APPENDIX

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. AP-77,054

RODNEY REED, Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL FROM CAUSE NUMBER
8701 IN THE 21ST DISTRICT COURT
BASTROP COUNTY

KEASLER, J., delivered the opinion of the Court in which KELLER, P.J., and HERVEY, ALCALA, RICHARDSON, YEARY, KEEL, and WALKER, JJ., joined. NEWELL, J., not participating.

O P I N I O N

Rodney Reed sought post-conviction DNA testing of over forty items collected in the course of investigating Stacey Stites's sexual assault and

murder. This investigation culminated in Reed's conviction and sentence of death for the capital murder of Stites. The trial judge denied the motion. Because Reed cannot establish that exculpatory DNA results would have resulted in his acquittal and his motion is not made for the purpose of unreasonable delay, we affirm the trial judge's denial.

I. Background

A. Trial

Because we detailed the case's factual background elsewhere,[1] only the facts relevant to Reed's current DNA appeal are included in this opinion. Stacey Lee Stites's partially clothed body was found on the side of a back country road in Bastrop County on April 23, 1996. She was wearing only a black bra, underwear, undone blue jeans, socks, and a single tennis shoe, and her H.E.B. name tag was found in the crook of her knee. A white t-shirt, a piece of a brown woven belt without a buckle, and two beer cans were found nearby. Before Stites's murder, she was engaged to Jimmy Fennell, a Giddings police officer at the time, and the two shared Fennell's red pick-up truck. Stites worked the early-morning shift at H.E.B. and typically drove the truck to work. The truck was discovered in the Bastrop High School parking lot after Stites's disappearance. Among other things inside the truck, authorities found Stites's other shoe and broken

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[1] *See Ex parte Reed*, 271 S.W.3d 698, 702–12 (Tex. Crim. App. 2008).

pieces of a green plastic cup. Outside the truck, police found a piece of a brown woven belt with the buckle attached.

Department of Public Safety (DPS) crime scene investigators Karen Blakley, Wilson Young, and Terry Sandifer processed Stites's body, the truck, and the scene where Stites was found. Blakley testified at trial that the murder weapon was the belt "[b]ecause it matched the pattern that was on [Stites's] neck." Blakley also concluded that the two belt pieces matched and were torn, not cut. Because Stites was found partially clothed and with her pants ripped open, Blakley presumed a sexual assault preceded the murder. At the scene, Blakley further observed Stites's underwear was wet in the crotch and bunched around her hips, so she tested the crotch of the underwear for semen. Getting a positive result, Blakley collected DNA samples from Stites's vagina and breasts. Blakley did not collect samples from Stites's rectum because rigor mortis had already set in. Blakley also observed scratches on Stites's arms and abdomen, a cigarette burn on her arm, and what appeared to be fire ant bites on her wrists. To preserve any DNA evidence under her fingernails, DPS investigators put plastic bags over Stites's hands.

Dr. Robert Bayardo, the Travis County Medical Examiner, conducted Stites ' s autopsy the day after her body was found. He determined that Stites died around 3:00 a.m. on April 23rd. He also concluded that the belt was the murder weapon and that Stites died of asphyxiation by strangulation. Like Blakley, Bayardo presumed Stites was sexually assaulted, took vaginal swabs, and found sperm with

both heads and tails intact. He also took rectal swabs but found only sperm heads with no tails. He noted that her anus was dilated with superficial lacerations. Dr. Bayardo thought the presence of sperm in the anus was indicative of penile penetration, but noted that it may have been attributed to seepage from the vagina. He concluded that Stites's anal injuries occurred at or around the time of death and therefore were not acts of consensual sexual activity.

When Young and Sandifer processed the truck for evidence, neither found fingerprints, blood, or semen identifying the perpetrator. However, they and Ranger L.T. Wardlow, the lead investigator on the case, noted the driver's seat position was reclined with the seatbelt fastened as if someone was pulled out of the seat while buckled in. Young, who stood six feet, two inches, also noticed that when he sat in the reclined driver's seat, he had a clear view out of the back window in the rearview mirror. Based on this, they concluded that someone who was six-foot-two or of similar height must have driven the truck.

Five days after Stites's body was found, a citizen reported finding some items they believed were connected to Stites's murder. The report, written by Officer Scoggins, stated that the citizen reported that a part of a shirt, two condoms, and part of a knife handle were found. At trial, Ranger Wardlow testified that he did not have personal knowledge about who brought in the condoms. However, he testified that he saw the condoms a short while after they were brought in and confirmed that the condoms "appeared to be old and cracked

and worn out." These items were not tested for DNA evidence before trial.

Police investigated Stites's murder over the course of eleven months. During that time, police obtained twenty-eight biological samples from twenty-eight males. None of them matched the biological evidence found in and on Stites's body. After following several theories and lines of investigation—ruling out people Stites knew personally—police learned information about Reed that could make him a suspect. Reed was about the same height as Young, lived near the Bastrop High School, and frequently walked the area late at night. Police learned from DPS that Reed had an existing DNA sample on file and had DPS test it against the vaginal swabs taken by Blakley. Two different DNA tests of the samples concluded that Reed could not be excluded as a donor of the semen. Looking for more conclusive results, DPS forwarded the samples to LabCorp for additional testing. Again, the results could not exclude Reed and determined that the samples matched Reed's genetic profile. The LabCorp technician, as well as Blakley, testified that intact sperm did not live more than twenty-four hours after commission of a vaginal-sexual assault and sperm breaks down faster in the rectal area than in the vaginal vault.

The jury found Reed guilty of capital murder and assessed a sentence of death.

B. Post-Conviction Procedural History

This case has an extensive post-conviction litigation history. After trial, Reed filed a direct appeal alleging insufficient evidence supporting his

capital murder conviction which we denied based on the strength of the evidence presented at trial.[2] Our judgment relied on Reed's DNA found in and on Stites's body, expert testimony regarding how long sperm heads can survive in the vagina and anus, and expert testimony that the sexual assault occurred at or near the time of death.

Before this Court affirmed the conviction, Reed filed an initial application for writ of habeas corpus under Code of Criminal Procedure Article 11.071. Reed also filed a supplemental claim while the initial writ was pending. We denied his initial application and characterized the supplemental claim as a subsequent application and dismissed it.[3] Reed filed a federal habeas application which was stayed and held in abeyance until Reed exhausted all available state remedies.[4] Then in March 2005, Reed filed another subsequent application that this Court ultimately denied in part and dismissed in part.[5] Between 2007 and 2009, Reed filed three more subsequent applications that were dismissed as abusive for failing to satisfy Article 11.071, § 5.[6]

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[2] *Reed v. State*, No. AP-73,135 (Tex. Crim. App. Dec. 6, 2000) (not designated for publication).

[3] *Ex parte Reed*, Nos. WR-50,961-01 & WR-50,961-02 (Tex. Crim. App. Feb. 13, 2002) (not designated for publication).

[4] *Reed v. Stephens*, 739 F.3d 753, 763 (5th Cir. 2014).

[5] *Ex parte Reed*, 271 S.W.3d at 751.

[6] *Ex parte Reed*, Nos. WR-50,961-04 & WR-50,961-05 (Tex. Crim. App. Jan. 14, 2009) (not designated for publication); *Ex parte Reed*, No. 50-961-06 (Tex. Crim. App. July 1, 2009) (not designated for publication).

In August 2009, the federal court lifted the stay on Reed's federal writ application.[7] In 2012, the federal district court judge denied Reed's application. Reed then filed motions to alter and amend the court's judgment and for leave to amend his petition and abate the proceeding. He asked "the district court to reopen his case, vacate its prior judgment, grant him leave to add an additional due process claim, and abate all further proceedings until he exhausted the due process claim in state court."[8] The judge denied the motions. And in January 2014, the Fifth Circuit denied a certificate of appealability, essentially affirming the denial.[9]

C. Reed's Request for Post-Conviction DNA Testing

In April 2014, the State requested an execution date be set. At a hearing held in July 2014, the trial judge set the execution date for January 14, 2015. On the day of the hearing, Reed filed his Chapter 64 motion requesting DNA testing of a large number of items. In reviewing Reed's pleadings, we note that Reed has not clearly or consistently identified items he seeks to test. At times, items discussed in the body of a pleading are not reflected on an appended chart purporting to be a comprehensive itemized list of the extent of Reed's motion. Consistent with the State's objections at the live evidentiary hearing, we note that some items Reed evidently seeks to test were not specifically

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[7] *Reed*, 739 F.3d at 763.

[8] *Id.*

[9] *Id.* at 790.

listed in Reed's Chapter 64 motion or addendum, yet were discussed by Reed's expert witnesses at the hearing.

To group the items, we look to Reed's addendum to his latest proposed findings of fact and conclusions of law and follow, but do not adopt, Reed's categories dividing the items he seeks to have tested: (1) items recovered from Stites's body or her clothing, (2) items found in or near Fennell's truck, and (3) items found near the victim-recovery scene. Because the live hearing testimony covered additional items that do not neatly fall within Reed's categories, we add an "other" category. Out of an abundance of caution and because the trial judge entered findings and conclusions regarding all the pleaded and unpleaded items in denying DNA testing, we include them in this appeal.

1. Items recovered from Stites's body or her clothing:

- Pants
- Underwear
- Bra
- H.E.B. name tag
- White t-shirt
- Section of belt (no buckle)
- Section of belt (with buckle)
- Earring
- Right shoe
- Left shoe
- H.E.B. employee shirt
- Strands of hair from left sock, back of left leg, and back
- White flakes
- Tape lifts from pubic area

- Vaginal and rectal swabs

The State and Reed agreed to have the last three items listed tested outside of Chapter 64's parameters, and the judge entered an agreed order to that effect July 14, 2014. The record shows Reed abandoned his Chapter 64 testing request in regard to these items.

2. In or near Fennell's truck:

- H.E.B pen
- Knife and metal cover
- Metal box cutter
- Pack of Big Red gum
- Piece of green plastic cup
- Brown planner/organizer
- Single hair from planner/organizer
- White paper napkin
- Carbon copies of checks
- Gas emergency book
- Latent fingerprint from passenger door
- Automatic teller receipt
- Bridal shop receipt
- Walmart receipt
- Business card
- Plastic bag
- Blue nylon rope
- Brown rope

3. Victim-recovery scene:

- Plastic bags placed over Stites's hands during investigation
- Used condoms
- Two Busch beer cans
- Swabs/samples taken from mouths of two Busch beer cans

- Extract samples from blue condom stored in coin envelope
- Piece of shirt
- Piece of knife

4. Other:

- Knee brace
- Back brace
- Green blanket
- White paper used under Stites's body during autopsy

B. Live Hearing Testimony

Reed's Chapter 64 motion largely hinges on the newly available analysis of touch DNA. Touch DNA is based on Locard's Principle that when a person touches something the person's epithelial, or skin, cells transfer to that object and then may be subjected to DNA analysis. But Reed also argued that items previously and successfully analyzed for DNA should be retested and subjected to more advanced and sensitive DNA analyses.

John Paolucci, a former detective and crime scene expert specializing in DNA cases, testified that scratches found on Stites's back and the back of her hand suggested that she was dragged. Paolucci expected that the person who dragged Stites would most likely deposit skin cells on the part of Stites's body or clothing the perpetrator grabbed to pull her body. Because the belt had a similar pattern to the markings found on Stites's throat and was most likely used to strangle Stites with pressure, Paolucci opined there would likely be a significant deposit of the perpetrator's skin cells on it. As to the items found in Fennell's truck, and presumably the items

found outside, Paolucci acknowledged he would presume that Fennell's DNA will be deposited on certain areas. Paolucci also noted that DNA testing would confirm or contradict accounts given by an alternate suspect. The commingling of a large number of the items Reed seeks to have tested in a box together would not, in Paolucci's opinion, make that evidence unsuitable for testing. In his opinion, even though the items are contaminated, Paolucci stated that if DNA profiles from contaminated and not contaminated items match, "you can start putting together evidence of an alternate suspect."

Deanna Lankord, an associate laboratory director at Cellmark Forensics, similarly testified that she would look for touch DNA, in addition to performing a more traditional DNA analysis of previously tested biological evidence using newer, more advanced techniques. She testified that, in her experience, she has tested pieces of evidence that have been commingled in a single container. And in her experience, her laboratory has "had many cases where [it] . . . obtained probative results" even when evidence is stored in this manner. Based on the exchange principle, Lankford opined that all of the specified items contain some amount of DNA material. Without testing the items, however, she could not say for sure or give an opinion on the likelihood of discovering DNA to the extent of producing a DNA profile, or a person's identity based on testing deposited DNA.

Lankford conceded that there could be infinite possibilities of DNA combinations on the items stored in the box of evidence maintained by the Bastrop Clerk's Office because many people may have touched the items. Lankford acknowledged

compounded possibilities because, under the exchange principle, those handling the items could deposit others' DNA. Despite a conceivably infinite mix of DNA combinations, Lankford testified that properly handled and stored evidence could act as a control of sorts. She explained it thus:

> [I]f we were to obtain DNA—DNA information from an item from the box and it happened to match an item that we tested from a different location stored in, say, a more appropriate manner, we can compare the two and see if—I mean, if they match, then there's a different scenario there.
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> * * *
>
> Well, that it wouldn't be a contaminant from someone handling the evidence, say a jury member or something.

Lankford testified similarly while addressing the potential of DNA being transferred from one item to another. She again focused on redundancy.

> If you think of an assailant handling certain areas of clothing or shoes or socks and you obtain DNA from those areas and they match and you test other areas of clothing maybe where an assailant wouldn't necessarily be grabbing or touching someone so they don't match those other areas, then you can kind of put two and two together.

Yet in a mixed sample when a major and minor contributor could not be identified, Lankford noted that there would be no way to separate the particular alleles discovered in subsequent testing and associate them to a particular profile without

reference samples from the different parties who potentially touched the items. And without these reference samples, the DNA test results would remain inconclusive.

The State presented testimony from three witnesses: Sergeant Gerald Clough, an Office of the Attorney General investigator; Etta Wiley, a Bastop County Deputy Clerk; and Lisa Tanner, the lead trial prosecutor at Reed's trial. According to his testimony, Clough investigated the existence of certain items introduced in Reed's trial and included in Reed's Chapter 64 motion. He discovered a number of items in two unsealed boxes maintained by the Bastrop County Clerk's office. The record contains the photos Clough took depicting how the items were stored. With the exception of one bagged item, the photos show that the evidence was simply placed in the box and was not separated into individual bags. Stites's clothing, a planner, both pieces of the belt, and videotapes, among other pieces of evidence, are clearly visible. The items are distinctly commingled and touching one another.

Bastrop County Deputy Clerk Etta Wiley testified that she is responsible for the exhibit closet for criminal matters. Wiley created an inventory list at the State's behest and testified about a number of paper trial exhibits maintained in a single manilla envelope at the clerk's office; specifically, the bridal shop receipt, a photographer's receipt, Reed's acknowledgment of statutory warnings, carbon copies of Fennell's checks, a utilities receipt, and Walmart receipts. Wiley testified that each trial exhibit was not individually wrapped and was commingled with the others in the manilla envelope.

According to Wiley, the exhibits were maintained under lock and key, and the evidence was not substituted, replaced, tampered with, or materially altered while in her care.

Lisa Tanner, the lead prosecutor at Reed's trial, testified that, after the forensic testing was completed before trial, a number of people handled the evidence at trial without gloves. Not only did she not use gloves at trial, but neither did the defense attorneys, court personnel, the court reporter, and presumably the district clerk. The list potentially included the twelve jurors. The admitted evidence was sent back with the jury to deliberate, and Tanner testified that she did not know if gloves were available for the jurors. According to Tanner, the evidence was not separately packaged when it was available to the jury.

After holding a live evidentiary hearing, the trial judge denied Reed's DNA testing request and issued findings of fact and conclusions of law. This direct appeal followed.[10] After remand, the judge made supplemental findings of fact and conclusions of law.

II. Analysis

A. Chapter 64's Requirements

When Reed filed his motion for Chapter 64 DNA testing, Texas Code of Criminal Procedure Article 64.01 stated that "[a] convicted person may submit to the convicting court a motion for forensic

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[10] *See* TEX. CODE CRIM. PROC. art. 64.05 (West Supp. 2016) (providing appeals to this Court when a person is sentenced to death).

DNA testing of evidence containing biological material."[11] At that time, to be eligible for post-conviction DNA testing of certain evidence, the evidence must have been secured in relation to the charged offense and been in the State's possession during the trial, "but: (1) was not previously subjected to DNA testing; or (2) although previously subjected to DNA testing, can be subjected to testing with newer techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test."[12]

Then-existing Article 64.03 provided that a court may order DNA testing under Chapter 64 only if it finds that:

> (1) the evidence still exists and is in a condition making DNA testing possible;
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> (2) the evidence has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect;
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> (3) identity was or is an issue in the case;
>
> (4) the convicted person establishes by a preponderance of the evidence that the person would not have been convicted if exculpatory results has been obtained through DNA testing; and

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[11] TEX. CODE CRIM. PROC. art. 64.01(a-1) (West Supp. 2014).

[12] *Id.* art. 64.01(b).

> (5) the convicted person established by a preponderance of the evidence that the request for the proposed DNA testing is not made to unreasonably delay the execution of sentence or administration of justice.[13]

Effective September 1, 2015, the Legislature amended Articles 64.01(a-1) and 64.03.[14] Article 64.01(a-1) now provides that a convicted person may seek forensic DNA testing of evidence "that has a reasonable likelihood of containing biological material."[15] The amendment also added a requirement to Article 64.03: the judge must find, in addition to the above requirements, that "there is a reasonable likelihood that the evidence contains biological material suitable for DNA testing."[16]

B. Standard of Review

When reviewing a judge's ruling on a Chapter 64 motion, we use the familiar bifurcated standard of review articulated in *Guzman v. State*: we give almost total deference to the judge's resolution of historical fact issues supported by the record and applications-of-law-to-fact issues turning on witness credibility and demeanor.[17] But we review *de novo* all other application-of-law-to-fact questions.[18]

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[13] *Id.* art. 64.03.

[14] Acts 2015, 84th Leg., ch. 70 (S.B. 487), § 1 (effective Sept. 1, 2015).

[15] TEX. CODE CRIM. PROC. art. 64.01(a-1) (West Supp. 2016).

[16] *Id.* art. 64.03(a)(1)(B).

[17] *Rivera v. State*, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002) (referring to *Guzman v. State*, 955 S.W.2d 85,89 (Tex. Crim. *(cont'd)*

C. Findings of Fact and Conclusions of Law

There is no dispute that the items Reed seeks to have tested exist and are in a condition making DNA testing possible and that identity was or is an issue in this case. The judge accordingly concluded that these requirements were satisfied.[19] Further, the record and the parties' briefing also indicate that there is no dispute whether Reed satisfied Article 64.0 1(b)'s requirement that the items were either not tested for DNA or could be tested with newer technologies providing more accurate and probative results. However, the parties took differing positions on the balance of Article 64.03's requirements. We review the judge's remaining findings and conclusions in turn.

1. Is the evidence subject to chain of custody sufficient to establish that individual pieces of evidence have not been substituted, tampered with, replaced, or altered in any material respect?

The judge concluded that a significant number of the items do not satisfy this standard. The judge concluded that the following items connected to Stites's body or clothing have been contaminated, tampered with, or altered:

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App. 1997)); *Holberg v. State*, 425 S.W.3d 282, 284–85 (Tex. Crim. App. 2014).

[18] *Id.*

[19] *See* TEX. CODE CRIM. PROC. art. 64.03(a)(1)(A)(i), (1)(C).

- Pants
- Underwear
- Socks
- Left shoe
- Right shoe
- Bra
- White t-shirt
- Section of belt (no buckle)
- Section of belt (with buckle)
- Earring
- H.E.B. employee shirt
- H.E.B. name tag

The judge concluded the following items recovered from or near Fennell's truck were contaminated, tampered with, or altered:

- Knife and metal cover
- Pieces of plastic cup
- Brown planner
- Bridal shop receipt
- Portrait receipt
- Carbon copies of checks
- Walmart receipt

Lastly, the judge's findings extended to the following items in the "other" category:

- Back brace
- Knee brace

Reed's argument for testing these items under Chapter 64 is the advancement in touch DNA, a relatively new DNA technique that can develop a DNA profile from epithelial cells left by those handling the item. The judge based his conclusion on the evidence presented at the evidentiary hearing and, as a result, focused on the testimony pertaining

to the number of people who handled (or potentially handled) the items depositing DNA on them and the likelihood that deposited DNA itself could be transferred to other items. The judge found credible Tanner's testimony that the above items were handled by ungloved attorneys, court personnel, and possibly the jurors. The judge also found credible Clough's and Wiley's testimony establishing that the evidence was not separately packaged, but instead commingled in a common repository. The judge credited Paolucci's testimony on cross-examination that there is "a good chance that [the items in the clerk's boxes are] contaminated evidence." The judge also credited Lankford's response to the State's hypothetical that handling evidence without gloves would tamper with the evidence. According to the judge, both assertions by Reed's witnesses were not contradicted.

We find the record supports the judge's findings and the conclusion on this requirement. The requirement at issue here necessitates a finding that the evidence "has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect."[20] Clough's and Wiley's combined testimony established that the items the judge deemed contaminated, tampered with, or altered were trial exhibits maintained by the Bastrop County Clerk's Office and not individually packaged. And based on Tanner's credited testimony, many people handled those exhibits without gloves. Reed's

[20] *Id.* art. 64.03(a)(1)(A)(ii).

own witnesses conceded that the manner of the trial exhibits' handling contaminated or tampered with the evidence. The cumulative weight of the State's and Reed's witnesses demonstrates that the manner in which the evidence was handled and stored casts doubt on the evidence's integrity, especially for the specific testing Reed seeks. Reed's experts' testimony on a suggested approach to mitigate the effect of the evidence's alterations does not undermine the judge's determination that certain items did not satisfy Article 64.03(a)(1)(ii).

The judge concluded that the remaining items that were not similarly handled and stored have been subject to a chain of custody sufficient to establish that they have not been substituted, tampered with, replaced, or altered in any material respect.

2. Does the evidence contain biological material suitable for DNA testing?

The judge found that there was not a reasonable likelihood that any of the items Reed sought tested listed above (and that were not withdrawn from his motion at the hearing) contain biological material suitable for DNA testing. This conclusion focused on the limitations of Paolucci's and Lankford's testimony about certain items.

The judge excluded all paper items under this criterion because Paolucci testified that, in his experience, he "didn't have much success in testing paper as a substrate." The judge further found that Paolucci necessarily did not know whether the white paper napkin, green blanket, driver's seat tape lift, and white paper sheet placed under Stites contained biological material because he testified that he would

want to examine those items to determine whether they contained biological material. On the likelihood that touch DNA was present on the items, the judge found that Paolucci could not "say for sure where—where these items were touched." And specifically, the judge found that Paolucci admitted that he could not say that the perpetrator touched the white paper napkin, H.E.B. pen, knife with metal cover, or the brown planner. The judge further found that Paolucci did not testify whether biological material might be found on any of the paper items, the latent fingerprint, plastic bag, blue rope, brown rope, pubic tape lift, piece of shirt, piece of knife, extracts from condom, and extracts from beer cans. The judge also found that Paolucci could not "'promise anybody that there's going to be DNA' on any particular item."

The judge likewise found limitations on Lankford's certainty whether any specific item was handled. The judge found that Lankford testified similarly to Paolucci, in that she would examine the green blanket, white paper sheet, and the driver's seat tape lift for trace evidence; an implicit opinion that she did not know whether those items in fact contain biological material. As with Paolucci's testimony, the judge found that Lankford did not discuss whether biological material would be found on certain items, specifically: any of the paper items; the earring; plastic bag; blue rope; brown rope; piece of shirt; piece of knife; extracts from condoms; extracts from beer cans; back brace; and knee brace. Regarding the presence of touch-DNA, the judge found that Lankford "admitted that she did not know whether any particular item was handled or that there is biological material in the supposedly handled item." Nor could Lankford "'say for sure' that DNA

will be detected on the items for which [Reed] requests testing."

After our own independent review of the hearing testimony, we find many of the judge's findings unsupported by the record and therefore we will not afford near total deference. Many of the judge's findings improperly tie together the separate inquires of whether the items are reasonably likely to contain biological material suitable for DNA testing with whether testing would produce a DNA profile. The statutory criterion is concerned only with the former. Both Paolucci's and Lankford's testimony centered on the exchange principle that maintains skin cells and DNA deposits remain on an item every time it is touched. Both witnesses testified to the ubiquity of touch DNA and both testified that, based on the exchange principle, they were one-hundred percent certain that certain items contained biological material. During Paolucci' s testimony, the judge clearly understood the concept in this exchange on cross-examination:

> [State]: But you can tell with 100 percent certainty that there's DNA on this material? Yes or no? Yes — yes or no?
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> [Paolucci]: It's such a —
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> [Paolucci]: That would be misleading to answer that yes or no, Judge.
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> THE COURT: Well, not really because there's going to be DNA on everything.
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> [Paolucci]: There is DNA on everything.
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> THE COURT: It may or may not have anything to do with this case, but there's

> DNA. That's basically what you're saying then?
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> [Paolucci]: Yes, I mean it's so —
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> THE COURT: Okay—
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> [Paolucci]: —minuscule that, you know, we might not have the—we might not have the ability, the sensitivity of testing at this point but, you know, is there [sic] DNA present.

In her affidavit, Lankford expressed her opinion that, based on the exchange principle and to a reasonable degree of scientific certainty, the following items (not waived at the hearing) contain biological material: the two pieces of the belt, pants, white t-shirt, condom, H.E.B. name tag, latent fingerprint found on Fennell's truck, white paper napkin, H.E.B. pen, and carbon copies of checks. Lankford conceded, however, that only through testing could one determine whether a DNA profile could be obtained. At the hearing she expanded the list of items she believed contained biological material to include underwear, socks, shoes, bra, earring, H.E.B. shirt, knife with the metal cover, the pieces of the plastic cup, planner, cigarette lighter, beer cans, package of gum, and metal box cutter. Paolucci's opinions were consistent with Lankford's. The State did not impeach Paolucci's and Lankford's applications of Locard's Principle supporting their opinions. Nor did the judge enter any adverse credibility finding on their testimony.

We note, like the judge did in his findings and conclusions, that the "reasonable likelihood" statutory standard became effective after Reed filed his Chapter 64 motion. When Reed filed his motion,

Article 64.01 (a-1) permitted a convicted person to request "DNA testing of evidence containing biological material."[21] We held that "[a] literal reading of [that] statute unequivocally mandates that all evidence to be tested must first be proven to contain biological material."[22] We further held that movants bear the burden to "prove biological material exists and not that it is merely probable."[23] Current Articles 64.01 (a-1)' s and 64.03(a) 1)(B) ' s new language requiring merely a reasonable likelihood that the evidence contains biological material is decidedly less onerous. Nonetheless, the judge found that Reed could not satisfy either standard when he included in his findings that his conclusion on this criterion would stand applying either the 2013 or 2015 versions of Chapter 64.

Because the record does not fully support the judge's finding on whether Reed satisfied his burden on the presence of biological material, we cannot adopt the finding in its entirety. We do, however, find record support for the judge's finding that Reed's witnesses did not address whether a number of items are reasonably likely to contain biological material. Therefore, Reed failed to satisfy his burden as to those items. After reviewing the witnesses' testimony on what they did and did not conclude contained

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[21] TEX. CODE CRIM. PROC. art. 64.01(a-1) (West Supp. 2014).

[22] *Swearingen v. State*, 424 S.W.3d 32, 37 (Tex. Crim. App. 2014) (quoting *Swearingen v. State*, 303 S.W.3d 728, 732 (Tex. Crim. App. 2010)).

[23] *Id.* at 38 (emphasis in original); *Holberg*, 425 S.W.3d at 285.

biological material, we find that Reed proved that either biological material exists or there is a reasonable likelihood that it exists on the following items:

- Both pieces of the belt
- Pants
- White t-shirt
- Condoms
- H.E.B. name tag
- Fingerprint found on Fennell's truck
- White paper napkin
- H.E.B. pen
- Carbon copies of checks
- Underwear
- Socks
- Right and left shoes
- Bra
- Earring
- H.E.B. shirt
- Knife with the metal cover
- Pieces of the plastic cup
- Planner
- Cigarette lighter
- Beer cans
- Package of gum
- Metal box cutter

3. Has Reed established by a preponderance of the evidence that he would not have been convicted if exculpatory results were obtained through DNA testing?

Addressing all of the items Reed moved to have tested, the judge concluded that Reed failed to prove by a preponderance of the evidence that he would not have been convicted in light of exculpatory

results from DNA testing of all the evidence he requested to be tested. The judge found that "[t]he State's case on guilt-innocence was strong." The judge found that the evidence at trial demonstrated Reed's "presence" and that the sexual assault occurred contemporaneously with the murder. The judge highlighted two additional aspects of the evidence: Reed frequented the area of Stites's disappearance and Reed matched the height of someone who would have fit the adjusted seat in the truck Stites was driving the night of her disappearance. Because many of the items Reed seeks to have tested were already before the jury and the jury knew they did not match Reed, the judge found that the items' potential exculpatory nature was already known to the jury. Further, the judge found that "none of the evidence was so integral to the State's case that the jury would have acquitted despite knowing that [Reed's] DNA was not on the item." In concluding that Reed failed to meet his burden, the judge found that the evidence's handling undermines its exculpatory value and "would muddy the waters, not prove by a preponderance that he would have been acquitted."

Before addressing the judge's findings on this criterion, we pause to summarize what evidence remains after our conclusions on the previous criteria thus far. Doing so marshals the evidence we must analyze to determine whether Reed has carried his burden that he would not have been convicted if exculpatory results were obtained through DNA testing. When we remove the items that are contaminated, tampered with, or altered in a material way from the items that we conclude

contain biological evidence, we are left with the following items:

- Condoms
- Fingerprint found on Fennell's truck
- White paper napkin
- H.E.B. pen
- Cigarette lighter
- Beer cans
- Package of gum
- Metal box cutter

In his brief, Reed asserts that the judge erred in concluding that he did not satisfy his burden in this respect because the judge misapplied the law in two critical ways. First, the judge incorrectly weighed the strength of the State's case at trial and assumed the correctness of the State's theory at trial. Reed claims the judge failed to consider subsequent evidence submitted with his motion that disproves the State's timing theory. Second, citing this Court's opinion in *Routier v. State*,[24] Reed argues that the judge improperly narrowed the definition of "exculpatory result" by failing to presume results implicating an alternative known suspect and the possibility of finding the same third party DNA on separate items. Reed argues that he satisfied his burden that the jury would not have convicted him had the judge applied the correct legal standard and the jury was informed that Reed's DNA was not present on these items. The judge further erred, Reed asserts, by not considering the effect on the conviction had the jury been informed that a

[24] 273 S.W.3d 241, 259–60 (Tex. Crim. App. 2008).

redundant DNA profile of a third party was found on other items that were handled by Stites's killer or particular items already tested.

To be entitled to Chapter 64 DNA testing of these items, Reed must show by a preponderance of the evidence—a greater than 50% likelihood—that he would not have been convicted if the proposed testing's exculpatory results were available at the time of his trial.[25]

"For purposes of this inquiry we must assume (without deciding, of course) that the results of all of the post-conviction DNA testing to which [Reed] is entitled under Article 64.01(b) would prove favorable to him."[26] "Exculpatory results" means only results excluding the convicted person as the donor of this material.[27] Reed's brief on this point claims post-trialfactual developments undermine the State's theory at trial, but our review in this context does not consider post-trial factual developments. Instead, we limit our review to whether exculpatory results "would alter the landscape if added to the mix of evidence that was available at the time of trial."[28]

We conclude that Reed fails to prove by a preponderance of the evidence that, in light of presumed exculpatory DNA results, he would not

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[25] TEX. CODE CRIM. PROC. art. 64.03(a)(2)(A) (West Supp. 2014); *Holberg*, 425 S.W.3d at 286–87.

[26] *Routier*, 273 S.W.3d at 257.

[27] *Holberg*, 425 S.W.3d at 287.

[28] *Id.* at 285; *see Kutzner v. State*, 75 S.W.3d 427, 439 (Tex. Crim. App. 2002).

have been convicted. Both in the trial court and on appeal, Reed fails to articulate why the presumed exculpatory results of the items he wanted tested would result in the jury finding him not guilty, as opposed to merely "muddying the waters" as the trial judge concluded.[29] Assuming that the exculpatory results include finding the same DNA profile on the condoms, beer cans, fingerprint found on Fennell's truck, white paper napkin, H. E .B. pen, cigarette lighter, package of gum, and metal box cutter, Reed cannot establish that an exculpatory redundant profile would have, by a preponderance of the evidence, resulted in his acquittal. Our holding that Reed cannot meet his burden by aggregating the exculpatory results naturally includes a holding that Reed's showing fails as to each singular item.

First, Reed cannot establish that the condoms, beer cans, and the white paper napkin are connected to Stites's capital murder. According to the trial testimony, the two beer cans were collected by the latent-fingerprint examiner who found them located across the road from where Stites was discovered. Another member of the crime-scene examination team testified that finding beer cans on the side of a country road is not uncommon. Other than an effort to be thorough in collecting items relatively near the crime scene, there was nothing in particular that led law enforcement to believe that the beer cans were connected to the crime scene.

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[29] *See Ex parte Gutierrez*, 337 S.W.3d 883, 901 (Tex. Crim. App. 2011).

There was sparse trial testimony concerning the circumstances of the condoms' recovery. Ranger Wardlow testified that condoms were given to the sheriff's office, although he did not recall exactly who turned them in. The trial record makes no mention where the condoms were discovered and by whom. Even assuming they were discovered near where Stites's body was found, Ranger Wardlow testified that the condoms appeared to be old, cracked, and worn out, suggesting they had long predated Stites's death. Reed's own expert at the Chapter 64 hearing testified similarly concerning the condoms' condition.

Although the trial testimony indicates that the white paper napkin was collected from the ground near Fennell's truck parked at the high school, there is no testimony to suggest that the napkin came from Fennell's truck. While the statute requires that we presume exculpatory results of the putative testing, it does not require us to presume an item's relevance to the question of the offender's identity. Reed provides little more than supposition to suggest that, because it was found on the ground outside of Fennell's truck, the napkin was connected to the murder. It is an ever bigger stretch to say that testing the napkin may identify Stites's murderer. The napkin was mentioned only twice over the course of the thirteen-volume record on guilt-innocence, and then merely in a list of items collected. Like the beer cans and condoms, Reed cannot demonstrate the relevance of the napkin, much less that its testing and the attending exculpatory result injects sufficient doubt into the evidentiary mix that a jury would acquit.

The items collected from Fennell's truck are only incrementally more likely to be connected to Stites's murder solely by virtue of the State's theory at trial that Reed assaulted Stites in the truck, dumped her body in the woods, and parked the truck in the high school parking lot. Yet Reed fails to demonstrate that the alternative murderer would have necessarily left the fingerprint found on Fennell's truck and handled the H .E .B. pen, cigarette lighter, package of gum, and metal box cutter. Other than their proximity to the murder's commission, the record fails to establish why these items are relevant to establishing Stites's murderer. Reed's experts recommended that these items be tested simply because a perpetrator could have touched them. We fail to see how even a presumed redundant profile on these items would have raised doubt sufficient enough to cause the jury to acquit Reed.

Second, Reed's counsel suggested his trial was "a case of competing stories," but he fails to explain why exculpatory results makes his story at trial clearly more convincing than the State's "story." At trial, Reed raised a two-pronged defensive theory: First, Reed pointed to the possibility that another person, particularly Fennell or David Lawhon, committed the murder. Second, Reed had a secret romantic relationship with Stites and his semen was present as a result of consensual intercourse.

The State's theory at trial was that Reed's DNA profile found in the semen deposited in Stites's vagina and rectum and in the saliva on her breast clearly indicated that Reed had sex with Stites. And based on the injuries she suffered both pre- and post-

mortem, the State argued that the sexual encounter was not consensual. Dr. Bayardo, the medical examiner, estimated that Stites died at 3:00 a.m., give or take a few hours. Because he observed fully intact sperm taken from the vaginal swabs, Dr. Bayardo concluded that the sperm was deposited "quite recently." Crime-scene investigator Karen Blakely testified that, based on a published study, sperm will remain intact inside the vaginal tract for as long as twenty-six hours. The medical examiner also found several sperm heads without visible tails from the rectal swabs and testified that sperm breaks down much faster in the rectum than it does in the vagina. During the sexual-assault exam, Dr. Bayardo noticed that Stites's anus was dilated and superficially lacerated. Dr. Bayardo concluded that the anal injury occurred at or near the time of her death. From the witnesses' testimony, the State argued to the jury that "whoever raped Stacey [Stites] also killed her."

The presumed redundant exculpatory results do nothing to undermine the State's case or alter the evidentiary landscape at Reed's trial. The results do not affect the State's time line supporting its theory tying the murder to the rape, the argument the jury ultimately believed. The presumed redundant DNA profile exculpatory results also do not support Reed's consensual-relationship defense that the jury disregarded. It is on this latter point, among others, that Reed's case differs from that in *Ex parte Routier*, a case he argues the trial judge misapplied.

In *Ex parte Routier*, we examined each piece of evidence to determine whether each piece individually satisfied Chapter 64's requirements and,

as a result, limited the items subjected to testing to a facial hair, a pubic hair, blood on a tube sock, a night shirt, and a blood sample on the door to the garage. We then set out to determine whether Routier could prove that she would not have been convicted had the jury known of the presumptively favorable test results.[30] At trial, Routier denied stabbing her two sons. She contended that "[s]he awoke to discover a stranger departing through the kitchen and utility room and out through the garage, leaving a bloody butcher knife from the kitchen behind on the utility room floor."[31] "The State presented circumstantial evidence suggesting that there was no intruder, that the crime scene had been 'staged,' that [Routier] had inflicted the wounds on herself, and that she had some pecuniary motive to murder her children."[32] Assuming a redundant DNA profile from a single unknown contributor on these items, we held that such results substantially corroborated Routier's account by placing an unknown assailant at the scene who then fled the house through the garage.[33] We held this corroboration "would have a strong tendency to engender a reasonable doubt in an average juror's mind" and Routier was entitled to post-DNA testing.[34]

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[30] *Routier*, 273 S.W.3d at 256–59.

[31] *Id.* at 244.

[32] *Id.* at 244–45.

[33] *Id.* at 257–58.

[34] *Id.* at 258, 259–60.

The circumstances surrounding the items subjected to post-conviction testing in *Routier* differ from those Reed seeks to test. The items Routier wanted tested were those that corroborated her defensive theory at trial. Second, and relatedly, those items, together with the presumptive redundant DNA profile, were significant because they were associated with the crime scene through Routier's own trial testimony and were recovered (with the exception of the tube sock) in her house, a place where only a reasonably limited number of hair and blood DNA contributors would be found. The same cannot be said of the remaining items in this case potentially subject to testing.

The presumptively exculpatory results in this case are decidedly weaker than in *Routier*. The presumptive redundant DNA profile does not sufficiently alter the evidentiary mix to a degree that would have a strong tendency to engender a reasonable doubt in an average juror's mind. The exculpatory results, even allowing a presumption that the redundant profile would be Fennell's, do not corroborate Reed's defensive theory that a consensual relationship existed between Stites and Reed nor do they strengthen the argument that Fennell murdered Stites. Again, even allowing an overly expansive presumption that the exculpatory results would come back to Fennell, the jury would most likely not be surprised to learn that Fennell's profile was found on his own truck or on items found in his truck. And if we presume Fennell's DNA profile was found on the extracts taken from the condoms and beer cans, in light of their uncertain provenance or connection to the crime scene, we

cannot say the jury would have found sufficient doubt that it would have acquitted Reed.

Moreover, any presumptive exculpatory results, including evidence of a redundant DNA profile, are relatively weak evidence because of the specific biological material Reed seeks to test. Reed's experts definitely opined that all of the items Reed identified have biological material because epithelial cells are ubiquitous on handled materials. According to the hearing testimony, testing technology has advanced to the degree that a small number of skin cells may yield a DNA profile. But as Reed's DNA experts explained the exchange principle, there is an uncertain connection between the DNA profile identified from the epithelial cells and the person who deposited them. Just as a person may deposit his own epithelial cells, he may deposit another's if those cells were exchanged to him by touching an item another has touched. So the exchange principle may support an equally persuasive argument that the DNA profile discovered from an epithelial cell was not deposited by the same person associated with the particular DNA profile.[35] And as with all DNA testing generally, touch DNA analysis cannot determine when an epithelial cell was deposited. So in addition to being unable to definitively show who left the epithelial cell, it is unable to show when it was deposited. Reed's experts contradict his

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[35] *Cf. Swearingen*, 424 S.W.3d at 38–39 (holding that discovering another's DNA under the victim's fingernails would not factually exclude Swearingen in light of the many ways another's DNA could have ended up there).

argument that touch DNA would prove the perpetrator's identity.

4. Has Reed established by a preponderance of the evidence that his request for DNA **testing is not made to unreasonably delay the execution of his sentence or administration of justice?**

The judge concluded that Reed failed to meet his burden on delay. In support of his conclusion, the judge found, among other things: (1) Reed failed to provide time estimates for the DNA testing he seeks; (2) Reed's filing his Chapter 64 motion on the day the State sought an execution date was a tactic designed to delay setting an execution date; (3) Reed had earlier opportunities to request Chapter 64 testing throughout his state and federal post-conviction litigation; (4) Reed initiated informal DNA-testing requests with the State only after the Fifth Circuit affirmed the district court's denial of his petition for habeas corpus, leaving little chance for future relief; (5) Reed has a history of filing untimely requests for testing in federal court, and this request is a continuation of this behavior; (6) Reed's claim that his request was delayed because he did not know of some evidence's existence until reading the State's response is not credible; and (7) Reed waited more than four months to obtain a subpoena for his own reference sample for purposes of testing certain items the State and Reed agreed to test outside of Chapter 64.

Although Article 64.03(a)(2)(B) does not contain set criteria a court must consider in deciding whether a movant satisfied his burden that his request is not made to unreasonably delay a

sentence's execution, various opinions flesh out the inquiry by considering the circumstances surrounding the request. Those circumstances may include the promptness of the request, the temporal proximity between the request and the sentence's execution, or the ability to request the testing earlier.[36] However, individual cases in this area turn on the discrete facts they presented and they offer no definitive criteria for answering this inherently fact-specific and subjective inquiry.

We hold that Reed failed to establish that his request is not made to unreasonably delay the execution of his sentence or the administration of justice. Reed's untimely request to test a significant number of items, including some items the State has agreed to test and others whose relevance to the crime are unknown, supports the conclusion that this motion was intended to delay his impending execution date. As chronicled earlier in this opinion, Reed engaged and continues to engage in protracted litigation since his conviction was affirmed in 2000. In 2002, this Court denied Reed's initial application for habeas corpus.[37]

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[36] *See, e.g., Swearingen*, 303 S.W.3d at 736 (noting that movant could have requesting testing of materials earlier); *Thacker v. State*, 177 S.W.3d 926, 927 (Tex. Crim. App. 2005) (movant failed to satisfy his burden when he waited over fours years to file his motion less than a month before his execution); *State v. Patrick*, 86 S.W.3d 592, 598 (Tex. Crim. App. 2002) (Hervey, J., concurring).

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

We dismissed as abusive under Texas Code of Criminal Procedure Article 11.071, § 5 the other five applications Reed filed over the next seven years.[38] In our 2009 opinion dismissing Reed's third and fourth subsequent applications, we noted that Reed has taken a "piecemeal approach" in his post-conviction litigation.[39] Reed also sought habeas relief in the federal courts, but his claims were denied in 2012. Before the denial was affirmed on appeal in 2014, he sought post-judgment remedies to further delay final judgment by requesting leave to add additional claims and abatement to restart his state court habeas litigation.[40]

While seeking an agreement with the State to voluntarily submit items for DNA testing without litigation is laudable and generally should not be held against a movant, the record reveals that Reed initiated the negotiations only after the 5th Circuit Court of Appeals denied his request for a certificate of appealability approximately three days before. Reed claims that the State dragged out the negotiations for months. The record does not indicate one way or the other. But even if the expiration of five months is attributable to the State,

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[38] *Ex parte Reed*, No. WR-50,961-02 (Tex. Crim. App. Feb. 13, 2002) (not designated for publication); *Ex parte Reed*, 271 S.W.3d at 698; *Ex parte Reed*, Nos. WR-50,961-04 & WR-50,961-05 (Tex. Crim. App. Jan. 14, 2009) (not designated for publication); *Ex parte Reed*, No. WR-50,961-06 (Tex. Crim. App. Jul. 1, 2009) (not designated for publication).

[39] *Ex parte Reed*, Nos. WR-50,961-04 & WR-50,961-05, 2009 WL 97260, at *1.

[40] *Reed*, 739 F.3d at 763, 790.

it is *de minimus* in light of Reed's lengthy post-conviction litigation. After Reed secured the State's agreement to test certain evidence, he took four months to even start the process of submitting his own reference sample. The timing of Reed's motion is even more suspect when we consider that it was filed on the same day the judge heard the State's motion to set an execution date filed three months earlier.

Chapter 64 had existed with only slight variations for over thirteen years at the time Reed filed his motion,[41] and there does not appear to be any factual or legal impediments that prevented Reed from availing himself of post-conviction DNA testing earlier. Reed argues that he cannot be faulted for his inaction since Chapter 64's enactment. He reasons that he could not have sought the type of forensic DNA testing he does now until the Legislature amended Article 64.01(a) in 2011 defining "biological material" to include, in relevant part, skin cells, fingernail scrapings, and other identifiable biological evidence that may be suitable for DNA testing. We disagree with Reed's argument that "[before] the 2011 amendments, a movant could not move to test items handled by a perpetrator for 'touch' DNA unless prior testing or analysis had already established the presence of blood, semen, hair, saliva, skin tissues or cells, bone, or bodily fluid."[42] In our 2010 *Swearingen* opinion, we addressed a Chapter 64 request to perform touch

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[41] Acts 2001, 77th Leg., ch. 2, § 2 (effective Apr. 5, 2001).

[42] Reed's Brief at 70.

DNA analyses.[43] The statutory impediment to Swearingen' s claim was not necessarily the definition of "biological material" but rather the article's language requiring a movant to prove evidence contained biological material.[44] Swearingen failed to satisfy this requirement because he "made[] only a general claim that biological material could be found from touching" and "relie[d] on conclusory statements."[45] Unlike Reed, Swearingen failed to present expert testimony to support the conclusion that DNA would necessarily be deposited.[46] And unlike in Swearingen, we have previously found that Reed presented sufficient expert testimony to establish certain evidence contained biological material. We therefore find no legally unavailable claim or legal impediment preventing Reed from seeking Chapter 64 testing at a much earlier time.

From the totality of circumstances surrounding Reed's motion, we hold that Reed is unable to establish by a preponderance of the evidence that his motion was not made for purposes of delay.

III. Conclusion

Because Reed failed to show by a preponderance of the evidence a reasonable probability that exculpatory DNA test results would change the outcome of his trial and that his request

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[43] *Swearingen*, 303 S.W.3d at 732–33.

[44] *See id.* at 732.

[45] *Id.*

[46] *Id.*

was not made to unreasonably delay the execution of his sentence or the administration of justice, we conclude that the trial judge did not err in denying Reed's Chapter 64 motion.

DELIVERED: April 12, 2017

PUBLISH

Cause No. 8701

STATE OF TEXAS	§	IN THE 21ST DISTRICT
	§	COURT
v.	§	OF
	§	BASTROP COUNTY,
RODNEY REED	§	TEXAS

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

RELEVANT PROCEDURAL HISTORY

1. Reed filed a Chapter 64 motion on July 14, 2014, seeking to conduct DNA testing (the "Motion or "Chapter 64 Motion").

2. On November 25, 2014, the Court held an evidentiary hearing on the Motion.

3. Crime-scene and forensics expert, John Paolucci, and DNA expert, Deanna Lankford, testified on behalf of Reed at the hearing. The State's witnesses were: Gerald Clough, an investigator with the Office of the Attorney General of Texas; Lisa Tanner, the special prosecutor in Reed's case; and Etta Wiley, a deputy district clerk for Bastrop County.

4. At the conclusion of the hearing, the Court denied the Motion and set Reed's execution date for March 5, 2015. R.R. Vol. IV 47:4-11.

5. The State proposed Findings of Facts and Conclusions of Law addressing only that: (1) the Motion was filed untimely and calls for unreasonable delay, and (2) that there is no

reasonable probability Reed would not have been convicted had the results been available at the trial of the case. The Court adopted the State's proposed findings and conclusions and entered them in an order dated December 16, 2014.

6. On January 12, 2015, Reed filed a notice of appeal of the Court's denial of the Chapter 64 Motion.

7. On June 29, 2016, the Court of Criminal Appeals entered an order remanding Reed's Chapter 64 case to the Court for additional findings of fact and conclusions of law. Reed v. Texas, No. Ap-77,054 (Tex. Crim. App. June 29, 2016) (Order).

8. The Court of Criminal Appeals directed the Court to make the following findings regarding each item Reed seeks to test:

   (a) whether the item still exists and is in a condition making DNA testing possible;

   (b) whether the item has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect;

   (c) whether there is a reasonable likelihood that the item contains biological material suitable for DNA testing; and

   (d) whether identity was or is an issue in this case.

Id., slip op. at 2.

ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Whether Evidence Still Exists And Is In A Condition Making DNA Testing Possible. Tex. Code Crim. Proc. Art. 64.03(a)(1).

9. Reed seeks to test three categories of evidence: (1) the victim's clothing, (2) evidence recovered in or near the truck the State claims the victim was driving when she was purportedly abducted, and (3) evidence recovered from the area where the victim's body was discovered. Each of the items Reed seeks to test is listed in the attached Addendum A.

10. The Court finds that based on the State's evidence, including the evidence inventories and hearing testimony of Gerald Clough and Etta Wiley, each item Reed seeks to test still exists and is within the possession, custody and control of the Attorney General's Office, the Texas Department of Public Safety Crime Lab, or the Bastrop District Court Clerk.

11. Crime-scene and forensics expert, John Paolucci, and DNA expert, Deanna Lankford, testified that each item Reed seeks to test is in a condition making DNA testing possible. The State offered no rebuttal evidence on this element. Although the State attempted to elicit the opinion of its investigator, Gerald Clough, about whether the evidence is suitable for DNA testing, the Court sustained objections to this testimony based on Mr. Clough's lack of qualifications as a DNA expert.

12. The Court finds that each item listed in Addendum A exists and is in a condition making DNA testing possible pursuant to Tex. Code Crim. Proc. art. 64.03(a)(1).

B. Whether The Evidence Has Been Subject To A Chain Of Custody Sufficient To Establish That It Has Not Been Substituted, Tampered With, Replaced, Or Altered In Any Material Respect. Tex. Code Crim. Proc. Art. 64.03(a)(1)(A)(ii).

13. Each of the items Reed seeks to test has been within the custody and control of the State since the item was collected. The State did not contest the chain of custody as to those items of evidence within the custody of the Department of Public Safety Crime Lab or the Office of the Attorney General. The Court finds that all items of evidence in the possession of the office of the Attorney General and the Department of Public Safety Crime Lab have been subjected to a chain of custody sufficient to establish that they have not been substituted, tampered with, replaced, or altered in any material respect pursuant to Article 64.03(a)(1)(A)(ii) of the Texas Code of Criminal Procedure.

14. The State argued that chain of custody was not established with respect to evidence that was introduced at Reed's trial in 1998 and has remained in the custody of the Bastrop District Court ever since.

15. At the hearing, the Bastrop District Court Criminal Deputy Clerk, Etta Wiley, testified

that each of the items Reed seeks to test remained within the custody of the Bastrop District Court "under lock and key." R.R. Vol. IV 195-196. Wiley also testified that to her knowledge, no item has been "been substituted, replaced, tampered with, or materially altered." R.R. Vol. IV 195-197.

16. Trial prosecutor Lisa Tanner testified regarding the handling of evidence before and during the 1998 trial. Tanner testified that the evidence was handled with gloves prior to trial, but that the evidence was handled during the trial by her, the defense attorneys, and court personnel without gloves. R.R. Vol. IV 199. Tanner also testified that she presumed the evidence had been handled by the district clerk and had also been sent back to the jury room. Id.

17. The State's investigator, Mr. Clough, testified in response regarding the following hypothetical proposed by the State: "if you had collected evidence and sealed it and put it in custody and somebody came in and opened that seal and touched it and then passed it around to other individuals". Clough gave a conclusory opinion over objection that, under these circumstances, he would consider the evidence to be "contaminated", "materially altered," and "tampered with." R.R. Vol. IV 185-186.

18. Crime-scene and forensics expert John Paolucci and DNA expert Deanna Lankford offered unrebutted expert testimony explaining how items that may have been handled without gloves or comingled can provide probative DNA evidence through either identifying and

comparing the DNA of those persons known to have handled the evidence as well as by comparing DNA profiles from the potentially contaminated items to those detected on items from the Attorney General's evidence locker or the

Department of Public Safety Crime Lab which were not handled at trial. See, e.g., R.R. Vol. II 26-29, 76-78; R.R. Vol. III 94-101, 104-105, 111; R.R. Vol. IV 76. Reviewing a photograph of the trial exhibits as they were stored together in a box by the Bastrop District Clerk's Office, Lankford also testified that it was common for evidence in old cases to be submitted to her lab for DNA testing under similar conditions. She further testified that the manner of storage under these circumstances did not prevent the lab from obtaining probative results from the items in the box. R.R. Vol. III 96.

19. The Court finds that a proper chain of custody has been established as to the evidence kept as trial exhibits by the Bastrop District Court Criminal Deputy Clerk. By admitting the items into evidence at Reed's 1998 trial, the Court has already determined that the items were subjected to a proper chain of custody prior to trial. There is also no dispute that the evidence was subsequently maintained by the Bastrop District Clerk under secure conditions. As discussed by Lankford, the fact that the items were handled by participants in the trial is certainly relevant to the Court's consideration of any DNA results from the testing of these items. However, such routine handling necessary for

the evidence to be considered at trial does not destroy the chain of custody as to that evidence.

20. The Court finds that each item Reed seeks to test has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect within the meaning of Article 64.03(a)(1)(A)(ii) and therefore meets the requirements of that article.

C. Whether There Is A Reasonable Likelihood That The Items Contain Biological Material Suitable For DNA Testing.

21. Crime-scene and forensics expert John Paolucci and forensic DNA expert Deanna Lankford testified why each item Reed seeks to test contains biological evidence.

22. Lankford opined that, to a reasonable degree of scientific certainty, each item Reed seeks to test contains biological material suitable for DNA testing. See R.R. Vol. II 17-18; R.R. Vol. III 114, 117-118, 135, 142; Defendant's Hearing Ex. 11, ¶ 15.

23. Paolucci explained how the items would have been handled during the commission of the crime and that DNA evidence obtained from those items could reveal the killer's identity. R.R. Vol. II 17-18.

24. The State offered no rebuttal witnesses, and sponsored no documentary evidence contradicting Paolucci's or Lankford's testimony. In fact, the State's contamination arguments made in the context of chain of custody presume

that biological material is present on each of the items of evidence kept in the custody of the Bastrop District Clerk's Office.

25. The Court finds that there is a reasonable likelihood that each item Reed seeks to test contains biological material and therefore meets the requirements of Tex. Code Crim. Proc. art. 64.01(a).

26. The Court further finds that each item Reed seeks to test was gathered in relation to the offense that is the basis of Reed's conviction and was in the possession of the State during Reed's trial.

27. The Court accepts the unrebutted testimony of Deanna Lankford that the evidence was either not previously subjected to DNA testing, or can be tested using newer techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of any previous testing.

28. Based on the documentary and testimonial evidence introduced at the hearing, the Court finds that the requirements of Tex. Code Crim. Proc. art. 64.01(b) are satisfied for each item Reed seeks to test.

D. Whether Identity Was Or Is An Issue In This Case.

29. The identity of Ms. Stites's killer was the primary contested issue at trial, and has been a contested issue through appeal and petitions for a writ of habeas corpus. The Court of Criminal Appeals has noted that the facts give rise to "a

> healthy suspicion that Fennell [the victim's fiancé] had some involvement in Stacey's death." Ex parte Reed, 271 S.W.3d 698, 747 (Tex. Crim. App. 2008). This Court finds that identity is at issue as required by Article 64.03(a)(1)(C).

ENTERED this 9 day of Sept, 2016.

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

Sitting by Assignment

ADDENDUM A

ITEMS REED SEEKS TO TEST

Victim's Clothing	In or Near Truck	Victim Recovery Scene
Pants	HEB pen	Plastic bags placed over victim's hands during investigation
Underwear	Knife and metal cover	Used condom
Bra	Green lighter	Two Busch beer cans
Employee name tag	Metal box cutter	Swabs/samples taken from mouths of two Busch beer cans
White t-shirt	Pack of Big Red gum	Extract samples from blue condom stored in coin envelope
Section of belt (no buckle)	Pieces of plastic cup	piece of shirt
Section of belt with buckle	Brown planner/ organizer	piece of knife
Earring	Single hair from organizer/ planner	
Right shoe	White paper napkin	
Left Shoe	Carbon copies of checks	

HEB Employee shirt	Gas emergency book	
Strands of hair from left sock, back of left leg, back	Latent fingerprint	
Tape lifts from pubic area	Automatic teller receipt	
vaginal and rectal swabs	bridal shop receipt	
	Wal-Mart receipt	
	business card	
	plastic bag	
	blue nylon rope	
	brown rope	

Cause No. 8701

STATE OF TEXAS	§	IN THE 21ST DISTRICT
	§	COURT
v.	§	OF
	§	BASTROP COUNTY,
RODNEY REED	§	TEXAS

SUPPLEMENTAL FINDINGS OF FACTS AND CONCLUSIONS OF LAW

After considering the record in this case, and after making credibility determinations following a live hearing in this Chapter 64 proceeding, the Court enters the following supplemental findings of fact and conclusions of law:

Relevant Procedural History

1. On July 14, 2014, Movant filed a Chapter 64 motion.
2. The State responded on September 12, 2014, and attached several exhibits regarding the existence, custody, and present condition of evidence collected in connection with the investigation of Movant's offense.
3. On October 22, 2014, the State filed an amended inventory regarding fingerprint evidence.
4. Movant filed an affidavit from a DNA expert on October 23, 2014.
5. On October 27, 2014, the Court set a hearing on Movant's Chapter 64 motion.
6. Movant filed a reply on November 24, 2014, and attached a personal affidavit.

7. The Court held a live hearing on the Chapter 64 motion on November 25, 2014. Movant called crime-scene and forensics expert, John Paolucci, and DNA expert, Deanna Lankford. The State-called Gerald Clough, an investigator with the Office of the Attorney General of Texas, Lisa Tanner, the special prosecutor on Movant's case, and Etta Wiley, a deputy district clerk for Bastrop County. Movant and the State also introduced various exhibits. After considering the record in this case, and after making credibility determinations from the hearing, the Court denied Movant's Chapter 64 motion.

8. On December 12, 2014, the Court issued findings of fact and conclusions of law explaining the denial of Movant's Chapter 64 motion.

9. Movant filed a notice of appeal on January 12, 2015.

10. On June 29, 2016, the Court of Criminal Appeals remanded this case for the limited purpose of making additional findings "regarding each item [Movant] seeks to have tested:

    (1) whether the item still exists and is in a condition making DNA testing possible;

    (2) whether the item has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect;

(3) whether there is a reasonable likelihood that the item contains biological material suitable for DNA testing; and

(4) whether identity was or is an issue in this case."

11. On July 5, 2016, the Court entered a scheduling order requiring the parties to file proposed findings.

Supplemental Findings of Fact and Conclusions of Law

Items Requested for DNA Testing

12. The Court finds that Movant initially requested DNA testing on the following items:
    - White paper napkin
    - Belt (in two parts)
    - HEB pen
    - Carbon copies of checks
    - Gas emergency book
    - Latent fingerprint
    - Automated teller receipt
    - Bridal shop receipt
    - Green cigarette lighter
    - Metal box cutter
    - Package of Big Red gum
    - Walmart receipt
    - Business card
    - Plastic bag
    - Earring
    - Knife with metal cover
    - Blue rope
    - Brown rope
    - White t-shirt

- Hair from Stites's left sock
- Hair from Stites's left leg
- Hair from Stites's back
- Hair from pubic tape lift
- Pubic tape lift
- Blue pants
- Black bra
- Green panties
- HEB nametag
- Vaginal swabs taken by medical examiner
- Rectal swabs taken by medical examiner
- Piece of a shirt
- Condom
- Piece of a knife

13. At the hearing, Movant expanded his initial DNA testing request to include these items and parts of items as well:
    - Blue pants—the crotch, zipper, cuffs, waistband, button opening, and button
    - Green panties—the crotch and waistband
    - Black bra—the clasp
    - White t-shirt—the collar
    - Socks—the heels and cuffs
    - Left shoe—the heel and laces
    - Right shoe—the heel and laces
    - HEB shirt—the collar, cuffs, and armpits
    - Pieces of a green cup
    - Portrait receipt
    - Brown planner
    - Beer cans—the lip and crush ridges
    - Hair from brown planner
    - Bags around Stites's hands
    - Extracts from condom
    - Extracts from beer cans

- White flakes
- Two tape lifts from Stites's body
- Green blanket
- Driver's seat tape lift
- White paper sheet
- Back brace
- Knee brace

14. At the hearing, Movant withdrew his request to test items that were part of a previous DNA testing agreement with the State:
    - Hair from Stites's left sock
    - Hair from Stites's left leg
    - Hair from Stites's back
    - Hair from pubic tape lift
    - Vaginal swabs taken by medical examiner
    - Rectal swabs taken by medical examiner

15. The Court notes that the State timely objected to Movant's expanded DNA testing request.

Existence *of Items and Their Condition*

16. The Court finds that all of the items listed in findings 12 and 13 still exist and are in a condition making DNA testing possible.

Chain of Custody

17. The Court finds that the following items have NOT been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect:
    - Blue pants
    - Green panties
    - Socks

- Left shoe
- Right shoe
- Black bra
- HEB nametag
- White t-shirt
- Belt (in two parts)
- Earring
- HEB shirt
- Knife with metal cover
- Pieces of a green cup
- Brown planner
- Back brace
- Bridal shop receipt
- Portrait receipt
- Knee brace
- Carbon copies of checks
- Walmart receipt

18. In making finding 17, the Court considers the following evidence:

18a. Tanner credibly testified that, following forensic analysis of the items in finding 17, the items were handled ungloved by the trial participants, court personnel, and possibly jurors as they were exhibits in Movant's trial. Tanner's testimony on this point was not contradicted by Movant.

18b. Clough credibly testified that some of the items in finding 17 have been stored without packaging, comingled in unsealed boxes. Clough's testimony on this point was not contradicted by Movant.

18c. Wiley credibly testified that some of the items in finding 17 have been stored without packaging, comingled in a manila envelope. Wiley's testimony on this point was not contradicted by Movant.

18d. Paolucci testified that evidence should remain sealed, or handled with gloves if unsealed, "[t]o prevent contamination." Paolucci admitted that there is "a good chance that [the items in finding 17 are] contaminated evidence."

18e Lankford testified that, if evidence in her laboratory was unsealed and touched with an ungloved hand, "you've tampered with our evidence."

19. The Court finds that all items listed in findings 12 and 13, except those in finding 17, have been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect.

Reasonable Likelihood of Biological Material Suitable for DNA Testing

20. The Court finds that there is NOT a reasonable likelihood that the following items contain biological material suitable for DNA testing:
    - White paper napkin
    - Belt (in two parts)
    - HEB pen
    - Carbon copies of checks
    - Gas emergency book
    - Latent fingerprint
    - Automated teller receipt

- Bridal shop receipt
- Green cigarette lighter
- Metal box cutter
- Package of Big Red gum
- Walmart receipt
- Business card
- Plastic bag
- Earring
- Knife with metal cover
- Blue rope
- Brown rope
- White t-shirt—the collar
- Pubic tape lift
- Blue pants—the crotch, zipper, cuffs, waistband, button opening, and button
- Black bra—the clasp
- Green panties—the crotch and waistband
- HEB nametag
- Piece of a shirt
- Condom
- Piece of a knife
- Socks—the heels and cuffs
- Left shoe—the heel and laces
- Right shoe—the heel and laces
- HEB shirt—the collar, cuffs, and armpits
- Pieces of a green cup
- Portrait receipt
- Brown planner
- Beer cans—the lip and crush ridges
- Hair from brown planner
- Bags around Stites's hands
- Extracts from condom
- Extracts from beer cans
- White flakes
- Two tape lifts from Stites's body

- Green blanket
- Driver's seat tape lift
- White paper sheet
- Back brace
- Knee brace

21. In making finding 20, the Court considers the following evidence:

21a For purposes of establishing biological material on most items, Movant relied on skin cell transfer—Locard's exchange principle.

21b Paolucci testified that, for paper items, he would prefer latent print examination over DNA testing because "we didn't have much success testing paper as a substrate."

21c The following items are paper goods:
- White paper napkin
- Carbon copies of checks
- Automated teller receipt
- Bridal shop receipt
- Walmart receipt
- Business card
- Portrait receipt
- White paper sheet

21d. Paolucci testified that he would want additional examination to determine if biological material existed on the following items:
- White paper napkin
- White flakes
- Two tape lifts from Stites's body
- Green blanket
- Driver's seat tape lift

- White paper sheet

21e Paolucci's request for additional examination to determine if biological material exists on the items in finding 21d necessarily means that he does not know if biological material exists on such items.

21f Paolucci admitted that the only way to determine if there is biological material on a certain item is if it is tested for DNA and he could not "promise anybody that there's going to be DNA" on any particular item.

21g Paolucci admitted that he could not "say for sure where—where these items were touched."

21f Paolucci specifically admitted that he could not say that the perpetrator touched any of the following items:

- White paper napkin
- HEB pen
- Knife with metal cover
- Brown planner

21i. Paolucci did not discuss whether biological material might be found on the following items:

- White paper napkin
- Carbon copies of checks
- Gas emergency book
- Latent fingerprint
- Automated teller receipt
- Bridal shop receipt
- Walmart receipt
- Business card

- Plastic bag
- Blue rope
- Brown rope
- Pubic tape lift
- Piece of a shirt
- Piece of a knife
- Portrait receipt
- Extracts from condom
- Extracts from beer cans
- White flakes
- Two tape lifts from Stites's body
- Green blanket
- Driver's seat tape lift
- White paper sheet

21j Lankford testified that "the only way to know for sure" if biological material is present "is to test the[items] and obtain a DNA profile" and that she "couldn't testify to there being a biological stain, for instance, on an item of clothing without testing it."

21k Lankford admitted that she has no personal knowledge that any particular item of evidence was manipulated with bare hands.

211. Lankford admitted that she did not know whether any particular item was handled or that there is biological material in the supposedly handled spot on the item.

21m Lankford admitted that she had no personal knowledge that Stites was dragged by her clothing and that it was

equally likely that she was moved via her unclothed body parts.

21n Lankford admitted that she could not say whether any particular stain on the white t-shirt contained biological material.

21o Lankford admitted that she could not say that the following items were handled during the commission of Stites's murder:

- White paper napkin
- HEB pen
- Carbon copies of checks

21p Lankford testified that for the items in finding 17, there is the possibility that so much biological material has been contributed it will be impossible to deconstruct the mixture.

21q Lankford stated she "couldn't say for sure" that DNA will be detected on the items for which Movant requests testing.

21r Lankford testified that, as far as fingerprints go, "sometimes we obtain a DNA profile and sometimes we don't." **[8]**

21s. Lankford testified that she would want additional examination to determine if biological material existed on the following items:

- Green blanket
- White paper sheet
- Driver's seat tape lift

21t Lankford's request for additional examination to determine if biological material exists on the items in finding 21s

necessarily means that she does not know if biological material exists on such items.

21u Lankford did not discuss whether biological material might be found on the following items:

- Gas emergency book
- Automated teller receipt
- Bridal shop receipt
- Walmart receipt
- Business card
- Plastic bag
- Earring
- Blue rope
- Brown rope
- Piece of a shirt
- Piece of a knife
- Portrait receipt
- Hair from brown planner
- Extracts from condom
- Extracts from beer cans
- Green blanket
- Driver's seat tape lift
- White paper sheet
- Back brace
- Knee brace

21v The items listed in finding 17 have been contaminated, tampered, and/or altered, as explained in finding 18.

21w There was testimony at trial that Stites was not dragged to her resting place.

21x There was testimony at trial that Stites's fingernails were too short to obtain scrapings from underneath.

21y There was no testimony at trial that Stites hit or scraped her attacker with her hands.

21z. There was testimony at trial that the following items contained no stains of evidentiary value on them:

- White t-shirt
- White flakes
- Black bra
- Paper napkin
- White paper sheet
- Knee brace
- HEB shirt

22. The Court finds that there is a reasonable likelihood that all items listed in findings 12 and 13, except those in finding 20, contain biological material suitable for DNA testing. Namely, the hair from the brown planner.

23. The Court notes that the reasonable likelihood standard utilized in finding 20 comes from an amendment of Chapter 64 that occurred after Movant filed his Chapter 64 motion.

24. The Court would enter finding 20 whether applying the 2013 version of Chapter 64 or the 2015 amendments to Chapter 64.

Identity Was or Is an Issue

25. The Court finds that identity was an issue in this case.

Supplementation

26. The above findings are supplemental to those issued by the Court on December 12, 2014.

DONE AND ENTERED this 9 day of Sept., 2016.

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

Sitting by Assignment

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. AP-77,054

RODNEY REED, Appellant

v.

THE STATE OF TEXAS

**ON DIRECT APPEAL IN CAUSE NUMBER 8701
FROM THE 21ST DISTRICT COURT
BASTROP COUNTY**

***Per curiam*. KELLER, P.J., filed a dissenting opinion. NEWELL, J., not participating.**

ORDER

On July 14, 2014, Rodney Reed filed a Chapter 64 Motion for Post-Conviction DNA testing. On November 25, 2014, the convicting court held a hearing on Reed's Chapter 64 motion. The trial judge issued findings of fact and conclusions of law on Reed's motion on December 16, 2014 and denied his

request. On February 15, 2015, we received Rodney Reed's direct appeal from the trial court's denial. We now remand the cause to the trial court for additional findings and conclusions pursuant to Chapter 64.

The trial judge made findings and conclusions under article 64.03(a)(2),[1] but did not make findings on whether the pieces of evidence Reed seeks to have tested satisfy article 64.03(a)(1).[2] Specifically, the trial court shall make the following findings regarding each item Reed seeks to have tested: (1) whether the item still exists and is in a condition making DNA testing possible; (2) whether the item has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect; (3) whether there is a reasonable likelihood that the item contains biological material suitable for DNA testing; and (4) whether identity was or is an issue in this case.[3]

The trial court shall forward these additional findings to this Court within 60 days of this order. Any extensions of time shall be obtained from this Court.

Filed: June 29, 2016
Do not publish

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[1] TEX. CODE CRIM. PROC. art. 64.03(a)(2)(A)-(B).

[2] *See id.* art. 64.03(a)(1)(A)-(C).

[3] *Id.*

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. AP-77,054

RODNEY REED, Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL IN CAUSE NUMBER 8701 FROM THE 21ST DISTRICT COURT BASTROP COUNTY

KELLER, P.J., filed a dissenting opinion.

In recommending that appellant's motion for DNA testing under Chapter 64 be denied, the trial court found that appellant failed to satisfy two of the statutory requirements. The Court, however, remands for the trial court to make findings on four other statutory requirements. Because the trial court's findings are sufficiently supported and those findings are, with respect to either of the two

statutory requirements that were addressed, sufficient to deny relief, I see no point in remanding this case for further findings.

I. BACKGROUND

A. General Chronological Background

Stacey Stites was sexually assaulted and murdered over twenty years ago, on April 23, 1996. The facts of the case are recited in detail in our opinion on direct appeal and in an opinion on appellant's second subsequent habeas application.[1] DNA evidence revealed that appellant's intact sperm was found inside the victim, which indicated that he had sexual intercourse with her shortly before her death.[2] In rejecting a factual sufficiency claim on direct appeal, we observed that the DNA evidence connected appellant to the sexual assault, and the forensic evidence indicated that the person who sexually assaulted the victim was also the person who killed her.[3]

Appellant was tried and convicted of the capital murder of Stites in May of 1998. After we affirmed the conviction on direct appeal in 2000, appellant filed six state habeas applications, the last three of which were disposed of in 2009.[4] Appellant

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[1] *See Reed v. State*, No. AP-73,135 (Tex. Crim. App. Dec. 6, 2000) (not designated for publication); *Ex parte Reed*, 271 S.W.3d 698, 701-12 (Tex. Crim. App. 2008).

[2] *See Reed*, 271 S.W.3d at 705.

[3] *Id.* at 712 (quoting from our direct appeal opinion).

[4] *See Ex parte Reed*, No. WR-50,961-04 and WR-50,961-05 (Tex. Crim. App. January 14, 2009) (not designated for *(cont'd)*

also pursued remedies on federal habeas, and the denial of relief in the federal system was ultimately upheld by the Fifth Circuit on January 10, 2014.[5] On April 8, 2014, the State filed a motion to set an execution date. On July 14, 2014, a hearing was held to set an execution date. On that date, shortly before the hearing, appellant had filed a motion for DNA testing. Relying upon his motion and the State's agreement to test some items for DNA, appellant requested that no execution date be set. The State requested an execution date of January 14, 2015, which would give appellant six months to litigate any issues. In accordance with the State's recommendation, the trial court set the execution date for January 14, 2015.

In November 2014, a hearing was held on appellant's DNA motion. At the end of the hearing, the trial court stated that "this motion was filed untimely and calls for unreasonable delay, that there's no reasonable probability the defendant would not have been convicted had the results been available at the trial of the case." At the State's request, however, the trial court reset the execution date to March 5, 2015. On December 2, 2014, appellant requested a subpoena to obtain a personal reference sample for the purpose of the DNA testing that had been agreed to on July 14, 2014.

B. Trial Court's Findings

(cont'd from previous page)
publication); *Ex parte Reed*, No. WR-50,961-06 (Tex. Crim. App. July 1, 2009) (not designated for publication).

[5] *See Reed v. Stephens*, 739 F.3d 753 (5th Cir. 2014).

On December 16, 2014, the trial court filed findings of fact and conclusions of law. These findings are extensive and amplify the trial court's two overarching bases for denying relief. The findings are also supported by the record.

1. *Delay*

With respect to the first basis—that the DNA motion was made for the purpose of unreasonably delaying the execution of sentence—the trial court pointed to thirteen factors in support of its conclusion. First, the trial court stated that appellant had not provided the court "with any information regarding time estimates for the extensive DNA testing he seeks." Second, the trial court observed that appellant "filed his Chapter 64 motion on the day [the trial court] initially set the [appellant's] execution date." The trial court believed that the timing of the Chapter 64 filing "was not coincidental but a designed tactic to delay the setting of [appellant's] execution date" and, when combined with appellant's failure to propose "concrete timelines" was indicative of a "repeated desire to infinitely delay his execution date."

Third , the trial court pointed out that appellant's DNA motion "was filed thirteen years after Chapter 64's enactment and approximately three years after Chapter 64's most recent amendment." The trial court remarked that "there was no legal impediment to filing a Chapter 64 motion during this entire period" and pointed out that appellant "has been continuously represented by counsel during his postconviction proceedings." Fourth, the trial court explained that appellant's "first informal request for DNA testing occurred

three days after" the Fifth Circuit upheld the denial of relief in the federal system—indicating that appellant "only sought DNA testing after his other efforts at relief proved unsuccessful."

Fifth, the trial court pointed out that appellant's counsel had represented Larry Swearingen and that appellant's motion for DNA testing was similar to Swearingen's. Consequently, the trial court concluded that appellant's counsel "had the legal and factual knowledge to file [appellant's] present Chapter 64 motion more than a year before it was filed."

Sixth, the trial court pointed to appellant's proceedings in other courts as showing his intent to delay. The trial court observed that appellant "has been cited for abuse of the writ on five separate occasions by the Court of Criminal Appeals." Moreover, the United States District Court for the Western District of Texas had ruled that appellant had untimely sought forensic testing and was dilatory in submitting an affidavit. And the trial court cited the Fifth Circuit as also finding that appellant submitted evidence in an untimely fashion. The trial court concluded these proceedings show that appellant "has engaged in a dilatory and piecemeal litigation strategy throughout his postconviction proceedings" and that his DNA motion "is a continuation of such behavior."

Seventh, the trial court observed that appellant "has thrice asked the Court to indefinitely postpone his execution date." The court concluded that appellant's requests for, "essentially, indefinite stays works against him in proving that he is not attempting to unreasonably delay his execution."

Eighth, the trial court remarked that, at the live evidentiary hearing on the DNA motion, appellant "asked for DNA testing on a substantial amount of evidence that he had not mentioned in his Chapter 64 motion." The trial court considered these "last-minute amendments to his Chapter 64 pleadings" to be yet another example of dilatory tactics.

Ninth, the trial court found appellant's explanation for these amendments—that he learned of the existence of certain items for the first time from the State's inventory in response to the DNA motion—to be inadequate because one of the items had been heavily litigated during prior postconviction proceedings and other items that were supposedly revealed for the first time in the State's inventory had been referred to in appellant's DNA motion.

Tenth, the trial court observed that appellant possesses extracts from some of the evidence for which he seeks testing. The court concluded that appellant's request "to test these items via Chapter 64 when he could conduct the testing himself, especially given his offer to pay for DNA testing," also supports the trial court's conclusion that the request is for the purpose of unreasonable delay.

Eleventh, appellant has also requested testing of items the State has already agreed to test. This request for "redundant testing" was also seen by the trial court as an attempt to unreasonably delay execution.

Twelfth, the trial court pointed to the fact that appellant's counsel "had repeatedly stated, in pleadings and in court, that he plans to soon file

postconviction motions for relief pursuant to Articles 11.071 and 11.073," but despite this "promise of diligence," applicant "has not filed either pleadings."

Finally, the trial court remarked that applicant "waited more than four months to obtain a subpoena for a reference sample from himself for purposes of the agreed-to DNA testing."

2. *Probability of Conviction*

With respect to the second overarching basis for denying relief—that appellant has not shown by a preponderance of the evidence that he would not have been convicted but for exculpatory results from DNA testing—the trial court pointed to three factors in support of its conclusion. First, the trial court observed that the State's "case on guilt-innocence was strong." Appellant's DNA was found both on and inside the victim, his sperm was intact in the vaginal cavity, and his saliva was on the victim's breasts. The peri-mortem injury to the victim's anus, the victim's bunched up panties, a broken pants zipper, the victim being partially unclothed, and bruises on the victim's arms, torso, and head were obvious signs of sexual assault and showed that the victim did not consent to sexual activity. Other evidence showed that appellant "frequented the area of the victim's disappearance at the time the victim disappeared" and "matched the height of someone who would have fit the adjusted seat in the victim's truck."

Second, the trial court remarked that many of the items appellant seeks to test "were already before the jury and the jury knew they did not match" him. For example, the trial court explained, a DNA and forensics expert testified that one of the hairs that

appellant seeks to test did not match his genetic profile. A Department of Public Safety forensics expert testified that none of the hairs collected from the victim's body microscopically matched appellant's hair. And appellant's fingerprints did not match any of the fingerprints collected during the course of the investigation.

Third, the trial court found that "none of the evidence Reed seeks to test was so integral to the State's case that the jury would have acquitted despite knowing that [Reed's] DNA was not on the item." The court pointed to the fact that many of the items were in a truck shared with the victim's fiancé and evidence demonstrated that other people had ridden in the truck. Moreover, many of the items "have been handled by ungloved individuals." At best, the trial court concluded, exculpatory results would merely "muddy the waters, not prove by a preponderance that he would have been acquitted."

II. ANALYSIS

In several contexts, we have held that a court need only address issues that are sufficient to dispose of the case.[6] Courts on appeal, this Court on habeas, and trial courts on habeas may all decline to address an issue that is not necessary to the disposition of the case because of the court's disposition of some other issue.[7] If, for example, a court grants relief to a habeas applicant on one ground, it may decline to

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[6] *Ex parte Reyes*, 474 S.W.3d 677, 680-81 (Tex. Crim. App. 2015).

[7] *Id.*

reach other grounds for relief, as long as the unreached grounds would not afford greater relief.[8]

The same principle applies here. There are a number of requirements that must be satisfied in order for a convicted person to be entitled to DNA testing under Chapter 64.[9] The failure to meet any one of these requirements is fatal to a defendant's claim under the statute.[10] The trial court concluded that appellant failed to satisfy two of the statutory requirements for obtaining DNA testing. If the trial court is correct as to either of the two requirements, then it need not address whether appellant has satisfied other requirements.[11]

An appellate court should remand a case when "the trial court's erroneous action or failure or refusal to act prevents the proper presentation of a case" to the appellate court.[12] We are now in a position to determine whether the trial court's reasons for denying testing are correct. If either of the trial

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[8] *Id.*

[9] *See* TEX. CODE CRIM. PROC. art. 64.03(a).

[10] *Bell v. State*, 90 S.W.3d 301, 306 (Tex. Crim. App. 2002) ("a court must order testing only if the statutory preconditions are met").

[11] The trial court could have chosen to address more than two requirements, but it was not obligated to do so; indeed, the trial court did more than it had to by addressing two.

[12] *See* Tex. R. App. P. 44.4(a) ("A court of appeals must not affirm or reverse a judgment or dismiss an appeal if (1) the trial court's erroneous action or failure or refusal to act prevents the proper presentation of a case to the court of appeal; and (2) the trial court can correct its action or failure to act.")

court's two bases for denying relief are correct, there is no "erroneous action or failure or refusal to act" that would serve as a basis for a remand. A remand might well provide further ammunition for a denial of relief, but if either of the trial court's conclusions is correct, further conclusions would not change the outcome of this appeal.

In any event, this is not a difficult case. The trial court has given numerous record-supported reasons for its conclusion that appellant has failed to show that the DNA motion "is not made to unreasonably delay the execution of sentence or administration of justice."[13] Appellant waited over thirteen years after the passage of Chapter 64 to file a DNA motion and nearly seven years after it was last amended.[14] He had time to file six habeas applications with this Court but not to file a single motion for DNA testing. He filed his DNA motion only after his other legal avenues were exhausted and after the State sought to set his execution date. He has given no timeframe for when testing might be complete and he has sought to test a large number of items. He has been cited for untimely submitting matters in federal court,[15] and he has been dilatory in connection with his DNA motion even after it was filed—broadening the scope of his testing requests in

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[13] *See* TEX. CODE CRIM. PROC. art. 64.03(a)(2)(B).

[14] The statute has been amended since applicant filed his motion. *See* Acts 2015, 84th Leg., ch. 70 (S.B. 487), § 2, eff. Sept. 1, 2015; Acts 2015, 84th Leg., ch. 1276 (S.B. 1287), § 11, eff. Sept. 1, 2015.

[15] *See Reed v. Stephens*, 739 F.3d 753, 768 n.5, 776 n.12.

the evidentiary hearing beyond what was originally sought in his motion, taking four months to even start the process of submitting his own reference sample, and continually seeking to indefinitely postpone his execution date.

This is not the conduct of a convicted person who knows he is innocent and thinks that DNA testing will prove it. Nor is it the conduct of a defense team who has any reason to believe the convicted person is innocent and thinks that DNA testing would prove it. This is the conduct of a defense team that realizes there is no hope of exoneration and is simply trying to delay the inevitable execution.

And then there is the trial court's second basis for denying relief: that appellant has not shown by a preponderance of the evidence that, had exculpatory DNA results been obtained, he would not have been convicted.[16] The trial court's supporting reasons for this basis are not nearly as numerous as for the first basis but they do not have to be. Appellant was tied to this murder by DNA testing: his sperm was found inside the victim. That sperm was intact, indicating that appellant had sex with the victim at a relatively short time before the murder. The forensic evidence shows that the rapist was the murderer and the DNA evidence shows that appellant was the rapist.

Appellant's only answer to the presence of his own sperm in the victim is to advance the theory from his own interested witnesses that he had some prior relationship with the victim and so the sex might have been consensual. In proceedings in

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[16] *See* TEX. CODE CRIM. PROC. art. 64.03(a)(2)(A).

federal court, Judge Lee Yeakel effectively answered this contention by explaining that none of applicant's evidence was reliable:

> Without reliable evidence demonstrating how this happened consensually, the DNA evidence effectively condemns Reed. And what evidence is there of a prior relationship? Statements of people who claim to have seen the two together. Yet, many of these are the very sort of eyewitness accounts that have been shown in numerous cases to be unreliable. Most of these witnesses did not know Stacey Stites, and identified her from memory by viewing her photograph. Those who claimed to have known her were proven to be badly mistaken. All of these witnesses were family, friends, or associates of Reed's. Reed was never able to identify anyone who was a friend, family member, or associate of Stacey Stites who claimed to have been aware of a relationship between Reed and Stites. In short, there is no reliable evidence that ties Reed to Stites before her murder.[17]

Without reliable evidence that appellant had a prior relationship with the victim, DNA evidence pointing to the involvement of another individual "would not exonerate appellant because it would show nothing more than there was another party to the crime, at best."[18]

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[17] *Reed v. Thaler*, 2012 U.S. Dist. LEXIS 83422, *133 (W.D. Tex. June 15, 2012).

[18] *Wilson v. State*, 185 S.W.3d 481, 485 (Tex. Crim. App. 2006).

Appellant is not entitled to DNA testing. We do not need a remand to arrive at that conclusion. Because the Court remands this case when doing so is unnecessary, I respectfully dissent.

Filed: June 29, 2016
Do Not Publish

STATE OF TEXAS	§	IN THE 21ST DISTRICT
	§	COURT
v.	§	OF
	§	BASTROP COUNTY,
RODNEY REED	§	TEXAS

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

After considering the record in this case, and after making credibility determinations following a live hearing in this Chapter 64 proceeding, the Court enters the following findings of fact and conclusions of law:

Relevant Procedural History

1. The State, on April 8, 2014, filed a motion to set an execution date for Movant, Rodney Reed. The State requested a date of November 19, 2014.

2. Movant, on April 8, 2014, filed a motion to recuse the elected judge overseeing his case, Judge Towslee-Corbett.

3. Movant, on April 14, 2014, opposed setting of an execution date. Movant requested indefinite delay of his execution to conduct DNA testing, to file a subsequent state habeas application, and to file a scientific-evidence application.

4. On May 23, 2014, Judge Towslee-Corbett issued an order of voluntary recusal.

5. On May 28, 2014, Judge Underwood, the presiding judge of the Second Administrative Judicial Region, assigned the undersigned judge to preside over the case.

6. On June 18, 2014, the Court set a hearing on the State's motion to set an execution date.

7. On June 17, 2014, the Court re-set the hearing on the State's motion to set an execution date at the request of the parties.

8. On July 14, 2014, the Court held a hearing on the State's motion to set an execution date. The Court entered an order setting Movant's execution for January 14, 2015.

9. On July 14, 2014, immediately before the hearing on the State's motion to set an execution date, Movant filed the instant Chapter 64 motion. The motion contained no affidavit from Movant and no affidavit from a DNA expert. Movant, however, attached several affidavits purporting to undermine the State's forensic case at trial.

10. At the July 14, 2014, hearing, the Court signed an order permitting agreed-to DNA testing. The items to be tested included four specified hairs and various swabs taken from the victim's body.

11. At July 14, 2014, hearing, Movant requested indefinite delay of his execution to conduct DNA testing.

12. The State timely responded on September 12, 2014. The State attached several exhibits regarding the existence, custody, and present condition of evidence collected in connection with the investigation of Movant's offense.

13. Movant filed a letter requesting a hearing on the Chapter 64 motion on October 14, 2014.

14. The State filed a letter opposing a hearing on the Chapter 64 motion on October 22, 2014. The State attached an exhibit reflecting an amended inventory regarding fingerprint evidence.

15. Movant filed a letter again requesting a hearing on the Chapter 64 motion on October 23, 2014. Movant attached, for the first time ever, an affidavit from a DNA expert.

16. On October 27, 2014, the Court set a hearing on Movant's Chapter 64 motion.

17. On November 18, 2014, the State moved to modify Movant's execution date. The State requested an amended date of March 5, 2015.

18. Movant filed a reply to the State's Chapter 64 response on November 24, 2014. Movant attached, for the first time ever, a personal affidavit.

19. Movant filed a motion to withdraw his execution date on November 25, 2014, immediately before the hearing on his Chapter 64 motion. Movant requested indefinite delay of his execution to conduct DNA testing or to appeal the denial of DNA testing.

20. The Court held a live hearing on the Chapter 64 motion on November 25, 2014. Movant called crime-scene and forensics expert, John Paolucci, and DNA expert, Deanna Lankford. The State called Gerald Clough, an investigator with the Office of the Attorney General of Texas, Lisa Tanner, the special prosecutor on Movant's case, and Etta Wiley, a deputy district clerk for Bastrop County. Movant and the State

also introduced various exhibits. After considering the record in this case, and after making credibility determinations from the hearing, the Court denied Movant's Chapter 64 motion.

21. At the November 25, 2014, hearing, the Court granted the State's motion to modify Movant's execution date. The Court entered an amended execution order setting Movant's execution for March 5, 2015.

22. On December 2, 2014, Movant requested a subpoena to obtain a personal reference sample for purposes of the agreed-to DNA testing ordered on July 14, 2014. A subpoena issued on December 3, 2014.

Findings of Fact and Conclusions of Law

23. Reed has failed to prove by a preponderance of the evidence that his Chapter 64 motion is not made to unreasonably delay the execution of sentence of administration of justice. This is explained below:

    23a Movant, to date, has not provided the Court with any information regarding time estimates for the extensive DNA testing he seeks. This alone, the Court believes, is sufficient to show that Movant has failed in his burden to show that his request is not made to unreasonably delay his execution.

    23b Movant filed his Chapter 64 motion on the day this Court initially set Movant's execution date. This timing, the Court

believes, was not coincidental, but a designed tactic to delay the setting of Movant's execution date. Movant's repeated desire to indefinitely delay his execution, instead of proposing concrete timelines, further supports the Court's belief that his Chapter 64 motion was filed for purposes of unreasonable delay.

23c The Court notes that Movant's Chapter 64 motion was filed thirteen years after Chapter 64's enactment and approximately three years after Chapter 64's most recent amendment. The Court finds that there was no legal impediment to filing a Chapter 64 motion during this entire period. The Court also notes that Movant has been continuously represented by counsel during his postconviction proceedings, as indicated by the multiple state and federal opinions generated during these proceedings. The lack of filing during this period, which was without factual or legal impediment, leads the Court to believe that the present Chapter 64 motion is filed for purposes of delay.

23d As pled in Movant's Chapter 64 motion, Movant's first informal request for DNA testing occurred three days after the United States Court of Appeals affirmed the denial of his federal petition for writ of habeas corpus. This timing is important because, as demonstrated in the State's response, there is little chance

for relief following affirmation of the denial of a federal habeas petition. Thus, the Court finds that Movant only sought DNA testing after his other efforts at relief proved unsuccessful. This diminishes Movant's case that his present Chapter 64 motion was not filed for purposes of unreasonable delay.

23e As demonstrated by the State's exhibits, Movant's attorney—Bryce Benjet—is counsel of record for Larry Swearingen, another Texas death row inmate. Mr. Benjet filed a Chapter 64 motion for Swearingen approximately a year and a half before Movant's Chapter 64 motion. Mr. Benjet filed another Chapter 64 motion for Swearingen approximately two months before Movant's Chapter 64 motion. Movant's motion is substantially similar to Swearingen's initial Chapter 64 motion and attached to Swearingen's initial Chapter 64 motion is a personal affidavit from Swearingen and an affidavit from a DNA expert. Swearingen's second Chapter 64 motion has attached to it another affidavit from a DNA expert. Thus, the Court concludes that Movant, through his counsel, Mr. Benjet, had the legal and factual knowledge to file Movant's present Chapter 64 motion more than a year before it was filed. Movant's delayed presentation of a personal affidavit and an expert affidavit, the Court finds, is a purposeful attempt at delay.

23f Movant has been cited for abuse of the writ on five separate occasions by the Court of Criminal Appeals. As demonstrated by the State's evidence, the United States District Court for the Western District of Texas ruled that Movant had untimely sought forensic testing and was dilatory in submitting an affidavit. The United States Court of Appeals for the Fifth Circuit also found that Movant submitted evidence in an untimely fashion. Accordingly, the Court finds that Movant has engaged in a dilatory and piecemeal litigation strategy throughout his postconviction proceedings and the Court believes this Chapter 64 motion is a continuation of such behavior.

23g Movant has thrice asked the Court to indefinitely postpone his execution date—once in opposing the State's motion to set an execution date, once at the hearing to set an execution date, and once at the hearing on this Chapter 64 motion via a motion to withdraw the date. The Court finds that Movant's request for, essentially, indefinite stays works against him in proving that he is not attempting to unreasonably delay his execution.

23h Movant, at the live evidentiary hearing on the Chapter 64 motion, asked for DNA testing on a substantial amount of evidence that he had not mentioned in

his Chapter 64 motion. Consequently, Movant has not individually briefed or explained the type of testing that he would like performed on these items. The Court finds this dilatory request to be another example of Movant's last-minute amendments to his Chapter 64 pleadings, which this Court considers to be an attempt to unreasonably delay his execution.

23i The Court rejects Movant's rationale for failing to request and brief those items of evidence raised for the first time at the hearing on the Chapter 64 motion; specifically, that Movant did not know of the evidence's existence until the State attached inventories to its Chapter 64 response. Movant has failed to demonstrate that he requested such inventories from the State prior to the State's Chapter 64 response or that the State refused him such inventories upon request. Further, one of the items of evidence that Movant requested to be tested for the first time at the Chapter 64 hearing beer cans—has been heavily litigated during the course of Movant's postconviction proceedings. It is inconceivable to the Court that Movant did not know that such item existed. Moreover, Movant requested DNA testing of items of evidence in his Chapter 64 motion—a condom, a knife, and a shirt piece—that were not introduced at trial and were, therefore, "unknown" to

Movant until the State attached an inventory to its response. Stated another way, Movant requested testing of some items he did not "know" were in the possession of the State or District Clerk. The Court finds Movant's unsupported excuse to be further evidence of his attempts to unreasonably delay his execution.

23j As demonstrated by the State's evidence, Movant is in possession of extracts from multiple pieces of evidence he seeks testing on and which he could test independently of a Chapter 64 motion. This includes the beer cans, various swabs from the victim's body, stains from the victim's pants and back brace, and a condom. Movant's request to test these items via Chapter 64 when he could conduct the testing himself, especially given his offer to pay for DNA testing, leads the Court to believe that his request for DNA testing is for the purpose of unreasonable delay.

23k The Court finds that Movant has requested DNA testing of items of evidence that the State has already agreed to test. This includes various hairs and swabs from the victim's body. The Court finds that this request for redundant testing is, again, an attempt to unreasonably delay the execution of sentence.

231. Movant has repeatedly stated, in pleadings and in court, that he plans to soon file postconviction motions for relief pursuant to Articles 11.071 and 11.073 of the Texas Code of Criminal Procedure. To date, despite Movant's promise of diligence, he has not filed either pleading. The Court views this procrastination as another example of an attempt to unreasonably delay his execution.

23m. Movant waited more than four months to obtain a subpoena for a reference sample from himself for purposes of the agreed-to DNA testing that this Court ordered in July. This delay in requesting a reference sample demonstrates, the Court believes, unreasonable delay and Movant's tardy actions in his agreed-to DNA testing makes this Court believe he could not complete his requested DNA testing before the present execution date.

24. The Court finds that Movant has failed to prove by a preponderance of the evidence that he would not have been convicted but for exculpatory results from DNA testing. This is explained below:

24a The State's case on guilt-innocence was strong—Movant's DNA was found both on and inside the victim, which demonstrated presence; the intactness of Movant's sperm inside the victim's vaginal cavity, the peri-mortem injuries to the victim's anus, Movant's saliva on the victim's breasts after she took a

shower the evening before her murder, and the small amount of semen in the victim's panties demonstrated sexual assault contemporaneous with murder; the peri-mortem injury to the victim's anus and the obvious signs of sexual assault—the victim's bunched up panties, a broken pants zipper, partially unclothed, bruises to the arms, torso, and head of the victim—demonstrated lack of consent; and additional evidence indicated that Movant frequented the area of the victim's disappearance at the time the victim disappeared and the Movant matched the height of someone who would have fit the adjusted seat in the victim's truck.

24b Many of the items of evidence Movant seeks to test were already before the jury and the jury knew they did not match Movant—their exculpatory nature was already before the jury. For example, Movant's DNA and forensics expert testified that one of the hairs Movant seeks to test did not match Movant's genetic profile. As another example, a DPS forensic scientist testified that none of the hairs collected from the victim's body microscopically matched Movant's hair. And, as another example, Movant did not match any of the fingerprints collected during the course of the investigation. Thus, the jury knew that many of the items Movant seeks to test were not from him.

24c Further, the Court finds that none of the evidence Movant seeks to test was so integral to the State's case that the jury would have acquitted despite knowing that Movant's DNA was not on the item. Many of items were in a truck shared with the victim's fiance and evidence at trial demonstrated that other people had ridden in the truck. Thus, the jury would not be surprised to know that foreign DNA was found on items originating from the truck. Further, many of the items of evidence have been handled by ungloved individuals, which further undermines the value of such "exculpatory" results before a jury. Ultimately, at best, exculpatory results from the items Movant seeks to test would muddy the waters, not prove by a preponderance that he would have been acquitted.

Accordingly, Movant's Chapter 64 motion is DENIED.

It is so ORDERED.

DONE AND ENTERED this 12 day of December, 2014.

_____

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

Sitting by Assignment

Rodney Reed Volume 4.txt

REPORTER'S RECORD
VOLUME 4 OF 10 VOLUMES
TRIAL COURT CAUSE NO. 8701

THE STATE OF TEXAS	) IN THE DISTRICT COURT
vs.	) BASTROP COUNTY, TEXAS
RODNEY REED	) 21ST JUDICIAL DISTRICT

MOTION FOR POST-CONVICTION
DNA TESTING HEARING

On the 25th day of November, 2014, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Doug Shaver, Judge Presiding, held in Bastrop, Bastrop County, Texas.

Proceedings reported by computerized stenotype machine.

APPEARANCES

FOR THE RESPONDENT:

Mr. Matthew D. Ottoway
SBOT NO. 24047707
Assistant Attorney General
Criminal Appeals Division

not identified biological evidence; it's identifiable biological evidence. It's not evidence that is proven suitable. It's evidence that may be suitable.

And so, again, I think you've heard the testimony from the experts. They certainly have the resources to provide their own expert on these issues and I think you can make a presumption as to why they didn't and, so our right to this testing is clear. I think the **[227]** timing establishes that we weren't trying to reasonably delay and we ask to you to grant the testing and save the execution.

THE COURT: All right. After reviewing all the documents that were presented, those in court today, and all the evidence and arguments of counsel, the Court finds that this motion was filed untimely and calls for unreasonable delay, that there's no reasonable probability the defendant would not have been convicted had the results been available at the trial of the case. Your motion is denied.

The motion to modify the execution date is granted. That new execution date is set for March 5th, 2015, and your motion to withdraw the execution date has been denied. All right. That completes our hearing. We're now adjourned.

(Proceedings adjourned.)

Rodney Reed Volume 4.txt

THE STATE OF TEXAS)
COUNTY OF BASTROP)

I, Margaret Raiford, Substitute Reporter in and for the 21st District Court of Bastrop County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested by counsel to be included in this volume of the Reporter's Record, in the above-entitled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted by the respective parties.

I further certify that the total cost of the preparation of this Reporter's Record is $285.00 and will be paid by Mr. Bryce Benjet.

WITNESS MY OFFICIAL HAND on this the 29th day of December, 2014.

/s/Margaret Raiford
Margaret Raiford, CSR 9192
Expiration Date; 12/31/16
Certified Shorthand Reporter
327 N. Knox
Giddings, TX 78942
(979)716-7122

No. 8071

EX PARTE	}	IN THE 21ST DISTRICT COURT
RODNEY REED	}	BASTROP COUNTY, TEXAS

ORDER

On this date the Court took up and considered applicant's MOTION TO DIRECT D.N.A. TESTING, and the Court having found that the motion is not meritorious hereby orders that the motion is DENIED.

Signed this 27 day of May ,1999

JUDGE PRESIDING

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. AP-75,693

EX PARTE RODNEY REED, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS IN CAUSE NO. 8701 IN THE 21ST DISTRICT COURT BASTROP COUNTY

KEASLER, J., delivered the opinion of the Court in which **MEYERS, PRICE, JOHNSON, HERVEY, HOLCOMB,** and **COCHRAN, JJ.,** joined**.**

OPINION

Rodney Reed was convicted and sentenced to death for the murder of Stacey Lee Stites. In this second subsequent application for a writ of habeas corpus, Reed has failed to prove that the State suppressed evidence in violation of *Brady v. Maryland*. Reed has also failed to meet the requisite, gateway standard of innocence—showing that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence not

presented at trial—under Article 11.071, Section 5(a)(2) of the Texas Code of Criminal Procedure. Relief is therefore denied.

I. Facts

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

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

Stacey, Carol, and Fennell moved into an apartment complex just outside Giddings. Stacey and Fennell shared an apartment on the second floor of the apartment building, and Carol lived in a separate one-bedroom apartment downstairs.

With a big church wedding planned for May 11, 1996, Stacey transferred into the produce

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

After leaving work on April 22, 1996, the day before she died, Stacey arrived at Carol's apartment early in the afternoon. She ate lunch and took a nap. Fennell came home from work a few hours later, and having borrowed Carol's Ford Tempo, Fennell returned Carol's extra set of car keys to Carol by placing them on a shelf in her apartment. Carol designated the extra set as Stacey's set. The three then briefly talked about their schedules for the following day. Stacey was scheduled to be at work at 3:30 a.m., and Fennell was not scheduled to work. Fennell and Stacey had planned to go to the

insurance agent and to pick out flowers for the wedding ceremony after Stacey got off of work. When Fennell suggested driving Stacey to work, Carol offered to drive him to Bastrop to meet Stacey so that Fennell could sleep in. However, Fennell declined Carol's offer, stating that he would drive Stacey to work. Fennell then left in his truck to coach a little-league-baseball team with his friend and coworker, Officer David Hall. He returned between 8:00 and 8:30 p.m. Stacey met Fennell outside of Carol's apartment, and according to Carol, the two then ran upstairs laughing "as hard as they could."

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

The next morning, April 23rd, Andrew Cardenas, Stacey's coworker in the produce department, arrived at the Bastrop H.E.B. around 3:30 a.m. and waited for Stacey in the parking lot. Cardenas would usually wait in his car for Stacey to arrive so that they could "keep an eye on each other, to make sure nobody was around and walk inside the store together...." Cardenas regarded Stacey as a punctual employee, and when she failed to show up

for work, he became concerned. Cardenas eventually went into work to start his shift, but he kept an eye out for Stacey.

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

Still looking out for Stacey to arrive at work, Cardenas finally decided to call Carol between 6:30 and 7:00 a.m. When Cardenas told Carol that Stacey failed to show up for work, Carol became upset and immediately yelled out for Fennell. Cardenas then went back to work, and Carol called Fennell on the phone, waking him up. Frantic, Carol told Fennell that H.E.B. called and told her that Stacey did not

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

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

The truck was later taken to a local tow shop and held until it could be transported to Austin so that members of the Texas Department of Public Safety Crime Laboratory (DPS Crime Lab) could process it for evidence. While the truck was at the tow shop in Bastrop, authorities requested Fennell's presence to identify items found in and outside of the truck. Fennell was specifically instructed not to touch

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

When the truck was delivered to the DPS garage in Austin, a crime-scene team began to process it for evidence. The team stopped their initial overview of the truck when Stacey's body was discovered by Kenneth Osborn shortly before 3:00 p.m. on Bluebonnet Drive, located off of FM 1141. Osborn, a real estate appraiser, was early for a 3:00 o'clock appointment and decided to drive on Bluebonnet Drive to pick some flowers for his wife. He spotted Stacey's body among some thorny brush in a ditch on the side of the road. When Osborn approached Stacey's body, he realized that she was dead. He got back into his car, stopped at a house

nearby, called the police, and then went back to Bluebonnet Road to wait for the police.

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

The DPS crime-scene team arrived in Bastrop from Austin at approximately 5:15 p.m. Karen Blakley, who specialized in DNA and serology, was designated the team leader by her coworker, Wilson Young. Other members of the team, led by Blakley, included a trace analyst, a photographer, a latent-print examiner, and a trainee in serology and DNA. Detailing the condition of Stacey's body, Blakley noted that Stacey was missing a shoe and that her white sock was clean, indicating that she had not likely walked on an outside surface. An H.E.B. name tag with the name "Stacey" written on it was found in the crook of Stacey's leg, and a white T-shirt, which Fennell later identified as belonging to him, was strewn over some brush near Stacey's body. Stacey was clothed in a black bra and a pair of blue pants with a broken zipper. Her visible green underwear was wet in the crotch and bunched around her hips. Viewing this as indicative of a sexual assault,

Blakley tested for the presence of semen, and the initial test yielded a positive result. Blakley then collected additional swab samples from Stacey's vagina and breasts. Because rigor mortis had set in, Blakley could not determine if Stacey had been anally sodomized. "She was already very stiff, and in order for me to try to get to the anal area I could possibly cause injury or further damage and make it look like she had suffered something that she didn't."

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

Documenting other injuries to Stacey's body, Blakley observed that there were scratches on her abdomen and arms, a burn from a cigarette on her arm, and shallow wounds on her wrists and back that looked like they were caused by fire-ant bites. Blakley also documented a large amount of mucus that ran from Stacey's nose, down the side of her face, and into her hair.

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

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

Dr. Robert Bayardo, the Travis County Medical Examiner, conducted an autopsy on Stacey's body the following afternoon at 1:50. He estimated that Stacey died on the 23rd of April at 3:00 a.m., give or take a few hours, based on changes that occur in the body after death. Dr. Bayardo noted that Stacey had pre- and post-mortem injuries. He differentiated between the two based on the absence of bleeding; once the heart stops beating, there is no more bleeding and no more bruising. The burn, which Blakley believed was caused by a cigarette, occurred

after Stacey died, as did several scratches, in Bayardo's opinion. Although Stacey's skull showed no outward signs of injury, when Dr. Bayardo looked inside the skull, he documented multiple bruises that "had the appearance of injuries sustained by being struck on the head with the finger knuckles with a closed hand." Comparing the injury pattern on Stacey's neck with the pieces of webbed belt collected by authorities, Dr. Bayardo concluded that the belt was the murder weapon and that Stacey died as a result of asphyxiation caused by strangulation. He estimated that asphyxiation takes approximately three to four minutes and that a person becomes unconscious within one to two minutes.

Because of evidence indicating sexual assault, Dr. Bayardo took vaginal swabs. Viewing the swabs under a microscope, he observed the presence of sperm with both heads and tails. This, according to Dr. Bayardo, indicated that the sperm had been introduced into Stacey's vagina "quite recently." Continuing the sexual-assault exam, Dr. Bayardo took rectal swabs. Viewed under a microscope, he identified several sperm heads without any visible tails, which led him to report the result of the test as negative. Sperm, according Dr. Bayardo, breaks down much faster in the rectum than it does in the vagina because of the presence of other bacteria in the rectum. When conducting a visual exam of Stacey's rectal area, Dr. Bayardo noticed that her anus was dilated and that there were some superficial lacerations on the posterior margin. In his opinion, this was consistent with penile penetration, even though he did not entirely rule out the possibility that the presence of sperm in the anus was the result of seepage from the vagina. Utilizing

his education and experience about determining whether a particular injury occurred before or after death, Dr. Bayardo concluded that Stacey sustained the injury to her anus at or around the time of her death and that the penetration was therefore not consensual.

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

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

24. This signified no carryover from Stacey and indicated that the semen donor possessed the DQ–Alpha alleles of 1.2 and 3 and the D1S80 alleles of 22 and 24. Testing on the male portion from the rectal swabs indicated the presence of DQ–Alpha alleles 1.2, 3, and 4. While there was carryover, the 3 DQ–Alpha allele was foreign to Stacey. Testing of the male potion of DNA from the crotch of Stacey's underwear showed the presence of DQ–Alpha alleles 1.2 and 3 and D1S80 alleles 22 and 24, indicating the absence of any carryover. Finally, testing on the swabs from Stacey's breasts showed the presence of DQ–Alpha alleles 1.2, 3, and 4 and D1S80 alleles of 22 and 24. The 3 DQ–Alpha allele and the 22 D1S80 allele were foreign to Stacey, even though there was carryover. Given the results, Young concluded that there was a single semen donor.

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

Stacey's body, noted that the substance on the transmission hump looked similar to the mucus that had flowed out of Stacey's nose.

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

Over the course of the next eleven months, authorities focused their investigation on people that Stacey knew, and with a $50,000 reward offered by H.E.B., numerous leads and information poured in. For instance, a newspaper-delivery person reported that Stacey's body was not on Bluebonnet Drive when he drove by the site where her body was found at 4:00 a.m. In all, officials interviewed hundreds of people, including former classmates, boyfriends, and coworkers, as well as Stacey's friends and coworkers at H.E.B. Over twenty-eight male suspects were

identified, some immediately and some during the ensuing investigation. Each suspect was asked to consent to give blood, hair, and saliva samples. With the exception of one, Brian Haynes, all of the suspects offered their consent and provided the samples. Although Haynes refused to consent, he was compelled to provide samples after authorities obtained a search warrant. Authorities also requested and obtained samples from Officer Hall. Because of his friendship with Fennell, Officer Hall was viewed as a suspect. Upon request, he voluntarily provided samples.

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

As the last known person to see Stacey alive, Fennell was deemed a suspect from the outset. Despite this, authorities never made an effort to search Fennell's apartment. Fennell, however, was vigorously interrogated on several occasions by Ranger Wardlow, who was, at various times, joined by Investigators Selmala, Barton, or Board. Fennell also voluntarily provided authorities with a blood sample, and even though DNA testing excluded him as the donor of the semen, authorities tried to make a case against him anyway. Ruling out the possibility that Fennell used Carol's Ford Tempo during the commission of the offense because Fennell had to

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

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

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

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

Eventually, officials received information that led them to look into Reed, an African–American who was approximately the same height as Young, as a suspect. Throughout their investigation, officials found nothing that indicated that Stacey knew Reed.

Reed lived in the City of Bastrop on Martin Luther King Drive near the railroad tracks. Several of Reed's family members and friends, as well as his girlfriend, lived nearby. Bastrop High School is also located near the railroad tracks, about sixth-tenths of a mile from Reed's house. The location of Reed's home was significant to authorities because Fennell's truck was found nearby at the Bastrop High School. Authorities had, early on in the investigation, theorized that the location was convenient for the perpetrator.

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

Officials contacted DPS to inquire about whether Reed had a DNA sample on file with the state database, which includes compiled DNA from convicted sexual offenders. When they learned that there was a sample, they requested a comparison between Reed's DNA and the DNA from the vaginal swab taken by Blakley. Michelle Lockhoof, a specialist in DNA and serology with DPS, conducted DQ–Alpha and D1S80 PCR testing on the two samples. Reed's DQ–Alpha alleles were identified as

1.2 and 3 and his D1S80 alleles were identified as 22 and 24. When compared with the sample taken from Stacey, Reed could not be excluded as the donor of the semen. In Young's opinion, 99.8% of the Caucasian population, 99.8% of the African–American population, and 99.92% of the Hispanic population would be excluded as the donor of the semen.

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

Lockhoff subjected the sample to a more discriminating type of DNA testing, Restriction Fragment Length Polymorphism (RFLP). Once again, Reed could not be excluded as the donor of the semen when four individual sites were tested. Regarding the statistical frequency in which Reed's RFLP profile would appear in the population, Lockhoff calculated that it would be one in 590 million for the Caucasian population, one in 330 million for the African–American population, and one in 3 billion for the Hispanic population. Combining the results of the PCR and RFLP testing, the frequency in which Reed's genetic profile would be present in the world's population is one in 5.5 billion

for the Caucasian, African– American, and Hispanic populations.

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

Because the testing conducted by DPS could not exclude Reed, DPS sought the assistance of LabCorp, an independent lab, to conduct additional testing. Meghan Clement, the director for the forensic-identity-testing department, received DNA samples from Stacey and Reed and conducted PCR testing, which included testing on genetic sites of the DNA strand that are distinct from those considered during DQ–Alpha and D1S80 testing. Looking at ten different sites on the male fraction of the substance on the vaginal swab taken from Stacey, Clement could not exclude Reed as the contributor of the semen; in fact, the sample matched Reed's genetic profile. The probability of randomly selecting an unrelated individual with this profile is approximately one in 449,000,000 for the Caucasian population, one in 46,800,000 for the African–American population, and one in greater than 5,500,000,000 for the Hispanic population. Combining some of the additional PCR testing with the previous DQ–Alpha and D1S80 results, only one person in the world's population would have this particular genetic profile. Testing on the male portion of the substance from the rectal swab revealed DQ–Alpha alleles of 1.2 and 3 and, therefore, matched Reed's DQ–Alpha profile. Recalling her prior experience working on sexual-assault cases for ten-and-a-half years, Clement noted that she never found intact sperm more than twenty-four hours after

commission of a vaginal-sexual assault and that sperm breaks down faster in the rectal area than in the vaginal vault.

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

To prove a romantic relationship between Stacey and Reed, Reed's defense team called Iris Lindley, a longtime friend of Reed's parents, to testify. In early 1996, Lindley was sitting on the porch of Reed's house visiting with Reed's mother. A young woman with brown hair pulled in front of the house in a gray truck, walked up to the porch, and asked if Reed was home. When Reed's mother told the young woman that Reed was not home, the young woman asked Reed's mother to tell Reed that "Stephanie" had come by. Clarifying the name, Lindley said that it was either "Stacey or Stephanie." When Lindley was shown a picture of Stacey, she stated that Stacey looked like the young woman who had come by Reed's house that day. While Lindley first testified that she formulated the impression that Stacey and Reed were dating, she conceded on cross-examination that she had no such knowledge.

To establish that Lawhon knew Stacey, Reed's attorneys called Jose Coronado, who had worked with Lawhon

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

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

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

Parnell admitted that he knew about the $50,000 reward offered by H.E.B.

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

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

Turning their attention to Fennell, Reed's defense team devoted a considerable amount of time highlighting the shortcomings of the investigation into Fennell by officials. Specifically, they were able to call the jury's attention to the fact that the lion's share of information provided to officials about

Stacey's whereabouts before she died, Stacey's routine and habits, and the items in Fennell's truck was given by Fennell himself. They also emphasized that officials did not search Fennell's home, thereby precluding the possibility of ever discovering evidence that may have implicated Fennell.

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

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

Dr. Johnson did not dispute the statistics that Lockhoff devised as a result of her testing.

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

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

II. Post-trial Background

A. Reed's Direct Appeal

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

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

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

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

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[1] *Reed v. State*, No. AP–73,135 (Tex.Crim.App. Dec. 6, 2000) (not designated for publication), *cert. denied*, Reed v. Texas, 534 U.S. 955, 122 S.Ct. 356, 151 L.Ed.2d 270 (2001).

[2] *Id.* at *9.

[3] *Id.* at *22.

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

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

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[5] 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

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

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

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

Answering Reed's allegation that she failed to disclose Young's report to his defense team at the evidentiary hearing, Tanner began by testifying that she learned of Young's test results on May 13th through Missy Wolfe, an investigator with the Attorney General's Office, who was assigned to work on Reed's case with Tanner. Because the trial court was in recess that day, Wolfe called Tanner at home and told her about the results. Young faxed the report on the 14th when the court was back in session, and Wolfe received the report and gave it to Tanner. Tanner stated that, upon receipt of the report, it would have been stamped and given to Reed's defense attorneys.

Prior to trial, the prosecution instituted a Bates stamping system; each page of each document subject to disclosure was assigned a sequential number. Four copies of each document were then made. One copy would be placed in the district clerk's file, one would be retained by the prosecution in its discovery file, and the remaining two would be given to Reed's defense attorneys. Young's May 13th letter, which consisted of two pages, was numbered 3,183 and 3,184. Under the hectic conditions of the trial, the standard procedure began to break down and the prosecution dispensed with providing copies of discovery materials to the district clerk. Tanner stated that she believed she gave a copy of Young's letter to Reed's defense team because, when she reviewed her file, she found three stamped copies of

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

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

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

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

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

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

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

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

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

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

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

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

In March 2005, Reed filed a second subsequent state application for a writ of habeas corpus under Article
11.071, Texas Code of Criminal Procedure. In it, Reed claimed, among other things, that he is actually

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

[7] *Id.*

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

[9] *Id.*

innocent under *Herrera v. Collins*[10] and that the State suppressed exculpatory evidence in violation of Brady. Contending that the State violated *Brady*, Reed maintained that the State suppressed the following evidence:

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

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

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[10] 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993).

In October 2005, we determined that Reed's *Brady* claims concerning Barnett and Blackwell satisfied the requirements of Article 11.071, Section 5(a) and remanded the claims to the trial judge for a live evidentiary hearing and ordered the trial judge to enter findings of fact and conclusions of law. With respect to Reed's remaining grounds for relief, we held that Reed failed to satisfy Section 5(a) and dismissed those claims as an abuse of the writ.

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

1. Barnett

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

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

> the Giddings Times and News and that's when I recognized him.

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

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

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

During 2001 and 2002, Smithville newspapers reported that the Bastrop District Attorney's Office had engaged in prosecutorial misconduct in Reed's case. Believing that the allegations of misconduct were defamatory, Penick filed a civil suit against the papers.[11] When pressed during a deposition taken as part of the civil suit in August 2001, Penick stated that he remembered Keng approaching him at the Bastrop County Law Enforcement Center and stating that he had a client who knew something about Reed's case. Penick recalled telling Keng that he had all of the information that he needed. Penick believed that Keng was making a joke because Keng never stated anything about having exculpatory evidence.

In October 2003, Penick, who was by then retired, elaborated on his conversation with Keng during a deposition ordered by the federal magistrate judge. Penick was certain that the conversation took place after Reed was convicted and sentenced. He asserted that Keng approached him in January or October of 2002 while Keng was at the Law Enforcement Center during one of the arraignments on a murder case involving Amanda Sykes. Penick reached this conclusion when he called up the District Attorney's Office following the deposition in the civil case and requested that they pull the dates

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

involving Sykes's case. Penick stated that his response to Keng was likely prompted by the news articles; he was "ill-tempered" at the time and perceived Keng's statement as a "jab" at him. Penick further claimed that in the twenty years he has known Keng, he has never known when to take him seriously and stated that Keng "didn't seem to sound serious about this."

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

2. Blackwell

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

Fennell in 1995. During the class, Fennell sat behind her with some of his friends. Continuing, Blackwell stated:

> I also knew who Jimmy's girlfriend was. One day after training class, I met a woman in the parking lot who asked for Jimmy. I told her he was inside and volunteered to get him. As I went in, Jimmy met me coming out of the building. Jimmy looked at us and said, "What are you telling my girlfriend? Keep away from her." Earlier that day, Jimmy and others in our class were learning self defense tactics. Jimmy's friend had broken my hand during one of the exercises. After Jimmy passed me in the parking lot I saw him go up to his girlfriend and could hear him telling her in a commanding voice what to do.
>
> The men from Bastrop that were taking the CAPCO class would talk about Jimmy's girlfriend. They said she was nice, but that Jimmy talked down to her in an abusive way—in a demanding kind of way.
>
> Towards the end of the CAPCO course, instructors had passed out photographs from real suicides and murders. Each student was supposed to say whether their group's photograph depicted a suicide or murder. The class had to break because one of the students had a relative who had committed suicide and that relative's suicide was depicted in one of the photographs.
>
> During the break, I overheard Jimmy talking to this other guy in class. He said, "If I ever

> find my girlfriend cheating on me, I'll strangle her." I told him that if he did that he would be caught because he would leave fingerprints. Jimmy then said, "That just goes to show you'll never know shit; I won't leave any prints because I'll use a belt."
>
> I didn't think much about Jimmy's comments until I heard Captain John Vasquez discussing the murder of Jimmy's girlfriend. Captain Vasquez was in my office and seemed to know a lot about the murder scene. He had worked as an investigator in connection with the murder. He told me the details from the murder scene and seemed to indicate that Jimmy's girlfriend knew her attacker. I then told him the details of what Jimmy said.

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

> After I retired, I became a private investigator and investigated several homicides. In 1998, I was appointed to assist the defense team of Rodney Reed. I was not the original investigator on the case and was only able to do a limited amount of work shortly before his trial began. I continued my involvement with his case until his conviction and sentence was [sic] decided.
> Sometime after Mr. Reed had been sentenced to death, I happened to speak to Travis County Deputy Constable Mary Best. We talked about the Stacey Stites case and she shared with me that she had been in a training class with

> Stites' fiancé, Jimmy Fennell. Mary recalled that they were talking about domestic problems. Fennell made the remark that if he ever caught Stacey cheating on him he would choke her to death. He then laughed and said he was joking.
>
> After I learned this information, I checked the police training academy and confirmed that Mary Best and Jimmy Fennell had indeed been in a joint training session. I told the Bastrop District Attorney's Office about the information that I learned. I believe that I spoke directly to District Attorney Charles Penick. I never heard anything more about it and I do not know what the District Attorney did with the information I gave them.

3. Live Evidentiary Hearing

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

a. Barnett

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

Barnett lived in Paige and took Highway 290 to Highway 21 into Bastrop. Her commute took approximately twenty-five to thirty minutes.

Although Barnett normally worked the 2:00 p.m. to 10:00 p.m. shift or 4:00 p.m. to 11:00 p.m. shift at the restaurant, on April 23rd, she was scheduled to cover a coworker's shift at 6:00 a.m. Barnett woke up at 4:00 a.m., got her children ready for the day, and dropped them off at her mother's house, located approximately thirty to forty-five seconds from her house. She stayed at her mother's house for twenty to twenty-five minutes. Before heading to Bastrop, Barnett drove east on Highway 290 to the Old Frontier store. When she arrived at the store at approximately 4:45 a.m., she observed a man and a woman standing in front of the store making hand gestures that indicated to her that the man and woman were involved in some type of conflict. The man and the woman then got into a red pickup when Barnett opened her car door. After getting a soda from the machine, Barnett saw the head of the woman sitting in the passenger's seat of the red truck go down and back up. When she got back into her car, Barnett heard elevated, muffled voices from the truck, even though the windows of the truck and her car were closed at the time. Barnett left the store while the truck was still parked in the lot and began her commute to work. Barnett did not recall whether she saw the red truck on her way into Bastrop, and she estimated that she arrived at work early at 5:30 a.m.

Believing that she saw Stacey on the day she was murdered, Barnett reported what she saw to her parents in January 1997. Her mother, Marjorie Cowan, advised her to talk to Keng. Cowan stated that Barnett had told her that she knew Stacey from the H.E.B. and that "the young man that was with her was very—looked like he was angry." Cowan

could not remember if Barnett identified the young man by name. However, she recalled urging her daughter to talk to Keng because she knew Keng's father and had used Keng as a lawyer several times.

On direct-examination by Reed's habeas counsel, Barnett testified that a year later, in January 1998, she met with Keng when he was representing her on a charge of driving while intoxicated (DWI) and told him about what she saw. Barnett stated that she realized sometime after the 23rd that the man with Stacey was Fennell when she saw his photograph in the paper.

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

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

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

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

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

A. About, yes.

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

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

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

A. No, I wasn't that late.

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

Also, raising an issue left unaddressed on direct examination, the State questioned Barnett about her arrest for DWI, which had occurred before Barnett told Keng that she had seen Stacey on the morning she was murdered. Fennell and Officer Hall arrested Barnett for DWI, and Fennell cited her with failing to maintain a proper lane on November 5, 1997. Fennell also executed a prior arrest warrant in a separate case in which Barnett was charged with theft. Barnett consulted Keng on the DWI case and

told him about seeing Stacey and Fennell two months later. Barnett stated that she had not been happy about the arrest and acknowledged that she had been aware that Fennell would have testified against her if the case had gone to trial.

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

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

To further undermine Barnett's testimony about recognizing Fennell from a photograph in the paper, the State called Emanuel Miranda, an investigator with the Postconviction Litigation Division at the Office of the Attorney General, to testify. Preparing for the hearing, Miranda was tasked with finding any articles in the Bastrop, Austin, and Giddings newspapers from April 23, 1996, the date Stacey was murdered and her body was found, to May 30, 1998, the day after Reed was sentenced, that were related to Stacey's murder or

Reed's trial. Miranda was ordered to look for a picture of Fennell that appeared with any of the articles. Miranda's research revealed that Fennell's picture did not accompany any of the articles relating to Stacey's murder or Reed's trial from April 23, 1996, to May 30, 1998.

Reed's trial attorneys, Garvie and Clay–Jackson, both testified that they had not been aware of Barnett's sighting of Fennell and Stacey on the morning of April 23rd before or during trial. Both attorneys agreed that, had such information been disclosed, it would have significantly altered their trial strategy. Because Fennell was the only source to verify his whereabouts on April 23rd, Garvie states that he would have used Barnett's sighting to establish reasonable doubt. First, Fennell's testimony that he had been at home sleeping when Stacey left for work would have been impeached, exposing Fennell as a liar. Next, Garvie believed that the defense could have challenged the State's time line by showing that Stacey was alive between 4:30 and 5:30 a.m. on the morning of the 23rd. Also, in Garvie's opinion, with Fennell in Paige, the distance that Fennell would have had to travel to get back to Giddings would not have been as great as that theorized during the trial. Clay–Jackson testified that, if she had known Fennell had been in Paige, she would have investigated Fennell's history for violence and his associates more closely to determine if someone else drove Fennell from the Bastrop High School to Giddings. Garvie testified that he would have taken another look into Dr. Bayardo's time of death, and Clay– Jackson stated that she would have had their medical experts explore the forensic evidence for anything that could place Fennell at the

scene of the offense. With Barnett's sighting, Garvie believed that Fennell's exclusion as a suspect through DNA would not have made a difference because Fennell had no motive to rape Stacey if he was just going to kill her. Clay–Jackson stated that, had she known of the information in Barnett's affidavit, she would have encouraged Reed to testify in his defense. However, on cross-examination, Clay–Jackson stated that she previously admitted that she did not want Reed to testify because he had several prior sexual-assault offenses that the State could have used against him.

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

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

Keng was also questioned about his participation in the film "State versus Reed." While a graduate student at the University of Texas, Ryan Polomski made the film for his thesis project. He interviewed Keng for the film and videotaped the

interview. Polomski maintained that the video camera was visible in the room when he conducted his interview with Keng. Polomski testified that he was uncertain whether he informed Keng that the thesis project would possibly become a documentary film that would be shown to the public. And Polomski did not inform Keng when the film was later shown to the public. When Keng was questioned by the State about his appearance in the documentary film, Keng stated that he was unfamiliar with the film and that he did not know who interviewed him or where the camera was located.

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

Regarding Barnett, Penick testified that he did not receive any information involving Barnett before or during Reed's trial. In fact, Penick stated that he did not learn that the client Keng referred to was Barnett until he read Keng's affidavit. Penick maintained that, had he received information about

Barnett's sighting, he would have investigated it and shared the information with the defense if the investigation revealed that it was exculpatory.

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

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

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

b. Blackwell

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

When Stacey was murdered, Blackwell was working as a Deputy Constable for Rocky Madrono in

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

According to Blackwell, at some point in 1998 when the weather was warm, she was introduced to Vasquez, the investigator appointed to assist Reed's trial attorneys. From his introduction, Blackwell got the impression that Vasquez was actively involved in investigating Stacey's murder and that he was working on behalf of the individual accused of murdering Stacey. When Vasquez told Blackwell that Stacey had been strangled with a belt, "bells and sirens went off" in Blackwell's head, and Blackwell immediately told Vasquez about what Fennell had said in class. Presented with the CAPCO cadet-class roster and class photograph, Blackwell identified the cadet who sat on Fennell's right as Christopher

Dezarn. Vacillating, Blackwell later stated she could not remember who Fennell had made the statement to and that the proposed seating chart would not refresh her recollection.

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

Vasquez testified that he was visiting with Madrono a few weeks after Reed's trial, following the conclusion of his official investigative duties. He was discussing Reed's case with Madrono when Blackwell approached him and told him about Fennell's statement. Vasquez then drove to CAPCO and confirmed that Blackwell and Fennell had been at the academy together. Vasquez documented his conversation with Blackwell in a memo. Contrary to the statement made in his affidavit about passing the information along to Penick, at the hearing, Vasquez stated that he gave the memo to Forrest Sanderson, a chief assistant district attorney in Bastrop County and a member of the trial team in Reed's case, a week or so after he drafted the memo. Vasquez testified that he believed that he had given the information to Penick, but when he saw Sanderson sitting in the courtroom, he remembered that he had in fact given the information to Sanderson. Vasquez was comfortable disclosing the information to the District Attorney's Office because, he had known Penick and Sanderson for eight or nine years, believed that it was important to pass the

information along to them, and was confident that they would do something with it. Vasquez did not call Garvie or Clay–Jackson. When asked if he gave the information to the previous investigator for the defense, Duane Olney, Vasquez stated that he believed that he had done so when he bumped into him on the street several months after he had given the information to Sanderson. Vasquez stated that he intended to give the information to Reed's appellate attorneys. Vasquez, however, failed to reach out to Reed's attorneys. Vasquez finally spoke to attorneys representing Reed after they initiated contact with him in 2003 or 2004.

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

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

Larry Franklin, another one of Blackwell's and Fennell's prior classmates at CAPCO, testified that he and Blackwell maintained a friendship after graduation and that the two would call one another. Sometime after Stacey's murder, Blackwell called Franklin and asked him if he heard about the murder. Together, Blackwell and Franklin

questioned whether Fennell had murdered Stacey. The two had other conversations on this topic, and during one of these conversations, Blackwell told Franklin about Fennell's statement. Although Franklin had sat to the left of Fennell in class, Franklin did not hear Fennell make this statement and learned about it only through his conversation with Blackwell. Though Franklin stated that, as a peace officer, he felt that there was an ethical obligation to report such information, he admitted that he failed to do so.

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

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

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

At the close of the evidentiary hearing, the trial judge, who succeeded the judge who presided over Reed's trial, requested that the parties submit proposed findings of fact and conclusions of law.

Adopting the State's proposed findings of fact and conclusions of law, which we will explore in greater detail below, the trial judge recommended that we deny relief.

III. Issues for Resolution

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

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

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

IV. Analysis

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

1. The Standard

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

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

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[12] *Strickler v. Greene*, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

[13] 514 U.S. 419, 438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); see also *Thomas v. State*, 841 S.W.2d 399, 402– 04 (1992) (tracing history and developments of *Brady* rule).

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

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

[4] [5] [6] For over forty years, our writ jurisprudence has consistently recognized that this Court is the ultimate factfinder in habeas corpus proceedings.[17] The trial judge on habeas is the " 'original factfinder.' "[18] Summarizing the role of the trial judge, we have explained that the judge is the collector of the evidence, the organizer of the materials, the decisionmaker as to what live testimony may be necessary, the factfinder who resolves disputed fact issues, the judge who applies the law to the facts, enters specific findings of fact and conclusions of law, and may make a specific recommendation to grant or deny relief.[19]

Uniquely situated to observe the demeanor of witnesses first-hand, the trial judge is in the best

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[15] *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

[16] *Id.*

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

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

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

position to assess the credibility of witnesses.[20] Therefore, in most circumstances, we will defer to and accept a trial judge's findings of fact and conclusions of law when they are supported by the record.[21] When our independent review of the record reveals that the trial judge's findings and conclusions are not supported by the record, we may exercise our authority to make contrary or alternative findings and conclusions.[22]

[7] [8] [9] [10] In answering the first two issues that we ordered the parties to brief, we conclude that it is appropriate to remain faithful to our precedent. Thus, we will afford no deference to findings and conclusions that are not supported by the record and will ordinarily defer to those that are. So where a finding or conclusion contains multiple sentences or phrases, we will pay deference to the sentences and phrases that are grounded in the record and reject or refuse to adopt those that are not. When our independent review of the record reveals findings and conclusions that are unsupported by the record, we will, understandably, become skeptical as to the reliability of the findings and conclusions as a whole. In such cases, we will proceed cautiously with a view toward exercising our own judgment. And when we deem it necessary, we

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

[21] Id.

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

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

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

[11] [12] Next, we conclude that when numerous, but not all, findings and conclusions are not supported by the record, the determination of the level of deference to be accorded to the findings and conclusions as a whole is to be made on a case-by-case basis. It is impossible to establish any type of litmus test for determining when and under what circumstances the level of overall deference may be affected by numerous unsupported findings and

conclusions. Because no two cases are alike, the level of deference accorded to the findings and conclusions as a whole where numerous findings are not supported by the record will depend on a thorough review and analysis of the specific facts and legal issues involved in a given case. The case may arise where the nature and number of unsupported findings and conclusions may render the findings and conclusions wholly unreliable and beyond repair. Under such circumstances, we may elect to take it upon ourselves to conduct all of the factfinding and to issue a ruling explaining our application of the law to the facts. However, we note that it will be under only the rarest and most extraordinary of circumstances that we will refuse to accord any deference whatsoever to the findings and conclusions as a whole.

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

Our independent review of the trial judge's remaining findings of fact (i.e., those irrelevant to our resolution) demonstrates that they are largely

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

instances in which the findings are inconsistent or misleading do not justify a decision to totally disregard the findings that are supported by the record and are germane to our resolution of Reed's Brady claims.

2. Discussion

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

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

that....' Penick testified that Keng did not approach him with information regarding Martha Barnett at any point prior to, or during Reed's trial.

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

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

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

Reed has not proven that the Bastrop County District Attorney's Office was in possession of

the information regarding Barnett prior to or during trial.

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

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

opportunity to offer a reason, independent of newspaper articles, for recognizing the significance of Barnett's sighting when he claimed that he did, Keng failed to offer any alternative explanation. Accordingly, the trial judge was justified in finding Keng's recollection about the timing of the disclosure to Penick to be unconvincing.

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

The trial judge also expressly found Penick to be credible. Because the trial judge was positioned to witness Penick's demeanor first-hand, we conclude that the trial judge's credibility determination and resultant factfindings are supported by the record.

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

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

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

> Q. Line 18: " 'Did you have any conversation with Mr. Keng before the Reed trial between the time Mr. Reed was indicted and the time it went to trial about a client of Mr. Keng's who said that she had seen Stacey Stites and Jimmy Fennell together on the morning of Ms. Stites' murder? And your answer was 'no.' "
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> A. That's correct.
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> Q. All right. Question: " 'You don't remember it or it didn't happen?' " And your answer is: " 'I don't remember it happening, I don't think it happened.' "
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> Question: " 'Okay. And so you didn't tell him that you had all the evidence that you needed and you didn't want to hear anything more about the case?' " Answer: " 'I do kind of remembering [sic] in passing making that statement to Steve.' "

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

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

This information was before the trial judge, and she was free to resolve any tendency toward bias and any contradictory statements made by Penick in favor of finding Penick credible. After reviewing newspaper articles and the petition filed in the civil

suit, Penick testified that the allegations involving Barnett had nothing to do with the civil suit. Reed's contentions about the potential impact of this case on Penick's civil suit is speculative, and the trial judge was permitted, in hearing Penick's testimony on the issue, to determine that his personal interests in the civil suit did not improperly influence his testimony.

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

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

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

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

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

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

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

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[23] *See generally Petition for Writ of Certiorari, District Attorney's Office for the Third Judicial District, et al. v. Osborne*, —U.S.—, 129 S.Ct. 488, 172 L.Ed.2d 355 (No. 08-6), granted Nov. 3, 2008 (arguing that the Ninth Circuit Court of Appeals in 42 U.S.C. § 1983 civil rights actions improperly "created a postconviction right of access to evidence under the Due Process Clause by extending the doctrine of Brady . . . and its progeny.")

District Attorney Charles Penick.' Vasquez testified that he thought at the time that he'd give[n] it to Penick but remembered when he saw Sanderson sitting in the courtroom that he had given the information to him, and not to Penick.

Charles Penick testified that John Vasquez never approached him with information pertaining to Reed's case.

Forrest Sanderson testified that he did not recall Vasquez ever approaching him with information about Reed's case. Sanderson testified that he would have remember[ed] if Vasquez had come to him with information pertaining to Reed's case.

Given the inconsistencies in Vasquez's testimony the Court finds him not to be credible.

This Court finds the testimony of Sanderson, Penick, and Wolfe to be credible.

This Court finds that the Bastrop County District Attorney's Office did not possess any evidence pertaining to Mary Best Blackwell prior to or during trial.

This Court finds that John Vasquez did not provide evidence pertaining to Mary Best Blackwell to the Bastrop County District Attorney's Office until after Reed's trial.

Based on the foregoing, we hold that the record supports the trial judge's conclusion that the State did not suppress favorable evidence during trial in violation of Brady. Accordingly, Reed has not proven that he is entitled to relief.

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

Under our Legislature's codification of the Supreme Court's *Schlup v. Delo*[24] standard, we may not consider the merits of or grant relief on a subsequent application unless the application contains sufficient specific facts establishing that:

...

(2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt.[25]

[15] [16] [17] [18] [19] To obtain review of the merits of a procedurally barred claim, an applicant must make a threshold, prima facie showing of innocence by a preponderance of the evidence.[26] A *Schlup* claim of innocence is not an independent constitutional claim; it is "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claims considered on the merits."[27] Because Article 11.071, Section 5(a)(2) was enacted in response to the Supreme Court's decision in *Schlup*,[28] we conclude that standards set forth for evaluating a gateway-actual-

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[24] 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995).

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

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

[27] *Schlup*, 513 U.S. at 315, 115 S.Ct. 851.

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

innocence claim announced by the Supreme Court should guide our consideration of such claims under Section 5(a) (2). Therefore, to mount a credible claim of innocence, an applicant "must support his allegations of constitutional error with reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial."[29] The applicant bears the burden of establishing that, in light of the new evidence, "it is more likely than not that no reasonable juror would have" rendered a guilty verdict "beyond a reasonable doubt."[30] To determine whether an applicant has satisfied the burden, we must make a holistic evaluation of " 'all the evidence,' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial.' "[31] We must then decide how reasonable jurors, who were properly instructed, "would react to the overall, newly
supplemented record."[32] In doing so, we may assess the credibility of the witnesses who testified at the applicant's trial.[33]

In this case, we must determine whether Reed has satisfied his gateway burden under subsection

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[29] *Id.* at 324.

[30] *Id.* at 327.

[31] *House v. Bell*, 547 U.S. 518, 537–38, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006) (quoting *Schlup*, 513 U.S. at 327–28, 115 S.Ct. 851).

[32] *Id.* at 538, 126 S.Ct. 2064.

[33] *Id.* at 539, 126 S.Ct. 2064.

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

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

1. Reed's Initial Application

We start by examining the evidence presented in Reed's initial application and the accompanying findings of fact that are pertinent to the particular items of evidence. We note that, reviewing this

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

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

evidence in its entirety, the trial judge found that Reed failed to prove that he is actually innocent under the more stringent standard of *Herrera* and *Ex parte Elizondo*.[36]

a. Robbins' Statements

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

The trial judge found that Carol Stites's testimony about Stacey rarely using the Tempo to drive to work because of its unreliability was credible. The trial judge also determined that, because of Stacey's work schedule, she could not have been at the Bastrop High School between 4:30 and 5:00 a.m. The trial judge found that, in April 1996, a 1988 Ford Tempo was registered to David Gonzalez, who worked for the High School in April 1996. As a result, the trial judge found no credible evidence that

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

Stacey was driving Carol's car to the High School the month before her death.

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

b. Witnesses Affirming Relationship Between Stacey and Reed

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

Kay Westmorland stated that Stacey and Reed came to her house three or four times between late January 1995 and April 1996. She knew Stacey from the H.E.B. and knew of Fennell because she saw him pick up Stacey at work. Westmorland knew Reed from the neighborhood. She heard that Fennell knew Reed was seeing Stacey and that Fennell was jealous. She claimed that she was "not surprised to see [Fennell] drive by [her] house on several occasions in the same truck that she had seen Stacey and [Reed] in."

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

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

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

Elizabeth Keehner stated that she saw Reed, whom she "knew quite well," walking out of the

H.E.B. "holding hands with a very pretty white girl" a few months before Stacey's death. When she saw Stacey's picture in the paper, she thought that Stacey might have been the girl with Reed at the H.E.B.: "The familiarity was there."

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

Walter Reed, Reed's father, stated that Kelly Bonguli, who had worked at the H.E.B., told him that he knew where Stacey was the night she was killed. Bonguli also told Walter that he and his family had been "tailed" during Reed's trial. He then said that he wanted to talk with someone before he said anything about the case.

Considering these statements, the trial judge found that they were not credible or persuasive. Reed

failed to submit an affidavit from Kelly Bonguli. The State obtained an affidavit from Bonguli that discredited Walter Reed's statements. Bonguli stated that he "never told Walter Reed that I knew where Stacey Stites was on the night she was killed. All I ever told Walter was that Rodney Reed was a crackhead who raped girls on the R.R. tracks. I have no idea where Stacey Stites was when she died."

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

The trial judge found that Moore's and Olney's statements were not persuasive or credible. Reed failed to provide the trial judge with affidavits from Campos and Pace. In an affidavit obtained by the State, Campos stated that she never told anyone that Reed did not kill Stacey or that she overheard a conversation between Fennell and Davis in which the two discussed an affair between Stacey and Reed. Pace also executed an affidavit at the State's request. In it, she asserted that she never told Moore or Olney about anything Campos said; when Moore and Olney came to her house, she refused to talk to them. Pace read Moore's and Olney's affidavits and stated that the two are "bald face liars." Campos said that Reed

did not do it when Pace was talking with Campos and Moore about their personal opinions about the case. Pace stated that Campos's tone was serious, but that for all she knew it was only Campos's opinion. Finally, Curtis Davis submitted an affidavit denying that he ever had such a conversation with Fennell.

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

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

The trial judge determined that Jon's statements were neither persuasive nor credible. Fennell, the trial judge found, was a Gidding's police officer at the time—not a Bastrop Sheriff's Deputy.

Additionally, after reviewing Jon's booking sheets, which the State submitted, the judge found that Fennell never booked Jon into the jail. Regarding the allegation of Stacey's crack cocaine use with Reed, the trial judge found that the toxicology report from Stacey's autopsy was negative for drugs and alcohol. The drug screen conducted by H.E.B. before Stacey was hired was also negative. Further, the trial judge found:

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

Finally, the trial judge found that many of these affidavits were from Reed's family members. Jon Aldridge, Shonta Reed, Meller Marie Aldridge, and Ron Moore are Reed's cousins, and Walter Reed is Reed's father. The trial judge also determined that, at the time of the habeas proceedings, many of these family members had criminal records. Jon Aldridge, who is Meller Marie Aldridge's son, had a lengthy arrest record. He had been convicted several times of theft by check and had been convicted for failure to identify himself as a fugitive from justice. Shonta

Reed had been convicted of theft four times and convicted of assault once. Linda Westmorland had been convicted of felony theft, and the State's motion to revoke her probation on that cause was pending at the time of the habeas proceedings. She also had forgery charges pending in Dallas.

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

c. Statements from Allison and Hawkins

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

Without judging Allison's and Hawkins's credibility, the trial judge found no credible evidence that Lawhon is guilty of murdering Stacey. The judge, who had presided over Reed's trial, made this determination after recalling the evidence at trial and reviewing the habeas evidence. The habeas evidence specifically included a written statement from Macy, Lawhon's ex-girlfriend, who would meet Lawhon in the Walmart parking lot, written statements from Lawhon's parents asserting that Lawhon was at home on the night Stacey was

murdered, and information showing that Lawhon had been excluded as a contributor to the DNA on the beer can (item number 24).

d. Fennell's Deceptive Polygraph Results

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

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

2. Reed's First Subsequent Application

We now turn to the beer-can-DNA evidence presented in Reed's second application. As previously discussed at length above, Reed submitted Young's DNA-test results on the beer can (item number 24) found on the road near Stacey's body in his first subsequent state habeas application. Young could not exclude Stacey, Officer Hall, or Investigator Selmala as DNA contributors. But Reed's trial expert, Dr. Johnson, did exclude all three through Polymarker testing.

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

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

Dr. Ranajit Chakraborty, whom Young testified was "one of the country's most definitive experts in the field of population genetics," submitted an affidavit concurring with Young's determination. "Review of the electropherograms indicates that the conclusions reached by the DPS laboratory are accurate and they are scientifically valid." Dr. Ranajit Chakraborty noted, however, that Young's results raised questions. He stated that Officer Hall is excluded based on three loci and Stacey and Investigator Selmala are each excluded based on eight loci. "[T]he exclusion of each of the three persons (based on multiple loci) are consistent with the inference that they are NOT part contributors of DNA in the mixture sample (of item # 24)."

In a deposition, Reed's habeas expert, Dr. Arthur Eisenberg, disagreed with two of Young's conclusions. In his opinion, the data from Young's

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

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

Using the lower threshold of 50 RFU units, so that the three loci not previously identified by Young were now visible, Dr. Eisenberg could not exclude Officer Hall. Ninety-nine percent of the Caucasian, African–American, and Hispanic populations would have been excluded. But Dr. Eisenberg made clear that he could not say whether Officer Hall put his saliva on the beer can. He also stated that the absence of an exclusion would have to be looked at in conjunction with other evidence relating to Officer Hall. As for Stacey and Investigator Selmala, Dr. Eisenberg found no reason to include them as DNA contributors. Because Dr. Eisenberg regarded Dr. Chakraborty as a friend, he spoke with Dr. Chakraborty and showed him the electropherograms where the loci were called at 50 RFU. Dr.

Chakraborty, according to Dr. Eisenberg, changed his opinion and agreed that only Officer Hall could not be excluded. Dr. Eisenberg had the impression that Dr. Chakraborty was not given the electropherograms when he reviewed Young's conclusions. Referring to Dr. Johnson's previous exclusion of Officer Hall, Dr. Eisenberg stated that if the Polymarker test was properly conducted, he would have no problem relying on the results.

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

3. Reed's Second Subsequent Application

a. Beer–Can–DNA Evidence

Reed again points to the beer-can-DNA evidence in this application. He theorizes that Officer Hall could have assisted Fennell with either committing the murder or returning to Giddings from Bastrop on the morning of the murder. Because Officer Hall is six feet, one inch tall, Reed contends that he cannot be excluded as the driver of Fennell's truck.

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

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

b. Officer Davis

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

c. Barnett and Blackwell

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

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

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

- Barnett failed to give a satisfactory explanation about why she failed to report her

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

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

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

· Barnett's credibility is damaged because her testimony about the time she saw Stacey and Fennell was inconsistent with her sworn statements made in her 2002 affidavit. Viewed in conjunction with the State's argument that it would have been impossible for Barnett to have seen Stacey and Fennell at the store between 5:00 and 5:30 a.m., the time discrepancy of Barnett's sighting at the hearing is significant.

· Barnett's testimony is incredible when considered with the following facts developed at trial: (1) Stacey was scheduled to be at the

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

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

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

> · Blackwell's testimony about Fennell feigning grief at Stacey's funeral is undermined by the testimony of Giddings Police Chief Nathan Lapham. Lapham testified that Fennell "appeared to be very upset, emotionally upset, he was crying, I believe before and after the funeral.... He was very distraught."
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> · Blackwell's testimony is severely undermined by Wolfe's testimony that none of the other cadets in the CAPCO class could corroborate the conversation that Blackwell said that she had had with Fennell in which Fennell threatened to strangle his girlfriend with a belt if he ever caught her cheating on him. Further, none of the

cadets could corroborate Blackwell's claim that Fennell acted abusively toward Stacey.

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

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

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

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

· Blackwell's credibility is undermined by the fact that she originally told Vasquez that Fennell was joking when he made the statement but testified at the hearing that Fennell was "absolutely" serious.

· "Given the fact that Blackwell lived in Austin, attended [Stacey's] funeral, and knew Fennell

from the academy, it is implausible that Blackwell was entirely unaware, as she claimed, of the circumstances surrounding [Stacey's] death."

d. Statements of Jennifer and Brenda Prater

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

On the 25th, Jennifer's mother-in-law told her that the police had been to Jennifer's house when she was not home. The police walked into the house when Jennifer's kids did not answer the door. Jennifer's mother-in-law, who lived across the street from Jennifer and Paul, saw the police arrive. She went to Jennifer and Paul's house and confronted the police

about their entry into the house. Jennifer's mother-in-law told Jennifer that the police threatened to call Child Protective Services because the kids were home alone. After Jennifer's mother-in-law explained that she was watching the children until Jennifer returned home, the police left, stating that they would come back later.

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

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

> The interior light was on. The driver was a man who had a darker complection [sic], but was not black. I thought that he was Mexican. There was a woman in the passenger seat. She was light complected [sic] with big dark hair. I remember that, as the car drove by the first time, the woman in the passenger seat turned her head toward the driver. I got a very good look at her face as they went by. There was a white male in the back scat [sic]. At first I was

> afraid that the man in the back seat was my husband. I got a better look at him when the car went through the second time and realized that he was not my husband. I later spoke with my brother Paul and Jennifer and they told me they saw the same car in back of their house.

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

e. Fennell's Deceptive Polygraph Results

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

f. Faulty Forensic Analysis and Collection of Forensic Evidence

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

Dr. Riddick is a medical examiner for the State of Alabama. His affidavit, for the most part, is devoted to criticizing Dr. Bayardo's conclusions.

First, Dr. Riddick contends that Dr. Bayardo's time of death estimate is unreliable.

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

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

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

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

As for the cause of death, Dr. Riddick attacks Dr. Bayardo's conclusion that Stacey died of asphyxiation resulting from strangulation associated with sexual assault. Dr. Riddick claims that it is unknown whether the sexual contact was consensual. "The best indicator of non-consensual sexual contact

is the existence of other injuries, such as being held down. There are no injuries of this type." Dr. Riddick contends that there is no evidence that Stacey died from ligature strangulation because, with the exception of the exterior injuries to Stacey's neck, other common injuries associated with strangulation were not present. Dr. Riddick suggests "some other modality, such as smothering...."

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

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

In his affidavit, Singer, a consulting forensic scientist who works at Tarrant County Medical Examiner's Office Criminalistics Laboratory, focuses on problems with the investigation of the scene

where Stacey's body was discovered and with Blakley's testimony. Singer offers some of the following personal observations and conclusions:

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

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

Finally, Reed cites to a book written by Dr. William Green in 1998, entitled: "Rape: The Evidential Examination and Management of the Adult Female Victim." In the book, Dr. Green surveys

studies conducted on the presence of nonmotile intact sperm in the cervix and vagina. Dr. Green notes that one study found intact sperm ten days after intercourse.[39] Other studies found the presence of intact sperm in the cervix or vagina anywhere from two days to nine days after intercourse.[40] Reed contends that Blakley's testimony estimating the length of time that sperm can remain intact in the "cervix" is patently false.

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

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

Reed also asserts that Fennell was violent toward women he dated. Reed directs us to an affidavit from Pamela Duncan, Fennell's girlfriend from August 1996 to September 1997. Duncan describes Fennell as abusive, possessive, controlling, and extremely prejudiced toward African–Americans. When Duncan broke up with Fennell, he stalked her

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

[40] *Id.* at 107–08.

until he left Giddings; she was afraid for her safety and that of her children.

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

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

Claiming that the Giddings Police Department had a long-standing reputation for brutalizing suspects and targeting non-whites at the time of Reed's trial, Reed relies on a federal-civil-rights action initiated against the Giddings Police Department and another Giddings officer. Attached to the plaintiff's petition in that case is an affidavit from Keng. Keng recalled several instances of alleged misconduct involving officers with the Giddings

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

h. Statement of James Robinson

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

4. Discussion

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

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

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

[42] 547 U.S. at 556, 126 S.Ct. 2064; *see also Schlup*, 513 U.S. at 332, 115 S.Ct. 851.

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

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

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

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

a. Fennell

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

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

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[43] *See Schlup*, 513 U.S. at 327–28, 115 S.Ct. 851.

[44] *See United States v. Scheffer*, 523 U.S. 303, 309–12, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998).

b. Consensual Sexual Relationship

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

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

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

Dr. Johnson claimed that leakage from the vagina is common and stated that semen could be detected in areas surrounding the vagina, including the anal area. Movement of the body, according to Dr. Johnson, makes

leakage more likely. She added, "A very small number of sperm that would be collected in an area would [be] much more likely to come from a contamination of the swab touching one area as it's inserted into another, or drainage from around that area." Semen in low numbers is not indicative of an ejaculate and is more likely to be discovered due to leakage.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

c. The Unidentified Male or Men

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

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

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

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

V. Conclusion

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

KELLER, P.J., filed a concurring opinion.

PRICE, J., filed a concurring opinion.

WOMACK, J., concurred.

KELLER, P.J., filed a concurring opinion.

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

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

EX PARTE RODNEY REED, Applicant

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

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

O R D E R

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

2. In May 1998, a jury convicted applicant of the offense of capital murder. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial

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

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

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

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

6. In his 2016 application (our -08), applicant asserts that he has newly discovered evidence that supports his claim that he is actually innocent, that the State's failure to disclose this newly discovered evidence violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), and that this newly discovered evidence shows that the State presented false and misleading testimony, which violated his right to due process. *See Ex parte Chabot*, 300 S.W.3d 768, 771 (Tex. Crim. App. 2009).

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

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

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

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

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IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

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

EX PARTE RODNEY REED, Applicant

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

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

CONCURRING AND DISSENTING OPINION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

To be clear, I do not express any view as to the merits of applicant's claims at this juncture. I simply

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

conclude that applicant has alleged facts in his -07 application on the basis of Dr. Bayardo's declaration that arguably could entitle him to relief, and thus I would permit further factual development of the claims rather than dismissing them on procedural grounds as the Court does today.[3] Without conducting an extensive review of the record, and in the absence of credibility determinations from the habeas court or live testimony to clarify the meaning of Dr. Bayardo's declaration, it is impossible to determine whether applicant's claims on this basis may have any merit. In my view, if the Court must conduct extensive factual and legal analysis in order to determine whether an applicant has established a prima facie case for relief, the better course in that situation is to remand the claim to the habeas court for findings and conclusions so that the parties may fully litigate the matter and present this Court with an adequate record upon which to evaluate the claim.

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

This is particularly true in this situation, given that the Court is already remanding applicant's -08 application for further proceedings. In my view, under these circumstances, it would be most efficient and prudent to resolve applicant's outstanding claims that may have some merit in a single proceeding.

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

Filed: May 17, 2017
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IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-50,961-06

EX PARTE RODNEY REED, Applicant

ON APPLICATIONS FOR WRIT OF HABEAS CORPUS CAUSE NO. 8701 IN THE 21ST DISTRICT COURT BASTROP COUNTY

Per curiam.

O R D E R

Applicant was convicted in May 1998 of a capital murder committed in April 1996. TEX. PENAL CODE ANN. § 19.03(a)(2). Based on the jury's answers to the special issues set forth in the Texas Code of Criminal Procedure, Article 37.071, sections 2(b) and 2(e), the trial court sentenced him to death. Art. 37.071, § 2(g).[1] This Court affirmed applicant'sconviction and sentence on direct appeal.

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

Reed v. State, No. AP-73,135 (Tex. Crim. App. Dec. 6, 2000) (not designated for publication). Applicant filed his initial post-conviction application for writ of habeas corpus in November 1999, and this Court denied relief in February 2002. *Ex parte Reed*, No. WR-50,961-01 (Tex. Crim. App., Feb. 13, 2002) (not designated for publication). Applicant filed four subsequent applications. None of them satisfied the requirements of Article 11.071, Section 5(a). *See Ex parte Reed*, No. WR-50,961-02 (Tex. Crim. App., Feb. 13, 2002) (not designated for publication); *Ex parte Reed*, 271 S.W.3d 698 (Tex. Crim. App. 2008); *Ex parte Reed*, No. WR-50,961-04 (Tex. Crim. App., Jan. 14, 2009) (not designated for publication); *Ex parte Reed*, No. WR-50,961-05 (Tex. Crim. App., Jan. 14, 2009) (not designated for publication). In April 2009, applicant filed this subsequent application in the convicting court, which forwarded the application in compliance with Article 11.071, Section 5(b).

In his fifth subsequent application, applicant asserts that he has newly discovered evidence that supports his previously raised Brady and actual innocence claims. He asserts, alternatively, that this evidence raises a new claim under *Schlup v. Delo*, 513 U.S. 298 (1995), and Section 5(a)(2); a new claim of actual innocence under *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1997), and *Herrera v. Collins*, 506 U.S. 390 (1993); and a new claim for relief under *Brady v. Maryland*, 373 U.S. 83 (1963), due to the State's continued suppression of exculpatory evidence.

As support for his assertions, applicant cites to allegations of Jimmy Fennell's misconduct, including several incidents as a Georgetown police officer and

one incident as a Giddings police officer. He also cites to a report of domestic violence against Fennell's ex-wife. Finally, applicant cites to a witness's affidavit concerning a possible sighting of the victim and applicant together.

The allegations of Fennell's misconduct and domestic violence do not exonerate applicant. See also *Ex parte Reed*, Nos. WR-50,961-04 and -05, slip op. at 5-9 (Tex. Crim. App. Jan. 14, 2009) (not designated for publication). As to the possible sighting of the victim and applicant together, the witness does not positively identify either the victim or applicant, and her description of the woman she saw is not consistent with descriptions of the victim. Applicant has failed to show that this information constitutes exculpatory evidence. Furthermore, applicant has not shown that the State violated *Brady* by withholding favorable material evidence.

The totality of the evidence before us still supports a guilty verdict. This application fails to meet the gateway standard of *Schulp* and Section 5(a)(2), fails to make a *prima facie* showing of actual innocence under *Elizondo* and *Herrera*, and fails to show a *Brady* violation.

We find that this subsequent application fails to satisfy any of the exceptions provided in Article 11.071, § 5. Therefore, Applicant's subsequent application is dismissed as an abuse of the writ.

IT IS SO ORDERED THIS THE 1st DAY OF JULY, 2009.

Do Not Publish

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITOL STATION
AUSTIN, TEXAS 78711

SHARON KELLER
Presiding Judge

DEANA WILLIAMSON
Clerk
(512) 463-1551

MIKE KEASLER
BARBARA P. HERVEY
ELSA ALCALA
BERT RICHARDSON
KEVIN P. YEARY
DAVID NEWALL
MARY LOU KEEL
SCOTT WALKER
JUDGES

October 10, 2017

District Clerk Bastrop County
Sarah Loucks
P.O. Box 770
Bastrop, TX 78602
* DELIVERED VIA E-MAIL *

Re: Reed, Rodney
CCA No. AP-77,054

Trial Court Case No. 8701
The Court of Criminal Appeals has this day issued a mandate for the above-referenced and styled case number. The mandate will be transmitted electronically only.

*****DISTRICT CLERK*****
MANDATE RECEIPT ACKNOWLEDGEMENT
Pursuant to Rule 51.2(a)(1) T.R.A.P, please acknowledge receipt of the mandate of the Court of Criminal Appeals in the above numbered and styled case via this email link.

Sincerely,

Deana Williamson, Clerk

cc: Presiding Judge 21st District Court
(DELIVERED VIA E-MAIL)
District Attorney Bastrop County
(DELIVERED VIA E-MAIL)
Travis Bragg (DELIVERED VIA E-MAIL)
Matthew Ottoway (DELIVERED VIA E-MAIL)
Bryce E. Benjet (DELIVERED VIA E-MAIL)
Andrew MacRae (DELIVERED VIA E-MAIL)
SUPREME COURT BUILDING, 201 WEST 14TH STREET, ROOM 106, AUSTIN, TEXAS 78701
WEBSITE WWW.TXCOURTS.GOV/CCA

TEXAS COURT OF CRIMINAL APPEALS
Austin, Texas

M A N D A T E

THE STATE OF TEXAS,

TO THE 21ST DISTRICT COURT OF BASTROP COUNTY C GREETINGS:

Before our **COURT OF CRIMINAL APPEALS**, on **APRIL 12, 2017**, the cause upon appeal to revise or reverse your Judgment between:

RODNEY REED
VS.
THE STATE OF TEXAS

CCRA NO. AP-77,054
TRIAL COURT NO. 8701
was determined; and therein our said **COURT OF CRIMINAL APPEALS** made its order in these words:

"This cause came on to be heard on the record of the Court below, and the same being considered, because it is the Opinion of this Court that there was

no error in the judgment, it is **ORDERED, ADJUDGED AND DECREED** by the Court that the judgment be **AFFIRMED**, in accordance with the Opinion of this Court, and that this Decision be certified below for observance."

Motion for rehearing denied October 4, 2017.

WHEREFORE, We command you to observe the Order of our said **COURT OF CRIMINAL APPEALS** in this behalf and in all things have it duly recognized, obeyed and executed.

WITNESS, **THE HONORABLE SHARON KELLER**,
Presiding Judge of our said **COURT OF CRIMINAL APPEALS**,
with the Seal thereof annexed, at the City of Austin,
on this day October 10, 2017.

_____

DEANA WILLIAMSON, Clerk

FILE COPY
OFFICIAL NOTICE FROM COURT OF CRIMINAL
APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

10/4/2017

REED, RODNEY Tr. Ct. No. 8701 AP-77,054

On this day, the Appellant's motion for rehearing has been denied.

Deana Williamson, Clerk

DISTRICT CLERK BASTROP COUNTY
SARAH LOUCKS
P.O. BOX 770
BASTROP, TX 78602
* DELIVERED VIA E-MAIL *

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AUSTIN, TEXAS 78711

10/4/2017

REED, RODNEY Tr. Ct. No. 8701 AP-77,054

On this day, the Appellant's motion for rehearing has been denied.

Deana Williamson, Clerk

TRAVIS BRAGG
ATTORNEY GENERAL OF TEXAS
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AUSTIN, TX 78711-2548
* DELIVERED VIA E-MAIL *

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APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

10/4/2017

REED, RODNEY Tr. Ct. No. 8701 AP-77,054

On this day, the Appellant's motion for rehearing has been denied.

Deana Williamson, Clerk

MATTHEW OTTOWAY
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POST CONVICTION LITIGATION
DIV--CAPITAL
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AUSTIN, TEXAS 78711

10/4/2017

REED, RODNEY Tr. Ct. No. 8701 AP-77,054

On this day, the Appellant's motion for rehearing has been denied.

Deana Williamson, Clerk

BRYCE BENJET
40 WORTH STREET SUITE 701
NEW YORK, NY 10013
* DELIVERED VIA E-MAIL *

FILE COPY
OFFICIAL NOTICE FROM COURT OF CRIMINAL
APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

10/4/2017

REED, RODNEY Tr. Ct. No. 8701 AP-77,054

On this day, the Appellant's motion for rehearing has been denied.

Deana Williamson, Clerk

ANDREW MACRAE
LEVATINO PACE LLP
1101 S CAPITAL OF TEXAS HWY
STE K125
WEST LAKE HILLS, TX 78746-7174
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P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

10/4/2017

REED, RODNEY Tr. Ct. No. 8701 AP-77,054

On this day, the Appellant's motion for rehearing has been denied.

Deana Williamson, Clerk

DISTRICT ATTORNEY BASTROP
COUNTY
BRYAN GOERTZ
804 PECAN
BASTROP, TX 78602
* DELIVERED VIA E-MAIL *

FILE COPY
OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

10/4/2017

REED, RODNEY Tr. Ct. No. 8701 AP-77,054

On this day, the Appellant's motion for rehearing has been denied.

Deana Williamson, Clerk

PRESIDING JUDGE 21ST DISTRICT COURT
100 E MAIN, STE 305
BRENHAM, TX 77833-3753
* DELIVERED VIA E-MAIL *

U.S. CONSTITUTION, AMENDMENT XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CODE OF CRIMINAL PROCEDURE

TITLE 1. CODE OF CRIMINAL PROCEDURE

CHAPTER 64. MOTION FOR FORENSIC DNA TESTING

Art. 64.01. MOTION. (a) In this section, "biological material":

(1) means an item that is in possession of the state and that contains blood, semen, hair, saliva, skin tissue or cells, fingernail scrapings, bone, bodily fluids, or other identifiable biological evidence that may be suitable for forensic DNA testing; and

(2) includes the contents of a sexual assault evidence collection kit.

(a-1) A convicted person may submit to the convicting court a motion for forensic DNA testing of evidence that has a reasonable likelihood of containing biological material. The motion must be accompanied by an affidavit, sworn to by the convicted person, containing statements of fact in support of the motion.

(b) The motion may request forensic DNA testing only of evidence described by Subsection (a-1) that was secured in relation to the offense that is the basis of the challenged conviction and was in the possession of the state during the trial of the offense, but:

(1) was not previously subjected to DNA testing; or

(2) although previously subjected to DNA testing:

(A) can be subjected to testing with newer testing techniques that provide a reasonable

likelihood of results that are more accurate and probative than the results of the previous test; or

(B) was tested:

(i) at a laboratory that ceased conducting DNA testing after an audit by the Texas Forensic Science Commission revealed the laboratory engaged in faulty testing practices; and

(ii) during the period identified in the audit as involving faulty testing practices.

(c) A convicted person is entitled to counsel during a proceeding under this chapter. The convicting court shall appoint counsel for the convicted person if the person informs the court that the person wishes to submit a motion under this chapter, the court finds reasonable grounds for a motion to be filed, and the court determines that the person is indigent. Counsel must be appointed under this subsection not later than the 45th day after the date the court finds reasonable grounds or the date the court determines that the person is indigent, whichever is later. Compensation of counsel is provided in the same manner as is required by:

(1) Article 11.071 for the representation of a petitioner convicted of a capital felony; and

(2) Chapter 26 for the representation in a habeas corpus hearing of an indigent defendant convicted of a felony other than a capital felony.

Added by Acts 2001, 77th Leg., ch. 2, Sec. 2, eff. April 5, 2001. Subsec. (c) amended by Acts 2003, 78th Leg., ch. 13, Sec. 1, eff. Sept. 1, 2003.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. 1006 (H.B. 681), Sec. 2, eff. September 1, 2007.

Acts 2011, 82nd Leg., R.S., Ch. 278 (H.B. 1573), Sec. 5, eff. September 1, 2011.

Acts 2011, 82nd Leg., R.S., Ch. 366 (S.B. 122), Sec. 1, eff. September 1, 2011.

Acts 2015, 84th Leg., R.S., Ch. 70 (S.B. 487), Sec. 1, eff. September 1, 2015.

Acts 2017, 85th Leg., R.S., Ch. 903 (H.B. 3872), Sec. 2, eff. June 15, 2017.

Art. 64.011. GUARDIANS AND OTHER REPRESENTATIVES. (a) In this chapter, "guardian of a convicted person" means a person who is the legal guardian of the convicted person, whether the legal relationship between the guardian and convicted person exists because of the age of the convicted person or because of the physical or mental incompetency of the convicted person.

(b) A guardian of a convicted person may submit motions for the convicted person under this chapter and is entitled to counsel otherwise provided to a convicted person under this chapter.

Added by Acts 2003, 78th Leg., ch. 13, Sec. 2, eff. Sept. 1, 2003.

Art. 64.02. NOTICE TO STATE; RESPONSE. (a) On receipt of the motion, the convicting court shall:

(1) provide the attorney representing the state with a copy of the motion; and

(2) require the attorney representing the state to take one of the following actions in response to the motion not later than the 60th day after the date the motion is served on the attorney representing the state:

(A) deliver the evidence to the court, along with a description of the condition of the evidence; or

(B) explain in writing to the court why the state cannot deliver the evidence to the court.

(b) The convicting court may proceed under Article 64.03 after the response period described by Subsection (a)(2) has expired, regardless of whether the attorney representing the state submitted a response under that subsection.

Added by Acts 2001, 77th Leg., ch. 2, Sec. 2, eff. April 5, 2001.
Amended by:

Acts 2007, 80th Leg., R.S., Ch. 1006 (H.B. 681), Sec. 3, eff. September 1, 2007.

Art. 64.03. REQUIREMENTS; TESTING. (a) A convicting court may order forensic DNA testing under this chapter only if:

(1) the court finds that:

(A) the evidence:

(i) still exists and is in a condition making DNA testing possible; and

(ii) has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect;

(B) there is a reasonable likelihood that the evidence contains biological material suitable for DNA testing; and

(C) identity was or is an issue in the case; and

(2) the convicted person establishes by a preponderance of the evidence that:

(A) the person would not have been convicted if exculpatory results had been obtained through DNA testing; and

(B) the request for the proposed DNA testing is not made to unreasonably delay the execution of sentence or administration of justice.

(b) A convicted person who pleaded guilty or nolo contendere or, whether before or after conviction, made a confession or similar admission in the case may submit a motion under this chapter, and the convicting court is prohibited from finding that identity was not an issue in the case solely on the basis of that plea, confession, or admission, as applicable.

(b-1) Notwithstanding Subsection (c), a convicting court shall order that the requested DNA testing be done with respect to evidence described by Article 64.01(b)(2)(B) if the court finds in the affirmative the issues listed in Subsection (a)(1), regardless of whether the convicted person meets the requirements of Subsection (a)(2). The court may order the test to be conducted by any laboratory that the court may order to conduct a test under Subsection (c).

(c) If the convicting court finds in the affirmative the issues listed in Subsection (a)(1) and the convicted person meets the requirements of Subsection (a)(2), the court shall order that the requested forensic DNA testing be conducted. The court may order the test to be conducted by:

(1) the Department of Public Safety;

(2) a laboratory operating under a contract with the department; or

(3) on the request of the convicted person, another laboratory if that laboratory is accredited under Article 38.01.

(d) If the convicting court orders that the forensic DNA testing be conducted by a laboratory other than

a Department of Public Safety laboratory or a laboratory under contract with the department, the State of Texas is not liable for the cost of testing under this subsection unless good cause for payment of that cost has been shown. A political subdivision of the state is not liable for the cost of testing under this subsection, regardless of whether good cause for payment of that cost has been shown. If the court orders that the testing be conducted by a laboratory described by this subsection, the court shall include in the order requirements that:

(1) the DNA testing be conducted in a timely and efficient manner under reasonable conditions designed to protect the integrity of the evidence and the testing process;

(2) the DNA testing employ a scientific method sufficiently reliable and relevant to be admissible under Rule 702, Texas Rules of Evidence; and

(3) on completion of the DNA testing, the results of the testing and all data related to the testing required for an evaluation of the test results be immediately filed with the court and copies of the results and data be served on the convicted person and the attorney representing the state.

(e) The convicting court, not later than the 30th day after the conclusion of a proceeding under this chapter, shall forward the results to the Department of Public Safety.

Added by Acts 2001, 77th Leg., ch. 2, Sec. 2, eff. April 5, 2001. Subsec. (a) amended by Acts 2003, 78th Leg., ch. 13, Sec. 3, eff. Sept. 1, 2003.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. 1006 (H.B. 681), Sec. 4, eff. September 1, 2007.

Acts 2015, 84th Leg., R.S., Ch. 70 (S.B. 487), Sec. 2, eff. September 1, 2015.

Acts 2015, 84th Leg., R.S., Ch. 1276 (S.B. 1287), Sec. 11, eff. September 1, 2015.

Acts 2017, 85th Leg., R.S., Ch. 903 (H.B. 3872), Sec. 3, eff. June 15, 2017.

Art. 64.035. UNIDENTIFIED DNA PROFILES. If an analyzed sample meets the applicable requirements of state or federal submission policies, on completion of the testing under Article 64.03, the convicting court shall order any unidentified DNA profile to be compared with the DNA profiles in:

(1) the DNA database established by the Federal Bureau of Investigation; and

(2) the DNA database maintained by the Department of Public Safety under Subchapter G, Chapter 411, Government Code.

Added by Acts 2011, 82nd Leg., R.S., Ch. 278 (H.B. 1573), Sec. 6, eff. September 1, 2011.
Added by Acts 2011, 82nd Leg., R.S., Ch. 366 (S.B. 122), Sec. 2, eff. September 1, 2011.

Art. 64.04. FINDING. After examining the results of testing under Article 64.03 and any comparison of a DNA profile under Article 64.035, the convicting court shall hold a hearing and make a finding as to whether, had the results been available during the trial of the offense, it is reasonably probable that the person would not have been convicted.

Added by Acts 2001, 77th Leg., ch. 2, Sec. 2, eff. April 5, 2001. Amended by Acts 2003, 78th Leg., ch. 13, Sec. 4, eff. Sept. 1, 2003.

Amended by:

Acts 2011, 82nd Leg., R.S., Ch. 278 (H.B. 1573), Sec. 7, eff. September 1, 2011.

Acts 2011, 82nd Leg., R.S., Ch. 366 (S.B. 122), Sec. 3, eff. September 1, 2011.

Art. 64.05. APPEALS. An appeal under this chapter is to a court of appeals in the same manner as an appeal of any other criminal matter, except that if the convicted person was convicted in a capital case and was sentenced to death, the appeal is a direct appeal to the court of criminal appeals.

Added by Acts 2001, 77th Leg., ch. 2, Sec. 2, eff. April 5, 2001. Amended by Acts 2003, 78th Leg., ch. 13, Sec. 5, eff. Sept. 1, 2003.

NO. AP-77,054

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

RODNEY REED,
Appellant,
v.
THE STATE OF TEXAS,
Appellee.

Arising from:

IN THE DISTRICT COURT
FOR THE 21ST JUDICIAL DISTRICT
BASTROP COUNTY, TEXAS

APPELLANT RODNEY REED'S MOTION FOR REHEARING

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ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

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Counsel for the State:	MATTHEW OTTOWAY Assistant Attorney General Bastrop County, Texas P.O. Box 12548 Capitol Station Austin, Texas 78711
Appellant:	RODNEY REED
Counsel for Appellant:	BRYCE BENJET Attorney at Law THE INNOCENCE PROJECT 40 Worth Street, Suite 701 New York, New York 10013 ANDREW F. MACRAE LEVATINO/PACE LLP 1101 S. Capital of Texas Highway Building K, Suite 125 Austin, Texas 78746

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Rodney Reed, through his undersigned counsel, respectfully asks the Court pursuant to Tex. R. App. P. 79 for rehearing of its April 12, 2017 opinion (the "Opinion") affirming denial of his Chapter 64 motion for DNA testing.

I. CHAIN OF CUSTODY WAS ESTABLISHED.

Citing no authority, the Opinion rejects most of Reed's requested DNA testing because it concluded that the manner in which the evidence was stored by the Bastrop District Clerk constituted tampering or alteration of the evidence negating chain of custody. Opinion at 17-18; Tex. Crim. App. Art. 64.03(a)(1)(A)(ii). To order DNA testing, a court must find that the evidence "has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect." *7* The Court focused on the hearing evidence regarding "the number of people who handled (or potentially handled) the items depositing DNA on them and the likelihood that deposited DNA itself could be transferred to other items." Opinion at 17. The Court held that this likelihood of contamination, "casts doubt" on the evidence's integrity. . . ." Opinion at 18.

This Court's holding that chain of custody is defeated by "doubt" about the integrity of the evidence and a "likelihood" of contamination conflicts with the long-established jurisprudence of this State as well as the legislative intent regarding this provision of Chapter 64.

A. Chain of custody is established absent affirmative evidence that the items to be tested were substituted, tampered with,

replaced, or altered in any material respect.

Article 64.03(a)(1)(A)(ii) tracks the traditional legal standard for proof of chain of custody. *See, e.g., Lagrone v. State*, 942 S.W.2d 602, 617 (Tex. Crim. App. 1997) ("Without evidence of tampering, most questions concerning care and custody of a substance go to the weight attached, not the admissibility); *Wortham v. State*, 903 S.W.2d 897, 900 (Tex. App.—Beaumont 1995, pet. ref'd) (" Only upon a showing that an exhibit was tampered with or altered will a chain of custody question affect admissibility."); Brown and Roden, *Texas Rules of Evidence Handbook* at 964-66 (2016). There is nothing in the legislative history of Chapter 64 that suggests an intent to stray from this decades-old jurisprudence. In fact, the bill analysis produced by the House Research Organization anticipated that chain of custody could be established by reports from law enforcement officials. See Texas Bill Analysis at 6, S.B. 3, March 21, 2001.

The law on chain of custody is well described by Judge Keasler in *Druery v. State*, 225 S.W.3d 491, 503 (Tex. Crim. App. 2007). The Court explained that the purpose of chain of custody is to authenticate evidence, establishing that it is what the proponent says it is. *See id.* The Court emphasized that, where the evidence is properly identified, the chain of custody is established "absent evidence of tampering or other fraud." *Id.*[1]

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[1] The use of the phrase "tampering or *other* fraud" is instructive because establishes that fraudulent intent is a component of "tampering." *Druery*, 225 S.W.3d at 503 (emphasis *(cont'd)*

Chain of custody works no differently when it comes to DNA evidence. In *Dossett v. State*, 216 S.W.3d 7 (Tex. App.—San Antonio 2006, pet. ref'd), the Court of Appeals rejected a claim of contamination and correctly applied the law to admit scientifically valid and reliable DNA results. *Dossett* was a cold-case prosecution involving DNA results from a 20 year-old rape kit. *See* 216 S.W.3d at 16. The evidence was visibly contaminated; swabs that contained the defendant's sperm "had fungus, mold, and bacteria growing on them." *Id.* at 21. DNA testing, in turn, revealed other evidence of contamination, including "unknown female DNA on the vaginal slide" and other DNA in control samples. *See id.* at 20.

Holding that the chain of custody was sufficient, the court credited the testimony of the State's DNA expert that the contamination would not "alter the DNA profile" of the samples—presumably, the one matching the defendant. *See id.* at 21. The Court concluded that "at most, Dossett showed only a *possibility* of contamination or tampering, which is insufficient to exclude the evidence" on chain of custody grounds. *Id.* at 21-22; *Stoker v. State*, 788 S.W.2d 1, 10 (Tex. Crim. App. 1989); *Darrow v. State*, 504 S.W.2d 416, 417 (Tex. Crim. App. 1974).

Dossett represents just one example how established law favors admission of evidence absent actual evidence of fraudulent tampering,

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(cont'd from previous page)
added.); *see also* Brown and Roden, Texas Rules of Evidence Handbook at 966 (altered evidence admissible so long as probative value not substantially outweighed by prejudice).

substitution, alteration or other fraud. *See, e.g., Larson v. State*, 488 S.W.3d 413, 421 (Tex. App.—Texarkana 2016, pet. ref'd) (chain of custody sufficient despite evidence that "blue jeans were handled repeatedly by multiple persons before, during, and after trial when there was no contemplation of DNA testing and further have been exposed to water damage due to flooding of the room in which it is stored"); *Richards v. State*, No. 12-13-0320-CR, 2015 WL 3609111, *4 (Tex. App.—Tyler June 10, 2015, no pet.) (delay in collection of evidence from scene "may suggest the possibility of tampering, but does not prohibit admission of the evidence"); *Williams v. State*, No. 2-06-416-CR, 2008 WL 1867979 *11 (Tex. App.—Fort Worth, pet. ref'd) (discrepancy in number of swabs in raped kit not "affirmative evidence" of tampering); *Brown v. State*, No. 04-09-00372-CR, 2010 WL 2772488, at *4 (Tex. App.—San Antonio, July 14, 2010, no pet.) (evidence of punctured baggie suggests only the "*possibility* of tampering").[2]

The Court's prior construction of a related element for DNA testing under Chapter 64 reinforces a strict requirement for affirmative proof. In *State v. Swearingen*, this Court reversed a trial court finding that biological material was present on a certain item

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[2] This same standard was advanced by Assistant Attorney General Tanner, the trial prosecutor in Reed's case in *Hatfield v. State*, 200 S.W.3d 813, 818 (Tex. App.—Texarkana 2006, pet. ref'd); *see also Jackson v. State*, 968 S.W.2d 495, 500 (Tex. App. 1998) (blood stained jeans and resulting DNA test admitted chain of custody objection based on victim's identification of jeans).

of evidence because Swearingen only showed that biological material was "likely" present:

> The only evidence that the cigarettes contained biological material was Ms. Nasir's affidavit stating that it was "likely." Our precedent is clear that the presence of biological material must be *proven*. The appellee has not done so.

State v. Swearingen, 424 S.W.3d 32, 38 n.15 (Tex. Crim. App. 2014) (emphasis in orig.). Where this Court has required affirmative and conclusive proof to meet the biological material requirement in the now-amended article 64.01(a), there would be nothing inappropriate to enforce the well-established requirement that tampering or alteration of evidence be *proven* with affirmative evidence.

B. A "likelihood" of contamination or "doubt" about the integrity of the evidence in Reed's case is not sufficient to defeat chain of custody.

The record in this case lacks ***any*** "affirmative evidence" of material contamination, tampering, alteration or other fraud. *See Druery*, 225 S.W.3d at 503; *Dossett*, 216 S.W.3d at 21.

Although the Court cites the testimony of Bastrop Deputy District Clerk Etta Wiley in support of its rejection of chain of custody, *see* Opinion at 17, its reliance on Wiley's testimony refers only to the uncontested fact that the evidence at issue was stored together in a box. Wiley also testified, however, that the evidence had been safeguarded in the clerk's office and that it had not been tampered with or altered in any way. TR Vol. III at 195-96.

This definitive testimony by the custodian of the evidence that established chain of custody was overlooked in the Opinion and should have been dispositive.

The Court also incorrectly asserted that Reed's own experts conceded that the evidence was contaminated and tampered with. This is simply not true. Paolucci testified on cross examination that there is a "good chance" the evidence stored by the Bastrop District Clerk's Office was contaminated. Opinion at 17. But just as in *Swearingen*, evidence of a "good chance" of contamination does not meet a requirement that tampering or alteration be "*proven*" with affirmative evidence. *See Swearingen*, 424 S.W.3d at 38 n.15; *Dossett*, 216 S.W.3d at 21.

This Court's citation to Lankford's testimony is even more problematic because it had ***nothing*** to do with the evidence actually stored by the Bastrop District Clerk's Office. Instead, Lankford was asked a hypothetical involving a break-in at the lab:

Q. If I went into Orchid Cellmark [the DNA lab] as we speak and I opened a bunch of containers for an active case and I touched it . . . and I provided it to other people to . . . . touch . . . as well, would you say that such evidence has been tampered with at that point?

A. If you go into our evidence room and you take out evidence and you hand it to other people and you touch it, yes, you've tampered with our evidence.

Q, And in fact, I probably materially altered that evidence, too, correct, in that I've left my profile there likely?

A. You – could have left your profile there, yes.

TR Vol. II at 154-55.

First, this hypothetical break in at the DNA lab is not analogous to lawful, routine handling of evidence at trial. *See Druery*, 225 S.W.3d at 503 (requiring affirmative evidence of "tampering or other fraud").

Moreover, the questioner asked if he would "likely" leave his DNA profile; Lankford responded only that he "could have" done so. Lankford's Testimony that contamination is "possible" does not constitute the affirmative evidence of actual tampering or alteration necessary to defeat chain of custody. *See Druery*, 225 S.W.3d at 503; *Dossett*, 216 S.W.3d at 21; *cf Swearingen*, 424 S.W.3d at 38 n.15.

Finally, Assistant Attorney General Lisa Tanner and an investigator with that office testified only to their first hand and uncontroversial knowledge of the handling and storage of the evidence. The investigator was also permitted to testify, over objection, in response to a hypothetical, that the opening of a sealed evidence bag and touching evidence that he had collected would result in the evidence being "contaminated", "materially altered" and "tampered with". TR Vol. III at 185-86. But the investigator's conclusory answers to a hypothetical question did not address the evidence in Reed's case. Because there is no affirmative evidence in the record that the items Reed sought to test were actually contaminated (as opposed to possibly or even

likely contaminated), the Court's determination of chain of custody is inconsistent with the law and the record.

C. The Court failed to consider whether any possible tampering or alterations was "material."

The Opinion erroneously fails to consider the statutory element of the materiality of tampering or alteration. *See* art. 64.03(a)(1)(A)(ii). In concluding its discussion of chain of custody, the Court observes that testimony from Reed's experts "on a suggested approach to mitigate the effect of the evidence's alterations does not undermine" its determination that chain of custody was not established. Opinion at 18. This observation is incorrect; expert testimony concerning mitigation of possible contamination is central to the question of the materiality of any alleged tampering or alteration. If the contamination does not interfere with the ability to obtain reliable and probative DNA test results —and the undisputed evidence at trial here established that it did not interfere —such "contamination" cannot be material. *See Dossett*, 216 S.W.3d at 21 (contamination did not alter DNA profile of defendant).

D. The Court's improper construction of the chain of custody is grounds for reconsideration of the Opinion.

Reconsideration is necessary because the Court's improper construction of the chain of custody element of the statute erroneously excluded from consideration any of the key evidence actually introduced at trial, including the murder weapon, the victim's clothing, and essentially every other item

touched by the murderer. This improper construct infects the entire Opinion and violates Reed's rights under the Texas and United States Constitutions. In particular, the Court's consideration of whether Reed would have been convicted in light of exculpatory results was based only upon items that were ***not*** conclusively associated with the murder. *See* Opinion at 24-25. The Court failed to consider the exculpatory effects of any of the key evidence used to convict Reed, and, moreover, ignored this same body of evidence in assessing Reed's motives in requesting DNA testing. *See infra* at § V.

If this Court does not reconsider its ruling and interpret Chapter 64 in a manner consistent with the plain language and purpose of the statute, it will have violated Reed's due process rights, his right to the due course of law, access to the courts and to a remedy as guaranteed by the Texas and United States Constitutions.

This construction of chain of custody will also have unforeseen consequences beyond Reed's case. In particular, the Court's decision will create insurmountable barriers to access to postconviction DNA testing as well as the admission of valid and reliable DNA evidence offered by the State to convict violent offenders who are connected to years-old crimes through DNA testing. The Opinion will essentially bar DNA testing in most postconviction cases from the 1990's and earlier, where law enforcement and court officials did not handle the evidence in anticipation of testing. The Texarkana court also observed that:

> To allow the State to avoid DNA testing by asserting that the evidence which it has been

> under a statutory mandate to preserve was somehow contaminated through improper handling and storage would essentially allow the State to circumvent Article 64.03 in its entirety.

Larson v. State, 488 S.W.3d 413, 421 (Tex. App.—Texarkana 2016, pet. ref'd). There will be problems for the State and the public as well. It is extremely doubtful, for example, that the construction of chain of custody articulated in the Court's opinion would permit introduction of the valid and reliable evidence which solved a twenty-year old murder in *Dossett*.

II. IRREGULARITIES IN THE DISTRICT COURT PROCEEDINGS VIOLATE THE RIGHTS GUARANTEED TO REED UNDER THE TEXAS AND UNITE STATES CONSTITUTIONS.

Irregularities in these proceedings also warrant reconsideration to avoid violating Reed's rights. In particular, the Court's opinion defers in large part to the findings of the trial court. Some of the findings on which the Court defers were produced after this Court remanded the case to the trial court for additional findings. Both parties submitted proposed additional findings to the Court, but Senior Judge Shaver (the assigned trial judge) inexplicably signed, *ver batim*, the findings submitted by *both* the State and Reed. The State and Reed had proposed opposing findings with respect to, among other elements, chain of custody. After the Court's remand had expired, and the trial court lost jurisdiction, Judge Shaver filed with the Court an undated, oddly formatted letter stating that his signing both proposed findings was an "inadvertent mistake" and

that he meant to "sign and adopt only the Findings of Fact and Conclusions of Law as proposed by the State of Texas." Even if there was jurisdiction for the Court to consider this letter, Judge Shaver provided no explanation for his mistake, and we are left to assume that he merely signed the findings he was given without any review.

In its opinion, the Court gave "almost total deference to the judge's resolution of historical fact issues supported by the record and application-of-law-to-fact issues turning on witness credibility and demeanor." (Opinion at 15.) In other words, as the Court of Appeals noted in *Lawson*, the power to prelude DNA testing rested almost entirely with the State – the State claimed it broke chain of custody by "contaminating" evidence (a term not used in Chapter 64), received total deference from the District Court, who then received near total deference from the appellate court. This irregular procedure is inadequate to protect Reed's due process rights.

III. REED WOULD NOT HAVE BEEN CONVICTED IF EXCULPATORY RESULTS HAD BEEN OBTAINED THROUGH DNA TESTING.

In his Opening Brief, Reed explained that the District Court had misapplied the test for determining whether Reed proved by a preponderance of evidence that exculpatory DNA test results likely would have resulted in his acquittal. (Opening Br. pp. 52-53) The Court appears to agree that the District Court's analysis was incorrect but continues to narrowly define "[e]xculpatory results"

as "only results excluding the convicted person as the donor of this material." (Opinion at 26.)

However, this Court's analysis of the potential "exculpatory results" under Chapter 64 has been inconsistent at best. In *Routier v. State*, 273 S.W.3d 241 (Tex. Crim. App. 2008), this Court held that the analysis of exculpatory DNA results includes both (1) excluding the convicted person and (2) identifying a consistent DNA profile from a third party—that is mixed with the victim's DNA—on multiple items of evidence. *See also In re Morton*, 326 S.W. 634, 641 (Tex. App.—Austin 2010, no pet.) (considering possibility that DNA testing of bandana found away from crime scene contained mixture of victim and third party's DNA). Although the Court purports to apply *Routier*, its Opinion does not reflect even this limited analysis on the truncated list of evidence created by the Court's erroneous chain of custody argument.

For example, the Court discounted the relevance of any DNA results from the beer cans found only yards away from the victim's body and condoms also collected in the vicinity because "Reed cannot establish that the condoms [and] beer cans . . . are connected to Stites's capital murder." Opinion at 27. But there is no dispute that the evidence was collected in relation to this case, *see* Tex. Code Crim. Proc. art. 64.01(b). Further, this Court considered the beer cans at length in Judge Keasler's 2008 opinion denying Reed habeas relief. In the context of Reed's claim that the State violated *Brady* in suppressing DNA results of its testing of the beer cans, the Court acknowledged the existence of a May 13, 1998 DNA report in which the Texas Department of Public

Safety found that Stites and two local police officers could not be excluded from a mixture of DNA on one of the beer cans. *Ex parte Reed*, 271 S.W.3d 698, 713 (Tex. Crim. App. 2008). Reed cannot be blamed for failing to present this important evidence at trial because he never received it. Although the results of this DNA testing are not in the trial record, it is inappropriate and in violation of Reed's constitutional rights to base this Court's denial of DNA testing on assumptions that are contradicted by known facts. *See In re Morton*, 326 S.W.3d 634, 640 (Tex. App.—Austin 2010, no pet.) (considering new evidence regarding composition of semen stain because it "arose in the context of DNA testing".)

The Court's analysis of this limited evidence is further flawed because the DNA testing of the beer cans and the condoms would in itself tie the evidence to the crime. If, as *Routier* requires, the Court assumes that the condom contains a mixture of DNA from the victim and a third party, and that same mixture is detected on the State's samples from the beer cans, it would be powerful evidence corroborating Reed's trial theory that someone else committed the crime. If the third party's DNA matched the DNA profile of Jimmy Fennel (who is certainly in the CODIS DNA database after his felony kidnapping conviction), that would be even stronger corroboration that Fennel killed Stites. These results would be no different from the DNA that exonerated Michael Morton, where a mixture of the victim's DNA was detected on a bandana found away from the crime scene along with that of a known offender Mark Alan Norwood. *See Norwood v. State*, No. 03-13-00230-CR, 2014 WL 4058820, at *1 (Tex. App.—Austin Aug. 15, 2014, pet. ref'd). In fact,

Assistant Attorney General Tanner, counsel for the State in Reed's proceedings, used this evidence to both connect the bandana to the crime and prove Norwood's guilt. *Id.*

The Court's failure to properly apply even the limited standard for "exculpatory results" articulated in *Routier*, is endemic of the Court's unconstitutional construct of Chapter 64 to prohibit consideration of results that actually identify an individual. *See* Opinion at 26 ("Exculpatory result" means only results excluding the convicted person as the donor of this material.). As argued in his prior briefing, this standard runs counter to the very purpose of DNA testing, which is to identify people. The Court need not look farther than the trial record in this case: Reed was convicted based a DNA identification, not an exclusionary result.

By limiting the Court's consideration of exculpatory results to the mere exclusion of the defendant, this Court has set out a standard inconsistent with the manner in which similar statutory provisions have been interpreted by every other court considering the issue[3] and deprives

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[3] *See, e.g., Powers v. Tennessee*, 343 S.W.3d 36, 55 (Tenn. 2011); *State v. Denny*, 2016 WI App 27, ¶ 57, 368 Wis. 2d 363, 393, 878 N.W.2d 679, 693, *rev'd on other grounds*, 2017 WI 17, ¶ 57, 373 Wis. 2d 390, 891 N.W.2d 144; *Hardin v. Commonwealth*, 396 S.W.3d 909, 915 (Ky. 2013) (non-statutory post-conviction DNA motion); *Ohio v. Noling*, 992 N.E.2d 1095, 1105 (Ohio 2013); *State v. Butler*, 21 A.3d 583, 588 (Conn. App. Ct. 2011); *Commonwealth v. Conway*, 14 A.3d 101, 114 (Pa. 2011); *New Jersey v. DeMarco*, 904 A.2d 797, 807 (N.J. Super. Ct. App. Div. 2006); *see also* Miss. Code Ann. § 99-39-11(10) (West Supp. *(cont'd)*

convicted persons of the most persuasive evidence for proving innocence. *See Ex parte Miles*, 359 S.W.3d 647, 666–67 (Tex. Crim. App. 2012); *House v. Bell*, 547 U.S. 518, 548 (2006) (evidence undermining State's case against House would not have proved innocence without other evidence pointing to a different suspect). This limited and arbitrary approach should be reconsidered because it violated Reed's constitutional right to due process, due course of law, access to courts and to a remedy.

IV. REHEARING IS NECESSARY BECAUSE THE COURT'S OPINION RELIES ON TRIAL EVIDENCE THAT HAS BEEN RETRACTED AND TRIAL COURT FINDINGS WHICH ARE CONTRADICTED.

The Court's citation to certain trial evidence raises separate due process concerns. In particular, the Court discounted the exculpatory power of any DNA results by relying on the retracted trial testimony of medical examiner Dr. Bayardo which associated Reed's semen with the murder. *See* Opinion at 29-30. At trial, the State relied upon Bayardo's testimony regarding the condition of sperm to establish the approximate time when Reed and Stites had sex and when Stites was killed. That evidence was crucial to the jury's finding of guilt, and contrary evidence would be powerfully exculpatory, as the Federal District Court previously observed. *See Reed v. Thaler*, 2012 WL 2254217 n.8 ("evidence that Reed and Stites had consensual sex days before

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2014); N.Y. Crim. Proc. Law § 440.30(1-a)(c) (McKinney Supp. 2015).

the murder would have clearly undermined the State's evidence.... [and] provided a credible motive for Fennell to kill
Stites.").

The Court repeats several of Bayardo's recanted trial conclusions, including that Stites died at approximately 3 a.m.; the intactness of recovered sperm indicated a "quite recent" nexus between coitus and her death; and she had suffered apparent anal injuries which were related to a sexual assault by Reed contemporaneous with her death. *See* Opinion at 29-30. Bayardo has unequivocally retracted ***each*** of the foregoing trial statements. As reviewed at length in Reed's pending habeas application and in his prior briefing, Bayardo now states that the evidence indicates that intercourse between Reed and Stites likely occurred more than 24 hours before her death, that such intercourse was consensual, and that his time of death testimony should not have been relied on by the State. *See* Appellant's Brief at 17.

Where the Legislature has consistently expanded access to DNA testing and created a specific remedy for retracted scientific evidence, *see* Tex. Code Crim. Proc. Art. 11.073, there is zero chance that the Legislature anticipated that a court would rely on the same type of retracted scientific evidence to deny access to DNA testing. Even if the Court may not consider new factual evidence to support a showing under article 64.03(a)(2)(A), nothing suggests that the Court may rely upon discredited, recanted and false "scientific" testimony to support a conclusion that an applicant has failed to meet his statutory burden. Such reliance also

violated Reed's due process rights. *Cf, e.g., Ex parte Robbins*, 360 S.W.3d 446, 459 (Tex. Crim. App. 2011) ("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.").

V. THE DNA MOTION IS NOT FILED FOR PURPOSES OF DELAY

The Court should reconsider its decision affirming the trial court's finding of delay because it is inconsistent with the record and attributes bad faith to actions that are equally consistent with an innocent man seeking to prove his wrongful conviction. First, the Court's decision is premised on its assertion that Reed waited until many other avenues of relief were exhausted before seeking DNA testing. Opinion at 35-36. This is not true. Reed sought DNA testing at trial and again in his first postconviction proceeding. *See* Appellant's Brief at 64.

Since that time, the DNA technology has advanced to allow for DNA testing that would not have been considered possible in earlier years. And this Court has itself noted that the criminal justice system, including the undersigned counsel, had generally not kept pace with the advancements in forensic science. It is no coincidence that the request for additional DNA testing came only after the undersigned counsel began working at the Innocence Project and received extensive training on the significant advancement in capabilities of forensic DNA testing.

The mere allegation that DNA testing *could* have delayed Reed's execution, does not address the central question in the Statute—the intent in filing the motion. The record here demonstrates Reed's consistent intent to prove his innocence by all means available, including through DNA evidence. He requested DNA testing at trial and in his early postconviction proceedings. He sought to conduct DNA testing by agreement, a process that would not have entitled Reed to a stay of execution. Especially where this Court's denial comes after more than two years of deliberation, any finding of unreasonable delay is both inconsistent with the record and violates Reed's constitutional right to due process, due course of law, access to courts and to a remedy under the Texas and United States Constitutions.

CONCLUSION AND PRAYER

Appellant, Rodney Reed, respectfully prays that this Honorable Court grant his Petition for Rehearing, set this case for oral argument, withdraw the Opinion and reverse the judgment of the District Court.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 9.4

I hereby certify that this document complies with the requirements of Tex. R. App. Proc. 9.4(i). As calculated by Microsoft Word, there are 4448 words in this document, excluding the portions excepted from the word count by the Rules.

/s/ Bryce Benjet
BRYCE BENJET

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was sent by electronic mail to counsel for the Appellee at their usual e-mail addresses, on the date of the submission of the original to the Clerk of this Court.

/s/ Bryce Benjet
BRYCE BENJET

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

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

DECLARATION OF
ROBERTO J. BAYARDO, M.D.

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

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

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

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

a. The autopsy report on Ms. Stites;

b. My trial testimony;

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

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

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

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

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

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

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

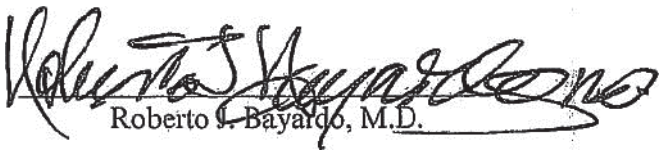
smears taken of Ms. Stites were negative for spermatozoa and seminal fluid. Upon direct examination, I did testify that under a microscope, the rectal smears showed what appeared to be the heads of spermatozoa. However, the smears were insufficient to conclude that spermatozoa were present in the rectum.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

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

to Ms. Stites's anus are certainly consistent with penile penetration, as I testified, but if there was penile penetration, there was lc° ejaculation. I understand that the sexual assault for which Mr. Fennell was convicted did not involve ejaculation. This is consistent with the sexual assault on Ms. Stites. Further, the injuries to Ms. Stites's anus are more consistent with penetration by a rod-like instrument, such as a police baton.

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

Executed on August 13, 2012.



Roberto J. Bayardo, M.D.

AFFIDAVIT OF WERNER U. SPITZ, MD

STATE OF MICHIGAN)
) ss
COUNTY OF MACOMB)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

_____
Werner U. Spitz, M.D.

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

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

Michael M. Baden, M.D.

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10 February 2015

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

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

Re: Stacey Stites, deceased

Dear Mr. Benjet:

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

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

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

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

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

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

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

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

7. Examination of the truck showed that the driver's seat was reclined back and the passenger seat was in a slightly forward position. "Some type of viscous fluid" was found on the passenger-side floorboard. 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.

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

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

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

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

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

Very truly yours,

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

MMB:ph

NO. AP-77,054

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

RODNEY REED,
Appellant,
v.
THE STATE OF TEXAS,
Appellee.

Arising from:

THE DISTRICT COURT
FOR THE 21ST JUDICIAL DISTRICT
BASTROP COUNTY, TEXAS

BRIEF OF APPELLANT RODNEY REED

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ORAL ARGUMENT REQUESTED

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REQUEST FOR ORAL ARGUMENT

This is an appeal from the denial of a Chapter 64 DNA testing motion in a capital case. Appellant Rodney Reed was convicted in 1998 of strangling Stacey Stites to death with a belt. No physical evidence was found on the belt, the victim's outer garments, or any other items recovered at the scene. There were no eyewitnesses, and Reed's conviction was supported only by trace evidence in the form of semen that he and Ms. Stites had had sex – an event Reed admits, and which is not criminal. The State relied on a time of death estimate from the medical examiner, Dr. Roberto Bayardo, and scientific evidence regarding the length of time that sperm remain intact, to argue that Stite's death closely followed coitus, and that Reed therefore was the perpetrator.

The State's theory of the case has since been debunked as junk science by notable experts in the field, and Dr. Bayardo has testified in a sworn statement that the prosecution badly misconstrued his testimony. The evidence shows instead at least a 24-hour gap between coitus and collection of the semen, if not longer. These developments underscore the critical need to DNA test evidence handled by Ms. Stite's killer. Oral argument will greatly assist this Court in understanding the extensive factual record, complex procedural history, and, most importantly, how DNA testing of the murder weapon and other evidence handled by the killer can exonerate Mr. Reed, possibly identify the real murderer, and ensure that justice is done.

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STATEMENT OF THE CASE

This is an appeal from an order entered in a capital case on December 12, 2014 by the District Court for the 21st Judicial District, Bastrop County, Texas (the "District Court"). C.R. at 342-48. Appellant Rodney Reed timely filed his notice of appeal on January 14, 2015. C.R. at 359-69. Appeal from a denial of a Chapter 64 motion in a capital case is a direct appeal to this Court. See Tex. Crim. Proc. Code Ann. art. 64.05 (West 2006).

ISSUES PRESENTED

Issue 1: Whether the District Court wrongly concluded that Mr. Reed failed to prove that exculpatory DNA test results would likely have resulted in his acquittal?

Issue 2: Whether the District Court wrongly concluded that Mr. Reed's Chapter 64 motion was intended to unreasonably delay the execution of sentence or the administration of justice?

Issue 3: Whether Mr. Reed met his burden of showing (a) the presence of biological material on the items which Mr. Reed seeks to test, and (b) the chain of custody for such items?

I.
INTRODUCTION

This is an appeal from the denial of DNA testing in a capital murder case in which the identity of the killer was – and still is – hotly disputed. The murder weapon (a belt) and other evidence that Mr. Reed seeks to subject to DNA testing were handled by Ms. Stites' killer and, if tested, should conclusively exonerate Reed, and may identify the murderer. Reed is scheduled to die on March 5, 2015 for a murder he did not commit.

* * *

Ms. Stites was strangled to death with a belt with such force that the belt broke into two pieces. One piece of the belt was found near Ms. Stites' body, which was discovered along a rural roadside outside Bastrop, Texas. The other piece of the belt was located near a truck owned by Ms. Stites' fiancé, Jimmy Fennell, abandoned ten miles away at the local high school. The belt pieces matched the ligature marks on Ms. Stites' neck and were admitted into evidence at trial. Mr. Reed sought DNA testing of the belt and a tee shirt in 1999, but the court denied the request without a hearing. *See* App. 1[1] (motion requesting testing), App. 2 (State's opposition), and App. 3 (order denying motion).

At the November 25, 2014 DNA testing hearing (the "Hearing"), Mr. Reed presented unrebutted expert testimony that established that

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[1] References to pages in the Appendix filed with this brief are cited herein as "App. __."

the person who handled the belt during Ms. Stites' strangulation and violent death left DNA on it, and that modern sophisticated "touch" DNA analysis of the belt and other evidence could conclusively identify the killer. ***Incredibly, neither piece of the belt has ever been subjected to DNA testing.***

Ms. Stites' body was roughly handled, dressed and dragged after her death. Thereafter, Stites' employee name tag was deliberately placed in the crook of her knee. Mr. Reed presented unrebutted expert testimony establishing that, like the belt pieces, the name tag contains DNA that may conclusively identify the person who placed the tag on Ms. Stites' body. ***The name tag has never been subjected to DNA testing.***

Likewise, the bulk of Ms. Stites' clothing – her pants, underpants, shoes, socks, work shirt, brassiere and a tee shirt found nearby – were likely handled by her killer and contain "touch" DNA. These items also have not been DNA tested (other than testing of small semen stains on portions of the underpants, discussed *infra*).

Law enforcement made a number of egregious mistakes in investigating Ms. Stites' murder. Although Ms. Stites' fiancé Fennell (a local police officer), was the leading suspect for many months, the police inexplicably failed to search the couple's apartment. After quickly gathering several items from Fennell's truck, the police returned the truck to Fennell. He sold it almost immediately. None of the items gathered from the truck were ever DNA tested, including a cigarette lighter that the killer probably handled, as the body of Ms. Stites, a non-smoker, bore a fresh cigarette burn.

Law enforcement placed plastic bags over the victim's hands to capture and preserve any fingernail scrapings, and a condom was also collected. Again, none of these items were subjected to DNA testing.

* * *

There were no eyewitnesses to Ms. Stites' murder, and the State presented no physical evidence – no fingerprints, footprints, hair, clothing fibers or other evidence – placing Mr. Reed at either the abandoned truck or where Ms. Stites' body was found. Instead, the State presented trace amounts of Reed's DNA detected on swabs taken from the body to establish that he and Stites had had sex, and an inference – now discredited as junk science by the State's own chief witness, medical examiner Dr. Bayardo – that estimated Ms. Stites' time of death as shortly after sex. Based on the foregoing, the State argued that Mr. Reed kidnapped, raped and murdered Stites.

Scientific evidence developed in Mr. Reed's post-conviction proceedings conclusively disproves the State's timelines that formed the foundation of its entire theory of the case. Such evidence demonstrates that Reed and Ms. Stites had sex at least a day before her death, and that their sex was consensual, gutting the State's theory of the case.

* * *

The District Court considered Mr. Reed's Chapter 64 motion at the one-day evidentiary Hearing. At the Hearing, Mr. Reed presented unrebutted expert testimony conclusively establishing that DNA was left on the belt, name tag,

and other items sought to be tested, and that the chain of custody as to each was satisfied.

At the conclusion of the Hearing, the District Court denied the motion in a one-sentence ruling from the bench:

> [T]he Court finds that this motion was filed untimely and calls for unreasonable delay, that there's no reasonable probability the defendant would not have been convicted had the results been available at the trial of the case.

R.R. Vol. 4 p. 227. The Court's bench ruling made no mention of the testimony of *any* of the witnesses who testified, and did not follow the statutory standard for DNA testing – the statute contains no timeliness requirement, only that the motion not be filed for the *purpose* of unreasonably delaying execution of judgment.

The State thereafter submitted *ex parte* extensive proposed findings and conclusions which contained *no* citations to the record or governing legal standards. The District Court adopted those findings and conclusions verbatim (typographical errors included) without providing Mr. Reed any opportunity to comment.[2]

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[2] The American Bar Association's Texas Capital Punishment Assessment Team has criticized Texas district courts' practice of the "adoption of one party's proposed findings of fact and conclusions of law verbatim" as "out of step with the overwhelming majority of capital punishment states in the United States." ABA, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report* at xiii (Sept. 2013), available at *(cont'd)*

II.
SUMMARY OF ARGUMENT

The District Court's denial of Mr. Reed's Chapter 64 motion reflects two key errors. *First*, the District Court wrongly concluded that Mr. Reed failed to meet his burden to show that exculpatory DNA evidence probably could have resulted in his acquittal at trial. Mr. Reed presented unrebutted expert testimony that the killer's DNA is present on the belt pieces, name tag, and clothing found on and near Ms. Stites' body. Pursuant to Article 64.03(a)(2)(A) of the Texas Code of Criminal Procedure, the District Court was required to – but did not – presume that DNA testing of these items would show exculpatory results, *i.e.*, that someone other than Mr. Reed handled the belt used to strangle Ms. Stites, her clothing and her name tag. The District Court should have considered whether, in light of this significant exculpatory evidence, the jury would nonetheless have convicted Mr. Reed of Ms. Stites' murder, when the State's evidence showed only that they had had sex, which was in fact consensual. The District Court's conclusion on this point is clearly wrong and should be reversed.

Second, the District Court erroneously adopted the State's proposed findings that Mr. Reed's purpose in seeking Chapter 64 relief was to unreasonably

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(cont'd from previous page)
www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/tx_complete_report.authcheckdam.pdf. The ABA has urged Texas to "[r]equire the district court to draft independent findings of fact and conclusions of law in each case." *Id.* at xiv. *See* App. 4.

delay the execution of his sentence and the administration of justice. In its bench ruling, the District Court applied the wrong standard with respect to delay and made no findings regarding Mr. Reed's purpose in filing the motion, noting only that it was "filed untimely and calls for unreasonable delay[.]"

Mr. Reed's initial post-conviction request for DNA testing was made 15 years ago, in 1999, two years before Chapter 64 was enacted. Mr. Reed subsequently sought testing by consent of the State through a letter sent in January 2014, three months before the State even filed a motion to schedule his execution. After months of negotiations, the State *finally* agreed in part to some DNA testing limited generally to the rape kit items known to contain Mr. Reed's semen and hairs from which he was already microscopically excluded. That agreed order was not finally obtained until a hearing in July 2014, when the State also obtained an execution date. Mr. Reed's Chapter 64 motion was filed at this time, still seven months before his currently-scheduled execution date.

In reaching its findings related to delay, the District Court also ignored the fact that substantial delays in Mr. Reed's post-conviction proceedings (including the DNA motion itself) resulted from *the State's* numerous requests for filing extensions and postponements to accommodate vacation and other scheduling issues. Instead, the District Court accepted wholesale the findings proposed by the State, including the incredible finding that *Mr. Reed's* Chapter 64 motion was intended to unreasonably delay his own as-yet-unscheduled

execution, because one of Reed's attorneys had previously filed a Chapter 64 motion on behalf of a different convicted person in an entirely unrelated capital case. The District Court's conclusion and findings on this point are in conflict with the record and well-established case law and should be reversed.

Moreover, the State's *ex parte* findings (adopted by the District Court) omitted all findings regarding the chain of custody and whether the evidence at issue contained biological material that can be tested for DNA, presumably because Mr. Reed satisfied those elements. Indeed, *the State did not even contest* chain of custody as to evidence in the possession of two of the three custodians (the Attorney General's Office and the Department of Public Safety Crime Lab). With respect to the third custodian, the State's witnesses testified that evidence held by the Bastrop County Clerk had been handled without gloves at the trial by jurors and court personnel, but Reed's experts established that chain of custody was nonetheless complete, *and* that such handling did not preclude probative DNA testing. None of these facts appear in the Findings and Conclusions.

Accordingly, and as further demonstrated below, the Court should reverse the District Court's decision and direct that the belt used to murder Ms. Stites, and the other evidence identified by Mr. Reed that was likely handled by her killer, be subjected to DNA testing.

III.
STATEMENT OF FACTS

A. Background

Mr. Reed has already presented dispositive scientific evidence of his actual innocence in a recently filed application for writ of habeas corpus. *See* Application for Writ of Habeas Corpus, Cause No. WR-50,961-07 (Tex. Crim. App.), filed February 13, 2015 ("Application for Writ of Habeas Corpus"). App. 5. And even before this new evidence was developed, serious questions remained regarding the identity of Ms. Stites' killer, the validity of the scientific evidence used to convict Mr. Reed, and his actual innocence of the crime. Indeed, in deciding a prior matter, this Court noted the facts give rise to "a *healthy suspicion* that Fennell had some involvement in Stacey's death." *Ex parte Reed*, 271 S.W.3d 698, 747 (Tex. Crim. App. 2008) (emphasis added). And, as Mr. Reed established through unrebutted expert testimony, the murder weapon and a considerable amount of other physical evidence that was handled by the killer can now be DNA tested to exonerate Reed and potentially identify the killer's DNA profile.

1. The Murder Of Stacey Stites.

On April 23, 1996, Ms. Stites missed her predawn shift at a Bastrop grocery store. Her mother was called, who then alerted Fennell and police. Ms. Stites' body was found that afternoon near an unpaved road outside Bastrop.

Before Ms. Stites was reported missing, a Bastrop police officer observed Ms. Stites' fiancé's truck in the Bastrop High School parking lot; nearby lay crumpled papers and a broken piece of belt. App.

6.[3] The school is approximately ten miles from where Ms. Stites' body was found. App. 7.

Texas Department of Public Safety ("DPS") Crime Laboratory investigators discovered numerous items at or near the body scene, including a second piece of belt similar to that found near Fennell's truck, an injury to Ms. Stites's neck consistent with the belt, and two beer cans. Karen Blakely, a DPS analyst, examined the body and swabs and tape lifts to recover trace evidence; presumptive tests indicated semen. App. 7. Stites' employee name tag was found placed on her leg on the outside of her pants, which had a broken zipper. R.R. Vol. 2 at 44. Both pieces of the belt, the name tag, and most items located at the body scene or in and around Fennell's truck have *never been tested for DNA evidence*.

2. The Investigation.

Fennell was for months the primary suspect in Ms. Stites' killing, even though the semen found was not his. App. 8. On two occasions, Fennell failed polygraph tests asking whether he strangled, hit or struck Stites.[4] App. 8, 9. During police questioning Fennell repeatedly invoked his Fifth Amendment rights. App. 14.

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[3] Documents at App. 6-16 are excerpts of the Reporter's Record of the trial phase in Cause No. 8701, *State of Texas v. Reed*, Bastrop County, Texas, 21st Judicial District.

[4] Fennell underwent exams in October and December 1996. Both examiners reported that Fennell deceptively answered questions like "did you strangle Stacey Stites," "did you see her on the morning of April 23," and "did you strike Stacey Stites." App. 13.

At Mr. Reed's trial, the State contended it was "logistically impossible" for Fennel to be guilty because he could not have left his truck in Bastrop around 5:00 a.m. and traveled 30 miles back to his apartment in Giddings, Texas by 6:45 a.m., where Stites's mother called him. App. 9, 14. The State inexplicably ignored the possibility that Fennell obtained a ride back to Giddings from associates that appear to have been investigated by the Bastrop Sheriff. *See* Application for Writ of Habeas Corpus at 25-27, App. 5 (discussing investigation of Curtis Davis and David Hall).

Mr. Reed was never investigated as a suspect in Ms. Stites' murder until he was implicated in an unrelated criminal investigation and his DNA was compared with that taken from Stites.

3. The State's Unsupported Scientific Evidence Results In Mr. Reed's Conviction.

Law enforcement conducted some DNA testing during their investigation, focusing on the swabs taken from Ms. Stites' body. They found three of Mr. Reed's intact sperm on a slide taken from Ms. Stites' vaginal cavity. The State then developed a theory of Mr. Reed's guilt premised on a scientific fallacy: that sperm remain intact in the body for no more than 24 hours after sex. The State contended that finding only a few intact sperm on a swab collected on the evening of April 23rd proved that Mr. Reed raped Ms. Stites at or near the time of her murder. App. 16. This false conclusion was bolstered by the medical examiner's testimony that Ms. Stites had been anally raped contemporaneous with her death. *Id.* at 45-46. App. 16. The State also argued that Mr. Reed's DNA

collected from Ms. Stites' breast was saliva from *recent* sexual contact, based solely upon Fennell's uncorroborated testimony that Ms. Stites showered the previous day (App. 16) (arguing "normal people take showers and wash things off of them. [A rape] happened that morning."). The murder weapon (the belt used to strangle Ms. Stites) *was never tested for DNA*.

Mr. Reed's trial counsel did not call a forensic pathologist, criminalist or serologist, but relied only on a DNA analyst who did not substantively disagree with the results of the State's limited DNA testing. The jury therefore was given no alternative to the false impression created by the State's putative forensic evidence, and critically, was deprived of the knowledge of whose DNA appeared on the belt used to strangle Ms. Stites, her name tag and clothing, and other evidence touched by her killer.

Mr. Reed was convicted of capital murder following a trial presided over by the Hon. Harold R. Towslee and sentenced to death by judgment dated May 29, 1998. The Court of Criminal Appeals affirmed on December 6, 2000. *Reed v. State*, No. AP-73,135 (Tex. Crim. App. Dec. 6, 2000).

B. Mr. Reed's Post-Conviction Proceedings

While Mr. Reed's direct appeal was pending, appointed counsel filed his initial state habeas application. Petition for Writ of Habeas Corpus, Cause No. WR-50, 961-01 (Tex. Crim. App.) After the State attached a previously undisclosed exculpatory DNA report to its response, Mr. Reed supplemented his claim and received a limited evidentiary hearing. *Ex parte Reed*, 271 S.W.3d at

739. Reed raised a *Brady* claim relating to the State's mid-trial suppression of an exculpatory DNA report from testing of a beer can found near Ms. Stites' body. The results showed that three people – Ms. Stites; Ed Salmela, a Bastrop police officer;[5] and David Hall, a Giddings police officer (and close friend and neighbor of Fennell) – all were potential matches to the DNA on the beer can. Additional DNA analysis was done regarding the beer can DNA.

In March 1999, during Mr. Reed's state habeas proceedings, he filed a motion seeking DNA testing of the belt used as a ligature and the white tee shirt found near Ms. Stites' body. App. 1. The motion argued that DNA testing was necessary to develop Mr. Reed's habeas claims of actual innocence and ineffective assistance of trial counsel. *Id.* at 2. The motion was supported by an affidavit of DNA expert Elizabeth A. Johnson, Ph.D., Mr. Reed's DNA expert at trial. Dr. Johnson testified that the belt "was not thoroughly examined for the presence of blood, tissue or skin cells that might be present if the belt were used, as believed, to strangle the victim, Stacy Stites." She further stated that "blood, tissue or skin cells foreign to the victim, if found, could indicate the identity of the perpetrator." App. 1, Ex. A ¶ 8. Dr. Johnson also testified that the tee shirt, which had been stored at the State's lab facility, had not been

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[5] Officer Salmela died a few months after Stites was killed from a gunshot wound to the head. His death was determined to be a suicide, despite the fact no testing was conducted to see whether his hands showed gunpowder residue. Mr. Reed moved for such testing but the motion apparently was never ruled upon. *See* App. 24.

tested for saliva, and that she was unable during the trial to conduct such testing there. App. 1, Ex. A ¶ 11. The District Court denied Mr. Reed's testing motion. App. 3.

Thereafter, the District Court adopted the State's proposed findings of fact and conclusions of law and recommended that this Court deny relief on Mr. Reed's state habeas petition. On appeal, this Court then adopted Judge Towslee's decision and determined that Mr. Reed's supplemental claim was procedurally defaulted. *See Ex parte Reed*, No. WR-50,961-01 (Tex. Crim. App. Feb. 13, 2002).

Mr. Reed then commenced a federal habeas proceeding with new counsel. New counsel uncovered additional exculpatory evidence and, as required, obtained a stay of the federal court proceedings so that the new claims could be first presented to the state court in a habeas application, which was filed March 29, 2005.[6] In this application, Mr. Reed presented claims based on new forensic vidence which supported his contention that he had a relationship with Ms. Stites and that the two had sex over a day before her death. Reed also raised claims that the State suppressed exculpatory evidence, including:

- An eyewitness who saw Fennell and Stites arguing by the side of the road on the morning of her death;

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[6] Under established federal habeas law, claims based upon exculpatory evidence discovered post-conviction must generally be presented to the state courts before they may be pursued in federal court. *See* 28 U.S.C. § 2254(b)(1)(A).

- An eyewitness placing Stites in a car on the outskirts of Bastrop with unidentified men the night before she disappeared, at the time when Fennell claimed she was at home and asleep;
- A statement from a police officer who said that Fennell bragged that if he caught his girlfriend cheating, he would strangle her with a belt; and
- Multiple complaints and lawsuits against Fennell alleging racism and physical abuse while on duty as a police officer.

This Court remanded two *Brady* claims for an evidentiary hearing, and found Mr. Reed's remaining claims to be procedurally defaulted. *Ex parte Reed*, No. WR-50,961-03, 2005 WL 2659440 (Tex. Crim. App. Oct. 19, 2005) (mem. op., not designated for publication). The hearing was conducted by the Hon. Reva Towslee Corbett, the daughter of the trial judge who oversaw Mr. Reed's trial.[7] After a hearing, Judge Corbett adopted verbatim the State's proposed findings of fact and conclusions of law, following which Mr. Reed appealed. During the appeal, Mr. Reed filed additional state habeas applications

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[7] Both judges were also involved in the trial and habeas proceedings of Anthony Graves, who was later found innocent and released from death row. Allegations of improper judicial conduct by this father/daughter team are well-known. *See* Lisa Faulkenberg, *Maybe Judge Is Just Dad's Girl*, Houston Chronicle, Feb.16, 2011, http://www.chron.com/news/falkenberg/article/Falkenberg-Maybe-judge-is-just-dad-s-girl-1685509.php). Judge Corbett has since recused herself from further proceedings. App. 17.

raising Fennell's rape conviction and recently filed corruption charges against Bastrop County Sheriff Richard Hernandez. This Court denied relief. *Ex parte Reed*, 271 S.W.3d 698 (Tex. Crim. App. 2008); *Ex parte Reed*, No. WR-50,961-04, -05 (Tex. Crim. App. Jan. 14, 2009); *Ex parte Reed*, No. WR 50,961-06 (Tex. Crim. App. July 1, 2009).

Mr. Reed thereafter filed in federal court his Second Amended Petition (the "Petition"), which restarted his abated federal proceeding. Mr. Reed's federal habeas proceedings were substantially delayed – in total, by more than ***six months*** – due to the State's repeated extension requests. For example, during these proceedings, the State obtained three extensions of time totaling 62 days.[8] Mr. Reed's habeas petition was eventually denied, and the denial later affirmed by the Fifth Circuit. *See Reed v. Stephens*, 739 F.3d 753, 790 (5th Cir. 2014). During the Fifth Circuit proceedings, the State requested and received three more extensions of briefing deadlines, totaling 71 days.[9] Thereafter,

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[8] *See* Unopposed Motion To Extend Time To File Responsive Pleading To Petition filed April 4, 2003 (Docket No. 42); Order On Motion entered April 8, 2003 (Docket No. 43) (granting State a 60-day extension to respond to habeas petition); *see also* Order Granting Motion To Extend Time entered April 28, 2003 (Docket No. 50) (granting State extension to respond to discovery motion). (*Reed v. Thaler*, C.A. No. 02-cv-142, W.D. Tex.). App. 18.

[9] *See* Phone Extension Confirmed entered on August 5, 2013 (granting 30 day extension to file appellee's brief); Unopposed Motion to Extend Time to File Respondent-Appellee's Brief filed on September 3, 2013 and Order on Motion entered September 4, 2014 (granting additional 31 day extension to file appellee's brief); Unopposed Motion for *(cont'd)*

Mr. Reed sought a writ of certiorari from the United States Supreme Court. During the Supreme Court briefing, the State twice requested and received additional time to respond, for a total of 60 additional days.[10] The Supreme Court denied Mr. Reed's certiorari petition on November 3, 2014. By that time, the State had obtained more than six months' of extensions in Reed's federal habeas proceedings alone.

1. New Scientific Evidence Eviscerates The State's Theory Of Reed's Guilt.

Since the trial, the State's key forensic witness – Robert 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. (C.R. 119-122) In addition, three of the most experienced and well-regarded forensic pathologists in the country – Michael Baden, Werner Spitz and LeRoy Riddick – all reevaluated the case and determined that Mr. Reed's guilt is ***medically and scientifically impossible***. These three nationally renowned experts unanimously agree that (1) Reed

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(cont'd from previous page)
Extension of Time to File a Response to Petitioner-Appellee's Petition for Rehearing En Banc and Order on Motion entered February 27, 2014 (granting 10 day extension to file response) in *Reed v. Stephens*, No. 13-70009 (5th Cir. 2013). App. 19.

[10] *See* Order extending time to file response to petition to and including August 20, 2014, entered July 21, 2014 (granting 30 day extension); *See also* Order further extending time to file response to petition to and including September 19, 2014, entered August 19, 2014 (granting additional 30 day extension) in *Reed v. Stephens*, No. 13-1509 (U.S.). App. 20.

did not sexually assault Stites and (2) she was killed much earlier that the 3 a.m. estimate relied upon by the State at trial. App. 5 at 3, 37-48. Indeed, these three individuals, who have more than 100 years of combined expertise, all agree that Stites was murdered before midnight on April 22, 1996 and kept in a face-down position for 4-6 hours before she was transported in Fennell's truck and dragged into the brush where she was discovered lying on her back on the afternoon of April 23, 1996.

Dr. Werner Spitz explained that the observable forensic evidence including "lividity, rigor, the amount of residual sperm in the genital tract, and evidence of decomposition" rendered the State's theory of the case "medically and scientifically impossible". App 5 at 3. Spitz stated that when all those factors were considered together, "it becomes indisputable that the time of death was considerably earlier than 3:00 a.m. on April 23rd", the timing required for the State's theory of the crime to hold true. *Id.* He states instead that "[a]ll findings point to a post mortem interval 20-24 hours prior to the time the body was filmed." *Id.* The State's forensic crime scene examiner was filmed manipulating the body between 7-8 p.m on April 23rd. Thus, the latest Ms. Stites could have been killed was just before midnight on April 22nd, during the time when Fennell – now the only possible suspect – claims he was home with Ms. Stites.

2. New And Mounting Evidence Corroborates Prior Testimony of Reed and Stites' Relationship And Reveals Fennell As An Abuser Of Police Power And A Serial Rapist

Who Stated He Would Kills Ms. Stites If She Were Unfaithful By Strangling Her With A Belt.

In addition to the scientific and motive evidence discussed above, more evidence implicating Fennell in Ms. Stites' murder has emerged since Mr. Reed's **[18]** conviction. This evidence undermines Fennell's uncorroborated alibi that he was home asleep when Ms. Stites was murdered, reveals Fennell as a serial rapist and an unabashed abuser of police power, and provides a disturbingly prophetic account of Fennell discussing how he would kill an unfaithful girlfriend. Constitutional claims based upon much of this evidence have been to date rejected, but there is no question that mounting evidence raises serious doubts about Reed's guilt that could well be resolved through DNA testing before his life is extinguished.

New credible witnesses have come forward to corroborate the fact that Reed had a consensual relationship with Ms. Stites. Alicia Slater, a co-worker of Stites at the H.E.B., state that Stites confided in her that she was "not excited about getting married . . . [and] 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." App. 5 at 5, 55-56. And, Lee Roy Ybarra, another H.E.B. employee, attested to the relationship between Reed and Stites. App. 5 at 57. He stated that when Reed came into the store, Stites' "demeanor would change" and she was "happy to seek him and would be in a good mood." App. 5 at 56. In contrast, when Fennell entered the store, "she would become a nervous wreck . . . there were times Ms. Stites would

deliberately hide so that she didn't have to talk to him." App. 5 at 57.

In addition to these two witnesses, there is further evidence that Fennell publicly stated he would gravely harm Ms. Stites if he discovered that she had been unfaithful. A police academy classmate of Fennell's, Sergeant Mary Blackwell, who witnessed Fennell yelling at Ms. Stites, testified that Fennell said he would kill Ms. Stites with a belt if he discovered she had been unfaithful:

> He said, "If I ever find my girlfriend cheating on me, I'll strangle her." I told him that if he did that he would be caught because he would leave fingerprints. Jimmy then said, "That just goes to show you'll never know shit; I won't leave any prints because I'll use a belt."

Ex parte Reed, 271 S.W.3d at 719, 724.

Fennell wasted no time in mourning Ms. Stites, and began dating again shortly after her death. His next girlfriend described him as abusive, possessive, controlling, and extremely prejudiced toward African–Americans. After the woman ended her relationship with Fennell, he relentlessly stalked her at home and work, and further abused his police authority to harass men she dated. *Id.* at 745-46.

Evidence further implicating Fennell has emerged, in addition to that which this Court has already acknowledged "may indeed arouse a healthy suspicion that Fennell had some involvement in Stacey's death." *Ex parte Reed*, 271 S.W.3d at 747. Fennell was accused of kidnapping and raping two

different woman within the span of one week and while he was on duty.[11] Shortly thereafter, three more women reported that Fennell abused his power as a peace officer to sexually harass and terrorize them.[12] Fennell is presently in prison for sexually assaulting a women he took into police custody, and is now nearing the end of his 10-year sentence. *Ex parte Reed*, Nos. WR-50,961-04, WR-50,961-05, 2009 WL 97260, at *3-4 (Tex. Crim. App. Jan. 14, 2009). See also App. 21.

C. Mr. Reed's DNA Testing Requests And Motion.

1. The State's stalling tactics concerning Mr. Reed's DNA testing requests.

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[11] See Indictment, *State v. Fennell*, No. 07-1752-K368 (368th Dist. Ct., Williamson County, Dec. 4, 2007) (victim reported that Fennell kidnapped her following a domestic disturbance call, drove her to a secluded location and raped her); Police Report attached as exhibit to *Ex parte Reed*, No. WR-50,961-04 (victim reported Fennell strip-searched her in front of other male officers, drove her to a park and raped her.

[12] *See* Police Report attached as exhibit to *Ex Parte Reed*, No. WR-50,961-04 (victim reported that Fennell isolated her from her family following a traffic stop, threatened her, and told her he would come to her home later and expected her husband to be away and her children asleep); *See* Police Report attached as exhibit to *Ex Parte Reed*, No. WR-50,961-04 (victim reported Fennell threatened her by claiming she could have her children taken from her he "could bend her over the couch and 'fuck' her"); Police Report attached as exhibit to *Ex parte Reed*, No. WR-50,961-04 (reporting that Fennell threatened to send a woman to jail and returned later to ask her personal questions about her dating interests and social activities).

On January 13, 2014, Mr. Reed's counsel wrote to the Bastrop County District Attorney requesting the State's agreement for DNA testing through a transparent and collaborative process. *See* C.R. 108-117 (Letter to Bryan Goertz requesting agreed DNA testing). Reed's letter explained that the State would incur no costs from the testing, and that all test results would be shared with the State when released. *Id.* The Bastrop County District Attorney, Bryan Goertz, agreed that DNA testing "should take place in the interests of justice," but referred the matter to the Attorney General's Office.[13] *See* Aff. Of Bryce Benjet ¶ 3, Ex. 1 to Reed's Opposition to State's Motion for Accelerated Appeal filed in this case on Jan. 30, 2015 (herein "Benjet Aff.").

Although the State's initial position was encouraging, negotiations with the State dragged on for more than five months until the State finally arrived at a decision regarding what it would agree to test. Within about two months of Mr. Reed's January 2014 letter, the majority of the evidence which Reed sought to test was either in the Attorney General's possession or had been inventoried by the State in the ensuing month. *See* C.R. 214 (inventory dated 2/14/14 of evidence held at Bastrop County Clerk's Office). Discussions with the Attorney General's Office nonetheless proceeded slowly.

On April 8, 2014, the State filed a motion to set Reed's execution date, while still delaying

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[13] At the time Mr. Reed's letter was sent, he was seeking a rehearing before the Fifth Circuit. The State did not move to set an execution date, for another three months.

resolution of Mr. Reed's long-pending DNA testing request. C.R. 34-35. Mr. Reed's counsel then proposed a stipulated interim order to allow for testing of items which the State agreed to test, while the State continued to consider the remainder. *See* Benjet Aff. ¶ 4. This, too, met with a tardy response. At the end of April, 2014, the Attorney General advised that any agreed DNA testing would be extremely limited, and continued to defer a decision regarding the evidence to be tested on a consensual basis. Benjet Aff. ¶ 5. The Assistant Attorney General insisted that all final decisions on the agreed testing be deferred until his supervisor returned from a lengthy vacation.

The supervisor's return from vacation did not abate the State's delays. Two more months passed before the Attorney General approved the form of stipulated testing order and permitted it to be presented to the District Court. *See* July 14, 2014 Agreed Order, C.R. 144-48. The State insisted that Mr. Reed's execution date be set at the same time, and the District Court acquiesced. C.R. 149-50.

2. Mr. Reed files his DNA testing motion after the State rejects the majority of his testing requests.

Once it became clear that the State would not agree to any meaningful DNA testing, Mr. Reed's counsel prepared a DNA motion, which was filed on the same day. C.R. 74-143. Belying any suggestion of urgency, the State took the full 60-day response period to file its opposition, even though the State had already advised that it would oppose all further evidence testing. C.R. 161. Mr. Reed's counsel sought a prompt hearing on the DNA testing motion

in early October, but no hearing took place until late November 2014, because the State asked to delay the hearing to accommodate another personnel vacation by its staff. Benjet Aff. ¶ 6.

(a) Mr. Reed's DNA Motion Was Supported By Two Affidavits.

Mr. Reed's DNA motion argued that the belt that was used to strangle Ms. Stites, her clothing and name tag, and other pieces of evidence collected from her body, the truck and death scene, should be tested for DNA evidence deposited by the killer during the strangulation.

In support of his motion, Mr. Reed submitted an affidavit[14] from a DNA testing expert, Deanna D. Lankford, M.T. (ASCP), the Associate Laboratory Director at Cellmark Forensics in Dallas, Texas. C.R. 243-54. Cellmark is an accredited laboratory that specializes in forensic DNA testing. C.R. 244, ¶ 2. Ms. Lankford explained that, because of advances in DNA testing technology, Cellmark could now obtain new and relevant information from evidence gathered in the investigation of Stites' murder.

> Modern DNA technology is considerably more sensitive and sophisticated than the testing available in 1998 when Mr. Reed's trial took place and in 2001 when additional DNA testing was performed. Current DNA technology can develop full or partial genetic profiles where DNA methods in use in 2001

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[14] The Clerk's Record contains multiple copies of Lankford's affidavit. Citations herein are to the first copy only.

> and earlier could not. Current DNA technology is sensitive enough to identify an individual's unique DNA profile from a microscopic amount of biological material previously undetected using older methods. Current technology is also designed to develop DNA profiles from poorly preserved or decades-old degraded samples that were unsuitable for testing using the testing techniques available over a decade ago. Likewise, advancements in DNA technology have allowed us to obtain genetic profiles despite the presence of chemicals that in the past would inhibit the DNA amplification process.

C.R. 245-46, ¶ 9. In particular, Lankford stated that DNA testing methods such as Y-STR, Mini-STR and mitochondrial DNA analysis could provide new information if used on the evidence that was gathered in the 1996 murder investigation, and that these methods were not previously available or used on the evidence that Reed sought to have tested. C.R. 246-47, ¶ 10-13.

Moreover, Lankford stated that, to a reasonable degree of scientific certainty, biological material is present on the items Reed seeks to test, because every time someone comes into contact with another human, place, or thing, physical material (trace evidence) is exchanged. C.R. 247, ¶¶ 15-16. She also attested to her certainty regarding the existence of biological material on the evidence Reed seeks to have tested by her review of crime lab and police reports, and photographs of the evidence. C.R. 247, ¶ 15. Ms. Lankford further attested that these

items were either in close and extended contact with a ready source of biological material, or had been forcefully repeatedly handled by a person (the perpetrator) whose shed epithelial cells can be detected and the DNA thereon analyzed. C.R. 248, ¶ 18.

Mr. Reed also filed his own sworn affidavit as required by statute (C.R. 317-18). In this affidavit, Mr. Reed explains the presence of his DNA on the samples taken from Stites's body. He and Ms. Stites met in October or November 1995 and carried on an occasional, mostly clandestine relationship, because both were dating other people. C.R. 317, ¶¶ 2-5. Less than a month before Ms. Stites' murder, Fennell discovered Reed's relationship with Stites; Fennell confronted Reed and threatened him, saying that Reed "was going to pay." C.R. 318, ¶ 6.[15] Upon hearing of the threat, Ms. Stites told Reed that if Fennell caught them, he would kill her. *Id.* Mr. Reed stated that the last time he saw Ms. Stites was very late Sunday, April 21 or very early Monday April 22, and that he and Ms. Stites had sex in Bastrop State Park. C.R. 318, ¶ 7. Mr. Reed further attested that when he heard of Ms. Stites' death, he became afraid that if he told the police of his relationship with Ms. Stites and Fennell's threats, he

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[15] This harrowing account is corroborated by the affidavit of Chris Aldredge that was filed in prior proceedings as well as a note in the investigative files of the Bastrop County District Attorney's Office that indicates a practice in which Jimmy Fennell would ridge along with Curtis Davis in his patrol car. See Application for Writ of Habeas Corpus at 30, n.18 (statement of Carol Stites). App. 5.

would become a suspect or Fennell would retaliate. C.R. 318, ¶ 8. For that same reason, Mr. Reed denied knowing Ms. Stites when he was arrested on a drug charge a year later. *Id.*

(b) Mr. Reed Put Forth Unrebutted Testimony At The Evidentiary Hearing On His DNA Motion.

The District Court held an evidentiary hearing on Reed's DNA Motion on November 25, 2014. At the Hearing, Reed put forth two witnesses, John Paolucci, a former police detective and an expert in crime scene investigation, and Ms. Lankford. (R.R. Vol. 2 at 12-13, 88) Both Mr. Paolucci and Ms. Lankford testified that the evidence that Mr. Reed sought to have tested could and should be tested for DNA to provide evidence of Reed's innocence.

Mr. Paolucci testified that DNA evidence located upon on the belt pieces and other items that the killer touched could reveal the perpetrator's identify and exculpate Mr. Reed. R.R. Vol. 2 at 17-18. Ms. Lankford testified that any item that had been touched has DNA on it. R.R. Vol. 3 at 135. The State did not introduce *any* evidence to refute the expert testimony provided by these two witnesses. R.R. Vol. 4 at 208. Reed's hearing evidence is summarized below.

(c) Items On Ms. Stites' Body.

Photos of Ms. Stites' body show that she was wearing jeans, underwear, socks, bra and a left shoe. R.R. Vol. 2 at 29-38. Her H.E.B. name tag was carefully placed in the crook of her knee. (R.R. Vol. 5, Def. Ex. 5)

The chart below summarizes the testimony regarding the items located on Stites' body, and the basis for DNA testing of each:

DESCRIPTION	CUSTODIAN	SUMMARY OF TESTIMONY
Victim's pants	Bastrop County Clerk	Karen Blakely testified that Stites' pants were pulled off in a violent manner. "this zipper here is broken. It's unzipped, her pants are parted but this zipper is actually broken and there is a tooth from the zipper actually pulled off, it's missing." App. 7. She also testified that Stites had post mortem scratches to one side of her body. App. 7. Wilson Young, the State's forensic serologist noted that he observed stains on Stites' pants. At the

		time, he testified that he believe that they were not of evidentiary value, so they were not tested for DNA. App. 12. Paolucci testified that the perpetrator may have pulled her pants off or redressed her. "In order to drag the victim to the location where she was found, there would have to be a lot of skin cell evidence deposited on the cuffs of the pants or maybe the waistband of the pants to – to move her. As well as the button closure . . . . That's an area where there's going to be some pressure and it's a non-porous

		substrate and skin cells would be scraped off on the button. I think that would be a good – good area to test." R.R. Vol. 2 at 29-30.
Victim's underwear	Bastrop County Clerk	Ms. Blakely testified at trial that Stites' underwear were loose and "baggy". App. 7. Only a stain from the crotch area was tested at trial. App. 12. Paolucci testified that DNA could be collected from the victim's underwear because "if the perpetrator grabbed the waistband inside the panties, he could be depositing epithelial cells there." R.R. Vol. 2 at 33.

Two socks	Bastrop County Clerk	Paolucci testified that the socks found on the victim could contain relevant DNA evidence of the killer, "if the victim was dressed, there's going to be skin cells on the socks. Also, the movement of the vehicle, a sneaker was removed that could – the socks could have been held when the victim's being dragged; so that would be a significant area for – to test for epithelial cells." Paolucci stated that the "upper cuff of the sock that had been pulled on and off" should be tested for DNA evidence. R.R. Vol. 2 at 34-35.
Left shoe	Bastrop	Blakely noted at

	County Clerk	trial that the crime scene investigators noted that it was significant that she was partially undressed and wearing only one shoe. App. 7. Paolucci testified that the left shoe, which was found tied to the body, should be tested for DNA from the perpetrator, "I would test the heel, which would be a convenient area to grab to – to move the victim, the – the toe area of the shoe if the victim's dressed and also the laces." Paolucci stated that these areas should be tested because it appears the victim was dragged. R.R. Vol. 2 at 35-37.

Bra	Bastrop County Clerk	Blakely testified at trial that Stites' shirtless body was carried at least part of the way to the crime scene. App. 7. Paolucci testified that the bra should be tested for DNA evidence because "that could also have – have been used to handle the victim, to move the victim. If the victim had been dressed, the clasp on the bra is another one of those non-porous substrates that would be able to scrape epithelial cells off the person handling it." R.R. Vol. 2 at 37.
Employee name tag	Bastrop County Clerk	Blakely testified at trial that it was "very significant" to the crime scene

		investigators that the HEB name tag was placed in the "crook" of Stites' knee. App. 7. Paolucci stated that the HEB tag found placed on Stites' leg "[b]ecause that would be something that's at the scene where the body was found. It's the – if the perpetrator handled it, he would have deposited DNA on it; and so I consider that highly probative [sic] piece of evidence." R.R. Vol. 2 at 44.
Plastic bags placed over victim's hands during investigation	Attorney General	Paolucci stated that these bags should be tested because "[i]n a struggle, the – the victim could have scratched the

		perpetrator and got skin cells on her hands, on her fingernails, which I understand were very short; that could then be transferred to the bag." R.R. Vol. 2 at 53-54.

(d) Items Found At Crime Scene.

Law enforcement collected but did not DNA test a number of items from the scene where Stites' body was found, including a white tee shirt, two beer cans and a section of woven belt. At trial, Ms. Blakely testified that the white tee shirt was held by someone, and crumpled up to wipe away dirt. App. 7. Also at trial, the section of woven belt was determined to be part of the murder weapon. App. 11. Moreover, at trial, it was determined that the belt had been torn, not cut, indicating that the murderer handled the belt with his hands. App. 10. As stated at page 13, *infra*, the two beer cans found on the roadside near the scene were previously swabbed and tested for DNA using less precise methods than currently available. The results of those tests conclusively excluded Mr. Reed, but Ms. Stites, Officer Salmela, and Officer Hall (a close friend and neighbor of Fennell), all were potential matches to the DNA on the beer can. There is no reason for Salmela or Hall to have been present at the scene when Ms. Stites' body was found. A

condom collected and turned over to police likewise was never tested for DNA of the victim or the killer.

Paolucci testified at the Hearing that the following items contained DNA evidence of the likely perpetrator and should be tested:

DESCRIPTION	CUSTODIAN	SUMMARY OF TESTIMONY
White t-shirt	Bastrop County Clerk	Blakely testified that the t-shirt had been held and "crinkled." App. 7. Paolucci testified that the t-shirt found in the brush near the victim's body should be tested for DNA of both Stites and the perpetrator. "I would test it in the areas that – like the collar, some areas that would be likely to identify the wearer so we can say that this is part of this crime scene; and then I would test it for areas where it

		could have been removed and handled by a perpetrator." R.R. Vol. 2 at 38.
Section of belt (no buckle)	Bastrop County Clerk	Blakeley testified that "on the road, leading towards the crime scene was a link of webbed belt" that was significant "because it matched the pattern that was on the victim's neck." App. 7. Paolucci testified that the belt should be tested "[b]ecause of the corresponding marks to the victim's throat, it would be apparent that the perpetrator handled it and with some degree of force which would cause a rubbing action and a heavy deposit of

		epithelial cells on the belt." R.R. Vol. 2 at 39.
Two Busch beer cans	Attorney General	Paolucci testified that the beer cans were "highly probative evidence" because they were found at the scene "where the victim was found." Paolucci stated he would test "the lip around the opening . . . where the person consuming the beer would be placing their lips, and I would also perform latent print development on the – on the cans – on the bite of each can" and that he would also test the cans for epithelial cells. R.R. Vol. 2 at 46-47.
Swabs/samples taken from mouths of two	DPS Crime Lab	Paolucci stated that these samples should be

Busch beer cans		tested for same reasons as the cans themselves, which are highly probative. R.R. Vol. 2 at 55.
Used condom	Attorney General	Paolucci testifies that the condom, which was recovered by a resident near the crime scene and brought to investigators and taken into evidence, should be tested. "I would recommend testing the outside of the condom because now you would know if this is related to this incident. If it has the victim's DNA on it, then we can say this is related to this incident." R.R. Vol. 2 at 53.
Extract samples from blue condom stored in coin envelope	DPS Crime Lab	Paolucci testified that these samples should be tested for the

		same reasons as the condom itself. R.R. Vol. 2 at 54-55.

(e) Items Found Near And Inside Fennell's Truck.

Several items found near or around Fennell's truck were likely touched by Ms. Stites' killer, but were never DNA tested, including another section of the belt used to strangle Ms. Stites. Mr. Paolucci testified that the belt and other items noted below were observed by crime scene investigators as being out of place and could have been used in the commission of the crime, and are likely to have the perpetrator's DNA on them. Paolucci's unrebutted testimony established that the items found near and inside Fennell's truck should be tested for the perpetrator's DNA, as follows:

DESCRIPTION	CUSTODIAN	SUMMARY OF TESTIMONY
Section of belt with buckle	Bastrop County Clerk	Paolucci testified that DNA evidence collected from this section of the belt should be collected and tested because the killer touched the belt since it was the murder weapon. "The belt was broken; so, being that it's

		also consistent with the – with the other portion of the belt, which is consistent with the marks on the victim's throat, that would have had a significant force applied to break that belt; and also the buckle is a non-porous substrate suitable for DNA." R.R. Vol. 2 at 43.
HEB pen	Attorney General	Trial testimony indicated that the HEB pen was located next to the section of belt found at the truck scene. App. 15. Paolucci stated that the HEB pen that crime scene investigators found on the ground near the truck should be tested because "it can be tied back to the vehicle, and it was also

		handled at some point either recklessly being knocked out of the vehicle or – or dropped." R.R. Vol. 2 at 48-49.
Right shoe	Bastrop County Clerk	Paolucci testified that portions of Stites" right shoe should be tested – the heel, toe and laces areas." "If [the shoe] has been removed from the victim and untied so the laces in those same areas would be probative." R.R. Vol. 2 at 39-40.
Earring	Bastrop County Clerk	Paolucci stated that the earring found in Fennell's truck should be tested because "[b]eing that the backing was found in the victim's hair, it's safe to assume that she was wearing the – an

		earring at the time; and if that earring's ripped out during the struggle, then it could have the perpetrator's DNA on it." R.R. Vol. 2 at 40.
HEB employee shirt	Bastrop County Clerk	Paolucci testified that Stites' work shirt, which was found in the back of Fennell's truck should be tested for DNA because "[i]f it was removed from her during an assault, then it would have the perpetrator's epithelial cells." Paolucci also suggests testing the collar area, the cuffs of the sleeves and the armpit areas of the shirt. R.R. Vol. 2 at 41.
Knife and metal cover	Bastrop County Clerk	Paolucci testified that the knife and metal cover found

		in Fennell's truck should be tested for the killer's DNA because "the victim's knife, if it's something that she would wear on her belt, the belt was removed; so if the knife is – is on the belt, it's also going to be handled by the perpetrator." R.R. Vol. 2 at 41-42.
Pieces of plastic cup	Bastrop County Clerk	Paolucci states that the shattered plastic cup found in Fennell's truck should be tested because "there was a portion of that cup in the driver's seat. It could be that that was broken during the event and then the – it was handled and pushed into the door pocket by the perpetrator." R.R. Vol. 2 at 42.

Brown planner / organizer	Bastrop County Clerk	Paolucci testified that the planner/organizer should be tested for the killer's DNA because it was found in between the passenger and the driver's seat in the cab of the truck. "That was in an area that would have been close to the perpetrator and the operator of the vehicle." R.R. Vol. 2 at 44-45.
Single hair removed from organizer / planner	Attorney General	Paolucci stated that the hair found in the brown planner should be tested because it could belong to the perpetrator. R.R. Vol. 2 at 50.
Green lighter	Attorney General	Paolucci recommends testing the lighter found in the truck because no cigarette butts

		were found in the truck, making it possible that the lighter could have been introduced by the perpetrator. R.R. Vol. 2 at 51-52.
Metal box cutter	Attorney General	Paolucci testified that the box cutter could have been handled by the perpetrator. R.R. Vol. 2 at 52.
Pack of Big Red gum	Attorney General	Paolucci testified that the gum pack could have been handled by the perpetrator. R.R. Vol. 2 at 52.

(f) The State's Evidence Does Not Contradict Reed's Evidence.

The State put forth *no* evidence to rebut Mr. Reed's expert testimony that the items Mr. Reed seeks to test contain biological evidence suitable for DNA testing, or regarding the effect of potentially exculpatory DNA results. Nor did the State contest chain of custody for the items within the possession of the Attorney General's Office and the Department of Public Safety Crime Lab. Instead, the State's three witnesses testified solely about the chain of custody of several items in the custody of the Bastrop County Clerk's Office. The State's witnesses were:

Gerald Clough, an investigator for the Attorney General's Office; Etta Wiley, a criminal deputy clerk for the Bastrop County Clerk's Office; and Lisa Tanner, an assistant attorney general and the prosecutor at Mr. Reed's trial. R.R. Vol. 4 at 176, 190, 196.

With respect to items located at the office of the Bastrop County Clerk, Etta Wiley, Criminal Deputy Clerk, testified that her job is to ensure the integrity of the evidence; she confirmed that the evidence from Mr. Reed's case was kept locked at all times. R.R. Vol. 4 at 195:9-196:19. Ms. Wiley further confirmed that she had no cause to believe any of the evidence items had been materially altered, tampered with, substituted, or replaced. *Id.* at 196:9-19.

Ms. Tanner, one of the prosecutors in Mr. Reed's case, testified that items had been handled at trial without gloves. R.R. Vol. 4 at 199:1-200:8. And Mr. Clough, an investigator for the Attorney General's Office, believed the clerk's office improperly stored the evidence. R.R. Vol. 4 at 184:5-10. However, neither Tanner nor Clough rebutted (nor were they qualified to rebut) Ms. Lankford's expert testimony that such treatment did not preclude effective DNA testing or destroy potentially exculpatory DNA information. R.R. Vol. 3 at 96:13-101:19; C.R. 288-290.

At the conclusion of the Hearing, the District Court denied the motion with a cursory bench ruling that stated, in its entirety:

> All right. After reviewing all the documents that were presented, those in court today, and

> all the evidence and arguments of counsel, the Court finds that this motion was filed untimely and calls for unreasonable delay, that there's no reasonable probability the defendant would not have been convicted had the results been available at the trial of the case. Your motion is denied.

R.R. Vol. 4 at 227:4-11. The District Court's cursory one-sentence ruling thus included no findings involving credibility or motive determinations, nor any comment upon the evidence presented during the day-long Hearing.

On December 12, 2014, the District Court entered Findings of Fact and Conclusions of Law drafted entirely by the State, which were submitted to the court *ex parte* and which contained no citations to the record. Notably, the State's draft – which was adopted by the court verbatim, including a typographical error incorrectly reciting one of the statutory elements – contains *thirteen* paragraphs regarding Mr. Reed's purported "delay" in filing the DNA Motion.[16] Most of these "findings" regarding delay were not based on any evidence presented at the Hearing. Moreover, the State's draft contained no findings regarding the unrebutted expert testimony Mr. Reed presented at the hearing regarding the suitability of the evidence at issue to DNA testing, the likelihood that presumptively favorable testing results would have resulted in Mr.

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[16] Given the sheer brevity of the District Court's bench ruling, the level of detail contained in the state-prepared findings is remarkable.

Reed's acquittal, the chain of custody, Reed's extensive efforts to reach an agreement for consensual DNA testing before filing his motion, or the delays occasioned by the State's repeated extensions of deadlines and briefing schedules. The District Court made no changes to the State's proposed findings before signing it.

The State did not rebut any of the testimony put forth by Mr. Reed at the DNA Motion hearing regarding the probative nature of the items Reed seeks to have tested. Nonetheless, the Findings of Facts adopted by the District Court stated that the exculpatory results of the requested DNA testing would be undermined because some unspecified items were handled by court personnel, certain individuals in the Attorney General's office and jurors. (C.R. 347-348, ¶ 24c) These findings are unsupported; the State presented no scientific expert testimony to refute the testimony of Mr. Reed's well-qualified experts that that effective DNA testing was possible, and that such items *would not* lose their probative value despite having been touched subsequent to their being taken into evidence.

IV.
ARGUMENT

A. Legal Standards and Standard of Review.

1. Chapter 64 Requirements.

Under Chapter 64, a convicted person may seek DNA testing of any "biological evidence that may be suitable for DNA testing" including "blood, semen, hair, saliva, skin tissue or cells, fingernail scrapings, bone, or bodily fluids." *See* Tex. Crim. Proc. Code Ann. art. 64.01(a)(1) (West Supp. 2014).

Such evidence must have been secured in relation to the challenged offense, in the State's possession at trial, and either not previously DNA-tested or capable of being tested with newer techniques that may yield "more accurate and probative" results. *Id.* at art. 64.01(b). DNA testing is mandatory if:

1. the evidence "exists in a condition making DNA testing possible" and "has been subjected to a chain of custody" sufficient to show that it has not been substituted, tampered with, replaced, or materially altered;
2. identity was an issue at trial;
3. the movant more than likely "would not have been convicted if exculpatory [DNA] results had been obtained"; and
4. the request for DNA testing is probably "not made to unreasonably delay the execution of sentence or administration of justice."

Id. at art. 64.03(a)(1), (2) (West Supp. 2014).

There is no burden of proof regarding the evidence's chain of custody, testable condition, and whether identity was at issue; rather, the court must simply make findings on these questions. *Cf. Prystash v. State*, 3 S.W.3d 522, 535 (Tex. Crim. App. 1999) (en banc) (no burden of proof on mitigation special issue in capital cases). The movant bears the burden to prove by a preponderance of the evidence (i.e. 51%) that favorable DNA results could have prevented his conviction, and his lack of intent to cause unreasonable delay. *See Routier v. State*, 273 S.W.3d 241, 257 (Tex. Crim. App. 2008). However,

the movant does not have to show that the test results are actually exculpatory; to the contrary, exculpatory test results (including the identification of a known alternate suspect as the source of the DNA, and the possibility of finding redundant DNA profiles on separate items of evidence) must be presumed. *See In re Morton*, 326 S.W.3d 634, 641 (Tex. App.—Austin 2010, no pet.). The Court must consider all possible exculpatory results, including identification of a known offender through comparison of a DNA profile to the CODIS database. *See Routier*, 273 S.W.3d at 259; *see also* Tex. Crim. Proc. Code Ann. art. 64.035 (West Supp. 2014).[17]

2. Bifurcated Standard Of Review On Appeal.

Appellate review of an order granting or denying Chapter 64 relief is governed by a bifurcated standard of review. Findings of historical fact, credibility and demeanor are entitled to substantial deference on appeal, but all other issues, including the ultimate question of whether the disposition below was correct, are reviewed de novo. *Green v. State*, 100 S.W.3d 344, 344 (Tex. App. —San Antonio 2002, pet. ref'd) (citing *Rivera v. State*, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002)).

In *Smith v. State*, this Court made clear that when a trial court makes findings on a Chapter 64

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[17] As this Court has acknowledged, the 2011 amendments to Chapter 64, including the new requirement to compare DNA results to the CODIS database, warrant a reexamination of prior interpretations of the statute. *See Holberg v. State*, 425 S.W.3d 282, 286 n.24 (Tex. Crim. App. 2014).

motion without a hearing, and such findings are based upon the record of the movant's underlying criminal trial and affidavits, such findings do not involve assessments of the credibility and demeanor of live witnesses, and, therefore, are not entitled to deference on appeal:

> While we defer to the trial court's determination of issues of historical fact and application of law to fact issues that turn on the credibility and demeanor of the witnesses, there were no such issues in this case since there were no witnesses at the hearing and the trial record and affidavit of Appellant are the only sources of information supporting the motion. As a result, the trial court is in no better position and we will review the issues *de novo*.

Smith v. State, 165 S.W.3d 361, 363 (Tex. Crim. App. 2005); *see also Campos v. State*, No. 01-14-00167-CR, 2014 WL 7204966, at *2 (Tex. App.—Houston, Dec. 18, 2014, no pet.) (mem. op., not designated for publication). Although the District Court conducted a hearing in this case, nearly all of the court's findings concerning whether Mr. Reed intended to cause unreasonable delay and whether exculpatory test results might have prevented his conviction were expressly derived from the underlying record of Reed's criminal trial and post-conviction proceedings. C.R. at 344-48, ¶¶ 23-24c. *None* of these 18 numbered paragraphs in the Findings and Conclusions are based upon the testimony of any of the five witnesses who testified at the Hearing. Accordingly, the *de novo* standard of review applies.

B. The District Court Wrongly Concluded That Mr. Reed Failed To Prove That Exculpatory DNA Test Results Likely Would Have Resulted In His Acquittal. (Issue 1).

At the conclusion of the Hearing, the District Court ruled that "that there's no reasonable probability the defendant would not have been convicted had the results been available at the trial of the case." R.R. Vol. 4 at 227:8-11. The court's one-line verbal conclusion contains no findings of fact, identifies *no* relevant evidence, and reflects a fundamental misunderstanding and misapplication of the statutory test.

The State's subsequent proposed written Findings and Conclusions, which the District Court adopted *in toto*, included more details. C.R. 342-348. The written Findings and Conclusions include an "umbrella" finding, C.R. 347, ¶ 24, stating that Mr. Reed "failed to prove by a preponderance of the evidence that he would not have been convicted but for exculpatory results from DNA testing" and several subsidiary paragraphs of findings. C.R. 347-48, ¶¶ 24a-24c.

The District Court's written Findings and Conclusions continue to misapply the applicable standard, in at least two critical ways. First, the District Court incorrectly weighed the "strength" of the State's case against Mr. Reed. It adopted and assumed the correctness of the State's theory at trial that Ms. Stites was killed shortly after having sex with Reed, as shown by the "intactness" of three of Reed's sperm found in her body, because human sperm ostensibly remain intact in such conditions for

no more than 24 hours. However, the court failed to consider the possibility that DNA testing would prove that this trial theory was incorrect. Experts, including Dr. Bayardo, the State's own chief expert at trial, all now agree that the State's "intactness" timing theory is wrong because, as a matter of established science, human sperm can remain intact for several days in such conditions. These sworn expert statements were included in Mr. Reed's testing motion but ignored by the District Court. C.R. 118-142. The District Court's written findings on these and related points are simply wrong, contradicted by the record, and should be reversed.

Second, the District Court erred by applying an improperly narrowed definition of "exculpatory result" which ignored the unique power of forensic DNA testing to actually identify the person whose biological material is detected and instead considered only a scenario in which Reed was excluded as the source of individual samples of biological material. The District Court failed to apply the required statutory presumption that DNA testing of the belt, name tag, victim's clothing and other specified items of evidence at issue would show the presence of the DNA of an alternative known suspect, and the absence of Mr. Reed's DNA, on each item. *See Routier*, 273 S.W.3d at 257 (statute requires court to assume DNA testing of evidence at issue will yield exculpatory results, and then evaluate "whether there is a greater than 50% chance that the appellant's jury would not have convicted her had it been aware of those presumptively favorable test results"). This error of law is reviewed *de novo* and should be reversed.

Instead of following *Routier*, the District Court accepted the State's crafted "futility" test. The court concluded that because the jury was aware that Mr. Reed's "genetic profile" did not match three identified items of evidence, testing *any* of the evidence at issue could not exculpate him. This is the wrong test. Moreover, the District Court simply ignored the fact that the vast majority of the evidence Reed seeks to test is evidence which was handled by the perpetrator and, like the belt and the name tag, but never subjected to DNA testing. DNA test results showing Reed's absence from such items, and the repeat presence of a third party, are more than likely to have resulted in Reed's acquittal.

1. The State's Case Against Mr. Reed Was Highly Circumstantial, Based Upon Now-Debunked Junk Science And Tenuous Inferences, And Did Not Constitute A "Mountain Of Evidence" By Any Measure.

The District Court accepted the State's characterization that its "case on guilt/innocence was strong." C.R. 347 ¶ 24a. As an initial matter, the "strength" of the State's evidence is relevant to the weighing of the exculpatory value to be attributed to DNA test results showing the presence of a third party's DNA at the crime scenes. The presence of a "mountain" of evidence supporting guilt can reduce the exculpatory significance of third party DNA. *State v. Swearingen*, 424 S.W.3d 32, 38 (Tex. Crim. App. 2014) (observing that exculpatory value of third-party DNA at crime scene would not overcome "mountain of evidence" against defendant and denying testing); *Qadir v. State*, No. 02–13–00308–

C.R., 2014 WL 1389545, at *4-5 (Tex.App.—Fort Worth Apr. 10, 2014, no. pet.) (mem. op., not designated for publication) (rejecting possibility of exculpatory effects of possible presence of third party DNA at crime scene where "substantial evidence" supported conviction).

On the other hand, when the State's case on guilt is not compelling (i.e., less than overwhelming), the presence of a third party's DNA at the crime scene may be sufficiently exculpatory as to justify DNA testing. *See Fain v. State*, 2014 WL 6840282, at *6 (Tex.App.—Fort Worth 2014, pet. filed) (mem. op., not designated for publication) (reversing district court and ordering DNA testing of items that could show presence of third party at crime scene where "evidence of Appellant's guilt was far from overwhelming"); *Routier*, 273 S.W.3d at 259 (because "the State's theory [of movant's guilt was] hardly unassailable[,]" presence of third party DNA at crime scene would support movant's intruder theory and "could readily have tipped the jury's verdict in the appellant's favor[;]" vacating denial of testing motion).

As demonstrated below, the District Court's conclusion that the State had a "strong" case against Mr. Reed was premised upon findings that are questionable and, in some instances, flatly wrong. The applicable standard of review is *de novo*. *See State v. Rivera*, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002); *see also Routier*, 273 S.W. 3d at 257; *Smith*, 165 S.W.3d at 363. The District Court's findings on these points are thus entitled to no deference and,

because they are wrong or highly questionable, should be reversed.[18] *See Routier*, 273 S.W.3d at 259-260. As a result, the District Court should have considered that DNA test results that demonstrate the presence of third party DNA at the crime scenes as sufficiently exculpatory evidence as to support an acquittal at trial, justifying DNA testing in this case. *See Fain*, 2014 WL 6840282, at *7; *Routier*, 273 S.W.3d at 259; *Esparza v. State*, 282 S.W. 3d 913, 921-22 (Tex. Crim. App. 2009).

2. The Circumstantial Evidence Cited By The District Court Does Not Support Its Findings.

The District Court found that the State's case against Mr. Reed was "strong" partly based on two items of highly suspect circumstantial evidence: (i)

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[18] Paragraph 24a of the District Court's Findings and Conclusions states as follows:

> The State's case on guilt-innocence was strong – Movant's DNA was found both on and inside the victim, which demonstrated presence; the intactness of Movant's sperm inside the victim's vaginal cavity, the perimortem injuries to the victim's anus, Movant's saliva on the victim's breasts after she took a shower the evening before her murder, and the small amount of semen in the victim's panties demonstrated sexual assault contemporaneous with murder; the peri-mortem injury to the victim's anus the obvious signs of sexual assault – the victim's bunched up panties, a broken pants zipper, partially unclothed, bruises to the arms, torso and head of the victim – demonstrated lack of consent; and additional evidence indicated that Movant frequented the area of the victim's disappearance at the time the victim disappeared and the Movant matched the height of someone who would have fit the adjusted seat in the victim's truck. C.R. 367, ¶ 24a.

the fact that Reed "matched the height of someone who would have fit the adjusted seat in the victim's truck" (C.R. 347, ¶ 24a); and (ii) the finding that "Movant frequented the area of the victim's disappearance at the time the victim disappeared." The court's characterization of these findings as "strong" evidence of Reed's guilt is unwarranted and both ignores and mischaracterizes contrary record evidence.

First, there is no evidence supporting the reliability of the State's "seat adjustment/mirror test" of height. The record is silent as to whether Fennell, could have seen through the mirror or if differences in posture could have affected visibility through the mirror. And even were this Court to entertain the absurd notion of resting a capital murder conviction on speculation arising from the adjustment of a seat and rear view mirror, *three* of Fennell's friends and fellow police officers – David Hall, Ed Salmela, and Curtis Davis – were each at least six feet tall.[19] C.R. 318; App. 22. Two of these persons – Hall and Salmela – were likely present at Bluebonnet Road where Stites' body was dumped, according to DNA tests conducted on a beer can found near her body. *See supra* at 12.[20] By contrast, ***no*** evidence was

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[19] See Petition for Writ of Habeas Corpus, p. 10 in *Ex Parte Reed*, WR-50, 961-04 (Tex. Crim. App. 2003)

[20] The presence of Officers Hall and Salmela on Bluebonnet Road at the time Stite's body was dumped could explain how Fennell returned to his apartment the morning Stites was reported missing. It could also indicate that Hall and Salmela dumped the body without Fennell, avoiding any need for Fennell to rush back to his apartment.

found that Reed was at that location (or anywhere near the truck).[21] Plainly, the seat positioning in Fennell's truck is just as consistent with the corroborated presence of Fennell's cohort David Hall as it is with the uncorroborated presence of Reed, and is therefore far from "strong" evidence of Reed's guilt.

Second, no witnesses testified as to the location where Stites actually "disappeared" or to having seen Reed at such time. All the State showed at trial was that Stites commuted 30 miles to work on occasion via a route that passed through Reed's Bastrop neighborhood (along with hundreds of other people) where he was known to walk. App. 16. However, new scientific evidence presented in Reed's recently filed habeas application demonstrates that Ms. Stites was murdered hours before she would have left Giddings to go to work. This, too, is far from "strong" evidence of guilt.

3. The District Court's Finding Regarding "Presence" Is Ambiguous And Should Either Be Clarified Or Reversed.

The District Court's finding of Mr. Reed's "presence" (based upon DNA taken from Ms. Stites' body) is ambiguous. "Presence" may have been intended to mean that Mr. Reed had sexual contact

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[21] No physical evidence of any kind established Mr. Reed's presence in the truck or at the Bluebonnet Road site – no eyewitness saw him, and no fingerprints, palm prints, DNA, clothing, fibers, or other evidence from Mr. Reed were found at either location.

with Ms. Stites at an unspecified prior point in time. If that is what the court meant, this finding is not disputed.

If, however, the District Court intended "presence" to mean that Mr. Reed was present *at one of the crime scenes at the time of Ms. Stites' death*, the finding is clearly wrongful and should be reversed. The record of Mr. Reed's case is replete with sworn expert declarations adduced during Mr. Reed's habeas proceedings conclusively demonstrating that the State's timing theory is not correct because sperm can remain intact in a woman's vagina for three days or more after sex.[22] C.R. 119-42 Indeed, even the State's own chief witness on this point at trial, medical examiner Dr. Roberto Bayardo, agrees. In his sworn habeas declaration, Dr. Bayardo disavows the theory that the time of Stites' death was at or shortly after the time when she and Reed had sex.

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[22] The District Court's Findings and Conclusions state that they are based upon consideration of "the record in this [Mr. Reed's] case." C.R. 342. Consideration of the trial and post-conviction record is permitted under the doctrine of judicial notice. *Routier v. State*, 273 S.W.3d 241, 244 n.2 (Tex. Crim. App. 2008). As in the *Routier* case, District Judge Doug Shaver was not the judge that presided over Mr. Reed's trial, and his reference to consideration of "the record" necessarily reflects judicial notice. *Id.* Such consideration is further consistent with Chapter 64's requirements that a movant seeking DNA testing provide affidavits alleging facts in support and that the movant establish by a preponderance that favorable DNA test results likely would have resulted in an acquittal. *See* Tex. Code Crim. Proc. arts. 64.01(a-1) *and* 64-03(a)(2)(A). Had the Legislature intended to confine judicial consideration of facts in support of Chapter 64 relief to the trial court record, it would have expressly done so.

C.R. 120. And, as noted above, no physical evidence of any kind placed Mr. Reed at either crime scene at any point in time. The District Court's finding of "presence" thus is utterly ambiguous and should be reversed or at least clarified to state that Mr. Reed had sexual contact with Ms. Stites at an unspecified point in time before her death. In either case, the finding does not constitute "strong" evidence against Mr. Reed.

4. The District Court's Finding Regarding Time Of Death Was Based Upon Unreliable Testimony That Has Either Been (i) Debunked By The Prosecution's Own Witness And Other Experts, Or (ii) Was Given Solely By Jimmy Fennell, Who Was Strongly Incentivized To Lie To Avoid Prosecution.

The District Court found "strong" evidence that Mr. Reed was physically present with Ms. Stites at the time of her death based in part upon "the intactness of Movant's sperm inside the victim's vaginal cavity" and semen found in her panties. C.R. 347, ¶ 24a. For the same reasons described in the preceding section, the State's contemporaneous timing theory is wrong as a matter of science, clearly erroneous, and should be reversed.

The District Court's "timing" finding was also based upon a separate temporal conclusion: that Mr. Reed's DNA, taken from saliva found on Ms. Stites' breast, was deposited *after* she had showered the evening before her death. (C.R. 347, ¶ 24a) The District Court ignored the unreliability of this evidence. The *only* evidence that Ms. Stites

showered on April 22, 1996 – and, thus, the only evidence of the time when the saliva and DNA were deposited – was Jimmy Fennell's uncorroborated trial testimony. App. 8. As noted, Fennell was the lead suspect in Stites' murder for more than a year, the person with the greatest possible incentive to lie, and twice failed lie detector tests when asked by investigators about having harmed Stacey Stites.[23] *See* pp. 10-11, *supra*. These facts and others, as this Court previously observed, give rise to a "healthy suspicion" that Fennell, not Reed, was the perpetrator, and greatly undermine the District Court's weighing of this evidence. This Court's *de novo* review of the District Court's findings should therefore recognize these material infirmities in the State's evidence and reverse the District Court's conclusion that the State's evidence on timing issues was "strong." *Cf. Routier*, 273 S.W.3d at 259 (holding that the State's theory was "hardly unassailable" and that the State's circumstantial evidence was "not so compelling that the jury would more likely conclude beyond a reasonable doubt" appellant's guilt); *Fain*, 2014 WL 6840282, at *1, *6 (discounting strength of state's case based upon "purchased and suspect" testimony of jailhouse informant with personal incentive to provide evidence of defendant's guilt and ordering DNA testing).

5. The District Court's Finding Of Stites' Apparent Lack Of Consent Does Not Implicate Mr. Reed.

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[23] Not surprisingly, these facts are notably missing from the District Court's Findings and Conclusions.

The District Court also made a finding regarding the broken pants zipper, appearance of Stites' underwear, and bruises to her body, characterizing them as "strong" evidence that Stites did not consent to sex. C.R. 347, ¶ 24a. These findings are misleading, and are not evidence of Reed's guilt – no DNA, fingerprint, or other evidence established that *Reed* (as opposed to someone else) broke the zipper, pulled the underwear, or caused bruises. There is no dispute that Ms. Stites did not consent to her strangulation or to the dragging of her body into the brush. The bruises and condition of Stites' clothing are simply evidence of the murder. Moreover, as Dr. Bayardo and other experts have stated under oath, there is no evidence that the sexual contact between Mr. Reed and Ms. Stites was non-consensual. C.R. 121, ¶ 6, C.R. 127, ¶ 21.

Finally, the District Court's reliance on the condition of the pants and underwear highlight the critical need in this case to subject these items to DNA testing, precisely because (as the District Court implicitly recognized), the person that killed Ms. Stites likely handled these items and left identifiable DNA on them. *See* pp. 27-35, *supra*. Absent such readily available and definitive DNA test results, it is clear error to characterize these items as "strong" evidence (or indeed as *any* evidence) of Mr. Reed's guilt.

For these reasons, this Court should reverse the District Court's finding that the State's case against Mr. Reed was "strong" and should hold that DNA test results which might show the presence of DNA at the crime scenes that does not belong to Mr.

Reed is sufficiently exculpatory to justify DNA testing in this case.

6. The District Court Misapplied The Test For Determining Whether Mr. Reed Proved By A Preponderance Of The Evidence That Exculpatory DNA Test Results Likely Would Have Resulted In His Acquittal

Under established law, the District Court was required to engage in a two-step analysis to determine whether Mr. Reed had met his burden under Article 64.03(a)(1)(B) and (2)(A) to show that exculpatory DNA test results could have changed the outcome at his trial.[24] First, the court must presume that DNA testing will yield favorable (i.e., exculpatory) results, and cannot weigh the likelihood that favorable results will in fact be obtained if testing is authorized. *See In re Morton*, 326 S.W.3d 634, 641 (Tex. App.—Austin 2010, no pet.); *Routier*, 273 S.W.3d at 257. Second, the court must then consider whether such presumptively favorable results, if presented at trial, would have made it more likely than not (*i.e.*, greater than 50% likelihood) that a conviction would not have been obtained. *See id.*

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[24] Approximately 50% of all DNA exonerations result in the identification of the real perpetrator. *See* Innocence Project, Know the Cases, http://www.innocenceproject.org /know/ (last visited February 14, 2015). 52 of the 325 cases in which DNA testing has resulted in exoneration involved persons convicted in Texas, more than any other state. *Id.* App. 23. (follow "National View" hyperlink).

7. The Statutory Presumption Of Exculpatory DNA Test Results.

As this Court recognized not long ago in *State v. Swearingen*, the text of Chapter 64 "does not set a standard for exculpatory results." 424 S.W.3d 32, 39 (Tex. Crim App. 2014). Cases from this Court and the Court of Appeals have developed standards as to the meaning of the phrase. In a leading decision under Chapter 64, *Blacklock v. State*, 235 S.W.3d 231 (Tex. Crim. App. 2007), this Court examined the nature of exculpatory results for which Chapter 64 testing should be granted. In *Blacklock*, the defendant had been convicted of aggravated robbery and aggravated sexual assault stemming from the same incident. The victim knew the defendant and identified him as her attacker. The State presented vaginal smear analysis to show that a sexual assault had occurred, but DNA testing of such evidence was inconclusive. Semen was also detected on the victim's clothing, but the clothes were not subjected to DNA testing. Years later, Blacklock later moved to DNA-test the clothing. This Court approved DNA testing and explained that DNA tests of the clothing that showed the semen donor was not Blacklock would be directly exculpatory, and that this was "precisely the situation in which the Legislature intended to provide post-conviction DNA testing." 235 S.W.3d at 232-33.

Blacklock was a sexual assault case in which the defendant denied having sex with the victim; as a result, DNA results that proved the semen was not his would plainly exclude him as the perpetrator and, thus, be exculpatory. The Court was not asked to consider and did not address whether DNA evidence

showing the presence of a third party at a crime scene could also be exculpatory.

In subsequent cases, courts have clarified that "exculpatory results" may include results that identify the presence of third party DNA at a crime scene as well as those which exclude the defendant. For example, in a subsequent sexual assault case, the Court permitted DNA testing of a rape kit and the victim's clothing despite eyewitness testimony identifying the defendant and circumstantial evidence. *Esparza v. State*, 282 S.W.3d at 921-22. The Court rejected the State's argument that DNA testing in that case showing the presence of third party DNA could not be exculpatory. *Id.* at 922.

In *Routier*, the State argued that exculpatory DNA results could not undermine the evidence of guilt presented at trial:

> The State argues that the presence of an unknown person's DNA could not have changed the jury's verdict because "it would not refute the evidence physically linking appellant to the murders and to the manipulation of the evidence at the scene. At a minimum, appellant would undoubtedly have been convicted as a party."

273 S.W.3d at 259. The Court rejected the State's argument, and held that DNA results implicating an unknown offender –intruder would corroborate the defendant's contention that someone else committed the murder and thereby create at least a 51% likelihood that the jury would not have convicted. *Id.*

In *Fain v. State*, the court reversed a decision denying testing where the evidence sought to be

tested could show third party DNA at the crime scene. The *Fain* court observed that the state's evidence of guilt was "far from overwhelming," 2014 WL 6840282, at *6, and, further explained:

> Evidence that exculpates the innocent and ties the guilty to [the victim] at the time of her death cannot be held to merely "muddy the waters." If the contributor of the untested hair in [the victim's] hands is identified, for the first time in this case, we would know whether Nix, Appellant, or the unidentified male was with [the victim] at the time of her death when she pulled hairs from his head. Additionally, identifying DNA other than [the victim]'s in the blood on the bathroom faucet handle would be compelling evidence of the identity of the assailant, since the bleeding neck injury necessarily connects to [the victim]'s death.

Id. at *8. These cases thus make clear that in a case like this one, where the killer's identity is hotly contested, where there is no proverbial "mountain" of evidence establishing the defendant's guilt, and where a sizable number of evidence items were touched by the perpetrator but not tested, the court has much greater discretion to treat DNA test results that may identify those physically present with the victim at the time of death as verdict-changing exculpatory evidence.[25] *See id.*; *Routier*, 273 S.W.3d at 259-260.

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[25] *But see State v. Swearingen*, 424 S.W.3d 32, 38 (Tex. Crim. App. 2014) (noting in *dicta* that prior decisions have "held 'exculpatory results' to mean *only* results 'excluding [the convicted person] as the donor of this material" (alteration in *(cont'd)*

It is also clear that the District Court was required to consider all exculpatory results, including the identification of a known alternate suspect, and the possibility of finding the same third party DNA on separate items of evidence (i.e., a "redundant" DNA profile). *See Routier*, 273 S.W.3d at 259. Because Chapter 64 now requires that the results of court-ordered DNA testing be cross-referenced against state and federal DNA databases of known offenders, the possibility that the perpetrator could be identified through such database comparison as a known offender should also be considered. See Tex. Crim. Proc. Code Ann. art. 64.035 (West Supp. 2014) (amended in September 2011).[26] The exculpatory ramifications of post-conviction DNA identification of a third party perpetrator are well-documented in Texas law, and should inform this Court's

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original) (emphasis added) (quoting *Blacklock v. State*, 235 S.W.3d 231, 232 (Tex. Crim. App. 2007)). *Swearingen* relied upon the *Blacklock* decision for this proposition, but as noted above, the question of whether the presence of third party DNA at a crime scene could be viewed as exculpatory for Chapter 64 purposes was not presented in *Blacklock*.

[26] This Court previously rejected a similar argument in *dicta* while acknowledging that the statute fails to set a standard for exculpatory results. *See Swearingen*, 424 S.W.3d at 39; *see also* n. 24, *supra*. More recently, the Court has recognized the need to reexamine its prior interpretations of Chapter 64 in light of the 2011 amendments. *See Holberg v. State*, 425 S.W.3d 282, 286 n.24 (Tex. Crim. App. 2014) (noting without deciding that "this amendment to Article 64.01(a) [may] operate[] to lessen the burden on Chapter 64 movants to prove the existence of biological material within the items they seek to have tested").

consideration in this case. *See, e.g., Ex parte Michael Morton*, No. AP-76663 (Tex. Crim. App. Oct. 12, 2011) (habeas relief granted where DNA results linked third party offender to crime); *Ex parte Phillips*, No. AP-76010, 2008 WL 4417288, at *1 (Tex. Crim. App. Oct. 1, 2008) (per curiam) (not designated for publication) (granting habeas relief after post-conviction DNA testing and investigation showed someone else committed at least one of the offenses of which defendant had been convicted); *Ex parte Giles*, No. AP-75712, 2007 WL 1776009, at *1 (Tex. Crim. App. June 20, 2007) (per curiam) (not designated for publication) (granting habeas relief in rape case where post-conviction DNA evidence and investigation indicated that someone other than defendant committed crime); *Ex parte Karage*, No. AP-75253, 2005 WL 2374440, at *1 (Tex. Crim. App. Sept. 28, 2005) (per curiam) (mem. op., not designated for publication) (granting habeas relief after semen and spermatozoa recovered from victim matched convicted offender in CODIS).

8. The District Court Failed To Apply The Required Presumption That DNA Test Results Would Be Exculpatory.

Had the District Court correctly applied the statutory presumption of exculpatory DNA test results, it would have presumed that such testing would reveal the DNA of an alternative known suspect, and the absence of Mr. Reed's DNA, on the evidence Reed seeks to test (i.e., the belt used to strangle Ms. Stites, the victim's name tag, her clothing, fingernail scrapings, and other evidence very likely handled by her killer). Acting properly,

the District Court would have then asked whether the jury would likely have harbored a reasonable doubt as to Reed's guilt in light of (i) the total absence of any evidence placing Reed in the truck or at the Bluebonnet Road location, and (ii) the evidence showing that Reed and Stites had sex before her mother last saw her. *See Routier*, 273 S.W.3d at 259 ("We think that adding DNA evidence that would corroborate the appellant's account of an unknown intruder into the evidentiary mix could readily have tipped the jury's verdict in the appellant's favor."); *Fain*, 2014 WL 6840282, at *8 (holding that it would be unlikely for a jury to convict appellant if DNA tested "excluded Appellant as the donor"); *In re Morton*, 326 S.W.3d at 645 (finding a greater than 50% likelihood that jury would have had a reasonable doubt that movant was the murderer if a bandana contained victim's blood and DNA of another person).

The District Court misapplied the statute. It failed to consider or identify presumptively favorable DNA test results for ***any*** of these items of evidence, and consequently failed to evaluate whether Mr. Reed had shown a likelihood of not being convicted if such presumed results had been presented at trial. Instead, the court substituted its own flawed "futility" analysis, assuming – without any citation to the underlying trial record – that the jury had been made aware that Mr. Reed's "genetic profile" was not found on three specified items (certain hairs and fingerprints, *see* C.R. 347 ¶ 24b), and, inferentially, that DNA testing of these or any other items could yield no further exculpatory results of value.

The District Court's substitute test was artificially constrained, and did not conform to the

well-established test articulated in this Court's jurisprudence. The court's conclusion should therefore be reversed. *See Routier*, 273 S.W.3d at 259.

First, the court did not consider the exculpatory ramifications of the body of evidence which Mr. Reed seeks to test as a whole. The jury was informed by the State that Ms. Stites was strangled to death with the belt, and that her name tag was placed upon her body after it was dressed and dragged. Had the jury been informed that Reed's DNA was not present on *any* of those items – and to be clear, the jury was *not* so informed – Reed 's showing that the jury likely would not have convicted him probably would have been sufficient. The court should have considered together the likely effect on the jury of favorable DNA results from the belt, name tag, victim's clothing and other items of evidence that Reed seeks to test.

Further, because the State's case was not "strong," as discussed *infra*, the court should also have considered the effect on conviction if the jury had been advised that a redundant DNA profile of a third party (either a known alternate suspect, such as Fennell, Hall or Salmela, or another person) was found repeatedly on items that were handled by her killer. *Cf.* R.R. Vol. 2 at 74-75; *Fain*, 2014 WL 6840282 at *8; *Routier*, 273 S.W.3d at 259. Even as to the three specified items which the court did consider, it failed to consider the effect on the jury had those items yielded a consistent redundant DNA profile of a known alternative suspect, such as Fennell, Hall, or Salmela. The presence of any of their respective DNA on the three items in question –

especially Hall, whose presence at the body location was corroborated (but not explained) by his DNA taken from the beer can – would persuasively support Reed's claim of innocence.

Moreover, there is no question that the jury did *not* hear testimony that Mr. Reed's DNA was absent from those materials; including, but not limited to, the belt, the name tag, the victim's clothing, and the beer cans. The court's contrary conclusion in Paragraph 24b that "the jury knew that many of the items Movant seeks to test were not from him" is simply wrong as a matter of fact and should be reversed. It is also unclear what the District Court's reference to Mr. Reed's "genetic profile" was intended to convey. If the court intended the phrase to refer to Reed's DNA, the finding is clearly erroneous, as it is undisputed that these items were not DNA-tested.

C. The District Court's Conclusion That This Motion Was Brought For The Purposes Of Delay Is Not Correct (Issue 2).

Mr. Reed presented evidence and argument to meet his statutory burden under Article 64.03(a)(2)(B) to show that he did not intend to cause unreasonable delay in the execution of sentence or administration of justice. *Despite having agreed to conduct some DNA testing of evidence*, the State nonetheless devoted the vast majority of its briefing and oral argument to this issue. The District Court found that Mr. Reed "failed to prove by a preponderance of the evidence that his Chapter 64 motion is not made to unreasonably delay the

execution of sentence of [sic] administration of justice."[27] C.R. 344, ¶ 23. This umbrella finding was followed by 13 individual subsidiary paragraphs listing the grounds upon which the court's finding was based. C.R. 344-47, ¶¶ 23a-m. In fact, all but three of the findings of fact centered around Reed's purported delay in filing the DNA Motion. *Id.* As set forth below, the District Court's conclusion and subsidiary findings on this issue are entitled to no deference on appeal, are plainly wrong, and should be reversed.

1. The Standard Of Review

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[27] The statute's text provides "execution of sentence or administration of justice." Tex. Crim. Proc. Code Ann. art. 64.03(a)(2)(B) (West Supp. 2014) (emphasis added). The typographical error noted was contained in the State's *ex parte* draft findings and conclusions, which the District Court adopted without change. The problems resulting from a trial court's verbatim adoption of one party's findings are well documented. *See Anderson v. City of Bessemer*, 470 U.S. 564, 572 (1985) (criticizing "verbatim adoption" of proposed findings, particularly "conclusory statements unsupported by citation to the record," noting the "potential for overreaching and exaggeration" by the prevailing party, and evaluating whether judge "uncritically accepted findings" entirely); *In re Luhr Brothers*, 157 F.3d 333, 338 (5th Cir. 1998) (noting that "near-verbatim recitals of the . . . proposed party's proposed findings . . ., with minimal revision" should be approached with "'caution'" (citation omitted)); *Marine Shale Processors, Inc. v. U.S. Envt'l Prot. Agency*, 81 F.3d 1371, 1386 (5th Cir. 1996) (discouraging practice of wholesale adoption of findings and conclusions: "[w]e tolerate the occasional use of this device because of our trust that district courts will closely examine the proposed findings and will carefully consider the objections and arguments of the opposing party").

The standard of review of the District Court's Findings and Conclusions regarding whether Mr. Reed intended to cause unreasonable delay under Article 64.03(a)(2)(B) is either the substantial deference standard or the *de novo* standard, depending on whether the court's findings and conclusions were based upon historic facts, determinations of the subjective credibility and motive of witnesses (in which case the substantial deference standard applies), or upon facts that are neither "historic" nor dependent upon the credibility or motive of witnesses (subject to *de novo* review). *See Skinner v. State*, 122 S.W.3d 808, 811 (Tex. Crim. App. 2003). Here, the District Court's findings concerning Mr. Reed's ostensible intent to cause unreasonable delay were not based upon the credibility or motive of Mr. Reed, any testifying witness or any historical facts relating to Ms. Stites' murder. Instead, the court's findings all constitute inferences which the court drew in error from its interpretation of the record of Mr. Reed's post-conviction proceedings and the record in an entirely separate, unrelated action involving another death row inmate, Larry Swearingen, who is also represented by one of Reed's attorneys. The District Court's findings on this issue are therefore subject to the *de novo* standard. *See Smith v. State*, 165 S.W.3d 361, 363 (Tex. Crim. App. 2005) (because trial court is no better suited to interpret record than appellate court, its record-based findings are reviewed *de novo*).

2. Mr. Reed's Motion Does Not Reflect An Intent To Cause Unreasonable Delay In The Execution Of Sentence Or The Administration Of Justice

Chapter 64 contains no deadline for the filing of a motion, and instead requires the movant to show by a preponderance of the evidence that he does not intend to "unreasonably delay the execution of sentence or administration of justice." Tex. Crim. Proc. Code Ann. art. 64.03(a)(2)(B) (West Supp. 2014). The statute does not require a movant to explain why he did not raise a claim earlier, only that the claim was not made to unreasonably delay the execution of his sentence. *Id.; see also Wilson v. State*, No. AP-76835, 2012 WL 3206219, at *4 (Tex. Crim. App. Aug. 7, 2012) (per curiam) (not designated for publication) (explaining that defendant seeking DNA testing need not show why he did not raise a claim earlier).

Chapter 64 does not provide explicit standards for determining whether Reed met his burden. However, case law in capital cases demonstrates two clear guideposts: (i) motions filed within a month or less of a scheduled execution date are generally viewed as inadequate to meet the statutory burden; and (ii) motions filed before an execution date is scheduled are generally adequate. For example, in *Thacker v. State*, 177 S.W.3d 926, 927 (Tex. Crim. App. 2005), the Court found that waiting to move for DNA testing until less than a month before an execution date reflected an intent to cause unreasonable delay. The Court reached the same conclusion in *Brown v. State*, No. AP-75469, 2006 WL 2069445, at *1 (Tex. Crim. App. 2006) (per curiam) (mem. op., not designated for publication) (finding unreasonable delay when movant filed DNA testing motion until less than one month before scheduled execution). In *Kutzner v. State*, the movant waited to file a DNA testing motion until a mere nine days

before his execution date, which the Court found to reflect an intent to unreasonably delay. 75 S.W.3d 427, 441-42 (Tex. Crim. App. 2002), *superseded by statue*, Tex. Crim. Proc. Code art. 64.03, *as stated in Smith v. State*, 165 S.W.3d 361 (Tex. Crim. App. 2005). Cases at the other end of the spectrum include *Holberg v. State*, in which the State conceded that the motion was not filed to cause unreasonable delay where the movant sought DNA testing at a time when no execution date was scheduled. 425 S.W.3d 282, 284 n.12 (Tex. Crim. App. 2014). Similarly, in *Skinner v. State*, the Court overruled a district court's findings of unreasonable delay when the defendant sought DNA testing before a set execution date and while his federal habeas petition was pending. 122 S.W.3d 808, 811 (Tex. Crim. App. 2003).

Mr. Reed's initial request for DNA testing was made in 1999, during his state habeas proceedings, before Chapter 64 was enacted. App. 1. His current requests for DNA testing began over a year ago, with a January 2014 letter to the State requesting agreed testing. The letter was sent three months before the State moved in April 2014 to fix an execution date, and 14 months before Mr. Reed's currently scheduled March 5, 2015 execution date. After the possibility of agreed testing was exhausted, Mr. Reed filed his DNA testing motion in July 2014. The motion was filed before the District Court fixed his execution date, and eight months before his currently scheduled execution date. Mr. Reed's DNA testing motion and letter request thus objectively satisfy the two clear guideposts embodied in this Court's precedents – namely, that the request made be made at least thirty days before a scheduled execution

date, and preferably before such date is scheduled. The District Court's finding to the contrary is in error and should be reversed.

3. Mr. Reed Was Not Required To Provide A Time Estimate For Testing (¶ 23a).

The District Court found that Mr. Reed's failure to provide "any information regarding time estimates" for the testing sought was independently sufficient to conclude that he failed to meet his burden to show the absence of an intent to cause unreasonable delay. The court stated "[t]his alone, the Court believes, is sufficient to show Movant has failed in his burden to show that his request is not made to unreasonably delay his execution." C.R. 344, ¶ 23a.

This subsidiary finding apparently was based upon a mistaken impression that Reed was required under the statute to provide an estimate of the likely duration of the movant's requested DNA testing. The District Court cited no authority in support, and Chapter 64 contains no such estimation requirement, either express or implicit.[28] The District Court's finding regarding failure to provide a time estimate was based upon a misreading of the statute, is entitled to no deference on appeal, and should therefore be reversed.

Mr. Reed notes that the State did not even argue, in either its opposition brief or at oral

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[28] To the knowledge of Mr. Reed's undersigned counsel, no court has held that a time estimate requirement should be implied from the statute.

argument, that Chapter 64 obligates a movant to provide such a time estimate – presumably because, the State, having agreed to DNA testing on certain items on a consensual basis, was already well aware of the time that such testing might take, *and had so represented to the District Court*. At the July 14, 2014 hearing, the State conceded that with respect to the agreed-upon items to be tested: "We believe the DNA testing will be completed within a reasonable time frame to consider those results." R.R. Vol. 1 at 14:3-4. Accordingly, the *only* findings supported by the record on this issue are that the length of time that Mr. Reed's requested DNA testing would likely take was "a reasonable time," and that the State was well aware of it. This Court can easily infer that, had the State consented to testing within a reasonable timeframe of Reed's January 2014 request, all such testing would be completed by now.

4. Mr. Reed Should Not Be Faulted For Filing His DNA Testing Motion On The Date The Court Scheduled His Execution (¶ 23b).

The District Court faulted Mr. Reed for filing his DNA testing motion on July 14, 2014, the same day the court scheduled Mr. Reed's execution. C.R. 344, ¶ 23b. The court characterized the timing of Reed's filing "as a designed tactic to delay the setting of Movant's execution date." *Id.* The court's findings are entitled to no deference and should be reversed for at least four reasons.

First, the District Court's finding misapplies the standard. The Legislature expressly recognized the need to delay executions where proceedings on a DNA motion are necessary. *See* Tex. Cod Crim. Proc.

Ar. 43.141(d). The question is not whether there is an intent to delay execution, but whether that intent is "unreasonable." *See id.* Art. 64.03(a)(2)(B). Here, Reed filed his motion before the hearing held that day, not after, as the court noted elsewhere in its opinion. C.R. 343, ¶ 9. Moreover, Reed's counsel argued at the hearing that day against the scheduling of an execution date in light of both the State's agreement to conduct limited testing on several items, and Mr. Reed's request to conduct DNA testing on a larger group. R.R. Vol. 1 at 5. Accordingly, it was error for the court to treat the filing of the motion as a reaction to the court's subsequent ruling on the State's motion.

Second, the District Court erred by drawing a negative inference about the putative intent of Mr. Reed's motion based on its timing without also considering the substantial contrary evidence in the record before it – namely, Reed's efforts in 1999 to obtain DNA testing, and his long-standing more recent prior efforts to reach a consensual agreement with the State to conduct DNA testing over the prior seven months. As the record shows, Reed requested the State's agreement to conduct DNA testing on the murder weapon and other items likely handled by the killer in a letter dated January 13, 2014. C.R. 108-117. Those efforts, which were hampered by months of foot-dragging by the State, eventually culminated in a consensual agreement to conduct DNA testing on certain items.[29] The District Court's

[29] Notably, the subset of items upon which the State ultimately agreed to permit DNA testing do not include the *(cont'd)*

Findings and Conclusions - - again, which were drafted by the State and submitted *ex parte* - - omit any meaningful discussion of Reed's prior letter request[30] and the substantial delays in the State's response thereto, and only briefly note in passing the existence of the parties' agreement to conduct DNA testing on certain items. C.R. 346, ¶ 23k; C.R. 347, ¶ 23m.

The court's findings also fail to note the State's sudden insistence on fixing Mr. Reed's execution date. The State filed its execution date motion on April 8, 2014, three months after Mr. Reed's DNA testing letter, and during the period when the State was simultaneously dragging its feet in responding to him. The State eventually agreed that DNA testing should occur, but refused to withdraw or even postpone its execution date motion. Mr. Reed should not be penalized with a negative inference based upon the District Court's failure to consider these undisputed record facts and his extensive efforts to reach an agreement with the State before filing his DNA motion – indeed, to do otherwise contravenes the policy underlying Chapter 64, and would encourage convicted persons in the future to file testing motions in the courts without reaching out to the State at all, for fear that such efforts will be held against them.

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murder weapon or any of the clothing or other items which were likely handled by the killer. *See* p. 7, *infra.*

[30] *See* C.R. 344, ¶ 23d (noting letter sent to State after 5th Circuit issued initial ruling).

Finally, the District Court's finding disregards Mr. Reed's efforts in 1999 to obtain DNA testing of the belt and tee shirt. *See* App. 1 (motion requesting testing), App. 2 (State's opposition), and App. 3 (order denying motion). Thus, Mr. Reed's current DNA testing motion is merely the most recent iteration of a 15-year effort to prove innocence through DNA testing of the murder weapon and other key evidence in the case, and cannot be viewed as a "designed tactic to delay the setting of Movant's execution date."

The record demonstrates that the District Court's finding is clearly erroneous. This Court should find instead that Mr. Reed met his burden to demonstrate by a preponderance of the evidence that the filing of his DNA motion on July 14, 2014 was not intended to cause unreasonable delay, in the execution of sentence or administration of justice.

5. The legal basis for the DNA testing requested in this motion was not available until 2011 (¶ 23c).

In its Findings and Conclusions, the District Court found that there were no legal or factual impediments to Mr. Reed's ability to file a Chapter 64 motion at any time, including during the ten-year period from Chapter 64's initial enactment through the date of the 2011 amendments, and the period after such amendments. (C.R. 344, ¶ 23c). It also found that Mr. Reed had been represented by counsel during such time. *Id.* The Court concluded that Mr. Reed's failure to file his Chapter 64 motion during such period supported a finding of intent to delay.

These findings were in error. As a threshold matter, the statute does not require Mr. Reed to prove that he could not have filed a DNA testing motion sooner than he did. Moreover, the District Court did not consider or discuss the scope of Chapter 64 as enacted or the effect of the 2011 amendments in light of the nature of Mr. Reed's DNA testing motion, which focuses on the presence of "touch" DNA on items handled by Ms. Stites' killer. Prior to the date of the 2011 amendments, a movant could not move to test items handled by a perpetrator for "touch" DNA unless prior testing or analysis had already established the presence of blood, semen, hair, saliva, skin tissues or cells, bone, or bodily fluid. *See Holberg*, 425 S.W.3d at 286 n.24 (discussing *Swearingen v. State*, 303 S.W.3d 728, 732 (Tex. Crim. App. 2010) and *Routier*, 272 S.W.3d at 250). The 2011 amendments were enacted with an eye toward the undeniable advancements made in forensic DNA testing science, and, as explained below, now permit a movant to seek DNA testing of perpetrator-handled items. Thus, it was error for the District Court to find that there was no legal impediment to Mr. Reed's ability to file a Chapter 64 motion.

6. The 2011 Amendments To Chapter 64

In 2011, the Legislature amended Chapter 64 to expand the right to post-conviction DNA testing to include precisely the sort of "touch" DNA testing that is the subject of Mr. Reed's motion. Mr. Reed thus was obligated to show that the evidence that he seeks to test contains "biological material." Tex. Crim. Proc. Code Ann. art. 64.01(a)(1) (West Supp. 2014). The 2011 amendments substantially broadened the definition to include the italicized language below:

> an item that is in possession of the state and that contains blood, semen, hair, saliva, skin tissue or cells, *fingernail scrapings*, bone, bodily fluids, *or other identifiable biological evidence that may be suitable for forensic DNA testing*.

Id. (emphasis added). By including the phrase, "or other *identifiable* biological evidence that *may* be suitable for forensic testing," the Legislature has eliminated any strict requirement that a defendant prove the existence of invisible biological material such as skin cells before being afforded DNA testing.

Had the Legislature wanted to limit such testing to already identified biological material, it would have written the 2011 amendments to refer to "identified" (not "identifiable") biological evidence that "is" (not "may be") suitable for testing, but it did not do so. The legislative history of the 2011 amendments confirms this point. Prior to the 2011 amendments to Chapter 64, this Court required a movant seeking post-conviction DNA testing to prove that the evidence contained "biological material" as a prerequisite to obtaining testing. *See Swearingen v. State*, 303 S.W.3d 728, 733 (Tex. Crim. App. 2010) ("The record is void of any concrete evidence that biological material existed on the evidence sought to be tested."). This Court noted that under its construction of the statute, requiring a movant to prove the existence of even microscopic amounts of biological material prior to testing could lead to instances in which probative DNA testing is denied. *Id.* at 732. The Court held that this issue was for the Legislature to address. *Id.* The Court likewise did not consider submission of DNA test results to the

CODIS DNA database because Chapter 64 as it existed in 2010 did not provide for such relief. *See id.* at 736 (noting that Chapter 64 provides for testing and retesting of evidence, not for database entry).

The 82nd Legislature amended Chapter 64 in two important ways. First, the Legislature added a broad definition of "biological material" that included "skin cells," "fingernail scrapings," and a catch-all provision for "other identifiable biological material that may be suitable for forensic DNA testing." Tex. Crim. Proc. Code Ann. art. 64.01(a)(1) (West Supp. 2014). Written testimony provided to both the House and Senate Committees specifically cited the need to address this Court's holdings in *Swearingen* that (1) a movant must prove the existence of biological material and (2) that Chapter 64 does not provide for submission of DNA profiles to the CODIS database, and urged expansion of the definition of "biological material" in light of the *Swearingen* opinion:

> ***"Biological material" and advanced DNA technology.***
> Art. 64.01 should also be amended to clarify the definition of "biological material" that may be subject to an order for DNA testing (a term that is currently undefined, but which should include a wide array of evidence that may yield exculpatory DNA results).
>
> The need for this amendment arises from the Court of Criminal Appeal's (CCA) opinions in Swearingen v. State, 303 S.W.3d 728 (Tex. Crim. App. 2010) and Routier v. State, 273 S.W.3d 241 (Tex. Crim. App. 2008). In each case, the CCA narrowly interpreted "biological material" to deny DNA testing. For example,

among other things, Swearingen sought to test fingernail clippings, a ligature, and contact DNA from the victim's clothing. The trial court denied the testing, in part, because Swearingen could not show that these items contained biological material suitable for DNA testing. However, in doing so, the CCA recognized that its narrow interpretation of biological material might "lead to the deprivation of DNA testing in the rare case simply because of the inability to ascertain whether or not biological material exists." Swearingen at 732. ***The CCA recognized that while its hands were tied, it invited the legislature to correct this glitch in the statute by providing a definition of "biological material."***

Clarifying amendment to Art. 64.01 would reflect the reality of how biological evidence is collected and DNA testing is performed. For example, it is precisely because fingernail clippings often contain DNA from perpetrators that they are routinely collected from victims after violent crimes. Indeed, fingernail clippings are collected even without knowing in advance that they definitively contain skin cells or other DNA from the perpetrator. It is only after the DNA testing is performed that the full probative value of the fingernail clippings is known. The same analysis is true for ligatures.

Hearing on S.B. 122 Before Senate Crim. Justice Comm., 82nd Leg., R.S. (March 22, 2011) (written testimony of the Innocence Project) (emphasis

added); *see also* Hearing on S.B. 122 Before Senate Crim. Justice Comm., 82nd Leg., R.S. (March 22, 2011) (oral testimony of Natalie Retzel, Chief Staff Attorney, Innocence Project of Texas); Hearing on S.B. 122 Before House Crim. Jurisprudence Comm., 82nd Leg., R.S. (May 10, 2011) (written testimony of the Innocence Project). Likewise, the addition of the CODIS provision in 2011 following the rejection of the right to such a comparison in the 2010 *Swearingen* opinion make it clear that the Legislature intended to address the limited holding in that case. *See id.* (Innocence Project testimony on CODIS provisions). There was little debate on these popular amendments, and they passed the Senate unanimously and the House by vote of 145 (yea)-4 (nay)-1 (present, not voting). *See* S.J. of Tex., 82nd Leg. R.S. 955 (2011); H.J. of Tex., 82nd Leg., R.S. 4364 (2011).

These statutory responses became effective on September 1, 2011. The expanded definition of "biological material" and the new CODIS provision clearly provide Mr. Reed a new legal basis for his request for DNA testing. Because Reed's last habeas application was filed before the September 1, 2011 effective date of the amendments, the legal basis for his DNA testing motion was "unavailable" as a matter of law, as explained below. The District Court's finding to the contrary was legal error and should be reversed, along with its "umbrella" finding that Reed failed to meet his preponderance burden to show a lack of intent to cause unreasonable delay.

7. Mr. Reed Suffered From A Legal Impediment Prior To The 2011 Amendments.

A legal impediment to the assertion of a claim cannot constitute intent to cause unreasonable delay, as this Court explained in relying upon the successive application provision of the capital habeas statute. *See Kutzner v. State*, 75 S.W.3d 427, 442 (Tex. Crim. App. 2002) (citing section 5 of Tex. Crim. Proc. Code Ann. art. 11.071), *superseded by statue*, Tex. Crim. Proc. Code art. 64.03, *as stated in Smith v. State*, 165 S.W.3d 361 (Tex. Crim. App. 2005). Section 5 of article 11.071 allows for the filing of a successive habeas corpus application only where the new claims brought were unavailable at the time the prior application was made. *See* Tex. Crim. Proc. Code Ann. art. 11.071, § 5(a)(1) (West Supp. 2014). A claim is defined as "unavailable" under section 5 if the legal basis for the claim was not yet recognized at the time the prior application was filed. *See id.* § 5(d).

As discussed *supra*, the Legislature specifically broadened Chapter 64's definition of "biological material" to include skin cells and fingernail scrapings in 2011. The Legislature also eliminated the "fault" provision from article 64.01. *See* Appendix D (S.B. 122 Enrolled showing markup). And finally, the Legislature also added a provision specifically requiring DNA Profiles to be compared to CODIS during the 2011 session of the 82nd Legislature.[31] These statutory responses to the denial of prior DNA testing in the *Swearingen* did not become effective

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[31] During the legislative process, the Innocence Project told both the House and Senate committees considering the amendments that the definition of "biological material" should be broadened in light of the opinion in *Swearingen*. ROA 53-55.

until September 1, 2011. And the expanded definition of "biological material" and the new CODIS provision clearly and intentionally provide Mr. Reed a new case legal basis for his request for DNA testing. Accordingly, before the September 1, 2011 amendments to Chapter 64, the legal basis for Mr. Reed's DNA motion was "unavailable." *See* Tex. Crim. Proc. Code Ann. art. 11.071, § 5(a), (d). Accordingly, Mr. Reed's motion proceeding was not brought for the purposes of delay. *See Kutzner*, 75 S.W.3d at 442.

8. The District Court's "Intent" Inferences Drawn From Mr. Reed's Post-Conviction Proceedings Are In Error And Should Be Reversed (¶¶ 23d-g, l-m)

The District Court identified several selected events from Mr. Reed's post-conviction proceedings, and inferred that such events showed that Mr. Reed's Chapter 64 Motion was made to unreasonably delay the execution of his sentence. (C.R. 344-45, ¶¶ 23d-g). The District Court found the fact that Mr. Reed's first request for DNA testing occurred shortly after the Fifth Circuit affirmed the denial of his federal petition for writ of habeas corpus "diminishes Movant's case that his present Chapter 64 motion was not filed for purposes of unreasonable delay." (*Id.* ¶ 23d). Second, the court surmised a "purposeful attempt at delay" based on the fact that Mr. Reed's counsel filed a Chapter 64 motion for another client, Mr. Swearingen, before filing Mr. Reed's motion. (*Id.* ¶ 23e). Third, the court found that prior rulings concerning the timeliness of certain of Mr. Reed's submissions caused it to believe the Chapter 64

Motion is a "continuation" of "a dilatory and piecemeal litigation strategy." (*Id.* ¶ 23f). Fourth, the District Court also found that Mr. Reed oppositions to scheduling an execution date (all of which occurred several months after he requested DNA testing) "works against him in proving that he is not unreasonably attempting to delay is execution." (*Id.* ¶ 23g). Finally, the Court observed that Mr. Reed had not yet filed additional motions for relief pursuant to Articles 11.071 and 11.073, an act of perceived "procrastination" and "another example of any attempt to unreasonably delay his execution." (*Id.* ¶ 23l).

As a threshold matter, the Court should review these findings *de novo*, as they all are based upon the court's evaluation of selected items from the record of Mr. Reed's post-conviction litigation, and the record of motions made by Mr. Reed's counsel on behalf of a *different client* in an unrelated case. None of the findings reflect credibility or motivation determinations based upon the testimony of Mr. Reed or any witness that testified at the November 25, 2014 hearing. *See Smith v. State*, 165 S.W. 3d 361, 363 (Tex. Crim. App. 2005) (lower court findings based upon review of record are reviewed de novo).

Each of the foregoing findings suffer from a fundamental failure to meaningfully connect the historical record of Mr. Reed's post-conviction proceedings with an intent "to unreasonably delay the execution of sentence or administration of justice." *See* Tex. Crim. Proc. Code Ann. art. 64.03(a)(2)(B) (West Supp. 2014). Although the statute does not require Reed to explain why he did not file a DNA testing motion sooner than he did, the

more cogent inference from the fact that Reed sought the State's consent to agree to DNA testing days after the Fifth Circuit denied his petition for writ of habeas corpus and before he moved for rehearing – more than a year ago – is that Reed and his counsel believed that such testing could have, and should have, been completed before any scheduled execution date, especially since the State had yet to move for setting of an execution date. *See Holberg*, 425 S.W.3d at 284 & n.12 (State conceded that the motion was not filed to cause unreasonable delay when DNA testing sought before execution date scheduled); *Skinner v. State*, 122 S.W.3d 808, 811 (Tex. Crim. App. 2003) (overruling district court's findings of unreasonable delay when DNA testing sought before execution date set).

Similarly, Mr. Reed can hardly be blamed for opposing the setting of his execution date in a capital case, for a crime he did not commit, especially when the State's request to fix such date was made *after* Reed sought the State's agreement to conduct DNA testing. Likewise, neither the timing of the filings of DNA motions by Reed's counsel on behalf of another client in an unrelated case, nor the complex post-conviction proceedings in this case, support a finding that Reed's own Chapter 64 Motion was filed for the purpose of unreasonably delaying his (at the time) unscheduled execution. The State did not move to set Reed's execution date until April 2014, three months *after* Reed asked for cooperative DNA testing. C.R. 34-35. Moreover, the State dithered about for months before eventually rejecting the majority of Mr. Reed's testing requests. The District Court's finding that Reed's DNA request was designed to unreasonably delay execution of sentence

is flatly contradicted by the record and should be reversed.

In addition, that Mr. Reed had not yet filed an Article 11.071 or 11.073 motion at the time he sought DNA testing by motion can hardly count against him, as the court's "finding" states. C.R. 346, ¶ 23l. The finding lacks record support from the moving papers and hearing, and, in any event, whether or when Mr. Reed filed an unrelated post-conviction motion based on new evidence (including that recently provided by the State) is irrelevant to whether the intent of his January 2014 DNA request and subsequent motion was to unreasonably delay an execution date that had yet to be scheduled.[32]

The statute requires the movant show by a preponderance of the evidence that his request was not made to "unreasonably delay the execution of sentence." Tex. Crim. Proc. Code Ann. art. 64.03(a)(2)(B). The facts stated by the District Court in subparagraphs 23(d-f) of its Findings and Conclusions do not demonstrate such an intent, and do not constitute a permissible statutory basis for denying Mr. Reed's Chapter 64 Motion. *See Wilson v. State*, No. AP-76835, 2012 WL 3206219, at *4 (Tex. Crim. App. Aug. 7, 2012) (per curiam) (not designated for publication) (statute does not require movant to show why he did not raise a claim earlier).

9. Mr. Reed Provided Ample And Adequate Notice To The State of the

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[32] Mr. Reed filed the referenced application for a writ of habeas corpus on February 13, 2015. *See* App. 5.

Items Which He Sought To Test (¶¶ 23h-j).

The District Court's eighth and ninth subsidiary findings of fact state that Reed failed to enumerate certain specific items for which he sought testing until the hearing on his DNA Motion. (C.R. 345-346, ¶¶ 23h-i). Thus, the findings state, Reed unreasonably delayed in bringing his DNA motion because he never explained or briefed the items to be tested and he has no excuse for not being more specific in his briefing. The record demonstrates that these findings should be reversed for at least three reasons.

First, Mr. Reed's DNA Motion provided precisely the level of specificity contemplated by Chapter 64. *See* Tex. Crim. Proc. Code Ann. art. 64.01(b) ("motion may request forensic DNA testing only of evidence… secured in relation to the offense that is the basis of the challenged conviction and was in the possession of the state during the trial of the offense" and which meets certain testing criteria). Reed's opening brief identified in its text at least 10 specific items or categories of evidence to be tested, including the belt, Stites' clothing, hairs, the name tag, the white tee shirt, items collected from near the truck, and samples taken from Stites' body, among other specified items. C.R. 76-77. In addition, the DNA Motion included as an incorporated exhibit the same list of over 30 specific items for testing included in Reed's January 2014 pre-filing letter request to the State. C.R. 115-17. This was direct, specific and unambiguous notice to the State of the evidence that Reed sought to test. Indeed, the State's response contains a detailed enumeration of the items the

State believed were the subject of Reed's request, thereby demonstrating that the State received and comprehended Reed's request. C.R. 172-73.

Moreover, the State, for the first time in its response, provided complete documentation of the evidence actually available for testing. The inventory of the evidence from the Attorney General's Office – where the beer cans and other important items from the truck are held – was produced for the first time to Reed in the State's response on September 9, 2014. C.R. 222-24. The State was not in any way prejudiced by the level of specificity Reed provided in his initial motion.[33] The District Court's findings to the contrary are baseless and should be reversed. Moreover, the information provided in Reed's DNA Motion was supplemented through the testimony of Detective Paolucci at the hearing. He discussed more than two dozen specific items of evidence to be tested. *Cf. Dinkins v. State*, 84 S.W.3d 639, 642 (Tex. Crim. App. 2002) (convicted person must do more than merely assert chapter 64's requirements have been met). Indeed, the State repeatedly objected to Paolucci's enumeration of specific items at the hearing, *but the State was overruled every time*. R.R. Vol. 2 at 32. Such overruled objections provide no support for the District Court's findings, and they should therefore be reversed.

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[33] The State's protests to the contrary are belied by the State's opposition to the motion, which included a lengthy itemization of the items of evidence which the State understood to be at issue. C.R. 172-73.

10. The District Court Erred In Finding That Reed Made Redundant Testing Requests (¶¶ 23j- m).

The District Court made subsidiary findings to the effect that Mr. Reed intended to cause delay by including items within his motion that were either in Reed's possession or that the State had already agreed to test. C.R. 346, ¶¶ 23j-m. These findings are baseless.

First, paragraph 23j refers to the "State's evidence," a single paper exhibit introduced by the State at the end of the DNA hearing after all testimony had been heard, which in turn lists certain extracts located at Technical Associates Laboratory. R.R. Vol. 4 at 205. There was no testimony provided regarding these samples at the hearing or in any of the moving papers. The listed extracts are primarily redundant of those that are being tested under the State's agreement, and do not include the most probative items that were the subject of the hearing. Moreover, the State expressly refused to conduct any agreed testing through the Chapter 64 process, *see* C.R. 144-48; by doing so, the State deprived Reed of the Court's supervision of the process, the ability to seek a hearing on innocence, and the right to mandatory DNA database comparison. *See e.g.*, Tex. Code Crim. Proc. Art. 64.035; 64-04. And most importantly, the potential to test the leftover scraps from the defense's 1998 DNA testing is no substitute for comprehensive DNA testing of the relevant evidence discussed in this brief. The court's finding to the contrary is simply unsupported.

Second, the court found that Reed intended to cause unreasonable delay because he sought testing

under Chapter 64 on items that the State has already agreed to test. C.R. 366, ¶ 23k. This finding makes little sense; by the November 25 hearing, the items that were subject to agreement had already been determined. To avoid any doubt, at the hearing, Reed's counsel withdrew on the record any possibly duplicative requests to test items that the State had already agreed to. R.R. Vol. 3 at 160. There was neither prejudice nor confusion on this point, and the court's finding reflects a misunderstanding of the record facts, not evidence of an intent to cause unreasonable delay.

This finding is also error for a second, more troubling reason. Absent Chapter 64 relief, a convicted person has no independent legal right or ability to cause DNA test results to be processed through state and federal DNA databases. Although the State may do so at any time, a convicted person's legal right to access such databases *only* arises upon entry of a District Court order directing DNA testing to occur. Tex. Crim. Proc. Code Ann. art. 64.035 (West Supp. 2014). Thus, the only mechanism by which a convicted person may seek database comparison of DNA test results is to include the evidence at issue in a Chapter 64 motion, without regard to whether the evidence to be tested is in the current possession of the State, the convicted person, or a third-party laboratory. It cannot have been the intent of the Legislature to provide a convicted person with a right to seek DNA testing of evidence regardless of its location, and a resulting right to cause the results to be cross-checked against state and federal offender databases – a right which only exists if testing is ordered – while permitting a court to consider the very making of such a request as a

factor that may warrant denial of the motion. *Cf. Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) (court should avoid interpretation of statute that "would lead to absurd consequences that the Legislature could not possibly have intended" (emphasis omitted)). The District Court's finding that Mr. Reed's DNA testing motion demonstrated an intent to cause unreasonable delay because it included within its scope evidence or extracts to which Mr. Reed had access disregards this fundamental point, would lead to an absurd construction of Chapter 64, and should therefore be reversed.

Third, the court found that Reed "waited more than four months to obtain a subpoena for a reference sample from himself for purposes of the agreed-to DNA testing that this Court ordered in July" and thus, this is evidence of his desire to bring the Chapter 64 motion to unreasonably delay his sentence. C.R. 367, ¶ 23n. This finding is, again, devoid of support and reflects a misunderstanding. There was no testimony provided at the hearing on this topic, and the State mentioned it for the first and only time in closing argument. Regardless, it is apples and oranges - - the reference sample was for the evidence that the parties had previously *agreed* to test, not for the items which Reed sought to test via the motion. Reed denies that he intended to or did delay in providing a reference sample[34] in any event, but even so, the time it took to do so is entirely

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[34] Reed notes that the testing facility already had a reference sample from Reed, and that the issue of a subpoena was based on the State's request for a new sample. C.R. 219

separate and distinct from whether Reed's motion is intended to cause unreasonable delay - - the two are separate events.

D. Mr. Reed Met His Burden Under Article 64.01 With Respect To Chain of Custody And Biological Evidence. (Issue 3)

The District Court made no findings with respect to whether Mr. Reed met his burden under Article 64.01 as to chain of custody and biological evidence. The District Court's silence on these requisite elements constitutes a presumptive finding that the elements have been satisfied. *See Skinner v. State*, 122 S.W.3d 808, 809 n.1 (presumption that elements as to which no findings are made have been satisfied). To avoid any further delays in proceeding with DNA testing, Reed respectfully requests that the Court conclude that the failure to make findings in this case presumptively demonstrates that Reed met his burden or, alternatively, find that the record demonstrates Reed has established chain of custody and that the evidence he seeks to test contained biological evidence.

1. Mr. Reed Has Established Chain Of Custody.

At the hearing, Reed established – and the State did not contest – chain of custody as to the evidence in the possession of two of the three custodians (the Attorney General's Office and the Department of Public Safety Crime Lab). Mr. Reed further established that chain of custody was complete as to evidence in the possession of the Bastrop Country Clerk.

There is no real dispute about where the evidence has been – the question at the heart of any chain of custody inquiry – and the record (including testimony of the State's own witnesses) demonstrates that the evidence has been in the State's custody and not compromised so as to preclude meaningful DNA analysis. First, the State's Sergeant Investigator, Gerald Clough, testified at the hearing that he could not "identify anything on [the list of items in the State's evidence locker] that has been substituted, replaced, tampered with, or materially altered." R.R. Vol. 4 at 188:12-189:20. Neither did Mr. Clough have "any reason to suspect that anything in [the locker] would have been materially altered, tampered with, substituted, or replaced." *See id.* Similarly, Ms. Etta Wiley, Criminal Deputy Clerk for the Bastrop County Clerk's Office, corroborated the sufficiency of the chain of custody. Ms. Wiley's job involves ensuring that people do not tamper with, materially alter, substitute, or replace items within her custody. R.R. Vol. 4 at 196:9-197:19. Ms. Wiley testified that the box of relevant evidence has remained "under lock and key" and that with "some confidence," all of the relevant evidence has "not been substituted, replaced, tampered with, or materially altered." *See id.* at 195:13-196:19 Ms. Wiley, like Mr. Clough, could not supply the Court with "any reason to suspect that anyone has substituted or replaced, tampered with, or materially altered" the items in the box within her custody. *Id.* at 196:16-19. Given Mr. Clough and Ms. Wiley's unrebutted statements, which track the very language of the relevant part of statute, Mr. Reed has established chain of custody.

This Court has held that nothing more is required to establish chain of custody: "The chain of

custody is conclusively proven if an officer is able to identify that he or she seized the item of physical evidence, put an identification mark on it [and] placed it in the property room." *Stoker v. State*, 788 S.W.2d 1, 10 (Tex. Crim. App. 1989), *abrogated on other grounds by Horton v. California*, 496 U.S. 128 (1990). Such proof of chain of custody creates a presumption that the evidence was not tampered with or altered. *See id.* (noting that chain of custody is presumptively established absent proof "of tampering or alteration"). The plain language of article 64.03(a)(1)(A)(ii) in the context of the case law on chain of custody, clearly indicates that the Legislature did not intend to place any additional burden on movants for DNA testing than the typical chain of custody showing required in most criminal cases. In addition, the legislative history indicates the Legislature intended that the requirements of Chapter 64 "would be minimal so as not to bar inmates unfairly from receiving tests." Texas Bill Analysis at 6, S.B. 3, March 21, 2001. Specifically with regard to the chain of custody requirement, the legislative history states that "[a] defendant's lawyer could establish those facts easily by requesting copies of reports from law enforcement officials." *Id.* at 7. Therefore, a showing of the chain of custody defined under Texas law is sufficient to establish that the evidence "has not been substituted, tampered with, replaced, or altered in any material respect." Tex. Crim. Proc. Code Ann. art. 64.03(a)(1)(A)(ii) (West Supp. 2014).

Chain of custody is distinct from whether evidence may or may not be contaminated, but the District Court's Findings and Conclusions impermissibly conflate the two concepts. That the

treatment of the evidence at trial may have resulted in the deposit of additional DNA on various items neither defeats Reed's proof of chain of custody, nor shows that the evidence no longer contains exculpatory DNA information. *See* Affidavit of Deanna Lankford C.R. 244. Possible contamination and issues of care are relevant only to the evidence's weight, not to the chain of custody. *See Stoker*, 788 S.W.2d at 10; *see also Medellin v. State*, 617 S.W.2d 229, 232 (Tex. Crim. App. 1981).

2. Mr. Reed's Unrebutted Expert Established That The Evidence He Seeks To Test Contains Biological Evidence.

Article 64.01 of the Texas Code of Criminal Procedure permits a convicted person to seek DNA testing of "evidence containing biological material." Tex. Crim. Proc. Code Ann. art. 64.01(a-1) (West Supp. 2014). The Legislature has broadly defined "biological material" to include, in addition to an enumerated list, any item that contain "identifiable biological evidence that may be suitable for forensic DNA testing." *Id.* art. 64.01(a)(1).[35]

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[35] Whether Chapter 64 requires that a person conclusively prove the existence of biological evidence, as opposed to showing that its existence is probable or likely, is an unresolved issue. *See Holberg v. State*, 425 S.W.3d at 286 n.24 (questioning but not deciding whether the 2011 amendment to Chapter 64 "operates to lessen the burden on . . . movants to prove the existence of biological material" as set forth in *Swearingen v. State*, 303 S.W.3d 728, 732 (Tex. Crim. App. 2010) and *Routier v. State*, 273 S.W.3d 241, 250 (Tex. Crim. App. 2008)). That issue is presently before the Court in the State's appeal in *State v. Swearingen*, No. AP-77020 (submitted by the Clerk on *(cont'd)*

In support of his DNA Motion, Mr. Reed offered the affidavit of a well-qualified forensic DNA expert, Deanna Lankford, who opined that, to a reasonable degree of scientific certainty, the items that Reed seeks to test contain biological material suitable for DNA testing. *See* Statement of Facts *supra* at 24-25; Affidavit of Deanna D. Lankford, M.T. (ASCP), C.R. 247-48, ¶¶ 15-18; *see also id.* ¶ 23 (belt ligature), ¶¶ 24-26 (victim's clothing), ¶ 27 (condom); ¶ 28 (hair); ¶ 29 (name tag); ¶ 30 (fingerprint); ¶¶ 32-33 (samples of biological material contained on swabs taken from the victim). Ms. Lankford confirmed her opinion during her testimony at the hearing on Reed's motion on November 24, 2014. *See* Statement of Facts *supra* at 27; R.R. Vol. 3 at 114, 142.

Despite its aggressive opposition to the Motion, and access to free experts from the DPS crime lab, the State declined to offer any rebuttal testimony to refute Ms. Lankford's credible opinion. Based on Ms. Lankford's unrebutted testimony and the unrefuted record, Mr. Reed submits that he has satisfied his burden under Article 64.01 with respect to chain of custody and biological evidence without regard to whether the applicable standard is based upon proof or probability.[36]

(cont'd from previous page)
January 21, 2015). Under either standard, the unrebutted evidence Reed presented at the Hearing satisfied Article 64.01.

[36] The State's position now appears to be that Mr. Reed was required to prove that forensic DNA analysis will conclusively identify biological material on the items to be tested, rather than prove (or demonstrate that it is probable or likely) that the items contain "identifiable biological evidence *(cont'd)*

CONCLUSION AND PRAYER

As the United States Supreme Court observed in *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52, 55 (2009), "DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty." Rarely has a more suitable case for DNA testing been presented. DNA testing of the belt used to strangle Stacy Stites and other evidence handled by her killer has the unparalleled ability to conclusively prove Mr. Reed's claim of innocence and identify her killer. The District Court's Findings and Conclusions should be reversed, for the reasons noted above, and the evidence that is the subject of Reed's Chapter 64 motion should be subjected to DNA testing.

Respectfully submitted,

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(cont'd from previous page)
that may be suitable for DNA testing." This interpretation is unsupported by the plain language of the statute, and further seeks to impose a standard that could never be satisfied with respect to microscopic biological material such as a few skin cells or other trace evidence.

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CERTIFICATE OF SERVICE

I, Bryce Benjet, do hereby certify that a true and correct copy of the foregoing Brief was served on this 17th day of February, 2015 by first-class U.S. mail on the following:

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

/s/ Bryce Benjet
Bryce Benjet

CERTIFICATE OF COMPLIANCE WITH TEXAS RULE OF APPELLATE PROCEDURE 9.4(I)(3)

In accordance with Texas Rule of Appellate Procedure 9.4(i)(3), I, Bryce Benjet, hereby certify that the foregoing electronically created document has been reviewed by the word count function of the creating computer program, and has been found to be in compliance with the requisite word count requirement.

/s/ Bryce Benjet
Bryce Benjet

Bode Cellmark
FORENSICS

LabCorp Specialty Testing Group

10430 Furnace Road, Suite 107
Lorton, VA 22079
Phone: 703-646-9740

Forensic DNA/Biology Analysis Testimony
Result of Review
January 11, 2018

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

Cellmark Case #: F9801744

List of Documents Evaluated from Innocence Project received on July 11, 2017:

Transcript for Case F9801744

CONCLUSIONS:

Bode Cellmark has completed its review of the testimony transcript [and/or stipulation] for the case referenced above and found it to contain:

___Satisfactory Statements

_X_ Unsatisfactory Statements

If Unsatisfactory: Bode Cellmark has completed its review of the testimony transcript [and/or stipulation] for the case referenced above and found it to contain:

___Error Type 1: The DNA Analyst stated an inclusion associated with a specific individual to the exclusion of all others when 1) source attribution threshold was not met (applicable only to cases reported before September 19, 2015) or 2) after Bode Cellmark discontinued the practice of applying source attribution (September 19, 2015).

___Error Type 2: The DNA Analyst provided an incorrect statistical value during testimony or incorrectly explained the meaning of the statistical value(s).

__X__Error Type 3: The DNA/Forensic Biology Analyst cites the number of cases and/or samples worked in the lab as a predictive value to bolster the conclusion that the DNA profile belongs to a specific individual or the DNA/Forensic Biology Analyst otherwise testifies beyond the scope of his/her expertise.

See enclosed Testimony Review Evaluation Form.

Report submitted by,

Stephane Sivak, MS
Technical Leader

Correction Review Evaluation Form

Case Information:	
Case Number:	F9801744
Defendant(s):	Rodney Reed
Date of Review:	11/22/2017

Review of Testimony:	
Date of Testimony:	5/11/1998
Testifying Analyst:	Meghan Clement
Name of Prosecutor	Mr. Charles Penick, Mr. Forrest Sanderson, & Ms. Lisa Tanner
Name of Defense:	Mr. Calvin Garvie & Ms. Lydia Clay-Jackson
Testimony Results (mark as appropriate): Unsatisfactory Statements: Yes X No ____	
If testimony contained Unsatisfactory Statements, cite each by Error type, page(s), and line number(s):	
Page 55, lines 13-21	With spermatozoa, the tails are very fragile and tend to break off, so after a short period of time they start losing their tails and then what you find is only the spermatozoa heads, from sexual assault cases. So that can be an indicator of how long the spermatozoa has been in a particular placebefore it is actually collected and detected.

Page 56, lines 8-16	In serology work, typically, sexual assault kits weren't even collected more than 24 hours after an encounter because the chances of finding sperm is so rare. Generally, finding intact sperm at more than probably about 20 hours, 20 to 24 hours, I don't ever recall finding intact sperm more than that, from the time of the sexual assault and from the time the collection was made.
Page 56, line 18, after asked to clarify above response: "And that was in over thousands of rape kits?"	Yes

Approved By: Date: 1/11/2018

Document: Correction Review Evaluation Form
Revision: 1
Effective: 113/2018 4:22:11 PM
issuing Authority: Quality Assurance Manager

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NOS. WR-50,961-04 & -05

EX PARTE RODNEY REED, Applicant

ON APPLICATIONS FOR A WRIT OF HABEAS CORPUS IN CAUSE NO. 8701 IN THE 21ST DISTRICT COURT BASTROP COUNTY

Per curiam.

ORDER

Rodney Reed was convicted of capital murder and sentenced to death for the murder of Stacey Lee Stites. We affirmed his conviction and sentence on direct appeal:[1] Reed filed his initial application for a writ of habeas corpus in November 1999, and we denied relief in a written order in February 2002.[2] In

[1] *Reed v. State*, No. AP-73,135 (Tex. Crim. App. Dec. 6, 2000) (not designated for publication).

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

February 2001, while his initial application was pending, Reed filed a "Supplemental Claim for Relief on Application for a Writ of Habeas Corpus." We construed that filing as a successive application and dismissed it because Reed's claim did not meet the dictates of Texas Code of Criminal Procedure, Article 11.071, Section 5.[3] Reed then sought federal habeas corpus relief, filing a petition for a writ of habeas corpus under Title 28, United States Code, Section 2254. Finding that Reed failed to exhaust all of his claims in this Court, the district court entered a stay in March 2004.[4] Reed filed a second subsequent state application for a writ of habeas corpus in March 2005. We dismissed some of the claims raised in that application under Article 11.071, Section 5 and remanded two of Reed's claims raised under *Brady v. Maryland*'[5] to the district court so that it could hold a live evidentiary hearing.[6] After the case was returned to us, we filed and set it for submission. After an exhaustive review of Reed's *Brady* claims and gateway-actual-innocence claims under Article 11.071, Section 5(a)(2), we denied relief last month in a published opinion in light of the evidence properly before us.'[7]

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

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

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

[6] *Ex parte Reed*, No. WR-50,961-03 (Tex. Crim. App. Oct. 2005) (not designated for publication).

[7] *Ex parte Reed*, AP-75,693, 2008 Tex. Crim. App. LEXIS 1569 (Tex. Crim. App. Dec. 17, 2008).

Taking a piecemeal approach, Reed filed two more subsequent applications while his second subsequent application was pending.'[8] In the first of these later applications, Reed contends that the State suppressed evidence that Jimmy Fennell abused his ex-girlfriend, Pamela Duncan. In support of this claim, Reed attached an affidavit from Duncan, sworn to on April 6, 2006, which we considered a part of Reed's gateway-actual-innocence claim on his second subsequent application. As observed in our recent opinion: "Duncan describes Fennell as abusive, possessive, controlling, and extremely prejudiced toward African-Americans. When Duncan broke up with Fennell, he stalked her until he left Giddings; she was afraid for her safety and that of her children." In her affidavit Duncan states, in part:

> My friends were not comfortable with Jimmy and they stopped hanging around us, all except for one. He was not very friendly, and made my friends feel unwelcome. My friends also didn't think that he treated me very well. He was very verbally hostile to me, called me some really unpleasant, mean names (describing me, my parents, and the fact that I had kids at a younger age), and would scream at me in public.
>
> Jimmy was extremely prejudiced. Before we started dating, I used to get my hair cut by a black woman. After we started dating, he wouldn't let me go to her anymore, because her salon 'was across the tracks' and 'white

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[8] *Ex parte Reed*, Nos. WR-50,961-04 & -05.

women don't go there.' At one point I was considering hiring a black woman to work at the store and Jimmy got really angry. He told me everything he thought about black people (he didn't say 'black people;' he used the N-word) — that they were all bad, all on drugs, all crocks — and why I shouldn't hire her. I ended up hiring her and that was a big problem between us for a couple months.

I broke up with Jimmy in September of 1997 Jimmy stalked me for months after that — until he left Giddings altogether. He would drive by my house, night after night, and shine a spotlight into the house. It got so bad that I finally put tin foil up in my windows, to reflect the light. He would stand outside my house at night, screaming at me, calling me a 'bitch' and other obscenities. He would come by my job at the Circle K, and just sit parked out front, with the headlights shining into the store. He would stay there, sitting in his car and watching me, for anywhere from two minutes to two hours . . . Once he came into the store and wouldn't let me out of the office—we had to call the police to get someone to escort him out, so I could leave. He would hassle any guy I tried to date until it scared them away. For instance, I dated one guy who delivered beer in town. After we started dating, Jimmy sta[r]ted pulling him over and giving him tickets. He got so many tickets he couldn't keep his job anymore.

What Jimmy did after I broke up with him really scared me. It made me feel like I knew

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

Reed asserts that Duncan's account of her relationship with Fennell is exculpatory for two reasons. First, it supports his theory that Fennell murdered Stacey because it confirms other evidence of Fennell's violent and abusive character and gives an additional explanation of Fennell's motive to kill Stacey—Reed's affair with Stacey coupled with racial discrimination. Second, Reed asserts that Duncan's account would have been valuable impeachment evidence at trial because Fennell testified that he did not have a controlling relationship with Stacey.

Reed maintains that Duncan's account was suppressed by the State because Duncan reported Fennell's abusive conduct to the Giddings Police Department. Reed states that, while the Giddings Police Department was not the primary agency involved in investigating Stacey's murder, it participated in the investigation and should therefore be regarded as part of the prosecution team. Reed

further argues that his claim meets the standards of Section 5 because the factual basis was previously unavailable. We disagree. Assuming that the information qualifies as *Brady* material,[9] Reed has failed to show that, through exercise of due diligence, the information contained in Duncan's affidavit was not available during Reed's trial in 1998 and when he filed his initial application.[10] Therefore, we dismiss Reed's third subsequent application as an abuse of the writ.

In his fourth subsequent application, Reed claims that he is entitled to relief based on newly discovered evidence of actual innocence."[11] He also contends that he is entitled to have the merits of his *Brady* and ineffective assistance of counsel claims reviewed because he has made a threshold showing of actual innocence under Article 11.071, Section 5(a)(2). Finally, Reed asserts that he is entitled to relief under *Brady*.

Reed first presents evidence that Fennell has, in recent years, performed sexual acts of misconduct as a police officer. In December 2007, the State

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[9] *But see United States v. Pelullo*, 399 F.3d 197, 217 (3d Cir. 2005) ("the prosecution was under no obligation to 'ferret out evidence from another pending proceeding with a tenuous connection to the prosecution.'"); *United States v. Beers*, 189 F.3d 1297, 1304 (10th Cir. 1999) ("It is unrealistic to expect federal prosecutors to know all information possessed by state officials affecting a federal case, especially when the information results from an unrelated state investigation.").

[10] *See* TEX. CODE CRIM. PROC. art. 11.071 § 5(e).

[11] *See Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1997).

charged Fennell in Williamson County, Texas with aggravated sexual assault with a deadly weapon, aggravated kidnaping, improper sexual activity with a person in custody, and official oppression. An officer with the Williamson County Sheriff's Department set out the factual allegations underlying the charges in an affidavit for a search warrant signed by that is attached to Reed's application:

> On October 26, 2007, Affiant was asked to assist in an investigation of an allegation that Jimmy Lewis Fennell, Jr., sexually assaulted an adult female. The female victim has elected to use . . . the pseudonym name of 'Amanda Smith.' Jimmy Lewis Fennell, Jr. is a peace officer employed as a patrol sergeant with the Georgetown Police Department. Ms. Smith reported at approximately 1:50 a.m. on October 26, 2007 to the Williamson County Sheriff's Department that she had been sexually assaulted by a police officer, who has now been identified as Jimmy Lewis Fennell, Jr., at a location in Williamson County which she believed to be a park.
>
> Ms. Smith told Affiant that the Georgetown Police Department had sent officers to a scene at an apartment complex in Georgetown where she was fighting with her boyfriend, and that while the officers were there an officer had her in his patrol car. Ms. Smith's boyfriend was arrested and taken from the location, and an 'Officer Fennell' had taken her from the apartment in his patrol car. Prior to being taken from the scene, Ms. Smith had

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

The affidavit also states that the victim positively identified Fennell in a photo spread as the assailant. The affidavit further noted that the Georgetown Police Department was cooperating in the investigation by providing Fennell's patrol car and the relevant dispatch logs to the Sheriff's Department. A review of the dispatch logs showed that Fennell could not be accounted for just after midnight to 1:52 a.m. The victim's prints were found on the trunk of the patrol car, "which is consistent with the location where the victim reported the sexual assault occurred in relation to the vehicle."

John Bradley, the District Attorney for Williamson County, entered into a plea-bargain agreement with Fennell. Waiving some of the charges, the District Attorney and Fennell entered into an agreement relating to only the charges of improper sexual activity with a person in custody and kidnapping. On the former, Fennell agreed to plead guilty in exchange for a two-year state jail sentence. And on the latter, Fennell agreed to plead guilty in exchange for a ten-year probated sentence, to be served concurrently with the two-year state jail term, and a $500 fine. Fennell also agreed to permanently surrender his peace officer's license. On May 20, 2008, Fennell appeared before District Judge Burt Carnes and pled guilty to the charges. Judge Carnes reset the case for June 24th for sentencing. The record before us goes no further; therefore, we have no official documentation concerning the final resolution of this case.

Next, Reed submits an incident report for the Travis County Sheriff's Department. The report documents an incident that occurred in May 2004 between Fennell and a woman named Angie Lee Smith. Fennell stopped Smith on Interstate 35 for a "crooked license plate." Smith's driver's license and vehicle registration were expired, and she told Fennell that she would take care of it on Monday. Fennell suggested that she take care of it by giving him a lap dance. Smith "diverted the conversation by talking about the Williamson County Sheriff and saying that she knew him and his wife at which point she was released."

Finally, Reed contends that Fennell maintained an interne page on MySpace.com that

contained sexually explicit and violent images. In support of this, Reed attaches several printouts from the MySpace page belonging to an individual named "pointman_l ." The other details from the page indicate that "pointman_ 1" is an individual claiming to be a thirty-four-year-old, 5'11", straight white male, "Swat Operator" in Texas.

Reed contends that all of this information is newly-discovered evidence of actual innocence. We disagree. First, regarding the MySpace page excerpts, other than mere conjecture by Reed, there is no concrete proof in the record to support Reed's claim that they have any relation to Fennell. And with respect to charges in Williamson County and the Travis County Incident Report, other than showing that Fennell has engaged in despicable and reprehensible conduct as an officer with the Georgetown Police Department, the information does not exonerate Reed of Stacey's murder.[12]

Reed also claims that this evidence, viewed on its own, and viewed in conjunction with some of the other evidence considered under his prior gateway-innocence claims, as well as new evidence presented on this, his fourth subsequent application, meets the gateway standard of innocence under Article 11.071, Section 5(a)(2). Viewing only the evidence presented on this application alongside the evidence presented at trial, we cannot say that Reed has established that it is more likely than not that no reasonable juror would have convicted him beyond a reasonable

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[12] *Id.* at 209.

doubt.'[13] And, giving Reed the benefit of all doubt, as we did before, by considering all of the evidence not presented at his trial (i.e., the "new" evidence presented on his prior applications),[14] we cannot say that Reed has shown by a preponderance of the evidence that no reasonable juror would have convicted him beyond a reasonable doubt. The totality of the evidence before us still supports a guilty verdict. Finally, we turn to the two items of evidence, presented for the first time on this application, that Reed relies on as additional support for his gateway-innocence claim.

First, Reed attaches a letter written by Fennell to the Giddings City Manager several months after Reed's trial. The letter details Fennell's dissatisfaction with the management of the Giddings Police Department, and in doing so, alludes to statements allegedly made by Officer David Hall: "David Hall made several comments during the murder investigation of my fiancee. I have learned to forgive and forget. But I understand Hall as does [sic] the other patrolman [sic]." Fennell continued, stating that "Hall is mad because he wants stripes. Hall will burn anyone to get this position. We are all aware of this problem and deal with it." Reed claims that the first portion of Fennell's comments about Hall cannot

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[13] *Ex parte Reed*, 2008 Tex. Crim. App. LEXIS 1569, at *95 (citing *Ex parte Brooks*, 219 S.W.3d 396, 399 (Tex. Crim. App. 2007)).

[14] *Id.* at *96 (noting that we were considering all of the evidence presented on Reed's three prior applications but had serious doubt "that some of the evidence Reed cites constitutes new evidence for purposes of our [gateway] inquiry").

be discounted as "idle gossip in light of the State's DNA testing that links Mr. Hall to a mixture of saliva found on a beer can near [Stacey's] body." According to Reed, the statements "begs the questions: what did Mr. Hall say?, [sic] when did he say it?, [sic] and to whom?" Reed also contends that Fennell's statements imply that Officer Hall was not Fennell's friend and therefore contradicts the testimony of Officer Hall and his wife, Carla Hall, that the two were close friends.

Next, Reed points to former Bastrop County Sheriff Richard Hernandez's guilty plea in January 2008 to six felony counts, including theft by a public servant, misapplication of fiduciary property, and abuse of official capacity. According to Reed, the theft began in 1997, when the Sheriff's Department was investigating Stacey's murder, and continued through Reed's trial. Reed maintains that "[t]his could only have established a culture of lawlessness at the agency and casts a dark shadow on the reliability of the investigation of the murder of [Stacey]."

Viewing this evidence in conjunction with all of the gateway-actual-innocence evidence that we have previously considered and with the evidence presented at trial, we cannot say that Reed has established that no reasonable juror would have rendered a guilty verdict beyond a reasonable doubt. The totality of the evidence before us still supports a guilty verdict. Therefore, we conclude that Reed has failed to meet the gateway standard of innocence under Article 11.071, Section 5(a)(2).

Reed also contends that Officer Hall's statements and the former Bastrop County Sheriff's

crimes of moral turpitude constitute evidence of actual innocence under *Ex parte Elizondo* and were suppressed in violation of *Brady*. This evidence does nothing to exonerate Reed of Stacey's murder; therefore, Reed has failed to make a prima facie showing of actual innocence under the *Ex parte Elizondo* standard.[15] Next, with regard to Reed's Brady claims, assuming that *Brady* is even applicable,[16] we conclude that his claims are conclusory and premised on nothing more than mere conjecture and speculation. Thus, Reed has not pled specific, particularized facts, that if true, would entitle him to relief.[17]

Based on the foregoing, we dismiss Reed's fourth subsequent application as an abuse of the writ.

DATE DELIVERED: January 14, 2009
DO NOT PUBLISH

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[15] *See Ex parte Brooks*, 219 S.W.3d 396, 400 (Tex. Crim. App. 2007); *Ex parte Briseno*, 135 S.W.3d 1, 3 (Tex. Crim. App. 2004).

[16] *See generally Petition for Writ of Certiorari, District Attorney's Office for the Third Judicial District*, et al. v. Osborne, 129 S. Ct. 488 (No. 08-6), granted Nov. 3, 2008.

[17] *See Ex parte Staley*, 160 S.W.3d 56, 64 (Tex. Crim. App. 2005).

REPORTER'S RECORD
VOLUME 2 OF 6 VOLUMES
WR-50,961-08
TRIAL COURT CAUSE NO. 8701

THE STATE OF TEXAS	)	IN THE DISTRICT COURT
	)	BASTROP COUNTY,
vs.	)	TEXAS
	)	21ST JUDICIAL
RODNEY REED	)	DISTRICT

WRIT OF HABEAS CORPUS

On the 10th day of October, 2017, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Doug Shaver, Judge Presiding, held in Bastrop, Bastrop County, Texas.

Proceedings reported by computerized stenotype machine.

[42]MR. PHILLIPS: Your Honor, if I may, as his lawyer --

THE COURT: Well, introduce yourself for the record.

MR. PHILLIPS: My name is Robert Phillips, counsel for Jimmy Fennell. Mr. Fennell tends to stand on the truthful testimony he gave 20 years ago and will be declining to testify further, on advice of counsel under the rights afforded him by the Constitution of the United States and particularly the Fifth Amendment.

THE COURT: All right, sir.

MR. PHILLIPS: I've made that known to both sides. We have an affidavit to file, in lieu of his testimony, which I think is acceptable to both counsel.

THE COURT: Do you agree?

MR. BENJET: I haven't -- I want to just take a look at it, but, if it's as represented, we would go on his affidavit that's presented today. You know, obviously, we can't make him talk.

THE COURT: You need to see the affidavit?

MR. BENJET: If you wouldn't mind, yeah.

THE COURT: Yeah. Go ahead.

[43]MR. OTTOWAY: I'd like to see a copy, too, Your Honor.

THE COURT: All right.

MR. OTTOWAY: But, again, Your Honor, I am reiterating here, we shouldn't get to Jimmy Fennell because the undisclosed evidence is not what Jimmy

Fennell said, it's what Curtis Davis said that Jimmy Fennell said. That's the entire basis of the writ. So having an invocation here, we might not even get to this particular witness. I think we should hear Curtis Davis first, before we take up this particular issue. If you don't believe Curtis Davis or you don't believe he says that, you know, Jimmy Fennell didn't tell him this alternative timeline, then we don't go further.

THE COURT: I understand. We're stilltalking about Mr. Fennell at this time.

MR. OTTOWAY: Thank you, Your Honor.

MR. BENJET: This affidavit is acceptableto us to memorialize the invocation of the rights.

THE COURT: Do we have something in the file?

MR. BENJET: We don't.

MR. PHILLIPS: I have the original.

THE COURT: If you would have it filed over there with the clerk so that --

[44]MR. PHILLIPS: Thank you.

MR. BENJET: And if I can just read italoud for the record. To the paragraph 1:

"My name is Jimmy Lewis Fennell, Jr. I am over the age of 18 and fully competent to make this affidavit. I currently reside at the TDCJ Sanders Estes Unit in Johnson County, Texas.

Paragraph 2:

"I am aware that a bench warrant for my appearance and testimony in Bastrop County District Court has been issued in Ex Parte Reed, No. WR-

50,961. A copy of a bench warrant is attached as Exhibit I. I have discussed this matter with my attorney prior to executing this affidavit.

Paragraph 3:

"If I am called to testify and asked any questions regarding the subject matter of (A), the murder of Stacey Stites; (B), any statements I may have made regarding my activities and whereabouts on April 22nd-23rd, 1996; (C), the investigation of the murder of Stacey Stites, or (D) the prosecution and trial of Rodney Reed for the murder of Stacey Stites, I will not answer the questions. Instead, I will respond to each question regarding the subjects by stating that, 'On advice of counsel, I am **[45]** declining to answer the question based on my Fifth Amendment right not to testify.'"

Paragraph 4:

"If I am called to testify and asked any questions regarding any allegation against me of criminal conduct while I was working as a police officer, I will not answer the questions. Instead, I will respond to each question regarding these subjects by stating that, 'On advice of counsel, I am declining to answer the question based on my Fifth Amendment right not to testify.'"

Signed on October 7, 2017. There is a notarized signature affirming that it's Jimmy Fennell, and then attached is the bench warrant. And, Your Honor, if you would like a copy, we can provide you one or you have it right there.

THE COURT: That'll be accepted. And he will not testify?

MR. PHILLIPS: He will not testify.

THE COURT: If he will not testify, you're free to go.

MR. PHILLIPS: I'm going to stay for a while, if I may.

THE COURT: You can stay. And if he'shere -- I don't know if he's here or not -- he can be

Postconviction DNA Testing Statutory Text

Alabama: Ala. Code § 15-18-200(c)(1), (f)(1)

(c) After notice to the state and an opportunity to respond, the circuit court may order forensic DNA testing and analysis if the court finds that all of the following apply: (1) The specific evidence which the petitioner has requested be subject to forensic DNA testing and analysis is still in existence and is in a condition that allows forensic DNA testing and analysis to be conducted which would yield accurate and reliable results.

(f)(1) Except as provided in subdivision (2), the circuit court shall order the testing requested in a motion for DNA testing, under reasonable conditions designed to protect the interest of the state and the integrity of the evidence and testing process, upon a determination…b. That the evidence to be tested is in the possession of the state or the court and has been subject to a chain of custody sufficient to establish that it has not been altered in any material respect.

Alaska: Alaska Stat. Ann. § 12.73.020(5)

The court shall order post-conviction DNA testing of specific evidence if:…(5) the evidence to be tested has been subject to a chain of custody and retained under conditions that ensure that the evidence has not been substituted, contaminated, or altered in any manner material to the proposed DNA testing.

Arizona: Ariz. Rev. Stat. § 13-4240(B)(2), (C)(2)

B. After notice to the prosecutor and an opportunity to respond, the court shall order deoxyribonucleic acid testing if the court finds that all of the following apply . . . 2. The evidence is still in existence and is in a condition that allows deoxyribonucleic acid testing to be conducted.

C. After notice to the prosecutor and an opportunity to respond, the court may order deoxyribonucleic acid testing if the court finds that all of the following apply:…2. The evidence is still in existence and is in a condition that allows deoxyribonucleic acid testing to be conducted.

Arkansas: Ark. Code Ann. § 16-112-202(4)

Except when direct appeal is available, a person convicted of a crime may make a motion for the performance of fingerprinting, forensic deoxyribonucleic acid (DNA) testing, or other tests which may become available through advances in technology to demonstrate the person's actual innocence if:...(4) The specific evidence to be tested is in the possession of the state and has been subject to a chain of custody and retained under conditions sufficient to ensure that the evidence has not been substituted, contaminated, tampered with, replaced, or altered in any respect material to the proposed testing.

California: Cal. Penal Code § 1405(g)(1), (2)

(g) The court shall grant the motion for DNA testing if it determines all of the following have been established:…(1) The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion. (2) The

evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced, or altered in any material aspect.

Colorado:

None

Connecticut: Conn. Gen. Stat. Ann. § 54-102kk(b)(2), (c)(2)

(b) After notice to the prosecutorial official and a hearing, the court shall order DNA testing if it finds that:…(2) The evidence is still in existence and is capable of being subjected to DNA testing.

(c) After notice to the prosecutorial official and a hearing, the court may order DNA testing if it finds that:…(2) The evidence is still in existence and is capable of being subjected to DNA testing.

Delaware: Del. Code. Ann. tit. 11, § 4504(a)(4)

(a) Except at a time when direct appellate review is available, and subject to the time limitations set forth in this subsection, a person convicted of a crime may file in the court that entered the judgement of conviction a motion requesting the performance of forensic DNA testing to demonstrate the person's actual innocence. Any such motion may not be filed more than 3 years after the judgement of conviction is final. The motion may be granted if: . . . . (4) The movant presents a prima facie case that the evidence to be tested has been subject to a chain of custody sufficient to establish that the evidence has not been substituted, tampered with,

degraded, contaminated, altered or replaced in any material aspect.

DC: D.C. Code § 22-4133(a)(2)

(a) A person in custody pursuant to the judgment of the Superior Court of the District of Columbia for a crime of violence may, at any time after conviction or adjudication as a delinquent, apply to the court for DNA testing of biological material that:…(2) Is in the actual or constructive possession of the District of Columbia or the United States, or has been retained by any other person or entity under conditions sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect.

Florida: Fla. Stat. Ann. § 925.11(2)(f)

(f) The court shall make the following findings when ruling on the petition: . . . 2. Whether the results of DNA testing of that physical evidence would be admissible at trial and whether there exists reliable proof to establish that the evidence has not been materially altered and would be admissible at a future hearing.

Georgia: Ga. Code Ann. § 5-5-41(c)(7)(A), (B)

(7) The court shall grant the motion for DNA testing if…all of the following have been established: (A) The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion; (B) The evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been

substituted, tampered with, replaced, or altered in any material respect.

Hawaii: Haw. Rev. Stat. § 844D-123(a)(3), (b)(2)

(a) The court shall order testing after a hearing if it finds that:…(3) The evidence sought to be analyzed has been identified with particularity and still exists in a condition that permits DNA analysis; provided that questions as to the chain of custody of the evidence shall not constitute grounds to deny the motion if the testing itself can establish the integrity of the evidence.

(b) The court may order testing after a hearing if it finds that:…(2) The evidence sought to be analyzed has been identified with particularity and still exists in a condition that permits DNA analysis; provided that questions as to the chain of custody of the evidence shall not constitute grounds to deny the motion if the testing itself can establish the integrity of the evidence.

Idaho: Idaho Code § 19-4902(c)(2)

(c) The petitioner must present a prima facie case that:…(2) The evidence to be tested has been subject to a chain of custody sufficient to establish that such evidence has not been substituted, tampered with, replaced or altered in any material aspect.

Illinois: 725 Ill. Comp. Stat. 5/116-3(b)(2)

(b) The defendant must present a prima facie case that:…(2) the evidence to be tested has been subject to a chain of custody sufficient to establish

that it has not been substituted, tampered with, replaced, or altered in any material aspect.

Indiana: Ind. Code § 35-38-7-8(2)

Sec. 8. After complying with section 7 of this chapter, the court shall determine whether the petitioner has presented prima facie proof of the following:…(2) That a sample of the evidence that the petitioner seeks to subject to DNA testing and analysis is in the possession or control of either: (A) the state or a court; or (B) another person, and, if this clause applies, that a sufficient chain of custody for the evidence exists to suggest that the evidence has not been substituted, tampered with, replaced, contaminated, or degraded in any material aspect.

Iowa: Iowa Code Ann. § 81.10(7)

7. The court shall grant the motion if all of the following apply:…a. The evidence subject to DNA testing is available and in a condition that will permit analysis. b. A sufficient chain of custody has been established for the evidence.

Kansas:

None

Kentucky: Ky. Rev. Stat. Ann. § 422.285(5)(b), (6)(b)

(5) After due consideration of the request and any supplements and responses thereto, the court shall order DNA testing and analysis if the court finds that all of the following apply:…(b) The evidence is still in existence and is in a condition that allows DNA testing and analysis to be conducted.

(6) After due consideration of the request and any supplements and responses thereto, the court may order DNA testing and analysis if the court finds that all of the following apply:…(b) The evidence is still in existence and is in a condition that allows DNA testing and analysis to be conducted.

Louisiana: La. Code Crim. Proc. Ann. art. 926.1(C)(3)

C. In addition to any other reason established by legislation or jurisprudence, and whether based on the petition and answer or after contradictory hearing, the court shall dismiss any application filed pursuant to this Article unless it finds all of the following:…(3) The evidence to be tested is available and in a condition that would permit DNA testing.

Maine: Me. Rev. Stat. Ann. tit. 15, § 2138(4-A)(B)

4-A. Standard for ordering DNA analysis. The court shall order DNA analysis if a person authorized under section 2137 presents prima facie evidence that:…B. The evidence to be tested has been subject to a chain of custody sufficient to establish that the evidence has not been substituted, tampered with, replaced or altered in a material way.

Maryland:

None

Massachusetts: Mass. Gen. Laws Ann. ch. 278A, § 7(b)(2)

(b) The court shall allow the requested forensic or scientific analysis if each of the following has been demonstrated by a preponderance of the evidence:…(2) that the evidence or biological material

has been subject to a chain of custody that is sufficient to establish that it has not deteriorated, been substituted, tampered with, replaced, handled or altered such that the results of the requested analysis would lack any probative value.

Michigan:

None

Minnesota: Minn. Stat. Ann. § 590.01(1a)(b)(2)

(b) A person who makes a motion under paragraph (a) must present a prima facie case that:…(2) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect.

Mississippi: Miss. Code Ann. § 99-39-9(1)(d)

(1) A motion under this article shall name the State of Mississippi as respondent and shall contain all of the following:…(d) A separate statement of the specific facts which are within the personal knowledge of the petitioner and which shall be sworn to by the petitioner, including, when application is made pursuant to Section 99-39-5, a statement…that the chain of custody of the evidence to be tested established that the evidence has not been tampered with, replaced or altered in any material respect or, if the chain of custody does not establish the integrity of the evidence, that the testing itself has the potential to establish the integrity of the evidence. For purposes of this paragraph, evidence that has been in the custody of law enforcement, other

government officials, or a public or private hospital shall be presumed to satisfy the chain-of-custody requirement, absent specific evidence of material tampering, replacement or alteration, and that the application for testing is made to demonstrate innocence or the appropriateness of a lesser sentence and not solely to unreasonably delay the execution of sentence or the administration of justice.

Missouri:

None

Montana: Mont. Code Ann. § 46-21-110(5)(a)

(5) The court shall grant the petition if it determines that the petition is not made for the purpose of delay and that: (a) the evidence sought to be tested is available and has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, degraded, contaminated, altered, or replaced in any material aspect.

Nebraska:

None

Nevada:

None

New Hampshire: N.H. Rev. Stat. Ann. § 651-D:2(III)(a), (b)

III. The court may order DNA testing pursuant to an application made under this section upon finding that the petitioner has established each of the following factors by clear and convincing evidence:…(a) The evidence to be tested was secured in relation to the investigation or prosecution that

resulted in the petitioner's conviction or sentence, and is available and in a condition that would permit the DNA testing that is requested in the motion. (b) The evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced, or altered in any material aspect.

New Jersey: N.J. Stat Ann. § 2A:84A-32a(d)(1), (2)

d. The court shall not grant the motion for DNA testing unless, after conducting a hearing, it determines that all of the following have been established: (1) the evidence to be tested is available and in a condition that would permit the DNA testing that is requested in the motion; (2) the evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced or altered in any material aspect.

New Mexico:

None

New York:

None

North Carolina:

None

North Dakota: N.D. Cent. Code § 29-32.1-15(2)(b)

2. A person who makes a motion under subsection 1 must present a prima facie case that:…b. The evidence to be tested has been subject to a chain of custody sufficient to establish that it has

not been substituted, tampered with, replaced, or altered in any material aspect.

Ohio: Ohio Rev. Code Ann. § 2953.74(C)(2), (6)

(C) If an eligible offender submits an application for DNA testing under section 2953.73 of the Revised Code, the court may accept the application only if all of the following apply:…(2) The testing authority determines all of the following pursuant to section 2953.76 of the Revised Code regarding the parent sample of the biological material described in division (C)(1) of this section:…(c) The parent sample of the biological material so collected has not degraded or been contaminated to the extent that it has become scientifically unsuitable for testing, and the parent sample otherwise has been preserved, and remains, in a condition that is scientifically suitable for testing….(6) The court determines pursuant to section 2953.76 of the Revised Code from the chain of custody of the parent sample of the biological material to be tested and of any test sample extracted from the parent sample, and from the totality of circumstances involved, that the parent sample and the extracted test sample are the same sample as collected and that there is no reason to believe that they have been out of state custody or have been tampered with or contaminated since they were collected.

Oklahoma: Okla. Stat. Ann. tit. 22, § 1373.4(A)

A. After the motion requesting forensic DNA testing and subsequent response have been filed, the

sentencing court shall hold a hearing to determine whether DNA forensic testing will be ordered. A court shall order DNA testing only if the court finds:…5. The chain of custody of the evidence to be tested is sufficient to establish that the evidence has not been substituted, tampered with, replaced or altered in any material respect or, if the chain of custody does not establish the integrity of the evidence, the testing itself has the potential to establish the integrity of the evidence. For purposes of this act, evidence that has been in the custody of law enforcement, other government officials or a public or private hospital shall be presumed to satisfy the chain-of-custody requirement of this subsection absent specific evidence of material tampering, replacement or alteration.

Oregon: Or. Rev. Stat. § 138.692(4)(b)

(4) The court shall order the DNA testing requested in a motion under subsection (1) of this section if the court finds that:…(b) Unless the parties stipulate otherwise, the evidence to be tested has been subject to a chain of custody sufficient to establish that the evidence has not been altered in any material aspect.

Pennsylvania: 42 Pa. Stat. and Cons. Stat. Ann. § 9543.1(d)(1)(ii)

(d) Order.-- (1) Except as provided in paragraph (2), the court shall order the testing requested in a motion under subsection (a) under reasonable conditions designed to preserve the integrity of the evidence and the testing process upon a determination, after review of the record of the applicant's trial, that the:…(ii) evidence to be tested

as been subject to a chain of custody sufficient to establish that it has not been altered in any material respect.

Rhode Island: 10 R.I. Gen. Laws. § 10-9.1-12(a)(2), (b)(2)

(a) Mandatory testing. After notice to the prosecution and a hearing, a justice of the superior court shall order testing after finding that:…(2) The evidence is still in existence and is capable of being subjected to DNA testing.

(b) Discretionary testing. After notice to the prosecution and a hearing, a justice of the superior court may order testing after finding that:…(2) The evidence is still in existence and is capable of being subjected to DNA testing.

South Carolina: S.C. Code Ann. § 17-28-90(B)(1), (2)

(B) The court shall order DNA testing of the applicant's DNA and the physical evidence or biological material upon a finding that the applicant has established each of the following factors by a preponderance of the evidence: (1) the physical evidence or biological material to be tested is available and is potentially in a condition that would permit the requested DNA testing; (2) the physical evidence or biological material to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced, or altered in any material aspect, or the testing itself may establish the integrity of the physical evidence or biological material.

South Dakota: S.D. Codified Laws § 23-5B-1(7)

Upon a written motion by any person who has been convicted of a felony offense, the court that entered the judgment of conviction for the felony offense shall order DNA testing of specific evidence if the court finds that all of the following apply:…(7) The specific evidence to be tested exists, is in the possession of the state, and has been subject to a chain of custody and retained under conditions sufficient to ensure that such evidence has not been substituted, contaminated, tampered with, replaced, or altered in any respect material to the proposed DNA testing.

Tennessee: Tenn. Code Ann. § 40-30-304(2)

After notice to the prosecution and an opportunity to respond, the court shall order DNA analysis if it finds that:…(2) The evidence is still in existence and in such a condition that DNA analysis may be conducted.

Texas: Tex. Code Crim. Proc. Ann. art. 64.03(a)(1)(A)

(a) A convicting court may order forensic DNA testing under this chapter only if: (1) the court finds that: (A) the evidence: (i) still exists and is in a condition making DNA testing possible; and (ii) has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect.

Utah: Utah Code Ann. § 78B-9-301(2)(a), (b)

(2) A person convicted of a felony offense may at any time file a petition for postconviction DNA testing in the trial court that entered the judgment of conviction if the person asserts factual innocence under oath and the petition alleges: (a) evidence has been obtained regarding the person's case which is still in existence and is in a condition that allows DNA testing to be conducted; (b) the chain of custody is sufficient to establish that the evidence has not been altered in any material aspect.

Vermont: Vt. Stat. Ann. tit. 13, § 5566(a)(4)

(a) The court shall grant the petition and order DNA testing if it makes all of the following findings:...(4)(A)(i) The chain of custody of the evidence to be tested establishes that the evidence has not been tampered with, replaced, or altered in any material respect; or (ii) If the chain of custody does not establish the integrity of the evidence, the testing itself has the potential to establish the integrity of the evidence. (B) For purposes of this subchapter, evidence that has been in the custody of a law enforcement agency, a governmental body, or a public or private hospital shall be presumed to satisfy the chain-of-custody requirement of this subdivision.

Virginia: Va. Code Ann. § 19.2-327.1(A)(ii)

A. Notwithstanding any other provision of law or rule of court, any person convicted of a felony or any person who was adjudicated delinquent by a circuit court of an offense that would be a felony if committed by an adult may, by motion to the circuit court that entered the original conviction or the adjudication of delinquency, apply for a new scientific investigation of any human biological evidence

related to the case that resulted in the felony conviction or adjudication of delinquency if:…(ii) the evidence is subject to a chain of custody sufficient to establish that the evidence has not been altered, tampered with, or substituted in any way.

Washington:

None

West Virginia: W. Va. Code § 15-2B-14(f)(1), (2)

(f) The court shall grant the motion for DNA testing if it determines all of the following have been established: (1) The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion; (2) The evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced or altered in any material aspect.

Wisconsin: Wis. Stat. § 974.07(7)(a), (b)

(7)(a) A court in which a motion under sub. (2) is filed shall order forensic deoxyribonucleic acid testing if all of the following apply:…4. The chain of custody of the evidence to be tested establishes that the evidence has not been tampered with, replaced, or altered in any material respect or, if the chain of custody does not establish the integrity of the evidence, the testing itself can establish the integrity of the evidence…(b) A court in which a motion under sub. (2) is filed may order forensic deoxyribonucleic acid testing if all of the following apply:…3. The chain of custody of the evidence to be tested establishes that the evidence has not been tampered with, replaced, or altered in any material respect or,

if the chain of custody does not establish the integrity of the evidence, the testing itself can establish the integrity of the evidence.

Wyoming: Wyo. Stat. Ann. § 7-12-303(c)(ii), (iii)

(c) A person convicted of a felony offense may, preliminary to the filing of a motion for a new trial, file a motion for post-conviction DNA testing in the district court that entered the judgment of conviction against him if the movant asserts under oath and the motion includes a good faith, particularized factual basis containing the following information:…(ii) That evidence is still in existence and is in a condition that allows DNA testing to be conducted; (iii) That the chain of custody is sufficient to establish that the evidence has not been substituted, contaminated or altered in any material aspect that would prevent reliable DNA testing.

Federal: 18 U.S.C. § 3600(a)(4)

(a) In general.--Upon a written motion by an individual sentenced to imprisonment or death pursuant to a conviction for a Federal offense (referred to in this section as the "applicant"), the court that entered the judgment of conviction shall order DNA testing of specific evidence if the court finds that all of the following apply:…(4) The specific evidence to be tested is in the possession of the Government and has been subject to a chain of custody and retained under conditions sufficient to ensure that such evidence has not been substituted, contaminated, tampered with, replaced, or altered in any respect material to the proposed DNA testing.