CAPITAL CASE
No. 19-_____

In the Supreme Court of the United States

RODNEY REED,
Petitioner,

v.

Texas,
Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of Texas

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Question Presented No. 1

At Rodney Reed's capital murder trial, the victim's fiancé, Jimmy Fennell, was a key witness for the prosecution. Years later, Reed discovered that Fennell (a prime suspect in the murder) made a prior inconsistent statement to a sheriff's officer about his activities the night of the murder. Fennell was subpoenaed to testify at a state habeas hearing on Reed's claim that the inconsistent statement was suppressed in violation of *Brady v. Maryland*. At the hearing, Fennell invoked his Fifth Amendment privilege and refused to testify, preventing Reed from confronting a key trial witness about the suppressed exculpatory evidence. In denying Reed's *Brady* claim, the Texas courts made no mention of Fennell's appearance at the hearing or his invocation of his Fifth Amendment privilege and refusal to testify.

The first question presented is:

When assessing under the *Brady* materiality standard whether "disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable,"[1] how should a court consider the impact of a key trial witness's assertion of the privilege against self-incrimination and refusal to testify when confronted with the suppressed exculpatory evidence?

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[1] *Kyles v. Whitley*, 514 U.S. 419, 441 (1995).

Question Presented No. 2:

At Reed's 1998 capital murder trial, the State relied on the opinions of three forensic experts as its central evidence of Reed's guilt. In the proceedings below, Reed raised a Due Process claim supported by evidence that the State's experts or their employing agency had retracted or modified their opinions implicating Reed because the opinions offered at trial were scientifically invalid.

The second question presented is:

When expert testimony relied on by the State in a criminal trial is later shown to be scientifically invalid, what is the appropriate standard to assess whether the State's use of scientifically invalid expert testimony was in violation of Due Process?

Question Presented No. 3:

Does the conviction or execution of a person who is actually innocent of the crime violate the United States Constitution?

PARTIES TO THE PROCEEDINGS BELOW

The petition arises from a state habeas corpus proceeding in which Petitioner, Rodney Reed, sought relief from the Texas Court of Criminal Appeals.

LIST OF RELATED PROCEEDINGS

Reed v. Goertz, No. 1:19-cv-00794-LY (W.D. Tex.) (filed Aug. 8, 2019)

State v. Reed, No. 8701 (Texas 21st District May 29, 1998) (ORDER ON CONVICTION AND SENTENCE OF DEATH)

Ex parte Rodney Reed, No. 8701 (Texas 21st District May 27, 1999) (ORDER)

Reed v. State, No. 73,135 (Tex. Crim. App. Dec. 6, 2000), *cert. denied*, 534 U.S. 955 (2001)

Ex parte Rodney Reed, Nos. 50-961-01, 50,961-02 (Tex. Crim. App. Feb. 13, 2002) (ORDER) (*Per curiam*)

Ex parte Rodney Reed, Nos. 50-961-03 (Tex. Crim. App. Oct. 19, 2005) (*Per curiam*)

Ex parte Rodney Reed, 271 S.W.3d 698 (Tex. Crim. App. 2008)

Ex parte Rodney Reed, Nos. 50-961-04, 50-961-05 (Tex. Crim. App. Jan. 14, 2009) (*Per curiam*)

Ex parte Rodney Reed, No. 50-961-06 (Tex. Crim. App. July 1, 2009) (*Per curiam*)

Reed v. Thaler, No. A-02-CV-142-LY (W.D. Tex. June 15, 2012) (REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE)

Reed v. Thaler, No. A-02-CV-142-LY (W.D. Tex. Sept. 26, 2012) (ORDER ON REPORT AND RECOMMENDATION), aff'd, *Reed v. Stephens*, 739 F.3d 753 (5th Cir. 2014)

Reed v. Stephens, 739 F.3d 753 (5th Cir. 2014), *r'hearing denied*, (5th Cir. Mar. 14, 2014), *cert. denied*, 135 S.Ct. 435 (2014)

State v. Reed, No. 8701 (Texas 21st District Nov. 25, 2014) (TRANSCRIPT)

State v. Reed, No. 8701 (Texas 21st District Dec. 12, 2014) (FINDINGS OF FACT AND CONCLUSIONS OF LAW)

Ex parte Rodney Reed, No. 50-961-07 (Tex. Crim. App. Feb. 23, 2015) (ORDER ENTERING STAY OF EXECUTION) (*Per curiam*)

Reed v. State, No. AP-77054 (Tex. Crim. App. June 29, 2016) (ORDER FOR REMAND) (*Per curiam*)

Reed v. State, 541 S.W.3d 759 (Tex. Crim. App. 2017), *cert. denied*, 138 S.Ct. 2675 (2018)

Ex parte Rodney Reed, Nos. 50-961-07, 50,961-08 (Tex. Crim. App. May 17, 2017) (ORDER) (*Per curiam*)

Ex parte Rodney Reed, No. 50-961-08, Trial Court Cause No. 8701 (Texas 21st District Jan. 8, 2018) (ORDER)

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Through his Actual Innocence, *Brady*, and other Due Process claims, Rodney Reed asks this Court to resolve important constitutional questions so that Texas does not execute an innocent man. The Texas Court of Criminal Appeals (the "CCA") disposed of Reed's constitutional claims challenging his capital murder conviction for the 1996 murder of Stacey Stites in a terse and largely boilerplate decision that referenced no legal authority. The summary decision ignored uncontradicted evidence that completely negates the State's forensic-based case against Reed at trial and instead implicates Stites's fiancé, Jimmy Fennell, who was a local police officer at the time, but is now a convicted felon.

Reed now seeks review of the decision below which wrongly, and under an inappropriately high standard, rejected his comprehensive showing of actual innocence. This Court should also review the denial of Reed's *Brady* and other Due Process claims based on new evidence of (1) Fennell's refusal to testify at a state habeas hearing after being confronted with a previously suppressed prior inconsistent statement about his activities on the night Stites was murdered, and (2) recantations by all of the State's forensic experts of their invalid scientific opinions relied on at trial to link Reed's DNA with the murder.

First, this Court should clarify how the *Brady* materiality standard applies when a trial witness invokes the Fifth Amendment privilege in post-conviction proceedings when confronted with exculpatory evidence. The impact of a witness's

invocation of the Fifth Amendment privilege during a trial is clear—Sixth Amendment confrontation rights require that witness's testimony to be disregarded. *See*, *e.g.*, *United States v. McGlory*, 968 F.2d 309, 344 (3d Cir. 1992); *Bagby v. Kuhlman*, 932 F.2d 131, 135 (2d Cir. 1991); *accord Gilbert v. California*, 388 U.S. 263, 272 (1967). Because this outcome is constitutionally mandated to protect confrontation rights in trials, the retrospective *Brady* materiality standard requires that courts likewise consider the severe consequences of a witness's invocation of the Fifth Amendment privilege when confronted with previously suppressed exculpatory evidence—their entire trial testimony should be disregarded.

Further, the Court should resolve a split in authority as to the proper standard for considering Due Process claims stemming from the use of invalid scientific evidence to convict. While the reliance on invalid scientific evidence as the primary proof of guilt certainly would violate fundamental fairness, *see Han Tak Lee v. Houtzdale*, 798 F.3d 159, 166 (3d Cir. 2015), the adoption of the *Napue* standard better reflects the uniquely prejudicial impact faulty scientific evidence has on jury trials. *See United States v. Ausby*, 916 F.3d 1089, 1092 (D.C. Cir. 2019).

Finally, this Court should resolve the long-standing question whether, and under what circumstances, Due Process prohibits the conviction or execution of an innocent person. *See Herrera v. Collins*, 506 U.S. 390 (1993). Because Reed has presented comprehensive evidence of innocence that would at least satisfy traditional miscarriage of justice standards, this Court should recognize that both his conviction and possible execution are in violation of Due Process.

OPINIONS BELOW

The June 26, 2019 order of the Texas Court of Criminal Appeals under review is unreported. (App.-1a.)[2]

STATEMENT OF JURISDICTION

The Texas Court of Criminal Appeals issued its order on June 26, 2019. (App.-1a.) This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment provides in relevant part that "[n]o person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law." U.S. Const. amend. V.

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[2] The hearing judge signed, without modification, the State's proposed findings of fact and conclusions of law (App.-6a), but those findings and conclusions were not adopted by the CCA. (App.-4a.)

The Sixth Amendment provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI.

The Fourteenth Amendment provides in relevant part that "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

A. The Theory Upon Which The State Obtained Reed's Conviction.

In April 1996, nineteen-year-old Stites lived in Giddings, Texas with Fennell, a local patrol officer. On April 22, Fennell insisted to Stites's mother that he was going to drive Stites to her early morning shift at a grocery store in Bastrop, Texas the next morning. (App.-87a.) When Stites failed to report to work on April 23, Fennell told investigators that the plan for him to drive her to work had changed and that he had slept in and Stites left for work in his truck at her usual time around 3:00 a.m. (App.-57a, 87a.)

Fennell's truck was found in the Bastrop High School parking lot that morning at 5:23 a.m. A broken portion of Stites's woven belt lay outside of the locked driver side door. (App.-88a.) Stites's body was discovered that afternoon in the brush along an unpaved road in Bastrop County. (App.-90a.) She had been strangled, and the ligature mark was consistent with the pattern of her belt. The other half of Stites's

belt was on the roadside, a t-shirt was strewn over the brush above her body, and Stites's employee name tag was positioned in the crook of her knee. (App.-91a-92a.) Vaginal swabs collected at the scene and at autopsy revealed a small number of intact spermatozoa. (App.-93a.)

Although Fennell was the last person to see Stites alive, and he was supposed to have driven her to work, officers never searched his and Stites's apartment (or even asked to do so). (App.-98a.) However, investigators' suspicions soon turned towards Fennell. He was actively investigated as a suspect for months, even though he was not a DNA match to the semen found on the vaginal swabs. (App.-98a.) Police interrogated Fennell aggressively and repeatedly, and after he was twice found to be deceptive on polygraph tests, Fennell invoked his Fifth Amendment privilege, thus refusing to cooperate in the investigation. (App.-166a,177a-178a.)

In 1997, Reed was charged with Stites's murder when his DNA matched that obtained from a small number of intact spermatozoa found in Stites's body. (App.-102a.) No other evidence—fingerprint, hair, footprint, or DNA—connected Reed to Fennell's truck or the location where Stites's body was found.

Using the timeline provided by Fennell, the State theorized that Stites left Giddings in Fennell's truck around 3:00 a.m. on April 23 and drove toward Bastrop. (App.-57a.) The State argued that Reed somehow intercepted her and gained entry to the truck, pulled Stites out of her seatbelt without disengaging it, and then sexually assaulted and strangled her in the truck without leaving any

fingerprints, hair or other evidence in the truck. The State claimed that Reed then drove to a back-country road where he partially re-dressed Stites's body, dragged her into the brush, placed her employee name tag in the crook of her knee, and left the other separated half of Stites's belt at the side of the road, pointing toward Stites's body. Then, Reed allegedly drove the truck to the Bastrop High School parking lot, locked it, and walked away, again leaving no trace of having been in the truck. (App.-192a.)

The absence of evidence connecting Reed to either crime scene was eclipsed by the State's experts who opined that the presence of three intact spermatozoa on a vaginal swab proved that Stites was sexually assaulted and murdered around 3:00 a.m. and, therefore, those intact sperm could not have been deposited consensually a day before her death, as the defense claimed.

Pathologist Roberto Bayardo testified at trial that Stites died by ligature strangulation at approximately 3:00 a.m. on April 23, and that Stites had been sexually assaulted at the same time. (App.-93a-95a.)

Texas Department of Public Safety ("DPS") crime scene investigator, Karen Blakely, testified that she surmised that Stites has been sexually assaulted based on the placement of her clothing. She further testified that she found three intact spermatozoa around 11:00 p.m. on April 23, and concluded that sex had occurred within 26 hours of when she saw the spermatozoa based on "published documentation that says that 26 hours is the outside length of time that tails will remain on a sperm head inside the vaginal tract of a female." (App.-91a-93a.)

The State's retained expert, Meghan Clement, a serologist with Bode Cellmark Forensics Laboratory ("Cellmark"), testified that tails of spermatozoa break off "after a short period of time" and that she had—in over ten years of examining thousands of rape kits—never found intact sperm more than 24 hours after intercourse. (App.-103a-104a.)

In closing arguments, the State repeatedly emphasized to the jury that the small amount of Reed's sperm proved he was the murderer:

> [B]ingo, she finds three fully intact spermatozoa. At that point she knows what she's got here. We all know what she's got here. Because we know, from the credible evidence, that that doesn't hang around for days on end. We know from the credible evidence that that tells you that that semen got in that girl's body within 24 hours of that eleven o'clock moment. Which is when? On her way to work.

(App.-307a.) The State further emphasized that its experts' testimony that the semen was inextricably linked to a sexual assault that occurred contemporaneously with the murder refuted Reed's defense that he and Stites had an interracial relationship and had had consensual intercourse in the days before her murder. (App.-309a, 312a.) This was not lost on the jury, which asked to see Dr. Bayardo's testimony and included a question about his opinion on the life expectancy of intact sperm.

(App.-371a) The judge responded by reading several portions of Dr. Bayardo's testimony to the jury.[3]

Fennell uses the Fifth Amendment like an umbrella in a windstorm. Before Reed was arrested, Fennell invoked the privilege when asked questions about his involvement in Stites's death. (App. 166a, 177a-178a.) But once Reed was on trial, Fennell changed gears and waived his Fifth Amendment privilege and testified to a timeline that exculpated himself and supported the State's case against Reed. The State relied on Fennell to establish that Stites was abducted while driving to work around 3:00 a.m. (App.-312a, 316a.) The State also relied on Fennell to discredit Reed's defense that he and Stites had recently had consensual sex, including emphasizing Fennell's testimony that he and Stites had showered together the night she was murdered, but were not engaging in sexual relations, to infer that Reed and Stites had not been together the day before her murder:

> Jimmy told you that Stacey was on the green pill at the time of her death so they weren't engaging in any kind of sexual relations, but they expect you to believe that she would go out and do that with [Reed]?

(App.-313a.)

On May 18, 1998, an all-white jury (the prosecutor struck the only two African-Americans from the

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[3] Although the jury note asked specifically about sperm in the anal cavity, the judge read testimony about Dr. Bayado's examination of intact sperm on the vaginal slides. (App.-318a.)

venire) convicted Reed of the sexual assault and murder of Stites and thereafter sentenced him to death. (App.-108a.)

B. The CCA Affirmed Reed's Conviction And Denied Post-Conviction Relief Based On The Strength Of Now Recanted And Demonstrably False Testimony.

The CCA affirmed Reed's conviction and death sentence on direct appeal in 2000 based on the timeline provided by Fennell and the "strength" of the State's expert witnesses. (App.-56a.) Specifically, the CCA adopted Fennell's testimony that Stites left for work around 3:00 a.m. on April 23, 1996, and further concluded that "[g]iven the strength of the DNA evidence connecting appellant to the sexual assault on Stites and the forensic evidence indicating that the person who sexually assaulted Stites was the person who killed her, a reasonable jury could find that appellant is guilty of the offense of capital murder." (App.-57a, 66a.)

The CCA also relied on the strength of the State's experts when finding other trial error to be harmless because "[t]he pathologist indicated that the donor of the semen was likely also the murderer, because the condition of Stites' body indicated that the sexual assault occurred at the time of the murder." (App.-77a, 79a.)

Thereafter, Reed presented the CCA with new evidence in state habeas proceedings, including evidence that Fennell was extremely prejudiced against African-Americans and violent toward women (he pled guilty to kidnapping and other

charges and served a 10-year prison sentence for raping a woman he was dispatched to protect), that Fennell had told a colleague that he would strangle Stites with a belt if he discovered her cheating, and that Fennell knew of Reed and Stites's relationship. (App.-117a, 183a.) Although the CCA recognized that the new evidence "may indeed arouse a healthy suspicion that Fennell had some involvement in Stacey's death," it denied relief based on the evidence of a sexual assault and an estimated time of death of 3:00 a.m. (App.-93a, 188a.)

C. Reed Demonstrated His Conviction Was Obtained Through False Testimony And Recanted Scientific Opinions, And In Violation Of *Brady v. Maryland*.

On February 13, 2015, Reed filed a successive state habeas petition (the "2015 Petition") after amassing powerful new evidence of innocence. *First*, Dr. Bayardo retracted his trial testimony concerning the key aspects of the State's case, critically (i) the time of Stites's death, (ii) the existence of a sexual assault, and (iii) the length of time sperm can remain intact. (App.-197a.)

Second, three of the nation's most experienced and respected pathologists—Drs. Michael Baden, Werner Spitz, and LeRoy Riddick—each determined that the State's theory of Reed's guilt was medically and scientifically impossible. (App.-202a-227a.) Specifically, these experts demonstrated that the forensic evidence proves that (i) Stites was murdered before midnight (when Fennell claimed the two were home together), (ii) Stites was not sexually assaulted, and (iii) Reed's DNA was deposited at least a day before her murder.

Third, new witnesses with no affiliation to Reed came forward to confirm a relationship between Reed and Stites. (App.-422a-434a.) This new scientific and other evidence, especially when considered with previous evidence, established Reed's actual innocence and his right to habeas relief for constitutional violations and pursuant to article 11.073 of the Texas Code of Criminal Procedure. On February 23, 2015, the CCA stayed Reed's execution, but took no immediate action on the case. *Ex parte Reed*, 2015 WL 831673, at *1 (Tex. Crim. App. Feb. 23, 2015).

Reed's 2015 Petition had been pending without action in the CCA for a year when he discovered that Officer Davis, a Bastrop Sheriff's Officer, had given an interview to a CNN program describing a previously undisclosed conversation between Davis and Fennell on April 23, 1996. Davis described an account by Fennell—given after Stites was reported missing, but before her body was found—of his whereabouts the night Stites was murdered that differed substantially from both the investigator's notes of Fennell's story obtained by the defense and Fennell's trial testimony.

Reed later discovered that, at the Bastrop District Attorney's request, Davis was disciplined for telling a journalist what he knew. (App.-340a.) Davis received a month's unpaid suspension based on formal findings that his speaking with CNN "could bring influence to a cause for a retrial" and because Davis "did not prepare a supplemental report [about what Fennell told him] or notify his supervisor regarding the need for such a report." (App.-338a, 342a-343a.) On June 6, 2016, Reed filed an additional habeas

petition (the "2016 Petition"), asserting *Brady* and false testimony claims based on this new information.

Almost a year later, on May 17, 2017, the CCA issued a cursory order, dismissing Reed's 2015 Petition as an abuse of the writ, stating in conclusory fashion and without analysis that Reed "failed to make a *prima facie* showing on any of his claims." (App.-45a.) The CCA also concluded that Reed failed to make a *prima facie* showing of innocence in his 2016 Petition, but that he had made the requisite showing on the *Brady* and false testimony claims related to Fennell's trial testimony. The CCA remanded those claims to the District Court for an evidentiary hearing. (App.-45a-46a.)

In October 2017, a four-day evidentiary hearing was held. At the hearing, Davis identified a transcript of his CNN interview and adopted it as his testimony. (App.-344a.) Davis's account of his conversation with Fennell only hours after Stites was reported missing is dramatically different from Fennell's statements to police and his later trial testimony.

- At trial, Fennell testified that, after attending baseball practice, he stayed home that evening with Stites, they showered together before she went to sleep, and that Fennell stayed up a while longer watching TV before retiring. (App.-293a.)

  But Fennell told Davis that he went out drinking with other officers that night. Fennell claimed that he stayed out late so as not to

> *disturb Stites, who had an early work shift.* (App.-347a, 386a.)

- Fennell testified that, after first insisting to Stites's mother that he would drive her to work in the morning, the two changed their plans and agreed that Fennell would sleep in the next morning and that she would drive herself to work. (App.-295a);

  But Fennell told Davis that he had planned to drive Stites to work, but overslept because he had been out drinking. (App.-385a.)

These two irreconcilable stories from Fennell about where he was and what he was doing on the night of April 22, 1996 fly in the face of the State's arguments to the jury highlighting the consistency of Fennell's testimony: "[i]t's important to note that nobody could ever find anything inconsistent with what he told you. Nobody." (App.-316a.)

When Reed called Fennell as a witness at the 2017 hearing, Fennell declined to take the witness stand and, instead, provided a declaration stating in relevant part:

> If I am called to testify and asked any questions regarding the subject matter of (A), the murder of Stacey Stites; (B), any statements I may have made regarding my activities and whereabouts on April 22nd-23rd, 1996; (C), the investigation of the murder of Stacey Stites; or (D), the prosecution and trial of Rodney Reed for the murder of Stacey Stites, I will not answer the questions. Instead, I will respond to each question regarding the subjects by stating

> that, "On advice of counsel, I am declining to answer the question based on my Fifth Amendment right not to testify." (App.-325a-326a).

The District Court then granted, over Reed's objection, the State's request that "no adverse inference" be drawn from Fennell's refusal to testify. (App.-327a.)

On December 22, 2017, the District Court signed, without modification, the Findings of Facts and Conclusions of Law proposed by the State (the "Findings"). Incredibly, the Findings (which the CCA reviewed but did not adopt) parse with great care Davis's testimony regarding what Fennell did and did not say to Davis about the events the night of Stites's murder, but fail to even mention that Fennell appeared but refused to testify. (App.-4a, 9a-10a, 26a-27a.)

The Findings also acknowledge that Dr. Baden opined that "Stites was dead before midnight on April 22, 1996 [when Fennell claimed the two were home together]; 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." (App.-12a.) The Findings tellingly avoid discrediting Dr. Baden's testimony, concluding instead that his "opinions are not material." (App.-39a.) This is hard to reconcile with the fact that Dr. Baden provided scientific proof (which the State did not rebut) that demonstrated both Fennell's motive to lie (given that Stites was killed when he testified they were home together) and that his testimony that Stites left of her own

volition on the morning of April 23 had to have been false.

While not mentioned in the Findings, Reed also admitted affidavits from Drs. Spitz and Riddick that supported Dr. Baden's testimony, as well as Dr. Bayardo's declaration recanting his trial testimony. (App.-197a, 202a, 213a.) Nevertheless, the Findings conclude that Dr. Baden's testimony was immaterial because it merely conflicted with Dr. Bayardo's (recanted) trial testimony. (App.-39a-40a.) Because Dr. Bayardo recanted his opinion as to the time of death, Fennell was the State's only witness that could support its theory that Stites was killed on her way to work—and Fennell has again hidden behind the Fifth Amendment.

D. Reed Demonstrated In His 2018 Petition That Nothing Remains Of The State's Case Against Him.

While Reed's 2016 Petition remained pending before the CCA, the agencies that employed Blakely and Clement issued letters that discredited their opinions—opinions that left the jury with the false impression that the deposit of Reed's sperm occurred within 24 hours of being tested, and was therefore contemporaneous with the murder. On June 26, 2018, Reed filed a subsequent petition (the "2018 Petition") asserting that this new evidence, in conjunction with other evidence, raised a *prima facie* case of innocence and also constituted changed scientific opinions pursuant to articles 11.071 and 11.073 of the Texas Code of Criminal Procedure. Thus, as of June 26, 2018, at the latest, Reed had disproven every aspect of the State's case.

1. Stites Could Not Have Been Murdered On Her Way To Work At 3:00 a.m., As Fennell Claimed, Because She Was Dead Before Midnight.

A key theory of the case at trial and upon which Reed's conviction has been upheld depended on Fennell's and Dr. Bayardo's testimony to infer that Stites was murdered after 3:00 a.m. on April 23, 1996. (App.-108a.) At trial, the State emphasized this fact to the jury:

> [W]e know that she didn't get killed at midnight the night before or seven o'clock or whenever the night before because Dr. Bayardo tells us that, that Stacey died within an hour of three o'clock."

(App.-316a.)

Neither Fennell nor Dr. Bayardo stands by his testimony today. Fennell refuses to testify and Dr. Bayardo has recanted his testimony on this crucial point. In his declaration, Dr. Bayardo stated that his estimated time of death "should not have been used at trial as an accurate statement of when Ms. Stites died." (App.-276a-277a.)

Drs. Baden and Spitz have explained in detail why the forensic evidence proves that Stites was murdered before midnight on April 22, hours before she was scheduled to leave for work, and when Fennell claimed the two were home together.

Dr. Spitz explained his opinion that Stites was murdered hours before her body was left in the brush where it was found—sometime before midnight:

> My review of the autopsy report, autopsy photos, crime scene photos, crime scene video, and report of crime scene investigation leads me to conclude that Stacey Stites was murdered prior to midnight on April 22, 1996 (the night before her body was found). (App.-280a.)
>
> The presence of lividity in these non-dependent areas makes it medically and scientifically impossible that Stites was killed between 3-5 a.m. on the date in question. ... It is impossible that Stites was murdered and left at the scene in the two-hour time frame asserted by the State at trial.

(App.-281a.)

Dr. Baden likewise explained that the presence of non-dependent lividity on the front of Stites's body was evidence that Stites was killed 4-6 hours prior to her body being removed from the truck and dragged into the brush. (App.-288a.) Dr. Baden also noted that the post-mortem purge fluid found in the truck would take hours to develop, further indicating that "she had been dead for a number of hours, before midnight, when she was placed in the passenger seat." (App.-288a.)

The foregoing forensic evidence supports that Fennell lied about the events that occurred the night of April 22, 1996, to his best friend Officer Davis, the police and, later, the jury. His now-contradicted testimony was crucial to the State's case, and the State emphasized his consistency in closing argument. (*Supra* at 12-13.) But now, when he might

be confronted with his prior statements, Fennell refuses to testify.

2. Stites Was Not Sexually Assaulted By Reed.

A second key opinion that the State repeatedly emphasized to the jury (and the CCA has repeatedly cited) is Dr. Bayardo's testimony that Stites was sexually assaulted while she was being strangled with her belt:

> We know that the sodomy occurred at the time of Stacey's death; and we know that the semen got in her body at the time of her death; and we know that whoever raped Stacey also killed her.
>
> He said ... whatever happened to this young girl had not happened consensually, based on everything he saw.
>
> Came to her death as a result of asphyxia due to ligature strangulation–the last four words are most important for right now–associated with sexual assault.

(App.-307a-309a.)

Dr. Bayardo has since recanted his extremely prejudicial testimony:

> [T]he presence of spermatozoa in Ms. Stites's vaginal cavity was not evidence of sexual assault. There was no indication that the spermatozoa in Ms. Stites's vaginal cavity was placed there in any fashion other than consensually. Also, because there was no spermatozoa found in Ms. Stites's rectal

> cavity, there is no evidence that any spermatozoa was deposited in the rectal cavity as a result of the sexual assault.

(App.-278a.)

Dr. Baden also found "*no forensic evidence that Ms. Stites was sexually assaulted in any manner" and "no evidence of anal intercourse or of sexual assault.*" (App.-211a.) (emphasis added); *see also* (App.289a.) (same opinion by Dr. Spitz).

3. Reed's DNA Could Not Have Been The "Smoking Gun" That Tied Him To The Murder Because It Was Deposited Consensually, Well-Before Stites Was Killed.

Finally, the State relied on Dr. Bayardo, Clement and Blakely to describe Reed's DNA as the "smoking gun" and "Cinderella slipper" based on the inference that it could not have possibly have been deposited at any time other than exactly when Stites was being murdered. The notion that Reed's DNA inextricably linked him to Stites's murder was premised on these experts' opinions that semen can remain intact for no more than 24 hours and therefore had to have been deposited simultaneously with Stites's death. (App.-306a-309a.)

These opinions are false and no one, including the witnesses, supports them today. The agencies that employed Blakely and Clement confirmed that their testimony was scientifically invalid, as did Dr. Bayardo:

> If the prosecuting attorneys had advised me that they intended to present testimony that

> spermatozoa cannot remain intact in the vaginal cavity for more than 26 hours, and argue that Ms. Stites died within 24 hours of the spermatozoa being deposited, I would have advised them that neither the testimony nor the argument was medically or scientifically supported.

(App.-217a.)

Dr. Bayardo further stated:

> I am personally aware of medical literature finding that spermatozoa can remain intact in the vaginal cavity for days after death. Accordingly, in my professional opinion, the spermatozoa I found in Ms. Stites's vaginal cavity could have been deposited days before her death. Further, *the fact that I found "very few" (as stated in the autopsy report) spermatozoa in Ms. Stites's vaginal cavity suggests that the spermatozoa was not deposited within 24 hours before Ms. Stites's death.*

(App.-277a.) (emphasis added).

Bode Cellmark Forensics (a subsidiary of LabCorp) Technical Leader Stephanie Sivak issued a letter which described Clement's testimony about the length of time sperm can remain intact as "unsatisfactory" and as an "error." (App.-228a-229a.)

DPS Crime Lab Director, Brady Mills, also acknowledged the "limitations" of Blakely's testimony and further admitted that her statement about "outside length of time" was contrary to the literature she cited. (App.-233a.) The paper Blakely cited

states: (1) its data regarding longer times after intercourse (26 hours) was not a reliable measure of the persistence of intact spermatozoa and (2) more reliable studies demonstrated "72 hours as the longest time for intact spermatozoa to be found in the vagina." (App.-233a.)

Dr. Spitz further explained the fallacy of Blakely's and Clement's trial testimony: "Very few sperm were found on autopsy smears, and the crime scene investigator found only 3 intact spermatozoa. If the victim was sexually assaulted between 3-5 a.m., there would be more sperm found on the slides. ... The amount of sperm found on the slides is more consistent with a longer interval between intercourse and the time the sample was collected. As I explain in my book, intact spermatozoa can be found in the vagina up to 72 hours after coitus." (App.-282a.)

Dr. Baden confirmed that "[t]he testimony at trial that no intact sperm remains in the vagina after 24 hours is not correct. It is my experience, and the experience of other forensic pathologists as reported in the forensic science literature, that sperm may remain intact for more than 72 hours after intercourse. The few sperm seen are entirely consistent with consensual intercourse that Petitioner said occurred between midnight and 3:00 a.m. on April 22, 1996." (App.-289a.)

4. New Witnesses Confirm An Intimate Relationship Between Reed And Stites.

In a prior federal habeas proceeding, Magistrate Judge Austin noted that:

> [P]ersuasive evidence that Reed and Stites had consensual sex days before the murder

> would have clearly undermined the State's evidence. Further, given the evidence that Fennell was racially prejudiced, evidence of an interracial affair between Stites and Reed would also have provided a credible motive for Fennell to kill Stites.

Reed v. Thaler, No. 2012 WL 2254217, at *14 n.8 (W.D. Tex. June 15, 2012). In the years since Reed's initial habeas petition was adjudicated, credible new witnesses have come forward with precisely this evidence:

- Weeks before her death, Stites confided to a co-worker, Alecia Slater, that "she was not excited about getting married," that "she was sleeping with a black guy named Rodney and that she didn't know what her fiancé would do if he found out" and that "she had to be careful." (App.-423a.)
- Another co-worker, Leroy Ybarra, observed Stites and Reed interacting at the grocery store where Ybarra and Stites worked. Based on their interaction, he believed the two were romantically involved. (App.-428a-429a.)
- Stites's cousin, Calvin "Buddy" Horton, recalled seeing Stites and a black man together at a Dairy Queen in late 1995. After Reed's image was circulated in the media as the suspected murderer, Horton identified Reed as the man he saw with Stites. (App.-432a-433a.)

Especially in light of the forensic evidence discussed above, these new witnesses provide the credible evidence of Reed and Stites's relationship,

which both explains the presence of Reed's DNA and gives motive for Fennell to have murdered Stites.

In light of these (1) new witnesses confirming a relationship, (2) Fennell's refusal to testify about his activities and whereabouts at the time the medical evidence shows Stites was murdered, and (3) recantations of the State's experts, nothing remains of the State's trial theory but a lingering prejudice that consensual, interracial relationships did not happen in rural Bastrop, Texas in 1996.

E. The CCA Entered A Cursory Denial Of Habeas Relief After A Four-Year Stay Of Execution.

On June 26, 2019, the CCA issued an order which, despite the length of time the CCA had the case and the amount of evidence presented, contained no analysis. (App.-1a.) With respect to the 2016 Petition, the Court stated that it had reviewed the Findings (but it did not adopt them) and the record, and it denied relief. (App.-4a.) Its analysis of Reed's *Brady* claim consisted of a two-sentence observation that Davis did not have perfect recollection of Fennell's statements and made some assumptions based on what he was told, and that Stites's mother gave unspecified testimony inconsistent with Reed's claims. (App.-4a.) As for the 2018 Petition, the CCA stated that Reed had not shown that his "'current claims and issues'" based on the recently obtained letters from DPS and Cellmark could not have been presented in an earlier application based on the factual or legal unavailability of the claim. (App.-5a.) The CCA also found that Reed had not made a *prima*

facie showing of innocence and denied the petition as an abuse of the writ. (App.-5a.)

REASONS FOR GRANTING THE WRIT

I. THE TEXAS COURTS FAILED TO CONSIDER FENNELL'S REFUSAL TO TESTIFY WHEN CONFRONTED WITH SUPPRESSED EXCULPATORY EVIDENCE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS.

The Texas courts' refusal to consider the implications of Fennell's blanket invocation of the Fifth Amendment privilege against self-incrimination at the habeas hearing as part of the *Brady* materiality analysis[4] was error this Court should address. Once Fennell invoked the Fifth Amendment privilege (a privilege Fennell first invoked as a murder suspect and then expressly waived at Reed's trial) and refused to testify, the court could not continue to rely on Fennell's trial testimony consistent with the Sixth and Fourteenth Amendments when assessing Reed's *Brady* claims.

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[4] The CCA did not discuss the first two elements of a *Brady* claim: whether the information is favorable and if it was suppressed. However, these elements were obviously met. Fennell's prior inconsistent statement to Davis is classic impeachment evidence, and Davis, who was employed by the lead investigatory agency, knew the information but did not disclose it. *See Kyles v. Whitley,* 514 U.S. 419, 433, 438 (1995) (impeachment evidence is favorable and suppression shown when undisclosed information is known by any member of the prosecution team).

Fennell's invocation at the evidentiary hearing demonstrates that, had his prior inconsistent statements to Davis been disclosed, Fennell either would have not waived the privilege in the first place, or he would have invoked the privilege when confronted with those statements upon cross-examination, resulting in his testimony being stricken. *See United States v. Williams*, 2012 WL 38229, at *10 (D. Minn. Jan. 9, 2012) (witness's invocation of Fifth Amendment privilege in post-conviction evidentiary hearing demonstrated "that the jury would have never heard from [the witness] on the[] topics" for which he invoked). Instead, the Texas courts did not even acknowledge that Reed called Fennell to testify at the hearing at all. (*See* App.-1a, 6a.)

The Sixth Amendment right to confront witnesses includes the right to cross-examine them. The "central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig,* 497 U.S. 836, 845 (1990).

Thus, when a witness testifies for the prosecution and, during the trial, also invokes the Fifth Amendment privilege against self-incrimination, the Sixth Amendment requires that the court consider whether the invocation has precluded a defendant from challenging the reliability of the testimony, as guaranteed by the Confrontation Clause. This Court has assessed the intersection of the protections afforded testifying witnesses by the Fifth Amendment and those guaranteed to defendants by

the Sixth Amendment and concluded that the Confrontation Clause does not permit a witness to "testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details." *Mitchell v. United States*, 526 U.S. 314, 321-22 (1999) (upholding a claim of privilege when a witness invokes privilege after testifying "would open the way to distortion of facts by permitting a witness to select any stopping place in the testimony").

When a witness testifies during trial and then invokes the Fifth Amendment privilege in the same proceeding, a court cannot, consistent with the Sixth Amendment, do nothing. A court can compel the witness to continue testifying if it concludes the witness waived the privilege by testifying voluntarily. *See Brown v. United States*, 356 U.S. 148, 154-57 (1958). If the witness refuses to testify when ordered or the court finds that there was no waiver of the privilege, the court may have to strike the witness's testimony. *See United States v. McGlory*, 968 F.2d 309, 344 (3d Cir. 1992); *Bagby v. Kuhlman*, 932 F.2d 131, 135 (2d Cir. 1991). Because a testifying witness's invocation of privilege "precludes inquiry into the details of his direct testimony, there may be a substantial danger of prejudice because the defense is deprived of the right to test the truth of his direct testimony," and the Sixth Amendment may require that the testimony be stricken. *United States v. Cardillo*, 316 F.2d 606, 611 (2d Cir. 1963). These constitutional concerns are compelling when a witness's testimony "add[s] critical weight to the prosecution's case in a form not subject to cross-examination." *Todaro v. Fulcomer*, 944 F.2d 1079, 1082 (3d Cir. 1991); *see also Klein v.*

Harris, 667 F.2d 274, 279, 288-89 (2d Cir. 1981); *Williams v. State*, 800 S.W.2d 364, 367 (Tex. App.-Fort Worth 1990) (trial court properly excluded witness's testimony after he indicated "he would invoke his fifth amendment privilege against self-incrimination if he testified before the jury").

This Court has not considered this intersection of the Fifth and Sixth Amendments in the context of a *Brady* claim. Where the focus of the *Brady* materiality test is the effect of the exculpatory evidence on the trial's outcome, there is no principled argument to apply a different standard to a trial witness invoking the Fifth Amendment privilege. For example, had Fennell's conversation with Davis been disclosed to the defense before trial, Fennell's refusal to testify at the habeas hearing demonstrated that he would have either (a) not waived his Fifth Amendment privilege and would therefore not have testified at all, or (b) refused to confront his inconsistent statements in open court before the jury. Consistent with Due Process and the Confrontation Clause, the trial judge would have had to strike his prior testimony.

Some courts have followed a similar approach in post-conviction proceedings. A Federal District Court in Pennsylvania, for example, found a state court denial of *Brady* claims to be unreasonable under the deferential federal habeas standard when the state court improperly permitted witnesses who had testified for the State at trial to make blanket privilege assertions in an evidentiary hearing when the issue involved whether or not they had testified truthfully at trial. *Harshman v. Superintendent, State Corr. Inst. at Rockview*, 368 F. Supp. 3d 776,

784 (M.D. Pa. 2019). Likewise, the Florida Supreme Court discussed the implications of a trial witness who invoked the Fifth Amendment privilege when confronted with a prior inconsistent statement during post-conviction proceedings. *See Duckett v. State*, 918 So. 2d 224, 232-33 (Fla. 2005). The Florida Supreme Court explained that the assertion of the privilege indicated the witness would not have testified at all. *Id.* at 233 (considering impact on trial evidence with witness' testimony "removed from this list").

Texas takes the opposite approach. In *Vargas v. State*, for example, the trial court conducted an evidentiary hearing on appellant's due process and fundamental fairness claims based on allegations that the State relied on perjured police testimony at his trial. 781 S.W.2d 356, 360 (Tex. App.—Houston 1989), *rev'd on other grounds*, 838 S.W. 2d 552 (Tex. Crim. App. 1992). At the hearing, two officers invoked their Fifth Amendment privilege. *Id.* at 361. The trial court entered findings concluding that there was no evidence that the conviction was procured as a result of perjured police testimony with no discussion of the implications of the appellant's inability to confront the officers. *Id.* The Court of Appeals then held that "[t]here was no evidence that either of the officers lied while under oath in *this* trial." *Id.*

As in *Vargas*, Reed's habeas judge drew no inferences from Fennell's refusal to testify when confronted with the exculpatory evidence and, indeed, the CCA opinion below did not even mention Fennell had been called as a witness. By focusing only on Davis's habeas testimony and ignoring the

impact of the privilege invocation on Fennell's trial testimony, the CCA has strayed from the well-established focus of the *Brady* materiality test on the trial's outcome. This Court should grant review and make clear the proper standard to be applied.

The importance of a proper application of the *Brady* materiality test in Reed's case is manifest because of Fennell's status as a key fact witness. As investigators concede, the only independent information gathered about Stites's whereabouts was the timeline provided by Fennell:

> Q: The information concerning Stacey's whereabouts after 7:30 on the 22nd of April, when she left her mother's apartment and went up to hers, all of that information--where did that information come from?
>
> A: It came from Jimmy Fennell.

(App.-301a.) If the exculpatory information that caused Fennell to invoke the Fifth Amendment privilege is properly considered under *Brady,* it would have painted the case against Reed in a different light and undermined confidence in the verdict.

II. REED'S CONVICTION IS PREMISED ON SCIENTIFIC EXPERT OPINIONS THAT HAVE SINCE BEEN RECANTED IN VIOLATION OF DUE PROCESS

Reed raised a Due Process claim based on the admissions by each of the State's experts, or their employing agencies, that the expert testimony offered at Reed's trial connecting Reed's DNA to the murder

was scientifically invalid. Because these experts told the jury that intact spermatozoa cannot be found in a woman's body after 24-26 hours, the State argued that the presence of a small amount of Reed's intact spermatozoa on vaginal swabs ruled out an earlier consensual encounter and demonstrated Reed must have sexually assaulted Stites contemporaneous with the murder. *Supra* at 19-21. The State's experts now admit that intact spermatozoa may persist in a body for 72 hours or more. Dr. Bayardo has even confirmed that the small number of intact spermatozoa he found indicated that Reed and Stites had sex more than 24 hours before her death. *Supra* at 20.

In his habeas application, Reed asked the CCA to consider the invalid scientific evidence under the *Napue* Due Process standard applicable to assessing the State's reliance on false testimony. (App.-254a-255a.)

A *Napue* violation generally occurs when the government introduces false or misleading testimony and fails to correct it when it knew or should have known that the testimony was false or misleading. *Longus v. United States*, 52 A.3d 836, 844-45 (D.D.C. 2012) ("A bedrock principle of due process in a criminal trial is that the government may neither adduce or use false testimony nor allow testimony known to be false to stand uncorrected."). The introduction of false or misleading testimony is material if the evidence "could … in any reasonable likelihood have affected the judgment of the jury." *Giglio v. United States*, 405 U.S. 150, 154 (1972) (alternation in original) (quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959).

Although *Napue* traditionally requires some level of knowledge by the prosecutor, the D.C. Court of Appeals and other jurisdictions have applied the *Napue* standard to Due Process claims arising out of the State's use of scientifically invalid expert testimony. In *United States v. Butler*, for example, the court discussed a letter from the United States Department of Justice, which expressed that in cases where invalid scientific testimony was offered regarding microscopic hair comparison by the FBI crime lab, procedural barriers should not bar review and that the underlying testimony should be considered false:

> In this letter, the government confirmed that it would "not dispute that [hair evidence] should be treated as false evidence and that knowledge of the falsity should be imputed to the prosecution . ... [T]he government ... will not contest that the erroneous evidence was false or misleading or that the government as a whole should have known that it was false or misleading."

278 F. Supp. 3d 461, 476 (D.D.C. 2017) (second ellipses in original). In *Jones v. United States*, the Court of Appeals referenced a letter from the FBI to the U.S. Attorney, which stated that in Jones's case, the FBI examiner's statements "exceeded the limits of science" and "were, therefore, invalid." 202 A.3d 1154, 1162 (D.C. 2019). The Court reversed the denial of Jones's motion to vacate his convictions under D.C. Code § 23-110. *Id.* at 1173.

Similarly, in *United States v. Ausby*, the FBI and Department of Justice determined that the

government's testimony about identifications using microscopic hair comparison was false testimony that amounted to a *Napue* violation. 916 F.3d 1089 (D.C. Cir. 2019). Like in Reed's case, the scientifically invalid testimony was the "primary evidence that directly contradicted [the] defense theory" and such testimony was emphasized by the prosecution during closing. *Id.*; *see also Jones*, 202 A.3d at 1168 (noting testimony was unrefuted and presented with photographic exhibits "to enhance its credibility and impact").

The Third Circuit appears to have taken a different approach to Due Process claims arising out of the State's use of scientifically invalid expert testimony and has applied a more general fundamental fairness test. The Third Circuit Court of Appeals considered a Due Process claim based on the State's reliance on scientifically invalid testimony that a fire was caused by arson and required a petitioner to show that the "admission of the fire expert testimony undermined the fundamental fairness of the entire trial because the probative value of [that] evidence, though relevant, [was] greatly outweighed by the prejudice to the accused from its admission." *Han Tak Lee v. Houtzdale SCI*, 798 F.3d 159, 166 (3d Cir. 2015); *see also Gimenez v. Ochoa*, 821 F.3d 1136, 1145 (9th Cir. 2016) (Due Process violated where introduction of flawed expert testimony undermined the fundamental fairness of the entire trial).

This Court should review the CCA's rejection of Reed's Due Process claim and resolve the split of authority as to the proper standard for considering

the impact of the State's reliance on scientifically invalid expert testimony.

The CCA dismissed Reed's Due Process claim purportedly on procedural grounds, citing section 5 of article 11.071 of the Texas Code of Criminal Procedure. (App.-5a.) This procedural denial is no barrier to the Court's review because the Texas procedural default provision has not been regularly applied as to Reed's Due Process claims. *See Wright v. Quarterman*, 470 F.3d 581, 586 (5th Cir. 2006). A close examination of the CCA's decisions in Reed's case alone demonstrates the inconsistent application of Texas's procedural default provisions. The CCA dismissed these Due Process claims in an ambiguous order, stating:

> We find that applicant has failed to make a *prima facie* showing on any of his claims. Therefore, his 2015 subsequent application (our –07) fails to satisfy any of the exceptions provided in Article 11.071 § 5. ... Accordingly, the application is dismissed as an abuse of the writ without reviewing the merits of the claims. Art. 11.071 § 5(c).

(App.-45a.) While the Court's mention of a *prima facie* showing indicated merits review, *see In re Davila*, 888 F.3d 179, 188–89 (5th Cir. 2018), the CCA also expressly disclaimed review of the merits and specifically noted that Reed failed to meet "any" of the three exceptions to the procedural default rule, including section 5(a)(1) of article 11.071, which requires that the evidence be previously unavailable.

In the June 26, 2019 order dismissing Reed's Due Process claim, the CCA court again held that Reed's

claims relating to scientifically invalid testimony were not previously unavailable pursuant to section 5(a)(1). (App.-5a.) This time, however, the CCA did not include language indicating whether it had reviewed the 2018 Petition to determine if Reed had made a "*prima facie* showing." *Id.* Because the CCA concluded in both orders that Reed's Due Process claims were not previously unavailable under section 5(a)(1), there is no meaningful justification for the court to have engaged in *prima facie* merits review of the 2015 Petition, but not the 2018 Petition. Accordingly, the CCA did not consistently apply Texas's procedural default here, and it should not prevent consideration of Reed's substantial claims of constitutional violations.

III. REED'S CONVICTION OR EXECUTION WOULD VIOLATE THE UNITED STATES CONSTITUTION BECAUSE HE IS ACTUALLY INNOCENT OF THE MURDER OF STACEY STITES.

Reed has made a comprehensive and persuasive showing of his actual innocence in the court below. As discussed in detail in the Statement of the Case, *supra* at 10-23, the State's proof of Reed's guilt centered on (1) now recanted and discredited expert testimony, and (2) a timeline provided by Fennell, whose testimony must be entirely disregarded based on his recent refusal to testify at a habeas hearing. While this showing alone is sufficient to meet the high burden of proving actual innocence as a constitutional violation, Reed's innocence evidence is uniquely powerful because he has also presented

evidence implicating Fennell as the murderer, including the following:

- uncontradicted forensic findings by three leading forensic pathologists indicating that the State's theory of Reed's guilt is "medically and scientifically impossible," and that Stites was murdered hours before Fennell claimed she left for work—at a time Fennell testified the two were together in their apartment;
- statements by Stites's cousin and co-workers corroborating Reed's trial defense that he and Stites were having an affair—this evidence explains the presence of Reed's DNA and provides motive for Fennell to have murdered Stites;[5]
- testimony by a police officer that Fennell told her he would use a belt to murder his girlfriend if he ever learned she was unfaithful; and
- evidence that Fennell has been engaged in a pattern of violence which ultimately resulted in a felony conviction and a ten year prison term arising out of charges that Fennell kidnapped and raped a woman while he was on duty as a police officer.

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[5] *See Reed v. Thaler*, 2012 WL 2254217, at *14 n.8 (W.D. Tex. June 15, 2012) (persuasive evidence of intimate relationship between Reed and Stites would both undermine State's evidence and provide credible motive for Fennell to kill Stites).

This comprehensive showing of innocence, which both negates the State's proof of guilt and implicates a third party in the crime, carries special weight. *See House v. Bell*, 547 U.S. 518, 548 (2006) (forensic evidence negating state's proof at trial might not establish actual innocence absent "troubling evidence" implicating victim's husband). Despite this comprehensive and uncontradicted showing of innocence, the CCA denied Reed's actual innocence claim on the merits in a summary order. (App.-4a-5a.) *See Davila*, 888 F.3d at 188-89 (dismissal for failing to make *prima facie* showing constitutes merits determination).

Although Texas has recognized that the Due Process Clause of the United States Constitution prohibits the conviction, imprisonment and execution of persons actually innocent of a crime, *see Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996), the matter remains unresolved in this Court. *See Herrera v. Collins*, 506 U.S. 390 (1993). The lower federal courts and state jurisdictions are split regarding the scope of constitutional protections for the actually innocent and the standard for determining if a person has made a sufficient showing. *See Graves v. Cockrell*, 351 F.3d 143, 151 (5th Cir. 2003) (claims of actual innocence are not cognizable on federal habeas review); *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997) (petitioner "must affirmatively prove that he is probably innocent," in derogation of panel opinion requiring clear and convincing proof); *Cornell v. Nix*, 119 F.3d 1329, 1335 (8th Cir. 1997) (standard "is at least as exacting as the clear and convincing evidence standard, and possibly more so"); *State v. Beach*, 302 P.3d 47, 54 (Mont. 2013) (clear and convincing

evidence that no reasonable juror would convict); *People v. Washington*, 665 N.E.2d 1330, 1337 (Ill. 1996) (evidence of such conclusive character as would probably change the result on retrial); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 543 (Mo. 2003) (requiring "a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment"); *In re Lawley*, 179 P.3d 891, 897 (Cal. 2008) (evidence of innocence must, if credited, "undermine the entire prosecution case and point unerringly to innocence or reduced culpability"); *Miller v. Comm'r of Corr.*, 700 A.2d 1108, 1130 (Conn. 1997) (actual innocence by clear and convincing evidence, plus insufficiency of evidence in combined record to support finding of guilt).

Because Reed has made a credible and comprehensive showing of his actual innocence and the Texas court has adjudicated the claim on the merits, this Court should (1) grant review on the issue, (2) articulate the correct standard for determining a constitutional violation based on actual innocence, and (3) enter judgment that Reed's constitutional rights were violated because he is actually innocent of the murder of Stacey Stites.

CONCLUSION

Petitioner respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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September 24, 2019

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APPENDIX

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. WR-50,961-08, WR-50,961-09

EX PARTE RODNEY REED, Applicant

ON APPLICATIONS FOR POST-CONVICTION WRIT OF HABEAS CORPUS FROM CAUSE NO. 8701 IN THE 21ST JUDICIAL DISTRICT COURT OF BASTROP COUNTY

Per curiam. Newell, J., not participating.

O R D E R

We have before us subsequent applications for writs of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071 § 5.[1] In May of 1998, a jury convicted Rodney Reed (applicant) of the capital murder of Stacey Stites. The jury answered the special issues submitted pursuant to Article 37.071, and the trial court, accordingly, set applicant's punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Reed v. State*, No. AP-73,135 (Tex. Crim. App. Dec. 6, 2000) (not designated for publication).

[1] Unless otherwise indicated all references to articles refer to the Code of Criminal Procedure.

In 1999, applicant filed his initial post-conviction application for writ of habeas corpus in the convicting court. In 2001, applicant filed his "Supplemental Claim for Relief on Application for Writ of Habeas Corpus" in the convicting court.[2] This Court subsequently denied applicant relief on his initial application and dismissed the subsequent application pursuant to Article 11.071 § 5. *Id*. Applicant filed his second subsequent habeas application in the convicting court on March 29, 2005. This Court dismissed some of the claims in that application as an abuse of the writ under Article 11.071 § 5, but remanded the case to the trial court for the development of two of applicant's claims. *Ex parte Reed*, No. WR-50,961-03 (Tex. Crim. App. Oct. 19, 2005) (not designated for publication). After the convicting court returned the case to this Court, we issued an opinion denying relief. *Ex parte Reed*, 271 S.W.3d 698, 751 (Tex. Crim. App. 2008).

Applicant filed three more subsequent writ applications, none of which satisfied the requirements of Article 11.071 § 5, and this Court dismissed each of them as an abuse of the writ. *Ex parte Reed*, Nos. WR-50,961-04 & WR-50,961-05 (Tex. Crim. App. Jan. 14, 2009) (not designated for publication) and *Ex parte Reed*, No. WR-50,961-06 (Tex. Crim. App. July 1, 2009) (not designated for publication).

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[2] The Court construed applicant's "Supplemental Claim" as a subsequent application. *Ex parte Reed*, Nos. WR-50,961-01 and WR-50,961-02 (Tex. Crim. App. Feb. 13, 2002) (not designated for publication).

Applicant filed his sixth subsequent application (No. WR-50,961-07) in the trial court on February 13, 2015, and he filed a document titled "Supplemental Application for Writ of Habeas Corpus" (No. WR-50,961-08) on June 9, 2016. In his -07 application, applicant asserted that he had newly discovered evidence that supported his claim that he is actually innocent and that new scientific evidence entitled him to a new trial pursuant to Article 11.073. Applicant also argued that the State presented false, misleading, and scientifically invalid expert testimony in violation of his right to due process. *See Ex parte Chabot*, 300 S.W.3d 768, 770-71 (Tex. Crim. App. 2009). In a fourth allegation, applicant asserted that we should reconsider his previous writ applications in light of this new evidence. In his -08 application, applicant asserted that he had newly discovered evidence that supported his claim that he is actually innocent, 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), and that this newly discovered evidence showed that the State presented false and misleading testimony, which violated his right to due process. *See Chabot*, 300 S.W.3d at 770-71.

In 2015, we ordered that applicant's execution be stayed pending further order of the Court. *Ex parte Reed*, No. WR-50,961-07 (Tex. Crim. App. February 23, 2015) (not designated for publication). On May 17, 2017, this Court found that applicant's -07 application failed to satisfy any of the exceptions provided in Article 11.071 § 5, and failed to make the requisite showing under Article 11.073. *Ex parte Reed*, Nos. WR-50,961-07 & WR-50,961-08, slip op. at 3 (Tex. Crim. App. May 17, 2017) (not designated for

publication). We dismissed the -07 application as an abuse of the writ without reviewing the merits of the claims and refused to reconsider applicant's prior writ applications. *Id*.

Also in the May 2017 order, we found that applicant failed to make a *prima facie* showing of actual innocence in his -08 application. *Id*. However, we found that applicant's *Brady* and false testimony claims (his second and third grounds for relief in his -08 application) satisfied the requirements of Article 11.071 § 5. *Id*. These claims were based on statements made to a CNN interviewer by Curtis Davis, a law enforcement officer and close friend of Stacey Stites's fiancé, Jimmy Fennell. Davis told the interviewer about statements that Fennell allegedly made to him in 1996 on the morning after the murder about Fennell's activities and whereabouts the previous evening. These statements appeared to be inconsistent with Fennell's trial testimony.

The trial court held an evidentiary hearing in October 2017. Applicant called five witnesses to the stand, including Davis. The State called five witnesses, including Stites's mother. At the hearing, Davis conceded that many of his answers to the interviewer's questions had been based on assumptions and he had trouble remembering some of Fennell's statements. Stites's mother also gave testimony inconsistent with applicant's claims. The trial judge signed findings of fact and conclusions of law on January 5, 2018, recommending that applicant's grounds two and three be denied.

We have reviewed the evidence in the writ record, the testimony at the writ hearing, the habeas court's findings of fact and conclusions of law, and relevant

portions of the direct appeal record. Based on our review of the record, with regard to the remanded grounds in applicant's -08 subsequent application, we deny the relief sought. We dismiss any other grounds applicant raised in his -08 application as an abuse of the writ for failure to satisfy Article 11.071 § 5.

In June 2018, applicant filed another document titled "Supplemental Application for Writ of Habeas Corpus." This 2018 application constitutes applicant's eighth subsequent application (No. WR-50,961-09) pursuant to Article 11.071 § 5(a). In this -09 application, applicant asserts that the scientific experts' opinions that the State relied on to convict him were "false when given and have since been changed." In support, applicant cites Article 11.073, due process principles, and actual innocence law. Applicant has not shown that his "current claims and issues" in his 2018 application were not or could not have been presented in a previous application because the factual or legal basis for the claim was unavailable on the date he filed the previous application. *See* Article 11.071 § 5(a)(1). In fact, applicant previously presented one of his current exhibits, a 2012 declaration authored by the State's medical examiner, Dr. Roberto Bayardo, as a basis for a substantially similar false evidence ground raised in his -07 writ application. Nor has applicant shown "by a preponderance of the evidence, [that] but for a violation of the United States Constitution no rational juror could have found [him] guilty beyond a reasonable doubt." *Id*. at § 5(a)(2). Consequently, we dismiss applicant's -09 application as an abuse of the writ for failure to satisfy Article 11.071 § 5.

IT IS SO ORDERED THIS THE 26 DAY OF JUNE, 2019. (Do Not Publish)

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

	§	IN THE 21ST
Ex parte	§	DISTRICT COURT
RODNEY REED	§	OF
Applicant.	§	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 eight application, in part:

> 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 Ardlt 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; 10:00ish, 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 inculpate 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 10:00ish, 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 nonexistent, 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

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NOS. WR-50,961-07 and WR-50,961-08

EX PARTE RODNEY REED, Applicant

ON APPLICATIONS FOR POST-CONVICTION WRITS OF HABEAS CORPUS IN CAUSE NO. 8701 IN THE 21ST DISTRICT COURT BASTROP COUNTY

***Per curiam*. Alcala, J., filed a concurring and dissenting opinion with which Walker, J., joined. Newell, J., not participating.**

O R D E R

These are subsequent applications for writs of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071 § 5.

In May 1998, a jury convicted applicant of the offense of capital murder. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set applicant's punishment at

death. This Court affirmed applicant's conviction and sentence on direct appeal. *Reed v. State*, No. AP-73,135 **[Reed – 2]** (Tex. Crim. App. Dec. 6, 2000)(not designated for publication). On November 15, 1999, applicant filed his initial post-conviction application for writ of habeas corpus in the convicting court. On February 8, 2001, applicant filed a "Supplemental Claim for Relief on Application for Writ of Habeas Corpus" in the convicting court. This Court subsequently denied applicant relief on his initial application and construed the supplemental claim as a subsequent application and dismissed it. *Ex parte Reed*, Nos. WR-50,961-01 and WR-50,961-02 (Tex. Crim. App. Feb. 13, 2002)(not designated for publication).

Applicant filed his second subsequent habeas application in the convicting court on March 29, 2005. This Court remanded the case to the trial court for the development of two claims. After the case was returned to this Court, we issued an opinion denying relief. *Ex parte Reed*, 271 S.W.3d 698 (Tex. Crim. App. 2008). Over time, applicant filed three more subsequent writ applications, none of which satisfied the requirements of Article 11.071 § 5, and the Court dismissed them. *Ex parte Reed*, Nos. WR-50,961-04 and WR-50,961-05 (Tex. Crim. App. Jan. 14, 2009)(not designated for publication), and No. 50,961-06 (Tex. Crim. App. July 1, 2009)(not designated for publication). Applicant filed his sixth subsequent application in the trial court on February 13, 2015, and a document titled a "Supplemental Application for Writ of Habeas Corpus" on June 9, 2016.

In his 2015 application, applicant asserts that he has newly discovered evidence that supports his claim that he is actually innocent, that new scientific evidence establishes his probable innocence pursuant to Article 11.073 of the Code of Criminal Procedure, and that **[Reed – 3]** the State presented false, misleading, and scientifically invalid testimony violating his right to due process. *See Ex parte Chabot*, 300 S.W.3d 768, 771 (Tex. Crim. App. 2009). In a fourth allegation, applicant asserts that we should reconsider his previous writ applications in light of this new evidence.

We find that applicant has failed to make a *prima facie* showing on any of his claims. Therefore, his 2015 subsequent application (our -07) fails to satisfy any of the exceptions provided in Article 11.071 § 5, and it fails to make the requisite showing under Article 11.073. Accordingly, the application is dismissed as an abuse of the writ without reviewing the merits of the claims. Art. 11.071 § 5(c). Further, we will not reconsider applicant's prior writ applications.

In his 2016 application (our -08), applicant asserts that he has newly discovered evidence that supports his claim that he is actually innocent, 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), and that this newly discovered evidence shows that the State presented false and misleading testimony, which violated his right to due process. *See Ex parte Chabot*, 300 S.W.3d 768, 771 (Tex. Crim. App. 2009).

After reviewing the 2016 application, we find that applicant has failed to make a *prima facie*

showing of actual innocence. However, we further find that his *Brady* and false testimony claims do satisfy the requirements of Article 11.071 § 5. Accordingly, we remand those claims to the trial court for resolution. Applicant has also filed in this Court and the **[Reed – 4]** trial court a "Motion for Deposition of Curtis Davis." We leave it to the trial court to rule on this motion as it sees fit.

The trial court shall resolve these issues within 60 days of the date of this order. Any extensions of this time shall be obtained from this Court.

IT IS SO ORDERED THIS THE 17th DAY OF MAY, 2017.

Do Not Publish

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NOS. WR-50,961-07 & WR-50,961-08

EX PARTE RODNEY REED, Applicant

ON APPLICATIONS FOR POST-CONVICTION WRITS OF HABEAS CORPUS CAUSE NO. 8701 IN THE 21ST DISTRICT COURT FROM BASTROP COUNTY

Alcala, J., filed a concurring and dissenting opinion in which Walker, J., joined.

CONCURRING AND DISSENTING OPINION

These are subsequent applications for post-conviction writs of habeas corpus filed by Rodney Reed, applicant, who was convicted and sentenced to death in 1998 for the capital murder of Stacey Stites. I respectfully concur in part and dissent in part to this Court's judgment that remands the -08 writ application to the habeas court for further factual development and dismisses the remainder of applicant's claims presented in his -07 application. I agree with this Court's determination that it is

necessary to remand the claims presented in applicant's -08 writ application, in which he asserts that new evidence has **[Reed – 2]** emerged indicating that an alternate suspect, Jimmy Fennell, made false statements about his whereabouts on the night of Stites's murder. I, however, disagree with the Court's majority's assessment that all of the claims in applicant's -07 writ application are subject to dismissal due to his failure to make out a prima facie showing on any of those claims. I would instead remand applicant's Article 11.073 and false-evidence claims to the habeas court for factual development and findings of fact and conclusions of law so that this Court may rule on the merits of those claims with the benefit of a fully developed record. I, therefore, write separately to explain my rationale.

In his instant application, applicant relies on the statutory basis in Code of Criminal Procedure Article 11.073 to assert that new scientific evidence has emerged that contradicts the scientific evidence relied upon by the State at trial. *See* TEX. CODE CRIM. PROC. art. 11.073; *Ex parte Robbins*, 478 S.W.3d 678 (Tex. Crim. App. 2014) (reh'g denied Jan. 2016). In addition, he relies on this Court's false-evidence jurisprudence to assert that the State's expert witnesses provided false or misleading testimony at his trial, thereby violating his due process rights. *See Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009). In support of his assertions, applicant presents, among other evidence, a 2012 declaration from medical examiner Roberto Bayardo, who performed the autopsy on the complainant in this case. Applicant alleges that, at trial, Dr. Bayardo testified that his observation of applicant's intact sperm at the time of Stites's autopsy meant that the

sperm was placed in the vagina "quite recently." Later in his testimony, Bayardo stated that this meant that the sperm was placed **[Reed – 3]** "a day or two" before his examination at autopsy, which occurred around twenty-four hours after Stites's body was found. Thus, Dr. Bayardo's trial testimony appears to have left the jury with the impression that applicant's sperm was likely deposited within the twenty-four hour period preceding Stites's death. Applicant asserts that this testimony was heavily relied upon by the State as evidence that he sexually assaulted and killed Stites during the narrow window of time during which her murder is thought to have occurred—between 3 a.m. and 5:30 a.m. on the morning of April 23—and to rebut his defensive theory at trial that he and Stites had consensual sexual intercourse more than a day before her murder and that someone else was responsible for her killing.

In a 2012 declaration, Dr. Bayardo has revisited this testimony and he now states as follows:

> I am personally aware of medical literature finding that spermatoza can remain intact in the vaginal cavity for days after death. Accordingly, in my professional opinion, the spermatoza I found in Ms. Stites's vaginal cavity could have been deposited days before her death. Further, the fact that I found "very few" (as stated in the autopsy report) spermatoza in Ms. Stites's vaginal cavity suggests that the spermatoza was not deposited less than 24 hours before Ms. Stites's death. If the prosecuting attorneys had advised me that they intended to present

> testimony that spermatoza cannot remain intact in the vaginal cavity for more than 26 hours, and argue that Ms. Stites died within 24 hours of the spermatoza being deposited, I would have advised them that neither the testimony nor the argument was medically or scientifically supported.

Applicant asserts that this portion of Bayardo's declaration indicates a "clear change in a scientists's opinion which constitutes a change in scientific knowledge as discussed in *Ex parte Robbins*." *See* 478 S.W.3d at 690. Applicant asserts that he is entitled to a new trial **[Reed – 4]** under Article 11.073 on the basis of Dr. Bayardo's revised opinion because, "if the jury had been told by Dr. Bayardo that Reed's sperm was likely left more than a day before [Stites] was murdered, the connection between the sex and the murder upon which the sufficiency of the evidence depended would have been broken, and no rational jury would have convicted Mr. Reed."

Similarly, applicant asserts that the State's presentation of Dr. Bayardo's testimony, combined with the testimony of two other witnesses, left the jury with the false impression that applicant's sperm could have been left only within the twenty-four-hour period prior to Stites's death, thus constituting a violation of his due process rights. *See Chabot*, 300 S.W.3d at 772; *Ex parte Ghahremani*, 332 S.W.3d 470, 480 (Tex. Crim. App. 2011). In support, he cites the testimony of Dr. Bayardo, as well as the testimony of DPS analyst Karen Blakely, who testified that twenty-six hours was the "outside length of time that tails will remain on a sperm head inside the vaginal tract of the female," and testimony

from private DNA analyst Meghan Clement that, in the course of examining thousands of rape kits, she could not recall seeing intact sperm where the sample had been collected more than twenty to twenty-four hours after intercourse. Applicant asserts that this testimony was "simply false" because it is an "accepted truth in forensic pathology that intact sperm can be found for up to 72 hours." Applicant also notes that the matter of the length of time that intact sperm remains in the body was emphasized by the State's prosecutor during closing **[Reed – 5]** argument, signaling that it was a key issue in the case.[1] And he notes that this testimony was clearly important to the jury because it asked to have Bayardo's testimony read back to it during its deliberations. Applicant asserts that he is entitled to relief on this claim because, "[w]here false testimony essentially cut off Reed's only defense to the murder, there is a reasonable likelihood that the false testimony could have affected the judgment of the jury."

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[1] Applicant cited three places in the record of the State's closing argument where it emphasized the time frame during which applicant's sperm must have been deposited:

- "We know, from the credible evidence, that [sperm] doesn't hang around for days on end . . . that semen got in that girl's body within 24 hours of that eleven o'clock moment which is when? On her way to work."
- "[F]ingerprints can last for years. Semen, on the other hand, can be dated. And semen, specifically spermatoza, only stays about 24 hours."
- "[S]emen is not something that hangs around for days on end."

In order to establish that he is entitled to relief under Article 11.073, applicant must show by a preponderance of the evidence that he would not have been convicted if the newly available scientific evidence had been presented at his trial. *Robbins*, 478 S.W.3d at 690; TEX. CODE CRIM. PROC. art. 11.073 (permitting granting of post-conviction relief based on previously unavailable relevant scientific evidence that contradicts evidence relied on by the State at trial, based on the court's assessment that, "had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted"). Because this is a subsequent application, to avoid dismissal, applicant must allege facts that "are at least minimally sufficient to bring him within the ambit of that new legal basis for relief" in the sense that "there is arguably relevant scientific evidence that **[Reed – 6]** contradicts scientific evidence relied on by the state at trial, and that evidence was not available at trial" due to the expert changing his opinion. *Robbins*, 478 S.W.3d at 690. Similarly, with respect to his false-evidence claim, applicant must make out a prima facie showing of a constitutional violation by alleging facts that arguably could demonstrate that the State presented materially false or misleading testimony at his trial. *See Ex parte De La Cruz*, 466 S.W.3d 855, 866 (Tex. Crim. App. 2015). Here, Dr. Bayardo's declaration appears to contain new information that could arguably conflict with certain portions of his trial testimony. I note here that Dr. Bayardo's declaration contains several other statements that call into question the accuracy of his trial testimony—he states that the "presence of spermatoza in Ms. Stites's vaginal cavity was not

evidence of sexual assault"; that there was "no indication that the spermatoza in Ms. Stites's vaginal cavity was placed there in any fashion other than consensually"; that there was no spermatoza in Ms. Stites's rectal cavity and thus that there was "no evidence that any spermatoza was deposited in the rectal cavity as a result of the sexual assault"; that, in Dr. Bayardo's professional opinion, "Ms. Stites was sexually assaulted in her anal cavity, and that assault did not result in the deposit of any spermatoza"; and that the injuries to Ms. Stites's anus are "more consistent with penetration by a rod-like instrument, such as a police baton." Given these statements, and because Dr. Bayardo's declaration has never before been considered by this Court in a post-conviction proceeding, I would permit applicant to litigate his Article 11.073 and false-evidence claims **[Reed – 7]** that pertain to Dr. Bayardo's declaration.[2]

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[2] Applicant raises a number of other issues and claims in his -07 application, and, as to those matters, I agree with the Court's assessment that those claims should be dismissed. In particular, applicant presents the expert opinions of several forensic pathologists who challenge the State's evidence at trial, but he has failed to demonstrate any reason why he could not have presented this evidence at some earlier juncture. In addition, applicant presents claims of actual innocence and a false-testimony claim based on testimony from a TDCJ employee who opined that applicant would be a future danger, and he further asks this Court generally to reconsider its prior denial of his earlier habeas applications. As to these matters, I agree with the Court's assessment that applicant has failed to present a prima facie basis for relief and that those claims are thus subject to dismissal.

To be clear, I do not express any view as to the merits of applicant's claims at this juncture. I simply conclude that applicant has alleged facts in his -07 application on the basis of Dr. Bayardo's declaration that arguably could entitle him to relief, and thus I would permit further factual development of the claims rather than dismissing them on procedural grounds as the Court does today.[3] Without conducting an extensive review of the record, and in the absence of credibility determinations from the habeas court or live testimony to clarify the meaning of Dr. Bayardo's declaration, it is impossible to determine whether applicant's claims on this basis may have any merit. In my view, if the Court must conduct extensive **[Reed – 8]** factual and legal analysis in order to determine whether an applicant has established a prima facie case for relief, the better course in that situation is to remand the claim to the habeas court for findings and conclusions so

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[3] I am unpersuaded that federal litigation disregarding Dr. Bayardo's revised testimony resolves the matters currently before this Court. In 2014, the federal district court denied applicant's federal habeas petition, and that decision was affirmed by the United States Fifth Circuit Court of Appeals. *See Reed v. Stephens*, 739 F.3d 753 (5th Cir. 2014). But his federal claims are unlike this instant application, in which applicant relies on the statutory basis in Code of Criminal Procedure Article 11.073. *See* TEX. CODE CRIM. PROC. art. 11.073; *Ex parte Robbins*, 478 S.W.3d 678 (Tex. Crim. App. 2014) (reh'g denied Jan. 2016). In addition, he relies on this Court's false-evidence jurisprudence. *See Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009). Although some of the issues implicated by Dr. Bayardo's affidavit have been litigated in federal court and resolved against applicant, I would permit applicant the opportunity to factually develop his claims through a live hearing.

that the parties may fully litigate the matter and present this Court with an adequate record upon which to evaluate the claim. This is particularly true in this situation, given that the Court is already remanding applicant's -08 application for further proceedings. In my view, under these circumstances, it would be most efficient and prudent to resolve applicant's outstanding claims that may have some merit in a single proceeding.

With these comments, I concur in this Court's decision to remand applicant's -08 writ application. Because the Court concludes that applicant has failed to present a prima facie case on any of the claims raised in his -07 application and dismisses the application in its entirety as an abuse of the writ without reviewing the merits of the claims, I dissent from that portion of the Court's order.

Filed: May 17, 2017
Do Not Publish

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 73,135

RODNEY REED, Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL FROM BASTROP COUNTY

JOHNSON, J., ***delivered the opinion of the Court, in which*** **MANSFIELD, PRICE** ***and*** **HOLLAND, JJ.,** ***joined.*** **MEYERS, J.,** ***joined except as to point of error no. four, in which he concurred in the result.*** **WOMACK** ***and*** **KEASLER, JJ.,** ***joined except as to point of error no. six, in which they concurred in the result.*** **MCCORMICK, P.J., and KELLER, J.,** ***concurred in the result.***

O P I N I O N

Appellant was convicted of capital murder in May 1998. TEX. PEN. CODE §19.03(a). Pursuant to the jury's answers to the special issues set forth in TEX. CODE CRIM. PROC. art. 37.071, §§2(b) and 2(e), the trial judge sentenced appellant to death. Art. 37.071 §2(g).[1] Direct appeal to this Court is automatic. Art. 37.071 §2(h). Appellant raises eight points of error including a challenge to the factual sufficiency of the evidence to support the verdict. We will affirm.

STATEMENT OF FACTS

Around 3:00 on the morning of April 23, 1996, Stacey Lee Stites left the upstairs apartment in Giddings that she shared with her fiancé, Jimmy Fennell, to go to her job at an H.E.B. store approximately thirty miles away in Bastrop. Stites frequently worked the early morning shift with Andrew Cardenas and was considered a punctual employee. Stites would typically arrive before or just about the same time as Cardenas, and their normal routine was to walk into the store together. If one arrived before the other, the early person would wait in his or her vehicle for the other.

Cardenas was surprised when Stites did not promptly arrive at work on this particular morning. Although he waited outside for a short time, Cardenas went inside in time to begin his shift. As the morning wore on, Cardenas became increasingly concerned about Stites. Finally, sometime between

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[1] Unless otherwise indicated, all future references to Articles refer to the Code of Criminal Procedure.

4:30 a.m. and 6:45 a.m., Cardenas called Stites' mother who lived in an apartment downstairs and across from Stites' and Fennell's apartment. Mrs. Stites immediately called Fennell and told him that Stites had never made it to work; she then called the Bastrop County Sheriff's Department, the Giddings and Bastrop Police Departments, and the Department of Public Safety. Fennell came downstairs moments later and got the keys to Mrs. Stites' car so that he could begin looking for Stites.[2]

Meanwhile, Bastrop police officer Paul Alexander was driving his patrol through the parking lots of the Bastrop H.E.B. and Bastrop High School. Around 5:23 a.m., on another drive through the high school parking lot, Alexander noticed a red Chevrolet pickup truck parked in the lot that had not been there on two previous patrols during his shift. Alexander requested a check on the license plate. The return indicated that the truck was registered to a person with the last name of Fennell and that it had not been reported stolen. Alexander approached the truck and noticed a broken piece of woven belt laying outside the driver's door of the truck.[3] He also looked inside the locked truck, but he saw nothing suspicious and resumed his patrol duties.

When Mrs. Stites called the Bastrop Sheriff's Department, the dispatcher apparently remembered Alexander's discovery of Fennell's truck and

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[2] Stites did not own a car and drove Fennell's red S-10 Chevrolet pickup truck to work.

[3] Alexander did not touch or otherwise move the piece of belt.

contacted Alexander, who returned to his office to write up a report. Bastrop police officers thereafter had the truck towed to a secure location and contacted Fennell, who met them to identify anything that he did not recognize as belonging there. When officers opened the truck, they found one of Stites' shoes and one of her earrings on the floorboard. They also found pieces of a plastic drinking glass, which Stites normally took with her to work, both in the door console and wedged in the seat. The driver's seat of the truck was reclined with the seatbelt still engaged, and the officers found what appeared to be bodily fluid on the transmission hump between the driver's and passenger's seats. Fennell told the officers that the piece of belt that Alexander had found outside the truck was part of a belt that Stites often wore.

Around 2:45 that afternoon, Kenneth Osborn stopped along a dirt road near Highway 1441 in Bastrop County to pick wildflowers and discovered a body lying in a ditch. He notified the authorities. The body was identified as Stacey Stites. Personnel from several law enforcement agencies went out to secure the area, and the crime-scene team from the Texas Department of Public Safety Crime Laboratory in Austin was called to help process the scene.[4]

While processing the site, officers found another section of a woven belt. Subsequent comparison with the piece of belt that Alexander had found in the high

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[4] This team had previously been called in to help process Fennell's truck, but temporarily stopped its efforts there and concentrated on the place where Stites' body was found.

school parking lot indicated that the two pieces were from the same belt. An abrasion around Stites' neck appeared to have been made by the belt. Suspecting from the condition of the body that Stites had been sexually assaulted, the leader of the crime-scene team, Karen Blakely, took vaginal and breast swabs. An immediate test of the vaginal swabs indicated that semen was present. Later testing in the laboratory confirmed the presence of intact spermatozoa.[5]

While performing an autopsy on Stites' body, Dr. Robert Bayardo noted bruising on the top of her head that was consistent with having been struck by a fist. He also found what appeared to be a post-mortem burn on Stites' left forearm. By comparing the pieces of belt that were found at the two scenes and the ligature mark on Stites' neck, Dr. Bayardo determined that Stites had been strangled with the woven belt around 3:00 a.m. on April 23, 1996. During the autopsy, Dr. Bayardo took an additional set of vaginal swabs and found intact spermatozoa, indicating recent deposit. He also found several superficial lacerations around Stites' anus which were consistent with penile penetration and determined that these injuries were inflicted at or very near the time of death. On a rectal swab, Dr. Bayardo found what appeared to be heads of

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[5] Intact sperm indicated to Blakely that they had been deposited very recently. Her testimony was later corroborated by Meghan Clement of LabCorp, who testified that in ten and a half years of serology work, she had never seen spermatozoa remain intact for more than 24 hours after a sexual assault.

spermatozoa, again indicating recent penetration.[6] Because of the determination that the anal penetration occurred at the time of Stites' death, law enforcement personnel concluded that whoever deposited the semen in Stites' body had murdered her.

Wilson Young, a DNA analyst with the Department of Public Safety (D.P.S.), performed DNA tests on the various bodily fluids collected. From his testing, Young determined that the semen from Stites' underwear and from the vaginal and rectal swabs and the saliva found on the breast swabs all came from the same person.

During the investigation of Stites' murder, law enforcement personnel talked with many people who knew Stites, including family, friends, co-workers, and anyone else they thought might have information about her murder. Because of the semen, investigators also asked Stites' male associates to give them a blood sample. Everyone who was asked to give samples did so, and the collected samples were forwarded to the D.P.S. laboratory for testing. During the year following Stites' murder, officers submitted blood samples from twenty-eight different individuals. Each potential suspect, including Stites' fiancé, was absolutely excluded from being the donor of the semen found in Stites' body. There was no indication throughout the investigation that Stites was in any way associated with appellant.

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[6] Dr. Bayardo testified that spermatozoa break down more rapidly in the anal cavity than in the vaginal cavity.

In late February or early March 1997, appellant became a suspect when he attempted to commit a similar crime against another victim.[7] Officers were already aware of appellant, his habit of walking the streets of Bastrop in the middle of the night, and his frequent presence at Long's Star Mart during the early morning hours.[8] Appellant also lived in the area and often walked along the railroad tracks through town.[9]

Once appellant became a suspect, D.P.S. searched its files and found that it already had a sample of appellant's DNA on file.[10] D.P.S. analysts tested the sample and determined that appellant could not be excluded as the donor of the semen. Armed with this information, Sgt. David Board of the Bastrop Police Department talked with appellant, who told Sgt. Board that he did not know Stacey Stites and knew only what he had seen on the news about the murder.

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[7] Approximately six months after Stites' murder, appellant tried to abduct another young woman during the same time of night and from the same area where Stites disappeared. This information was admitted as an extraneous offense at punishment, but was not presented at guilt/innocence.

[8] Long's Star Mart was located along the route Stites drove to go to work.

[9] Fennell's truck was found next to the same railroad tracks in an area located only six-tenths of a mile from appellant's residence.

[10] The database sample came from a previous allegation of appellant's rape of his mentally disabled girlfriend. This information was not presented during guilt/innocence phase of the trial in the instant case.

Shortly thereafter, officers obtained samples of appellant's blood, hair, and saliva under a search warrant. After obtaining appellant's known samples, Wilson Young compared those samples to the evidence samples and determined that appellant's DNA was consistent with that of the semen recovered from Stites' body. Independent, and more discriminating, DNA testing also determined that appellant's DNA was consistent with the DNA of the evidence samples. Young calculated that 99.8% of the African-American and Caucasian populations and 99.92% of the Hispanic population would be excluded by comparison with that sample. Young also performed DNA tests upon blood samples obtained from appellant's father and three brothers, each of whom was excluded as being a possible donor.

The D.P.S. laboratory concluded its testing and sent appellant's known DNA, Stites' known DNA, a portion of the vaginal swabs, and a portion of the rectal swabs to LabCorp, a well-known North Carolina laboratory, for independent testing. LabCorp performed additional DNA tests and determined that the DNA recovered from Stites' body was consistent with appellant's DNA. Appellant's expert, who did her own independent testing, also could not exclude appellant as being the donor of the sperm found in Stites' body.

Appellant attempted to refute the DNA evidence against him by asserting that either Jimmy Fennell, David Lawhon, another man who was initially suspected by the police of the murder, or one of three "mystery men" actually murdered Stites. However,

the state countered each of appellant's theories and questioned the credibility of appellant's witnesses.[11]

POINTS OF ERROR

In his first point of error, appellant asserts that the evidence is factually insufficient to support the verdict. In a factual sufficiency review, this Court views all the evidence and sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996).[12]

In conducting such a review, we begin with the presumption that the evidence is legally sufficient under *Jackson v. Virginia*, 443 U.S. 307 (1979). *Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996), *cert. denied*, 522 U.S. 832, 118 S. Ct. 100, 139 L. Ed.2d 54 (1997). Next, we consider all of the evidence in the record, comparing the evidence which tends to prove the existence of the elemental fact in dispute with the evidence which tends to disprove it. *Jones, supra*. We are authorized to disagree with the jury's determination, even if probative evidence exists which supports the verdict, but we must avoid substituting our judgment for that of the fact-finder. *Jones*, 944 S.W.2d at 647-48. A clearly wrong and

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[11] Appellant does not raise this matter in his brief or illustrate how it does or does not contribute to the factual sufficiency of the evidence in his case. However, we have reviewed all of the evidence and considered it in responding to appellant's point of error.

[12] The continued vitality of this standard was recently reaffirmed in *Johnson v. State*, 23 S.W.3d 1 (Tex. Crim. App. 2000).

unjust verdict occurs where the jury's finding is "manifestly unjust," "shocks the conscience," or "clearly demonstrates bias." *Jones*, 944 S.W.2d at 648.

The thrust of appellant's argument under this point is that the evidence is factually insufficient because "other than the DNA evidence, there is no direct evidence which supports the verdict or ties [a]ppellant to the offense." Appellant argues that "when the only direct evidence in a case is expert scientific testimony, a conviction should not be permitted to stand when the evolution of the science is such that experts are still disagreeing about the fundamentals of interpreting data."

Expert scientific testimony that is unreliable is also inadmissible. *See Nenno v. State*, 970 S.W.2d 549, 560 (Tex. Crim. App. 1998) (noting that in *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992), Court of Criminal Appeals held that Texas Rules of Evidence required satisfaction of three-part reliability test before novel scientific evidence would be admissible). On the other hand, reliable scientific testimony has its basis in sound scientific methodology and is admissible. *Griffith v. State*, 983 S.W.2d 282, 287-288 (Tex. Crim. App. 1998), *cert. denied*, __ U.S. __, 120 S. Ct. 77, 145 L. Ed.2d 65 (1999). Once admitted, such evidence can be sufficient to support a conviction. *See, e.g., Roberson v. State*, 16 S.W.3d 156 (Tex. App. — Austin 2000, pet. ref'd), and cases cited therein. To the extent that appellant is arguing against the reliability of DNA evidence, we have previously held that such evidence is admissible when it meets the standards of reliability set forth by our rules of evidence. *See, e.g.,*

Massey v. State, 933 S.W.2d 141, 152-53 (Tex. Crim. App. 1996); *Campbell v. State*, 910 S.W.2d 475, 479-79 (Tex. Crim. App. 1995), *cert. denied*, 517 U.S. 1140, 116 S. Ct. 1430, 134 L. Ed.2d 552 (1996); *Flores v. State*, 871 S.W.2d 714, 722 (Tex. Crim. App. 1993), *cert. denied*, 513 U.S. 926, 115 S. Ct. 313, 130 L. Ed.2d 276 (1994); *Hicks v. State*, 860 S.W.2d 419, 422-23 (Tex. Crim. App. 1993), *cert. denied*, 512 U.S. 1227, 114 S. Ct. 2725, 129 L. Ed.2d 848 (1994); *Kelly*, 824 S.W.2d at 569-74. Appellant does not point to any place in the record where he objected in the trial court on this basis.[13] *See* TEX. R. APP. P. 38.1(h).

Given the strength of the DNA evidence connecting appellant to the sexual assault on Stites and the forensic evidence indicating that the person who sexually assaulted Stites was the person who killed her, a reasonable jury could find that appellant is guilty of the offense of capital murder. The verdict is not so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust.[14] Point of error one is overruled.

In his second point of error, appellant asserts that the trial court erred in overruling his *Batson* challenge to the state's use of peremptory strikes on

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[13] The citations in appellant's brief to our case law concerning the reliability of scientific evidence (*Hartman v. State*, 946 S.W.2d 60 (Tex. Crim. App. 1997); *Kelly, supra*) refer to other points of error.

[14] Appellant did present a defense at trial that some other person could have committed this crime, but he does not argue that evidence under this point. Our review of that evidence does not change our resolution of the issue.

venire members Harvey Lee Scroggins and Byron Alvin Mitchell. *See Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed.2d 69 (1986). Under *Batson*, a defendant must make a *prima facie* showing of racial discrimination in the state's exercise of its peremptory strikes. *Id.* at 96-97, 106 S. Ct. at 1723. After such a showing, the burden shifts to the state to articulate race-neutral explanations for its questioned strikes. The defendant then has the opportunity to rebut those explanations. *Id.* at 97-98, 106 S. Ct. at 1723-24. The trial court must determine whether the defendant has carried his burden of proving racial discrimination. *Id.* at 98, 106 S. Ct. at 1724. The trial court's determination is accorded great deference and will not be overturned on appeal unless it is clearly erroneous. *Chamberlain v. State*, 998 S.W.2d 230, 236 (Tex. Crim. App. 1999), *cert. denied*, __ U .S. __, 120 S. Ct. 805, 145 L. Ed.2d 678 (2000).

In his argument, appellant asserts that he made a *prima facie* case of discrimination by showing that the state struck the only two African-Americans in the venire. He notes (with only general references to the record) that the prosecutor "testified as to her alleged reasons for cutting" the venire members and that the trial court then overruled appellant's *Batson* challenge.

According to the record, the prosecutor set out the state's goals for voir dire,[15] and stated the state's

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[15] The state's two stated goals were to select jurors who (1) felt comfortable working within the Texas system in which the death penalty is an option, and (2) had at least some *(cont'd)*

specific reasons for striking each of the complained-of venire members. With regard to Scroggins, she stated that he appeared to have some "pretty significant reservations" about participating in a jury where the death penalty was an option.[16] The prosecutor also noted that Scroggins had indicated that he was estranged from his four children and had been jailed at least once for not paying child support. With regard to Mitchell, the prosecutor noted that he felt that capital punishment should be abolished, and stated that he could never personally return a verdict in which the death penalty would be assessed. Mitchell further noted that he did not believe that he or anyone else had the right to determine who lives and who dies. Appellant did not thereafter cross-examine the prosecutor as to the reasons given, made only minimal argument to the trial court, and did not address the reasons given by the prosecutor for striking the two men.

The state's explanations are race-neutral on their face and are reasonable. In the absence of rebuttal, we cannot hold that the trial court abused its discretion in finding that appellant failed to carry his

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(cont'd from previous page)
rudimentary knowledge of the world around them, specifically regarding the realm of scientific evidence.

[16] During voir dire, Scroggins stated that he would vote against the death penalty if he were in the Texas Legislature. Scroggins also stated in his questionnaire that he did not feel that the death penalty served any legitimate purpose in society and that he professed no knowledge whatsoever of scientific evidence.

burden. *See Chamberlain*, 998 S.W.2d at 236. Appellant's second point of error is overruled.

In his third point of error, appellant contends that the trial court erred when it permitted the state to introduce testimony from a D.P.S. criminalist about whether the crime scene reflected a "crime of passion." Specifically, appellant complains that the testimony of Karen Blakely was outside the scope of her expertise and, therefore, was lay testimony.[17] The record reflects that appellant objected to this testimony on the grounds that it called for speculation, was not relevant, and the probativeness of the information was substantially outweighed by unfair prejudice. Because appellant's objection at trial does not comport with the complaint he now makes on appeal, he has not preserved anything for our review. TEX. R. APP. P. 33.1; *see also Trevino v. State*, 991 S.W.2d 849, 855 (Tex. Crim. App. 1999). Point of error three is overruled.

In his fourth point of error, appellant complains that the trial court erred in excluding evidence that Jimmy Fennell had been deceptive during two polygraph examinations. Appellant states that he repeatedly attempted to demonstrate at trial that the polygraph information was both reliable and relevant and that he proffered testimony that two different examiners tested Fennell, and both found that he gave deceptive answers.

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[17] Karen Blakely was the D.P.S. chemist/criminalist who specialized in and testified about the DNA and serological evidence in the case.

Appellant asserts that "[p]olygraph evidence meets the criteria established by *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992)] and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed.2d 469 (1993)] and is admissible in a criminal case."[18] Appellant also notes that the federal courts have begun to re-examine the admissibility of polygraph evidence in light of *Daubert* and that several states have followed this example and re-examined their own laws, with many now allowing the admission of polygraph evidence under specified circumstances.

As we have previously stated, to be considered reliable, evidence derived from a scientific theory must satisfy three criteria in any particular case: (a) the underlying scientific theory must be valid; (b) the technique applying the theory must be valid; and (c) the technique must have been properly applied on the occasion in question. *Hartman*, 946 S.W.2d at 62; *Kelly*, 824 S.W.2d at 573. The proponent of this evidence must prove by clear and convincing evidence that the scientific evidence is reliable. *Kelly*, 824 S.W.2d at 573. Absent an abuse of discretion, we will not disturb the trial court's decision regarding the admission of such evidence. *Griffith*, 983 S.W.2d at 287; *see also General Elec. Co. v. Joiner*, 522 U.S. 136, 141-42, 118 S. Ct. 512, 517, 139 L. Ed.2d 508 (1997).

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[18] *See also Hartman v. State*, 946 S.W.2d 60 (Tex. Crim. App. 1997) (*Daubert* standard is virtually identical to standard previously formulated by Texas Court of Criminal Appeals in *Kelly*).

Although appellant states that he repeatedly attempted to demonstrate at trial that the polygraph information was both reliable and relevant, we have examined the record and found little evidence of such demonstrations. The evidence proffered by appellant concerning the polygraph information goes to the issue of relevance, i.e., whether Fennell was telling the truth; however, we find scant evidence in the record indicating that appellant made a showing of the reliability of such evidence, based on the three *Kelly* criteria. Indeed, following his proffers, appellant argued to the trial court only that the Fifth Circuit has held that such a determination regarding admission of polygraph evidence should be made on a case-by-case basis.[19] The defense called on Pat Carmack, a probation officer with a polygraph license, to testify to the reliability of polygraph evidence; yet, on cross-examination, Carmack admitted that there could be reliability problems with such evidence. Given all this, we cannot say either that appellant made a "clear and convincing" showing that such evidence was reliable, or that the trial court abused its discretion in excluding such evidence. Point of error four is overruled.

In his fifth point of error, appellant argues that the trial court erred in admitting several autopsy photographs, state's Exhibits 80 through 87 and 80a through 87a,[20] into evidence because their prejudicial

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[19] *See United States v. Posado*, 57 F.3d 428 (5th Cir. 1995) (holding that polygraph evidence is no longer *per se* inadmissible).

[20] Despite appellant's inclusion of state's exhibits 85 and 85a, the record does not reveal the existence of such exhibits.

effect outweighed their probative value. TEX. R. CRIM. EVID. 403.[21]

Rule 403 of the Texas Rules of Criminal Evidence states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

Rule 403 favors the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial. *Williams v. State*, 958 S.W.2d 186, 196 (Tex. Crim. App. 1997); *Montgomery v. State*, 810 S.W.2d 372, 389 (Tex. Crim. App. 1990); *Jones v. State*, 944 S.W.2d 642, 652 (Tex. Crim. App. 1996), *cert. denied*, 522 U.S. 832, 118 S. Ct. 100, 139 L. Ed.2d 54 (1997); *Long*, 823 S.W.2d at 271. The trial court's decision will not be disturbed on appeal unless there has been an abuse of discretion, that is, the decision falls outside the zone of reasonable disagreement. *Jones v. State*, 982 S.W.2d 386, 394 (Tex. Crim. App. 1998), *cert. denied*, __ U.S. __, 120 S. Ct. 444, 145 L. Ed.2d 362 (1999).

A court may consider several factors in determining whether the probative value of evidence

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[21] The Texas Rules of Criminal Evidence and the Texas Rules of Civil Evidence were combined into the Texas Rules of Evidence, which became effective March 1, 1998.

is substantially outweighed by the danger of unfair prejudice, including the number of exhibits offered, gruesomeness, detail and size, whether they are in color or black and white, close-up or distant, and whether the body depicted is clothed or naked. *Chamberlain*, 998 S.W.2d at 237.

Regarding the photographs complained of in the instant case, we first note that exhibits numbered 80-a through 84-a, 86-a, and 87-a are all 4" x 6" in size and exhibits numbered 80 through 84, 86, and 87 are enlarged duplicates of the smaller photographs.[22] Exhibits 80/80a through 84/84a and 87/87a all show the manner and means of the victim's death or other injuries which occurred in the course of the attack. Because the photographs show no more than the crime scene and the nature of the victim's injuries, the trial court could have reasonably concluded that the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice. *Ladd v. State*, 3 S.W.3d 547, 568 (Tex. Crim. App. 1999), *cert. denied*, __ U.S. __, 120 S. Ct. 1680, 146 L. Ed.2d 487 (2000). We cannot say that

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[22] None of the original photographs were included in the appellate record sent to this Court, but the black-and-white xerox copies of the smaller exhibits appear to sufficiently represent the actual photographs for purposes of this appeal. Neither appellant's brief nor the record reveals the size of the larger exhibits, but the state asserts in its brief that the larger photographs are 16" x 20". We will presume for the sake of analysis that 16" x 20" is the correct size. We will also assume that all are in color. Furthermore, because appellant does not argue that the enlarged photos are more prejudicial than their smaller counterparts due to their size, we will address the photographs in their relative pairs, as does appellant.

the trial court abused its discretion in admitting them.

Exhibits 86 and 86a, on the other hand, require additional analysis. We have previously stated that autopsy photographs are generally admissible unless they depict mutilation of the victim caused by the autopsy itself. *Rojas v. State*, 986 S.W.2d 241, 249 (Tex. Crim. App. 1998). These photographs depict the victim's skull after the scalp has been cut and "reflected" back. Although this type of photograph is particularly gruesome, medical examiner Dr. Roberto Bayardo testified that, looking at the outside of the head, he did not notice any injuries to the head. However, once he "reflected" the skull to look at the inside, he saw multiple bruises, leading him to conclude that the victim had been struck on the head with a fist. Because this "reflected" view was apparently the only way to visually depict these injuries, and because the testimony and presentation of the photographs were brief and to the point, we cannot say that, in this case, the trial judge was outside the zone of reasonable disagreement in allowing these exhibits. Appellant's fifth point of error is overruled.

In his sixth point of error, appellant complains that the trial court erred when it permitted the state to strike at appellant over his counsel's shoulders. In attacking the credibility of the evidence the defense had presented, the prosecutor noted that appellant had initially given the police a statement that he did not know Stacey Stites. However, upon being confronted with the DNA evidence, the state asserted that defense counsel had concocted a defensive theory that Stites and appellant were having a secret affair.

In support of this theory, appellant put on various witnesses to testify that they had seen appellant and Stites together at some point in time. It was in reference to one of these witnesses that the complained-of argument arose. Specifically, appellant complained of the following state's argument regarding the testimony of defense witness Iris Lindley:

> So you hear from Ms. Lindley, Iris Lindley. And usually when I talk to jurors I have to talk to you and say, you know, it's not like it is on TV, you don't usually get to cross-examine people like on TV. Well, I can't [say] that here because Ms. Lindley is a witness who I must say is utterly devoid of credibility. Utterly devoid. And your job is to judge the credibility of the witnesses, and you have the right to believe all, none or some of what they say. How much of what Ms. Lindley said are you going to believe? She comes in here and she tells you,
>
> "Yeah, I saw a girl come up and talk to [appellant]."
>
> "What was her name?"
>
> "Stephanie."
>
> "Stephanie?"
>
> You saw [defense counsel] go, "What did you say?" And [the witness] said, "Stephanie." And then you could kind of see her go, uh-oh, I got my script wrong.

> [BY DEFENSE COUNSEL:] Objection, striking at the defendant through counsel. I'm going to object to that, Judge.
>
> THE COURT: It's overruled. Go ahead.
>
> [BY THE PROSECUTOR:] She got her script wrong, so then she says, "No, no, Stacey, Stacey. Yeah, that's it, Stacey." Okay, sure.
>
> And then [the witness] says that this girl drove up in a gray truck. I saw her in a gray truck. Well, we know Stacey didn't drive a gray truck. She got that part of the script wrong, too. Then this is when it gets classic. [Defense counsel] shows [the witness] [Stites'] driver's license picture. "Is this the girl?" "No." So then we take this picture. "Is this the girl?" Well, gee, what do you think she's going to say now? "Yeah, that's her." Gheez.

Permissible areas of jury argument include: (1) summation of the evidence; (2) reasonable deductions from the evidence; (3) an answer to the argument of opposing counsel; or (4) a plea for law enforcement. *Wilson v. State*, 938 S.W.2d 57, 59 (Tex. Crim. App. 1996). Prosecution argument that the witnesses for the defense are not worthy of belief may fall under summation of or deduction from the evidence or answer to defense argument. *Satterwhite v. State*, 858 S.W.2d 412, 425 (Tex. Crim. App.), *cert. denied*, 510 U.S. 970, 114 S. Ct. 455, 126 L. Ed.2d 387 (1993). However, final arguments that result in uninvited and unsubstantiated accusation of improper conduct directed at a defendant's attorney are manifestly

improper and serve only to inflame the minds of the jury to the accused's prejudice. *Mosley v. State*, 983 S.W.2d 249, 258 (Tex. Crim. App. 1998), *cert. denied*, 526 U.S. 1070, 119 S. Ct. 1466, 143 L. Ed.2d 550 (1999); *Wilson*, 938 S.W.2d at 59. Indeed, trial judges should assume responsibility for preventing this type of argument. *Mosley*, 983 S.W.2d at 258.

While the argument in the present case does not directly refer to defense counsel, the statement that the witness had gotten her "script" wrong necessarily implied that counsel had a hand in coaching the witness. This is a necessary implication because only counsel would have had a grasp both of the facts of the case and of the information needed to support the defensive theory. Furthermore, no evidence appears in the record that any kind of "script" even existed. Therefore, the argument potentially injected a new fact into the case which was outside the record. *See Wilson, supra*. Because the argument, albeit impliedly, attacked defense counsel's honesty and integrity as an attorney, we hold that the argument was improper and that the trial judge erred in overruling appellant's objection. Hence, we must determine whether this error warrants reversal.

As we noted in *Mosley*, 983 S.W.2d at 259, improper comments on defense counsel's honesty do not rise to the level of a constitutional violation. Rather, we have characterized such comments as falling outside the areas of permissible argument. *See also Wilson*, 938 S.W.2d at 59. Our harm analysis is thus governed by TEX. R. APP. P. 44.2(b), which provides that: "Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Because this harmless error

rule was taken directly from Federal Rule of Criminal Procedure 52(a) without substantive change, we have looked to federal caselaw for guidance in construing the rule. *See Mosley*, 983 S.W.2d at 259-261. In applying the federal rule to improper argument cases, federal courts generally look to three factors: (1) severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks); (2) measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge); and (3) the certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction). *Id.* (citing to *United States v. Millar*, 79 F.3d 338, 343 (2nd Cir. 1996) and *United States v. Palmer*, 37 F.3d 1080, 1085 (5th Cir. 1994), *cert. denied*, 514 U.S. 1087, 115 S. Ct. 1804, 131 L. Ed.2d 730 (1995)).

Applying this three-factor test, we first note that, while the comments were inappropriate, they did not directly accuse the defense attorneys of lying or of manufacturing evidence. *Cf. Dinkins v. State*, 894 S.W.2d 330, 357 (Tex. Crim. App. 1995) (comment by prosecution to jury that defense counsel "wants to mislead you a little bit" not as egregious as accusation that defense counsel was paid to "manufacture evidence" and "get this defendant off the hook"), *cert. denied*, 516 U.S. 832, 116 S. Ct. 106, 133 L. Ed.2d 59 (1995). Furthermore, the comments ultimately went to the issue of the truthfulness and credibility of a witness, an issue which it is ultimately the jury's duty to evaluate. Hence, the first factor of the harm test weighs only slightly in appellant's favor.

As for the second factor, no curative action was taken. In addition, the prosecutor reemphasized the statements after the trial court overruled appellant's objection. Thus, the second factor weighs heavily in favor of appellant.

The third factor, certainty of conviction, weighs heavily in favor of the state. Although appellant initially told the police that he was not acquainted with Stites, he asserted a defense based on a consensual sexual relationship with her. Appellant frequented the area where the crime occurred, and the police saw him there at about around the time of the murder. According to testimony about the DNA evidence from both state and defense experts, appellant could not be excluded as the donor of the semen recovered from Stites' body, while all of appellant's close male relatives and male colleagues of Stites were excluded. The pathologist indicated that the donor of the semen was likely also the murderer, because the condition of Stites' body indicated that the sexual assault occurred at the time of death. Balancing all these factors, we find the error harmless. Point of error six is overruled.

In his seventh point of error, appellant asserts that the trial court erred when it permitted the state to comment on his failure to testify. Specifically, appellant complains about the following closing argument by the state:

> And isn't it interesting that we talked a lot about the fact that Jimmy [Fennell] didn't have an alibi. Jimmy didn't have an alibi for that night. Jimmy didn't have anybody accounting for his whereabouts because Stacey was the only one who could have

> accounted for his whereabouts. It's important to note that nobody could ever find anything inconsistent with what he told you. Nobody. They canvassed his apartment, they looked everywhere, and nobody could find anything inconsistent. But it's true, Jimmy didn't have an alibi. But ask yourselves, is there anyone else here who didn't have an alibi? Is there anyone else who we've heard evidence about that didn't have an alibi? Yes, there is, the defendant.

Appellant submits that this argument was a comment on his failure to testify in that it could only have been interpreted by the jury as a statement that it had never heard from him. We disagree.

Appellant correctly notes that the Fifth Amendment, Article I, §10, of the Texas Constitution, and Article 38.08 of the Code of Criminal Procedure all prohibit the state from commenting on a defendant's failure to testify in a manner that invites the jury to construe the defendant's silence as evidence of guilt. However, pointing out to the jury that a defendant has failed to present evidence other than his own testimony is not necessarily a comment on his failure to testify. *See, e.g., Ladd*, 3 S.W.3d at 569; *Wolfe v. State*, 917 S.W.2d 270, 279-80 (Tex. Crim. App. 1996). By the plain language of the argument itself, read in context, the above comment is a reference to appellant's failure to present witnesses other than himself. Indeed, after appellant's objection was overruled, the prosecutor said:

> Don't you know that if somebody, anybody, would have been able to come her [sic] and tell you, yeah, [appellant] was asleep in bed at my house at three o'clock in the morning the night of April 23rd. If anyone, family member, friend, girlfriend, anyone on this earth could have come here and told you [appellant] was at home in bed with them, and alibied him, you would have heard from them.

Because the prosecutor did not err in commenting on appellant's failure to call defense witnesses other than himself, appellant's seventh point of error is overruled.

In his eighth point of error, appellant asserts that the "trial court erred in admitting [at punishment] evidence of a 1987 extraneous act offense for which appellant had been acquitted." In his brief, appellant appears to argue that the admission of this extraneous offense violated the doctrines of double jeopardy and collateral estoppel under *Ashe v. Swenson*, 397 U.S. 436, 443 (1970).[23] For purposes of

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[23] At trial, appellant objected, simply stating, "It's our position that such evidence should be inadmissible." After further discussion, appellant stated, "You are allowing the jury to consider information that will be prejudicial to the defendant in this particular case, and violative of his Eight Amendment [sic] as well as the corollary of the Texas Constitution." Arguably, neither of these statements provides a sufficiently specific objection to preserve error on appellant's claims on appeal. However, because the state utilized our decision in *Powell v. State*, 898 S.W.2d 821, 830 (Tex. Crim. App. 1994), *cert. denied*, 516 U.S. 991, 116 S. Ct. 524, 133 L. Ed.2d 431 (1995), *overruled on other grounds*, *Prystash v. State*, 3 S.W.3d 522 (Tex. Crim. App. 1999), *cert.* *(cont'd)*

analysis, we assume, without deciding, that the 1987 extraneous offense was improperly admitted.

In the extraneous offense of which appellant complains, appellant was tried and acquitted of sexually assaulting Connie York in her Wichita Falls apartment. York testified, in the instant case, that she did not consent to sex with appellant. However, appellant was acquitted in York's case, apparently on the basis that the sex was consensual.

The state also put on evidence that appellant: broke into twelve-year-old Angela Hamby's home and beat, bit, raped, sodomized, and threatened to kill her; frequently beat and raped the mother of his two children while they were dating and, after she had broken off their relationship, broke into her home and raped her while their two children watched; raped Vivian Harbottle on the railroad tracks in the middle of the night and laughed at her when she asked him not to kill her; anally raped and physically abused his mentally disabled girlfriend, Caroline Rivas; abducted, assaulted, and attempted to rape Linda Schlueter six months after the abduction, rape, and murder of Stacey Stites.

Given the evidence presented, and that the majority of the evidence of extraneous offenses presented, including the instant case, was substantially similar to the complained-of evidence,

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denied, __ U.S. __, 120 S. Ct. 1840, 146 L. Ed.2d 782 (2000), at trial to show admissibility, and *Powell* addresses admission on double jeopardy grounds, we address appellant's point of error. *See* TEX. R. APP. P. 33.1(a)(1)(A).

we determine beyond a reasonable doubt that the admission of the evidence did not contribute to appellant's punishment. *See* TEX. R. APP. P. 44.2. Point of error eight is overruled.

Finding no reversible error, we affirm the judgment of the trial court.

Johnson, J.

Date Delivered: December 6, 2000

En banc

Do Not Publish

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. AP-75,693

EX PARTE RODNEY REED, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS IN CAUSE NUMBER 8701 IN THE 21ST DISTRICT COURT OF BASTROP COUNTY

KEASLER, J., delivered the opinion of the Court in which MEYERS, PRICE, JOHNSON, HERVEY, HOLCOMB, and **COCHRAN, JJ.,** joined. **KELLER, P.J., filed a concurring opinion. PRICE, J., filed a concurring opinion. WOMACK, J., concurred.**

OPINION

Rodney Reed was convicted and sentenced to death for the murder of Stacey Lee Stites. In this second subsequent application for a writ of habeas corpus, Reed has failed to prove that the State suppressed evidence in violation of *Brady v. Maryland*. Reed has also failed to meet the requisite,

gateway standard of innocence—showing that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence not presented at trial—under Article 11.071, Section 5(a)(2) of the Texas Code of Criminal Procedure. Relief is therefore denied.

[702] I. Facts

Stacey Lee Stites's partially clothed body was discovered on the side of a desolate country road in Bastrop County, Texas on April 23, 1996.

Stacey and her mother, Carol Stites, moved to Bastrop from Smithville in 1995 after Stacey graduated from high school. After briefly working for a car dealership in Bastrop, Stacey began working at the Bastrop H.E.B., a grocery store, as a cashier and bagger in October 1995. In January 1996, Stacey and her mother moved to the nearby town of Giddings so that Stacey could be with her fiancé, Jimmy Fennell. Fennell, who had completed the police academy at the Capital Area Planning Counsel Organization (CAPCO) in October 1995, was hired as a patrol officer with the Giddings Police Department in December. With a long-term interest in law enforcement, Fennell had previously been employed by the Bastrop County Sheriff's Office as a jailer. Carol described Stacey and Fennell as inseparable since they began dating a few weeks after meeting at the Smithville Jamboree in May 1995. By late December 1995, the two were engaged.

Stacey, Carol, and Fennell moved into an apartment complex just outside Giddings. Stacey and Fennell shared an apartment on the second floor of

the apartment building, and Carol lived in a separate one-bedroom apartment downstairs.

With a big church wedding planned for May 11, 1996, Stacey transferred into the produce department at H.E.B. to earn more money. The new assignment required her to report to work at 3:30 a.m. to stock produce for the day. Normally, she would wake up between 2:45 to 2:50 a.m. and take anywhere from five to twenty minutes getting ready to leave for work; she would dress in her H.E.B. uniform, which consisted of blue pants and a red shirt with an H.E.B. insignia on the front. Typically, she would wear a white T-shirt and carry the red shirt with her on the way out the door, along with a plastic cup of juice or water. Although Stacey had access to Carol's white or gray Ford Tempo, she routinely drove Fennell's red Chevrolet S-10 extended-cab truck to work. Carol's car was unreliable and had broken down on the road in the past. When commuting to work, Stacey would take Highway 290 to Highway 21 and then Loop 150/Chestnut Street, over the railroad tracks into Bastrop. The drive took approximately twenty-five to thirty minutes. When she finished her shift in the early afternoon, Stacey would usually go to Carol's apartment, take a nap, and then get up and prepare things with Carol for the upcoming wedding.

After leaving work on April 22, 1996, the day before she died, Stacey arrived at Carol's apartment early in the afternoon. She ate lunch and took a nap. Fennell came home from work a few hours later, and having borrowed Carol's Ford Tempo, Fennell returned Carol's extra set of car keys to Carol by placing them on a shelf in her apartment. Carol

designated the extra set as Stacey's set. The three then briefly talked about their schedules for the following day. Stacey was scheduled to be at work at 3:30 a.m., and Fennell was not scheduled to work. Fennell and Stacey had planned to go to the insurance agent and to pick out flowers for the wedding ceremony after Stacey got off of work. When Fennell suggested driving Stacey to work, Carol offered to drive him to Bastrop to meet Stacey so that Fennell could sleep in. However, Fennell declined Carol's offer, stating that he would drive Stacey to work. Fennell then left in his truck to coach a little-league-baseball team with his friend and coworker, Officer David Hall. He returned between 8:00 and 8:30 **[703]** p.m. Stacey met Fennell outside of Carol's apartment, and according to Carol, the two then ran upstairs laughing "as hard as they could."

When Fennell and Stacey returned to their apartment, they showered together. Although Stacey was taking birth-control pills, the two did not have sexual intercourse because, at this point in her prescription cycle, the vitamin pills she was taking allowed for a greater possibility of pregnancy. The two also discussed their plans for the next day for a second time. Abandoning their earlier plan, they agreed that Stacey would take Fennell's truck to work and that Fennell would arrange to have Carol take him to meet Stacey in Bastrop when she got off of work. Stacey then went to sleep at 9 p.m., while Fennell stayed up and watched the news.

The next morning, April 23rd, Andrew Cardenas, Stacey's coworker in the produce department, arrived at the Bastrop H.E.B. around 3:30 a.m. and waited for Stacey in the parking lot.

Cardenas would usually wait in his car for Stacey to arrive so that they could "keep an eye on each other, to make sure nobody was around and walk inside the store together...." Cardenas regarded Stacey as a punctual employee, and when she failed to show up for work, he became concerned. Cardenas eventually went into work to start his shift, but he kept an eye out for Stacey.

At 5:23 a.m., while on routine patrol, Officer Paul Alexander with the Bastrop Sheriff's Department observed Fennell's truck parked in the Bastrop High School parking lot. Mindful that the truck had not been parked there during his previous patrol of the area and that there were no other vehicles in the lot, Officer Alexander contacted the dispatcher and requested a stolen-vehicle check. The dispatcher reported that the vehicle was registered to an individual with the last name Fennell. Although Officer Alexander knew Jimmy Fennell, he did not know him well, and it did not enter his mind that the truck belonged to Jimmy Fennell. When Officer Alexander looked inside the cab with his flashlight, he noticed that the driver's seat was reclined and that there were books and clothing on the seats. Outside the driver's side door on the ground, Officer Alexander observed a small piece of a broken belt with a buckle. After noting that there was no shattered glass, that the ignition was intact, and that the driver's side door was locked, Officer Alexander concluded that nothing was out of order and returned to his patrol duties.

Still looking out for Stacey to arrive at work, Cardenas finally decided to call Carol between 6:30 and 7:00 a.m. When Cardenas told Carol that Stacey

failed to show up for work, Carol became upset and immediately yelled out for Fennell. Cardenas then went back to work, and Carol called Fennell on the phone, waking him up. Frantic, Carol told Fennell that H.E.B. called and told her that Stacey did not show up for work. Fennell rushed down the stairs, putting on a shirt on the way down. He told Carol to call authorities and tell them that he and Carol were looking for Stacey. Carol had both sets of keys to her car, so Fennell took Stacey's set and drove to Bastrop in Carol's Tempo to look for Stacey. He drove to the H.E.B. and then returned to Carol's apartment. He did not see any sign of Stacey or the truck. Meanwhile, officers with the Bastrop Police Department were looking for Stacey, and David Board, an investigator with the Department, called Carol to ensure her that they were doing everything possible to locate Stacey.

At approximately 9:00 a.m., after authorities received the missing-persons report, Ed Selmala, an investigator with the Bastrop Police Department, was dispatched to **[704]** the Bastrop High School parking lot. Upon arrival, Investigator Selmala notified other law enforcement officers, including Board, of the truck's location and requested assistance. While numerous investigators from the Bastrop Police and Sheriff's Departments were photographing the truck and other pieces of evidence, Officer Alexander was called back into work to explain why he ran the license plate on the truck earlier that morning and to write a report.

The truck was later taken to a local tow shop and held until it could be transported to Austin so that members of the Texas Department of Public

Safety Crime Laboratory (DPS Crime Lab) could process it for evidence. While the truck was at the tow shop in Bastrop, authorities requested Fennell's presence to identify items found in and outside of the truck. Fennell was specifically instructed not to touch anything and to peer into the cab and identify anything that was not supposed to be in the vehicle. Fennell observed several things in the truck that were "out of the ordinary." First, one of the tennis shoes that Stacey normally wore to work was on the floorboard of the passenger's side of the truck. Second, there was a foamy substance resembling saliva on the carpet covering the hump over the truck's transmission. Third, there were broken pieces of green plastic in the console from the type of cup that Stacey usually took with her in the truck. Fourth, the driver's seat was laid back at a forty-five-degree angle. Fifth, the driver's seatbelt was still buckled. And sixth, there was a large smudge on the back window on the passenger's side. Fennell also identified several items found outside the truck. First, there were carbon copies of checks from his checkbook. And second, regarding the piece of the belt with a buckle attached, Fennell told investigators that it was part of the belt that Stacey normally wore to work. After this, Fennell returned to his apartment complex in Giddings.

When the truck was delivered to the DPS garage in Austin, a crime-scene team began to process it for evidence. The team stopped their initial overview of the truck when Stacey's body was discovered by Kenneth Osborn shortly before 3:00 p.m. on Bluebonnet Drive, located off of FM 1141. Osborn, a real estate appraiser, was early for a 3:00 o'clock appointment and decided to drive on

Bluebonnet Drive to pick some flowers for his wife. He spotted Stacey's body among some thorny brush in a ditch on the side of the road. When Osborn approached Stacey's body, he realized that she was dead. He got back into his car, stopped at a house nearby, called the police, and then went back to Bluebonnet Road to wait for the police.

John Barton, an investigator with the Bastrop County Sheriff's Department, was one of the first law-enforcement officers to arrive at the scene. He covered Stacey's body with a green blanket to prevent the media, circling above in a helicopter, from taking photographs. He also closed off the crime scene and began to photograph the area and Stacey's body. Shortly thereafter, Bastrop authorities, joined by Texas Ranger L.T. Wardlow, who became the designated lead investigator assigned to work with both the Bastrop Police and Sheriff's Departments, decided to call in DPS Crime Lab members to process the scene.

The DPS crime-scene team arrived in Bastrop from Austin at approximately 5:15 p.m. Karen Blakley, who specialized in DNA and serology, was designated the team leader by her coworker, Wilson Young. Other members of the team, led by Blakley, included a trace analyst, a photographer, a latent-print examiner, and a trainee in serology and DNA. Detailing **[705]** the condition of Stacey's body, Blakley noted that Stacey was missing a shoe and that her white sock was clean, indicating that she had not likely walked on an outside surface. An H.E.B. name tag with the name "Stacey" written on it was found in the crook of Stacey's leg, and a white T-shirt, which Fennell later identified as belonging to

him, was strewn over some brush near Stacey's body. Stacey was clothed in a black bra and a pair of blue pants with a broken zipper. Her visible green underwear was wet in the crotch and bunched around her hips. Viewing this as indicative of a sexual assault, Blakley tested for the presence of semen, and the initial test yielded a positive result. Blakley then collected additional swab samples from Stacey's vagina and breasts. Because rigor mortis had set in, Blakley could not determine if Stacey had been anally sodomized. "She was already very stiff, and in order for me to try to get to the anal area I could possibly cause injury or further damage and make it look like she had suffered something that she didn't."

According to Blakley, it "looked like a great force had been applied [to Stacey's neck] ... because it was like an indentation but red, like it had cut into her skin." Blakley concluded that the injury was caused by a piece of webbed belt that was located near Stacey's body on the side of the dirt road "[b]ecause it matched the pattern that was on [Stacey's] neck." And when the piece of belt with a buckle found near Fennell's truck at the high school was brought to the scene, Blakley compared the two and concluded that they matched. Another criminalist on the team designated to search for trace evidence concurred with Blakley's determination, concluding that the pieces matched. Going a step further, he also concluded that the belt had been torn not cut.

Documenting other injuries to Stacey's body, Blakley observed that there were scratches on her abdomen and arms, a burn from a cigarette on her

arm, and shallow wounds on her wrists and back that looked like they were caused by fire-ant bites. Blakley also documented a large amount of mucus that ran from Stacey's nose, down the side of her face, and into her hair.

Terry Sandifer, the latent-fingerprint examiner, collected two Busch beer cans that were located across the road from where Stacey's body was discovered. When Sandifer processed the cans for fingerprints at the lab, she discovered no suitable fingerprints to analyze.

After processing the scene, Blakley returned to the lab that evening around 11:00 p.m. so that she could look at the substance on the vaginal swabs under a microscope. She discovered intact sperm—sperm heads with the tails still attached—that, in her opinion, indicated that the sexual activity was recent. Her conclusion was based on a published study finding that "26 hours is about the outside length of time that tails will remain on a sperm head inside the vaginal tract of a female." She immediately reported her finding to Ranger Wardlow. Ranger Wardlow viewed the presence of semen as a "smoking gun," surmising that the evidence of sexual assault gave the perpetrator a motive to kill. Ranger Wardlow theorized that identifying the man who left the semen would lead to the discovery of Stacey's killer.

Dr. Robert Bayardo, the Travis County Medical Examiner, conducted an autopsy on Stacey's body the following afternoon at 1:50. He estimated that Stacey died on the 23rd of April at 3:00 a.m., give or take a few hours, based on changes that occur in the body after death. Dr. Bayardo noted that

Stacey had pre- and post-mortem **[706]** injuries. He differentiated between the two based on the absence of bleeding; once the heart stops beating, there is no more bleeding and no more bruising. The burn, which Blakley believed was caused by a cigarette, occurred after Stacey died, as did several scratches, in Bayardo's opinion. Although Stacey's skull showed no outward signs of injury, when Dr. Bayardo looked inside the skull, he documented multiple bruises that "had the appearance of injuries sustained by being struck on the head with the finger knuckles with a closed hand." Comparing the injury pattern on Stacey's neck with the pieces of webbed belt collected by authorities, Dr. Bayardo concluded that the belt was the murder weapon and that Stacey died as a result of asphyxiation caused by strangulation. He estimated that asphyxiation takes approximately three to four minutes and that a person becomes unconscious within one to two minutes.

Because of evidence indicating sexual assault, Dr. Bayardo took vaginal swabs. Viewing the swabs under a microscope, he observed the presence of sperm with both heads and tails. This, according to Dr. Bayardo, indicated that the sperm had been introduced into Stacey's vagina "quite recently." Continuing the sexual-assault exam, Dr. Bayardo took rectal swabs. Viewed under a microscope, he identified several sperm heads without any visible tails, which led him to report the result of the test as negative. Sperm, according to Dr. Bayardo, breaks down much faster in the rectum than it does in the vagina because of the presence of other bacteria in the rectum. When conducting a visual exam of Stacey's rectal area, Dr. Bayardo noticed that her anus was dilated and that there were some

superficial lacerations on the posterior margin. In his opinion, this was consistent with penile penetration, even though he did not entirely rule out the possibility that the presence of sperm in the anus was the result of seepage from the vagina. Utilizing his education and experience about determining whether a particular injury occurred before or after death, Dr. Bayardo concluded that Stacey sustained the injury to her anus at or around the time of her death and that the penetration was therefore not consensual.

Because Blakley had prior commitments, Young took over the serological duties on the 24th. Young conducted two types of Polymerase Chain Reaction (PCR) DNA testing, DQ-Alpha and D1S80, on Stacey's blood, the vaginal swabs taken by Blakley and Dr. Bayardo, and the substance found on the crotch of Stacey's underwear. Young conducted only one type of PCR DNA testing, DQ-Alpha testing, on the anal swabs taken by Dr. Bayardo because the quantity of sample was limited.

Every person receives one DQ-Alpha allele and one D1S80 allele from each parent; therefore, every person possesses two DQ-Alpha alleles and two D1S80 alleles. Stacey's blood possessed the DQ-Alpha alleles of 1.2 and 4 and the D1S80 allele of 24, which meant that each of her parents contributed a 24 D1S80 allele to her genetic makeup. On the male portion of the vaginal swabs taken by Dr. Bayardo, the results showed DQ-Alpha alleles 1.2, 3, and 4 and D1S80 alleles of 22 and 24. The presence of three DQ-Alpha alleles, according to Young, is a common occurrence when there is carryover of DNA from either of the two donors that cannot be entirely

eliminated during the testing process and does not affect the validity of the results. The 22 D1S80 allele was foreign to Stacey. Regarding the vaginal swab taken by Blakley, the male portion showed DQ-Alpha alleles of 1.2 and 3 and D1S80 alleles of 22 and 24. This signified no carryover from Stacey and indicated that the semen donor possessed the DQ-Alpha **[707]** alleles of 1.2 and 3 and the D1S80 alleles of 22 and 24. Testing on the male portion from the rectal swabs indicated the presence of DQ-Alpha alleles 1.2, 3, and 4. While there was carryover, the 3 DQ-Alpha allele was foreign to Stacey. Testing of the male potion of DNA from the crotch of Stacey's underwear showed the presence of DQ-Alpha alleles 1.2 and 3 and D1S80 alleles 22 and 24, indicating the absence of any carryover. Finally, testing on the swabs from Stacey's breasts showed the presence of DQ-Alpha alleles 1.2, 3, and 4 and D1S80 alleles of 22 and 24. The 3 DQ-Alpha allele and the 22 D1S80 allele were foreign to Stacey, even though there was carryover. Given the results, Young concluded that there was a single semen donor.

Young also participated in processing the truck on the 25th, accompanied by Sandifer, the latent-print examiner, and Ranger Wardlow. Blakley joined them the next day when she returned to work. In processing the truck and the carbon copies of Fennell's checks found outside the truck for prints, Sandifer did not discover anything remarkable. Sandifer could find only a few items with suitable prints. When she examined the prints, she was either unable to make a match or identified the prints as belonging to either Stacey or Fennell. Young focused on looking for the presence of blood or semen but discovered none. And although Young collected other

items, including a portion of the saliva or mucus substance that Fennell previously noticed on the carpet over the transmission hump, he did not discover anything significant that would help in identifying the perpetrator. Blakley, having observed Stacey's body, noted that the substance on the transmission hump looked similar to the mucus that had flowed out of Stacey's nose.

Young, Ranger Wardlow, and Blakley all took note of the reclined position of the driver's seat and that the driver's seatbelt was fastened. Ranger Wardlow specifically noted that the lap portion of the belt looked like someone sat on it because it was in a downward bow. The three then tested whether it was possible to pull a person from the vehicle while the seatbelt was fastened. Putting Blakley, who was similar in height and weight to Stacey, in the driver's seat with and without the lap belt on, Ranger Wardlow and Young took turns pulling her from the vehicle by either the feet or the shoulders. In each instance, Ranger Wardlow and Young were able to remove Blakley from the truck. Further, when Young, who was six-foot-two, sat in the reclined driver's seat, he noticed that he had a clear view out of the back window of the truck in the rearview mirror. When DPS completed processing the truck, it was returned to Fennell. Fennell immediately transported it to the dealership and traded it in.

Over the course of the next eleven months, authorities focused their investigation on people that Stacey knew, and with a $50,000 reward offered by H.E.B., numerous leads and information poured in. For instance, a newspaper-delivery person reported that Stacey's body was not on Bluebonnet Drive

when he drove by the site where her body was found at 4:00 a.m. In all, officials interviewed hundreds of people, including former classmates, boyfriends, and coworkers, as well as Stacey's friends and coworkers at H.E.B. Over twenty-eight male suspects were identified, some immediately and some during the ensuing investigation. Each suspect was asked to consent to give blood, hair, and saliva samples. With the exception of one, Brian Haynes, all of the suspects offered their consent and provided the samples. Although Haynes refused to consent, he was compelled to provide **[708]** samples after authorities obtained a search warrant. Authorities also requested and obtained samples from Officer Hall. Because of his friendship with Fennell, Officer Hall was viewed as a suspect. Upon request, he voluntarily provided samples.

Hall, who lived approximately one block away from Fennell's apartment, had an alibi—that he was home with his wife, Carla Hall, when Stacey disappeared. When investigating Officer Hall, Ranger Wardlow found no evidence refuting Officer Hall's alibi. The alibi, coupled with DNA testing excluding Officer Hall, led Ranger Wardlow to conclude that Officer Hall had not been involved in Stacey's death.

As the last known person to see Stacey alive, Fennell was deemed a suspect from the outset. Despite this, authorities never made an effort to search Fennell's apartment. Fennell, however, was vigorously interrogated on several occasions by Ranger Wardlow, who was, at various times, joined by Investigators Selmala, Barton, or Board. Fennell also voluntarily provided authorities with a blood

sample, and even though DNA testing excluded him as the donor of the semen, authorities tried to make a case against him anyway. Ruling out the possibility that Fennell used Carol's Ford Tempo during the commission of the offense because Fennell had to retrieve the keys from Carol on the morning of the 23rd before he went looking for Stacey, Ranger Wardlow investigated alternative methods of transportation that Fennell could have used. Toward that end, Ranger Wardlow examined taxi records and the vehicle mileage on all of the cars belonging to the Giddings Police Department. This investigation revealed nothing, and officials believed that Fennell could not have walked the thirty-five miles from Bastrop to Giddings between 3:00 a.m. and 6:45 a.m. Authorities also canvassed Fennell's apartment complex, looking for anyone that could shed some light on anything relating to Stacey or Fennell on the morning of the 23rd. No one reported being awake and about that morning. Finding no evidence to support Fennell's involvement in the crime, authorities eventually eliminated him as a suspect.

David Lawhon, Brian Haynes's brother, emerged as a viable suspect shortly after Stacey was killed when authorities discovered that he murdered a woman named Mary Ann Arldt in Elgin. Arldt was murdered by Lawhon a few weeks after Stacey was killed, and officials learned that Lawhon had bragged about killing Stacey. Because the two cases bore some similarities, authorities homed in on Lawhon in investigating Stacey's case. A few people informed authorities that there had been a relationship between Lawhon and Stacey, but authorities were unable to confirm any connection between the two. Indeed, a mutual friend never had any indication

from either Lawhon or Stacey that they knew one another. Like Fennell, Lawhon was excluded as the donor of the semen through DNA analysis and was later eliminated as a suspect.

Investigator Selmala also became a suspect in August 1996 after he committed suicide in his home. Ranger Wardlow investigated his death. A note written by Investigator Selmala's girlfriend was found by his body. The note revealed that he was distraught over his relationship with his girlfriend. Taking into account his knowledge about Investigator Selmala, which included the note and the investigation into Stacey's death, Ranger Wardlow found no reason to conclude that Investigator Selmala had any involvement in Stacey's death. Indeed, the investigation into Stacey's death revealed no connection between Investigator Selmala and Fennell or **[709]** Investigator Selmala and Officer Hall. The only common thread between Investigator Selmala and the other two was that all three were law-enforcement officers. Nevertheless, Ranger Wardlow directed that a blood sample be drawn from Selmala during Selmala's autopsy and submitted to DPS for DNA testing. Ranger Wardlow made this decision anticipating that someone might try to link Investigator Selmala's suicide to Stacey's murder. If such an allegation ever arose, Ranger Wardlow would then be able to give an answer—DNA testing cleared Investigator Selmala as a suspect.

All of the other potential suspects that were investigated were excluded as a result of DNA testing.

Eventually, officials received information that led them to look into Reed, an African-American who was approximately the same height as Young, as a suspect. Throughout their investigation, officials found nothing that indicated that Stacey knew Reed. Reed lived in the City of Bastrop on Martin Luther King Drive near the railroad tracks. Several of Reed's family members and friends, as well as his girlfriend, lived nearby. Bastrop High School is also located near the railroad tracks, about sixth-tenths of a mile from Reed's house. The location of Reed's home was significant to authorities because Fennell's truck was found nearby at the Bastrop High School. Authorities had, early on in the investigation, theorized that the location was convenient for the perpetrator.

Reed was frequently seen by Bastrop patrol officers walking in the area near his home late at night. When he worked the night shift in 1995 through the early part of 1997, Officer Michael Bowen would see Reed almost every night between 9:00 p.m. to 3:00 a.m. or 4:00 a.m. When Officer Bowen saw Reed, Reed was usually at Long's Star Mart, located near Reed's house on Loop 150/Chestnut Street and Haysel Street. Bowen also saw Reed walking along the railroad tracks on more than one occasion. Officer Steven Spencer reported seeing Reed in the early morning hours walking near Long's Star Mart and the All Star Grocery, which was located at Loop 150/Chestnut and Pecan Street.

Officials contacted DPS to inquire about whether Reed had a DNA sample on file with the state database, which includes compiled DNA from convicted sexual offenders. When they learned that there was a sample, they requested a comparison

between Reed's DNA and the DNA from the vaginal swab taken by Blakley. Michelle Lockhoof, a specialist in DNA and serology with DPS, conducted DQ–Alpha and D1S80 PCR testing on the two samples. Reed's DQ–Alpha alleles were identified as 1.2 and 3 and his D1S80 alleles were identified as 22 and 24. When compared with the sample taken from Stacey, Reed could not be excluded as the donor of the semen. In Young's opinion, 99.8% of the Caucasian population, 99.8% of the African–American population, and 99.92% of the Hispanic population would be excluded as the donor of the semen.

Investigator Board interviewed Reed after learning that the preliminary DNA results could not exclude him as a suspect. Investigator Board withheld the results of the DNA testing and Mirandized Reed. Reed waived his rights and gave a written statement. In it, he stated, "I don't know Stacey Stites, never seen her other than what was on the news. The only thing that I do know is what was said on the news is that she was murdered." Pursuant to a search warrant, blood was drawn from Reed and turned over to the DPS lab.

Lockhoff subjected the sample to a more discriminating type of DNA testing, Restriction **[710]** Fragment Length Polymorphism (RFLP). Once again, Reed could not be excluded as the donor of the semen when four individual sites were tested. Regarding the statistical frequency in which Reed's RFLP profile would appear in the population, Lockhoff calculated that it would be one in 590 million for the Caucasian population, one in 330 million for the African-American population, and one

in 3 billion for the Hispanic population. Combining the results of the PCR and RFLP testing, the frequency in which Reed's genetic profile would be present in the world's population is one in 5.5 billion for the Caucasian, African-American, and Hispanic populations.

Reed's father and three brothers were then excluded as possible donors through DQ–Alpha and D1S80 DNA testing.

Because the testing conducted by DPS could not exclude Reed, DPS sought the assistance of LabCorp, an independent lab, to conduct additional testing. Meghan Clement, the director for the forensic-identity-testing department, received DNA samples from Stacey and Reed and conducted PCR testing, which included testing on genetic sites of the DNA strand that are distinct from those considered during DQ–Alpha and D1S80 testing. Looking at ten different sites on the male fraction of the substance on the vaginal swab taken from Stacey, Clement could not exclude Reed as the contributor of the semen; in fact, the sample matched Reed's genetic profile. The probability of randomly selecting an unrelated individual with this profile is approximately one in 449,000,000 for the Caucasian population, one in 46,800,000 for the African–American population, and one in greater than 5,500,000,000 for the Hispanic population. Combining some of the additional PCR testing with the previous DQ–Alpha and D1S80 results, only one person in the world's population would have this particular genetic profile. Testing on the male portion of the substance from the rectal swab revealed DQ–Alpha alleles of 1.2 and 3 and, therefore, matched

Reed's DQ–Alpha profile. Recalling her prior experience working on sexual-assault cases for ten-and-a-half years, Clement noted that she never found intact sperm more than twenty-four hours after commission of a vaginal-sexual assault and that sperm breaks down faster in the rectal area than in the vaginal vault.

Reed was charged with capital murder in May 1997. At trial, to raise reasonable doubt during the guilt phase, Reed mounted a two-prong challenge to the State's evidence. First, Reed pointed to the possibility that another person, particularly Fennell and Lawhon, had committed the offense. And as a secondary theory, Reed focused on showing that he had a romantic relationship with Stacey and that his semen was therefore present in Stacey's body because of consensual intercourse.

To prove a romantic relationship between Stacey and Reed, Reed's defense team called Iris Lindley, a longtime friend of Reed's parents, to testify. In early 1996, Lindley was sitting on the porch of Reed's house visiting with Reed's mother. A young woman with brown hair pulled in front of the house in a gray truck, walked up to the porch, and asked if Reed was home. When Reed's mother told the young woman that Reed was not home, the young woman asked Reed's mother to tell Reed that "Stephanie" had come by. Clarifying the name, Lindley said that it was either "Stacey or Stephanie." When Lindley was shown a picture of Stacey, she stated that Stacey looked like the young woman who had come by Reed's house that day. While Lindley first testified that she formulated the impression that

Stacey and Reed were dating, she conceded on **[711]** cross-examination that she had no such knowledge.

To establish that Lawhon knew Stacey, Reed's attorneys called Jose Coronado, who had worked with Lawhon at Walmart and with Stacey in the produce department at the H.E.B., to testify. Coronado stated that he once saw Stacey and Lawhon talking in the Walmart parking lot and that later, when he and Stacey worked together at H.E.B., Stacey told him that she and Lawhon had dated and that Lawhon was "sort of a player." On cross-examination, the State asked Coronado whether it would surprise him to know that Lawhon was dating a woman named Christie Macy and that she would frequently meet him in the Walmart parking lot. Coronado stated that he did not know about Macy or that she met Lawhon in the parking lot.

Supporting Coronado's testimony, Cynthia Jones, a friend of Lawhon's, testified that she and her boyfriend were with Lawhon and Stacey at a party in Elgin and then again at Smithville Jamboree in 1995. Jones said that Lawhon introduced Stacey as "his girl" for the first time at the Jamboree.

Scott Parnell furthered the defense's strategy to implicate Lawhon when he testified that Lawhon confessed to killing Stacey. While drinking at a bar one night in 1996, Lawhon told Parnell that he strangled Stacey with either his or her belt and that Stacey had pretty blue eyes before she closed them. On cross-examination, the prosecution questioned Parnell about a signed written statement that Parnell made at the Sheriff's Department in which Parnell stated that Brian Haynes made the confession. Explaining the evident discrepancy,

Parnell testified that both Lawhon and Haynes had confessed. Additionally, when the prosecution inquired about the motive behind his testimony, Parnell admitted that he knew about the $50,000 reward offered by H.E.B.

To rebut the evidence supporting any relationship between Stacey and Lawhon, the State called two of Stacey's best friends from high school to testify. Cathy Vacek went to the Jamboree with Stacey in 1995 and stated that she would have known if Stacey dated Lawhon and had gone with him to the Jamboree. Sherry Lastovica went to the Jamboree with Stacey on Friday night in 1995 and stated that after Stacey attended the Jamboree for a second time the following day, Stacey told Lastovica that she had met Fennell. Neither woman knew anything about a relationship between Stacey and Lawhon.

The State also offered testimony from Lawhon's wife. She specifically remembered the night that her husband murdered Arldt. On that night, when Lawhon failed to come home, she locked the screen door, which did not have a key, so that she would know when he got home. When he finally returned home, the two then argued about it. She recalled that the argument ensued because it was unusual for him to come home so late. When asked whether anything like that happened on April 23rd, Lawhon's wife remembered the day because it was her son's first birthday, and she stated that nothing unusual happened.

Turning their attention to Fennell, Reed's defense team devoted a considerable amount of time highlighting the shortcomings of the investigation

into Fennell by officials. Specifically, they were able to call the jury's attention to the fact that the lion's share of information provided to officials about Stacey's whereabouts before she died, Stacey's routine and habits, and the items in Fennell's truck was given by Fennell himself. They also emphasized that officials did not search Fennell's home, thereby precluding the possibility of **[712]** ever discovering evidence that may have implicated Fennell.

Tami Renee Hannath, Stacey's high-school friend, cast Fennell as controlling and possessive. She testified that when she and Stacey were on the phone, making arrangements for Stacey to come to Smithville for a visit, Fennell came home. Stacey then told him about the upcoming plans while Hannath remained on the phone and then the phone was disconnected.

Finally, Reed's defense team presented its own DNA expert, Dr. Elizabeth Ann Johnson from Technical Associates Incorporated. Dr. Johnson's DQ–Alpha and D1S80 DNA test results on the vaginal swabs taken by Blakley and the fluid found in Stacey's underwear were consistent with those obtained by DPS. And although Dr. Johnson attempted to test the rectal swab, she determined that there was not enough DNA to conduct accurate testing. Dr. Johnson's DQ–Alpha testing on the saliva from breast swabs taken by Blakley yielded the same results as the previous testing conducted by DPS. On the swab taken from Stacey's left breast, testing indicated 1.2, 4.1, and 3 alleles, and on the swab taken from Stacey right breast, testing indicated 1.2, 3, and 4.1 alleles. Dr. Johnson conceded that in all of the sixteen sites tested in this

case, Reed could not be excluded as the donor of the semen and saliva found on Stacey's body. Further, Dr. Johnson did not dispute the statistics that Lockhoff devised as a result of her testing.

To quell the prosecution's theory that Stacey had been anally sodomized before her death, Dr. Johnson was questioned about vaginal drainage. Dr. Johnson testified that vaginal drainage, which allows semen to be deposited in surrounding areas, may occur when a body is moved around after intercourse. She opined that when there has been an ejaculation in the rectal area, there should be a lot of sperm because a full ejaculate contains hundreds of millions of sperm. And regarding the decomposition of sperm, Dr. Johnson stated that she was unaware of any difference in the rate of decomposition of sperm in the vagina versus that in the rectum. In her experience, she obtained better sperm samples from rectal swabs. On cross-examination, Dr. Johnson admitted that a male can deposit a small amount of sperm without ejaculating when there is penetration and that trauma to the anal area should be considered when determining whether there has been penetration.

After weighing the evidence, a jury found Reed guilty of capital murder. And following a separate punishment hearing, Reed was sentenced to death.

II. Post-trial Background

A. Reed's Direct Appeal

Reed appealed, claiming, among other things, that the evidence was factually insufficient to

support his conviction for capital murder.[1] We rejected Reed's sufficiency claim, holding, "Given the strength of the DNA evidence connecting [Reed] to the sexual assault on [Stacey] and the forensic evidence indicating that the person who sexually assaulted [Stacey] was the person who killed her, a reasonable jury could find that [Reed] is guilty of the offense of capital murder."[2] And concluding that Reed's other claims were without **[713]** merit, we affirmed Reed's conviction and sentence.[3]

B. Reed's First and Second State Applications for a Writ of Habeas Corpus

Reed also sought habeas relief under Article 11.071, Texas Code of Criminal Procedure. Regarding Reed's original application, based on the trial judge's recommended findings and conclusions and our own review of the record, we denied relief in a written order.[4] While Reed's original application was pending, Reed filed a supplemental claim for relief, which we later construed as a subsequent application under Section 5, Article 11.071, Texas Code of Criminal Procedure.

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[1] *Reed v. State*, No. AP-73,135 (Tex. Crim. App. Dec. 6, 2000) (not designated for publication), *cert. denied*, *Reed v. Texas*, 534 U.S. 955 (2001).

[2] *Id.* at *9.

[3] *Id.* at *22.

[4] *Ex parte Reed*, No. WR-50,961-01 (Tex. Crim. App. Feb. 13, 2002) (not designated for publication).

Relying on *Brady v. Maryland*,[5] Reed claimed in the subsequent application that the prosecution failed to give his defense attorneys a letter from Young dated May 13, 1998. The letter was addressed to the lead prosecutor, Lisa Tanner, an Assistant Attorney General whom Bastrop District Attorney Charles Penick had called in to prosecute the case. In the letter, Young acknowledged a request for DNA analysis on the beer cans recovered from the scene where Stacey's body was found and a request for a comparison of the results to samples of Stacey's DNA as well as samples from other individuals that had been submitted throughout the course of the investigation. Young subjected the samples to DQ–Alpha DNA testing and documented the results. Testing on one of the cans, identified by officials as item number 24, revealed the presence of DQ–Alpha alleles 1.3 and 4. A possible 1.2 DQ–Alpha allele was potentially masked but was not specifically detected. Testing on the other can yielded no DQ–Alpha results. Based on the results, Young concluded that Reed was excluded as a possible source of the DNA. Young, however, could not exclude Stacey if the source of DNA compromised a mixture of DNA but could exclude her as a donor if the DNA was provided by single source. Officer Hall and Investigator Selmala could not be excluded as possible sources of the DNA. According to Reed, the State failed to make Young's letter available to him until the State attached it as an exhibit to its response to the allegations raised in his original habeas application.

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[5] 373 U.S. 83 (1963).

The trial judge held a live evidentiary hearing on this claim and, after evaluating its merits, recommended that we deny relief. Testimony from the hearing supplied additional insight into the DNA testing conducted on the beer cans.

On May 13th, when Young documented the results from the DQ–Alpha DNA testing on the beer cans, the guilt phase of the trial was underway and the defense was in the process of presenting its case-in-chief. On that particular day, the court was in recess because Dr. Johnson was the defense's next witness and she was not available to testify until the following day. Initially, the prosecution did not request that testing be conducted on the beer cans, having concluded that they were a non-issue. According to Ranger Wardlow, the cans, which had some pine needles on top of them and compressed needles below, appeared to have been there longer than Stacey's body. Conversely, proceeding under the theory that everything should be tested, Reed's defense team ordered testing **[714]** on the cans. As a result, when Dr. Johnson went to the DPS lab and met with Young on April 15th, Young swabbed the lips and sides of the cans for saliva in Dr. Johnson's presence and split the swabs with Dr. Johnson. Dr. Johnson later used her portion of the swabs to conduct DQ–Alpha and Polymarker testing. On May 5th, Reed's defense attorneys requested that blood samples from the other suspects, including Officer Hall and Investigator Selmala, that had been collected by DPS, be made available to Dr. Johnson. The trial judge granted this request. Alerted to the defense's decision to test the beer cans, Tanner

requested that Young test the portions of the swabs that he had retained. When Dr. Johnson testified at trial, she did not testify about the results that she obtained from the DNA testing conducted on the beer cans.

Answering Reed's allegation that she failed to disclose Young's report to his defense team at the evidentiary hearing, Tanner began by testifying that she learned of Young's test results on May 13th through Missy Wolfe, an investigator with the Attorney General's Office, who was assigned to work on Reed's case with Tanner. Because the trial court was in recess that day, Wolfe called Tanner at home and told her about the results. Young faxed the report on the 14th when the court was back in session, and Wolfe received the report and gave it to Tanner. Tanner stated that, upon receipt of the report, it would have been stamped and given to Reed's defense attorneys. Prior to trial, the prosecution instituted a Bates stamping system; each page of each document subject to disclosure was assigned a sequential number. Four copies of each document were then made. One copy would be placed in the district clerk's file, one would be retained by the prosecution in its discovery file, and the remaining two would be given to Reed's defense attorneys. Young's May 13th letter, which consisted of two pages, was numbered 3,183 and 3,184. Under the hectic conditions of the trial, the standard procedure began to break down and the prosecution dispensed with providing copies of discovery materials to the district clerk. Tanner stated that she believed she gave a copy of Young's letter to Reed's defense team because, when she reviewed her file, she found three stamped copies of the letter and the

district clerk's file did not contain a copy. Based on the usual policy and practice of disclosure in this case, Tanner was convinced that the fourth copy had been given to Reed's defense team. Wolfe testified similarly. However, neither Tanner nor Wolfe had any independent recollection of specifically providing the report to Reed's attorneys.

Tanner also testified that she considered Young's results to be exculpatory when she first received them. Therefore, on May 13th, she directed Wolfe to have Young forward the DNA samples to LabCorp via FedEx for additional, more discriminating D1S80 and Polymarker DNA testing. However, Tanner cancelled the testing the next day when she reviewed Dr. Johnson's report and notes during the lunch break before Dr. Johnson was set to testify. Dr. Johnson's DQ–Alpha testing yielded the same results as Young's. But through Polymarker testing, Dr. Johnson excluded Stacey, Officer Hall, and Investigator Selmala as contributors. Still firm in her belief that she had given Young's report to the defense, Tanner stated that the exculpatory value of Young's report was negated when she learned about Dr. Johnson's exclusion of Stacey, Officer Hall, and Investigator Selmala. At that point, Tanner believed that the issue with the beer cans "had been put to bed" and directed Wolfe to cancel the additional testing with LabCorp.

[715] Calvin Garvie and Lydia Clay-Jackson, Reed's trial attorneys, testified that they had not seen Young's May 13th report until Reed's habeas counsel gave them a copy. Both attorneys also recalled that the prosecution gave each of them their own copies of all discovery materials before and

during the trial. Garvie, who took the responsibility of dealing with the DNA evidence in the case, stated that he remembered someone was excluded and was certain that, if Dr. Johnson's results had included any of the other suspects, he would have had Dr. Johnson testify to that fact. Garvie further stated that, had he received Young's report, it could have affected the jury's verdict because when there is evidence from the State suggesting innocence and showing the presence of other individuals at the scene, it is "huge." Clay-Jackson agreed, stating it would have helped advance their theory of the case by giving an explanation of how Fennell could have traveled to Giddings from Bastrop and back to Giddings. When asked whether he would have used Young's report, Garvie stated that he would have used it to consult with Dr. Johnson. Garvie further stated that he would hesitate in using the report because of Dr. Johnson's exclusion. Clay-Jackson expressed a similar sentiment, stating that Young's report would not have given her a reason to "exhale" during the trial if she would have known that Dr. Johnson's testing refuted Young's results.

Regarding Officer Hall, Carla Hall testified, verifying her husband's alibi. She stated that, in the early morning hours on April 23rd, her husband was at home with her. She remembered that night because her two-month-old daughter woke up with a "bloodcurdling scream" at 3:30 a.m. While her husband held their baby, she went to fix a bottle. Her husband then left for work at 5:35 a.m. because he was scheduled to be on duty at 5:45. Officer Hall testified consistently with his wife. And when asked if he had any involvement with Stacey's death, Officer Hall stated that he did not.

Recommending that Reed's *Brady* claim be denied, the trial judge adopted the State's proposed findings of fact and conclusions of law. In doing so, the trial judge entered findings of fact consistent with the testimony given at the hearing and found Tanner, Garvie, Clay–Jackson, and Officer Hall and his wife, Carla, to be credible. The trial judge also adopted the following conclusions of law:

- The State did not intentionally suppress the May 13, 1998 DPS lab report in violation of *Brady v. Maryland*.
- The State provided the May 13, 1998 DPS lab report to Applicant's attorneys.
- There remains a legitimate fact issue as to whether Applicant's trial counsel actually received a copy of the May 13, 1998 DPS lab report during Applicant's trial.
- If the May 13, 1998 DPS lab report was disclosed and used by the defense effectively, it would not have made a difference between conviction and acquittal, since the defense's own expert has already reached the same conclusion as that reflected in the report.
- Because the DNA results reflected in the May 13, 1998 DPS lab report were previously refuted by Applicant's own expert, they are not material because they do not create a probability sufficient to undermine the confidence in the outcome of Applicant's trial.

Considering Reed's *Brady* claim as raised in a subsequent application for a writ of habeas corpus, we held that Reed failed to show that his claim meets

any of the exceptions outlined in **[716]** Article 11.071, Texas Code of Criminal Procedure.[6] As a result, we dismissed Reed's subsequent application as an abuse of the writ.[7]

C. Reed's Federal Petition for a Writ of Habeas Corpus

Reed then sought federal habeas corpus relief under Title 28, United States Code, Section 2254. Although the magistrate judge permitted discovery and ordered several depositions, the United States District Court for the Western District of Texas determined that several of Reed's claims were unexhausted because Reed had failed to present them to this Court before pursuing federal habeas corpus relief.[8] As a result, the District Court entered a stay in March 2004 allowing Reed to exhaust his state-court remedies.[9]

D. Reed's Second Subsequent State Application for a Writ of Habeas Corpus

In March 2005, Reed filed a second subsequent state application for a writ of habeas corpus under Article 11.071, Texas Code of Criminal Procedure. In it, Reed claimed, among other things, that he is actually innocent under *Herrera v. Collins*[10] and that

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[6] *Ex parte Reed*, No. WR-50,961-02 (Tex. Crim. App. Feb. 13, 2002) (not designated for publication).

[7] *Id.*

[8] *Reed v. Dretke*, No. A-02-CA-142-LY (W.D. Tex., Mar. 22, 2004).

[9] *Id.*

[10] 506 U.S. 390 (1993).

the State suppressed exculpatory evidence in violation of Brady. Contending that the State violated *Brady*, Reed maintained that the State suppressed the following evidence:

- DNA evidence linking the beer cans found near Stacey's body to Officer Hall.
- Eyewitness information from Martha Barnett that she had seen Stacey and Fennell the morning that Stacey was murdered.
- Reports from family members Jennifer and Brenda Prater that Stacey had been seen early in the morning on April 23rd with a man who was not Reed and who had a dark complexion.
- Longstanding information that Fennell and other Giddings officers engaged in a pattern of brutality against suspects.

Reed also claimed that the State suppressed information from Mary Blackwell, formerly known as Mary Best. Blackwell is a former classmate of Fennell's at CAPCO, and she states that she overheard a conversation in which Fennell stated that he would strangle his girlfriend with a belt if he ever caught her cheating on him. While this claim was originally filed under seal, it was made a matter of public record at the evidentiary hearing when Blackwell testified in open court.

In October 2005, we determined that Reed's *Brady* claims concerning Barnett and Blackwell satisfied the requirements of Article 11.071, Section 5(a) and remanded the claims to the trial judge for a

live evidentiary hearing and ordered the trial judge to enter findings of fact and conclusions of law. With respect to Reed's remaining grounds for relief, we held that Reed failed to satisfy Section 5(a) and dismissed those claims as an abuse of the writ.

We now turn to the details of Reed's *Brady* claims concerning Barnett and Blackwell.

1. Barnett

[717] To support his claim concerning the non-disclosure of eyewitness information from Barnett, Reed attached an affidavit from Barnett.

> On the morning of April 23rd, 1996 at approximately 5:00 to 5:30 AM I was on my way to work. I pulled into the parking lot of the Old Frontier. At that time I saw Stacy [sic] Stites and a man I recognized as Jimmie [sic] Fennell standing in front of a red pickup on the side walk. I got out of my vehicle and approached the soda machine. I got my coke, turned and got into my vehicle. There was a 4 door car leaving the parking lot as I turned in. I presumed it was the newspaper deliveries' [sic] people because the newspaper rack was full. I recognized Stacy [sic] because I always went thru her line at H.E.B. I worked at a restaurant in front of H.E.B. I found out about 2 weeks later that the man with her that morning in front of the Frontier was Jimmie [sic] Fennell because his picture was run in the Giddings Times and News and that's when I recognized him.

Reed also attached affidavits from Barnett's attorney, Steven Keng. Keng was formerly the Lee

County Attorney, a county adjacent to Bastrop County. Keng stated that Barnett told him about seeing Stacey and Fennell at Old Frontier in Paige, Texas, a town between Giddings and Bastrop, on the morning of April 23rd. Barnett relayed this information to Keng sometime in late 1997 or early 1998 when Keng was representing her in Lee County. Keng felt that the information was important because of newspaper reports stating that Fennell was excluded as a suspect because officials could not explain how he committed the crime. When Keng was at the Bastrop County Courthouse a few weeks later, he approached District Attorney Penick and relayed Barnett's disclosure without specifically identifying Barnett by name, referring to her only as a client. Keng was under the impression that Reed had not yet been tried and approached District Attorney Penick with the information, knowing that a prosecutor has a duty to explore all of the evidence and to see that justice is done. Keng was surprised by Penick's reaction to the disclosure.

> He laughed and told me that he had all of the evidence that he needed, and he did not want to hear anymore about the case. He did not indicate that the case was over, and a conviction secured, (which I would have expected if the case had already been tried), only that he did not need anymore evidence.

When Keng returned to his office, he told his wife, who assisted him at the office, of Penick's response.

During 2001 and 2002, Smithville newspapers reported that the Bastrop District Attorney's Office

had engaged in prosecutorial misconduct in Reed's case. Believing that the allegations of misconduct were defamatory, Penick filed a civil suit against the papers.[11] When pressed during a deposition taken as part of the civil suit in August 2001, Penick stated that he remembered Keng approaching him at the Bastrop County Law Enforcement Center and stating that he had a client who knew something about Reed's case. Penick recalled telling Keng that he had all of the information that he needed. Penick believed that Keng was making a joke because Keng never stated anything about having exculpatory evidence.

[718] In October 2003, Penick, who was by then retired, elaborated on his conversation with Keng during a deposition ordered by the federal magistrate judge. Penick was certain that the conversation took place after Reed was convicted and sentenced. He asserted that Keng approached him in January or October of 2002 while Keng was at the Law Enforcement Center during one of the arraignments on a murder case involving Amanda Sykes. Penick reached this conclusion when he called up the District Attorney's Office following the deposition in the civil case and requested that they pull the dates involving Sykes's case. Penick stated that his response to Keng was likely prompted by the news articles; he was "ill-tempered" at the time and perceived Keng's statement as a "jab" at him. Penick further claimed that in the twenty years he has known Keng, he has never known when to take him

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[11] *See Cox Tex. Newspapers, L.P. v. Penick*, 219 S.W.3d 425, 432-33 (Tex. App.-Austin 2007, pet. denied).

seriously and stated that Keng "didn't seem to sound serious about this."

In response to Penick's claim that Keng's disclosure took place long after Reed's trial, Keng, in his affidavit, steadfastly maintained that the conversation took place prior to Reed's trial. Keng's awareness that Reed had yet to be tried prompted him to believe that the information would be important to the State. Keng reviewed his appointment book to identify the dates that he would have been in the Bastrop County representing clients. His review showed that he had been in Bastrop between March 1998 and April 1998. Keng also recalled that the conversation did not take place during any of the pretrial proceedings held on the Sykes case. Keng was dealing with an assistant district attorney on that case and was informed that Penick was on vacation during at least one of the pretrial settings. Keng claimed that Penick did not participate in the trial of Sykes.

2. Blackwell

In support of his *Brady* claim concerning the State's failure to disclose Fennell's statement in which he threatened to strangle Stacey if he ever caught her cheating on him, Reed attached an affidavit from Blackwell. In the affidavit, Blackwell states that she is a licensed Texas peace officer and that she attended a training class at CAPCO with Fennell in 1995. During the class, Fennell sat behind her with some of his friends. Continuing, Blackwell stated:

> I also knew who Jimmy's girlfriend was. One day after training class, I met a woman in the

parking lot who asked for Jimmy. I told her he was inside and volunteered to get him. As I went in, Jimmy met me coming out of the building. Jimmy looked at us and said, "What are you telling my girlfriend? Keep away from her." Earlier that day, Jimmy and others in our class were learning self defense tactics. Jimmy's friend had broken my hand during one of the exercises. After Jimmy passed me in the parking lot I saw him go up to his girlfriend and could hear him telling her in a commanding voice what to do.

The men from Bastrop that were taking the CAPCO class would talk about Jimmy's girlfriend. They said she was nice, but that Jimmy talked down to her in an abusive way—in a demanding kind of way.

Towards the end of the CAPCO course, instructors had passed out photographs from real suicides and murders. Each student was supposed to say whether their group's photograph depicted a suicide or murder. The class had to break because one of the students had a relative who had committed suicide and that relative's suicide was depicted in one of the photographs.

[719] During the break, I overheard Jimmy talking to this other guy in class. He said, "If I ever find my girlfriend cheating on me, I'll strangle her." I told him that if he did that he would be caught because he would leave fingerprints. Jimmy then said, "That just goes to show you'll never know shit; I won't leave any prints because I'll use a belt."

> I didn't think much about Jimmy's comments until I heard Captain John Vasquez discussing the murder of Jimmy's girlfriend. Captain Vasquez was in my office and seemed to know a lot about the murder scene. He had worked as an investigator in connection with the murder. He told me the details from the murder scene and seemed to indicate that Jimmy's girlfriend knew her attacker. I then told him the details of what Jimmy said.

John Vasquez, who had retired from the Austin Police Department before Reed's trial after twenty-six years of service, documented Blackwell's recollection of Fennell's threat in an affidavit:

> After I retired, I became a private investigator and investigated several homicides. In 1998, I was appointed to assist the defense team of Rodney Reed. I was not the original investigator on the case and was only able to do a limited amount of work shortly before his trial began. I continued my involvement with his case until his conviction and sentence was [sic] decided. Sometime after Mr. Reed had been sentenced to death, I happened to speak to Travis County Deputy Constable Mary Best. We talked about the Stacey Stites case and she shared with me that she had been in a training class with Stites' fiancé, Jimmy Fennell. Mary recalled that they were talking about domestic problems. Fennell made the remark that if he ever caught Stacey cheating on him he would choke her to death. He then laughed and said he was joking.

> After I learned this information, I checked the police training academy and confirmed that Mary Best and Jimmy Fennell had indeed been in a joint training session. I told the Bastrop District Attorney's Office about the information that I learned. I believe that I spoke directly to District Attorney Charles Penick. I never heard anything more about it and I do not know what the District Attorney did with the information I gave them.

3. Live Evidentiary Hearing

At the direction of this Court, limited to the *Brady* issues concerning Barnett and Blackwell, the trial judge held a live evidentiary hearing in March 2006.

a. Barnett

Barnett expanded on the facts surrounding her sighting of Stacey and Fennell at the Old Frontier store on the morning of April 23, 1996. At that time, Barnett was working at Papa's Catfish restaurant in Bastrop, located in front of the Bastrop H.E.B. She knew Stacey because she shopped at the H.E.B., and Stacey had checked her out.

Barnett lived in Paige and took Highway 290 to Highway 21 into Bastrop. Her commute took approximately twenty-five to thirty minutes. Although Barnett normally worked the 2:00 p.m. to 10:00 p.m. shift or 4:00 p.m. to 11:00 p.m. shift at the restaurant, on April 23rd, she was scheduled to cover a coworker's shift at 6:00 a.m. Barnett woke up at 4:00 a.m., got her children ready for the day, and dropped them off at her mother's house, located approximately thirty to forty-five seconds from her

house. She stayed at her mother's house for twenty to twenty-five minutes. Before heading to Bastrop, Barnett drove east on Highway 290 to the **[720]** Old Frontier store. When she arrived at the store at approximately 4:45 a.m., she observed a man and a woman standing in front of the store making hand gestures that indicated to her that the man and woman were involved in some type of conflict. The man and the woman then got into a red pickup when Barnett opened her car door. After getting a soda from the machine, Barnett saw the head of the woman sitting in the passenger's seat of the red truck go down and back up. When she got back into her car, Barnett heard elevated, muffled voices from the truck, even though the windows of the truck and her car were closed at the time. Barnett left the store while the truck was still parked in the lot and began her commute to work. Barnett did not recall whether she saw the red truck on her way into Bastrop, and she estimated that she arrived at work early at 5:30 a.m.

Believing that she saw Stacey on the day she was murdered, Barnett reported what she saw to her parents in January 1997. Her mother, Marjorie Cowan, advised her to talk to Keng. Cowan stated that Barnett had told her that she knew Stacey from the H.E.B. and that "the young man that was with her was very—looked like he was angry." Cowan could not remember if Barnett identified the young man by name. However, she recalled urging her daughter to talk to Keng because she knew Keng's father and had used Keng as a lawyer several times.

On direct-examination by Reed's habeas counsel, Barnett testified that a year later, in

January 1998, she met with Keng when he was representing her on a charge of driving while intoxicated (DWI) and told him about what she saw. Barnett stated that she realized sometime after the 23rd that the man with Stacey was Fennell when she saw his photograph in the paper.

On direct-examination, Barnett also revealed that she had prior misdemeanor convictions for theft by check.

On cross-examination, Barnett acknowledged that news of Stacey's murder was a big deal and that she failed to report what she saw to law-enforcement officials, the Bastrop District Attorney, or the Attorney General's Office, even though she was aware that authorities would have been interested in having the information. Confronted with her prior sworn statement, in which she claimed that she saw Stacey and Fennell at the Old Frontier store between 5:00 and 5:30 a.m. on the 23rd, Barnett was questioned about whether anyone had told her that Fennell's truck had been located at the high school at 5:23 a.m., making it impossible for Barnett to have seen Fennell and Stacey with the red truck twenty to twenty-five minutes away at the store in Paige between 5:00 and 5:30 a.m. In response, Barnett stated that no one had talked to her about the time frame. The State continued to question Barnett about her time line:

> [State] Q. So it would have taken you only 45 minutes to get four kids ready, get them out of the house, get them dressed, get them to somebody else's house, visit with them for 20 to 30 minutes and then get to that store; is that your testimony?

A. I [sic] mother doesn't live very far from where I lived at the time.

Q. And then you told us that it would have taken you about 30 minutes to get in to work from there; right?

A. About, yes.

Q. Okay. So you certainly wouldn't have gotten to work at like 5 o'clock or 5:15 would you, because that would have been just crazy; right?

A. I don't recall that it was that early.

Q. In fact, it was closer to six, wasn't it?

[721] A. No, I wasn't that late.

When the State asked Barnett if she had omitted any information in her affidavit about Stacey and Fennell gesturing as if they were involved in a conflict, Barnett admitted that she had.

Also, raising an issue left unaddressed on direct examination, the State questioned Barnett about her arrest for DWI, which had occurred before Barnett told Keng that she had seen Stacey on the morning she was murdered. Fennell and Officer Hall arrested Barnett for DWI, and Fennell cited her with failing to maintain a proper lane on November 5, 1997. Fennell also executed a prior arrest warrant in a separate case in which Barnett was charged with theft. Barnett consulted Keng on the DWI case and told him about seeing Stacey and Fennell two months later. Barnett stated that she had not been happy about the arrest and acknowledged that she had been aware that Fennell would have testified against her if the case had gone to trial.

On redirect, Barnett admitted that she was drunk when arrested and testified that her intoxication at the time of her arrest affected her ability to recognize Fennell. She further stated that she did not execute the affidavit to retaliate against Fennell; she made the connection between Fennell and Stacey when she saw Fennell's picture and name in the paper.

Testing whether Barnett had actually recognized Fennell from a photograph in the Giddings newspaper, as she had claimed in her affidavit, the State presented Barnett with copies of the weekly paper issued from April 25, 1996, to May 28, 1998, and asked her to identify which paper included a picture of Fennell. After looking through the papers, Barnett conceded that Fennell's picture did not appear in any of the papers. Barnett then stated that she must have seen it in another paper.

To further undermine Barnett's testimony about recognizing Fennell from a photograph in the paper, the State called Emanuel Miranda, an investigator with the Postconviction Litigation Division at the Office of the Attorney General, to testify. Preparing for the hearing, Miranda was tasked with finding any articles in the Bastrop, Austin, and Giddings newspapers from April 23, 1996, the date Stacey was murdered and her body was found, to May 30, 1998, the day after Reed was sentenced, that were related to Stacey's murder or Reed's trial. Miranda was ordered to look for a picture of Fennell that appeared with any of the articles. Miranda's research revealed that Fennell's picture did not accompany any of the articles relating

to Stacey's murder or Reed's trial from April 23, 1996, to May 30, 1998.

Reed's trial attorneys, Garvie and Clay–Jackson, both testified that they had not been aware of Barnett's sighting of Fennell and Stacey on the morning of April 23rd before or during trial. Both attorneys agreed that, had such information been disclosed, it would have significantly altered their trial strategy. Because Fennell was the only source to verify his whereabouts on April 23rd, Garvie states that he would have used Barnett's sighting to establish reasonable doubt. First, Fennell's testimony that he had been at home sleeping when Stacey left for work would have been impeached, exposing Fennell as a liar. Next, Garvie believed that the defense could have challenged the State's time line by showing that Stacey was alive between 4:30 and 5:30 a.m. on the morning of the 23rd. Also, in Garvie's opinion, with Fennell in Paige, the distance that Fennell would have had to travel to get back to Giddings would not have been as great as that theorized during the trial. Clay-Jackson**[722]** testified that, if she had known Fennell had been in Paige, she would have investigated Fennell's history for violence and his associates more closely to determine if someone else drove Fennell from the Bastrop High School to Giddings. Garvie testified that he would have taken another look into Dr. Bayardo's time of death, and Clay-Jackson stated that she would have had their medical experts explore the forensic evidence for anything that could place Fennell at the scene of the offense. With Barnett's sighting, Garvie believed that Fennell's exclusion as a suspect through DNA would not have made a difference because Fennell had no motive to

rape Stacey if he was just going to kill her. Clay–Jackson stated that, had she known of the information in Barnett's affidavit, she would have encouraged Reed to testify in his defense. However, on cross-examination, Clay–Jackson stated that she previously admitted that she did not want Reed to testify because he had several prior sexual-assault offenses that the State could have used against him.

Parroting his prior statements, Keng testified about the facts surrounding Barnett's disclosure, his subsequent attempt to inform Penick of the disclosure before Reed's trial, and Penick's reaction. He recalled that Barnett had come to see him about the DWI and a family-law matter and that he did not end up representing her on the DWI. Regarding his attempt to inform Penick of Barnett's disclosure, Keng added that he told Penick that he could give him his client's name and telephone number. He chose to tell Penick about Barnett's disclosure in person instead of calling him because the information was important, he knew Penick, and Penick was in charge of the prosecution. Keng stated that he failed to convey the information to anyone else in the District Attorney's Office or any law-enforcement officials, even after he was rebuffed by Penick. Keng testified that Barnett never gave him the impression that she had told anyone else about the sighting and that, if he thought that Barnett was lying, he would not have given the information to Penick.

With the timing of Keng's disclosure to Penick as a hotly contested issue, both parties attempted to nail down exactly when Keng spoke to Penick. Confident that he spoke to Penick before Reed's trial, Keng stated that he informed Penick about Barnett's

sighting in February or March of 1998. On cross-examination, the State challenged whether Keng spoke to Penick before Reed's trial by noting that Keng had previously stated in an affidavit that, according to his schedule, he had been at the Bastrop County Courthouse representing other clients in March and April 1998, immediately before, and during, Reed's trial. When cross-examining Keng about his prior statement in which he stated that he recognized the importance of the information provided by Barnett because newspapers reported that Fennell had been eliminated as a suspect, the State presented Keng with the first news articles from the Austin and Giddings papers to report this particular information from mid-May 1998. The State then asked Keng whether it is possible that he did not disclose Barnett's sighting until after Reed's trial. In response, Keng stated that he believes that his statement suggests that memory is cumulative in people and that when he wrote the affidavit, the information about Fennell having been excluded as a suspect was published. He added that Penick never told him that Reed's trial was over and that he believed if it had been over, Penick would have told him that.

Keng was also questioned about his participation in the film "State versus Reed." While a graduate student at the University **[723]** of Texas, Ryan Polomski made the film for his thesis project. He interviewed Keng for the film and videotaped the interview. Polomski maintained that the video camera was visible in the room when he conducted his interview with Keng. Polomski testified that he was uncertain whether he informed Keng that the thesis project would possibly become a documentary

film that would be shown to the public. And Polomski did not inform Keng when the film was later shown to the public. When Keng was questioned by the State about his appearance in the documentary film, Keng stated that he was unfamiliar with the film and that he did not know who interviewed him or where the camera was located.

Penick testified that when he receives exculpatory information, he turns it over to the defense. During Reed's trial, he was approached by a woman named Elizabeth Keehner, and she told him that she did not believe that Reed was guilty of murdering Stacey. Viewing Keehner's statement as exculpatory information, Penick stated that he told Tanner or someone in law enforcement about the statement and that someone working for the State took a statement from her. The statement was then turned over to the defense. Wolfe corroborated Penick's testimony, stating that she interviewed Keehner and obtained an exculpatory statement that was later disclosed to the State. She also stated that Penick never expressed "an attitude that we've got everything we need."

Regarding Barnett, Penick testified that he did not receive any information involving Barnett before or during Reed's trial. In fact, Penick stated that he did not learn that the client Keng referred to was Barnett until he read Keng's affidavit. Penick maintained that, had he received information about Barnett's sighting, he would have investigated it and shared the information with the defense if the investigation revealed that it was exculpatory. Penick recalled that Keng relayed the information from Barnett in passing as he and Keng were leaving

the courtroom after a docket call approximately four years after Reed's trial. On cross-examination, Penick was asked what he thought of Keng's allegation that he had disclosed the information about Barnett's sighting to him in 1998. Penick said that Keng was "telling a big lie." Penick then acknowledged that, in supporting Keng's reelection in 1996, he wrote a letter stating that he knew and worked with Keng for fifteen years and that, in his opinion, Keng is "a very competent, honest, professional prosecutor...." Explaining his current opinion of Keng, Penick stated that Keng was honest as a prosecutor but changed when he became a defense attorney, and his dealings with him as a defense attorney were not good.

Reed's habeas counsel asked Penick why he used the present tense during the deposition in the civil case when recalling that he told Keng that he "has" all of the evidence he needed against Reed. In response, Penick explained that the question took him by surprise and that he failed to clear up the fact that Keng passed along the information involving Barnett four years after Reed's trial. During that deposition, he realized that Keng made the disclosure during the Sykes case. Knowing this, Penick later pulled the District Attorney's file on the Sykes case and determined that Keng would have been at the courthouse between January and October 2002.

Finally, Penick stated that the civil suit dealt with other allegations and that the alleged suppression of Barnett's sighting did not provide a basis for the suit.

b. Blackwell

When testifying, Blackwell reiterated and added to the statements made in her **[724]** affidavit. Blackwell stated that class was seated alphabetically in the academy and that she was seated near Angela Allred, Larry Franklin, and Fennell. When Blackwell was rewriting her notes in the classroom during a break, Fennell was standing up in the back of the room talking with the cadet who sat to his right. Blackwell overheard Fennell tell the cadet seated to his right that he would strangle his girlfriend if he discovered that she was cheating on him. Blackwell, who was seated at the table in front of Fennell, then looked over her shoulder and said, "Well, if you do that they'll find your fingerprints all over her throat." Fennell responded to Blackwell, telling her that he would use a belt. Blackwell found Fennell "to be extremely offensive when it came to his attitude towards wom[e]n in particular, not only women in police work but wom[e]n in general." She also "found him to be conceited, arrogant, and that he regarded himself as a police officer having power over others in a way that police officers should not have power." Recalling the incident in the parking lot in which Fennell directed her to stop talking to Stacey, Blackwell testified that when Fennell got into the truck with Stacey, she could tell from his facial expressions that he was yelling at her.

When Stacey was murdered, Blackwell was working as a Deputy Constable for Rocky Madrono in Travis County. The Bastrop County Sheriff's Department called Madrono's office and requested help with the escort for Stacey's funeral. This was the first time that Blackwell had learned about Stacey's

murder. Blackwell received permission to use one of Madrono's vehicles, and another deputy, who had been a cadet with Blackwell at CAPCO, accompanied Blackwell to the funeral. Blackwell attended the funeral and saw Fennell exiting the church. As Fennell followed Stacey's casket, Fennell collapsed on one knee and needed assistance getting up. Blackwell returned to work and told Madrono that Fennell appeared to be putting on an act. She then informed him about the comments made by Fennell in class, even though, according to her testimony, she was unaware that the community and people attending the funeral were questioning what had happened to Stacey. During her testimony, Blackwell also recalled that she had previously told her best friend about what Fennell had said the night that Fennell made the statement.

According to Blackwell, at some point in 1998 when the weather was warm, she was introduced to Vasquez, the investigator appointed to assist Reed's trial attorneys. From his introduction, Blackwell got the impression that Vasquez was actively involved in investigating Stacey's murder and that he was working on behalf of the individual accused of murdering Stacey. When Vasquez told Blackwell that Stacey had been strangled with a belt, "bells and sirens went off" in Blackwell's head, and Blackwell immediately told Vasquez about what Fennell had said in class. Presented with the CAPCO cadet-class roster and class photograph, Blackwell identified the cadet who sat on Fennell's right as Christopher Dezarn. Vacillating, Blackwell later stated she could not remember who Fennell had made the statement to and that the proposed seating chart would not refresh her recollection.

On cross-examination, Blackwell conceded that she failed to notify authorities investigating Stacey's murder of Fennell's statement even though she believed that the statement was significant in light of her status as a peace officer, her professional training and experience, as well as her personal experience with Fennell.

Vasquez testified that he was visiting with Madrono a few weeks after Reed's **[725]** trial, following the conclusion of his official investigative duties. He was discussing Reed's case with Madrono when Blackwell approached him and told him about Fennell's statement. Vasquez then drove to CAPCO and confirmed that Blackwell and Fennell had been at the academy together. Vasquez documented his conversation with Blackwell in a memo. Contrary to the statement made in his affidavit about passing the information along to Penick, at the hearing, Vasquez stated that he gave the memo to Forrest Sanderson, a chief assistant district attorney in Bastrop County and a member of the trial team in Reed's case, a week or so after he drafted the memo. Vasquez testified that he believed that he had given the information to Penick, but when he saw Sanderson sitting in the courtroom, he remembered that he had in fact given the information to Sanderson. Vasquez was comfortable disclosing the information to the District Attorney's Office because, he had known Penick and Sanderson for eight or nine years, believed that it was important to pass the information along to them, and was confident that they would do something with it. Vasquez did not call Garvie or Clay–Jackson. When asked if he gave the information to the previous investigator for the defense, Duane Olney, Vasquez stated that he

believed that he had done so when he bumped into him on the street several months after he had given the information to Sanderson. Vasquez stated that he intended to give the information to Reed's appellate attorneys. Vasquez, however, failed to reach out to Reed's attorneys. Vasquez finally spoke to attorneys representing Reed after they initiated contact with him in 2003 or 2004.

Sanderson testified that Vasquez did not give him the information at issue and that, if Vasquez had given him such information, he certainly would remember it. Sanderson also expressed his opinion about how Penick would deal with exculpatory information relating to Reed's case. Sanderson stated that Penick "would have been on it like white on rice." Penick stated that Vasquez never handed him any document pertaining to the Reed case after Reed's trial.

Contradicting Blackwell's testimony, Dezarn testified that Fennell never told him that he would strangle his girlfriend with a belt if he caught her cheating on him.

Larry Franklin, another one of Blackwell's and Fennell's prior classmates at CAPCO, testified that he and Blackwell maintained a friendship after graduation and that the two would call one another. Sometime after Stacey's murder, Blackwell called Franklin and asked him if he heard about the murder. Together, Blackwell and Franklin questioned whether Fennell had murdered Stacey. The two had other conversations on this topic, and during one of these conversations, Blackwell told Franklin about Fennell's statement. Although Franklin had sat to the left of Fennell in class,

Franklin did not hear Fennell make this statement and learned about it only through his conversation with Blackwell. Though Franklin stated that, as a peace officer, he felt that there was an ethical obligation to report such information, he admitted that he failed to do so.

Missy Wolfe was assigned to investigate the validity of Blackwell's contentions for the State. She began by getting the class roster from CAPCO, which indicated that Fennell and Blackwell's class had twenty-nine members. Wolfe and another investigator contacted all the individuals in the class, including Fennell and Blackwell. They obtained written or tape-recorded statements from everyone except Fennell and Blackwell. Wolfe testified that none of twenty-seven people in the class corroborated **[726]** Blackwell's contentions regarding Fennell.

Clay-Jackson stated that if she had found out about Fennell's statement within time for filing a motion for a new trial, she would have moved for a new trial on that basis.

4. Trial Judge's Findings of Fact, Conclusions of Law, and Recommendation

At the close of the evidentiary hearing, the trial judge, who succeeded the judge who presided over Reed's trial, requested that the parties submit proposed findings of fact and conclusions of law. Adopting the State's proposed findings of fact and conclusions of law, which we will explore in greater detail below, the trial judge recommended that we deny relief.

III. Issues for Resolution

When this case was returned to us, we noted, after conducting a careful review of the record, that a few of the trial judge's fact findings were either unsupported by the record or appeared, in some fashion, to be misleading. Because of this and the sharply conflicting testimony offered at the evidentiary hearing, we filed and set this case for submission to decide whether Reed is entitled to relief under *Brady*. To facilitate our resolution of Reed's claims on the record before us, we directed the parties to brief the following issues:

- Assuming, *arguendo*, that the court has entered a finding of fact or conclusion of law that has multiple sentences or phrases and that a portion of the finding or conclusion is supported by the record, while another portion is not, to what extent does this Court owe deference to the trial court on such a finding or conclusion? May the Court disregard the finding or conclusion in its entirety?
- Assuming, *arguendo*, that numerous findings and conclusions, or parts thereof, are not supported by the record, how should this affect the level of deference to the findings and conclusions as a whole?

We also ordered the parties to address whether Reed's gateway-actual-innocence claim satisfied the requirements under Article 11.071, Section 5(a)(2).

IV. Analysis

A. Reed's *Brady* Claims that Satisfied Article 11.071, Section 5(a)(1)

1. The Standard

To protect a criminal defendant's right to a fair trial, the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the prosecution to disclose exculpatory and impeachment evidence to the defense that is material to either guilt or punishment.[12] This rule of law originated in 1963 in *Brady v. Maryland* and has been clarified and further refined in its progeny. Applying the rule in 1995, the Supreme Court, in *Kyles v. Whitley*, held that the rule encompasses evidence unknown to the prosecution but known to law-enforcement officials and others working on their behalf.[13]

Under its present incarnation, to succeed in showing a *Brady* violation, an individual must show that (1) the evidence is favorable to the accused because it is exculpatory or impeaching; (2) the evidence was suppressed by the government **[727]** or persons acting on the government's behalf, either inadvertently or willfully; and (3) the suppression of the evidence resulted in prejudice (i.e., materiality).[14] Evidence is material to guilt or punishment "only if

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[12] *Strickler v. Greene*, 527 U.S. 263, 280 (1999).

[13] 514 U.S. 419, 438 (1995); see also *Thomas v. State*, 841 S.W.2d 399, 402-04 (1992) (tracing history and developments of *Brady* rule).

[14] *Strickler*, 527 U.S. at 281–82, 119 S.Ct. 1936.

there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[15] "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[16]

> For over forty years, our writ jurisprudence has consistently recognized that this Court is the ultimate factfinder in habeas corpus proceedings.[17] The trial judge on habeas is the "'original factfinder.'"[18] Summarizing the role of the trial judge, we have explained that the judge is the collector of the evidence, the organizer of the materials, the decision-maker as to what live testimony may be necessary, the factfinder who resolves disputed fact issues, the judge who applies the law to the facts, enters specific findings of fact and conclusions of law, and may make a specific recommendation to grant or deny relief.[19]

Uniquely situated to observe the demeanor of witnesses first-hand, the trial judge is in the best position to assess the credibility of witnesses.[20]

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[15] *United States v. Bagley*, 473 U.S. 667, 682 (1985).

[16] *Id.*

[17] *Ex parte Young*, 418 S.W.2d 824, 829 (Tex. Crim. App. 1967); *Ex parte Adams*, 768 S.W.2d 281, 288 (Tex. Crim. App. 1989); *Ex parte Van Alstyne*, 239 S.W.3d 815, 817 (Tex. Crim. App. 2007) (per curiam).

[18] *Ex parte Van Alstyne*, 239 S.W.3d at 817 (quoting *Ex parte Simpson*, 136 S.W.3d 660, 669 (Tex. Crim. App. 2004)).

[19] *Ex parte Simpson*, 136 S.W.3d at 668.

[20] *Ex parte Van Alstyne*, 239 S.W.3d at 817.

Therefore, in most circumstances, we will defer to and accept a trial judge's findings of fact and conclusions of law when they are supported by the record.[21] When our independent review of the record reveals that the trial judge's findings and conclusions are not supported by the record, we may exercise our authority to make contrary or alternative findings and conclusions.[22]

In answering the first two issues that we ordered the parties to brief, we conclude that it is appropriate to remain faithful to our precedent. Thus, we will afford no deference to findings and conclusions that are not supported by the record and will ordinarily defer to those that are. So where a finding or conclusion contains multiple sentences or phrases, we will pay deference to the sentences and phrases that are grounded in the record and reject or refuse to adopt those that are not. When our independent review of the record reveals findings and conclusions that are unsupported by the record, we will, understandably, become skeptical as to the reliability of the findings and conclusions as a whole. In such cases, we will proceed cautiously with a view toward exercising our own judgment. And when we deem it necessary, we will enter alternative or contrary findings and conclusions that the record supports. Furthermore, **[728]** when we determine

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[21] *Id.*

[22] *Ex parte Adams*, 768 S.W.2d at 288 (citing *Ex parte Davila*, 530 S.W.2d 543, 544 (Tex. Crim. App. 1975); *Ex parte Bagley*, 509 S.W.2d 332, 335 (Tex. Crim. App. 1974); *Ex parte Williams*, 486 S.W.2d 566, 568 (Tex. Crim. App. 1972)). *See e.g.*, *Ex parte White*, 160 S.W.3d 46, 51-55 (Tex. Crim. App. 2004).

that the trial judge's findings and conclusions that are supported by the record require clarification or supplementation, we may exercise our judgment and make findings and conclusions that the record supports and that are necessary to our independent review and ultimate disposition. However, where a given finding or conclusion is immaterial to the issue or is irrelevant to our disposition, we may decline to enter an alternative or contrary finding or conclusion.

As recognized by our decisions, this standard of review accounts for the unparalleled position of the habeas judge to directly assess a witness's demeanor. When listening to testimony, the habeas judge is tuned in to how something is being said as much as to what is being said. The judge is acutely aware of a witness's tone of voice or inflection, facial expressions, mannerisms, and body language. There is no doubt that this type of assessment, the essence of which a cold record rarely captures, is a determinative factor in a trial judge's credibility assessment and factfindings.

Next, we conclude that when numerous, but not all, findings and conclusions are not supported by the record, the determination of the level of deference to be accorded to the findings and conclusions as a whole is to be made on a case-by-case basis. It is impossible to establish any type of litmus test for determining when and under what circumstances the level of overall deference may be affected by numerous unsupported findings and conclusions. Because no two cases are alike, the level of deference accorded to the findings and conclusions as a whole

where numerous findings are not supported by the record will depend on a thorough review and analysis of the specific facts and legal issues involved in a given case. The case may arise where the nature and number of unsupported findings and conclusions may render the findings and conclusions wholly unreliable and beyond repair. Under such circumstances, we may elect to take it upon ourselves to conduct all of the factfinding and to issue a ruling explaining our application of the law to the facts. However, we note that it will be under only the rarest and most extraordinary of circumstances that we will refuse to accord any deference whatsoever to the findings and conclusions as a whole.

In this case, in adopting the State's proposed findings of fact and conclusions of the law, the trial judge concluded that Reed was not entitled to relief under *Brady* because he failed to establish that (1) the State suppressed evidence and (2) the evidence was material to guilt. We agree with the trial judge's legal conclusion that Reed has not demonstrated that the State suppressed evidence and therefore find it unnecessary to render a decision regarding materiality. So in reviewing the trial judge's factfindings, we will confine our discussion of the factfindings to those that are relevant to our determination that the State did not withhold any favorable information.

Our independent review of the trial judge's remaining findings of fact (i.e., those irrelevant to our resolution) demonstrates that they are largely supported by the record. A select few of these findings, however, are inconsistent with the record or are somewhat misleading. For example, with respect

to Barnett's habeas testimony, the trial judge found that when Barnett was confronted with the fact that Fennell's picture did not appear in any of the articles relating to Stacey's murder from April 24, 1996, through May 30, 1998, "Barnett conceded that she knew Jimmy Fennell from 'something completely independent of the Giddings newspaper,' i.e., her DWI arrest." This finding unfairly **[729]** portrays Barnett's testimony. Even though Barnett admitted that she knew Fennell from her DWI arrest, she was adamant that she recognized Fennell as the man she saw with Stacey at the Old Frontier store from a photograph in the newspaper. While the trial judge was entitled to find, based on her credibility determination, that Barnett recognized Fennell solely from her DWI arrest, especially given Barnett's mother's inability to specifically confirm Barnett's identification of Fennell, the trial judge was not justified in finding as a matter of fact that Barnett conceded this point. We attribute this inaccuracy (and other like findings) to the fact that the State generated the proposed findings and they are therefore wholly representative of the State's interpretation of the evidence. Mindful of the role of an advocate, the trial judge as a neutral arbiter should have more carefully scrutinized the State's proposed findings to ensure that they accurately reflect the evidence in the record before adopting them verbatim. Regrettably, the trial judge's decision to adopt the State's proposed findings and conclusions verbatim has unnecessarily complicated our independent review of the record. Nevertheless, in this case, we conclude that the few instances in which the findings are inconsistent or misleading do not justify a decision to totally disregard the findings

that are supported by the record and are germane to our resolution of Reed's *Brady* claims.

2. Discussion

Relevant to Reed's allegation that the State suppressed information concerning Barnett's sighting of Stacey and Fennell, the trial judge found:

> Stephen Keng testified that, at some point after speaking with Barnett, he told Bastrop County District Attorney, Charles Penick that he had a client who claimed to have seen [Stacey] with Fennell on the morning that she disappeared. According to Keng, this conversation took place sometime in February or March of 1998, on the second floor of the Bastrop County Courthouse, before Reed's trial began. Keng testified that, in response, Penick laughed and told him 'that he had all [t]he evidence he needed, and he just didn't want to hear about it.'
>
> Charles Penick testified that he recalled having a conversation with Keng, during which Keng told him that he had a client that knew something about the Reed case. Penick recalled that this conversation with Keng took place about four years after the trial in the law enforcement center during a docket call. Penick stated that he thought Keng was joking and 'didn't take him seriously.' Penick testified that he told Keng that he had enough evidence against Reed and 'didn't need to hear that....' Penick testified that Keng did not approach him with information regarding

Martha Barnett at any point prior to, or during Reed's trial.

In his April 16, 2002 affidavit, Keng stated that he believed the information Barnett had shared with him 'was important because the newspaper reports indicated that Mr. Fennell had been excluded as a suspect because law enforcement could not explain how he committed the crime.' Keng stated that information regarding Fennell's elimination as a suspect came out in the newspaper before he spoke with Penick about Barnett. During cross-examination, Keng was confronted with the fact that articles reporting that Fennell had been eliminated as a suspect came out in May 1998, several months after he claimed to have spoken with Penick. Reed's trial concluded on May 29, 1998.

[730] Stephen Keng testified that he did not participate in the making of a documentary movie in the instance [sic] case. Keng testified, 'News to me.... I don't know who interviewed me or where they had a camera.'

Ryan Polomski testified that he produced a documentary film about the instant case and Stephen Keng was interviewed on camera for that film and that parts of that interview were featured in the film.

Reed has not proven that the Bastrop County District Attorney's Office was in possession of the information regarding Barnett prior to or during trial.

Clearly implied by the trial judge's finding that the Bastrop District Attorney's Office was not in possession of information regarding Barnett before or during trial is the determination that Keng failed to disclose that Barnett had information relating to Reed's case until sometime after Reed was convicted and sentenced. And what necessarily flows from this is the trial judge's implicit determination that Keng's testimony about the timing of the disclosure to Penick's memory is not credible. The trial judge's credibility determination is supported by the record, and we therefore choose to adhere to her findings. However, we find it necessary to clarify and supplement the findings that pertain to Keng's credibility.

First, the finding relating to Keng's recognition of the importance of Barnett's information suggests that it is unlikely that Keng truly realized the significance of Barnett's sighting until sometime in May 1998, at the earliest, when the newspapers first began reporting that Fennell had been excluded as a suspect. This determination is reasonable regardless of Keng's explanation that he wrote the affidavit years after the events took place, including when the newspapers began reporting Fennell's exclusion as a suspect, and that the information therefore became part of his collective memory about the case. Because the impetus behind Keng's disclosure to Penick is directly tied to the timing of his disclosure, anything that serves to undermine his credibility about the impetus also undermines his credibility about the timing. Further, when Keng was given the opportunity to offer a reason, independent of newspaper articles, for recognizing the significance of Barnett's sighting when he claimed that he did, Keng

failed to offer any alternative explanation. Accordingly, the trial judge was justified in finding Keng's recollection about the timing of the disclosure to Penick to be unconvincing.

Next, the trial judge's findings about Keng's appearance in the documentary film "State versus Reed" suggests that Keng testified untruthfully when he denied that he was interviewed for the documentary film. Our reading of the testimony indicates it is unlikely that Keng realized he was participating in a documentary film that would be released to the public. Polomski testified that he recalled telling Keng that he was a graduate student at the University of Texas and that he was working on his thesis project for a Master of Fine Arts in Film and Video Production. Polomski was unable to specifically recall whether he referred to the film as a documentary or a thesis project and stated that he did not believe that they talked about any showings, distributions, or screenings. However, the record does support the broader, implicit finding that Keng's testimony about being interviewed for the film was not credible. Even if Keng was unaware that Polomski's film was a documentary, the trial judge, after observing Keng's demeanor, was free to disbelieve Keng's denial about being interviewed for a film devoted to Reed's case. And even **[731]** though this subject matter was unrelated to the disclosure of Barnett's sighting, the trial judge was permitted to take Keng's veracity on this issue into account when assessing his credibility on the timing of the disclosure.

The trial judge also expressly found Penick to be credible. Because the trial judge was positioned to

witness Penick's demeanor first-hand, we conclude that the trial judge's credibility determination and resultant factfindings are supported by the record.

Reed argues that we should find that Keng is more credible than Penick. Keng, according to Reed, had no involvement in Reed's case and has nothing to gain from the outcome of this case; he has placed his credibility and reputation on the line by stepping forward. Penick, on the other hand, should not be found credible because, when he testified at the habeas hearing, he had a financial interest in the case, his memory has proven to be selective, and he previously endorsed Keng's character for honesty.

Pointing to Penick's civil lawsuit, Reed argues that, if Penick was found to have suppressed evidence in this case, the impact on Penick's case, which was unresolved at the time of the hearing, would be devastating. Reed claims that, if his case were reversed due to Penick's failure to disclose *Brady* evidence, a jury in the civil case would be unlikely to award Penick damages, regardless of whether the particular evidence suppressed was the subject of Penick's lawsuit.

Regarding Penick's inconsistent testimony about the disclosure, Reed points to Penick's evidentiary-hearing testimony addressing the first statements he made about the disclosure in 2003 during a deposition in the civil lawsuit. Referring to the transcript from the civil-suit deposition at the hearing, Reed's habeas attorneys questioned Penick about his prior statements on cross-examination:

> Q. Line 18: "'Did you have any conversation with Mr. Keng before the Reed trial between the time

> Mr. Reed was indicted and the time it went to trial about a client of Mr. Keng's who said that she had seen Stacey Stites and Jimmy Fennell together on the morning of Ms. Stites' murder? And your answer was 'no.'"
>
> A. That's correct.
>
> Q. All right. Question: "'You don't remember it or it didn't happen?'" And your answer is: "'I don't remember it happening, I don't think it happened.'"
>
> Question: "'Okay. And so you didn't tell him that you had all the evidence that you needed and you didn't want to hear anything more about the case?'" Answer: "'I do kind of remembering [sic] in passing making that statement to Steve.'"

Because Penick failed to correct this testimony and only mentioned, for the first time, during a subsequent deposition that the disclosure took place four years after the trial, Reed argues that we should credit his initial testimony, "not his carefully crafted answers presented months later."

Finally, Reed argues that Penick could not reconcile accusing Keng of lying about the timing of the disclosure with the letter he had written in support of Keng's reelection in 1996.

This information was before the trial judge, and she was free to resolve any tendency toward bias and any contradictory statements made by Penick in favor of finding Penick credible. After reviewing newspaper articles and the petition filed in the civil suit, Penick testified that the allegations involving Barnett had nothing to do with the civil suit. Reed's

contentions about the potential impact of this case on **[732]** Penick's civil suit is speculative, and the trial judge was permitted, in hearing Penick's testimony on the issue, to determine that his personal interests in the civil suit did not improperly influence his testimony.

The trial judge was also at liberty to believe Penick's testimony explaining his failure to state that Keng's disclosure took place after Reed's trial during the civil-suit deposition and Penick's reason for changing his personal opinion of Keng. Elaborating on his failure to state that Keng's disclosure occurred four years after Reed's trial when he was deposed in the civil suit, Penick admitted that he failed to clear up the matter during the deposition. He explained that the initial questions regarding Keng's disclosure caught him off guard and he did not remember the conversation at first. The questions then prompted him to remember the conversation with Keng, and during the questioning, he thought about it and remembered that it occurred when Sykes was being prosecuted, four years after Reed's trial.

> I knew what case it was. I went back to that case and I found out what dates were that we have been over here because I remembered then, back in the first deposition, of the conversation I had with Steve Keng and it was over at the law enforcement center when he was representing Amanda Sykes on a murder case where she killed her husband.

Because Keng's first affidavit relating to the disclosure was made in April 2002, Penick assumed that, based on his review of the docket dates for the

Sykes case, Keng must have made the disclosure between January and April 2002.

Finally, regarding the letter endorsing Keng's reelection, Penick explained that Keng was a friend of his and that, based on his opinion of Keng at the time he wrote the letter, he was being truthful when he said that Keng was an honest person. Penick stated: "[A]t the time he was in prosecution, I felt that way, but when he became a criminal defense lawyer he changed, he changed an awful lot." Penick added that, had he known what he now knows about Keng, he would not have written the letter.

Next, although we question whether Fennell's statement to Blackwell falls within *Brady*'s ambit because it was not alleged to have been disclosed until after Reed's trial and therefore may be more properly characterized as newly discovered evidence,[23] we will nevertheless defer to the trial judge's credibility determinations and factfindings because our independent review of the record establishes that they are supported by the record. Concerning Vasquez's credibility, the trial judge found the following:

> During cross-examination, Vasquez was confronted with the fact that he had sworn in his January 2, 2005, affidavit that he 'spoke

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[23] *See generally Petition for Writ of Certiorari, District Attorney's Office for the Third Judicial District, et al. v. Osborne*, 129 S. Ct. 488 (No. 08-6), granted Nov. 3, 2008 (arguing that the Ninth Circuit Court of Appeals in 42 U.S.C. § 1983 civil rights actions improperly "created a postconviction right of access to evidence under the Due Process Clause by extending the doctrine of *Brady* . . . and its progeny.").

> directly to District Attorney Charles Penick.' Vasquez testified that he thought at the time that he'd give[n] it to Penick but remembered when he saw Sanderson sitting in the courtroom that he had given the information to him, and not to Penick.
>
> Charles Penick testified that John Vasquez never approached him with information pertaining to Reed's case.
>
> Forrest Sanderson testified that he did not recall Vasquez ever approaching him **[733]** with information about Reed's case. Sanderson testified that he would have remember[ed] if Vasquez had come to him with information pertaining to Reed's case.
>
> Given the inconsistencies in Vasquez's testimony the Court finds him not to be credible.
>
> This Court finds the testimony of Sanderson, Penick, and Wolfe to be credible.
>
> This Court finds that the Bastrop County District Attorney's Office did not possess any evidence pertaining to Mary Best Blackwell prior to or during trial.
>
> This Court finds that John Vasquez did not provide evidence pertaining to Mary Best Blackwell to the Bastrop County District Attorney's Office until after Reed's trial.

Based on the foregoing, we hold that the record supports the trial judge's conclusion that the State did not suppress favorable evidence during

trial in violation of *Brady*. Accordingly, Reed has not proven that he is entitled to relief.

B. Reed's *Schlup* Claims Under Article 11.071, Section 5(a)(2)

Under our Legislature's codification of the Supreme Court's *Schlup v. Delo*[24] standard, we may

> not consider the merits of or grant relief on a subsequent application unless the application contains sufficient specific facts establishing that:
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> ...
>
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt.[25]

To obtain review of the merits of a procedurally barred claim, an applicant must make a threshold, prima facie showing of innocence by a preponderance of the evidence.[26] A *Schlup* claim of innocence is not an independent constitutional claim; it is "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claims considered on the merits."[27] Because Article

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[24] 513 U.S. 298 (1995).

[25] TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a)(2) (Vernon Supp. 2008).

[26] *Ex parte Brooks*, 219 S.W.3d 396, 400 (Tex. Crim. App. 2007).

[27] *Schlup*, 513 U.S. at 315.

11.071, Section 5(a)(2) was enacted in response to the Supreme Court's decision in *Schlup*,[28] we conclude that standards set forth for evaluating a gateway-actual-innocence claim announced by the Supreme Court should guide our consideration of such claims under Section 5(a) (2). Therefore, to mount a credible claim of innocence, an applicant "must support his allegations of constitutional error with reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial."[29] The applicant bears the burden of establishing that, in light of the new evidence, "it is more likely than not that no reasonable juror would have" rendered a guilty verdict "beyond a reasonable doubt."[30] To determine whether an applicant has satisfied the burden, we must make a holistic evaluation of "'all the evidence,' old and new, incriminating and exculpatory, without regard to **[734]** whether it would necessarily be admitted under 'rules of admissibility that would govern at trial.'"[31] We must then decide how reasonable jurors, who were properly instructed, "would react to the overall, newly supplemented record."[32] In doing so, we may

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[28] *Ex parte Brooks*, 219 S.W.3d at 399.

[29] *Id.* at 324.

[30] *Id.* at 327.

[31] *House v. Bell*, 547 U.S. 518, 537-38 (2006) (quoting *Schlup*, 513 U.S. at 327-28).

[32] *Id.* at 538.

assess the credibility of the witnesses who testified at the applicant's trial.[33]

In this case, we must determine whether Reed has satisfied his gateway burden under subsection (a)(2) so as to permit us to review his procedurally barred *Brady* claims, ineffective-assistance-of-counsel claims, and other constitutional claims. And in deciding whether Reed has met his burden, we will defer to the trial judge's findings and conclusions when it is appropriate.

In support of his gateway-innocence claim, Reed relies on numerous items of evidence not presented at trial, some of which were offered in his prior applications. While we seriously doubt that some of the evidence Reed cites constitutes new evidence for purposes of our inquiry,[34] we will give Reed the benefit of all doubt and consider all of the evidence that was not presented at his trial, namely the evidence presented in all three of Reed's applications. We will leave it for another day to decide exactly what new evidence, not presented at trial, may be considered in the purview of Section 5(a)(2)'s threshold showing of innocence.[35]

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[33] *Id.* at 539.

[34] *See* Jay Nelson, Note, *Facing up to Wrongful Convictions: Broadly Defining "New" Evidence at the Actual Innocence Gateway*, 59 Hastings L.J. 711, 718-20 (2008) (surveying approaches adopted by federal circuit courts in defining new evidence under *Schlup* standard).

[35] Compare with *Ex parte Brown*, 205 S.W.3d 538, 545-46 (Tex. Crim. App. 2006) (discussing what constitutes new evidence for purposes of a substantive claim of innocence under *Ex parte Elizondo*).

1. Reed's Initial Application

We start by examining the evidence presented in Reed's initial application and the accompanying findings of fact that are pertinent to the particular items of evidence. We note that, reviewing this evidence in its entirety, the trial judge found that Reed failed to prove that he is actually innocent under the more stringent standard of *Herrera* and *Ex parte Elizondo*.[36]

a. Robbins' Statements

First, Reed submits two statements from Robert and Wilma Robbins that were given to police in March 1998. The Robbinses delivered the Austin American-Statesman Monday through Saturday in Bastrop. Their route included the Bastrop High School. A month before Stacey's murder, the Robbinses saw a gray/blue Ford Tempo parked in the School parking lot a few days during the week between 4:30 and 5:00 a.m. The car was not there on the day of Stacey's murder, and they never saw it parked at the School after Stacey was murdered. Robert also stated that he saw a Chevrolet full-size truck, which he believed was white, in the lot two or three days during the week. He did not see the truck the day of Stacey's murder and did not see it in the lot again after Stacey's murder.

The trial judge found that Carol Stites's testimony about Stacey rarely using the Tempo to drive to work because of its unreliability was credible. The trial judge **[735]** also determined that,

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[36] 947 S.W.2d 202 (Tex. Crim. App. 1996).

because of Stacey's work schedule, she could not have been at the Bastrop High School between 4:30 and 5:00 a.m. The trial judge found that, in April 1996, a 1988 Ford Tempo was registered to David Gonzalez, who worked for the High School in April 1996. As a result, the trial judge found no credible evidence that Stacey was driving Carol's car to the High School the month before her death.

Concerning the white truck, the trial judge found that when Robert was cross-examined at trial, he admitted that, when he was questioned two days after Stacey's murder, he told investigators that the truck was silver. The Bastrop Police Chief investigated the information from Robert and concluded that the truck belonged to a school employee. Further, while Patty Timmons testified at trial that she saw three men in a white truck parked near Bluebonnet Road on April 23, 1996, between 6:30 and 7:00 a.m., she told investigators three weeks after Stacey's murder that she saw the truck at 9:30 a.m. on April 22, 1996. As a result, the trial judge found no credible evidence that Stacey was murdered by three unknown men in a white truck.

b. Witnesses Affirming Relationship Between Stacey and Reed

Reed also presented several affidavits from witnesses claiming to know of an ongoing relationship between Stacey and Reed.

Kay Westmorland stated that Stacey and Reed came to her house three or four times between late January 1995 and April 1996. She knew Stacey from the H.E.B. and knew of Fennell because she saw him pick up Stacey at work. Westmorland knew Reed

from the neighborhood. She heard that Fennell knew Reed was seeing Stacey and that Fennell was jealous. She claimed that she was "not surprised to see [Fennell] drive by [her] house on several occasions in the same truck that she had seen Stacey and [Reed] in."

Meller Marie Aldridge stated that, when she was at a friend's house, Stacey came and picked up Reed. Her friend identified Stacey as Reed's girlfriend. Meller Marie Aldridge knew Stacey from the H.E.B.

On June 13, 2000, Meller Marie Aldridge gave a second affidavit to the State elaborating on her first sworn statement. The young woman, whom she saw pick up Reed, had driven a full-size truck, worked at the customer-service center at H.E.B., and was "best friends" with a Hispanic woman named Rose, who worked at H.E.B. and lived in the "projects" in Bastrop. The trial judge found that the only truck Stacey drove belonged to Fennell and that it was not a full-size truck. Further, according to the general manager of the Bastrop H.E.B., Stacey did not work at the customer-service center. That position required special training, which Stacey never received. The general manager also maintained that Stacey did not regularly hang out with a Hispanic woman named Rose and that she was not drawn toward any particular coworker. The trial judge found that there was no Hispanic woman named Rose who worked at the H.E.B. or was Stacey's best friend. The trial judge found that the evidence presented by Meller Marie Aldridge concerning a relationship between Stacey and Reed was unpersuasive.

Shonta Reed stated that Stacey had come by her house looking for Reed when he was not at home and that Stacey returned to pick him up when he got back home.

Elizabeth Keehner stated that she saw Reed, whom she "knew quite well," walking out of the H.E.B. "holding hands with a very pretty white girl" a few months **[736]** before Stacey's death. When she saw Stacey's picture in the paper, she thought that Stacey might have been the girl with Reed at the H.E.B.: "The familiarity was there."

The trial judge found that Keehner was a bondswoman and a close friend of Reed's family. She often bonded Reed out of jail. Before trial, Keehner gave a more detailed statement to police. In addition to mentioning her sighting of Stacey and Reed at H.E.B., Keehner detailed a conversation she had with Chris Hill's grandmother-in-law, Betty Wallace. Wallace, who occasionally worked for Keehner, told Keehner, in Chris Hill's presence, that everyone at H.E.B. knew that Stacey and Reed were dating. Hill also worked at H.E.B., and Keehner stated that Hill responded in the affirmative when Wallace asked whether it was common knowledge at H.E.B. about Stacey and Reed dating. The State obtained a statement from Hill in 2000. He denied any knowledge of the conversation and stated that he did not have any personal knowledge of a relationship between Stacey and Reed. The trial judge found that the State could have subjected Keehner to significant impeachment if she had testified at Reed's trial.

Walter Reed, Reed's father, stated that Kelly Bonguli, who had worked at the H.E.B., told him that he knew where Stacey was the night she was killed.

Bonguli also told Walter that he and his family had been "tailed" during Reed's trial. He then said that he wanted to talk with someone before he said anything about the case.

Considering these statements, the trial judge found that they were not credible or persuasive. Reed failed to submit an affidavit from Kelly Bonugli. The State obtained an affidavit from Bonugli that discredited Walter Reed's statements. Bonugli stated that he "never told Walter Reed that I knew where Stacey Stites was on the night she was killed. All I ever told Walter was that Rodney Reed was a crackhead who raped girls on the R.R. tracks. I have no idea where Stacey Stites was when she died."

In an affidavit submitted by Reed, Ron Moore states that he had a conversation with Debra Pace and Jane Campos about Stacey's murder in January 1999. According to Moore, Campos told him that Reed did not kill Stacey and that she had overheard a conversation between Fennell and his coworker, Curtis Davis. Davis told Fennell "not to worry that 'it was all taken care of'" in response to Fennell's complaint about Stacey's affair with Reed. Pace told Reed's trial investigator, Olney, about the conversation. Olney submitted an affidavit attesting to his conversation with Pace.

The trial judge found that Moore's and Olney's statements were not persuasive or credible. Reed failed to provide the trial judge with affidavits from Campos and Pace. In an affidavit obtained by the State, Campos stated that she never told anyone that Reed did not kill Stacey or that she overheard a conversation between Fennell and Davis in which the two discussed an affair between Stacey and Reed.

Pace also executed an affidavit at the State's request. In it, she asserted that she never told Moore or Olney about anything Campos said; when Moore and Olney came to her house, she refused to talk to them. Pace read Moore's and Olney's affidavits and stated that the two are "bald face liars." Campos said that Reed did not do it when Pace was talking with Campos and Moore about their personal opinions about the case. Pace stated that Campos's tone was serious, but that for all she knew it was only Campos's opinion. Finally, Curtis Davis submitted an affidavit denying that he ever had such a conversation with Fennell.

[737] Jon Chris Aldridge submitted an affidavit stating that he saw Stacey and Reed together during the three months before she was murdered. Around April 1st, when Jon and Reed were walking, Fennell stopped them and told Reed he knew about him and Stacey. Fennell then told Reed that he was going to "pay."

Jon Aldridge gave the State a more detailed affidavit on June 14, 2000. He stated that he was at Shonta Reed's house when a large full-size pick-up truck pulled up. When Reed introduced Jon to the driver, he told Jon that her name was Stacey and that they were dating. The three then rode around and purchased crack cocaine. After Stacey and Reed smoked the crack cocaine, Stacey dropped them off at a local bar. Jon asserted that Fennell and another law-enforcement official whom he did not know stopped them in Bastrop. Fennell was wearing plain clothes, and the other officer was wearing a uniform. Jon stated that they were in a Bastrop County Sheriff's Department vehicle with a star embossed on the side. He stated that he knew Fennell because

Fennell had booked him into the Bastrop County Jail.

The trial judge determined that Jon's statements were neither persuasive nor credible. Fennell, the trial judge found, was a Gidding's police officer at the time—not a Bastrop Sheriff's Deputy. Additionally, after reviewing Jon's booking sheets, which the State submitted, the judge found that Fennell never booked Jon into the jail. Regarding the allegation of Stacey's crack cocaine use with Reed, the trial judge found that the toxicology report from Stacey's autopsy was negative for drugs and alcohol. The drug screen conducted by H.E.B. before Stacey was hired was also negative. Further, the trial judge found:

> Prior to trial, the State sent samples of Stacey Stites' hair to National Medical Services, Inc. in Pennsylvania. That laboratory analyzed 32 centimeters of her hair in order to determine whether cocaine or its metabolites were present. As that laboratory's report indicates, two different analyses were negative for cocaine. Since hair grows at an approximate rate of one centimeter per month, the State was prepared, through the use of these analyses, to prove that Stacey Stites was not a cocaine user for the last 32 months of her life.

Finally, the trial judge found that many of these affidavits were from Reed's family members. Jon Aldridge, Shonta Reed, Meller Marie Aldridge, and Ron Moore are Reed's cousins, and Walter Reed is Reed's father. The trial judge also determined that,

at the time of the habeas proceedings, many of these family members had criminal records. Jon Aldridge, who is Meller Marie Aldridge's son, had a lengthy arrest record. He had been convicted several times of theft by check and had been convicted for failure to identify himself as a fugitive from justice. Shonta Reed had been convicted of theft four times and convicted of assault once. Linda Westmorland had been convicted of felony theft, and the State's motion to revoke her probation on that cause was pending at the time of the habeas proceedings. She also had forgery charges pending in Dallas.

In light of his earlier findings, the trial judge found that the evidence of a secret affair between Stacey and Reed was unpersuasive. Moreover, the trial judge determined that the evidence of Fennell's awareness of a "secret affair" and vow to get revenge was unpersuasive.

c. Statements from Allison and Hawkins

Reed also submitted written statements taken from Jason Allison and Neal Hawkins **[738]** while they were in custody during the investigation into Arldt's murder. Both Allison and Hawkins recounted the murder. Hawkins stated that Lawhon confessed to killing Stacey immediately after he killed Arldt. Lawhon told Hawkins that he "did the girl in Bastrop."

Without judging Allison's and Hawkins's credibility, the trial judge found no credible evidence that Lawhon is guilty of murdering Stacey. The judge, who had presided over Reed's trial, made this determination after recalling the evidence at trial

and reviewing the habeas evidence. The habeas evidence specifically included a written statement from Macy, Lawhon's ex-girlfriend, who would meet Lawhon in the Walmart parking lot, written statements from Lawhon's parents asserting that Lawhon was at home on the night Stacey was murdered, and information showing that Lawhon had been excluded as a contributor to the DNA on the beer can (item number 24).

d. Fennell's Deceptive Polygraph Results

Finally, Reed pointed to Fennell's two polygraph results. The polygraphs were conducted during the investigation into Stacey's death, and both results indicated that Fennell was deceptive when he was asked if he strangled, struck, or hit Stacey. At trial, the results were offered by Reed's attorneys, and the trial judge ruled that they were inadmissible. On direct appeal, we affirmed the trial judge's ruling.[37]

After exhaustively considering all of the trial and habeas evidence, the trial judge determined that there was no credible evidence that Fennell is guilty of murdering Stacey.

2. Reed's First Subsequent Application

We now turn to the beer-can-DNA evidence presented in Reed's second application. As previously discussed at length above, Reed submitted Young's DNA-test results on the beer can (item number 24)

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[37] *Reed*, No. AP-73,135, at *12–14.

found on the road near Stacey's body in his first subsequent state habeas application. Young could not exclude Stacey, Officer Hall, or Investigator Selmala as DNA contributors. But Reed's trial expert, Dr. Johnson, did exclude all three through Polymarker testing.

At the end of 2000, when Reed's first and second applications were before the trial judge, the State ordered additional, more discriminating DNA testing on the beer can. With intervening advances in DNA testing, Young conducted Short Tandem Repeat (STR) testing on the can and compared the results with the genetic profiles for Stacey, Officer Hall, and Investigator Selmala. STR testing is more discriminating than the previous testing conducted by both parties' trial experts. Young examined thirteen STR loci. Based on his evaluation of the results, Young was unable to exclude Hall from ten loci. He was also unable to exclude Stacey and Investigator Selmala from five loci. Young documented these findings in a report on January 22, 2001.

Dr. Ranajit Chakraborty, whom Young testified was "one of the country's most definitive experts in the field of population genetics," submitted an affidavit concurring with Young's determination. "Review of the electropherograms indicates that the conclusions reached by the DPS laboratory are accurate and they are scientifically valid." Dr. Ranajit Chakraborty noted, however, that Young's results raised questions. He stated that Officer Hall is excluded based on three loci and Stacey and Investigator **[739]** Selmala are each excluded based on eight loci. "[T]he exclusion of each of the three

persons (based on multiple loci) are consistent with the inference that they are NOT part contributors of DNA in the mixture sample (of item # 24)."

In a deposition, Reed's habeas expert, Dr. Arthur Eisenberg, disagreed with two of Young's conclusions. In his opinion, the data from Young's testing did not support the finding that Stacey and Investigator Selmala are included as contributors. Officer Hall, however, cannot be excluded. Dr. Eisenberg opined that DPS's protocol was correct but stated that his results were obtained using an alternative interpretation method. Explaining DPS's method, Dr. Eisenberg maintained that DPS protocols mandate a peak-height-minimum of 150 RFU units when making an allele or loci call designation. Another value, a stochastic cutoff level, is 50 RFU units. Dr. Eisenberg asserted:

> to make an allele designation, it needs to be a minimum of 150 RFU units to be used for what we refer to as inclusionary purposes. However, there is an area between 50 and 150 RFU where there are peaks that are clearly visually detectable but are typically only used for purposes of exclusion....

Using the lower threshold of 50 RFU units, so that the three loci not previously identified by Young were now visible, Dr. Eisenberg could not exclude Officer Hall. Ninety-nine percent of the Caucasian, African–American, and Hispanic populations would have been excluded. But Dr. Eisenberg made clear that he could not say whether Officer Hall put his saliva on the beer can. He also stated that the absence of an exclusion would have to be looked at in conjunction with other evidence relating to Officer

Hall. As for Stacey and Investigator Selmala, Dr. Eisenberg found no reason to include them as DNA contributors. Because Dr. Eisenberg regarded Dr. Chakraborty as a friend, he spoke with Dr. Chakraborty and showed him the electropherograms where the loci were called at 50 RFU. Dr. Chakraborty, according to Dr. Eisenberg, changed his opinion and agreed that only Officer Hall could not be excluded. Dr. Eisenberg had the impression that Dr. Chakraborty was not given the electropherograms when he reviewed Young's conclusions. Referring to Dr. Johnson's previous exclusion of Officer Hall, Dr. Eisenberg stated that if the Polymarker test was properly conducted, he would have no problem relying on the results.

Considering the results of Young's 2001 DNA analysis on the merits, the trial judge concluded that Reed's free-standing-innocence claim did not entitle him to relief. The trial judge found that the jury's guilty verdict would not have differed if the report had been admitted into evidence at trial. The trial judge also determined that Reed failed to establish by clear and convincing evidence that no reasonable juror would have convicted him in light of the report.[38]

3. Reed's Second Subsequent Application

a. Beer-Can-DNA Evidence

Reed again points to the beer-can-DNA evidence in this application. He theorizes that Officer Hall could have assisted Fennell with either

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[38] *See Ex parte Elizondo*, 947 S.W.2d at 208.

committing the murder or returning to Giddings from Bastrop on the morning of the murder. Because Officer Hall is six feet, one inch tall, Reed contends that he cannot be excluded as the driver of Fennell's truck.

[740] In a follow-up affidavit to his deposition testimony, Dr. Eisenberg asserts that his subsequent review of Dr. Johnson's Polymarker testing does not change his opinion about the inability to exclude Officer Hall based on the STR results. "The STR systems are in general several times more sensitive at detecting minute amounts of DNA, and the visualization of the STR profiles on an electropherogram is better at discerning mixtures as compared with DQ–Alpha and Polymarker systems."

b. Officer Davis

Reed further contends that Officer Curtis Davis could have assisted Fennell with either committing the murder or returning home. Reed asserts that Officer Davis reported for the night shift on the night before Stacey was murdered, but he signed out an hour later, taking sick leave. He was then absent from work for a few days after the murder to comfort Fennell.

c. Barnett and Blackwell

Reed also relies on the information that originated with Barnett and Blackwell, the particulars of which we have fully discussed above.

In relation to Reed's *Brady* claims, the trial judge made findings on Barnett and Blackwell's credibility. The trial judge found that both were not credible.

Regarding Barnett, the trial judge found that she was not credible or persuasive for the following reasons:

- Barnett failed to give a satisfactory explanation about why she failed to report her sighting of Stacey and Fennell on the morning of April 23rd to police and why she did not report it to anyone until she spoke with Keng, over a year and a half after the murder. Barnett: (1) knew Stacey's murder was huge news where she worked; (2) agreed that it was common knowledge that H.E.B. offered a $50,000 reward; and (3) was aware that her sighting would have been important to law-enforcement officers investigating Stacey's murder.

- The timing of Barnett's disclosure, because of her DWI arrest by Fennell shortly before her disclosure to Keng, suggests an apparent bias and motive underlying her testimony.

- Given Attorney General Investigator Miranda's testimony and collection of local newspaper articles about Stacey's murder, Barnett's credibility is undermined by the fact that she could not have identified Fennell from a photograph in the newspaper because his photo was never in the newspaper.

- Barnett's credibility is damaged because her testimony about the time she saw Stacey and Fennell was inconsistent with her sworn statements made in her 2002 affidavit. Viewed in conjunction with the State's argument that it would have been impossible for Barnett to have seen Stacey and Fennell at the store between 5:00

and 5:30 a.m., the time discrepancy of Barnett's sighting at the hearing is significant.

• Barnett's testimony is incredible when considered with the following facts developed at trial: (1) Stacey was scheduled to be at the Bastrop H.E.B. for work at 3:30 a.m.; (2) Stacey was a prompt employee who was never late to work; (3) Stacey was partially dressed in her H.E.B. uniform when her body was discovered; (4) Fennell's red truck, which Stacey drove to work, was found at the Bastrop High School at 5:23 a.m. on the 23rd; (5) Stacey had already been killed when Fennell's truck was found; (6) Carol Stites woke Fennell up at 6:45 a.m. to tell him that Stacey failed to arrive at work; and (7) Carol had to give Fennell a set of **[741]** keys to her Tempo so he could go look for Stacey.

The trial judge then concluded that Barnett did not see Stacey and Fennell at the Old Frontier store on the morning of April 23rd.

Finding Blackwell's testimony neither credible nor persuasive, the trial judge entered the following findings:

• Blackwell's testimony about Fennell feigning grief at Stacey's funeral is undermined by the testimony of Giddings Police Chief Nathan Lapham. Lapham testified that Fennell "appeared to be very upset, emotionally upset, he was crying, I believe before and after the funeral.... He was very distraught."

• Blackwell's testimony is severely undermined by Wolfe's testimony that none of the other cadets in the CAPCO class could corroborate the

conversation that Blackwell said that she had had with Fennell in which Fennell threatened to strangle his girlfriend with a belt if he ever caught her cheating on him. Further, none of the cadets could corroborate Blackwell's claim that Fennell acted abusively toward Stacey.

• Blackwell's testimony is undermined by the testimony of Derzan, who was assigned to sit next to Fennell during the class. Derzan never heard or participated in the conversation with Fennell that Blackwell described.

• Larry Franklin's testimony also undermines Blackwell's testimony. Franklin did not hear the conversation described by Blackwell and never heard Fennell say anything disparaging about Stacey.

• Blackwell's testimony that she did not make a connection between Stacey's murder and Fennell's statement until she spoke to Vasquez is undermined by her testimony that she recalled Fennell's statement when she returned to work after the funeral and Franklin's testimony that he and Blackwell discussed whether Fennell could have killed Stacey. And during that conversation, Blackwell told Franklin about Fennell's statement.

• Blackwell's testimony is undermined because, as a peace officer, she failed to report information relevant to a homicide investigation.

• Blackwell's credibility is undermined by the fact that she originally told Vasquez that Fennell was joking when he made the statement but

testified at the hearing that Fennell was "absolutely" serious.

- "Given the fact that Blackwell lived in Austin, attended [Stacey's] funeral, and knew Fennell from the academy, it is implausible that Blackwell was entirely unaware, as she claimed, of the circumstances surrounding [Stacey's] death."

d. Statements of Jennifer and Brenda Prater

Reed has submitted affidavits from Jennifer and Brenda Prater. Both women claim that they saw Stacey with a man, who was not Reed, in the early morning hours of April 23rd. Jennifer maintained that her husband, Paul, woke her up that morning because there was a suspicious car behind their house. The car was light in color, and Jennifer did not recognize the driver or the passenger. The man in the driver's seat had a dark complexion but was not an African–American. The woman in the passenger's seat was pale and had "big" hair. Jennifer and Paul went outside to get a better look at the occupants. Jennifer recalled that the two people in the car saw them and drove off. Jennifer stated that she got a good look at **[742]** the two because the interior light in the car was on. Later she saw a picture of Reed and was sure that he was not the driver of the car. The man in the driver's seat had a lighter skin tone and different facial features. When Jennifer's mother-in-law showed her Stacey's picture in the paper on the 25th, Jennifer knew that Stacey was the woman who had been in the passenger's seat.

On the 25th, Jennifer's mother-in-law told her that the police had been to Jennifer's house when she

was not home. The police walked into the house when Jennifer's kids did not answer the door. Jennifer's mother-in-law, who lived across the street from Jennifer and Paul, saw the police arrive. She went to Jennifer and Paul's house and confronted the police about their entry into the house. Jennifer's mother-in-law told Jennifer that the police threatened to call Child Protective Services because the kids were home alone. After Jennifer's mother-in-law explained that she was watching the children until Jennifer returned home, the police left, stating that they would come back later.

When the police returned later that day and spoke to Jennifer, they asked her about the car she saw on the 23rd. Aware that she was lying, Jennifer told the officers that she did not know anything. Jennifer did not want to be involved in a criminal investigation, did not trust the police, and was angry at the police for entering her house.

Brenda Prater lived in a house a block away from her brother, Paul, and her sister-in-law, Jennifer. During the early morning hours on April 23rd, she was writing in her journal. She was awake because her husband, whom she was in the process of divorcing, called and harassed her. She called Paul and asked him to keep an eye out for her husband. Between 1:00 and 3:00 a.m., while Jennifer was sitting outside in her front yard, she saw a light-colored car pass by with three occupants.

> The interior light was on. The driver was a man who had a darker complection [sic], but was not black. I thought that he was Mexican. There was a woman in the passenger seat. She was light complected [sic] with big dark hair. I

> remember that, as the car drove by the first time, the woman in the passenger seat turned her head toward the driver. I got a very good look at her face as they went by. There was a white male in the back scat [sic]. At first I was afraid that the man in the back seat was my husband. I got a better look at him when the car went through the second time and realized that he was not my husband. I later spoke with my brother Paul and Jennifer and they told me they saw the same car in back of their house.

Jennifer went to work the next day, and a coworker asked if she heard about Stacey's murder and showed her Stacey's picture in the newspaper. Realizing that she had seen Stacey on the night she disappeared, she began to yell, "When, when, when[?]"

e. Fennell's Deceptive Polygraph Results

Again, Reed directs our attention to Fennell's polygraph exams, which led both examiners to conclude that he was deceptive when asked about Stacey's murder.

f. Faulty Forensic Analysis and Collection of Forensic Evidence

Reed asserts that the various aspects of the forensic testimony offered by the State and admitted into evidence at trial lack a foundation in science. To support his theory, Reed refers to an affidavit from Dr. Leroy Riddick, an affidavit from Ronald Singer, and to medical literature. Reed **[743]** included each of these items in his habeas application.

Dr. Riddick is a medical examiner for the State of Alabama. His affidavit, for the most part, is devoted to criticizing Dr. Bayardo's conclusions. First, Dr. Riddick contends that Dr. Bayardo's time of death estimate is unreliable.

> In order for the time of [Stacey's] death to have been reliably determined, rigor mortis, post mortem lividity, and body temperature should have been recorded at the scene where her body was found. These measurements are the most common means for calculating time of death, but none of this information was recorded at the scene in this case. By the time Dr. Bayardo saw [Stacey's] body for the autopsy at 1:50 p.m. on April 24, the body had been handled by multiple people, turned and had been refrigerated for nearly a full day. Consequently, it was too late for accurate assessments of rigor mortis, lividity, and body temperature to produce a reliable determination of time of death.

Next, Dr. Riddick asserts that the evidence of anal intercourse is inconclusive. Dr. Riddick faults Dr. Bayardo for failing to preserve the slides that he used to determine the presence of intact sperm in Stacey's rectum. "[W]ithout the slides on which Dr. Bayardo claimed to have seen the presence of sperm heads from swabs from [Stacey's] rectum, this conclusion cannot be verified." Dr. Riddick states that Dr. Bayardo's conclusion about the presence of intact sperm would be more reliable if the rectal swabs he used had been taken at the scene. Noting the pubic-hair-tape lifts between Stacey's labia and rectum conducted by Blakley and the manner in

which Stacey's body was moved, Dr. Riddick contends that "there were several opportunities for leakage by the time that Dr. Bayardo took the rectal swabs." Dr. Riddick asserts that "there is no evidence of anal dilation at the time that [Stacey's] body was recovered." When Dr. Bayardo examined Stacey, it was twenty-four hours after she died. "Rigor mortis begins to pass 24 hours after death and makes dilation of the anus easier, whether by finger, swab or another object." Dr. Riddick also maintains that "it cannot be concluded with any degree of scientific certainty that [Stacey's] anus was lacerated and that those lacerations occurred around the time of death." The photographs taken at the autopsy do not show redness, according Dr. Riddick. Redness is associated with laceration and "would have accompanied a laceration incurred at or around the time of death." Regarding Bayardo's testimony, Dr. Riddick states that Dr. Bayardo mentioned lacerations on direct-examination but described them as scrapes on cross-examination. Further, Dr. Bayardo's report mentioned only abrasions. Dr. Riddick contends that lacerations and abrasions are not the same.

> Lacerations of the anus could be consistent with anal intercourse. In contrast, abrasions of the anus are not as accurate an indicator of anal intercourse, much less an anal assault. Abrasions of the anus can and do occur naturally, for example, due to constipation or hemorrhoids.... 'Scrapes' would be consistent with an abrasion, not a laceration.

As for the cause of death, Dr. Riddick attacks Dr. Bayardo's conclusion that Stacey died of asphyxiation resulting from strangulation associated

with sexual assault. Dr. Riddick claims that it is unknown whether the sexual contact was consensual. "The best indicator of non-consensual sexual contact is the existence of other injuries, such as being held down. There are no injuries of this type." Dr. Riddick contends that there is no evidence **[744]** that Stacey died from ligature strangulation because, with the exception of the exterior injuries to Stacey's neck, other common injuries associated with strangulation were not present. Dr. Riddick suggests "some other modality, such as smothering...."

Finally, regarding the collection of evidence at the scene where Stacey's body was found, Dr. Riddick claims that no effort was made to collect evidence from under Stacey's fingernails. Even though Stacey's nails were short, Dr. Riddick claims that the investigators could have collected evidence with a toothpick. Dr. Riddick contends that the video of the crime scene does not show the authorities, who collected evidence, changing gloves between tasks. In making this critique, Dr. Riddick admits that he is an expert in crime-scene evidence collection only in so far as it relates to establishing time and cause of death.

Dr. Riddick viewed the following items of evidence in rendering his opinion: (1) Dr. Bayardo's autopsy report; (2) photographs of Stacey's body at the scene of discovery, Stacey's clothing, and Stacey's body at the autopsy; (3) the video of the scene where Stacey's body was discovered; (4) the trial testimony of Dr. Bayardo; (5) the trial and habeas testimony of Blakley; (5) DPS Crime Lab reports; (6) crime scene reports; and (7) police reports of witness interviews.

In his affidavit, Singer, a consulting forensic scientist who works at Tarrant County Medical Examiner's Office Criminalistics Laboratory, focuses on problems with the investigation of the scene where Stacey's body was discovered and with Blakley's testimony. Singer offers some of the following personal observations and conclusions:

- Law enforcement officials exercised poor security and control at the scene where Stacey's body was discovered; "a perimeter should have been established around the scene with only one entrance and exit. Entrance and egress should have been limited until that area was thoroughly searched for tire prints, shoe prints, and other evidence."
- "The law enforcement authorities depicted on the tape demonstrated poor technique in dealing with, and taking evidentiary samples from [Stacey's] body." The origin of the blanket used to cover her body is unknown and the video does not show whether it was inspected for trace evidence. "It was not good technique for one of the crime scene analysts to put his gloved hand into his pocket—as the video shows—and then later handle trace evidence without having changed to fresh gloves." Ungloved personnel touched the body and "one of the individuals who moved [Stacey's] body to a stretcher does not appear to be gloved."
- It is probable that Blakley contaminated Stacey's bra and breasts with trace evidence because there is no evidence that the criminalist changed gloves between taking evidentiary samples. "This contamination

likely occurred when Ms. Blakley handled [Stacey's] brassiere and breasts after taking swabs and tape lifts from [Stacey's] pubic area."

- It is troubling that the criminalist failed to swab the pieces of belt for DNA evidence. "If, as the prosecution later theorized, this belt was used to strangle [Stacey], the pieces likely would have had trace DNA evidence from [Stacey] and her attacker."
- The videotape was poorly done; there is no time marker and it begins after the crime scene team arrived. As a **[745]** result, it does not completely depict the activities of law enforcement. "A better practice is to record continuously from the moment that the police get to the scene after the first responding officer." "[A] valuable record of evidence collection—which could support or impeach the integrity of the prosecution's evidence—has been lost."
- Blakley exhibited poor forensic practices and repeatedly went beyond her area of expertise. Blakley testified beyond her expertise when stating how long Stacey was dead, identifying marks on Stacey's body and dating the marks, and opining that it was a crime of passion. "[T]raining as a criminalist does not give one the ability to estimate how long someone has been dead. This determination is the province of a pathologist." And "[o]nly pathologists can determine that a mark is, in fact, a bruise, cigarette burn, scratch or bite, or how old the mark is and how it was incurred."

Finally, Reed cites to a book written by Dr. William Green in 1998, entitled: "Rape: The Evidential Examination and Management of the Adult Female Victim." In the book, Dr. Green surveys studies conducted on the presence of nonmotile intact sperm in the cervix and vagina. Dr. Green notes that one study found intact sperm ten days after intercourse.[39] Other studies found the presence of intact sperm in the cervix or vagina anywhere from two days to nine days after intercourse.[40] Reed contends that Blakley's testimony estimating the length of time that sperm can remain intact in the "cervix" is patently false.

g. Fennell and the Giddings Police Department's Reputation for Violence

Reed maintains that both Fennell and the Giddings Police Department have a reputation for violence. Concerning Fennell, Reed points to a state-civil-rights lawsuit filed against the City of Giddings, Giddings Police Chief Dennis Oltmann, Giddings Officer Nathan Lapham and Fennell for using excessive force against suspects a year before Reed's trial.

Reed also asserts that Fennell was violent toward women he dated. Reed directs us to an affidavit from Pamela Duncan, Fennell's girlfriend from August 1996 to September 1997. Duncan

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[39] WILLIAM M. GREEN, M.D., RAPE: THE EVIDENTIAL EXAMINATION AND MANAGEMENT OF THE ADULT FEMALE VICTIM 107 (Lexington Books 1988).

[40] *Id.* at 107-08.

describes Fennell as abusive, possessive, controlling, and extremely prejudiced toward African–Americans. When Duncan broke up with Fennell, he stalked her until he left Giddings; she was afraid for her safety and that of her children.

> He would drive by my house, night after night, and shine a spotlight into the house. It got so bad that I finally put tin foil up in my windows, to reflect the light. He would stand outside my house at night, screaming at me, calling me a 'bitch' and other obscenities. He would come by my job at the Circle K, and just sit parked out front, with the headlights shining into the store. He would stay there, sitting in his car and watching me, for anywhere from two minutes to two hours ... Once he came into the store and wouldn't let me out of the office—we had to call the police to get someone to escort him out, so I could leave. He would hassle any guy I tried to date until it scared them away. For instance, I dated one guy who delivered beer in town. After we started dating, Jimmy sta[r]ted pulling him over and giving **[746]** him tickets. He got so many tickets he couldn't keep his job anymore.

Summarizing the end of her relationship, Duncan states that it was the worst time in her life.

Claiming that the Giddings Police Department had a long-standing reputation for brutalizing suspects and targeting non-whites at the time of Reed's trial, Reed relies on a federal-civil-rights action initiated against the Giddings Police Department and another Giddings officer. Attached

to the plaintiff's petition in that case is an affidavit from Keng. Keng recalled several instances of alleged misconduct involving officers with the Giddings Police Department using excessive force and recalled some specific instances of alleged misconduct. He also recalled requesting that the Texas Rangers investigate abuse allegations when Chief Oltmann failed to give him a satisfactory explanation about the alleged abuse. A Ranger told Keng that there was not much he could do because Chief Oltmann was supporting his officer. In closing, Keng stated: "For the past ten years, the Giddings Police Department has had a reputation in Lee County of roughing up suspects during their arrest."

h. Statement of James Robinson

James Robinson contends that he had a separate relationship with Stacey and Reed. Robinson knew Reed from the nursing home where they worked and knew Stacey from "school." Robinson saw Stacey and Reed together on numerous occasions, kissing and calling each other "baby." He went to parties where Stacey and Reed would meet. Lawhon would often be at the same parties, and Stacey would say hello to him. After Stacey was murdered, Reed seemed sad and angry. Robinson was in the Bastrop County Jail while Reed was being held there on this case. At the jail, Reed told Robinson that he did not kill Stacey. Robinson was told that he would be transferred to another county and that he could not stay in Bastrop to testify at Reed's trial. Robinson also declares that he was with Chris Aldridge and Reed when Fennell stopped them, telling Reed that he knew about Reed's relationship with Stacey and that he would pay.

4. Discussion

[20] We hold that all of the reliable evidence, both old and new, presented by Reed does not compel the conclusion that it is more likely than not that no reasonable juror would have voted to convict Reed.[41] Initially, we note that what separates this case from the majority of gateway-innocence cases is the complete lack of a cohesive theory of innocence. Reed's claim of innocence is seriously disjointed and fragmented—he presents numerous alternative but critically incomplete theories. By focusing on a romantic relationship between himself and Stacey as well as pointing to several alternative suspects—Fennell, Lawhon, and some unknown dark-skinned man—the new evidence before us fails to tell a complete, rational exculpatory narrative that exonerates Reed. None of Reed's theories meets the gateway standard of innocence.

As Chief Justice Roberts recognized in his concurring opinion in *House v. Bell*, "Implicit in the requirement that a habeas petitioner present reliable evidence is the expectation that a factfinder will assess credibility."[42] Here, consistent with our writ jurisprudence, we follow the credibility determinations and factfindings made **[747]** by the two judges who presided over Reed's habeas proceedings. Both judges had the opportunity to assess the demeanor of the witnesses who appeared before them. Further, the trial judge who presided over Reed's first and second habeas proceedings also

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41 TEX.CODE CRIM. ANN. art. 11.071 § 5(a)(2).

42 547 U.S. at 556; *see also Schlup*, 513 U.S. at 332.

presided over Reed's trial. Based on our review of the record, the findings entered by the trial judges and discussed above are supported by the record; thus, in several instances Reed has failed to provide us with reliable evidence of innocence. The evidence that we reject as unreliable includes: the Robbinses' statements; the witnesses who affirmed a relationship between Reed and Stacey; Allison's and Hawkins's statements, even if regarded as credible; and the information from Barnett and Blackwell. Further, regarding Barnett's sighting, given the evidence developed during the habeas proceedings about Officer Hall's alibi, which has not been undermined, and the lack of any reliable evidence suggesting that Fennell had an accomplice, we conclude that Barnett's information is not credible or reliable.

Additionally, we find that Robinson's statement is not credible for several reasons. First, his statement is not sworn. Second, he contends that he knew Stacey from school and that, as of 2000, he has known Reed for eight or nine years. The evidence at trial, however, establishes that Stacey moved to Bastrop after graduating from Smithville High School; therefore, Robinson's statement is suspect. Third, Robinson's statements about seeing Stacey and Reed together are general; Robinson offers no specific facts that have been or could be corroborated. Fourth, this statement lacks credibility because Jon never mentioned that Robinson was present when Reed was threatened by Fennell, even though he gave two statements.

Based on the above, we refuse to credit the foregoing evidence in assessing whether Reed has

made a prima facie showing that, in light of all of the evidence before us, no reasonable juror would have convicted him. We now consider the remaining new evidence as it relates to the various alternative theories of innocence offered by Reed.

a. Fennell

Excluding the items of evidence that we have rejected, we consider the following evidence that, according to Reed, suggests Fennell's involvement in Stacey's murder: (1) Fennell's deceptive polygraph results, regardless of their admissibility,[43] even though we question their reliability;[44] (2) the DNA-beer-can-test results that cannot exclude Officer Hall; (3) evidence that Fennell's coworker, Officer Davis, took sick leave shortly after beginning his shift on the night of April 22nd; and (4) evidence that Fennell and the Giddings Police Department had a reputation for violence.

Although this new evidence may indeed arouse a healthy suspicion that Fennell had some involvement in Stacey's death, we are not convinced that Reed has shown by a preponderance of the evidence that no reasonable juror, confronted with this evidence, would have found him guilty beyond a reasonable doubt. The evidence of vaginal assault, which we will discuss more fully below, and the circumstantial evidence admitted against Reed at trial have not been undermined and still support a guilty verdict.

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[43] *See Schlup*, 513 U.S. at 327-28.

[44] *See United States v. Scheffer*, 523 U.S. 303, 309-12 (1998).

b. Consensual Sexual Relationship

[748] Reed contends that the evidence from Dr. Riddick, Singer, and Dr. Green's book establishes only that he and Stacey had sexual relations at some point before her death and that there is no credible evidence that Stacey was raped. We disagree. When considered in conjunction with the trial evidence, Reed's new evidence does not verge on establishing that it is more likely than not that no reasonable juror would have convicted Reed.

Reed contends that the evidence of anal intercourse is inconclusive. From our reading of Reed's briefing, it is apparent that Reed theorizes that, if Stacey was not anally sodomized, then the uncontested forensic evidence of vaginal intercourse was from a consensual encounter and Reed is therefore not her killer. This theory is illogical. Any deficiency in the evidence suggesting anal intercourse does not necessarily support Reed's theory that he and Stacey engaged in consensual vaginal intercourse. Likewise, evidence of anal intercourse does not conclusively establish that the encounter was forced. Nevertheless, the competing evidence that semen leaked from the vagina to the anus was before the jury. Blakley stated that she did not see a significant amount of leakage in Stacey's underwear and therefore could not conclude that semen from her vagina was transferred into her rectal cavity. Blakley observed only "[f]our small, maybe less than dime-sized spots" of semen in Stacey's underwear, which was atypical for a significant amount of leakage. According to Blakley, this indicated that Stacey did not move much after intercourse. Garvie cross-examined Blakley about the

movement of Stacey's body after it was discovered. Blakley stated that she rolled Stacey's body onto the stomach so they could look at the back side. Stacey's body was then rolled back, transferred onto the gurney, and transported to Dr. Bayardo's office in Austin.

Dr. Johnson claimed that leakage from the vagina is common and stated that semen could be detected in areas surrounding the vagina, including the anal area. Movement of the body, according to Dr. Johnson, makes leakage more likely. She added, "A very small number of sperm that would be collected in an area would [be] much more likely to come from a contamination of the swab touching one area as it's inserted into another, or drainage from around that area." Semen in low numbers is not indicative of an ejaculate and is more likely to be discovered due to leakage.

Dr. Riddick's contentions that moving Stacey's body created several opportunities for leakage, which in Reed's view supports his theory that there was no anal intercourse, was presented to the jury and is therefore cumulative. Because of this, we cannot say that Reed's new evidence regarding leakage would have had any appreciable impact on the jury's verdict.

Additionally, Dr. Riddick's opinions that there is no evidence that Stacey's anus was dilated and that it cannot be concluded with any degree of scientific certainty that Stacey's anus was lacerated merely presents differing opinions that a jury could reject.

In any event, when the conflicting evidence about anal penetration is viewed in conjunction with the evidence at trial, Reed has not shown by a preponderance of the evidence that no reasonable juror would convict him.

Compelling, independent circumstantial evidence showed that Reed forced Stacey to have vaginal intercourse. When discovered, Stacey's body was partially disrobed, her pants were unzipped, the top of her pants were parted, the zipper was broken and was "jammed down onto the metal that holds—the piece of metal that clamps **[749]** the zipper together, a tooth from the zipper was pulled off and missing, and her underwear was bunched down around her hips." Contrary to Dr. Riddick's opinion that Stacey had no other injuries consistent with an assault, Blakley noted a darkened area on the inside of the elbow on Stacey's left and right arms. The bruise was there before Stacey died because bruising does not occur or increase after the heart stops beating. On Stacey's right arm, Blakley also noted a mark that was "very consistent with a fingernail being dug into the flesh." Blakley believed these marks suggested physical violence. Blakley opined that the bruises resulted from "a small area of pressure being applied to the skin, either from a fingertip or instrument, something sharp but localized." Regarding her ability to differentiate between old and recent bruises, Blakley noted that Stacey had older yellow and green bruises on her upper thighs, which were consistent with Stacey carrying boxes at H.E.B. Dr. Bayardo documented pre-mortem injuries to Stacey's head that suggested that she had been hit with a closed fist.

Furthermore, Stacey's life circumstances leading up to her death strongly support a finding that she did not willingly participate in vaginal intercourse with Reed. When Stacey was murdered, the wedding she carefully planned and helped pay for by working the early-morning shift at the H.E.B. was only eighteen days away; she and Fennell were in the final stages of preparing for the wedding and their future as a married couple. Stacey devoted every free moment of her time to planning the details of the wedding. Her mother, Carol, suffered from a nervous condition that caused her to get depressed. When Carol's exhaustion and stress from helping Stacey with the planning came to a head the day before Stacey was murdered, Carol asked Stacey if she was certain that she wanted to marry Fennell. Stacey reassured her mother, stating, "I love Jimmy[,] and I'm going to marry him." Stacey also told her mother that her mother needed to get over her anxiety about the wedding.

The evidence at trial also establishes that Stacey consistently arrived to work on time. Further, Stacey's body was partially dressed in the H.E.B. uniform when it was discovered. This shows that she was en route to work and fully intended to be there at 3:30 a.m., as scheduled. Stacey was murdered at some point before 5:23 a.m., when Officer Alexander first noticed Fennell's truck at the High School with a piece of Stacey's belt lying on the ground outside the door. Finally, despite Reed's efforts, he presents no credible evidence showing that he had a romantic relationship with Stacey.

The State also presented relevant circumstantial evidence implicating Reed at trial. For

example, authorities knew Reed routinely walked around Bastrop late at night and in the early morning. Authorities frequently saw Reed walking near the roads that Stacey traveled on her way to the H.E.B. Further, it was convenient for Reed to leave Fennell's truck parked at the Bastrop High School. The School was near Reed's house, where Reed walked at odd hours. With Reed's height at six feet, two inches, the position of the driver's seat and the rearview mirror also supports the State's theory that Reed was the last person who drove the truck. Importantly, Reed denied knowing Stacey when he was first questioned by authorities. This made Reed's claim of a consensual sexual relationship, offered for the first time at trial, look like a manufactured and implausible explanation to account for the presence of his semen.

[750] Reed also takes issue with Blakley's testimony about the viability of sperm, and in doing so, Reed points to Dr. Green's survey of studies on nonmotile-intact sperm. To Reed, the small amount of leakage of semen from Stacey's vagina is consistent with Stacey having sex with Reed at least a day before her death. The studies cited by Dr. Green do not fully support Reed's contentions. For example, the study that reported finding intact sperm after ten days was based on an analysis of cervicovaginal scrapings. In this case, Blakley used vaginal swabs. Next, Blakley's testimony that the outside length of time for finding the presence of intact sperm is twenty-six hours was not the only testimony on the issue. When Dr. Bayardo conducted the autopsy at 1:50 p.m. on the 24th and obtained his own vaginal swabs, he documented the presence of intact sperm and testified at trial that this meant the

semen was introduced into the vagina a day or two before the exam. Thus, Dr. Bayardo's estimate about the length of time that sperm can remain intact in the vagina exceeded the length of time that Blakley testified to and is consistent with Reed's theory that he and Stacey had consensual vaginal intercourse at least a day before her death. Furthermore, even if we assume that Blakley and Dr. Bayardo underestimated the length of time that sperm will remain intact, we conclude that, given the other evidence in this case, Reed has failed to meet his burden.

Finally, citing cross-contamination, Reed contends that testimony at trial that the breast swabs taken by Blakley contain saliva is unreliable. Reed claims that the State simply found epithelial cells, which are present in semen along with sperm. In support of this, Reed relies on Dr. Riddick's statement that it is likely that Blakley contaminated Stacey's breasts with trace evidence. At trial, Dr. Johnson testified that the swabs taken from Stacey's breasts contained saliva samples. Dr. Johnson identified the substance as saliva based on an amylase test. Amylase is a primary component of saliva, according to Dr. Johnson. Dr. Johnson stated that it was likely that the saliva got there after Stacey's last shower, which was the night before she was murdered.

To refute Dr. Johnson's testimony, Reed points to Singer's affidavit. Singer maintains:

> Amylase testing is a procedure that is helpful as a screening device. It is, however, a general test and cannot be relied upon to identify a specific body fluid such as saliva with

> accuracy. We have discovered, for example, that amylase testing routinely indicates a presumptive positive in reaction to certain plant matter as well as vaginal fluid and non-human body fluid.

The possibility that the substance on the breast swabs was not saliva was before the jury. Dr. Johnson stated that amylase is found in other fluids. Furthermore, Singer offers only an alternative theory that the jury could have chosen to disregard. However, even if we assume that the type of substance is unreliable because of cross-contamination, considering the evidence at trial, it is highly unlikely that any reasonable juror would view the presence of Reed's semen in Stacey's vagina as the by-product of a intimate, consensual interlude between the two.

c. The Unidentified Male or Men

The statements from Jennifer and Brenda Prater also fail to make a threshold showing of innocence. First, we question their reliability because they did not come forward with this information until September 2002, even though the investigation into Stacey's death was well known in Bastrop. **[751]**[45] Further, we find that Jennifer's credibility is also suspect because her husband, Paul, failed to corroborate his wife's account in an affidavit. However, we need not linger on this point. This evidence has no continuity with any of the other new

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[45] *Goldblum v. Klem*, 510 F.3d 204, 230 (3d Cir. 2007) (considering the timing of a disclosure and credibility of a witness in assessing the probable reliability of a statement).

evidence offered by Reed and does not fit within the chronicle of events that the trial evidence supports. Thus, when the information about Stacey from Jennifer and Brenda is viewed alongside the evidence at trial, we cannot say that Reed has established that it is more likely than not that no reasonable juror would have convicted him.

Because, after reviewing the cumulative force of all the foregoing evidence, Reed has failed to satisfy the gateway standard under Article 11.071, Section 5(a)(2), we refuse to reach the merits of Reed's *Brady* and ineffective assistance of counsel claims.

V. Conclusion

In reviewing Reed's *Brady* claims that satisfied Article 11.071, Section 5(a)(1), we hold that Reed has failed to show that the State did not disclose favorable evidence. We also hold that Reed has not made a threshold, prima facie showing of innocence by a preponderance of the evidence under Article 11.071, Section 5(a)(2). Therefore, we refuse to consider the merits of Reed's other constitutional claims. We deny relief.

DATE DELIVERED: December 17, 2008

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RODNEY REED,	§	
Petitioner	§	
	§	
v.	§	CIVIL ACTION NO.
	§	A-02-CA-142
DOUG DRETKE,	§	
Director, Texas	§	
Department of	§	
Criminal Justice,	§	
Institutional Division,	§	
Respondent	§	

DECLARATION OF
ROBERTO J. BAYARDO, M.D.

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

1. My name is Roberto J. Bayardo, M.D. I am over the age of 18 years and fully competent in all respects to make this Declaration. All the facts recited herein are within my personal knowledge and are true and correct. All of the opinions recited herein are expressed within a reasonable degree of medical and/or scientific probability, except where noted.

2. I am a forensic pathologist, and the former Travis County Medical Examiner. I performed the autopsy on Stacy Stites, and testified at the trial

of Rodney Reed. I have recently reviewed the following materials:

a. The autopsy report on Ms. Stites;

b. My trial testimony;

c. Excerpts from the trial testimony of Karen Blakely and Meghan Clement; and

d. The April 14, 2006 affidavit and June 16, 2010 declaration of Leroy Riddick, M.D.

I am also personally aware that Jimmy Fennell, who was a Giddings police officer at the time of Ms. Stites's death, and was a suspect in her murder, has been convicted of sexual assault while serving as police officer in Georgetown, Texas and is in prison. Based on the materials identified above, the information concerning Mr. Fennell, and my expertise as a forensic pathologist, I have the following opinions and clarifications.

3. Time of Death. At trial, I testified that I estimated the time of death as 3:00 a.m. on April 23, 1996. Estimates regarding time of death are just that — estimates — and the accuracy of the estimate is subject to various factors, as outlined by Dr. Riddick in paragraphs 10-13 of his April 14, 2006 affidavit. My estimate of time of death, again, was only an estimate, and should not have been used at trial as an accurate statement of when Ms. Stites died. (As I testified, I am unaware of how long it was between the time of death and the time her body was brought to the Travis County Medical Examiner's office.) If the prosecuting attorneys had advised me that they

intended to use my time of death estimate as a scientifically reliable opinion of when Ms. Stites died, I would have advised them not to do so. In my professional opinion, pinpointing a precise time of exactly when Ms. Stites died would have been, and remains, impossible.

4. Survival of Sperm. At trial, I testified that the very few spermatozoa I found in Ms. Stites's vaginal cavity had been deposited there "quite recently." Ms. Blakely testified that spermatozoa can remain intact in the vaginal cavity for no more than 26 hours; and Ms. Clement testified that spermatozoa can remain intact for no more than 24 hours. I question the qualifications of these witnesses to offer this testimony, and in any event, they are incorrect. I am personally aware of medical literature finding that spermatozoa can remain intact in the vaginal cavity for days after death. Accordingly, in my professional opinion, the spermatozoa I found in Ms. Stites's vaginal cavity could have been deposited days before her death. Further, the fact that I found "very few" (as stated in the autopsy report) spermatozoa in Ms. Stites's vaginal cavity suggests that the spermatozoa was not deposited less than 24 hours before Ms. Stites's **[2]** death. If the prosecuting attorneys had advised me that they intended to present testimony that spermatozoa cannot remain intact in the vaginal cavity for more than 26 hours, and argue that Ms. Stites died within 24 hours of the spermatozoa being deposited, I would have advised them that neither the testimony nor the argument was medically or scientifically supported.

5. Sperm Not Found in Rectum. I reported in the autopsy report and testified at trial that rectal

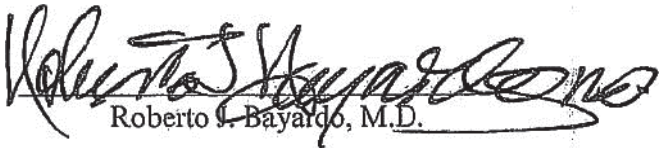
smears taken of Ms. Stites were negative for spermatozoa and seminal fluid. Upon direct examination, I did testify that under a microscope, the rectal smears showed what appeared to be the heads of spermatozoa. However, the smears were insufficient to conclude that spermatozoa were present in the rectum. Accordingly, I reported the smears as negative on the autopsy report. My trial testimony should not have been construed as suggesting that spermatozoa were indeed found in Ms. Stites's rectal cavity. Had the prosecuting attorneys advised me that they intended to present my testimony as evidence that spermatozoa was found in Ms. Stites's rectal cavity, I would have informed them that that was incorrect. An autopsy report is the result of scientifically valid, forensic pathology methods. Trial testimony is given in response to the questions asked. Had I been asked at trial if spermatozoa and/or seminal fluid had been found in Ms. Stites's rectal cavity, I would have said that it had not, consistent with the autopsy report.

6. Sexual Assault. I found on autopsy that Ms. Stites was sexually assaulted, and testified consistently at trial. However, the presence of spermatozoa in Ms. Stites's vaginal cavity was not evidence of sexual assault. There was no indication that the spermatozoa in Ms. Stites's vaginal cavity was placed there in any fashion other than consensually. Also, because there was no spermatozoa found in Ms. Stites's rectal cavity, there is no evidence that any spermatozoa was deposited in the rectal cavity as a result of the sexual assault. In my **[3]** professional opinion, Ms. Stites was sexually assaulted in her anal cavity, and that assault did not result in the deposit of any spermatozoa. The injuries

to Ms. Stites's anus are certainly consistent with penile penetration, as I testified, but if there was penile penetration, there was no ejaculation. I understand that the sexual assault for which Mr. Fennell was convicted did not involve ejaculation. This is consistent with the sexual assault on Ms. Stites. Further, the injuries to Ms. Stites's anus are more consistent with penetration by a rod-like instrument, such as a police baton.

7. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 13, 2012.



Roberto J. Bayardo, M.D.

AFFIDAVIT OF WERNER U. SPITZ, M.D.

STATE OF MICHIGAN)
) ss
COUNTY OF MACOMB)

I, Werner U. Spitz, M.D., having been duly sworn and having personal knowledge of the matters set forth in this affidavit, hereby states:

I am a medical doctor licensed to practice medicine. I graduated from medical school in 1953 and have undertaken residency in pathology followed by fellowship in forensic pathology. I am certified by the American Board of Pathology in anatomic pathology (1961) and forensic pathology (1965). I have spent my entire professional life (62 years) in the practice of forensic pathology. My curriculum vitae is attached.

1. My review of the autopsy report, autopsy photos, crime scene photos, crime scene video, and report of crime scene investigation leads me to conclude that Stacey Stites was murdered prior to midnight on April 22, 1996 (the night before her body was found). And further that she laid in a different position for about 4-5 hours before she was moved to the location where the body was found.

2. The lividity (livor mortis, red purple discoloration due to pooling of blood after death) on Stites's face, shoulder, and arm, scientifically proves that she was dead in a position different from that which she was found for a period of at least 4-5 hours. This pattern of lividity seen on the anterior arm, chest, shoulder, and face would develop if Stites was lying face down with one arm lower than the rest

of the body for 4-5 hours, before she was moved to the position in which she was found. It is impossible that this lividity occurred at the scene in the position the body was found because Stites's body was found on her back. I have reviewed investigation reports indicating that mucus-like fluid was found near the passenger floor board of the truck belonging to Stites's fiancé. The presence of this fluid in combination with the lividity on the arm, shoulder and face is consistent with Stites being killed at a different location and later placed into the pick-up truck, resting with her face and arm lower than the rest of the body. This would explain both the mucus-like fluid near the passenger floor of truck and the blanching (areas where blood is pressed out of the skin) on the fingers as if pressed into something after death.

3. The presence of lividity in these non-dependent areas makes it medically and scientifically impossible that Stites was killed between 3-5 am. on the date in question. Stites could not have been both murdered and dumped between the hours of 3-5 a.m. on April 23, 1996 and remained undisturbed in that spot until her body was discovered at around 3 p.m. because the lividity observed in the non-dependent areas **[1]** would have taken at least 4-5 hours to develop. It is impossible that Stites was murdered and left at the scene in the two-hour time frame asserted by the State at trial. I have reviewed the trial transcripts of the pathologist Roberto Bayardo M.D. and the Crime Scene Investigator Karen Blakely. The medico-scientific analysis of the lividity I discuss was never addressed.

4. Dr. Bayardo describes "slight residual" rigor at autopsy conducted at 1:30 p.m. on April 24, 1996, after the body was refrigerated since approximately 11 p.m. on April 23rd. Rigor is seen on the crime scene video, but the arms are easily placed down from above Stites's head as she is put into a body bag before sundown on April 23, 1996. This movement of the arms shows passing rigor. Likewise, "slight residual rigor" after refrigeration at the ME's office is consistent with passing rigor, at the time the body is filmed in the video.

5. Rigor is markedly temperature-dependent. In warm weather rigor mortis progresses faster, in cool weather it progresses more slowly. The average temperature on April 23rd was in the mid-60s. Taking this temperature into consideration, passing rigor, as depicted in the video, is consistent with death of about 20-24 hours prior to the video—a period of 15 hours as estimated by Dr. Bayardo would not allow for such movement, without having broken the rigidity.

6. Very few sperm were found on autopsy smears, and the crime scene investigator found only 3 intact spermatozoa. If the victim was sexually assaulted between 3-5 a.m., there would be more sperm found on slides. A normal sperm count is considered to be 15 million spermatozoa per milliliter. The amount of sperm found on the slides is more consistent with a longer interval between intercourse and the time the sample was collected. As I explain in my book, intact spermatozoa can be found in the vagina up to 72 hours after coitus.

7. My review shows evidence of decomposition that is not consistent with a time of death at 3 a.m.

on April 23, 1996. The body is described as having green discoloration, which can be seen in the video. The appearance of the breasts after the bra is removed shows gas formation. The abdomen does not appear flat. There is skin slippage in several places. What is described at autopsy as post mortem burns in the face, breasts, and other areas is also likely skin slippage, in which the top layer of skin has dried. What has been described as petechiae in the scalp are none other than small torn blood vessels in the process of reflection of the scalp. Brown fluid running from the mouth and nose, across the right cheek is decomposition fluid and is not described in the autopsy report. Internal organs also show evidence of decomposition—what Dr. Bayardo describes as congestion in lungs is actually decomposition. The heart is flabby and the blood is liquid after liquefaction which is part of the decomposition process. **[2]** Brain swelling is also part of decomposition. This amount of decomposition supports a post-mortem interval of about 20 to 24 hours before the film and photographs.

8. The distended anus seen in photos and described at autopsy is normal, in consideration of the absence of rigidity. It is a common mistake for death investigators to misinterpret natural relaxation of the sphincter, as evidence of anal penetration. There are no apparent lacerations in the photographs of the anus, If lacerations were present, they would be visible. Abrasions described at autopsy are not evidence of anal assault, and are equally consistent with hard bowel movements. I am aware that there was a weak DNA result consistent with Rodney Reed on the sperm fraction of the rectal swab taken from Stites. The presence of a small amount of

sperm in the rectum is not surprising and does not contradict my conclusion that there is no evidence of anal penetration in this case. When semen is present in a body, it can drain from the vagina into the dilated anus. I have seen this happen in a number of cases. Contamination of the rectal swab by vaginal contents is also a concern, especially in cases where vaginal swabs are collected prior to the taking of the rectal specimens.

9. The examination of the body at the scene was inappropriate. None of the investigation should have been done by the crime scene investigator. The body should have been placed in a body bag, preserving all trace evidence, and then taken to a controlled environment where it could be examined by a forensic pathologist. But despite these errors, the photographs and video provide enough evidence to estimate the post-mortem interval. These observable factors include: lividity, rigor, amount of residual sperm in the genital tract, and evidence of decomposition. When all of these factors are considered together, it becomes indisputable that the time of death was considerably earlier than 3:00 am on April 23rd as estimated by Dr. Bayardo. All findings point to a post-mortem interval of about 20-24 hours prior to the time the body was filmed.

10. My textbook, *MEDICOLEGAL INVESTIGATION OF DEATH*, 4th edition, published by Charles C. Thomas, Springfield, Illinois, 2006 discusses many of the issues in this affidavit in greater detail. **[3]**

11. All my opinions expressed in the above paragraphs 1-10 are based on my education, training

and experience and are rendered to a reasonable degree of medical certainty.

_____
Werner U. Spitz, M.D.

Sworn to and subscribed before me on February 4th, 2015.

/s/ Diane L. Lucke
Diane L. Lucke, Notary Public, State of Michigan
Monroe County, Acting in Macomb County
My commission expires: October 20, 2017

Michael M. Baden, M.D.

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10 February 2015

Via e-mail to *bbenjet@innocenceproject.com*

Bryce Benjet
Staff Attorney, Innocence Project
40 Worth Street, Suite 701
New York, New York 10013

Re: Stacey Stites, deceased

Dear Mr. Benjet:

1. I am a physician, licensed to practice medicine in the State of New York and Board-Certified in Anatomic, Clinical and Forensic Pathology. I am a former Chief Medical Examiner of New York City and the former Chief Forensic Pathologist for the New York State Police. I have held professorial appointments at Albert Einstein Medical School, Albany Medical College, New York Law School and John Jay College of Criminal Justice. I served as Chairman of the Forensic Pathology Panels of the United States Congress Select Committee on Assassinations that reinvestigated the deaths of President John F. Kennedy and Dr. Martin Luther King, Jr. (1970s). I have been a forensic pathology consultant to the Federal Bureau of Investigation, **[2]** the Veterans Administration, the

U.S. Department of Justice and the U.S. Drug Enforcement Agency. Attached hereto is a copy of my *curriculum vitae*.

2. I have reviewed the autopsy report and other medical examiner office documents, scene and autopsy and clothing photographs, a scene videotape, police reports, laboratory reports and a statement by Mrs. Carol Stites relative to the death of Stacey Stites, 19 years old.

3. According to Mrs. Stites, her daughter returned from work as usual about 1:30 p.m. on April 22, 1996. She went upstairs to the apartment she and her fiancé Jimmy Fennel, a police officer, shared, changed out of her work clothes and came back down. She stayed with her mother until about 8:00 p.m. when Mr. Fennel returned from baseball practice and they both went upstairs. That was the last time Mrs. Stites saw her daughter alive.

4. Mr. Fennel told police that Ms. Stites left their apartment to drive to work in his pickup truck by herself about 3:00 a.m. on April 23, 1996. The unoccupied truck was seen parked in the Bastrop High School parking lot by a patrol officer less than 2-1/2 hours later, at 5:23 a.m. The officer also noticed a six to eight inch length of part of a leather belt with a square chrome buckle on the ground in front of the driver's door.

5. Ms. Stites' partially clothed body was found lying face-up in brush a number of yards from an unpaved road about 3:00 p.m. the same day. Prominent **[3]** lividity was noted on the front non-dependent parts of her body by responding sheriff's department officers. This inappropriate lividity is

clearly documented in scene photographs. A homicidal ligature mark was present around her neck and the ligature, the remainder of the belt portion seen near the truck, was nearby.

6. Lividity develops by the gravitational settling of red blood cells while still in blood vessels in the lower dependent portions of the body after death causing a maroon-type discoloration of the skin. The intensity and extent of the lividity present on Ms. Stites' body demonstrates that she would have lain face down after she was dead for more than four or five hours in order for this lividity to remain after she was turned over when she was placed on her back in the brush. This lividity demonstrates that Ms. Stites was dead before midnight on April 22nd when she was alone with Mr. Fennel.

7. Examination of the truck showed that the driver's seat was reclined back and the passenger seat was in a slightly forward position. "Some type of viscous fluid" was found on the passenger-side floorboard. DNA analysis showed that this fluid came from Ms. Stites. This is not pulmonary edema fluid which is thin and frothy and would also have been present in her mouth and nose and windpipe, and was not. Pulmonary edema fluid is not viscous. This is typical post-mortem purge fluid that flowed from her nose and mouth as her body began to decompose and showed other decomposition changes, such as skin slippage and **[4]** green discoloration of skin, which were also described at the scene and autopsy. It would have taken more than four hours after her death for this purge fluid to develop. It could not have developed in less than 2-1/2 hours if she were alive at 3:00 a.m. when she got into the truck. This

finding also demonstrates that she had been dead for a number of hours, before midnight, when she was placed in the passenger seat.

8. The testimony at trial that no intact sperm remains in the vagina after 24 hours is not correct. It is my experience, and the experience of other forensic pathologists as reported in the forensic science literature, that sperm may remain intact for more than 72 hours after intercourse. The few sperm seen are entirely consistent with consensual intercourse that Mr. Reed said occurred between midnight and 3:00 a.m. on April 22, 1996.

9. The autopsy photographs show dilatation of Ms. Stites' anus that normally occurs after death when the anal sphincter muscles relax. No lacerations, no blood, no semen were present in or around the anus in the photographs and which finding was also confirmed in Dr. Bayardo's autopsy report. There is no evidence of anal penetration. There is no forensic evidence that Ms. Stites was sexually assaulted in any manner.

10. In my opinion removing the clothing and performing vaginal swabs at the scene where the body was found rather than at the properly equipped medical **[5]** examiner's office is contrary to proper forensic practice. Such procedure can cause loss of trace evidence at the scene and contamination of evidence that is removed and evidence that remains, including contamination of rectal swabs with vaginal contents.

11. It is my opinion, to a reasonable degree of medical and scientific certainty, based on my education, training and more than fifty years'

experience as a forensic pathologist, that the distribution and intensity of Mrs. Stites' lividity shows that she was murdered before midnight of April 22, more than four hours before she was brought to where her body was found; that she was already dead with signs of decomposition and development of purge fluids when she was placed in the truck; that intact sperm could be present two or three days after consensual vaginal intercourse; and that there is no evidence of anal intercourse or of sexual assault. It is further my opinion beyond a reasonable degree of medical certainty that, based on all of the forensic evidence, Mr. Reed is scheduled to be executed for a crime that he did not commit.

Very truly yours,

Michael M. Baden, M.D.
Former Chief Medical Examiner,
City of New York
Former Chief Forensic Pathologist,
New York State Police

MMB:ph

County of Mobile)

)

State of Alabama)

Affidavit of LeRoy Riddick, M.D.

LeRoy Riddick, M.D., being duly sworn, deposes and says upon penalty of perjury thereof:

1. My name is LeRoy Riddick and I am a medical doctor licensed to practice in the State of Alabama. I am board certified in anatomic and forensic pathology. I served as an adjunct professor in the pathology department at the University of South Alabama College of Medicine until i retired from that position in 2013. I retired from employment with the State of Alabama in 2006. Before my retirement, I was employed as a State Medical Examiner by the Alabama Department of Forensic Services, an agency of the State of Alabama. In addition, I served as the County Medical Examiner for the County of Mobile, Alabama and Laboratory Director for the Region IV Full Service Forensic Science Laboratory for the Alabama Department of Forensic Sciences. I was employed both as a State Medical Examiner and as County Medical Examiner for over 25 years. I currently consult privately on issues of forensic pathology. I was deputy medical examiner in Washington D.C. from 1974 until I moved to Alabama in 1979.

2. Over my career with the State of Alabama, my responsibilities extended to virtually every aspect of forensic investigation. I have attended over 75

homicide scenes and conducted thousands of autopsies. In my capacity as the administrative director of the Region IV Full Service Forensic Laboratory in the State of Alabama, I also worked with scientists and analysts in drug chemistry, firearms and toolmarks, forensic biology (DNA), toxicology, and latent fingerprint examination.

3. I have testified as a qualified expert witness in more than 500 court appearances in a number of jurisdictions including the federal courts in Alabama, the District of Columbia and Louisiana, and in state courts in Alabama and Mississippi. I have testified for the prosecution and the defense. In most of the cases in which I have testified as an expert witness, I have done so on behalf of the prosecution in state court and the federal government in federal court. My curriculum vitae is attached to this Affidavit as Exhibit 1.

4. I examined the following items from *State of Texas v. Rodney Reed*:

a. Medical Examiner's Report of the autopsy of Stacey Stites performed by Robert J. Bayardo, M.D.;

b. Photographs of: Ms. Stites' body at the scene where it was recovered; Ms. Stites' clothing; and Ms. Stites' body at the autopsy;

c. The videotape showing where Ms. Stites' body was recovered and evidence collection;

d. The trial testimony of Robert J. Bayardo, M.D., Meghan Clement, and Elizabeth

Johnson and the trial and state habeas corpus hearing testimony of Karen Blakely;

e. Reports from the Texas Department of Public Safety Crime Laboratory;

f. Crime scene reports from various law enforcement agencies; and

g. Police reports of witness interviews and the Affidavit of Rodney Reed.

I have also conferred with other experts regarding this case and reviewed written statements by Ronald Singer, M.S., Roberto Bayardo, M.D., and Joseph Warren, Ph.D. Based upon my review of the documents listed above, and based upon my knowledge, training, experience and education, I have reached several conclusions and opinions which are expressed in this affidavit. These conclusions and opinions are based upon a reasonable degree of medical certainty.

5. I was initially retained over 10 years ago to assist attorneys representing Rodney Reed in evaluating the forensic evidence in the case. I have previously provided written opinions in 2003, 2006, and in 2010. 1 was contacted again in the fall of 2014 to re-examine the case and to supplement the opinions that I have previously offered in this case if I discovered anything new in this re-examination. I was asked specifically to look at the crime scene video, crime scene and autopsy photographs, and other documents to see if they contained evidence that would assist in determining the post mortem interval. As part of my re-evaluation of the case, I have also conferred with other experts in forensic

investigation. In conducting this re-evaluation of the case, I have noticed additional forensic evidence which has allowed me to address the post-mortem interval with greater accuracy than I have in my prior statements.

Post Mortem Interval

6. The post mortem interval (the time between the victim's death and the time when the body is discovered) is one of the most difficult tasks of the death investigator with the most experienced and qualified forensic investigator being the medical examiner, forensic pathologist. Currently in forensic practice, there is no scientific means of determining that interval with precision. The investigator is left with making an estimation based on the circumstances surrounding the body and the post mortem changes in the body, which generally progress in a regular manner. These changes are rigor mortis (stiffening of the muscles to chemical alterations in the cells), livor mortis (pink to red discoloration of the skin due to blood settling in the vessels and later seeping into the skin), and algor mortis (cooling of the body.) Examination of the chemical composition of the vitreous humor, the fluid in the eye can also be employed. All of the modalities with the exception of analysis of the vitreous humor need to be systematically determined at the scene by the medical examiner, the scientist with the most experience in making these determinations. In this case, the medical examiner did not attend the scene and none of the investigators, including the law enforcement officers and forensic technicians, systematically examined the body for rigor, livor, and temperature. The vitreous was never analyzed.

7. Despite the absence of a systematic investigation of these key elements, much can be derived from a review of the existing record, especially the videotape of the crime scene investigation, which is attached as Exhibit 2 to this Affidavit. The first officers at the scene from the Bastrop Police Department made no scene report. Lt. David Campos Jr. from the Bastrop Sheriff's Office, who arrived at the scene some time (not specified) after 3:11 p.m. on April 23, 1996, made the recorded observation in a typewritten report that "The body had marked lividity and rigor mortis had set in." He did not specify any muscle groups or the intensity of the stiffness, which would have indicated whether the rigor was beginning, reached its peak, or waning. He did not test the lividity to ascertain if it blanched, that is, whether the color dissipated with pressure and did not return, indicating in general that the body has been in that position for several hours. The relevant portion of Lt. Campos's report is attached as Exhibit 3. Texas Ranger L.R. Wardlow, who entered the scene at 5:43 p.m. made observations about the position and clothing on the body but nothing about livor, rigor, or temperature. However, Wardlow observed a "greenish discoloration" in parts of the body, including under each breast. The relevant portion of Ranger Wardlow's report is attached as Exhibit 4.

8. A time stamp on the video reads 16:19, which would indicate filming began at 4:19 p.m. However, a report by Texas Ranger Rocky Wardlow states that the filming began at 5:16 p.m. The video is not continuous and ends some time after dark. A time stamp at the end of the video shows 20:22 (8:22 p.m.) A note from DPS crime scene investigator Karen

Blakely to the Medical Examiner's Office discussing the completed collection of evidence gives the time of 8:15 p.m. A copy of this note is attached as Exhibit 5. Ranger Wardlow indicates that the scene was released at 8:55 p.m. The Travis County Medical Examiner's Office records indicate that the body was received at 10:00 p.m. Based on this information, it appears that the video documents the condition of the body over a 3-4 hour period.

9. Dr. Bayardo, the medical examiner, at the time of the autopsy at 1:50 p.m. on April 24, 1996 and after the body had been examined at the scene, transported to the morgue, and refrigerated observed "slight residual rigor mortis" and "post mortem dependent lividity." Such observations made many hours after the body was found and subjected to movement and stored in a cooler at the morgue are open to critique and of little relevance to the determination of the post-mortem interval. In his trial testimony, Dr. Bayardo, without specifying anything other than "Based on the changes that occur after death in the body" opined that "an estimation of the time of death being around 3:00 a.m. on April 23, 1996," "Give or take one or two hours", making it between 1:00 and 5:00 a.m. An excerpt of the relevant portions of Dr. Bayardo's testimony is attached as Exhibit 6. It is impossible to evaluate Dr. Bayardo's conclusion because he was not asked and did not offer the basis for his time of death estimate. This testimony conformed to the State's theory of the case that the victim left home for work around 3:30 a.m. and was murdered between 3:30 a.m. and the time the truck she was driving was seen in a parking lot in Bastrop at 5:23 a.m. Assuming the victim left her home in Giddings according to her

usual schedule at 3:30 a.m. and was abducted 30 miles away in Bastrop as alleged at trial, the post mortem interval from when the victim was first described and filmed around 5:15 p.m. would have been around thirteen (13) hours.

Rigor Mortis

10. If the post mortem interval had been roughly thirteen hours as estimated by Dr. Bayardo at the trial, rigor should have been intense and progressing to completion. The crime scene video contradicts this finding and indicates a much longer post-mortem interval. A body in complete rigor (which is generally achieved at roughly 12 hours under normal conditions and will be essentially unchanged at 13 hours) is stiff. Manipulation of an arm, a leg, or the head is difficult and will also result in moving the torso. The manipulation of the body demonstrated in the crime scene video, however, indicates that the limbs can be moved independently, thus indicating that rigor was no longer at its height and was passing. For example, a crime scene investigator can be seen lifting the left arm easily without the left side of the torso being lifted as it would have been with completed rigor. *See* Exhibit 2 at 19:10-19:20. The arm also flops back down when released. At frame 21:00 of the crime scene video, the left leg is moved without the body turning as it would have in advance rigor. In a subsequent frame, 23:26, the examiner easily turns the head to the left without having to move the stiff body and then allows the head to easily roll back to the right. At frame 23:46 to 23:50 of the video, the head, when moved by investigators, returns easily to its original position in a manner that is not consistent with the level of rigor I would

expect if the victim had been killed at around 4:00 a.m. that morning. When the funeral directors move the body to a bag, they easily position the arms across the chest; a manipulation difficult to complete in a body stiff with complete rigor. This is depicted in Exhibit 2 at 27:15-27:50. In short, during the examination of the body between 5:15 p.m. and around 8:22 p.m. when the crime scene video ends, the body appears in many instances to be easily manipulated and at times the arms appear limp indicating that rigor has waned. Based on the lessening of rigor demonstrated in the crime scene video, I estimate that the post mortem interval is significantly longer than the 13 hours estimated at trial. The level of rigor demonstrated in the crime scene video is more consistent with a post-mortem interval of 16-20 hours from the first documentation of the body at 5:15 p.m.

11. My estimate of the post-mortem interval takes into account environmental factors that can affect the speed at which rigor develops. According to the National Weather Service, the temperature in the neighboring city of Elgin ranged from a low of 50 to a high of 75 degrees Fahrenheit on April 23, 1996. Although the National Weather Service indicated sixteen hundredths (.16) of an inch of precipitation on that day in Elgin, the videotape shows dry conditions at the crime scene.[1] Further, the body appears to be

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[1] A note written by Karen Blakely to the Medical Examiner's Office, attached as Exhibit 5, indicates that the victim's underwear and pants were wet. However, none of the other evidence such as the victim's bra and socks were described as wet, and it is common that a deceased person's pants and *(cont'd)*

shaded by small trees and brush. These are normal conditions, which would not affect the routine progress of rigor. It is an accepted fact, proven through my career investigating death in southern Alabama, that the progress of rigor is accelerated in hot and humid conditions. Although there is evidence in the video of post mortem superficial burns on the left side of the victim's face, the lower portions of the breasts, the right leg, and the left forearm, the heat source that caused these superficial burns would not have been enough to affect temperature of the body as to accelerate the development and passing of rigor in the victim. I would expect to see significantly larger or more severe burns if the victim had come in contact with a source of heat sufficient to affect the progress of rigor.

Livor Mortis

12. Another significant factor in my opinion as to the post-mortem interval is my observation of the location and level of livor in the body. As discussed above, livor mortis (or lividity) is the pooling of the blood to the lowest part of the body, described by clinicians as a dependant area. Lividity that exceeds faint patches of discoloration generally develops after at least 2 hours, and takes several more hours to become fixed. Lividity is fixed when the blood congeals in the capillaries or diffuses into the extravascular tissues. Once lividity is fixed, it will not be displaced by compression and will not shift if

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(cont'd from previous page)
underwear become wet due to the post-mortem release of urine. This would not affect the development of rigor.

the body is moved. If lividity is not fixed, the blood that has pooled in one area will shift to a new area once the body has been moved. The figure attached as Exhibit 7 describes this phenomena with an approximation of the time required.[2] Observation of lividity is a key tool in determining whether a body has been moved after death and for how long the body was in a certain position. Lividity found on a non-dependant area of a body is evidence that the body was moved. A photograph from a forensic pathology text attached as Exhibit 8 shows fixed lividity in a non-dependent area, which is evidence that the body had been moved after having been in a different position for several hours.[3]

13. Photographs and the crime scene video show lividity on the back and other dependant areas in the position in which the victim was found. This lividity is depicted in the photograph attached as Exhibit 9. Absent documentation of blanching, however, I cannot state with precision how long the body was in the position in which it was discovered other than that it would take at least 4-6 hours for such complete lividity to form.

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[2] Burkhard Madea, *Handbook of Forensic Medicine* 80, figure 7.8 (Wiley 2014) (complete shifting of lividity expected if body turned within 6 hours of death) (Exhibit 7).

[3] J. Prahlow, R.W. Bayard, *Atlas of Forensic Pathology* 153 figure 8.13 ("After several hours, lividity becomes fixed," such that movement of a body from one position to another may become evident because the lividity pattern is inappropriate for the current body position) (Exhibit 8).

14. There is also lividity in the non-dependent areas of the victim's right shoulder and right arm. This lividity can be seen as the red coloration of the arm and portions of the shoulder in the photos attached as Exhibit 10. Just as is shown in the textbook photograph in Exhibit 8, this discoloration in the victim is identified as lividity based on the presence of white areas on the fingertips and near the elbow which show blanching through compression of the skin at the time the lividity developed. These blanched areas are circled in Exhibit 11. Because the lividity remains complete in the non-dependant areas of the right arm and shoulder and did not shift to the dependant areas of the body, this indicates that the victim's body was in a different position in which the right arm and shoulder were dependent for at least 4-6 hours.

15. In summary the observable evidence of rigor mortis and livor mortis discussed above do not support the conclusion offered at Reed's trial that the time of death was at 3:00 a.m. on April 23, 1996, even with a standard of error of two hours. Rather, the available forensic evidence indicates a post mortem interval of 16-20 hours from the time the body was first documented in the video with the body having been in a different position for a period of 4-6 hours.

Time Since Intercourse

16. At trial, Dr. Bayardo testified that he found intact sperm in his examination of a sample collected at autopsy and that the sperm he found was placed in the victim's vagina "quite recently." I have also reviewed similar trial testimony by crime scene investigator Karen Blakely and DNA analyst Meghan Clement. Ms. Blakely testified that

spermatozoa will remain intact no longer than 26 hours in the female vaginal tract, and Ms. Clement testified that an intact spermatozoa would not be found on a rape kit more than 24 hours after a sexual encounter.

17. Both Ms. Blakely and Ms. Clement are incorrect regarding the length of time a morphologically intact sperm survives in the vagina. As a forensic pathologist, I am familiar with a host of medical literature that, simply put, absolutely refutes those witnesses' conclusions that a sperm cannot remain intact beyond 24 or 26 hours, and even refutes Dr. Bayardo's conclusion that the semen was introduced into the vagina a day or two before his autopsy exam. Reliable scientific studies, many of which I understand have been cited by Mr. Reed in his pleadings in this case, have found morphologically intact sperm in the human vagina after two, four, five, six, seven, and even 10 days. As a general rule, morphologically intact sperm can be expected to be seen up to 72 hours after intercourse.

No Reliable Evidence of Anal Rape

18. The evidence of forced anal intercourse — whether pre- or post-mortem — is not conclusive in this case. Dr. Bayardo testified that he believed that the victim was raped anally. He based this conclusion on his testimony that he found lacerations on the anus, that that anus was dilated, and that he observed what may have been sperm heads in a rectal smear. Dr. Bayardo's opinion offered at trial is not supported by the available evidence.

19. First, no sperm was actually visualized on the rectal smears.[4] The small amount of sperm which was detected through DNA testing could have come from post-mortem cross contamination. The body was left at the scene on its back and remained in this position during the crime scene investigation, transportation to the morgue, and while stored at the morgue. Especially where the anus was dilated as depicted in the autopsy photo, sperm could have leaked from the vagina unto the anus. The videotape of the scene where the body was recovered also shows Karen Blakely taking pubic hair tape lifts in a manner that would transfer semen from the labia to the rectum. Additionally, the videotape shows that Ms. Blakely and others at the scene rolled Ms. Stites' body from its right side over onto its left side. This rolling was sufficient to cause sperm to be expelled from the vagina and to leak into the anus. The body was moved into a body bag, then moved onto a stretcher and then loaded for transport to the Office of the Travis County Medical Examiner, where it was moved to a refrigerated unit and then moved to an autopsy table. Thus, there were several opportunities for leakage by the time that Dr. Bayardo took the rectal swabs. It is also possible that the small amount of sperm detected by DNA testing was transferred through an error in collection such as touching the swab against an external area of the body that may have had sperm on it.

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[4] The Medical Examiner's Report submitted by Dr. Bayardo states, "[rlectal smears are negative for spermatozoa."

20. Second, the observation of dilation of the anus at the time of Dr. Bayardo's autopsy does not indicate anal sexual assault. The anus was not examined at the time that Ms. Stites' body was recovered. By the time Dr. Bayardo examined the body at 1:50 p.m. on April 24, 1996, Ms. Stites had been dead for more than 36 hours. Rigor mortis would be passing at this time, as reflected by Dr. Bayardo's observation of only "slight residual rigor mortis." With passing rigor mortis, sphincters, including the anus, dilate, and with manipulation from swabs can expand even more. The misinterpretation of postmortem dilation of the anus as sexual assault or sodomy is listed as one of the most common errors by forensic pathologists in the forensic pathology text *Spitz and Fisher's Medicolegal Investigation of Death*.[5]

21. Third, it cannot be concluded with any degree of scientific certainty that Ms. Stites' anus was lacerated and that those lacerations occurred around the time of death. The autopsy report describes "longitudinal linear abrasions." Abrasions are scrapes which are not necessarily associated with anal intercourse and can be caused by a hard bowel movement. Lacerations, by contrast, are tears in the skin. A trained forensic pathologist should not confuse these two terms. The photograph taken at the autopsy does not show breaks in the skin, a sign of a laceration. Blood would also be expected if the tear to the anus was sustained while the victim was alive. By contrast, it is possible that minor abrasions

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[5] *Spitz and Fisher's Medicolegal Investigation of Death* at 120.

would be present that would not be seen on the photograph. To determine whether these were in fact lacerations, a microscopic section of this area should have been performed.

22. Additionally, Dr. Bayardo very clearly stated in both his testimony and the autopsy report that Ms. Stites' rectum was "intact and free of injury." The rectum is the lower 10-15 centimeters of the gastrointestinal tract. It is highly improbable that sperm heads could be found in the rectum as a result of forced anal intercourse without the existence of some noticeable trauma to the rectum. The fact that the rectum was intact and free of injury indicates that no forced anal intercourse occurred.

Further affiant sayeth naught.

/s/ LeRoy Riddick, M.D.
LeRoy Riddick, M.D.

Sworn and subscribed to before me, this 10 day of January, 2015.

/s/ Kuptal Swan Stiles

NOTARY PUBLIC

My commission expires: September 16, 2015.

Bode Cellmark
FORENSICS

LabCorp Specialty Testing Group

10430 Furnace Road, Suite 107
Lorton, VA 22079
Phone: 703-646-9740

Forensic DNA/Biology Analysis Testimony
Result of Review
January 11, 2018

To:
Bryce Benjet
Staff Attorney
Innocence Project
40 Worth Street, Suite 701
New York, NY 10013

Cellmark Case #: F9801744

List of Documents Evaluated from Innocence Project received on July 11, 2017:

Transcript for Case F9801744

CONCLUSIONS:

Bode Cellmark has completed its review of the testimony transcript [and/or stipulation] for the case referenced above and found it to contain:

___Satisfactory Statements

_X_ Unsatisfactory Statements

If Unsatisfactory: Bode Cellmark has completed its review of the testimony transcript [and/or stipulation] for the case referenced above and found it to contain:

___Error Type 1: The DNA Analyst stated an inclusion associated with a specific individual to the exclusion of all others when 1) source attribution threshold was not met (applicable only to cases reported before September 19, 2015) or 2) after Bode Cellmark discontinued the practice of applying source attribution (September 19, 2015).

___Error Type 2: The DNA Analyst provided an incorrect statistical value during testimony or incorrectly explained the meaning of the statistical value(s).

__X__Error Type 3: The DNA/Forensic Biology Analyst cites the number of cases and/or samples worked in the lab as a predictive value to bolster the conclusion that the DNA profile belongs to a specific individual or the DNA/Forensic Biology Analyst otherwise testifies beyond the scope of his/her expertise.

See enclosed Testimony Review Evaluation Form.

Report submitted by,

Stephane Sivak, MS
Technical Leader
Page 1 of 1

Correction Review Evaluation Form

Case Information:	
Case Number:	F9801744
Defendant(s):	Rodney Reed
Date of Review:	11/22/2017

Review of Testimony:	
Date of Testimony:	5/11/1998
Testifying Analyst:	Meghan Clement
Name of Prosecutor	Mr. Charles Penick, Mr. Forrest Sanderson, & Ms. Lisa Tanner
Name of Defense:	Mr. Calvin Garvie & Ms. Lydia Clay-Jackson
Testimony Results (mark as appropriate): Unsatisfactory Statements: Yes X No ____	
If testimony contained Unsatisfactory Statements, cite each by Error type, page(s), and line number(s):	
Page 55, lines 13-21	With spermatozoa, the tails are very fragile and tend to break off, so after a short period of time they start losing their tails and then what you find is only the spermatozoa heads, from sexual assault cases. So that can be an indicator of how long the spermatozoa has been in a particular place before it is actually collected and detected.

Page 56, lines 8-16	In serology work, typically, sexual assault kits weren't even collected more than 24 hours after an encounter because the chances of finding sperm is so rare. Generally, finding intact sperm at more than probably about 20 hours, 20 to 24 hours, I don't ever recall finding intact sperm more than that, from the time of the sexual assault and from the time the collection was made.
Page 56, line 18, after asked to clarify above response: "And that was in over thousands of rape kits?"	Yes.

Approved By: Date: 1/11/2018

Document: Correction Review Evaluation Form
Revision: 1
Effective: 1/3/2018 4:22:11 PM
Issuing Authority: Quality Assurance Manager

TEXAS DEPARTMENT OF PUBLIC SAFETY
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April 30, 2018

Bryce Benjet
Senior Staff Attorney
Innocence Project
40 Worth Street, Suite 701
New York, NY 10013

Dear Mr. Benjet:

I have reviewed your correspondence entitled "Request for Correction, L-246937" dated July 11, 2017. I do not believe that Ms. Blakely's testimony constitutes professional negligence or professional misconduct and thus do not see a basis for the Crime Lab to report this matter to the Texas Forensic Science Commission pursuant to Article 38.01, Sec. 4, Texas Code of Criminal Procedure. The issues raised in your letter have been extensively litigated in this

case. We do not see a duty to correct in this matter; however, during our review of the testimony by Ms. Blakely we noted some potential limitations in the paper she cited during testimony: Spermatozoa — Their Persistence After Sexual Intercourse, GM Willott and JE Allard, Forensic Science International, 19 (1982) pp 135-154.

The Willott paper cited by Ms. Blakely during her testimony concerned a study that was undertaken to determine the amount of time spermatozoa could remain in the body after intercourse. Data for this study was collected from living victims and relied on the victim to correctly estimate the time since the offense (intercourse) occurred. The paper acknowledged that reliance on the victim to estimate the time since the offense occurred was a potential limitation to the research. The paper also included a table comparing the results of similar studies. In this table, a study by Davies and Wilson was referenced that reported 72 hours as the longest time for intact spermatozoa to be found in the vagina. The Davies and Wilson study, in contrast to the Willott study, relied on laboratory volunteers to collect samples at pre-established time points. The difference in collection method is a possible explanation for the difference in result. As seen in the table in the Willott paper, the literature varied greatly in the time given for finding spermatozoa (intact and otherwise) in the female reproductive tract.

Your letter indicates that you have sent your Request for Correction to the Texas Forensic Science Commission. We would fully cooperate with the Commission or the Courts regarding any hearings or reviews they may choose to conduct.

Sincerely,

Brady W. Mills
Assistant Division Director
Crime Laboratory Service
Law Enforcement Service Division

Cc: Lynn Garcia, Texas Forensic Science Commission

BWM:cg

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS AND
THE 21ST JUDICIAL DISTRICT COURT
BASTROP COUNTY, TEXAS

EX PARTE	§	Writ Cause No.
	§	WR-50,961-08
RODNEY REED,	§	
	§	Trial Cause No. 8701
Applicant.	§	

SUPPLEMENTAL APPLICATION FOR WRIT OF HABEAS CORPUS

THIS IS A DEATH PENALTY CASE

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Attorneys for Applicant Rodney Reed

Applicant Rodney Reed files this supplemental application for writ of habeas corpus pursuant to articles 11.071 and 11.073 of the Texas Code of Criminal Procedure because the scientific expert opinions relied on by the State to convict Mr. Reed of capital murder were false when given and have since been changed. The false and repudiated expert testimony offered by the State is both material and establishes Mr. Reed's innocence.

Mr. Reed was convicted because his DNA was linked by expert testimony to a purported sexual assault that the State claimed was contemporaneous with Ms. Stites's murder. *See Reed v. State*, No. AP 73, 135, *9 (Tex. Crim. App. December 6, 2000). The Texas Department of Public Safety (who employed the State's expert Karen Blakely), the Bode Cellmark Forensics Laboratory (who employed the State's retained expert Meghan Clement), and the State's forensic pathologist Dr. Roberto Bayardo, have all now acknowledged that the scientific opinions offered by the State to tie Mr. Reed to the murder were in error. *See* Exhibit 1 (Letter from DPS Crime Lab Director Brady Mills "DPS Correction letter"); 2 (Letter from LabCorp Technical Leader Stephanie Sivak "LabCorp Correction Letter"); 2A (Affidavit of LabCorp Serologist Purnima Bokka); 3 (Declaration of Roberto Bayardo, M.D. "Baryardo Dec."). Because these erroneous expert testimonies were central to the State's case against Mr. Reed, he is entitled to relief pursuant to Articles 11.071 and 11.073 of the Code of Criminal Procedure.[1] In light of these new

[1] This Application is filed as a supplement to Mr. Reed's pending habeas corpus proceedings and incorporates the factual *(cont'd)*

expert opinions, which must be viewed in conjunction with other evidence implicating Mr. Fennell in the murder and corroborating a relationship between Mr. Reed and Ms. Stites, this Court should also find Mr. Reed actually innocent under the *Elizondo* and *Schlup* innocence standards.

A. The State Relied on Testimony From Three Experts Regarding the Presence of Intact Spermatozoa in a Body to Convict Mr. Reed.

Mr. Reed was convicted based on the State's theory that he abducted, sexually assaulted, and murdered Stacey Stites at around 3:30 a.m. on April 23, 1996. *See Reed v. State*, No. AP 73, 135 (Tex. Crim. App. December 6, 2000). This theory was based primarily on the presence of a few of Mr. Reed's intact spermatozoa on samples taken from Ms. Stites's body. The State relied on three experts, who told the jury that the intact sperm was evidence of recent intercourse—occurring not more than 26 hours before her death. These expert opinions supported the State's theory of a sexual-assault murder and ruled out Mr. Reed's defense that he and Ms. Stites were involved and had consensual intercourse in the days before the murder.

(cont'd from previous page)
allegations presented in Mr. Reed's prior applications. Because the Court is currently considering other pending habeas claims, a lengthy recitation of the facts is unnecessary in this pleading.

1. DPS Serologist Karen Blakley

Texas Department of Public Safety ("DPS") criminalist and serologist, Karen Blakley collected vaginal swabs during her examination of Ms. Stites's body at the crime scene on the evening of April 23, 1996. TT Vol. 44:123. She took these samples back to the DPS Crime Lab that night, created slides from the swabs, and examined them under a microscope. *See id.* at 131-32. Ms. Blakely testified that she found "several sperm heads and then several sperm that had tails on it as well." *Id.* at 132.

On direct examination by the State, Ms. Blakely explained that the presence of these several intact spermatozoa "indicated to us that sexual intercourse had been fairly recent." *Id.* at 134. Later in her direct examination, Ms. Blakely was more specific as to the significance of her observation of intact spermatozoa:

Q. You indicated that in your opinion the fact that you saw three intact sperm on the slides indicated that the sexual activity had to have been quite recent?

A. Yes.

Q. And you saw them when?

A. I saw them about 11:30 - - 11:00 or 11:30 that night.

Q. And at the point that you saw the three intact sperms, had the swab that it had

been on had it been air dried or had it been refrigerated to stop the deterioration?

A. No.

***

Q. Okay. Based on your knowledge and your training and experience, how long of a time frame are we talking about that you would expect a sperm to be able to stay intact?

A. ***I have published documentation that says that 26 hours is the outside length of time that tails will remain on a sperm head inside the vaginal tract of a female.***

TT Vol. 45:16 (emphasis added). On cross examination, Ms. Blakley identified the published documentation she relied on as an article from 1981 by "Willot and Allard." TT Vol. 45:17.

Indeed, Ms. Blakley's flawed opinion regarding the presence of intact spermatozoa formed the basis of the entire investigation that ultimately targeted Mr. Reed. Ms. Blakely immediately reported her opinion regarding the intact spermatozoa to the lead homicide investigator, Texas Ranger Rocky Wardlow. *See Ex parte Reed*, 271 S.W.3d 698, 705 (Tex. Crim. App. 2008). And based on Ms. Blakeley's report, Wardlow viewed the presence of semen as a "smoking gun," "surmising that the evidence of sexual assault gave the perpetrator motive to kill." *Id.*

2. Labcorp Serologist Meghan Clement

Ms. Blakley's expert opinion was bolstered by another expert serologist retained by the State, Meghan Clement of the Labcorp DNA laboratory. Ms. Clement testified on direct examination by the State that the tails of spermatozoa break off "after a short period of time" and that she had never seen intact sperm more than 24 hours after intercourse:

Q. And I also wanted to ask you, before doing DNA analysis you indicated that you did a great deal of work in serology?

A. Yes.

Q. And about how many years did you do?

A. I performed serology analysis for approximately ten and a half years.

Q. And in the course of that, can you tell us, did you have the opportunity to examine evidence in various types of sexual assault cases?

A. Oh, yes.

Q. Give me an approximation. When you say, "oh, yes," tell me what you mean.

A. Probably about seventy-five percent of our case work is sexual assault case work. Hundreds, if not thousands of sexual assault cases.

Q. And when you look at sexual assault kits through your employment, did you have the opportunity to look at swabs and slides

and things like that to determine whether or not spermatozoa was actually present?

A. Yes.

Q. And would that be on as many occasions?

A. Yes, absolutely.

Q. Thousands of times?

A. Yes.

Q. Okay. And when you're doing that sort of analysis, when you're looking at that microscopically, are you trying to determine whether spermatozoa, number one, are present; and, number two, whether they're intact or broken up?

A. Yes.

Q. What is the significance of whether spermatozoa are intact or whether they're broken up?

A. Generally the longer spermatozoa is – the longer amount of time of it being deposited to it being detected the more likely it's not going to be intact. With spermatozoa, the tails are very fragile and tend to break off, so after a short period of time they start losing their tails and then what you find is only the spermatozoa heads, from sexual assault cases.

Q. And in thousands of rape kits that you have looked at, when a vaginal swab is taken in the traditional way that it's taken, what's the longest time that you ever personally saw a lapse between a sexual

encounter and in finding a fully intact spermatozoa?

***

A. In serology work, typically, sexual assault kits weren't even collected more than 24 hours after an encounter because the chances of finding sperm is so rare. ***Generally, finding intact sperm at more than probably about 20 hours, 20 to 24 hours, I don't ever recall finding intact sperm more than that, from the time of the sexual assault and from the time the collection was made.***

Q. And that was in over thousands of rape kits?

A. Yes.

TT Vol. 51:53-56 (emphasis added).

3. Travis County Medical Examiner Roberto Bayardo, M.D.

The State also relied on the medical expert opinion of Travis County Medical Examiner Roberto Bayardo, M.D., to corroborate the expert opinions offered by the State's serologists Ms. Blakley and Ms. Clement. Dr. Bayado testified that, as part of his autopsy conducted on April 24, 1996, he collected vaginal swabs, created slides, and examined them for sperm. TT Vol. 48:120-21. Dr. Bayardo testified that he found intact spermatozoa on the vaginal slides and that this indicated recent intercourse:

Q. . . . did you take vaginal swabs from the young lady's body?

A. Yes, I did so.

Q. How many swabs did you take?

A. I took two.

Q. And what steps did you take in taking those swabs? I mean, what is the procedure?

A. I get the cotton tipped swabs and open the vulva and introduce the swabs into the vagina as deep as they can go and then try to pick up whatever might be there. After that I get the swabs and I get glass slides and swipe the swabs on the slides.

Q. And did you do that with the vaginal swabs in this case?

A. Yes, I did so.

Q. And did you look at those slides under the microscope?

A. Yes, and then I stained them with special dye, that stains the cells, whatever micro-organs might be there, and then I look under the microscope.

Q. And what did you see under the microscope in this case when you looked at the vaginal swabs?

A. I found the presence of spermatozoa with heads and tails.

Q. What is the significance of the fact – well, let me back up and ask you this. Is there a difference between seeing semen and seeing spermatozoa?

A. Yes, you can have semen with seminal fluid but without spermatozoa.

Q. Does spermatozoa break down more quickly than just semen?

A. Say that again.

Q. Let me re-ask it, I didn't ask that very well. Biological samples over time break down, do they not?

A. That's correct, yes.

Q. And, typically, semen includes spermatozoa, right?

A. Correct.

Q. And do the spermatozoa break down over a period of time?

A. That's correct, yes.

Q. What is the significance of having found, intact, spermatozoa in this case?

A. That tells me that this semen was placed in the vagina quite recently.

TT Vol. 48:120-23.

4. The State Emphasized the False Expert Testimony Regarding Intact Spermatozoa in Closing Argument and the Judge Read the False Testimony Back to the Jury During Deliberations.

In addition to the lengthy direct examination of its three expert witnesses on the topic, the State re-emphasized this testimony in closing argument:

> [DPS analyst Karen Blakely] took the vaginal swabs, and what did she find? At eleven o'clock that night she goes back to the lab, she puts them under the microscope and bingo, she finds three fully intact spermatozoa. At that point she knows what she's got here. We all know what she's got here. Because we know, from the credible evidence, that that doesn't hang around for days on end. We know from the credible evidence that that tells you that that semen got in that girl's body within 24 hours of that eleven o'clock moment. Which is when? On her way to work.

TT Vol. 56:33-34; *see also* TT Vol. 56:139 ("Semen, on the other hand, can be dated. And semen, specifically spermatozoa, only stays there about 24 hours."); TT Vol. 56:140 ("Spermatozoa and semen is not something that hangs around for days on end.").

These expert opinions were emphasized once more during the jury's deliberation. After several hours in the jury room, the jury sent out a note asking about Dr. Bayardo's testimony, including a question about his opinion on the life expectancy of intact sperm.[2] TT Vol. 56: 154. The Court responded by reading several portions of Dr. Bayardo's testimony to the jury, which included his opinion that the presence of intact spermatozoa meant that the intercourse took place "a day or two" before Dr. Bayardo's April 24, 1996 examination—

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[2] Although the jury note asked specifically about sperm in the anal cavity, the answer provided dealt with Dr. Bayado's examination of intact sperm on the vaginal slides. *See* TT vol 56 :160

within 24 hours of Dr. Bayardo's 3:30 a.m. estimate of Ms. Stites's time of death. TT Vol 56: 160.

5. This Court Emphasized the False Expert Testimony Regarding Intact Spermatozoa in its Direct Appeal Opinion.

In reciting the facts in support of its analysis of the sufficiency of the evidence on direct appeal, this Court observed that "intact" spermatozoa was found by both Karen Blakley and Dr. Bayardo. *Reed*, No. AP 73,135 at 4-5. The Court emphasized the specific expert testimony of DPS serologist Blakley and LabCorp serologist Clement at issue in this Application:

> Intact sperm indicated to Blakley that they had been deposited very recently. Her testimony was later corroborated by Meghan Clement of LabCorp, who testified that in ten and a half years of serology work, she had never seen spermatozoa remain intact for more than 24 hours after a sexual assault.

Id. at 4 n.5. This Court likewise credited Dr. Bayardo's expert opinion on the matter, explaining that "Dr. Bayardo took an additional set of vaginal swabs and found intact spermatozoa, indicating recent deposit." *Id.* at 4-5. The testimony of the State's experts was the sole basis of this Court's decision upholding the sufficiency of the evidence:

> Giving the strength of the DNA evidence connecting appellant to the sexual assault on Stites and the forensic evidence indicating that the person who sexually assaulted Stites

> was the person who killed her, a reasonable jury could find that the appellant is guilty of the offense of capital murder.

Id. at 9.

B. The Testimony of all Three Experts Regarding the Persistence of Intact Spermatozoa Has Now Been Repudiated.

All of the testimony cited above regarding the persistence of intact spermatozoa has now been repudiated. Each of the states' experts, or their employing agencies, have recognized that this testimony on the persistence of intact spermatozoa was false.

1. DPS Crime Lab Director Brady Mills Has Repudiated DPS Serologist Karen Blakley's Testimony.

On April 30, 2018, DPS Crime Lab Director Brady Mills sent a letter to undersigned counsel acknowledging "limitations" affecting Karen Blakley's testimony. Exhibit 1 (DPS Correction Letter). Ms. Blakley testified at Mr. Reed's trial that her observation of intact spermatozoa from vaginal swabs meant that the sperm must have been left by Mr. Reed within 26 hours of collection. TT Vol. 45:16. She cited a paper by Willott and Allard as "published documentation that 26 hours is the outside length of time that tails will remain on a sperm head inside the vaginal tract of a female." TT Vol. 45:17. Director Mills, however, explains that the

paper cited by Ms. Blakley does not actually support the opinion she offered:

> The paper acknowledged that reliance on the victim to estimate the time since the offense occurred was a potential limitation to the research. ***The paper also included a table comparing the results of similar studies. In this table, a study by Davies and Wilson was referenced that reported 72 hours as the longest time for intact spermatozoa to be found in the vagina. . . .*** As seen in the table in the Willott paper, the literature varied greatly in the time given for finding spermatozoa (intact and otherwise) in the female reproductive tract.

Exhibit 1 (emphasis added).

An examination of the Willott and Allard paper confirms Director Brady's statement. Although the paper provides "26 hours" as the longest time intact spermatozoa was seen in that particular study, the full paragraph reporting this data also notes:

> The numbers examined are quite small for the longer times after intercourse, so that, although they provide a very useful guide, ***they may not represent the longest time spermatozoa can persist.***

Exhibit 4 at 137 (Willott and Allard paper) (emphasis added). The paper further explains that "[p]revious reports on the persistence of spermatozoa in the vagina show considerable variation". *Id.* As noted by Director Mills, the paper references a study by Davies and Wilson of 730 vaginal swab samples

which reported finding intact spermatozoa "up to 72 hours" after intercourse. *Id.* at 143.

Ms. Blakeley twice testified at Mr. Reed's trial — based on the 1981 Willott and Allard article—that 26 hours was the "outside length of time" that intact sperm can persist in the vaginal tract. TT Vol. 45:16-17. However, she failed to mention either the article's express warning that this data "may not represent the longest time spermatozoa can persist" or that the article cited other reputable studies in which intact sperm were found up to 72 hours after intercourse. *See* Exhibit 4 at 137, 143.

Director Mills's acknowledgement of the "limitations" affecting Ms. Blakley's testimony constitutes an admission that her testimony was invalid, misleading, and false. Contrary to Ms. Blakley's testimony that the Willott and Allard study supported her conclusion, Director Mills now admits that the Willard and Allard paper actually states the opposite: (1) its data regarding longer times after intercourse (26 hours) was not a reliable measure of the persistence of intact spermatozoa and (2) more reliable studies demonstrated "72 hours as the longest time for intact spermatozoa to be found in the vagina." Exhibit 1 (DPS Correction Letter). This is a direct repudiation of Ms. Blakley's trial testimony.[3]

[3] Karen Blakely no longer works for DPS, is no longer working as a forensic scientist, and has declined to cooperate with this proceeding.

2. LabCorp Has Repudiated Serologist Meghan Clement's Testimony

The opinion offered by the State's retained serology expert Meghan Clement's has also been repudiated by her laboratory. Ms. Clement testified at Mr. Reed's trial that, based on her examination of thousands of rape kits, over the course of ten and a half years, she had never seen intact spermatozoa persist for longer than 20-24 hours. TT 51:53-56. Just as with Ms. Blakley, Ms. Clement's testimony, left a clear and false impression on the jury that intact spermatozoa does not persist in the vaginal tract for more than 24 hours. Moreover, Ms. Clement's citation to her examination of "thousands" of rape kits added an unsupported level of certainty to her opinion.

On January 11, 2018 Bode Cellmark Forensics (a subsidiary of LabCorp)[4] Technical Leader Stephanie Sivak issued a letter which described Ms. Clement's testimony cited above as "unsatisfactory" and as an "error". Exhibit 2 (LabCorp Correction Letter). Specifically, Technical Leader Sivak characterized the error in Ms. Clement's testimony as follows:

> Error Type 2: The DNA/Forensic Biology Analyst cites the number of cases and/or samples worked in the lab as a predictive value to bolster the conclusion that the DNA profile belongs to a specific individual or . . .

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[4] Bode Cellmark Forensics is a subsidiary of Labcorp which, until recently, employed Ms. Clement.

> otherwise testifies beyond the scope of his/her experience."

Exhibit 2. An attached worksheet identified the specific testimony which the laboratory deemed in error:

Correction Review Evaluation Form

Case Information:	
Case Number:	F9801744
Defendant(s):	Rodney Reed
Date of Review:	11/22/2017

Review of Testimony:	
Date of Testimony:	5/11/1998
Testifying Analyst:	Meghan Clement
Name of Prosecutor:	Mr. Charles Penick, Mr. Forrest Sanderson, & Ms. Lisa Tanner
Name of Defense:	Mr. Calvin Garvie & Ms. Lydia Clay-Jackson
Testimony Results (mark as appropriate): Unsatisfactory Statements: Yes [X] No [ ]	
If testimony contained Unsatisfactory Statements, cite each by Error type, page(s), and line number(s):	
Page 55, lines 13-21	With spermatozoa, the tails are very fragile and tend to break off, so after a short period of time they start losing their tails and then what you find is only the spermatozoa heads, from sexual assault cases. So that can be an indicator of how long the spermatozoa has been in a particular placebefore it is actually collected and detected.
Page 56, lines 8-16	In serology work, typically, sexual assault kits weren't even collected more than 24 hours after an encounter because the chances of finding sperm is so rare. Generally, finding intact sperm at more than probably about 20 hours, 20 to 24 hours, I don't ever recall finding intact sperm more than that, from the time of the sexual assault and from the time the collection was made.
Page 56, line 18, after asked to clarify above response: "And that was in over thousands of rape kits?"	Yes.

Approved By: [signature] **Date:** 1/11/2018

Exhibit 2 at 2. Moreover, LabCorp forensic serologist Purnima Bokka has confirmed that intact sperm may be found in the vaginal cavity up to 72 to 144 hours after intercourse. *See* Exhibit 2A (Affidavit of Punima Bokka, M.S.). Through Technical Leader Sivak's letter and Serologist Bokka's affidavit, LabCorp has directly repudiated Ms. Clement's testimony that (1) suggested that intact spermatozoa are not found 24 hours after intercourse and (2) cited

her experience in examining "thousands" of rape kits to bolster her erroneous statement.[5]

3. Roberto Bayardo, M.D. Has Changed His Opinion

Dr. Bayardo's expert opinion has also changed. Where Dr. Bayardo testified at trial that his observation of intact spermatozoa indicated that intercourse was "quite recent" to her death, his subsequent declaration conforms with the opinions offered by DPS Crime Lab Director Brady Mills and LabCorp Technical Leader Stephanie Sivak:

> Accordingly in my professional opinion, the spermatozoa I found in Stites's vaginal cavity could have been deposited days before her death. Further, the fact that I found "very few" (as stated in the autopsy report) spermatozoa in Ms. Stites's vaginal cavity suggests that the ***spermatozoa was not deposited less than 24 hours before Ms. Stites's death.***

Exhibit 3 (Declaration of Roberto Bayardo, M.D.) (emphasis added). Dr. Bayardo's current opinion directly contradicts his and the serologists' testimony that was elicited by the State at trial. Instead of 24-26 hours being the outside length of time an expert

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[5] Ms. Clement has repeatedly declined to cooperate with this proceeding. LabCorp agreed to address Ms. Clement's erroneous testimony only after Ms. Clement left the company. Now working as a consultant, Ms. Clement recently declined undersigned counsel's request to retain her to review her testimony and the applicable serology literature. A hearing is required to obtain her testimony.

would expect to have found intact spermatozoa, Dr. Bayardo now states that intercourse was *more* than 24 hours prior to Ms. Stites's death. *See* Exhibit 3.

C. It is Reasonably Likely That False, Misleading, and Scientifically Invalid Expert Testimony Influenced Mr. Reed's Trial in Violation of His Due Process Rights.

The standard for due process claims based on false, misleading, or scientifically unreliable testimony is as follows:

> The Due Process Clause of the Fourteenth Amendment can be violated when the State uses false testimony to obtain a conviction, regardless of whether it does so knowingly or unknowingly. Accordingly, to constitute a due process violation, the testimony used by the State must have been false, and it must have been material to the defendant's conviction, meaning there is a reasonable likelihood that the false testimony could have affected the judgment of the jury.

Ex parte Robbins, 360 S.W.3d 446, 459 (Tex. Crim. App. 2011). Furthermore, "[t]estimony need not be perjured to constitute a due-process violation; rather, 'it is sufficient that the testimony was false,'" *Chavez*, 371 S.W.3d at 208, (quoting *Robbins*), and "it is sufficient if the witness' testimony gives the trier of fact a false impression." *Ex parte Ghahremani*, 332 S.W.3d 470, 477 (Tex. Crim. App. 2011).

Additional guidance on the determination of materiality in false-testimony claims is found in *Ex parte Weinstein*:

> The second prong in a false-testimony claim is materiality, not harm. Only the use of *material* false testimony amounts to a due-process violation. And false testimony is *material* only if there is a "reasonable likelihood" that it affected the judgment of the jury. Thus, an applicant who proves, by a preponderance of the evidence, a due-process violation stemming from a use of *material* false testimony necessarily proves harm because a false statement is material only if there is a reasonable likelihood that the false testimony affected the judgment of the jury. The applicant must still prove his habeas-corpus claim by a preponderance of the evidence, but in doing so, he must prove that the false testimony was material and thus it was reasonably likely to influence the judgment of the jury.

421 S.W.3d 656, 665 (Tex. Crim. App. 2014).

This Court has repeatedly applied its false testimony/due process jurisprudence to reverse a conviction or sentence when a jury was misled because an expert espoused an unreliable scientific theory or other factors rendered the expert's testimony unreliable. *See, e.g., Ex parte Tiede*, 448 S.W.3d 456 (Tex. Crim. App. 2014); *Ex parte Graf*, AP-77003, 2013 WL 1232197 (March 27, 2013) (expert testimony deemed false where critical aspects of the testimony repudiated); *Ex parte Henderson*, 384 S.W.3d 833, 835 (Tex. Crim. App. 2012) (Price, J.

concurring) (due process violated where critical part of expert's testimony was "highly questionable"); *id.* at 849-50 (Cochran, J. concurring) (due process violated where expert opinion on critical disputed issue found unreliable).

This Court's consideration of scientifically invalid testimony as a due process violation is consistent with the holding of at least one other state as well as the policy of the United States Department of Justice. The Arkansas Supreme Court recently considered the repudiation of similarly false testimony offered by an FBI agent concerning microscopic hair comparison. *see Strawhacker v. State*, 500 S.W.3d 716, 720 (Ark. 2016). Faced with an admission by the Department of Justice that the testimony offered by an FBI microscopic hair comparison expert contained errors and "exceeded the limits of science," the Arkansas Supreme Court reinvested jurisdiction in the trial court to consider the extraordinary remedy of a writ of error coram nobis. *See id.* The Arkansas Supreme Court noted that its decision was grounded in due process. *See id.* at 719.

The Arkansas Supreme Court's decision in *Strawhacker* adopted the official position of the Department of Justice that the interests of justice require the courts to afford a remedy where a government expert has testified in a manner that was erroneous or exceeded the limits of reliable science. *See id.* at 718 ("The Department said it would waive any statute-of-limitations or procedural default defenses . . ."). In a 2015 letter regarding its review of the erroneous testimony by FBI hair comparison experts, the Department of Justice

further expressed its policy that "the erroneous statements should be treated as false evidence and that knowledge of the false evidence should be imputed on the prosecution."

Exhibit 5 (DOJ letter). These principles are not unique to the field of microscopic hair comparison, and the false serology testimony offered at Mr. Reed's trial should receive similar scrutiny.

1. False, Misleading, and Invalid Testimony Regarding Persistence of Spermatozoa.

As detailed above, the State presented three expert witnesses who testified erroneously as to the relevance of finding intact spermatozoa on the vaginal swabs taken from Ms. Stites's body. DPS Serologist Karen Blakley testified that her finding "three intact sperms" showed that the spermatozoa could not have been more than 26 hours old at the time of her observation. TT 45:16. Ms. Blakley cited a specific article by Willott and Allard in support of this opinion. However, this expert testimony has been repudiated by DPS Crime Lab Director Brady Mills, who points out that (1) there are "limitations" to Willott and Allard's data on the persistence of intact spermatozoa study and (2) the cited article by Willott and Allard discusses another study in which intact spermatozoa were found up to 72 hours after intercourse. Exhibit 1 (DPS Correction Letter).

In a similar fashion, LabCorp serologist Meghan Clement's testimony— that she had not seen intact sperm more than 24 hours after intercourse on any of the thousands of rape kits she examined—has

been repudiated by LabCorp Technical Leader Stephane Sivak and Serologist Purnima Bokka. Technical Leader Sivak explains that Ms. Clement's testimony both exceeded the scope of her expertise and improperly cited her past experience to bolster the weight of her expert conclusions. *See* Exhibit 2 (LabCorp Correction Letter). LabCorp Serologist Bokka confirms that intact spermatozoa can be found in the vaginal cavity for at least up to 72 hours. *See* Exhibit 2A.

And finally, Dr. Roberto Bayardo has changed his expert medical opinion as to the finding of intact spermatozoa. Where he claimed at trial that his observation of intact spermatozoa indicated recent intercourse, he has now stated in a sworn declaration that his finding "very few" of Mr. Reed's intact spermatozoa indicates that Mr. Reed and Ms. Stites had intercourse more than 24 hours before her death. *See* Exhibit 3 (Declaration of Roberto Bayardo, M.D.). This change constitutes an admission that Dr. Bayardo's trial testimony was false, misleading and in error.

When an expert opinion offered by a witness has been shown to be factually incorrect or invalid, the expert's testimony constitutes "false testimony" for the purposes of finding a due process violation. For example, in *Ex parte Graf*, this Court found a violation of due process in an arson/murder case where "critical aspects of expert testimony concerning the cause of the fire have since been disproven." No. AP-77,003, 2013 WL 1232197, *1 (Tex. Crim. App. 2013). In *Ex parte Tiede*, a psychiatrist retained by the State testified that the defendant had an "unremarkable mental health

history" and that there was no evidence to support the defense theory that the murder was committed during a dissociative episode. 448 S.W.3d 456, 458 (Tex. Crim. App. 2014) (Alcala, J., concurring). This Court held that the psychiatrist's opinion offered at trial constituted false testimony where the psychiatrist later learned that the defendant had a history of childhood sexual abuse, which he now believes supports the defense diagnosis at trial. *See id*. at 456; 460 (Alcala, J., concurring). The good or bad faith of the witness in offering her erroneous expert opinion is irrelevant to the constitutional question. *See Chavez*, 371 S.w.3d. at 208.

Mr. Reed's case is no different from those cited above. The State elicited testimony from DPS serologist Blakley, LabCorp serologist Clement, and forensic pathologist Dr. Bayardo during which all three erroneously told the jury that Mr. Reed's intact spermatozoa could not have persisted in Ms. Stites's body for more than 24 or 26 hours. These experts (or their sponsoring laboratories) have now disavowed the testimony, acknowledging the opinions as invalid and in error. Instead, these experts now agree that intact sperm may be observed on vaginal swabs up to 72 hours or more after intercourse—three times as long as Mr. Reed's jury was told at trial. In fact, Dr. Bayardo now agrees with Mr. Reed's habeas experts that his finding only "very few" spermatozoa indicates that the intercourse between Mr. Reed and Ms. Stites was likely more than 24 hours before her death.

2. The False Testimony Regarding the Persistence of Intact Spermatozoa is Material.

It is uncontested that Mr. Reed's DNA was present on samples taken from Ms. Stites's body. Mr. Reed argued at trial that he and Ms. Stites were romantically involved which explained the presence of his biology. The State disputed Mr. Reed's claim and relied on the expert opinions of Ms. Blakley, Ms. Clement, and Dr. Bayardo in arguing that Mr. Reed raped Ms. Stites contemporaneous with the murder. *See* TT 56:143 (prosecutor argues that Ms. Stites would not have consented to sex with Mr. Reed, "particularly at the time of her death").

The expert opinions that Mr. Reed's intact spermatozoa could not persist for more than 24-26 hours was crucial to the State's case. Ms. Stites's whereabouts were generally accounted for during this 24 hour period, rendering Mr. Reed's defense that his biology was left during consensual sex impossible. This is why the prosecutor repeatedly referenced its experts' opinions in closing argument:

> We know from the credible evidence that that tells you that that semen got in that girl's body within 24 hours of that eleven o'clock moment. Which is when? On her way to work.
>
> So Karen [Blakley] tells us that, and then we know Stacey goes to Dr. Bayardo. Dr. Bayardo does the same thing. He looks at the swabs and what does he find? He finds intact spermatozoa, same thing, and he tells you what the significance of that is.

TT Vol.56:33-34; *see also* TT Vol. 56:139 ("Semen, on the other hand, can be dated. And semen, specifically spermatozoa, only stays there about 24 hours."); TT Vol. 56:140 ("Spermatozoa and semen is not something that hangs around for days on end."). The importance of the repudiated expert testimony is also shown by the fact that it was the subject of a question in a note sent by the jury, and Dr. Bayardo's testimony on the matter was read back to the jury. *See* TT Vol. 56:160 (Dr. Bayardo's testified that finding a few spermatozoa with heads and tails indicated intercourse a day or two before his April 24, 1996 autopsy—within 24 hours of April 23, 1996).

Moreover, this Court's analysis on direct appeal of the sufficiency of the evidence against Mr. Reed focused exclusively on the State's expert testimony now shown to be false. *See Reed*, No. AP 73,135 at 4-5. The Court's opinion affirming Mr. Reed's conviction recites the invalid opinions of all three experts that the presence of intact spermatozoa indicated recent intercourse. *See id.* The direct appeal opinion even bolsters the weight of LabCorp serologist Clement's testimony by citing her experience—an error specifically identified by LabCorp Technical Leader Sivak. *Compare id.* at 4n.5 *with* Exhibit 2 (LabCorp Correction Letter).

The State's false expert testimony connecting Mr. Reed's sperm to a sexual assault and murder was (1) emphasized in closing argument, (2) read back to the jury during deliberations, and (3) the only evidence cited by the Court on direct appeal in affirming the sufficiency of the evidence. Because the false expert testimony of Ms. Blakley, Ms. Clement, and Dr. Bayardo implicated Mr. Reed in

the murder and directly contradicted Mr. Reed's defense, there is a reasonable probability that the false expert testimony influenced the judgment of the jury. *See Ex parte Tiede*, 448 S.W.3d at 461 (Alcala, J., concurring) (false expert testimony contradicting defense mitigation theory was material); *Ex parte Weinstein*, 421 S.W.3d at 665.

3. The Materiality of the False Expert Testimony Must be Considered Cumulatively With the False and Suppressed Evidence Relating to Jimmy Fennell's April 23, 1996 Conversation With Curtis Davis.

Although the false expert testimony of serologists Blakley and Clement and Dr. Bayardo is material standing alone, this Court must also consider the false expert testimony cumulatively with the false trial testimony of Jimmy Fennell and/or the suppressed and inconsistent account of his whereabouts on the night of the murder. *See*, *generally*, *Ex parte Reed*, No. WR 50,961-08. Currently before the Court are Mr. Reed's due process claims relating to statements made by Jimmy Fennell to his best friend, Bastrop Sheriff's Officer Curtis Davis, about Fennell's whereabouts and activities on the night of April 22, 1996—the night that the reliable forensic evidence indicates Ms. Stites was murdered. *See generally* Applicant's Memorandum and Objections to Findings of Fact and Conclusions of Law, *Ex parte Reed*, No. WR 50,961-08 (filed on March 9, 2018) ("Memorandum and Objections"). At a 2017 hearing, Curtis Davis testified that Fennell told him that Fennell had been

out drinking with other police officers on the night of April 22, 1996 and that he did not get home until late, after Ms. Stites was supposed to be asleep. *See id.* at 8-10. This account, provided by Fennell to his best friend, is irreconcilable with this Fennell's trial testimony that he and Ms. Stites spent the evening together in their apartment. When called at a habeas hearing to explain this discrepancy, Fennell declined to testify and asserted his Fifth Amendment rights against self-incrimination, further supporting the conclusion that Fennell perjured himself at trial and is actually responsible for the murder of Ms. Stites. *See id.* at 38-39; *Coffey v. State*, 796 S.W.2d 175, 178 (Tex. Crim. App. 1990) (permissible to consider invocation of 5th Amendment Rights when improperly asserted).

This Court and the United States Supreme Court have held that, when considering due process claims under *Brady v. Maryland* and its progeny, all exculpatory evidence must be considered collectively and not item-by-item. *See Kyles v. Whitley*, 514 U.S. at 436; Ex parte Miles, 359 S.W.3d at 665. Evidence that Fennell's trial testimony was false, when combined with evidence of the invalidity of the State's experts' opinions, greatly undermines support for the verdict. The impact of Fennell's false testimony cannot be discounted by citing a forensic link between Mr. Reed's semen and the crime. Nor can the harm from the State's invalid expert testimony be mollified by the credibility of Fennell's account of the nature of his relationship with Stites and her whereabouts at the time of the murder. *Compare Ex parte Reed*, 271 S.W.3d at 749 (citing Ms. Stites's "life circumstances" in refuting consensual affair). Because both the scientific and

circumstantial aspects of the State's case have been shown to be false, Mr. Reed's conviction must be reversed.

D. The Court Should Order A New Trial Pursuant to Article 11.073 of the Code of Criminal Procedure.

Article 11.073 of the Code of Criminal Procedure provides for a new trial where there is (1) newly available scientific evidence that (2) "contradicts scientific evidence relied on by the state at trial" and (3) that the applicant would probably not have been convicted if the newly available scientific evidence has been presented at trial. Tex. Code Crim. Proc. art. 11.073 (a)(2); *Ex parte Robbins*, 478 S.W.3d 678, 690 (Tex. Crim. App. 2014). In *Ex parte Robbins*, this Court held that scientific evidence is considered "newly available" where the opinion of the State's expert had changed since trial. 478 S.W.3d at 690. A claim for relief brought pursuant to article 11.073 should be remanded for a hearing where the facts alleged "are at least minimally sufficient to bring him within the ambit" of the statute. *Id.* Mr. Reed's claims under article 11.073 fit within this holding in *Ex parte Robbins*.

1. Newly Available Expert Opinions Contradict the Scientific Evidence Relied on by the State to Convict.

First, the opinions of all three of the State's experts who provided testimony supporting the State's theory of a sexual assault by Reed contemporaneous with the murder have been changed:

- Texas Department of Public Safety Lab Director Brady Mills has identified "limitations" in the opinion of former DPS Serologist Karen Blakley, correcting her testimony that 26 hours is the "outside length of time" that Mr. Reed's spermatozoa could have remained intact in Ms. Stites's vaginal tract. Rather, he confirms the established literature that intact spermatozoa may be found up to 72 hours after intercourse. *See* Exhibit 1 (DPS Correction Letter.
- LabCorp Technical Leader Stephanie Sivak has identified "errors" in former LabCorp Serologist Meghan Clement's trial testimony which implied that intact spermatozoa cannot be found on rape kits more than 24 hours after intercourse. LabCorp explained that Clement erroneously testified outside her expertise and cited the number of rape kits she had examined in a misleading fashion to bolster her erroneous opinion. *See* Exhibit 2 (LabCorp Correction Letter). In fact, it is the expert opinion of LabCorp Serologist Purnima Bokka that studies have shown intact spermatozoa to be found in the vaginal cavity up to 72-144 hours after intercourse. *See* Exhibit 2A.
- Dr. Roberto Bayardo has changed his opinion that the presence of Mr. Reed's intact spermatozoa was evidence that intercourse was "fairly recent" and within "a day or two" of his April 24, 1996 autopsy. He now states that "the fact that I found "very few" (as stated in the autopsy report) spermatozoa in Ms. Stites's vaginal cavity suggests that the

spermatozoa was not deposited less than 24 hours before Ms. Stites's death." Exhibit 3 (Declaration of Roberto Bayardo, M.D.).[6]

Under this Court's holding in *Ex parte Robbins*, these changed opinions by the State's experts constitute newly available scientific evidence. *See* 478 S.W.3d at 690.[7]

2. Mr. Reed Would Probably Not Have Been Convicted if these Changed Expert Opinions Had Been Presented at Trial.

The sufficiency of the State's evidence against Mr. Reed is based on a connection between his semen, a claimed sexual assault, and the murder. *See Reed v. State*, No. 73, 135 at 9. The State repeatedly emphasized the expert testimony linking Mr. Reed's sperm with a sexual assault in their closing argument. *see supra* Part A(4). The Judge specifically, read back Dr. Bayardo's testimony on the matter to the jury during their deliberations. *see id.* The importance of this false expert testimony at trial cannot be downplayed. With the recantation of

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[6] Dr. Bayardo has also changed his opinion regarding his estimate of the time of death as well as the connection between the presence of Mr. Reed's DNA and an anal sexual assault of Ms. Stites. *See* Exhibit 3.

[7] The changed scientific opinions of DPS, Labcorp, and Dr. Bayardo are not novel or unreliable and would be equally admissible as the original testimony relied on by the State. Therefore, this newly available evidence meets the requirements of article 11.073(b)(1)(B) of the Code of Criminal Procedure.

Dr. Bayardo and the changes to the testimony of Serologists Karen Blakley and Meghan Clement, this central component of the State's evidence has evaporated.

The changed scientific opinions would have presented the jury with a very different set of facts. Instead of three consistent experts claiming that the presence of intact spermatozoa meant that Mr. Reed must have raped Ms. Stites contemporaneous to her murder, the jury would have been told the opposite. Dr. Bayardo would have testified that the evidence suggests consensual intercourse between Mr. Reed and Ms. Stites more than 24 hours before her death:

> in my professional opinion, the spermatozoa I found in Ms. Stites's vaginal cavity could have been deposited days before her death. ***Further, the fact that I found "very few" (as stated in the autopsy report) spermatozoa in Ms. Stites's vaginal cavity suggests that the spermatozoa was not deposited less than 24 hours before Ms. Stites's death.***

Exhibit 3 (emphasis added). The DPS Serologist would have confirmed Dr. Bayardo's opinion, verifying that only three intact spermatozoa were found and that intact spermatozoa can persist for up to three days. *See* Exhibit 1 (DPS Correction Letter). And the LabCorp serologist would likewise not have improperly bolstered these erroneous opinions with her own experience, and instead would have noted that intact spermatozoa may be found 72-144 hours after intercourse. *See* Exhibit 2 (LabCorp Correction Letter): Exhibit 2A (Affidavit of Purinima Bokka, M.S.)

If the jury had been told—without contradiction—that Mr. Reed's sperm was likely from intercourse more than a day before Ms. Stites was murdered, the connection between the sex and the murder upon which the sufficiency of the evidence depended would have been broken, and it is unlikely that a rational jury would have convicted Mr. Reed.[8]

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[8] Any connection between Mr. Reed's semen and an anal assault has likewise been discounted by Dr. Bayardo's changed opinion. Dr. Bayado testified at trial that he saw sperm heads on the rectal sample taken from Ms. Stites at autopsy. He has now retracted this opinion stating:

> Had the prosecuting attorney advised me that they intended to present my testimony as evidence that spermatozoa was found in the rectal cavity, I could have informed them that was incorrect. . . . Had I been asked at trial if spermatozoa and/or seminal fluid had been found in Ms. Stites's rectal cavity, I would have said that it had not, consistent with the autopsy report.

Exhibit 3. Dr. Bayardo has also contradicted his trial testimony regarding observed injury in Ms. Stites's anus. *See* Exhibit 3 at 6 ("I found on autopsy that Ms. Stites was sexually assaulted, and testified consistently at trial. However, the presence of spermatozoa in Ms. Stites vaginal cavity was not evidence of sexual assault. . . . Also, because there was no spermatozoa found in Ms. Stites's rectal cavity, there is no evidence that any spermatozoa was deposited in the rectal cavity as a result of the sexual assault").

Further, the presence of low levels of Mr. Reed's DNA in rectal samples does not discount this changed opinion because the DNA results are consistent with drainage from the vaginal cavity as Ms. Stites's body lay on her back. Because the sphincter relaxes and then stands open post-mortem, there is ample opportunity for bodily fluids to migrate into the rectum. *See* Exhibit 6 at ¶9 (Baden Aff.); Exhibit 7 at ¶8 (Spitz Aff.); 8 at ¶¶18-19 (Riddick Aff.). For example, in *Pitts v. State*, evidence of "a few sperm" in a sample from a male murder victim's anal

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In fact, the presence of Mr. Reed's spermatozoa from intercourse more than a day before Ms. Stites's death would be powerful evidence corroborating Mr. Reed's account of an affair and providing motive for Jimmy Fennell to murder his fiancé. *See Reed v. Thayler*, 2012 WL 2254217, *14 n.8.[9]

At this stage, the question before the Court is whether the facts alleged in this application "are at least minimally sufficient to bring him within the ambit" of the statute. *See Ex parte Robbins*, 478 S.W.3d at 690. Mr. Reed need not show that the changed scientific opinions render the evidence insufficient to convict. Instead, the standard is whether, "on a preponderance of the evidence" a reasonable jury would find reasonable doubt. *See* Tex. Code Crim. Proc. art 11.073 §(b)(2).

Mr. Reed has shown that all of the State's scientific evidence linking Mr. Reed's DNA to a

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cavity was discounted as contamination from "postmortem ejaculation." 273 Ark. 220, 226-27 (1981). In a later case, *Stephens v. State*, 234 S.W.3d 748, 773 (Tex. App.—Fort Worth 2007, no pet.), Dr. Bayardo's opinions about anal dilation as evidence of a sexual assault were attacked as unreliable by the same assistant attorney general who vouched for Dr. Bayardo's opinions in Mr. Reed's prosecution. *See id.*

[9] In his 2012 recommendation, Magistrate Judge Austin cited the absence of evidence of a consensual affair in discounting Mr. Reed's claims. *See Reed v. Thayler*, 2012 224517 at 14. Since that time additional, disinterested witnesses have come forward with knowledge of the affair including two co-workers and Ms. Stites's cousin. *See* Exhibit 9 (Affidavit of Alicia Slater); Exhibit 10 (Affidavit of Leroy Ybarra), Exhibit 11 (Affidavit of Buddy Horton).

sexual assault contemporaneous with Ms. Stites's murder has changed. The State's witnesses have all recanted their testimony that Mr. Reed's intact spermatozoa could not persist more than 26 hours after intercourse, and Dr. Bayardo (consistent with Mr. Reed's uncontradicted experts)[10] now states that the evidence suggests Mr. Reed and Ms. Stites had sex ***more*** than 24 hours before her death. *See* Exhibit 3. Because the jury's decision centered on whether the assailant was Mr. Reed or the victim's fiancé Jimmy Fennell who had motive, was sole witness to Ms. Stites's whereabouts, and invoked the Fifth to avoid questioning in the case, Mr. Reed has alleged facts that are "at least minimally sufficient to bring him within the ambit" of article 11.073.[11]

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[10] Exhibit 6 (Affidavit of Michael Baden, M.D.); Exhibit 7 (Affidavit of Werner Spitz, M.D.); Exhibit 8 (Affidavit of Leroy Riddick, M.D.)

[11] Judge Alcala's concurring and dissenting opinion on Mr. Reed's prior habeas application implied that his false testimony and article 11.073 claims were dismissed based on an earlier federal finding that Dr. Bayardo was not credible. *See Ex parte Reed*, 2017 WL 2131826 at *4 n3. However, the federal judge who rejected Dr. Bayardo's declaration on procedural grounds did not have the benefit of (1) the new scientific evidence invalidating the testimony of the remaining State's experts, Blakley and Clement and (2) the new and corroborative opinions of Drs. Spitz, Baden, and Riddick. *See* Exhibits 1, 2, 6, 7, and 8. This additional evidence changes the credibility determination before this Court.

E. Mr. Reed's Claims Satisfy Article 11.071 §5.

Mr. Reed's claims satisfy the requirements of article 11.071 § 5 because their factual basis could not have been discovered with the exercise of reasonable diligence. *See* Tex. Code Crim. Proc. art 11.071 § 5(a)(1). This Court has already held that, where a State's expert changes her scientific opinion, the evidence is "not ascertainable through the exercise of reasonable diligence." *See Ex Parte Robbins*, 478 S.W.3d at 692 (changed scientific opinion meets article 11.073§(b)(1)(A)). Moreover, this Court has generally acknowledged that a defendant is entitled to rely on the truthfulness of the State's witnesses. Where a witness later recants her testimony, reasonable diligence is exercised even though there may have been reason to question the credibility of that witness. *See Ex Parte Harleston*, 431 S.W.3d 67, 87 (Tex. Crim. App. 2014) (citing *Ex parte Tuley*, 109 S.W.3d 388, 403 (Tex. Crim. App. 2002) (Price, J., concurring in denial of rehearing) ("The fact that there was some evidence at the time of the applicant's trial that could have been used to impeach the complainant, does not mean that her affidavit recanting her trial testimony is not new evidence…")).

The State presented the expert testimony of Travis County Medical Examiner Dr. Bayardo[12] as

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[12] Dr. Bayardo's declaration was presented in a prior habeas application. However, the unavailability of the additional evidence from the Texas Department of Public Safety and LabCorp rendered it impossible for the Court to consider the *(cont'd)*

well as serologists from DPS and LabCorp. Mr. Reed had no reason to believe that these witnesses would change their testimony, and as a matter of law, the subsequent Declaration of Dr. Bayardo and the letters from DPS and LabCorp that are the subject of Mr. Reed's claims were not ascertainable through the exercise of reasonable diligence. *See Ex parte Harleston*, 431 S.W.3d at 87; *Ex parte Tulley*, 109 S.W.3d at 403. And for the same reasons discussed *supra* Part C, the false testimony of the State's experts is a constitutional violation that is material such that there is proof by a preponderance of the evidence that Mr. Reed would not have been convicted but for the violation of his Due Process rights. *See* Tex. Code Crim. Proc. art. 11.071 § 5(a)(2). Accordingly, Mr. Reed's claims presented in this Application may be considered pursuant to section 5 of article 11.071 of the Code of Criminal Procedure.

F. Mr. Reed is Actually Innocent.

The State's case against Mr. Reed stands on two pillars: (1) putative scientific evidence connecting Mr. Reed's semen with a sexual assault contemporaneous with the murder and (2) evidence about Ms. Stites's "life circumstances" which was inconsistent with the idea she was having an affair with Mr. Reed. Because the new scientific evidence presented in this Application, when viewed in conjunction with the evidence in prior habeas proceeding, has toppled both

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full impact of the false testimony and new scientific evidence at that time.

of these pillars, this Court should find that Mr. Reed meets the actual innocence standard under both *Elizondo* and article 11.071 §5(a)(2).

1. Legal Standard

Both Texas and federal constitutional law prohibit the conviction and/or punishment of persons who are innocent. *See Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996).[13] Under *Elizondo*, the court reviewing an innocence claim must examine the new evidence in light of the evidence presented at trial. *Ex parte Thompson*, 153 S.W.3d 416, 417 (Tex. Crim. App. 2005). "In order to grant relief, the reviewing court must believe that no rational juror would have convicted the applicant in light of the newly discovered evidence." *Id.* at 417. This must be shown by clear and convincing evidence. *See Ex parte Elizondo*, 947 S.W.2d at 209. The Court of Criminal Appeals described this weighing of evidence as follows:

> Because, in evaluating a habeas claim that newly discovered or available evidence proves the applicant to be innocent of the crime for which he was convicted, our task is to assess the probable impact of the newly available evidence upon the persuasiveness of the State's case as a whole, we must necessarily

[13] Mr. Reed does not concede that *Elizondo* correctly sets forth the federal constitutional standard. Instead, Due Process prevents the conviction of persons who are probably innocent. *See Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997). However, the evidence presented in this application meets any applicable standard.

> weigh such exculpatory evidence against the evidence of guilt adduced at trial.

Id. However, the Court in *Elizondo* was careful to emphasize that this standard was something less than a legal sufficiency review. 947 S.W.2d at 207. No presumptions should be applied to the evidence either in favor or against the verdict:

> the court charged with deciding such a claim should make a case-by-case determination about the reliability of the newly discovered evidence under the circumstances. The court then should weigh the evidence in favor of the prisoner against the evidence of his guilt. Obviously, the stronger the evidence of the prisoner's guilt, the more persuasive the newly discovered evidence must be.
>
> *Id.*

Article 11.071 §5(a)(2) adopts the U.S. Supreme Court's "gateway" actual innocence standard as set forth in *Schlup v. Delo*. *See Ex parte Reed*, 271 S.W.3d 698, 733 (Tex. Crim. App. 2008). A habeas applicant is actually innocent under this standard where the Court finds that it is more likely than not that a reasonable jury would not have found the defendant guilty beyond a reasonable doubt. *See id.*

2. The New Evidence Presented in Mr. Reed's Habeas Applications Demonstrates His Innocence.

The evidence presented in this Application, and in Mr. Reed's prior habeas proceedings contradicts both the State's scientific evidence of guilt as well as the contention that Ms. Stites's "life circumstances" were

inconsistent with a secret affair with Mr. Reed. Because these central aspects of the State's evidence against Mr. Reed has now been contradicted, he has established his innocence as defined under *Elizondo* and article 11.071 §5(a)(2).

a. The State's scientific evidence has been disproven.

As reflected in this Court's opinion on direct appeal, the sufficiency of the evidence in Mr. Reed's case turned on the reliability of the State's scientific evidence that linked Mr. Reed's semen to a sexual assault contemporaneous with the murder. *See Reed v. State*, No. AP 73,135 at 9. This evidence has been retracted by the experts who offered the opinions and is recognized as scientifically invalid and false. Dr. Bayardo has provided a sworn declaration indicating that there is no scientific evidence that Mr. Reed sexually assaulted Ms. Stites, and that the evidence actually indicates that Mr. Reed and Ms. Stites had vaginal intercourse over 24 hours before her death. *See* Exhibit 3. The opinions of DPS serologist Karen Blakeley and LabCorp serologist Meghan Clement have likewise been repudiated by their laboratories. *See* Exhibits 1 (DPS Correction Letter); 2 (LabCorp Correction Letter); 2A (Affidavit of Purnima Bokka, M.S.).

Moreover, three of the most experienced and renown forensic pathologists in the United States all agree that (1) there is no reliable scientific evidence linking Mr. Reed's semen to a sexual assault and (2) that the forensic and medical evidence demonstrates that Ms. Stites was killed sometime before midnight on April 22, 1996 and that her body was moved to the

place where it was found several hours after her death. *See* Exhibits 6, 7, 8.

The forensic experts rely primarily on three key elements in determining the post-mortem interval: livor mortis (pink to red discoloration of the skin due to blood settling in the vessels and later seeping into the skin), rigor mortis (stiffening of the muscles due to chemical alterations in the cells), and signs of decomposition. *See Spitz and Fisher*, Medicolegal Investigation of Death 94 (4th Ed. 2006) (livor, rigor, and decomposition included in most common protocols used in postmortem timing). None of these factors were discussed in relation to the postmortem interval at Mr. Reed's trial.

i. Patterns of Postmortem Lividity Indicate that the Body was Moved 4-6 Hours After Death

Lividity seen on Ms. Stites's right shoulder, arm, and part of her face shows that Ms. Stites was left in a position in which these areas were lower (dependent) for at least 4 hours prior to the body being left in the position it was found. Exhibit 7, ¶¶2-3 (Spitz Aff.); Exhibit 6,¶6 (Baden Rpt.); Exhibit 8, ¶12-14 (Riddick Aff.). Lividity is the pooling of blood to the lowest part of the body or dependent area. Once lividity is fixed it will not move with compression or shifting of the body. *See* Exhibit 8, ¶ 12(Riddick Aff.). Ms. Stites showed lividity on her right arm, right shoulder and chest, and the side of her face—areas that are not dependent in the position she was found. All three defense experts

explain the relevance of this non-dependent lividity concurrent with Dr. Spitz:

> ***The presence of lividity in these non-dependent areas makes it medically and scientifically impossible that Stites was killed between 3- 5 a.m. on the date in question.*** Stites could not have been both murdered and dumped between the hours of 3-5 a.m. on April 23, 1996 and remained undisturbed in that spot until her body was discovered at around 3 p.m. because the lividity observed in the non-dependent areas would have taken at least 4-5 hours to develop. It is impossible that Stites was murdered and left at the scene in the two-hour time frame asserted by the State at trial.

Exhibit 7,¶3(Spitz Aff.)(emphasis added); *see also* Exhibit 6,¶6 (Baden Aff.) ("Lividity develops by gravitational settling of bloods cells while still in the lower dependent portions of the body . . . This lividity demonstrates that Ms. Stites was dead before midnight on April 22nd when she was alone with Mr. Fennel").

ii. Rigor Mortis Indicates a Longer Post-Mortem Interval

Drs. Spitz and Riddick also focus on the level of rigor mortis seen in the crime scene video, which shows a longer post-mortem interval. Dr. Riddick explains :

> If the post mortem interval had been roughly thirteen hours as estimated by Dr. Bayardo at the trial, rigor should have been intense and

> progressing to completion. The crime scene video contradicts this finding and indicates a much longer post-mortem interval. A body in complete rigor (which is generally achieved at roughly 12 hours under normal conditions and will be essentially unchanged at 13 hours) is stiff. Manipulation of an arm, a leg, or the head is difficult and will also result in moving the torso. The manipulation of the body demonstrated in the crime scene video, however, indicates that the limbs can be moved independently, thus indicating that rigor was no longer at its height and was passing. . . . Based on the lessening of rigor demonstrated in the crime scene video, I estimate that the post mortem interval is significantly longer than the 13 hours estimated at trial. The level of rigor demonstrated in the crime scene video is more consistent with a post-mortem interval of 16-20 hours from the first documentation of the body at 5:15 p.m. My estimate of the post-mortem interval takes into account environmental factors that can affect the speed at which rigor develops. . . . Further, the body appears to be shaded by small trees and brush. These are normal conditions, which would not affect the routine progress of rigor.

Exhibit 8,¶ 10-11 (Riddick Aff.); *see also* Exhibit 7,¶4-5 (Spitz Aff.) (explaining that the manipulation of the body in the crime scene video demonstrates "passing" rigor consistent with a longer post-mortem interval).

iii. Evidence of Decomposition Demonstrates a Longer Postmortem Interval and Shows that Ms. Stites was Moved in the Truck Several Hours After Her Death

Dr. Spitz points out evidence of decomposition that is inconsistent with the time of death advanced by the State at trial:

> My review shows evidence of decomposition that is not consistent with a time of death at 3 a.m. on April 23, 1996. …Brown fluid running from the mouth and nose, across the right cheek is decomposition fluid and is not described in the autopsy report. Internal organs also show evidence of decomposition-what Dr. Bayardo describes as congestion in lungs is actually decomposition. The heart is flabby and the blood is liquid after liquefaction which is part of the decomposition process. Brain swelling is also part of decomposition. This amount of decomposition supports a post-mortem interval of about 20 to 24 hours before the film and photographs.

Exhibit 7, ¶ 7 (Spitz Aff.)

The viscous fluid found on the passenger-side floor board was not pulmonary edema fluid as identified by the prosecution but more typical of post-mortem purge fluid. Purge fluid takes more than four hours to develop and could not of been present in less than 2-1/2 hours if Ms. Stites was alive at 3:00 am. These finding show that she had been dead several

hours before midnight. *See* Exhibit 6, ¶ 7(Baden RPT.).

iv. The State's Evidence that Reed's Sperm was Associated with a Sexual Assault is False.

The State's forensic experts, or their sponsoring agencies, have retracted their original testimonies in Mr. Reed's case as incorrect. *See* Exhibits 1, 2 and 3. Drs. Spitz, Baden, and Riddick all confirm that there is no evidence of a vaginal or anal sexual assault. These experts concur in disputing the faulty timeline derived from the retracted and erroneous testimony provided by the states experts. Dr. Spitz explains:

> Very few sperm were found on autopsy smears, and the crime scene investigator found only 3 intact spermatozoa. If the victim was sexually assaulted between 3-5 a.m., there would be more sperm found on slides. A normal sperm count is considered to be 15 million spermatozoa per milliliter. The amount of sperm found on the slides is more consistent with a longer interval between intercourse and the time the sample was collected. As I explain in my book, intact spermatozoa can be found in the vagina up to 72 hours after coitus.

Exhibit 7,¶ 6 (Spitz Aff.); *see also* Exhibit 6, ¶ 8 (Baden RPT.); see also Exhibit 8, ¶ 17 (Riddick Aff.).

The Doctors also rebut the State's evidence of anal rape:

> The distended anus seen in photos and described at autopsy is normal, in

> consideration of the absence of rigidity. It is a common mistake for death investigators to misinterpret natural relaxation of the sphincter, as evidence of anal penetration. There are no apparent lacerations in the photographs of the anus. If lacerations were present, they would be visible. Abrasions described at autopsy are not evidence of anal assault, and are equally consistent with hard bowel movements. I am aware that there was a weak DNA result consistent with Rodney Reed on the sperm fraction of the rectal swab taken from Stites. The presence of a small amount of sperm in the rectum is not surprising and does not contradict my conclusion that there is no evidence of anal penetration in this case. When semen is present in a body, it can drain from the vagina into the dilated anus. I have seen this happen in a number of cases. Contamination of the rectal swab by vaginal contents is also a concern, especially in cases where vaginal swabs are collected prior to the taking of the rectal specimens.

Exhibit 7,¶8 (Spitz Aff.). *see also* Exhibit 5,¶18-21 (Riddick Aff.)(Dr. Riddick provides a more detailed description for why the evidence of anal rape is lacking); *see also* Exhibit 6, ¶9 (Baden Rpt.) (dilation of anus normal and no evidence on photographs of lacerations).

Dr. Michael Baden, M.D., testified at Mr. Reed's October 2017 habeas hearing on these issues, and his testimony was neither meaningfully impeached nor

contradicted by the State. *See* Reporter's Record Vol. 3:9-122, *Ex parte Reed*, No. WR-50,961-08.

With the benefit of this new scientific evidence, other evidence suggesting and supported the State's theory of a sexual assault by Mr. Reed falls away. For example, the Court focused on Ms. Stites's broken zipper and bunched underwear as suggesting a sexual assault. However, this could have occurred just as easily as Fennell carried Ms. Stites's body from their apartment to his truck and then to the crime scene.[14]

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[14] The state of dress of the body is not consistent with a sexual-assault murder. It is unlikely that a stranger who abducted, raped, and murdered Mr. Stites would take the trouble of re-dressing her lifeless body in her jeans, underwear and brassier. Retired New York Police Department Homicide Detective Sergeant Kevin Gannon has also pointed out certain aspects of the crime scene which appear staged:

> Certain aspects of the crime scene appear to have been staged in a manner that does not conform to a kidnapping/murder by a stranger. First, the placement of Stacey's name tag between her legs is direct evidence of a staged crime scene. The location of the two halves of Stacey's belt also does not comport with a kidnapping murder by a stranger seeking to evade detection. It is unlikely if not impossible that Stacey's woven leather belt broke while it was used as a ligature. The force necessary to break a leather belt would have caused greater injury to her neck than was reported at autopsy. It is far more likely in my opinion that the belt was separated after the murder. One half of the belt was left at the side of the road in a position pointing towards the body. Especially where it was alleged that the murderer used the victim's shirt to wipe fingerprints from the truck at the scene, it is not plausible that the same person would have left the belt in this location

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b. New Evidence Contradicting the State's "Life Circumstances" Argument.

The second pillar of the State's case against was the racially charged contention that the "life circumstances" of Ms. Stites, a young white woman engaged to a local police officer, made it implausible that she would have been romantically involved with a young black man like Mr. Reed. The evidence before the Court today, however, corroborates Mr. Reed's assertion that he was having an affair with Ms. Stites directly and implicates Fennell in the murder.

i. Credible Evidence of the Affair Between Mr. Reed and Ms. Stites.

First and foremost, there is now credible evidence from witnesses who have no connection to Mr. Reed, that Mr. Reed and Ms. Stites were seeing each other. Alicia Slaughter, a coworker at the HEB, states in a sworn affidavit that Ms. States confided in her about the affair:

> On one occasion when Ms. Stites and I were eating together in the break room, she talked

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> unless he wanted the body to be quickly found. The same is true for the portion of the belt left outside the truck at the Bastrop High School. A murderer who had the forethought to wipe his fingerprints and lock the door of the truck would not leave such obvious evidence in plain view accidentally.

Exhibit 12, ¶9 (Gannon Aff.)

> to me about her relationship with her boyfriend. She was talking about her engagement ring and that she was not excited about getting married. She told me that she was sleeping with a black guy named Rodney and that she didn't know what her fiancé would do if he found out. She commented that she had to be careful.

Exhibit 9 ¶ 4 (Slater Aff.). Another co-worker at the HEB, Leroy Ybarra, recalls seeing Mr. Reed and Ms. Stites interact at the HEB and also noticed Ms. Stites avoiding her fiancé Fennell. *See* Exhibit 10. Based on his direct observation during the numerous occasions he saw Mr. Reed and Ms. Stites together, Mr. Ybarra confirms they had an intimate, positive relationship. He noticed her "demeanor would change" when Mr. Reed came around and she was "happy to see him and would be in a good mood." *Id.* at ¶3. The nature of Mr. Reed's and Ms. Stites's encounters were happy and romantic. *See id.*

Ms. Stites's behavior around her fiancé stands in stark contrast. Mr. Ybarra observes:

> I knew Ms. Stites was engaged to a police officer at the same time she was seeing [Mr. Reed], and I recall that the few times that Stacey's fiancé entered the store to visit her, she would become a nervous wreck. I know that there were times Ms. Stites would deliberately hide so that she didn't have to talk to him. I just thought it was a strange relationship.

Ex. 10 ¶5 (Ybarra Aff.).

Ms. Stites' own cousin, Calvin Buddy Horton, also recounts seeing Ms. Stites and Mr. Reed together in the months before Ms. Stites's murder:

> As I pulled into the Dairy Queen in the Ford pickup I was driving at the time, with my children inside, I remember seeing Stacey coming out of the Dairy Queen with a black man. I hollered her name to get her attention as I drove in, but she did not respond. I know they heard me because both Stacey and the black man looked directly at me, but neither came toward me. I have a rather loud voice; I easily project and rarely have a difficult time being heard.
>
> Seeing Stacey with a black man did not surprise me because I remembered what my parents told me about her dating and associating with black men. Stacey, however, was shocked; she seemed embarrassed when she saw us and she quickly left with the black man without introducing me. Stacey and the black man got into a darker colored car that Stacey was driving, and they drove off without speaking to me or my children. I told my father of this incident, but to me it was not a big deal at the time because I had been told that Stacey associated with black men.

Exhibit 11, ¶¶ 6-7 (Horton Aff.). After Ms. Stites's death, Mr. Horton saw pictures of Mr. Reed in the media and identified Mr. Reed as the man accompanying Ms. Stites at the Dairy Queen in 1995:

> Sometime after Stacey's death I remember seeing pictures of Rodney Reed on the news

> and in the newspaper after he became a suspect in the death of my cousin. Rodney Reed is the same man I saw with Stacey at the Dairy Queen in 1995. I understand that the appeals courts have previously said that there were no credible witnesses that would testify as to having seen Rodney and Stacey together. I would have testified to my experience at the Dairy Queen in 1995 at trial, but no one ever approached me to do so. Since then, I have told other members of my family and would have told law enforcement and prosecutors the same had they interviewed me.

Exhibit 11 ¶ 8.

ii. Evidence Implicating Fennell

Much of the State's "life circumstances" evidence came from Fennell. Fennell had been a prime suspect in Ms. Stites's murder, was aggressively interrogated, and failed two polygraph examinations as to whether he committed the murder. Fennell testified that he and Ms. Stites were happy together and accounted for both Ms. Stites's work routine and her whereabouts leading up to the murder. Fennell's credibility was very important to the State's case. But new evidence, available today, raises far more than the "healthy suspicion" identified by this Court in 2008. *See Ex parte Reed*, 271 S.W.3d at 747. Most important is a newly discovered inconsistent statement made by Fennell to his best friend, Bastrop Sheriff's Officer Curtis Davis, about his whereabouts on the night of April 22, 1996. Although Fennell testified at Mr. Reed's trial that he and Ms. Stites spent a quiet evening at home on April 22, 1996, Fennell told Officer Davis a very

different story about the events of that evening. Officer Davis testified at an October 2017 hearing that he spoke to Fennell during the day on April 23, 1996, soon before Ms. Stites's body was discovered. In that conversation, Fennell claimed that he had been out drinking with other officers on the night of April 22, 1996 and that he did not come home until late at night so as not to disturb Ms. Stites's sleep. *See* Memorandum and Objections at 8-10. Fennell's failure to provide a consistent account of where he was and what he was doing at the time Ms. Stites was murdered is classic evidence of consciousness of guilt. *See Lozano v. State*, 359 S.W.3d 790, 814 (Tex. App.—Fort Worth 2012, pet. ref'd).[15]

Fennell's inconsistent statements would also have led to the introduction of other evidence casting doubt on his credibility including:

- Fennell's false explanation for why he and Ms. Stites had not recently had sex;
- Fennell's inconsistent statements about refilling the gas tank in his truck the night of April 22, 1996;

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[15] A similar inconsistency was used as evidence against Mr. Reed at his trial. Upon his arrest for unrelated drug charges, Mr. Reed was surprised by the Bastrop Police investigators when he was asked about Ms. Stites's murder and falsely denied knowing Ms. Stites. Although Mr. Reed's reluctance to reveal an affair with the white fiancé of a racist police officer that would connect him to an open murder investigation is understandable, there is no innocent reason for Fennell to have given a false statement about his activities on the night of April 22, 1996 to his best friend.

- Fennell's inconsistency with Ms. Stites's mother's account that Fennell was supposed to have driven Ms. Stites to work;
- Fennell's withdrawal of all the money in his bank account on the morning Ms. Stites was reported missing.

Memorandum and Objections at 27.

Fennell is also affirmatively implicated in the murder by the new scientific evidence. The uncontradicted expert opinions of Drs. Michael Baden, M.D., Werner Spitz, M.D., and Leroy Riddick, M.D., establish that Ms. Stites was murdered before approximately midnight on April 22, 1996—hours before Fennell claimed Ms. Stites left for work. *See* Exhibits 6, 7, and 8. Further, these experts also state that Ms. Stites's body was moved several hours after her death. *See id.* The new medical evidence places the murder at a time Fennell testified that he and Ms. Stites were alone in their apartment. The evidence that Ms. Stites was moved after death is also consistent with an attempt by Fennell to later dispose of Ms. Stites's body around the time she would have been traveling to work.

And finally, when confronted with this inconsistency and subpoenaed to testify and explain himself at the October 2017 habeas hearing, Fennell refused to testify and asserted his Fifth Amendment right against self-incrimination. *See* Memorandum and Objections at 39. Because Fennell has selectively and opportunistically asserted his Fifth Amendment rights, this Court can and should infer that Fennell's testimony at that hearing would

incriminate him. *See Coffey v. State*, 796 S.W.2d 175, 178 (Tex. Crim. App. 1990).

This Court has recognized that even the demanding standard under *Elizondo*, does not require a person to negate the sufficiency of the State's evidence or affirmatively prove innocence. *See, e.g., Ex parte Cacy*, 543 S.W. 802, 803(Tex. Crim. App. 2016) (Yeary, J., concurring) (*Elizondo* requires only evidence "compelling enough to defeat the systemic *presumption* of innocence"). Rather, the focus of the Court's innocence inquiry (under *Elizondo* and article 11.071 § 5(a)(2), as well as under article 11.073) is whether a jury would entertain reasonable doubt. Where the new evidence presented herein and through Mr. Reed's prior habeas applications contradicts both (1) the State's scientific evidence linking Mr. Reed to the murder and (2) the "life circumstances" evidence refuting Mr. Reed's defense, he has established his actual innocence. *See Ex parte Elizondo*, 947 S.W.2d at 209; Tex. Code Crim. App. art.11.071 §5(a)(2).

Conclusion and Prayer

The jury that convicted Mr. Reed of capital murder was faced with competing theories which explained the presence of Mr. Reed's DNA on and in Ms. Stites's body. Mr. Reed alleged that he and Ms. Stites were involved in a relationship that had been kept secret from Mr. Stites's fiancé. Based on the unrebutted testimony of multiple experts, the State contended that such a relationship was impossible because Mr. Reed's spermatozoa was linked to a sexual assault contemporaneous with Ms. Stites's murder. Instead, the State argued that Mr. Reed abducted Ms. Stites on her way to work and drove

her to a secluded location where he raped and murdered her. Faced with this evidence at trial, the jury had little choice but to convict.

Over the past two decades, every aspect of the State's case against Mr. Reed has been disproven. In this Application, Mr. Reed has presented new scientific evidence which repudiates the State's expert opinions offered at trial and establishes that the State's theory of guilt is scientifically impossible. There is also now considerable and credible evidence that Mr. Reed and Ms. Stites were sexually involved and that Fennell was not truthful in his representations to police. Rather than testify as a crime victim in these post-conviction proceeding, Fennell has asserted his Fifth Amendment rights because his truthful testimony would incriminate him.

Accordingly, Mr. Reed respectfully requests that this Court find that his Application for Writ of Habeas Corpus meets the requirements of section 5 of article 11.071 and remand his case to the district court for further proceedings at which he will prove his claims of innocence and for other relief.

Respectfully Submitted,

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	X	COURT OF
VS.	X	BASTROP COUNTY,
	X	TEXAS
RODNEY REED	X	21ST JUDICIAL
	X	DISTRICT

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particularly significant?

A. Not necessarily.

Q. Do you recall whether or not the two of you went down and visited with Carol?

A. No, sir, we didn't.

Q. Okay. About what time did Stacey retire or go to sleep that night?

A. Around 9 p.m..

Q. Okay. Were you going to go to sleep with her, or were you going to stay up later that night?

A. I went ahead and stayed up and watched the news.

Q. Now, I hate to have to ask you this, but I have to ask you this. Did you and Carol -- I'm sorry, I mean, did you and Stacey have any type of sexual relations that night?

A. No, sir.

Q. Did you take a shower?

A. Yes, sir.

Q. Did she take a shower?

A. Yes, sir.

Q. Did you take a shower together?

A. Yes, sir.

Q. But nothing happened thereafter?

A. Nothing happened.

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Q. And is there any specific reason why nothing sexual happened that night between you?

A. Yes, sir.

Q. What is that reason?

A. She was on birth control and there was a certain amount of the pills that she takes that are not actually birth control, they're just vitamins, and within that period of time there is a greater possibility of getting pregnant than the other pills, and she was on those type of pills so we didn't have any kind of sexual relationship during that time.

Q. And that information comes to you as a result of the prescription?

A. Yes, sir.

Q. Is that what they told you?

A. Yes, sir.

Q. Once again, what was your intent with regard to how she, Stacey, was going to get to work the next morning?

A. She was going to drive herself and then I was going to go down and get with her mother and we was going to go that afternoon.

Q. All right. Do you recall at exactly what time her alarm went off that morning?

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A. I sure don't.

Q. I'm talking about the morning of the 23rd?

A. No, sir.

Q. Do you recall waking up and waking her up?

A. No, sir.

Q. Do you recall that she woke up and woke you up?

A. No, sir.

Q. Are you a light sleeper or heavy sleeper?

A. On the evenings that I coach baseball, I'm usually a heavy sleeper, because I get up there running around and everything and my exercise and everything so I sleep heavier.

Q. Do you know what her schedule called for on that particular day?

A. I believe it was the 3:30 a.m. shift.

Q. Okay. Which would mean she would get up at what time to be there by 3:30?

A. She would usually get up around 2:45, or 2:50.

Q. And it would take her how long before she left the apartment?

A. About fifteen -- ten or fifteen minutes.

Q. And that would give her enough time to make that drive and be there by 3:30?

A. Yes, sir.

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A. Yes, sir.

Q. And also on her side?

A. Yes, sir.

Q. Was it -- in term of the invitations, was it anticipated to be pretty much half and half?

A. Probably more favored to my side. I have a larger family.

Q. What were your feelings about the upcoming wedding?

A. I was excited about it.

Q. Did Stacey ever mention to you ever even knowing a person named Rodney Reed?

A. No, sir.

Q. Prior to any of this happening, did you ever know a person named Rodney Reed?

A. No, sir.

Q. Jimmy, I do have to ask you this. Did you kill Stacey Stites?

A. No, sir.

MR. SANDERSON: I'll pass the witness.

THE COURT: Go head, ma'am.

MS. CLAY-JACKSON: Judge, may we approach?

THE COURT: Yes, ma'am.

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Q. You personally spoke with David Lawhon concerning Stacey Stites, did you not?

A. Yes, ma'am.

Q. Other officers, as well, spoke with David Lawhon concerning Stacey Stites, is that correct?

A. I don't have any personal knowledge of that.

Q. No one other than you was in the interview room with David Lawhon when Stacey Stites was discussed?

A. Not that I recall.

Q. After --

MS. CLAY-JACKSON: We need to approach the bench one more time.

(Whereupon a brief discussion was held off the record.)

Q. (BY MS. CLAY-JACKSON) After Gordon Moore interviewed Jimmy Fennell, you spoke with him?

A. With who?

Q. Jimmy Fennell?

A. Yes, ma'am.

Q. And he invoked his right to an attorney.

MS. TANNER: Objection, Your

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Honor, that is not permissible questioning with regard to Jimmy or anyone else.

THE COURT: It's overruled. Go ahead, sir, you may answer the question.

A. Yes, he did.

Q. (BY MS. CLAY-JACKSON) That was in December of 1996, was it not?

A. I believe that's correct.

Q. And after he did that, you did not then issue a search warrant for his residence?

A. No, ma'am.

Q. Because you had not issued a search warrant prior to that either, had you?

A. No, ma'am.

Q. Did you speak with Jimmy Fennell any more after that incident in December of 1996?

A. I spoke with him afterwards, yes, ma'am.

Q. Did you speak to him between -- did you speak to him concerning Stacey Stites's murder between January of 1997 and March of 1997?

A. Yes, I did.

Q. Did he have his attorney with him at that time?

A. No, ma'am.

Q. Ranger, you have no personal knowledge, or

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you-all?

A. Yes, he did.

Q. The information concerning Stacey's whereabouts after 7:30 on the 22nd of April, when she left her mother's apartment and went up to hers, all of that information -- where did that information from come from?

A. It came from Jimmy Fennell.

Q. I'm sorry, would you say it again?

A. It came from Jimmy Fennell.

Q. Do you recall whether there was any independent information gathered about Stacey's whereabouts or her actions after -- that did not come from Jimmy Fennell?

A. I can't recall. I can't recall that.

Q. That type -- would that type of detail, independent information from someone who was not a suspect, would that have been information that you would have put in your report?

A. Yes, it would have.

Q. Have you had an opportunity to look at your report?

A. Yes, I have.

Q. And that information was not in your report,

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MS. TANNER: No further questions.

RECROSS EXAMINATION

QUESTIONS BY MS. CLAY-JACKSON:

Q. And you said your name last name is Vacek; is that right?

A. V-A-C-E-K, yes.

Q. Are you in school now?

A. Yes, ma'am, I am.

Q. Where are you going to school?

A. I go to Blinn in Schulenberg.

Q. And what are you studying?

A. Agriculture.

Q. And when you and Stacey were in school, did she anticipate going to college also?

A. Yeah, she did, but I didn't know where she wanted to go or what she was going to do.

Q But she knew that you were going to Blinn, correct?

A. Well, my first year of college was at Stephen F. Austin in Nacogdoches. I went there two years and, yes, she knew I was going there.

MS. CLAY-JACKSON: No further questions.

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[25] contract is to follow your oaths and find the defendant guilty of capital murder.

So the question is, as we finish all this, is did we hold up our end of the deal? And the answer to that is, yes, we did, and I want to talk to you about that specifically, how we held up our end of the deal. And in doing that, we introduced a number of witnesses to you, and lots of pieces of evidence, and everything that we introduced to you was introduced to prove to you one of four things. Some of them proved something within each of those four things, but every piece of evidence was tailored to prove to you one of the four things.

Number one, on April the 23rd of 1996 Stacey Stites was abducted on her way to work, early that morning around three o'clock. Number two, everything was brought to tell you that after she was abducted she was raped and she was sodomized at the time of her death. Number three, everything we brought you was here to tell you that in the course of that rape and sodomy, Stacey was intentionally murdered. And, number four, and this is just **[26]** as important as all the others, everything we brought you was brought to you to tell you that he is the one who did it. Only one person on the face of this earth could have done those three things, and it was this defendant. That's what all the evidence was brought to you to prove.

And before I go into each one of the four of those, I feel the same way I did on opening statement, and I need to apologize to you again. This time I feel like I need to apologize to you for the nature of what you had to sit here and listen to for two weeks, and I know it wasn't easy, and I want to

tell you I'm sorry that we had to expose you to this underbelly of our society, this sort of thing. I'm sorry that we had to show you the photographs that we had to show you. I'm sorry that we had to bring in the people to talk about the evidence that was as graphic as it was. We weren't doing that to try to gross you out, or to shock you, or to upset you. I know by necessity it's going to upset you, but we were doing that because the only way that you can come to a rational verdict is to

[33]The second thing that we endeavored to prove to you through the course of the evidence was that Stacey was raped and sodomized, and we talked so very much about that, and the reason for that is because it's so critically important. And that evidence of rape revealed itself to Karen Blakley, a seasoned crime scene investigator, right away. And it revealed itself because, as we talked about, the first thing they noticed is a young lady laying out in the woods without a shirt on. They noticed her pants wide open, her zipper broken. Now how critical is that?

You remember, Karen came here and she looked at Stacey's pants and it was so broken she had to yank and play with it to get it to come up. And, I mean, she yanked on it pretty good. That tells you something, folks.

She told you that Stacey's panties were all stretched out. That tells you something. So right there, this seasoned crime scene investigator has bells going off in her head. And thank goodness she did the smart thing, she went and she took the swabs that we talked about. She took the vaginal **[34]** swabs, and what did she find? At eleven o'clock that night she goes back to the lab, she puts them under

the microscope and bingo, she finds three fully intact spermatozoa. At that point she knows what she's got here. We all know what she's got here. Because we know, from the credible evidence, that that doesn't hang around for days on end. We know from the credible evidence that that tells you that that semen got in that girl's body within 24 hours of that eleven o'clock moment. Which is when? On her way to work.

So Karen tells us that, and then we know Stacey goes to Dr. Bayardo. Dr. Bayardo does the same thing. He looks at the swabs and what does he find? He finds intact spermatozoa, same thing, and he tells you what the significance of that is. And then Dr. Bayardo goes further, and thank goodness he does. Karen told you why she couldn't go further. Dr. Bayardo does a full examination and what does he find? He finds that evidence of the anal tearing that we talked so much about. And he finds, without any doubt at all, that that occurred at the time of **[35]** Stacey's death. How important is that in the grand scheme of things in this case?

He also, if you will recall, looked at the swabs from the rectal swabs and remember what he said. He said he saw a small amount of what appeared to him to be broken up heads and tails of spermatozoa. Now that's pretty significant, taking into account what Dr. Johnson said later on, and we'll talk about that in greater detail in a little bit.

So that right there tells you just how important this scientific evidence is. So what did Dr. Bayardo tell you when he testified? He said that in his opinion, looking at everything, looking at all the evidence, whatever happened to this young girl had

not happened consensually, based on everything he saw.

And it's important to note that we introduced -- the defense introduced this autopsy report. And you have this, and if you need to see it, you can. At the very end Dr. Bayardo gives his opinion, and his opinion is, that based on the findings that the decedent, Stacey Stites, came to her death as a result **[36]** of asphyxia due to ligature strangulation -- the last four words are the most important for right now -- associated with sexual assault. Not associated with some sort of a sexual rendezvous, but ligature strangulation associated with sexual assault. How important is that?

Now, we also brought you evidence of the mapping of Stacey's underwear. Karen Blakley told you about that. And why is that so important? That's important because it tells you, it gives you an idea of where the semen was on Stacey's panties. And what did Karen tell you? That it wasn't consistent with any kind of drainage like the defense talked about, that there was a very small amount, and that the significance of that is that relative to what they saw on the vaginal swabs, there was very little drainage, and the conclusion that you have to reach is that there wasn't much movement after that happened. There was not much movement after the sexual act. What does that tell you once again? It tells you that it got there at the time of her death. It tells you again, **[37]** objective evidence of what happened.

So we bring you as well Karen's testimony with regard to the breast swabs, and later testimony that there was saliva on those. That, too, tells you that this happened that morning at the time of her

death, because it's not going to be hanging around there days later, not when normal people take showers and wash things off of them. It happened that morning.

So when I came here and I talked to you and I characterized this part of the evidence as the smoking gun, and I still do, because it is a smoking gun, because it is the thing, because it got there at the time that it did, that leads you directly to Stacey's killer. Everything that is credible, everything that is objective points to that happening that morning, and that is critically important.

So, once again, as we look at the elements that we're required to prove to you, number seven for count one, "while in the course of committing aggravated sexual assault," put a check there, because the **[38]** credible evidence tells you that.

Now, we have to also prove to you that this aggravated sexual assault and this murder go hand in hand, and we have to prove to you that this was an intentional murder. That's one of the elements that we are required to prove, and that's yet another thing that we did. We know that the sodomy occurred at the time of Stacey's death; and we know that the semen got in her body at the time of her death; and we know that whoever raped Stacey also killed her. And based on Dr. Bayardo's testimony, we know that whoever killed her did it intentionally. He told you, remember this, how he said this happened, this belt is broken now, but remember he said this was taken and it was held like this. For how long? For three to four minutes, ladies and gentlemen. Three to four minutes. How can anyone say this would be anything other than intentional, for that length of time? His

opinion, based on that, was that this was an intentional killing.

And you know, it's real easy for us -- we toss around the word "minute" a lot.

[39] We talk about, oh, it took five minutes; it took a minute; I don't know, a minute or two. If you had any doubt, any doubt at all about just how long three or four minutes is, for purposes of what we're talking about here, go back in the jury room, sit quietly, just take your arm and squeeze your arm just hard enough to have pressure there and watch the clock. Let three minutes pass. And see just how long of a time that is, just where you know there's pressure on it, and try to imagine just what that would be like in the situation that Stacey was in. There is no way that you could possibly conclude that this was anything but an intentional murder.

So, once again, you can go over here, as to these elements, and check off intentionally. Check off intentionally.

Dr. Bayardo's testimony was hard, and I know it was, and it was hard because I could see it on your faces, on many of your faces, the realization of it. The realization and sort of the visualization of really what we were talking about in this case I think finally hit; and the realization of a **[40]** 19-year-old girl being sodomized while the life was being taken out of her while this belt was around her neck. And I'm sorry that you had to be exposed to that; but, again, you can't come to the right decision if you don't understand. You've got to be able to understand what happened here, as bad and as horrible as it might be; to adequately judge, you've got to understand.

So, let's talk about the fourth thing. The fourth thing that we had to prove to you in this case. We had to prove to you, obviously, that it was that man over there who did these things to that girl. And we talked to you about the semen. Gosh, we talked a lot about that, and I characterized it at opening as the smoking gun. You can also think of it sort of like as equivalent to the slipper in the Cinderella story. Here we had it, we just had to find who it fit. Just like that. We had the smoking gun, we had the semen, and the investigators had to find out who it fit. So they go, and all these investigators, they told you about the year of frustration they lived with, getting blood, working up

[49] It's compelling. And it's convicting. But there's other stuff, too. There's other evidence in this case that ties this defendant to being the murderer of Stacey Stites.

We know that she had to drive through his territory every night, and that he was wandering around. He was out and about. Now, I know what the defense is going to come tell you I suspect is that we don't know for sure that she went that route. She could have gone the loop, and if she went the loop, then they never would have seen each other. But I want to point out to you what Andrew said. Andrew Cardenas came before you -- here is a picture of HEB, and he told you that he would see Stacey driving in this side entrance over here to the HEB, over here to the side, right in front of what was then a Walmart and now is a Ben Franklin, I think.

If you look at this exhibit, State's Exhibit 2, she would be going down Hospital Drive to get over in here.

Now what does that tell you? It tells you that Stacey was going exactly the route that Jimmy told you. If she's going to **[50]** go the loop, she's not going to make this turn here and go up and go around. So you can reasonably assume, based on what Andrew told you and based on what Jimmy told you, Stacey went to work this very same way that we've talked about so many times. And what do we know about that route? We know that this defendant is out there hanging around all night out there. Now, if he's out hanging around --

MR. GARVIE: I'm going to object this, she's stating facts not in evidence. Obviously, no one has testified to the man being out that night.

THE COURT: Overruled. Go ahead.

MS. TANNER: If he's out hanging around out in here, you know, somewhere up in here in the county in the middle of the night, and some sheriff's deputies tell you that, that's not real compelling. That doesn't mean a whole lot even if he does hang out all night. But the fact that he's over here at Long's Star Mart most every night of the week until three,

[56] See, that's kind of the strength of DNA evidence. DNA evidence is so powerful when you're talking about semen in a dead girl's body, that it is so powerful it's a little hard to go, "It wasn't me, must have been somebody else. Couldn't have been mine." So then because of that, this is how you get those claims of, "Well, okay, it was consensual." What else are they going to say? What else can they say?

That's why, that's why this statement that the defendant made is so important. That's why this is so

critically important, because at that point in time when he made this statement he didn't know they had tested that other sample that they already had. He didn't know that they already had him tied to that semen. So what's he telling you there when he doesn't know? Well, I don't know, never met her, never seen her, don't know her. And then only after he finds out that he's nailed by the semen do we get this secret affair. That's why this is so important.

Now, let's talk about the secret affair. The angle of the investigation in

[60] Ms. Lindley is utterly devoid of credibility, and we know how darn reliable that ID is.

So that's the evidence of the secret affair. That's what we've got. And we've got to look at the circumstances of Stacey's life to tell us whether that's really true. Let's look at her life back then in April of 1996 when she died. She was 18 days away from her wedding. She was, by all accounts, even their own witness says, she was extremely excited about the wedding. The girl took a job where she had to be at work at 3:30 in the morning so she could make 50 cents more an hour to pay for her wedding dress. Her friends all knew how excited she was. Her mom told you that the very night before she died she looked like a young girl in love, as did Jimmy. The last conversation she ever had with her sister was about the shoes for the wedding. The last conversation she ever had with her mother was about, "I'm going to marry Jimmy." Remember that?

Jimmy told you that Stacey was on the green pill at the time of her death so they **[61]** weren't engaging in any kind of sexual relations, but they

expect you to believe that she would go out and do that with him?

Let's look at what was in her truck. State's Exhibit Number 79 is a portrait certificate. Stacey and Jimmy were scheduled to have their portraits made on the 27th of April, 1996.

State's Exhibit Number 78. On the 18th of April, Stacey put down $50 on her wedding dress, a dress that she was getting up at 3:00 in the morning to go to work to pay for.

Those things are all circumstantial evidence of her state of mind at the time of her death. And what was her state of mind? It wasn't what they're saying it is, that's for sure. What was she planning on doing that day? Her plan for that day was Jimmy was going to meet her, they were going to get the insurance together, and then they were going to go pick out flowers after she got off work.

Now, do you really expect that that girl on the morning of April 23rd of 1996,

[72] to do.

And I want to you to think, just imagine, would you, please, imagine being in Jimmy's shoes. Think about being Jimmy Fennell through the course of all this. Your fiance is murdered 18 days before your marriage. You were supposed to take her to work and her mom, she talked you out of it. You were supposed to have taken her to work and she wouldn't have been out there. You don't even get to grieve normally because the police are all over you for seven and a half months saying, "Did you kill her? Did you kill her? You killed her. You killed her." You're the

first in line to give blood and you're the first in line to give hair and saliva. They're still all over you because you're a cop and because you are the boyfriend. Seven and a half months they're after him.

Finally, finally there is an arrest. Finally they find the person who really did it. We come trial and then what happens, if you're Jimmy? You get to hear that your fiancee is off having a secret affair with **[73]** this guy. And then you get to come here and have the defense tell the whole world and tell you to your face pretty much that you killed her. What a nightmare that must be. God, what a nightmare to be Jimmy Fennell. The fact is, though, for seven and a half months they looked at Jimmy and the truth is, he couldn't have done it. It was logistically impossible for Jimmy to have committed this offense, and that's the bottom line.

Mrs. Stites told you over and over again that there were two sets of keys to her car and she had them. And she, on the morning that Stacey disappeared, gave the extra set of keys to Jimmy. He had no means to use her car. The police didn't stop there, though, they looked for taxi fares. None. They even went so far as to check the mileage logs of all the Giddings police cars to make sure everything jived and everything was where they should have been, and they were. There was no means by which Jimmy could have even done this.

You know how desperate the defense is getting when they ask Lieutenant Campos, "Well **[74]** is it possible to walk from Bastrop to Giddings and back?" "Well, I suppose." Well, let's look at that for just a minute.

We know that Stacey's truck was left sometime between 4:30 and 5:23. So let's give the defense the benefit of the doubt here, and let's say the truck got left at 4:30 in the morning and Jimmy starts hoofing it back to Giddings at 4:30 in the morning. Now we know that she didn't get killed at midnight the night before or seven o'clock or whenever the night before because Dr. Bayardo tells us that, that Stacey died within an hour of three o'clock. So we know what our timeframes were. So let's say 4:30 in the morning the truck is left off and Jimmy is hoofing it back to Giddings. He's accounted for by Mrs. Stites at 6:45. That's two hours and 15 minutes. You can do the math. Thirty miles. He would have to be doing four and a half minute miles to have made it back to Giddings by the time he came downstairs and saw Mrs. Stites.

Well, I'm sorry, folks, but Jimmy Fennell does not look to me like a marathoner,

[76] The fact is, is that there is their case. There it is. And there is nothing, nothing, that takes you away from him being the true killer of Stacey Stites.

And isn't it interesting that we talked a lot about the fact that Jimmy didn't have an alibi. Jimmy didn't have an alibi for that night. Jimmy didn't have anybody accounting for his whereabouts because Stacey was the only one who could have accounted for his whereabouts. It's important to note that nobody could ever find anything inconsistent with what he told you. Nobody. They canvassed his apartment, they looked everywhere, and nobody could find anything inconsistent. But it's true, Jimmy didn't have an alibi. But ask yourselves, is there

anyone else here who didn't have an alibi? Is there anyone else who we've heard evidence about that didn't have an alibi? Yes, there is, the defendant.

MR. GARVIE: Objection. Again, comment on the defendant's failure to testify.

THE COURT: It's overruled,

[156] response to your latest inquiry. Let me remind you of what that inquiry said. After I do that, then the court reporter will read to you from her notes what we believe is a response to that. The inquiry is as follows: "To the Court, we disagree as to the testimony of the medical examiner regarding, A. Did he find sperm in the anal cavity as observed by tests or observation? What was the condition of found sperm? B. His opinion on the life expectancy of intact sperm in the anal cavity. C. Time period associated with anal dilation after death in non-sexual assault victims; and D. What is the evidence that supports the sodomizing of Stacey Stites?"

The court reporter has found what I believe is a response to A, a response to B, and a response to C. As far as inquiry D is concerned, I do not believe the Court is permitted to answer that, that's within the jury's purview to answer that. That inquiry was: "What is the evidence that supports the sodomizing of Stacey Stites?" That's for the jury to decide. Otherwise, I'll have the

[160]

Q. In regard to the injuries suffered by Stacey Stites, the dilated rectum, the rectum dilates at death, does it not?

A. No, it does not, it only dilates very late in the stages of body decomposition, and that usually occurs after four or five days.

Q. So your testimony is that it does not dilate at the time of death, right?

A. That's correct.

(Ends third portion read back to jury.)

Q. On page three of your report, where you speak of smears, do you recall stating in that result that there were few spermatozoa, heads and tails, was an indication that a day or two before that -- that intercourse had happened a day or two before that exam?

A. No, before my examination.

Q. That's your recollection of what that means?

A. That's correct, yes, ma'am.

(Ends fourth portion read to jury.)

Q. Okay, the rectum was intact and free of

[170]

STATE OF TEXAS

COUNTY OF BASTROP

I, Carolee Murray, Official Court Reporter in and for the 21st Judicial District Court of Bastrop County, State of Texas, and Notary Public for the State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all the proceedings (of all proceedings directed by counsel to be included in the Statement of Facts, as the case may be), in the above styled and numbered cause, all of which occurred in open Court or in chambers and were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

WITNESS my hand this the 20th day of August, 1998.

_____

Carolee Murray
Official Court Reporter
335th Judicial District
Certification No. 1938
Expiration Date 12-31-98
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REPORTER'S RECORD

VOLUME 2 OF 6 VOLUMES

WR-50,961-08

TRIAL COURT CAUSE NO. 8701

THE STATE OF TEXAS	)	IN THE DISTRICT
	)	COURT
vs.	)	BASTROP COUNTY,
	)	TEXAS
RODNEY REED	)	21ST JUDICIAL
	)	DISTRICT

WRIT OF HABEAS CORPUS

On the 10th day of October, 2017, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Doug Shaver, Judge Presiding, held in Bastrop, Bastrop County, Texas.

Proceedings reported by computerized stenotype machine.

[39] pathologist, Your Honor.

Brady requires a link from the nondisclosure to what is presented in support of it, Your Honor. And there's absolutely no link here between Jimmy Fennell supposedly saying that he got home at a later time and a forensic pathologist. I see absolutely no relevance to that whatsoever.

THE COURT: Okay.

MR. OTTOWAY: In addition, if we actually look at the order that we have from the Court of Criminal Appeals, and we look at the description in the concurrence by Judges Alcala and Walker, they say specifically, "I agree with this Court's determination that it is necessary to remand the claims presented in the Applicant's eighth writ application in which he asserts that new evidence has emerged indicating that an ultimate suspect, Jimmy Fennell, made false statements about his whereabouts." That's the only thing we are here on, Your Honor, is whether Jimmy Fennell supposedly was not where he said he was at. And forensic pathology has nothing to do with where Jimmy Fennell was or was not. That is simply a credibility matter. It's simply an impeachment matter. It is not opening a retrial, including forensic pathology.

Alternatively, if you are not going to **[40]** accept the argument that I have presented, I believe that a more limited manner in this proceeding would be warranted, in which we have Curtis Davis -- the entire basis of his claim that Jimmy Fennell supposedly told him something that differed from his testimony -- testify first. And if you don't believe that Jimmy Fennell told him the statement that is the

basis of the entire writ, that he got home later, then we shouldn't proceed further, Your Honor. It should be that one witness. And if you don't believe that he was told by Jimmy Fennell that he got home at a time different than what he testified to, there is no further reason for this proceeding.

And, again, forensic pathology has nothing to do with whether Jimmy Fennell got home at 10:00 or 11:00 versus 8:00 or 8:30, Your Honor.

THE COURT: All right. I'll take that into consideration after we have heard those witnesses.

MR. OTTOWAY: Okay. Thank you, Your Honor.

THE COURT: All right. Your objection is on the record. Who will be your first?

MR. BENJET: Your Honor, I think we want to take up a matter with regard to Jimmy Fennell. And I know he's got counsel here. And so we would be calling **[41]** him as a -- our first witness. But if we want to -- if his counsel wants to be heard on that, we can certainly accommodate that.

THE COURT: I don't know -- who is his lawyer?

MR. OTTOWAY: Well, your Honor, if I may -- I mean, this is directly related to what I was arguing, is that Curtis Davis needs to be the first witness. And if you don't believe Curtis Davis, if you don't believe that Jimmy Fennell told Curtis Davis anything, we shouldn't get to Jimmy Fennell, we shouldn't get to a possible invocation. We should hear Curtis Davis, and if you don't believe Curtis Davis or if Curtis Davis says something different, if he doesn't, you

know, say that Jimmy Fennell told him anything, we shouldn't be going further.

MR. BENJET: The whole case is about a statement made by Mr. Fennell. You know, certainly my -- I think my case, and I should be able to choose the order. And I suspect that we might hear some sort of objection about hearing what Jimmy Fennell told somebody else from the State. So let's take --

THE COURT: Well, another reason this lawyer needs to do whatever he's going to do is to get out here. Call Mr. Fennell.

[42] *MR. PHILLIPS*: Your Honor, if I may, as his lawyer --

THE COURT: Well, introduce yourself for the record.

MR. PHILLIPS: My name is Robert Phillips, counsel for Jimmy Fennell. Mr. Fennell tends to stand on the truthful testimony he gave 20 years ago and will be declining to testify further, on advice of counsel under the rights afforded him by the Constitution of the United States and particularly the Fifth Amendment.

THE COURT: All right, sir.

MR. PHILLIPS: I've made that known to both sides. We have an affidavit to file, in lieu of his testimony, which I think is acceptable to both counsel.

THE COURT: Do you agree?

MR. BENJET: I haven't -- I want to just take a look at it, but, if it's as represented, we would go on

his affidavit that's presented today. You know, obviously, we can't make him talk.

THE COURT: You need to see the affidavit?

MR. BENJET: If you wouldn't mind, yeah.

THE COURT: Yeah. Go ahead.

[43] *MR. OTTOWAY*: I'd like to see a copy, too, Your Honor.

THE COURT: All right.

MR. OTTOWAY: But, again, Your Honor, I am reiterating here, we shouldn't get to Jimmy Fennell because the undisclosed evidence is not what Jimmy Fennell said, it's what Curtis Davis said that Jimmy Fennell said. That's the entire basis of the writ. So having an invocation here, we might not even get to this particular witness. I think we should hear Curtis Davis first, before we take up this particular issue. If you don't believe Curtis Davis or you don't believe -- he says that, you know, Jimmy Fennell didn't tell him this alternative timeline, then we don't go further.

THE COURT: I understand. We're still talking about Mr. Fennell at this time.

MR. OTTOWAY: Thank you, Your Honor.

MR. BENJET: This affidavit is acceptable to us to memorialize the invocation of the rights.

THE COURT: Do we have something in the file?

MR. BENJET: We don't.

MR. PHILLIPS: I have the original.

THE COURT: If you would have it filed

over there with the clerk so that --

[44] *MR. PHILLIPS*: Thank you.

MR. BENJET: And if I can just read it aloud for the record. To the paragraph 1:

"My name is Jimmy Lewis Fennell, Jr. I am over the age of 18 and fully competent to make this affidavit. I currently reside at the TDCJ Sanders Estes Unit in Johnson County, Texas.

Paragraph 2:

"I am aware that a bench warrant for my appearance and testimony in Bastrop County District Court has been issued in Ex Parte Reed, No. WR-50,961. A copy of a bench warrant is attached as Exhibit 1. I have discussed this matter with my attorney prior to executing this affidavit.

Paragraph 3:

"If I am called to testify and asked any questions regarding the subject matter of (A), the murder of Stacey Stites; (B), any statements I may have made regarding my activities and whereabouts on April 22nd-23rd, 1996; (C), the investigation of the murder of Stacey Stites, or (D) the prosecution and trial of Rodney Reed for the murder of Stacey Stites, I will not answer the questions. Instead, I will respond to each question regarding the subjects by stating that, 'On advice of counsel, I am **[45]** *declining to answer the question based on my Fifth Amendment right not to testify.'"*

Paragraph 4:

"If I am called to testify and asked any questions regarding any allegation against me of

criminal conduct while I was working as a police officer, I will not answer the questions. Instead, I will respond to each question regarding these subjects by stating that, 'On advice of counsel, I am declining to answer the question based on my Fifth Amendment right not to testify.'"

Signed on October 7, 2017. There is a notarized signature affirming that it's Jimmy Fennell, and then attached is the bench warrant. And, Your Honor, if you would like a copy, we can provide you one -- or you have it right there.

THE COURT: That'll be accepted. And he will not testify?

MR. PHILLIPS: He will not testify.

THE COURT: If he will not testify, you're free to go.

MR. PHILLIPS: I'm going to stay for a while, if I may.

THE COURT: You can stay. And if he's here -- I don't know if he's here or not -- he can be **[46]** returned back to his unit.

MR. OTTOWAY: Actually, Your Honor, if we could, if he could stay, in case he decides to change his mind during the proceeding. Just keep him here until that period, until this is concluded.

THE COURT: Just let the sheriff know that. Okay.

MR. BENJET: Your Honor, you know, I don't know, holding him up here for how long?

THE COURT: Until we're finished. And we'll let the lawyer know he's never coming in this courtroom without you.

MR. PHILLIPS: Thank you, Judge. Mr. Fennell reserves the right to change his mind, but right now that's our position.

THE COURT: All right.

MR. OTTOWAY: And, Your Honor, we would ask, again, with any Fifth Amendment invocation that no adverse inference may be drawn from that.

THE COURT: So done.

MR. BENJET: Your Honor, I think that's actually a more complicated issue than that, and we can take that up. I'm happy to take that up, you know, in a little bit, but I do think that this is a circumstance in which an adverse inference would be permissible. And **[47]** so, you know, I'm happy to talk to you about that now, or I know we talked about doing a document review before Curtis Davis testified, based on the Court's disclosure. I can take that up right before we go into Curtis Davis after that break.

THE COURT: Okay. Is now when you need the break?

MR. BENJET: Yes.

THE COURT: So everyone knows, there's several videos of statements that the defense has to look at. And it's going to take approximately an hour. And I know y'all are all sitting around. I am going to give them an hour to review it so that they can question the witnesses with some knowledge of what the

person may or may not have said. So that's what all this is about, so that you all know.

We will be recessed for one hour.

(Break.)

THE COURT: Have you had an opportunity to review all materials?

MR. BENJET: Yes, we have.

THE COURT: So now you are prepared to call your first witness?

MR. BENJET: Yes, Your Honor. We will call Curtis Davis.

[63] *THE COURT*: That's sustained.

MR. OTTOWAY: It's not permissible direct examination.

THE COURT: That's sustained.

Q. (*By Mr. Benjet*:) So, on the morning of April 23rd, did you see Jimmy Fennell?

A. Yes, I did.

THE COURT: Excuse me. What year are we talking about?

MR. BENJET: Oh, I'm sorry. 1996.

THE COURT: All right. Go ahead.

Q. (*By Mr. Benjet*:) So let me clean that up then. On the morning of April 23, 1996, did you see Jimmy Fennell?

A. Yes, I did.

Q. And where did you see him?

A. The first time I saw him?

Q. Yeah.

A. It was in the break room of the sheriff's office here.

Q. And did you spend some time with him there in the sheriff's office?

A. Yes, sir.

Q. Did you go anywhere with him, subsequent to seeing him there in the sheriff's office?

[64] A. All day long.

Q. Okay. So you were with him all day?

A. Yes.

Q. Did you go out to take a look at his truck?

A. Yes.

Q. And where did you go after that?

A. I believe that we went back to his apartment in Giddings.

Q. And what was the purpose of you going back to his apartment?

A. Just to be comfort, assist in helping him make it through what seemed to be a very, very difficult time for both him and me.

Q. And while you were there at the apartment with Mr. Fennell, did you have a conversation about the events of the night before?

A. We did talk about the night before.

Q. And so did he tell you that, you know, he felt some blame for allowing her to drive to work that morning?

A. Yes.

MR. OTTOWAY: Hearsay, Your Honor.

THE COURT: That's sustained.

MR. OTTOWAY: Move to strike the answer.

MR. BENJET: Your Honor, respecting

[70]Honor.

THE COURT: That's sustained. We're getting kind of off here.

What we need to ask and answer: What did you tell CNN? You'll have lawyers for the State ask you some questions here in a minute about why you answered it a certain way. But he's asking you: What did you tell CNN?

That's all we want to hear at this point, correct?

MR. BENJET: Judge, maybe I can suggest, he's reviewed these statements.

Q. (*By Mr. Benjet*:) Would he -- would you adopt those as what you told CNN?

A. Yes.

Q. And those statements --

THE COURT: Are you going to offer those?

MR. BENJET: Yeah, that's what I am going to do. So I am going to offer the transcript of the CNN interview, which is at Tab 2. I am going to mark that as Applicant's Exhibit 1.

(*Applicant's Exhibit No. 1 marked*.)

MR. BENJET: May I approach?

THE COURT: Please.

MR. BENJET: Your Honor, I'd ask that be **[71]** admitted, based on Officer Davis' adoption as what he told CNN.

MR. OTTOWAY: Your Honor, I think it should be -- I have no objection to certain portions of it. I don't think the entire thing needs to come in. If the relevant portions want to come in, I have no objection.

THE COURT: It's all admitted.

MR. BENJET: Thank you, Your Honor.

(Applicant's Exhibit No. 1 admitted.)

Q. (*By Mr. Benjet*:) Now, did you stay in touch with Jimmy Fennell after Stacey Stites was murdered?

A. For a while, yes, sir.

Q. And are you aware he moved on to a different police department after Giddings?

A. Yes, I was.

Q. And which department was that?

A. Georgetown Police Department, I believe.

Q. Did he then move away from Giddings?

A. Yes.

Q. And that was why you didn't keep up as much?

A. It aided that he was in a different city, different timeframe, yes, sir.

Q. So you don't have any personal beef with Jimmy Fennell?

[73] of us, Counselor?

Q. This one or others.

A. Can I read this one?

Q. Yeah, absolutely.

A. Thank you.

(*Pause*.)

A. I'm reading it, but I don't remember it.

Q. If the fact that you were -- have reported something like this information about the murder to investigators of Bastrop County appeared in a police report, would you have any reason to question that?

MR. OTTOWAY: Your Honor, he said he doesn't recall.

THE COURT: That's sustained.

Q. (*By Mr. Benjet*:) So as an officer of law, if you did have any information regarding the murder of Stacey Stites, do you have an obligation to tell the truth about that?

A. That is correct.

Q. Do you know who Rocky Wardlow is?

A. I do.

Q. Did you know him back in 1996 --

A. Yes.

Q. -- through '98?

A. Yes, sir.

[74] Q. And you talked to him about the Stites murder investigation; is that correct?

A. Talked to, interviewed, spoken in passing? Which? I am going to have to define that. I am going to say we spoke, yes.

Q. About the investigation?

A. Yes.

THE COURT: No, he's asking you -- what are you asking him?

Q. (*By Mr. Benjet*:) Oh, did you speak to Rocky Wardlow about the investigation of the murder of Stacey Stites?

A. Yes.

Q. Do you know who Forrest Sanderson is?

A. Yes, I do.

Q. And was he an assistant Bastrop County district attorney at the time of the Stites investigation?

A. Yes, sir.

Q. And you talked to him about the Stites investigation during the time period before Mr. Reed's trial; isn't that correct?

A. I don't recall a specific conversation or interview or anything like that, no, sir. I don't recall.

Q. Now, you were disciplined by the Bastrop County **[75]** Sheriff's Office in relation to what you said to CNN; isn't that true?

MR. OTTOWAY: Objection, Your Honor, specific incidence of conduct.

THE COURT: That's overruled.

THE WITNESS: Say it again.

Q. (*By Mr. Benjet*:) You were disciplined by the Bastrop County Sheriff's Office in relation to what you said to CNN; is that right?

A. Yes, I was.

Q. What was the discipline?

A. Excuse me?

Q. What was the discipline that you received?

A. Two weeks off, without pay.

Q. Was that a good amount of money for you?

A. Yes, sir.

MR. OTTOWAY: Objection, Your Honor.

THE COURT: That's sustained.

Q. (*By Mr. Benjet*:) Were you aware of what the grounds for the discipline was?

A. The ground for the discipline?

Q. Yeah.

A. Yes, sir, I was.

Q. And was the grounds for the discipline that you didn't get permission to do the interview?

[76] A. That is correct.

Q. Now, you were questioned by an investigator in relation to that disciplinary proceeding; is that right?

A. Yes, sir.

Q. Now, where did that questioning take place?

A. In one of our interview rooms in the investigative department of the sheriff's office.

Q. Is that a big room?

A. No, sir.

Q. And how many -- where did -- small room? Is that a room you've used? Is that a room you've used before?

A. Several times.

Q. In what capacity?

A. Investigations.

Q. Were you interrogating a witness in a room like that?

A. Interviewing -- interviewing witnesses and suspects alike, uh-huh.

Q. Was the door open when you were questioned about this?

MR. OTTOWAY: Relevance, Your Honor.

THE COURT: That's sustained.

Q. (*By Mr. Benjet*:) Who interviewed you?

A. Excuse me?

[77] Q. Who interviewed you about this matter?

A. It had been Rick Cole.

Q. Rick? How do you spell the last name?

A. C-O-L-E.

Q. Did he seem happy about what you said?

MR. OTTOWAY: Relevance, Your Honor.

THE COURT: That's overruled.

THE WITNESS: Seemed happy --

Q. (*By Mr. Benjet*:) Did he seem happy about what you said to CNN?

A. He was professional. I wouldn't say happy or unhappy.

Q. Did he indicate that the prosecutors were happy about what you said -- the Bastrop County district attorney was happy about what you said to CNN?

A. He was --

MR. OTTOWAY: Hearsay, Your Honor.

THE COURT: That's sustained.

Q. (*By Mr. Benjet*:) During that interview, did you ask Cole where this came from, the disciplinary proceeding?

A. I'm not sure I understand.

Q. Did you ask the interrogator, Officer Cole, why you were being disciplined?

A. No. That point was made pretty clear.

[78] Q. Did you ask him where the impetus for the discipline was coming from?

A. The what?

Q. Where the idea to discipline you, where the complaint was coming from?

A. I don't recall anything like that.

Q. If you saw a video of that interview, do you think that would refresh your recollection?

A. I have not seen an interview.

Q. But, if you saw it, would that refresh your recollection?

A. Of my interview with Cole?

Q. Yeah.

A. Oh, I'm sure it would.

MR. OTTOWAY: Your Honor, I think they are going to attempt to refresh his recollection by playing a video on the screen. I don't believe that that's appropriate. It should be presented to him personally.

THE COURT: I agree.

UNIDENTIFIED SPEAKER: Show it to him before --

THE COURT: Sure. Yeah.

MR. OTTOWAY: Then, Your Honor, if we may approach.

[81] this might be a good time to take lunch so that he can review it and we can come back.

THE COURT: Y'all agree?

MR. BENJET: No objection.

THE COURT: How much time do y'all normally take around here? An hour?

12:30. We'll see everyone back at 1:30.

(Lunch break.)

THE COURT: You may continue, sir.

MR. BENJET: Thank you, Judge.

THE COURT: And let me say this before you start: Officer Davis, I need for you to speak up a little louder so the court reporter and I can hear you.

THE WITNESS: Yes, sir.

THE COURT: You might have to lean into that microphone.

Go ahead, please.

Q. (*By Mr. Benjet*:) Now, Officer Davis, you testified earlier that you received two weeks' suspension without pay?

A. I will say two weeks, but it was -- it was four weeks.

Q. Now, when you agreed to do the CNN interview, did you take time off work for that?

A. No, sir.

[82] You mean, did I take the day off? What are you asking?

Q. Was it a weekend or a weekday that you --

A. It was a weekday.

Q. Did you tell your supervisor that you were going to do this interview?

A. No.

Q. Was there a sergeant of any -- at the sheriff's office that you went and told?

A. If I would have told somebody, there would have been, yes, sir.

Q. And who would that have been?

A. Sergeant Wofford.

Q. Do you remember if you did or didn't tell Sergeant Wofford?

A. I did not.

Q. Would you have told Investigator Cole that you told -- not asked permission, but told your sergeant that you were doing this interview?

A. I don't recall that.

Q. If you watched a videotape of your interview with Investigator Cole, would that refresh your recollection?

A. If I watched the videotape, it would.

THE COURT: Excuse me a minute.

[83] Go ahead and have your seat again, Counsel.

MR. PHILLIPS: Thank you, sir.

THE COURT: All right. I'm sorry for that. Go ahead.

MR. BENJET: Judge, in the interest of efficiency, we probably will refresh his recollection, but I want to go through a number of questions before we get there.

THE COURT: All right.

Q. (*By Mr. Benjet*:) Now, when you did that CNN interview, did you think at the time you were doing anything wrong?

A. No.

Q. In fact, you testified you thought you were helping be correct and accurate?

A. That's correct.

Q. And now, once this came out, though, you got disciplined; isn't that true?

A. This is true.

Q. And you learned that came from the DA to the sheriff to internal affairs; isn't that true?

A. Yes, sir.

Q. Now, how many times were you interviewed by internal affairs? How many times were you interviewed **[84]** by internal affairs?

A. Just that one time.

Q. If there was video of you having two interviews, would you doubt that that was the case?

A. I was spoke to one time.

Q. Well, is it possible that the interview began and then you brought in a representative, and then it continued after you brought in a representative?

A. That's exactly how it was.

Q. Okay. Now, were you made aware, at the time of the interview, that if you did not cooperate you could lose your job?

A. Yes.

Q. And were you made aware, in fact ordered, that if you discussed the matter that you could lose the job -- your job?

A. I was told --

MR. OTTOWAY: Hearsay, Your Honor.

THE COURT: That's overruled at this time. Go ahead.

Q. (*By Mr. Benjet*:) And so, at that time, you were told that if you discussed the matter you could lose your job?

A. I was told not to discuss it.

Q. And this is the disciplinary proceeding that **[85]** came from the DA to the sheriff to the internal affairs?

A. Yes.

MR. OTTOWAY: Personal knowledge, Your Honor.

THE COURT: That's sustained.

MR. BENJET: Well, I think it was answered already.

THE COURT: We'll strike the answer, then.

MR. OTTOWAY: I move to strike the answer, Your Honor.

THE COURT: Done, strike.

Q. (*By Mr. Benjet*:) Now, you've testified -- just to kind of catch up, but, when you gave that interview, there was no intention to help Mr. Reed in any way --

THE COURT: Time out for a minute. Which interview was it, internal affairs, or was it CNN or --

MR. BENJET: Oh, excuse me.

Q. (*By Mr. Benjet*:) You have testified that, when you did the interview with CNN, you had no intent to help Mr. Reed or his case?

MR. OTTOWAY: Asked and answered, Your Honor.

THE COURT: That's overruled. Go ahead.

Q. (*By Mr. Benjet*:) Is that correct?

[90] overruled, Your Honor?

THE COURT: Yes, it is.

DIRECT EXAMINATION (CONTINUED)

BY MR. BENJET:

Q. All right. I am going to show you Applicant's 2. Let me put it on the screen so we can all look at it.

Now, do you see the first finding up here? It says, you know, that it was:

"Sustained-The evidence obtained in the investigation established that the employee committed the alleged misconduct. Investigator Davis did provide what he felt was testimony regarding this case" --

THE COURT: Time out a minute. I have known all my career that when lawyers are reading they read faster than court reporters can take it down. So if you'll slow down just a little bit, then read it so she can take it.

MR. BENJET: I'll do my best.

Q. (*By Mr. Benjet*:) -- "regarding this case" --

MR. OTTOWAY: Your Honor, again, I'm not sure why we're reading it. It's been admitted.

THE COURT: That's all right. We are going to read it. That's what everybody wants to do. Let's do this. Get along.

[91] Q. (*By Mr. Benjet*:) -- "regarding this case that could bring influence to a cause for a retrial, even though this testimony was never solicited by previous prosecution or defense teams. Davis did not

prepare a supplemental report or notify his supervisor regarding the need for such report."

So that's the first finding.

Now, was it your intent to influence or cause a retrial?

A. No.

Q. You're pretty well known in the Bastrop County Sheriff's Office, aren't you?

A. Yes, sir.

Q. I mean, do you think anybody would really even suspect that you would ever intend to cause a retrial in this case?

A. I don't know --

MR. OTTOWAY: Personal observation, Your Honor.

THE COURT: That's sustained.

Q. (*By Mr. Benjet*:) Second finding was:

"Bastrop County Rule of Conduct 21. Public Statements. Sustained-Investigator Davis did, without Sheriff approval, make statements to a public media that were recorded regarding the above case with the **[92]** knowledge his statements would be used in a televised media documentary."

Now, we've been talking about this. Have you been able to think about whether you had discussed this with other members of the office before you gave the interview to CNN?

A. Did I discuss it?

Q. Yeah.

A. No, I did not.

Q. Okay. Were you aware that other -- that filming was done in the Bastrop County Sheriff's Office with regard to this program?

A. I was made aware of that after the fact, yes, sir.

Q. And so permission had to have been given to somebody?

A. At the time it was, I believe, the sheriff's clerk.

Q. All right. Let me take you back to Applicant's Exhibit 1. And I had handed up my copy, so if I can grab that off of the clerk's desk here.

And I just want to clarify this, in case we didn't get that. Now, you have adopted this -- the statements in this exhibit as what you told CNN; is that right?

[93] A. Pretty close, yes, sir.

Q. Well, pretty close? Is there anything that's inaccurate?

A. There is a couple words that look like they came off of --

Q. Well, let me direct you to Page 31, then, just to make sure that these are not words that you have any issue with. So do you see, in the middle of the page, it says:

"She would go to bed at 9:00, 8:00/9:00 at night in order to get ready for the shift the next morning. So he didn't want to disturb her. That was kind of their sleeping arrangement. You know, didn't want to just come in and disturb her. And so that was part of

the other reason why he said he didn't come home, you know, uh, earlier than he did."

That's a statement you will adopt?

A. Yes, sir.

Q. And the "He said he didn't come home," who is the "he" there?

A. That would have been Jimmy Fennell.

Q. Now, let's go back to Applicant's Exhibit 2, which is the disciplinary findings. And I'm going to show you again, if you remember, the part we talked about, "Davis did not prepare a supplemental report."

[94] Do you remember that finding that we talked about?

A. Yes, sir.

Q. Now, if you were required -- if you had nothing to do with an investigation, would you be required to prepare a report?

A. That would be correct. That would be a correct statement.

Q. Well, I'm sorry. If you had nothing to do with an investigation, would you be required to prepare a report?

A. No.

Q. If you could turn to Tab 5 in the binder. And I'm going to represent that these are documents produced by the Bastrop County Sheriff's Department.

MR. BENJET: And, I think -- would the State stipulate these are business records?

MR. OTTOWAY: I think these were actually produced by the office of the Attorney General because it has the Bates stamp. It may be duplicates of what we produced.

MR. BENJET: Sure.

MR. OTTOWAY: But, no, I do not -- I stipulate to authenticity.

THE COURT: I accept it.

[113] *THE COURT*: Any redirect?

REDIRECT EXAMINATION

BY MR. BENJET:

Q. Now, everything in that CNN transcript that's Applicant's Exhibit 2 that you adopted as what you told CNN, that's what Jimmy Fennell told you; isn't that right?

MR. OTTOWAY: That's a very vague question, Your Honor.

THE COURT: Yeah. Try that over again, please.

Q. (*By Mr. Benjet*:) The statements that you told CNN that Jimmy Fennell told you in that transcript, you told those to CNN because that's what Jimmy Fennell told you; is that correct?

A. Yes.

Q. So he told you he went to the baseball field?

A. He told me he was at the ball practice.

Q. Yeah. And he told you he went out drinking with other officers?

A. He said they --

MR. OTTOWAY: Your Honor, I think we're going beyond the scope of what I was asking.

THE COURT: That's overruled.

Q. (*By Mr. Benjet*:) And he told you he went out **[114]** drinking with other officers?

A. He said that he drank after practice.

Q. And he told you that he came back after Stacey Stites was asleep?

A. I want to say that's an assumption, but, again --

Q. Well, I mean, let's take a look at what you adopted. And we went over this before, but I guess -- well, let's do it one more time.

Now, you adopted the statement that, you know, didn't want to just come in and disturb her, and so that was part of the other reason why he said he didn't come home, you know, earlier than he did. And that's the statement you adopted, correct?

A. I adopted that.

Q. And when I asked you who "he" was, you said that was Jimmy Fennell?

A. That's correct.

Q. And because that's what Jimmy told you?

A. That's correct.

Q. Now, you knew Jimmy Fennell pretty well, or you thought you did, in March of 1996, didn't you?

A. I knew Jimmy Fennell well.

Q. I'm sorry. Could you repeat?

A. I knew Jimmy Fennell well.

[125] A. Yes.

Q. And do you recall -- the capital murder trial of Mr. Reed was 1998; is that right?

A. Yes, sir.

MR. BENJET: And, Judge, if you'll permit me to kind of go through this with the witness on Exhibit 2, I think that's going to be the easiest way to try to get through.

THE COURT: That's fine.

Q. (*By Mr. Benjet*:) All right. Officer Davis, I want you to take a look at -- well, first off, take a look at Page 29 of Exhibit 2 (sic). Now, if you look at the line here that starts at 17:00:04, the line that I've just pointed on, and do you see here where it says, "When Jimmy -- when Jimmy talked to me about the night before"?

Now, there, was that again something that Jimmy -- you attributed a direct statement from Jimmy Fennell?

A. Yes, sir.

Q. Okay. So when Jimmy Fennell said something to you, and you were not making an assumption, you are attributing it to his speech, you made that statement; is that correct?

A. We did talk, but I would still say it was an **[126]** assumption based on some of the conversation, yes.

Q. Let me -- so you're saying it is an assumption based on what Jimmy Fennell told you?

A. There are facts, and then there's parts that, like I am saying, that's an assumption.

Q. Okay. Well, let's kind of walk through this here. So now, if you go to Page 30, and about middle of the page. And I am just going to point this to you here, "Whatever their little arrangement," it says in the middle here, "but I remember him making comments about he should have got up out of bed."

A. Yes.

Q. So you said he's making comments. You are attributing those to comments. That's not an assumption, correct?

A. That would -- that would be true.

Q. Okay. Now, go to the following paragraph at the bottom there, where it says, "The night before, based on what he told me, uh, they -- him and a couple of other police officers."

Now, here you say, "Based on what he told me." That's not an assumption?

A. That is not an assumption.

Q. Okay. Now, let's go to the next page, 31. And let me clear this up. And so one of the things that he **[127]** told you in this paragraph here on 30, "based on what he told me" was that he was drinking beer?

A. Yes.

Q. He told you that?

A. Yes, sir.

Q. That's not an assumption?

A. That's not an assumption.

Q. Now, you then say -- I am on the top of 31. Do you see that?

A. Uh-huh.

Q. And you say, "I don't know how -- what time...somebody was to ask me a direct question what time they got home that night, I couldn't answer 'cause I don't know that. But it was later that night after practice."

So you're very clear, when you're saying that, that you don't know; is that correct?

A. It doesn't say it exactly. I just --

Q. Sure. But was it your intent in saying those words to make it clear to the person who you were being interviewed by that you didn't know exactly the answer to that question?

A. That would be correct.

Q. Now, let's go to the next paragraph. "So, um, I would assume definitely 10:00-ish, 11:00, maybe at **[128]** night."

That's an assumption, correct?

A. That is an assumption.

Q. And you said it was an assumption. You told him that?

A. Yes.

Q. And now -- and you testified earlier. You were careful when you were making assumptions -- or excuse me, when you were -- didn't know something, that you would tell them you didn't know it. That was your testimony before; isn't that right?

A. That is correct.

Q. And then the bottom of that same paragraph, and so -- and you're talking about the sleeping arrangements. And you say, "You know, didn't want to come in and disturb her. And so that was part of the other reason why he said" -- do you see that, "why he said he didn't come home"?

And so just like you did before, when you are attributing something to Jimmy Fennell's statements, you attribute it to his statement; isn't that right?

A. Where are you seeing that?

Q. Oh, sure. "You know, didn't want to just come in and disturb her. And so that was part of the other reason why he said he didn't come home." And so there **[129]** you are attributing that to a statement by Jimmy Fennell just like you did before; isn't that right?

A. That would be correct.

MR. BENJET: Pass the witness.

THE COURT: Anything else?

MR. OTTOWAY: Please, Your Honor.

FURTHER RECROSS-EXAMINATION

BY MR. OTTOWAY:

Q. Did Jimmy Fennell tell you what time ball practice ended?

A. No, he did not.

Q. Did Jimmy Fennell tell you what time he got home on April 22, 1996?

A. No, he did not.

Q. Did Jimmy Fennell tell you what time Stacey Stites went to bed?

A. No, he did not.

Q. And by that I mean that night --

A. No, he didn't.

Q. -- April 22nd?

A. No, he did not.

Q. Did Jimmy Fennell tell you how many beers he had on April 22, 1996?

A. No, sir, he did not.

Q. And so everything we just covered right there, **[130]** all those prior questions, those were all based on assumptions, were they not?

MR. BENJET: Objection. I don't think he -- I think he just answered, no, he did not. I don't know what he's assuming.

THE COURT: That's overruled.

Q. (*By Mr. Ottoway*:) So the answers that you provided to CNN with respect to the questions that I just went over with you were all based on assumptions, correct?

A. That's correct.

Q. And some of those assumptions are when Stacey Stites would normally go to bed?

A. Yes, sir.

Q. Correct?

A. That's correct.

Q. And what time your daughter's Little League practice ended?

A. That would be correct.

Q. And so, just to be clear, you have no personal knowledge of any of those times, correct?

A. I have none.

MR. OTTOWAY: Nothing further, Your Honor.

THE COURT: Anything else from you?

DRS PRODUCTIONS

"DEATH ROW STORIES"

INTERVIEW WITH CURTIS DAVIS

MEDIA ID: THS_62415_09.OGG

TC_16_25_11_20160414_DAVIS_1,

TC_16_58_18_20160414 _AVIS_2

MALE #1:

16:25:36:00 Tell me your name and what your title is?

CURTIS:

16:25:41:00 My name is Curtis Davis. I work at the Bastrop County Sherriff's office as a Criminal Investigator.

MALE #1:

16:26:18:00 So take me back with you to the mid nineties and tell me what Bastrop was like.

CURTIS:

16:26:25:00 Bastrop back there in the mid nineties was very uh, a rural type of setting. Uh, we were basically the- the room and board for Travis County. Uh, people came and lived there and then worked in Travis County, for the most part Austin. And uh, so there wasn't a lot to even

do. Matter of fact the only restaurant that was open 24 hours there in Bastrop at the time was the Water Burger. And uh, the Pig Grill and uh, so uh, those are the only two things that you had a choice of if you were working nights in **[2]**Bastrop County because those were the only two things open.

CURTIS:

16:27:05:00 All the other convenience stores and everything closed down overnight. So uh, to kind of give you a setting of the idea that's behind what was available back there it was large ranching, farming community, rural type living, rural type subdivisions and uh, that was pretty much the makeup of the 1990s of Bastrop.

MALE #1:

16:27:28:00 Do you know what the- I mean they call it the Lost Pines Region and I, uh- This is a test. I'm just curious if you know what uh, Lost Pines are?

CURTIS:

16:27:37:00 Lost Pines would be that you're driving on the highway and all of a sudden there's a bunch of lo-lost pines. There's a bunch of trees that just kind of seemed like they didn't quite belong and it would be the-the

pine trees of that area. And uh, so that's pretty much where the Lost Pines came from.

MALE #1:

16:27:54:00 Hmm. So when did you get involved in uh, the police force. I mean you were in **[3]** training. Well let me start; when-when did you first meet Jimmy Fennell?

CURTIS:

16:28:07:00 Uh, I had started working, when I met Jimmy Fennell I had started working at the Bastrop County Jail and uh, he was also a-a jailor at the time and I think he hired on maybe a week earlier than I did. And uh, we worked the same shift together.

MALE #1:

16:28:24:00 Didn't you guys, uh, go to the academy together?

CURTIS:

16:28:27:00 We later went on to the academy together. Uh, I think it was probably about a year later uh, the Bastrop County Sherriff's Office sponsored an uh, a police academy there at the office which was pretty handy. And uh, at that point me, Jimmy, several other uh, people that worked the jail

and around the community uh, of Bastrop uh, went to that academy.

MALE #1:

16:28:51:00 So if you're jailers together, does that mean you guys get to spend a lot of time together or are you working different shifts or what's it like?

[4]CURTIS:

16:29:01:00 As a jailor you get to spend a lot of time together. Um, the shifts that we worked at Bastrop back then and still currently today were 12 hour shifts. And uh, you would work a rotation of every other weekend off which consisted of a Friday, Saturday and Sunday. And the rotation on Monday and Tuesday would also fall into that as far as uh, being off on Wednesday and Thursday. So it just rotated over and over again but we worked 12 hours shifts and yes we were together. Uh, back in those days uh, the jail basically when you walked in it shut the door behind you and you were there all day.

CURTIS:

16:29:40:00 And it shut the door behind you when you walked out. Um, they fed us. You know we ate at the jail; we worked the jail, if we had to go to the

restroom it was in the jail. Um, so yes we spent a lot of time together.

MALE #1:

16:29:57:00 So tell me about Jimmy, what-what kind of guy was he like?

CURTIS:

16:30:01:00 Jimmy Fennell was a very quiet individual. I mean he- I often-often sensed him as the follower type. He-he uh, was very quiet. **[5]** Uh, he-he enjoyed the fact that he was looking to become a police officer some day. Uh, that's what we talked about uh, that's what we visited about. Uh, it was-it was a goal. And uh, that's got to start somewhere and for both of us it seemed like the jail was a good start. It was uh- It was back then real easy to get hired on particularly Bastrop in the jail.

CURTIS:

16:30:40:00 Um, so it was a good fit. We got on, we started working. Uh, Jimmy is such you know took care of his people, took care of his inmates. I didn't know him necessarily to be mean or anything like that. Um, he took care of his business you know. Uh, very precise, he liked being precise in his paperwork and things

along those lines but a very-very laid back, very quiet person.

MALE #1:

16:31:10:00 When you say he was more of a follower, tell me a little bit what you mean?

CURTIS:

16:31:17:00 He-he wasn't the type to jump up and rah-rah in front of a crowd. He wasn't the one to jump up and say uh, "This is what we ought to do, gang charge ahead, let's go." He wasn't that guy. Um, he was more the guy, "Let's sit back and see what they're fixing **[6]**to say. Let's see what they're fixing to tell us to do. You know let's-let's-let's follow directions, follow directives." That's the guy I'm talking about.

MALE #1:

16:31:41:00 Why do you think Jimmy wanted to be a-a-an officer so-so badly?

CURTIS:

16:31:48:00 Uh, Jimmy wanted to be an officer is a good question. I-I'm not sure that I even have an answer for that. I know we compared thoughts um, back then, back during those days. Of course you know the-the-the little show of uh, COPS. And that was a

very prevalent show on-on TV at the time and-and for-for him he was obviously way younger than I was and-and yet our interests were still going towards the same directions and that was that we had a goal that we wanted to meet. And uh, probably the interest in seeing COPS.

CURTIS:

16:32:30:00 Having-having and being around cops in my family uh, we just talked about that all the time. And then of course once you started working in a corrections environment you deal with the cops on a daily basis and you see them and you see them what possibly on what you would like to be; your dream. And **[7]** uh, that's- it kind of drives you a little bit more I guess.

MALE #1:

16:32:55:00 What is it about that that you think was attractive to him?

CURTIS:

16:32:59:00 Being a police officer? The honest opinion of I believe anybody that would want to be a police officer um, again I can't speak for him. I don't know exactly why he wanted to be a police officer. I-I would say that there is a certain amount of uh, prestige

you know a-at least back those days uh of being a police officer. You're a police officer, you're a cop and particularly you know in a rural area uh, the respect level for law enforcement is generally pretty high. And so to have a respect level of-of people of the community, people that you associate with, you got the store with.

CURTIS:

16:33:42:00 They see you, they know you're the police officer in the area; it-it was probably alluring because of that factor you know for-for Jimmy, you know.

MALE #1:

[8] 16:33:56:00 Did uh, did he tell you when he started seeing Stacey, do you remember if he talked about that?

CURTIS:

16:34:03:00 Yes he talked about that.

MALE #1:

16:34:04:00 Tell me about that?

CURTIS:

16:34:04:00 Jimmy-Jimmy talked about seeing Stacey.

MALE #1:

16:34:06:00 I'm sorry you're going to have to start over, Jimmy?

CURTIS:

16:34:08:00 Yeah Jimmy talked about seeing Stacey uh, probably the first time he met her. Um, I believe the story goes and-and you're going to have to excuse. It's been 20 years but I believe the story goes that uh, he'd met her at a softball game and they talked, and talking let to going and getting drink together. Uh, I believe the drink was non-alcoholic; I believe it was actually soda water and that's what he made fun of. He said, "We went and got a drink together and all we got was a coke." He said but he said "She was pretty cool. She's pretty, she's attractive, and-and she was very- seems very **[9]** outgoing." And he made a comment that first conversation with me that has always stuck in my mind and that is that he said he could see himself being with somebody like this the rest of his life.

CURTIS:

16:34:58:00 And I just kind of looked at him and said, "I've been married for a long time, you might want to look into this." You know. So.

MALE #1:

16:35:05:00 And do you remember when you first met her?

CURTIS:

16:35:08:00 Uh, the first time I met her she came to one of our academy classes.

MALE #1:

16:35:14:00 Can you start that over and use her name?

CURTIS:

16:35:15:00 Yes, yes. The first time I met Stacey she came to one of our academy classes and uh, came to visit Jimmy, drop off something Jimmy; dinner or something. I don't really recall. Uh, but she came up there and he introduced me directly to her at that point. And again big smile, big eyes uh, a very attractive young lady. Um, I could see why **[10]** he was-he was you know looking forward to being with her someday maybe.

MALE #1:

16:35:45:00 So you and your wife and family got to know her as well, got to know them as a couple; tell me about that?

CURTIS:

16:35:53:00 Sure. My wife and my family we got to know Stacey and uh, even Jimmy a little bit more through uh, the ongoing medium of partners. And we-we became very good friends. Um, at the time my friends were my brothers. I didn't really have anybody outside of my family as friends. This was the first friend outside of high school that-that I actually enjoyed being around. We shared the same interests uh, we-we went hunting, we went shooting, we-we went fishing. Um, these were things we did. And of course once he started dating Stacey then Stacey was along on some of those situations.

CURTIS:

16:36:34:00 Uh, the hunting, the shooting, the fishing. Uh, just sitting around shooting the bull. You know uh, she would be around for some of those and uh, so we got to talk to her and interact with her. Um, at the time my-my daughter was 12 years old and she was involved and volleyball and-and sports and **[11]** stuff at school. And learned that Stacey had also been involved in volleyball and sports at school and so they kind of hit it off. And-and she kind of took

my daughter as a little friend, type of thing and every time she come over they talked.

CURTIS:

16:37:12:00 So it-it was a very pleasant relationship.

MALE #1:

16:37:17:00 So it sounds like you um, like you really got to know Stacey a bit. Tell me-tell me your impressions of her, what she was like uh, you know her character. What was Stacey like?

CURTIS:

16:37:31:00 Stacey's character was-was one of uh... I could see her fitting in very well at the time with Jimmy. She was somebody first off I could stand to be around. So it was-it was pleasant to have her... if I'm going to be with Jimmy, if we're going to do guy stuff together then it was always nice to have our women get along together too. And of course my wife was older than Stacey too but they were talking. They were able to talk. They were able to visit. They- she got along with-with my family. That was first and foremost very important. Um, the **[12]** second part of that would be her personality was just very outgoing.

CURTIS:

16:38:14:00 Very outgoing. Uh, the first time she came over to our home we had had a dinner and it was-it was and fortunately dinner at my house there's plates everywhere I mean because there's a big family. And Stacey was the first one to jump up and start cleaning the table off you know. And-and-and fully assisted my daughter, by telling my daughter. It just happened my daughters night and my-my boys wash cl- wash dishes too but uh, it just happened to be my daughters night to wash the dishes. And uh, she jumped up and told Kim, "I'm going to help you." And they did, they started helping each other. And uh, I remember laughing and cutting up and I mean we're talking about a 12 year old and what she was 19, 21 years old something around there at that time.

CURTIS:

16:38:56:00 And, uh, they're giggling and cutting up just like little girls you know at the sink. And I remember those pictures, I remember those thoughts and they're very pleasant. Um, again I... thirdly I guess I would say if I was looking for somebody for my buddy, my friend at the time I would want somebody **[13]** that-that was

going to take care of him. That was going to care about him and his-his goals and his dreams and that's exactly what she did. She promoted him, she pushed him uh, she directed. She would get on him with that finger and uh, Jimmy did it because he knew that's what- that was what was expected of him.

CURTIS:

16:39:41:00 And Stacey expected him to-to do the best he could and-and he always did. You know under her rule. So um, I guess that would be the three top items that I would probably list as far as Stacey's uh, personality and-and how she dealt with people.

MALE #1:

16:39:57:00 Hmm, now how did you find out that she was missing?

CURTIS:

16:40:07:00 I'd actually come to work that morning and when I walked in I saw Jimmy standing in what was kind of our break room there... well it's not kind, it is the break room there at the Sherriff's office and uh, that was odd. First off I knew he didn't work there anymore, what is he doing here? And he was standing by himself and I said basically exactly

that; "What are you doing here?" And his ex- first words out of his **[14]** mouth was "Stacey's missing. We can't find her." "Oh okay." And as I took that in um, I didn't know what to think. You know we-we live in a world particularly in law enforcement where the first thing we think of is the criminal side.

CURTIS:

16:40:53:00 And so what could've happened to her because she-she also in a personality trait that she had was working very hard at the time at-at the local store that we have there in town. And um, early hours, late hours; that was nothing for her. And for her not to be at work or for them not to be able to find her at work was totally outside the pocket. And so that would've been the first real feeling of loss that's something's not right. So.

MALE #1:

16:41:31:00 Let me take you back a second. Did uh, did he tell you when they had first gotten engaged? Do-do your remember that or?

CURTIS:

16:41:31:00 Oh he talked about that all the time.

MALE #1:

16:41:31:00 What-what did he talk about when he talked about it.

CURTIS: **[15]**

16:41:41:00 Yeah he... can I get a drink.

MALE #1:

16:41:47:00 It's a weird way to have a conversation I know.

CURTIS:

16:41:50:00 Yeah, I know where we're going though. Jimmy approached me and told me that uh, he had uh, finally decided that Stacey was going to be the one and that they'd actually talked about marriage. And he told me that uh, he was going to ask her to marry him and that uh, they would be engaged roughly probably by the plan uh, what would be about a year.

MALE #1:

16:42:20:00 Cool.

CURTIS:

16:42:20:00 And uh, that's kind of how I was told. And then uh, I believe we had a dinner...

MALE #1:

16:42:26:00 Sorry.

CURTIS:

16:42:42:00 We did a dinner uh, sometime later and kind of... because we always had dinners to have official things. You know and-and you know my family, baptisms, graduations, things **[16]** like that; well this was one of those dinners. You know it was-it was important to us, it was important to the family and so we had a fish fry and we invited them both over and you know she got to show us the ring and she was you know exhibitant [PH] to my daughter you know looky here and just like giddy little girls. I mean it just-it was a very happy moment.

CURTIS:

16:43:16:00 And uh, we had a-we had a big feed that night, big dinner and uh, and from there we knew they were-they were going to be together.

MALE #1:

16:43:26:00 Now Stacey was working real hard; I think she had switched to the morning shift. Tell me why Stacey was working so hard at the time?

CURTIS:

16:43:34:00 Stacey was working pretty hard at the time all of this had-had come to a head and that is that um, she was working at the store and had changed her hours so that she could make a little bit more money uh, so that she could help support further her own wedding because her mother didn't have a whole lot of means at the time. And so she took it upon herself to-to pay for that wedding. **[17]** And instead of just saying "Hey let's run down to the JP and go get married for 50 bucks?" or whatever it was back then. She still wanted to have that big wedding uh, wedding dress, the-the reception, the-the little girl dream I guess you would say.

CURTIS:

16:44:17:00 And because of that um, she did take on extra-extra duty, extra time and extra money because she took these shift uh, differential.

MALE #1:

16:46:40:00 Tell me again why she was working so hard?

CURTIS:

16:46:42:00 Stacey was working pretty hard at the time uh, uh, of their engagement and just after because she was uh,

trying to uh, pay for her own wedding. Uh, her mother was... didn't have a whole lot of means at the time and she just took it upon herself uh, to-to talk to the store management and see if she could do something to increase her pay and-and her-and her hours. And so she started going in early in the morning. Got some shift deferential because of it and uh, uh, she was working uh, longer hours to make more money. And it as all to go to buy her own wedding dress and things like that.

[18] CURTIS:

16:47:23:00 She could've gone and him-him and her could've gone to the-to the JP and spent 50 bucks and-and been done with it but she really wanted that little girl dream of the big dress, the big reception. You know the little pomp and circumstance type thing. And-and you know most of us guys can't necessarily relate to it but uh, you know having a-a young girl myself I-I was in the same area. So um, I understood it by the time I had to go through it with my own daughter a little bit better so.

MALE #1:

16:47:53:00 Mm-hmm. Um, now through my notes you had said that um, that he called you that morning um, when she disappeared. I'm not sure whether uh, he called you or he just showed up?

CURTIS:

16:48:11:00 No, he showed up. It wasn't... If I had said it would've been- that wouldn't have been true.

MALE #1:

16:48:16:00 Okay.

CURTIS:

16:48:16:00 So um, the way I found out was when I walked through that-that side employee door and I **[19]** turned to go to the jail. Where we work at there's a break room right there and I saw him there. And like I said it struck me as hey what are you doing here, you know type of thing because it-it really was odd for him to be there. Not to mention the fact if he was there he would've been there as a police officer and he'd have been in uniform. Ah, because he'd already starting working for Gideon's at that time. And uh, he was not, he was in street clothes. So that-that

immediately something-something wasn't right.

MALE #1:

16:48:54:00 Do you remember what time that would've been?

CURTIS:

16:48:56:00 It was early in the morning. I would say around eight o'clock in the morning maybe; somewhere around that timeframe. And uh, um, it just was unexpected to see him there at that time of the morning and particularly in street clothes and not in uniform. So.

MALE #1:

16:49:14:00 And what did he tell you and how did you react?

CURTIS: **[20]**

16:49:17:00 Well once I saw him in that break room he was standing by himself and my reaction was again uh, kind of why are you here? You know uh, kind of half-heartedly, "Why are you here?" You know. And uh, his direct comments were to me that-that Stacey was missing and that she didn't show up to work. That's all.

MALE #1:

16:49:41:00 And how did you react?

CURTIS:

16:49:42:00 Something's up, something is wrong because the reaction that I had was that something was wrong and that uh, something wasn't right and it was based on probably related to my job, my atmosphere of law enforcement that we always probably think of the criminal side before we think anything else. And uh, I also knew at the time that Stacey was very diligent in going to work and showing up to work and being on time and all that- those type of things. And for her not to have been at work or showed up on time that that was-that was way outside the pocket for her.

MALE #1:

16:50:27:00 And how was Jimmy behaving, feeling and?

CURTIS: **[21]**

16:50:32:00 He was very anxious.

MALE #1:

16:50:34:00 Who?

CURTIS:

16:50:34:00 Jimmy. Jimmy was very anxious that morning when he had told me this. Um, you could see in his eyes, you could see the movements that

obviously over the years now it means more to me than it did even maybe even then. But uh, the movements and the-and the-the body language that he was giving was one of high anxiety. Something was wrong. And he sensed it and yet he-he didn't directly say it. He knew something was wrong.

MALE #1:

16:51:09:00 And tell me how you found out when they found his truck?

CURTIS:

16:51:15:00 We had been at the office for a little while just because that's I think if I re-if I remember-if I remember right Jimmy was told when we were find-when we found out about the truck... When we found out about the truck Jimmy was told that uh, he had been told already to stay at that little break area. Don't remember exactly who he was waiting on at the time. I don't remember if it was city police uh, Aaron the-the **[22]** Sherriff's Office Investigators, uh, but he was there and he had been told to stay there. Well one of the investigators from the Sherriff's Office and I do not recall which one at the time. Uh, came and told him that uh, they had found the red truck.

CURTIS:

16:51:57:00 Jimmy's red truck. And with that being known immediately that's the first clue or as you would say it. Uh, well wherever that truck is she needs to be close by. And so that was the response we had. Um, he had came over to the Sherriff's Office that morning in Stacey's moms car and of course I had drove my own vehicle. Um, we both drove separate vehicles over to where the truck was found near the high school. I had got permission from my boss to stay with him. And be with him and uh, was given that permission. So I left the jail and went on uh, instead of reporting to work that morning.

CURTIS:

16:52:40:00 And uh, we both pull up outside the scene of where they had us stage and uh, sure enough the truck was parked over by what appeared to be if I remember right a dumpster area back behind the stadium.

MALE #1: **[23]**

16:52:53:00 And what was your first thought?

CURTIS:

16:52:59:00 Again the- My first thought again was that a criminal element had stepped into this. There's somewhere

something's not going to be right. Um, is she going to be hurt? Is she going to be uh, somebody will have taken her? All these things start going through your mind uh, it-it'd be about like walking into a room where your child's supposed to be and that child's not there. And you start rampantly running through the house checking windows, doors everything to make sure that the child didn't get outside of the home. And you find the child underneath a bed. You know you're hoping for the best but you are expecting the worst and you are-you-you look and prepare for the worst.

CURTIS:

16:53:46:00 And seeing that truck there vacant parked where it was immediately brought the worst ideas.

MALE #1:

16:53:56:00 Describe the scene for me in terms of what you saw, what the truck looked like, what they had Jimmy do?

CURTIS: **[24]**

16:54:03:00 When we got there to the truck uh, obviously there was a couple of investigators there and they were taking their pictures and-and doing their processing. Uh, one of the

things that became very quickly uh, made aware of; I mean we weren't there very long and Jimmy was called over to the truck. And he was asked uh, and I don't recall which investigator did this. Uh, but one of the investigators asked, "Jimmy tell us what's not supposed to be in the truck? What-what do you see? What's out of place?" Um, and just from a-a peering position you're looking through an open door, standing back from the door.

CURTIS:

16:54:44:00 Um, I remember him start making comments that you know there was-there was clothing uh, that was in the back seat that probably shouldn't probably have been there. There was uh, and it was some of Stacey's clothing. Um, there was uh, uh, what appeared to be some form of a-a I guess you would describe it as a mucus or a-a type of uh, um, element like that that was on the-the floorboard that he said that was there. And uh, it kind of looked like sputum or-or mucus or something along those lines.

MALE #1:

16:55:25:00 Bodily fluid.

[25] CURTIS:

16:55:26:00 Yeah bodily fluid. And it was on the-it was on the floor uh, of the floorboard. Um, the seat was all the way back and the seatbelt was in place. Uh, very common for people who don't want to be wearing a seatbelt; they'll lock it into place and just ride on the seatbelt. Uh, that's kind of what it appeared like; except the seat was laid all the way back also. Um, you could tell just by looking that there was a hair print I guess you would describe it uh, that was directly over what would've been the headrest area of this truck. It was a small S-10 pickup truck that had an extended cab.

CURTIS:

16:56:05:00 But yet if you laid the seat all the way back and-and let's say where a tall man or tallish person you could've sat in that seat and your head would've rested on the back windshield. Uh, there's not a lot of storage area behind the seat. I believe it was only like that. So um, that was something I would recognize that seemed a little out of the ordinary was the actual what appeared to be hair print on the back windshield caused by I couldn't tell you; sweat, water, uh, some kind of

oil, grease; I-I don't know. But it was obviously a hair **[26]** print. And uh, where somebody's head had rested against that back window.

CURTIS:

16:56:45:00 Um, there was nothing that I recall Jimmy making a note of other than the mucus on the floorboard. That there was something of a mucus type material that was on the floorboard. Uh, everything else that said was just kind of a disarray but nothing as far as wasn't there that should've not have been there other than that one mark on the floorboard.

MALE #1:

16:57:13:00 I think there was also one of her sneakers and an earring found in there which you might not remember but?

CURTIS:

16:57:20:00 Yeah, yeah and I don't remember whether the sneaker and earring were found by Jimmy or if they were found by the investigators themselves. Uh, I-I don't recall seeing that but uh, again it's been a while.

MALE #1:

16:57:34:00 Do you remember seeing anything outside of the truck?

CURTIS: **[27]**

16:57:40:00 I-I-I remember us looking around the truck; just walking around from a distance outside of the truck and unfortunately if you were to ask me if I saw anything outside the truck I'd have to tell you I do not-I do not remember seeing anything there outside the truck.

MALE #1:

16:57:59:00 And what was uh, Jimmy's... [NON-INTERVIEW]

MALE #1:

16:58:11:00 What uh, do you remember what Jimmy's reaction was to all this; to seeing the truck, to seeing the...

MALE #1:

16:58:18:00 Condition things around.

CURTIS:

16:58:19:00 Where is she at? His reaction was, "Where is she at?" He want-he wanted to know where she was at, when the truck was found, uh, again, probably the worst thing in the world that could happen sometimes to an

investigation is that the investigation happens to a police officer because there's a lot of training that goes into the p-police academies and the police officers' field training and things along those lines that are-that are directly responsible for the reports in which we write. So in order **[28]** to write those reports in a way that they have to be presented for court, they have to be very meticulous. They have to be precise, and because of that, we automatically start asking questions that normally people wouldn't maybe have asked.

CURTIS:

16:59:05:00 He's asking those questions, and he wants to know when the truck was found, where- you know, who found it. Uh, when-when it was seen, uh, was anybody around the truck? These are questions he's starting to fire at the investigators and of course, they're doing their job and saying, "Well, the truck was found this morning," and that was about all he could get out of 'em is what time it was found and the approximate time it was first seen at-at-at that location. And I want to say the first time it was seen by memory was around 5:00 if I recall.

MALE #1:

16:59:37:00 5:23.

CURTIS:

16:59:38:00 Yes, sir.

MALE #1:

16:59:40:00 Um, when... Let me jump back a second. Uh, when you first came to the Bastrop police department that morning...

[29] CURTIS:

16:59:53:00 Sheriff's office.

MALE #1:

16:59:54:00 Sheriff's office.

CURTIS:

16:59:54:00 Mm-hmm.

MALE #1:

16:59:55:00 Um, did he tell you anything about the night before what he was doing?

CURTIS:

17:00:04:00 Not then. When-when Jimmy-when Jimmy talked to me about the night before and some of the things that had-had led up to her leaving that morning to go to work, um, that was pretty much after the fact. It was after we were trying, and when I say

after the fact, I'm talking about once we'd gone and seen the truck. Um, he was basically excused. He was told, "Look. You need to go wait. We're- we're gonna be looking. We're gonna be searching for her. We will find her." And we're police officers. We know that's what they're gonna tell us. We knew that's what they wanted us to do and we knew not to check their authority.

CURTIS: **[30]**

17:00:45:00 So pretty much we did. We went back to-to Giddings, and uh-uh, went back to his apartment, and at that point is when he started talking about some of the things that had happened the night before. Um, he... It's the first time I really sensed that he was having some kind of blame. He blamed himself for allowing her to drive to work that morning because he had said that he had actually been driving her to work; that way he can keep the truck. He can go pick her up later. Whatever their little arrangement was, but I remember him making comments about he should have got up out of bed and drove her to tr- drove her to work that morning. He said otherwise she wouldn't be missing.

MALE #1:

17:01:33:00 So why didn't he?

CURTIS:

17:01:36:00 The night before, based on what he told me, uh, they- him and a couple of the other police officers, I believe, that were part of a little league coaching group uh, had consumed a little bit of alcohol. Uh, I won't say they were drunk 'cause that's not what he said, but they had drank a few beers after practice and uh, those beers were consumed in and around his vehicle, and uh, that uh, brought the truck back home that **[31]** night. Um, I don't know how- what time. I mean uh, if somebody was to ask me a direct question about what time they got home that night, I couldn't answer that 'cause I don't know that I was ever told. But it was later that night after practice.

CURTIS:

17:02:18:00 So um, I would assume definitely 10:00ish, 11:00 maybe at night. You know, after he powed around with the guys a little bit. Plus his whole reasoning for necessarily not coming straight back home was Stacey was asleep. She would go to bed at 9:00, 8:00. 9:00 at night in order to get ready for the shift the next morning.

So he didn't want to disturb her. That was kind of their sleeping arrangement. You know, didn't want to just come in and disturb her. And so that was part of the other reason why he said he didn't come home, you know, uh, earlier than he did. So...

MALE #1:

17:02:54:00 And uh, did he normally wake up when she left for work? And if he didn't that morning, why not?

CURTIS:

17:03:01:00 Well, and to ask me if-if uh, they- he normally woke up to take her to work, uh, I guess the question would be answered like **[32]** this. Their-their sleeping arrangements were based on uh, his job being shift work and now her job being shift work of an early hours and stuff. So they were kind of passing in the wind sometimes, you know, because of the way that they were working, but yet, um, for him to get up in the morning, that was mentioned to me that he was driving her to work so that he could have the truck, but every day I can't answer that 'cause I don't know for a fact that's true.

MALE #1:

17:03:40:00 Yeah, I don't mean to uh... It's not- it's more of what happened that morning.

CURTIS:

17:03:44:00 Yeah.

MALE #1:

17:03:44:00 You had told me when I talked to you on the phone.

CURTIS:

17:03:45:00 Yeah.

MALE #1:

17:03:47:00 That he said, uh, that he didn't wake up when she left because he had had a few beers.

[33] CURTIS:

17:03:51:00 Yeah, he'd had a few beers.

MALE #1:

17:03:52:00 That's all. So just do me a favor and tell me that.

CURTIS:

17:03:55:00 Yeah, uh, and basically the reason why he didn't get up the next morning whether it was because of uh, her wanting to allow him to sleep further because she knew that he'd

had a few beers the night before or he slept in because he had a few beers the night before. Whatever the decision was made, ultimately she drove herself to work that morning.

MALE #1:

17:04:13:00 And, uh, describe to me the scene where you were with Jimmy uh, when you found out that her body had been found. [CLEARS THROAT]

CURTIS:

17:04:42:00 When we discovered that her body had been found, that Stacey had been found, um, me and Jimmy were actually upstairs in his apartment. Um, he was basically laying on a beanbag on the floor, on the big bean bags, and I was sitting on a chair, and we were just talking about police stuff. Trying to-trying to think about something else for **[34]** right now, and I kept telling him every time he'd go back to the topic of her, "They're gonna find her. She's gonna be okay, and we'll deal with whatever has happened to her. We'll deal with it." And I just kept telling him that and reassuring him that. And this went on for a little while. I don't remember how long.

CURTIS:

17:05:27:00 We were actually in the-the room together, but uh, there was a knock at the door. I answered the door and, if I recall right, it was the chief deputy for Lee County; a guy by the name of Rodney Meyer, who is now the sheriff. Looked down and I could see that there was other police officers in the grassy area of the apartment, and there was cop cars from Bastrop. There was investigators from Bastrop. The Texas ranger was there. Rocky Wardlow. Uh, there was another deputy there from Lee County, and we walked downstairs, and we got downstairs. I believe it was uh, Investigator Connor who walked up and told Jimmy, "We found her, and she's deceased."

MALE #1:

17:06:24:00 And how did he react? Do you remember?

CURTIS: **[35]**

17:06:27:00 Shock. He didn't say anything. Yeah, I that-that Connor kind of gave him a-a brief hug and-and Jimmy started crying, and the officers that were out there that day, several of 'em, started crying, and uh, new phase in our life began. So...

MALE #1:

17:06:56:00 So just briefly tell me what happened after that; how things went.

CURTIS:

17:07:04:00 Well, right after they notified Jimmy, uh, knowing that uh, Stacey's mom had some medical issues, um, it was decided that they were going to tell Jimmy first, and then follow through with her mother, and actually her mother lived right underneath Jimmy, and we went into the apartment, sat down, and we told her at that point. Um, as you can imagine, a mother just lost her daughter. It was not a pleasant scene. Um, pretty much after that, you know, I-I told Jimmy I'd be there for him. Um, "You know, you need anything. . ." His dad has showed up.

CURTIS:

17:07:50:00 I turned basically him over to his father. [OFF-CAMERA CONVERSATION] Yeah, we-we went downstairs and we told his uh, her mother and uh, as you can imagine, mother just lost her daughter, and so the scene was very **[36]** chaotic. Um, wasn't pleasant whatsoever. And uh, from that point there's some time that had gone through and-and actually Jimmy's

dad had arrived and I turned Jimmy over to his father, and uh, I think I probably personally had to have a moment myself, you know?

CURTIS:

17:08:44:00 So um, I drove to my home there in Lee County and uh, now I get the job of telling my family who had grown fairly close to the whole situation and uh, and you know, obviously when you have somebody who has a car crash or they die in a car accident or a sudden health issue, a heart attack or something like that, it's explainable. You expect it almost sometimes, but to have a loved one or a friend removed from you through what was told to us by means of somebody else taking her.

CURTIS:

17:09:30:00 Um, that was hard to accept. It was hard to explain to young kids when I got home that-that afternoon.

MALE #1:

17:09:41:00 Uh, I can't imagine. I'd never been in that position and I'm glad I haven't. Um, I want to take you back to when you were a jailer then. Um, and ask you about this guy and Rodney Reed and whether you ever knew of him **[37]** or as an officer uh, did you ever

come across him? Like was Rodney Reed somebody that you knew before this happened?

CURTIS:

17:10:19:00 Rodney Wee- Reed was a- Rodney Reed was a person that uh, I had encountered in the jail uh, maybe a couple times. Uh, I wouldn't be for sure, but I do- I did recognize him from the jail. At the time I was working in the jail that I ran across Rodney a couple of times. I'd also, at the same time, been working for the Bastrop County Sheriff's office as a reserve deputy. Kind of a reserve deputy and go out on patrol and-and assist the deputies, uh, on nights off, vacations, things like that, and you can just kind of fill in a spot.

CURTIS:

17:10:53:00 And so I was doing that at the same time I was working at the jail. So I had an opportunity to patrol the streets of Bastrop uh, County, and cities of Alvin, Bastrop, Smithville. So I got to learn a lot of the people that were roaming around, that were available for uh, contact with police, I guess you would say. Um, also because of my stint in the jail, I recognize a lot of these people. I-I knew who they were, you know? But

then here they are at 3:00 in the **[38]** morning walking around and I'm thinking, "No, that's not gonna end up well."

CURTIS:

17:11:28:00 Uh, probably need to check this guy. You know, see exactly what he's doing. Rodney happened to be one of those people. Rodney was one of those people that was always out 3:00, 4:00 in the morning, um, usually on a bicycle, and uh, riding up and down the railroad tracks there in Bastrop, in the city of Bastrop. Um, it-it just became almost his uh, mode of operation, you might say, that if you ran across Rodney Reed, he was gonna be on the railroad tracks and he was gonna be there in the city of Bastrop and he was gonna be on a bicycle.

CURTIS:

17:12:02:00 You know, to stop and talk to him was almost stupid because you already knew who he was. You knew what he was doing, but at least you knew where he was. So it-it became, "Well, there's Rodney. At least we know where he is," you know? But uh, that would-that would have been, if I was to explain when I first met Rodney, that would be some of my

first encounters of Rodney would be along the railroad track of Bastrop and-and sometimes in the jail.

MALE #1: **[39]**

17:12:29:00 When you say you knew what he was doing, what-what kind of things was Rodney doing?

CURTIS:

17:12:33:00 I'd love to explain what I thought Rodney was doing at that hour of the night driving up and down, riding up and down the railroad tracks on a bicycle. Uh, I'm not sure I could give an explanation. I will say that I know that he had been stopped and talked to about drug uh, sales. He had been stopped and talked to about having drugs on him. Um, how many arrests were made because of that, I could not tell you. I never personally arrested him for anything. So that would probably have to be my answer on that. I don't know what Rodney was doing at that time of morning, uh, other than didn't have a job. So I guess he could roam whenever he wanted to.

MALE #1:

17:13:13:00 Did he have any kind of reputation among the police?

CURTIS:

17:13:16:00 He had a reputation among the police. Uh, Rodney uh, was somebody that was known, and unfortunately when you're dealing with a law enforcement community, it's better off not to be known because it's kind of like the bad kid in class. That bad kid, teacher **[40]** knows that bad kid every time. Well, Rodney was kind of developing that type of reputation as being the bad kid. He was always seems to be around when he wouldn't, shouldn't be around. Um, whether or not he was every arrested for burglaries or theft, um, I will say this, it seemed like every night that I ever encountered him on the rail road track, he was on a different bicycle.

CURTIS:

17:13:55:00 So again, small town theft, I-I really don't know what he was doing.

MALE #1:

17:14:01:00 Which is [I think?] when you, uh, you discover or when you learned who was arrested for Stacey's murder, what was your reaction?

CURTIS:

17:14:13:00 My reaction when I found out that Rodney had been arrested for

Stacey's murder was pretty awestruck. I- that's not really what I saw him as doing. He had already started...There was some cases that were coming in and again, you gotta remember I was a jailer at the time. I was not involved in direct investigations of any sort, but the Bastrop Sheriff's Office. And-and yet, you know, hallway talk and things, but uh, the hallway **[41]** talk at the time was that Rodney had been involved in a couple of assaults in the area, and that in all actuality, those assaults are what led to the knowledge that-that Stacey was one of his victims.

MALE #1:

17:14:57:00 I'm gonna be talking to David Board about that 'cause I-I know he... [OVERLAP]

CURTIS:

17:15:01:00 Yeah, and that's-that's your best answer is right there.

MALE #1:

17:15:03:00 And I know since you weren't involved.

CURTIS:

17:15:05:00 Yeah.

MALE #1:

17:15:06:00 Even though you might know the information.

CURTIS:

17:15:08:00 Yeah.

MALE #1:

17:15:08:00 It's not really best for me to talk to you about it

CURTIS:

17: 15: 12:00 Yeah.

[42] MALE #1:

17:15:13:00 Um, so what uh, what did you think? How did you feel when you found out that he was convicted and given the death sent- when Rodney was given the death sentence for his crime?

CURTIS:

17:15:37:00 The way I felt when I discovered that-that Rodney was found guilty and ultimately he was given the death sentence, um, the first part of that would have been we found out he was guilty. That was-that was step one. And actually the important step. The part about the death penalty, depending on what genre you talk, who you talk to, what facet of life you were brought up in, the

death penalty has its own-its own conversations.

CURTIS:

17:16:13:00 At the time, I was hurt. At the time, I was disappointed. I had to watch a woman be buried in her wedding dress. All those pictures came back to my mind watching my friend suffer the way we did that day together not knowing, finding out. And again, ultimately seeing her buried a few days later in her wedding dress that she worked so hard to buy and was so proud of. And I was a little upset. To say that I would like to see Rodney Reed die, that day, yes. I was very pleased with the outcome.

[43] CURTIS:

17:17:04:00 Um, I still say that there's justice and justice and because I do believe in the American justice system. I do believe and do support the death penalty. Um, again, we can conversate that for days, but ultimately that day I would say because of all the pictures that ran through my mind, I was very pleased of the fact that I found out that he got the death penalty.

MALE #1:

17:17:36:00 Forget about that day. Just tell me how you feel about it. Uh, not about the death penalty, but about him and about what-what the justice system wants to do to him. I mean. . .

CURTIS:

17:17:48:00 Well, that's... As...

MALE #1:

17:17:49:00 Whether he deserves to live or not.

CURTIS:

17:17:51:00 As we progress further and we get into what has become a 20 year stint of my experience, my law enforcement experience, my law enforcement teachings, um, what I know now about the case that's been more open than more prevalent throughout whether you listen **[44]** to the news or you listen direct case law coming out of the court. Um, there is no doubt in my mind that Rodney Reed caused the death of Stacey Stites, and because he caused the death of Stacey Stites, he should have to answer for that.

CURTIS:

17:18:28:00 A court of law has appointed him to die by lethal injection and I support that and I believe that that would be

the right thing to do. I believe based on-on the information that came out of the court and the evidence that was presented. There is no doubt that he committed this crime. Um, and he is going to ultimately be held accountable for it, uh, if not by man's law, by God's law.

MALE #1:

17:19:03:00 You said Rodney uh, caused the death of Stacey Stites. That sounds a little indirect.

CURTIS:

17:19:11:00 When I said Rodney caused the death of Stacey Stites, it-it may sound a little indirect, but uh, in all actuality it's a-it's a legal term. Uh, that's exactly what he did do. Whatever actions he did to cause that, um, ultimately his actions caused her death. Uh, the evidence speaks for itself. **[45]** I mean you know, the autopsies, the evidence that was found at the scene of her body. Uh, we can pretty well surmise what happened to her.

CURTIS:

17:19:43:00 Um, again, without being directly involved in the investigation, I can tell you what-what I know was found, but uh, I believe the evidence

definitely supports the fact that Rodney Reed caused the death of Stacey Stites, which meant he committed murder.

MALE #1:

17:20:04:00 It's just that's what most people think of. I mean e-even though you're using correct legalistic term. [COUGH]

CURTIS:

17:20:08:00 Sure.

MALE #1:

17:20:10:00 I'm thinking of the general public.

CURTIS:

17:20:12:00 Sure.

MALE #1:

17:20:12:00 So that's-that's why I wanted you to make you say that. That's a little more...

CURTIS: **[46]**

17:20:15:00 Mm-hmm. Oh, that's cool.

MALE #1:

17:20:17:00 Okay. [LAUGH] Um, and tell me what you think of Rodney Reed; about him as you know, the kind of person that has committed these

crimes and what should happen to them?

CURTIS:

17:20:36:00 Rodney Reed, at the point in which I interacted with him or he interacted with what became part of my life, um, he took a piece of life at that point. A piece of my life that uh, I will never forget. I will never forget having to tell my uh, daughter who had been told that she was going to be part of Stacey's wedding group, and uh, the fact that I was going to be the best man at the wedding, and these are things that uh, he took away from us.

CURTIS:

17:21:16:00 And like I said, Stacey was not killed in a car accident. Something you could explain. She had somebody maliciously take her life. Selfishly take her life and because of that, we were left to pick up the pieces. Um, I can tell you this. Uh, the friendship that I talked very highly of earlier is non-existent. We do not talk anymore. It became easier not to talk to each other anymore because of the memories. He went **[47]** his way, and I went mine. I continue to raise my family and he went on and continued to raise his family.

CURTIS:

17:21:53:00 Um, it uh, tore apart a good friendship. Something that, quite honestly, I have never looked for again. I fell back into the love and care about my brothers and that's who my friends are, and so Rodney Reed, as a person, is a liar. He's not willing to admit what he has done to people, to himself; not to mention his own family. You know, we're talking about putting a man to death and he has a family. The problem is in this case, he's not the victim. He's the person who committed the murder, and the family is gonna hurt just the same. So I don't think much of Rodney Reed.

MALE #1:

17:22:55:00 You feel justice has been served.

CURTIS:

17:22:57:00 And I do feel like justice has been served and will be served.

MALE #1:

17:23:03:00 You hope to see it served.

CURTIS:

17:23:04:00 Yes, I do.

[48]MALE #1:

17:23:06:00 Can you tell me that?

CURTIS:

17:23:07:00 Yeah, I feel like justice has been served and I-and I hope to see it fulfilled and served through the whole process.

MALE #1:

17:23:17:00 And tell me what happened to Jimmy after because I know some-some bad things ended up happening or he ended up doing some bad things.

CURTIS:

17:23:25:00 Yeah. After this- after the trial, after the-the sentencing, after that part of or segment of our life had-had come to a close, and then Rodney will go on. Rodney Reed will go on and-and, you know, his lawyers will start to work the legal system as-as is afforded to him by law. The other side of it is, is that Jimmy, he went on with his life or tried.

CURTIS:

17:24:02:00 Um, he ends up going from Giddings. Moving from Giddings to uh, a police department uh, just north of Austin in the area of Georgetown, and I believe, if I remember right, that

that is his hometown is from **[49]** that area. Um, so he went back home. Um, he joins the police department there. Uh, from what my understanding is and I apologize, I am not a Facebook person. My wife is. Apparently my wife and Jimmy would keep up with each other throughout the years on and off conversations.

CURTIS:

17:24:41:00 Um, and she would fill me in about what he was doing and what he was accomplishing. Um, and he moved up into the ranks of the Georgetown Police Department. Um, he eventually uh, will remarry or re- or he will get married. Uh, I believe he actually has a couple daughters. Uh, I believe from Facebook entries to my wife, he actually bought some land. Um, he was trying to move on with his life, and somewhere in all this, there's a news article that come out, "Georgetown Police Officer arrested for sexual abuse of a prisoner," and it's Jimmy Fennell.

CURTIS:

17:25:35:00 I was shocked. I really was. I was shocked. I-I had no- I did not know what to think. You know, first off you want to think, well, he's innocent.

You know? But uh, as fast as the evidence started showing or coming to a conclusion, uh, through their investigations up there and through what I **[50]** believe it was Texas Rangers, it became very obvious, he-he will have committed what this lady was claiming. Um, there was evidence to prove that.

CURTIS:

17:26:11:00 So again, you know, you live by the sword, you die by the sword. DNA is what caught Rodney Reed. DNA is what caught Jimmy Fennell. Um, again, our friendship at that point was non-existent. I had not talked to him in a couple of years, and since that's happened, I have not communicated with him at all nor does my wife Facebook with him. The last I heard he was actually in prison. So that's an area in my life that uh, as I refer to, I shelf. I'll never forget it. It was important to me at the time, but I'm also one of them people that I'm not gonna dwell on things I cannot fix.

CURTIS:

17:26:59:00 I cannot fix this. All I can do is teach my children, my grandchildren to move on and to experience life to the fullest because you truly never ever

know what's waiting around the corner. So um, it was very sad to see somebody, however he was affected that may have caused him to act like this. Uh, was it a power thing? Was it... He was a cop and it just he thought he could do it and get away with it? I don't know 'cause I've **[51]** never- I don't think I've ever experienced that in my career.

CURTIS:

17:27:39:00 You know, there's uh... And when I'm- when I say not experienced, I'm talking about the power thing. It's- you're trying to serve people. You're trying to do those things, and I'm not a Crusader. I mean I'm not-I'm not that type of guy, but you have a job to do. Just do the job and go home. You know, that's-that's some old cops taught me that a long time ago. Just do the job and go home. You know, don't bring it home. There's no sense in it, and yet, these type of aspects of your friend's fiancé being murdered, uh, every day dealing with it, it-it's tough not to do.

CURTIS:

17:28:18:00 But uh, if my wife was sitting here today, she'd tell you I do not talk about this stuff at home. I do not bring it home. So what happened to

Jimmy that made him turn to be now the reputation is gonna be no matter what a good cop he might have ever been, he will always be known as the bad cop, and uh, what made him do that I could never tell you. I have no idea. So um, it's unacceptable. Totally unacceptable. Uh, based on other news stories and-and people of the community of Bastrop, you know, **[52]** rumors go pretty strong, and the first thing that happened when Jimmy was sided with this was obviously he was guilty of-of uh, taking Stacey's life.

CURTIS:

17:29:11:00 And I will never believe that. Never. The person who took Stacey's life is sitting on death row in Austin, Texas; that's Rodney Reed.

MALE #1:

17:29:23:00 That's what I was gonna ask you because after that happened, people started saying, "Well, if-if he's able to commit this violent crime and try to cover it up" because according to the story he tried to, you know, hide what he did...

CURTIS:

17:29:44:00 Mm-hmm.

MALE #1:

17:29:45:00 That... Well, you tell me. What were-what was the reasoning for-for people to think that after that happened, that maybe he could have killed Stacey.

CURTIS:

17:29:57:00 Oh, that's an easy one. Just um, I believe the reason why Bastrop rumors, stories started flying around after Jimmy's arrest for uh, his crime he committed with that- **[53]** with that lady up in Georgetown- I believe the reason why most people jumped on the Jimmy Fennell bandwagon that he had to have done this. He-he had to have had something to do with it um, was because...

MALE #1:

17:30:25:00 Had to have something to do with what? Sorry.

CURTIS:

17:30:28:00 The reason why I think they jumped on the bandwagon because of the fact that-that Jimmy had to do with the murder and death of Stacey is because it was-it was an easy target at the time. It's easy to sit there because our judicial system is one of doubt. If we can cause somebody to doubt something, that's all it takes.

It's just mere doubt. If you're sitting in that jury box and you have any doubt whatsoever, you have an obligation to tell the court that I don't believe this happened. And um, I-I think you have obviously, I mentioned earlier, a family that's fighting for the life of their child.

CURTIS:

17:31:13:00 Their son, their cousin, their brother. And they will do anything in their power to cause that doubt, and they're reaching out with all hope to save Rodney Reed's life. I **[54]** don't blame them for it. I would expect that, but I also know it's wrong, and as I've said earlier, the man who is responsible for Stacey Stites' death is Rodney Reed and he is sitting on death row in Huntsville, Texas.

MALE #1:

17:31:54:00 And Jimmy Fennell is not the man who killed Stacey Stites.

CURTIS:

17:31:57:00 And Jimmy Fennell is not the person who killed Stacey Stites. Jimmy Fennell, in my opinion, based only on opinion, is a person who lost sense, lost control of his life. Was it based on the fact that he'd lost his fiancé? I wouldn't be able to tell you that

'cause I've never talked to him about that, but uh, victims sometimes do strange things, and because of the fact that we really don't ever know the total mentality behind a victim, and each person has their own strengths, I don't know what the death of Stacey caused Jimmy, but I will say this, the person who was accused and ultimately convicted of the wrongdoings with that lady in Georgetown was not the person that I originally met.

CURTIS: **[55]**

17:33:01:00 And I allowed into my home and was around my children. So...

MALE #1:

17:33:09:00 I believe it. I think I covered everything I wanted to, but I just want to check.

CURTIS:

17:33:18:00 Sure.

MALE #1:

17:33:19:00 Um, oh, this was something. Because-because people brought this up, uh, and I don't-it's not necessarily because I want to use it in this film, but I'm just curious and want to hear it from you. Um, peop-

there have been some conspiracy theories and...

CURTIS:

17:33:45:00 Oh yeah.

MALE #1:

17:33:45:00 And people could have helped Jimmy. Uh, what do you think of those? The possibility that, you know, a police officer... That Jimmy could have done this and that other police would have helped him cover it up or helped him drive back or something like that?

CURTIS:

17:34:04:00 The other thing that-that followed with the rumor mills and the-and the different things **[56]** that happened in a small communities obviously. I guess it happen in large too, but uh, particularly in Bastrop at that time of the-the murder case going on, uh, was that uh, Jimmy could have had somebody help him do this; that uh, the conspiracy factor behind police officers, you know, know how to get away with it a lot better than the normal criminal person would, um, that is ludicrous. There...

CURTIS:

17:34:37:00 This of all things, small communities, particularly small police communities, it's harder to hide things that it is necessarily in a large community police agency. Um, I'm not sure if I have factual numbers or anything to go behind that. It's just my opinion that we can't get away with nothing in my office because everybody knows what you do. So it takes a lot. It would take a lot for another man, particularly a police officer, to walk up to another police officer and say, "Hey, look, I'm thinking about killing my wife or my fiancé. How about you come help me with it?"

CURTIS:

17:35:26:00 First off, what's the end-end run for the other guy? Oh, I get to sit there and watch? I get that's supposed to be fun for me. Uh, I get to maybe go to prison for the **[57]** rest of my life. These are not things that are readily available in the thought process of police officers when you would be planning a murder. Um.

MALE #1:

17:35:47:00 Well, let me just... Sorry to interrupt you, but...

CURTIS:

17:35:49:00 No, I...

MALE #1:

17:35:51:00 I'd say that if anything, in these other theories, it wasn't a premeditated thing. That it might be a more oh, I-I [OVERLAP]...

CURTIS:

17:36:00:00 I can talk about that.

MALE #1:

17:36:01:00 Had some moment of [COUGH] passion or...

CURTIS:

17:36:04:00 I can talk about that.

MALE #1:

17:36:04:00 Be it a mistake, will you as a friend help me?

CURTIS:

17:36:07:00 Yeah, you know, to think that this was a premeditated thing, obviously I-I don't **[58]** believe that. [OVERLAP] [OFF-CAMERA CONVERSATION]

MALE #1:

17:36:23:00 I'm sorry.

CURTIS:

17:36:24:00 Um, I'm having a brain freeze for a second.

MALE #1:

17:36:27:00 Well, uh, you had been talking about something premeditated. I'm talking about or I think the idea.

CURTIS:

17:36:31:00 Yeah, if-if the idea that this was a premeditated situation is not gonna work. Um, it would probably be something if you're gonna blame Jimmy it would be what? A-a-an act of passion. They had an argument. Uh, he didn't see things the same way she did or whatever. And it would have to be an act of passion. Well, if you're gonna do that and you're gonna say that somebody else helped you do this, you're still gonna have to go to somebody and say, "Hey, you're gonna have to help me get rid of this body." That is a big undertaking, you know, to ask another man or woman to come in on your criminal episode.

CURTIS: **[59]**

17:37:12:00 I would... Had he come to me with that, be very honest with you. I'll tell you this. Had he come to me and said, "Curtis, I killed Stacey. I need

some help getting rid of the body. I can't-I can't be caught in this, you know?" "Oh buddy, I don't know what to tell you, but uh, you're now under arrest, and I will take you down to the police station myself and I'll make sure nobody hurts you, but you're going down to the police station because now you have crossed the line. I cannot be part of whatever you just did," and besides we're-we're of a cooperative law enforcement.

CURTIS:

17:37:50:00 You know, law enforcement wants cooperation. So the first thing we preach to the bad guys when we even talk to them. I've done it for 18 years. Is you need to cooperate. You need to tell us what you've done. You need to show repentance because District Attorneys are sitting back and they're waiting. They want to see what you're gonna say and if you come in and you basically say, "I'm not talking to you," okay, well, I'm not gonna deal with you. We'll just send you up the river 'cause we got the evidence. So you're done. You come in there and say, "Look, my family was hungry. I had to get some food for 'em. Yeah I stole that TV. I repent. I'm sorry. I **[60]** won't ever do it again. Please give me a break."

CURTIS:

17:38:30:00 Which do you think people want to hear? Had Jimmy gone in and said, "I killed her. We got mad at each other. I pushed her. She slipped and fell." Whatever the situation was that would have caused her death, but to take an item and place it around her neck and pull with the force that it took to strangle her, Jimmy Fennell did not do that. It did not happen like that. The man who wanted her dead because he could not allow her to talk about him is sitting on death row in Huntsville and his name is Rodney Reed.

MALE #1:

17:39:10:00 What do you mean could not allow her to talk about him? Explain that.

CURTIS:

17:39:13:00 There was uh, indications that there was a sexual act committed against her and so I'm pretty sure that uh, he didn't want her getting out telling everybody that it was him that did it, and for him to be found out.

MALE #1:

17:39:28:00 Right. So...

[61] CURTIS:

17:39:28:00 And besides, we-we never will know what Rodney's state of mind was at that time as far as whether he was using alcohol, whether he was using drugs, or whether that's just his normal psyche. We'll never know that. You know, because he's not telling us. So we're left to wonder, well is this something that the Rodney Reed of the world did on a regular basis? Is this something the Rodney Reed of the world did only when he got drunk or-or high on drugs? We'll never know because Rodney did not want to cooperate with law enforcement.

MALE #1:

17:40:07:00 If you could say something to Rodney, what would you say?

CURTIS:

17:40:14:00 If I could say something to Rodney, I would probably say, "I forgive you for what you did to my family only because I was raised in a Christian lifestyle and I feel like I owe that at least to my grandmother, but you deserve what the state of Texas will be doing to you and that is ending your life."

MALE #1:

17:40:47:00 I believe you. Is there anything else you'd like to say that I haven't covered?

[62] CURTIS:

17:40:55:00 Not a lot. No. We're-we're pretty done. Yeah. Um, yeah.

MALE #1:

17:41:04:00 Grace. Guys. Anything?

FEMALE:

17:41:07:00 I think we're good. [OFF-CAMERA CONVERSATION]

MALE #3:

17:41:16:00 [ROOM TONE]

MALE #1:

17:41:33:00 Could you do me one favor and just stand up and just stand up and then step and sit down uh, just so that we film you sitting down in the chair?

CURTIS:

17:41:45:00 Okay.

MALE #1:

17:41:45:00 As if it's the beginning of the interview, unless you did that.

CURTIS:

17:41:48:00 Into this chair? [OFF-CAMERA CONVERSATION]

MALE #1: **[63]**

17:41:49:00 Yeah, just uh, you don't have to go anywhere. Just really stand up and sit down and make yourself comfortable.

CURTIS:

17:42:00:00 Right here and then sit down?

MALE #1:

17:42:01:00 Yeah, go for it. Great. Curtis, I apologize for putting you through this, but I really appreciate it.

CURTIS:

17:42:16:00 It brought back some memories.

MALE #1:

17:42:16:00 I can't-I can't tell you how much I appreciate it.

CURTIS:

17:42:18:00 All right. Well, and I-I think based on the phone call, you know most of the evidence anyway. You know, I did I know about the belt? Yeah. I know about the belt. Uh, did I know where she...

County of Alameda)
)
State of California)

AFFIDAVIT OF ALICIA SLATER

Alicia Slater, of lawful age, being duly deposed and sworn states that:

1. My name is Alicia Slater, I am a resident of Alameda County, California, I am over the age of 18 and otherwise competent to give this affidavit. I am originally from Cedar Creek, Texas and my maiden name is Alicia Griesemer.
2. In 1995 and 1996, I was employed part-time at the HEB in Bastrop while I went to high school. I worked as a bagger and would collect shopping carts from the parking lot. I worked at the HEB until I graduated Bastrop High School May of 1996. I moved to Austin almost immediately after I graduated and never returned to Bastrop County to live. I moved to California permanently in 2003 and had lived there for a year in the late 1990's.
3. In the summer of 1995, I was working in the HEB parking lot collecting shopping carts. I was approached by a man in his thirties who asked me for my phone number. When I refused, he grabbed my arm and tried to pull me towards his blue Chevy Suburban. I knocked his hand away, screamed and ran to the front of the parking lot. A co-worker named Chuck heard me scream and ran after the

truck. The truck ran the red light at the intersection and drove off. No one was able to get the license plate because it was blacked out. I reported the incident to the store manager, and I eventually was interviewed by the Bastrop Police. Sometime after Stacey's murder, but before I left Bastrop, I was interviewed again about the incident in the parking lot. I don't remember who interviewed me, but I understood it to be related to the investigation of the murder of Stacey Stites. Since that time, I have seen photographs of Rodney Reed on the internet. I am certain that the man who tried to abduct me was not Rodney Reed. I have been provided with a copy of the police report from this incident which is attached to this Affidavit. The attached report contains my statement given to the police at the time and accurately describes the incident.

4. I met Stacey Stites when she came to work at the Bastrop HEB. She was very friendly and close to my age. Sometimes, when we were working at the same time, we would eat lunch together in the break room.

5. On one occasion when Stacey and I were eating together in the break room, she talked to me about her relationship with her fiancé. She was talking about her engagement ring and that she was not excited about getting married. She told me that she was sleeping with a black guy named Rodney and that she didn't know what her fiancé would do if he found out. She commented that she had to be careful. I was taken aback by this because I

didn't know Stacey that well and was surprised that she would confide in me. I cannot remember when this conversation took place, but it was within a few months of Stacey's murder and could have been only a few weeks before. I did not know Jimmy Fennell or Rodney Reed at the time, and have never met either of them since.

6. I remember that some people at the HEB thought that Stacey's fiancé Jimmy Fennell committed the murder. I didn't tell the police what Stacey had told me because I did not want to get involved. I knew Jimmy Fennell was a cop and didn't trust the police in Bastrop. After I graduated high school, I wanted to get out of town. If I said something to accuse a police officer, I was afraid there would be repercussions for my family.

7. Although I had heard that Rodney Reed was convicted of the murder, I didn't really follow the case. I don't remember telling anyone about the information that Stacey shared with me. However, I recently mentioned this to my childhood friend Velma Gonzalez who remembered me telling her about it soon after Stacey's murder. She recalled that I told her that Stacey informed me that she was having an affair with a black dude. I thought that the relationship between Rodney Reed and Stacey was common knowledge, that everyone knew. I remember that in 2003, a friend from Bastrop brought up the case and said that she heard I knew Stacey. I did not tell her anything about what I knew. I kept this to myself because, at

the time, I had just moved to California, had just gotten married, and had started a new job. I thought that if I said something, that I would have to come back to testify in Bastrop.

8. On November 22, 2014, I read a Facebook post about the Reed case from KXAN and found out that he was scheduled to be executed. The first thing I did was called KXAN and other news media that covered the case to find out who I could talk to provide the information I knew. I also called the Bastrop County DA's office but don't recall leaving a message. I also sent an email to a person named Gayle Wilhelm at Bastrop County explaining what Stacey told me and providing additional information about the case that I had since read on the internet. I got no response to my e-mail. Ultimately, my friend Heather Pritchard, who has been following the case, gave me the name of Bryce Benjet, Rodney Reed's lawyer at the Innocence Project and a filmmaker Ryan Polomski, who did a film about the case. I contacted both of them and told them what I knew.

9. When I saw in the Facebook post that Rodney Reed had an execution date, I realized that it was now or never. I didn't track the case before and didn't realize the importance of what Stacey had told me. When I read about the case on the internet, I learned that an important issue has been whether Stacey and Rodney were in a consensual relationship. Based on this, it became clear that what Stacey told me in the break room at the HEB needed to be made public. I felt morally

compelled to tell someone that Stacey herself told me that she was sleeping with Rodney. I felt that it would be terrible if the wrong person was executed for Stacey's murder and I had never come forward with this information.

10. I declare under penalty of perjury that my statements in the above numbered paragraphs 1-9 are true and correct.

Further affiant sayeth naught.

Alicia Slater

Dated: December 15, 2014

Subscribed and sworn to, before me, a Notary Public, this _day of December 2014, by Alicia Slater who is personally known to me or has shown adequate identification:

/s/ M. Davis

Notary Public

PROOF OF EXECUTION BY A SUBSCRIBING WITNESS

State of California)
)
County of San Francisco)

On December 15, 2014, before me, the undersigned, a notary public for the State of California, personally appeared Hannah Gilson, personally known to me and providing satisfactory evidence, who is known to be the person whose name is subscribed to the within instrument, as a witness thereto, who, being by me duly sworn, deposed and said that he/she was present and saw/heard acknowledged Alicia Slater, the same person described in and whose name is subscribed to the within and annexed instrument in his authorized capacity as a party thereto, execute the same, and that said affiant subscribed his/her name to the within instrument as a witness at the request of Alicia Slater.

WITNESS my hand and official seal.

M. Davis
NOTARY PUBLIC SIGNATURE

STATE OF TEXAS

COUNTY OF BASTROP

AFFIDAVIT

LEE ROY YBARRA, being first duly sworn, appeared before the undersigned authority duly designated to administer oaths and states as follows:

1. My name is Lee Roy Ybarra. I am a resident of Bastrop, Texas. I am over the age of 18 years and do hereby declare that am competent to give this affidavit. No promises or agreements have been made to me in exchange for this statement, and I do not expect any in the future. This affidavit is based on my personal knowledge and the following facts are true and correct to the best of my knowledge:

2. I was employed at the HEB grocery store located at 104 N. Hasler in Bastrop, Texas in 1996. During the course of my employment I met Stacey Stites, a nice personable young lady who also worked at the store as a checker and then moved to the fruits and vegetables department.

3. There were several times that I would see Stacey talking with a young black man inside the store. I did not know his name but I would notice that her demeanor changed whenever he came around. She seemed happy to see him and would be in a good mood.

4. I remember this man because some times they were close enough that I got a very good look at him. I remember him because I used to think that this was not a very attractive black man and she on the other hand was a very pretty young lady with a good personality. I couldn't understand what she saw in him but I guessed that if he made her happy, nothing else mattered.

5. I knew that Stacey was engaged to a police officer at the same time that she was seeing this same black man and I recall that the few times that Stacy's fiancee entered the store to visit her, she would become a nervous wreck. I know that there were times that Stacey would deliberately hide so that she didn't have to talk to him. I just thought that it was a strange relationship.

6. I left my employment with HEB about two weeks before the murder of Stacey Stites. I took a short vacation and when I returned I found out about Stacey's death. Much later I read a newspaper article about Stacey's death and saw the photograph of the black man who was accused of her murder. I quickly said to myself that this is the same black man who used to visit her at the store. It was then that I found out that the man's name was Rodney Reed.

7. I did not read anymore news articles about the death of Stacey Stites because I have rarely taken the time to read newspapers or to watch the news. I don't know what happened between the two of them but I thought that it

was a sad thing because they looked pretty happy when they were together. I just thought that it was a terrible tragedy.

8. At the time of Rodney Reed's trial or prior to his trial no one from the prosecution or defense team contacted me. If anyone had asked, I would have gladly told them what I knew about Stacey Stites and Rodney Reed. I was recently interviewed by a television crew about my knowledge of Stacey Stites and Rodney Reed. As in this affidavit, everything that I told the television crew is true to the best of my recollection.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and ability.

Signature

COUNTY OF BASTROP
STATE OF TEXAS

Subscribed and SWORN before me in the jurisdiction aforesaid, this 15th day of January, 2015

Richard Reyna
Notary Public Signature
My Commission Expires: August 22, 2018

AFFIDAVIT OF CALVIN "BUDDY" HORTON

THE STATE OF TEXAS §
§
COUNTY OF BASTROP §

BEFORE ME, the undersigned Notary Public, on this day personally appeared Calvin "Buddy" Horton, known to me to be the person whose name is subscribed to this Affidavit, and who, being duly sworn on his oath, deposed and said:

1. My name is Calvin "Buddy" Horton. I am over twenty-one years of age and am fully competent to make this Affidavit. I have personal knowledge of the facts set forth in this Affidavit, and they are true and correct. Currently, I live in Red Rock, Texas.

2. When my cousin Stacey Stites ("Stacey") was 16 years old, she and her mother moved in with my parents, Janice and Ray Horton, in Rosanky, Texas—less than a mile from where I lived with my wife Camille Horton and our three young children, Jaymi, Whitford and Steven, at the time. I traveled to Corpus Christi around this time to help Stacey and her mother Carol move their belongings into a storage facility in the Bastrop area.

3. I understood from speaking with my parents that Stacey's mother was concerned that Stacey had begun dating and associating with men at an early age—including black men—that Stacey had gotten pregnant, and that her mother decided to move after Stacey's pregnancy. My father told me that Carol was concerned about the influences in

Stacey's environment in Corpus Christi and wanted to leave.

4. Stacey and Carol lived with my parents for approximately two months, but within that time, my mom and father informed me that some of Stacey's traits from Corpus Christi resurfaced. According to them, she would continue to see men, was disobedient and would leave the house at-will. Because of this, my dad asked my mom and wife to seek out more suitable housing for them. Eventually, my wife and my mother found a home in Smithville for Carol and Stacey to live. As I had done before, I helped Stacey and her mother move. This time I moved their belongings from the storage facility to the Smithville home, where they stayed until they moved to Bastrop.

5. One Sunday evening, around five, or six o'clock in 1995, two of my young children, Jaymi and Whitford, and I went to the Dairy Queen in Bastrop to get some ice cream. I remember they were young at the time—both were under the age of ten. I also remember it was a warm day, but the weather was not hot or humid as is typical in Texas summers. I believe it was sometime between October and November. At that time in my life I worked as a carpenter and did not get Saturdays off. The only day I would have been able to take them for ice cream would have been on a Sunday.

6. As I pulled into the Dairy Queen in the Ford pickup I was driving at the time, with my children inside, I remember seeing Stacey coming out of the Dairy Queen with a black man. I hollered her name to get her attention as I drove in, but she did not respond. I know they heard me because both Stacey

and the black man looked directly at me, but neither came toward me. I have a rather loud voice; I easily project and rarely have a difficult time being heard.

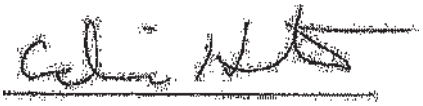
7. Seeing Stacey with a black man did not surprise me because I remembered what my parents told me about her dating and associating with black men. Stacey, however, was shocked; she seemed embarrassed when she saw us and she quickly left with the black man without introducing me. Stacey and the black man got into a darker colored car that Stacey was driving, and they drove off without speaking to me or my children, I told my father of this incident, but to me it was not a big deal at the time because I had been told that Stacey associated with black men.

8. Sometime after Stacey's death I remember seeing pictures of Rodney Reed on the news and in the newspaper after he became a suspect in the death of my cousin. Rodney Reed is the same man I saw with Stacey at the Dairy Queen in 1995. I understand that the appeals courts have previously said that there were no credible witnesses that would testify as to having seen Rodney and Stacey together. I would have testified to my experience at the Dairy Queen in 1995 at trial, but no one ever approached me to do so. Since then, I have told other members of my family and would have told law enforcement and prosecutors the same had they interviewed me or shown any interest.

9. Because of this information, and Stacey's behavior at this time in her life, I have always believed Mr. Reed's story that he had a relationship with my cousin Stacey—despite the unfortunate pain it brings upon my aunt Carol. I do not wish to cause

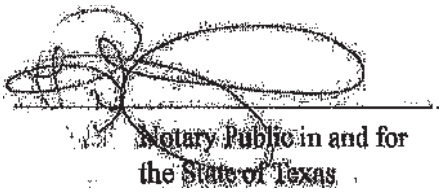
her, or my family, any more pain. I simply want to bring this truth to light.

Further Affiant sayeth not.



Calvin "Buddy" Horton

Subscribed and sworn to before me this __ day of March, 2015, to certify which witness my hand and official seal.



Notary Public in and for the State of Texas