IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-77,065

ROBERT LYNN PRUETT, Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL OF A CHAPTER 64 DNA PROCEEDING
FROM CAUSE NO. B-01-M015-0-PR-B
FROM THE 156TH JUDICIAL DISTRICT COURT
BEE COUNTY

HERVEY, J., delivered the opinion of the Court in which KELLER P.J., KEASLER, YEARY, NEWELL, KEEL, WALKER, JJ., joined. ALCALA, J., filed a concurring opinion. RICHARDSON, J., did not participate.

O P I N I O N

In April 2002, a jury convicted appellant of the offense of capital murder. In April 2015, appellant moved for DNA testing pursuant to Texas Code of Criminal Procedure Chapter 64. The trial court granted the motion, but found that the test results were not

favorable to appellant.[1] Appellant now appeals the trial court's determination that it was not reasonably probable that, had the results of the testing been available during the trial of the offense, he would not have been convicted. Specifically, appellant argues on appeal that the trial court erred by:

> (1) "not granting [appellant's] reasonable request for expert funding prior to the [August 2015] hearing" and not allowing appellant "time to adequately prepare for the August 13 hearing";
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> (2) finding that the weapon used in the offense had been contaminated after finding that it had not been tampered with;
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> (3) not requiring the laboratory to supply all of the data generated during testing before the August 2015 hearing;
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> (4) "not ordering the partial profile to be compared to the profiles in the FBI and DPS databases before the August 13[, 2015] hearing"; and
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> (5) "entering findings [and conclusions] denying [appellant] relief without first insisting that its May 8, 2015 order be fully executed."

After reviewing appellant's points of error, we find them to be without merit. Consequently, we affirm the trial court's determination that it is not reasonably probable that appellant would not have been convicted had the results of the testing been available at trial.

I. HISTORY OF THE CASE

In April 2002, a jury convicted appellant of the December 17, 1999 murder of

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[1] All references to chapters and articles refer to the Texas Code of Criminal Procedure unless otherwise indicated.

Texas Department of Criminal Justice correctional officer Daniel Nagle. The murder occurred at the McConnell prison unit in Beeville, where Nagle worked as a guard and appellant was serving a 99-year sentence for murder.[2] The jury answered the statutory special issues submitted in a manner which required the trial court to set appellant's punishment at death. This Court affirmed appellant's conviction and sentence on direct appeal. *Pruett v. State*, No. AP-74,370 (Tex. Crim. App. Sept. 22, 2004) (not designated for publication). Appellant filed his initial application for a writ of habeas corpus in the convicting court in February 2004, and this Court subsequently denied relief. *Ex parte Pruett*, 207 S.W.3d 767 (Tex. Crim. App. 2005).

In May 2013, appellant filed in the trial court a motion for post-conviction DNA and palm-print testing under Chapter 64, and the trial court granted that testing. However, the results of the testing were inconclusive, and the trial court found that it was not reasonably probable that appellant would not have been convicted had the results been available at trial. Appellant appealed that decision to this Court, and we affirmed the trial

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[2] On the day of the offense, Nagle was working alone in Three Building. Other corrections officers saw Nagle alive around 3:20 p.m. Shortly thereafter, he was found stabbed, unresponsive, and lying in a pool of blood. He was pronounced dead at 3:55 p.m.

Nagle had a reputation among offenders and officers for sticking to the rules and expecting everyone else to do the same. When appellant returned from his morning assignment, the "chow hall" was closed, so he was given a sack lunch. When he tried to take the lunch into the "rec yard," which is not allowed under the rules, appellant and Nagle had a heated discussion. Nagle wrote a disciplinary report about the incident. The shredded report was found with Nagle's body. The State's theory was that appellant stabbed Nagle because of this issue.

court's judgment. *Pruett v. State*, No. AP-77,037 (Tex. Crim. App. Oct. 22, 2014) (not designated for publication), *cert. denied*, *Pruett v. Texas*, 135 S.Ct. 1707 (2015).

Appellant filed a subsequent application for a writ of habeas corpus in the trial court on July 14, 2014. This Court determined that the subsequent application failed to satisfy the requirements of Article 11.071 § 5(a), and the Court dismissed it. *Ex parte Pruett*, No. WR-62,099-02 (Tex. Crim. App. Dec. 10, 2014) (not designated for publication). On December 12, 2014, the trial court set appellant's execution for April 28, 2015. On April 1 and 8, 2015, appellant filed in this Court a motion for leave to file a petition for a writ of prohibition and a petition for a writ of prohibition. On April 20, 2015, the Court denied appellant leave to file the writ of prohibition.

On April 17, 2015, appellant filed in the trial court his second subsequent application for a writ of habeas corpus. In that application, appellant asserted that he was entitled to relief under Article 11.073 because, had the results of DNA testing conducted pursuant to a May 2013 Chapter 64 motion been available at the time of trial, it was likely that the jury would not have convicted him. This Court denied relief on his claim, explaining that:

> Article 11.073 provides that a court may grant relief on an application for a writ of habeas corpus if a person (1) files an application containing specific facts indicating that (A) relevant scientific evidence is currently available that was not available at the time of trial because it was not ascertainable, and (B) the scientific evidence would be admissible at trial, and (2) the court makes the above findings and also finds that, had the evidence been presented at trial, "on the preponderance of the evidence the person would not have been convicted." Because both the trial court and this Court

> during the 2013 Chapter 64 proceedings found that the inconclusive DNA evidence did not support a reasonable probability that [appellant] would have been acquitted had that evidence been available at his trial, [appellant] is foreclosed from obtaining relief under Article 11.073. Therefore, [appellant] is denied relief in this subsequent writ application, and his motion to stay his execution is denied.

Ex parte Pruett, 458 S.W.3d 535 (Tex. Crim. App. 2015).

On April 20, 2015, appellant filed in the trial court his third subsequent application for a writ of habeas corpus. In this application, appellant asserted that he was entitled to relief under Article 11.073 because a 2009 National Academy of Sciences report discredited "sciences" which involved physically comparing different items to determine a match. Appellant asserted that, if this report had been available, he could have used it to discredit the testimony regarding the comparison of the ends of different rolls of masking tape, and then the jury would not have convicted him. After reviewing the application, this Court found that appellant had failed to satisfy the requirements of Article 11.071 § 5 and Article 11.073(c). The Court dismissed the application as an abuse of the writ without reviewing the merits of the claim. *Ex parte Pruett*, 458 S.W.3d 537 (Tex. Crim. App. 2015).

On April 28, 2015, the day appellant was scheduled to be executed, appellant filed in the trial court a new Chapter 64 motion for post-conviction DNA testing. The trial court stayed appellant's execution and granted his motion for testing. The testing thereafter commenced in the Department of Public Safety (DPS) laboratory, and the laboratory issued a report on June 25, 2015. After holding a hearing and reviewing the

case, the trial court determined that it was not reasonably probable that appellant would not have been convicted had the results of the testing been available during the trial of the offense. This appeal challenges that determination.

II. THE MOTION AND ORDER FOR POST-CONVICTION DNA TESTING

In his April 28 motion for post-conviction DNA testing, appellant specifically requested testing of "the metal rod that is believed to have been used to kill [the victim in this case] and the tape that was wrapped around its handle." Appellant stated in the motion that he had always maintained his innocence of the crime. He asserted that DNA testing could corroborate his claim of innocence and also identify the actual perpetrator or perpetrators. *See* Art. 64.03 (setting out the requirements for DNA testing). Appellant noted in his motion that both the rod and the tape wrapped around it were collected by law enforcement officials when they initially investigated the crime. *See* Art. 64.01. He also noted that pretrial testing of the blood on the sharp end of the rod was found to belong to the victim. However, the DNA analyst was not able to develop a profile from blood found on the handle end of the rod. Appellant asserted that more sophisticated DNA analyses than those used in 2000 might now be capable of identifying a genetic profile.[3] *See id.*

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[3] Appellant inexplicably claimed in his motion that "[u]ndersigned counsel has recently determined that neither the rod itself nor, more importantly, the tape used to wrap it have ever been subjected to DNA analysis." However, the rod was tested before trial, as appellant acknowledges. It is also worth noting that counsel in this case are the same

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Appellant also opined that it appeared that no DNA analysis had been conducted on either the non-adhesive or adhesive side of the tape wrapped around the rod to form a handle. Appellant asserted that, should a profile not belonging to appellant or the victim be developed, such evidence would undermine the State's case, and appellant would have established his actual innocence. In support of this assertion, appellant noted that no guards witnessed the offense, and testimony given by inmates at trial was conflicting and weakened by the fact that the inmates had received deals for their testimony. Furthermore, appellant emphasized, no forensic or other physical evidence linked appellant to the crime: the blood found on and around the victim belonged to the victim; none of appellant's DNA was found on the victim; and bloody clothes found during the investigation, which belonged to appellant, only had appellant's blood on them and none of the victim's DNA. In addition, a torn up disciplinary report written against appellant, which was found near the victim's body, had only the victim's blood on it, and no evidence otherwise connected the report to appellant.

Appellant further asserted that the evidence was "in a condition making DNA testing possible and ha[d] been subjected to a chain of custody sufficient to establish that it ha[d] not been substituted, tampered with, replaced, or altered in any material respect." *See* Art. 64.03. Specifically, appellant noted that the investigating officer placed the weapon in a brown bag when he collected it. After the DNA analyst performed her tests

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[3](...continued)
counsel who filed for and received DNA testing in appellant's case in 2013.

on the weapon, she returned it to the prosecutors who admitted it as evidence in appellant's trial. Appellant stated that the weapon had been stored at the Bee County Clerk's office since the time of trial. Appellant also asserted that "[t]ape is a particularly strong piece of evidence in criminal cases because the adhesive qualities of tape enable DNA to be preserved from contamination[.]" Finally, appellant asserted that, because he would not have been convicted if exculpatory DNA results had been obtained, the trial court should find his request for testing was not made for the purpose of causing unreasonable delay. *See* Art. 64.03(a)(2)(B).

The State objected to the testing and asserted that the request was made solely for the purpose of delay. The State reminded the court that appellant had requested DNA testing two years earlier (which the State had not contested), and he had filed several writs mere days before the April 28 execution date. The State also summarized the evidence presented against appellant at trial.[4] Given the record, the State argued that a

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[4] At appellant's trial, the State presented testimony from several inmates. Inmate Anthony Casey testified that he was housed in the same unit as appellant at the time of the offense. He testified that on the day of the murder he heard appellant talking to another inmate about a weapon. Appellant then told Casey that "something was going to happen." Casey later saw appellant inside the multipurpose room, and appellant told Casey not to come in. Casey went outside to the "rec yard" and through a window he saw appellant standing near Nagle's desk. He later saw appellant in a hallway. While in the hallway, appellant took off his clothes, pushed them through a "gas port" onto the rec yard, and changed into another set of clothes provided by an inmate. Casey picked up appellant's clothes and placed them in a box in the rec yard. Casey observed blood on appellant's discarded clothes.

Inmate Jimmy Mullican testified that he was standing outside the craft shop on the

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motion for DNA testing filed on the day of appellant's scheduled execution could only be for the purpose of delay.

On the same day that appellant filed the motion for testing, the trial court stayed his execution and issued an order granting the testing. In the order, the trial court first noted that the State had made all of the evidence in the case available for testing for over fifteen years. The court further stated that when appellant made a motion for testing in 2013, the testing was granted but achieved inconclusive results. However, in the 2013

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[4](...continued)
afternoon of the murder when inmate "Shaky" Phillips, who was inside the locked craft shop, asked him to pass some masking tape to appellant. The tape was rolled onto the handle of what appeared to be part of a toothbrush. Mullican took the tape and slid it under the door of the multipurpose room for appellant to retrieve.

Inmate Harold Mitchell was in the multipurpose room the day of the murder when appellant entered and told Mitchell that he might want to leave. When Mitchell asked appellant what he was going to do, appellant replied, "Kill someone." When Mitchell asked who he was going to kill, appellant indicated Nagle. Mitchell testified that he tried to talk appellant out of it, but appellant said that "he was tired of this shit in general, referring to life in prison. And then he stated that he wasn't going to kill himself, but he didn't have any problem making the State do it for him." Mitchell got up to leave after appellant started banging on the door to get Officer Nagle's attention. Mitchell saw Nagle open the door, and as Mitchell was leaving, he heard appellant say something about somebody being sick in the bathroom. He then heard Nagle yell, "Inmate Stop. What are you doing? Stop." Mitchell said that, when appellant thereafter exited the multipurpose room, he was really "hyped up" and excited.

Inmate Johnny Barnett testified that appellant and Nagle had been having trouble with each other all day. Barnett saw Nagle come into the multipurpose room, after which he heard Nagle and appellant arguing. Barnett then heard Nagle say, "Look, I'm tearing up the case[,]" and appellant replied, "It's too late for that." Barnett then heard the sounds of scuffling and turned to see Nagle and appellant on the bathroom floor. He stated that it looked like appellant was hitting Nagle, and Nagle had his hands up in a defensive posture.

motion, appellant did not request testing of the metal rod and the tape wrapped around the rod. Further, the court observed, although appellant was given information eleven days before the scheduled execution date regarding whom to contact to obtain testing of the rod and tape, he waited almost ten days before attempting to contact the appropriate person. Thus, the court concluded:

> This court has no doubt the request for the proposed DNA testing was made to delay the execution of sentence. However, at this point, although such delay tactics *appear* to be unreasonable, it is not clear that they, in fact, are unreasonable. Although unlikely, it is not impossible to conceive that there *could* be exculpatory results. Therefore, given the circumstances and the timing, this court is hesitant to punish [appellant] for his attorney's dilatory tactics.

(Emphasis in original order). On May 8, 2015, the trial court issued a second order for post-conviction DNA testing. In this second order, the trial court ordered testing of the metal rod and the tape along with thirteen additional items.[5] The testing thereafter commenced. The laboratory issued a report on June 25, 2015, and the trial court thereafter scheduled a hearing for August 13, 2015.

III. JURISDICTION

When a case becomes final or is taken to a higher court, the trial court loses its general jurisdiction over that case. *State v. Patrick*, 86 S.W.3d 592, 596 (Tex. Crim. App. 2002) (plurality op.). Once a trial court's general jurisdiction expires, it has only limited

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[5] The additional items to be tested included stains from appellant's pants and shirt, stains from the victim's pants and shirt, a piece of blue plastic removed from the metal rod, and apparent blood drops and stains collected from the multi-purpose room.

jurisdiction to carry out a higher court's mandate or to perform functions specified by law, such as determining whether a defendant is entitled to DNA testing.[6] *Skinner v. State*, 484 S.W.3d 434, 437 (Tex. Crim. App. 2016); *Patrick*, 86 S.W.3d at 594. "[P]rior to the enactment of Chapter 64, [a] trial court would not have had jurisdiction to enter any order relating to post-conviction DNA testing." *Skinner*, 484 S.W.3d at 437; *Patrick*, 86 S.W.3d at 596. In enacting Chapter 64, the Legislature provided a source of limited jurisdiction enabling trial courts to entertain a movant's request for post-conviction DNA testing and established a framework in which trial courts may conduct those proceedings. *Skinner*, 484 S.W.3d at 437. To invoke the subject-matter jurisdiction granted by Chapter 64, a movant must file a Chapter 64 motion. *Id*.

When he filed his Chapter 64 motion, appellant invoked the jurisdiction of the trial court as it pertained to the testing of the two items listed in the motion. Thus, the trial court had jurisdiction to issue its first order pertaining to the testing of those items. But ten days later, the trial court issued a second order granting DNA testing. In that order, the trial court again granted DNA testing of the metal rod and the tape that had been wrapped around the rod (the two items listed in the Chapter 64 motion for DNA testing). However, the court also ordered the testing of thirteen additional items for which testing had not been requested pursuant to a properly filed Chapter 64 motion. Because the second order included the two items requested in the Chapter 64 motion, the trial court

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[6] *See* Ch. 64 (authorizing a convicting court, under certain circumstances, to order post-conviction DNA testing and determine whether a defendant is entitled to relief).

had jurisdiction to issue the second order, and we have jurisdiction to review the case on appeal. Because the State did not challenge the testing of any of the items, we will assume without deciding that the trial court had the authority to order the testing. *See Patrick*, 86 S.W.3d 592.

IV. THE TESTING RESULTS AND TRIAL COURT'S FINDINGS

Having assumed that the trial court had jurisdiction to order testing and that we, therefore, have jurisdiction to review the trial court's findings and conclusions related to that testing, we now set out the results of the testing and the trial court's findings.

According to the report issued by DPS forensic scientist, Lisa Harmon Baylor, testing on appellant's pants and shirt revealed profiles that were consistent with appellant and excluded the victim. Testing on the victim's shirt and pants and blood found in the multipurpose room revealed profiles that were consistent with the victim and excluded appellant. These results were consistent with the results obtained after testing the items before appellant's trial.[7] No DNA profile was obtained from testing on the masking tape wrapped around the handle of the metal rod or from testing on a piece of blue plastic removed from the metal rod. A swabbing from the metal rod revealed an unknown female profile. Testing of the rod before trial revealed no such profile.

At the August 13, 2015, hearing concerning this testing, the court first stated that a

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[7] Baylor also testified that the recently discovered FBI database issues which led to the recalculation of the database numbers were accounted for in her testing of these various items.

prior motion for DNA had been granted in 2013, and the results had been inconclusive. The court also noted that the State had made all of the evidence in the case available for several years, but appellant had not requested testing of the metal rod and tape in the 2013 motion. The court then noted that appellant's counsel sought information about testing the rod and tape nearly two weeks before appellant's scheduled execution date, and information was provided the next day regarding whom to contact to obtain testing. However, counsel waited nearly ten days to contact the person identified, and then contacted that person on the Sunday preceding the Tuesday execution date. Finally, the court noted that appellant had requested funding for an expert, which the court denied. But the court added, "If I heard additional evidence that warranted the granting of $6,000 – or somewhere around that amount – to the defense, I would consider it after I heard the evidence today." The court thereafter heard testimony from two witnesses called by the State. The defense did not present any witnesses.

Baylor testified that she was the analyst who conducted the original pretrial DNA testing and testified at appellant's trial. Baylor testified consistently with the report she issued on her testing, which included the results she obtained on the items listed in the May 8 order. Baylor testified that, despite her effort, she was unable to obtain a DNA profile from the masking tape. She testified that she had very little success obtaining much DNA from tape samples in the past because of the "surface area" and how the tape had been handled. Additionally in this case, the tape was covered in black powder

because it had been processed for potential fingerprints right after the murder. Baylor explained that, at the time of this offense, DNA testing was new, and the investigators had to choose between DNA testing, which might destroy print evidence, and testing the tape for prints. Here, they chose to test the tape for prints.

Baylor testified that she processed the metal rod in 2000, but was unable to obtain a DNA sample.[8] However, when she re-swabbed and tested the rod in 2015, she obtained a DNA profile consistent with that of an unknown female. Baylor stated that, upon finding that result, she conducted the proper checks to ensure that the findings had not been contaminated within the laboratory or during her analysis. She found no contamination. She also re-tested the sample preserved from the testing conducted before trial, and she again obtained no DNA profile. Baylor testified that, because of the disparate results obtained from the concurrent testing of the old and new samples, she was certain that the female profile was not present on the metal rod when she first tested it in 2000. She opined that the profile must have come from someone who handled the evidence after it was tested in 2000. She also noted that, especially ten to fifteen years ago, evidence was regularly handled by any number of people in the courtroom during trial.

The second witness to testify at the hearing was William Lazenby. Lazenby

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[8] Baylor did obtain a profile from the blood on the pointed tip of the metal rod, which was consistent with that of the victim. However, Baylor's testimony concerned the sample taken from the remainder of the rod.

testified that he had been employed as the bailiff/security officer for Bee County and the Bee County courts since 2009. His prior employment included working for the Texas Department of Criminal Justice. He was an investigator on the McConnell Unit when this crime occurred and was part of the investigative team in this case.

Lazenby testified that some time in the two years before the August 2015 hearing, he was contacted "about some attorneys or, maybe, employees of attorneys and a film crew wanting to look at the evidence in [appellant's] case[.]" He stated that a male and a female with the British Broadcasting Corporation (BBC) and some female attorneys wanted to look at some evidence related to appellant's case. He noted that, in at least one instance, he saw the evidence, including the metal rod, laid out on the table in front of these four individuals, and no one was wearing gloves. The only other time he saw the metal rod after that was when it was secured and sent for DNA testing by people at the district clerk's office who wore gloves as they handled the evidence.

Finally, the State offered a video from television station KWTX into evidence. The video shows a woman with no gloves on handling the metal rod. The trial court concluded from all of the evidence that there was nothing on the metal rod that was inculpatory or exculpatory, nothing on the tape at all, and nothing on the additional items that was inculpatory or exculpatory. The court found that, although an unknown sample was found on the metal rod, there was no such sample present when the rod was originally tested, and any evidence that previously existed on the rod had since been

contaminated.

In its written findings and conclusions, the trial court first set out the background of the case, which we paraphrase below:

> 1. The State made all of the evidence available for DNA testing for over fifteen years before appellant's most recent request. In fact, appellant made a request for DNA testing in 2013, and the results were inconclusive.
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> 2. Appellant did not include in his 2013 motion for DNA testing a request that the metal rod and the tape wrapped around it be tested.
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> 3. Appellant asserted that testing should be done now because newer DNA testing techniques exist. However, those same testing techniques existed in 2013.
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> 4. Appellant began seeking information regarding DNA testing of the metal rod after business hours on Thursday, April 16, 2015. Although the State responded with the necessary information the next day, appellant waited nearly ten days before contacting the laboratory, and then he contacted the laboratory by email on the Sunday two days before the scheduled execution when the laboratory was closed.
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> 5. Appellant's counsel failed to file an Affidavit of Good Cause for failing to comply with the Court of Criminal Appeals "Seven Day Rule" when they requested a stay of execution on the day of the execution.[9]
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> 6. Upon reviewing appellant's motion for DNA testing, and in deciding to allow testing, the trial court stated that it "ha[d] no doubt the request for the proposed DNA testing was made to delay the execution of sentence." However, the court was not willing "to punish [appellant] for his attorney's dilatory tactics." Thus, the court granted the testing.
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> 7. After the laboratory tested the requested items and more, the court held a hearing on August 13, 2015, at which the State called two witnesses:
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> (1) Lisa Baylor, a DPS employee and DNA expert, testified that she

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[9] *See* Texas Court of Criminal Appeals Miscellaneous Rule 11-003 found at http://www.txcourts.gov/media/208124/miscruleexecution.pdf.

> conducted the current testing, and she conducted the DNA testing performed at the time of trial. She also testified at appellant's trial. Baylor unequivocally testified that the metal rod contained no DNA profile in 2000 when she originally tested it. In fact, she re-tested the original sample during this round of testing and again found no DNA profile. However, when the metal rod was tested in 2015, it contained an unknown female profile. With regard to the tape, Baylor testified that no DNA profile was found on the tape that had been wrapped around the rod. Baylor also testified that recently published problems with the FBI database and related calculations were addressed during testing. Other DNA samples from the victim and appellant were identified during testing, but were found not to be relevant to the court's findings and conclusions.
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> (2) William Lazenby was the supervisor of the investigative team that worked the Nagle murder. Lazenby testified that, in 2009, he became a bailiff for the courts in Bee County. He further testified that, sometime in the two years before the August 2016 hearing, appellant and his attorneys cooperated with the British Broadcasting Corporation (BBC) while they prepared a story on appellant. During that preparation, Lazenby observed the television crew and members of counsel's staff handling the evidence, including the metal rod, and none of them were wearing gloves. Several females were in the group. Lazenby subsequently observed members of the district clerk's office prepare the items for transfer to DPS, but those individuals were wearing gloves.

8. Appellant presented no witnesses at the hearing.

Based upon the evidence presented at the hearing, the trial court then made the following findings of fact, which are paraphrased in pertinent part as follows:

> 1. As tested in 2015, the tape wrapped around the metal rod contained no DNA profile.
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> 2. There was no DNA profile on the metal rod when it was originally tested for trial in 2000.
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> 3. When tested in 2015, the metal rod contained an unknown female DNA profile. However, since 2000, that metal rod was handled on numerous occasions by members of the BBC and appellant's own defense team, with no one wearing

gloves.

4. The DNA profile found on the metal rod during the most recent testing, which was not present on the rod when it was originally tested, cannot be considered relevant to this motion.

5. Baylor's testimony adequately addressed the most recent problems concerning the FBI database and DNA calculations.

6. The motion for DNA testing and the motion to stay appellant's execution were not filed until the day appellant was scheduled for execution, even though counsel emailed the motions to the trial court the day before.

7. Appellant's counsel were aware of the prior failure to test the requested items as early as April 16, 2015. However, for some inexplicable reason, they waited until two days before the execution to contact the DNA expert.

8. No affidavit for good cause was attached to appellant's pleadings in violation of the Court of Criminal Appeals Miscellaneous Rule 11-003.

9. On July 23, 2015, appellant filed his first motion for the authorization of funds for expert services requesting $5750.00. During the August 13 hearing, appellant re-urged his request, but the court withheld its ruling until all of the evidence had been presented.

On August 17, 2015, appellant filed his second motion for the authorization of funds for expert services requesting $6500.00. Because the trial court found that there was no relevant DNA evidence to further consider, the court denied the requests. Given the results of the testing and the evidence presented at the hearing, the court concluded that, had the results been available during the trial of the offense, it was not reasonably probable that appellant would not have been convicted.

V. APPELLANT'S POINTS ON APPEAL AND THE COURT'S ANALYSIS

When reviewing a trial court's Chapter 64 rulings, this Court employs a bifurcated

standard of review. On findings of historical fact and application-of-law-to-fact issues that turn on witness credibility and demeanor, this Court gives "almost total deference" to the trial court's findings and conclusions, but it reviews *de novo* all other application-of-law-to-fact questions. *See Ex parte Gutierrez*, 337 S.W.3d 883, 890 (Tex. Crim. App. 2011).

In his first point on appeal, appellant asserts that the trial court erred in not granting appellant's reasonable request for expert funding before the August 13 hearing and in not giving appellant time to adequately prepare for the August hearing. Because appellant bases his single point of error on more than one legal theory, his entire point of error is multifarious and could be overruled on this basis. TEX. R. APP. P. 38.1; *see also Davis v. State*, 329 S.W.3d 798, 803 (Tex. Crim. App. 2010). We will, however, review his arguments in the interest of justice.

In this point, appellant notes that the DNA analyst issued a report on June 25, 2015, setting out the results of the testing. However, he did not receive a copy of the report until July 9, 2015.[10] On the same day that appellant received a copy of the report,

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[10] Appellant makes a point of stating that he did not receive the report from the DNA analyst as he contends is required by Chapter 64. Instead, the State provided him with a copy of the report "weeks" after it was issued. Technically, Article 64.03(d)(3), to which he cites in support of his argument, requires the trial court to order the laboratory to provide the convicted person with a copy of the report and all data related to the testing, but only if the testing was conducted by a laboratory other than a DPS laboratory or a laboratory under contract with the department. No such provision exists for a DPS laboratory or laboratory under contract with DPS, and the testing in the instant case was conducted by a DPS laboratory. Texas Government Code § 411.144 provides that the

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the State apparently asked the trial court to schedule a hearing and proposed several dates in August that corresponded with times that the courtroom would be available.[11] In response to the State's request, appellant indicated that a hearing would be premature because he had just begun his efforts to identify the source of the unknown DNA profile discovered on the metal rod. Nevertheless, the trial court scheduled the hearing for August 13, 2015. Appellant subsequently filed a motion asking the trial court to authorize funds for expert services to assist counsel in preparing for the August 13 hearing. The court indicated that it would consider the funding request only after evidence was presented at the hearing and only if it determined that the evidence presented warranted that such funds be granted.

In *Wolfe v. State*, 120 S.W.3d 368 (Tex. Crim. App. 2003), this Court considered a prior version of Article 64.05. Specifically, this Court considered whether a defendant could appeal a convicting court's decision to deny the defendant an independent expert to

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[10](...continued)
director of DPS shall by rule establish procedures for DPS DNA laboratories "in the collection, preservation, shipment, analysis, and use of a DNA sample for forensic DNA analysis . . . and the use of the evidence in a criminal case." And Texas Government Code § 411.147 provides to whom the DPS director may release DNA samples, analyses, or records. But appellant does not argue about these provisions. Although appellant's complaint is noted, he did receive the report in this case. Because appellant has not shown that he was harmed by the manner in which he received the report in this case, we will not otherwise address this complaint. *See and compare Booker v. State*, 155 S.W.3d 259, 263-64 (Tex. App.–Dallas 2004).

[11] This exchange is documented in a series of emails that were sent to this Court in a supplemental clerk's record in the case. However, these emails were not offered as evidence at the August 2015 hearing.

assist him in analyzing the laboratory report and to help him with a Chapter 64 hearing. *See id.* at 370-71. This Court held that the defendant improperly sought to collaterally attack an issue for which no appeal was authorized. *See id.* However, that provision of Chapter 64 has been fairly significantly changed and no longer contains the limitations that led to this Court's holding in *Wolfe*. *See Whitfield v. State*, 430 S.W.3d 405, 407 (Tex. Crim. App. 2014). Assuming without deciding that this is an issue that is now appealable, we find that the trial court was within its discretion to deny the request for funding.

Appellant asserts that he was entitled to have an expert assist him in interpreting and addressing the complex scientific nature of DNA testing and issues raised in the June 25 report. Among other issues, appellant argues that he needed expert assistance before the August hearing to make relevant inquiries into "laboratory protocols under which the testing was performed, the potential testing for errors, conclusions about whether additional profiles or a complete profile could be developed from" the unknown sample found on the rod, and whether a more sensitive analysis could confirm whether the partial profile belonged to a female.

Article 64.01(c) provides that a convicted person is entitled to counsel during a Chapter 64 proceeding. It further states that "[c]ompensation of counsel is provided in the same manner as is required by . . . Article 11.071 for the representation of a petitioner convicted of a capital felony[.]" Article 11.071 provides that a court shall grant a timely

and reasonable request for expenses, including expenses for experts. Art. 11.071 §§ 3(b)-(d). If any error exists, it was harmless.

Appellant requested DNA testing on the metal rod used as a weapon in the offense and on the tape that had been wrapped around the rod's handle. Although the trial court initially granted the testing, the testimony at the hearing established that, in the two years before appellant's request, individuals associated with the defense team had improperly handled the rod without gloves. The testing established that an unknown profile was now on the rod that was not present during the initial pretrial testing. The necessary conclusion from this was that the weapon had been contaminated and was no longer in a condition which qualified it for DNA testing under Article 64.03. The testimony also established that the tape that had been wrapped around the metal rod had been tested for fingerprints before trial and, therefore, was already in an altered state from that in which it was found immediately after the murder. Furthermore, no DNA profile was found on the tape.

We next turn to appellant's claim that he was not given time to adequately prepare for the August hearing. Here, appellant argues that on the same day that he received the DNA report, the State proposed five possible dates for the trial court to hold a hearing. He asserts that less than two hours later, counsel informed the court that they would not be able to be prepared for the hearing by any of the dates the State suggested. In support of this position, appellant points this Court to an email exchange included in the clerk's

record.[12] In relevant part, the specific email message to which he refers states:

> In light of the fact that an unidentified female profile was located on the [metal rod], we believe it would be premature at this point to schedule a hearing. We did not receive the lab's report until today, and we have begun efforts to attempt to identify the source of the unknown profile.

Appellant points to no other support in the record.

Appellant's claim that he "would not be able to be prepared for the hearing" is not supported by the email to which he refers us, which makes no such assertion. Further, appellant failed to file a motion for continuance requesting additional time. *See* Articles 29.03 and 29.08.[13] In *Anderson v. State*, for example, Anderson made an unsworn oral motion for a continuance so that he would have time to mount a defense against the State's DNA test results, and the trial court denied it. *Anderson*, 301 S.W.3d 276 (Tex. Crim. App. 2009). This Court held that precedent clearly established that the right to present a complete defense falls within *Marin's* third category and is therefore subject to forfeiture. *Id*. at 279-80 (citing *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993)). Because Anderson failed to file a proper motion for continuance, he forfeited his complaint on appeal. *Id*. at 280. Appellant has likewise forfeited this complaint on

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[12] As previously stated, this exchange is documented in a series of emails that were sent to the Court in a supplemental clerk's record. However, these emails were not offered as evidence at the August 2015 hearing.

[13] Article 29.03 provides that, "A criminal action may be continued on the written motion of the State or of the defendant, upon sufficient cause shown; which cause shall be fully set forth in the motion. A continuance may be only for as long as is necessary." Article 29.08 provides that, "All motions for continuance must be sworn to by a person having personal knowledge of the facts relied on for the continuance."

appeal. Point of error one is overruled.

In his second point of error, appellant asserts that since "[t]he trial court found on April 28[, 2015] that the weapon had not been tampered with[,]" the court "should be prevented under the doctrine of res judicata from subsequently holding otherwise." Further, appellant asserts that "there is testing yet to be completed that could conclusively show the partial profile is not the product of contamination."

Res judicata precludes the relitigation of claims that have been finally adjudicated or that arise out of the same subject matter and that could have been litigated in a prior action. *In re Commitment of Miller*, 262 S.W.3d 877, 894 (Tex. App.–Beaumont 2008); *see also Ex parte Doan*, 369 S.W.3d 205, 221 (Tex. Crim. App. 2012) (Keller, P.J., dissenting) (explaining the concepts of res judicata and collateral estoppel), and *York v. State*, 342 S.W.3d 528, 553 (Tex. Crim. App. 2011) (Womack, J., concurring) (same).

According to Black's Law Dictionary, res judicata is defined as (1) an issue that has been definitively settled by judicial decision, and (2) an affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit. BLACK'S LAW DICTIONARY, 7th Edition, p. 1312 (1999). Black's lists the essential elements of res judicata as (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties. *Id*.

A trial court's threshold determination under Article 64.03 that DNA testing should be granted is not a final determination that the trial judge is precluded from changing later in the same proceeding should additional information or evidence be brought to his attention. This is especially true in this circumstance. Because of extraordinary time constraints, the trial court apparently, at least as a preliminary matter, accepted as true appellant's representation that the metal rod he sought to test met the requirement of Article 64.03 that it "ha[d] been subjected to a chain of custody sufficient to establish that it ha[d] not been substituted, tampered with, replaced, or altered in any material respect." However, later testimony revealed that several people, many of whom were part of or connected with appellant's defense team, had improperly handled the metal rod without gloves, which necessarily altered the surface of the rod. This evidence negated the trial court's initial threshold finding, and the trial court was entitled to alter its finding accordingly.

Appellant also argues that there is testing yet to be completed that could conclusively show the partial profile is not the product of contamination. However, he does not refute evidence showing that, since the offense, various individuals have handled the evidence without gloves. No additional testing can change that. Point of error two is overruled.

In his third point of error, appellant states that "Chapter 64 mandates that [appellant] is entitled to all the data generated during testing required to evaluate the

analysis." He also argues that, "[a] defendant does not waive this right by not re-raising a prior request for all data at a hearing. The statute requires that he be provided the data prior to the hearing."

Here, appellant asserts that, on the same day he received the laboratory's report, he requested that the analyst "provide all the data related to the testing required for an evaluation of the results." Further, counsel requested all of the data generated from both the 2015 and the 2000 analyses because the State had made known its belief that the unknown female profile was the product of post-trial contamination.[14] According to appellant, the analyst indicated that she would comply with the request.

Appellant acknowledges that Baylor did provide him with "some data" soon after counsel made the request. However, at the August hearing, Baylor used a drawing that she made to show the area of the weapon that was swabbed and a picture of the metal rod on which she had made some notes. Appellant now argues that these documents constitute "data" to which he was statutorily entitled. Appellant also argues that any emails exchanged between Baylor and appellant's counsel in which they discuss any

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[14] Appellant also complains that he should not have had to make this request because the statute requires the laboratory to provide this information. However, as previously stated, Article 64.03(d)(3) technically requires the trial court to order the laboratory to provide the convicted person with a copy of the report and all data related to the testing only if the testing was conducted by a laboratory other than a DPS laboratory or a laboratory under contract with the department. No such provision appears to exist for a DPS laboratory or a laboratory under contract with DPS, and the testing in the instant case was conducted by a DPS laboratory. *See and compare* TEX. GOV'T CODE §§ 411.144 and 411.147. Under the circumstances, we will not further address appellant's complaint that he was not automatically given the requested information.

testing constitute "data" under Article 64.03(d) to which he is statutorily entitled.[15]

Despite appellant's argument that he is statutorily entitled to the underlying data supporting the testing, he fails to show that he is actually entitled to the complained-of documents. Article 64.03(d)(3) states that the convicting court shall enter an order requiring that, "on completion of the DNA testing, the results of the testing and all data related to the testing *required for an evaluation of the test results* be immediately filed with the court and copies . . . be served on the convicted person[.]" (Emphasis added). At the hearing, Baylor testified that she created the complained-of documents strictly as personal notes so that she would know where she swabbed the metal rod. Even if Article 64.03(d) applies to appellant, the analyst's personal notes are not the sort of material contemplated by the statute to constitute underlying "data," nor does appellant provide any authority for his argument or otherwise show that the complained-of notes are information required for an evaluation of the test results.

Baylor's notes or drawings to remind herself where she swabbed the metal rod might be useful in arguing that she did not swab every possible surface of the weapon, but they offer no information that is "required for an evaluation of the test results." Thus, they do not constitute "data" to be provided pursuant to Article 64.03(d). Likewise, any emails exchanged between appellant's counsel and Baylor in which they discussed the

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[15] Notably, if any such emails do exist, appellant's counsel should already possess them. If his argument is that they do not actually exist, then his complaint is multifarious and self-defeating, and it will not be addressed.

testing do not constitute "data" contemplated by Article 64.03(d). Point of error three is overruled.

In his fourth point of error, appellant complains that the trial court erred in not ordering the partial profile to be compared to the profiles in the FBI and DPS databases before the August 13 hearing. Article 64.035 requires a convicting court, on completion of Chapter 64 testing, to order any unidentified DNA profile to be compared to those profiles contained in the FBI and DPS databases, "[i]f an analyzed sample meets the applicable requirements of state or federal submission policies[.]" Thus, appellant argues, the trial court should have ordered that the partial profile found on the metal rod be compared to the profiles contained in the FBI and DPS databases. According to appellant, only if the trial court expressly found that the partial profile failed to satisfy the applicable requirements would it be justified in failing to order the profile compared to the profiles in the FBI and DPS databases.

During the August hearing, when appellant was cross-examining Baylor, appellant somewhat inartfully asked Baylor if she was aware of the applicable requirements or submission policies for submitting an "analyzed [DNA] sample" to "either the FBI or the Texas Department of Public Safety." Baylor responded that she was not familiar with those policies. In a motion to compel later submitted to the trial court, appellant urged that the unknown profile be submitted for comparison with the profiles in the FBI and DPS databases.

Appellant cannot prevail on this point. First, there is nothing in the record to show what the "applicable requirements of state or federal submission policies" are, much less whether the unknown sample met them. Therefore, there is no showing that the partial profile could or should have been submitted for comparison with the profiles maintained in the FBI or DPS databases. Furthermore, even if the failure to submit the profile for comparison did amount to trial court error, appellant cannot show harm. The testimony at the August hearing unequivocally showed that several individuals had handled the metal rod without gloves within the two years before the 2015 testing. The testimony also unequivocally showed that no unknown female profile was found on the metal rod during the pretrial testing. Thus, the record supports the trial court's findings that the rod has now been altered or contaminated and that the unknown profile is not relevant to the conviction. Appellant's fourth point of error is overruled.

In his fifth point of error, appellant complains that the trial court erred in entering findings denying him relief without first insisting that its May 8, 2015 order be fully executed. In his motion for post-conviction DNA testing, appellant requested: (1) that the blood found at the handle end of the metal rod be subjected to newer, more sophisticated DNA analyses to see if a profile could be developed; (2) that the metal rod and the tape wrapped around the metal rod be analyzed to determine whether any epithelial cells were present that could be tested or whether other testing not available at the time of trial could be performed; and (3) that any unidentified profiles developed

during testing be compared to the DNA databases maintained by DPS and the FBI.

In his argument in his brief, appellant states that the trial court's May 8, 2015 order "clearly specified that all of the items listed in the order were to be analyzed and that [the] analysis was to include the development of any profiles that could be developed from epithelial cells that were present on the items." Appellant argues that, because the victim's murder was violent, "[i]t is highly probable that epithelial cells from [the victim's] killer were deposited on [the victim's] clothes." Appellant asserts that the court's May 8, 2015 order specified that the victim's clothes should be analyzed to determine whether epithelial cells were present in an amount that would make DNA analysis possible. However, he argues that Baylor made no attempt to recover epithelial cells from the clothes, and, in fact, the State never delivered the clothes to her for an examination.

In this point, appellant seems to be arguing that the State should have delivered the victim's clothes to DPS, and Baylor should have swabbed various areas of those clothes for epithelial cells to test. However, this is not what the trial court ordered. In the May 8 order, the trial court noted that the submission number and item number used to refer to the individual items to be tested "originated from the DPS lab *when these items were originally submitted* to that lab[.]" (Emphasis added). Nowhere in the order did the trial court instruct the laboratory to collect new samples from any item. Further, Baylor testified at the hearing that she did test the items listed in the order for epithelial cells.

Appellant has failed to show that the trial court's May 8 order was not fully executed. Appellant's fifth point of error is overruled.

VI. CONCLUSION

Under the facts of this case, we affirm the trial court's determination that it is not reasonably probable that appellant would not have been convicted had the results of the testing been available at trial.

Delivered: April 5, 2017

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