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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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COURT OF CRIMINAL APPEALS
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JOHNNIE DUNNING,	§	
APPELLANT	§	
	§	
V.	§	**NO. _____**
	§	
THE STATE OF TEXAS,	§	
APPELLEE	§	

STATE'S PETITION FOR DISCRETIONARY REVIEW OF THE DECISION OF THE COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS IN CAUSE NUMBER 02-17-00166-CR REVERSING THE POST-CONVICTION FORENSIC DNA TESTING FINDING BY THE TRIAL COURT IN CAUSE NUMBER 0632435D IN THE 371ST JUDICIAL DISTRICT COURT OF TARRANT COUNTY, TEXAS; THE HONORABLE MOLLEE WESTFALL, JUDGE PRESIDING.

§ § §

STATE'S PETITION FOR DISCRETIONARY REVIEW

§ § §

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IDENTITY OF JUDGES, PARTIES AND COUNSELS

DNA Proceedings Judges:

Hon. Mollee Westfall, Presiding Judge, 371st Judicial District Court of Tarrant County, Texas

Hon. Charles P. Reynolds, Tarrant County Writ Magistrate

Parties to the Judgment:

Appellant, Johnnie Dunning, and the State of Texas

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

STATEMENT REGARDING ORAL ARGUMENT

The State requests that oral argument be granted because this case involves important questions of State law to be decided.

STATEMENT OF THE CASE

This case addresses whether post-conviction forensic DNA testing showing unidentified minor alleles on a clothing item creates a reasonable probability that a defendant would not have been convicted of aggravated sexual assault of a child.

The trial court found that the DNA testing results, although excluding the appellant, did not cast affirmative doubt on his guilt and entered a finding that the results were not favorable. The Court of Appeals vacated that finding and

held that the DNA results established a reasonable probability that the appellant would not have been convicted had they been available at the time of his trial.

STATEMENT OF PROCEDURAL HISTORY

The trial court ordered post-conviction forensic DNA testing done on the victim's white swim shorts and on the contents of his sexual assault kit by the Texas Department of Public Safety (DPS), and by the Serological Research Institute (SERI). (C.R. I:133-34; Supp. C.R. I:7-8). Each laboratory issued reports from their DNA testing. (C.R. I:141-42, 158-64; R.R. III:Defense Exhibit #1). After reviewing these reports, conducting a live hearing and considering other evidence, the trial court concluded that the DNA testing results did not cast affirmative doubt on the appellant's guilt and entered a "not favorable" finding. (C.R. I:370).

On March 1, 2018, the court of appeals held that the appellant had established a reasonable probability that he would not have been convicted had his post-conviction DNA results been available at the time of trial, and ordered the trial court to vacate its "not favorable" finding and enter a finding that the appellant would not have been convicted had the post-conviction DNA results

been available at the time of trial. See ***Dunning v. State***, ___ S.W.3d ____, 2018 WL 1095749 (Tex. App. – Fort Worth March 1, 2018). The State filed a timely motion for rehearing and a motion for reconsideration en banc, which were denied by the court of appeals on March 29, 2018. See Appendices B & C (Orders Denying Motion for Rehearing and Motion for Reconsideration En Banc).

STATEMENT OF FACTS

DPS issued a report stating that:

- No interpretable DNA profile was obtained from the swabbing of the back waistband of the victim's white shorts.
- No interpretable DNA profile was obtained from the swabbing of the inside front crotch of the victim's white shorts.
- No interpretable DNA profile was obtained from the victim's perianal swab.
- No DNA foreign to the victim was obtained from his anal swabs.

(C.R. I:141-42). SERI issued a report stating that:

- The anal swab extract contained a single source male DNA profile matching the victim at all tested loci.
- The perianal swab extract contained a single weak male DNA profile from which the victim is included as a possible source. The defendant is excluded as a possible contributor to that profile.
- A single weak male DNA profile was obtained from a swab of the victim's white shorts that includes the victim as a possible source with the chance that another random person unrelated to him could be similarly included is approximately one in 330,000. The

defendant is excluded as a possible contributor to that profile.

- A mixture of at least two individuals was obtained from the victim's shorts' crotch swab and crotch. The victim is included as the major contributor to both mixtures and the chance that another random person unrelated to him could be similarly included is approximately one in one billion. The defendant is excluded as a possible contributor to both mixtures.
- A mixture of at least two individuals was obtained from the shorts' waistband swab with both the victim and the defendant excluded as possible contributors to its major portion. There is insufficient information in its minor component for making any conclusions.
- The shorts waistband extract contained a weak mixture of at least two individuals, including at least one male, but there is insufficient information for any further conclusions to be made.

(C.R. I:158-64; R.R. III:Defense Exhibit #1).[1] Dr. Bruce Budowle - Director of the University of North Texas Center for Human Identification disputed SERI's exclusion of the victim as a potential contributor to the major component of the mixture DNA profile obtained from his shorts' waistband swab. (C.R. I:178-79; R.R. III:Defense Exhibit #8).

At the live hearing, SERI analysist Amy Lee and Dr. Budowle agreed that the victim is the source for the DNA profiles obtained from his anal and perianal swabs[2] and that he is the primary source for most of the identifiable DNA

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1 Neither lab found the presence of blood or semen, which was consistent with the pre-trial finding by the Fort Worth Police Crime Laboratory. (C.R. I:141-42, 158-64; R.R. III:Defense Exhibit #1 & 9).

2 The appellant was excluded as the source of these intimate sample DNA profiles since, as expected, they belonged to the victim. (R.R. II:77-78).

profiles obtained from his white shorts. (R.R. II:*passim*, III:Defense Exhibits #1 & #8). They also agreed that the appellant's DNA profile did not match any of the samples - either due to exclusion or insufficient information. (R.R. II:*passim*, III:Defense Exhibits #1 & #8). Dr. Budowle and Ms. Lee disagreed on whether the victim was excluded as a potential contributor to the shorts' waistband swab DNA profile, and whether minor DNA profiles on his swim shorts established the presence of an alternate perpetrator. (R.R. II:*passim*).

QUESTIONS FOR REVIEW

1. What evidence should courts consider in determining whether post-conviction forensic DNA testing results establish a reasonable probability that a defendant would not have been convicted had they been available at the time of trial when he pled guilty, waived his right to trial and the presentation of evidence, and admitted under oath to committing the charged offense?

2. Did the court of appeals improperly shift the burden of proof by presuming that the appellant's plea was involuntarily entered and discounting its value, along with his judicial admissions, in determining that the post-conviction DNA testing results established a reasonable probability that he would not have been convicted had they been available at the time of trial?

3. Whether the court of appeals properly determined that the post-conviction DNA testing results established a reasonable probability that the appellant would not have been convicted had they been available at the time of trial?

4. Whether the court of appeals gave proper deference to the trial court's determination of historical facts and application-of-law-to-fact issues that turn on credibility or demeanor?

5. Whether the court of appeals considered all the evidence before the trial court in making its article 64.04 finding before determining that post-conviction DNA testing results established a reasonable probability that the appellant would not have been convicted had they been available at the time of trial?

REASONS FOR REVIEW

This Court should grant review because:

1. The court of appeals decided an important question of state law that should be settled by this Court: What evidence should be considered in making and reviewing an article 64.04 finding when a defendant has pled guilty and admitted the offense under oath? See **Tex. R. App. P. 66.3(b)**.

2. The court of appeals so far departed from the accepted and usual course of judicial proceedings to call for an exercise of this Court's power of supervision by shifting the burden of proof in evaluating whether post-conviction DNA testing results created a reasonable probability that a defendant who has pled guilty would not have been convicted. See **Tex. R. App. P. 66.3(f)**.

3. The court of appeals decided that the presence of unidentified minor alleles on a clothing item establishes a reasonable probability that a defendant would not have been convicted in a way conflicting with this Court's directive that a trial court's determination of historical facts and application-of-law-to-fact issues that turn on credibility or demeanor be given deference. See **Tex. R. App. P. 66.3(c)**.

4. The court of appeals' decision that the presence of unidentified

minor alleles on a clothing item establishes a reasonable probability that a defendant would not have been convicted conflicts with decisions by two other courts of appeals. See **Tex. R. App. P. 66.3(a)**.

5. The court of appeals decided that the presence of unidentified minor alleles on a clothing item establishes a reasonable probability that a defendant would not have been convicted in a way conflicting with this Court's directive that it should consider all the evidence before the trial court before making its article 64.04 finding. See **Tex. R. App. P. 66.3(c)**.

6. The court of appeals so far departed from the accepted and usual course of judicial proceedings to call for an exercise of this Court's power of supervision by speculating in alternate theories unsupported by any evidence. See **Tex. R. App. P. 66.3(f)**.

ARGUMENT

A. Evidence Considered in 64.04 Hearing When Defendant Waived Trial and Pled Guilty

In order for a defendant to establish that exculpatory DNA results create a reasonable probability that he would not have been convicted had they been available at his trial, he must show that, more likely than not, he would not have been convicted had the fact-finder been able to weigh evidence that he did not deposit biological material against the balance of the other evidence. ***Reed v. State***, ___ S.W.3d. ___, 2017 WL 1337661 (Tex. Crim. App. April 12, 2017); ***Holberg v. State***, 425 S.W.3d 282, 287 (Tex. Crim. App. 2014). The unsettled

question is what "other evidence" should be balanced against the new DNA results?

Unlike in *Reed v. State* and *Holberg v. State*, where the trial court and the reviewing court had the benefit of a trial transcript to weigh the evidence, no trial transcript exists herein because the appellant, on advice of counsel, chose to plead guilty and waive the appearance, confrontation and cross-examination of witnesses against him. (Plea Hearing R.R. III:17 & Exhibit #1). His choice relieved the State of its requirement to prove guilt by presenting witness testimony or other inculpatory evidence as it would have done in a trial – a choice leaving the trial court only the appellant's judicial confession, his admissions under oath that he committed this offense, and the police files showing what the State would have presented at trial. (R.R. III:Defense Exhibit #9; Plea Hearing R.R. III:18, 20-21, 57). This Court should use this case to provide some guidance for what evidence a trial court may use when conducting the balancing test underlying its article 64.04 determination in a non-trial/guilty plea situation. See **Tex. R. App. P. 66.3(b)**.

B. Shifting of Burden of Proof

In its analysis, the court of appeals details the appellant's decision to

plead guilty and make judicial admissions in a manner that presumes that his plea was entered involuntarily:

> That posture is that the day before his guilty plea, Dunning had entered a plea not guilty. He was prepared for a jury trial, but on the morning of trial, any evidence of Clark's prior convictions for sexual abuse of his stepdaughter in Arkansas and argument concerning the "platform" of his defense—that Clark was the actual assailant—was excluded when the trial court granted the State's motion in limine. So, Dunning changed his plea to guilty and made a judicial confession to attain a plea-bargained sentence of the 25-year minimum because his indictment alleged two prior felony convictions for credit card abuse and because he faced a life sentence.

See ***Dunning v. State***, 2018 WL 1095749, at *7.[3] The court compounded this burden-shifting by devaluing the appellant's judicial confession and admissions under oath that he committed this offense[4], and criticizing the State for the paucity of non-biological evidence supporting guilt when the appellant created this paucity by pleading guilty and waiving the appearance, confrontation and cross-examination of witnesses against him.[5] See ***Dunning v. State***, 2018 WL

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3 Texas law actually places a "heavy" burden on a defendant to prove that his guilty plea was involuntarily entered; particularly, when he attested that he understood the nature of his plea when he entered it. See ***Ex parte Moody***, 991 S.W.2d 856, 859 (Tex. Crim. App. 1999); ***Arreola v. State***, 207 S.W.3d 387, 391 (Tex. App. – Houston [1st Dist.] 2007, no pet).

4 (Plea Hearing R.R. III:18, 20-21, 57).

5 (C.R. I:75; Plea Hearing R.R. III:17).

1095749, at *7. Put simply, the court of appeals would require the State to prove the guilty plea's voluntariness or guilt itself before a trial court could find a reasonable probability that he still would have been convicted; thus, shifting the 64.04 burden to the State to prove a reasonable probability of conviction. Contrast ***Smith v. State***, 165 S.W.3d 361, 365 (Tex. Crim. App. 2005) (defendant must establish by a preponderance of the evidence that there is a reasonable probability that he would not have been convicted based on favorable DNA testing results).[6]

Review is justified because the court of appeals has departed from this Court's standards in resolving the "reasonable probability of non-conviction" prong by implicitly shifting the burden of proof. See **Tex. R. App. P. 66.3(f)**.

C. Lack of Deference to Trial Court's Determination of Factual and Credibility Issues

The court of appeals reasoned that the presence of DNA unrelated to either the appellant or the victim on the shorts crotch swab and extract established a reasonable probability that he would not have been convicted:

> [B]ecause the complainant was still wearing the white shorts when he was taken to the hospital; because police seized the shorts from the

6 A better analysis might ask: Would the trial court have still accepted the guilty plea in light of these new DNA testing results?

> hospital; because the police report documents that the complainant did not bathe, wash his genitals, or change his clothes, or otherwise interrupt the "chain of custody" of the items tested; and because Lee and Dr. Budowle agree that a third person's DNA was found in the "shorts crotch swab" and the "shorts crotch swab extract"

See ***Dunning v. State***, 2018 WL 1095749, at *6. While purportedly applying the correct standard of review[7], the court's conclusion did not give deference to the trial court's credibility assessments regarding the value of the scientific evidence; specifically, its determination that the minor profiles recovered from the swim shorts' crotch had little relevance in establishing the presence of an alternate perpetrator. (Supp. R.R. II:38-39, 44-45).

According to SERI's table of results, the crotch swab from the victim's swim shorts had DNA alleles at three markers – D3, D19 and vWA – that cannot be attributed to either him or the appellant. (R.R. III:Defense Exhibit #1).[8]

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7 [W]e give almost total deference 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. We review the entire record, 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. 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." ***Dunning v. State***, 2018 WL 1095749, at *5. (citations omitted).

8 Curiously, the only DNA allele on the crotch extract that cannot be attributed to the victim – the [13] at the D19 marker – does not differ from the appellant's known 12,13 at that same marker – raising questions how Ms. Lee even

The issue of whether this low-level (below the stochastic threshold) DNA recovered from the shorts establishes the presence of an alternate perpetrator was thoroughly litigated at the DNA hearing. (R.R. II79-81, 97).

Dr. Budowle cautioned against deducing the presence of an alternate perpetrator from this background DNA, or even placing too much importance on that information because:

- Low or trace level DNA on material can come from a variety of sources;
- Clothing is particularly sensitive to innocent DNA transfer;
- Must have a good amount of DNA to distinguish what is background DNA;
- SERI uses 29 cycles which heightens the visibility of low-level background DNA; and
- SERI did not take substrate samples to generate sufficient evidence to ascertain what might be background DNA.

(R.R. II:79-81, 97).[9] SERI's own protocols and interpretation guidelines dictate against making broad conclusions from minor DNA such as that found on clothing like the victim's shorts without taking substrate controls. (R.R. II:80, III:State's Exhibit #1).

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excluded him . (R.R. III:Defense Exhibit #1).

9 The trial court's implied finding that these minor DNA alleles were attributable to incidental contact with the victim's clothing rather than an alternate perpetrator is also more reasonable given that the two intimate samples – the anal swab and the perianal swab – produced single source profiles attributable to the victim. (R.R. III:Defense Exhibit #1; Supp. R.R. II:25).

Dr. Budowle also raised concerns that these minor DNA alleles may have already been on the swim shorts before the victim wore them. (R.R. II:87-89). SERI's description of the swim shorts indicates that they were not pristine or in a condition suggesting the lack of prior innocent contact by other people. (R.R. III:Defense Exhibit #1). The court of appeals ignored the possibility that these minor DNA alleles were already on the shorts before the victim wore them -- possibilities which played into the trial court's determination that they did not establish an alternate perpetrator or create a reasonable probability of non-conviction.

This Court noted similar concerns about minor or touch DNA in *Reed v. State*:

> Testing technology has advanced to the degree that a small number of skin cells may yield a DNA profile. But as Reed's DNA experts explained the exchange principle, there is an uncertain connection between the DNA profile identified from the epithelial cells and the person who deposited them. Just as a person may deposit his own epithelial cells, he may deposit another's if those cells were exchanged to him by touching an item another has touched. So the exchange principle may support an equally persuasive argument that the DNA profile discovered from an epithelial cell was not deposited by the same person associated with the particular DNA profile. And as with all DNA testing generally, touch DNA analysis cannot determine when an epithelial cell was deposited. So in addition to being unable to definitively show who left the epithelial cell, it is unable to show when it was deposited.

Reed v. State, 2017 WL 1337661, at *13.[10]

Other intermediate courts of appeals have found that the presence of unidentified minor alleles does not establish the presence of an alternate perpetrator or create a reasonable probability of non-conviction. See ***Glover v. State***, 445 S.W.3d 858, 862 (Tex. App. – Houston [1st Dist.] 2014, pet. refused) (evidence containing unidentified minor alleles does not cast doubt on conviction where State did not rely on DNA evidence as basis for conviction); ***Ewere v. State***, 2017 WL 5559585, at *3 (Tex. App. – Dallas November 16, 2017, no pet.) (not designated for publication) (genetic markers unattributed to defendant or "unknown female" did not affirmatively link someone else to the sexual assault; gender-inconclusive DNA merely "muddied the water" and did not justify a favorable finding when the jury was already aware that no physical evidence connected defendant to the crime scene or the sexual assault).

In sum, the trial court's determination that the minor DNA alleles did not establish the presence of an alternate perpetrator giving rise to a reasonable probability of non-conviction was supported by Dr. Budowle's scientific

10 The court of appeals also assumed that these minor DNA alleles definitely came from a male despite SERI's report using the term "individuals", and no testimony from Ms. Lee nor Dr. Budowle that this mixture came from two males. See ***Dunning v. State***, 2018 WL 1095749, at *3.

testimony and SERI's own interpretation guidelines. Review is justified because the court of appeals did not afford the trial court deference in its credibility assessments and historical fact determinations, and because its decision conflicts with two other courts of appeal on this same issue. See **Tex. R. App. P. 66.3(c)**; **Tex. R. App. P. 66.3(a)**.

D. Failure to Consider All Evidence before Trial Court

A reviewing court should consider all the evidence before the trial court in reviewing whether the DNA testing results establish a reasonable probability of non-conviction. See ***Asberry v. State***, 507 S.W.3d 227, 229 (Tex. Crim. App. 2016) (emphasis added). The trial court's finding states that it reviewed the evidence presented before it, which obviously would include all exhibits admitted into evidence by the trial court during the DNA hearing – including the sealed exhibits. (C.R. I:370; R.R. II:21, 40, 101, III:State's Exhibit #2 & Defense Exhibits #1, 3, 7 & 9).

In determining that the appellant had established a reasonable probability of non-conviction, the court of appeals reasoned:

> [T]he record before us reflects: that Dunning had pleaded not guilty; that Dunning was prepared to begin trial before a jury, that Dunning signed a judicial confession the morning of trial only after the trial court ruled he

> could not present Clark's Arkansas conviction to the jury or mention or present arguments concerning Clark; that Dunning faced up to a life sentence and that, in exchange for his guilty plea and judicial confession, the State agreed to the minimum 25-year sentence; that within three weeks of his guilty plea Dunning filed a pro se motion for new trial explaining that his decision to plead guilty was an error and was made based on the exclusion on the morning of trial of any evidence or arguments concerning Clark—the "platform" of his case—which had left him "frantically scrambling"; that identity was an issue—in fact, the only issue; that the DNA test results established the absence of Dunning's DNA on all tested items—including the crotch of complainant's shorts worn during the sexual assault and not removed until the complainant reached the hospital; that the DNA test results established that not only was Dunning's DNA not present in the "shorts crotch swab," but that another person's DNA was present there along with the complainant's DNA; and that Dunning's and the State's experts both agreed that another person—who was not Dunning and not the complainant—had contributed DNA to the "shorts crotch swab" tested and to the "shorts crotch extract" tested. In light of all of these facts—including Dunning's judicial confession and the complainant's identification of Dunning from a photographic lineup—applying a de novo standard of review to the application-of-the-law-to-the-fact-issue of whether Dunning has proved that had the post-conviction DNA test results we now have been available during the trial of the offense it is reasonably probable that he would not have been convicted, we hold that he has so proven by a preponderance of the evidence;

See ***Dunning v. State***, 2018 WL 1095749, at *7. This "record" description makes no mention of the other evidence inculpating the appellant, including the police files admitted as an exhibit during the 64.04 hearing and considered by the trial court in making its reasonable probability of non-conviction

determination. (C.R. I:370; R.R. III:Defense Exhibit #9).[11]

By ignoring the contents of Defense Exhibit #9, the court of appeals did not consider inculpatory evidence that:

- The victim made his initial identification of the appellant to family friend James Oliver at the pool immediately after the sexual assault occurred and before he ever told his stepfather Lorne Clark; and
- The victim identified the appellant to his mother the following day at the apartment complex which is how the appellant actually came to police attention.

(R.R. III:Defense Exhibit #9). The importance of this ignored evidence on the trial court's determination process is reflected by the court's inquiries into the identification process when it was reconsidering its 64.04 finding. (Supp. R.R.

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11 The State referenced both the plea hearing testimony and the contents of the sealed exhibits, including information from the police files, in its appellate brief and during oral argument. The State assumed that the court of appeals, in complying with *Asberry*, reviewed everything before the trial court, such as the sealed exhibits and the plea hearing transcript; or that, if the court of appeals did not have such records before it, it would have requested those records in order to properly review whether the trial court erred when it found that, if the results had been available, it was not reasonably probable that the defendant would not have been convicted.

The Texas Rules of Appellate Procedure provide that:

> In a criminal case, if the statement contains a point complaining that the evidence is insufficient to support a finding of guilt, the record must include all the evidence admitted at the trial on the issue of guilt or innocence and punishment.

Tex. R. App. P. 34.6(c)(5). This "sufficiency" rationale should apply to article 64.04 reviews since the appellate court must engage in a quasi-sufficiency review to determine "whether, had the results been available during the trial of the offense, it is reasonably probable that the person would not have been convicted". See **Tex. Code Crim. Proc. 64.04**.

II:21-23).[12]

In sum, review is justified because the court of appeals failed to consider all the evidence before the trial court before reversing its finding that the appellant did not establish a reasonable probability of non-conviction. See **Tex. R. App. P. 66.3(c)**.

E. Engagement in Alternate Theory Analysis

In determining that the DNA testing results create a reasonable probability of non-conviction, the court of appeals speculated that Lorne Clark might have been the actual perpetrator and that the victim "could have been easily manipulated by Clark to deflect suspicion away from himself". See ***Dunning v. State***, 2018 WL 1095749, at *7.

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12 The court of appeals also unduly limited the inculpatory value of the appellant's judicial confession and admissions under oath that he committed this sexual assault by conflating the authority regarding eligibility for post-conviction DNA testing with post-testing determinations of what those results mean. See ***Dunning v. State***, 2018 WL 1095749, at *7, *citing* **Tex. Code Crim. Proc. art. 64.03(B)** (guilty plea cannot be the sole basis for denying testing) and ***Esparza v. State***, 282 S.W.3d 913, 922 (Tex. Crim. App. 2009) (eyewitness identification not consequential in determining whether defendant is entitled to testing). No statutory authority prevents a trial court from considering a defendant's guilty plea or his judicial admissions as probative evidence in deciding whether exculpatory DNA results create a reasonable probability of non-conviction under article 64.04. See **Tex. Code Crim. Proc. art. 64.04**.

First, there was no evidence before the trial court that Clark may have perpetrated this sexual assault and the trial court specifically excluded speculation by the appellant's trial counsel's that Clark "manipulated" the victim because it was not supported by any evidence. (R.R. II:15). Second, the appellant stipulated at the plea hearing that the victim had never made any allegation that Clark sexually abused him, and that no formal or informal allegations had ever been made that Clark sexually abused the victim. (Plea Hearing R.R. III:23). Third, the victim consistently told numerous people that he was sexually assaulted by a black male when Clark is a white male. (Plea Hearing III:28-29, 42). Finally, the contemporaneous police records show that the victim actually made his initial identification to family friend James Oliver at the pool immediately after the sexual assault occurred and before he ever told Clark, which was confirmed by an investigating officer at the plea hearing. (R.R. III:Defense Exhibit #9; Plea Hearing R.R. III29).

The court of appeals' speculation in alternate theories unsupported by any evidence violates this Court's admonitions against such speculation in deciding whether DNA testing results create a reasonable probability of non-conviction, and it reads like a resurrection of the long-rejected alternate reasonable hypothesis construct. See ***State v. Swearingen***, 478 S.W.3d 716,

721-22 (Tex. Crim. App. 2015), *cert. denied*, ___ U.S. ___, 137 S.Ct. 60, 196 L.Ed.2d 32 (2016); ***Geesa v. State***, 820 S.W.2d 154, 161 (Tex. Crim. App. 1991). No authority addressing "reasonable probability of non-conviction" under article 64.04 requires that the State disprove every possible alternate theory before a convicting trial court can issue a "not favorable" finding that a defendant has not established a reasonable probability of non-conviction. Thus, review is justified since, by engaging in such speculation, the court of appeals has departed from the standards adopted by this Court in resolving the "reasonable probability of non-conviction" prong. See **Tex. R. App. P. 66.3(f)**.

CONCLUSION

This Court should provide standards for what evidence should be considered by a trial court in making an article 64.04 finding when a defendant pleads guilty, waived his right to a trial, and admits under oath committing the charged offense. Additionally, the Court of Appeals in reversing the trial court's decision that the DNA testing results did not establish a reasonable probability of non-conviction shifted the burden of proof, misapplied the proper standard of review, failed to consider all the evidence before the trial

court, and acted as a "super-factfinder" engaging in speculation and discovering alternate theories.

PRAYER

The State prays that this Court grant review in this cause, reverse the decision of the Court of Appeals, and affirm the trial court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This petition for discretionary review has been electronically served on

opposing counsel, Mr. William H. Ray, 515 Houston Street, Suite 611, Fort Worth, Texas 76102 (bill@billraylawyer.com), on this, the 27th of April, 2018.

/s/ Steven W. Conder
STEVEN W. CONDER

CERTIFICATE OF COMPLIANCE

This petition for discretionary review complies with the typeface and word count requirements of Tex. R. App. P. 9.4 because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes, and contains approximately 4498 words, excluding those parts specifically exempted, as computed by Microsoft Office Word 2013 - the computer program used to prepare the document.

/s/ Steven W. Conder
STEVEN W. CONDER

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COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00166-CR

JOHNNIE DUNNING — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 371ST DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 0632435D

OPINION

I. INTRODUCTION

Appellant Johnnie Dunning raises a single point challenging the "not favorable" finding made by the trial court following post-conviction DNA testing pursuant to chapter 64 of the Texas Code of Criminal Procedure. For the reasons set forth below, we will sustain Dunning's point, vacate the trial court's "not favorable" finding, and remand this case to the trial court for an entry of a

finding that had the post-conviction DNA test results attained by Dunning been available during the trial of the offense, it is reasonably probable that Dunning would not have been convicted.[1]

II. FACTUAL BACKGROUND

The evidence and testimony presented at the chapter 64 DNA hearing show the following factual background. In 1999 on the morning of Dunning's jury trial for the offense of aggravated sexual assault of a child by inserting his penis into the complainant's anus, after the jury had been sworn and Dunning had entered a plea of "not guilty," the trial court granted the State's motion in limine to

[1]The trial court's May 17, 2017 order finds that "the post-conviction forensic DNA testing results do not cast affirmative doubt on the defendant's guilt, and are, thus, NOT FAVORABLE, as defined by article 64.04 of the Texas Code of Criminal Procedure." We note that article 64.04 was amended in 2003 (prior to Dunning's 2010 motion for DNA testing and prior to the trial court's May 17, 2017 order) to eliminate the use of the word "favorable." *See* Act of April 3, 2001, 77th Leg., R.S., ch. 2, § 2, 2001 Tex. Gen. Laws 2, 4, *amended by* Act of May 9, 2003, 78th Leg., R.S., ch. 13, § 4, 2003 Tex. Gen. Laws 16 (current version at Tex. Code Crim. Proc. Ann. art. 64.04 (West Supp. 2017)). Article 64.04 no longer uses this standard; under the current version of article 64.04, 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 reasonably probable that the person would not have been convicted." Tex. Code Crim. Proc. Ann. art. 64.04. Thus, to the extent, if any, the trial court's "not favorable" finding differs from a finding that had the results been available during the trial of the offense it is not reasonably probable the person would not have been convicted, because we review de novo this ultimate application-of-law-to-the-facts question not involving credibility and demeanor, we apply the current standard despite referring to the trial court's finding as "not favorable." *See Whitfield v. State*, 430 S.W.3d 405, 407 & n.1 (Tex. Crim. App. 2014) (recognizing trial court's "unfavorable findings" equated to finding under article 64.04 that there was no reasonable probability that defendant would not have been convicted had the results been available at his trial); *Rivera v. State*, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002) (stating that this ultimate question is reviewed de novo on appeal).

exclude evidence of convictions by registered-sex-offender Lorne Clark and to prevent Dunning from making any arguments or statements that Clark was the actual assailant. Clark was the stepfather of, and lived in an apartment with, the mentally impaired and hearing impaired twelve-year-old male complainant. Dunning's planned defense at trial was that Clark—not Dunning—had in fact perpetrated the offense, and that Clark had influenced and manipulated his stepson to identify Dunning—"the black man"—as the perpetrator in order to steer the investigation away from himself.[2] Dunning explained that his defense

[2]At the chapter 64 DNA hearing, Dunning's trial counsel, David Pearson, testified, in part, as follows:

> Q. If you would, give us kind of a general -- and like I told the Judge in front of you a minute ago, I'm not asking to try this case. I just want to tell the Judge basically what the allegations were and kind of what the case was about in about 30 words or less.
>
> [PEARSON]: Well, the young victim, and I won't use his name, I don't remember whether he was -- a pseudonym was in the indictment or not, but he said that in an apartment complex laundry room allegedly the black man had had sex with him, but the witness that claimed that he heard him say that was a registered sex offender living in the same apartment that had been convicted of aggravated sexual assault in another state and had moved to Texas and moved into the same family home and was also convicted in this county a month before Mr. Dunning for aggravated sexual assault of two children in the same apartment, and he was a witness.
>
> Q. All right. Let me ask you this. Did you have a defense that you'd aligned in this case and gone over with Mr. Dunning about what y'all were going to try to defend this case with had he gone to trial?
>
> [PEARSON]: Yes, and that was our defense.

would be based on the facts that: Clark had been previously convicted of first degree sexual abuse of Clark's stepdaughter in Arkansas; about a month after Dunning's arrest, Clark had been arrested for sexual assault of two other female children who lived in the same apartment complex;[3] and, a few weeks before

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> Q. Was that somebody else had committed the offense, had an opportunity to be around the victim and was a registered sex offender?
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> [PEARSON]: Well, and that plus the fact that the victim, it was in the report, was mentally challenged and deaf. He would have been in my opinion easy to manipulate, and you have a convicted sex offender that would be a master manipulator of children by definition, and he wasn't used as an outcry, but he was the original witness number two that said that's what the child said to me. I got raped. The black man raped me.
>
> Q. Okay. Now, and ultimately this child, a victim, picked Mr. Dunning out of a photo spread; is that correct?
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> [PEARSON]: Correct.
>
> Q. And so it was your defense, then, that you were trying to present to the Court essentially that someone else who was a bad person had potentially kind of steered the investigation away from himself and was a sex offender in his own right; is that correct?
>
> [PEARSON]: Well, that, and in my opinion that plus sloppy police work.

[3]Although it was suggested during the course of these proceedings that the two other female victims were the male complainant's siblings and although neither Defendant nor the State appeared to dispute the suggestion, our review of the record leads us to believe that the two other female victims were living in the same apartment complex but were unrelated to the complainant. In either case, the record reflects that Clark was convicted of sexual assault of two other children, occurring during the same time period and at the same apartment complex as the instant sexual assault.

Dunning's trial was scheduled to start, Clark had pleaded guilty to the sexual assault of the two other female children.

In anticipation of presenting his defense at trial that Clark was the perpetrator of the sexual assault on the complainant, Dunning had filed notice of his intent to offer copies of Clark's prior sexual abuse conviction in Arkansas. When the trial court ruled that Dunning would not be able to present this evidence, Dunning entered into a plea bargain. Dunning faced a life sentence because of two prior credit card abuse convictions that are no longer classified as felonies. When the State agreed to the minimum sentence of 25 years' confinement and the trial court agreed to grant Dunning permission to appeal the adverse ruling concerning the Lorne Clark evidence and arguments and also permitted Dunning to make a bill of exception, Dunning entered a guilty plea conditioned on these agreements.[4]

Although the State possessed a sexual assault kit containing various swabs, as well as the complainant's white shorts worn during and after the assault,[5] no DNA testing had been conducted on any of the items prior to trial.[6]

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[4]Dunning timely filed a motion for new trial asserting that his decision to plead guilty was an error and was done solely because the exclusion on the morning of trial of any evidence or arguments concerning Clark—the "platform" of his case—which had left him "frantically scrambling." The trial court denied the motion.

[5]The September 3, 1996 police report, also offered into evidence at the chapter 64 DNA hearing, established that the complainant did not bathe, wash his genitals, or change his clothes prior to the administration of the sexual assault kit by the Fort Worth Police Department.

[6]Pearson testified about the significance DNA testing in this case:

Q. Was there DNA testing done in this case prior to the entry of a plea?

[PEARSON]: No.

Q. To your knowledge by the State or the Defense?

[PEARSON]: Right. Not to my knowledge, no DNA testing was done.

Q. There was some serology, but there wasn't any actual DNA testing; is that correct?

[PEARSON]: Correct.

. . . .

Q. Have you ever tried a DNA case?

[PEARSON]: Have I tried cases involving DNA? Yes.

Q. In your opinion in a sexual assault case of a child who is alleging that he's been anally sexually assaulted, would DNA findings on a piece of clothing the child was wearing at the time that had DNA on the back side of the pants or the underwear, if that was underwear that the child wore or was wearing, would that be relevant in the guilt or innocence of the defendant potentially?

[PEARSON]: Yes.

Q. A no result could mean something, correct?

[PEARSON]: Right.

Q. Certainly if it was the Defendant in that case's DNA, that would be very good for the State, would it not?

[PEARSON]: Correct.

In accordance with Dunning's plea bargain conditioned on his right to appeal the trial court's ruling concerning the Lorne Clark evidence and arguments, Dunning did appeal. Seventeen years ago, this court affirmed Dunning's conviction, noting that the case "presented a very close question" and that other than the complainant's identification of Dunning in a photographic line-up, "[n]o other evidence linked [Dunning] to the offense." *Dunning v. State*, No. 02-99-00311-CR, pp. 2, 5 (Tex. App.—Fort Worth, Feb. 22, 2001, pet. ref'd) (not designated for publication).

III. PROCEDURAL BACKGROUND CONCERNING POST-CONVICTION DNA TESTING

In 2010, Dunning began requesting a post-conviction DNA test pursuant to chapter 64 of the code of criminal procedure. *See* Tex. Code Crim. Proc. Ann. art. 64.01 (West Supp. 2017). Ultimately, after an approximately four-year delay for reasons not relevant here, the trial court ordered the Department of Public

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> Q. And if the DNA findings were some third party unknown that were not the Defendant and not the perpetrator, that could also be relevant, correct?
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> [PEARSON]: Right.
>
> Q. And in that last instance is it your opinion that that could be relevant and material in a jury finding that the person was not guilty if they believed all that?
>
> [PEARSON]: Yes. It would be relevant.
>
> Q. It could go either way, but it would certainly be something that would be relevant; would you agree with that?
>
> [PEARSON]: Yes, no question.

Safety to conduct DNA testing of the complainant's white shorts and several additional items in the sexual assault kit but denied Dunning's request for counsel at that time.[7]

The DPS Crime Laboratory determined the proper locations for testing and tested portions of the white shorts but found no interpretable DNA profile. Thus, the State moved for an entry of a not favorable finding. On June 9, 2015, the trial court found that the lab results were inconclusive and entered a not favorable finding. During his appeal of the June 9, 2015 not favorable finding, Dunning was appointed counsel, and he filed a motion to dismiss his appeal, which we granted. *See Dunning v. State*, No. 02-15-00222-CR, 2015 WL 5722605, at *1 (Tex. App.—Fort Worth Aug. 26, 2015, no pet.) (mem. op., not designated for publication).

Dunning then sought to conduct his own DNA testing and the trial court authorized the Serological Research Institute (SERI) to conduct the testing. Amy Lee, a forensic serologist at SERI, tested items, which included the white shorts, items in the sexual assault kit, and various swabs. The results and interpretations of SERI's testing are found in Lee's July 18, 2016 report. Lee's report concerning SERI's testing contains seven different conclusions, including that Dunning was excluded as a donor of the DNA on all of the items tested (conclusions 2–5) and that, in addition to DNA of the complainant, there was also

[7]*But see* Tex. Code Crim. Proc. Ann. art. 64.01(c).

DNA from a different person on the "crotch swab" of complainant's white shorts (conclusion 4).[8] Lee also concluded that both the complainant and Dunning were excluded as contributors to the DNA on the waistband swab of the white shorts (conclusion 5).

The State requested that Dr. Bruce Budowle review SERI's testing and the conclusions in Lee's report. The State filed an affidavit from Dr. Bodowle in which he agreed with all of Lee's conclusions except for part of conclusion 5, which excluded the complainant as a possible contributor of the DNA located on the white shorts waistband swab. Dr. Budowle stated, "While I agree that Johnnie Dunning can be excluded as a possible contributor of the major portion of the mixture, the victim . . . cannot be excluded as a possible contributor . . . ." Thus, even in his disagreement about part of conclusion 5, Dr. Budowle still agreed with Lee that none of Dunning's DNA was found on any of the items tested.

On February 28, 2017, the trial court conducted a chapter 64 DNA hearing and received testimony from Dunning's trial counsel, Amy Lee, Dr. Budowle, and Dunning. As set forth in the footnoted quotations from Dunning's trial counsel's testimony at the chapter 64 DNA hearing, Dunning's planned trial defense was to suggest that Clark—who was a registered sex offender, who had been convicted in Arkansas of sexual abuse of his stepdaughter, who had been convicted of

[8]It was suggested at oral argument that this third-party DNA was specifically male DNA.

sexual assault of two other children who lived in complainant's apartment complex, and who had helped the complainant report the offense and identify Dunning as the assailant—was actually the perpetrator. The trial court's morning-of-trial ruling excluding this evidence after Dunning had pleaded not guilty led to the plea bargain and Dunning's guilty plea. Dunning's trial counsel opined that DNA findings on the complainant's clothing including a third person, not the victim and not Dunning, and excluding Dunning as a contributor to all DNA tested, would have been material and relevant to Dunning's guilt or innocence but that there was no DNA testing done prior to Dunning's guilty plea.

The trial court also heard testimony from Amy Lee and Dr. Budowle. Both Lee and Dr. Budowle agreed that Dunning's DNA was not found present on any of the items tested.[9] Lee was asked about her conclusions, and in particular, her findings about the complainant's white shorts:

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[9]The State conceded that the post-conviction DNA testing excluded Dunning as a contributor of any DNA found on any of the items tested:

> [PROSECUTOR]: I don't think -- I don't think anybody is disputing that Mr. Dunning's DNA is not on any of these items. I think Ms. Lee said that; I think Dr. Budowle said that.
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> . . . .
>
> [DEFENSE COUNSEL]: He's [Dunning] excluded in more than one place, and that's not in dispute. I mean he is absolutely excluded as being the contributor to the DNA anywhere in this case.
>
> THE COURT: And that's -- you do agree with that, [Prosecutor]?

Q. So what you're saying in summary is the DNA on the victim's shorts, and this is -- if we go back and look, these are shorts that the swab actually came from -- where was the swab? What part of the underwear did the swab touch? It's the rear area of the pants; is that right?

A. I believe it was described as 'crotch.'

Q. And that sample there has two people's DNA, right?

A. At least, yes.

Q. One of them belongs to the victim, right?

A. Correct.

Q. And the other one does not belong to Johnnie Dunning; is that right?

A. That's correct.

Thus, Lee's testimony confirmed that DNA existed on the complainant's white shorts that was not attributable to Dunning or to the complainant.[10]

[PROSECUTOR]: Yes, I do agree with that.

[10]Conclusions 4 and 5 set forth in Lee's report provide:

4. A mixture of at least two individuals was obtained from the shorts crotch swab (02-01-AB, item 4-4) and the shorts crotch extract (02-01 AB, item 5-2). Victim RFF is included as the major contributor to both mixtures and the chance that another random person unrelated to him could be similarly included is approximately one in one billion for items 4-4 and 5-2. Johnnie Dunning is excluded as a possible contributor to both mixtures.

5. A mixture of a least two individuals was obtained from the shorts waistband swab (02-01-AA, item 4-3). Victim RRF and Johnnie Dunning are both excluded as possible contributors to the major portion of this mixture. There is insufficient information in the minor component of this mixture for any conclusions to be made.

With only slight variances, Dr. Budowle's live testimony reaffirmed his affidavit, which provided that he was in agreement with SERI's conclusions except for part of conclusion 5. Dr. Budowle testified live that he was "cautious" concerning SERI's conclusion 4 although he did not disagree outright with it. Dr. Budowle also expressed some disagreement on how SERI performed its statistical analysis, but stopped short of any type of reliability challenge to the protocols utilized by SERI in obtaining statistical data. Ultimately, Dr. Budowle testified on cross-examination:

> [DEFENSE COUNSEL]: Q. But the fact of the matter is you don't have any dispute that this little boy's underwear has got his DNA on it and got somebody else's DNA on it, right?
>
> A. I don't dispute that, no.
>
> [DEFENSE COUNSEL]: Q. And that somebody else's DNA is not Johnnie Dunning's?
>
> A. I don't dispute that, no.

Dunning testified that identity was an issue at the trial.

After hearing and considering all of the above evidence, the trial court entered a "not favorable" finding under article 64.04 after finding that the post-conviction DNA testing results did "not cast affirmative doubt on the defendant's guilt[.]" The trial court did not enter separate findings.

IV. STANDARD OF REVIEW

When reviewing a trial court's finding in a chapter 64 post-conviction-DNA-test proceeding as to whether, had the results been available during the trial of

the offense, it is reasonably probable that the person would not have been convicted, we apply the same standard of review 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"). That is, we use the familiar bifurcated standard of review articulated in *Guzman v. State*: we give almost total deference 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. 955 S.W.2d 85, 89 (Tex. Crim. App. 1997); *see also Reed v. State*, No. AP-77,054, 2017 WL 1337661, at *6 (Tex. Crim. App. Apr. 12, 2017), *petition for cert. filed*, (U.S. Feb. 1, 2018) (No. 17-1093); *Rivera,* 89 S.W.3d at 59. We review the entire record, 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.

V. THE LAW CONCERNING FINDINGS ON POST-CONVICTION DNA TESTING

The purpose of post-conviction DNA testing is to provide a means through which a defendant may establish his innocence by excluding himself as the perpetrator of the offense of which he was convicted. *See Blacklock v. State*, 235 S.W.3d 231, 232–33 (Tex. Crim. App. 2007). Chapter 64 of the code of criminal procedure provides that a convicted person may submit a motion to the convicting court to obtain post-conviction DNA testing. Tex. Code Crim. Proc. Ann. art. 64.01; *Ex parte Gutierrez*, 337 S.W.3d 883, 889 (Tex. Crim. App. 2011). If such DNA testing is conducted, 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 reasonably probable that the person would not have been convicted. Tex. Code Crim. Proc. Ann. art. 64.04; *see also Solomon v. State*, No. 02-13-00593-CR, 2015 WL 601877, at *4 (Tex. App.—Fort Worth Feb. 12, 2015, no pet.) (mem. op., not designated for publication). The defendant may appeal a trial court's finding that even if DNA testing results had been available during the trial of the offense, it is not reasonably probable that the person would not have been convicted. *See* Tex. Code Crim. Proc. Ann. art. 64.05 (West 2006); *Whitfield*, 430 S.W.3d at 409.

To be entitled to a finding that, had the results been available during the trial of the offense, it is reasonably probable that the person would not have been convicted, "[t]he defendant must prove that, had the results of the DNA test been available at trial, there is a 51% chance that the defendant would not have been

convicted." *Glover v. State*, 445 S.W.3d 858, 861 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd); *Medford v. State*, No. 02-15-00055-CR, 2015 WL 7008030, at *3 (Tex. App.—Fort Worth Nov. 12, 2015, pet. ref'd) (mem. op., not designated for publication). A defendant is not required to establish actual innocence to be entitled to a favorable finding. *See Glover,* 445 S.W.3d at 862.

VI. ANALYSIS

On appeal, the State argues that the lack of Dunning's DNA on any of the items tested does not establish Dunning's innocence and that even if the DNA test results are exculpatory, Dunning's judicial admission and the complainant's identification of Dunning from a photographic line-up are sufficient evidence of Dunning's guilt to preclude a finding that had the results of the DNA test been available at trial, there is a 51% chance that the defendant would not have been convicted. Concerning the results of the DNA tests, the State does not mention or address the DNA testing of the "shorts crotch swab" or the "shorts crotch extract" test results set forth in Lee's conclusion 4—that a mixture of at least two individuals' DNA was found on both the "shorts crotch swab" and the "shorts crotch extract" and that although the complainant was the major contributor to both mixtures, Dunning was excluded as a contributor to both mixtures. Instead, the State focuses its arguments on the "waistband swab" DNA test results set forth in Lee's conclusion 5 to argue that "it can be presumed that the trial court agreed that [the complainant] could not be excluded as a potential contributor to

the DNA profile obtained from the waistband swab, and that the presence of minor DNA profiles did not establish an alternate perpetrator."

Dunning, on the other hand, focuses his arguments on the "shorts crotch swab" and the "shorts crotch extract[,]" Lee's conclusion 4, and Dr. Budowle's agreement with Lee's conclusion 4 that the "shorts crotch swab" contained a mixture of the complainant's DNA and the DNA of another person who was not Johnnie Dunning. Dunning argues that—because the complainant was still wearing the white shorts when he was taken to the hospital; because police seized the shorts from the hospital; because the police report documents that the complainant did not bathe, wash his genitals, or change his clothes, or otherwise interrupt the "chain of custody" of the items tested; and because Lee and Dr. Budowle agree that a third person's DNA was found in the "shorts crotch swab" and the "shorts crotch swab extract"—if this exculpatory DNA evidence had been available during the trial of the offense, it is reasonably probable that Dunning would not have been convicted.

First, we agree with Dunning that the post-conviction DNA test results in this case excluding him as a contributor to any DNA found on any item tested and establishing the existence of another DNA contributor—that is not Dunning and is not the complainant—to a mixture of DNA on the complainant's shorts in the "shorts crotch swab" and the "shorts crotch extract" is exculpatory. *See, e.g.*, *Reed*, 2017 WL 1337661, at *6 (explaining that exculpatory results are necessarily results excluding the convicted person as the donor of the material).

This is not a case, like those relied upon by the State, where DNA evidence of the convicted defendant is simply absent or where the DNA evidence is inconclusive as to whether the convicted defendant was a contributor. *See, e.g.*, *Booker v. State*, 155 S.W.3d 259, 266–67 (Tex. App.—Dallas 2004, no pet.) (upholding trial court's negative finding because DNA testing did not exclude appellant as the assailant); *Fuentes v. State*, 128 S.W.3d 786, 787 (Tex. App.—Amarillo 2004, pet. ref'd) (upholding trial court's negative finding when post-conviction DNA testing revealed DNA profile from the sperm fraction of the semen on the victim's panties to be consistent with a mixture of the convicted defendant and the victim). Nor is this a case where the effect of exculpatory DNA evidence is to merely muddy the waters. *LaRue v. State*, 518 S.W.3d 439, 446 (Tex. Crim. App. 2017) ("The required showing [for DNA testing] has not been made if exculpatory test results would 'merely muddy the waters.'") (quoting *Rivera*, 89 S.W.3d at 59). In this case, the post-conviction DNA test results do more than merely exclude Dunning as a contributor; there is additional DNA evidence. Both the State's expert Dr. Budowle and the defense expert Amy Lee agree that another person contributed DNA to the "shorts crotch swab" and the "shorts crotch extract" and agreed that this other person was not the complainant or Dunning.

Concerning Dunning's judicial confession, we note that chapter 64 expressly contemplates and authorizes post-conviction DNA testing even after a guilty plea. Tex. Code Crim. Proc. Ann. art. 64.03(b). Based on the clear

language in article 64.03, the court of criminal appeals has recognized that "[a]n appellant who entered a guilty plea is no more, or less, entitled to a favorable ruling on his Chapter 64 motion [for DNA testing] than one who plead[s] not guilty." *Bell v. State*, 90 S.W.3d 301, 307 (Tex. Crim. App. 2002). Thus, the mere fact that Dunning pleaded guilty cannot automatically render it not reasonably probable that had the DNA results been available during trial he would not have been convicted, or else there would be no reason to permit post-conviction DNA testing after guilty pleas. *Accord Blacklock*, 235 S.W.3d at 232 (reversing trial court's denial of post-conviction DNA testing despite defendant's guilty plea because "exculpatory DNA test results, excluding appellant as the donor of this material, would establish appellant's innocence"). And here, Dunning's judicial confession must be viewed in the context of the record before us showing the posture of his case when he made it. *See Asberry*, 507 S.W.3d at 228 (instructing appellate courts that in reviewing a trial court's article 64.04 finding, we review the entire record to determine whether appellant established that he would not have been convicted). That posture is that the day before his guilty plea, Dunning had entered a plea not guilty. He was prepared for a jury trial, but on the morning of trial, any evidence of Clark's prior convictions for sexual abuse of his stepdaughter in Arkansas and argument concerning the "platform" of his defense—that Clark was the actual assailant—was excluded when the trial court granted the State's motion in limine. So, Dunning changed his plea to guilty and made a judicial confession to attain a plea-bargained

sentence of the 25-year minimum because his indictment alleged two prior felony convictions for credit card abuse and because he faced a life sentence.

Concerning the inculpatory evidence against Dunning consisting of the complainant's identification of him from a photographic line-up, again, the court of criminal appeals has recognized in the context of chapter 64 motions for post-conviction DNA testing, following a sexual assault conviction,

> eye-witness identification of [appellant] is of no consequence in considering whether [appellant] has established that, by a preponderance of the evidence, exculpatory DNA tests would prove his innocence. In sexual assault cases like this, *any overwhelming eye-witness identification and strong circumstantial evidence . . . supporting guilt is inconsequential* when assessing whether a convicted person has sufficiently alleged that exculpatory DNA evidence would prove his innocence under Article 64.03(a)(2)(A).

Esparza v. State, 282 S.W.3d 913, 922 (Tex. Crim. App. 2009) (emphasis added). Thus, again, the mere fact that the complainant identified Dunning in a photographic line-up cannot automatically render it not reasonably probable that had the DNA results been available during trial he would not have been convicted, or else there would be no reason to permit post-conviction DNA testing if a complainant identifies the alleged defendant. We must consider the complainant's identification of Dunning along with the undisputed facts that the complainant was twelve years old, was mentally impaired and hearing impaired, lived with Clark, and according to Dunning's trial counsel, could have been easily manipulated by Clark to deflect suspicion away from himself, and that Clark had

spoken to police and reported that the complainant had said that "a black man raped me."

In summary, examining the entire record, giving almost total deference to the trial court's resolution of disputed historical fact issues supported by the record and applications-of-law-to-fact issues turning on witness credibility and demeanor, the record before us reflects: that Dunning had pleaded not guilty; that Dunning was prepared to begin trial before a jury, that Dunning signed a judicial confession the morning of trial only after the trial court ruled he could not present Clark's Arkansas conviction to the jury or mention or present arguments concerning Clark; that Dunning faced up to a life sentence and that, in exchange for his guilty plea and judicial confession, the State agreed to the minimum 25-year sentence; that within three weeks of his guilty plea Dunning filed a pro se motion for new trial explaining that his decision to plead guilty was an error and was made based on the exclusion on the morning of trial of any evidence or arguments concerning Clark—the "platform" of his case—which had left him "frantically scrambling"; that identity was an issue—in fact, the only issue; that the DNA test results established the absence of Dunning's DNA on all tested items—including the crotch of complainant's shorts worn during the sexual assault and not removed until the complainant reached the hospital; that the DNA test results established that not only was Dunning's DNA not present in the "shorts crotch swab," but that another person's DNA was present there along with the complainant's DNA; and that Dunning's and the State's experts both

agreed that another person—who was not Dunning and not the complainant—had contributed DNA to the "shorts crotch swab" tested and to the "shorts crotch extract" tested. In light of all of these facts—including Dunning's judicial confession and the complainant's identification of Dunning from a photographic lineup—applying a de novo standard of review to the application-of-the-law-to-the-fact-issue of whether Dunning has proved that had the post-conviction DNA test results we now have been available during the trial of the offense it is reasonably probable that he would not have been convicted, we hold that he has so proven by a preponderance of the evidence; that is, there is a 51% chance that a reasonable juror would have had a reasonable doubt about Dunning's guilt had the current post-conviction DNA test results been available at the time of trial. *See* Tex. Code Crim. Proc. Ann. art. 64.04; *Glover*, 445 S.W.3d at 861; *accord Routier v. State*, 273 S.W.3d 241, 259 (Tex. Crim. App. 2008) (reversing order denying DNA testing of certain items because such testing could add DNA evidence "to the evidentiary mix" that would have corroborated appellant's theory of an alternate assailant and "could readily have tipped the jury's verdict in appellant's favor"); *State v. Long*, No. 10-14-00330-CR, 2015 WL 2353017, at *3 (Tex. App.—Waco May 14, 2015, no pet.) (mem. op., not designated for publication) (affirming a trial court's "favorable" finding when "there was no DNA evidence found on any evidence that matched the profile of [appellee]"); *Solomon*, 2015 WL 601877, at *5 (affirming a trial court's not favorable finding because even though "the test results did not add any further corroboration for

appellant's guilt, they also *did not affirmatively link someone else to the crime* or conclusively exclude appellant's commission of it") (emphasis added).

We sustain Dunning's sole point.

VII. CONCLUSION

Having held that Dunning established a reasonable probability that he would not likely have been convicted had the post-conviction DNA testing been available at the time of trial, we sustain Dunning's sole point of error, vacate the trial court's May 17, 2017 "not favorable" finding, and remand this case to the trial court for an entry of a finding that had the post-conviction DNA test results attained by Dunning been available during the trial of the offense, it is reasonably probable that Dunning would not have been convicted.

/s/ Sue Walker
SUE WALKER
JUSTICE

PANEL: WALKER, MEIER, and KERR, JJ.

PUBLISH

DELIVERED: March 1, 2018

B

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00166-CR

JOHNNIE DUNNING — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 371ST DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 0632435D

ORDER

We have considered the “State's Motion For Rehearing.”

It is the opinion of the court that the motion for rehearing should be and is hereby denied and that the opinion and judgment of March 1, 2018 stand unchanged.

The clerk of this court is directed to transmit a copy of this order to the attorneys of record.

SIGNED March 29, 2018.

/s/ Sue Walker
SUE WALKER
JUSTICE

PANEL: WALKER, MEIER, and KERR, JJ.

C

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V.

THE STATE OF TEXAS — STATE

FROM THE 371ST DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 0632435D

ORDER

We have considered the "State's Motion For Reconsideration En Banc."

It is the opinion of the court that the motion for reconsideration en banc should be and is hereby denied and that the opinion and judgment of March 1, 2018 stand unchanged.

The clerk of this court is directed to transmit a copy of this order to the attorneys of record.

SIGNED March 29, 2018.

/s/ Sue Walker
SUE WALKER
JUSTICE

EN BANC

D

REPORTER'S RECORD

VOLUME 3 OF 4 VOLUMES

TRIAL COURT CAUSE NO. 0632435D

THE STATE OF TEXAS	IN THE DISTRICT COURT
V.	TARRANT COUNTY, TEXAS
JOHNNIE E. DUNNING	371ST JUDICIAL DISTRICT

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HEARING ON DEFENDANT'S MOTION REGARDING ADMISSIBILITY OF EVIDENCE REGARDING LORNE CLARK

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On the 14th day of July, 1999, the following proceedings came on to be heard in the above-entitled and numbered cause before the said Honorable James R. Wilson, Judge Presiding, held in Fort Worth, Tarrant County, Texas:

Proceedings reported by computerized stenotype machine.

==========

Brenda C. Hein, Texas CSR #2077
Official Court Reporter
371st Judicial District Court
401 West Belknap
Fort Worth, Texas 76196-7118
(817) 884-2895

REPORTER'S RECORD

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401 West Belknap
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APPEARANCES:

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222 West Exchange Avenue
Fort Worth, Texas 76106

CHRONOLOGICAL INDEX

VOLUME 3 OF 4 VOLUMES

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ALPHABETICAL WITNESS LIST

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EXHIBITS INDEX

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DEFENDANT'S EXHIBITS:

NO.	DESCRIPTION	OFD	ADD	VOL
5	Judgment in Cause No. 0633489D	52	52	1

PROCEEDINGS

July 14, 1999
9:25 a.m.

(State's Exhibits No. 2 through 14 marked.)

(OPEN COURT, DEFENDANT PRESENT, JURY NOT PRESENT.)

THE COURT: All right. Back on the record.

Counselor, you want to go through -- I believe the State's objecting to what you want to go into in opening statement.

Do you want to go through what you are going to bring up in opening statement?

MR. PEARSON: I guess you mean as it relates to their objecting to the individual, Lorne Clark.

THE COURT: Yes.

MR. LAPHAM: I believe that's correct, Judge.

MR. PEARSON: Well, Judge, I just intend to, of course, do what opening statement allows, and that's to show -- tell the jury what I think the evidence will show, and I think the evidence will show that -- and I have public records to -- certified

public records to show that Lorne Clark pled guilty to sex offense against a child in the state of Arkansas in 1993; that he came to Texas and was living in the same household as the victim in this case, Russell Franks; that during the summer that this offense took place, Lorne Clark committed two more offenses that resulted in convictions in this courtroom on June the 29th of this -- this year, June the 29th of 1999; and that under my -- I'm not saying these are all my grounds, but basically, that's what the evidence will show.

He's also a witness in this case. He has proximity to Russell not only by living there, but by -- I believe the detective and the police officers will state that they have knowledge that Lorne Clark turned over Russell Franks' outcry as it is -- as it was to the mother.

THE COURT: That --

MR. PEARSON: Well, that he was there on the date this allegedly occurred.

THE COURT: Was he -- okay. Was he the outcry witness?

MR. PEARSON: Well, I said that. I don't mean the way that's used in the Rules of Evidence. I'm saying he's an adult that the child told, "Hey, I've been -- something's happened to me,

and this is what happened to me."

THE COURT: Okay. But he was not the outcry witness as we use it here?

MR. PEARSON: Right. In fact, there's not an outcry witness. I have just --

THE COURT: Okay.

MR. PEARSON: -- in trying to describe his role --

THE COURT: All right. Was there a relationship -- I guess my problem is that I -- not knowing the facts of the case, I'm assuming, the way you're saying it, that there's a relationship between Mr. Dunning and Mr. Clark.

MR. PEARSON: I don't know what you mean by there's -- a relationship.

THE COURT: Well, all I heard yesterday was this all -- all the events took -- happened at the same place.

Were they all living together? I'm -- I'm --

MR. PEARSON: No. The facts -- I don't believe the evidence will show that they were all living together.

THE COURT: Okay. So this -- so am I to understand that Mr. Dunning's case was just a totally

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separate, isolated incident from Mr. Clark's?
MR. PEARSON: Well, Judge, the -- yes, his case is isolated and separate from the cases that Lorne Clark has pled guilty to.
I guess what I'm having trouble with as far as being called on the carpet on this is: I'm talking about his basic -- Mr. Dunning's basic right to defend against these accusations and just to put on a defense according -- under the right of effective assistance of counsel, that a man living in the apartment with this child, that has a relationship, a close relationship with the mother of this child, is a known, verifiable child sex offender.
And there's -- I believe the evidence will show that there's not a physical link to Johnnie Dunning. In fairness, there's not a physical link to Lorne Clark, but I'm talking -- I mean, I'm saying this is, to me, just basic fundamental fairness and due process and due course of law that I be able to present to the jury what I believe -- evidence that I believe raises a reasonable doubt.
MR. LAPHAM: Judge, if you wanted a response from the State.
And if I say something that's incorrect or Mr. Pearson doesn't agree with me, then I think what

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the facts will show clearly was that Lorne Clark is, in fact, the stepfather of the injured party in this case, Russell Franks, and during September of 1996, Russell Franks lived with his stepfather, Lorne Clark, in apartment 128 at the Taj Mahal.
I think the evidence will also show that the Defendant in this case, Johnnie Dunning, was not residing anywhere in any apartment at the Taj Mahal complex. He was residing -- or at least had paid for a room at the Union Gospel Mission.
However, Mr. Dunning would come and visit a close friend of his by the name of Vanessa Bostick, and she was a resident of the Taj Mahal Apartments. She lives -- or lived at the time in apartment number 145. That's the only relationship that -- that there is between this Defendant and Lorne Clark, is they happen to be on the same property.
Clearly, the child has always referred to the man that has sexually assaulted him or molested him as being an African-American -- I think Russell used the words "black," a black man, and I think there's no disagreement that Lorne Clark is an Anglo, a white individual.
At no time has Russell ever indicated to police, or to anyone for that matter, that Lorne Clark

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has ever sexually abused him in any manner.
That in addition to that, Detective Kamper is here, and I'm sure she'll testify that Lorne Clark was never a suspect in the case involving -- the case involving Russell Franks being assaulted, anally assaulted.
And, Judge, to allow the defense to point the finger at Lorne Clark when there's no -- there's no evidence that suggests that Lorne Clark did anything to Russell Franks would -- would require us to retry Lorne Clark all again, and this case is about Johnnie Dunning, not Lorne Clark.
And under balancing -- the State's position is it's not relevant, and if the Court does find that it's relevant, that it's -- the -- the unfair and undue prejudice is outweighed by any probative value, and we'd ask the defense be not permitted to go into anything about Lorne Clark's prior criminal history.
And I can let the Court also know that we don't plan to call Lorne Clark. So I don't think Lorne Clark, unless the defense is planning on calling him, that he'll ever come into this courtroom unless the defense brings him in. And at that time, I don't think they get to bring him in just to impeach him with

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his prior felony convictions. We certainly won't ask about him.
MR. PEARSON: May I respond, Your Honor?
I'm not interested in whether or not Detective Kamper thought that Lorne Clark was the perpetrator, and I don't think that the defense has to rely upon and this Court should rely upon the fact that the law enforcement don't think that Lorne Clark is a righteous suspect.
They can think what they want. I'm talking about fundamental basic right to raise a reasonable doubt, to present evidence in your own defense, evidence that may show your innocence.
And I don't see how under the definition of relevance in the code -- excuse me -- in the Rules of Criminal Evidence, the Rules of Evidence, how it can be evidence that has any tendency to make more probable or less probable a fact of consequence. I don't see how that cannot -- the threshold there is not meant when you're talking about a known active child sex offender. Not only somebody that has it in his background, but somebody that during the same months -- excuse me -- weeks before this abused minor children in the apartment where Russell Franks lived.

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If the jury -- we're talking about admissibility. The jury may decide to give that no weight whatsoever, and that's their prerogative.

And we -- we object under due -- well, we -- we offer this under due -- due course of law, due process; effective assistance of counsel; and under the Sixth and Fourteenth Amendments of the United States Constitution; Article I, Section 10 of the Texas Constitution; and under the Rules of Evidence, Rule 401, that it's relevant. And under 403, if the State wants to make that argument.

A defendant just merely trying to produce -- produce another perpetrator in the area that is a actual witness in the case, that was there, whose name is in the police reports, just trying to show the jury that, "Hey, this man is a child sex offender," that is not unduly prejudicial to the State. That is just offering it to the jury so that they can get to the truth.

THE COURT: All right. The Court's going to find that -- what I now know of the facts, that it is not relevant, and you will not be able to get into it. If you call Mr. Clark as a witness and wish to take up relevancy of his testimony at that time, we will. You will not be allowed to get into it

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in opening argument.

MR. PEARSON: Your Honor, he is under subpoena. For purposes of preserving the record, Your Honor, we -- we discussed on the record yesterday -- I made arguments yesterday as to why the testimony and the evidence surrounding Lorne Clark is relevant. I think I can assume this would be the case anyway, but I would like yesterday's discussion on the record and today's discussion on the record to be an -- an offer of proof as to what I'm not allowed to put on in opening statement.

THE COURT: All right. Is there anything further before we bring in the jury?

MR. LAPHAM: Not from the State, Judge. I think Sandy wanted to go and talk to our witnesses just briefly and instruct them of the Court's rulings, and then we'll be ready to go.

THE COURT: All right.

MR. PEARSON: And, Judge, just so, Your Honor, there's no -- even if the Court's ruling never changes, I'll -- Lorne Clark's been subpoenaed. If you want to do it at a time that's not inconvenient to the jury, I'm going to want to make an offer of proof.

THE COURT: All right.

MR. PEARSON: Of course, I'm going to

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try to get the ruling in my favor, but I will need him here before he goes to TDC.

THE COURT: All right. We can do your bill sometime before we get the verdict.

MR. PEARSON: Thank you, Judge.

(Pause.)

(DEFENDANT PRESENT, JURY NOT PRESENT.)

THE COURT: All right. State ready?

MR. LAPHAM: We're ready, Judge.

THE COURT: Defense ready?

MR. PEARSON: Judge, momentarily, I'd just like to put -- ask Mr. Dunning, we just had plea negotiations, of course, off the record, but since the jury is about to come in and the State is about to present evidence --

Mr. Dunning, I just need to ask you -- I'm not trying to put you on the spot, but the State just offered you 25 years in the penitentiary in exchange for your plea of guilty. And did I communicate that offer to you?

THE DEFENDANT: Yes, sir.

MR. PEARSON: And you are rejecting that offer; is that correct?

THE DEFENDANT: Yes, sir.

MR. PEARSON: And, of course, I told you

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before that the punishment range is up to life or 99 for this offense.

THE DEFENDANT: Yes, I understand.

MR. PEARSON: And you have an habitual count on the indictment, which if it's found to be true, that would make the minimum punishment, you understand, 25 years to do.

Do you understand that?

THE DEFENDANT: No, I don't.

MR. PEARSON: Mr. Dunning, I differed with you on the fact that we -- you understand -- we talked about the fact that you have an habitual count --

THE COURT: Hold on just a second.

Counselor, you want to go back and talk to him again?

MR. PEARSON: Yes, I do, Judge.

(Recess from 10:04 a.m. to 11:13 a.m.)

(DEFENDANT PRESENT, JURY NOT PRESENT.)

THE COURT: All right. Court calls cause number 0632435D, styled the State of Texas versus Johnnie E. Dunning.

What says the State?

MS. HELLER: State's ready, Your Honor.

THE COURT: What says defense?

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MR. PEARSON: Ready, Your Honor.
THE COURT: Are you Johnnie E. Dunning?
THE DEFENDANT: Yes, sir.
THE COURT: I'm holding in my hand what's known as written plea admonishments.
Have you had sufficient time to go over these with your attorney, and do you understand, to your own satisfaction, what's contained in these?
THE DEFENDANT: Yes, sir.
THE COURT: Are you a US citizen?
THE DEFENDANT: Yes, sir.
THE COURT: You understand if you were not a US citizen, this could lead to your deportation or prevent you from being a naturalized citizen?
THE DEFENDANT: I'm aware of that.
THE COURT: All right. Is this your signature here, here, and here?
THE DEFENDANT: Yes, sir.
THE COURT: Did you understand all the rights you gave up?
THE DEFENDANT: Yes, sir.
THE COURT: Are you satisfied with your attorney's representation?
THE DEFENDANT: Yes, sir.
THE COURT: Counselor, is your client

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competent?
MR. PEARSON: He is, Your Honor.
THE COURT: All right. State have anything to offer?
MS. HELLER: Your Honor, at this time, for the record, the State is proceeding on Count One only this morning, waiving Count Two and Three.
THE COURT: Okay. And --
MS. HELLER: And also, Your Honor, at this time, we would offer the written plea admonishments and judicial confessions as State's Exhibit No. 1.
MR. PEARSON: We have no objection to those exhibits.
THE COURT: All right. Will be admitted.
Anything to be offered by the defense?
MR. PEARSON: Your Honor, I just want to -- at least while Mr. Dunning is here, he is entering a plea with the understanding that he will be granted permission to appeal the Court's ruling to suppress evidence, which we -- we have some more evidence to offer to make that offer of proof more complete.
And it's Mr. Dunning's understanding of

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what makes this plea voluntary is that that motion -- which I have filed a motion entitled Defendant's Motion Regarding Admissibility of Evidence Regarding Lorne Clark, that -- that that motion would be -- that he would receive permission to appeal that.
THE COURT: Right. And the Court will grant him permission to appeal that issue.
MR. PEARSON: And I'll prepare a notice of appeal, Your Honor, that reflects that permission.
THE COURT: All right. It is also this Court's understanding that with that notice of appeal, you're going to file a motion for new trial.
MR. PEARSON: Yes, Your Honor.
THE COURT: All right. I believe you had some testimony.
MR. PEARSON: I'd like to offer some -- an offer of proof.
And also, my client, Mr. Dunning, I've explained to him his Fifth Amendment right to not testify against himself.
But for the purposes of this plea bargain, Mr. Dunning, it's true that you will waive the Fifth Amendment right and go ahead and testify as to Count One of this indictment; is that correct?
THE DEFENDANT: Correct.

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MR. PEARSON: I tender him as a witness.
MS. HELLER: Your Honor, at this time, the State would call the Defendant, ask he be sworn.
THE COURT: All right. Would you raise your right hand.
(Defendant sworn.)
THE COURT: Okay. Make sure Brenda can hear you over here.

JOHNNIE E. DUNNING,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. HELLER:

Q. Sir, you are Johnnie E. Dunning; is that correct?
A. Correct.
Q. And you are the same Johnnie E. Dunning who is charged with the offense of aggravated sexual assault of a child in indictment number 0632435; is that correct?
A. Correct.
Q. Mr. Dunning, you are charged with: On or about September the 2nd of 1996, here in Tarrant County, Texas, intentionally or knowingly causing the penetration of the anus of Russell Franks, a child younger than 14 years of age, who was not your spouse,

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by inserting your penis into the anus of Russell Franks.

Sir, is that accusation true?

A. It's true.

Q. And are you guilty of that offense?

A. Yes, I am.

MS. HELLER: Pass the witness, Your Honor.

CROSS-EXAMINATION

BY MR. PEARSON:

Q. Mr. Dunning, it's your understanding, what I've just asked the Court to take notice of about the right to appeal, that you're going to have the right to appeal this issue of the Court, not allowing us to present some evidence regarding Lorne Clark.

A. Yes, sir.

Q. Now, before we got to this juncture, I'd asked you the question, if you realize that if the jury found you guilty with the enhancement and habitual count, that would mean that the minimum sentence is 25 years. You understand that?

A. Yes, sir.

Q. And that's something that we've talked about before.

A. Yes.

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Q. So a moment ago, when you said you didn't understand that, did you just not understand how I phrased the question?

A. Right. That's what it was.

Q. Okay. But you know that with an habitual count and enhancement count, the minimum punishment is 25 years.

A. I'm well aware of that.

Q. I don't mean to -- all right. I'll withdraw that.

Do you have any questions about what you're doing right now?

A. No, sir.

Q. And you understand that you've just waived the right to have this case heard by the jury?

A. Yes, I understand that.

MR. PEARSON: Pass the witness.

THE COURT: Anything further from either side?

MS. HELLER: No, Your Honor, not in regards to the plea; however, there is a stipulation that the State does wish to enter onto record --

THE COURT: All right.

MS. HELLER: -- before these proceedings are finished.

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THE COURT: All right.

MS. HELLER: So we'd rest and close at this point.

THE COURT: Do you want to go on and put the stipulation on now?

MS. HELLER: Your Honor, at this time, the State and the defense have stipulated to the following facts as being true and correct: We believe the testimony and the evidence would show at trial that the victim of this offense, Russell Franks, at no time, has ever made any allegation regarding Lorne Clark sexually abusing him. There has been no allegation, formally or informally to anyone at all, no police agency, not CPS, no family member. At no time Russell Franks has ever accused Lorne Clark of sexually abusing him in any fashion.

And that would conclude our stipulation.

MR. PEARSON: We agree to stipulate to that, Your Honor.

THE COURT: Okay.

MR. PEARSON: And what we want to offer is a continuation of our offer of proof in some question-and-answer form.

THE COURT: All right. Do you want to do that before we do the plea?

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MR. PEARSON: I would like to do that, Your Honor.

THE COURT: Okay. Mr. Dunning, have a seat back over there.

(Defendant returned to counsel table.)

THE COURT: All right. Counselor, you may call your first witness.

MR. PEARSON: Your Honor, I would call Officer Scott Thompson, W. S. Thompson.

THE COURT: Come right over here. Raise your right hand.

(Witness Thompson sworn.)

THE COURT: All right. If you'll have a seat there and print your name on the pad and then pull up the microphone so everybody can hear you.

WELDON SCOTT THOMPSON,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PEARSON:

Q. Okay. Would you state your name, please.

A. Weldon Scott Thompson.

Q. And how are you employed?

A. Police officer of the City of Fort Worth.

Q. Officer Thompson, did you go out to the investigation of an alleged offense here in Tarrant

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County on September the 2nd of 1996?
A. Yes, I did.
Q. And have you reviewed a police report for purposes of refreshing your testimony (sic) in this offense?
A. Yes, I have.
Q. And would that be the -- the offense of aggravated sexual assault of a child with the name of -- Defendant in this case, Johnnie Dunning, that case -- case he's on trial for?
A. Yes, it is.
Q. Okay. So on September the 2nd of 1996, did you talk to a witness by the name of Jan Clark and/or Lorne Clark?
A. Yes, I did.
Q. Okay. What is your recollection of what Lorne Clark told you about this offense?
A. I don't believe I -- if you'll just allow me a second to look back. I just --
THE COURT: You want to pull that microphone down just a little bit.
Thank you.
Q. (BY MR. PEARSON) Let me -- go ahead.
A. I'll just say basically Lorne Clark, all he did was reaffirm what another witness had stated about

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a specific person in apartment 145.
Q. And did he reaffirm what Jan Clark said?
A. No. I believe it was the witness three, a Mr. Oliver.
Q. Okay. And from that witness, you had heard the allegation from Russell Franks that basically a black man had assaulted him.
A. Yes.
Q. And Lorne Clark affirmed that information. Is that what your testimony is?
A. I believe all he did was affirm that a person matching the description lived in -- or stayed in apartment 145.
Q. Okay. Now, I had a chance to talk to you about this case yesterday.
How did you come to the information of a suspect -- of a named suspect of Allen Beavers? How did that name get brought to your attention?
A. Okay. Allen -- they gave a description and Lorne Clark and the mother -- I'm not sure -- I can't remember her name -- Jan Clark. They all said that there was a person stayed in 145. They believed his name was Allen. That was the only name given.
Q. Okay. And how did Allen -- with that -- so you're saying that Jan Clark and Lorne Clark told you

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that there was a -- a man by the name of Allen that stayed in another apartment there at the complex.
A. Correct.
Q. And this -- did the name "Allen Beavers" come to be incorporated into this report as a suspect?
A. Okay. The way Allen Beavers came up was after receiving that information in the police report, went to patrol sector and pulled up offenses and found an unrelated offense with a suspect the same first name, and that's how I came up with a last name.
Q. So you came up -- by pulling up an unrelated offense that had occurred in the same apartment complex?
A. Correct.
Q. And that individual named in that offense was an Allen Beavers?
A. Yes, sir.
Q. And is he a black male?
A. Yes, he is.
Q. And did Lorne -- did Jan Clark tell you that Allen -- the man by the name of Allen that stayed at that apartment or visited that apartment was a black man?
A. Yes.
Q. And did Lorne Clark also state that or affirm

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her giving that information to you?
A. Yes, she did -- he did.
Q. And this apartment 145, is there anything that's significant where Allen Beavers -- excuse me -- where a man named Allen stayed or visited, is there any significance as to apartment 145 at that complex in the case against my client, Johnnie Dunning?
A. I believe that was the apartment from which he was first -- he was first located by another patrol officer.
Q. Okay. All right. Thank you.
MR. PEARSON: I pass the witness, Your Honor.
MS. HELLER: Just a few questions, Your Honor.
CROSS-EXAMINATION
BY MS. HELLER:
Q. Officer Thompson, were you able to get a description from the victim, Russell Franks, of the man who had assaulted him?
A. Yes, we were.
Q. And were you able to get a description of the individual's race?
A. Yes, we were.
Q. What race did Russell tell you the person was

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who had assaulted him?
A. A black male.
Q. And for the record, when you talked with Lorne Clark, what was his race?
A. A white male.
Q. Is it also true that in speaking with James Oliver, Mr. Oliver indicated to you that Russell had pointed out to him who the man was who had offended against him that day?
A. Yes, he did.
Q. Was Mr. Oliver able to give you a description that included race?
A. Yes, he was.
Q. What race did Mr. Oliver tell you the individual was that Russell had pointed out to him that day?
A. A black male.
Q. The apartment that you responded to on September the 2nd of 1996, was that apartment number 128?
A. Yes, it was.
Q. And is that the apartment where Mr. Clark lived, along with Jan Clark and Russell Franks?
A. Yes, it was.
Q. Did you, at some point, go to apartment 145?

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A. We did not knock on the apartment -- we went by the front.
Q. Did you ever ascertain whether or not this Defendant, Johnnie Dunning, knew the inhabitants of apartment number 145?
A. At that point in time or --
Q. Yes.
A. No.
Q. Did you, at any point, do that?
A. Just since I've been involved here this week.
Q. Oh, you've just gotten information about that particular issue this week --
A. Yes.
Q. -- in preparation for trial?
A. Yes.
Q. And for the record, Officer Thompson, what race is Mr. Johnnie Dunning, the Defendant in this cause?
A. He's a black male.
MS. HELLER: Pass the witness, Your Honor.
REDIRECT EXAMINATION
BY MR. PEARSON:
Q. Officer Thompson, I believe you just stated that you came by the information that Lorne Clark lived

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in the same apartment with Jan Clark and Russell Franks, Russell Franks being the victim in this case.
A. Yes, sir.
Q. Now, is it true that you, from the description that was given of the black male from James Oliver, that you -- that you thought you recognized that could be the person from that description that could be Allen Beavers?
A. The name "Allen," it rang a bell, yes, sir.
Q. Did it ring -- and were you thinking -- it rang a bell -- I guess you're saying, then, that you were thinking of the person that you found the police report for, Allen Beavers.
A. Correct. They said he had been evicted from the premises, and I knew of a person -- I wasn't familiar with the last name until I pulled up the report.
Q. When you pulled up the report and you were -- and saw that the name was Allen Beavers, this was one and the same person by the name of Allen, as far as the information you had gotten, the person that you were thinking of.
A. That was the person I was thinking of, yes, sir.
Q. All right. Did you provide that information

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about Allen Beavers to Detective Kamper?
A. Yes, I did.
Q. Did -- did you get information that Allen Beavers visited or lived at apartment 145?
MS. HELLER: Your Honor, excuse the interruption. We have to object that these questions are outside the scope of the particular issue being placed on the record. The issue that the Court has granted the Defendant leave to appeal is the criminal history of Lorne Clark. We'd object to all these questions about Allen Beavers as it's outside the scope of that issue.
THE COURT: Sustained.
MR. PEARSON: Wait, Your Honor. May I please respond?
THE COURT: You may.
MR. PEARSON: The basis of my objection, as far as what's being -- what I'm not being allowed to put on in evidence in this case is regarding Lorne Clark; however, that is our whole defense, and this can be connected up through Detective Kamper.
It is relevant that Lorne Clark provided the information, helped affirm the information to this Officer Thompson that there's a black guy that goes in those apartments by the name of Allen.

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So it is -- I'm not suggesting that I'm trying to put Allen Beavers on trial. I'm -- I'm trying to show the Court by -- in this offer of proof that Lorne Clark helped affirm and give the information of an Allen Beavers, thus distracting, according to our defense and our only realistic defense.

We're not -- in this defense, we weren't planning on trying to beat up on Russell Franks or discredit him, per se, as lying, but we were trying to show that he's living with Lorne Clark, and Lorne Clark provided the police -- help provide the police with a trail against another black man, Allen Beavers.

So we would, of course, ask that this be included in our -- in our offer of proof and that -- and the Court ruled it is relevant.

And, Your Honor, I would further add in an offer of proof -- I don't really -- this is what I'm trying to prove.

THE COURT: Continue, Counselor.

MR. PEARSON: Okay. We pass the witness.

MS. HELLER: No further questions, Your Honor.

THE COURT: All right. You may step down.

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MR. PEARSON: And we would call Detective Kamper.

MS. HELLER: Your Honor, may Officer Thompson and Officer Browning be excused?

MR. PEARSON: We have no objections.

THE COURT: All right. Thank you very much.

(Witness Thompson excused from the courtroom.)

THE COURT: Were you sworn in the other day?

WITNESS KAMPER: Not in this case.

(Witness Kamper sworn.)

THE COURT: All right. If you'll have a seat here, print your name on the pad, and pull the microphone up close.

You may continue.

MR. PEARSON: Thank you, Judge.

S. R. KAMPER,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PEARSON:

Q. Would you state your name, please.

A. Detective Kamper.

Q. All right. Detective, were you in charge of the investigation of the sexual assault of Russell Franks, the case that's on trial in this court?

A. Yes, I was.

Q. And did the person -- well, who was the person that was arrested for that offense?

A. The Defendant.

Q. Johnnie Dunning?

A. Yes, sir.

Q. Now, have you seen or looked at your notes, your summary and details of your investigation in this case -- in this case?

A. Yes, sir, I have.

Q. I just want to ask you a few questions about Lorne Clark.

A. Okay.

Q. Did you come to find out from the victim or the victim's family that he lived -- Russell Franks, that he lived in an apartment with Lorne Clark and, of course, his mother, Jan Clark?

A. Yes, sir.

Q. Did Lorne Clark provide -- let me back up. Strike that question.

Did -- Russell Franks, did you come to find from your investigation -- did he tell Lorne Clark what had happened to him?

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A. Well, I believe that he did state that he told his father, but when we -- during the investigation, he actually told his mother in detail about what happened to him.

Q. Right. His mother at the time -- well, on this date in question, was his mother working at a convenience store there close by?

A. Yes.

Q. In your report, did you indicate that when -- on that date, September 2nd, 1996, that when Russell Franks was at home with his stepfather, Lorne Clark, and his two sisters, that he told his stepfather that a black man had had sex with him in the laundry room?

A. Yes, sir, I believe I did put that in my report.

Q. And is that -- what you put in your report, is that how you recall the events that you learned from your -- from your investigation?

A. Actually, before Lorne Clark was interviewed, we were able to interview the victim's mother, and she said that it was her that the victim told in detail about what happened. So she is our outcry witness.

Q. All right. And I don't have any dispute with that.

A. Okay.

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Q. The mother is the person that came to get all the details on what had happened to Russell Franks from Russell Franks.
A. That's correct.
Q. But it doesn't -- that does not change your answer, I assume, that --
A. That's correct.
Q. -- however great the description was, he did tell his stepfather, Lorne Clark, that a black man had assaulted him in the laundry.
A. I believe that's correct, yes.
Q. Now, about Lorne Lee Clark, is -- did he become a suspect in a separate incident, but an aggravated sexual assault of a child under the age of 14 that occurred in Tarrant County, Texas?
A. Yes, he did.
Q. And did he become a suspect, and -- and was he arrested for that crime in two separate cases?
A. Yes, he was.
Q. And those two separate cases, did they occur in the apartments there where he was living with Jan Clark?
A. Yes, they did.
Q. That's the Taj Mahal Apartments at -- at 545 Camp Bowie Boulevard.

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A. That's correct.
Q. Do you know the dates that those two offenses occurred?
A. I do not recall.
Q. Okay.
THE COURT: Can you pull that microphone up just a little bit.
WITNESS KAMPER: I'm sorry. Uh-huh.
Q. (BY MR. PEARSON) Do you -- and in your investigation of Lorne Lee Clark regarding those two cases in Tarrant County, did you come to find out that he had a previous felony conviction for sexual abuse of a child in another state?
A. Yes, I did.
Q. Did he have a prior felony conviction for sexual abuse of a child in the state of Arkansas?
A. Yes, he did.
Q. And was the victim in that case, Lena, L-e-n-a, Sanstra, S-a-n-s-t-r-a, the child of Jan Clark?
A. Yes.
Q. And did this -- is this the same Jan Clark that was living with Lorne Clark here in Tarrant County, Texas?
A. Yes.

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Q. And was that offense in Arkansas committed in 1993?
A. I believe so. I don't recall exactly.
Q. Do you know whether or not Lorne Clark has --
THE COURT: Hang on one second.
Could you speak into the microphone. I'm having trouble hearing you.
WITNESS KAMPER: I'm sorry.
MR. LAPHAM: You can pull it closer to you.
Q. (BY MR. PEARSON) Do you have personal knowledge of whether or not Lorne Clark pled guilty to the -- his prior felony conviction in Arkansas of sexual abuse of a child?
A. I don't recall if he pled guilty or if he was convicted or how that happened.
Q. Do you know whether or not he pled guilty or how he came to be convicted in Tarrant County?
A. I believe he was convicted.
Q. Okay. Do you know whether he pled guilty?
A. No, I don't recall.
MR. PEARSON: All right. I pass the witness, Your Honor.
MR. LAPHAM: Judge, I just have a few questions.

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MS. HELLER: Brief questions, Judge.
CROSS-EXAMINATION
BY MS. HELLER:
Q. Detective Kamper, was Lorne Clark ever, at any point, a suspect in this case involving Russell Clark being assaulted on September the 2nd -- oh, I'm sorry -- Russell Franks being assaulted on September the 2nd of 1996?
A. No, he was not.
Q. At some point, did you show a photo spread to Russell Franks regarding this offense?
A. Yes, I did.
Q. And were the physical characteristics of all of the individuals in the photo spread similar?
A. Yes, they were.
Q. Was Russell Franks able to identify the person who had assaulted him in that photo spread?
A. Yes, he was.
Q. And who did he identify as being the perpetrator?
A. The Defendant.
Q. And that's Johnnie Dunning?
A. Yes, it is.
Q. And is that one and the same person who is here in court today as the Defendant in this cause?

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A. Yes, it is.
Q. Now, as far as Mr. Clark's criminal conviction out of Arkansas, the victim of that offense was Lena Sanstra, correct?
A. That's correct.
Q. And Lena Sanstra is a female, correct?
A. That's correct.
Q. And Russell Franks is not a victim in that offense?
A. No, he was not.
Q. And as far as the two Tarrant County convictions from last month, those two victims in those cases were both females, correct?
A. That's correct.
Q. And neither of those victims were family members or resided with Mr. Lorne Clark, correct?
A. That's correct.
Q. And those cases did not, in any way, involve Russell Franks; is that true?
A. That's true.
Q. Detective Kamper, obviously you are the detective regarding this case, correct?
A. That's correct.
Q. And you have gathered the information, reviewed the information, and sought an arrest warrant

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in this case, correct?
A. That's correct.
Q. Is it fair to say that Russell Clark has been consistent in stating that it was, in fact, a black man who assaulted him on September the 2nd of 1996?
A. Yes, that's correct.
Q. And that would be the same description that he gave to the officers on the scene on September the 2nd of 1996, as well as to you, to Glenda Wood in his videotape, as well as to Dr. Leah Lamb at the CARE team at Cook Children's Hospital; is that correct?
A. That is correct.
Q. And that is also the description that he gave to James Oliver; as well as Jan and Lorne Clark; and his sister, Jennifer Clark (sic) as well, correct?
A. That's correct.
Q. And Russell has never been inconsistent about that assertion that it was a black man who assaulted him, correct?
A. That is correct.
MS. HELLER: We'll pass the witness, Your Honor.
REDIRECT EXAMINATION
BY MR. PEARSON:
Q. Detective Kamper, it's true, is it not, that

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Lorne Clark who -- you were the detective in charge of the investigation against him in Tarrant County, correct?
A. That's correct.
Q. And those two incidents, those two victims in those apartments, in that apartment, they occurred in June and August of 1996.
A. I believe that's correct.
MR. PEARSON: May I approach the witness briefly, Your Honor?
THE COURT: You may.
Q. (BY MR. PEARSON) Detective, I'm not going to ask you to identify this document, but is -- was one of the victims in -- that Lorne Clark was arrested for, was her name Nicole Martin?
A. Yes.
Q. And do you also recognize whether or not the other victim that Lorne Clark was arrested for sexually assaulting was Sarah Pounders?
A. Yes, sir, that's correct.
Q. And do you know whether or not the offense date against Lorne Clark's sexual assault of Nicole Martin was August the 9th of 1996?
A. I'm sorry. Without them right in front of me, I could not give you an exact date, but that --

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that sounds correct.
Q. And I'll just go ahead and ask you the same question about Sarah Pounders that Lorne Clark sexually assaulted, that offense date, June the 1st of 1996.
A. Yes, sir, or about that date.
Q. About that date?
A. Uh-huh.
Q. And that would have been June and August right before September when this alleged -- well, when Russell Franks was -- was sexually assaulted.
A. Yes, sir, that's correct.
Q. Did you -- in your investigation of Lorne Clark, did you come to find out that he had fled the state of Texas?
A. Yes, I did.
Q. And he went to what state? Do you know?
A. Arkansas.
Q. When did he flee?
A. After -- after the alleged assaults on the victims.
Q. You're talking about the victims of the cases that -- the two names I just mentioned to you?
A. Yes, sir.
Q. But he's still in Tarrant County, Texas, of course, you know, because you saw him September the 2nd

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of 1996, when this case was first investigated; is that correct?
A. I don't recall whether I actually saw him or not.
Q. Well, did you review the -- excuse me -- Officer Thompson just testified that you -- did you listen to his testimony?
A. The very last of it.
Q. Okay. And do you have any dispute with his testimony that he talked to Lorne Clark and Jan Clark?
A. No, sir.
Q. And do you have any dispute with his testimony that that's the Lorne Clark that lived with Jan Clark in that apartment?
A. No, sir.
Q. So you don't have any information that he fled Texas -- I realize it was after those assaults occurred on those two young girls, but you don't have any information that he fled Texas before this assault on Russell Franks.
A. Without documentation in front of me, I'm sorry, I can't -- I couldn't tell you exactly when he fled the state. I do know that he did flee the state.
Q. Is that where he was eventually taken into custody, in Arkansas?

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A. Yes, sir, it is.
Q. So he never came back to Texas voluntarily?
A. No, sir.
Q. Now, Detective Kamper, the -- I realize that there -- in your investigation of this case and, I guess, from talking to -- I assume you talked to Dr. Leah Lamb.
A. Yes, sir.
Q. And did you come to find out that there were medical findings that Russell Franks had been sexually assaulted?
A. Yes, sir, I did.
Q. However, these medical findings did not -- no evidence was gathered in that process that linked -- by way of physical evidence that linked a suspect to that sexual assault.
A. That's correct.
Q. Such as no DNA or no semen that was tested for DNA that linked a specific suspect.
A. That's correct.
Q. And would you agree, then, that the identification by Russell Franks in the photo ID of Johnnie Dunning is specifically what links Johnnie Dunning to this offense?
A. That, with the fact that he pointed the

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Defendant out to other persons who also identified him, yes.
Q. Right. And I'm not taking away from your answer. What led Johnnie Dunning to be arrested for this is the fact that he was pointed out by the victim.
A. That's true.
Q. But there is no evidence that apart from that, he is somehow linked to this offense in physical, tangible form.
A. That's correct.
Q. It's based upon -- basically, it is based upon the victim's identification.
A. That's true.
Q. There is -- is it true, Detective Kamper, that there is no eyewitness that saw the assault -- apart from Russell Franks, of course, but there is no eyewitness that saw the sexual assault of Russell Franks?
A. That is correct.
Q. And is it true, also, that there's no eyewitness that saw Russell Franks inside this laundry room where this case -- when this assault occurred with Johnnie Dunning?
A. No, sir, that's -- that's correct.

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Q. Do you know of any eyewitness that can put Johnnie Dunning with Russell Franks at all that day?
A. No, sir.
MR. PEARSON: I pass the witness.
MS. HELLER: Just a couple more questions, Your Honor.
RECROSS EXAMINATION
BY MS. HELLER:
Q. Detective, isn't it your recollection that Lorne Clark actually fled about a day after the outcry of Nicole Martin that she had been sexually assaulted by him?
A. The first two victims, yes. Well --
Q. Okay. And that would be either Nicole Martin or Sarah Pounders.
A. Yes.
Q. And isn't it also fair to say that Russell Clark had no involvement -- Russell Franks, I'm sorry, had no involvement in those cases involving Nicole Martin and Sarah Pounders?
A. That is correct.
MS. HELLER: Pass the witness, Your Honor.
FURTHER REDIRECT EXAMINATION
BY MR. PEARSON:

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Q. Now, Detective Kamper, just so that I understand you, Lorne Clark, you're testifying, fled at some point after the two victims or the allegation against him in the two cases in Tarrant County came to light.
A. That's correct.
Q. He went to the state of Arkansas.
A. That's correct.
Q. Now, is it still true what you've put in your report here -- well, did you gather information from the police officers that went out there, specifically J. W. Goodwin and W. S. Thompson?
A. Yes, sir.
Q. Did you review your reports?
A. Yes.
Q. And in those -- the report that you -- that you reviewed, do you know whether or not that was service number 9652963?
A. Yes. It's 96529634.
Q. All right. And who is listed as witness number two in that report?
A. Lorne Clark.
Q. All right. Is this the same Lorne L. Clark with the date of birth of 10/23/62 that was arrested for, charged, and convicted of the two assaults in that

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apartment against those two girls?
A. Yes, sir.
Q. So you think it's safe to assume that Lorne Clark, being listed in this report as witness number two, was there on the date that this incident occurred?
A. I know that his name is in the report and that -- I can't give testimony if he was there. I don't know. I would assume so by the report, yes.
Q. You would assume from the report that if he's named as witness number two, that he was there.
A. Yes.
MR. PEARSON: Okay. I pass the witness, Your Honor.
MS. HELLER: Nothing further, Your Honor.
THE COURT: All right. May this witness be excused?
MR. PEARSON: Yes, Your Honor.
MS. HELLER: No objection.
MR. PEARSON: No objection.
THE COURT: All right.
(Witness Kamper excused from the courtroom.)
MR. PEARSON: Your Honor, we would -- I would offer Defense Exhibit No. 1 for the purposes of

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this offer of proof, which is the -- the public record in Garland County, Arkansas, in the Circuit Court of Garland County, Arkansas, which is the information and conviction, judgment, and sentence against Lorne Lee Clark that was certified to by the clerk of -- deputy clerk in Garland County, Arkansas. And this, Your Honor, contains the information about Lorne Lee Clark pleading guilty to the sexual abuse in the first-degree of Lena Sanstra.
MS. HELLER: For purposes of the record, no objection.
THE COURT: All right. Will be admitted.
MR. PEARSON: And, Your Honor, I will offer Defendant's Exhibit No. 2 and 3.
And Defendant's Exhibit No. 2 is the -- a certified copy of the indictment for the offense -- against Lorne Clark, for the offense of aggravated sexual assault of a child under the age of 14, that occurred on August 9th, 1996.
And Defendant's Exhibit No. 3 is the judgment and sentence in that same offense, which is case number 0633490D, showing his conviction for that offense on June 29th, 1999.
We'd offer that for purposes of this

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offer of proof.
MS. HELLER: No objection.
THE COURT: All right. Defendant's Exhibits 2 and 3 will be admitted.
MR. PEARSON: Your Honor, finally, for purposes of this offer of proof, Defendant's Exhibit No. 4 and Defendant's Exhibit No. 5.
Defendant's Exhibit No. 4 is the indictment against Lorne Lee -- Lorne Clark for the offense of aggravated sexual assault of a child here in Tarrant County, Texas, that occurred on June the 1st of 1996.
And Defendant's Exhibit No. 5 in that same case, which is cause number 0633489D. It's the judgment and sentence against Lorne Lee Clark where he was convicted of aggravated sexual assault of a child under 14 years of age. That judgment being June the 29th, 1999, for the record.
MS. HELLER: And for the record, no objection.
THE COURT: All right. Defendant's Exhibits 4 and 5 will be admitted.
MR. PEARSON: And, Your Honor, I'm through with evidence and my offer of proof, and I would like to be heard, finally, and succinctly, I

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might add.
I've alleged my grounds of due process, effective assistance of counsel. I would just further stress to the Court that based upon the testimony of Detective Kamper and Officer Thompson, perhaps I could not prove that -- by any physical evidence that Lorne Clark perpetrated this offense against Russell Franks. However, it is Johnnie Dunning's defense and his only viable defense. And by the Court's ruling that we cannot put before the jury that Lorne Lee Clark was a fixated pedophile living in that apartment with a previous conviction of sexual abuse of a child and two more felonies committed in June and August of 1996 before this offense, it guts our defense, and we -- it denies my client basic fundamental fairness to a fair trial to put that theory before the jury.
Especially, in light of the fact that as Detective Kamper just indicated, there is no physical link by way of tangible evidence and tangible physical form that makes my client -- that is evidence of guilt against my client or against Lorne Lee Clark. So the credibility of the victim's identification is very much the sole issue of -- well, it's a pivotal issue in this case.
The defense that -- the defense that

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we're not able to put forth and that we would ask the Court to change his ruling and allow us to put forth is that Jan Clark has a relationship -- she's married to Lorne Clark, this convicted pedophile. She brings him to the state of Texas to the same apartment where a previous victim of his sexual molestation, Lena Sanstra, was again living; thereby, her character, her credibility as somebody that was protecting her child, I would argue, is destroyed just by the mere fact that she allowed Lorne Clark back into her apartment.
Further added to that, two more minor children were assaulted in that apartment and then -- and you know we could present evidence that Lorne -- I mean, excuse me, that Jan Clark knew about Lorne Clark's previous sexual molestation, obviously, since it was against her own daughter. She continued a relationship with him in spite of that. That gives her plenty of motivation to help Lorne Clark -- if he should have been a suspect in this case, to help him cover that up. That gives her plenty of motivation that she obviously puts her relationship with him above the relationship she has with her own children and above her duty by law to protect her children, and our whole defense was to show that this woman put that before anything.

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She has all the motivation and the opportunity -- if Russell Franks was assaulted sexually by a man, she has plenty of motivation to coach, coerce, to persuade, and, along with Lorne Clark, to intimidate Russell Franks into identifying a black male as the perpetrator, thereby diverting from Lorne Clark.
And again, I'm not saying that this -- this evidence would persuade the jury, but I do know that it meets the minimum -- I think that it meets the minimum threshold of admissibility for them to consider, and it is -- we now stand in the position that without this avenue of trying to raise a reasonable doubt, we really have no -- we just have no way of putting on a viable defense.
And I believe that my client, Johnnie Dunning, deserves that right to put on that defense just because it goes against -- he doesn't have a burden, but it -- it makes their burden -- it puts their burden to the test.
And the fact that the police didn't investigate Lorne Clark, the fact that they don't think that he's a suspect, that's fine, but the jury is the ultimate determiner of guilt or innocence, and we just want to put before them this man's history, his wife's

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motivation to -- to help him cover it up, and the fact that he did flee to Arkansas. You tie all that -- we have another witness who's not here, but her testimony would be that Lorne Clark did flee after this. He left -- she's the manager of that same apartment complex, that he took off right after this allegation came to light and that that's the time frame of when he left.
And that would be our offer of proof.
MR. LAPHAM: Judge, I believe you've heard everything that we've said. It's been on the record. We offer it now, but to reurge that the only misfortunate part of this is that Russell Franks had the misfortune of having a crummy mom, Jan Clark, and to have a stepfather that was a sexual offender. It's not relevant to this case what Lorne Clark -- what's Lorne Clark's past. Johnnie Dunning's on trial. Jan Clark's not on trial. Only Johnnie Dunning.
The child has been consistent that it's been a black male that assaulted him. Even if there's some way that the Court could determine that it was relevant, that the prejudicial value of -- the prejudice -- the prejudice that would occur by just interjecting this -- this Lorne Clark's criminal history far and greatly outweighs any probative value

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under the balancing test, which I'm sure the Court has done previously, would certainly find that it certainly outweighs any probative value.

THE COURT: All right. All right. Mr. Dunning, to the charge of aggravated sexual assault of a child as contained in Count One, you may plead guilty or not guilty.

THE DEFENDANT: Guilty.

THE COURT: Are you pleading guilty because you are guilty and for no other reason?

THE DEFENDANT: Yes.

THE COURT: And the habitual offender notice -- habitual offender notice, they're claiming that you -- prior to the commission of this offense, that you were finally convicted of the felony offense of credit card abuse in the 204th District Court of Dallas County in cause number F89-79893-Q on the 17th day of May 1989, and that prior to the commission of the offense or offenses for which you were convicted as set out above, that you were finally convicted of the felony offense of credit card abuse in the 194th Judicial District Court of Dallas County in cause number F86-86415-SM on the 21st day of May, 1990 -- I'm sorry -- 1986.

To this paragraph, you may plead true or

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not true.

THE DEFENDANT: True.

THE COURT: Are you pleading true because it is true and for no other reason?

THE DEFENDANT: Right.

THE COURT: Okay. On your plea of guilty and true, I'm going to find them guilty and true. I'm going to assess your punishment at 25 years in the Institutional Division of the Texas Department of Criminal Justice.

Is that your understanding of the plea-bargain agreement?

THE DEFENDANT: (Nods.)

THE COURT: And did you approve that?

THE DEFENDANT: Yes, sir.

THE COURT: Is that your understanding, Counselor?

MR. PEARSON: Yes, Your Honor.

THE COURT: And did you approve that?

MR. PEARSON: I did, Your Honor.

THE COURT: All right. I have followed the State's recommendation. You will have the right to appeal the suppression of -- of Lorne Clark's criminal past.

Good luck, sir.

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THE DEFENDANT: Yes, sir.

MR. PEARSON: Thank you, Your Honor.

MS. HELLER: Thank you, Judge.

(Proceedings concluded at 12:07 p.m.)

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THE STATE OF TEXAS I

COUNTY OF TARRANT I

I, Brenda C. Hein, Official Court Reporter in and for the 371st District Court of Tarrant County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted by the respective parties.

I further certify that the total cost for the preparation of this Reporter's Record is $_____ and will be paid by Tarrant County, Texas.

WITNESS MY OFFICIAL HAND this the 11th day of November, 1999.

Brenda C. Hein

BRENDA C. HEIN, Texas CSR #2077
Expiration Date: December 31, 2000
Official Court Reporter
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