# the Jasuta / Schulman report

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# TIBA's Case of the Week

## Austin Court of Appeals

**Case Name**: ***In re Anthony Roberson***

- **OFFENSE**: Chapter 64 DNA Testing
- **COUNTY**: Travis
- **C/A CASE No**. 03-24-00325-CR
- **DATE OF OPINION**: October 2, 2025 **OPINION**: Justice Chari Kelly
- **DISPOSITION**: Trial Court Affirmed in Part
- **TRIAL COURT**: 299th D/C; Hon. Karen Sage
- **LAWYERS**: Appellant *Pro Se* (Defense); Danielle Tierney (State)

(**Background Facts**): "In the early morning hours of November 4, 1990, R.P. was sexually assaulted in her Northwest Hills home in Austin. She was unable to identify her assailant." ***Roberson v. State***, 16 S.W.3d 156 (Tex.App. - Austin 2000)(see §§, Vol. 8, No. 17; 05/01/2000).

[§§ **550.21 Sufficiency of the Evidence / Trial Court's Rulings / DNA Testing Results**]: Appellant moved for re-testing of samples associated with his 1998 conviction -- including the vaginal swab from R.P.'s sexual assault kit. Appellant noted that comparisons between the DNA from the vaginal swab and Appellant were made in 1995, but the evidence could now be "subjected to testing with newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test." The State did not oppose the motion on the conditions that (1) DNA analysis be conducted in all five of the aggravated sexual assault cases that were attributed to Appellant via DNA, and (2) all analysis be conducted in the same lab. The convicting court ordered re-testing of the samples associated with the convictions; the State sent the samples associated with the unadjudicated offenses. Bode Technology conducted all the testing. The convicting court concluded that the results of the DNA testing were "not exculpatory," and that, if they had been available during the 1998 trial, "it is reasonably probable that [Appellant] would have been convicted." Appellant now challenges the convicting court's conclusion that the results were not favorable.

**Holding**: "When reviewing an Article 64.04 favorability finding, we apply a bifurcated standard of review, affording almost total deference to a trial court's resolution of historical facts and mixed questions that turn on credibility and demeanor, but we review *de novo* mixed questions

that do not turn on credibility and demeanor and questions of law." ***Dunning v. State***, 572 S.W.3d 685 (Tex.Cr.App. 2019)(see ☙, Vol. 27, No. 12; 04/11/2019). Ultimate questions -- such as whether a reasonable probability exists that, given the results of the testing, the person would not have been convicted -- are mixed questions reviewed *de novo*. See ***Rivera v. State***, 89 S.W.3d 55 (Tex.Cr.App. 2002)(see ☙, Vol. 10, No. 45; 11/11/2002). *** [Appellant] argues that the convicting court inverted the language in the statute, requiring him to show actual innocence; invoked an erroneous assessment of law; failed to focus on how a reasonable juror would evaluate the evidence; erroneously assessed the facts and erroneously applied the law; and ignored that any number of individuals could have committed the crime. All these arguments rely on the fact that the new results do not tie him as *strongly* to the crime. *** There is no doubt that the correctly calculated DNA statistic undermines the reliability of the most damning DNA evidence presented at the guilt-innocence phase of trial, but the discrete question before the convicting court, and now before us on *de novo* review, is whether the weakened inculpatory inference from the DNA evidence created a reasonable likelihood of a different outcome. It does not; the revised estimate still inculpates [Appellant], and the four results in the related cases were unaffected. These cases could have been available for use at guilt innocence -- admissible under the "mark of Zorro" or "modus operandi" rationales to show identity. See ***Segundo v. State***, 270 S.W.3d 79 (Tex.Cr.App. 2008)(see ☙, Vol. 16, No. 43; 11/03/2008). *** In addition, at trial, Steve Robertson, a supervisor at the DPS Crime Lab in Austin, testified that he "tested the semen on the vaginal swabs for blood group typing and secretor status" and "determined that [R.P.'s] assailant was a blood group O secretor or else was a nonsecretor of any blood type with a PGM of 1 minus or 1 minus, 1 plus." [Appellant], therefore, "could not be eliminated as being the donor of the semen in question, including the semen stain on [R.P.'s] nightgown." *** Also, Dr. David Bing, the scientific director of Genomice Collaborative, testified that he performed polymerase chain reaction (PCR) testing on R.P.'s blood, one of the vaginal swabs from the rape kit, and [Appellant]'s blood. Bing concluded that [Appellant] could not be excluded as a donor of the sperm found on the vaginal swab and that the frequency of [Appellant]'s DNA profile in the population would be 1 in 1600 (under 1992-93 guidelines) and 1 in 1800 (under 1996 guidelines). *** Given the complete post-conviction results and trial evidence, the weakened inculpatory inference from the DNA evidence did not create a reasonable likelihood of a different outcome.

## Sidebars

(**Rob Daniel**) Presumably the reporter's record of trial was filed with the Court of Appeals in 2000. I recently sent a paper copy of a trial record to a client at a cost $30.00. Just send the guy the record so he can file his next 11.07 already. It doesn't look like it's going anywhere.

(**David A. Schulman**) Very good analysis by both the trial court and the Court of Appeals. As I understand this one, the results are not only **not** exculpatory, they are actually **more** inculpatory because of the increased numbers involved in the later testing methods.

[§§ 591 DNA Testing (Chapter 64) / Right to Counsel]: Before Appellant filed his briefs, the Court of Appeals abated this appeal and remanded it to the convicting court with instructions to conduct a hearing to consider Appellant's pending request, if any, for the appointment of Appellate counsel. The convicting court held that hearing and (1) found Appellant indigent, noted that it had held the hearing contemplated by Article 64.04, and explained that although Appellant would normally be entitled to a free record of that hearing, that hearing had not been transcribed; and (2) allowed the Innocence Project, which had represented Appellant in the Chapter 64 proceedings to that point, to withdraw. When the convicting court asked why the Project wanted to withdraw, counsel replied, "*Our representation was tied to the Chapter 64 testing, and when that concluded, so did our representation of Mr. Appellant. We notified him by writing. I believe he's accepted that as he's appearing pro se, [he's] not reached out to us to help him with this appeal, Your Honor*." Counsel acknowledged that if the Project were to file a brief, "it would be an ***Anders*** brief." Appellant stated that he was not requesting counsel "at this time. And I don't want him representing me at this time." On appeal, however, Appellant argues the convicting court violated his constitutional rights by failing to rule on his motions for counsel.

**Holding**: The convicting court did not violate [Appellant]'s limited rights under Chapter 64. First, [Appellant] does have a limited right to counsel for Chapter 64 proceedings. "The convicting court shall appoint counsel for the convicted person if the person informs the court that the person wishes to submit a motion under this chapter, the court finds reasonable grounds for a motion to be filed, and the court determines that the person is indigent." *** [Appellant] got that counsel, and, after the results came back and the Project moved to withdraw from representation, [Appellant] informed the convicting court he was not requesting replacement counsel. Under these circumstances, we cannot find that the convicting court violated [Appellant]'s right to counsel as provided for in Chapter 64.

[§§ 595 DNA Testing (Chapter 64) / Right to Appeal (Right to Free Use of Appellate Record)]: When the Court of Appeals abated the case, it included instructions requiring the convicting court to determine whether Appellant was presently indigent, and if he was so, to order the preparation of the reporter's record at no cost to him. On appeal, Appellant claims the convicting court erred by refusing to provide him access to the trial record.

**Holding**: [Although] indigent defendants have the right to a free trial record on direct appeal, they do not have that right for collateral attacks on their convictions. ***In re Bonilla***, 424 S.W.3d 528 (Tex.Cr.App. 2014)(see §§, Vol. 22, No. 11; 03/17/2014). It follows that, without a statutory right to such a record, a convicting court would not abuse its discretion in denying a free trial record in a proceeding subsidiary to a collateral attack, which, as discussed below, a Chapter 64 proceeding is. No such statutory right appears in Chapter 64 . . ..

[§§ 595 DNA Testing (Chapter 64)(Issues Challenging The Underlying Conviction)]: Appellant asserts that two witnesses testified falsely at the 1998 trial. He also asserts that the evidence is insufficient to sustain his conviction.

**Holding**: These trial-based claims are beyond the scope of a Chapter 64 appeal. The remedy in a Chapter 64 proceeding is limited to obtaining DNA evidence and findings based on any test results. ***Wood v. State***, 693 S.W.3d 308 (Tex.Cr.App. 2024)(see ☙, Vol. 32, No. 20; 05/27/2024). That evidence might then be used in a state or federal *habeas* proceeding. The Chapter does not confer jurisdiction on an Appellate court to consider collateral attacks on the trial court's judgment or to review anything beyond the scope of the Articles in it. ***In re Garcia***, 363 S.W.3d 819 (Tex.App. - Austin 2012). We therefore lack subject matter jurisdiction over [Appellant]'s complaints about the 1998 trial and dismiss those complaints.

## Sidebars

(**David A. Schulman**) Typical situation involving a *pro se* litigant.