NO. 14-24-00957-CR

IN THE

COURT OF APPEALS

FOR THE

FOURTEENTH JUDICIAL DISTRICT OF TEXAS

HOUSTON, TEXAS

ROLAND RAMOS,

Appellant

V.

THE STATE OF TEXAS,

Appellee

On Appeal from the 122nd District Court
Galveston County, Texas
Cause No. 98CR0765

BRIEF FOR APPELLANT

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Attorney for Appellant

IDENTITY OF PARTIES AND COUNSEL

Parties and counsel in this case are as follows:

1. Roland Ramos, appellant, represented at trial by Greg Russell, 711 59th, Galveston, Texas 77551; represented on appeal by Greg Russell, 711 59th, Galveston, Texas 77551.

2. The State of Texas, appellee, represented at trial by Michael Taliaferro and Rebecca Klaren, Assistant District Attorneys, and on appeal by Jack Roady, Criminal District Attorney for Galveston County, Texas, 600 59th Street, Galveston, Texas 77551.

CITATION TO THE RECORD

Clerk's Record (98CR0765)…… CR 1 (page)

Clerk's Record (98CR0767)…… CR 2 (page)

Reporter's Record (Trial)…… RR Trial (page)

Reporter's Record (DNA Hrg)…….. RR (page)

Reference to the Complainant

At trial and on direct appeal, the complainant was referred to "J.A.", however she was referred to in the DPS lab reports and at the DNA hearing as "Jessica Doe." For the purposes of this appeal, she will be referred to as "Jessica Doe."

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ATTORNEY FOR APPELLANT

TO THE HONORABLE COURT OF APPEALS:

COMES NOW, Roland Ramos, hereinafter referred to as "appellant" and submits this brief pursuant to the provisions of the Texas Rules of Appellate Procedure and would respectfully show as follows:

STATEMENT OF THE CASE

1. Procedural background

For the convenience of the Court, below is a summary of the relevant procedural events:

a. Proceedings from original trial in 1999

This proceeding arises from three cases that were consolidated for trial and tried together. In cause number 98CR0765, appellant, Roland Ramos was charged by indictment with the offense of aggravated sexual assault in relation to complainant J.A.. (CR 1, 8) In a second case, cause number 98CR0767, appellant was charged by indictment with an additional offense of aggravated sexual assault in relation to the same complainant, J.A.. (CR 2, 8) In the third case, cause number 98CR0766, appellant was charged with indecency with a child by contact in relation

to a different complainant, V.R. (however, appellant did not file a motion for DNA testing in this case).

On August 26, 1999, a jury found Ramos guilty of all three offenses. (RR, Trial 6, 106-107) On August 27, 1999, the jury assessed Ramos's punishment. (RR, Trial 6, 106-107) In cause numbers 98CR0765 and 98CR0767, for the offenses of aggravated sexual assault of complainant J.A., the jury assessed prison sentences of 30 years and 25 years, respectively. *Id*. at 103-104. For the offense of indecency with a child by contact in relation to complainant V.R. in cause number 98CR0766, the jury assessed a 15-year prison sentence. In addition, the jury assessed a fine of $7,500 for each of the three offenses. *Id*. at 103-04.The trial court (Honorable Judge Frank Carmona presiding) ordered the sentences in cause numbers 98CR0765 and 98CR0767 to be served concurrently. The sentence in cause number 98CR0766, involving a different complainant, was ordered to be served consecutively (stacked) and to commence after completion of the sentences in the other two cases. (RR Trial, 7, 5)

b. Direct appeal

The trial court's judgment in each of the three cases was affirmed on direct appeal. See *Ramos v. State*, Nos. 14-99-01197-CR, 14-99-01200-CR & 14-99-01201-CR, 2001 WL 1287359 (Tex. App.—Houston [14th Dist.] Oct. 25, 2001, pet. ref'd) (not designated for publication).

c. Post-conviction DNA testing

On June 20, 2019, the appellant filed "Motion for Post-Conviction DNA Testing" in two of the cause numbers, 98CR0765 and 98CR0767. (CR 1, 50; CR 2, 75)

On January 17, 2020, in cause numbers 98CR0765 and 98CR0767, the trial court (Honorable Judge John Ellisor presiding) issued an agreed order granting post-conviction DNA testing of evidence pursuant to Chapter 64 of the Texas Code of Criminal Procedure. Additionally, on that same date, Judge Ellisor issued findings of fact and conclusions of law in support of that order. (CR 1, 54-83; CR 2, 79-82)

Over twenty years after appellant's jury trial, the Texas Department of Public Safety Crime Laboratory (DPS) issued the following six laboratory reports relating to this case, in Laboratory Case Number HOU-2001-02104:

1. February 28, 2020 (Biology)
2. March 17, 2020 (DNA)
3. May 14, 2020 (Supplemental Biology)
4. June 24, 2020 (Supplemental DNA)
5. June 9, 2023 (DNA-YSTR)
6. December 4, 2024 (Supplemental DNA-YSTR)

(RR, 60-106; appellant's exhibits # 1-6)

ISSUE PRESENTED

1. THE TRIAL COURT ERRED IN ISSUING A NON-FAVORABLE RULING AT THE DNA HEARING HELD PURSUANT TO CHAPTER 64 OF THE TEXAS CODE OF CRIMINAL PROCEDURE.

STATEMENT OF FACTS

On direct appeal of this case, this Honorable Fourteenth Court of Appeal's summarized the facts as follows:

In November 1997, appellant and his wife, Kristine, their three children, V.R., M.R., and R.R., along with Kristine's daughter J.A. were living with appellant's mother. On November 22, 1997, appellant returned home around ten o'clock in the evening after an afternoon of fishing and drinking. Appellant and Kristine argued, and Kristine left the house for approximately thirty to forty-five minutes. When she returned around eleven-thirty her infant was asleep in his carrier and V.R. and M.R. were asleep with their grandmother. When Kristine opened the door to her bedroom, however, she observed her daughter, J.A., on the same bed with appellant. Significantly, the child was naked from the waist down. Appellant, who was seated on the end of the bed, was also naked. Upon a closer examination, Kristine noticed

the child's genitals were red and lubricated with Vaseline. Kristine took J.A. to her neighbor's house, further examined the child, and found two pubic hairs on the child's vagina. Kristine called the Texas City Police Department.

J.A. was immediately taken to the University of Texas Medical Branch Hospital emergency room. After completing an examination of the child, Dr. Adams asked the child to describe what happened. J.A. told the doctor that appellant put Vaseline on her and then placed his hands and penis on her genitals. Dr. Adams told the jury J.A. had redness on the hymen itself, consistent with penetration. Joy Blackmon, a physician assistant at the hospital, testified that J.A. had greasy material on her vulva, and there was an oily sheen on her the examination of J.A., his findings were consistent with contact being made to the child's genital area.

On November 24, 1997, Kristine gave a written statement to Detective Darrel L. Matheson of the Texas City Police Department. Kristine gave a detailed report regarding the sexual assault of her daughter J.A.. The statement was reduced to a printed document and signed by Kristine.

On December 5, 1997, J.A. and V.R. were placed with a foster mother, Catherine Lynskey. While caring for the two girls, Lynskey observed what she called unusual behavior by V.R.. She noticed that the child rubbed her genital area with bathtub toys during her bath. Further, V.R. would remove her underwear and

rub herself while in bed. V.R. later told Lynskey that her father, appellant, would touch her genital area. V.R. stated that he did not tickle her and that she told appellant "leave me alone, daddy."

At trial, both J.A. and V.R. testified from the trial judge's chambers. The jury could see and hear the testimony on a monitor in the courtroom. J.A. testified that appellant touched her "privacy" with his hands and penis. V.R. testified that appellant often touched her "privacy" with his hand. *Ramo*s, 2001 WL 1287359, at *1–2.

Additionally, as the opinion points out, appellant testified in his own defense. *Id*. at *4; (RR Trial, 34-73).

a. Post Conviction Chapter 64 DNA Hearing

The trial court indicated that it took judicial notice of the reporter's record from the original trial. (RR, 44)

The six lab reports were admitted into evidence. (RR, 8-9; appellant's exhibits RR, 61-105) The DNA analyst from DPS, Ashley Kibbe, testified to the six lab reports as follows:

1. Biology Report

The DPS analyst testified regarding the February 28, 2020, Biology Report that there was no semen found on Jessica Doe's underwear. (RR, 10-11)

2. DNA Report

The DPS analyst testified to the March 17, 2020, DNA Report that there was no interpretable DNA in the crotch of the underwear of Jessica Doe. (RR, 10-11) Further, there was no male DNA on inside or outside of underwear. (RR, 12)

3. Supplemental Biology Report

The May 14, 2020, Supplemental Biology Report was in relation to a vaginal and oral swab that were taken from Jessica Doe during the SANE exam and both swabs had no indications of semen. (RR, 13-14). There was also no semen found on Jessica Doe's shirt, pants or socks. (RR, 14-15).

4. Supplemental DNA Report

The June 24, 2020, Supplemental DNA Report, which analyzed Jessica Doe's vaginal, oral and rectal swabs, was found to contain no male DNA. (RR, 15-16).

5. DNA YSTR Report

The June 9, 2023, DNA YSTR Report, again tested vaginal, oral and rectal swabs which no interpretable YSTR profile was obtained. However, in the crotch area and the inside of Jessica Doe's underwear, there was a mixture of at least two individuals and the appellant could not be excluded as a contributor. (RR, 17-18)

6. Supplemental DNA YSTR Report

The Supplemental DNA YSTR Report dated December 4, 2024, basically just echoed what was found in the DNA YSTR Report with some updated calculations, to wit:

"Profile found in 3 of 16,388 and this profile is not expected to occur more frequently than 1 in 2,114 U.S. males." (RR, 18, appellant's exhibits 5 and 6)

At the DNA hearing pursuant to Chapter 64, TCCP, the appellant argued the following to the trial court:

> MR. RUSSELL: The burden at these 64.04 hearing is on the Applicant, the Movant, to show that had the evidence been available at the time of his trial that there's a reasonable probability that the outcome would have been different. And none of this evidence was tested. It was all collected obviously, but it was never tested prior to Mr. Ramos's trial where he could use it at trial. And as the Court has heard, these reports would have definitely helped Mr. Ramos because if you look at the very first report, there's no semen found in her underwear, in Jessica Doe's underwear. That definitely would have been beneficial to Mr. Ramos had he had that information at the time of his trial. I mean, his lawyer,

Mr. Fieglein could have argued: Ladies and gentlemen, there's a -- very first report, there's no semen in Jessica Doe's underwear. And then the very next report, the DNA report dated March 17th of 2020, in the crotch area of the underwear, no interpretable DNA was obtained. That would have been beneficial for Mr. Ramos at the time of his trial. Also, no male DNA -- no male DNA on the inside of her underwear or the outside of her underwear. That would have definitely been beneficial to Mr. Ramos.

And as the Court's aware from having the reporter's record and also the State's request for judicial notice of the reporter's record, you would know that the allegation at trial, your Honor, was complete penile penetration in Jessica Doe's vagina. That's the allegation. And digital, in addition to penile penetration, there was digital penetration. And if those are the allegations at trial, surely the fact that there's no male DNA present would be very beneficial to Mr. Ramos at his trial.

You know, it's kind of hard to fathom how you could have vaginal and digital penetration but have no male DNA in the vaginal area, the vaginal swabs of Jessica Doe. Now, the YSTR couldn't even find male DNA in the vaginal and -- the vaginal area of Jessica Doe.

Now, I'm sure when I sit down, the Prosecutor is going to say there's nothing that excludes him. Well, I mean, I think that's kind of splitting hairs. When you say there's no male DNA, it does exclude him. There's no male DNA excludes all the males, right? Not just Mr. Ramos, but any male if there's no male DNA.

And as far as the supplemental YSTR where he's not excluded from the swabs of the underwear, well, he's in the same household, your Honor. They're sharing the same couch. They're sharing the same washing machine. And all of this is in the reporter's record. And so, there's -- I mean, that's -- they're mixtures. So, that would even lead more -- lend more credence to the fact that it was transferred possibly from the residence that Jessica Doe, Mr. Ramos, and Kristen (phn), and another child were living. But that's all they have is Mr. Ramos's DNA in the underwear. And it's at such a low threshold and it's a mixture. If you're in the same household, it's -- that leads credence to the fact that it's more than likely transferred because there's no male DNA anywhere else. Even YSTR couldn't find it in the vaginal area.

> And I think we've met our burden by a preponderance of the evidence that his -- the outcome of his trial would probably -- reasonably probable to have a different outcome, is the standard that we're required to meet. And I think we've met it, your Honor. (RR, 44-47)

The state's argument to the trial court was as follows:

> MR. TALIAFERRO: Just a couple points of clarification. First of all, Judge, you're familiar with the record. There were three cases that were tried together. And in this particular proceeding the Defense is challenging only two of the convictions; that is, the conviction in 98-CR-0765, which relates to aggravated sexual assault of the child, Jessica, by contact or penetration. Not just penetration but contact or penetration. Contact itself would have been sufficient to support the conviction.
>
> And he's also challenging Cause No. 98-CR-0767, which is the aggravated sexual assault of the child, Jessica. That's penetration of the sexual organ with the hand and/or finger. The point I'm making here is that there's no challenge in this proceeding to the conviction in the third case, Cause No. 98-CR-0766, which was indecency with a child by contact in relation to a different child, the Defendant's biological daughter, Veronica.
>
> MR. TALIAFERRO: Anyway, Judge, as the Court knows, this is all about Article 64.04. The Defense has the burden to establish that if the results had been available at the time of trial, the -- it's reasonably probable that the Defendant would not have been convicted. I quote that to make the point that it's about conviction. It's only about conviction. It's not about the punishment assessed in this case. So, solely about whether the conviction would have been changed by the existence of this DNA evidence.
>
> The State's position is that the Defense has not met their burden. This is an offense that occurred back in 1997, 27 years ago. So, it's not a surprise that there was no DNA evidence admitted at trial. There was, in fact -- I'll just say this. There was no DNA evidence admitted at trial. So, this is not the type of situation where there's new DNA that somehow conflicts or contradicts or

somehow eliminates the significance of prior DNA evidence that was admitted at trial. We don't have that here. This isn't one of those deals.
In terms of the evidence that was presented by the State at trial, I don't intend to reiterate all of that to you, Judge. But there was compelling evidence that was presented at trial indicated that the Defendant committed this offense.
What happened is that the Defendant got into an argument with his wife. She left the home. She came back home a short while later. She walked into the bedroom, and she sees Jessica on the bed, no clothing on from the waist down basically. The child's panties and pants were on the floor next to the bed.
The Defendant's wife also observed that Jessica's genitals were red and that Jessica's genitals were covered with Vaseline. The Vaseline is significant because the evidence showed in trial that Vaseline was something that the Defendant and his wife used when they themselves were engaged in sexual activities. And there's -- evidence was admitted at trial that when the wife saw this situation, she knew that the Defendant -- her testimony -- she knew that the Defendant had been messing with her daughters. After -- by the way, the wife also saw -- not only was Jessica on the bed, but also the Defendant was in the bedroom as well. He was -- standing on the bed with his pants and underwear down at his knees.
There was also evidence in the record where one witness testified that he was told by the wife at some point in time that the Defendant -- she saw the Defendant with an erection at that point in time. After the wife saw this situation, she got upset. She left the house, went over to the neighbor's house. The neighbor said, "What you should do is contact" -- "is check Jessica before you contact the police."
So, the wife goes back home. She gets Jessica. Takes Jessica back over to the neighbor's house. And there she -- the wife examines Jessica again. At this point in time, she, again, sees that the child's genitals are red and the Vaseline is there. And also, she sees -- you heard about two pubic hairs. She sees two pubic hairs on or around the victim's genitalia. Those pubic hairs were not recovered. The wife testified that she basically knocked those to the floor and that was the end of that.
The police were called. And then before the wife left the house, she told the Defendant she was going to call the police. So, anyway, she called the police from over at the neighbor's house. The police show up at the neighbor's house.

The wife takes them over to her house, to the Defendant's house. The Defendant's not there. They're there for a considerable period of time, but the Defendant is not there that entire time.

Later, the Defendant's wife takes Jessica to UTMB for medical treatment and an examination. By the way, before I get to that, during the course of everything that happened at the house, Jessica told the Defendant's wife that the Defendant put Vaseline on her, that the Defendant was touching her down there, and that the Defendant put his pee-pee on her. So, there's that outcry. At UTMB Jessica was seen by a physician and there was an outcry there as well. Jessica told the physician that the Defendant, "put Vaseline on me. He put his hands down there, and he put his pee-pee down there." And again, she -- the doctor made it clear in her testimony that Jessica was referring to her genitalia. At this particular point in time this doctor did not notice Vaseline on the child's genitalia, but there was testimony at trial that that may have been because no colposcope was used as a magnifying instrument that enables doctors to take an up-close look at the genitalia. And because that was also in the -- this examination occurred in the emergency room at UTMB. And also, the doctor there at UTMB saw the redness on the hymen and also redness in another part of the child's genitals.

There was a subsequent UTMB visit the following day, and the medical professionals there likewise observed a Vaseline sheen at that time.

Now, Mr. Russell made a point that – he argues that this evidence, the serology evidence actually, not the DNA evidence, but the serology evidence would have been beneficial. But that's not the standard. The standard is not whether it would have been beneficial. The standard is whether it would have resulted in a reversal of the conviction, that it would have caused the jury to arrive at a different verdict.

And the State's position is that this evidence – that the DNA evidence would not have accomplished that. If anything, Judge, this evidence is not exculpatory. It's inculpatory. The last two YSTR reports that the witness testified about both indicated that the Defendant could not be excluded as a contributor with respect to stains at two different points on the victim's underwear. So, in light of all that, Judge, I would ask the Court to rule against the Defendant on this particular motion. Thank you. (RR, 47-54)

SUMMARY OF ARGUMENT FOR ISSUE NUMBER ONE

THE TRIAL COURT ERRED IN ISSUING A NON-FAVORABLE RULING AT THE DNA HEARING HELD PURSUANT TO CHAPTER 64 OF THE TEXAS CODE OF CRIMINAL PROCEDURE.

The jury found appellant guilty on two cases of Aggravated Sexual Assault of a Child and on one case of Indecency with a Child by Contact. The jury assessed Appellant's punishment at thirty years (30) and twenty-five (25) years on the two Aggravated Sexual Assaults of a Child respectively, and fifteen (15) years for Indecency with a Child by Contact.

The trial court erred in issuing a non-favorable ruling denying appellant relief because the DNA testing that was performed showed that had this DNA evidence been available at the appellant's trial, there is a reasonable probability that the outcome would have been different.

ARGUMENT IN SUPPORT OF APPELLANT'S ISSUE NUMBER ONE

a. Standard of Review

When reviewing a trial court's finding in a chapter 64 post-conviction-DNA-test proceeding the same standard of review is applied to review a trial court's ruling granting or denying DNA testing under article 64.03. *See* Tex. Code Crim. Proc.

Ann. arts. 64.03, 64.04 (West Supp. 2017). *Asberry v. State,* 507 S.W.3d 227, 228-29 (Tex. Crim. App. 2016) (explaining that "we do not see any reason to treat a review of a ruling pursuant to Article 64.04 differently than a ruling pursuant to Article 64.03"). The standard is the familiar bifurcated standard of review where almost total deference is given to the judge's resolution of historical fact issues supported by the record and applications-of-law-to-fact issues turning on witness credibility and demeanor and we review de novo all other application-of-law-to-fact questions. *Guzman v. State,* 955 S.W.2d 85, 89 (Tex. Crim. App. 1997); *see also Reed v. State,* No. AP-77, 541 S.W.3d 759, 2017 WL 1337661, * 6 (Tex. Crim. App. April 12, 2017), *petition for cert. filed,* (U.S. Feb. 1, 2018) (No. 17-1093); *Rivera v. State*, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002). The entire record should be reviewed, that is, all of the evidence that was available to, and considered by, the trial court in making its ruling, including testimony from the original trial. *Asberry,* 507 S.W.3d at 228. The ultimate question of whether a reasonable probability exists that exculpatory DNA tests would have caused the appellant to not be convicted "is an application-of-the-law-to-fact question that does not turn on credibility and demeanor and is therefore reviewed *de novo*." *See Rivera*, 89 S.W.3d at 59.

b. Analysis

Chapter 64 of the Code of Criminal Procedure allows a convicted person to "submit to the convicting court a motion for forensic DNA testing of evidence

containing biological material." Tex. Code Cim. Proc. art. 64.01(a-1). This motion may request testing of evidence that was secured in relation to the offense comprising the underlying conviction and was in the possession of the state during the trial but either was not previously tested or, although previously tested, can be tested with newer techniques which can provide more accurate and probative results. *Id.,* art. 64.01(b).

Biological material means "an item in the possession of the state and that contains blood, semen, hair, saliva, skin tissue or cells, fingernail scrapings, bone, bodily fluids, or other identifiable biological evidence that may be suitable for DNA testing and includes the contents of a sexual assault evidence collection kit." *Id.,* art. 64.01(a)(1)(2).

In order to prevail at a Chapter 64 DNA hearing and receive a favorable ruling from the trial court, the appellant must show by a preponderance of the evidence (51%) that he would not have been convicted if the exculpatory results were available at trial. See *Smith v. State*, 165 S.W. 3d 361, 364 (Tex. Crim. App. 2005). This requires the convicted person to show that he, more likely than not, would not have been convicted with exculpatory results. In the past, courts have held "exculpatory results" to mean only results "excluding [the convicted person] as the

donor of this material...." *Blaylock v. State,* 235 S.W 3d 231, 232 (Tex. Crim. App. 2007).

The trial court (Honorable Judge John Ellisor presiding) agreed with appellant that the evidence he seeks to test still exists and is in a condition making DNA testing possible, that the chain of custody is sufficient and the integrity of the evidence has been maintained, that identity was an issue in appellant's case, and that the appellant's motion was legally sufficient. (CR 1, 83; CR 2, 79) Nevertheless, the trial court (Honorable Judge Jeth Jones) denied appellant relief on his motion for DNA testing by issuing a non-favorable ruling and issued an Order stating:

"Ramos has not established, in relation to Cause Number 98CR0765 or in relation to Cause Number 98CR0767, that 'had the results [of post-conviction DNA testing] been available during the trial of the offense, it is reasonably probable that the person would not have been convicted' (Tex. Code Crim. Proc. art 64.04). If those results had been available during Ramos' trial, the verdict of the jury in each of those cases probably would not have been any different." (CR 1, 209; CR 2, 160)

Article 64.04 of the Texas Code of Criminal Procedure states, in pertinent part, as follows:

Art. 64.04 Finding

> After examining the results of testing under Article 64.03…the convicting court shall hold a hearing and make a finding as to whether, had the results been available during the trial of the offense, it is reasonable probable that the person would not have been convicted.

Tex. Code Crim. Proc. Art. 64.04; *see id.,* art 64.03.

The requirement of a "different outcome" showing is satisfied when "the convicted person establishes by a preponderance of the evidence that ... the person would not have been convicted if exculpatory results had been obtained through DNA testing. Art. 64.03(a)(2)(A).

"A court considering whether DNA test results demonstrate a reasonable probability of acquittal should not apply the actual innocence standard articulated in *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996)." *Flores v. State*, 491 S.W.3d 6, 9 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). "Instead, the court should determine whether the results would 'cast affirmative doubt upon the validity of the inmate's conviction.'" *Id*. (quoting *Raby v. State*, No. AP–76,970, 2015 WL 1874540 at *5–*6 (Tex. Crim. App. April 22, 2015) (not designated for publication)); see *Dunning v. State*, 572 S.W.3d 685, 690 (Tex. Crim. App. 2019) (where Court of Criminal Appeals upheld article 64.04 ruling of trial court, which had ruled against defendant on ground that "the DNA results did 'not cast affirmative doubt on the defendant's guilt'"); *Gowan v. State*, No. 02-18-00032- CR, 2020 WL

1949015, at *7 (Tex. App.—Fort Worth Apr. 23, 2020, pet. ref'd) (not designated for publication) ("In other words, the convicting court is to determine whether the results would cast affirmative doubt on the validity of the conviction based on 'the exculpatory value, if any, of the test results and whether the results meet the standard set out in Article 64.04.'") (quoting *Dunning*, 572 S.W.3d 685, 697).

The defendant bears the burden of persuasion on this question by a preponderance of the evidence. *Gowan*, 2020 WL 1949015, at *7 (citing *Asberry v. State*, 507 S.W.3d 227, 228 (Tex. Crim. App. 2016).

One of the legislature's purposes in enacting article 64.04 was "to give the parties a forum to submit evidentiary matters relating to the test results." *Rivera v. State,* 89 S.W.3d 55, 59 (Tex. Crim. App. 2002). Consequently, evidence presented at an article 64.04 hearing should be limited to the explanation of the results of the new DNA testing:

A hearing under Article 64.04 is solely for the purpose of examining the results of DNA testing to determine whether the results are favorable to the appellant and show that it is reasonably probable that he would not have been prosecuted or convicted had the results been available before or during the trial. While the court may consider all of the evidence from the trial in light of the new DNA test results in making a favorability determination, a Chapter 64 hearing is not a retrial of the

case. In *Ex Parte Gutierrez*, 337 S.W.3d 883 (Tex. Crim. App. 2011), the court explained that "Chapter 64 is simply a procedural vehicle for obtaining certain evidence 'which might then be used in a state or federal habeas proceeding.'" *Id.* at 890 (citing *Thacker v. State*, 177 S.W.3d 926 (Tex. Crim. App. 2005)). Exculpatory DNA results are the "certain evidence" to which we were referring and the explanation of the results of the new DNA testing. *Raby v. State*, No. AP-76,970, 2015 WL 1874540, at *8 (Tex. Crim. App.-Apr. 22, 2015) (not designated for publication; emphasis added). To perform the analysis required by article 64.04, the court should take judicial notice of the reporter's record of the trial proceedings. See *Asberry*, 507 S.W.3d at 229 (Tex. Crim. App. 2016) (recognizing, in the context of article 64.04, the "broad discretion in the trial court to consider matters within the knowledge of the trial court in both rulings by the trial court and appellate review"); see, e.g., *Flores v. State*, 491 S.W.3d 6, 7 n.1 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (where trial court took judicial notice of the reporter's record when making article 64.04 finding and where the appellate court, during subsequent appeal, also took judicial notice of that reporter's record).

In this case, the incriminating evidence adduced at trial was Kristine seeing the appellant sitting on his bed naked and Jessica Doe, who was three years old, was also sitting on the bed naked from the waist down. Jessica Doe gave a statement to

a doctor accusing appellant of penile and digital penetration and the doctor noticed a Vaseline sheen.

Comparing the evidence that was adduced at trial to the above-mentioned post-conviction lab reports, there was a reasonable probability that the outcome would have been different. There was no semen found inn Jessica Doe's underwear. There was no male DNA in Jessica Doe's underwear (inside or outside). There was no semen found on Jessica Doe's vaginal, oral or rectal swabs. There was no semen detected on Jessica Doe's shirt, pants or socks. There was no male DNA on Jessica Doe's vaginal, oral or rectal swabs. The YSTR analysis was a mixture of two individuals.

There was a "reasonable probability" that the outcome of appellant's trial would have been different, and the trial court erred by issuing a non-favorable ruling.

CONCLUSION AND PRAYER

WHEREFORE PREMISES CONSIDERED, Appellant respectfully asks that the trial court be reversed and that a judgment of acquittal be entered or in the alternative that appellant be granted a new trial or appellant's sentence be set aside and for such other and further relief to which Appellant may be justly entitled.

Respectfully submitted,

/s/ Greg Russell

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CERTIFICATE OF SERVICE

As Attorney of Record for Appellant, I do hereby Certify that a true and correct copy of the above and foregoing document was this date provided to the Attorney for Appellee, by certified electronic service provider, to Mr. Jack Roady, District Attorney of Galveston County at the offices of the District Attorney of Galveston County, Texas, 600 59th Street, Galveston, Tx. 77551, on the 29th day of May 2025.

/s/ Greg Russell
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I do hereby certify that this brief is in compliance with rule 9.4(i) of the Texas Rules of Appellate Procedure because it is computer generated, and its relevant portions contain 5,658 words.

/s/ Greg Russell
Attorney for Appellant

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