

NO. \_\_\_\_\_

**THE TEXAS OBSERVER,  
INNOCENCE PROJECT, INC.,  
INNOCENCE PROJECT OF TEXAS,  
and TEXAS INNOCENCE NETWORK**

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**IN THE DISTRICT COURT OF**

**Plaintiffs/Relators,**

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v.

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§

**SAN JACINTO COUNTY, TEXAS**

**BILL BURNETT as SAN JACINTO  
COUNTY DISTRICT ATTORNEY,  
REBECCA CAPERS as DISTRICT  
COURT CLERK for San Jacinto County  
and SAN JACINTO COUNTY**

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**Defendants/Respondents.**

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**\_\_\_\_\_ JUDICIAL DISTRICT  
PETITION FOR WRIT OF MANDAMUS AND INJUNCTIVE AND DECLARATORY  
RELIEF**

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW The Texas Observer, Innocence Project, Inc., Innocence Project of Texas, and Texas Innocence Network, Plaintiffs and Relators in the above-styled and numbered cause, and file this Petition for Writ of Mandamus and Injunctive and Declaratory Relief, and, in support hereof, would show the Court as follows:

**SUMMARY OF PLEADING**

Plaintiffs-Relators (“Plaintiffs”) The Texas Observer, Innocence Project, Inc., Innocence Project of Texas, and Texas Innocence Network move for declaratory relief and, in the event that the authorities appear unlikely to comply with the declaration of the court, injunctive relief prohibiting Defendants-Respondents (“Defendants”), along with their agents, employees and assigns, from destroying or disposing of any evidence admitted in the trial of Claude Howard Jones (Cause No. 6768) (“Mr. Jones”). Plaintiffs additionally seek a writ of mandamus compelling Defendants to release a one-inch hair fragment contained among that evidence — the

only physical evidence linking Mr. Jones to the charged crime — and related hair sample evidence as authorized under TEX. GOV'T CODE ANN. ch. 552 (Vernon Supp. 2004). Plaintiffs request that this hair fragment and related evidence be released to a forensic laboratory that is under contract with the Texas Department of Public Safety or is otherwise accredited and mutually agreeable to the parties to perform mitochondrial DNA testing so that the laboratory can conclusively determine whether the hair fragment actually came from Mr. Jones and, if it did not, whether that hair fragment can establish that a different suspect actually entered the liquor store, and therefore is the likely murderer. Plaintiffs make this request pursuant to their own rights of access under the common laws of Texas and the United States, Article I, Section Eight of the Texas Constitution, and the First Amendment to the United States Constitution, and to support the right of the People of Texas to receive complete information about the operation of their government.

### **DISCOVERY CONTROL PLAN**

1. Plaintiffs intend that discovery be conducted under Level 2 and affirmatively plead that they seek injunctive relief.

### **PARTIES**

2. Plaintiff-Relator The Texas Observer is a bi-weekly political newsmagazine with offices at 307 West 7th Street, Austin, TX 78701, in Travis County, Texas. Its goal is to cover stories crucial to the public interest and to provoke dialogue that promotes democratic participation and open government, in pursuit of a vision of Texas where education, justice and material progress are available to all.

3. Plaintiff-Relator Innocence Project, Inc. is a nonprofit legal clinic and resource center co-founded by Barry C. Scheck and Peter J. Neufeld and located at 100 Fifth Avenue,

Third Floor, New York, New York 10011, in New York County, New York. Created at the Benjamin N. Cardozo School of Law in 1992, the Innocence Project provides pro bono legal services to indigent prisoners nationwide for whom post-conviction DNA testing of evidence can yield conclusive proof of actual innocence, and works to reform the underlying causes of wrongful convictions. The Innocence Project's attorneys were asked by the Texas Legislature to assist with the drafting of Chapter 64 of the Texas Code of Criminal Procedure in 2001, after representing several Texans exonerated by post-conviction DNA testing prior to the statute's enactment. Nationally, the Innocence Project has provided direct representation or other legal assistance to a majority of the 200 innocent persons exonerated as a result of post-conviction DNA testing to date.

4. Plaintiff-Relator Innocence Project of Texas is a consortium of five participating organizations created to investigate claims of actual innocence, exonerate the wrongfully convicted, and advocate for criminal justice reforms to reduce the risk of wrongful conviction. Its members include attorneys and law students affiliated with the West Texas Innocence Project at Texas Tech University, the North Texas Innocence Project at Wesleyan, the University of North Texas, the University of Texas at Arlington, and the University of St. Thomas in Houston.

5. Plaintiff-Relator Texas Innocence Network is a nonprofit organization based at the University of Houston Law Center and established in March 2000. Texas Innocence Network is devoted exclusively to investigating claims of actual innocence raised by prison inmates in Texas and elsewhere.

6. Plaintiffs have appeared herein and may be served through their counsel-of-record, William H. Knull, III, Mayer Brown LLP, 700 Louisiana Street, Suite 3400, Houston, Texas 77002, in Harris County, Texas.

7. Defendant-Respondent Bill Burnett is named solely in his official capacity as District Attorney for San Jacinto County, Texas. In that capacity, he is located at 1 State Highway 150, Room 21, Coldspring, Texas, 77331, in San Jacinto County, Texas. Defendant-Respondent Rebecca Capers is named solely in her official capacity as District Court Clerk for San Jacinto County, Texas. In that capacity, she is located at 1 State Highway 150, Room 4, Coldspring, Texas, 77331 in San Jacinto County, Texas. Defendant-Respondent San Jacinto County may be served through San Jacinto County Judge Fritz Faulkner, located at 1 State Highway 150, Room 5, Coldspring, Texas 77331, and Burnett. TEX. LOCAL GOV'T CODE § 89.0041.

#### **VENUE AND JURISDICTION**

8. Venue is mandatory in San Jacinto County, Texas pursuant to TEX. CIV. PRAC. & REM. CODE § 15.015, as this action is against, *inter alia*, San Jacinto County.

9. This court has jurisdiction over this original action for declaratory, injunctive, and writ relief. *See* TEX. GOV'T CODE § 24.011 (“A judge of a district court may . . . grant writs of mandamus [and] injunction. . . .”); TEX. CIV. PRAC. & REM. CODE § 65.021 (“The judge of a district or county court . . . shall hear and determine applications for writs of injunction.”); Tex. R. CIV. P. 680-89 (governing restraining orders and injunctions); *Davis v. Burnam*, 137 S.W.3d 325, 331-32 (Tex. App.—Austin 2004, no pet.).

10. The District Court also has jurisdiction over suits seeking issuance of the writ of mandamus against the Clerk of the District Court, *see LeCroy v. Hanlon*, 713 S.W.2d 335, 336-37 (Tex. 1986), and local law enforcement officials such as the District Attorney. *See Sheppard v. Thomas*, 101 S.W.3d 577, 580 (Tex. App.—Houston[1st Dist.] 2003, pet. denied) (“district courts are vested with original mandamus jurisdiction over county officials”); *In re Crudup*, 179

S.W.3d 47, 51 (Tex. App.—San Antonio 2005, no pet.). San Jacinto County is an indispensable party to this injunction proceeding as Plaintiffs are seeking to enjoin the District Attorney and the Clerk of the District Court of San Jacinto County. *See Davis v. Wildenthal*, 241 S.W.2d 620, 622 (Tex. App.—El Paso 1951, writ ref'd n.r.e.).

### **BACKGROUND FACTS**

11. Claude Howard Jones was executed by the State of Texas on December 7, 2000 for the murder of Allen Hilzendager. Mr. Hilzendager was murdered during an apparent robbery at a liquor store in San Jacinto County, though there are indications that the killing may have been motivated by hate rather than greed. To the end, Mr. Jones steadfastly denied that he had any involvement in Mr. Hilzendager's death. *See* Affidavit of James A. Delee, ¶ 4 and there always has been substantial reason to doubt that Mr. Jones was the killer. Apart from the later-recanted testimony of Timothy Mark Jordan, who admitted his participation in the killing — and whose testimony, standing alone, was therefore insufficient as a matter of law to support the jury's verdict — the evidence of Mr. Jones's involvement in the crime was entirely circumstantial. *Compare* Morrison Aff., Ex. 1 (Trial Transcript 458-460) *with* Morrison Aff., Ex. 2 (May 24, 2004 Affidavit of Timothy Mark Jordan).

12. At the center of this circumstantial web was an inch-long hair fragment that was found on the counter behind which Mr. Hilzendager was standing when the fatal shots were fired. Stephen Robertson, a forensics expert employed by the Texas Department of Public Safety, testified at trial that, of fifteen individuals believed to have had access to the store on the day of the murder, the hair fragment was a potential match only for Mr. Jones. However, as Mr. Robertson candidly explained, the microscopic hair analysis that he employed to arrive at that conclusion was far from an exact science:

[W]e take a hair that we want—that we’re worried about and we compare that hair to this person’s hair. If that hair falls within the range of characteristics that that person has, then that could be that person’s hair or it could be another person that has hair with similar characteristics. Technology has not advanced where we can tell you that this hair came from that person. Can’t do that. We can tell you that this hair matches this person in all characteristics and could be his. . . . [I]t’s impossible to put a percentage or a statistical study on these variations because each hair in your head varies a little bit. How do you put a number on something that varies like that? . . . So I can’t tell you, you know, this hair occurs in 10 percent of the population. Nobody can tell you something like that.

Trial Transcript 693-94. *See Morrison Aff.*, Ex. 3.

13. Apart from Mr. Robertson’s admittedly inconclusive analysis, no physical or forensic evidence tied Jones to the scene of the crime. *See Jones v. State*, No. 71,127, slip op. at 1-5 (Tex. Crim. App. 1994) (en banc) (reciting the evidence presented at trial by the State). And neither of the two eyewitnesses to the scene of the crime was able to identify Mr. Jones as the man who entered the liquor store shortly before shots were fired. *See Morrison Aff.*, Ex. 4 (Trial Transcript 113-14, 119, 123 (Wendy Goodson); 136-37, 141, 148-49, 161-62 (Leaon Goodson)). Rather, their testimony established only that, from some distance and at night, the man who entered the store appeared to be — like Mr. Jones — of medium height, middle-aged, and pot-bellied, and wearing a gray sweatshirt not unlike the one that witness Terry Hardin said Mr. Jones had been wearing that day.<sup>1</sup> *See Morrison Aff.*, Ex. 4, *supra*; Ex. 5 (Trial Transcript 353). Crucially, this testimony did not exclude Danny Dixon, who was convicted of participating in the robbery that culminated in Mr. Hilzendager’s death. Like Mr. Jones, Mr. Dixon was of medium height, was middle-aged, and was described by Hardin as “stocky”, precisely the same word she later used to describe Mr. Jones’s physique. *See Morrison Aff.*, Ex. 5 (Trial Transcript 343-44, 349). Hardin conceded that, at “five six, five seven” and “[a]bout

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<sup>1</sup> In fact, eyewitness Wendy Goodson testified that Mr. Jones *did not* have the same hair color as the man who killed Mr. Hilzendager. *See Morrison Aff.* Ex. 4 (Trial Transcript 119).

200” pounds, Dixon also had a pot belly, though she suggested that it was a “little one.” *See Morrison Aff.*, Ex. 5 (Trial Transcript 407). The other circumstantial evidence of Mr. Jones’s guilt — that the fatal shots were fired from a gun owned by Mr. Jordan, and that a pickup truck resembling Mr. Dixon’s truck was seen parked outside the liquor store by one eyewitness — likewise pointed equally to Dixon, who, according to Hardin, was well acquainted with Jordan, *see Morrison Aff.*, Ex. 5 (Trial Transcript 344), and owned the relevant truck. Given this backdrop, the hair analysis performed by Mr. Robertson was *the* key piece of evidence against Mr. Jones, as it was the only evidence that tended to show that Mr. Jones was more likely than Mr. Dixon to have committed the crime. As the prosecution put it in summation: “[W]here was the hair found? That hair was found right in the area where [Jones] was shooting that gun. And what did Mr. Robertson tell us? Mr. Robertson said, out of all the people he tested that he had, that hair matches this defendant, Claude Howard Jones.”<sup>2</sup> *See Morrison Aff.*, Ex. 6 (Trial Transcript 827). So counseled, the jury found Mr. Jones guilty, and he was subsequently sentenced to death.

14. A sharply divided panel of the Court of Criminal Appeals affirmed both the conviction and sentence. Like the prosecution, the majority viewed the microscopic hair analysis as a critical piece of evidence against Mr. Jones, noting that “[Jones] was the only person with access to the pistol whose hair sample matched the one at the murder scene.” *Jones v. State*, No. 71,127, slip op. at 5 (Tex. Crim. App. 1994) (en banc). *See Morrison Aff.*, Ex. 7. The dissent likewise emphasized the importance of the hair analysis to the prosecution’s case, but reached

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<sup>2</sup> Plaintiffs note that The Honorable Robert Hill Trapp of this Court was the district attorney who prosecuted Jones at trial and represented Texas on direct appeal. TEX. R. CIV. P. 18b(2)(d) provides that a judge “shall recuse himself in any proceeding in which he participated as counsel . . . in the matter in controversy, or expressed an opinion concerning the merits of it, while acting as an attorney in government service.” See also TEX. R. CIV. P. 18b(2)(d) (providing for recusal where judge has “personal knowledge of disputed evidentiary facts concerning the proceeding”). Plaintiffs do not at this time request that Judge Trapp be recused from this case, but raise the matter for the Court’s consideration in the first instance.

the opposite conclusion: “Because the hair sample establishes only a similarity, it is insufficient to tend to connect [Jones] with the commission of the offense.” *Jones*, slip op. at 4 (Baird, J., dissenting). *See Morrison Aff.*, Ex. 7. Mr. Jones’s further appeals to state and federal tribunals were unavailing.

15. On December 6, 2000, Mr. Jones asked the 258th District Court for San Jacinto County to stay his impending execution for the purpose of allowing the hair fragment entered into evidence at trial to be subjected to mitochondrial DNA testing. *See Morrison Aff.*, Ex. 8. This technology, which had not been available at the time of Mr. Jones’s trial, could have determined what the State’s witness conceded that microscopic hair analysis could not — whether the hair fragment came from Claude Jones or from a different person with similar hair. However, the Court deemed Mr. Jones’s request to be a successive writ for habeas corpus or, in the alternative, to be an abuse of the writ, and therefore denied Mr. Jones’s motion to stay his execution.<sup>3</sup> *See Morrison Aff.*, Ex. 9. The Court of Criminal Appeals also concluded that Jones’ stay motion constituted an abuse of the writ, and denied his application. *See Morrison Aff.*, Ex. 10.

16. Mr. Jones also requested a stay of execution from then-Governor Bush. *See Morrison Aff.*, Ex. 11. However, as documents later obtained by The Innocence Project pursuant to an Open Records Act request demonstrate, the memorandum provided to the Governor to assist his consideration of Jones’s stay request ignored the entire premise of the plea for clemency, failing to even *mention* the term DNA, let alone address Mr. Jones’s argument that mitochondrial DNA testing might demonstrate his innocence. *See Morrison Aff.*, Ex. 12.

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<sup>3</sup> Plaintiffs note that The Honorable Elizabeth E. Coker of this Court signed the order denying Jones’s stay request. Plaintiffs do not at this time request that Judge Coker be recused from this case, but raise the matter for the Court’s consideration in the first instance.

17. This failure occurred even though officials in the Governor's Office clearly understood that the sole issue raised by the stay petition was the reliability of the hair analysis; in fact, the documents obtained by the Innocence Project show that, on December 7, 2000, Mr. Shannon Edmonds, then an assistant general counsel in the Governor's Office, called Stephen Robertson — the DPS official who had testified at trial — to ask about the hair analysis that Robertson had performed during the investigation of Mr. Jones. *See Morrison Aff.*, Ex. 13. Robertson advised Edmonds to contact the FBI Lab in Washington, D.C. to inquire whether a mitochondrial DNA test could be performed on the hair sample. *See Morrison Aff. Ex.*, 13. This, of course, was precisely the relief that Mr. Jones was seeking. Given these circumstances, the failure of the Governor's staff to advise the Governor of the reason that Mr. Jones was seeking a stay of his execution is inexplicable. It may also have been highly consequential, as the Governor had previously supported the grant of a stay to Texas death-row inmate Ricky McGinn so that a DNA test could be conducted prior to McGinn's execution. In explaining the position he had taken with respect to Mr. McGinn's request, Governor Bush stated, "[a]ny time DNA can be used in its context and can be relevant as to the guilt or innocence of a person on death row, we need to use it."

*See* <http://archives.cnn.com/2000/LAW/06/02/bush.reprive/> (last visited Aug. 13, 2007).

18. Having never been informed that Mr. Jones also sought a DNA test relevant to his guilt or innocence of the charged murder, Governor Bush denied his stay request on December 7, 2000. *See Morrison Aff.*, Ex. 14. Claude Jones was executed later that day.

19. Because Mr. Jones' request for DNA testing was denied, the hair sample upon which Mr. Jones's conviction was based was *never* subjected to any scientifically conclusive method of testing at any stage of the trial, appellate or clemency proceedings. To this day,

therefore, nobody can say with confidence whether the hair fragment at the core of the prosecution's case came from Claude Jones or instead belonged to someone else.

20. On May 24, 2004, Max M. Wayman, an investigator engaged by the NAACP Legal Defense and Educational Fund, Inc., visited the San Jacinto County Courthouse to determine whether the trial exhibits admitted in Mr. Jones' trial had been preserved. *See* Affidavit of Max. M. Wayman, ¶ 3. During this visit, Wayman spoke to Defendant-Respondent Rebecca Capers, who at that time was Deputy Chief Clerk for San Jacinto County. *Id.* ¶ 3. Capers located the requested trial exhibits, including the hair sample at the center of this dispute and other hair samples collected for the Jones trial, and permitted Wayman to view them. *Id.* ¶ 3. On July 8, 2004, a second investigator, Gary D. Maberry, visited the San Jacinto County Courthouse on behalf of the Innocence Project. *Id.* ¶ 3; Affidavit of Gary D. Maberry, ¶ 3. Maberry arranged for the trial exhibits to be photographed. Maberry Aff. ¶¶ 3, 5. He was then advised by the then-District Clerk, Marilyn Nettles, that she would not permit forensic examination of the exhibits without a court order. *Id.* ¶ 4. Nettles also advised Maberry that her office had been directed to destroy the records of the trial, and that they had been preserved only due to oversight. *Id.* ¶ 4. Wayman returned to the Courthouse on December 20, 2005, this time at the request of plaintiffs. *See* Wayman Aff. ¶ 5. During this visit, Wayman was again permitted to view the physical evidence admitted at trial, and thereby confirmed that this evidence was still in the possession of the Clerks' Office. *Id.* ¶ 5. Wayman also observed at that time a copy of the order directing the District Clerk to destroy the trial exhibits. *Id.* ¶ 6. Plaintiffs do not possess a copy of that order, and therefore do not know its precise contents or who issued it. Informed that the Innocence Project would be moving to prevent the destruction of the evidence and for its release for testing,

Capers agreed not to destroy the exhibits until the matter could be resolved in a formal proceeding. Wayman Aff. ¶ 5.

21. Because Capers has refused to release this evidence for testing without formal proceedings, Plaintiffs have filed a request pursuant to the Texas Open Records Act seeking access to the hair sample and related evidence. See Knull Aff. ¶ 3 and Morrison Aff., Ex. 15. Plaintiffs have not yet received a response to this request. See Knull Aff. ¶ 4. However, in conversations on September 4 and 6, 2007, the undersigned counsel was informed by Defendant Burnett that he would not agree to testing the hair sample and would not agree to preserve the evidence pending a ruling in court. See Knull Aff., § 6. Accordingly, given the existence of a standing order to destroy the evidence and Mr. Burnett's refusal to agree to preserve the evidence, Plaintiffs submit that immediate declaratory or injunctive relief is necessary to ensure that this evidence is not destroyed before the Open Records Act process can be completed.

### **CAUSES OF ACTION**

#### **I. Texas Law Requires Preservation And Disclosure Of The Claude Jones Evidentiary File**

22. The fundamental question presented by this Petition is whether the State of Texas may close the door on the Claude Jones matter by destroying the physical evidence of the crime, or whether the People of Texas have a right to know whether critical evidence in the case presented in the trial of the man who paid the ultimate price for Mr. Hilzendager's murder in fact did not belong to Mr. Jones. Under Texas law, the answer is clear. As the People, through their Legislature, emphatically declared in enacting the Open Records Act:

it is the policy of this state that each person is *entitled*, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people

insist on remaining informed so that they may retain control over the instruments they have created.

TEX. GOV'T. CODE ANN. § 552.001 (West 2007) (emphasis added).

23. Because the State has declared its intention to destroy this evidence, rather than to preserve or test it itself, only this Court can preserve the People's right to know the truth about this case, and thereby give effect to the People's insistence on remaining fully informed so that they may retain control over the instruments of government they have created. At least in these grave circumstances, the law of this State entitles each citizen of Texas to know whether Jones's conviction was based on an accurate identification of the hair sample. By seeking to preserve and test the hair fragment and to release the results of that test to the public, Plaintiffs intend to defend and effectuate that fundamental right. By seeking a resolution to this lingering question concerning the identity of Mr. Hilzendager's killer, Plaintiffs intend to either give Mr. Hilzendager's kin definitive reassurance that justice was served, or alert the People that the task of prosecuting of the actual killer remains.

**II. The Right Of Public Access To Judicial Records And Trial Exhibits Guaranteed By The Common Law And The United States And Texas Constitutions Requires The Preservation And Disclosure Of The Evidence**

24. Plaintiffs also are entitled to the requested relief because the common law recognizes a powerful presumption of public access to exhibits entered into evidence at trial. That right is overcome only where disclosure would pose a clear threat of harm to an identifiable individual or to an overriding societal interest. Because no such countervailing concern is present here, the common law gives Plaintiffs the right to obtain and test the physical evidence presented at Claude Jones's trial.

25. At least since the United States Supreme Court's decision in *Nixon v. Warner Communications*, it has been clear that "the courts of this country recognize a general right to

inspect and copy public records and documents, including judicial records and documents.” 435 U.S. 589, 597 (1979). That right of access is not limited to paper documents, but extends to “any item entered into evidence at a public session of a trial.” *In re Nat’l Broad. Co., Inc.*, 635 F.2d 945, 952 (2d Cir. 1980). *See also Belo Broad. Corp. v. Clark*, 654 F.2d 423, 429 (5th Cir. 1981) (holding that the common law creates a right of access to courtroom exhibits). The courts of Texas, like the federal courts, have recognized and vigorously protected this right. *See Times Herald Printing Co. v. Jones*, 717 S.W.2d 933, 936 (Tex. App.—Dallas 1986) (recognizing that “a common-law right of inspection and copying judicial records exists”), *rev’d on other grounds*, 730 S.W.2d 648 (Tex. 1987); *Taylor v. Texas*, 938 S.W.2d 754, 757 (Tex. App.—Waco 1997, no pet.) (describing the existence of a common-law right of access as “axiomatic”). The importance of this common-law right under Texas law is also reflected in Texas Rule of Civil Procedure 76a, which safeguards the public’s right of access by permitting the sealing of court documents only in carefully and narrowly defined circumstances where a “serious and substantial interest” in closure “clearly outweighs [] this presumption of openness.” TEX R. CIV. P. 76a. *See Clear Channel Communs., Inc. v. United Servs. Auto. Ass’n*, 195 S.W.3d 129, 136-37 (Tex. App.—San Antonio 2006, no pet.) (holding that the trial court erred by issuing a protective order that directed the clerk to file under seal all pleadings and documents that a party unilaterally designated as confidential without first complying with the procedures mandated by TEX. R. CIV. P. 76a). Here, the public has an overriding interest in “remaining informed so that they may retain control over the instruments they have created,” particularly where the instrument involved is the machinery by which capital punishment is imposed.

26. The First Amendment to the United States Constitution and Article I, Section 8 of the Texas Constitution also guarantee a broad right of access to trial exhibits entered in evidence

in criminal trials. See *Globe Newspaper v. Superior Court of Norfolk County*, 457 U.S. 596, 605 (1982) (“a right of access to criminal trials in particular is properly afforded protection by the First Amendment”); *Times Herald Printing Co.*, 717 S.W.2d at 936-37 (suggesting that the right of access guaranteed by Art. I, Section 8 is coextensive with the First Amendment right).

27. While the right of access to exhibits entered into evidence at trial “is not absolute,” see *Nixon*, 435 U.S. at 598, that right nonetheless has been broadly construed, subject only to narrow limitations consistent with the recognition that the right of access is “fundamental to a democratic state.” *United States v. Mitchell*, 551 F.2d 1252, 1260 (D.C. Cir. 1976), *rev’d sub nom. Nixon v. Warner Communications*, 435 U.S. 589 (1978). Thus, appellate courts have upheld denial of public access to trial exhibits only where the clear prospect of unwarranted harm to an entity or individual required that result or where the exigencies of the litigation process so demanded. The United States Supreme Court noted in *Nixon*, for example, that “the painful and sometimes disgusting details of a divorce case,” “libelous statements,” and “business information that might harm a litigant’s competitive standing” may be properly withheld from the public view notwithstanding the strong presumption of public access to trial exhibits. *Nixon*, 435 U.S. at 598. The Texas Supreme Court has likewise held that public access may be denied where it is necessary for “the courts of appeals to protect their jurisdiction.” *Dallas Morning News v. Fifth Circuit Court of Appeals*, 842 S.W.2d 655, 658-59 (Tex. 1992) (held court of appeals properly denied public access where disclosure of sought exhibits would frustrate its jurisdiction of an appeal of a Rule 76a motion to seal in the same litigation). Other courts have noted that limitations on the common-law rights of the public and the press may be necessary to protect weighty societal interests such as “the defendant’s right to a fair trial . . . certain privacy rights of participants or third parties, trade secrets and national security.” *Brown & Williamson*

*Tobacco Corp. v. Fed. Trade Comm'n*, 710 F.2d 1165, 1179 (6th Cir. 1983). In sum, courts have consistently held that the strong presumption of public access may be curtailed only where “closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *In re New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987) (internal quotation marks and citation omitted).

28. In the same vein, courts have strongly resisted attempts to expand the array of interests deemed sufficient to overcome the powerful and historic presumption in favor of public access beyond this narrow sphere. In particular, they have repeatedly made clear that the prospect that a party will be embarrassed by the truth that disclosure would reveal is not enough to justify displacement of the historic right. *See, e.g., Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982) (“[A] naked conclusory statement that publication of the Report will injure the bank in the industry and local community falls woefully short of the kind of showing which raises even an arguable issue as to whether it may be kept under seal.”); *Brown & Williamson*, 710 F.2d at 1179 (“Simply showing that the information would harm the company’s reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records. . . . Indeed, common sense tells us that the greater the motivation a corporation has to shield its operations, the greater the public’s need to know.”); *Skolnick v. Alzheimer & Gray*, 730 N.E.2d 4, 14-18 (Ill. 2000) (trial court abused its discretion if it sealed counterclaim to spare plaintiff from embarrassment).

29. Finally, courts have made clear that the *kind* of access guaranteed by the common law and the First Amendment is not static, but varies with the interests at stake at a particular point in a given case. *See, e.g., Nixon*, 435 U.S. at 599 (noting that contours of access must be determined “in light of the relevant facts and circumstances of the particular case”). Drawing on

this principle, the Fifth Circuit has recognized that interests that may justify restrictions on access to evidence during trial may recede in the face of the common-law right of access once the judicial process has reached its conclusion. *See United States v. Branch*, 26 F.3d 1118, 1994 WL 286169, at \*1 (5th Cir. 1994) (per curiam) (unpublished disposition) (noting that although it would be reluctant to question the trial court’s control of exhibits during the trial, “[f]ollowing completion of the trial with no companion trial to come, we would expect the court to allow access to public records such as the trial exhibits.”) (emphasis added).

30. Together, these precedents make clear that Plaintiffs are entitled to the relief they seek in this Court. First, the strong presumption of access created by the common law and the state and federal constitutions plainly applies. *See, e.g., In re Nat’l Broad. Co.*, 635 F.2d at 952. Second, no cognizable “higher value” stands in the way of the public’s right to access the evidence presented at trial: Plaintiffs seek access to the Claude Jones file for a proper purpose and in the service of the public interest; there is no danger that the release of the trial evidence to a forensic laboratory regularly employed by the State of Texas to perform mitochondrial DNA testing in active cases will interfere with an ongoing judicial proceeding because the judgment against Jones has long been final; and finally, it is clear that the authorities have no further plans to employ or preserve the evidence to serve any societal goal. To the contrary, Defendants intend to destroy the hair samples even though mitochondrial DNA testing of those samples could yet provide powerful evidence that Mr. Jones did not commit the murder and – particularly if it shows that the hair came from Danny Dixon – give clear direction as to the identity of the actual shooter.

31. In these circumstances, the presumption of access created by the common law and the state and federal constitutions mandates the preservation, disclosure and testing of the

evidence presented at Claude Jones's trial, including the one-inch hair fragment that was indispensable to the prosecution's case at trial and related evidence. Texas courts have long recognized that searching scrutiny of the criminal justice system provides a real and substantial benefit to the public and, ultimately, to the system itself. As the Court of Criminal Appeals once stated in discussing the necessity of maintaining open habeas proceedings, "[i]f the system failed [petitioner], it at once surely disserved the public. In demonstrating that failure before their very eyes, if he can, [petitioner] will provide the public with some information on which to base adjustment or reform in the criminal justice system." *Houston Chronicle Pub. Co. v. McMaster*, 598 S.W.2d 864, 867 (Tex. Cr. App. 1980) (en banc). Today, Texas is engaged in an ongoing review of its criminal justice system. That process of review is intended to strengthen the current system, and to ensure that it does not fail victims, defendants, or the public by convicting the innocent. Accurate information about the successes and failures of the existing system is critical to that process and indispensable to the public discourse that surrounds and informs the official effort. This is democracy at work, and democracy at its finest. Properly construed, the right of public access and knowledge fundamental to the Texas system of government, adopted by the common law, and protected by the state and federal constitutions, can further that democratic discourse by permitting Plaintiffs to determine whether, in Claude Jones's case, the system worked. The present request for a writ of mandamus compelling Defendants to release the hair sample and other related evidence asks no more of this Court, but also nothing less.

**III. Declaratory Relief Is Warranted To Ensure That The Requested Evidence Is Preserved Until The Presently Pending Legal Proceedings Have Concluded**

32. Plaintiffs are also entitled to declaratory and injunctive relief to prevent the destruction of the Claude Jones evidentiary file at any time, or in the alternative, while their Open Records Act request is pending. As noted in paragraph 21 above, Plaintiffs filed a request

under the Act on August 31, 2007 seeking access to this evidence. Defendants have not yet acted on this request. *See* Knull Aff., ¶ 4.

33. However, as noted above, Defendant Burnett informed Plaintiffs' counsel that he will not agree to either transfer the requested hair sample and related evidence, or even preserve the same. *See* Knull Aff., ¶ 6.

34. It is clearly established that a party may seek declaratory relief in these circumstances to ensure that the state agency to which the Open Records Act request was directed does not destroy the materials responsive to the request until the Public Information Officer has determined whether the requestors in fact are entitled to the desired records. *See Burnam*, 137 S.W.3d at 331 (“declaratory relief is appropriate in order to compel the Department to act within the requirements of the [Act].”). Declaratory relief is appropriate because state agencies are forbidden to destroy materials that become the subject of a pending Open Records Act request before the applicable mandatory retention period has expired. *See* TEX. GOV'T CODE ANN. § 441.187(b) (“A state record may not be destroyed if any litigation, claim, negotiation, audit, open records request, administrative review, or other action involving the record is initiated before the expiration of a retention period for the record set by the commission or in the approved records retention schedule of the agency until the completion of the action and the resolution of all issues that arise from the action, or until the expiration of the retention period, whichever is later.”).

35. The applicable retention period for these exhibits is set forth in TEX. CODE CRIM. P. ART. 38.43. By its terms, “[t]his article applies to evidence that: (1) was in the possession of the state during the prosecution of the case; and (2) at the time of conviction was known to contain

biological material that if subjected to scientific testing would more likely than not: (A) establish the identity of the person committing the offense; or (B) exclude a person from the group of persons who could have committed the offense.” Art. 38.43(b).

In pertinent part, the statute further provides:

(c) Except as provided by Subsection (d), material required to be preserved under this article must be preserved: (1) until the inmate is executed, dies, or is released on parole, if the defendant was convicted of a capital felony;

and that

(d) The attorney representing the state, clerk, or other officer in possession of evidence described by Subsection (b) may destroy the evidence, but only if the attorney, clerk, or officer by mail notifies the defendant, the last attorney of record for the defendant, and the convicting court of the decision to destroy the evidence and a written objection is not received by the attorney, clerk, or officer from the defendant, attorney of record, or court before the 91st day after the later of the following dates:

(1) the date on which the attorney representing the state, clerk, or other officer receives proof that the defendant received notice of the planned destruction of evidence; or  
(2) the date on which notice of the planned destruction of evidence is mailed to the last attorney of record for the defendant.

36. Article 38.43 unquestionably applies to the hair fragment and other related samples that are the subject of this petition, as they were admitted into evidence during Mr. Jones’s prosecution, and are biological materials that were subjected to scientific testing for the specific purpose of identifying suspects and excluding persons from suspicion. *See* TEX. CODE CRIM. P. ART. 38.43(b).

37. Article 38.43(d) just as plainly requires the continued preservation of this evidence because Defendants have failed to provide prior notice of their intent to dispose of this evidence

to Mr. James A. Delee, Mr. Jones's final attorney of record, as TEX. CODE CRIM. P. ART. 38.43(d) mandates. *See* Affidavit of James A. Delee, ¶ 5. This failure means that the applicable mandatory retention period has not expired, and that the destruction of the trial exhibits during the pendency of the present Open Records Act process therefore would be unlawful under TEX. GOV'T CODE ANN. § 441.187(b). Declaratory relief should issue to ensure the preservation of this evidence until the Open Records Act process is complete.

38. Additionally, Defendants' failure to comply with the notice provisions of TEX. CODE CRIM. P. ART. 38.43 means that the evidence must be preserved, at a minimum, until the 91st day following mailing of the required notice to Mr. Delee. Destruction of evidence containing biological evidence at any earlier point would be unlawful under the plain terms of this statute, and declaratory relief should issue to ensure its preservation for the full period mandated by the Legislature.

### **RIGHT TO REMEDY**

38. The Court should also enter an order enjoining Defendants from destroying or disposing of the requested materials until they have satisfied the notice requirements of TEX. CODE CRIM. P. ART. 38.43 or, in the alternative, until the Open Records Act Request has been resolved. In doing so, the court may act pursuant to its ancillary powers under the uniform declaratory judgments act, *see* TEX. CIV. PRAC. & REM. ANN. § 37.011, the general injunction statute, *see* TEX. CIV. PRAC. & REM. ANN. § 65.011; TEX R. CIV. P. 680-89, or the common law. *See Triantaphyllis v. Gamble*, 93 S.W.3d 398, 401 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

39. A court may issue an injunction if, *inter alia*: (1) the applicant is entitled to the relief demanded and all or part of the relief requires the restraint of some act prejudicial to the applicant; or (2) a party performs or is about to perform or is procuring or allowing the performance of an act relating to the subject of pending litigation, in violation of the rights of the applicant, and the act would tend to render the judgment in that litigation ineffectual. TEX. CIV. PRAC. & REM. CODE § 65.001.

40. As demonstrated *supra*, Plaintiffs are entitled to the relief sought, which requires restraining Defendants from carrying out the order to destroy the evidence at issue, including the critical hair sample and related evidence.

41. In addition, the order to destroy directly involves the evidence at issue — which is the subject of the pending Open Records Act request — and would violate Plaintiffs’ rights of access to that evidence. The performance of that act, *i.e.*, the destruction of the evidence, would necessarily render final adjudication in the pending Open Records requests ineffectual.

42. Under the common law, a moving party is entitled to injunctive relief if it can prove “the existence of a wrongful act, imminent harm, irreparable injury, and the absence of an adequate legal remedy.” *Howell v. Tex. Workers’ Compensation Comm’n*, 143 S.W.3d 416, 432 (Tex. App.—Austin 2004, pet. denied). Each of these requirements is satisfied here.

43. As discussed above in paragraph 29 and 30, Defendants are prohibited by statute from destroying the materials before complying with the notice provisions of TEX. CODE CRIM. P. ART. 38.43 or, in the alternative, while the Plaintiffs’ Open Records Act request is pending.. Accordingly, any destruction or alteration of these materials would be unlawful.

44. Plaintiffs face imminent harm because an order directing Defendant/Respondent Rebecca Capers to destroy the requested evidentiary materials has already issued and only “oversight” saved the evidence from destruction. Moreover, Defendant Burnett has indicated to Plaintiffs that he will not agree to either transfer or preserve the evidence. Therefore, Plaintiffs’ request is not motivated by mere “fear or apprehension,” *see id.*, but rather by the existence of a directive that, if carried out, would prevent this Court from granting effective relief.

45. The harm that Plaintiffs would suffer if the requested evidentiary materials are destroyed “cannot be adequately compensated in damages or . . . measured by any certain pecuniary standard,” and is therefore irreparable as a matter of law. *See Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). Although the evidentiary materials at issue have no evident monetary value, the injury suffered by Plaintiffs — the loss of evidence that could resolve an outstanding question central to the conviction of Mr. Jones — could not be compensated through money damages. Thus, Plaintiffs have no adequate remedy at law. *See id.*

#### **APPLICATION FOR TEMPORARY RESTRAINING ORDER**

46. Plaintiffs incorporate herein by reference paragraphs 1 through 45 as if set forth herein, and, as authorized by TEX. CIV. PRAC. & REM. CODE § 65.011 and TEX R. CIV. P. 680, further ask this Court for a temporary restraining order directing Defendants to preserve all exhibits entered into evidence in the trial of Claude Howard Jones.

47. It is probable that Plaintiffs will prevail after a trial on the merits due to the reasons stated in the foregoing paragraphs 1 through 45.

48. Given the nature of the remedy sought, Plaintiffs submit that bond is not required in this case. However, should the Court determine a bond to be necessary, Plaintiffs are willing to post bond.

**REQUEST FOR TEMPORARY INJUNCTION**

49. Plaintiffs incorporate herein by reference paragraphs 1 through 48 as if fully set forth herein, and, as authorized by TEX R. CIV. P. 681, further ask this Court to set their application for temporary injunction for a hearing and, after the hearing, issue a temporary injunction directing Defendants to preserve all exhibits entered into evidence in the trial of Claude Howard Jones.

50. Plaintiff has joined all indispensable parties under TEX. R. CIV. P. 39.

**REQUEST FOR PERMANENT INJUNCTION**

51. Plaintiffs incorporate herein by reference paragraphs 1 through 50 as if fully set forth herein, and further ask this Court to set their request for a permanent injunction for a full trial on the merits and, after the trial, issue a permanent injunction requiring Defendants to: grant access to all trial exhibits admitted in the trial of Cause # 6768, the State of Texas versus Claude Howard Jones, and the temporary transfer of Exhibits 75A, 75B, 75C, 75D (hair samples taken from Jones) and Exhibit 77, Item #13 (designated "Hair from counter") to a forensic testing facility mutually agreeable to the District Court Clerk and Plaintiffs.

**REQUEST FOR WRIT OF MANDAMUS**

52. Plaintiffs incorporate herein by reference paragraphs 1 through 51 as if fully set forth herein, and further ask this Court to issue a writ of mandamus to compel Defendants to grant access to all trial exhibits admitted in the trial of Cause # 6768, the State of Texas versus

Claude Howard Jones, and the temporary transfer of Exhibits 75A, 75B, 75C, 75D (hair samples taken from Jones) and Exhibit 77, Item #13 (designated “Hair from counter”) to a forensic testing facility mutually agreeable to the District Court Clerk and Plaintiffs.

**REQUEST FOR DECLARATORY JUDGMENT**

53. Plaintiffs incorporate herein by reference paragraphs 1 through 52 as if fully set forth herein, and, as authorized by TEX. CIV. PRAC. & REM. CODE §§ 37.001-37.011, further ask this Court to enter a declaratory judgment that: Defendants shall grant access to all trial exhibits admitted in the trial of Cause # 6768, the State of Texas versus Claude Howard Jones, and the temporary transfer of Exhibits 75A, 75B, 75C, 75D (hair samples taken from Jones) and Exhibit 77, Item #13 (designated “Hair from counter”) to a forensic testing facility mutually agreeable to the District Court Clerk and Plaintiffs.

**REQUEST FOR ATTORNEY’S FEES**

54. Plaintiffs further ask this court, as authorized by TEX. CIV. PRAC. & REM. CODE § 37.009, to award such costs and attorney’s fees as it deems equitable and just.

**DEMAND FOR JURY**

55. Plaintiffs demand a jury trial and tender the appropriate fee with this petition.

**CONDITIONS PRECEDENT**

56. All conditions precedent to Plaintiffs’ claims for relief have been performed or have occurred.

**REQUEST FOR DISCLOSURE**

57. Pursuant to TEX. R. CIV. P. 194, Plaintiffs request that Defendants disclose, within 50 days of the service of this request, the information or material described in Rule 194.2.

**PRAYER FOR RELIEF**

WHEREFORE, PREMISES CONSIDERED, Plaintiffs-Relators pray that this Court, upon consideration of their arguments, pleadings and affidavits, grant full hearings, and that:

- A temporary restraining order be issued prohibiting Defendants from destroying any exhibits — including the hair sample purportedly belonging to Claude Howard Jones and related evidence — entered into evidence in the Jones trial;
- A temporary injunction order be issued prohibiting Defendants from destroying any exhibits — including the hair sample purportedly belonging to Claude Howard Jones and related evidence — entered into evidence in the Jones trial;
- A permanent injunction order be issued granting access to all trial exhibits admitted in the trial of Cause # 6768, the State of Texas versus Claude Howard Jones, and the temporary transfer of Exhibits 75A, 75B, 75C, 75D (hair samples taken from Jones) and Exhibit 77, Item #13 (designated “Hair from counter”) to a forensic testing facility mutually agreeable to the District Court Clerk and Plaintiffs;
- A writ of mandamus be issued granting access to all trial exhibits admitted in the trial of Cause # 6768, the State of Texas versus Claude Howard Jones, and the temporary transfer of Exhibits 75A, 75B, 75C, 75D (hair samples taken from Jones) and Exhibit 77, Item #13 (designated “Hair

from counter”) to a forensic testing facility mutually agreeable to the District Court Clerk and Plaintiff;

- A declaratory judgment be entered, granting access to all trial exhibits admitted in the trial of Cause # 6768, the State of Texas versus Claude Howard Jones, and the temporary transfer of Exhibits 75A, 75B, 75C, 75D (hair samples taken from Jones) and Exhibit 77, Item #13 (designated “Hair from counter”) to a forensic testing facility mutually agreeable to the District Court Clerk and Plaintiff;
- Such reasonable attorney’s fees and costs be awarded as are equitable and just;
- Plaintiffs receive all such further and available relief that this Court, in equity or justice, may award.

SIGNED this \_\_\_\_ day of September, 2007.

Respectfully Submitted,  
MAYER BROWN LLP

By: \_\_\_\_\_

William H. Knull, III  
700 Louisiana Street, Suite 3400  
Houston, TX 77002-2730  
Telephone: (713) 221-1651  
Facsimile: (713) 224-6410

ATTORNEYS FOR PLAINTIFFS-  
RELATORS  
THE TEXAS OBSERVER  
INNOCENCE PROJECT, INC.  
INNOCENCE PROJECT OF TEXAS and  
TEXAS INNOCENCE NETWORK

NO. \_\_\_\_\_

**THE TEXAS OBSERVER,  
INNOCENCE PROJECT, INC.,  
INNOCENCE PROJECT OF TEXAS,  
and TEXAS INNOCENCE NETWORK**

§  
§

**IN THE DISTRICT COURT OF**

**Plaintiffs/Relators,**

§  
§

v.

§  
§

**SAN JACINTO COUNTY, TEXAS**

**SAN JACINTO COUNTY DISTRICT  
ATTORNEY,  
REBECCA CAPERS as DISTRICT  
COURT CLERK for San Jacinto County  
and SAN JACINTO COUNTY**

§  
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**Defendants/Respondents.**

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\_\_\_\_\_ **JUDICIAL DISTRICT**

**ORDER**

1. After considering Plaintiffs’ application for temporary restraining order, the pleadings, the affidavits, and arguments of counsel, the Court finds there is evidence that harm is imminent to Plaintiffs, and if the Court does not issue the temporary restraining order, Plaintiffs will be irreparably injured because the loss of evidence that could potentially exonerate Claude Jones could not be compensated through money damages.

2. Therefore, by this Order, the Court does the following:

a. Restrains Defendants-Respondents, Bill Burnett in his capacity as San Jacinto County District Attorney, Rebecca Capers in her capacity as District County Clerk for San Jacinto County, and San Jacinto County, from destroying or disposing of any evidence entered into evidence in the trial of Claude Howard Jones (No. 71,127).

b. Orders the clerk to issue notice to Defendants-Respondents, Bill Burnett in his capacity as San Jacinto County District Attorney, Rebecca Capers in her capacity as District

County Clerk for San Jacinto County, and San Jacinto County, that the hearing on Plaintiffs' application for temporary injunction is set for 2007, at \_\_\_\_a.m./p.m. The purpose of the hearing shall be to determine whether this temporary restraining order should be made a temporary injunction pending a full trial on the merits.

c Sets bond at \$\_\_\_\_\_

This order expires on \_\_\_\_\_, 2007

SIGNED on \_\_\_\_\_, 2007, at \_\_\_\_\_ a.m./p.m.

\_\_\_\_\_

Presiding Judge