

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Amici curiae the Innocence Project, Inc., the Texas Center for Actual Innocence, the Innocence Project of Texas, and the Texas Innocence Network respectfully ask that this brief in support of Petitioner be received by the Court. Pursuant to Rule 11(c), *amici* certify that no fee has been paid nor will be paid to any person in connection with the preparation of this brief.

IDENTITY OF AMICI CURIAE

Amicus Innocence Project, Inc., (“the Project”), is a nonprofit legal clinic and resource center co-founded by Barry C. Scheck and Peter J. Neufeld and based in New York, New York. Created at the Benjamin N. Cardozo School of Law in 1992, the Project provides *pro bono* legal services to indigent prisoners nationwide for whom post-conviction DNA testing of evidence can yield conclusive proof of actual innocence, and works to reform the underlying causes of wrongful convictions. The Project’s attorneys were asked by the Texas Legislature to assist with the drafting of Chapter 64 of the Texas Code of Criminal Procedure in 2001, after representing several Texans exonerated by post-conviction DNA testing prior to the statute’s enactment. Nationally, the Project has provided direct representation or other legal assistance to a majority of the 185 innocent persons exonerated as a result of post-conviction DNA testing to date.

Amicus Texas Center for Actual Innocence (a non-profit, tax-exempt corporation), in conjunction with the University of Texas School of Law, operates

the Actual Innocence Clinic, which screens, investigates and litigates post-conviction claims of innocence based on DNA and non-DNA evidence arising in the State of Texas.

Amicus Innocence Project of Texas is a consortium of five participating organizations created to investigate claims of actual innocence, exonerate the wrongfully convicted, and advocate for criminal justice reforms to reduce the risk of wrongful conviction. The IPT's members include attorneys and law students affiliated with the West Texas Innocence Project at Texas Tech University, the North Texas Innocence Project at Wesleyan, the University of North Texas, the University of Texas at Arlington, and the University of St. Thomas in Houston.

Amicus Texas Innocence Network ("TIN") is a nonprofit organization based at the University of Houston Law Center and established in March 2000. TIN is devoted exclusively to investigating claims of actual innocence raised by prison inmates, in Texas and elsewhere. To date, TIN has reviewed over 7,000 cases; its work has thus far led to the full exoneration of two clients, and new trials for two death-sentenced inmates in Texas.

PRELIMINARY STATEMENT

This is a case with vast implications for the interpretation of this State's landmark post-conviction DNA testing statute – and, with it, the fates of untold numbers of actually innocent persons, for whom access to modern DNA testing under Chapter 64 may provide their only hope of exoneration and release from

prison. Chapter 64 is, of course, but a preliminary step in the road to such exonerations -- since even where DNA testing yields exclusionary results, all petitioners must then demonstrate that they also satisfy the demanding terms of Article 11.07 before they may obtain relief from their convictions based on the newly-discovered DNA evidence. But access to such testing is undeniably a crucial first step in that process. And if upheld by this Court, the Court of Appeals' unduly restrictive interpretation of Chapter 64's plain language would so narrow the class of eligible petitioners as to render the statute effectively meaningless.

Indeed, it is hard to imagine a case with forensic "facts" that are *more* in keeping with the clear purpose of the statute, and the proven ability of DNA testing to isolate genetic material from the perpetrator of a violent crime. The crime at issue here was a rape by a single perpetrator who was a stranger to the victim (and the defense at trial one of misidentification); ample spermatozoa from the victim's "rape kit" has been preserved on an intact vaginal swab, and is highly susceptible to modern DNA testing; and the record is clear that the victim was a married woman whose only other recent time of coitus (some 40 hours prior to the rape) is known, as is the identity of the only individual besides the perpetrator (her husband) who could possibly be the source of the spermatozoa.

Remarkably, however, Mr. Phillips' plea for a simple DNA test -- which can either confirm his guilt, or establish his actual innocence -- has been misunderstood by the lower courts hearing his claims to date, as well as by the

attorneys appointed to represent him in those earlier proceedings. As such, the implications of this denial go far beyond this one case. For if biological evidence such as this, in a crime as straightforward (for DNA purposes) as this one, is not deemed subject to Chapter 64's scope, *amici* submit that there would be precious few cases to follow in its wake in which the lower courts would find it permissible to order a DNA test. The result would be to essentially nullifying a statute which was enacted, and then reaffirmed, by near-unanimous bipartisan majorities of this State's legislature.

This brief, drawing on *amici*'s experience representing persons exonerated in the wake of post-conviction DNA testing in Texas and nationwide, will address two principal errors made by the Court of Appeals as they relate to the statute and DNA technology at issue. First, the Court's finding that the requested DNA testing does not have even the *potential* to establish that Mr. Phillips "would not have been convicted" of the crime (Art. 64.03(a)(2)(A)) – on the ground that the spermatozoa on the vaginal swab from the victim's rape kit might have come from a prior act of intercourse with her husband, rather than the perpetrator of her rape – fails to grasp the basic means by which modern DNA technology can eliminate any such speculation. For as the State well knows from its active prosecutions of sexual assault cases in the post-DNA era, there exist two simple routes by which the testing could show, beyond any doubt, that the perpetrator of this crime was the source of the sperm on this evidence. First, because the victim was married, and testified under oath that her one and only act of coitus in the days prior to the

rape occurred with her husband 40 hours earlier (testimony whose veracity the State does not challenge), if Mr. Phillips is in fact excluded as the source of this male DNA, the laboratory could simply conduct an additional test on a sample of the husband's DNA – a test which, if the husband is also excluded, would prove beyond any doubt that the spermatozoa could only have come from the rapist. Such “elimination” testing is routinely performed in active criminal prosecutions and in the Chapter 64 context statewide. The Court of Appeals also failed to consider the possibility that any unknown male DNA profile from this spermatozoa could also be run through the national convicted-offender DNA databank, potentially generating a “hit” to an identifiable individual from the millions of DNA profiles of convicted rapists, murderers, and other felons contained therein – one who may well be incarcerated for a host of similar *modus operandi* crimes, and who could well give a full confession to all of the crimes for which Mr. Phillips was convicted if confronted with this highly inculpatory DNA evidence. (This would include the other sexual assaults to which he pled guilty; although no DNA evidence exists in those cases, it has never been disputed that they were committed by the same man – fitting the same description – who committed the rape which is the subject of the instant Motion). Such a remarkable result is not at all uncommon in the post-DNA era, as numerous cases (discussed *infra*) demonstrate. Clearly, Mr. Phillips is entitled to the inference that the potential for that outcome exists here – particularly since the bizarre and distinctive nature of the crimes at issue bear all the hallmarks of a serial offender.

Indeed, given that these same DNA tests could not only lead to the exclusion of Appellant as the source of the DNA at issue, but also the *identification* of a sexual predator who would otherwise remain at large, broader interests of public safety are also advanced by permitting access to this scientific analysis.

Second, the Court of Appeals erred in misconstruing the statute's "identity at issue" (Art. 64.03(a)(1)(B)) requirement. It failed to grasp that cases like this one -- in which the crime was committed by a stranger to the victim(s), and the defense raised at trial was misidentification -- fall squarely within this provision's scope. Indeed, the primary purpose served by "identity at issue" requirements is to remove from eligibility for testing a narrow class of cases that are wholly distinguishable from the instant case -- ones in which DNA testing would truly reveal nothing about the perpetrator's identity, because the defendant admits his presence at the scene, but offers an alternative defense such as consent, self-defense, insanity, or another form of legal justification for his acts. Here, however, Mr. Phillips clearly did not make (and does not make) such a claim; he has always maintained that he was nowhere near the victim's home that day, and was convicted as the result of honestly made, but nonetheless mistaken, eyewitness identification.

Application of the "identity at issue" bar to a stranger-rape case such as this one misinterprets the Legislature's intent and the statute's plain language, and cries out for swift correction from this Court. Moreover, it fails to give due weight to the fifteen years of sobering lessons learned from post-conviction DNA

exonerations -- which have repeatedly shown that eyewitnesses, particularly those subjected to highly traumatic events, can be badly mistaken. Indeed, DNA cases in Texas and nationally are replete with examples of identifications in which the descriptions were far more detailed and seemingly accurate (in terms of corresponding to the defendants' distinctive features) than in the instant case. And they include a number of cases, discussed *infra*, in which numerous victims and/or eyewitnesses confidently "identified" a single defendant, only to have that individual's innocence proved by DNA testing after trial.

Despite the State's repeated characterization of the "overwhelming" evidence against Appellant, *amici* have represented many innocent persons who were exonerated as a result of post-conviction DNA testing despite the existence of trial evidence which had appeared infinitely more damning than that presented against Mr. Phillips. But whether or not Appellant turns out to be innocent of the crimes for which he was convicted, the instant case is unquestionably one in which modern DNA testing has the scientific potential to answer that question beyond any doubt. That is all that Chapter 64 – a statute which does nothing more than provide access to DNA testing in appropriate cases – requires. *Amici* respectfully submit that to deny Mr. Phillips a simple DNA test would eviscerate the language and purpose of this laudable statute, and, by implication, preclude countless future innocent petitioners from access to the only evidence that may hold the key to their own freedom.

ARGUMENT

I. The Court of Appeals' Finding that Appellant Did Not Satisfy Art. 64.03(a)(2)(A) Failed to Account for the Proven Ability of Modern DNA Testing to Establish, Beyond Any Doubt, That the Spermatozoa at Issue Came From the Perpetrator of These Crimes – and Thus to Determine Appellant's Actual Innocence

Since the time of Appellant's 1982 convictions, forensic DNA technology has revolutionized the nation's criminal justice system. While unheard of at the time of Appellant's trials, forensic DNA typing has, in the last fifteen years, evolved from a novel technique into the foremost method used by law enforcement to identify – and eliminate – criminal suspects whenever spermatozoa, blood, saliva, hair, skin cells, and other biological material are deposited at a crime scene. The FBI's National DNA Index System ("CODIS"), a computerized databank containing the DNA profiles of millions of convicted offenders and unsolved crimes from around the nation, has been used to solve thousands of "cold cases," some of them decades old – including over 1,300 "hits" in Texas criminal investigations alone.¹ And in the post-conviction context, DNA testing has, to date, led to the exoneration and release from prison of at least 185 wrongfully

¹ As of August 2006, the database system had led to 1,136 such "hits" (termed "investigations aided") in Texas cases. See Federal Bureau of Investigation – Combined DNA Index System, Texas Statistics, <http://www.fbi.gov/hq/lab/codis/tx.htm>. Currently, the CODIS system includes over 3.6 million DNA profiles from convicted offenders and unsolved cases, which can be searched simultaneously by participating law enforcement agencies to aid in their investigations. See Federal Bureau of Investigation – Combined DNA Index System, State Statistics, <http://www.fbi.gov/hq/lab/codis/clickmap.htm>.

convicted individuals in the United States, 21 of whom were from Texas.²

Indeed, DNA's ability to both exonerate the innocent and identify the guilty has repeatedly been demonstrated in the context of the same post-conviction case, when DNA test results that exclude a convicted person as the source of crime scene evidence are then run through CODIS and generate a "hit" to the real perpetrator of the crime, often a dangerous criminal who would otherwise have remained at large. (*See Part I.C., infra.*)

These technological advances, coupled with the precision and objectivity of modern DNA science, has resulted in its widespread endorsement by persons of ordinarily divergent views in our justice system: Republicans and Democrats, liberals and conservatives, prosecutors and defense attorneys. In 2001, for example, Attorney General John Ashcroft aptly characterized DNA typing as "nothing less than the 'truth machine' of law enforcement, ensuring justice by identifying the guilty and exonerating the innocent."³

That same year, the Texas Legislature overwhelmingly endorsed the notion that persons convicted of crimes prior to the time that today's advanced DNA technology became available are entitled to avail themselves of its potential to put their claims of innocence to the test of science. By a landslide bipartisan vote of 30-1 in the Senate, and 132-1 in the House, the Legislature enacted Chapter 64 of

² See The Innocence Project, <http://www.innocenceproject.org/index.php> and <http://www.innocenceproject.org/case/> (tracking post-conviction DNA exonerations nationally, and in individual states, with summaries of each case).

³ See Naftali Bendavid, *U.S. Targets DNA Backlog-Agency To Spend \$30 million To Aid State Crime Labs*, Chi. Trib., Aug. 2, 2001, at 10, App. at A166.

the Code of Criminal Procedure – authorizing a rare but critical exception to the ordinarily-strict procedural rules that relate to challenges to criminal convictions in this State. Indeed, the impetus to enact the law was so strong that it went into effect on April 5, 2001 (rather than the standard effective date of September 1) as “emergency” legislation. And in 2003, the Legislature reaffirmed the statute’s core mandate, while amending it slightly to correct what it viewed as an unduly restrictive interpretation of certain provisions by the courts of this State, adopting the language currently in effect without a single vote in opposition.⁴

Under Ch. 64.03(a)(2)(A), where a convicted person can show, *inter alia*, that there is at least a 51% chance that he “would not have been convicted” had exclusionary DNA test results been available at trial – that is, a 51% chance that such exculpatory results would create at least a reasonable doubt as to his guilt – he is entitled to obtain access to the biological material at issue for that purpose. *See Smith v. State*, 165 S.W.3d 361, 364 (Tex.Crim.App. 2005). Of course, DNA testing can, and often does, do far more than cast serious doubt on a convicted person’s guilt. This has been made clear by the numerous writs of *habeas corpus*

⁴ See Senate Journal, 76th Legislative Session-Regular, Apr. 19th, 2001, at 1291, available at <http://tlo2.tlc.state.tx.us/sjrn/77r/html/4-19.htm> (2001 Senate vote); House Journal, 76th Legislative Session- Regular, May 23, 2001, at 4003, available at <http://tlo2.tlc.state.tx.us/hjrn/77r/html/day80.htm> (2001 House vote); Senate Journal, 77th Legislative Session-Regular, Mar. 3, 2003, at 368, available at <http://tlo2.tlc.state.tx.us/sjrn/78r/html/sj03-03-f.htm> (2003 Senate Journal); House Journal, 77th Legislative Session- Regular, Mar. 25, 2003, at 833, available at <http://tlo2.tlc.state.tx.us/hjrn/78r/html/day38final.htm> (2003 House passage; no recorded vote).

under Art. 11.07 of the Criminal Procedure Code granted by this Court, as well as the numerous pardons on grounds of actual innocence granted by Governor Perry, to persons who obtained DNA testing under Ch. 64 in the last five years.

In many cases, for example, the same DNA results which exclude a convicted person as the source of a given piece of biological material from a crime scene also have led to a databank “hit” on another individual – not uncommonly, a prisoner with a history of similar offenses, or who confesses to the crime at issue and in so doing fully exonerates the original defendant. But because the possibility of that outcome simply cannot be measured in advance of performing the requested tests, the Legislature has crafted Chapter 64’s terms to ensure that access to DNA testing in the first instance will be granted where that scientific potential exists. Depending on the outcome of the testing, a petitioner who is excluded as the source of the DNA evidence at issue may then seek judicial findings regarding the significance of the test results under Art. 64.04 of the statute, and thereafter petition for relief from the underlying conviction under the provisions of Art. 11.07.

The instant case provides a critical test of Chapter 64’s continued viability. In its discussion of both the forensic and non-forensic evidence offered against Appellant at trial, the Fifth District Court of Appeals failed to consider at least three distinct grounds on which DNA testing conducted on the vaginal swab

containing spermatozoa would easily satisfy Art. 64.03(a)(2)(A).⁵ Indeed, because this is in many ways such a simple case for purposes of DNA analysis, *amici* respectfully submit that for this Court to affirm the decision below and deny testing would wreak havoc on the application of this provision (and the Act as a whole) statewide. Moreover, each of the three grounds discussed below are, *amici* submit, equally applicable in the vast majority of viable Chapter 64 motions (particularly cases of sexual assault) – making it highly appropriate for this Court to address them when correcting the errors made below.

A. Significance of Intact Spermatozoa and Time of Deposit

The Court of Appeals’ assertion that “the trial record does not show that the assailant ejaculated while assaulting [the victim]” (Op.:5) is, in fact, directly contradicted by a key portion of the State’s evidence at trial, which the Court apparently did not consider. As set forth in Appellant’s Initial Brief on the Merits at pp. 15-17, the prosecution clearly established at trial that the specimens taken

⁵ *Amici* submit that there is no need for this Court to reach the merits of Appellant’s claim that he is also entitled to DNA testing on hair evidence recovered from the bed where the rape occurred, for two reasons. First, the factual record is incomplete on the issues that would determine the potential probative value of the hair: (a) whether or not the hair is a pubic hair (which, if it proved foreign to the victim and to the victim’s husband, would thus be far more probative since the only other likely source would be the perpetrator), or (b) whether the hair contains “root” material which would make it possible to run an STR-DNA test and thus enter the results into the CODIS databank. If (b) were true, testing the hair would have the same potential as the vaginal swab. *See, e.g.,* Associated Press, *DNA Evidence Links Convicted Rapist to 1977 Sexual Assault*, KANSAS CITY STAR, Oct. 11, 2006. Second, since the spermatozoa on the vaginal swab clearly has the potential to either prove or disprove Appellant’s claim of actual innocence, testing the hair will be unnecessary (and is, as a practical matter, far less likely to yield a full DNA profile) if testing on the vaginal swab is granted.

from the victim's vaginal canal 2-1/2 hours following the rape revealed the presence of intact spermatozoa (that is, in which the heads and tails remained joined). The state further established through its forensic witness, without contradiction, that the maximum reported time in the scientific literature for such intact spermatozoa to persist in the female vagina was 24 hours. Furthermore, the rape victim herself – who was married and living with her husband and child at the time of the assault – testified under oath that the only recent act of sexual intercourse she had engaged in prior to the rape was with her spouse, some 40 hours previously.

One does not need to be an experienced forensic scientist to understand the significance of this evidence and determining the probative value of a DNA test on the vaginal swab. Given this undisputed testimony, the spermatozoa contained on this evidence could only have been deposited by the assailant. Indeed, any fair reading of this record yields the conclusion that this testimony was offered by the State at trial for the purpose of establishing that very fact; for although serology tests at that time were unable to determine the donor's blood type, the intact spermatozoa provided strong evidence that a completed rape had in fact occurred during the time reported by the victim. Indeed, had today's DNA technology been available at the time of Mr. Phillips' arrest, there can be no doubt that the State would have immediately conducted a DNA test on the vaginal swab to determine whether or not Mr. Phillips was actually the source of that spermatozoa.

For the State to now oppose DNA testing on this very item of evidence by asserting that -- contrary to its own proof at trial -- these intact spermatozoa might not have come from the assailant after all is simply unconscionable. Such a claim certainly cannot be reconciled with any fair application of Chapter 64's plain language, nor with the fair administration of justice in this State.

B. Elimination Sample from the Victim's Husband

Were the existing record not enough to establish with sufficient certainty that the spermatozoa at issue came from the perpetrator -- and, therefore, that a DNA test on the vaginal swab can scientifically determine whether or not Mr. Phillips was that man -- there exists a simple method to put those doubts to rest during the testing process itself. The trial court can simply order that, if Appellant does turn out not to be the source of the spermatozoa (male DNA) on this swab, the laboratory shall proceed to test a sample of DNA from the victim's husband. Because the record here is clear that there were two -- and only two -- men with whom the victim had sexual intercourse in this time period, a test eliminating the husband as the source would establish beyond any doubt that the male DNA in fact came from the perpetrator.

In both the post-conviction context and in hundreds of active sexual assault prosecutions each year, such "elimination" samples are routinely collected and tested in order to make that very determination. Indeed, this approach is part of the core recommendations regarding procedures for post-conviction DNA testing that have been issued by the U.S. Department of Justice's National Commission

on the Future of DNA Evidence -- a bipartisan group of law enforcement officials, prosecutors, forensic scientists and other criminal justice professionals which was convened to determine whether and how to grant convicted persons access to DNA technology at both the state and federal level.⁶ The fact that the State has not acknowledged that this approach would bring similar resolution to any exclusionary result in the instant case is even more remarkable given that this particular District Attorney's office routinely applies this procedure in sexual assault cases when it consents to DNA testing, as well as in cases where it joins in a petition to vacate a defendant's conviction under Art. 11.07 in the wake of exclusionary DNA results. Indeed, one such case transpired in Dallas County the week this *amicus* brief was filed, when Larry Fuller was exonerated and freed in the wake of a series of post-conviction DNA tests which excluded him and the victim's two prior consensual sexual partners as the source of spermatozoa in the rape kit. (Examples of documents filed on consent of the parties in *Fuller* and other cases following the same procedure are annexed as Appendix A.)

The 2004 DNA exoneration of Brandon Lee Moon of El Paso is illustrative. Mr. Moon was convicted of the 1987 rape of a married woman which occurred in

⁶ See NAT'L INSTIT. JUST., OFF. JUST. PROGRAMS, U.S. DEPT. JUST., *Postconviction DNA Testing: Recommendations for Handling Requests*, Pub No. NCJ 177626, Sept. 1999, at 4 (Example 3), and 14. Indeed, by the time the Commission issued its report in 1999, it noted that the collection of such samples had already become standard procedure in post-conviction DNA cases. *See id.* at 14 ("In fact, elimination samples from third parties have routinely been obtained at the request of prosecutors, courts, and governors in more than a third of the post-conviction exonerations to date.").

her home. After the attack, the victim put on her son's robe, drove to a local store and called the police. With the help of an officer, she created a composite sketch and later identified Brandon Moon as the perpetrator from a photo array. At trial, Mr. Moon was identified in court both by the victim and by the victim of another El Paso rape, committed by an attacker of similar description and using the exact same *modus operandi*. (He was also a suspect in a series of three other, highly similar attacks in the area, for which he was not prosecuted after he was convicted of the rape.) The victim testified that Mr. Moon's eyes, physique, complexion, and hands were identical to those of the attacker's. Semen was detected on the bathrobe and on the comforter on which the rape took place, although no blood group antigens could be detected using the technology available at that time.

In 2003, Mr. Moon obtained an order for DNA testing on the bedspread and robe under Chapter 64 (the rape kit was no longer available). The DNA test results showed that Mr. Moon was not the source of semen recovered from the bedspread or the robe. A DNA test was then conducted on a sample from the victim's husband (who, although the two had since divorced, readily provided a saliva sample for comparison purposes). The husband's DNA matched the profile obtained from the spermatozoa on the bedspread stain (revealing that it came from a prior act of marital intercourse, and rendering that stain irrelevant for purposes of Mr. Moon's claim). The seminal fluid on the robe, however, did not match the victim's husband. Further elimination tests comparing the DNA from the robe to that of a sample from the victim's son excluded the son as the source of the semen

in question – conclusively demonstrating that this semen in fact came from the rapist. The District Attorney and Mr. Moon’s counsel from the Innocence Project (NY) then stipulated to findings of fact and conclusions of law regarding Mr. Moon’s entitlement to *habeas corpus* relief under Art. 11.07, leading to Mr. Moon’s release from prison in December 2004 after seventeen years of incarceration.⁷ This Court then affirmed the findings and granted the writ. *See Ex Parte Moon*, Cause Nos. AP-75, 31 & AP-75,132 (Tx. Ct. Crim. App. April 6, 2005) (slip. op.).⁸ The District Attorney thereafter dismissed the indictment, citing Mr. Moon’s DNA evidence of “actual innocence.”⁹

The fact that the District Attorney in the instant case has unreasonably opposed DNA testing does not make the proceedings in *Moon* any less analogous. For if Appellant is granted DNA testing and is excluded as the source of the male DNA on the vaginal swab, a simple “elimination test” can put to rest any doubts

⁷ *See* Charles K. Wilson, *17-year Ordeal Finally Ends for Freed El Pasoan’s Family*, EL PASO TIMES, Dec. 22, 2004; Maurice Possley, *Texas Man Exonerated in Rape Case*, THE CHICAGO TRIBUNE, December 21, 2004; Barbara Novovitch, *Free After 17 Years for a Rape That He Did Not Commit*, THE NEW YORK TIMES, December 22, 2004; Tammy Fonce-Olivias, *Juror Says Scientist Influenced Moon Case Rape Verdict*, EL PASO TIMES, December 23, 2004; Tammy Fonce-Olivias and Daniel Borunda, *Eyewitnesses Most Common Reason for Mistaken IDs*, EL PASO TIMES, December 21, 2004.

⁸ The full record from the Moon proceedings, including the DNA test results and the joint state-defense motion to vacate based upon those results, was submitted to this Court in 2004 and is also on file with undersigned counsel.

⁹ *People v. Moon*, State’s Motion to Dismiss and Order, Nos. 50015/50033, 346th Dist. Ct., El Paso County, April 22, 2005 (on file with counsel).

about whether the DNA actually came from the rapist – and, if it did, whether or not Mr. Phillips was that man.

Moreover, if the Court of Appeals’ error on this point (relying on the victim’s prior act of intercourse to hold that any exculpatory DNA results would not necessarily exonerate Appellant, because the DNA evidence could, theoretically, have been deposited during that earlier coitus) stands uncorrected, the result would be to vastly narrow the category of eligible DNA testing cases far beyond what the Legislature intended. For if a sexual assault victim’s prior consensual intercourse is held to be sufficient to negate a claim for DNA testing, without considering the possibility of “elimination sample” testing from the victim’s consensual partner, it would, in essence, create a rule that post-conviction DNA testing is only appropriate in cases where the victims were not sexually active in the days prior to the rape. Such a rule, of course, would be absurd. Were it in effect, countless meritorious claims for DNA testing (like those of Brandon Moon) would be unfairly barred, even though a simple round of additional DNA testing could easily eliminate any doubts raised about the source of semen or spermatozoa in a sample. Moreover, as discussed in Part C, *infra*, such a rule would also deprive rape victims themselves of the opportunity to have a DNA test conducted which could affirmatively identify their actual assailants.

C. DNA Databank “Hit”

Modern DNA testing does far more than merely eliminate suspects or convicted persons as the source of biological material from a crime; it can also

affirmatively identify the true perpetrators of those offenses and bring them to justice. For this reason, further certainty about the probative value of any DNA testing ordered under Chapter 64 in the instant case can also be obtained through searching any unknown male profile in the CODIS DNA databank.

The millions of DNA profiles of convicted offenders and unsolved crimes contained in the CODIS system are derived from a national network of state-based DNA collection and profiling systems, including Texas', which can be instantly and simultaneously compared to DNA evidence from a single crime scene. As of last July, Texas' own databank had received widespread praise for its success in solving approximately 600 crimes, 289 of which were sexual assault cases.¹⁰ The significance of a CODIS "hit" derives from the statistical infrequency of the individual profiles contained in the DNA typing system used (Short Tandem Repeat, or "STR"), which renders them "effectively unique" given the size of the world's current population. See NAT'L INSTIT. JUST., OFF JUST. PROGRAMS, U.S. DEPT. JUST., *The Future of Forensic DNA Testing*, Nov. 2000, at 25, available at <http://www.ojp.usdoj.gov/nij/pubs-sum/177626.htm>. For example, the statistical probability of a 13-locus STR-DNA match between two unrelated persons in the Caucasian American population has been conservatively estimated at 1 in 575 trillion. *Id.* at 19.

¹⁰ See Editorial, *To Exonerate—and Prosecute*, THE AUSTIN STATESMAN, July 27, 2005.

That the DNA testing requested here could do more than merely eliminate Appellant as the source of the spermatozoa, but affirmatively identify that source through a DNA databank search, is hardly a farfetched notion. Indeed, a recent analysis of 71 DNA post-conviction DNA exoneration cases, in which unknown DNA profiles used to exonerate a wrongfully convicted person were then entered into CODIS, revealed that 41 “cold hits” on new suspects resulted from the databank searches. See Maurice Possley & Steve Mills, *Crimes Go Unsolved as DNA Tool Ignored*, CHI. TRIB., Oct. 26, 2003. Such was the case of Entre Nax Karage, also of Dallas, who was exonerated in 2005 as a result of DNA testing and a databank hit under Chapter 64. See *Ex Parte Karage*, No. AP-75,253, 2005 Tex. App. WL 2374440 (Tex. Crim. App. Sep 28, 2005) (record on file with this Court). Mr. Karage was convicted of the 1997 murder of his girlfriend, whose body was found at the foot of a ravine in Dallas, in light of what appeared to be considerable evidence of his guilt. It included prior allegations of violent behavior against the victim; highly contradictory statements about his whereabouts on the day of the murder; death threats he made against both the victim and another boyfriend of hers; and blood found on the defendant’s clothes and in his vehicle. See *State v. Karage*, No. 04-98-00179-CR, 1999 Tex. App. WL 454638, at *1, 5, 6 (San Antonio, Jul. 7, 1999).

After conviction, advanced DNA testing on sperm from the victim’s vaginal swab was ordered under Chapter 64, so that the profile could be run in the CODIS databank. A “cold hit” linked the DNA (with 1-in-51.8 quadrillion odds)

to Keith Jordan – a prisoner who had been previously convicted of aggravated sexual assault of another 14-year old girl in the neighborhood. Mr. Jordan had been sentenced *in the same courthouse, in the same month* as Mr. Karage.¹¹ With the support of the District Attorney and the trial court, this Court vacated Mr. Karage’s conviction based on the DNA results (*Ex Parte Karage*, No. AP-75,253, 2005 Tex. App. WL 2374440 (Tex.Crim.App. Sep 28, 2005), and on December 22, 2005, Gov. Perry pardoned him on grounds of actual innocence.¹²

A similar outcome was obtained in two recent exonerations of defendants separately convicted of murder in New York State (Douglas Warney, and Jeffrey Deskovic). Each defendant had confessed to the homicide for which he was convicted, although DNA evidence from the crime scene remained unidentified. When the evidence from each case was re-analyzed using modern STR-DNA typing after conviction, however, both yielded CODIS “hits” on the individuals who had actually committed the murders – convicted felons who had subsequently been imprisoned for other homicides. In both cases, when confronted with the DNA test results, each inculpated prisoner admitted his guilt and wholly

¹¹ Mr. Karage was convicted and sentenced November 25, 1997 in the 282 District Court, Dallas County (Cause Number F-9700731-K). Keith Jordan was sentenced on November 12, 1997 in the 203rd District Court, Dallas County (Cause Numbers. F96-78296-WP and Cause No. F97-03223-KP). *Ex Parte Entre Nax Karage*, State’s Proposed Agreed Findings of Fact and Conclusions of Law at 2, 3, filed June 2004 (on file with counsel and with this Court). Both the 203rd and 282nd District Courts are housed in the Frank Cowley Courts Building.

¹² See Mary Alice Robbins, *DNA Test and Lawyer’s Tenacity Lead to Client’s Exoneration*, TEXAS LAWYER, March 15, 2004, at 1.

exonerated the defendant who had been wrongfully convicted in his place -- leading prosecutors to quickly overturn the original convictions and set Mr. Warney and Mr. Deskovic free in May and September 2006, respectively.¹³

It is essential that lower courts be aware of the potential for DNA testing to yield similar results under Chapter 64, in order to fairly consider the merits of a Chapter 64 motion. *Amici* respectfully urge this Court to make clear that, when evaluating the probative value of “exculpatory results . . . obtained through DNA testing,” *see* Art. 64.03(a)(2)(A) (emphasis supplied), Appellant and other similarly-situated petitioners are entitled to have a reviewing court consider the potential significance of a CODIS “hit” from the DNA evidence at issue, should one ultimately be obtained.

D. Additional Considerations

Amici note, as well, that the right to access DNA evidence in order to provide objective evidence of third party guilt has constitutional as well as statutory dimensions. *See, e.g., Holmes v. South Carolina*, 547 U.S. ___, 126 S.Ct. 727 (May 1, 2006) (unanimously holding that a criminal defendant has the

¹³ Regarding the Warney case, *see* Gary Craig, *Innocent man freed after 10 years in prison*, ROCHESTER DEMOCRAT & CHRON., May 16, 2006; Jim Dwyer, *Inmate to Be Freed as DNA Tests Upend Murder Confession*, NEW YORK TIMES, May 16, 2006, at B1, B6; Editorial, *DNA Is Good for the Soul*, NEW YORK TIMES, May 17, 2006, at A22. Regarding the Deskovic case, *see* Fernanda Santos, *DNA Testing Frees Man Imprisoned for Half His Life*, NEW YORK TIMES, Sept. 21, 2006, at B1, B4; Jonathan Bandler, *Killer: ‘I strangled her’*, JOURNAL NEWS, Oct. 6, 2006, at 1A; Jim Fitzgerald, *DNA Test Opens Door to Freedom*, TIMES UNION ONLINE, Sept. 21, 2006, <http://www.timesunion.com/AspStories/story.asp?storyID=518820>.

constitutional right to present affirmative evidence of third-party guilt to support his own claim of innocence); *State v. DeMarco*, 387 N.J. Super. 506, 521, 904 A.2d 797 (2006) (citing *Holmes* and granting post-conviction DNA testing under N.J. statute, on the ground that “[t]echnological advances since defendant's conviction have enabled the production of DNA typing data, which could be run through the CoDIS system and potentially implicate another suspect”).

In addition, especially when coupled with the potential of the rapidly-expanding DNA databank to produce a cold hit on a known individual, the distinctive nature of these crimes makes it likely that the single DNA test at issue here could do more than merely clear him on the charges of which he was convicted at trial; it could well bring a final resolution to the entire “spree” of cases in which Mr. Phillips was a suspect. The DNA may well turn out to come from someone who was unknown to Dallas County officials at the time of Mr. Phillips’ trials, but has since been convicted of similar offenses – such as William Dixon Steen of California. According to news reports, Steen pled guilty in 1985 to a series of ten sexual assaults in Southern California, all of which occurred in the fall of 1982, shortly after Appellant was convicted and sent to prison incarcerated in the instant case. The assaults to which Steen pled guilty involved a lone gunman who broke into health clubs, spas, and other athletic/bathing facilities, then forced his female victims to disrobe and pose for him – eerily similar to the spree of sexual assaults in Appellant’s case, which occurred in the Dallas area just months earlier. Moreover, after his arrest on the California cases,

Steen escaped from a holding cell and fled to Texas – where he was apprehended only after committing a sexual assault in the Houston area, for which he was convicted and received a 45-year sentence. *See Janet Rae-Dupree, Transient, Serving Time in Texas, Gets 20 Years for Sex Assaults in L.A.*, THE LOS ANGELES TIMES, July 19, 1985.

The DNA from the instant case could well yield a “hit” on Steen’s own DNA, or another man whose criminal history mirrors the instant offenses; in either case, the individual implicated may even confess to all of the crimes at issue when confronted with the inculpatory DNA results. Such an outcome would, of course, do more than merely exonerate Appellant. It would also provide these numerous victims with deserved certainty as to the true identity of the man who assaulted them in 1982. *See, e.g., S.K. Bardwell, Man Charged in Serial Killings of Four Houston-Area Women*, HOUSTON CHRONICLE, Oct. 28, 2003 (reporting DNA match in four unsolved rape-homicide cases to man previously convicted of sexual assault, who then admitted his role in the killings when interviewed by detectives). And that conclusive result has, with good reason, been championed by the same District Attorney’s Office which opposes DNA testing here. *See, e.g., CBS-11 News, Dallas Murders Solved After 20 Years*, Aug. 14, 2006, http://cbs11tv.com/local/local_story_226183856.html (reporting DNA databank hit on two previously unsolved homicides, leading to guilty pleas by perpetrators; quoting Dallas County Assistant District Attorney’s remark that “DNA is truly a

wonderful forensic tool in prosecution, and as you've seen today it has brought closure to the families.'").

Indeed, as far as the victims of crimes are concerned, the State's opposition to DNA testing is also inconsistent with its mandate to promote public safety. For if in fact Appellant is innocent, and the DNA testing proceeds to identify the true source of the spermatozoa from M.B.'s rapist, the results could well serve to keep that individual behind bars (for example, by constituting grounds to oppose or revoke the suspect's parole). *See, e.g.,* Deanna Boyd, *DNA Match Leads to Arrest in 1996 Rape*, FORT WORTH STAR-TELEGRAM, Dec. 15, 2004 (reporting CODIS match and arrest of rape suspect who was "just weeks away from being released from prison for another crime").

Whether exclusionary results from DNA testing ordered would wholly exonerate Appellant of one or more of the offenses of which he was convicted in 1982 is, of course, a question that the courts need not (and do not) address on a Chapter 64 motion. *See Ex parte Tuley*, 109 S.W.3d 388, 391 (Tex.Crim.App. 2002) (noting that Art.11.07 and Art.11.071, not Chapter 64, remain the vehicles for obtaining relief from convictions based on affirmative evidence of innocence). But the statute clearly provides him with the right of access to evidence which, given the facts of the case, may well aid him in satisfying that ultimate burden, and the Court of Appeals erred in holding otherwise.

In sum, by holding that Appellant "has not even arguably shown a reasonable probability that he would not have been prosecuted or convicted [of the

rape of M.B.] if exculpatory DNA results existed” (Op:5), yet failing to consider (a) the forensic evidence, by the State’s own trial witnesses, establishing that the spermatozoa almost surely came from the perpetrator; (b) the potential for an elimination sample from the victim’s husband to resolve any concerns about whether any male DNA on the vaginal swab came from their marital relationship rather than the rape; or (c) the potential for a CODIS databank hit to specifically identify another convicted offender as the source of this DNA, the Court of Appeals badly misconstrued the terms of Art.64.03(a)(2)(A). This Court should clearly and decisively correct these errors.

II. The Court of Appeals Misinterpreted the Purpose and Effect of Chapter 64’s “Identity at Issue” Requirement, By Failing to Grasp That this Element is Satisfied Where, as Here, a Defense of Misidentification Was Offered at Trial

In denying Appellant’s claim for DNA testing, the Court of Appeals also misinterpreted the prong of Chapter 64 which requires a petitioner to demonstrate that “identity is or was an issue” in his case. *See* Art. 64.03(a)(1)(B). As in other states whose DNA statutes contain similar requirements, this provision has a straightforward but limited purpose: to remove from consideration those cases in which a defendant *admitted committing the acts charged*, but asserted a justification defense of some kind (self-defense, consent, etc.) to avoid criminal liability. It was never intended to apply – and should not apply – in cases where, as here, a defendant does not dispute that a crime occurred, but denies his “identity” as the person who committed the acts in question.

The Court of Appeals never addressed the fact that Appellant had, at trial, asserted a defense of misidentification – one which necessarily satisfies Art. 64.03(a)(1)(B)’s threshold requirement. Instead, the Court focused on what it viewed as the strength of the identification proof offered by the state, deeming it “reliable” and based on Appellant’s “distinctive features,” which, in the Court’s view, “virtually eliminate[s] the possibility that the victim’s misidentified him.” (Op.: 4.)

There are two problems with this reasoning. First, it ignores the clear purpose of the “identity at issue” requirement, as that provision has been interpreted in this State and in other jurisdictions, and thus threatens to add great confusion to what should otherwise be a straightforward application of this legal standard. Second, it simply does not comport with experience. For it was, in no small part, a series of post-conviction DNA cases revealing that innocent persons were misidentified by rape victims -- who were often just as “certain” in their original testimony as the victims here -- which prompted the Legislature to enact Chapter 64 in the first place. To deny a petitioner the right to use DNA science to objectively test the accuracy of a lay witness’ identification testimony, on the ground that the identification *appears* to be correct, casts aside the irrefutable lessons that DNA evidence has taught us about the risk of human error in eyewitness identification – and would clearly eviscerate the statute’s purpose and intended scope. Moreover, while it cannot be known with certainty whether Appellant is guilty or innocent until the requested DNA test is actually performed,

the identification described as so “distinctive” and reliable” by the Court below pales in comparison to other DNA exoneration cases, in which the lay witness proof appeared far more detailed and accurate, until DNA testing proved otherwise.

A. Art. 64.03(a)(1)(B)’s purpose and scope

This Court clearly grasped – and applied – the purpose and effect of Art. 64.03(a)(1)(B) last year in *Raby v. State*, No. AP-74,930 (Tx. Crim. App. June 25, 2005) (not designated for publication). In *Raby*, the Court granted in part the defendant’s request for DNA testing in a capital murder case. In the process, the Court quickly disposed of the State’s claim that identity was not “at issue” merely because the defendant --who had argued at trial that he was not the perpetrator of the murder -- had previously signed a confession while in police custody:

[T]he only issue presented [at trial] was one of the murderer’s identity. There was no question that a murder had occurred and that no other legal defenses, such as self-defense, insanity, or consent, were presented. Appellant also raised the issue of identity in his habeas corpus proceedings. Under the facts of this case, identity is, or was, an issue as required under Article 64.03.

Id. at 10 (emphasis supplied). *See also Wilson v. State*, 185 S.W.3d 481, 484-85 (Tex.Crim.App. 2006) (holding that identity not at issue in rape and kidnapping case where prior DNA test implicated defendant, and he did not claim at trial or in any post-conviction proceeding “that the State was prosecuting the wrong man,” but merely that DNA testing could show that another man may have aided him in commission of the crime).

A number of other lower courts in this State have applied this provision in a similar (and correct) fashion. Such rulings have recognized that this threshold requirement pertains to the type of defense offered at trial, not the strength of the evidence offered in support of a misidentification claim. In rape cases, for example, a number of courts have properly denied DNA testing requests by petitioners who admitted having intercourse with the victim, but offered a “consent defense” at trial -- and, thus, for whom DNA testing would clearly be irrelevant in support of their innocence claim, because (by the defendant’s own admission) his semen/spermatozoa would be present on the evidence in question. *See, e.g., Lopez v. State*, No. 14-03-00871-CR, 2004 Tex. App. LEXIS 2374 (Tex. App. – Houston 2004) at *5 (not designated for publication)(identity not at issue as defendant “admitted at trial [that] he had sexual intercourse with the complainant”); *Arkansas v. State*, No. 05-04-00101-CR, 2004 Tex. App. LEXIS 10147 (Tex. App. – Dallas 2004) at *2 (not designated for publication)(identity not at issue since “at trial, appellant’s defense was to suggest [the victim] consented to have sex with him”); *In re Crayton*, No. 03-04-00217-CR, 2004 Tex. App. LEXIS 10757 (Tex. App. – Austin 2004) at *1 (not designated for publication)(identity not an issue where the appellant “admitted having sexual intercourse with the complainant but asserted that it was consensual”); *see also Jackson v. State*, No. 05-02-0575-CR, 2003 Tex. App. LEXIS 250 (Tex. App. – Dallas 2003) at *6 (not designated for publication)(finding post-conviction DNA

testing not necessary where “[a]ppellant admitted to physically assaulting complainant; [and] the only issue in the case was the extent of the assault”).

These decisions comport with those from other states’ appellate courts, when discussing identity-at-issue requirements in their own post-conviction DNA testing statutes. In *State v. Peterson*, 835 A.2d 821 (N.J. Super. 2003), for example, New Jersey’s Appellate Division considered the meaning of a provision in that state’s statute requiring a convicted defendant to show that “the identity of the defendant was a significant issue in the case.” In granting DNA testing, the Court properly focused on the nature of the defense offered at trial – and soundly rejected the State’s claim that Mr. Peterson did not satisfy this requirement because there appeared to be “overwhelming evidence” of his guilt:

[D]espite the strong evidence of his guilt, defendant's identity as the perpetrator was the only issue at trial. Defendant took the stand and denied that he was the one who raped and murdered the victim. Moreover, defendant presented his girlfriend's testimony that he was with her in a motel room at the time of the crime. Although this alibi evidence was discredited, defendant's only defense was that he was not the perpetrator of this horrific crime. Therefore, we conclude that the strength of the evidence against a defendant is not a relevant factor in determining whether his identity as the perpetrator was a significant issue.

Id. at 826 (emphasis supplied). (As a coda to the *Peterson* case, the outcome of the DNA testing ordered by the appellate court is also noteworthy. Despite what had been cited as “overwhelming” evidence against him – including microscopic hair comparison analysis, testimony by another witness that the defendant he had

made admissions to the murder, and a discredited alibi – the DNA results cleared Mr. Peterson, and he was freed from prison and exonerated in 2005.)¹⁴

See also Anderson v. State, 831 A.2d 858, 865 (Del. 2003) (characterizing DNA statute’s identity-at-issue requirement as “relatively straightforward,” since “[i]dentity is always an issue in a criminal trial unless the defendant admits having engaged in the alleged criminal conduct and relies on a defense such as consent or justification”); *State v. Urioste*, 316 N.E.2d 706, 711 (Ill. App. 5th Dist. 2000) (discussing “identity at issue” requirement, and holding that “the strength of the State’s case was not a hurdle that [the defendant] had to overcome in order to meet the statute’s requirements for postconviction forensic testing”).

Given Appellant’s trial defense, then, he satisfies Art. 64.03(a)(1)(B) as a matter of law. As noted repeatedly in his counsel’s summation, the defense never claimed that M.B. was not the victim of a brutal rape -- only that she was mistaken in her belief that Appellant was that rapist:

[H]as that woman really identified the person who actually did this to her? I’m not even going to argue with you about whether or not it was done to her or whether she was raped or not or whether she was sodomized or not. And what happened to this woman is a horrible situation, there is no question about that. But we talked about that earlier, just because a horrible thing happened to her does not necessarily mean he [the defendant] did it. Because the crime was bad, doesn’t mean that man did it. (T.170)¹⁵

¹⁴ *See* Laura Mansnerus, *Citing DNA, Court Annuls Murder Conviction From 1989*, N.Y. TIMES, July 30, 2005, at B2; Laura Mansnerus, *Case Dropped Against New Jersey Man After 18 Years*, N.Y. TIMES, May 27, 2006, at B3.

¹⁵ Unless otherwise specified, references to “T.” refer to pages of the transcript of Appellant’s trial for aggravated sexual assault, Cause No. F82-77162-Q.

I'm not suggesting to you that this lady was not in any way, shape, or form harmed or hurt on that day, I merely am suggesting to you that they have not proved that he had done it beyond a reasonable doubt . . . And there is a tremendous amount of doubt just based upon her testimony as to what happened out there and her ability to see and perceive who her attacker was. (T.179)

This is a textbook misidentification defense, one which could not be more in keeping with Art. 64.03(a)(1)(B). And because the case involved an allegation of rape by an intruder who was a total stranger to the victim, it is readily distinguishable from the line of cases in which Texas courts have faced the more difficult question of whether identity is “at issue” under Chapter 64 if the defendant in a sexual assault case was already known to the complainant, yet still denies committing the crime (*i.e.*, where the defendant was a family member or admitted acquaintance of the complainant).¹⁶ Clearly, this Court need not tread

¹⁶ *See, e.g., Dunham v. State*, 2006 Tex. App. LEXIS 5436 (Tx.App.- Dallas 2006) (not designated for publication) (identity not at issue where complainant and defendant in sexual assault case were well known to each other, as they had been friends for more than one year); *Morris v. State*, 110 S.W.3d 100, 397 (Tex.App.-Eastland 2003) (identity not at issue where defendant was the longtime boyfriend of complainant's mother, and lived in same household); *see also Eubanks v. State*, 113 S.W.3d 562, 566 n.1 (Tx.-App.) (noting, in dicta, that identity was not at issue as complainant was defendant's daughter). An argument might be made that certain sexual assault cases in which the parties were known to one another could nonetheless fall within Art. 64.03(a)(1)(B)'s intended scope (if, for example, DNA testing could show that the complainant had in fact had intercourse with someone who was not the defendant, and thereby impeach the witness' testimony to such an extent as to place identity at issue). But this Court need not resolve that question – or disturb this line of cases – here, given that Appellant's case involves an entirely different set of facts and a straightforward misidentification defense.

any new ground to decide that stranger-rape cases such as this one, with a defense of misidentification at trial, fall squarely within Art. 64.03(a)(1)(B)'s mandate.

B. “Reliable” Identifications and Human Error

Although no forensic evidence has ever connected Appellant to the rape of M.B., the Court of Appeals expressed unwavering confidence in the accuracy of her eyewitness identification of him as her assailant. But a wealth of social science research – and dozens of real-life DNA cases – suggest that such confidence, absent confirmatory DNA testing, is misplaced. And that is no less true where, as here, multiple victims participated in the pre-trial identification process.

Despite its apparent force, eyewitness identification can be extraordinarily unreliable. Indeed, a number of studies have shown that the very factors that jurors and courts consider to be strong signs of the reliability of an identification – including the degree of certainty expressed by the witness – often bear little relationship to its accuracy. *See, e.g.,* Amy Bradfield and Gary Wells, *The Perceived Validity of Eyewitness Identification Testimony: A Test of the Five Biggers Criteria*, 24 LAW & HUM. BEHAV. 581, 582 (2000); Amy Bradfield et al, *The Damaging Effect of Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112 (2002); *see also* Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM.

BEHAV. 1, 3 (1988) (citing research demonstrating that "eyewitness testimony is among the least reliable forms of evidence and yet persuasive to juries").

This is especially true where the eyewitness is the victim of a traumatic crime. Conventional wisdom has long suggested that stress enhances a witness' ability to perceive and remember a perpetrator's physical characteristics, *see, e.g., Commonwealth v. Roddy*, 184 Pa. 274, 290 (Pa. 1898) (stating that, in an instance where assailants tied up a witness and his wife and threatened to shoot the witness, "every particularity of each of [the assailants] must have been literally burned into the memory of both [the witness] and his wife"). But a wealth of research has demonstrated the opposite. In fact, "[a]ll other factors being equal, a witness in a high stress situation is more likely to be an unreliable witness than one not under such stress." *See* Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 1013, 1023 (1995) (emphasis supplied). One recent study, conducted on a group of subjects whom one would expect to have *higher* than average abilities to make identifications under stress -- 500 elite U.S. soldiers in "survival school" training -- provides powerful new evidence of the surprisingly inverse relationship between stress and accuracy.¹⁷ Moreover, a phenomenon known as "weapons focus" has

¹⁷ The study was funded by the U.S. military and conducted by Charles A. Morgan of Yale University. Over 500 soldiers underwent intense interrogations designed to simulate prisoner-of-war conditions, with some subjects threatened with physical violence. After twenty-four hours, the soldiers were asked to identify the individual who had interrogated them. Soldiers were either shown a live lineup; a

long demonstrated that victims of crimes in which the assailant brandishes a gun or a knife are particularly likely to misidentify their attackers, since their attention – understandably – is invariably drawn to the threatening weapon, rather than the assailant’s facial features, during the attack.¹⁸

These research findings have, of course, been most dramatically brought to life through DNA exoneration cases in the last fifteen years. One rape victim (Jennifer Thompson of North Carolina, who has become a national advocate for reform of eyewitness identification procedures) has written powerfully about the experience of learning that she had been “certain, but wrong,” when she misidentified an innocent man named Ronald Cotton as her assailant.¹⁹

photo spread (*i.e.*, a group of photos together), or sequential photos (*i.e.*, a series of photos shown one at a time). The results were stunning: **only twenty-seven percent of the soldiers identified the correct person in a live lineup. Moreover, only thirty-four percent made a correct identification in the photo array; and only forty-eight percent were correct in the sequential photos.** Thirty people were even mistaken about the **gender** of their interrogator. Moreover, those subject to physical threats were even more likely to misidentify their interrogators than those subjected to relatively “low stress” interrogations. See Charles Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 INTERNATIONAL J. OF L. & PSYCH. 265, 272 (2004).

¹⁸ See, e.g., Kerri L. Pickel, *Unusualness and Threat as Possible Causes of ‘Weapon Focus,’* 6(3) MEMORY (1998); Nancy Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16(4) LAW AND HUM. BEHAV. (1992).

¹⁹ Ms. Thompson was raped at knifepoint in her college dormitory in 1984. During the attack, she later wrote:

I studied every single detail on the rapist's face. I looked at his hairline; I looked for scars, for tattoos, for anything that would help me identify him. When and if I survived the attack, I was going to make sure that he was put in prison and he was going to rot.

Other cases have vividly demonstrated that even where a witness gives a highly detailed description of an attacker -- including highly "distinctive" features -- the identification may still be incorrect. Three recent Texas cases are illustrative. In March 2006, **Gregory Wallis of Dallas** was freed from prison, with the State's consent, after DNA proved that he was wrongfully convicted of a 1988 rape; at the time of his arrest, the victim in Mr. Wallis' case not only selected him from a photo array and live lineup, but also described the rapist as having a distinctive tattoo of a woman with large eyes and long hair -- as Mr. Wallis did.²⁰ **Ben Salazar of Houston**, convicted in 1992 based upon a rape victim's eyewitness identification, and cleared by DNA evidence in 1997, also had a tattoo on his hand which fit the description of the assailant's. In addition, the victim misidentified Mr. Salazar despite a substantial opportunity to view her assailant's facial features (for over an hour, including face-to-face contact, in her fully lighted home).²¹ And in 2004, DNA evidence led to the exoneration of **Brandon Moon of El Paso**, who

In a photo spread and, later, a lineup, Ms. Thompson identified Ronald Cotton as her attacker. She later wrote, "I knew this was the man. I was completely confident. I was sure." Later, when another man, Bobby Poole, was alleged to have boasted about raping Ms. Thompson, Mr. Poole was brought to Ms. Thompson, who told police, "I have never seen him in my life. I have no idea who he is." Eleven years after her rape, however, DNA testing proved that Bobby Poole, and not Ronald Cotton, was the real assailant. See Jennifer Thompson, *I Was Certain, But I Was Wrong*, THE NEW YORK TIMES, June 18, 2000.

²⁰ See CNN.COM, *DNA Clears Man Imprisoned for 18 Years*, March 21, 2006, www.cnn.com/2006/LAW/03/21/dna.exonerate.ap/index.html section =cnn_latest; Robert Tharp, *DNA Frees Man Jailed 18 Years*, DALLAS MORNING NEWS, Mar. 21, 2006.

²¹ Dave Harmon, *After 5 Years, DNA Tests Help Man Leave Prison*, AUSTIN AMERICAN-STATESMAN, October 28, 1997.

was misidentified by two separate rape victims at his 1987 trial – victims who had given detailed testimony about the attacker’s physique; pale complexion; striking “blue, blue” eye color; and even the distinctive shape of his hands and fingertips.²²

Likewise, the fact that Appellant was reportedly seen wearing clothing (a grey sweatshirt) generally similar to the perpetrator’s only makes his case all that much more analogous to those of other persons exonerated by post-conviction DNA evidence, a number of whom were also originally arrested on that basis.²³

In light of this overwhelming evidence of the risks of eyewitness misidentification, the Court of Appeals’ conclusion that “*Appellant’s unusually distinctive features virtually eliminate the possibility that the victims [in this case] misidentified him*” (Op.: 4) (emphasis supplied) cannot withstand scrutiny. That is particularly so given that the physical description of the assailant in this case was hardly “distinctive” at all. Indeed, the list of characteristics cited by the State in its brief opposing DNA testing in the district court – the assailant’s “receding hairline, mustache, blue eyes, and muscular build” – are generic ones, shared by perhaps thousands of men in the Dallas area at the time. More troubling, neither

²² See *supra* n.7 and n.8.

²³ For example, in 1984, Dennis Maher was arrested and charged with a series of three sexual assaults in Massachusetts after he was picked up near the scene of one of the offenses, and was, like the rapist, wearing *a red hooded sweatshirt*. All three victims then identified him in police lineups, and he was convicted. But in 2003, after post-conviction DNA testing excluded him as the source of spermatozoa from the two rape kits available, prosecutors agreed that Mr. Maher was innocent of all three crimes and consented to his release from prison -- acknowledging that “a horrible mistake” had been made in the original identification. See Dick Lehr, *After 19 years, DNA set to free rape convict*, THE BOSTON GLOBE, April 2, 2003, at B1.

the State nor the Court of Appeals mentioned the fact that while both M.B. and other victims in the related incidents described the assailant as having blue eyes, Appellant actually has green eyes. See City of Garland Prosecution Report, Arrest No.82-3972. The significance of this eye-color discrepancy is particularly noteworthy given the perpetrator's efforts to disguise the rest of his appearance. For in covering up his forehead with the hood of his sweatshirt, and the lower half of his face with a piece of cloth, the perpetrator's eyes were virtually *the only facial feature the victims did have the opportunity to see clearly*. For the Court of Appeals to hold that an identification with at least one such significant discrepancy is so "reliable" as to wholly preclude a simple, objective DNA test surely does not comport with the Legislature's intent – or with common sense.

In arguing that identity is not "at issue," the State and the Court of Appeals also rely upon the fact that six victims identified Appellant (although, notably, a total of more than sixty were victimized in this spree of assaults). The State places particular emphasis on this point, essentially arguing for a new rule in which courts should allow DNA testing in a "one-witness case," but refusing to concede the possibility that additional eyewitness(es) could also be mistaken. (See State's Brief on Discretionary Review at p.12-13.) Such a rule, of course, is not only nowhere to be found in the text of Chapter 64 itself; it also flies in the face of experience. For the factors which lead to erroneous identifications are no less present in multiple-witness cases. Indeed, DNA testing has, in recent years, conclusively exonerated a number of actually innocent defendants in serial-rape

cases -- even where the convictions were based upon seemingly reliable identifications made by multiple victims.

Take the case of Luis Diaz of Miami, Florida. In 1980, he was tried and convicted as the infamous “Bird Road Rapist” – a man whom authorities believed had committed as many as 25 sexual assaults using the same *modus operandi*, and who was convicted at trial of charges arising from seven separate incidents. Mr. Diaz was identified by eight separate victims of these crimes in live line-ups, who all testified against him at trial. In 2005, however, DNA evidence which remained available from two of the assaults excluded him as the source. Given the similarities between the crimes, based upon this new DNA evidence, all of Mr. Diaz’s convictions were promptly vacated and dismissed, and he was freed from custody, upon a joint motion by the State and defense counsel.²⁴

Similarly, in 1986, Lonnie Erby of Missouri was convicted of raping three teenage girls in separate incidents, all part of a crime spree by a suspected serial rapist; during the investigation and in court, four separate victims identified Mr. Erby as the assailant. Seventeen years later, court-ordered post-conviction DNA testing on biological evidence that remained from two of the rape cases excluded Mr. Erby as the source; all of his convictions were overturned, and he was set free

²⁴ See Abby Goodnough, *25 Years Later, DNA Testing Comes to a Prisoner’s Defense*, N.Y. TIMES, Aug. 3, 2005; *State v. Diaz*, Joint Motion for Post Conviction Relief, Cause Nos. 79-14159, 79-14556, 79-14557, 79-14559, 79-14560, Cir. Ct. of 11th Jud. Cir. – Miami-Dade, Fla., Aug. 5, 2005 (on file with counsel).

in September 2003.²⁵ See also NAT'L INSTIT. JUST., 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*, NCJ161258, June 1996 (describing various DNA exoneration cases resulting from eyewitness misidentifications, including Kirk Bloodsworth of Maryland, who wrongfully convicted of rape and murder and sent to death row, after five separate eyewitnesses mistakenly identified him as the man who abducted the child victim).

Nor, of course, does the fact that Appellant pled guilty to the remaining charges in this series of incidents diminish his entitlement to DNA testing here. First, by the express terms of Chapter 64, the courts are prohibited from determining that identity is not “at issue” solely by reason of the convicted individuals’ guilty pleas. See Art.64.03(b). That provision is rooted in the Legislature’s recognition that innocent people may, at times, face substantial pressure to plead guilty to crimes they did not commit. They might do so, for example, to avoid the death penalty (as in the case of Christopher Ochoa, whose exoneration is often cited as the impetus for Chapter 64’s passage), or, more commonly, when facing a far longer prison sentence if they go to trial and lose. See also *Weeks v. State*, 140 S.W.3d 39, 46 (Mo. 2004) (noting, in interpreting state’s DNA statute to apply to such cases, that “[a] person who pleaded guilty is

²⁵ See Peter Shinkle, *Man Cleared By DNA Tests is Freed After 17 Years*, ST. LOUIS POST DISPATCH, Aug. 26, 2003.

not somehow "more" guilty, or less deserving of a chance to show actual innocence, than one who went to trial”).

It seems particularly illogical for the State to rely upon Appellant’s guilty pleas in the related cases here, since (a) he accepted those pleas only *after* he was convicted by juries and sentenced to decades in prison for the rape/burglary of M.B. -- and thus had every reason to believe that his misidentification defense in the remaining cases, even if valid, would be similarly unsuccessful, and (b) all of these proceedings took place at a time when DNA testing was unavailable. Conversely, however, it seems virtually certain that if Appellant *had* the benefit of DNA testing at that time, and had been excluded as the source of the sperm deposited by the rapist in M.B.’s case, he not only “would not have been convicted” in that incident – he would not have faced anywhere near the same pressure to plead guilty to the remaining, lesser charges. Indeed, it has never been disputed that the same lone gunman committed all of these highly distinctive assaults (*see, e.g.*, Lori Ann Haubenstock, *Gunman Terrorizes 61 in 2-day Spree*, DALLAS MORNING NEWS, May 16, 1982, at 1A, 15A), given the similarities in the perpetrator’s clothing and description; the incidents’ close proximity in time and location; and the assailant’s behavior (forcing his victim’s to disrobe, pose, etc.). Thus, an exculpatory DNA test in M.B.’s case in 1982 would have been an enormous impediment to prosecuting Appellant in the remaining cases – perhaps even leading the State to quickly dismiss those charges altogether. Of course, this Court need not untangle that history to resolve Appellant’s straightforward

application for a DNA test on evidence from the rape of M.B. But it illustrates the profound unfairness of relying on these guilty pleas to deny DNA testing in the single case now before this Court.

CONCLUSION

Amici urge this Court to clearly and unequivocally hold that Appellant is entitled to the DNA testing he seeks – testing which will put his longstanding claim of innocence to the test of modern, dispositive DNA science. As the facts presented here fall squarely within Chapter 64’s plain terms, this Court can grant relief without in any way expanding the statute’s intended scope. By contrast, however, should this Court deny relief despite the straightforward scientific “facts” of Appellant’s case and the misidentification defense he offered at trial, it would make it virtually impossible for any other applicant in this State to obtain such testing. That result is clearly contrary to the Legislature’s intent, and to the interests of justice and public safety this Court is charged with upholding.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Brief of Amici Curiae* was served on John Rolater, Assistant District Attorney and Deputy Chief, Appellate Division, Dallas County District Attorney's Office, Appellate Division, 133 N. Industrial LB-19, Dallas, TX 75207, and on John Hagler, attorney for Petitioner, P.O. Box 12243, Dallas, TX 75225, by depositing same in the United States Mail, postage prepaid, on _____, 2006.

Nina Morrison