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

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COURT OF CRIMINAL APPEALS
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EX PARTE	§	Writ Cause No. 50, 961
	§	
RODNEY REED,	§	
	§	Trial Cause No. 8701
Applicant.		

SUPPLEMENTAL APPLICATION FOR WRIT OF HABEAS CORPUS

THIS IS A DEATH PENALTY CASE

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Rodney Reed files this Supplement[1] to his pending Application for Writ of Habeas Corpus based on newly discovered information which further establishes his longstanding claims of innocence and other constitutional violations. Specifically, new evidence has come to light that Jimmy Fennell lied about his whereabouts on the night of Stacey Stites's murder. During a recent CNN interview, Bastrop Sherriff's Officer Curtis Davis recounted a conversation with Fennell the morning of April 23, 1996—the day that Stacey's body was discovered—in which Fennell told Officer Davis, his best friend, that he had been drinking the night of April 22, 1996, with other police officers in and around his truck, and did not return home until approximately 10:00 or 11:00 that night. This recent statement contradicts Fennell's statement to investigators given two days after the murder. Fennell then told police (and later testified) that he was at home with Stacey[2] on the night of April 22, 1996.

Fennell's inconsistent account of his whereabouts is significant evidence of Mr. Reed's innocence because, among other reasons, it represents evidence of Fennell's consciousness of guilt. *See Gear v. State*, 340 S.W.3d 743, 747 (Tex. Crim. App. 2011) (suspect's inconsistent statements are affirmative evidence of guilt). Further, Fennell told Officer Davis that he arrived home after drinking near

[1] Mr. Reed hereby incorporates by reference all factual allegations and legal argument raised in his prior habeas applications.

[2] For clarity, Stacey Stites and her mother Carol Stites will be referred to by their first names.

the time when forensic evidence shows that Stacey was murdered; before midnight on April 22, 1996. *See* Application, *Ex parte Reed*, No. 50, 961-07 at Exhibits 3-5 (Affidavits of Dr. Spitz, Dr. Baden, and Dr. Riddick).[3] Because Fennell's statement to Officer Davis was never disclosed to the defense, this new evidence also establishes a violation of Due Process both under *Brady v. Maryland* and this Court's false testimony jurisprudence. *See Ex Part Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009).

A. Factual Background

Rodney Reed was convicted of murder based on the State's theory that Mr. Reed abducted Stacey while she drove to work at approximately 3:30 am on April 23, 1996. The State's timeline was based in large part on Fennell's own account of Stacey's schedule and the events of the night before. Even though Fennell was the last person to see Stacey alive, no statement was taken from Fennell until two days after Ms. Stites's body was found. Exhibit 1 (Reports from April 25, 1996 Fennell Interview). Fennell was interviewed on April 25, 1996. He told investigators that he and Stacey were together in their apartment from approximately 7:30 p.m. on. *See id.* Fennell gave specific details that the two showered together, that he rubbed Stacey's back, but they did not have sex. *Id.* Fennell claimed that Stacey went to sleep at about 8:30 to 8:40 p.m. and Fennell stayed up a short while later watching

[3] Mr. Reed's Pending Application will be abbreviated hereafter as the 2015 Application.

TV. *Id.* Fennell said he went to bed around 9 p.m. *Id.* Fennell told police that he was asleep when Stacey left, and was awoken only by a phone call between 6:00 and 7:00 a.m. reporting that Stacey was missing. *Id.*

Fennell's account of these events at trial differed slightly. He testified that he came home from work at around 2 p.m., changed his clothes and went to coach little league baseball practice. TR Vol. 45 at 79. Fennell claimed that he returned home from practice at around 8:00 or 8:30 p.m., and that he and Stacey spent the rest of the evening together in their apartment. TR Vol. 45 at 79-82. Fennell's account was partially corroborated by Carol, who testified that Jimmy took his truck to baseball practice that afternoon and that she last saw Stacey when Fennell returned from practice and the two went up to their apartment. TR Vol. 44 at 60, 65. Several years after Mr. Reed's conviction, David Hall, a fellow Giddings Police Officer and neighbor, testified during a habeas hearing that Fennell dropped him off at home after the two had little league baseball practice. 2001 Habeas Hearing TR at 216.[4]

In the spring of 2016, Officer Davis agreed to be interviewed for a CNN documentary about Mr. Reed's case. Undersigned counsel Bryce Benjet learned of the interview when asked by a CNN producer to comment about certain statements

[4] David Hall's wife Carla gave a completely different account of the afternoon of April 22nd. During the 2001 postconviction hearing, Carla Hall testified that she and Stacey went shopping while David Hall and Fennell were coaching little league. 2001 Habeas Hearing TR at 204 ("During little league with my two sons we dropped off the guys and my little girl and her [Stacey] and I went to Wallmart . . . .").

made by Officer Davis. A producer of the show allowed Mr. Benjet and his legal assistant to view portions of the interview with Officer Davis and to briefly review a transcript of the entire interview. However, CNN declined to release a copy of the interview or the transcript for use in this proceeding. The relevant portions of the recording are expected to be part of an upcoming CNN broadcast. The following information is based on undersigned counsel's viewing of the video and review of the transcript and is proven through counsel's verification of the facts alleged in this application.

Officer Davis gave a lengthy recorded interview to CNN in which he discussed his interactions with Fennell on April 23, 1996. During this interview, Officer Davis described seeing Fennell at the Bastrop Sheriff's Office on the morning of April 23rd. Fennell was anxious and told his friend Officer Davis that Stacey was missing. The two stayed at the Sheriff's Office until Fennell was called out to look at his truck, which had been found in a parking lot at Bastrop High School. Officer Davis accompanied Fennell to view the truck, and then to Fennell's apartment in Giddings where the two sat and talked, awaiting news of the search for Stacey. During this time Fennell told Officer Davis where he had been the night before.

Fennell told Officer Davis that he had planned to drive Stacey to work that morning, but did not because he had been drinking the night before. Fennell

further told Davis that, after baseball practice, he and other police officers went out and drank beer in and around Fennell's truck. Because Stacey had to go to sleep early for work, Fennell stayed out late so not to disturb her. Officer Davis understood Fennell to have arrived home from drinking beer at around 10:00 or 11:00 p.m. Fennell then told Officer Davis that he did not wake up in the morning to drive Stacey either because he had been drinking the night before or because Stacey did not wake him up, knowing that he had been drinking. Fennell's account to Officer Davis of the events of the night of April 22, 1996, made prior to Stacey's body being found, deviates substantially from what he told police two days later and his trial testimony.

B. Fennell's Inconsistent Account of His Wherabouts on April 22, 1996 is Additional Evidence of Innocence

In his pending habeas application, Mr. Reed has raised claims of innocence both as a free standing Due Process claim under *Elizondo* as well as a procedural gateway for relief under Article 11.071 § 5(a)(2). Mr. Reed's innocence claim is based on new evidence including:

- A recantation by the State's medical examiner of his opinion offered at trial that Mr. Reed's semen is associated with Stacey's murder;
- New and renowned forensic experts who explain the forensic evidence showing that Stacey was murdered sometime before midnight on April 22, 1996 and that her body was moved to the area where it was found hours after her death;

- New witnesses who credibly establish that Stacey was having an affair with Mr. Reed.

All of this new evidence is added to the existing record from which this Court drew a "healthy suspicion" that Fennell was involved in the murder. *Ex parte Reed*, 271 S.W.3d 698, 747 (Tex. Crim. App. 2008). Fennell's inconsistent account of what he was doing on the night of April 22, 1996 is yet more evidence that Fennell—and not Mr. Reed—murdered Stacey.

This Court has recognized that a person's inconsistent statements about the circumstances surrounding a crime constitute affirmative evidence of guilt. *See Gear v. State*, 340 S.W.3d 743, 747 (Tex. Crim. App. 2011) (implausible or inconsistent statements by suspect are evidence of consciousness of guilt). Indeed, the State effectively argued at trial that Mr. Reed's initial denial of any relationship with Stacey was affirmative evidence of guilt. TR Vol. 56 at 56. However, the inconsistency between Fennell's account of his whereabouts on April 22 to his best friend and later to the police is far more suspicious. If Fennell was really at home all night on April 22nd, why would he lie to his best friend? Instead, the timing and inconsistency of Fennell's statements suggests that his later account given to the police was fabricated to conceal his responsibility for the murder.

Fennell would expect police to learn of his violent temper and deteriorating relationship with Stacey. *See* 2015 Application at 17-19. He also knew that, as

Stacey's fiancé and the last person seen with Stacey, he would be scrutinized as a suspect. An admission that he arrived home intoxicated, at the approximate time of Stacey's death,[5] would be damning evidence of guilt. This Court can infer from Fennell's inconsistent account of his whereabouts and activities on April 22nd that Fennell constructed a false story that he and Stacey spent a quiet evening together and that she had been kidnapped the next morning on her way to work. *See Lozano v. State*, 359 S.W.3d 790, 814 (Tex. App.—Fort Worth 2012, pet. ref'd).

The inconsistency between Fennell's statement to Officer Davis and his later statements to police is just one of a number of inconsistent or implausible statements and suspicious actions made by Fennell in the wake of Stacey's murder:

- Fennell gave a false statement regarding why he had not had sex with Stacey in the days before the murder. He claimed that they did not have sex because Stacey was on the "green" placebo pill of her birth control and that the prescription told them that she could become pregnant at the time . *See* 2015 Application at 20-21. An experienced OB/GYN, Merrill Lewen, M.D., has explained that there is no added risk of pregnancy when taking the placebo portion of a birth control prescription and no doctor or prescription would have advised a patient to the contrary. *See id.*

- Fennell falsely claimed that he had filled the gas tank of his truck the day before Stacey's murder. *See* 2015 Application at 21. After police discovered that the truck's gas tank was no more than 1/4 full, Fennell changed his story. *See id.* The use of over 3/4 of a tank of gas did not fit Fennell's narrative that Stacey had been abducted in Bastrop on her way to work and her body left soon after in a nearby secluded location. However, if Stacey was murdered by Fennell at night on April 22nd, it is very possible that Fennell could have used a

[5] *See* 2015 Application at Exhibits 3-5.

significant amount of gas searching out a place to abandon Stacey's body and/or leaving the car running while staging the crime scene and then arranging for a ride back from Bastrop.

- Fennell insisted that he was going to drive Stacey to work on the 23rd in an upsetting disagreement with Stacey and Carol on the afternoon of April 22nd. 2015 Application at 22. He attributed the supposed change of plans to a private conversation with Stacey later in the evening. *See id.* If Fennell was out drinking until Stacey went to sleep, then that conversation could not have taken place.[6]

- Fennell was not truthful about his access to Carol Stites's car. In his trial testimony, Fennell claimed that he never borrowed Stacey's mother Carol's car. *See* TR Vol. 45 at 73. He stated that he had only driven Carol's car "if they wanted me to drive, for some off reason, whenever we all went somewhere together." *Id.* However, Carol Stites testified that Fennell routinely borrowed her car and had done so on April 22nd to go to work. TR Vol. 44 at 57, 61 ("...he took the keys out of his pocket and gave me my car keys because it was just a routine. I'd loan him the car, and he'd give me the car keys back.").

- Fennell closed out his bank account on the morning Stacey disappeared. *See* 2015 Application at 23. This is some evidence that Fennell was initially preparing to flee.

- Fennell was found deceptive on two polygraph examination regarding his involvement in the crime and invoked his right to counsel to avoid further questioning. *See* 2015 Application at 23-24.

The newly discovered inconsistent statements by Fennell as to his whereabouts on the night of April 22nd, when viewed in the totality of Fennell's other inconsistent

[6] Fennell's testimony on this point differed substantially from the account of Stacey's mother Carol. At trial, Fennell testified that he was not working the following day and planned to sleep in. TR Vol. 45 at 81. Carol testified that Fennell had insisted he drive Stacey to work so that Fennell would have his truck because "he was supposed to be in court at 10:00 that morning." TR Vol. 44 at 62.

and implausible statements about the case, along with the forensic evidence, is powerful evidence of Fennell's likely responsibility for Stacey's murder.

A similar situation in which a police officer murdered his wife and staged the crime scene was considered by the Fort Worth Court of Appeals *in Lozano v. State*, 359 S.W.3d 790 (Tex. Crim. App. 2012). In upholding the sufficiency of the evidence against Denton Police Detective Robert Lozano, the Fort Worth Court of Appeals closely analyzed the statements made by Lozano in which he alleged that his wife had accidentally shot herself while he was away from the house. The court noted that Lozano's statements were inconsistent and implausible when compared to the known forensic evidence, and considered this to be affirmative evidence of guilt. *Id.* at 814. Considering the inconsistency and implausibility of Lozano's words and actions as a whole, the Fort Worth Court of Appeals explained that this suspicious behavior was sufficient to establish Lozano's guilt beyond a reasonable doubt. *See id.* (courts should not rely on "divide and conquer" approach, and instead must consider "combined and cumulative force of evidence" suggesting guilt). Although *Lozano* involved the question of sufficiency of the evidence of guilt, its reasoning applies equally where a court is considering evidence of third-party guilt as part of an innocence claim.

Fennell's inconsistent and implausible account of his actions surrounding Stacey's murder in combination with the substantial other evidence presented in

Mr. Reed's prior and pending applications, the cumulative force of this evidence establishes Mr. Reed's innocence under both the *Elizondo* clear and convincing standard as well as the reasonable probability standard under Article 11.071, section 5(a)(2) and *Schlup.*

C. Fennell's Inconsistent Account Given to Officer Davis Was Not Disclosed in Violation of *Brady v. Maryland*

Fennell's inconsistent account of his whereabouts on the night of April 22, 1996 also establish a Due Process violation under *Brady v. Maryland.* To establish a Due Process violation under *Brady*, an applicant must prove that:

> (1) the State failed to disclose evidence, regardless of the prosecution's good or bad faith;
>
> (2) the withheld evidence is favorable to him; and
>
> (3) the evidence is material, that is, there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different.

Ex Parte Miles, 359 S.W.3d 647, 665 (Tex. Crim. App. 2012). The first prong of the test regarding disclosure is met even where the prosecutor was not personally aware of the exculpatory evidence. *See id.* Rather, Due Process is violated where the undisclosed exculpatory information was known to any member of law enforcement connected to the investigation. *See id.*; *Ex Parte Reed*, 271 S.W.3d 698, 726 (Tex. Crim. App. 2008). This Court has defined "favorable" evidence under the second prong as either exculpatory evidence, "which may justify, excuse,

or clear the defendant from fault," or impeachment evidence, "which disputes, disparages, denies, or contradicts other evidence." *Ex Parte Miles*, 359 S.W.3d at 665. Finally, the materiality of the evidence must be considered collectively. *See id.* Favorable evidence is material where there is a reasonable probability of a different outcome had the evidence been timely disclosed to competent counsel. *See id.* at 666. A reasonable probability is such that the Court's confidence in the outcome is undermined. *See id.*

In this case, the State failed to disclose Fennell's inconsistent statement as to his whereabouts on the night of April 22, 1996. Even though the trial prosecutors may not have been aware of what Officer Davis learned from Fennell, Officer Davis was a Bastrop County Sheriff's Officer. And the Bastrop County Sheriff's Office was the lead agency investigating Stacey's murder. Accordingly, Officer Davis's knowledge of what Fennell told him is imputed to the State. *See Miles*, 359 S.W.3d at 665; see also *Ex parte Richardson*, 70 S.W.3d 865, 872 (Tex. Crim. App. 2002) (knowledge of police officer that served on witness's security detail, but did not investigate the crime, imputed to the State).

For the same reasons discussed *supra* Part B that Fennell's inconsistent statement to Officer Davis is evidence of innocence, this statement is "favorable" for the purposes of *Brady*. And finally, considering "all of the evidence," there is a reasonable probability that the outcome of Mr. Reed's proceedings would be

different. As explained in Mr. Reed's prior and pending applications, the evidence against Mr. Reed was based almost exclusively on now discredited and disavowed expert testimony. This Court recognized that the record as it stood in 2008 raised a "health suspicion" that Fennell—and not Mr. Reed—murdered Stacey. *Ex Parte Reed*, 271 S.W.3d at 747. Fennell's inconsistent statement regarding his whereabouts on April 22nd both (1) demonstrates Fennell's consciousness of guilt and (2) places him arriving home—intoxicated—at the approximate time of Stacey's death as found by a panel of esteemed forensic pathologists. This new evidence, especially when considered in conjunction with the additional forensic evidence that competent counsel should have presented, would transform the Court's "healthy suspicion" into a reasonable probability of a different outcome.

C. Officer Davis's Account Proves that Fennell Testified Falsely at Trial

Due Process is also violated when the State uses false testimony to obtain a conviction. *Ex parte Robins*, 360 S.W.3d 446, 459 (Tex. Crim. App. 2011). The constitution is violated regardless of whether the prosecutor used the false testimony knowingly or unknowingly. *See id.* A conviction should be reversed anytime there is a reasonable likelihood that the false testimony used by the State "could have affected the judgment of the jury." *Id.*

The new evidence that Fennell was actually out drinking on the night of April 22, 1996 meets this Court's standard for reversal where a conviction could

have been affected by false testimony. Fennell testified that he was at home with Stacey on the night of April 22nd. *See* TR Vol. 45 at 79-83. Fennell's testimony painted a picture of a happy couple, sharing an intimate but mundane evening together on the night Stacey was murdered. *Id.* Had Fennell testified consistent with his initial statements to Officer Davis, his best friend, the jury would have a very different impression. The jury would have learned that Fennell gave wildly different accounts of his whereabouts on the night of the murder to his best friend and to other investigators. This inconsistency would be construed as affirmative evidence of guilt, which clearly could have affected the judgment of the jury. *See Robbins,* 360 S.W.3d at 459; *Gear*, 340 S.W.3d at 747; *Lozano*, 359 S.W.3d at 814.

D. This Court May Consider the Claims Raised in this Application Under Section 5 of Article 11.071

Section 5 of article 11.071 allows consideration of a successive habeas application where either (1) the underlying facts or law were previously unavailable through the exercise of reasonable diligence or (2) but for a violation of the United States Constitution, no rational jury could find the applicant guilty beyond a reasonable doubt. As discussed *supra* Part B, Mr. Reed's claims establish his innocence and therefore meets the requirements for consideration under section 5(a)(2) of Article 11.071.

Moreover, Mr. Reed could not have discovered Fennell's inconsistent statement through the exercise of reasonable diligence. Officer Davis was not only Fennell's best friend, but he was also a member of the Bastrop County Sheriff's Office—the lead investigative agency in the case. It is undisputed that Fennell's inconsistent account was not disclosed to the defense. Mr. Reed's trial counsel could reasonably rely on the State to disclose a prior statement by Fennell which directly contradicted what he told police and what he testified to at trial. *See Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."); *Miles*, at 664 (Brady claim based on undisclosed exculpatory police reports and recanting witness were previously unavailable under analogous Article 11.07 § 4(a)(1)). Because Fennell's inconsistent statement to Officer Davis is proof of innocence and because Mr. Reed could not have discovered this statement through the exercise of reasonable diligence, this Court may consider Mr. Reed's claims pursuant to section 5 of article 11.071.

Conclusion and Prayer

As is common in cases where there has been a wrongful conviction, the evidence showing that Mr. Reed did not murder Stacey Stites has developed slowly

over several proceedings.[7] Fennell's inconsistent account to Officer Davis of where he was on the night of April 22, 1996 is yet more evidence implicating Fennell in the murder of his fiancé. This information—known to a Bastrop Sheriff's Officer, but never disclosed to the defense—constitutes affirmative evidence of Mr. Reed's innocence and establishes violations of Due Process under *Brady* and *Ex parte Chabot*.

Accordingly, Mr. Reed asks this Court to grant a hearing with full discovery rights through which he may fully present the dispositive evidence of his innocence and obtain the relief sought in this and his prior habeas applications.

Respectfully submitted,

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[7] The case of Kerry Max Cook is a perfect example of this phenomena. Even after 38 years, new exculpatory evidence came to light in 2016 leading to a stipulation by the State that Mr. Cook's Due Process rights were violated and his conviction should be vacated. *See* Stipulation, *Ex Parte Cook*, No. 1-77-179-A (114th Dist. Ct., Smith County, Tex., June 6, 2016) (new evidence that alternate suspect lied about events on the day before murder).

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VERIFICATION

I, Bryce Benjet, verify that the facts stated in the foregoing pleading are true and correct and that the exhibits attached are true and correct copies of the original documents obtained from law enforcement agencies in this case.

Bryce Benjet

Sworn before me this

7th day of June, 2016

Notary Public

ELIZABETH D. VACA
Notary Public, State of New York
No. 01VA4927171
Qualified in Nassau County
Certificate Filed in New York County
Commission Expires May 31, 2018

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Memorandum in Support of Application for Writ of Habeas Corpus has been served on the attorneys for the State by placing same in the United States mail, certified/return receipt requested, on this 7th day of June 2016, addressed to:

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