CAUSE NO. F-88-79428-SM

VINCENT EDWARD COOKS	§	**IN THE 194TH DISTRICT COURT**
	§	
V.	§	**IN AND FOR**
	§	
THE STATE OF TEXAS	§	**DALLAS COUNTY, TEXAS**

MOTION FOR FORENSIC DNA TESTING, STAY OF EXECUTION, AND APPOINTMENT OF COUNSEL

THIS IS A DEATH PENALTY CASE.

VINCENT EDWARD COOKS IS SCHEDULED TO BE EXECUTED ON DECEMBER 12, 2001.

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Vincent Edward Cooks is scheduled to be executed on December 12, 2001, for a murder he did not commit. In 1988, he was convicted of killing Gary McCarthy, an off-duty Dallas police officer, during the commission of a robbery. Pursuant to Article 64 of the Texas Code of Criminal Procedure, Mr. Cooks asks this Court to order forensic DNA testing of a piece of evidence that the State introduced at trial. Specifically, Mr. Cooks contends that DNA testing of biological material on a baseball cap that the gunman was wearing at the time of the offense will exclude him as the killer and establish that Tony Ray Harvey, a co-defendant who testified against Mr. Cooks in exchange for a lesser sentence, actually murdered Gary McCarthy. Accordingly, Mr. Cooks asks this Court to order DNA testing, stay his execution set for December 12, 2001, and appoint undersigned counsel to represent him in the Article 64 proceedings.

PROCEDURAL HISTORY

Mr. Cooks was convicted of capital murder and sentenced to death in December 1988. The Court of Criminal Appeals affirmed his conviction and sentence in 1992. Cooks v. State, 844 S.W.2d 697 (Tex. Crim. App. 1992). The Supreme Court denied Mr. Cooks's petition for writ of certiorari. Cooks v. Texas, 509 U.S. 927 (1993). Mr. Cooks filed a petition for writ of habeas corpus, which the Court of Criminal Appeals denied in 1996. Ex parte Cooks, No. 30,629-01 (Tex. Crim. App. Apr. 3, 1996).

After the completion of state postconviction proceedings, Mr. Cooks sought habeas relief in federal court. In 2000, the federal district court adopted the magistrate's recommendation denying the petition for writ of habeas corpus. The district court then denied Mr. Cooks's application for a certificate of appealability (COA). On July 12, 2001, the Fifth Circuit affirmed the district court's denial of COA. Cooks v. Johnson, No. 01-10034 (5th Cir. Jul. 12, 2001) (unpublished).

Mr. Cooks's appointed federal habeas counsel did not seek rehearing in the Fifth Circuit. Nor did appointed counsel file a petition for writ of certiorari with the Supreme Court. Nor did appointed counsel file a petition for clemency with the Texas Board of Pardons and Paroles. Mr. Cooks's execution is currently scheduled for December 12, 2001.

PROCEDURES FOR OBTAINING DNA TESTING

On April 5, 2001, Texas Governor Rick Perry signed a law amending the Code of Criminal Procedure to establish a convicted person's right to obtain postconviction DNA testing. The recently created Chapter 64 of the Code reflects the Legislature's recognition of the importance of providing a procedural mechanism that allows convicted persons to seek exoneration through forensic DNA testing. For the Court's convenience, the relevant provisions of the new DNA legislation that govern these proceedings are summarized below.

A. A movant has the right to seek DNA testing of previously untested evidence.

Article 64.01 provides that a convicted person may petition the convicting court for DNA testing of biological evidence:

> (a) A convicted person may submit to the convicting court a motion for forensic DNA testing of evidence containing biological material. The motion must be accompanied by an affidavit, sworn to by the convicted person, containing statements of fact in support of the motion.
>
> (b) The motion may request forensic DNA testing only of evidence described by Subsection (a) that was secured in relation to the offense that is the basis of the challenged conviction and was in the possession of the state during the trial of the offense, but:
>
> (1) was not previously subjected to DNA testing:
> (A) because DNA testing was:
> (i) not available; or

(ii) available, but not technologically capable of providing probative results; or

(B) through no fault of the convicted person, for reasons that are of a nature such that the interests of justice require DNA testing; or

(2) although previously subjected to DNA testing, can be subjected to testing with newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test.

TEX. CRIM. PROC. CODE ANN. art. 64.01(a),(b) (Vernon Supp. 2001).

The item of evidence that Mr. Cooks seeks to have tested is a baseball cap. Several eyewitnesses testified that the gunman was wearing a baseball cap during the robbery and shooting. See, e.g., S.F. vol. 40 at 54, 56, 73 (testimony of Mark DeCardenas); S.F. vol. 40 at 155, 217 (testimony of Frank Green); S.F. vol. 40 at 244, S.F. vol. 41 at 19, 46, 47 (testimony of Oliver Powell). In addition, co-defendant Tony Ray Harvey testified that Mr. Cooks was wearing a cap during the commission of the crime. S.F. vol. 43 at 103, 163. The police located the baseball cap in the getaway car that was abandoned within a half mile of the crime scene. S.F. vol. 41 at 60, 156. The prosecution introduced the baseball cap into evidence and the Court admitted it. S.F. vol. 41 at 153-57 (admitting State's Ex. 54). It remains in the evidence vault within the custody of the Dallas County District Clerk's Office.

There is no question that this evidence was "secured in relation to the

offense that is the basis of the challenged conviction and was in the possession of the state during the trial of the offense." TEX. CRIM. PROC. CODE ANN. art. 64.01(b). Moreover, through no fault of Mr. Cooks, the baseball cap has never been tested for DNA evidence, nor could it have been at the time of his trial in 1988. The Texas Court of Appeals first ruled on the admissibility of DNA evidence in 1990, two years after Mr. Cooks's trial. See Glover v. State, 787 S.W.2d 544, 547-48 (Tex. Ct. App. 1990) (holding that admissibility of DNA testimony was an issue of first impression in Texas and concluding "that 'DNA fingerprinting' – its underlying principles, procedures and technology – is a scientific test that is reliable and has gained general acceptance in the scientific community in the particular fields in which it belongs"). Moreover, the Short Tandem Repeat (STR) DNA testing system, a method that permits the analysis of degraded biological material containing small amounts of DNA, was not developed until the mid-1990's. See Commonwealth of Massachusetts v. Rosier, 685 N.E.2d 739 (Mass. 1997) (first court opinion to mention STR testing, noting that STR testing was commercially unavailable until "several years" after 1991); National Institute of Justice, Off. Just. Programs, U.S. Dept. Just., Pub. No. NCJ 177626, Postconviction DNA Testing: Recommendations for Handling Requests, 28 (Sept. 1999) (noting that "DNA testing at a number of STR locations will likely

replace RFLP and earlier PCR-based tests in most laboratories throughout the United States and the world").

B. <u>The Court is required to appoint counsel in these proceedings.</u>

Article 64.01(c) requires the convicting court to appoint counsel to an indigent prisoner who wishes to seek forensic DNA testing:

> (c) A convicted person is entitled to counsel during a proceeding under this chapter. If a convicted person informs the convicting court that the person wishes to submit a motion under this chapter and if the court determines that the person is indigent, the court shall appoint counsel for the person.

TEX. CRIM. PROC. CODE ANN. art. 64.01(c) (Vernon Supp. 2001).

In his affidavit attached to this motion, Mr. Cooks has stated that he is indigent and needs the assistance of counsel to represent him in the Article 64 proceedings. <u>See</u> Exhibit 1 (affidavit of Vincent Edward Cooks). Appointment of counsel is mandatory upon a finding of indigency.

C. <u>The District Attorney must deliver the biological evidence to the Court, or explain in writing why he cannot do so.</u>

Article 64.02 contains a mandatory provision requiring this Court, upon receipt of a motion for forensic DNA testing, to notify the State and compel it to produce the evidence at issue, or explain why it cannot do so:

On receipt of the motion, the convicting court shall:

(1) provide the attorney representing the state with a copy of the motion; and
(2) require the attorney representing the state to:
(A) deliver the evidence to the court, along with a description of the condition of the evidence; or
(B) explain in writing to the court why the state cannot deliver the evidence to the court.

TEX. CRIM. PROC. CODE ANN. art. 64.02 (Vernon Supp. 2001).

The Court is already in possession of the item to be tested. The State introduced at trial as an exhibit the baseball cap worn by the gunman and recovered from the getaway car. It has remained in the exclusive possession of the Dallas County District Clerk's Office since it was admitted as evidence. See S.F. vol. 41 at 156-57. Upon the filing of this motion, the Court should not permit the State (or any party) to view or handle the evidence outside the presence of an independent, court-appointed DNA expert who can guard against possible loss or degradation of the biological material contained on the baseball cap.

D. The standards for assessing a motion for forensic DNA testing.

Article 64.03 delineates the standards by which the convicting court, after receiving the evidence, must assess a request for DNA testing:

(a) A convicting court may order forensic DNA testing under this chapter only if:

(1) the court finds that:
(A) the evidence:

(i) still exists and is in a condition making DNA testing possible; and
(ii) 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

(B) identity was or is an issue in the case; and,

(2) the convicted person establishes by a preponderance of the evidence that:

(A) a reasonable probability exists that the person would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing; and

(B) the request for the proposed DNA testing is not made to unreasonably delay the execution of sentence or administration of justice.

TEX. CRIM. PROC. CODE ANN. art. 64.03(a) (Vernon Supp. 2001).

The evidence in this case still exists. It should be in a condition that would make the extraction and testing of DNA possible. After conferring with the Innocence Project[1] and Dr. Elizabeth A. Johnson,[2] undersigned counsel has determined that current testing techniques are capable of extracting typeable DNA

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[1] The Innocence Project at the Benjamin N. Cardozo School of Law is a pro bono clinical program that has, for nearly ten years, helped inmates gain access to postconviction DNA testing to support their claims of innocence. There have been at least 93 cases of inmates around the country who have used postconviction DNA testing to prove their innocence, and the Innocence Project has either represented or assisted in fifty of these cases.

[2] Dr. Johnson is the former founder and director of the DNA laboratory in the Harris County Medical Examiner's Office. She is currently employed as the senior forensic scientist for Technical Associates, Inc., in California, which provides forensic science consulting and laboratory testing in criminal and civil cases.

from the baseball cap. Dr. Johnson stated that hats are commonly tested for DNA because they may contain several kinds of testable biological material, such as hair follicles, skin cells, saliva, or blood. Some of these materials, like hair follicles, may be visible, but other materials may not be so readily detected with the unaided eye. Testing, therefore, would need to include careful examination of small pieces of fabric from the brim and the headband. Even degraded samples of biological material and samples containing small amounts of DNA can be successfully analyzed using STR DNA testing. See National Institute of Justice, Off. Just. Programs, U.S. Dept. Just., Pub. No. NCJ 183697, The Future of Forensic DNA Testing: Predictions of the Research and Development Working Group, 41 (Nov. 2000). In fact, STR "can be used to amplify very small amounts, less than 1 ng. of DNA [1 ng. = 1 billionth of a gram]." Id. at 39.

The baseball cap has been subjected to a proper chain of custody that is sufficient to establish that it has not been tampered with, replaced, or altered in any material aspect. Frank Henderson, Jr., an officer in the physical evidence section of the Dallas Police Department, photographed and collected the baseball cap from the inside of the getaway car on the day of the crime. S.F. vol. 41 at 150-57. The baseball cap remained in the possession of the State until the prosecution introduced it into evidence at trial on December 1, 1988. S.F. vol. 41 at 153-57

(admitting State's Ex. 54). In determining whether a chain of custody has been established, "[t]he record of preservation must demonstrate to the court that nothing occurred that would affect the trustworthiness or reliability of the [evidence]." McEntyre v. State, 717 S.W.2d, 140, 147 (Tex. Crim. App. 1986). As the Court of Criminal Appeals has instructed, "[t]his does not mean that the Court should resort to speculation in making its determination." Id. Moreover, passage of time is no evidence of tampering. See Lagrone v. State, 942 S.W.2d 602, 617 (Tex. Crim. App.,1997) (stating that, "[i]n the absence of any evidence of tampering, therefore we see no reason to prohibit the admission of properly identified evidence just because it has been kept in an evidence room for an extended period of time and undergone prior forensic testing").

Finally, as argued more fully below, Mr. Cooks can clearly establish that identity was an issue in his case; that a reasonable probability exists that he would not have been prosecuted or convicted if an exculpatory DNA test result had been obtained; and that he did not make this request in an attempt to unreasonably delay the execution of his sentence.

E. If a movant satisfies the prerequisites for testing set out in Article 64.03(a), the Court must order DNA testing.

Pursuant to Article 64.03(c), if a movant satisfies the conditions for testing,

the convicting court must order DNA testing:

> (c) If the convicting court finds in the affirmative the issues listed in Subsection (a)(1) and the convicted person meets the requirements of Subsection (a)(2), the court shall order that the requested forensic DNA testing be conducted. The court may order the test to be conducted by the Department of Public Safety, by a laboratory operating under a contract with the department, or, on agreement of the parties, by another laboratory.

TEX. CRIM. PROC. CODE ANN. art. 64.03(c) (Vernon Supp. 2001). Upon receiving the results of the testing, this Court is required to hold a hearing:

> After examining the results of testing under Article 64.03, the convicting court shall hold a hearing and make a finding as to whether the results are favorable to the convicted person. For the purposes of this article, results are favorable if, had the results been available before or during the trial of the offense, it is reasonably probable that the person would not have been prosecuted or convicted.

TEX. CRIM. PROC. CODE ANN. art. 64.04 (Vernon Supp. 2001).

ARGUMENT

MR. COOKS IS ENTITLED TO DNA TESTING UNDER ARTICLE 64.

Mr. Cooks is entitled to DNA testing under Article 64 because: (1) identity was the central issue in his case; (2) there is a reasonable probability that he would not have been prosecuted or convicted if exculpatory DNA results had been obtained; and, (3) he has not made this request for the purpose of unreasonably delaying the execution of sentence or administration of justice.

A. **The identity of the gunman was the central issue in this case.**

On February 26, 1988, off-duty Dallas Police Officer Gary McCarthy was fatally wounded in a shootout in the parking lot of a grocery store in West Dallas. McCarthy was providing security for store owner Mark DeCardenas, who had just returned from the bank with approximately $30,000 to be used to cash customers' paychecks. McCarthy thwarted the robbery by pushing DeCardenas toward the front doors of the store. After firing three shots at McCarthy, the gunman fled in a getaway car driven by another person.

1. Problematic Eyewitness Identification Testimony

Immediately after the shooting, DeCardenas, the eyewitness closest to the gunman, the person who tussled with him over the grocery sack containing the money, described the gunman as being 5'7" tall and weighing 180 pounds. S.F. vol. 40 at 118-19. At that time, Mr. Cooks stood 6'3" tall and weighed 260 pounds. S.F. vol. 40 at 171. DeCardenas identified someone other than Mr. Cooks when he viewed a photographic line-up and a live line-up. S.F. vol. 40 at 85-88.

The crime was witnessed by a large number of people besides DeCardenas, and the police transported 20 eyewitnesses to the Crimes Against Persons Division of the Dallas Police Department that same day for interviews. S.F. vol. 43 at 11.

The police later placed Mr. Cooks's photograph in a photographic line-up that six eyewitnesses viewed. Only one person, Oliver Powell, identified him. S.F. vol. 43 at 32. However, Powell never viewed Mr. Cooks in a live line-up. S.F. vol. 43 at 50.

The police also placed Mr. Cooks in two live line-ups within days of the crime. A total of ten eyewitnesses viewed the line-ups. S.F. vol. 43 at 18. Eight persons identified someone other than Vincent Cooks, and one person failed to make any identification. S.F. vol. 43 at 22-26. Only one person, Frank Green, identified Mr. Cooks. S.F. vol. 43 at 22. However, Green could not identify Mr. Cooks in an earlier photographic line-up, S.F. vol. 43 at 51, and initially described the gunman as being 5'10" tall and weighing 210 to 220 pounds. S.F. vol. 40 at 214. At the live line-up, Green saw Mr. Cooks – and only Mr. Cooks – a second time, because he was the only person in the live line-up whose photograph also appeared in the photospread that Green had viewed. S.F. vol. 40 at 150, 214; S.F. vol. 43 at 51.

2. The Lack of Physical Evidence

Identity was the central issue in the case because no physical evidence connected Mr. Cooks directly to the crime. His fingerprints were not found on the murder weapon, the money, the paper sack containing the money, or in the

getaway car. S.F. vol. 41 at 146-47, 158, 172-73. The police did recover Mr. Cooks's fingerprints on the outside of a rental car parked across the street from the grocery store about a half hour before the crime. S.F. vol. 41 at 181-83. However, the rental car was not the car used in the commission of the crime. Furthermore, the Dallas Police officer who approached the rental car containing three men later positively identified a man named Johnny Ray McGinnis as one of the occupants of the car. S.F. vol. 41 at 82-83. In addition, an eyewitness to the shooting identified McGinnis as the gunman. S.F. vol. 43 at 14. As a result of these identifications, McGinnis was arrested the next day but eventually released. S.F. vol. 43 at 14; S.F. vol. 41 at 82.

3. The Case Against Tony Ray Harvey

Tacitly acknowledging the weakness of the eyewitness identification testimony, coupled with the lack of physical evidence, the State was forced to call co-defendant Tony Ray Harvey as a witness. See S.F. vol. 43 at 61 (prosecutor admitting that "we weren't convinced that we were going to use [Harvey]" until a few days ago). Harvey testified that he drove the getaway car and saw Mr. Cooks shoot Gary McCarthy. S.F. vol. 43 at 104-05. However, Harvey's testimony was suspect, because he agreed to testify for the prosecution in exchange for a lesser sentence and because the case against him was stronger than the one against Mr.

Cooks.

Harvey testified that the State had offered him a sentence of anywhere between 25 years to life, but that he did not know what sentence in that range the prosecutor would recommend. S.F. vol. 43 at 117, 159. In actuality, the day after Mr. Cooks's deadline for filing a motion for new trial expired, the prosecutor dismissed the capital murder charges pending against Harvey, indicted him for aggravated robbery instead, and recommended a sentence of 20 years. See Cooks v. State, 844 S.W.2d 697, 724-25 (Tex. Crim. App. 1992). Harvey received a substantially more lenient sentence than that he testified to before the jury.

In addition to the plea bargain calling Harvey's credibility into question, the evidence presented a compelling case against him. Mark DeCardenas, the eyewitness closest to the gunman, described the gunman as being 5'7" tall and weighing 180 pounds. S.F. vol. 40 at 118-19. Tony Ray Harvey stood 5'9" tall and weighed 187 pounds at the time of the offense. S.F. vol. 43 at 119. However, the police never gave DeCardenas the opportunity to view Harvey in person or in a photograph. In fact, not a single eyewitness ever viewed Harvey in a photograph or in person, because the police never included Harvey's picture in a photographic line-up or placed him in a live line-up. S.F. vol. 43 at 34.

A number of eyewitnesses testified that the gunman was wearing a blue

warm-up or jogging suit. See, e.g., S.F. vol. 40 at 155, 208 (testimony of Frank Green); S.F. vol. 41 at 120 (testimony of Paul Mountique). Police Officer Steven Shaw testified that one of the occupants in the rental car parked across the street from the grocery store was wearing a blue jogging suit. S.F. vol. 41 at 86. Harvey admitted on the stand that, after fleeing from the getaway car, he took off his "blue jumper" and threw it down a sewer. S.F. vol. 43 at 160. As the defense pointed out in closing, Harvey provided this detail in his initial statement to the police:

> Now that's his story. Blue jogging suit. Why is that in his statement[?] [B]ecause you know he had no way of knowing that would be identified or the killer would be identified wearing a blue jogging suit. He had no way of knowing that when he made the statement. Now, he's made it and can't back out of it.

S.F. vol. 44 at 46.

The defense also pointed out numerous inaccuracies and omissions in Harvey's testimony, along with discrepancies between his testimony and the statement he initially gave the police. For example, Harvey testified that he picked up the rental car at the airport between 9:30 and 10:00 on the morning of the crime. S.F. vol. 43 at 97. However, the rental car agency's records revealed that the car was rented at 12:25 that afternoon. S.F. vol. 41 at 128, 132. Harvey's testimony about his position in the rental car and the time when Officer Shaw

approached conflicts with Shaw's testimony. Cf. S.F. vol. 43 at 100, 101 with S.F. vol. 41 at 73, 86. Harvey also testified that, within half-an-hour after the crime, he heard co-defendant Tracy Stallworth say that Mr. Cooks "had killed a police officer." S.F. vol. 43 at 150. However, Harvey's initial statement to the police did not contain this information, S.F. vol. 43 at 153; Gary McCarthy was working off-duty at the grocery store and was not in uniform or otherwise identifiable as a police officer, S.F. vol. 40 at 47; and Gary McCarthy did not die until 9:30 at night, approximately four-and-a-half hours after the crime. S.F. vol. 40 at 41. Finally, Harvey testified that Mr. Cooks said he was going to get some money even if he had to kill someone. However, his initial statement to the police did not mention this highly prejudicial information. S.F. vol. 43 at 154. During closing argument, the defense pointed out additional inconsistencies between Harvey's police statement and his testimony at trial. See S.F. vol. 44 at 36-40.

Finally, physical evidence ties Harvey directly to the crime. Unlike Vincent Cooks, Harvey's fingerprints were found in the getaway car. S.F. vol. 41 at 174. Harvey also inculpated himself as the gunman when he initially testified on direct examination that he exited the getaway car from the passenger's side, rather than the driver's side. S.F. vol. 43 at 106.

C. Mr. Cooks would not have been prosecuted or convicted if

exculpatory DNA results had been obtained from the baseball cap.

Article 64 does not require Mr. Cooks to show that a favorable result from DNA testing of the baseball cap would conclusively prove his innocence. Instead, the statute merely requires at this preliminary pre-testing stage that he demonstrate that a reasonable probability exists that he would not have been prosecuted or convicted if exculpatory DNA test results had been obtained. TEX. CRIM. PROC. CODE ANN. art. 64.03(a) (Vernon Supp. 2001). Because this was such a close case, any additional piece of favorable evidence would have had the capacity to shift the spotlight from Vincent Cooks to Tony Ray Harvey. If Harvey's DNA is present on any biological material found on the baseball cap, there can be no question that Mr. Cooks would meet the "reasonable probability" standard and be entitled to DNA testing.

The State's case against Mr. Cooks was far from overwhelming. The eyewitness identification testimony was suspect. Far less troubling identification testimony has been found extraordinarily unreliable. For example, in 1996, the Justice Department released a report detailing 28 cases in which individuals convicted of various crimes were later exonerated by DNA testing. The report stated:

> In the majority of these cases, given the absence of DNA evidence at trial, the eyewitness testimony was the most compelling evidence. Clearly, however, those eyewitness identifications were wrong.

National Institute of Justice, Off. Just. Programs, U.S. Dept. Just., Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial (1996); see Loftus, Ten Years in the Life of an Expert Witness, 10 LAW & HUMAN BEHAVIOR 241, 243 (1986) (estimating that half of all wrongful convictions are caused by inaccurate eyewitness identification). The problems associated with the eyewitness identification testimony were exacerbated by the lack of physical evidence directly linking Mr. Cooks to the crime and the strength of the case against accomplice witness Tony Ray Harvey.

This was undoubtedly a very close case. Despite the enormous pressure to convict Mr. Cooks for killing a Dallas Police Officer (even though Mr. Cooks was not indicted for killing a peace officer who was acting in the law discharge of an official duty), the length of the deliberations clearly demonstrates that the jurors struggled with their decision at the guilt-innocence stage of the trial. The jurors deliberated half-a-day before the Court ordered them sequestered for the night. S.F. vol. 44 at 72-74. They returned the next morning and delivered their verdict before the lunch recess. S.F. vol. 45 at 5. In light of Tony Ray Harvey's testimony

that he was not wearing a hat or cap on the day of the crime, S.F. vol. 43 at 162-63, if the jurors had heard that the baseball cap the gunman was wearing had Harvey's DNA on it, then there is certainly a reasonable probability that they would not have convicted Mr. Cooks.

D. This motion is not being made to unreasonably delay the execution of sentence.

The Legislature clearly intended Article 64 to provide a procedural mechanism to ensure against the wrongful punishment of innocent persons. This noble purpose can be no greater than in a case where the death penalty has been assessed. The Legislature clearly acknowledged the need for additional safeguards in death penalty cases by allowing persons convicted of capital offenses to appeal the trial court's denial of a motion for forensic DNA testing directly to the Court of Criminal Appeals. See TEX. CRIM. PROC. CODE ANN. art. 64.05 (Vernon Supp. 2001).

Article 64 did not become law until April 5, 2001. At that time, Mr. Cooks was in the midst of his federal habeas corpus proceedings challenging his capital conviction and death sentence. He had completed his direct appeal. He had completed state habeas corpus proceedings. The federal district court had denied his petition for writ of habeas corpus, and he had filed an application for a

certificate of appealability with the Fifth Circuit. The Fifth Circuit did not deny his request for COA until July 12, 2001. His deadline for filing a petition for writ of certiorari with the Supreme Court expired on October 12, 2001. It was not until shortly after that time that undersigned counsel first became involved in Mr. Cooks's case and began reviewing the record.

Nevertheless, even if undersigned counsel had filed this motion shortly after the passage of Article 64, Texas's unique habeas abstention doctrine (the "two-forum" rule) would have prevented him from filing a subsequent application for writ of habeas corpus based on favorable DNA test results until the completion of the federal habeas corpus proceedings. Under the "two-forum" rule, Texas state courts, as a matter of comity, will not adjudicate a postconviction petition if a federal petition challenging the same conviction or sentence is pending. See Graham v. Johnson, 168 F.3d 762, 779 (5th Cir. 1999); May v. Collins, 948 F.2d 162, 169 (5th Cir. 1991); Rumbaugh v. McKaskle, 730 F.2d 291, 293 (5th Cir. 1984); Carter v. Estelle, 677 F.2d 427, 435-36 (5th Cir. 1982); Ex parte McNeil, 588 S.W.2d 592, 592-93 (Tex. Crim. App. 1979); Ex parte Green, 548 S.W.2d 914, 916 (Tex. Crim. App. 1977); Ex parte Powers, 487 S.W.2d 101, 102 (Tex. Crim. App. 1972); see also S.B. 3 § 5(a) (stating that, "[i]f a person filed an application for a postconviction writ of habeas corpus that was denied or

dismissed before September 1, 2001, and if the results of forensic testing conducted under Article 64.03 . . . are favorable to the person, a claim based on actual innocence that is asserted in a subsequent application is, for the purposes of . . . Subsection (a), Section 5, Article 11.071, Code of Criminal Procedure, a claim the legal basis for which was unavailable on the date the applicant filed the previous application.").

Mr. Cooks's motion for forensic DNA testing is clearly not frivolous. He has submitted the motion within a reasonable period of time after the completion of federal habeas corpus proceedings. The Legislature has noted the importance of providing DNA testing for persons like Mr. Cooks, who have been convicted of capital crimes. Depriving Mr. Cooks of his statutory right to DNA testing under Article 64 merely because he is scheduled for execution in one week would be manifestly unjust and defeat the purpose of Article 64.

PRAYER FOR RELIEF

Mr. Cooks ask this Court to:

1. Preserve the integrity of the evidence and protect it against the possible loss or degradation of the biological material contained on it by allowing only an independent DNA expert, appointed by the Court, to view, inspect, or handle any part of State's Exhibit 54 (which includes the baseball cap, a glove, and the sack in which these items are contained), before it is tested;

2. Make the findings required under Article 64.03 of the Texas Code of Criminal Procedure and order DNA testing of any biological material found on State's Exhibit 54;

3. Stay Mr. Cooks's execution scheduled for December 12, 2001;

4. Appoint undersigned counsel to represent Mr. Cooks in these proceedings pursuant to Article 64.01(c);

5. Serve a copy of this motion on the State as required by Article 64.02; and

6. Grant such other relief as law and justice require.

Respectfully submitted,

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O R D E R

Having reviewed Movant Vincent Edward Cooks's Motion for Forensic DNA Testing, Stay of Execution, and Appointment of Counsel, it is ORDERED that:

1. No party shall view or inspect any part of the evidence comprising State's Exhibit 54 (which includes a baseball cap and a glove, along with the sack in which these items are contained), currently in the possession of the Dallas County District Clerk's Office, until such time as the Court appoints a DNA expert to preserve the integrity of the evidence and protect it against the possible loss or degradation of the biological material on it.

2. Mr. Cooks's December 12, 2001, execution date is STAYED until the conclusion of the proceedings under Article 64 of the Texas Code of Criminal Procedure.

3. Gregory W. Wiercioch is appointed to represent Mr. Cooks in these proceedings.

4. The Clerk of the Court shall serve a copy of this motion and order upon the State.

Signed on this _____ day of December 2001.

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Hon. F. Harold Entz, Jr.