



Writ Cause No. 50,961-08
Trial Court Cause No. 8701

Ex parte § IN THE 21ST DISTRICT COURT
RODNEY REED §
Applicant. § OF
§ BASTROP COUNTY, TEXAS
§

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After considering the record in this case, and after making credibility determinations following a live hearing in this state habeas proceeding, the Court enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

Relevant Procedural History

1. On May 18, 1998, Applicant, Rodney Reed, was found guilty of the capital murder of Stacey Stites. On May 28, 1998, Applicant was sentenced to death.
2. Applicant has challenged his conviction and sentence on numerous occasions in both state and federal court. *See, e.g., Ex parte Reed*, Nos. WR-50,961-07 & WR-50,961-08, 2017 WL 2131826, at *1 (Tex. Crim. App. May 17, 2017).
3. The conviction challenge presently before the Court comes from Applicant's eighth state habeas application, filed on June 7, 2016. *See Eighth Appl. 18.*
4. In Applicant's eighth application, he raised three grounds: (1) newly-discovered evidence—an interview of Curtis Davis by CNN in 2016 wherein Davis recalled a 1996 conversation with Jimmy Fennell—supports his actual-innocence claim; (2) this newly-discovered evidence was suppressed, is favorable, and is material to his conviction; and (3) this newly-discovered evidence proves that false testimony was given at Applicant's capital murder trial. *See generally Eighth Appl. 1-13.*
5. Because Applicant's eighth application was filed subsequent to his initial one, the Court of Criminal Appeals considered it under Section 5 of Article 11.071 of the Code of Criminal Procedure. *Ex parte Reed*, 2017 WL 2131826, at *2
6. On May 17, 2017, the Court of Criminal Appeals remanded the eighth application, in part:

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In his [eighth] application (our –08), applicant asserts that he has newly discovered evidence that supports his claim that he is actually innocent [Ground One], that the State’s failure to disclose this newly discovered evidence violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963) [Ground Two], and that this newly discovered evidence shows that the State presented false and misleading testimony, which violated his right to due process [Ground Three]. See *Ex parte Chabot*, 300 S.W.3d 768, 771 (Tex. Crim. App. 2009).

After reviewing the [eighth] application, we find that application has failed to make a prima facie showing of actual innocence [Ground One]. However, we further find that his *Brady* [Ground Two] and false testimony [Ground Three] claims do satisfy the requirements of Article 11.071 § 5. Accordingly, we remand those claims to the trial court for resolution.

Ex parte Reed, 2017 WL 2131826, at *2.

7. The Court set the two remanded claims for a live evidentiary hearing. That hearing took place over four days beginning October 10, 2017. During that hearing, the following individuals testified: Curtis Davis, David Hall, Nina Smith, Forrest Sanderson, Dr. Michael Baden, Lydia Clay-Jackson, Calvin Garvie, David Campos, David Board, “Rocky” Wardlow, Charles Penick, and Carol Stites. The Court also admitted various items of evidence, including judicially noticing the record of Applicant’s capital murder trial.
8. Following the hearing, the Court ordered the parties to submit proposed findings of fact and conclusions of law.

The Evidentiary Hearing

Curtis Davis

9. Applicant called Curtis Davis. 2.EHRR.47.
10. Davis testified that, at the time of Stites’s murder, he was good friends with Fennell and Stites. 2.EHRR.52–56.
11. Davis testified that he was interviewed by CNN sometime in 2016 regarding a conversation that he had with Fennell that took place about twenty years earlier. 2.EHRR.57–58, 63–64, 104.
12. The factual basis of Applicant’s remanded grounds for review—that Fennell supposedly told Davis that (1) he arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) had consumed some alcohol on April 22, 1996—

stems from Davis's interview by CNN sometime in 2016. *See generally* AX.1; Eighth Appl. 1–13.

13. Davis testified that Fennell never told Davis what time he arrived home on April 22, 1996, and that Davis surmised Fennell's arrival time based on his own granddaughter's experience in the same little league baseball organization in which Fennell previously coached. 2.EHRR.69.
14. Davis testified that he did not remember whether Fennell told him that Stites was asleep when Fennell arrived home on April 22, 1996, 2.EHRR.69, then later said that Stites being asleep was "an assumption," 2.EHRR.114, and he did "not think that [Fennell] ever" told him that Stites was asleep, 2.EHRR.116.
15. Davis testified that he had no personal knowledge of Fennell's activities or whereabouts on April 22, 1996. 2.EHRR.105.
16. Davis testified that he was not part of the investigation into Stites's murder. 2.EHRR.101.
17. Davis testified that he took time off from his employment as a jailer with the Bastrop County Sheriff's Office on April 23, 1996, before he had any conversations with Fennell regarding Fennell's whereabouts on April 22, 1996. 2.EHRR.103.

David Hall

18. Applicant called David Hall. 2.EHRR.132.
19. Hall testified that, at the time of Stites's murder, he worked with and was friends with Fennell, and they coached a little league baseball team together. 2.EHRR.132.
20. Hall had difficulty remembering the events of April 22, 1996, both at this evidentiary hearing and at a 2001 evidentiary hearing. *See, e.g.*, 2.EHRR.135, 144.
21. Hall recalled that he coached a little league baseball event, either practice or a game, with Fennell on April 22, 1996, which started sometime after school let out and ended sometime "[p]robably before dark." 2.EHRR.135, 138.
22. Hall previously testified that following the little league event, he and Fennell took some kids home, then Fennell took Hall home, and finally Fennell "went back to [his] apartment," 2.EHRR.145, all probably before sunset on April 22, 1996, 2.EHRR.147.

23. The Court notes that Hall did not think that he consumed any alcohol with Fennell on April 22, 1996 after the little league event, 2.EHRR.142, but that he could not say so with certainty and that sometimes they would have beers in the ballfields parking lot, 2.EHRR.145-46.

Nina Smith

24. Applicant called Nina Smith. 2.EHRR.149.
25. Nina Smith testified that she was the little league baseball president and treasurer in Giddings, Texas from 1988 to 1999. 2.EHRR.151.
26. Smith testified that Fennell coached little league with Hall at the time of Stites's murder. 2.EHRR.151-52.
27. Smith recalled that practices usually started around 5:00 p.m., that games usually started around 7:00 p.m., and that practices could end fairly late depending on whether there was a game scheduled and the coach's discretion. 2.EHRR.153.
28. Smith testified that while she never saw drinking at the ballfields by any coaches, 2.EHRR.154, there was a lot of activity on any given night at the ballfields, that she was usually watching her own children compete, and that it would have been "very easy" for something to have happened in the ballfields parking lot without her observation, 2.EHRR.159-60.

Forrest Sanderson

29. Applicant called Forrest Sanderson. 2.EHRR.163.
30. Sanderson testified that he was the First Assistant at the Bastrop County Criminal District Attorney's Office at the time of Applicant's trial. 2.EHRR.163.
31. Sanderson recalled speaking with Davis only one time about the Stites case, though he did not recall the details of what was discussed. 2.EHRR.174-76.
32. Sanderson had no recollection of there being an alternative timeline for Fennell's whereabouts on April 22, 1996. 2.EHRR.182.

Dr. Michael Baden

33. Applicant called Dr. Michael Baden. 3.EHRR.6.
34. Dr. Baden testified that he has been a forensic pathologist for the last fifty years. 3.EHRR.10.

35. Dr. Baden opined that Stites was dead before midnight on April 22, 1996; that there is no evidence from the autopsy or photos of Stites that she was sexually assaulted; and that Stites was dead in Fennell's truck for at least four to five hours before being left at the location where she was found. 3.EHRR.22-23, 34-77.
36. Dr. Baden admitted that "[a]utopsies can be done by competent people who have different opinions, or scenes can be looked at and have difference of opinions, sure." 3.EHRR.67.
37. Dr. Baden testified has never spoken with Fennell, Davis, and was not in Giddings on April 22, 1996. 3.EHRR.80.
38. Dr. Baden testified that he did not conduct, nor was he present at, Stites's autopsy, and that his opinions are based on a records review, which included photos and video that were not high resolution, and a video that was not continuous. 3.EHRR.81-84.
39. Dr. Baden confirmed that there was no formal measure of lividity, rigor, or body temperature taken for Stites, that no vitreous fluid was removed from her, and that no ambient temperature, light intensity, humidity, or topography were recorded at the crime scene. 3.EHRR.85-86.
40. Dr. Baden acknowledged that the determination of a sexual assault is not based simply on an autopsy. 3.EHRR.91-94.
41. Dr. Baden agreed with a learned treatise, Spitz and Fisher's *Medicolegal Investigation of Death*, that "none of the methods used in establishing time of death are totally reliable and mathematically precise. Dogmatic and pinpoint accuracy in this matter is clearly not achievable." 3.EHRR.98.

Lisa Tanner

42. Applicant stipulated to Lisa Tanner's testimony. 3.EHRR.122.
43. Tanner was the lead prosecutor at Applicant's capital murder trial. AX.22, at 1.
44. Tanner had no knowledge before, at, or after Applicant's capital murder trial that Fennell supposedly told Davis that (1) he arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) he had consumed some alcohol on April 22, 1996. AX.22, at 1-3.

Missy Wolfe

45. Applicant stipulated to Missy Wolfe's testimony. 3.EHRR.122.

46. Wolfe was the investigator for Tanner at Applicant's capital murder trial. AX.23, at 1.
47. Wolfe had no knowledge before, at, or after Applicant's capital murder trial that Fennell supposedly told Davis that (1) he arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) he had consumed some alcohol on April 22, 1996. AX.22, at 1-3.

Lydia Clay-Jackson

48. Applicant called Lydia Clay-Jackson. 3.EHRR.123.
49. Lydia Clay-Jackson testified that she was one of two attorneys who represented Applicant at his capital murder trial. 3.EHRR.128.
50. Clay-Jackson testified that the defense, at the time of Applicant's capital murder trial, did not have information that Fennell supposedly told Davis that he (1) had arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) had consumed some alcohol on April 22, 1996. 3.EHRR.150.
51. Clay-Jackson testified that, had she known Fennell told Davis that he (1) arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) had consumed some alcohol on April 22, 1996, she would have taken the "gloves off" when she cross-examined Fennell at Applicant's capital murder trial. 3.EHRR.152.
52. Clay-Jackson testified that, had she known Fennell told Davis that he (1) arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) had consumed some alcohol on April 22, 1996, she would have, during her cross-examination of Fennell, (a) accused Fennell of murdering Stites; (b) confronted Fennell with his Fifth Amendment invocation made to interrogating law enforcement; (c) confronted Fennell about his testimony concerning Stites's birth control cycle; (d) brought out a discrepancy regarding his recollection of his truck's fuel status; (e) elicited a conflict regarding the reason he did not drive Stites to work on April 23, 1996; and (f) brought out that Fennell closed his checking account on the day of Stites's death. 3.EHRR.152-61.
53. Clay-Jackson testified that, had she determined that a brief relationship Stites had with Jerry Ormand overlapped with that of Fennell, she might have called Ormand and his wife to testify at Applicant's capital murder trial. 3.EHRR.167.
54. Clay-Jackson testified that had she known Fennell told Davis that he (1) arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) had consumed some alcohol on April 22, 1996, it would have affected the forensic

investigation into the case and caused her to direct a forensic pathologist to look into Stites's time of death. 3.EHRR.168-69; 4.EHRR.9-12.

55. Clay-Jackson admitted that she did not remember all the details of Applicant's capital murder trial and that she had misremembered a few details from that trial. 4.EHRR.13.
56. Clay-Jackson admitted that, back in 2000, she did not remember all the details from Applicant's capital murder trial. 4.EHRR.16; AX.33.
57. In 2003, Clay-Jackson alleged that the State had failed to turn over a video of the crime scene, which was proven incorrect. 4.EHRR.16; RX.1.
58. Clay-Jackson admitted that a large portion of her opening statement at trial was used to paint Fennell as a suspect. 4.EHRR.30.
59. Clay-Jackson admitted that defense counsel investigated Fennell as a suspect prior to Applicant's capital murder trial. 4.EHRR.35.
60. Either through cross-examination or evidentiary presentation, Clay-Jackson made the following points at Applicant's capital murder trial that Fennell was a suspect: (a) Fennell was the only person with Stites after Carol last saw her; (b) Fennell told law enforcement what was disturbed or missing in his truck; (c) Fennell provided law enforcement with Stites's route to work; (d) Stites's sister, Crystal, hired a private investigator; (e) Fennell had been interviewed on multiple occasions by law enforcement; (f) Fennell's home had never been searched by law enforcement; (g) Fennell immediately sold his truck after it was returned by law enforcement; (h) Fennell invoked his Fifth Amendment rights during questioning by law enforcement; and (i) and a friend of Stites's thought Fennell was possessive and possibly slashed Stites's tires. 4.EHRR.36-40.
61. Clay-Jackson attempted to introduce at Applicant's capital murder trial the polygraph results from Fennell's two polygraph sessions, but the trial judge ruled them inadmissible. 4.EHRR.40.
62. In 2006, Clay-Jackson testified at a prior state habeas evidentiary hearing regarding Martha Barnett, a woman who claimed to have seen Stites and Fennell arguing in Fennell's truck in Paige, Texas, around 5:00 a.m. on April 23, 1996. 4.EHRR.42.
63. Barnett's testimony was inconsistent with the State's theory at Applicant's capital murder trial that Stites died around 3:00 a.m. on April 23, 1996, and also with Fennell's testimony at Applicant's trial that he was home around 8:00 p.m. on April 22, 1996 until awoken around 7:00 a.m. on April 23, 1996. 4.EHRR.45.

64. Clay-Jackson testified that she did not believe the CNN interview with Davis was the only timeline discrepancy at issue, and that the discrepancy at issue was a “scientific discrepancy.” 4.EHRR.45–46.
65. Clay-Jackson testified that, despite being presented with evidence that the State’s time-of-death estimate was incorrect and that Fennell was not where he claimed, Clay-Jackson did not say at the 2006 state habeas evidentiary hearing that she would have hired a forensic pathologist, challenged time of death, or conducted the cross-examination of Fennell she described in her present testimony. 4.EHRR.48–52, 69, 77, 89, 95.
66. Clay-Jackson admitted that she received a Bastrop Police Department report before Applicant’s capital murder trial that noted Fennell and Davis were close friends. 4.EHRR.61; RX.2.
67. Clay-Jackson admitted that she could not have cross-examined Fennell at Applicant’s trial regarding his polygraph results because it would have violated the trial court’s order. 4.EHRR.67.
68. Clay-Jackson admitted that the discrepancy regarding the fuel level of Fennell’s truck was included in the Bastrop Police Department report that she received before Applicant’s capital murder trial. 4.EHRR.74; RX.2.
69. Clay-Jackson believes that she received notice before Applicant’s capital murder trial that Fennell closed his checking account. 4.EHRR.79; AX.26.
70. Clay-Jackson admitted that had the defense pressed a consent defense—that Stites and Applicant had a consensual sexual relationship—this would have permitted the State to rebut with extraneous sexual assault offenses like those the State offered at punishment. 4.EHRR.83–87.
71. Clay-Jackson admitted that the defense subpoenaed Jerry Ormand and his wife at Applicant’s capital murder trial. 4.EHRR.88.
72. Clay-Jackson admitted that Dr. Roberto Bayardo’s time-of-death estimate given at Applicant’s capital murder trial was based on an examination of Stites’s body. 4.EHRR.92.

Calvin Garvie

73. Applicant called Calvin Garvie. 4.EHRR.128.
74. Calvin Garvie testified that he was one of two attorneys who represented Applicant at his capital murder trial. 4.EHRR.130.

75. Garvie testified that the defense, at the time of Applicant's capital murder trial, did not have information that Fennell told Davis that he (1) had arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) had consumed some alcohol on April 22, 1996. 4.EHRR.143.
76. Garvie testified that had he known that Fennell told Davis that he (1) had arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) had consumed some alcohol on April 22, 1996, it (a) could have been used as an inconsistent statement, (b), could have linked Fennell to the beer cans found at the crime scene; (c) could have undermined Fennell's testimony that Stites took a shower on April 22, 1996; and (d) could have "possibly even change[d] the timeframe of death." 4.EHRR.144-46.
77. Garvie claimed that he had no way of knowing about the relationship between Fennell and Davis. 4.EHRR.148.
78. Garvie admitted that his testimony regarding possible trial tactic changes "assumes everything in the CNN transcript is correct," and "that the witness is relating what happened." 4.EHRR.149.
79. Garvie admitted that he would not recall every detail from a conversation had twenty years ago. 4.EHRR.150-51.
80. Garvie testified that the defense believed Fennell was a suspect and knew he had to be thoroughly investigated. 4.EHRR.159.
81. Garvie testified that the defense had a DNA expert and that the suspects from whom DNA samples were collected were excluded from the beer cans found at the crime scene. 4.EHRR.161.
82. Garvie admitted that a Bastrop Police report that the defense had prior to Applicant's capital murder trial noted that Fennell and Davis were close friends. 4.EHRR.169; RX.2.
83. Garvie admitted that Dr. Bayardo's time-of-death estimate given at Applicant's capital murder trial was based on an examination of Stites's body. 4.EHRR.172.
84. Garvie stated that he had no reason to believe that Dr. Bayardo's time-of-death estimate was at all based on Fennell's testimony. 4.EHRR.174.
85. In 2006, Garvie testified at a prior state habeas evidentiary hearing regarding Martha Barnett, a woman who claimed to have seen Stites and Fennell arguing in Fennell's truck in Paige, Texas, around 5:00 a.m. on April 23, 1996. 4.EHRR.175.

86. Garvie admitted that Barnett's testimony was inconsistent with the State's theory at Applicant's capital murder trial that Stites died around 3:00 a.m. on April 23, 1996, and also with Fennell's testimony at Applicant's trial that he was home around 8:00 p.m. on April 22, 1996 until awoken around 7:00 a.m. on April 23, 1996. 4.EHRR.176.
87. Garvie admitted that the same type of allegation litigated in 2006 was being litigated again—a discrepancy with the timeline of events leading up to Stites's death as presented at Applicant's capital murder trial. 4.EHRR.177.
88. Garvie testified that, despite being presented with evidence that the State's time-of-death estimate was incorrect and that Fennell was not where he claimed, Garvie did not say at the 2006 state habeas evidentiary hearing that he would have hired a forensic pathologist. 4.EHRR.179.

David Campos

89. The State called David Campos. 4.EHRR.202.
90. Campos testified that he was employed by the Bastrop County Sheriff's Office at the time of Stites's murder and was one of the investigators into her murder. 4.EHRR.203.
91. Campos interviewed Fennell on April 25, 1996, wherein Fennell stated that "the last time he saw [Stites] was the night before she died. He said that she went to bed at about 8:30 to 8:40 p.m." 4.EHRR.215.
92. Campos testified that he never heard that Fennell (1) arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) had consumed some alcohol on April 22, 1996. 4.EHRR.216.

David Board

93. The State called David Board. 4.EHRR.219.
94. Board testified that he was employed by the Bastrop Police Department at the time of Stites's murder and was one of the investigators into her murder. 4.EHRR.219.
95. Board testified that he never heard that Fennell (1) arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) had consumed some alcohol on April 22, 1996. 4.EHRR.216.

Rocky Wardlow

96. The State called Rocky Wardlow. 4.EHRR.229.

97. Wardlow testified that he was employed by the Texas Rangers at the time of Stites's murder and was the lead investigator into her murder. 4.EHRR.230.
98. Wardlow testified that Davis was not an investigator into Stites's murder. 4.EHRR.231.
99. Wardlow testified that he interviewed Fennell on two occasions and that Fennell told him that Stites went to bed around 8:30 p.m. on April 22, 1996, and that he went to bed around 9:00 p.m. on April 22, 1996. 4.EHRR.232.
100. Wardlow testified that he never heard that Fennell (1) arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) had consumed some alcohol on April 22, 1996, 4.EHRR.233, though he did confuse this case with another, the Mary Ann Ardlit case, regarding beer consumption, 4.EHRR.233.

Charles Penick

101. The State called Charles Penick. 5.EHRR.5.
102. Penick testified that he was the elected Criminal District Attorney for Bastrop County at the time of Applicant's capital murder trial. 5.EHRR.6.
103. Penick did not recall hearing that Fennell (1) arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) had consumed some alcohol on April 22, 1996, 5.EHRR.233.

Carol Stites

104. The State called Carol Stites. 5.EHRR.11.
105. Carol testified that she is the mother of the victim in this case, Stacey Stites. 5.EHRR.12.
106. Carol testified that, at the time of Stites's murder, Carol lived in an apartment underneath the apartment Fennell and Stites shared, and because of the location of the stairs to her apartment, Carol could hear folks using the stairs. 5.EHRR.13-15.
107. Carol testified that, on April 22, 1996, Stites came home from work at around 1:30 p.m. 5.EHRR.18.
108. Carol testified that, on April 22, 1996, Fennell arrived home from work after his shift. 5.EHRR.18.
109. Carol testified that, on April 22, 1996, she was babysitting a young girl named Jennifer whose mother normally picked her up around 5:00 p.m. 5.EHRR.18.

110. Carol recalled that, on April 22, 1996, Fennell left for a little league event shortly after Jennifer as picked up. 5.EHRR.20.
111. Carol recalled that, on April 22, 1996, Fennell arrived home after the little league event “right before dusk,” and that he and Stites ran up to their apartment laughing. 5.EHRR.20.
112. Carol testified that Fennell did not appear drunk when he got home on April 22, 1996, she had never seen him drunk, and that she had “seen [Fennell] have a beer, but most the people that I know have beers.” 5.EHRR.21.
113. Carol testified that the last time she saw Stites, Stites was wearing her bed clothes—a t-shirt and shorts that Stites normally slept in. 5.EHRR.28.
114. The Court takes judicial notice that the sun set on April 22, 1996, in Giddings, Texas at 8:00 p.m. 5.EHRR.28; RX.4.

GROUND TWO—SUPPRESSION OF FAVORABLE, MATERIAL EVIDENCE

Applicant’s Allegation

115. Applicant alleges that “Fennell’s inconsistent account of his whereabouts on the night of April 22, 1996 . . . establish[es] a Due Process violation under *Brady v. Maryland*.” He asserts that the State possessed “Fennell’s inconsistent account of his whereabouts” because “Davis was a Bastrop County Sheriff’s Officer[a]nd the Bastrop County Sheriff’s Office was the lead agency investigating [Stites’s] murder.” He claims that “Fennell’s inconsistent account of his whereabouts” is favorable because it “is evidence of innocence.” And he argues materiality because “the evidence against [Applicant] was based almost exclusively on now discredited and disavowed expert testimony,” and because “Fennell’s inconsistent statement regarding his whereabouts” would have demonstrated “Fennell’s consciousness of guilt” and “placed him arriving home—intoxicated—at the approximate time of [Stites’s] death as found by a panel of esteemed forensic pathologists.” Eighth Appl. 10–12.

Factual Conclusions

116. The Court finds credible Davis’s testimony that Fennell never told Davis what time he arrived home on April 22, 1996, and that Davis surmised Fennell’s arrival time based on his own granddaughter’s experience in the same little league in which Fennell previously coached. 2.EHRR.69.
117. Davis’s testimony that Fennell never told Davis what time he arrived home on April 22, 1996, is consistent with what Davis told CNN in 2016: “*I don’t know how—what time [Fennell got home on April 22, 1996]. I mean uh, if somebody was to ask me a direct question about what time they got home that night, I*

couldn't answer 'cause I don't know that I was ever told. But it was later that night after practice. So um, I would *assume* definitely 10:00'ish, 11:00 *maybe* at night." AX.1, at 31 (emphasis added).

118. The Court finds that Fennell never told Davis what time he arrived home on April 22, 1996.
119. The Court finds credible Davis's testimony that Stites being asleep when Fennell arrived home on April 22, 1996 was "an assumption," 2.EHRR.114, and that he did "not think that [Fennell] ever" told him that Stites was asleep when Fennell arrived home on April 22, 1996, 2.EHRR.116.
120. The Court finds that Fennell never told Davis that Stites was asleep when he came home on April 22, 1996.
121. The Court finds credible Davis's testimony that he was not part of the investigation into Stites's murder. 2.EHRR.105.
122. The Court finds credible Wardlow's testimony that Davis was not part of the investigation into Stites's murder. 4.EHRR.232.
123. The Court finds credible Davis's testimony he took time off from his employment as a jailer with the Bastrop County Sheriff's Office on April 23, 1996, before he had any conversations with Fennell regarding Fennell's whereabouts on April 22, 1996. 2.EHRR.103.
124. The Court finds that Davis was not a part of the investigation into Stites's death and was not acting under color of Texas law when he had a conversation with Fennell on April 23, 1996.
125. The Court finds that Applicant has not offered any credible evidence to suggest that the State possessed information that Fennell (1) arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) had consumed some alcohol on April 22, 1996.
126. The Court finds credible Davis's testimony that he had no personal knowledge of Fennell's activities or whereabouts on April 22, 1996. 2.EHRR.105.
127. The Court does not find credible Clay-Jackson's testimony that, had she known that Fennell told Davis he (1) had arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) had consumed some alcohol on April 22, 1996, she would have taken the "gloves off" when she cross-examined Fennell at Applicant's capital murder trial, 3.EHRR.152, because her strategy at Applicant's capital murder trial was to inculcate Fennell as a viable suspect, including using a large portion of her opening argument to suggest that Fennell was a viable suspect in Stites's death, using cross-examination or

presenting evidence pointing to Fennell as a viable suspect in Stites's death, and attempting to introduce the polygraph results of Fennell's interviews. 4.EHRR.30, 36-40. The trial record demonstrates that Clay-Jackson strongly pointed the finger at Fennell as Stites's killer at Applicant's capital murder trial, and her testimony that she would have done anything more than cross-examine Fennell with supposed statements made to Davis that he 1) had arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) had consumed some alcohol on April 22, 1996, is not credible given that much of the putative cross-examination could have been undertaken at Applicant's capital murder trial even absent knowledge of Fennell's alleged statement to Davis.

128. The Court does not find credible Clay-Jackson's testimony that she would have directly accused Fennell of murdering Stites during cross-examination because, at the evidentiary hearing, she erroneously recalled taking this tack at Applicant's capital murder trial. 3.EHRR.148.
129. The Court does not find credible Clay-Jackson's testimony that she would have directly confronted Fennell with his Fifth Amendment invocation to law enforcement because she elicited that testimony through Wardlow at Applicant's capital murder trial. 4.EHRR.38.
130. The Court does not find credible Clay-Jackson's testimony that she would have directly confronted Fennell about his testimony concerning Stites's birth control cycle because nothing prevented her from doing so at Applicant's capital murder trial.
131. The Court does not find credible Clay-Jackson's testimony that she would have directly confronted Fennell about his erroneous recollection of his truck's fuel level because she had that information at the time of trial but did nothing with it. 4.EHRR.74; RX.2.
132. The Court does not find credible Clay-Jackson's testimony that she would have directly confronted Fennell about the discrepancy in why he did not drive Stites to work on April 23, 1996, because she brought out that discrepancy through cross-examination of Fennell. *Compare* 44.RR.62 (Carol testifying that Fennell had court on April 23, 1996, which is why Fennell was going to drive Stites to work so that he could keep his truck), *with* 46.RR.51-52 (Fennell testifying that he did not have court on April 23, 1996).
133. The Court does not find credible Clay-Jackson's testimony that she would have directly confronted Fennell about the closure of his checking account on the day of Stites's death because she had that information at the time of trial but did nothing with it. 4.EHRR.79; AX.26.

134. The Court does not find credible Clay-Jackson's testimony that she would have possibly called the Ormands, because it is based on a conditional—if she had determined that Stites' relationship with Ormand overlapped that with Fennell—and because the Ormands were subpoenaed as witnesses by the defense but were never called. 4.EHRR.88.
135. The Court further does not find credible Clay-Jackson's testimony that, had she known Fennell told Davis that he (1) had arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) had consumed some alcohol on April 22, 1996, she would have taken the above cross-examination tactics with Fennell because she did not so testify in 2006 when confronted with a similar timeline discrepancy. 4.EHRR.48–52, 69, 77, 89, 95.
136. The Court further does not find credible Clay-Jackson's testimony that, had she known Fennell told Davis that he (1) had arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) had consumed some alcohol on April 22, 1996, she would have taken the above cross-examination tactics with Fennell because her proposed cross-examination is largely identical to that described in Applicant's eighth application, which was filed in June of 2016, and Clay-Jackson admitted she had not spoken with Applicant's current counsel until 2017. *Compare* Eighth Appl. 7–8, with 4.EHRR.97–98.
137. The Court further does not find credible Clay-Jackson's testimony that, had she known Fennell told Davis that he (1) had arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) had consumed some alcohol on April 22, 1996, she would have taken the above cross-examination tactics with Fennell because she appeared to be mistaken about the exact nature of what was supposedly suppressed, suggesting that there was a "forensic discrepancy" at issue instead of the just the interview Davis gave to CNN. 4.EHRR.45–46.
138. The Court further does not find credible Clay-Jackson's testimony that, had she known Fennell told Davis that he (1) had arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) had consumed some alcohol on April 22, 1996, she would have taken the above cross-examination tactics with Fennell because she had numerous deficits in memory yet answered the questions regarding her possible cross-examination without hesitancy.
139. The Court does not find credible Clay-Jackson's testimony that had she known Fennell told Davis that he (1) had arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) had consumed some alcohol on April 22, 1996, it would have affected the forensic investigation into the case and caused her to direct a forensic pathologist to look into Stites's time of death, 3.EHRR.168–69; 4.EHRR.9–12, because she did not so testify in 2006 when confronted with a similar timeline discrepancy. 4.EHRR.48–52, 69, 77, 89, 95.

140. The Court does not find convincing Clay-Jackson's testimony that had she known Fennell told Davis that he (1) had arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) had consumed some alcohol on April 22, 1996, it would have affected the forensic investigation into the case and caused her to direct a forensic pathologist to look into Stites's time of death, 3.EHRR.168-69; 4.EHRR.9-12, because Garvie did not so testify, 4.EHRR.146.
141. The Court finds that Clay-Jackson did not satisfactorily explain why a timeline discrepancy regarding Fennell's whereabouts would have called into question Stites's time of death, a scientific estimate based on changes in the deceased's body.
142. The Court notes that Clay-Jackson did not testify that she would have called Dr. Baden to testify at Applicant's capital murder trial.
143. The Court notes that Dr. Baden did not testify that his opinion would have been the same at the time of Applicant's capital murder trial, that he was available to testify at Applicant's capital murder trial, or that he would have offered the same testimony as he presented to the Court.
144. The Court notes that Dr. Baden did not testify that his opinion about Stites's time of death was at all influenced by the time Fennell arrived home, but rather on an autopsy report, photograph and video of Stites, and various other documents concerning lividity, purge fluid, and rigor mortis.
145. The Court does not find credible Garvie's testimony that, had he known Fennell had consumed some alcohol on April 22, 1996, that he would have been able to link this to the beer cans at the crime scene, 4.EHRR.144, because Garvie knew that, through the defense's DNA testing of the beer cans, all suspects had been excluded as contributors, 4.EHRR.161.
146. The Court notes that Garvie did not explain how Fennell's alleged statement to Davis that he (1) had arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) had consumed some alcohol on April 22, 1996, "could possibly [have] even change[d] the timeframe of death" for Stites, 4.EHRR.146, and the Court finds such testimony is entirely speculative.
147. The Court notes that Garvie did not testify that he would have employed a forensic pathologist to challenge Stites's time of death had he known Fennell told Davis that he (1) had arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) had consumed some alcohol on April 22, 1996.
148. The Court finds that Clay-Jackson and Garvie could not have confronted or introduced evidence that Fennell told Davis that he (1) had arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and that (2) Stites was

asleep when he arrived home because Fennell never made those statements to Davis.

GROUND THREE—FALSE TESTIMONY

Applicant's Allegation

149. Applicant alleges that Fennell testified falsely at trial because “Fennell was actually out drinking on the night of April 22, 1996,” instead of being “at home with [Stites] on th[at] night.” He asserts that “[h]ad Fennell testified consistent with his initial statements to . . . Davis, his best friend, the jury . . . would have learned that Fennell gave wildly different accounts of his whereabouts on the night of the murder to his best friend and to other investigators. This inconsistency would be construed as affirmative evidence of guilt, which clearly could have affected the judgment of the jury.”

Factual Conclusions

150. The Court finds credible Davis’s testimony that he had no personal knowledge of Fennell’s activities or whereabouts on April 22, 1996. 2.EHRR.105.
151. The only evidence Applicant presents suggesting that Fennell was not at home on April 22, 1996, around 8:00 p.m. is hearsay, and based on the recollection of a conversation that occurred some twenty years ago.
152. The Court finds credible Davis’s testimony that Fennell never told Davis what time he arrived home on April 22, 1996, and that Davis surmised Fennell’s arrival time based on his own granddaughter’s experience in the same little league in which Fennell previously coached. 2.EHRR.69.
153. Davis’s testimony that Fennell never told Davis what time he arrived home on April 22, 1996, is consistent with what Davis told CNN in 2016: “*I don’t know how—what time [Fennell got home on April 22, 1996]. I mean uh, if somebody was to ask me a direct question about what time they got home that night, I couldn’t answer ‘cause I don’t know that I was ever told. But it was later that night after practice. So um, I would assume definitely 10:00’ish, 11:00 maybe at night.*” AX.1, at 31 (emphasis added).
154. The Court finds that Fennell never told Davis what time he arrived home on April 22, 1996.
155. The Court finds credible Davis’s testimony that Stites being asleep when Fennell arrived home on April 22, 1996 was “an assumption,” 2.EHRR.114, and that he did “not think that [Fennell] ever” told him that Stites was asleep when Fennell arrived home on April 22, 1996, 2.EHRR.116.

156. The Court finds that Fennell never told Davis that Stites was asleep when he came home on April 22, 1996.
157. The Court finds that Davis had difficulty recalling his conversation with Fennell from twenty years ago, had difficulty recalling events surrounding his 2016 interview by CNN, and had difficulty recalling some of his prior testimony in this very proceeding.
158. The Court finds credible Carol's testimony that, on April 22, 1996, Fennell arrived home after the little league event "right before dusk," 5.EHRR.20, which would have been around 8:00 p.m. on April 22, 1996, in Giddings, Texas, 5.EHRR.28; RX.4.

CONCLUSIONS OF LAW

GROUND TWO—SUPPRESSION OF FAVORABLE, MATERIAL EVIDENCE

Legal Standard

1. This claim is governed by *Brady v. Maryland*, 373 U.S. 83 (1963). *Pena v. State*, 353 S.W.3d 797, 809 (Tex. Crim. App. 2011). To prove a "Brady violation," an applicant must demonstrate (1) the suppression of (2) favorable evidence (3) that is material, meaning that there is a reasonable probability of a different result had the suppressed evidence been disclosed. *Id.* "Additionally, . . . the evidence central to the *Brady* claim [must] be admissible in court." *Pena v. State*, 353 S.W.3d 797, 809 (Tex. Crim. App. 2011).

Suppression

2. Applicant has failed to prove that Fennell told Davis that (1) he arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) he had consumed some alcohol on April 22, 1996, because Applicant presented only hearsay evidence that Fennell arrived home later than he testified or consumed alcohol on April 22, 1996; because Davis disavowed that Fennell ever told him the time he arrived home on April 22, 1996; and because Davis's memory was proven suspect multiple times at the evidentiary hearing. Evidence that does not exist cannot be suppressed. *See, e.g., United States v. Edwards*, 442 F.3d 258, 266 (5th Cir. 2006) ("Because '[t]he prosecution has no duty to turn over to the defense evidence that does not exist,' we reject Appellants' *Brady* claims with respect to Robert Guidry." (quoting *Brogdon v. Blackburn*, 790 F.2d 1164, 1168 (5th Cir. 1986)); *Hafdahl v. State*, 805 S.W.2d 396, 399 (Tex. Crim. App. 1990) ("Brady and its progeny do not require prosecuting authorities to disclose exculpatory information to defendants that the State does not have in its possession and that is not known to exist.").

3. Assuming that Fennell told Davis that (1) he arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) he had consumed some alcohol on April 22, 1996, such knowledge cannot be imputed to the State because Davis took no part in the investigation of Stites's murder and because Davis was not acting under color of state law when he spoke with Fennell on April 23, 1996. *Compare Ex parte Castellano*, 863 S.W.2d 476, 484–85 (Tex. Crim. App. 1993) (finding imputation where police officer's "participation in the investigation was considerable" despite being motivated by personal reasons for committing perjury, knowing about perjury, and altering evidence).

Favorability

4. Assuming that Fennell told Davis that he arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and that such knowledge could be imputed to the State, that statement is favorable because it would have impeached Fennell's statements to authorities and his testimony at trial that he arrived home between 8:00 p.m. and 8:30 p.m. on April 22, 1996. *See Harm v. State*, 183 S.W.3d 403, 408 (Tex. Crim. App. 2006) (noting that "impeachment evidence is that which disputes or contradicts other evidence").
5. Assuming that Fennell told Davis that he had consumed some alcohol on April 22, 1996, and that such knowledge could be imputed to the State, that statement is not favorable because it does not "justify, excuse, or clear [Applicant] from fault." *See Harm*, 183 S.W.3d at 408.

Materiality

6. Because Applicant has failed to prove that Fennell told Davis that he (1) had arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) had consumed some alcohol on April 22, 1996, Applicant cannot show a reasonable probability of a different outcome at his capital murder trial.
7. Alternatively, assuming that Fennell told Davis that (1) he arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) he had consumed some alcohol on April 22, 1996, and that such knowledge can be imputed to the State, and that both statements are favorable, Applicant has failed to prove materiality because such evidence does not make a different outcome reasonably probable. *See Pena*, 353 S.W.3d at 809. The additional suspicion that would have been cast on Fennell at Applicant's capital murder trial would not have affected the outcome because (1) the evidence of Applicant's guilt was strong, (2) Applicant forcefully pointed to Fennell a viable suspect, an allegation which the jury rejected, (3) Applicant presented no credible evidence of a consensual relationship between he and Stites, which would have been needed to explain why his semen and saliva were found on a dead woman with injuries and an appearance indicating abduction and sexual assault, and (4)

significant evidence was presented that the relationship between Stites and Fennell was happy and healthy.

8. Alternatively, assuming that Fennell told Davis that (1) he arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) he had consumed some alcohol on April 22, 1996, and that such knowledge can be imputed to the State, and that both statements are favorable, because there is not a sufficient link between the supposed statement of Fennell to Davis and the hiring of a forensic pathologist, and because Clay-Jackson's and Garvie's testimony that they would have hired a forensic pathologist is either not credible or non-existent, and because Dr. Baden did not testify that his opinion would have been the same at the time of Applicant's capital murder trial, that he was available to testify at Applicant's capital murder trial, or that he would have offered the same testimony as he presented to the Court at Applicant's capital murder trial, his opinions are not material.
9. Alternatively, Assuming that Fennell told Davis that (1) he arrived home between 10:00 p.m. and 11:00 p.m. on April 22, 1996, and (2) he had consumed some alcohol on April 22, 1996, and that such knowledge can be imputed to the State, and that both statements are favorable, and that this would have caused Applicant to retain and present a forensic pathologist with the opinions of Dr. Baden, Applicant has failed to prove materiality because such evidence does not make a different outcome reasonably probable. *See Pena*, 353 S.W.3d at 809. In addition to the reasons why the additional suspicion that would have been cast on Fennell at Applicant's capital murder trial would not have affected the outcome, Dr. Baden's opinions, to the extent that they conflict with those offered at trial by Dr. Bayardo, would not have affected the outcome of trial because (1) they simply present an alternative explanation that the jury could have rejected, (2) the evidence of Applicant's guilt was strong, and (3) Applicant presented no credible evidence of a consensual relationship between he and Stites, which would have been needed to explain why his semen and saliva were found on a dead woman with injuries and an appearance indicating abduction and sexual assault. *Cf. Boyle v. Johnson*, 93 F.3d 180, 186 (5th Cir. 1996) ("The fact that other experts disagreed with Dr. Erdmann is insufficient, by itself, to call Dr. Erdmann's testimony into question.").

GROUND THREE—FALSE TESTIMONY

Legal Standard

10. To prove a false testimony claim, an applicant must prove that (1) "the testimony was, in fact, false, and, if so, (2) whether the testimony was material." *Ex parte Weinstein*, 421 S.W.3d 656, 665 (Tex. Crim. App. 2014). As to the latter, the applicant "must prove that the false testimony was material and thus it was reasonably likely to influence the judgment of the jury." *Id.*

Falsity

11. Applicant failed to prove by a preponderance of the evidence that Fennell's testimony at Applicant's 1998 trial regarding the time he arrived home on April 22, 1996, was false for a variety of reasons, including because Applicant presented no credible evidence that Fennell arrived home later than he testified; because the only evidence that Fennell arrived home later than he testified is hearsay; because Davis disavowed that Fennell ever told him the time he arrived home on April 22, 1996 and that Stites was asleep when he arrived home; because Davis's memory was proven suspect several times at the evidentiary hearing; and because Carol credibly testified that Fennell arrived home around 8:00 p.m. on April 22, 1996, and that Stites was awake, dressed for bed, and happy to see Fennell when he arrived. *See Ex parte De La Cruz*, 466 S.W.3d 855, 871 (Tex. Crim. App. 2015) ("[I]nconsistencies do not, without more, support the trial court's finding that Torres's testimony is false.").

Materiality

12. Applicant failed to prove that, assuming Fennell's testimony at Applicant's 1998 trial regarding the time he arrived home was false, such testimony was material. Even if Fennell was incorrect about the time he arrived home on April 22, 1996, that would not have been reasonably likely to influence the jury because, at trial, (1) the evidence of Applicant's guilt was strong, (2) Applicant forcefully pointed to Fennell a viable suspect, an allegation which the jury rejected, (3) Applicant presented no credible evidence of a consensual relationship between he and Stites, which would have been needed to explain why his semen and saliva were found on a dead woman with injuries and an appearance indicating abduction and sexual assault, (4) significant evidence was presented that the relationship between Stites and Fennell was happy and healthy, and (5) Carol provided independent corroboration that Fennell was home in the "evening" of April 22, 1996, following a little league event.

RECOMMENDATION

The court recommends that Applicant's grounds for relief remanded to this Court—Applicant's Ground Two and Ground Three—be denied.

Signed this 5 day of January, 2018.



Doug Shaver
Presiding Judge
21st District Court
Bastrop County, Texas

Sitting by Assignment

Filed 10:27 AM 1/8

JAN 08 2018

Sarah Loucks
District Clerk, Bastrop County