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## Application for Writ of Habeas Corpus

Rodney Reed files this Application for Writ of Habeas Corpus asking this Court to vacate his conviction and sentence of death because there is new evidence which proves that he did not murder Stacey Stites. Three of the most experienced and well-regarded forensic pathologists in the country—Michael Baden, Werner Spitz, and LeRoy Riddick—have reevaluated the case and determined that Mr. Reed’s guilt is medically and scientifically impossible. New witnesses have also come forward in recent months who have credible knowledge of the affair between Mr. Reed and Ms. Stites and her deteriorating relationship with Jimmy Fennell. This dispositive new evidence, coupled with the compelling facts already known to the State and this Court, establish Mr. Reed’s innocence and his right to habeas relief for constitutional violations and pursuant to article 11.073 of the Code of Criminal Procedure. Accordingly, Mr. Reed asks this Court to stay his March 5, 2015 execution and remand this case to the trial court for a live evidentiary hearing so that he can prove his innocence.

### **I. Introduction**

#### **A. New Forensic Evidence Demonstrates that the State’s Theory of Mr. Reed’s Guilt is Impossible**

Mr. Reed’s DNA is present on swabs taken from Stacey Stites’s vaginal cavity, rectum, and breasts. *See Reed v. State*, No. 73,135 at 6-7 (Tex. Crim. App. Dec. 6,

2000)). His capital murder conviction was based on the flawed opinions of the State's forensic experts that Reed's DNA could only have been left during a sexual assault contemporaneous with the murder. *See id.* Although Mr. Reed's trial counsel argued that Reed's DNA was left during a consensual encounter, the jury could not have credited this defense at trial in the face of unrebutted testimony by the State's forensic experts that Mr. Reed's semen was inextricably linked to a sexual assault contemporaneous with the murder.

Since trial, the State's key forensic witness—Roberto Bayardo, M.D.—has retracted his opinion offered at trial and now contradicts the State's scientific proof that Mr. Reed sexually assaulted Ms. Stites. Dr. Bayardo now admits that the forensic evidence suggest 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 1, Bayardo Aff. ¶ 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<sup>1</sup>—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.*

The recantations by experts<sup>2</sup> relied on by the State at trial are supplemented the conclusions of three of the nation's leading forensic pathologists (Werner Spitz, M.D.; Michael Baden, M.D.; and LeRoy Riddick, M.D.) who unanimously agree that (1) Mr. Reed did not sexually assault Ms. Stites and (2) that she was killed much earlier than the 3 a.m. estimate relied on by the State at trial. *See* Exhibits 3(Spitz Aff.), 4 (Baden Rpt.), 5 (Riddick Aff.). These experts—with over 100 years of combined experience—establish that Ms. Stites was murdered before midnight on April 22, 1996 and that her body was kept face down for 4-6 hours before she was transported in Jimmy Fennell's pickup and dragged into the brush where she was discovered lying on her back on the afternoon of April 23, 1996.

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<sup>1</sup> At trial, Bayardo testified that he determined the deposit of Mr. Reed's semen in Ms. Stites occurred "quite recently" in proximity to the time of her death. *See* TT Vol. 48:122.

<sup>2</sup> The State's retained DNA expert at trial has also clarified that her testimony with regard to the semen found may not have been scientifically accurate. *See* Exhibit 2 (e-mail from Meghan Clement).

*See id.* Dr. Werner Spitz, M.D., explains that the observable forensic evidence including “lividity, rigor, the amount of residual sperm in the genital tract, and evidence of decomposition” renders the State’s theory of the case “***medically and scientifically impossible.***” Exhibit 3 ¶ 3, 5 (emphasis added). He further states that:

When all these factors are considered together, ***it becomes indisputable that the time of death was considerably earlier than 3:00 a.m. on April 23<sup>rd</sup>*** as estimated by Dr. Bayardo. All findings point to a post mortem interval of about 20-24 hours prior to the time the body was filmed.

*Id.* ¶ 10 (emphasis added). Because the manipulation of the body observed on the video took place roughly between 7-8 p.m., Dr. Spitz confirms that the latest Ms. Stites could have been murdered was just before midnight.

And if Ms. Stites was murdered in the hours before midnight on April 22, 1996, the only plausible suspect is the man who claimed he was at home with her at the time, her fiancé Jimmy Fennell. Mr. Fennell, a rookie Giddings Police Officer, was the State’s prime suspect for months. He gave inconsistent information regarding his and Stacey’s action surrounding the murder, failed two polygraph examinations as to whether he murdered his fiancé, and was known as a jealous partner with a violent temper. *See infra* Part III C. This Court has already held that the existing evidence raises a “healthy suspicion” that Jimmy Fennell and not Mr. Reed committed the murder. *See Ex parte Reed*, 271 S.W.3d 698, 747

(Tex. Crim. App. 2008). Any doubt regarding Fennell's character as a violent sexual predator has since been resolved, due to his conviction for kidnapping and rape a young woman while Fennell was on duty as a Georgetown Police Officer. *See Ex parte Reed*, WR-50, 961-04, -05, 2009 WL 97260 (Tex. Crim. App. January 19, 2009).

**B. New Witnesses Provide Further Support for Mr. Reed's Account of His Relationship with Ms. Stites**

In addition to the dispositive new forensic evidence, two additional witnesses have come forward who confirm that Ms. Stites and Mr. Reed were romantically involved and that she and Fennell here not happy together.

**1. Alicia Slater<sup>3</sup>**

In November 2014, Alicia Slater, formerly Griesemer, contacted Mr. Reed's defense team on her own volition. "[S]he felt morally compelled to tell someone" that she was aware of a relationship between her former co-worker Ms. Stites and Mr. Reed – and that Ms. Stites told her specifically that the relationship was *sexual* in nature.<sup>4</sup> In 1995 and 1996, Mrs. Slater was employed part time at the H.E.B. She and Ms. Stites were friend and 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

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<sup>3</sup> The affidavit of Alicia Slater is attached to this Application as Exhibit 6.

<sup>4</sup> *Id.*

was not excited about getting married. She told me that she was sleeping with a black guy named Mr. Reed and that she didn't know what her fiancé would do if he found out. She commented that she had to be careful.

Ex. 6, Slater Aff, ¶ 4.

## 2. Lee Roy Ybarra<sup>5</sup>

In January 2015, Lee Roy Ybarra also submitted an affidavit to attest to a relationship that he saw between Mr. Reed and Ms. Stites—information he says he would have gladly told to police in 1996 had they contacted him.<sup>6</sup>

Mr. Ybarra also worked at the H.E.B. in Bastrop with Ms. Stites in 1996; on numerous occasions he saw Ms. Stites and “a young black man” he later identified as Mr. Reed from news articles after her death.<sup>7</sup> He remembers Mr. Reed's face well because “sometimes they were close enough that [Mr. Ybarra] got a very good look at him.”<sup>8</sup>

Based on his direct observation during the numerous occasions he saw Mr. Reed and Ms. Stites together, Mr. Ybarra confirms they had an intimate, positive relationship. He noticed her “demeanor would change” when Mr. Reed came

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<sup>5</sup>The affidavit of Lee Roy Ybarra is attached to this Application as Exhibit 7.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*, ¶ 3.

<sup>8</sup> *Id.*, ¶ 4.

around and she was “happy to see him and would be in a good mood.”<sup>9</sup> The nature of Mr. Reed’s and Ms. Stites’ encounters were happy and romantic.<sup>10</sup>

Ms. Stites’s behavior around her fiancé stands in stark contrast. Mr. Ybarra observes:

I knew Ms. Stites was engaged to a police officer at the same time she was seeing [Mr. Reed], and I recall that the few times that Stacey’s fiancé entered the store to visit her, she would become a nervous wreck. I know that there were times Ms. Stites would deliberately hide so that she didn’t have to talk to him. I just thought it was a strange relationship.

Ex. 7, Ybarra Affidavit, ¶5.

Although numerous witnesses have already provided evidence of the relationship between Mr. Reed and Stacey both at trial and in prior habeas proceedings, these witnesses were generally discounted due to their close association with Mr. Reed, a criminal record, or inconsistencies in their description. And matters of credibility aside, the Court could not accept evidence of a consensual relationship in the face of the un rebutted forensic testimony at trial linking Reed’s DNA to a sexual assault at or near the time of Ms. Stites’ murder. *See Ex parte Reed*, 271 S.W.3d at 747. This Court should certainly revisit its credibility judgments regarding the prior witnesses based on the now total discrediting of the State’s forensic theory.

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<sup>9</sup> *Id.*, ¶ 3.

<sup>10</sup> *Id.*

**C. The New Evidence in This Application, Coupled With the Evidence Already in the Record, Establishes Mr. Reed’s Right to Habeas Relief**

This application raises the following constitutional and statutory claims for relief based on new evidence of innocence and under newly available legal basis:

- Mr. Reed is innocent under the *Elizondo* standard;
- New scientific evidence establishes probable innocence pursuant to Article 11.073 of the Code of Criminal Procedure;
- The State presented false, misleading, and scientifically invalid testimony violating Due Process under *Ex parte Chabot*;
- The new evidence presented in this application is grounds for this Court to reconsider its denial of Mr. Reed’s prior habeas applications pursuant to Rule of Appellate Procedure 79.2(d).

**II. Factual Background**

**A. Stacey is Found Dead on the Afternoon of April 23, 1996**

Stacey Stites was last seen by her mother Carol Stites at “a little after 8 O’Clock” on April 22, 1996 as Stacey and her fiancé Jimmy Fennell went upstairs to the apartment they shared in the in the same building as Carol. *See* Exhibit 8 (Sworn Statement of Carol Stites, March 5, 1997). Stacey had arrived home from her 3:30 a.m. shift at the Bastrop, Texas HEB store at around 1:30 p.m., changed her clothes, ate a sandwich at her mother’s house and then took a nap on her mother’s sofa. *Id.* Jimmy Fennell arrived home at 2:30 p.m. from his patrol with

the Giddings Police Department, and the three spent the afternoon watching TV and playing with a 5 year old girl that Carol Stites was babysitting. *Id.* Later in the afternoon, Fennell left for baseball practice that he coached with his neighbor and fellow Giddings Police Officer David Hall. *See id.* Stacey went upstairs to her apartment to lay down. Exhibit 9 (Handwritten Statement, Sept. 16, 1996). At around 7:30 p.m. Stacey came back down to talk to her mother. *Id.* Carol had been crying because of tension with Jimmy's family about the wedding. Stacey responded, "you think you have stress, you don't know what stress is." *Id.* Soon after, Jimmy came home, the two went upstairs, and Stacey was never seen alive again.

Stacey was supposed to be at work the next morning at 3:30 a.m. at the Bastrop HEB, about 30 miles from her home. When she didn't arrive at work, co-workers had difficulty immediately finding her phone number.<sup>11</sup> Eventually, a call was made to Stacey's mother Carol at around 6:45 a.m. reporting that she was not at work.

Meanwhile, Bastrop Police Officer Paul Alexander noticed a wine colored pick-up truck parked in the Bastrop High School Parking Lot at 5:23 a.m. Exhibit 11. He read the license plate number to his dispatcher, who informed that the truck

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<sup>11</sup> There is some inconsistency regarding the phone call. Stacey's co-worker informed police that he spoke to Carol Stites at 5:05 a.m. *See* Exhibit 10. However, Carol Stites stated that the Store Manager called her over an hour later.

was registered to a Fennell in the City of Bastrop. *Id.* Alexander then walked up to the truck and found it unoccupied with the driver's seat reclined. He observed a broken belt with a square chrome buckle on the ground in front of the driver's side door. *Id.* Because the truck was not reported stolen, however, Officer Alexander took no action.

By 8:15 a.m., law enforcement officers had converged on Jimmy Fennell's truck at the Bastrop High School Parking lot. Carol Stites was notified that the truck had been found, and a formal missing person case was reported. Exhibit 12. The search for Stacey was resolved when, shortly before 3 o'clock in the afternoon, Kenneth Osborn, a real estate appraiser, spotted Ms. Stites' body while on Bluebonnet Road, a secluded gravel road on the outskirts of Bastrop, Texas. TT Vol. 44:18-21. Ms. Stites' body was located in brush off to the side of the road. Mr. Osborn went to a nearby house and had the occupants notify the authorities. Mr. Osborn returned to the body with the occupant of the house who checked the body for a pulse. TT Vol. 44:29. Law enforcement officers from several agencies quickly responded to the scene.

## **B. Forensic Investigation by the State**

### **1. Investigation of Jimmy Fennell's Truck**

Law enforcement documented Jimmy Fennell's truck at the Bastrop High School parking lot and then had the truck towed to a secure location. The truck was locked and the keys were missing. Exhibit 13. On the ground outside of the driver's side door was a portion of a woven leather belt, and some papers including carbon check copies belonging to Jimmy Fennell's checkbook. *Id.*



Mr. Fennell who came out with his friend, Bastrop Sherriff's Officer Curtis Davis, to unlock the truck. *See* Exhibit 14. The DPS cataloged what they found inside the truck including one of Ms. Stites' shoes, one of her earrings, broken pieces of a plastic cup, an HEB work shirt, and a single edged knife in a metal sheath. *See* Exhibit 13. 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 15. Fingerprints were collected from the truck and items inside the truck, the only prints that could be identified belonged to Jimmy Fennell and Stacey Stites. TT Vol. 47:39. Rodney Reed was excluded as the source of all other prints identifiable prints. *See id.* at 43.

## **2. Investigation of Scene Where Body Found**

The investigation of the scene where Stacey's body was found was well documented in photographs, reports, notes and in a 45 minute videotape depicting activity that took place over the course of roughly 3 hours. Reports indicate that a large group of Bastrop area law enforcement officers arrived at the scene between 3 and 4pm. BCSO Officer Walker reported a perimeter was roped off and BCSO officers began photographing the scene around the time the DPS Crime Lab was contacted. Exhibit 16. Sometime after these initial observations were made by the Bastrop authorities, a green wool blanket was placed over the body. However, the DPS Crime Lab arrived around 4:30 and processed the scene in the video. The photographs below depict the body as it was found as well as the evidence on the roadway:



DPS Crime Lab Technician Karen Blakely was primarily responsible for the investigation of the body. Despite standard forensic practice suggesting that the examination of a body take place in a controlled environment by a medical examiner, Ms. Blakely conducted a thorough examination of the body at the scene that included removing all of Stacey's clothing but her knee brace, taking tape lifts from the body, and vaginal and breast swabs. *See* Exhibit 15 at 3. She is not shown changing her gloves at any point during the crime scene video and, on one occasion, a piece of some debris is evident on her glove while she is examining the body. *See* Exhibit 17. Once she returned to the crime lab, Blakely examined a smear slide from the vaginal swabs and reported finding only three intact sperm. Exhibit 15 at 3.

### **3. Autopsy**

Stacey's body was checked into the Travis County ME's Office at 10 p.m. on April 23, 1996, and her autopsy commenced at 1:50 p.m. the following day. Exhibit 18. In his autopsy report, Dr. Bayardo provided his opinion that "the decedent STACEY STITES, came to her death as a result of asphyxia due to ligature strangulation associated with sexual assault." *Id.* He lists the following DIAGNOSES:

1. Ligature strangulation.

2. Congestion and Edema of the lungs.
3. Congestion of viscera.
5. Linear abrasions of dilated anus.
6. Bruises of skin.
7. Post-mortem bruises, abrasions and burns.

Dr. Bayardo took vaginal smears and reported finding “very few” spermatozoa, heads and tails. He reported the rectal swabs as negative for spermatozoa. *Id.*

### **C. Fact Investigation by Law Enforcement**

Law Enforcement Officers conducted an in-depth investigation into Stacey’s life and her relationship with Fennell in an effort to identify possible suspects in the murder. Officers spoke to a number of Stacey’s friends and co-workers who often described her as a friendly, outgoing, and a flirt. Exhibit 19. Stacey and her mother had moved to Smithville, Texas from Corpus Christi after Stacey became pregnant at age 15. *See* Exhibit 20. She gave the baby up for adoption and completed high school. Mr. Fennell and Ms. Stites began dating while Stacey was still in high school and Fennell was 22 years old and working as a Bastrop jailer. Fennell was with Ms. Stites at her high school graduation and considered the relationship to be “serious” within two or three weeks after they began dating in May of 1995. *See* Tr. Vol. 43:89; TR. Vol. 45:62. Despite Jimmy’s

characterization of the relationship as “serious” as of June 1995, Police reports indicate that Ms. Stites was also dating Johnny Earl McCoy up until they broke up 6-8 months prior to an interview that took place on May 16, 1996. *See* Exhibit 21 (Bastrop Sheriff’s Office Reports re: McCoy). Therefore, Ms. Stites’s relationship with Mr. McCoy did not end until September –November of 1995, overlapping with her “serious” relationship with Jimmy by at least three months.<sup>12</sup>

Other reports discuss relationships that appear to have ended around the time or soon after Ms. Stites became serious with Fennell. John Jason Conwell stated that he dated Ms. Stites for 4-5 months after meeting her in “early 1995”. *See id.* Robert Champion stated that he resumed a prior relationship with Ms. Stites at the end of April 1995 and they dated for about one month. *See id.* Jerry Ormand, a married man who was ten years older than Stacey, gave a sworn statement that he dated Ms. Stites for a brief period in April and May 1995, ending on her high school graduation. Mr. Ormand recounted the relationship as follows:

Sometime around the last part of April 1995 Stacey and I had sex together for the first and last time. We were parked in my truck under the rail road crossing bridge in Smithville. Sometime after Stacey mentioned she was being tested every so often for the aids virus.<sup>13</sup>

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<sup>12</sup> It is worth noting that Mr. McCoy was on probation for deadly conduct after he “shot up” two businesses where he had been fired. *See* Exhibit 21.

<sup>13</sup> This relationship was confirmed by Mr. Ormand’s wife, Sammi Ormand, who described an incident in May of 1995 in which she confronted Stacey, who was “very drunk” at a bar, but that

Exhibit 22. Lisa Avery, a friend of Stacey's, who she met while working at a car dealership in the summer of 1995 told Bastrop Police Officer David Board that Stacey was a big flirt, who once hit on her husband. Although Lisa said that Stacey wanted to get married and settle down, Lisa also said that Stacey "liked to drink" and "at one time did drugs. Crystal and X".<sup>14</sup> Exhibit 24.

Stacey's relationship with Jimmy Fennell was described in law enforcement documents as strained. Jimmy Fennell was repeatedly described as jealous by Stacey's friends. Heather Flanagan, a friend of Stacey's from the HEB, shared with the Bastrop Police what Stacey had told her about her relationship with Jimmy:

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

Exhibit 26. 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.

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Stacey later told a friend with in Sammi Ormand's earshot that "she was going to take my husband to bed." Exhibit 23.

<sup>14</sup> In a prior habeas proceeding, the State submitted the negative report from drug testing of Stacey's hair claiming that this disproved witnesses who alleged that Stacey Stites has used drugs. *See Findings of Fact and Conclusions of Law, Ex Parte Reed*, No. 8701-A at ¶ 112 (Tx. Dist. Ct. October 1, 2001) However, this test was only sensitive enough to detect a heavy drug user. It would not have detected occasional recreational drug use. *See Exhibit 25 (Affidavit of Robert Johnson, Ph.D.)*. The State opposed Mr. Reed's motion brought in federal court to re-test Stacey's hair with more sensitive technology to determine if Stacey in fact used drugs recreationally.

Exhibit 27. Bastrop Sheriff's officers learned that Stacey would have coffee on Wednesdays with a former co-worker Ronnie Reveal. Mr. Reveal saw Stacey 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 28 (emphasis added).<sup>15</sup> A note in the file of the Bastrop Sheriff's Office that appears to be from an interview with Stacy's mother likewise indicates that Stacey and Jimmy had argued the night of the murder and that Jimmy was "Jealous of Everyone":

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<sup>15</sup> Richard Scroggins also recently came forward with information about witnessing Jimmy Fennell's violent temper towards Stacey:

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 42, Scroggins Aff.

STACEY & JIMMIE ARGUED ON NITE  
BEFORE HOMICIDE.  
JIMMIE HAD KEYS TO CAR -  
(JEALOUS OF EVERYONE)   
(5:15 AM WAKEN UP CRYING) TRUCK WAS GONE  
CALLED JIMMIE JUST BEFORE ~~6:45 AM~~ (HEB) 6:45  
LEFT FROM GIDDING 6:47 AM  
HAD STACEY'S CAR KEYS TO MOTHER'S CAR -  
STACEY GOT CAR KEY FROM CAROL

Jimmy Fennell was clearly a suspect in the investigation. He was interrogated by both Bastrop County Sheriff's Officers and Texas Ranger Sergeant Rocky Wardlow concerning his involvement in the murder. TT Vol. 45:110; TT Vol. 46:125. 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. However, the contents of these interviews were not recorded in the police reports and no audio or videotape was made that could have captured any inculpatory statements made by Mr. Fennell.

These harsh interrogations were likely inspired by the fact that Fennell's account of the events leading up to Stacey's murder was inconsistent and false, and his actions immediately following Stacey's disappearance were suspicious. For

example, Jimmy Fennell told police and later testified that he had not had sex with Stacey 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; Exhibit 29. Fennell confirmed that the information regarding the risk of pregnancy came to him “as a result of the prescription.”. Merrill Lewen, M.D., a Houston area Board Certified OB/GYN has reviewed Jimmy’s statement and 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 30 (Affidavit of Merrill Lewen, M.D.). Fennell’s false statement regarding birth control could not have come from the instructions on the pills or from Stacey’s doctor as he indicated in his testimony at trial. Fennell’s statement could reasonably be construed as either (1) a fabrication by Fennell to cover up the fact that he and Stacey were not having sex or (2) a lie told by Stacey to Jimmy in order to postpone his unwanted sexual advances.

Fennell also gave a false statement on the morning of Stacey’s disappearance about his truck. He told police officers on the morning of Stacey’s disappearance that he had filled the truck with gas the night before. *See* Exhibit 31. It was only days later, and after police had discovered that the truck’s gas tank was only 1/8 to 1/4 full, that Fennell changed his story and said that the tank had been 1/4 full. *See* Exhibit 32. It would be extremely unlikely that Fennell, a police officer, would have mistaken whether he filled his truck with gas only hours earlier. And the use of 3/4 of a full tank of gas was not consistent with the State’s theory that Stacey was abducted in Bastrop and murdered and left in a location roughly 5 miles away.

Fennell also differed from Carol Stites in describing his plans for April 23, 1996. In a statement to police, Carol Stites recalled that Fennell had been insistent on driving Stacey to work on the morning of April 23<sup>rd</sup>:

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 8. In a handwritten statement Carol Stites further explains that she was upset by disagreement regarding whether Jimmy should drive Stacey to work, that it reminded her of Jimmy's poor manners the day before, and that she started to cry. Exhibit 9. Jimmy's testimony was less than clear on the point. He first claimed that Carol had asked Jimmy to drive Stacey to work, but then corrected himself that it was his suggestion. TR Vol. 45: 81. Jimmy then claimed that, despite this prior arrangement, that he and Stacey decided separately that Stacey would go to work on her own in Jimmy's truck. TT Vol. 45:83. This was a key point because what Jimmy was "determined" to do on the afternoon of the 23<sup>rd</sup> was inconsistent with his own alibi for the murder.

Perhaps Fennell's most suspicious action in the immediate aftermath of his fiancée's disappearance is found in his bank records. Soon after his truck has been located, and before Stacey was found, Jimmy Fennell withdrew all of the money in his bank account. *See* Exhibit 33 (BPD Chief Ronnie Duncan: "I was told that Jimmy closed out his account the morning his fiancée disappeared."). Although Fennell had been instructed to contact his bank about a missing checkbook, Fennell's decision to withdraw his savings rather than place a hold on the checks makes no sense unless he was preparing to flee.

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

Two months later, Mr. Fennell was given another polygraph examination by Texas Department of Public Safety Lieutenant Gordon Moore in December of 1996. TT Vol. 52: 10; Exhibit 35. In this examination, Mr. Fennell was found to be deceptive in answering questions including:

Anytime after April 22, 1996, did you penetrate Stacey's anus with anything?

Response: No.

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 first.

Response: No.

*Id.* After learning that the polygraph again indicated deception, Jimmy Fennell asked for a lawyer, and the interview was terminated.

The investigation of Jimmy Fennell ended, however, when DNA testing of evidence containing Rodney Reed's sperm collected in an uncharged sexual assault allegation was matched to the DNA profile obtained from the vaginal swabs collected from Stacey Stites. Mr. Reed was then arrested on unrelated drug charges and then confronted about the murder of Stacey Stites. Surprised by this questioning, Mr. Reed denied knowing Ms. Stites and signed a written statement to that affect. *See* TT St. Ex. 91(a).

At the trial, Texas Ranger Rocky Wardlow claimed that Jimmy was dropped as a suspect only because they could not figure out how he could have left his truck at the Bastrop High School Parking lot at around 5 a.m. and then return home approximately 30 miles in time for Carol Stites to speak to him at around 7 a.m. in Giddings. TT Vol. 46: 127 (“Logistically, it was impossible.”).

However, documents in the BCSO’s investigation file suggest that Jimmy Fennell’s close friend, BCSO Deputy Curtis Davis, had the opportunity to assist Jimmy with travel in the early morning hours of April 23, 1996. Curtis Davis’s time sheet and a time off request form are contained within a stack of officer’s notes from the investigation. Davis’s time sheet has the box for April 22, 1996 circled, and an officer has noted “WORKED NIGHT SHIFT 1 HOUR TOOK 11 HOURS OFF.” Exhibit 37. The next time Curtis Davis is accounted for is when he arrived with Jimmy Fennell to drop off the key to his truck. *See* Exhibit 14. Davis’s time-off form indicates that the excuse he gave to leave work on the night shift that coincided with Stacey’s murder was a “BROKEN TOOTH.” Exhibit 37. Davis was then absent for his scheduled shifts on April 23, 26, and 27 for “PERSONAL DEATH”—presumably to assist his close friend Jimmy Fennell. There is no documentation of any attempt by the police to interview Curtis Davis or otherwise establish whether he could have driven Jimmy Fennell home to Giddings on the morning of April 23, 1996.

BCSO investigative records also indicate an investigation of David Hall as the man who drove Jimmy home:

NOV 14, 1995 (Officer OUTMANN 3-4-97) employed

Hall - lived in same complex - (6-2 PM 4-23) Fennell Dr. - P.D. Car to Hall

met one time at P.D.)

Hall - Captain - )

Mr. Hall shared a City of Giddings patrol car with Jimmy Fennell and they lived in the same apartment complex. TT Vol. 44:55; TT Vol. 46:29. They went to baseball practice together on the afternoon of April 22, only hours before Stacey Stites disappeared. TT Vol. 44:60. David Hall is also 6'1" and thus, according to the state's theory about the seat adjustment of the vehicle, cannot be excluded as a driver of the pickup truck. Mr. Hall's whereabouts on the night in question could only be corroborated by his wife. See 1<sup>st</sup> Habeas RR at 200-216. Mr. Fennell also referenced unspecified statements made by Mr. Hall about the murder in a letter sent to the Giddings City Manager soon after Mr. Reed's conviction. See Exhibit 38 (Letter to D. E. Sosa). Further, Mr. Hall cannot be excluded as a contributor to

a mixture of saliva detected on a beer can which was collected from the crime scene. See *Ex parte Reed*, 271 S.W.3d at 739.

These records indicate that the State was not entirely forthcoming when it described the efforts to determine if Jimmy Fennell was given a ride home to Giddings early on April 23, 1996. The failure of the police to document any investigation of possible suspects like Hall and Davis leaves little faith in the State's pronouncement that Jimmy Fennell's guilt was "logistically impossible."<sup>16</sup>

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<sup>16</sup> As part of a thorough review of the case, retired NYPD Homicide Detective Kevin Gannon discusses other factors known to the police at the time that raise suspicion that Jimmy Fennell was the murderer:

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

#### **D. Mr. Reed's Consistent Account of His Relationship With Stacey Stites**

Soon after his arrest, Mr. Reed's family retained counsel, Jimmy Brown. Mr. Brown investigated Mr. Reed's claim that he and Stacey were romantically involved. In a pre-trial hearing, Mr. Reed's mother testified that she was aware of the relationship and saw Stacey come by her house to pick Mr. Reed up. TT Vol. 5:25. Although Mr. Reed had declined to testify at trial on the advice of counsel, Mr. Reed has since given a full account of his relationship with Stacey in an affidavit provided as part of the statutory requirements applicable to his pending Chapter 64 proceeding. In his affidavit, Mr. Reed explains how he met Stacey and how their relationship grew:

2. I first met Stacey in October or November of 1995 in the game room in back of the Diamond Shamrock in Bastrop. It was in the afternoon, and I remember that there were pool tables and juke box in the game room. We started talking and played some pool. Later, we

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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 40.

left the game room and went down to the boat dock by the river and talked some more. Afterwards, Stacey dropped me off at my house. We did not have a phone in the house, and I may have given her the number of the payphone at the Long's Market on the corner near my house. I often received calls at this phone.

3. After spending the afternoon together, Stacey would occasionally stop by my house or the community center next door to see me or she would call the payphone at Long's. Sometimes we would see each other twice in a week, and sometimes a couple of weeks would go by without seeing each other. My mother sometimes would see Stacey when she came by my house looking for me.

4. When Stacey and I hung out, we would often go to a gazebo in Bastrop State Park or another spot near a pond in the park. Sometimes we would meet at a bar called Ray's Place that was down the street from my mom's house. A couple of times we went to Linda Kaye Westmoreland's house. We only had sex a handful of times either at the Bastrop State Park, at my mom's house, or at Linda Kaye Westmoreland's house.<sup>17</sup>

Exhibit 39. He also discusses the fact that Jimmy Fennell suspected that he and Stacey were seeing each other and threatened Mr. Reed in the weeks before Ms. Stites's murder:

Less than a month before Stacey was murdered, I was threatened by Jimmy Fennell. I was walking at night on the north end of Bastrop with my cousin Chris Aldridge. A Bastrop Sheriff's deputy car pulled up to us. There were two white men in the car. When the man in the passenger seat came out, I recognized him as Jimmy Fennell. I was not sure who the man driving the car was, but he was larger than Jimmy, was wearing a uniform, and could have been Curtis Davis.

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<sup>17</sup> Ms. Westmoreland's affidavit recounting her knowledge of the relationship between Mr. Reed and Ms. Stites was presented to this Court in a prior habeas proceeding. *See* Exhibit 39.

Jimmy said, the he knew I was messing around with his girl and that “I was going to pay.” I do not know how Jimmy would have figured out I was seeing Stacey. The only connection that I can think of is that I was also dating Michelle Castillo, and her brother Randy Castillo was in the same police academy class as Jimmy Fennell. I saw Stacey a week or so after Jimmy Fennell threatened me and told her about it. She told me that, if Jimmy catches us, he would kill her.<sup>18</sup>

*Id.* Mr. Reed describes the last time he saw Ms. Stites before she went to work at 3:00 a.m. on April 22, 1996:

7. The last time I saw Stacey was either very late Sunday night on April 21<sup>st</sup> or very early Monday morning on April 22<sup>nd</sup>. Stacey came by the community center by my mom’s house where I often hung out. She picked me up and drove to the Bastrop State Park. We had sex at the park, and then Stacey dropped me off around 3am at the corner of Linden and Main Street in Bastrop before she went to work.

*Id.* And finally, Mr. Reed explains why he did not report his involvement with Stacey and his suspicion of Jimmy Fennell to the police after Stacey was murdered:

I didn’t hear that Stacey had been murdered until Thursday or Friday of that week. I was either at my mom’s house or my cousin Shonte Reed’s house when someone told me about the murder. But I didn’t really believe it until I saw it on the news. I immediately suspected that Jimmy Fennell had killed Stacey, but I did not go to the police about this. I knew Jimmy was a police officer with many friends in Bastrop. I did not want to get involved and was afraid that I would

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<sup>18</sup> Mr. Arledge has provided an affidavit describing this incident in a prior proceeding. Moreover, Carol Stites observed in her statement to the BCSO that at Jimmy Fennell would in fact ride along with Curtis Davis while Davis was on patrol. *See* Exhibit 9.

become a suspect if I told the police that we had been dating. Jimmy Fennell had also threatened me, and if I came forward I was concerned Jimmy Fennell would retaliate. For the same reason, I denied even knowing Stacey when I was arrested on a drug charge in 1997 and questioned about Stacey's murder.

*Id.*

### **E. State's Case at Trial Relied Entirely on Flawed Forensic Testimony**

At trial, the State relied almost exclusively on the opinions of forensic experts to convince the jury that Mr. Reed had killed Ms. Stites. Dr. Bayardo testified without any explanation that the time of death was 3 a.m.<sup>19</sup> In order to connect Mr. Reed to the crime, the State relied on expert testimony that Ms. Stites was sexually assaulted contemporaneous with her murder. First, the state claimed that sperm can only remain morphologically intact for twenty-four hours. Dr. Bayardo testified that the sperm he found was paced "very recently." TT Vol. 48:122. Karen Blakely was more specific:

I have published documentation that says that 26 hours is the outside length of time that tails will remain on a sperm head inside the vaginal tract of a female

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<sup>19</sup> The State's reliance on this fact was misplaced because Dr. Bayardo's conclusory testimony regarding the lacerations was no evidence. *See U.S. v. McCall*, 553 F.3d 821, 834 (5<sup>th</sup> Cir. 2008) (unreliable expert testimony is not sufficient evidence); *Stevenson v. E. E. DuPont De Nemours & Co.*, 327 F.3d 400, 406 (5<sup>th</sup> Cir. 2003) (same); *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797 (Tex. 2006); *Volkswagon of America Inc. v. Ramirez*, 159 S.W.3d 897, 912 (Tex. 2004) (juries cannot credit as "some evidence expert opinions that are not reliable or are conclusory on their face").

TT Vol. 45:16. Meghan Clement, a private DNA analyst retained by the State also confirmed that in her career examining thousands of rape kits that she had never seen intact sperm more than 24 hours after intercourse. TT Vol. 51: 56. This point was emphasized by the State in closing argument:

[DPS analyst Karen Blakely] took the vaginal swabs, and what did she find? At eleven o'clock that night she goes back to the lab, she puts them under the microscope and bingo, she finds three fully intact spermatozoa. At that point she knows what she's got here. We all know what she's got here. Because we know, from the credible evidence, that that doesn't hang around for days on end. We know from the credible evidence that that tells you that that semen got in that girl's body within 24 hours of that eleven o'clock moment. Which is when? On her way to work.

TT Vol. 56:33-34.

Next, the prosecution relied upon Dr. Bayardo's assertion of anal tearing as conclusive proof that Ms. Stites' was raped at the time of her murder. Dr. Bayardo testified at trial, inconsistent with his Autopsy report, that he found lacerations in the anus, and that the dilation of the anus was consistent with penetration at or near the time of death. *See* TT Vol. 48:126. This testimony was also relied on heavily by the State in closing:

Dr. Bayardo does a full examination and what does he find? He finds that evidence of the anal tearing that we talked so much about. And he finds, without any doubt at all, that that occurred at the time of

Stacey's death. How important is that in the grand scheme of things in this case? . . . So that right there tells you how important this scientific evidence is. So what did Dr. Bayardo tell you when he testified? He said that in his opinion, looking at everything, looking at all the evidence, whatever happened to this young girl had not happened consensually, based on everything he saw.

TT Vol. 56: 34-35. This assertion was used by the state in conjunction with Dr. Bayardo's claim that sperm heads were found in the anal cavity:

Doctor Bayardo sees what appears to him to be heads and tails of spermatozoa on [the rectal swabs]. Wil Young and Megan Clements both test those swabs to see if they can get DNA. They did it because there was evidence of anal trauma. I mean if they wouldn't have done it, that would have been a dereliction of their duties. I mean they wouldn't have been doing their jobs if they wouldn't have attempted to test that which is obviously relevant.

TT Vol. 56: 45-46. The prosecution emphasized the importance of the recovery of sperm in Ms. Stites' rectum, stating "that that's the piece of evidence, if nothing else does, that's going to hammer him. [] ...the rectal swab is the one that really hammers the defendant." TT Vol. 56: 47-48. The jury also obviously was greatly concerned by the evidence of sodomy as they requested a readback of Dr. Bayardo's testimony and submitted a question asking "What is the evidence that supports the sodomizing of Stacey Stites?" TT Vol. 56: 156.

Finally, the prosecution argued that Mr. Reed's DNA found on Ms. Stites' breast was saliva that indicated recent sexual contact.

So we bring you as well Karen's testimony with regard to the breast swabs, and later testimony that there was saliva on those. That, too, tells you that this happened that morning at the time of her death, because it's not going to be hanging around there days later, not when normal people take showers and wash things off of them. It happened that morning.

TT Vol. 56: 37.

Unprepared to defend essentially every aspect of the case, Mr. Reed's trial counsel did not meaningfully contradict any of the State's damning forensic proof. Mr. Reed's counsel did not present a forensic pathologist, criminalist, or serologist to respond to the State's case. On cross examination, Reed's trial counsel was only able to elicit evidence that intact sperm had been found in a body for longer than 24 hours in extreme conditions such as a body high in the mountains where the temperatures were frequently below freezing. *See* 55 RR. 40.<sup>20</sup> The Defense DNA analyst Dr. Johnson testified that she had cases where bodies decomposed for three weeks and she was able to detect and isolate sperm. 55 RR. 40. However,

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<sup>20</sup> In prior proceedings, the State has made the misleading and unscientific suggestion that Dr. Bayardo's discovery of intact sperm at autopsy on the afternoon of April 24, 1996 was evidence contradicting the State's evidence that sperm can only remain intact for 24 hours. However, this ignores the fact that (1) the body was refrigerated once it came to the ME's Office at 10 pm on April 23<sup>rd</sup> and (2) Dr. Bayardo himself concluded that the sperm was placed in the vagina "quite recently".

she described this scenario as "extreme" and notably did not discuss finding intact sperm—which was the only relevant issue. *Id.* Mr. Reed’s defense also could not contradict Dr. Bayardo’s conclusion that Ms. Stites was anally assaulted.

Although Dr. Bayardo was cross examined regarding an inconsistency between his report stating “abrasions” in the anys and his trial testimony about finding “lacerations,” Bayardo stuck to his testimony and no defense expert contradicted his conclusions. *See* TT Vol. 48:145-46.

Highlighting the importance of this testimony to the State’s case was a question the jury sent the Court during deliberations asking for Dr. Bayardo’s testimony regarding the following questions:

- A. Did he find sperm in the anal cavity as observed by tests or observation?
- B. His opinion on the life expectancy of intact sperm in the anal cavity?
- C. Time period associated with anal dilation after death in non-sexual assault victims?
- D. What is the evidence that supports the sodomizing of Stacey Stites?

TR Vol. 56:156. The judge responded by having only selected portions of Dr. Bayardo’s direct examination read to the jury, thus eliminating the benefit of any cross examination by the defense. *Id.* at 157-162.

After deliberating from 1-6:45 p.m., the jury convicted Mr. Reed of capital murder. This Court later upheld the sufficiency of the evidence supporting the conviction based entirely on the opinions of the State's forensic experts:

Giving the strength of the DNA evidence connecting appellant to the sexual assault on Stites and the forensic evidence indicating that the person who sexually assaulted Stites was the person who killed her, a reasonable jury could find that the appellant is guilty of the offense of capital murder.

*Reed v. State*, No. 73,135 at 9.

### **III. New Scientific Evidence Proves Mr. Reed's Innocence**

This Application for habeas relief is based in large part on new scientific evidence that was developed after a disinterested, retired NYPD homicide detective, Kevin Gannon, reviewed the police reports, autopsy report, photographs and crime scene video and discovered evidence that contradicted the post mortem interval and other forensic findings asserted in the law enforcement documents. *See* 40 (Gannon Affidavit). Gannon conducted this review as part of a television show in which a team of experienced homicide detectives are asked to examine old criminal cases and offer their findings without prior knowledge of the outcome of the case at trial. *See id.* Because of the impending execution date, Gannon immediately contacted the undersigned counsel with his findings, which sparked a

ground-up reassessment of the forensic evidence that has conclusively proven Mr. Reed's Innocence.

**A. Proper Interpretation of the Forensic Evidence Render's the State's Theory of Mr. Reed's Guilt Impossible**

The State's contention at trial was that Mr. Reed abducted, raped, and murdered Stacey Stites after she left home in Giddings for work at around 3:00 a.m. and before the truck she was traveling in was seen empty in Bastrop at 5:23 a.m. Three of the nation's leading forensic pathologists, Drs. Spitz, Baden, and Riddick, now conclude 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 the 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 Reed contemporaneous with death—a fact essential to sustaining the sufficiency of the evidence supporting the verdict against Reed. *See Reed v. State*, No. 73, 135 at 9. If Ms. Stites was murdered at a time that Jimmy Fennell testified that she was at home with him, and if there is no evidence that Mr. Reed sexually assaulted Ms. Stites, then it becomes clear that Jimmy Fennell and not Mr. Reed murdered 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 (4<sup>th</sup> Ed. 2006) (livor, rigor, and decomposition included in most common protocols used in postmortem timing). None of these factors were discussed in relation to the post-mortem interval at Mr. Reed's trial.

**1. Patterns of Postmortem 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 the body being left in the position it was found. Exhibit 3, Spitz Aff. ¶¶2-3; Exhibit 4 Baden Rpt. at ¶6; Exhibit 5, Riddick Aff. ¶¶ 12-14. Dr. Riddick explains lividity in his affidavit:

Another significant factor in my opinion as to the post-mortem interval is my observation of the location and level of livor in the body. As discussed above, livor mortis (or lividity) is the pooling of the blood to the lowest part of the body, described by clinicians as a dependant area. Lividity that exceeds faint patches of discoloration generally develops after at least 2 hours, and takes several more hours to become fixed. Lividity is fixed when the blood congeals in the capillaries or diffuses into the extravascular

tissues. Once lividity is fixed, it will not be displaced by compression and will not shift if 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 5 at ¶ 12. Areas of lividity often contain patches of white called “blanching” where compression of the skin has prevented the blood to pool. *Id.* at ¶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 dependant in the position she was found. Areas of blanching can be seen on Ms. Stites’s elbow. Dr. Spitz explains the relevance of this non-dependant 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 3, Spitz Aff. ¶3. Dr. Baden similarly concludes:

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 22<sup>nd</sup> when she was alone with Mr. Fennel

Exhibit 4, *see also* Exhibit 5, Riddick Aff ¶14 (body in different position for at least 4-6 hours). This nondependent lividity with blanching on the elbow can be seen in the photograph below:



## **2. Rigor Mortis Indicates Longer Post-Mortem Interval**

Drs. Spitz and Riddick also focus on the level of rigor mortis seen in the crime scene video which shows a longer post-mortem interval. Dr. Riddick explains:

If the post mortem interval had been roughly thirteen hours as estimated by Dr. Bayardo at the trial, rigor should have been intense and progressing to completion. The crime scene video contradicts this

finding and indicates a much longer post-mortem interval. A body in complete rigor (which is generally achieved at roughly 12 hours under normal conditions and will be essentially unchanged at 13 hours) is stiff. Manipulation of an arm, a leg, or the head is difficult and will also result in moving the torso. The manipulation of the body demonstrated in the crime scene video, however, indicates that the limbs can be moved independently, thus indicating that rigor was no longer at its height and was passing. For example, a crime scene investigator can be seen lifting the left arm easily without the left side of the torso being lifted as it would have been with completed rigor. *See Exhibit 2 at 19:10-19:20.* The arm also flops back down when released. At frame 21:00 of the crime scene video, the left leg is moved without the body turning as it would have in advance rigor. In a subsequent frame, 23:26, the examiner easily turns the head to the left without having to move the stiff body and then allows the head to easily roll back to the right. At frame 23:46 to 23:50 of the video, the head, when moved by investigators, returns easily to its original position in a manner that is not consistent with the level of rigor I would expect if the victim had been killed at around 4:00 a.m. that morning. When the funeral directors move the body to a bag, they easily position the arms across the chest; a manipulation difficult to complete in a body stiff with complete rigor. This is depicted in *Exhibit 2 at 27:15-27:50.* In short, during the examination of the body between 5:15 p.m. and around 8:22 p.m. when the crime scene video ends, the body appears in many instances to be easily manipulated and at times the arms appear limp indicating that rigor has waned. Based on the lessening of rigor demonstrated in the crime scene video, I estimate that the post mortem interval is significantly longer than the 13 hours estimated at trial. The level of rigor demonstrated in the crime scene video is more consistent with a post-mortem interval of 16-20 hours from the first documentation of the body at 5:15 p.m.

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.<sup>21</sup> 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 5, Riddick Aff ¶ 10-11. Dr. Spitz also explains that the manipulation of the body in the crime scene video demonstrates “passing” rigor consistent with a longer post-mortem interval:

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 3, Spitz Aff ¶4-5.

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<sup>21</sup> A note written by Karen Blakely to the Medical Examiner's Office, attached as Exhibit 5, indicates that the victim's underwear and pants were wet. However, none of the other evidence such as the victim's bra and socks were described as wet, and it is common that a deceased person's pants and underwear become wet due to the postmortem release of urine. This would not affect the development of rigor.

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

Dr. Spitz points out evidence of decomposition that is inconsistent with the time of death advanced by the State at trial:

My review shows evidence of decomposition that is not consistent with a time of death at 3 a.m. on April 23, 1996. 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 3, Spitz Aff ¶ 7.<sup>22</sup> Dr. Baden explains the importance of the viscous fluid on the floor of the truck in determining the time of death:

Examination of the truck showed that the driver's seat was reclined

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<sup>22</sup> The photography and video were taken between approximately 5:15 and 8:15 p.m. See Exhibit 5 Riddick Aff ¶ 8.

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 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 4, Baden Rpt. ¶7. The viscous purge fluid described by Dr. Baden is depicted in the photograph below and is consistent with the description of the fluid in the truck:



**4. The State's Evidence that Reed's Sperm was Associated with a Sexual Assault is False.**

Drs. Spitz, Baden, and Riddick all confirm that there is no evidence of a sexual assault or anal penetration, and that the evidence presented by the State's experts to that effect was false. First, the doctors address the testimony of Karen Blakley and Meghan 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 7-8 p.m. on April 23<sup>rd</sup> would rule out Reed's account of consensual sex between midnight and 3 a.m. on April 22<sup>nd</sup>. Dr. Spitz explains:

Very few sperm were found on autopsy smears, and the crime scene investigator found only 3 intact spermatozoa. If the victim was sexually assaulted between 3-5 a.m., there would be more sperm found on slides. A normal sperm count is considered to be 15 million spermatozoa per milliliter. The amount of sperm found on the slides is more consistent with a longer interval between intercourse and the time the sample was collected. As I explain in my book, intact spermatozoa can be found in the vagina up to 72 hours after coitus.<sup>23</sup>

Exhibit 3, Spitz Aff ¶ 6. Dr. Baden echoes this statement:

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

Exhibit 4, Baden Rpt. ¶ 8; *see also* Exhibit 5 Riddick Aff ¶ 17. The doctors also rebut the State's evidence of anal rape:

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<sup>23</sup> *Spitz and Fisher* at 1262.

The distended anus seen in photos and described at autopsy is normal, in consideration of the absence of rigidity. It is a common mistake for death investigators to misinterpret natural relaxation of the sphincter, as evidence of anal penetration.<sup>24</sup> There are no apparent lacerations in the photographs of the anus. If lacerations were present, they would be visible. Abrasions described at autopsy are not evidence of anal assault, and are equally consistent with hard bowel movements. I am aware that there was a weak DNA result consistent with Rodney Reed on the sperm fraction of the rectal swab taken from Stites. The presence of a small amount of sperm in the rectum is not surprising and does not contradict my conclusion that there is no evidence of anal penetration in this case. When semen is present in a body, it can drain from the vagina into the dilated anus. I have seen this happen in a number of cases. Contamination of the rectal swab by vaginal contents is also a concern, especially in cases where vaginal swabs are collected prior to the taking of the rectal specimens.

Exhibit 3, Spitz Aff ¶ 8. Dr. Riddick provides a more detailed description for why the evidence of anal rape is lacking:

18. The evidence of forced anal intercourse – whether pre- or post-mortem – is not conclusive in this case. Dr. Bayardo testified that he believed that the victim was raped anally. He based this conclusion on his testimony that he found lacerations on the anus, that that anus was dilated, and that he observed what may have been sperm heads in a rectal smear. Dr. Bayardo’s opinion offered at trial is not supported by the available evidence.

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<sup>24</sup> Id. at 120 (listing common situations in which distortions due to postmortem changes may be subject to misinterpretation).

19. First, no sperm was actually visualized on the rectal smears.<sup>25</sup> The small amount of sperm which was detected through DNA testing could have come from post-mortem cross contamination. The body was left at the scene on its back and remained in this position during the crime scene investigation, transportation to the morgue, and while stored at the morgue. Especially where the anus was dilated as depicted in the autopsy photo, sperm could have leaked from the vagina unto the anus. The videotape of the scene where the body was recovered also shows Karen Blakely taking pubic hair tape lifts in a manner that would transfer semen from the labia to the rectum. Additionally, the videotape shows that Ms. Blakely and others at the scene rolled Ms. Stites' body from its right side over onto its left side. This rolling was sufficient to cause sperm to be expelled from the vagina and to leak into the anus. The body was moved into a body bag, then moved onto a stretcher and then loaded for transport to the Office of the Travis County Medical Examiner, where it was moved to a refrigerated unit and then moved to an autopsy table. Thus, there were several opportunities for leakage by the time that Dr. Bayardo took the rectal swabs. It is also possible that the small amount of sperm detected by DNA testing was transferred through an error in collection such as touching the swab against an external area of the body that may have had sperm on it.

20. Second, the observation of dilation of the anus at the time of Dr. Bayardo's autopsy does not indicate anal sexual assault. The anus was not examined at the time that Ms. Stites' body was recovered. By the time Dr. Bayardo examined the body at 1:50 p.m. on April 24, 1996, Ms. Stites had been dead for more than 36 hours. Rigor mortis would be passing at this time, as reflected by Dr. Bayardo's observation of only "slight residual rigor mortis." With passing rigor mortis, sphincters, including the anus, dilate, and with manipulation from swabs can expand even more. The misinterpretation of

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<sup>25</sup> The Medical Examiner's Report submitted by Dr. Bayardo states, "[r]ectal smears are negative for spermatozoa." Exhibit 18.

postmortem dilation of the anus as sexual assault or sodomy is listed as one of the most common errors by forensic pathologists in the forensic pathology text *Spitz and Fisher's Medicolegal Investigation of Death*.<sup>26</sup>

21. Third, it cannot be concluded with any degree of scientific certainty that Ms. Stites' anus was lacerated and that those lacerations occurred around the time of death. The autopsy report describes "longitudinal linear abrasions." Abrasions are scrapes which are not necessarily associated with anal intercourse and can be caused by a hard bowel movement. Lacerations, by contrast, are tears in the skin. A trained forensic pathologist should not confuse these two terms. The photograph taken at the autopsy does not show breaks in the skin, a sign of a laceration. Blood would also be expected if the tear to the anus was sustained while the victim was alive. By contrast, it is possible that minor abrasions would be present that would not be seen on the photograph. To determine whether these were in fact lacerations, a microscopic section of this area should have been performed.

Exhibit 5, Riddick Aff. ¶ 18-21; *see also* Exhibit 4, Baden Rpt. ¶ 9 (dilation of anus normal and no evidence on photographs of lacerations).

**B. The State's Forensic Experts Dr. Bayardo and Meghan Clement Have Retracted the Opinions Relied on by the State at Trial**

In 2012, as soon as it became clear that Mr. Reed's counsel would not be able to call Dr. Bayardo as a witness in a federal evidentiary hearing, counsel reached out to Dr. Bayardo and confronted him with the opinions offered by Dr. Riddick at the time. To counsel's great surprise, Dr. Bayardo retracted most of what he told the jury at Mr. Reed's trial:

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<sup>26</sup> *Spitz and Fisher's Medicolegal Investigation of Death* at 120.

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 1 (Declaration of Roberto Bayardo, M.D.) (emphasis added). Contrary to the impression left on the jury, Dr. Bayardo now states that (1) his estimate of the time of death at approximately 3 a.m. was scientifically invalid, (2) the evidence suggests that intercourse between Mr. Reed and Ms Stites took place more than 24 hours before her death.

State's witness Meghan Clement testified at trial that she had never seen intact sperm collected more than 24 hours after intercourse. Meghan Clement recently clarified her trial testimony in an e-mail to undersigned counsel explaining that her trial testimony that she had not seen intact sperm in a rape kit more than 24 hours old should not be construed as an opinion on whether Mr. Reed's sperm could actually have been found intact after 24 hours in Ms. Stites' body:

- 1) Yes, the processing of rape kit samples could break the tails off sperm

2) My testimony did not address the length of time sperm can last in the body based on literature or opinions but rather, my experience in observation of intact sperm on rape kit items based on the length of time from an alleged incident to the time of kit collection.

Exhibit 2 (October 23, 2012 e-mail from Meghan Clement). At Ms. Clement's suggestion, undersigned counsel retained another forensic biologist to review the question. Joseph Warren, Ph.D., explained (consistent with Ms. Clement's email) that viewing sperm on rape kits is not the equivalent of finding intact sperm at autopsy. See Exhibit 41 ¶¶ 2-6.

#### **IV. Claims for Relief**

This successive application for a writ of habeas corpus raises constitutional and statutory claims for relief based on new evidence of innocence and under newly available factual and legal basis as permitted under section 5, article 11.071 of the Code of Criminal Procedure. Mr. Reed seeks relief on the following claims:

- Mr. Reed is innocent under the *Elizondo* standard;
- New scientific evidence establishes probable innocence pursuant to Article 11.073 of the Code of Criminal Procedure;
- The State presented false, misleading, and scientifically invalid testimony violating Due Process under *Ex parte Chabot*;
- The new evidence presented in this application is grounds for this Court to reconsider its denial of Mr. Reed's prior habeas applications pursuant to Rule of Appellate Procedure 79.2(d).

In support of these claims, Reed incorporates the evidence and argument discussed in all portions of this application and incorporates the evidence introduced at his trial and in all of his prior habeas corpus proceedings.

**A. Rodney Reed’s Conviction Violates Due Process Because He is Innocent**

Both Texas and federal constitutional law prohibit the conviction and/or punishment of persons who are innocent. *See Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996).<sup>27</sup> Under *Elizondo*, the court reviewing an innocence claim must examine the new evidence in light of the evidence presented at trial. *Ex parte Thompson*, 153 S.W.3d 416, 417 (Tex. Crim. App. 2005). “In order to grant relief, the reviewing court must believe that no rational juror would have convicted the applicant in light of the newly discovered evidence.” *Id.* at 417. This must be shown by clear and convincing evidence. *See Ex parte Elizondo*, 947 S.W.2d at 209. The Court of Criminal Appeals described this weighing of evidence as follows:

Because, in evaluating a habeas claim that newly discovered or available evidence proves the applicant to be innocent of the crime for

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<sup>27</sup> 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 (9<sup>th</sup> Cir. 1997). However, the evidence presented in this application meets any applicable standard.

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.

*Id.* However, the Court in *Elizondo* was careful to emphasize that this standard was something less than a legal sufficiency review. 947 S.W.2d at 207. No presumptions should be applied to the evidence either in favor or against the verdict:

the court charged with deciding such a claim should make a case-by-case determination about the reliability of the newly discovered evidence under the circumstances. The court then should weigh the evidence in favor of the prisoner against the evidence of his guilt. Obviously, the stronger the evidence of the prisoner's guilt, the more persuasive the newly discovered evidence must be.

*Id.*

The new scientific evidence discussed in this application goes to the very heart of the sufficiency of the evidence used to convict Mr. Reed. As this Court noted in affirming Reed's conviction:

Given the strength of the DNA evidence connecting appellant to the sexual assault on Stites and the forensic evidence indicating that the person who sexually assaulted Stites was the person who killed her, a reasonable jury could find that appellant is guilty of the offense of capital murder.

*Reed v. State*, No. 73, 135 at 9. As discussed *supra* Part III, the new scientific evidence disproves every aspect of the trial evidence discussed above. The new scientific evidence including the opinions of Drs. Spitz, Baden, and Riddick as well as the recantations of Dr. Bayardo and Meghan Clement proves that (1) Mr. Reed’s DNA was left through consensual intercourse, (2) that there was no sexual assault, (3) the person who murdered Stacey Stites did so long after the semen was left in her body, and (4) she was murdered at a time that Jimmy Fennell testified she was at home with him in his apartment.

There is also new non-scientific evidence from witnesses who have no affiliation with Mr. Reed, were friendly with Ms. Stites, and knew of her relationship with Mr. Reed. In November 2014, Alicia Slater, formerly Griesemer, contacted Mr. Reed’s defense team on her own volition. *See* Exhibit 6. “[S]he felt morally compelled to tell someone” that she was aware of a relationship between her former co-worker Ms. Stites and Mr. Reed – and that Ms. Stites told her specifically that the relationship was *sexual* in nature.<sup>28</sup> In 1995 and 1996, Mrs. Slater was employed part time at the H.E.B. She and Ms. Stites were friend and would often take lunch together:

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<sup>28</sup> *Id.*

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 Mr. Reed and that she didn't know what her fiancé would do if he found out. She commented that she had to be careful.

Exhibit 6, Slater Aff ¶ 4.

Although she has known this information for some time, she has not disclosed it because she “thought it was common knowledge”, and if it was not, she feared disclosure would require she get involved:<sup>29</sup>

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.

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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

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<sup>29</sup> *Id.*, ¶ 7

that Ms. Stites had told me herself that she was sleeping with Mr. Reed.

Exhibit 6 Slater Aff ¶¶ 7, 9.

In January 2015, Lee Roy Ybarra also submitted an affidavit to attest to a relationship that he saw between Mr. Reed and Ms. Stites—information he says he would have gladly told to police in 1996 had they contacted him. *See* Exhibit 7.

Mr. Ybarra also worked at the H.E.B. in Bastrop with Ms. Stites in 1996; on numerous occasions he saw Ms. Stites and “a young black man” he later identified as Mr. Reed from news articles after her death.<sup>30</sup> He remembers Mr. Reed’s face well because “sometimes they were close enough that [Mr. Ybarra] got a very good look at him.”<sup>31</sup>

Based on his direct observation during the numerous occasions he saw Mr. Reed and Ms. Stites together, Mr. Ybarra confirms they had an intimate, positive relationship. He noticed her “demeanor would change” when Mr. Reed came around and she was “happy to see him and would be in a good mood.”<sup>32</sup> The nature of Mr. Reed’s and Ms. Stites’s encounters were happy and romantic.<sup>33</sup>

Ms. Stites’s behavior around her fiancé stands in stark contrast. Mr. Ybarra observes:

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<sup>30</sup> *Id.*, ¶ 3.

<sup>31</sup> *Id.*, ¶ 4.

<sup>32</sup> *Id.*, ¶ 3.

<sup>33</sup> *Id.*

I knew Ms. Stites was engaged to a police officer at the same time she was seeing [Mr. Reed], and I recall that the few times that Stacey's fiancé entered the store to visit her, she would become a nervous wreck. I know that there were times Ms. Stites would deliberately hide so that she didn't have to talk to him. I just thought it was a strange relationship.

Ex. 7 Ybarra Aff ¶5. Mr. Ybarra has not come forward before now because he did not realize the import of his testimony around the time of Ms. Stites's murder investigation, and he has not followed the murder 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.

Ex. 7 Ybarra Aff ¶5, 8.

These statements from former HEB employees who knew Stacey and were not associates of Mr. Reed stand apart from the statements of friends and family of the Reeds who were found not to be credible. *Compare Ex Parte Reed*, 271 S.W.3d at 735-37 (discussing lack of credibility of witnesses affirming relationship between Stacey and Reed). Slater and Ybarra stand nothing to gain from involving themselves in this case, and provided reasonable explanations for why they did not come forward with this information earlier. And as noted by Federal Magistrate Andrew W. Austin, evidence of a consensual relationship coupled with scientific evidence disproving the State's forensic case would be powerfully exculpatory:

. . . the DNA evidence and evidence suggesting rape was plainly the primary evidence relied on by the State to prove Reed's guilt. Thus, persuasive evidence that Reed and Stites had consensual sex days before the murder would have clearly undermined the State's evidence. Further, given the evidence that Fennell was racially prejudiced, evidence of an interracial affair between Stites and Reed would also have provided a credible motive for Fennell to kill Stites.

*Reed v. Thayer*, No. A-02-CA-142, 2012 WL 2254217 n.8 (W.D. Tex. June 15, 2012). Where this Court has already recognized that the totality of the evidence before it in 2008 raised a "healthy suspicion" that Jimmy Fennell and not Reed killed Stacey, the additional evidence presented in this application tips the scales and demonstrates Mr. Reed's innocence by clear and convincing evidence as required for relief under *Elizondo*.

**B. Mr. Reed's New Scientific Evidence Establishes a Right to a Statutory New Trial under Article 11.073 of the Code of Criminal Procedure**

In 2013, the Texas Legislature enacted article 11.073 of the Code of Criminal Procedure to allow for a new trial where relevant scientific evidence:

- (1) was not available to be offered by a convicted person at the convicted person's trial; or
- (2) contradicts scientific evidence relied on by the state at trial.

A claim for relief under article 11.073 must show that:

- (A) relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not

ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and

(B) the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application;

Tex. Code Crim. Proc.art. 11.073(b)(1). The statute provides guidance on when scientific evidence was not ascertainable through the exercise of reasonable diligence:

In making a finding as to whether relevant scientific evidence was not ascertainable through the exercise of reasonable diligence on or before a specific date, the court shall consider whether the scientific knowledge or method on which the relevant scientific evidence is based has changed since:

(1) the applicable trial date or dates, for a determination made with respect to an original application; or

(2) the date on which the original application or a previously considered application, as applicable, was filed, for a determination made with respect to a subsequent application.

*Id.* at(d). Relief may only be granted upon this showing if the court finds that, “had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.” *Id.* at (b)(2).

### **1. Dr. Bayardo’s Changed Opinion is Grounds for a New Trial**

The Texas Court of Criminal Appeals recently construed article 11.073 for the first time in *Ex parte Robbins*, --- S.W.3d ---, 2014 WL 6751684 (Tex. Crim.

App. November 26, 2014). First, the Court held that article 11.073 constitutes a new legal basis for the purposes of the restrictions on successive applications. *See id.* at \*8. Therefore, if a proper claim is brought for the first time under article 11.073, it may be heard even if the applicant has filed other habeas applications prior to the enactment of article 11.073. For the same reasons as stated in *Ex parte Robbins*, Mr. Reed may bring a claim under article 11.073 because this new statutory remedy did not exist at the time he filed his last habeas application. *See* Tex. Code Crim. Proc. Art. 11.071 §5(a)(1).

The second holding of the Court in *Ex parte Robbins* was to determine the scope of new scientific evidence that could entitle an applicant to relief: whether a change in the relevant scientific evidence applies to a scientific field as a whole, or to the knowledge of an individual scientist. *See Ex parte Robbins* at \*9.

In *Robbins* a forensic pathologist Patricia Moore had testified at Robbins's 1999 trial that a child had been asphyxiated and that the death was a homicide. *See id.* at \*3. Robbins was convicted of murder despite presenting contrary evidence including his own forensic pathologist who contradicted the State's experts and testified that the cause of death was "undetermined." *See id.* \*4. Eight years later, several medical examiners (including Moore) reevaluated the autopsy findings and reached the conclusion that Moore had been mistaken and that the correct cause and manner of death should have been "undetermined". *Id.* at \*5. An independent

forensic examination was eventually ordered by the trial court and a new forensic pathologist reached the conclusion that the death was indeed a homicide by asphyxiation. *See id.* at \*7.

On this factual record, Robbins filed an application for writ of habeas corpus seeking relief under article 11.073. The Court observed that nothing in the methodology of forensic pathology had changed in the intervening years, but decided that the scope of article 11.073 reaches beyond the general scientific knowledge. Rather, the Court held that (1) the opinion of the individual forensic pathologist Moore constituted “scientific knowledge” and (2) that the forensic pathologists changed opinion as to the cause of death constituted a change in scientific knowledge for the purposes of the statute. *See id.* at \*10. The Court further observed that Moore’s changed opinion was not ascertainable for the purposes of the statute even though similar testimony was actually before the jury through a retained defense expert. *See id.* \*10.

Finally, the Court considered whether Robbins had established innocence. Even though the State had retained a new expert who confirmed Moore’s original forensic opinion, the Court focused only on the impact of Moore’s changed opinion and granted relief. *See id.* at 11.

Mr. Reed’s claims under article 11.073 fit within this holding in *Ex parte Robbins*. The sufficiency of the evidence against Mr. Reed is based on a

connection between his semen, a sexual assault, and the murder. *See Reed v. State*, No. 73, 135 at 9. As discussed *supra* \*\*, the State emphasized Dr. Bayardo's testimony linking Reed's sperm with both vaginal and anal sexual assault. The jury specifically requested Dr. Bayardo's testimony on the matter during their deliberations: his opinion was central to the State's case. With the recantation of Dr. Bayardo in his 2012 Declaration, the State's evidence of Reed's guilt has evaporated.

Dr. Bayardo testified at the trial that his observation of intact sperm at autopsy meant that the sperm was placed in the vagina "quite recently". TT Vol. 48:122. He explained later in his testimony that this meant that the sperm was placed "a day or two" "before my examination" at autopsy. *Id.* at 144. Where Dr. Bayardo's autopsy began at 1:50 p.m. on April 24, 1996, his testimony meant that the earliest that intercourse with Reed could have taken place was at 1:50 p.m. on April 22<sup>nd</sup>. This was a time that Ms. Stites was at home with her mother. So based on Dr. Bayardo's testimony at trial, the intact condition of the sperm rendered Mr. Reed's account of a consensual relationship impossible.

Dr. Bayardo has now reevaluated his testimony and states that the evidence suggests consensual intercourse between Reed and Stites more than 24 hours before her death:

in my professional opinion, the spermatozoa I found in Ms. Stites's vaginal cavity could have been deposited days before her death. ***Further, the fact that I found "very few" (as stated in the autopsy report) spermatozoa in Ms. Stites's vaginal cavity suggests that the spermatozoa was not deposited less than 24 hours before Ms. Stites's death.***

Exhibit 1 (emphasis added). This is a clear change in a scientist's opinion which constitutes a change in scientific knowledge as discussed in *Ex parte Robbins*.

Accordingly, Mr. Reed has met the requirements of article 11.073(b)(1)(A). Just as Dr. Bayardo's original opinions on forensic pathology were admissible, his changed opinion would be equally admissible, thus satisfying article

11.073(b)(1)(B). Furthermore, if the jury had been told by Dr. Bayardo that Reed's sperm was likely left more than a day before she was murdered, the connection between the sex and the murder upon which the sufficiency of the evidence depended would have been broken, and no rational jury would have convicted Mr. Reed. In fact, such evidence would have provided motive to Jimmy Fennell to kill Stacey as observed by Judge Austin. *See Reed v. Thayer*, 2012 WL 2254217 n.8.

**2. A New Trial Should be Granted under Article 11.073 Based on Dr. Bayardo's Changed Opinion as to the Time of Death in Addition to the New Opinions of Dr. Spitz, Baden, and Riddick**

Dr. Bayardo testified at trial that he believed the time of death to be 3 a.m.

"give or take one or two hours". TT Vol. 48: 114. He stated that this was based on

changes that occur after death, but did not specify which changes or how those unidentified changes might provide information to base his estimation of time of death. *Id.* at 113. In his 2012 declaration, Dr. Bayardo has changed his opinion and now states:

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.***

Exhibit 1. This is a clear change in a scientist’s opinion which constitutes a change in scientific knowledge as discussed in *Ex parte Robbins*. Accordingly, Mr. Reed has met the requirements of article 11.073(b)(1)(A). Just as Dr. Bayardo’s original opinions on forensic pathology were admissible, his changed opinion would be equally admissible, thus satisfying article 11.073(b)(1)(B). Furthermore, Dr. Bayardo’s changed opinion should not be viewed in a vacuum. Article 11.073 applies to both relevant evidence that was not available (such as Dr. Bayardo’s

changed opinion) or evidence that contradicts scientific evidence relied on by the State at trial. Tex. Code Crim. Proc. Art. 11.073(a)(2). These words must be given meaning,<sup>34</sup> and in the context of a forensic witness who has given incorrect scientific evidence to a jury, this remedial statute should be construed to allow a full examination the mistake. In this case, the opinions of Drs. Spitz, Baden, and Riddick explain that Ms. Stites was actually murdered before midnight on April 22, 1996. *See supra* Part III A. When these opinions are coupled with Dr. Bayardo's retraction of his own estimate of time of death, it is difficult to imagine how a jury would credit the State's theory that Ms. Stites was murdered by Mr. Reed at 3 a.m. when all of the evidence is to the contrary.

**C. Mr. Reed's Conviction was Based on False, Misleading, and Scientifically Invalid Testimony**

The Court of Criminal Appeals set forth the standard for due process claims based on false, misleading, or unreliable testimony as follows:

The Due Process Clause of the Fourteenth Amendment can be violated when the State uses false testimony to obtain a conviction, regardless of whether it does so knowingly or unknowingly. Accordingly, to constitute a due process violation, the testimony used by the State must have been false, and it must have been material to

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<sup>34</sup> A basic canon of statutory construction is that a court must construe a statute so that every word has meaning. *Morter v. State*, 551 S.W.2d 715, 718 (Tex. Crim. App. 1977). This Court has specified that “[e]very word of a statute is presumed to have been used for a purpose, and a cardinal rule of statutory construction requires that each sentence, clause, phrase and word be given effect if reasonably possible.” *Id.* (quoting *Eddins-Walcher Butane Co. v. Calvert*, 298 S.W.2d 93, 96 (Tex. 1957)).

the defendant's conviction, meaning there is a reasonable likelihood that the false testimony could have affected the judgment of the jury.

*Ex parte Robbins*, 360 S.W.3d 446, 459 (Tex. Crim. App. 2011). Furthermore, “[t]estimony need not be perjured to constitute a due-process violation; rather, ‘it is sufficient that the testimony was false,’” *Chavez*, 371 S.W.3d at 208, (quoting *Robbins*), and “it is sufficient if the witness' testimony gives the trier of fact a false impression.” *Ex parte Ghahremani*, 332 S.W.3d 470, 477 (Tex. Crim. App. 2011).

This Court has found it proper to reverse convictions when a jury was misled because an expert espoused an unreliable scientific theory or other factors rendered the expert's testimony unreliable. *See, e.g., Ex parte Graf*, AP-77003, 2013 WL 1232197 (March 27, 2013) (expert testimony is deemed false where critical aspects of the testimony is disproven); *Ex parte Henderson*, 384 S.W.3d 833, 835 (Tex. Crim. App. 2012) (Price, J. concurring) (stating that due process is violated where a critical part of an expert's testimony is shown to be “highly questionable”); *id.* at 849-50 (Cochran, J. concurring) (stating that due process is violated where expert opinion on critical disputed issue are shown to be unreliable).

**1. False, Misleading, and Invalid Testimony Regarding Forensic Theory that Mr. Reed Raped Stacey Stites**

It is worth repeating that the primary evidence against Mr. Reed is the testimony of the State's experts connecting Mr. Reed's sperm, to a sexual assault, to the murder. Without this connection, the Court of Criminal Appeals held there would not be sufficient evidence to sustain the conviction. *See Reed v. State*, No. 73, 135 at 9. However, Mr. Reed has now shown that the testimony relied on by the state to establish this vital connection was false, misleading, and scientifically invalid.

First, the State's witnesses mislead the jury by claiming that intact semen cannot be found on a rape kit more than 24-26 hours after intercourse. Karen Blakely testified that 26 hours was the "outside length of time that tails will remain on a sperm head inside the vaginal tract of the female." TT Vol. 45:16. Meghan Clement left the same impression on the jury, testifying that in the course of examining thousands of rape kits, she could not recall seeing intact sperm where the sample had been collected more than 20 to 24 hours after intercourse. TT Vol. 51: 56. This testimony was simply false. It is an accepted truth in forensic pathology that intact sperm can be found for up to 72 hours. *See Spitz and Fisher: Medicolegal Investigation of Death* at 1262; Exhibit 3, Spitz Aff at ¶6; Exhibit4, Baden Rpt at ¶ 8; Exhibit 5, Riddick Aff ¶ 17. Dr. Bayardo now also confirms that

intact sperm can remain “for days”. Exhibit 1, Bayardo Dec ¶ 4. Even Meghan Clement has now admitted in an e-mail that her testimony “did not address the length of time sperm can last in the body based on literature or opinions” but rather on her experience examining rape kits that were usually collected within the 20-24 time frame. She also acknowledged that the processing of rape kits (as opposed to smears taken from a wet swab) “could break tails off sperm.” Exhibit 2. Dr. Bayardo provided similarly false testimony, but in a different format. He testified that the intact sperm he found was placed “a day or two” “before my examination” at autopsy. TT Vol. 48:144. Where Dr. Bayardo’s autopsy began at 1:50 p.m. on April 24, 1996, his testimony meant that the earliest that intercourse with Reed could have taken place was at 1:50 p.m. on April 22<sup>nd</sup>. This was an even shorter time frame than the one offered by Blakely and Clement—less than 15 hours from Dr. Bayardo’s estimated 3 a.m. April 23<sup>rd</sup> time of death.

Further, this false 24 hour time frame for the survival of intact sperm had a significant affect on the outcome of the case because it essentially ruled out Reed’s defense. Stacey’s whereabouts were accounted for within 24 hours of the collection of the sample by Karen Blakely. And for this very reason, the false testimony regarding the length of time intact sperm remains in the body was mentioned three times during closing argument. TT Vol. 56:34 (“We know, from the credible evidence, that that doesn’t hang around for days on end. . . that semen

got in that girl's body within 24 hours of that eleven o'clock moment which is when? On her way to work."); TT Vol. 56:139 ("[fingerprints] can last for years. Semen, on the other hand, can be dated. And semen, specifically spermatozoa, only stays about 24 hours."); TT Vol. 56:140 ("semen is not something that hangs around for days on end"). The jury was clearly interested in this testimony as well, and specifically asked for Dr. Bayardo's testimony to be read back. Dr. Bayardo's false testimony regarding the item intact sperm can be found was actually repeated to the jury during their deliberations. TT Vol. 56:160. Where false testimony essentially cut off Reed's only defense to the murder, there is a reasonable likelihood that the false testimony could have affected the judgment of the jury and a new trial should be granted. *See Ex parte Robbins*, 360 S.W.3d 446, 459 (Tex. Crim. App. 2011).

## **2. False, Misleading, and Invalid Testimony Regarding Anal Assault**

Dr. Bayardo also testified falsely regarding the dilation of Stacey's anus after death. Dr. Bayardo considered the dilation of the anus as evidence of anal assault. He explained that the rectum does not dilate until "very late in the stages of body decomposition, and that usually occurs after 4 or 5 days." TT Vol. 48:142. This statement is simply not true. Prior to the onset of rigor mortis, "the muscles become flaccid" Spitz and Fisher at 101. Spitz and Fisher note that when this

flaccidity relaxes the sphincter, “postmortem dilation and flaccidity of the . . . anus may produce the appearance of a sexual attack or sodomy.” *Id.* at 120. Drs. Spitz, Baden, and Riddick all confirm that the dialation of Stacey’s anus depicted in the autopsy photographs is consistent with such flaccidity and not penetration. *See, e.g.,* Exhibit 4, Baden Rpt. at ¶ 9.

The effect of this false testimony on the jury is obvious. During deliberations, the jury specifically as that Dr. Bayardo’s testimony regarding “Time period associated with anal dilation after death in non-sexual assault victims,” TT Vol. 56:154. And based on this request, the false testimony was repeated to the jury. *Id.* at 160. The evidence of anal assault was particularly harmful to Mr. Reed both because of its inherently inflammatory nature and because it allowed the State to argue that the dilated anus was direct evidence of anal sexual assault contemporaneous with the murder. It is difficult to imagine how this false testimony could not have affected the jury’s verdict. *See Ex parte Robbins*, 360 S.W.3d at 459.

### **3. False, Misleading, and Invalid Testimony Regarding Future Dangerousness**

The State’s closing punishment phase witness was a TDCJ employee Royce Smithey who testified in response to a hypothetical question that Mr. Reed would

constitute a threat or danger to other inmates if he were placed in the general prison population:

Q. Mr. Smithey, I want to ask you a hypothetical question, and I would like you to answer it based on your training, your knowledge, and your experience of 13 years with the Texas Department of Criminal Justice. In this question I would like for you to assume that there is a man who has been convicted of capital murder in that he abducted, he raped and he ultimately strangled a 19-year-old girl, and I would like for you in this hypothetical to also assume that he has committed numerous other rapes against other women, including perfect strangers, girlfriends, run the gamut.

I would also like for you to assume that that man has also in the course of those rapes sodomized a number of those victims, violent anal rape and has demonstrated a particular proclivity for that sort of thing. I would like you also to assume that he is a person who has physically assaulted some of those victims, hitting, slapping, biting even. I would also like you to assume that that person has training as a boxer and, in fact, once had a promising boxing career, and finally I would like for you to assume that that person has sold and/or used crack cocaine in the past.

Based on your knowledge and experience, would you believe that that individual that I have described to you would present a threat or a danger to the other inmates in the Texas Department of Criminal Justice should he be in the general population.

MS. CLAY-JACKSON: Objection Your Honor, to that particular hypothesis because it goes to into the purview of the jury.

THE COURT: It's overruled. You may answer that.

Q. (BY MS. TANNER) Would you believe that that person I described would present a threat or a danger to the other inmates in the Texas Department of Criminal Justice should he be in general population.

A. Yes, ma'am.

Vol. 63:64-66. This Court has held that such standardless predictions of dangerousness are invalid and have no place in court. *See Coble v. State*, 330 S.W.3d 253, 279-280 (Tex. Crim. App. 2010). There is no question that Mr. Smithey's prediction of Mr. Reed's dangerousness was invalid and therefore false under this Court's due process jurisprudence. *See See, e.g., Ex parte Graf*, AP-77003, 2013 WL 1232197 (March 27, 2013) (expert testimony is deemed false where critical aspects of the testimony are disproven); *Ex parte Henderson*, 384 S.W.3d at 835 (Price, J. concurring) (stating that due process is violated where a critical part of an expert's testimony is shown to be "highly questionable"); *id.* at 849-50.

This invalid testimony regarding Mr. Reed's dangerousness should not be discounted. Mr. Smithey represented himself as an expert and provided the jury with what he claimed was specialized knowledge of when a certain inmate would be dangerous or not, when in fact, there is no basis for this belief. In stark contrast to *Coble*, where the jury heard a direct and effective critique of the invalid dangerousness testimony, *see Coble*, 330 S.W.3d at 285, Mr. Reed's jury was allowed to accept Smithey's opinion at face value. Where a TDCJ employee falsely represents himself as an expert on the dangerousness of inmates and then

tells the jury that he believes the defendant will be dangerous, there is a reasonable likelihood that this false and invalid testimony had an affect on the jury's assessment of punishment.

**D. In the Alternative to the Relief Request in this Application, Pursuant to Rule of Appellate Procedure 79.2(d), this Court Should Reconsider Its Prior Denials of Habeas Relief**

This Court has previously rejected habeas applications brought by Mr. Reed raising substantial claims of innocence, violations of *Brady v. Maryland* and ineffective assistance of counsel. The resolution of many of these claims turned on whether Mr. Reed had made a sufficient showing of innocence to avoid procedural defaults under article 11.071§5. These claims included (1) the suppression of exculpatory evidence that Jimmey Fennell had threatened to strangle Stacey with a belt, (2) the suppression of a report of foreign DNA on a beer can at the crime scene, (3) and inadequate defense at trial. In light of the new forensic evidence demonstrating that it is medically and scientifically impossible for Mr. Reed to have committed the crime, as well as the new witnesses who credibly corroborate the affair between Mr. Reed and Ms. Stites, this Court should reconsider its prior denials on its own initiative as permitted under Rule of Appellate Procedure 79.2(d)

Respectfully submitted,

/s/ Bryce Benjet

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing Memorandum in Support of Application for Writ of Habeas Corpus has been served on the attorneys for the State by placing same in the United States mail, certified/return receipt requested, on this 12th day of February 2015, addressed to:

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