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

BRYCE BENJET
State Bar No. 24006829
THE INNOCENCE PROJECT
40 Worth St. Suite. 701
New York, New York 10013
(212) 364-5340
(212) 364-5341 (fax)

ANDREW F. MACRAE
State Bar No. 00784510
LEVATINO|PACE PLLC
1101 S. Capital of Texas Highway
Building K, Suite 125
Austin, Texas 78746
(512) 637-8563
(512) 637-1583 (fax)

MICHELLE L. DAVIS
State Bar No. 24038854
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM, LLP
725 N Avalon Street
Granbury, Texas 76048
(972) 523-8718

MORRIS L. OVERSTREET
State Bar No. 00000046
P.O. Box 35
Prairie View, Texas 77446
(713) 225-2016
(713) 225-2010 (fax)

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 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 Pressence 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.

[1] This Application is filed as a supplement to Mr. Reed's pending habeas corpus proceedings and incorporates the factual 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—within 24 hours of Dr. Bayardo's 3:30 a.m. estimate of Ms. Stites's time of death. TT Vol 56: 160.

[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

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 Megham 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]

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.

[3] Karen Blakely no longer works for DPS, is no longer working as a forensic scientist, and has declined to cooperate with this proceeding.

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 . . . otherwise testifies beyond the scope of his/her experience."

Exhibit 2. An attached worksheet identified the specific testimony which the laboratory deemed in error:

[4] Bode Cellmark Forensics is a subsidiary of Labcorp which, until recently, employed Ms. Clement.

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: **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 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.

[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.

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 Serolgist 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.

C. 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]

[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.

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 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.

[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.

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] 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

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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 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).

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 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.

D. 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 well as serologists from DPS and LabCorp. Mr. Reed

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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 full impact of the false testimony and new scientific evidence at that time.

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.

E. 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 of these

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Therefore, Mr. Reed has been diligent in presenting all of the evidence in support of his claims and this Court should consider all of his evidence.

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 weigh such exculpatory evidence against the evidence of guilt adduced at trial.

[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.

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 (4^{th} 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); s*ee 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 edma fluid as indentified 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.[23]

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]

[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

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 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

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> fingerprints from the truck at the scene, it is not plausible that the same person would have left the belt in this location 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.)

> 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 Diary 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;
- 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.*

[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.

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 postconviction 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,

/s/Bryce Benjet
BRYCE BENJET
State Bar No. 24006829
THE INNOCENCE PROJECT
40 Worth Street, Suite 701
New York, New York 10036
(212) 364-5340
(212) 364-5341 (fax)

ANDREW F. MACRAE
State Bar No. 00784510
LEVATINO|PACE PLLC
1101 S. Capital of Texas Highway
Building K, Suite 125
Austin, Texas 78746
(512) 637-8563
(512) 637-1583 (fax)

MICHELLE L. DAVIS
State Bar No. 24038854
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM, LLP
725 N Avalon Street
Granbury, Texas 76048
(972) 523-8718

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MORRIS L. OVERSTREET
State Bar No. 00000046
P.O. Box 35
Prairie View, Texas 77446
(713) 225-2016
(713) 225-2010 (fax)

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing pleading was served by placing same in the United States mail, postage prepaid, on this the -26th day of June, 2018, addressed and electronically sent to:

BRYAN GOERTZ
Criminal District Attorney
Bastrop County, Texas
804 Pecan Street
Bastrop, Texas 78602
Bryangoertz@aol.com

MATTHEW OTTOWAY
Assistant Attorney General
Office of the Attorney General
PO Box 12548
Austin, TX 78711
Matthew.Ottoway@texasattorney general.gov

/s/Bryce Benjet
BRYCE BENJET
State Bar No. 24006829
THE INNOCENCE PROJECT
40 Worth Street, Suite 701
New York, New York 10036
(212) 364-5340
(212) 364-5341 (fax)