

**IN THE
COURT OF CRIMINAL APPEALS OF TEXAS
AND
THE 21st JUDICIAL DISTRICT COURT
BASTROP COUNTY, TEXAS**

EX PARTE	§	Writ Case No. 50,961
	§	
RODNEY REED,	§	
	§	Trial Cause No. 8701
Applicant.	§	

**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 LLP
1101 S. Capital of Texas Highway
Building K, Suite 125
Austin, Texas 78746
(512) 637-8563
(512) 637-1583 (fax)

Attorneys for Applicant Rodney Reed

TABLE OF CONTENTS

	PAGE
INTRODUCTION	1
FACTUAL BACKGROUND.....	4
I. NEW EVIDENCE FURTHER INCULPATES MS. STITES'S FIANCÉ IN HER MURDER.	4
A. Mr. Fennell Confessed To Killing Ms. Stites Because She Was Having An Affair With A Black Man.	4
B. Mr. Fennell Threatened To Kill Ms. Stites If He Caught Her Cheating On Him.....	6
C. Mr. Fennell Discovered That Ms. Stites Was "Messing Around" On Him With A Black Man.	7
D. Mr. Fennell's Directed Inculpatory Statements At Ms. Stites's Body At Her Funeral.	9
E. More Evidence That Mr. Fennell And Ms. Stites's Relationship Was Not The Happy One Presented At Mr. Reed's Trial.	10
II. THE INVESTIGATION.	13
A. The Early Investigation Of Ms. Stites's Disappearance And Murder.	13
B. Mr. Fennell Was The Primary Suspect For Months Even Though He Was Not A DNA Match.	18
C. Once Mr. Reed Was Identified As The Source Of The DNA, The State Dropped Mr. Fennell As A Suspect And Focused Only On Convicting Mr. Reed.	25
D. The Trial.	26
III. MR. REED HAS DISPROVEN EVERY ASPECT OF THE STATE'S FORENSIC CASE AGAINST HIM.....	31

A.	The Length Of Time Spermatozoa Can Remain Intact.....	31
1.	Dr. Roberto Bayardo, M.D.	32
2.	Karen Blakely.	35
3.	Meghan Clement.....	36
4.	The Forensic Evidence Proves That The State's Evidence As To The Length Of Time Spermatozoa Can Remain Intact Was False.	39
B.	Forensic Evidence Proves That Ms. Stites Was Murdered When Mr. Fennell Claimed The Two Were Alone Together.	40
1.	Patterns of Post-mortem Lividity Indicate that the Body was Moved 4-6 Hours After Death.....	42
2.	Rigor Mortis Indicates Longer Post-Mortem Interval	44
3.	Decomposition Evidence Demonstrates a Longer Post- mortem Interval and Shows that Ms. Stites was Moved in the Truck Several Hours After Her Death.....	46
C.	The State's Evidence that Mr. Reed's DNA Was Associated With A Sexual Assault Is False.	47
D.	Evidence That The Crime Scene Was Staged To Look Like A Sexual Assault.	48
IV.	PROOF THAT MR. REED AND MS. STITES WERE INVOLVED IN A SEXUAL RELATIONSHIP	49
A.	Witnesses Discredited Because They Knew Mr. Reed.	49
B.	Family And Friends Of Ms. Stites Have Come Forward To Attest To Knowledge Of A Relationship Between Mr. Reed And Ms. Stites.	51
1.	Alicia Slater.....	51
2.	Lee Roy Ybarra.....	52
3.	Rebecca Peoples.....	53

4.	Calvin "Buddy" Horton.....	54
V.	MR. FENNELLS DISCOVERY THAT MS. STITES WAS HAVING AN AFFAIR WITH MR. REED PROVIDED A POWERFUL MOTIVE FOR MR. FENNELLS TO DO WHAT HE THREATENED TO DO IF HE CAUGHT HER CHEATING.	56
A.	Mr. Fennell Threatened To Kill Ms. Stites If He Discovered She Was Cheating On Him.....	56
B.	Powerful New Evidence Suggests That Mr. Fennell Discovered Ms. Stites's Relationship With Mr. Reed And Followed Through On His Threats.....	57
VII.	OTHER EVIDENCE IMPLICATING MR. FENNELLS.	59
A.	Mr. Fennell's Inconsistent Statements.	60
B.	Evidence Mr. Fennell Was Abusive Towards Ms. Stites.....	62
C.	Fennell's Pattern of Violence And Abuse As A Police Officer	66
1.	The October 26, 2007 Rape.	66
2.	March 12, 2007 Rape of B.A.	68
3.	Sexual Misconduct Reported by Travis County Sheriff's Office.....	69
4.	August 11, 2007 Misconduct Regarding Kelly Ramos.	69
5.	Threat to Sexually Assault Mary Ann Bone.....	70
6.	Jamie Bolin Report.	71
VIII.	EVIDENCE OF MR. REED'S ALLEGED PRIOR BAD ACTS.....	72
	REASONS FOR GRANTING THE WRIT.....	73
I.	APPLICABLE LEGAL STANDARDS.....	73
A.	Article 11.071 § 5(a)(1)—Newly Discovered Evidence.....	73
B.	Article 11.071 § 5(a)(2)—Gateway Actual Innocence/ <i>Schlup</i>	74

C. Actual Innocence under <i>Elizondo</i>	75
II. THE NEWLY-DISCOVERED EVIDENCE.....	76
III. MATERIAL NEWLY DISCOVERED EXCULPATORY EVIDENCE WAS SUPPRESSED IN VIOLATION OF <i>BRADY V. MARYLAND</i>	77
IV. THE STATE PRESENTED FALSE TESTIMONY OF MR. FENNELL IN VIOLATION OF DUE PROCESS.....	83
V. DEFENSE COUNSEL’S INEFFECTIVE ASSISTANCE DEPRIVED MR. REED OF DUE PROCESS UNDER <i>STRICKLAND V. WASHINGTON</i>	87
A. Defense Counsel Failed To Investigate Time Of Death.....	88
B. Counsel Failed To Investigate The Scientific Basis For The State’s Expert Testimony Regarding The Time Of Survival Of Intact Spermatozoa	89
C. Counsel Failed To Investigate Relationship Witnesses	90
VI. MR. REED’S ACTUAL INNOCENCE SHOWING SATISFIES BOTH <i>ELIZONDO</i> AND ARTICLE 11.071, SECTION 5(A)(2).	91
CONCLUSION AND PRAYER	934

INTRODUCTION

Rodney Reed files this successor Application for Writ of Habeas Corpus (the "Application") asking the Court to vacate his conviction and death sentence because there is *even more* new evidence, discovered since this Court's June 26, 2019 order denying his prior habeas applications, that proves that Mr. Reed did not murder Stacey Stites. Several more witnesses have come forward with powerful new credible information that exonerates Mr. Reed and inculpates another person, Ms. Stites' fiancé, Jimmy Fennell, Jr., in her murder.¹

Of particular note is a former prisoner and Aryan Brotherhood gang member named Arthur J. Snow, Jr., who states in a sworn affidavit dated October 29, 2019 that Fennell confided in Snow that Fennell's fiancé was cheating on him with a black man and confessed that: "I had to kill my nigger-loving fiancé[.]" (Exhibit 1)

More witnesses, each of whom knew Ms. Stites and Mr. Fennell (but not Mr. Reed), have also come forward just in the past three months with evidence that

¹ Several other new witnesses have also come forward implicating Mr. Fennell in Ms. Stites's death and are being actively investigated by Mr. Reed's defense. On October 4, 2019, Mr. Reed filed with the District Court a Motion for Withdrawal of Execution Date in order to permit him to investigate the newly discovered information and prepare a comprehensive habeas application. On October 16, 2019, the State filed its opposition to the motion, arguing that the District Court lacked jurisdiction. After Mr. Reed's motion had been pending for more than a month, the State filed a Motion for Leave to File A Petition for Writ of Prohibition and a Motion for Temporary Relief to prevent the District Court from ruling on Mr. Reed's motion.

inculpatates Mr. Fennell in Ms. Stites's murder. The new evidence includes affidavits from:

- Charles Wayne Fletcher, a former member of the Bastrop County Sheriff's Office, stating that Mr. Fennell told him a month before Ms. Stites was murdered that she was "fucking a nigger" (Exhibit 3);
- An insurance salesperson, stating that while Ms. Stites was completing an application for life insurance, Mr. Fennell threatened that if he discovered Ms. Stites cheating on him, he would kill her and no one would find out that it was him (Exhibit 2); and
- Jim Clampit, a former Deputy in the Lee County Sheriff's Office, stating that Mr. Fennell directed an alarming and inculpatory statement at Ms. Stites's body at her funeral to the effect that she got what she deserved (Exhibit 4).

Others have been located only in the past few days with additional evidence that refutes the State's portrayal of Mr. Fennell and Ms. Stites as a happy couple eagerly anticipating their upcoming wedding. This new evidence includes declarations from:

- Richard Derleth, a deputy in the Bastrop County Sheriff's Office, states that H.E.B. staff members who worked with Ms. Stites would warn her when Mr. Fennell came to the store so she could hide from him to avoid having him start fights with her (Exhibit 5);
- Brent Sappington, who stated that while visiting his father, William Sappington, who lived in the apartment directly below Mr. Fennell and Ms. Stites, he overheard screaming and banging and his father confirmed that it was the couple upstairs fighting (Exhibit 6); and

- Vicki Sappington, William Sappington's daughter-in-law, and Brent Sappington's wife, who stated that Mr. Sappington frequently expressed concern that Mr. Fennell was verbally abusive toward Ms. Stites, that he feared Mr. Fennell was also physically abusive, and that he had reported his concerns to local law enforcement, but officers dismissed his concerns (Exhibit 7).
- Rebecca Peoples, another co-worker of Ms. Stites, who recalled Ms. Stites telling her both that she was afraid of her fiancé and that she was having an affair with a black man. (Exhibit 7a)

Mr. Reed will prove at a hearing that none of these witnesses could have been previously discovered through the exercise of reasonable diligence because there was no indication in the record that these witnesses had exculpatory knowledge and many of the witnesses themselves were reluctant to involve themselves in a murder investigation or legal proceedings.

All of this new evidence, coupled with the compelling evidence presented in Mr. Reed's prior habeas applications, establishes Mr. Reed's innocence and his right to habeas relief for constitutional violations pursuant to article 11.071 of the Code of Criminal Procedure. Specifically, as demonstrated below, (i) Mr. Reed's conviction violates Due Process under *Brady v. Maryland* and *Strickland v. Washington*; (ii) the State's solicitation of Mr. Fennell's false testimony violates Due Process, (iii) Mr. Reed's conviction violates Due Process because he is actually innocent of the murder of Ms. Stites; and (iv) Mr. Reed should be permitted to pursue his prior constitutional claims that the Court found procedurally defaulted because

he has established his probable innocence under Article 11.071 § 5(a)(2) and *Schlup v. Delo*, 513 U.S. 298 (1995).

Accordingly, Mr. Reed asks the Court to vacate his conviction or, alternatively, stay his November 20, 2019 execution and remand this case to the District Court for a live evidentiary hearing to consider the evidence and permit Mr. Reed to finally and conclusively prove that he did not murder Stacey Stites.

FACTUAL BACKGROUND

I. NEW EVIDENCE FURTHER INCULPATES MS. STITES'S FIANCÉ IN HER MURDER.

A. Mr. Fennell Confessed To Killing Ms. Stites Because She Was Having An Affair With A Black Man.

In 2008, Mr. Fennell pled guilty to kidnapping and sexually assaulting a woman he had been dispatched to protect, and then attempting to cover it up by, among other things, threatening to kill the victim if she told anyone. Mr. Fennell was incarcerated in the Stephenson Unit in Cuero, Texas. Arthur J. Snow, Jr. was also incarcerated in the Stephenson Unit at the same time. In his affidavit, Mr. Snow recounted his involvement with the Aryan Brotherhood, a whites-only organization. Mr. Fennell sought protection from the Aryan Brotherhood while he was in prison. Mr. Snow states that Mr. Fennell told him that, after he discovered that his fiancée had been cheating on him with a black man, "I had to kill my nigger-loving fiancé":

In about 2010, a white man named Jimmy Fennell ("Jimmy") approached me at the Stevenson Unit wanting the protection of the Aryan Brotherhood.

Jimmy said he needed protection from the blacks and Mexicans at the prison. At the time, I didn't know anything about Jimmy. All I knew was that I had seen Jimmy around the prison and observed that he seemed out of his element. So, I cut a deal with Jimmy that he would pay the Aryan Brotherhood out of his commissary, and in exchange we would keep the blacks and Mexicans off of him and protect him from violence.

Jimmy and I were never really friends, but we occasionally made conversation. One conversation stands out very clearly in my mind. Jimmy and I were in the rec yard at the Stevenson Unit walking around the track and talking. He was talking about his ex-fiancé with a lot of hatred and resentment. Jimmy said his fiancé had been sleeping around with a black man behind his back. By the way Jimmy spoke about this experience, I could tell that it deeply angered him. Toward the end of the conversation Jimmy said confidently, "I had to kill my nigger-loving fiancé." My impression was that Jimmy felt safe, even proud, sharing this information with me because I was a member of the Aryan Brotherhood. I think Jimmy assumed that his confession would impress me and earn him credibility with the Aryan Brotherhood.

As I recall, people didn't really bother Jimmy anymore once they knew he was under our protection. However, one day a new inmate came onto the unit who said he knew Jimmy from time he spent in Williamson County. I do not recall this man's name, but the new inmate said that Jimmy was a former cop who had been convicted of raping a woman in his custody. I wanted to verify this, so I asked a guard at the prison to look Jimmy up and tell me who he was and what he was in for. After looking Jimmy up, the guard confirmed Jimmy's history.

After the news spread around the prison that Jimmy was a cop, and that he was a rapist, the Aryan Brotherhood couldn't protect Jimmy anymore. Then, Jimmy accused the Aryan Brotherhood of extorting him. Because the guards saw me as one of the leaders of the gang, Jimmy's accusations landed on me. As a result, I was ultimately moved to the Connally Unit where they send a lot of gang members.

(Exhibit 1)

Fennell's confession to Mr. Snow's just recently came to light after an attorney for an inmate in the Hays County Jail informed undersigned counsel that Mr. Snow had information about the Reed case. Counsel then contacted Snow's attorney who allowed an investigator for Mr. Reed to interview Snow. After Snow told our investigator the information now memorialized in his affidavit, we were able to corroborate informally with the Texas Department of Criminal Justice that Snow and Fennell were both at the Stevenson Unit during this time period and that Snow was later transferred to the Connolly Unit as he stated. Based on this initial corroboration, we obtained and now present his sworn affidavit.

B. Mr. Fennell Threatened To Kill Ms. Stites If He Caught Her Cheating On Him.

Another witness, an insurance salesperson who knew both Mr. Fennell and Ms. Stites, observed and overheard Mr. Fennell threaten to kill Ms. Stites.² (Exhibit 2) The salesperson worked at a function hall where then-Officer Fennell worked security. The salesperson met Ms. Stites through Mr. Fennell and saw her at the hall on a few occasions. In November 1995, the couple applied for life insurance together. This transaction is confirmed by a contemporaneous record from the insurance company. (Exhibit 2 at Ex. 1)

² Information identifying this witness has been redacted out of respect for the witness's expressed safety concerns in light of Mr. Fennell's release from prison. However, the State knows the identity of the witness, and its investigators have interviewed the witness.

The witness stated that, while filling out her application, Ms. Stites remarked: "I really don't know why I need life insurance since I'm so young." (Exhibit 2 at 2) Fennell then replied: "If I ever catch you messing around on me, I will kill you and no one will ever know it was me that killed you." (*Id.*) The salesperson did not take this as a joke:

I remember it well because of the tone of voice that he used. It was not presented as a joke. That concerned me and still concerns me today, because I took it as a threat on her life. I found it harsh and abrasive, and I have never forgotten it.

(*Id.*)

The witness's statement only recently became available to the defense following the setting of Mr. Reed's current execution date and, therefore, could not have been discovered earlier or raised in a previous filing. In light of the substantial evidence implicating Mr. Fennell in the murder, this specific threat confirms Mr. Fennell's intent to kill Ms. Stites if he caught her "messing around" on him.

C. Mr. Fennell Discovered That Ms. Stites Was "Messing Around" On Him With A Black Man.

Mr. Fletcher, a former Bastrop County Sheriff's officer and close friend of Mr. Fennell, also came forward with information that describes the couple's deteriorating relationship and further provides motive for Mr. Fennell to kill Ms. Stites. Mr. Fletcher specifically recalled a visit with the couple at their apartment in March 1996, the month before her murder, during which he observed that:

Jimmy and Stacey were short with each other and raised their voices in communicating when they spoke. Generally, I got the impression that they were not in a good place with their relationship because of how they talked to each other.

(Exhibit 3 ¶ 5) Mr. Fletcher also recalled that during that visit he and Mr. Fennell were outside cooking and Mr. Fennell stated that he believed that Ms. Stites was "fucking a nigger." (*Id.* ¶ 6) Mr. Fletcher explained that he recalls that Mr. Fennell "said those words because I was disturbed by them," and "I have never forgotten his words." (*Id.*)

Mr. Fletcher also recalled that Mr. Fennell "looked cold, empty, and emotionless" before and during the funeral service. (Exhibit 3 ¶ 5) Mr. Fletcher drove with Mr. Fennell and his parents from Giddings to Corpus Christi for Ms. Stites's burial service. Mr. Fletcher recounted that during the drive and at the burial services Mr. Fennell's "odd, emotionless behavior" continued. Mr. Fletcher "was so disturbed by" Mr. Fennell's behavior that he began to "question whether he was involved in Stacey's death" and "chose to have no further interaction or communication with him." (*Id.* ¶ 8)

Mr. Fletcher explained that he did not previously speak out because he has family in the Bastrop area and was concerned about the potential for negative consequences if he was perceived as "going against local law enforcement." (Exhibit 3 ¶ 9) Accordingly, as Mr. Fletcher came forward only recently, Mr. Reed could not have presented this evidence in a previous filing.

D. Mr. Fennell's Directed Inculpatory Statements At Ms. Stites's Body At Her Funeral.

Jim Clampit, a former Texas Game Warden and Lee County Sheriff's Deputy, also recently came forward with evidence that Mr. Fennell made an inculpatory statement at Ms. Stites's funeral. (Exhibit 4) Mr. Clampit worked in the Lee County Sheriff's Office at the time of Ms. Stites's murder and knew Mr. Fennell from working in law enforcement in Giddings. Mr. Clampit attended Ms. Stites's funeral with other law enforcement officers, and his name appears on the guest register from the service. (*Id.*) Mr. Clampit recalled the funeral in detail, and described overhearing Mr. Fennell direct an alarming statement toward Ms. Stites's body:

I recall that at the viewing services, Ms. Stites's body was inside of a casket in a small viewing room. Her body was dressed in a white dress which looked like a wedding dress. I distinctly remember standing in the doorway to the viewing room next to Jimmy Fennell. Jimmy was looking at Ms. Stites. At that moment, Jimmy said something that I will never forget. Jimmy said something along the lines of, "***You got what you deserved.***" Jimmy was directing his comment at Ms. Stites's body. I was completely shocked and floored by what Jimmy said. It did not strike me as something a grieving partner would say to their murdered fiancé.

(Exhibit 4 ¶ 6) (emphasis added) Mr. Clampit was an experienced lawman with an agency that participated in the investigation of Ms. Stites's murder (*id.* ¶ 9), but he only recently discussed what he heard from Fennell:

Over the years, I have often thought about what Jimmy said at Ms. Stites's services. I am still shocked by it. Recently, after reading about Rodney Reed's case in the newspaper, I started thinking about what Jimmy said more and more. I told a couple friends and my wife about

what I heard Jimmy say. The more I thought about it, the more I knew that I would not be able to live with myself if I did not come forward.

(*Id.* ¶ 8) Mr. Clampit's statement only became available following the setting of Mr. Reed's current execution date and, therefore, could not have been raised in a previous filing because this evidence was known only to Mr. Clampit at that time.

E. More Evidence That Mr. Fennell And Ms. Stites's Relationship Was Not The Happy One Presented At Mr. Reed's Trial.

Recently, more witness have provided additional evidence that Mr. Fennell and Ms. Stites were not the happily engaged couple that the State presented to the jury through Mr. Fennell's testimony. Richard Derleth, a Bastrop County Sheriff's Office Deputy at the time of Ms. Stites's murder, recalled employees of H.E.B. informing him that they frequently warned Ms. Stites when they spotted Officer Fennell enter the grocery store to give her an opportunity to hide from Mr. Fennell and avoid confrontation:

On one occasion, I remember a member of the check-out staff telling me something concerning about Stacey Stites and Jimmy Fennell. Specifically, they told me that members of the staff would keep a look-out for Jimmy Fennell to see if he would come into the store. They told me that if they saw Jimmy coming into the store, they would tell Stacey and she would run and hide from Jimmy. They told me they were concerned that if they did not alert Stacey to Jimmy's presence in the store before he found her, he would start a fight with her.

When I received this information, I shared it with some members of the Sheriff's Office. I am not sure what was done with the information.

(Exhibit 5 ¶¶ 5-6) Mr. Derleth's information was not shared with Mr. Reed's defense counsel until Mr. Derleth recently came forward; therefore, it could not have been presented previously.

Another former H.E.B. co-worker of Ms. Stites, Rebecca Peoples, also came forward with information that Ms. Stites had confided in her that she was having an affair with a black man and that she was afraid of her fiancé:

A number of times [Ms. Stites] spoke about the fact that she was engaged to be married, but she said she was afraid of her fiancé. She never elaborated on why she was afraid. I was more than twenty years her senior and had been in bad relationships in the past myself, so I could understand and empathize with her. I think we bonded a bit over our shared experiences. I don't remember that she ever told me her fiancé's name. She either mentioned, or I came to learn on my own, that he was a police officer.

Stacey also mentioned that she was having an affair with a black man. She never told me who he was or mentioned his name, but I remember on one occasion when we talked there in the store about our lives she shared this detail. I am not sure why she told me this, except that maybe she felt comfortable with me.

I did not share this information with anyone before the trial of Rodney Reed because I did not realize that it was important and no one ever approached me.

(Exhibit 7a ¶¶ 3-5)

The declarations of Brent and Vicki Sappington also confirm the troubled relationship between Ms. Stites and Mr. Fennell. Mr. Sappington recalled the following event in early 1996 while visiting with his father, William Sappington,

who lived in a first floor apartment in the Rolling Oaks Apartment Complex just beneath Mr. Fennell and Ms. Stites's second floor apartment:

One night in the earlier part of 1996 I was over daddy's apartment and I heard a lot of loud noises and banging above his apartment. It startled me because it sounded like loud arguing and fighting. I asked daddy what that was, and I remember him telling me that it was Jimmy yelling and screaming and "getting into it" with Stacey. I remember either saying, or thinking to myself, that they were making a lot of racket.

(Exhibit 6 ¶ 3)

Ms. Sappington recalled that her father-in-law was so concerned for Ms. Stites that he reported instances of Mr. Fennell's treatment of her to local law enforcement, but those concerns were not taken seriously:

Daddy told us that he was very concerned about the way Jimmy treated Stacey, however. He told us that he would hear loud noises and thumping sounds at all times of the night from arguments above him. He said it was always Jimmy's voice that he heard and that Jimmy's language was abusive, aggressive, and angry toward Stacey. He would yell and scream at her. Daddy mentioned that this happened often and he often relayed these stories to us. He told us specifically that he was concerned for Stacey because the aggression seemed to be directed at her in these arguments—not the other way around. Based on the loud noises and thumping, and Jimmy's tone, Daddy told us he believed Jimmy was also physically abusive to Stacey.

Regrettably, I remember discouraging daddy from getting involved or speaking out while she was alive. I told him that he could not be sure what was going on and probably should just stay out of it.

When Stacey was killed, daddy was devastated, and he told us that he contacted law enforcement to tell them what he knew about Jimmy's abuse but was told that Jimmy would not do that type of thing and was not involved in Stacey's death. He told me he could not understand why

investigators were not more interested in speaking to him since Jimmy and Stacey were directly above his apartment.

Because of what he heard and experienced at that apartment complex, daddy never believed that anyone other than Jimmy Fennell could be responsible for Stacey's murder. Daddy was very sharp until the day he died and never had memory or cognitive issues.

(Exhibit 7 ¶¶ 6-9)

While the foregoing new information, standing alone, demonstrates that Mr. Reed's conviction is not consistent with the mandates of Due Process, it need not stand alone in light of the mountain of other evidence that demonstrates Mr. Reed is innocent of the murder of Ms. Stites.

II. THE INVESTIGATION.

A. The Early Investigation Of Ms. Stites's Disappearance And Murder.

A search for Ms. Stites began a few hours after she failed to report for her shift at the H.E.B. grocery store in Bastrop, Texas at 3:30 a.m. on April 23, 1996. Ms. Stites began working at the grocery store in October 1995 as a bagger and cashier, but later moved to a higher-paying position in the produce department. *See Ex parte Reed*, 271 S.W.3d 698, 702 (Tex. Crim. App. 2008). This new position required Ms. Stites to wake up between 2:45 and 2:50 a.m. to get ready and drive to work for her early morning shift. *Id.* Ms. Stites lived with then-Officer Fennell in the same Giddings apartment complex as her mother, Carol Stites, and had access to her mother's Ford Tempo, but she usually drove Mr. Fennell's "red Chevrolet s-10 extended cab truck" to work. *Id.*

The day before Ms. Stites's disappearance, she arrived home from work in the early afternoon and spent time in her mother's apartment. *Id.* Mr. Fennell joined Ms. Stites and her mother upon returning home from work in her mother's car. *Id.* When making plans for the next day, Mr. Fennell insisted to Ms. Stites and her mother that he would drive Ms. Stites to work in the morning and pick her up after her shift so the two could run errands together. *Id.* Mr. Fennell declined Carol Stites's offer to let him sleep in and drive him to Bastrop in the afternoon. *Id.* The remaining few hours in Ms. Stites's life were detailed solely by Mr. Fennell.

Mr. Fennell claimed that on April 22, 1996, he returned home from a baseball practice between 8:00 and 8:30 p.m. *Id.* at 702-03. Mr. Fennell testified that he and Ms. Stites showered together, but that they did not have sex because Ms. Stites was taking birth control pills and that "at this point in her prescription cycle, the vitamin pills she was taking allowed for a greater possibility of pregnancy." *Id.* at 703. Mr. Fennell testified that Ms. Stites went to sleep at approximately 9:00 p.m. and that he stayed awake and watched the news.

When Ms. Stites failed to report to work on April 23, Mr. Fennell told investigators that the plan for him to drive her to work had changed and that he had slept in and Ms. Stites left for work in his truck at her usual time around 3:00 a.m. *Ex parte Reed*, 271 S.W.3d at 703.

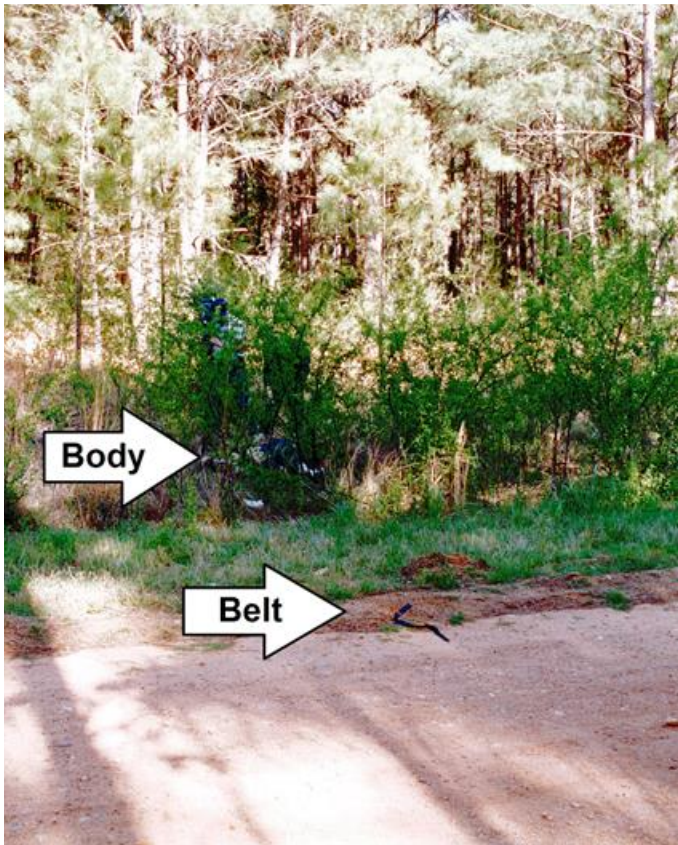
Mr. Fennell's truck, which he testified Ms. Stites had taken to drive herself to work that morning, was found in a high school parking lot at 5:23 a.m. The truck was locked and the keys were missing. (See Exhibit 8 (Police Report re: Truck)) On the ground outside of the driver's side door was a portion of Ms. Stites's woven leather belt and some papers, including carbon check copies belonging to Jimmy Fennell's checkbook. *Id.*



The driver's seat was reclined and the seatbelt still fastened. The passenger seat was described as "partially back in a slightly forward position." *Id.* Between the driver's and passenger's seats, officers found what was described as "some type of viscous fluid" in the "passenger floorboard and the transmission hump." (Exhibit 9 (Notes of Investigation)) Fingerprints were collected from the truck and items inside the truck; the only prints that could be identified belonged to Mr. Fennell and Ms. Stites. (TT Vol. 47:39) Rodney Reed was excluded as the source of all other identifiable prints. (*Id.* at 43)

Just before 3:00 p.m. that afternoon, Ms. Stites's body was discovered lying face-up along Bluebonnet Drive, an unpaved road off FM 1441 in Bastrop County. Law enforcement from a variety of agencies quickly responded, and members of the Texas Department of Public Safety Crime Laboratory ("DPS") processed the scene. *Ex parte Reed*, 271 S.W.3d at 704. A piece of woven belt that lay on the road near Ms. Stites's body was later determined to match the piece found outside Mr. Fennell's truck and matched the red marks observed on Ms. Stites's neck.

Karen Blakely, a DPS criminalist, arrived at the scene on Bluebonnet Drive at approximately 5:15 p.m. Ms. Blakely examined Ms. Stites's body and took vaginal swab samples. Ms. Blakely noted that although Ms. Stites was missing one shoe, her sock on that foot was clean. Ms. Blakely also noticed a large volume of mucus running from Ms. Stites's nose and mouth, and that Ms. Stites's H.E.B. name tag had been placed in the crook of her leg. A white T-shirt belonging to Mr. Fennell was found in the nearby brush. *Id.* The photographs below depict Ms. Stites's body as it was found, as well as the evidence on the roadway:



Ms. Blakely returned to the DPS Crime Lab at approximately 11:00 p.m. on April 23, 1996, and she examined the vaginal swabs she had collected earlier that

evening. Ms. Blakely discovered the presence of three intact spermatozoa. (TT Vol. 56:33-34)

When conducting Ms. Stites's autopsy at 1:50 p.m. the next day, after the body was refrigerated, Medical Examiner Dr. Roberto Bayardo also took vaginal swabs, and he too detected only a small amount of intact spermatozoa. *Ex parte Reed*, 271 S.W.3d at 706.

B. Mr. Fennell Was The Primary Suspect For Months Even Though He Was Not A DNA Match.

Although Mr. Fennell was the last person to see Ms. Stites alive, and he was supposed to have driven her to work, officers never searched his and Ms. Stites's apartment (or even asked to do so). *Reed* 271 S.W.3d at 708. However, investigators' suspicions soon turned toward Mr. 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. *Id.* Police interrogated Mr. Fennell aggressively and repeatedly, and after he was twice found to be deceptive on polygraph tests, Mr. Fennell invoked his Fifth Amendment privilege, thus refusing to cooperate in the investigation. *Id.* at 738, 742-43.

Law enforcement officers conducted an in-depth investigation into Ms. Stites's life and her relationship with Mr. Fennell. Officers spoke to a number of Ms. Stites's friends and co-workers, who described her as friendly, outgoing and flirtatious. (Exhibit 10 (Stites and Fennell Background Investigation Reports))

When Ms. Stites became pregnant at 15, she and her mother moved from their hometown of Corpus Christi, Texas to Smithville, Texas. *See id.* Ms. Stites gave the baby up for adoption and completed high school in Smithville. Mr. Fennell, who was 22 years old and working as a Bastrop jailer, began dating Ms. Stites while she was still in high school. Although Mr. Fennell considered the relationship to be "serious" within two or three weeks after they began dating in May 1995 (TT Vol. 43:89; TT Vol. 45:62), police reports indicate that Ms. Stites continued to date several other men. (*See Exhibit 10*)

Law enforcement documents described the couple's relationship as strained. Ms. Stites's friends repeatedly described Mr. Fennell as jealous. Heather Flanagan, Ms. Stites's friend and co-worker, shared with the Bastrop Police that Ms. Stites had described Mr. Fennell as jealous:

Jimmy was a jealous type person who didn't like her talking with other guys. They cancelled their wedding. Stacey never said why.


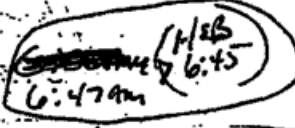
(Exhibit 10) Another friend, Tammy Hannath, told the police that:

Jimmy Fennell got upset with Stacey when he found out she was going out with her friends. Thinks Jimmy even slit her tires. Jimmy wouldn't let her talk on the phone with her friends. Stacey always said she loved Jimmy. They would set wedding dates, then call it off.

(Exhibit 10) Bastrop County Sheriff's officers learned that Ms. Stites had coffee weekly with a former co-worker, Ronnie Reveal. Mr. Reveal saw Ms. Stites less than a week before her murder and related that:

She seemed down quite a bit and he asked her what was wrong. She told him that her and her boyfriend were having problems. *And also that the boyfriend had a violent temper.*

(Exhibit 10) (emphasis added) A Bastrop County Sherriff's Office investigation file note, which appears to be from an interview with Ms. Stites's mother, likewise indicates that the couple had argued the night of the murder and that Mr. Fennell was "Jealous of Everyone":

STACY & JIMMIE ARGUED ON NITE
BEFORE MURDER.
JIMMIE HAD KEYS TO CAR -
(JEALOUS OF EVERYONE) 
(5:15AM WAKENED CRYING) TRUCK WAS GONE
CALLED JIMMIE JUST BEFORE 
LEFT FROM GIDDING
HAD STACY'S CAR KEYS TO MOTHER'S CAR -
STACY GOT CAR KEY FROM CAROL

Mr. Fennell was interrogated by both Bastrop County Sheriff's Officers and Texas Ranger Sergeant Rocky Wardlow. (TT Vol. 45:110; TT Vol. 46:125) Mr. Fennell testified that there were multiple interrogations in which officers would yell, were verbally abusive, would play on his emotions, and offered leniency in exchange for a confession. (*Id.* at 64-69) Unlike when Mr. Reed was questioned, there were no audio or video recordings made that would have preserved any inculpatory statements made by Mr. Fennell.

These harsh interrogations were likely inspired by the fact that Mr. Fennell's account of the events leading up to Ms. Stites's murder was inconsistent and false, and his actions immediately following Ms. Stites's disappearance were suspicious. For example, Mr. Fennell told police and later testified that he and Ms. Stites had not had sex for several days because she was on the "green pill" on her birth control medication and that he had been told that there was a higher risk of pregnancy when taking these "vitamin" pills. (See TT Vol. 45:83) Mr. Fennell testified that the information regarding the risk of pregnancy came to him "as a result of the prescription." *Id.* Merrill Lewen, M.D., a Board Certified OB/GYN, reviewed Mr. Fennell's testimony and concludes that it is false:

The statement made by Jimmy Fennell with regard to the risk of pregnancy while taking certain pills that he describes as "vitamins" is false. The "green pills" to which Mr. Fennell refers are placebo pills. Birth control pills generally contain three weeks worth of pills that contain hormones and one week of placebo pills; the pills to be taken each week can be different colors depending on the brand or manufacturer.

From my experience prescribing birth control to women since the 1990s, I am certain that nothing in any of the instructions accompanying birth control pills, or instructions from a patient's physician, would indicate a higher risk of pregnancy during the placebo pill week. No physician would have told a patient this information or put such information in a prescription, as it is simply false.

In over twenty years of medical practice, I have never heard of a woman who thought that there was an added risk of pregnancy when taking the placebo portion of her birth control pills. I have also never heard of anyone referring to them as "vitamins". I am aware of one

manufacturer that adds iron to the placebo, but these pills are brown in color, not green.

(Exhibit 11 (Affidavit of Merrill Lewen, M.D.)) Mr. Fennell's false statement regarding birth control could not have come from the instructions on the prescription or Ms. Stites's physician, as he testified at trial. Mr. Fennell's statement could reasonably be construed as either (1) a fabrication to hide the fact that he and Ms. Stites were not intimate, or (2) a lie told by Ms. Stites in order to postpone Mr. Fennell's unwanted sexual advances.

Mr. Fennell also gave a false statement on the morning of Ms. Stites's disappearance about the fuel level in his truck. Mr. Fennell told police officers on the morning of Ms. Stites's disappearance that he had filled the truck with gas the night before. (*See* Exhibit 12 (Police Reports re: Gas Tank)) When police confronted Mr. Fennell days later with the fact that the truck's gas tank was less than 1/4 full, he changed his story and said that the tank had been 1/4 full. (*See id.*) It is unlikely that Mr. Fennell, a police officer who understood the importance of providing accurate information regarding the search for his fiancée, would have been mistaken about whether he had filled his truck with gas less than a day earlier. And the use of 3/4 of a tank of gas was not consistent with the State's theory that Ms. Stites was abducted and murdered in Bastrop and her body left in a location roughly five miles away.

There were also significant inconsistencies in Mr. Fennell's and Carol Stites's descriptions about the plans for the morning of April 23, 1996. In her statement to police, Carol Stites recalled that Mr. Fennell had insisted on driving Ms. Stites to work on the morning of April 23rd:

Jimmy said he was going to take Stacey to work the next morning because he wanted his truck. He said he was scheduled for court and needed his truck, that he didn't want to drive my car. Jimmy was supposed to go with Stacey when she got off to get insurance on her so she could drive his truck. Stacey and I both got on him because it was stupid for him to get up, drive her to work, drive back home, then drive back to Bastrop to pick her up. Jimmy just walked out of the apartment and Stacey said she would talk to me later and she left to go upstairs. I was under the impression that Jimmy was taking Stacey to work the next morning.

(Exhibit 13 (Carol Stites Statements)). Carol Stites's handwritten statement further explains that she was upset by the disagreement with Mr. Fennell about whether he should drive Ms. Stites to work that reminded her of Mr. Fennell's poor manners the day before, and that this caused her to cry. (*Id.*) Mr. Fennell's testimony was less than clear on the point. Having argued with Carol Stites and insisting that he would drive Ms. Stites to work, Mr. Fennell explained himself at trial by claiming that he and Ms. Stites later decided that she would drive herself. (TT Vol. 45:83) This was a key point because what Mr. Fennell was "determined" to do on the afternoon of April 23 was inconsistent with his own claimed alibi for the murder.

Another suspicious action taken by Mr. Fennell in the immediate aftermath of his fiancée's disappearance is found in his bank records. Soon after his truck has

been located, and before Ms. Stites's body was found, Mr. Fennell withdrew all of the money in his bank account. (*See* Exhibit 14 (BPD Chief Ronnie Duncan: "I was told that Jimmy closed out his account the morning his fiancé disappeared.")) Mr. Fennell's decision to withdraw all of his funds rather than simply placing a hold on the purported missing checks makes no sense unless he was preparing to flee.

Mr. Fennell was given two polygraph examinations during the investigation, both of which revealed deception in his responses to questions about whether he strangled, hit or struck Ms. Stites. (TT Vol. 52:10, 15; *id.* at 150, 155) In October 1996, Mr. Fennell was examined by licensed polygraph examiner Pat Carmack of the Bastrop County Adult Supervision Department. (TT Vol. 52:150) Officer Carmack reported that Mr. Fennell was deceptive when he responded to the questions:

Did you strangle Stacey Stites on 4/23/96?

Answer: No.

On 4/23/96 did you have any sexual conduct with Stacey Stites?

Answer: No.

Exhibit 15.

Officer Carmack testified at trial that he took steps to explain the deceptive findings by running another chart, but that it did not change the result. *Id.*

Two months later, in December 1996, Mr. Fennell took a second polygraph examination by Texas Department of Public Safety Lieutenant Gordon Moore. (TT

Vol. 52:10; Exhibit 15) Mr. Fennell was found again to have answered deceptively, including the following questions:

Did you strangle Stacey with her Belt?

Response: No.

Did you leave Stacey's body along that county road where she was found?

Response: No.

Anytime after April 22, 1996, did you hit Stacey's head with your fist?

Response: No.

(Exhibit 15) When the polygraph examination indicated deception a second time, Mr. Fennell requested counsel and invoked his Fifth Amendment privilege against self-incrimination.

C. Once Mr. Reed Was Identified As The Source Of The DNA, The State Dropped Mr. Fennell As A Suspect And Focused Only On Convicting Mr. Reed.

The investigation of Mr. Fennell ended only after Mr. Reed's DNA (collected in an unrelated investigation in which charges were dismissed) matched the DNA profile obtained from the vaginal swabs collected from Ms. Stites. Mr. Reed was then arrested on unrelated charges and confronted about Ms. Stites's murder. Surprised by this questioning, Mr. Reed denied knowing Ms. Stites and signed a written statement to that effect. (TT St. Ex. 91(a). However, he immediately told his attorney about the relationship. (Exhibit 16 (Affidavit of Jimmie Brown))

In 1997, Mr. Reed was charged with Ms. Stites's murder based on the DNA match. No other evidence—fingerprint, hair, footprint or DNA—connected Mr.

Reed to Mr. Fennell's truck or the location where Ms. Stites's body was found. As explained in detail in an amicus brief recently filed in the Supreme Court by current and former Texas law enforcement officers, the investigation into Ms. Stites's death was skewed by numerous phenomena, including weak facts and tunnel vision after Mr. Reed was identified as the DNA contributor. (Exhibit 17 (Brief of Deke Pierce And Other Current and Former Law Enforcement Officers As Amicus Curiae In Support of Petitioner))

D. The Trial.

Using the timeline provided by Mr. Fennell, the State theorized that Ms. Stites left Giddings in Mr. Fennell's truck around 3:00 a.m. on April 23, 1996 and drove toward Bastrop. The State argued that Mr. Reed somehow intercepted her and gained entry into the truck, pulled Ms. 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 Mr. Reed then drove to a back-country road where he partially re-dressed Ms. 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 Ms. Stites's belt at the side of the road, pointing toward her body. Then, Mr. 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. *Ex Parte Reed*, 271 S.W.3d at 750.

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

Pathologist Roberto Bayardo, the Travis County Medical Examiner who performed the autopsy, testified at trial that Ms. Stites died by ligature strangulation at approximately 3:00 a.m. on April 23, and that she had been sexually assaulted at the same time. *Ex Parte Reed*, 271 S.W.3d at 705-706.

Texas DPS crime scene investigator, Karen Blakely, testified that she surmised that Ms. 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." *Ex Parte Reed* 271 S.W.3d at 704-05.

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 spermatozao more than 24 hours after intercourse. *Ex Parte Reed*, 271 S.W.3d at 710.

In closing arguments, the State repeatedly emphasized to the jury that the small amount of Reed's spermatozoa conclusively 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.

(TT Vol. 56:33-34)³ The State further emphasized that expert testimony that the semen was inextricably linked to a sexual assault that occurred contemporaneously with the murder also refuted Mr. Reed's defense that he and Ms. Stites had consensual intercourse in the days before her murder. (TT Vol. 56:38, 56-61) 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 spermatozoa. (TT Vol. 56:154) The judge responded by reading several portions of Dr. Bayardo's testimony to the jury.⁴ (TT Vol. 56:160)

³ The State also relied on Dr. Bayardo's expert testimony that he found rectal tears ("lacerations") consistent with a sexual assault by Mr. Reed. (TT Vol. 56:34-35) As with the State's theory on intact spermatozoa, this has been retracted by Dr. Bayardo and unanimously debunked by three experienced forensic pathologists. (*See* Exhibit 18 ¶ 6 (no evidence Reed's spermatozao related to sexual assault); Exhibit 19 ¶ 8 (Dr. Spitz); Exhibit 20 ¶ 9 (Dr. Baden); Exhibit 21 ¶ 18-22 (Dr. Riddick))

⁴ 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. (TT Vol. 56:154, 160)

Before Mr. Reed was arrested, Mr. Fennell invoked the privilege when asked questions about his involvement in Ms. Stites's death. (TT Vol. 56:160) But once Mr. Reed was on trial, Mr. Fennell reversed course: he waived his Fifth Amendment privilege and testified to a timeline that exculpated himself and supported the State's case against Mr. Reed.

The State relied on Mr. Fennell to establish that Ms. Stites was abducted while driving to work around 3:00 a.m. (TT Vol. 56:49-50) As investigators concede, the only independent information gathered about Ms. 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.

(TT Vol. 53:34)

The State also relied on Mr. Fennell to discredit Mr. Reed's defense that he and Ms. Stites had recently had consensual sex. The State emphasized Mr. Fennell's testimony that he and Ms. Stites had showered together the night she was murdered, but were not engaging in sexual relations, to infer that Ms. Stites would not have had sex with Mr. Reed 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]?

(TT Vol. 56:60-61)

Mr. Fennell also told the jury that he did not know Mr. Reed. (TT Vol. 45:114) And, Mr. Fennell affirmatively testified that he did not kill Ms. Stites. (TT Vol. 45:114) The State emphasized Mr. Fennell as the grieving fiancé to the jury. (TT Vol. 56:71 (Jimmy's "reactions were normal, ordinary, grief reactions, the kind of things that you would expect to see from someone who's suffered what he's suffered."); *id.* at 71-72 ("He did everything exactly like you would expect a grief-stricken fiancé to do."); *id.* at 73 ("What a nightmare that must be" for Jimmy Fennell to "hear that your fiancée is off having a secret affair with this guy."))

Given that Mr. Fennell had been the primary suspect, and provided the timeline for the State's theory of the murder, the State focused the jury on the consistency of his testimony:

It's important to note that nobody could ever find anything inconsistent with what he told you. Nobody.

(TT Vol. 56:76)

The police spent seven and a half months trying to find something inconsistent with what Jimmy had told them, trying, didn't find a thing, nothing. I mean, everything that they found corroborated Jimmy. And don't you know, if there were something out there that he said that turned out not to be true, you would have heard about it. He didn't give a sworn statement. Well, he talked to the police enumerable times, and don't you know if there was anything that he would have said that was inconsistent from one statement to the next, you would have heard about it. But it wasn't. You see, it goes back to what we talked about. When you're telling the truth, you're not going to be inconsistent. When you're telling the truth, you're not going to find witnesses out there that are inconsistent with you.

(TT Vol. 56 130-131)

Mr. Reed's defense counsel did not call an expert to rebut the expert opinions that linked Mr. Reed's DNA to the murder and failed to meaningfully impeach Mr. Fennell. Mr. Reed was convicted of capital murder and sentenced to death. On May 18, 1998, an all-white jury (the prosecutor struck the only two African-Americans from the venire) and sentenced him to death. TT Vol. 56 165:10-20)

As demonstrated *infra*, Mr. Reed's conviction was obtained through the use of: (1) scientifically invalid testimony from three experts who maintained that Mr. Reed's DNA was from a sexual assault contemporaneous with the murder that occurred in the early morning hours of April 23, 1996; and (2) testimony from Mr. Fennell that he and Ms. Stites spent a quiet evening at home together before she left for work in his truck at 3:00 a.m.

III. MR. REED HAS DISPROVEN EVERY ASPECT OF THE STATE'S FORENSIC CASE AGAINST HIM.

A. The Length Of Time Spermatozoa Can Remain Intact.

The lynchpin of the State's case against Mr. Reed rests on the premise that Mr. Reed's semen was associated with a sexual assault contemporaneous with Ms. Stites's murder. As discussed above, prosecutors elicited expert testimony that spermatozoa cannot remain intact in a woman's body for more than 24-26 hours after intercourse and repeatedly focused on that testimony during closing arguments. Because Mr. Fennell's testimony accounted for Ms. Stites over the prior 24 hours, there was no possible innocent explanation for Mr. Reed's DNA. This expert

testimony was clearly important to the jury because the jury specifically asked about this evidence, and the trial judge had Dr. Bayardo's testimony on the subject read back to the jury. (TT Vo. 56:152-154,)

However, this key testimony has no basis in the accepted scientific literature and has been disavowed by the experts themselves or the agencies that employed them. In fact, spermatozoa can remain intact for at least 72 hours, and the number of intact spermatozoa seen in the samples collected from Ms. Stites would have been far more numerous if intercourse was contemporaneous with her death.

1. Dr. Roberto Bayardo, M.D.

Former Travis County Medical Examiner, Roberto Bayardo, M.D.—who conducted Ms. Stites's autopsy—has recanted much of his trial testimony. Dr. Bayardo testified at Mr. Reed's 1998 trial that Mr. Reed's semen was left "quite recently," and supported the State's theory that Mr. Reed sexually assaulted Ms. Stites contemporaneous with her murder. He has retracted that opinion. Dr. Bayardo now admits that the forensic evidence suggests consensual intercourse between Mr. Reed and Ms. Stites *more than* 24 hours before her death—which is consistent with Mr. Reed's account of his last meeting with Ms. Stites:

Ms. Blakely testified that spermatozoa can remain intact for no more than 24 hours. I question the qualification 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.

(Exhibit 18 ¶ 4) Dr. Bayardo now states that the deposit of Mr. Reed's semen was not "quite recent" to her death—as he testified at trial (TT Vol. 48:122) —but was approximately a day before her death:

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.

(*Id.*) Dr. Bayardo has also disclaimed any connection between Mr. Reed's semen and the murder:

[T]he presence of spermatozoa in the vaginal cavity was not evidence of sexual assault. There was no indication that the spermatozoa were placed there in any fashion other than consensually.

(*Id.*) Dr. Bayardo has retracted or modified almost everything he told the jury at Mr. Reed's trial:

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.***

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 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.*

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.*

(Exhibit 18 (emphasis added)) Contrary to the impression left on the jury, Dr. Bayardo states that (1) his estimate of the time of death at approximately 3:00 a.m. was not reliable, (2) there is no evidence that Mr. Reed sexually assaulted Ms. Stites, and (3) the evidence actually corroborates Mr. Reed's statement that he and Ms. Stites had sex a day before her disappearance. (*Id.*)

2. Karen Blakely.

Texas DPS Crime Lab Director Brady Mills wrote a letter to Mr. Reed's counsel acknowledging "limitations" in Ms. Blakely's testimony at Mr. Reed's trial. Citing a scientific study, Ms. Blakely testified that finding Mr. Reed's intact spermatozoa meant that the spermatozoa could not have been left more than 26 hours before her examination. (*See Exhibit 22 (DPS Crime Lab Letter re: Limitations)*) Ms. Blakely's opinion essentially ruled out Mr. Reed's defense that he and Ms. Stites had consensual sex in the days before her murder: The State argued that since Ms. Stites's whereabouts were accounted for most of the day before the murder, the only possible explanation for the presence of Mr. Reed's sperm was that he had raped Ms. Stites at the time of her murder.

Director Mills's letter acknowledges on behalf of the Texas DPS that the data and related scientific literature Ms. Blakely claimed to have relied upon actually show that intact spermatozoa can and do remain for at least 72-hours. (*See Exhibit 22*)

3. Meghan Clement

On January 11, 2018, Bode Cellmark Forensics ("Bode")⁵ Technical Leader Stephanie Sivak issued a letter that described Ms. Clement's testimony cited above as "unsatisfactory" and as an "error." (Exhibit 23 (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.

(*Id.*) A worksheet attached to the letter identified the specific testimony that the laboratory deemed erroneous:

⁵ At that time, Bode was a subsidiary of Labcorp, which had employed Ms. Clement for many years.

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 <input checked="" type="checkbox"/> No <input type="checkbox"/>
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

(*Id.* 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 24 (Affidavit of Purnima 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 more than 24 hours after intercourse, and (2) cited her experience in examining "thousands" of rape kits to bolster her erroneous statement.⁶

In 1998, the jury was told—without contradiction from the defense—that the presence of Mr. Reed's semen was conclusive proof that he sexually assaulted Ms. Stites contemporaneous with her murder. This point was emphasized by the State in closing arguments:

[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)⁷

Not one witness continues to assert this scientifically bankrupt theory today. The expert opinions offered by the State at trial have been retracted and the State's

⁶ Ms. Clement has repeatedly declined to cooperate with Mr. Reed's legal proceedings. 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 deposition or hearing would be required to obtain her testimony.

⁷ The State also relied on Dr. Bayardo's testimony that he found rectal tears ("lacerations") consistent with a sexual assault by Mr. Reed. (TT Vol. 56:34-35) As with the State's theory on intact spermatozoa, this has been retracted by Dr. Bayardo and unanimously debunked by three experienced forensic pathologists. (Exhibit 18 ¶6 (no evidence Mr. Reed's sperm related to sexual assault); Exhibit 19 ¶8 (Dr. Spitz); Exhibit 120 ¶9 (Dr. Baden); Exhibit 21 ¶¶ 18-22 (Dr. Riddick))

own witness admits that the evidence actually corroborates Mr. Reed's account.
(Exhibit 18)

4. The Forensic Evidence Proves That The State's Evidence As To The Length Of Time Spermatozoa Can Remain Intact Was False.

Even had the State's experts or the agencies that employed them not limited and discredited the trial testimony, the forensic evidence proves that the testimonies of Ms. Blakeley and Ms. Clement that intact sperm would not be found more than 24-26 hours after intercourse, and that finding any intact sperm on swabs taken between 7:00 p.m. and 8:00 p.m. on April 23rd ruled out Mr. Reed's account of consensual sex, was false. This is confirmed by the unanimous opinions of eminent forensic pathologists Drs. Baden, Spitz, and Riddick who each explained that the State's theory is false and, indeed, why there is no reliable evidence that Ms. Stites was sexually assaulted at all. Dr. Spitz explained:

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.⁸

(Exhibit 19 ¶ 6).

⁸ *Spitz and Fisher* at 1262.

Likewise, Dr. Baden confirmed that:

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 Petitioner said occurred between midnight and 3:00 a.m. on April 22, 1996.”

(Exhibit 20 ¶ 8)

As did Dr. Riddick:

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 witness's 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 ... 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 sperms can be expected to be seen up to 72 hours after intercourse.

(Exhibit 21 ¶ 17)

B. Forensic Evidence Proves That Ms. Stites Was Murdered When Mr. Fennell Claimed The Two Were Alone Together.

Mr. Fennell testified at trial that he and Ms. Stites spent the night of April 22, 1996 together in their apartment. He told the jury that he was at home when Ms. Stites went to sleep around 9:00 p.m. and that he went to sleep about an hour later. (TT Vol. 45:82) Mr. Fennell claimed he was still sleeping when Ms. Stites left for work in his truck at approximately 3:00 a.m. in the morning. (TT Vol. 45:83-84)

At least three of the nation's leading forensic pathologists, Drs. Spitz, Baden and Riddick, have concluded that Ms. Stites was actually murdered before midnight on April 22, 1996, and that she was placed in the location and position where she was found at least 4 hours after the murder. This longer post-mortem interval, coupled with the fact that Ms. Stites's body was moved at least 4 hours after death, makes the State's theory of Mr. Reed's guilt impossible.

Drs. Spitz, Baden and Riddick likewise agree that there is no evidence of a sexual assault by Mr. Reed contemporaneous with Ms. Stites's death—a fact essential to the verdict against Mr. Reed. *See Reed v. State*, No. 73,135, slip op. at 9 (Dec. 6, 2000). If Ms. Stites was murdered at a time that Mr. Fennell testified that she was at home with him, and if there is no evidence that Mr. Reed sexually assaulted Ms. Stites, then Mr. Reed did not murder Ms. Stites.

The forensic experts rely primarily on three key elements in determining the post-mortem interval: rigor mortis (stiffening of the muscles due 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 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 post-mortem timing). None of these factors were mentioned in relation to the post-mortem interval at Mr. Reed's trial.

1. Patterns of Post-mortem Lividity Indicate that the Body was Moved 4-6 Hours After Death.

Drs. Spitz, Baden, and Riddick explain that the 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 her body being left in the position it was found. (Exhibit 19 ¶ 2-3 (Dr. Spitz); Exhibit 20 ¶6 (Dr. Baden); Exhibit 21¶¶ 12-14 (Dr. Riddick)) Dr. Riddick explained lividity as follows:

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 dependent 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 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.

(Exhibit 15 ¶ 12) Areas of lividity often contain patches of white called "blanching" where compression of the skin has prevented the blood from pooling. (*Id.* ¶14) The photographs of Ms. Stites show 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. Areas of blanching can be seen on Ms. Stites's elbow. Dr. Spitz explained the relevance of this non-dependent lividity:

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 19 ¶3) (emphasis added)) Dr. Baden similarly concluded:

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.

(Exhibit 20; *see also* Exhibit 21 ¶14 (Dr. Riddick) (body in different position for at least 4-6 hours)) The photographs below demonstrate this non-dependent lividity with blanching on the elbow and on the fingertips:



(note red discoloration on face, chest and arm with blanching on elbow area)

2. Rigor Mortis Indicates Longer Post-Mortem Interval

Drs. Spitz and Riddick also observed the level of rigor mortis seen in the crime scene video, which shows a longer postmortem interval than presented by the State.

Dr. Riddick explained:

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. . . . 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. 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. 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 21 ¶ 10-11) Dr. Spitz also explained how the manipulation of Ms. Stites's body in the crime scene video demonstrates "passing" rigor consistent with a longer post-mortem interval than presented by the State:

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.

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.

(Exhibit 19 ¶ 4-5)

3. Decomposition Evidence Demonstrates a Longer Post-mortem Interval and Shows that Ms. Stites was Moved in the Truck Several Hours After Her Death.

Dr. Spitz also explained that the decomposition is inconsistent with the time of death theory upon which the State's case depended:

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. 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 19 ¶ 7)⁹ Dr. Baden explained the importance of the viscous fluid on the floor of Mr. Fennell's truck in determining the time of death:

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. This is not pulmonary edema fluid from Ms. Stites as interpreted by the prosecution. Pulmonary edema fluid is thin and frothy and would also have been present in and around her mouth and

⁹ The photographs and video were taken between approximately 5:15 p.m. and 8:15 p.m. (See Exhibit 21 ¶ 8 (Dr. Riddick))

nose, 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 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.

(Exhibit 20 ¶7)

C. The State's Evidence that Mr. Reed's DNA Was Associated With A Sexual Assault Is False.

The primary proponent of the State's theory that Mr. Reed's DNA was associated with a sexual assault, Dr. Bayardo, recanted his opinion on this subject:

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.

(Exhibit 18 ¶ 6) The conclusion that there is no evidence that Ms. Stites's was sexually assaulted is confirmed by Drs. Baden, Spitz, and Riddick who each explained that there is no reliable evidence that Ms. Stites was sexually assaulted at all. (Exhibit 19 ¶ 6 (Dr. Spitz); Exhibit 20 ¶ 8 (Dr. Baden); Exhibit 21 ¶ 18-22 (Dr. Riddick))

The pathologists also explain that the State's evidence of anal assault was scientifically and medically unfounded. (See (Exhibit 19 ¶ 8 (Dr. Spitz) (anus and

rectum normal); Exhibit 21 ¶¶ 18-21 (Dr. Riddick); Exhibit 20 ¶ 9 (Dr. Baden)
(dilation of anus normal and no evidence on photographs of lacerations))

D. Evidence That The Crime Scene Was Staged To Look Like A Sexual Assault.

Additional evidence demonstrates that the body was moved to the location and the crime scene staged so that Ms. Stites would be quickly discovered and identified. As part of a thorough review of the case, retired NYPD Homicide Detective Sergeant Kevin Gannon reached the following conclusions:

In addition to the forensic evidence which indicates that the murder took place while Jimmy and Stacey were at home together, a number of other factors raise suspicion that Jimmy Fennell was the murderer:

- The seatbelt of the truck was fastened as if the last driver had been sitting on top of the seat belt. It is common for police officers to sit on top of a fastened seat belt in their vehicle. Officers do this because they are often called upon to quickly exit their vehicles in an emergency. A seatbelt can impede a fast exit, so it is buckled to keep it out of the way and stop warning signal in the car. My experience is confirmed by statistics released by the California Commission on Police Officer Standards and Training indicating that roughly half of all police officers do not wear seatbelts.
- Stacey's fingernails are closely cut in a manner that I would not expect from a nineteen year old woman only a few weeks before her wedding. Strangulation involves a close struggle that provides the victim an opportunity to scratch her attacker and leave his DNA under her fingernails. In 1996, a police officer would be familiar with the fact that fingernail scrapings are taken during autopsy, and it is unlikely that a lay person would know to cut the fingernails of a victim to avoid detection.
- 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 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 25)

The forensic evidence proves that the State's theory and factual bases of the case have evaporated, and that: (1) Ms. Stites was not sexually assaulted by Mr. Reed, and (2) she was murdered before midnight on April 22, 1996—a time when Mr. Fennell testified to the jury that he was at home alone with the victim.

IV. PROOF THAT MR. REED AND MS. STITES WERE INVOLVED IN A SEXUAL RELATIONSHIP

A. Witnesses Discredited Because They Knew Mr. Reed.

Mr. Reed has explained that he and Ms. Stites were in a casual sexual relationship, and that they had sex in the early morning hours on April 22, 1996—over a day before she was reported missing. (Exhibit 26 (Affidavit of Rodney Reed)) Although he initially denied knowing Ms. Stites when surprised by police after he was arrested on unrelated charges, Mr. Reed immediately told his attorney about the relationship. (Exhibit 16 (Affidavit of Jimmie Brown)). At a bail hearing long before

Mr. Reed's trial, his mother testified that she knew Mr. Reed was seeing Ms. Stites, and had witnessed her come to the Reed home several times to pick up Mr. Reed. (Exhibit 27 (Sandra Reed Testimony Excerpt)) A number of witnesses who knew of the relationship were presented by Mr. Reed's appointed attorneys at trial and in early habeas proceedings, but they were all either ignored by the courts or discounted due to their relationships with Mr. Reed or other factors.

In her opening statements, Mr. Reed's counsel, Lydia Clay-Jackson, argued that the defense would show that Mr. Reed and Ms. Stites were involved in a "secret affair." (TT Vol. 42: 69) However, the defense presented limited evidence in support. Julia Estes testified that she had seen Mr. Reed and Ms. Stites talking together at the H.E.B. (TT Vol. 51: 136) Iris Lindley also testified that while she was sitting on the front porch at Mr. Reed's mother's home, Ms. Stites came by asking for Rodney. (TT Vol. 53: 92) Ms. Lindley testified that she presumed they were dating. (TT Vol. 53: 98) However, both witnesses were impeached by the State, and their testimony could not be credited considering the State's forensic experts told the jury that Mr. Reed's DNA had to have been deposited contemporaneous with a sexual assault and murder.

During Mr. Reed's prior habeas proceedings, additional witnesses came forward with knowledge of the relationship between Mr. Reed and Ms. Stites, but they were found not to be credible based on their criminal history or close affiliation

to the Reed family. *See Reed v. Thaler*, No. A-02-CA-142 LY, 2012 WL 2254217, at *14 (W.D. Tex. June 15, 2012) ("[M]any of those claiming they had seen Reed and Stites together were Reed's cousins or parents, and many had criminal felony or misdemeanor convictions for charges involving dishonesty, such as theft.").

B. Family And Friends Of Ms. Stites Have Come Forward To Attest To Knowledge Of A Relationship Between Mr. Reed And Ms. Stites.

More recently, credible witnesses with knowledge of a relationship between Ms. Stites and Mr. Reed have come forward. These new witnesses have no connection to Mr. Reed or any motive to assist him. These witnesses have not had an opportunity to testify in Mr. Reed's case, and their accounts have not been contradicted by the State.

1. Alicia Slater.

Alicia Slater, formerly Griesemer, contacted Mr. Reed's defense team on her own volition. (Exhibit 28) Ms. Slater felt "morally compelled to tell someone" that she was aware of a sexual relationship between her former co-worker, Ms. Stites, and Mr. Reed. (*Id.*) In 1995 and 1996, Mrs. Slater was employed part-time at the H.E.B. She and Ms. Stites would often take lunch together:

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 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.

(*Id.* ¶ 4) Ms. Slater did not come forward with the information sooner because she "thought it was common knowledge" and did not want get involved (*id.* ¶ 7):

Although I had heard that Mr. Reed was convicted of the murder, I didn't really follow the case. . . . I thought that the relationship between Mr. Reed and Ms. Stites 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. 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, so I kept the information secret.

When I saw that Mr. Reed actually had an execution date, I realized that it was now or never. I didn't track the case and didn't realize the importance of what Ms. Stites had told me until that time. When I read about the case on the internet, I learned that an important issue was whether Ms. Stites and Mr. Reed were in a consensual relationship. Based on this, it became clear that what Ms. Stites told me could make a difference. I felt morally compelled to tell someone that Ms. Stites had told me herself that she was sleeping with Mr. Reed.

(*Id.* ¶¶ 7, 9)

2. Lee Roy Ybarra.

Another H.E.B employee, Lee Roy Ybarra, came forward to attest that he too observed a relationship between Mr. Reed and Ms. Stites—information he says he would have gladly told to police in 1996 had they contacted him. (Exhibit 29 (Affidavit of Le Roy Ybarra)) Mr. Ybarra described that in 1996 he saw Ms. Stites on numerous occasions with "a young black man" he later identified as Mr. Reed from news articles after her death. (*Id.* ¶ 3) Mr. Ybarra recalls Mr. Reed's face well

because "sometimes they were close enough that [Mr. Ybarra] got a very good look at him." (*Id.* ¶ 3)

Based on his direct observations during the numerous occasions he saw Mr. Reed and Ms. Stites together, Mr. Ybarra confirms that they had a positive relationship. He noticed that Ms. Stites's "demeanor would change" when Mr. Reed came around and that she was "happy to see him and would be in a good mood." (Exhibit 29 ¶ 4) Mr. Ybarra observed that the nature of the encounters appeared to happy and romantic. (*Id.*) Mr. Ybarra explained that this was in stark contrast to Ms. Stites's behavior around her fiancé:

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.

(*Id.* ¶5) Mr. Ybarra did not previously come forward because he did not realize the import of his testimony around the time of Ms. Stites's murder investigation, and he had not followed the case since.

At the time of Mr. 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 Ms. Stites and Mr. Reed.

(*Id.* ¶¶ 5, 8)

3. Rebecca Peoples.

As discussed *supra*, Ms. Peoples, another co-worker of Ms. Stites came forward very recently and described that Ms. Stites had confided in her. Ms. Stites

had also told Ms. Peoples, just as she had told Ms. Slater, that she was having a relationship with a black man. (Exhibit 7a ¶ 3) Ms. Peoples also relayed that Ms. Stites had further confided in her that she was afraid of her fiancé. (*Id.* ¶ 4)

4. Calvin "Buddy" Horton.

Calvin "Buddy" Horton, Ms. Stites's cousin has also come forward to attest to a relationship between Ms. Stites and Mr. Reed. (Exhibit 30) Mr. Horton explained that he helped Ms. Stites and her mother move away from their hometown of Corpus Christi after Ms. Stites's mother became concerned about the environment and influences on her daughter. (*Id.* ¶ 3) In particular, Ms. Stites's mother was concerned that Ms. Stites was too young to be involved with men and that Ms. Stites had gotten pregnant when she was fifteen. (*Id.*) Mr. Horton's parents initially took Ms. Stites and her mother into their home. However, they moved out after Mr. Horton's parents became uncomfortable with Ms. Stites's behavior:

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.

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.

(*Id.* ¶¶ 3-4)

Mr. Horton states that in October or November 1995, he saw Ms. Stites leaving a Bastrop Dairy Queen with a black man. He called out to Ms. Stites, but she did not respond:

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.

(*Id.* ¶¶ 6-7)

After Ms. Stites's death, Mr. Horton saw pictures of Mr. Reed in the media and he 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 22 ¶ 8)

V. MR. FENNELLS DISCOVERY THAT MS. STITES WAS HAVING AN AFFAIR WITH MR. REED PROVIDED A POWERFUL MOTIVE FOR MR. FENNELLS TO DO WHAT HE THREATENED TO DO IF HE CAUGHT HER CHEATING.

A. Mr. Fennell Threatened To Kill Ms. Stites If He Discovered She Was Cheating On Him.

As discussed, *supra*, Mr. Fennell threatened in a serious and harsh tone that he would kill Ms. Stites if he ever caught her "messaging around" on him. (Exhibit 2) This account is consistent with Mr. Fennell's conversation with a fellow law enforcement officer. During police training class, Mr. Fennell told a classmate, who later rose to the rank of Sergeant in a Texas law enforcement agency, Mary Blackwell,¹⁰ that he would kill his girlfriend if he ever caught her cheating. Ms. Blackwell recounted attending a police training in which Mr. Fennell was also a student. She explained that Mr. Fennell made a disturbing statement while discussing crime scene investigation:

After this conversation completed itself, Captain Whitley had us take a break. And during this break period is when I would re-write my notes

¹⁰ At the time of her testimony in March 2006, Ms. Blackwell had been a police officer for almost ten years, supervised seven officers at the Northlake College Police, and had been an instructor at the Cedar Valley Police Academy. (2nd Habeas RR Vol. 3:87-88)

for class, and Jimmy Fennell was having a conversation with another classmate that sat near him. . . . And he made a comment that if he ever found that his girlfriend was cheating on him that he would strangle her.

And I looked over my shoulder at him and said, "Well, if you do that they'll find your fingerprints all over her throat." And he said, "That's where you don't know shit, Best.¹¹ I'll strangle her with a belt."

(2nd Habeas RR Vol. 3:92-93)

B. Powerful New Evidence Suggests That Mr. Fennell Discovered Ms. Stites's Relationship With Mr. Reed And Followed Through On His Threats.

The recent statement by former Bastrop County Sheriff's Officer Charles Wayne Fletcher likewise demonstrates that Mr. Fennell learned of, and was angry about, Ms. Stites's affair with Mr. Reed:

I remember clearly that Jimmy said that he believed Stacey was "fucking a nigger." We were outside of the apartment building by the barbeque pit on the ground level preparing barbeque when he said it. He did not elaborate. He did not say specifically how he knew that or what made him believe it, but I remember he said those words because I was disturbed by them. I did not ask him about it. I did not know how to respond and did not want to pry into it. Although I have not shared this with many people, I have never forgotten his words.

(Exhibit 3)

Even more recently, there is new evidence that Mr. Fennell confessed that he discovered Ms. Stites's infidelities with Mr. Reed and murdered her because of it.

As Mr. Snow explained:

¹¹ At the time, Ms. Blackwell's last name was Best. (2nd Habeas RR Vol 3: 115)

In about 2010, a white man named Jimmy Fennell ("Jimmy") approached me at the Stevenson Unit wanting the protection of the Aryan Brotherhood. Jimmy said he needed protection from the blacks and Mexicans at the prison. At the time, I didn't know anything about Jimmy. All I knew was that I had seen Jimmy around the prison and observed that he seemed out of his element. So, I cut a deal with Jimmy that he would pay the Aryan Brotherhood out of his commissary, and in exchange we would keep the blacks and Mexicans off of him and protect him from violence.

Jimmy and I were never really friends, but we occasionally made conversation. One conversation stands out very clearly in my mind. Jimmy and I were in the rec yard at the Stevenson Unit walking around the track and talking. He was talking about his ex-fiancé with a lot of hatred and resentment. Jimmy said his fiancé had been sleeping around with a black man behind his back. By the way Jimmy spoke about this experience, I could tell that it deeply angered him. Toward the end of the conversation Jimmy said confidently, "I had to kill my nigger-loving fiancé." My impression was that Jimmy felt safe, even proud, sharing this information with me because I was a member of the Aryan Brotherhood. I think Jimmy assumed that his confession would impress me and earn him credibility with the Aryan Brotherhood.

As I recall, people didn't really bother Jimmy anymore once they knew he was under our protection. However, one day a new inmate came onto the unit who said he knew Jimmy from time he spent in Williamson County. I do not recall this man's name, but the new inmate said that Jimmy was a former cop who had been convicted of raping a woman in his custody. I wanted to verify this, so I asked a guard at the prison to look Jimmy up and tell me who he was and what he was in for. After looking Jimmy up, the guard confirmed Jimmy's history.

After the news spread around the prison that Jimmy was a cop, and that he was a rapist, the Aryan Brotherhood couldn't protect Jimmy anymore. Then, Jimmy accused the Aryan Brotherhood of extorting him. Because the guards saw me as one of the leaders of the gang, Jimmy's accusations landed on me. As a result, I was ultimately moved to the Connally Unit where they send a lot of gang members.

(Exhibit 1)

Moreover, Messrs. Snow's and Fletcher's account that Fennell knew of Ms. Stites's relationship with a black man is important corroboration of Mr. Reed's previous statements that Mr. Fennell confronted him about his relationship with Ms. Stites a month before the murder (Exhibit 26 ¶ 6)—the same time Mr. Fennell confided in Mr. Fletcher—and of Mr. Fennell's motive to kill Ms. Stites.

In light of all of the foregoing evidence, the recollection of Mr. Clampit, a friend of Mr. Fennell and former Lee County Sherriff's deputy, of Mr. Fennell's odd behavior at Ms. Stites's funeral services, including telling the young woman's body that she got what she deserved cannot be ignored. (Exhibit 4 ¶ 3)

In contrast to the witnesses previously rejected by the courts, Ms. Slater, Ms. Peoples and Messrs. Ybarra, Horton, Fletcher, Clampit and Snow have no connection to Mr. Reed, and their motivation in coming forward with evidence of the relationship cannot be attributed to incentives or bias. Their statements are further proof that Mr. Reed and Ms. Stites were having an affair and that Mr. Fennell, who had threatened to kill Ms. Stites if he ever discovered she was cheating on him, had knowledge of that affair and that Mr. Fennell confessed to killing her because of that affair.

VII. OTHER EVIDENCE IMPLICATING MR. FENNEL.

Mr. Fennell was the primary suspect in Ms. Stites's murder, even after he was excluded as the source of the semen found in her body. In addition to the forensic

evidence showing that Ms. Stites was murdered at a time Mr. Fennell testified that he was alone with her, significant other evidence inculpates him in her death. As discussed *infra*, Mr. Fennell's statements to investigating officers were riddled with inconsistencies, his actions around the time of the murder (like emptying his bank account) were suspicious, and he was found deceptive on two separate polygraphs when denying responsibility for the murder. When confronted with his deceptions, Mr. Fennell refused to cooperate further with the investigation and asserted his Fifth Amendment privilege against self-incrimination. Only after Mr. Reed was indicted did Mr. Fennell waive his rights and testify for the State. In the years since Mr. Reed's conviction, significant evidence has come to light implicating Mr. Fennell in the murder.

A. Mr. Fennell's Inconsistent Statements.

At trial, Mr. Fennell responded "No, sir" to the question: "Did you kill Stacey Stites." (TT Vol. 58 at 114:17-19) Yet, he later confessed: "I had to kill my nigger-loving fiancé." (Exhibit 1)

Mr. Fennell also told police and later testified that he and Ms. Stites were together in their apartment from around 8:00 p.m. on April 22, 1996 until the next morning, when Ms. Stites left for work. On the day of Ms. Stites' disappearance—before her body was found—Mr. Fennell told his best friend, Bastrop County Sheriff's Officer Curtis Davis, something entirely different. In an interview with

CNN, which statements Officer Davis later affirmed as his sworn testimony, Officer Davis recounted what Mr. Fennell told him the morning of April 23, 1996, before Ms. Stites's body had been found:

He blamed himself for allowing her to drive to work that morning because he said that he had actually been driving her to work; that he can keep the truck. . . . I remember him making comments about he should have got up out of bed and drove her to . . . drove her to work that morning.

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 bit of alcohol. Uh, I won't say they were drunk 'cause that's not what he said, but they drank a few beers after practice and uh, those beers were consumed in and around his vehicle. . . .

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. . . . And so that was part of the other reason why he said he didn't come home, you know, uh, earlier than he did.

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.

(Exhibit 31 (Excerpt of Curtis Davis Interview))

What Mr. Fennell told Officer Davis only hours after Ms. Stites was reported missing is dramatically different from his statements to police and his trial testimony.

- At trial, Mr. Fennell testified that, after attending baseball practice, he stayed home that evening with Ms. Stites, they showered together before she went to sleep and Mr. Fennell stayed up a while longer watching TV before retiring to bed. (TT Vol. 45:82)

But Mr. Fennell told Officer Davis that he went out drinking with other officers that night. Mr. Fennell claimed that he stayed out late so as not to disturb Stites, who had an early work shift. (Exhibit 31)

- Mr. Fennell testified that, after first insisting to Ms. Stites's mother that he would drive her to work in the morning, the two changed their plans and agreed that Mr. Fennell would sleep in the next morning and that she would drive herself to work. (TT Vol. 81-83);

But Mr. Fennell told Officer Davis that he had planned to drive Ms. Stites to work, but overslept because he had been out drinking. (Exhibit 31)

When confronted with Officer Davis's account at a hearing held in October 2017, Mr. Fennell again asserted his Fifth Amendment privilege against self-incrimination and refused to testify. (3rd Habeas Hearing Vol. 2:44-56) Accordingly, Mr. Fennell has refused to explain why he gave inconsistent stories about his whereabouts and activities at the precise time period that the forensic evidence shows that Ms. Stites was murdered.

B. Evidence Mr. Fennell Was Abusive Towards Ms. Stites.

As discussed *supra*, William Sappington, who lived in the apartment directly below Mr. Fennell and Ms. Stites relayed his concerns about Mr. Fennell's verbal abuse of Ms. Stites to both his family members and law enforcement. (Exhibits 7-8) Moreover, in addition to hearing Mr. Fennell describe how he would kill Ms. Stites if he caught her being unfaithful, Ms. Blackwell also described an incident in which she briefly spoke to Ms. Stites when she came to the training to pick Mr. Fennell up.

(2nd Habeas RR Vol. 92-97) Ms. Blackwell testified that Mr. Fennell yelled at her, "Best, quit talking to my girlfriend. What are you talking to my girlfriend for?" (*Id.* at 97-98) She then saw Mr. Fennell have a hostile exchange with Ms. Stites:

Q. In the truck . . . what did you see?

A. I saw Jimmy Fennell turn his complete body around facing Stacey--well, I didn't know it was Stacey at the time, but his girlfriend--and he was just--his whole facial--from the side I could see he was just yelling at her . . . just like all over her. Now, I couldn't hear anything but just seeing it physically.

(*Id.* at 99)

Another witness, Richard Scroggins, recounted witnessing another example of Mr. Fennell's violent temper toward Ms. Stites:

He was standing near a smaller model pick-up truck darker in color. I remember he was completely red in the face, yelling and calling her obscene and vulgar names. Repeatedly, as he would yell, he would start to walk toward the truck as though he was finished, but overcome with anger, he would drift back towards her and continue his tirade. At one point, I visibly saw his fist shaking toward her. At another point he called her a "cheating, lying cunt." He also called her a "slut" and a "whore" during this encounter. The young lady merely stood there as he screamed at her, with her arms folded, a purse in one hand.

Several times, I heard the young lady try to calm him down by saying, "Can we please not do this here. This is where I work. Let's talk about this when we get home?" It was to no avail. He was completely out of control and consumed with rage.

(Exhibit 32)

This behavior was consistent with Mr. Fennell's abuse of other romantic partners. Pamela Duncan, who dated Mr. Fennell during the time between Ms.

Stites's murder and Mr. Reed's trial, described Mr. Fennell as "extremely possessive and jealous" during their relationship. (Exhibit 33 ¶ 4) Mr. Fennell would threaten men who flirted with Ms. Duncan at her place of employment and was an abusive partner:

He was very verbally hostile to me, called me some really unpleasant, mean names (describing me, my parents, and the fact that I had kids at a younger age), and would scream at me in public. He didn't like me going out with my friends. Or doing anything apart from him.

(*Id.* ¶ 6) Mr. Fennell's hostility toward people of color also drove a wedge between Ms. Duncan and him:

Jimmy was extremely prejudiced. Before we started dating, I used to get my hair cut by a black woman. After we started dating, he wouldn't let me go to her any more, because her salon was "across the tracks" and "white women don't go there." At one point I was considering hiring a black woman to work at the store, and Jimmy got really angry. He told me everything he thought about black people (he didn't say "black people"; he used the N-word)-that they were all bad, all on drugs, all crooks-and why I shouldn't hire her. I ended up hiring her and that was a big problem between us for a couple of months.

(*Id.* ¶ 7) After Ms. Duncan's romantic relationship with Mr. Fennell ended, things got worse:

I broke up with Jimmy in September of 1997. Jimmy stalked me for months after that-until he left Giddings altogether. 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. If the parking lot got

crowded, he would leave, then come back when it emptied out again. 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 started pulling him over and giving him tickets. He got so many tickets he couldn't keep his job anymore.

What Jimmy did after I broke up with him really scared me. It made me feel like I knew what he was capable of, and that made me afraid for me and my kids. It made my parents afraid for my safety. The fact that he was a police officer made it that much more difficult. I felt like I was being constantly harassed and threatened, and there was nowhere to go. I finally filed a report with the police, and another officer came by and told me they would make sure he left me alone. A friend of mine later went down to the police station looking for the report I filed, and they couldn't find it. Things got better after I filed the report, and the officer came and talked to me, but the harassment didn't stop altogether until Jimmy moved away from Giddings.

(*Id.* ¶¶ 8-9)

The Williamson County Sheriff's Office also documented an instance of physical abuse by Mr. Fennell against his wife in 2007. Specifically, a co-worker and friend of Mrs. Fennell advised the Williamson County Sheriff's Office of the following:

On Tuesday 11-13-07 I, Detective J. W. Knutson #10041, received information that the wife of Fennell, Aida Solano Fennell, previously worked at the juvenile justice center. I contacted M. Loney who coordinates the law enforcement work at the JJC and asked if he knew the time frame that she worked there. I was informed that she quit during 2004 but while she worked here it had been rumored that her husband, Jimmy Fennell, and another employee at the JJC, Keith Tubbs, got into a verbal argument on the phone about Aida. I contacted Tubbs He advised me that he did know Aida and did work with her at JJC. He advised that they were friends but worked on different

shifts. I asked about the incident where he and Jimmy Fennell had an argument and he advised that Jimmy has called and questioned him about calling his house which Tubbs says he did not do. He further advised me that Jimmy began to ask if Aida was seeing someone at the JJC. During the conversation it was brought up that Aida has previously shown up at work with bruises on her face and claimed it was a result of being hit in the face by a phone when Jimmy became upset with her and threw a phone at her. Tubbs advised that Aida was nervous about Jimmy because he was jealous and has a temper and expressed concern about the death of his former fiancé in Giddings.

(Exhibit 34 (Police Report re: Aida Fennell))

C. Fennell's Pattern of Violence And Abuse As A Police Officer

1. The October 26, 2007 Rape.

Through an indictment filed on December 4, 2007, the State charged Mr. Fennell with aggravated sexual assault with a deadly weapon, aggravated kidnapping, improper sexual activity with a person in custody, and official oppression. *See* Indictment, *State v. Fennell*, 07-1752-K368 (Williamson Co., 368th Dist. Ct., December 4, 2007). A search warrant affidavit signed by a Williamson County Sheriff's Officer states that the victim of the sexual assault reported the following:

Ms. Smith¹² told Affiant that the Georgetown Police Department had sent officers to a scene at an apartment complex in Georgetown where she was fighting with her boyfriend, and that while the officers were there an officer had put her in his patrol car. Ms. Smith's boyfriend was arrested and taken from the location, and an "Officer Fennell" had taken her from the apartment complex in his patrol car. Prior to being taken from the scene, Ms. Smith had been vomiting due to intoxication. Ms. Smith was handcuffed and allowed to ride in the front seat of the patrol

¹² The name Smith was used as pseudonym.

car. Ms. Smith believed that the officer was going to take her to a hotel so that she would have a place to stay, since the people she had been staying with were friends of her boyfriend and would not answer the door at the apartment complex. "Officer Fennell" drove her to a location which she believed to be a park, stopped the patrol unit, and got her out of the car. Fennell unhandcuffed her and asked her to dance for him outside of his patrol unit, then had her place her hands on the trunk of his patrol unit, pulled down her pants, and penetrated her vaginally from behind with his penis. The defendant asked her if she liked it, she said no and asked him to stop, and he did not. When the officer was finished, he drove her back to the original apartment complex and dropped her off. The victim immediately reported the sexual assault by calling 911.

The victim has been shown a photo spread with a picture of Jimmy Fennell, Jr., in it and positively identified Fennell as the police officer who sexually assaulted her.

(Exhibit 35 at 3 (Fennell Warrant Affidavit))

The warrant affidavit also states that the victim's report was corroborated by a review of dispatch logs and an examination of the patrol car driven by Mr. Fennell. (*Id.*) This review showed that Mr. Fennell was "unaccounted for from just after midnight until 1:52 a.m.," and that the "processing of the patrol car vehicle has shown the victim's prints on the trunk, which is consistent with the location where the victim reported the sexual assault occurred in relation to the vehicle." (*Id.*) Physical evidence was also taken from the victim in the course of a sexual assault nurse examiner's SANE examination, performed on the same day as the assault. (*Id.*)

A redacted police report that has been released by the Georgetown Police Department further describes the incident:

On 10/26/2007 I heard Sgt. Fennell requesting another Officer to [REDACTED] Water's Edge. Upon arriving, I made contact with Sgt. Fennell who advised that [REDACTED] was accusing him of sexually assaulting her, and asked me to talk with her and find out what was going on. I had assisted Officer Morris on a previous call of disturbance involving [REDACTED] (see Officer Morris report 07-43903). I observed Officer Sanford attempting to talk with [REDACTED] observed that [REDACTED] was on her cell phone and walking up the stairs. I could hear [REDACTED] screaming and yelling that she had been raped.

(Exhibit 29 at 3) (Georgetown Police Report)) The victim's report of rape took place immediately after Mr. Fennell released her from his custody. (*Id.*) Mr. Fennell pleaded guilty to this offense and served ten years in prison.

2. March 12, 2007 Rape of B.A.¹³

In its investigation of Mr. Fennell for the rape of Amanda Smith, the Williamson County Sheriff's Department uncovered evidence of another rape perpetrated by Mr. Fennell. Pursuant to Williamson County supplemental report, on March 12, 2007, Jimmy Fennell arrested B.A., strip searched her at the Georgetown Police Department in front of two other male officers, and then drove her to a park in the middle of the night and raped her. (Exhibit 37 (Williamson County Supplemental Report)). The witness reported that Mr. Fennell, apparently oblivious to the repugnant nature of his conduct, frequently phoned B.A. for months afterward, essentially asking her out on dates. (*Id.*)

¹³ Initials have been used to protect the victim's privacy.

3. Sexual Misconduct Reported by Travis County Sheriff's Office.

A Travis County incident report states that in the early morning hours of June 9, 2004, Mr. Fennell pulled over an exotic dancer from a local club for a "crooked license plate." (Exhibit 38 (Travis County Incident Report No. 040011957)) The woman reported that after informing her that her license and registration were expired, Mr. Fennell requested that she would remove her clothes and dance for him. (*Id.*) Mr. Fennell asked the woman to go with him to a secluded location nearby stating: "Its not like I'm going to rape you or anything." (*Id.*) The woman managed to extricate herself from the situation by telling Mr. Fennell that she knew the wife of the Williamson County Sheriff. (*Id.*) She then drove to Travis County where reported the incident to a Travis County Sheriff's Officer, who then took a detailed statement from the woman, whom he described as shaking when she relayed the events. (*Id.*) The information was conveyed to the Georgetown Police Department, but the case was closed. (*Id.*)

4. August 11, 2007 Misconduct Regarding Kelly Ramos.

The Williamson County Sheriff's Department also documented what was reported as an unconsummated incident in which Mr. Fennell abuse his status as a police officer to sexually assault another woman. Ms. Ramos recounted the following:

Kelly advised that she was then directed to go toward some bushes off the side of the road where Amy could not hear her talking with the officer. Kelly advised she was wearing a low cut spaghetti strap shirt which showed cleavage. She advised that the officer got very close to her, within a foot of her, and backed her against the bushes. She advised that she was told that the officer had found methamphetamines in her car and he could take her to jail and have her kids taken away from her. She advised that while he was talking he continued to look at her breasts in a provocative manner. This encounter in the bushes lasted approximately 10 minutes. During the conversation Kelly stated that the officer continually attempted to get closer to her and she would lean further back. She advised that the officer was holding her ID and cell phone. She further advised that he had already run her name through dispatch and heard her returns come over the radio and he knew of her criminal background and it appeared to her that he was trying to use that against her. She stated that the officer told her that she was not going to go to jail but they needed to discuss the situation further and he would be by her apartment at around 0300 hrs and her boyfriend better not be at home and her kids better be asleep. The officer continued to stare at her breasts and make her uncomfortable. I asked Kelly what she thought was going to happen when he came to her house and she advised that she believed he wanted to have sex with her and was using the fact that he could take her to jail to get her to consent. She advised that she had no drugs in her car and believes he planted them.

Exhibit 39 (Ramos Police Report))

5. Threat to Sexually Assault Mary Ann Bone.

Another incident reported to the Williamson County Sheriff's Department involved a threat to a woman made when Mr. Fennell was called to her home, presumably on a criminal matter. Ms. Bone reported asking Mr. Fennell how she could avoid CPS taking her kids away, to which Mr. responded by asking if he "could bend her over the couch and "fuck" her." (Exhibit 40 (Bone Police Report))

6. Jamie Bolin Report.

The Williamson County Sheriff's department reported another incident in which Mr. Fennell was again accused of abusing his authority as a police officer to pressure a personal or sexual relationship with persons accused of a crime. In this case, Mr. Fennell responded to a domestic disturbance call in which he asked Ms. Bolin's boyfriend to leave the residence for the night. (Exhibit 41 (Bolin Police Report)). Ms. Bolin reported that Mr. Fennell told her that she needed another boyfriend and that while she had an outstanding warrant, he was the supervisor and that the decision whether she would go to jail was made by him. (*Id.*) He then asked if he could return later in the evening.

Mr. Fennell returned about an hour later, without the other officers who had responded to the call. Ms. Bolin reported that Mr. Fennell had no apparent purpose for his visit and began asking "personal questions about what she did for fun and whether she had ever considered dating older men." (*Id.*)

Additionally, in his short time as a Giddings Police Officer prior to Mr. Reed's trial, Fennell had already been the target of civil rights complaints alleging racism and violence. This included an incident that took place only two months before Ms. Stites's was killed in which Fennell was accused of beating and putting a gun to the head of a young Hispanic man and then attempting to cover it up by making a false report. (Exhibit 42 (Civil Rights Complaint))

VIII. EVIDENCE OF MR. REED'S ALLEGED PRIOR BAD ACTS

Rather than address any of the (1) the forensic evidence demonstrating the medical and scientific impossibility of Mr. Reed's guilt, (2) the credible new witnesses confirming a relationship between Mr. Reed and Ms. Stites, and (3) the evidence implicating Mr. Fennell, the State continues to focus on accusations of sexual assault leveled at the punishment phase of Mr. Reed's trial—but Mr. Reed was not convicted of any of these allegations and was actually acquitted in the only matter actually prosecuted.

Some of these allegations arose out of established romantic relationships between Mr. Reed and other white women, but others were presented as stranger attacks. Mr. Reed denies these accusations, but his overwhelmed trial attorneys, having already lost the guilt/innocence phase of the trial, did not mount a meaningful response during the penalty phase of Mr. Reed's 1998 trial. None of this implicates Mr. Reed in Ms. Stites's murder and, moreover, there is reason to doubt the State's continued reliance on these accusations:

- Mr. Reed was never convicted of any of these alleged sexual assaults, and the accusations were never fully investigated by Reed's attorneys. In fact, Mr. Reed was acquitted by a jury in the only accusation presented by the State for which he was prosecuted.
- Mr. Reed has requested DNA testing using modern techniques on any physical evidence relating to these cases, even offering to pay for this DNA testing. The Bastrop County District Attorney and the Texas Attorney General's Office have refused, even though such testing could, if the State's position was warranted, potentially prove the State's claims. The State's utter

refusal to permit Mr. Reed to conduct the DNA testing in connection with these uncharged offenses is telling.

- The Attorney General has argued that one of the accusations involving an alleged carjacking in Bastrop County was similar to the Ms. Stites's murder. However, the forensic evidence discussed above demonstrates that the State's theory that Mr. Reed kidnapped Ms. Stites on her way to work is "medically and scientifically impossible." There was no physical evidence implicating Mr. Reed in that crime, and the victim identified Mr. Reed from a photo lineup that was challenged at the punishment phase trial as suggestive. Witness misidentifications are the leading cause of wrongful convictions in Texas.¹⁴

REASONS FOR GRANTING THE WRIT

This Application seeks relief based upon substantial newly discovered evidence—including a confession by Mr. Fennell—that affirmatively demonstrates Mr. Reed's actual innocence and inculpates Mr. Fennell in Ms. Stites's murder. Mr. Reed seeks relief under section 5, article 11.071 of the Code of Criminal Procedure, *Schlup v. Delo*, 513 U.S. 298 (1995), and *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996).

I. APPLICABLE LEGAL STANDARDS

A. Article 11.071 § 5(a)(1)—Newly Discovered Evidence.

Article 11.071, Section 5(a)(1) authorizes the Court to consider a successive habeas application when the underlying facts or law were previously unavailable through the exercise of reasonable diligence. Here, Mr. Reed could not have

¹⁴ See <https://www.innocenceproject.org/wrongful-convictions-in-texas-caused-by-eyewitness-misidentification-and-overturned-with-dna-testing/> (summarizing Texas exonerations resulting from witness misidentification).

previously discovered the information known by the new witnesses through the exercise of reasonable diligence because these individuals only recently came forward, and Mr. Reed had no reason to know that they possessed relevant information in connection with Ms. Stites's murder. As demonstrated below, the newly discovered information establishes that Mr. Reed's conviction was obtained in violation of Due Process and that he is innocent of the murder of Ms. Stites.

B. Article 11.071 § 5(a)(2)—Gateway Actual Innocence/*Schlup*.

Article 11.071 § 5(a)(2) adopts the U.S. Supreme Court's "gateway" actual innocence standard, as set forth in *Schlup*. See *Ex parte Reed* 271 S.W.3d at 733. Under *Schlup*, a petitioner's showing of actual innocence can overcome a procedural default in state court, allowing the petitioner to revive otherwise-defaulted claims. 513 U.S. at 321. In evaluating a *Schlup* actual innocence claim, "the habeas court must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial." *House v. Bell*, 547 U.S. 518, 538 (2006) (internal quotation marks and citation omitted).

The Court should consider the following claims it previously found were procedurally defaulted because Mr. Reed has obtained more new evidence that demonstrates his actual innocence pursuant to Article 11.071 § 5(a)(2) and *Schlup*.

C. Actual Innocence under *Elizondo*.

Both Texas and federal constitutional law prohibit the conviction or punishment of persons who are innocent. *See Ex parte Elizondo*, 947 S.W.2d 202; *see also In re Davis*, 557 U.S. 952, 953-54 (2009) (Stevens, Ginsberg and Breyer, J.J., concurring) ("[I]t 'would be an atrocious violation of our Constitution and the principles upon which it is based' to execute an innocent person.") (citations omitted). 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.* This must be shown by clear and convincing evidence. *See Elizondo*, 947 S.W.2d at 209. The Court described this weighing of evidence as follows¹⁵:

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.

¹⁵ 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. at 206. In *Elizondo*, the Court 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 of or against the verdict:

[T]he 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. (citation omitted); *see also Ex parte Chaney*, 563 S.W.3d 239, 274-278 (Tex. Crim. App. 2018) (sustaining actual innocence determination under *Elizondo* after detailed reassessment of trial record in light of newly discovered exonerative evidence).

II. THE NEWLY-DISCOVERED EVIDENCE.

The sworn testimonies provided with this Application constitute newly discovered evidence. Each was obtained within the past few weeks and, in some instances, days. None of the witnesses were previously known to Mr. Reed. Moreover, none had ever been identified by the State as having been interviewed by the State, nor had the State ever disclosed to the defense or suggested that any of these individuals may have possessed relevant discoverable information (even though three were members of local law enforcement). None appeared on the State's list of potential trial witnesses.

Each of the witnesses states that recent publicity concerning Mr. Reed's case caused him or her to contact Mr. Reed's defense team. Mr. Reed had no reason to know that these individuals possessed relevant information in connection with Ms. Stites's murder. None of the witnesses could have been discovered previously with the exercise of diligence by Mr. Reed. Their declarations thus satisfy the standards for newly discovered evidence. *Ex parte Chaney*, 563 S.W.3d at 274 ("Newly discovered evidence is that which 'was not known to the applicant at the time of trial, plea, or post-trial motions and could not be known to him even with the exercise of due diligence.'") (quoting *Ex parte Miles*, 359 S.W.3d 647, 671 (Tex. Crim. App. 2012)).

III. MATERIAL NEWLY DISCOVERED EXCULPATORY EVIDENCE WAS SUPPRESSED IN VIOLATION OF *BRADY V. MARYLAND*.

To establish a Due Process violation under *Brady*, an applicant must prove that: (1) the State failed to disclose evidence, regardless of the prosecution's good or bad faith; (2) the withheld evidence is favorable to the applicant; and (3) the evidence is material; that is, there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different. *Ex parte Miles*, 359 S.W.3d 647, 665 (Tex. Crim. App. 2012). The first prong of the test regarding disclosure is met even if the prosecutor was not personally aware of the exculpatory evidence. *See id.* Rather, Due Process is violated where the undisclosed exculpatory information was known to any member of law enforcement connected to the

investigation. *See id.*; *Ex parte Reed*, 271 S.W.3d at 726 (Tex. Crim. App. 2008); *Ex parte Richardson*, 70 S.W.3d 865, 872 (Tex. Crim. App. 2002).

The Court has defined "favorable" evidence under the second prong as either exculpatory evidence, "which may justify, excuse, or clear the defendant from fault," or impeachment evidence, "which disputes, disparages, denies, or contradicts other evidence." *Ex parte Miles*, 359 S.W.3d at 665. Finally, the materiality of the evidence must be considered collectively. *See Id.* Favorable evidence is material where there is a reasonable probability of a different outcome had the evidence been timely disclosed to competent counsel. *See Id.* at 666. A reasonable probability is such that the Court's confidence in the outcome is undermined. *Id.* Further, 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.

Here, in addition to the numerous prior instances in which the State suppressed evidence known to law enforcement that was favorable to the defense, three new members of law enforcement have come forward with new evidence that was never disclosed to Mr. Reed's defense. This information was exculpatory and material because if, disclosed, the defense could have used it to impeach Mr. Fennell's trial testimony; it is also inculpatory because it provides motive for Mr.

Fennell to do what he had promised to do—kill Ms. Stites if he ever caught her cheating on him.

First, the State failed to disclose to Mr. Reed material information known to members of the Bastrop County Sheriff's Department, which was one of the agencies that investigated Ms. Stites's murder. Two former members of the Bastrop County Sheriff's Office recently came forward with suppressed exculpatory information that both discredits Mr. Fennell's trial testimony and provides motive for him to have murdered Ms. Stites.

The day before Mr. Reed filed this Application, Richard Derleth, a deputy in the Bastrop County Sheriff's Office, provided an affidavit that he had informed members of the Bastrop County Sherriff's Office that employees of H.E.B. had relayed to him how they kept a lookout for Mr. Fennell so that they could warn Ms. Stites when he came to the store and she could then hide from him to avoid him starting fights with her. (Exhibit 5 ¶¶ 5, 6) Mr. Derleth's testimony undermines and contradicts the State's evidence, including Mr. Fennell's testimony, that he and Ms. Stites had a "close-knit relationship" with no current conflicts and that they never argued in public. (TT Vol. 45:62, 80; 46:49; *see also id.* Vol. 45:114 (describing excitement about upcoming wedding); TT Vol. 46:32 (describing relationship with Ms. Stites as a good and open equal partnership))

Because Mr. Derleth was a member of the law enforcement agency investigating Ms. Stites's murder, and because he further reported what he had learned to other officers within that agency, his knowledge is imputed to the State. *Ex parte Chaney*, 563 S.W.3d at 266 ("For purposes of a *Brady* claim, 'the State' includes ... members of law enforcement connected to the investigation and prosecution of the case."); *Ex parte Miles*, 359 S.W.3d at 665 (finding "the State" suppressed evidence when evidence was in the possession of the police department investigating the crime, even when the information was not present in the State's files); *Ex parte Richardson*, 70 S.W.3d at 872 (knowledge of police officer that served on witness's security detail, but did not investigate the crime, imputed to the State). T

Second, Another former member of the Bastrop County Sheriff's Office recently came forward with new information that was not previously disclosed that could have been used to impeach Mr. Fennell's testimony (assuming he would have testified at all) and implicate him in Ms. Stites's murder. Mr. Fletcher, like Mr. Derleth, was a Bastrop County Sheriff's officer at the time of the initial investigation into Ms. Stites's murder. (Exhibit 3 ¶ 2)

Mr. Fletcher was friends with both Mr. Fennell and Ms. Stites. (Exhibit 3 ¶ 2) The evidence provided by Mr. Fletcher is very different than the happy couple portrayed by the State and Mr. Fennell at trial. As discussed above, Mr. Fletcher

personally observed facts that suggested the couple's relationship had not only deteriorated, but that Mr. Fennell had discovered his fiancé was being unfaithful to him with someone of a different race. That the race of the object of Ms. Stites's infidelity mattered to Mr. Fennell is apparent from the racial epithet he used to describe the relationship. (*Id.* ¶ 6)

Mr. Fletcher also recalled that Mr. Fennell behaved very oddly during Ms. Stites's funeral, including that he "looked cold, empty, and emotionless" before and during the funeral service. (Exhibit 3 at ¶ 5) Mr. Fletcher recalled that he "was so disturbed by" Mr. Fennell's behavior that he began to "question whether he was involved in Stacey's death." (*Id.* ¶ 8)

This suppressed evidence is powerful because it both contradicts Mr. Fennell's trial testimony and it inculcates Mr. Fennell by demonstrating his motive to follow through on his previous threats to kill Ms. Stites if he caught her cheating on him. Mr. Fletcher's testimony demonstrates that Mr. Fennell *knew* that Ms. Stites was cheating on him and, if disclosed, would have corroborated the defense's theory at trial that Mr. Reed and Ms. Stites were in a consensual relationship (which explains the presence of Reed's DNA on her person) and that Mr. Fennell, therefore, had motive to kill Ms. Stites.

Third, information known to Lee County Sheriff's Department Officer Clampit was also not disclosed to Mr. Reed by the State, in violation of *Brady*. At

the time of Ms. Stites's murder, Officer Clampit was a deputy at the Lee County Sheriff's Office. "As a deputy in a small Sheriff's Office [Clampit] had a lot of responsibilities," including homicide investigations (Exhibit 4 ¶ 3), and the Lee County Sheriff's Office assisted in the murder investigation (*id.* ¶ 9) Officer Clampit was, therefore, a member of law enforcement investigating the murder, whose knowledge is imputed to the State and whose knowledge should have been disclosed to Mr. Reed at the time of trial.

Officer Clampit witnessed Mr. Fennell address Ms. Stites's body at her viewing services: "Jimmy was looking at Ms. Stites's [body]. [and] said something along the lines of, 'You got what you deserved.'" (Ex. 4 ¶ 7) While perhaps not an admission of guilt, it certainly shows that Mr. Fennell was aware of actions by Mr. Stites that he believed justified her violent death. Under the circumstances presented here, it is clear that Mr. Fennell was aware of and deeply angered by Ms. Stites' ongoing sexual relationship with Mr. Reed.

The newly discovered evidence provided by these law enforcement officers is material. Indeed, if this information had been disclosed, it is unlikely that Mr. Fennell would have waived his Fifth Amendment privilege and testified for the State at Mr. Reed's trial at all. Thus, the State would have lost its key fact witness. It was Mr. Fennell who provided the timeline of the murder and testified (falsely) to exculpate himself and inculpate Mr. Reed in Ms. Stites's murder.

Had Mr. Fennell testified, the defense could have used this evidence, if it had been disclosed, to impeach his trial testimony, inculcate him in Ms. Stites's murder, corroborate the relationship between Ms. Stites and Mr. Reed, and refute the State's portrayal of a happily engaged couple and a grieving fiancé.

Accordingly, because law enforcement was aware of this exculpatory evidence at the time of Mr. Reed's trial, the failure to disclose it violated Mr. Reed's Due Process under *Brady*. *Ex parte Chaney*, 563 S.W.3d at 273 (a witness's "inconsistencies and untruths, taken together, change the character of [him] as a witness," and "undermined the State's case" and is material evidence suppressed in violation of *Brady*) (citation omitted).

IV. THE STATE PRESENTED FALSE TESTIMONY OF MR. FENNELL IN VIOLATION OF DUE PROCESS.

The newly discovered evidence also demonstrates that the State relied on Mr. Fennell's false testimony in order to convict Mr. Reed. A prosecutor's reliance on false or misleading testimony to secure a conviction violates due process. *See Ex parte Robbins*, 360 S.W.3d 446, 459 (Tex. Crim. App. 2011). An applicant asserting a Due Process claim based on false testimony must show by a preponderance of the evidence that the testimony was both false and material. *See Ex parte Weinstein*, 421 S.W.3d 656, 665 (Tex. Crim. App. 2014). Texas does not require that the prosecution be aware that the testimony was false. *See Ex parte Ghahremani*, 332 S.W.3d 470, 478 (Tex. Crim. App. 2011). To demonstrate materiality, an applicant must show

that there is a "reasonable likelihood" that the false testimony affected the outcome at trial. *Id.* This materiality standard is akin to the standard federal courts apply to instances of knowing use of perjured testimony. *See id.* (citing *United States v. Bagley*, 473 U.S. 667, 679 n.9 (1985)). That is, there is a reasonable likelihood that the testimony affected the outcome unless it can be shown beyond a reasonable doubt that it did not. *See id.* Mr. Reed can establish both falsity and materiality here.

First, at trial, Mr. Fennell affirmatively and unequivocally told the jury that he did not kill Ms. Stites:

Q. Jimmy, I do have to ask you this. Did you kill Stacey Stites?

A. No, sir.

(TT Vol. 45, 114:17-19) Mr. Fennell, however, confessed the opposite to Mr. Snow: "I had to kill my nigger-loving fiancé. (Exhibit 1 ¶ 7) These two statements cannot be reconciled, nor can they be considered immaterial.

Second, at trial Mr. Fennell testified that he did not know Mr. Reed. (TT Vol. 45, 114:14-16) However, in addition to previous evidence demonstrating that this testimony was false, the new evidence offered by both Messrs. Fletcher and Snow that Mr. Fennell knew Ms. Stites was having an affair with a black man puts the lie to that testimony as well. These statements cannot be reconciled with Mr. Fennell's trial testimony either, and they are material.

Third, the information provided by other new witnesses about the state of Mr. Fennell and Ms. Stites's relationship—his threats in front of the insurance

salesperson, the fighting as observed by the Sappingtons, her hiding from him at work as relayed to Officer Derleth by H.E.B employees, and her fear of him and infidelities with a black man as discussed by Ms. Peoples—(Exhibits 2, 5, 6-7a) cannot be squared with Mr. Fennell's trial testimony that he and Ms. Stites were a conflict-free happy couple who never even quarreled in public. (*See infra*)

Moreover, Mr. Fennell's own conduct further supports that his trial testimony was false. After he answered deceptively on two polygraph exams, Mr. Fennell invoked his Fifth Amendment privilege and refused to cooperate in the investigation. However, once Mr. Reed was arrested, Mr. Fennell expressly waived his Fifth Amendment privilege and testified for the State in order to exculpate himself. However, when confronted during post-conviction proceedings with his previous suppressed statements to Officer Davis that contradicted his trial testimony, Mr. Fennell again invoked his Fifth Amendment privilege, broadly refusing to answer any questions, including those regarding "the murder of Stacey Stites" and the "trial of Rodney Reed." (3rd Habeas Hearing Vol. 2:44-56)

Each of these false statements was material to Mr. Reed's trial, both individually and when considered in the aggregate. By testifying falsely about his involvement in Ms. Stites's murder, disclaiming knowledge of Ms. Stites's relationship with Mr. Reed, and misrepresenting his relationship with Ms. Stites, Mr. Fennell assisted the prosecution in successfully refuting Mr. Reed's consent defense

while, at the same time, exculpating himself and hiding his own motive for murder. Accordingly, the State's use of Mr. Fennell's false testimony violated Mr. Reed's Due Process. *See Ghahremani*, 332 S.W.3d at 478.

V. DEFENSE COUNSEL'S INEFFECTIVE ASSISTANCE DEPRIVED MR. REED OF DUE PROCESS UNDER *STRICKLAND V. WASHINGTON*¹⁶

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court recognized a criminal defendant's Sixth Amendment right to effective assistance of counsel. *Strickland*, 466 U.S. at 685 (internal citations and quotation marks omitted). A defendant claiming ineffective assistance of counsel must show that (1) counsel's performance was deficient, falling below an "objective standard of reasonableness," and (2) the deficient performance prejudiced the defense. *Id.* at 687; *see Bryant v. Scott*, 28 F.3d 1411 (5th Cir. 1994); *Vela v. Estelle*, 708 F.2d 954, 963-64 (5th Cir. 1983), cert. denied, 464 U.S. 1053 (1984). This Court follows *Strickland's* test for determining the effectiveness of counsel. *Hernandez v. State*, 726 S.W. 2d 53, 57 (Tex. Crim. App. 1986).

To establish prejudice:

[A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case. Prejudice is determined by whether there is a reasonable probability that, but

¹⁶ To the extent these claims rely on false testimony claims or claims that evidence was suppressed in violation of Due Process, Reed's Ineffective Assistance of Counsel claims are plead in the alternative.

for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is simply a probability sufficient to undermine confidence in the outcome.

Ex parte Armstrong, No. WR-78,106-01, 2017 WL 5483404, at *2 (Tex. Crim. App. Nov. 15, 2017) (internal quotations and citations omitted).

In prior habeas proceedings, Mr. Reed has presented evidence that his defense counsel's forensic and factual investigation was incomplete and deficient in several respects. While this likely resulted from a rush to trial rather than a lack of effort by defense counsel, the effect on the jury was the same: the jury (i) was presented with the State's medically and scientifically false forensic theory of the case, without any meaningful rebuttal evidence or argument; and (ii) did not hear the dispositive forensic and factual evidence that exculpates Mr. Reed and inculpates Mr. Fennell.

Defense counsel's lack of preparation and deficient performance in failing to challenge the false testimony offered against Mr. Reed at trial altered the outcome of his case. As a direct result of counsel's ineffectiveness, there can be no confidence in the outcome of Mr. Reed's trial.

A. Defense Counsel Failed To Investigate Time Of Death.

Dr. Bayardo's erroneous (and since recanted) testimony regarding time of death, as well as Mr. Reed's proof that Ms. Stites was dead before midnight when Mr. Fennell claimed the two were home together (which the State does not refute), is discussed *infra*. Mr. Reed's trial counsel testified at an evidentiary hearing in

October 2017 that, had the defense learned of Mr. Fennell's inconsistent statements about his activities on the evening of April 22, 1996, the defense would have been put on notice to investigate the time of death. (3rd Habeas Hearing Vol. 4:8)

A competent defense investigation, including calling a forensic pathologist at trial, would have revealed that there was *no* forensic basis for Dr. Bayardo's conclusion as to time of death. Indeed, three of the nation's leading pathologists all concluded that there is no question that Ms. Stites was actually murdered before midnight on April 22, 1996, and that she had been placed in the location and the position where she was found at least four hours after she was killed, thereby making the State's theory of Mr. Reed's guilt impossible. (*See infra*)

Because Mr. Reed's trial counsel was unprepared, evidence that would have disproved the State's theory of Mr. Reed's guilt was never presented. This failure prejudiced Mr. Reed under *Strickland* because it undermines confidence in the verdict. *Strickland*, 466 U.S. at 694.

B. Counsel Failed To Investigate The Scientific Basis For The State's Expert Testimony Regarding The Time Of Survival Of Intact Spermatozoa.

A competent investigation by trial counsel would have also revealed that the State's expert testimony regarding the outside length of time spermatozoa can remain intact was false. Had Mr. Reed's counsel performed a competent investigation, they would likely have been able to exclude the State's expert evidence entirely. *See Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992)

(adopting *Daubert* gatekeeping standard). Even if such testimony were admitted, the defense could have presented testimony from an independent forensic pathologist to explain why the opinions from Ms. Clement and Ms. Blakely on that issue were scientifically unsound. The jury would then have heard evidence that directly refuted the State's theory, and understood that it depended entirely upon *two* scientific fallacies: (i) an invalid time of death; and (ii) invalid serology testimony linking Reed's DNA to a contemporaneous rape and murder.

C. Counsel Failed To Investigate Relationship Witnesses.

Trial counsel's inadequate preparation also prevented them from effectively explaining to the jury the reason for the presence of Mr. Reed's semen.¹⁷ During opening statements, defense counsel stated that the defense would show that Mr. Reed and Ms. Stites were involved in a "secret affair." (TT Vol. 42:69) At trial, however, the defense presented little proof of that promise, and the few witnesses who testified to knowledge of a relationship were impeached. Moreover, defense counsel had inadequate time to prepare for trial and had been denied a motion for continuance, requested for the purpose of investigating witnesses to this

¹⁷ There is record evidence that the defense was hamstrung in its ability to locate relationship witnesses due to intimidation by law enforcement. (*See* Exhibit 16 ¶¶ 5-7 (Affidavit of Jimmie Brown)) If the Court finds that witnesses' reluctance to come forward defeats a showing of deficient performance, it should also find that the State's intimidation of such witnesses deprived Reed of fundamental fairness in violation of Due Process.

relationship. (TT Vol. 4:133)

Had defense counsel adequately investigated Ms. Stites's co-workers and friends, they would have located and presented numerous unbiased witnesses to testify competently, and without fear of impeachment, to the ongoing relationship between Ms. Stites and Mr. Reed—Slater, Ybarra, Peoples, Horton, and Fletcher. None of these witnesses had an affiliation with, or motive to help, Mr. Reed. Here, because of defense counsel's admitted unpreparedness, more evidence that directly contradicted the State's theory of Mr. Reed's guilt was never presented to the prejudice of Mr. Reed.

VI. MR. REED'S ACTUAL INNOCENCE SHOWING SATISFIES BOTH *ELIZONDO* AND ARTICLE 11.071, SECTION 5(A)(2).

The State's case against Mr. Reed consisted of three components: (1) putative "scientific" evidence that spermatozoa remain intact for no more than 24 hours, which the State used to bolster its argument that a tiny amount of Mr. Reed's intact spermatozoa proved that Ms. Stites died in conjunction with an ostensible sexual assault by him; (2) a narrative of the evening before she disappeared, provided by Mr. Fennell; and (3) evidence of Ms. Stites's "life circumstances," which was purportedly inconsistent with the idea that she was having an affair with Mr. Reed. As demonstrated *supra*, Mr. Reed has disproven each of these components: (1) the expert opinions have been recanted by the experts who offered them at trial, proven false by at least three renowned pathologists, or both, rendering the State's theory of

the case "medically and scientifically impossible"; (2) the narrative provided by Mr. Fennell has been proven false on almost every topic about which he testified; and (3) numerous credible witnesses have come forward with evidence that Ms. Stites was having an affair with Mr. Reed, that Mr. Fennell knew it, and that he threatened and fought often with Ms. Stites in response.

Further, had the jury heard the new evidence that refutes the rest of the State's case, there is no doubt the jury would not convicted him:

- Months before Ms. Stites died, Mr. Fennell threatened to kill her if he discovered she was cheating on him (Exhibit 2);
- Mr. Fennell discovered that Ms. Stites was cheating on him with a black man. (Exhibits 1, 3)
- Mr. Fennell confessed that he discovered Ms. Stites was being unfaithful to him and that he killed her as a resulted. (Exhibit 1); and
- Mr. Fennell's comments and demeanor at Ms. Stites' funeral are consistent with his having followed through on his threat to kill her if she was unfaithful. (Exhibit 4)

Thus, when the Court evaluates the full record in conjunction with Mr. Reed's new evidence, as required by *House*, there is uncontroverted proof that:

- The State's forensic theory of the case that Ms. Stites was murdered during a sexual assault by Mr. Reed is scientifically false.
- Mr. Reed and Ms. Stites were engaged in a consensual sexual relationship for months before her death;
- Mr. Fennell and Ms. Stites were not happily engaged, but, rather, their relationship was rapidly deteriorating;

- Mr. Fennell threatened more than once to kill Ms. Stites if he caught her cheating on him;
- Mr. Fennell knew about, and was angered by, Ms. Stites's infidelities with Mr. Reed;
- Ms. Stites was murdered at a time when Mr. Fennell testified the two were home together; and
- Mr. Fennell boasted about murdering Ms. Stites.

Mr. Reed's case is similar to *House v. Bell* in critical respects. In both cases, "the only forensic evidence at the scene" linking the petitioner to the victim was a small amount of semen. 547 U.S. at 541. In both cases, prosecutors emphasized the presence of semen as proof that the defendant raped the victim and motive for the crime, to overcome the implausibility of the prosecution's theory of the case. In *House*, for instance, the prosecution argued that the petitioner must have "trekked the nearly two miles to the victim's home" on foot. *Id.* at 540-41. Here, the State claimed, without any eyewitness or physical evidence, that Mr. Reed somehow intercepted and overpowered Ms. Stites while she was driving a truck in the early morning hours of April 23, 1996.

Moreover, a re-examination of the evidence in both cases demonstrated that the victim had not been sexually assaulted. 547 U.S. at at 540. In both cases, the victim's partner provided inconsistent testimony as to his whereabouts on the night of the murder, yet his credibility was largely accepted. *Id.* at 552. And, in both cases, there was "troubling evidence that ... the victim's husband, himself could have been

the murderer," including several witnesses who had seen the victim's husband behave abusively toward the victim. *Id.* at 448.

In *House*, like here, "when identity is in question, motive is key." *Id.* at 540; *see also id.* at 552-53 ("In combination ... with the challenges to [forensic] evidence and the lack of motive with respect to [the petitioner], the evidence pointing to [the victim's husband] likely would reinforce other doubts as to [the petitioner's] guilt."). Just as in *House*, the existing evidentiary record amassed by Mr. Reed, in light of the highly probative newly discovered evidence, leads to but one conclusion: if Mr. Reed had been provided a full and fair trial, he would not have been convicted of the murder of Ms. Stites.

Accordingly, because Mr. Reed has met the standards under Article 11.071, Section 5(a)(2), in addition to *Elizondo*, the Court should also remand the claims the Court previously found procedurally defaulted for a hearing on the merits.

CONCLUSION AND PRAYER

In this Application, Mr. Reed has presented new evidence, which includes strong circumstantial evidence as well as a direct confession, proving that Mr. Fennell, who was the State's prime suspect until a small amount of spermatozoa found on Ms. Stites's body were linked to Mr. Reed, was the person who murdered Ms. Stites. Together with the previous evidence that both exonerates Mr. Reed and

inculpates Mr. Fennell, Mr. Reed demonstrated, under both *Schlup* and *Elizondo*, that he is innocent of the murder of Ms. Stites.

Accordingly, Mr. Reed respectfully requests that the Court find that his Application for Writ of Habeas Corpus meets the requirements of Section 5 of Article 11.071 and *Elizondo* and that it vacate his conviction and death sentence or, alternatively, remand his case to the District Court for an evidentiary hearing.

DATED: November 11, 2019

Respectfully submitted,

/s/ Bryce Benjet
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)

Attorneys for Applicant Rodney Reed

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Texas Court of Criminal Appeals and the 21st Judicial District Court of Bastrop, County using the Texas Online eFiling for courts system and served all counsel of record by electronic service or United States Postal Service, this 11th day of November, 2019 on the following:

Matthew Ottoway
Assistant Attorney General
P.O. Box 12548
Capitol Station
Austin, Texas 78711

Bryan Goertz
Bastrop County District Attorney
804 Pecan Street
Bastrop, Texas 78602

/s/ Bryce Benjet
Bryce Benjet

INDEX OF EXHIBITS

- Exhibit 1 Affidavit of Arthur Snow
- Exhibit 2 Affidavit of Insurance Salesperson
- Exhibit 3 Affidavit of Charles Wayne Fletcher
- Exhibit 4 Affidavit of Jim Clampit
- Exhibit 5 Affidavit of Richard Derleth
- Exhibit 6 Affidavit of Brent Sappington
- Exhibit 7 Affidavit of Vicki Sappington
- Exhibit 7a Affidavit of Rebecca Peoples
- Exhibit 8 Police Report re: Truck
- Exhibit 9 Notes of Investigation
- Exhibit 10 Stites and Fennell Background Investigation Reports
- Exhibit 11 Affidavit of Merrill Lewen, M.D.
- Exhibit 12 Police Reports re: Gas Tank
- Exhibit 13 Carol Stites Statements
- Exhibit 14 Fennell Bank Documents
- Exhibit 15 1996 Failed Polygraphs of Jimmy Fennell
- Exhibit 16 Affidavit of Jimmie Brown
- Exhibit 17 Brief of Deke Pierce And Other Current and Former Law Enforcement Officers As Amicus Curiae In Support of Petition
- Exhibit 18 Declaration of Robert Bayardo, M.D.
- Exhibit 19 Affidavit of Wener Spitz, M.D.
- Exhibit 20 Affidavit of Michael Baden, M.D.
- Exhibit 21 Affidavit of LeRoy Riddick, M.D.

- Exhibit 22 Letter from DPS Crime Lab Director Brady Mills
- Exhibit 23 Bode Cellmark Forensics Letter
- Exhibit 24 Affidavit of Purnima Bokka
- Exhibit 25 Affidavit of Retired Det. Sgt. Gannon
- Exhibit 26 Affidavit of Rodney Reed
- Exhibit 27 Sandra Reed Bail Hearing Testimony Excerpt
- Exhibit 28 Affidavit of Alicia Slater
- Exhibit 29 Affidavit of Lee Roy Ybarra
- Exhibit 30 Affidavit of Calvin "Buddy" Horton
- Exhibit 31 Excerpt of Curtis Davis Interview
- Exhibit 32 Affidavit of Richard Scroggins
- Exhibit 33 Affidavit of Pam Duncan
- Exhibit 34 Police Report re: Aida Fennell
- Exhibit 35 Fennell Warrant Affidavit
- Exhibit 36 Georgetown Police Report #7043913
- Exhibit 37 Williamson County Supplemental Report re: B.A.
- Exhibit 38 Travis County Incident Report No. 040011957
- Exhibit 39 Ramos Police Report
- Exhibit 40 Bone Police Report
- Exhibit 41 Bolin Police Report
- Exhibit 42 Civil Rights Complaint