

Petitioner's Motion

Petitioner requests an opportunity to (1) review all documentation regarding DNA testing and other forensic testing previously performed on several items of physical evidence identified at the crime scene, (2) undertake enhanced DNA testing procedures not available at the time of petitioner's original trial on several items of physical evidence, including blood stains and human hairs from a tube sock found outside the Routier residence, the butcher knife which is the purported murder weapon, and petitioner's blood-soaked night shirt, (3) chemically examine micro-fibers and particles found on another knife in a butcher block inside the Routier residence, (4) the garage window and window screen which petitioner alleges was the means of entrance into, and egress from, the Routier residence by her alleged assailant, (5) have four fingerprints previously identified at petitioner's trial as State exhibits 85-I, 85-J, 85-F, and 85-G submitted to the FBI for potential identification, and (6) conduct modern DNA-testing on State exhibits 85-I and 85-J.

The Standard of Review

Unlike an ordinary civil litigant, a federal habeas corpus petitioner is not entitled to discovery as a matter of course. *Bracy v. Gramley*, 520 U.S. 899, 904, 117 S.Ct. 1793, 1796-97, 138 L.Ed.2d 97 (1997); *Reed v. Quarterman*, 504 F.3d 465, 471 (5th Cir. 2007). Instead, pursuant to Rule 6(a) of the Rules Governing

Section 2254 Cases in the United States District Courts, a party is entitled to discovery only where "good cause" is shown. *Brace v. Gramley*, 520 U.S. at 904, 117 S.Ct. at 1797; *Reed v. Quarterman*, 504 F.3d at 471; *Lave v. Dretke*, 416 F.3d 372, 380 (5th Cir. 2005). "Good cause" for discovery exists where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief. *Brace v. Gramley*, 520 U.S. at 908-09, 117 S.Ct. at 1799; *Reed v. Quarterman*, 504 F.3d at 471-72; *Lave v. Dretke*, 416 F.3d at 381. "Simply put, Rule 6 does not authorize fishing expeditions." *Murphy v. Johnson*, 205 F.3d 809, 814 (5th Cir. 2000), *cert. denied*, 531 U.S. 957 (2000).

Synthesis: The Claims

The first step in evaluating petitioner's request for discovery is to ascertain whether the requested materials are relevant any of petitioner's claims for relief herein. See *Brace v. Gramley*, 520 U.S. at 904-0517 S.Ct. at 1797 (addressing the "essential elements" of the petitioner's claim to determine whether discovery request satisfied "good cause" standard). Petitioner presents ineffective assistance, actual innocence, and due process claims in his relevant pleadings herein.

To satisfy the first prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), i.e., establish that his counsel's performance was constitutionally deficient, a

convicted defendant must show that counsel's representation "fell below an objective standard of reasonableness." *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003); *Williams v. Taylor*, 529 U.S. 362, 390-91, 120 S.Ct. 1495, 1511, 146 L.Ed.2d 389 (2000). In so doing, a convicted defendant must carry the burden of proof and overcome a strong presumption that the conduct of his trial counsel falls within a wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. at 687-91, 104 S.Ct. at 2064-66. Courts are extremely deferential in scrutinizing the performance of counsel and make every effort to eliminate the distorting effects of hindsight. See *Wiggins v. Smith*, 539 U.S. at 523, 123 S.Ct. at 2536 (holding the proper analysis under the first prong of *Strickland* is an objective review of the reasonableness of counsel's performance under prevailing professional norms which includes a context-dependent consideration of the challenged conduct as seen from the perspective of said counsel at the time). It is strongly presumed counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland v. Washington*, 466 U.S. at 690, 104 S.Ct. at 2066.

Respondent argues, convincingly, that the failure of petitioner's trial counsel to obtain *modern* DNA-testing on many of the items of physical evidence in question cannot be faulted as ineffective assistance because many of these new testing procedures

and techniques were unavailable at the time of petitioner's trial. Respondent correctly notes that, insofar as petitioner complains about her trial counsel's failure to obtain DNA-testing on many items of physical evidence, the standard of review for the performance of petitioner's trial counsel is necessarily dependent, in part, upon the availability at the time of petitioner's trial of the same testing techniques and procedures petitioner now requests. Respondent correctly notes petitioner's trial counsel cannot rationally be faulted for failing to conduct testing techniques on physical evidence when those techniques were unavailable at the time of petitioner's trial. Thus, even assuming modern DNA-testing techniques might furnish new evidence relevant to petitioner's case, the petitioner's trial counsel cannot be faulted for failing to secure such test results unless similar procedures available at the time of petitioner's trial would have produced results similar to those from more modern testing techniques. Moreover, it is incumbent upon petitioner to establish the failure of petitioner's trial counsel to request such testing procedures or techniques was objectively unreasonable based upon the information then-available to her trial counsel.

Likewise, respondent correctly notes petitioner's naked assertion of "actual innocence" does not furnish an independent basis for federal habeas relief. In *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993), the United States

Supreme Court unequivocally declared that claims of "actual innocence" based on newly discovered evidence do *not* constitute an independent ground for granting federal habeas corpus relief. *Herrera v. Collins*, 506 U.S. at 400-01, 113 S.Ct. at 860-61; *Reed v. Quarterman*, 504 F.3d at 475-77 (rejecting request for discovery where petitioner failed to allege facts showing specific evidence "once existed and may continue to exist that holds the potential to exonerate him").

A state denies a criminal defendant due process when it knowingly uses perjured testimony at trial or allows untrue testimony to go uncorrected. *Giglio v. United States*, 405 U.S. 150, 153-54, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972); *Napue v. Illinois*, 360 U.S. 264, 269-70, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959). To succeed in showing a due process violation from the use of allegedly perjured testimony, a defendant has the burden of establishing that (1) the witness in question actually gave false testimony, (2) the falsity was material in that there was a reasonable likelihood that it affected the judgment of the jury, and (3) the prosecution used the testimony in question *knowing* that it was false. *Giglio v. United States*, 405 U.S. at 153-54, 92 S.Ct. at 766. Insofar as petitioner complains the prosecution's expert witnesses misrepresented the results of scientific testing performed on physical evidence, petitioner's current complaints appear at this stage to more closely mimic complaints about the

efficacy of the trial testimony of various prosecution experts (when viewed with the twenty/twenty vision of hindsight and more advanced testing techniques unavailable at the time of petitioner's trial) rather than as fact-specific complaints the prosecution knowingly employed false or perjured testimony to secure petitioner's conviction. Even if petitioner can show that modern DNA-testing techniques would undermine the credibility or reliability of certain prosecution experts' trial testimony, that fact, standing alone, does not establish the prosecution *knowingly* employed perjured or false testimony at the time of petitioner's trial.

Synthesis: The Evidence

Having reviewed the parties' motions and advisories, the voluminous documents accompanying petitioner's motion, and the state court record from petitioner's trial, the Court believes the best course available at present to be to grant petitioner an opportunity to employ the most modern DNA-testing and other forensic-testing procedures available to inspect (1) all organic material found on the tube sock, (2) the bloody fingerprint identified in State Exhibit nos. 85-I and 85-J, (3) the butcher knife purported to be the murder weapon, (4) the other knife previously found to contain micro-fibers and other microscopic material allegedly similar to the materials from which the garage window screen was composed and all materials previously removed

from that knife, and (5) the garage window and window screen and all samples or swabs taken from same. Petitioner has furnished reasonable arguments, as well as affidavits from experts, establishing that modern testing techniques unavailable at the time of petitioner's trial could now reveal whether this evidence discloses that a male other than a member of petitioner's immediate family was present during the fatal assaults upon Damon and Devin Routier. For similar reasons, petitioner is also entitled to have the four fingerprints identified in her motion as State Exhibit nos. 85-I, 85-J, 85-F, and 85-G forwarded to the FBI for analysis and possible identification.

The tube sock found outside the Routier residence was tested previously and found to contain blood from the crime scene, as well as human hairs. Petitioner argues more sophisticated testing techniques now available should be employed to re-test these materials, as well as to test for the presence of petitioner's saliva on the sock. Petitioner speculates that the presence of her saliva on the tube sock would somehow demonstrate it was used as a gag during the assault upon her. However, petitioner did not testify at her trial that she had been gagged at any point during the alleged assault upon her. Instead, petitioner testified only that her mouth's interior felt rough, sore, and scratchy when she reached the hospital. S.F. Trial, Volume 44, testimony of Darlie Lynn Routier, at pp. 4887, 4934. Moreover, petitioner offers no

rational explanation for how the tube sock, assuming it had ever been inside her mouth, wound up outside her residence following the alleged assault upon her and the fatal assaults upon her sons. She most certainly offered no testimony at trial suggesting the tube sock had been removed from her mouth. Nor did she offer any testimony suggesting that she had seen her alleged assailant with the tube sock in his possession. Furthermore, because it was eventually located outside the Routier residence, the presence on the tube sock of human hairs from someone unrelated to the Routier family would have very little probative value. Those hairs could have come from a person or other source completely foreign to the interior of the Routier home long after the tube sock was removed from the routier home.

Nonetheless, petitioner's experts suggest re-testing of this item might very well produce evidence in the form of DNA from petitioner's alleged assailant. While this Court has grave doubts as to the efficacy of such test results, the Court will grant petitioner leave to conduct the more advanced testing procedures on the organic materials contained on the tube sock outlined in the affidavit of Dr. Elizabeth A. Johnson accompanying petitioner's motion for discovery. The blood-stained tube sock's presence outside the Routier home is an anomaly worthy of further investigation in this cause. This does not mean, however, the test

results suggested by petitioner in her motion will necessarily be relevant to any of the claims petitioner has presented herein.

Likewise, the bloody fingerprint deserves to be examined with the most modern techniques available. The same is true for the fingerprints marked as State Exhibit nos. 85-F and 85-G.

However, having reviewed petitioner's trial testimony at length, this Court concludes any attempts to find instances of petitioner's alleged assailant's blood or DNA on petitioner's blood-soaked night shirt would necessarily amount to an incredibly over-broad fishing expedition. Likewise, the arguments underlying petitioner's request for a review of any and all records relating to previous DNA-testing performed in petitioner's case are simply too speculative to support a finding of "good cause" for discovery at this juncture. At best, petitioner's request for documents amounts to a fishing expedition for evidence that better DNA-testing techniques or procedures might have been employed or that other, as-yet-unidentified physical evidence might exist which should be subjected to further testing. Petitioner's only justification for searching her blood-soaked night shirt for blood left by her alleged attacker is her highly speculative assertion that her alleged assailant *might* have somehow cut himself during the alleged assault. However, at no point during her trial testimony did petitioner assert any facts suggesting she had any reason to believe her assailant had cut herself. Nor did

petitioner testify as to any facts from which a reasonable person might suspect or deduce that petitioner's alleged assailant was wounded at any time during his time inside the Routier residence. In fact, contrary to petitioner's representations in her motion for discovery, during her trial testimony, petitioner repeatedly denied that she had any recollection of having actually fought with her alleged assailant; on the contrary, petitioner testified repeatedly that she had no recollection of having struggled with her alleged assailant. S.F. Trial, Volume 44, testimony of Darlie Lynn Routier, at pp. 4868-89, 4935, 4974, 4976-77, 4979, 4985-86.

Instead, petitioner's trial testimony established her only accounts of a struggle between her and her assailant came in the form of either (1) her recitations of "dreams" she had subsequently experienced, *Id.*, at pp. 4985-86, or (2) her assertions that her injuries strongly suggested she might have struggled with her alleged attacker, *Id.*, at p. 5030. In any event, petitioner has offered this Court nothing more than rank speculation regarding the possibility the petitioner's alleged attacker might have deposited DNA on petitioner's night blood-soaked shirt. Given the great volume of blood on this garment, readily apparent from review of the photographs attached to petitioner's motion, petitioner's failure to offer any suggestion as to precisely where on this garment a new effort to locate male blood among the many blood stains thereon might prove successful is significant. Rule 6 does

not authorize fishing expeditions of this type. *Rector v. Johnson*, 120 F.3d 551, 563 (5th Cir. 1997), *cert. denied*, 522 U.S. 1120 (1998); *West v. Johnson*, 92 F.3d 1385, 1400 (5th Cir. 1996), *cert. denied*, 520 U.S. 1242 (1997).

Petitioner's assertion of a global "actual innocence" claim does not, standing alone, justify a broad-ranging re-testing of all the physical evidence obtained in petitioner's case. Nor does it justify a wholesale re-investigation of all the forensic evidence collected prior to petitioner's trial. The discovery this Court has authorized should be sufficient to permit petitioner to corroborate portions of her trial testimony. However, absent some new evidence which actually exonerates petitioner for the murders of her two sons, mere corroboration of some portions of her trial testimony is unlikely to satisfy the "actual innocence" standard enunciated by the Supreme Court.

The Supreme Court's holding in *Herrera* precludes petitioner's argument implying her attacks on the quality of the police investigation into her sons' murders independently warrant federal habeas corpus relief. Under *Herrera*, even new evidence establishing a state prisoner's actual innocence beyond any doubt does not independently authorize federal habeas corpus relief. *Herrera v. Collins*, 506 U.S. at 400-02, 113 S.Ct. at 860-61; *Parr v. Quarterman*, 472 F.3d 245, 252 (5th Cir. 2006), *cert. denied*, ___ U.S. ___, 127 S.Ct. 2974, 168 L.Ed.2d 707 (2007); *Foster v.*

Quarterman, 466 F.3d 359, 367 (5th Cir. 2006), *cert. denied*, ___ U.S. ___, 127 S.Ct. 2099, 167 L.Ed.2d 817 (2007); *Dowthitt v. Johnson*, 230 F.3d 733, 741 (5th Cir. 2000), *cert. denied*, 532 U.S. 915 (2001).

However, the foreclosure of petitioner's frontal assault upon her conviction does not end this Court's examination of petitioner's actual innocence claim. The Supreme Court has held that a showing of "actual innocence" opens the door to federal habeas review of procedurally defaulted claims and claims that would otherwise be barred by abuse-of-the-writ principles. *Schlup v. Delo*, 513 U.S. 298, 326-27, 115 S.Ct. 851, 867, 130 L.Ed.2d 808 (1995); *Herrera v. Collins*, 506 U.S. at 404, 113 S.Ct. at 862; *Parr v. Quarterman*, 472 F.3d at 252.

In *Schlup v. Delo*, the Supreme Court explained a federal habeas petitioner seeking to surmount a procedural default through a showing of "actual innocence" must establish it is more likely than not that, in light of the new evidence, no juror, acting reasonably, would have voted to find the petitioner guilty beyond a reasonable doubt. *Schlup v. Delo*, 513 U.S. at 327, 115 S.Ct. at 867; *Wright v. Quarterman*, 470 F.3d 581, 590 (5th Cir. 2007), *cert. denied* ___ U.S. ___, 127 S.Ct. 2996, 168 L.Ed.2d 707 (2007); *Foster v. Quarterman*, 466 F.3d at 367. The Supreme Court has more recently reaffirmed the vitality of this standard of review. See *House v. Bell*, 547 U.S. 518, 538, 126 S.Ct. 2064, 2077, 165 L.Ed.2d

1 (2006) ("A petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt - or to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt.").

Thus, even though petitioner may not seek federal habeas corpus relief premised exclusively on a showing that new evidence establishes her "actual innocence," she may assert such an argument as a means of circumventing her procedural default on any other constitutional claim she presents to this Court. *House v. Bell*, 547 U.S. at 536-38, 126 S.Ct. at 2076-77; *Parr v. Quarterman*, 472 F.3d at 252; *Wright v. Quarterman*, 470 F.3d at 590-92.

Petitioner's arguments about allegedly undiscovered exculpatory evidence and the poor quality of the police investigation into her sons' murder do not satisfy the constitutional "actual innocence" standard discussed in *House v. Bell, supra*. As the Supreme Court emphasized, the threshold for a showing of "actual innocence" is "extraordinarily high." *House v. Bell*, 547 U.S. at 553-55, 126 S.Ct. at 2086-87. Petitioner's speculative allegations about allegedly undiscovered or unexamined exculpatory evidence are also insufficient to satisfy this standard. Petitioner's experts have convinced this Court further investigation into the organic material contained on the tube sock

as well as better forensic examination of the relevant fingerprints might furnish some potentially definitive evidence regarding the presence of another male inside the Routier home on the night of the murders. However, petitioner's husband described the crime scene as chaotic, with many law enforcement and emergency medical personnel stumbling over each other. S.F. Trial, Volume 42, testimony of Darin Routier, at pp. 4297-98, 4307-08. Under such circumstances, even if petitioner can establish that a male unrelated to her immediate family was present on the night of her sons' murders, that fact will need to be joined with considerably more "newly discovered evidence" before petitioner can satisfy the "actual innocence" standard outlined above.

Respondent argues evidence of another male inside the Routier home would merely suggest petitioner had an accomplice. Considering the absence at petitioner's trial of any other evidence establishing petitioner had an accomplice from outside her family, respondent's argument is less than convincing. This is because the possibility remains that any unidentified male who left behind fingerprint or DNA evidence inside the Routier home or on the tube sock may not necessarily have been an "accomplice" of the *petitioner*. Admittedly, evidence establishing an adult male unrelated to the Routier family was present inside the Routier home *at the time of the murders* would tend, albeit rather obliquely, to discredit the prosecution's theory that the murders were part of a

plot to murder the boys and "fake" the attack upon petitioner. However, contrary to respondent's contention, evidence showing the presence of a third adult inside the Routier home *at the time of the fatal assaults* might just as easily support a theory that the murders of the boys were part of a plot to murder petitioner, as well as her sons. The undeniable fact remains that petitioner's neck wound came perilously close to being fatal. If the nearly fatal assault on petitioner was indeed a "fake," it was a suspiciously convincing one. It is quite possible the petitioner's neck wound was the product of either a sincere suicide attempt or a deliberate murder attempt perpetrated by a person other than the petitioner herself. Thus, proof of the presence of a third adult inside the Routier home *at the time of the fatal stabbing of petitioner's sons* does not, standing alone, answer the ultimate question of who is responsible for the murders of the two boys. However, such evidence could prove helpful in determining whether their murders were the products of a conspiracy, rather than the wanton act of an individual suffering from severe postpartum depression, as suggested by the prosecution at petitioner's trial.

While petitioner has not identified with specificity precisely how the test results in question might fully exonerate her, the theory underlying the prosecution's case against petitioner is as convoluted and counter-intuitive as that of any death penalty case to come before this Court. Given the improvements in forensic

testing techniques that have occurred over the last decade, and the potential for discovery of evidence showing the presence of petitioner's alleged assailant within the Routier home at the time of the murders, this Court believes petitioner has demonstrated "good cause" for the limited discovery (re-testing of physical evidence) authorized by this Order.

Accordingly, it is hereby **ORDERED** that:

1. Petitioner's motion for discovery, filed August 20, 2008, docket entry no. 35, is **GRANTED** in part, as set forth hereinafter.

2. Petitioner is entitled to examine and test the items listed as numbers 1, 2, 3, 4, 6, 7, 8, 10, and 11 in petitioner's motion for discovery in the manner requested in petitioner's motion and the attachments thereto.


3. In addition, petitioner's request to have State Exhibit nos. 85-I, 85-J, 85-F, and 85-G submitted to the FBI for analysis and possible identification is **GRANTED**.

4. Petitioner's requests for further examination and testing of petitioner's blood-soaked night shirt are **DENIED**.

5. Petitioner's request for examination of all documentation relating to previous DNA-testing and other forensic testing done on the physical evidence in this cause is **DENIED** without prejudice as over-broad and speculative.

6. The terms and provisions of this Court's original scheduling Order, issued December 8, 2005, docket entry no. 9, remain in full force and effect.

SIGNED AND ENTERED this 5th day of ~~October~~ ^{November}, 2008, at San Antonio, Texas.



ROYAL FURGESON
United States District Judge