, as well. (R.R.: 222).

On October 25, 2007, Barnes, through appointed counsel, filed a motion for post-conviction DNA testing under Chapter 64 of the Texas Code of Criminal Procedure. The State responded to Barnes's motion and agreed that he had met the statutory requirements for entitlement to DNA testing. Accordingly, on February 19, 2009, this Court granted Barnes's motion. The DNA test results issued on May 13, 2009, showed that Barnes could not be excluded as the source of male DNA recovered from one of the victims. (Exhibit B). After a hearing on June 8, 2009, this Court entered findings that, had these results been available during the trial of these offenses, it was not reasonably probable that Barnes would not have been convicted. *See* Tex. Code Crim. Proc. Ann. art. 64.04 (West Supp. 2014). For reasons that are not entirely clear, this Court entered written article 64.04 findings in these cases on June 8, 2009; August 11, 2009; and December 11, 2014. Each successive set of findings merely reiterated the findings entered previously. Barnes is currently attempting to appeal the article 64.04 findings entered on December 11, 2014.

On April 4, 2014, Barnes filed a subsequent, pro se motion for post-conviction DNA testing in these cases.[3] In an order signed March 26, 2015, this Court directed the State to respond to Barnes's motion, in accordance with article 64.02 of the Texas Code of Criminal Procedure, by May 15, 2015. The State subsequently requested that the time for filing its response be extended to August 13, 2015.

[3] Barnes's motion also requests post-conviction DNA testing of evidence related to his conviction in cause number F80-16530-J for a third aggravated rape. The State has filed a separate response addressing Barnes's request in that case.

III. Factual Summary

On July 3, 1980, 14-year-old Y.O. and her cousin, 15-year-old E.R., came to Dallas from Baytown, Texas, to visit E.R.'s father, Joe. (R.R.: 15-16). After the girls arrived in Dallas, Joe dropped them off at a movie; after the movie, the girls returned to Joe's apartment, where they ate dessert and stayed up talking. (R.R.: 17). Everyone went to bed at about 1:30 a.m. (R.R.: 18).

In the early-morning hours of July 4, Y.O., who was sleeping in an upstairs bedroom with E.R., woke up and saw a man with a gun standing in the room. (R.R.: 18, 37). The man instructed the girls to get up, grabbed E.R. by her hair, and forced the girls to accompany him downstairs. (R.R.: 37-38). The man took the girls to the kitchen, where he pointed the gun at them and ordered them to undress. (R.R.: 39-40). The girls complied. (R.R.: 40). The man then issued some command to E.R., which she refused, and he struck her on the forehead with the gun, causing her to bleed. (R.R.: 40-41). The man told the girls that he would kill them if they made any noise. (R.R.: 41). He also said that he would kill anyone who came downstairs. (R.R.: 41-42).

The man ordered Y.O. to follow him into the dining room. (R.R.: 42). There, he told her to kneel with her back facing the wall. (R.R.: 43). The man took his shorts off, forced his penis into Y.O.'s mouth, and told her to "suck it." (R.R.: 44-45). He then retrieved E.R. from the kitchen and brought her into the dining room, as well. (R.R.: 45). He ordered both girls to lie on the floor and spread their legs because he was "going to rape [them]." (R.R.: 45). Next, the man sent both girls into

the kitchen to find some cooking oil. (R.R.: 45-46). When they were unable to find any, the man went into the kitchen himself, found the oil, and poured it over the girls. The man then vaginally raped Y.O. (R.R.: 46). When he was finished, the man vaginally raped E.R. (R.R.: 46). The man repeatedly vaginally and orally raped the two young girls. (R.R.: 46-47). He also ordered the two cousins to perform oral sex on each other while he watched. (R.R.: 48).

Finally, at about 7:00 a.m., the man got dressed and forced the nude girls out onto the patio, where he fled through the back gate. (R.R.: 19, 21-22, 48-49, 67, 73-74). The girls then wrapped themselves in towels and ran upstairs to get E.R.'s father. (R.R.: 49). The girls were taken the police station and then to Parkland Hospital, where they underwent rape examinations. (R.R.: 49-50, 95-96). The examining physician testified at trial that both girls had vaginal bruising and that sperm were present in Y.O.'s vagina. (R.R.: 97-99).

Crime-scene investigators discovered that the perpetrator had gained access to the apartment by removing a pane of glass from one of the windows near the back door. (R.R.: 80). Investigators were able to lift a partial palm print from the window. (R.R.: 82-83). At trial, a fingerprint expert testified that the palm print belonged to Barnes. (R.R.: 87-93).

Y.O. testified at trial and identified Barnes as the man who had raped both her and E.R. (R.R.: 42-43, 51-52). E.R. was apparently too traumatized by the ordeal to testify to anything other than the most basic facts of the offense. (R.R.: 32-33, 75). She was never asked at trial if she could identify Barnes as her attacker. (R.R.: 32-

33). Moreover, the record indicates that Barnes's photograph was not in any lineup shown to the girls before trial. (R.R.: 54-56).

Barnes's wife testified that Barnes was at home in bed with her throughout the early-morning hours of July 4, 1980. (R.R.: 105, 114-15). Barnes himself testified that he was asleep at home from approximately midnight to 6 a.m., when he got up to drive his wife to work. (R.R.: 122-24). Barnes testified that he had never seen either of the victims before and had never been to the apartment where the offenses occurred. (R.R.: 125). He could not explain how his palm print ended up on the window. (R.R.: 127, 143). During cross-examination by the State, Barnes admitted that he had been previously convicted of rape in 1975, while serving in the United States Army. (R.R.: 141-42).

IV. Previous DNA Testing

In its response to Barnes's 2007 motion for post-conviction DNA testing, the State informed this Court that the only items of evidence still in existence in relation to these cases were vaginal smears collected during the victims' rape examinations and retained by the Southwestern Institute of Forensic Sciences (SWIFS). In its order granting Barnes's motion, this Court directed the Texas Department of Public Safety (DPS) to conduct DNA testing on the vaginal smears and on buccal-swab standards that were to be collected from Barnes and from the victims. The State was ultimately unsuccessful in its attempts to locate the victims and obtain their buccal swabs for comparison.

According to the May 13, 2009 DNA report, DPS received and analyzed two buccal swabs from Barnes (Items 1 and 2), three vaginal-smear slides from Y.O. (Items 3-1, 3-2, and 3-3), and one vaginal-smear slide from E.R. (Item 4). (Exhibit B). The DNA test results were as follows:

- The partial DNA profile from the sperm fraction of the Item 3-1 vaginal-smear slide was consistent with a mixture from Barnes and some unknown individual. Barnes could not be excluded as a contributor to the stain at 11 specified loci. At these loci, the probability of selecting an unrelated person at random who could be a contributor to the sperm fraction of the Item 3-1 vaginal-smear slide was approximately 1 in 6.789 million for Blacks.

- The partial DNA profile from the epithelial-cell fraction of the Item 3-1 vaginal-smear slide was consistent with some unknown female.

- The partial DNA profile from the sperm fraction of the Item 3-2 vaginal-smear slide was consistent with a mixture from Barnes and some unknown individual. Barnes could not be excluded as a contributor to the stain at 13 specified loci. At these loci, the probability of selecting an unrelated person at random who could be a contributor to the sperm fraction of the Item 3-2 vaginal-smear slide was approximately 1 in 46.15 million for Blacks.

- The partial DNA profile from the epithelial-cell fraction of the Item 3-2 vaginal-smear slide was consistent with the same unknown female.

- The partial DNA profile from the sperm fraction of the Item 3-3 vaginal-smear slide was consistent with a mixture from Barnes and some unknown individual. Barnes could not be excluded as a contributor to the stain at 4 specified loci. At these loci, the probability of selecting an unrelated person at random who could be a contributor to the sperm fraction of the Item 3-3 vaginal-smear slide was approximately 1 in 79 for Blacks.

- The partial DNA profile from the epithelial-cell fraction of the Item 3-3 vaginal-smear slide was consistent with the same unknown female.

- The partial DNA profiles from the sperm and epithelial-cell fractions of the Item 4 vaginal-smear slide were consistent with some other female. Barnes was excluded as a contributor to the sperm and epithelial-cell fractions of the Item 4 vaginal-smear slide.

(Exhibit B). The report stated that all four vaginal-smear slides were depleted during the analysis, but that the DNA extracts from the slides, together with the remaining samples of Barnes's buccal swabs and DNA extracts therefrom, would be kept frozen to preserve their biological constituents. (Exhibit B).

V. Barnes's Complaints Concerning Previous DNA Testing

In his current, pro se motion, Barnes contends that the evidence previously subjected to DNA testing in these cases was not the evidence collected from Y.O. and E.R. He appears to suggest that the evidence tested may have instead come from J.K., who was the victim of an extraneous rape with which Barnes was charged but never convicted. He also maintains that the lab numbers assigned to these cases by SWIFS "are not the evidence numbers for crimes of July 4, 1980."

To the extent the State has been able to understand Barnes's reasoning, his conclusion that the wrong evidence has been tested in these cases is based on two false premises: (1) that the rape of J.K. occurred prior to the rapes of Y.O. and E.R.; and (2) that the examiner's notes from the testing conducted in 2009 show that the vaginal-smear slide that was supposed to have been from E.R. was actually labeled with J.K.'s last name. In fact, according to the police reports associated with the case, the rape of J.K. occurred on October 12, 1980, over three months *after* the rapes of Y.O. and E.R. (Exhibit C). Furthermore, the State has reviewed the unredacted

laboratory notes from the 2009 testing and has determined that the Item 4 vaginal-smear slide did not, in fact, have J.K.'s name on it. Instead, E.R.'s last name was merely spelled with a "K" instead of an "R." This may have been the result of either an error by the individual who labeled the slide or the examiner's mistaking a handwritten "R" for a "K." In any event, the State has found no merit to Barnes's allegation that the wrong evidence was previously tested in these cases.

VI. Location and Condition of Evidence

The State has confirmed that DPS still possesses the DNA extracts from the four vaginal-smear slides, as well as the remainder of Barnes's buccal swabs and DNA extracts therefrom. (Exhibit D). This evidence has been stored in a frozen condition at the DPS Garland Crime Laboratory since the time of the prior analysis in 2009. In an abundance of caution, the State has also confirmed that neither SWIFS nor the Dallas Police Department (DPD) currently possesses any evidence related to these cases. (Exhibits E, F, G).

VII. DNA Statutes

Chapter 64 of the Texas Code of Criminal Procedure allows a convicted person to "submit to the convicting court a motion for forensic DNA testing of evidence containing biological material." Tex. Code Crim. Proc. Ann. art. 64.01(a-1) (West Supp. 2014). "Biological material" is defined as "blood, semen, hair, saliva, skin tissue or cells, fingernail scrapings, bone, bodily fluids, or other identifiable biological evidence that may be suitable for forensic DNA testing" and "includes the

contents of a sexual assault evidence collection kit." *Id.* art. 64.01(a). The motion may request DNA testing only of evidence that was secured in relation to the offense comprising the underlying conviction and was in the State's possession during trial, but either was not previously tested or, although previously tested, can be tested with newer testing techniques that provide a reasonable likelihood of more accurate and probative results. *Id.* art. 64.01(b).

A convicting court may order DNA testing under Chapter 64 only if the court finds that (1) the evidence still exists and is in a condition making DNA testing possible; (2) the evidence has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect; and (3) identity was or is an issue in the case. Tex. Code Crim. Proc. Ann. art. 64.03(a)(1) (West Supp. 2014). Additionally, the movant must establish by a preponderance of the evidence that (1) he would not have been convicted if exculpatory results had been obtained through DNA testing; and (2) the request for DNA testing is not made to unreasonably delay the execution of sentence or administration of justice. *Id.* art. 64.03(a)(2).

This Court need not hold a hearing before ruling on Barnes's motion. Chapter 64 does not give the movant a right to a hearing on the issue of whether testing should be granted. *Rivera v. State*, 89 S.W.3d 55, 58-59 (Tex. Crim. App. 2002); *cf.* Tex. Code Crim. Proc. Ann. art. 64.04 (West Supp. 2014) (requiring the court to hold a hearing prior to making a finding on the favorability of DNA test results).

VIII. Application

Existence of Evidence

Although the four vaginal-smear slides themselves were depleted during the previous DNA testing, DPS still has the DNA extracts from the slides and from Barnes's buccal swabs. (Exhibit D). The State has confirmed with DPS that Y-STR testing can be performed on these previously obtained DNA extracts.

Condition of Evidence

The DNA extracts from the slides and from the buccal swabs have been stored in a frozen state since the previous testing was completed in 2009. (Exhibit D). Thus, they are presumed to be in a testable condition. The exact condition of the extracts cannot, however, be ascertained until testing is attempted.

Previous DNA Testing

Although the vaginal-smear slides were previously subjected to DNA testing, a newer testing technique — Y-STR analysis — is available and reasonably likely to yield results that are more accurate and probative than the results of the previous test, which utilized conventional STR analysis.

Chain of Custody

The chain of custody appears to be intact for the evidence located at DPS. Pending this Court's ruling on Barnes's motion, the State requests that DPS be

permitted to retain physical custody of all the evidence in its possession related to these cases.

Identity at Issue

Identity was and is an issue in these cases. *See* Tex. Code Crim. Proc. Ann. art. 64.03(a)(1)(B). The victims did not know their attacker, and only one of the victims identified Barnes at trial. Barnes presented an alibi defense: both he and his wife testified that he was asleep at home during the time when the assaults occurred.

Significance of Exculpatory Results

Barnes has met his burden of establishing by a preponderance of the evidence that he would not have been convicted if exculpatory results had been obtained through DNA testing. *See* Tex. Code Crim. Proc. Ann. art. 64.03(a)(2)(A). The DNA test results will be exculpatory for purposes of Chapter 64 if Y-STR testing of the DNA extracts from the vaginal-smear slides from both victims yields the same male DNA profile, and Barnes is excluded as the contributor of this profile.

Administration of Justice

Barnes has met his burden of establishing by a preponderance of the evidence that his request for DNA testing is not made to unreasonably delay the execution of sentence or the administration of justice. *See* Tex. Code Crim. Proc. Ann. art. 64.03(a)(2)(B). Barnes is currently serving his sentences in these cases.

IX. Entitlement to Counsel

A convicted person is entitled to counsel during a proceeding under Chapter 64. Tex. Code Crim. Proc. Ann. art. 64.01(c). The convicting court shall appoint counsel for the convicted person if the person informs the court that he wishes to submit a motion for post-conviction DNA testing under Chapter 64, the court finds that reasonable grounds exist for a motion to be filed, and the court determines that the person is indigent. *Id.*

Barnes is currently incarcerated in the Texas Department of Criminal Justice. While his most recent, pro se motion for post-conviction DNA testing does not specifically request the appointment of counsel, this Court did appoint counsel in connection with Barnes's 2007 motion for post-conviction DNA testing, and Barnes has, since those prior proceedings concluded, filed at least one request in these cases for the appointment of counsel under article 64.01. Moreover, if testing is granted, the State believes that an attorney is necessary to assist Barnes in the interpretation of the DNA test results and to represent Barnes at the hearing that will be required once DNA testing has been completed. *See* Tex. Code Crim. Proc. Ann. art. 64.04.

X. Conclusion

Under a fair reading of Chapter 64, Barnes has met the statutory requirements for entitlement to additional post-conviction DNA testing. Thus, the State does not oppose Y-STR testing of the DNA extracts from the vaginal-smear slides and from Barnes's buccal swabs. The State's lack of opposition to further testing in these cases

should not, however, be construed as a waiver of any arguments the State may later raise regarding the integrity of the evidence to be tested or the interpretation of the test results under Chapter 64 or a subsequent writ.

XI. Prayer

The State requests that this Court grant Barnes's motion for post-conviction DNA testing and direct DPS to perform Y-STR DNA testing on the previously obtained DNA extracts from the vaginal-smear slides (Items 3-1, 3-2, 3-3, and 4) and on the previously obtained DNA extracts from Barnes's buccal swabs (Items 1 and 2). If testing is granted in these cases, the State further requests that this Court appoint counsel to represent Barnes in future Chapter 64 proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing State's response has been served on Gary Wayne Barnes, TDCJ-ID # 318814, Ramsey Unit, 1100 FM 655, Rosharon, Texas 77583, by depositing same in the United States mail, postage prepaid, on August 13, 2015.

Johanna H. Kubalak