No. 19-____

In the Supreme Court of the United States

IN RE SWEARINGEN,
Petitioner,

PETITION FOR EXTRAORDINARY WRIT AND ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

PHILIP H. HILDER
JAMES G. RYTTING*
Counsel of Record
HILDER & ASSOCIATES, P.C.
819 Lovett Boulevard
Houston, TX 77006
(713) 655-9111
james@hilderlaw.com

BRYCE BENJET
THE INNOCENCE PROJECT
40 Worth Street, Ste. 701
New York, NY 10013
(212) 364-5980

CAPITAL CASE

QUESTION PRESENTED

Larry Ray Swearingen is scheduled to be executed tomorrow, on August 21, 2019, even though critical evidence used to convict him has been recanted and revised by the Texas Department of Public Safety Crime Laboratory ("DPS") in the past month. Specifically, DPS noted that two of its experts provided scientifically invalid testimony at Mr. Swearingen's trial. One expert negated otherwise powerfully exculpatory DNA evidence by claiming that the presence of an unknown man's blood under the victim's fingernails at the time of the discovery of the body (which excluded Mr. Swearingen) was the result of contamination. DPS now concedes that this expert had no direct knowledge and had an insufficient basis to support any such position.

In addition, DPS conceded that its trace analyst should not have provided testimony that a pattern matching association of two pieces of pantyhose entered into evidence (one of which was used as the murder weapon and one which was allegedly found in Mr. Swearingen's residence) was a "unique" match and a match "to the exclusion of all other pantyhose."

Mr. Swearingen sought authorization from the United States Court of Appeals for the Fifth Circuit to file a successor petition for a writ of habeas corpus on the basis that these DPS corrections of past testimony, when viewed in light of the evidence as a whole, including the lack of a single piece of physical or any other direct evidence connecting Mr. Swearingen to the crime, and additional scientific evidence which further invalidates the State's proof at trial, constituted the necessary *prima facie* showing under 28 U.S.C. § 2244(b)(2)(B). The Fifth Circuit denied the motion, holding that the recent DPS concessions would not, in and of themselves, exonerate Mr. Swearingen in light of the supposed "weight" of the State's proof of guilt at trial. In considering whether Mr. Swearingen met the innocence showing under 28 U.S.C. § 2244(b)(2)(B)(ii), the Fifth Circuit considered only the new claims—declining to consider any additional exculpatory evidence that was presented in support of claims raised in a prior application.

Discussing the merits of Mr. Swearingen's due process claim, the Fifth Circuit rejected Mr. Swearingen's classification of the DPS statements conceding certain invalid scientific testimony as evidence of "false" testimony under this Court's standard set forth in *Napue v. People of Ill.,* 360 U.S. 264 (1959).

The questions presented are as follows:

1) What is the scope of the evidence for a court's assessment of innocence under 28 U.S.C. § 2244(b)(2)(B)(ii)? Is a court of appeals' consideration of exculpatory evidence limited to the specific newly discovered evidence supporting the new constitutional

claim or should the court undertake a more holistic evaluation of the evidence as a whole as required under *Schlup v. Delo*, 513 U.S. 298 (1995)?

2) Where an applicant has discovered that State sponsored testimony at trial was scientifically invalid, should such testimony be considered "false and misleading testimony" such that the applicant has been denied due process in violation of the United States Constitution?

PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which petitioner, Larry Ray Swearingen, was the movant before the United States Court of Appeals for the Fifth Circuit. Mr. Swearingen is a prisoner sentenced to death and in the custody of the Texas Department of Criminal Justice.

TABLE OF CONTENTS

Page

Table of Appendices

Page

Table of Authorities

Page

CASES

STATUTES

OTHER AUTHORITIES

PETITION FOR EXTRAORDINARY WRIT AND ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Larry Ray Swearingen respectfully petitions for (1) extraordinary writ under 28 U.S.C. § 1691(a) to resolve the circuit split regarding the gatekeeping function of United States Courts of Appeal under 28 U.S.C. § 2244(b)(2); and (2) an original writ of habeas corpus petition under 28 U.S.C. §§ 2241 and 2242.

OPINIONS BELOW

The Fifth Circuit's denial of the application for a successive petition is available in the Appendix.

JURISDICTION STATEMENT

Jurisdiction for this Petition for Extraordinary Writ is appropriate pursuant to 28 U.S.C. § 1651(a) and Supreme Court Rule 20. First, extraordinary writ will be in aid of the Court's appellate jurisdiction. 28 U.S.C. § 2244(b)(3)(e) prohibits the use of writs of certiorari to appeal decisions of the lower courts regarding successive habeas petitions under 28 U.S.C. § 2244(b)(2). However, in *Felker v. Turpin*, 518 U.S. 651, 667, 116 S. Ct. 2333, 2341, 135 L. Ed. 2d 827 (1996) (Souter, J., concurring), Justice Souter recognized that the statute "does not necessarily foreclose all of our appellate jurisdiction." Namely, "if the courts of appeals adopted divergent interpretations of the gatekeeper standard," a petition for extraordinary writ under §1651(a) could provide a viable mechanism Supreme Court review. *Id.* As detailed herein, such a circuit split over the interpretation of the gateway innocence provisions of § 2244(b)(2) has now developed, and § 1651(a) provides a unique opportunity to resolve the split. Moreover, adequate relief cannot be obtained in any other court. Under 28 U.S.C. § 2244(b)(3)(E), Petitioner cannot seek rehearing of the Fifth Circuit panel's decision interpreting § 2244(b)(2). Similarly, the questions raised herein could not be brought in a federal district court, because authorization by the Fifth Circuit is necessary before a district court may hear any cause of action brought under 28 U.S.C. § 2244. Accordingly, Petitioner has no recourse to any other court.

Jurisdiction for this Original Petition for Writ of Habeas Corpus is appropriate under 28 U.S.C. §§ 2241-42. Petitioner is currently in the custody of the State of Texas and is scheduled to be executed on August 21, 2019. Petitioner cannot seek a writ of habeas corpus in the district court where he is held because the Fifth Circuit has interpreted § 2244(b)(2) to bar relief in Petitioner's case. Because the Fifth Circuit's position is premised on an improper interpretation of § 2244(b)(2), and because Petitioner will otherwise be executed imminently contrary to law, exceptional circumstances warrant the exercise of the Court's discretionary powers to grant a writ of habeas corpus.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2244(b), enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), provides in relevant part:

(2) A claim presented in a second or successive habeas corpus application under § 2254 that was not presented in a prior application shall be dismissed unless—

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

. . . .

(3) (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

. . . .

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

STATEMENT

This case concerns (1) the scope of a court of appeals' innocence inquiry in considering authorization to file a successive federal habeas petition, *see* App.-1--2a, and (2) whether claims based on admissions by the State crime lab that it offered scientifically invalid testimony should be adjudicated under the *Napue* "false testimony" due process standard. Larry Ray Swearingen's motion for authorization included substantial new developments where DPS issued corrections of invalid scientific evidence presented at Mr. Swearingen's trial. A panel of the U.S. Court of Appeals for the Fifth Circuit, empowered to decide only whether to authorize Mr. Swearingen's successive petition, denied the motion on grounds that Mr. Swearingen could not satisfy the prima facie requirements of the statute. In deciding this question at the authorization stage, the panel failed to weigh this new evidence "in light of the evidence as a whole" as is required by the statute and improperly rejected the characterization of the State-sponsored testimony as "false and misleading" in violation of due process.

For some time, the scope and nature of § 2244(b)(2)(B)(ii)'s innocence inquiry have gone unresolved by this Court. *See Felker* v. *Turpin*, 518 U.S. 651, 667 (1996) (Souter, J., concurring) (noting that this Court's involvement will become necessary "if the courts of appeals adopt[] divergent interpretations of the gatekeeper standard"). This case presents the opportunity to offer guidance in this important area.

In the context of scientifically invalid expert testimony regarding the association of hair evidence, state and federal courts have considered the invalid scientific opinions as "false testimony" and applied the *Napue*, due process standard. Because the scientifically invalid expert testimony relied on by the State at Mr. Swearingen's trial was materially indistinguishable from that offered by the FBI's microscopic hair comparison experts, it should likewise be considered false under *Napue*.

A. Rules For Authorizing Successive Petitions

Federal law provides two distinct stages of review for successive habeas petitions: authorization to file and review on the merits. 28 U.S.C. § 2244(b) sets forth, in four subsections, the procedures for authorization. Subsection (1) requires that any claim presented in a previous habeas petition be dismissed. (App.-1a.) Subsection (2) sets forth the substantive "gateways" for new claims appearing in successive petitions. (*Id.)* The gateway relevant here, § 2244(b)(2)(B), requires the applicant to show that his successive claim relies upon newly discovered evidence and that " the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty."

Mr. Swearingen need only establish a prima facie showing that he meets the requirements of § 2244(b)(2)(B). If such a showing is made, then the case is remanded for the district court's consideration of whether the elements of § 2244(b)(2)(B) are met and, if so, for an evaluation of the merits of the constitutional claims.

B. The Evidence of Record

Melissa Trotter was found deceased in a state of partial undress in the Sam Houston National Forest on January 2, 1999, nearly one month after she disappeared. There were no eye witnesses to Ms. Trotter's murder, and for all but the first three days after she disappeared, Petitioner Larry Ray Swearingen was confined in jail following an arrest on unrelated charges. For Mr. Swearingen to have committed this crime, Ms. Trotter's body – which was largely intact and minimally decomposed – would have had to have been lying exposed on the forest floor for more than 3 weeks. The only pre-trial DNA testing that revealed a male donor—scrapings from under the fingernails of the victim's left hand—*excluded* Mr. Swearingen. Nevertheless, Mr. Swearingen was charged with and convicted of Ms. Trotter's murder based entirely on circumstantial evidence.

1. The State's circumstantial case. Mr. Swearingen, an electrician, met Ms. Trotter, a 19-year-old college student, on the Montgomery College campus on December 8, 1998, around 1:30 p.m. After that point, the "picture of events becomes very cloudy." *Swearingen v. Texas* (*Swearingen I*), 101 S.W.3d 89, 105 (Tex. Crim. App. 2003) (Johnson, J., dissenting). Witnesses saw Ms. Trotter in the student center with a large blond man, and Ms. Trotter's biology instructor also saw her leaving with a light haired man. *See* Brief of Appellee Larry Ray Swearingen at 1, *Texas v. Swearingen*, 478 S.W.3d 716 (Tex. Crim. App. 2015) (No. AP-77,043) [hereinafter '043 Brief for Appellee]. Mr. Swearingen's hair was black. *Id.* Varying reports had Ms. Trotter leaving campus with a male as early as 2 p.m., *Swearingen I*, 101 S.W.3d at 93, and as late as after 2:30 p.m., Petition for Writ of Habeas Corpus of Person in State Custody at 5, *Swearingen v. Dretke*, No. H-04-2058 (S.D. Tex. Sept. 8, 2005), ECF No. 19 [hereinafter FHD Petition].

According to his landlord, Mr. Swearingen returned to his trailer home in Willis, Texas on the afternoon in question, and left again sometime between 2:00 and 3:30 p.m. *Swearingen I*, 101 S.W.3d at 93. Cell phone records also indicated that Mr. Swearingen traveled south from his home at 3:03 p.m., *away* from the National Forest, where Ms. Trotter's body was found. *See* '043 Brief for Appellee at 2. His landlord thought he returned home once more after that. *Id.*

Other than on campus with Ms. Trotter, Mr. Swearingen was not seen in the company of another person until 4:30 p.m., at which time Mr. Swearingen met his wife at his stepfather's house. '043 Brief for Appellee at 2; Respondent Dretke's Original Answer & Motion for Summary Judgment with Brief in Support at 6, *Swearingen v. Dretke*, No. H-04-2058 (S.D. Tex. Sept. 8, 2005), ECF No. 25 [hereinafter FHD Ans.]. His whereabouts—getting fast food, returning home, and spending time with family—were established thereafter. *See* '043 Brief for Appellee at 2.

The State's speculative theory at trial was that Mr. Swearingen kidnapped, sexually assaulted and killed Ms. Trotter by strangulation before leaving her body in the forest sometime between their departure from campus and Mr. Swearingen's arrival at his stepfather's house. Even under the most favorable view of the facts, this would have been a challenging feat. The National Forest was 25 miles from Mr. Swearingen's house, and 40 miles from the college campus. *See* FHD Pet., *supra*, at 5-6. The secluded area where Ms. Trotter's body was found was accessible only by single-lane dirt roads. *Id.*

The so-called "motive" (that Ms. Trotter angered Mr. Swearingen by resisting his advances) was mere conjecture. Hair found in Mr. Swearingen's bed excluded Ms. Trotter, *Swearingen I*, 101 S.W.3d at 106 (Johnson, J., dissenting), and a pubic hair discovered during autopsy was determined not to be Mr. Swearingen's. FHD Pet., *supra*, at 6 n.4.[1] Two hairs were found in Mr. Swearingen's truck with the roots intact. Although the State "suggested that they had been forcibly removed," FHD Ans.. *supra*, at 11, they were neer positively identified as Ms. Trotter's, s*ee* '043 Brief for Appellee at 3, and there were no defensive wounds on Ms. Trotter's body. *Swearingen I*, 101 S.W.3d at 94.

Nevertheless, Mr. Swearingen was convicted of capital murder. Mr. Swearingen remains sentenced to death and his execution is scheduled for August 21, 2019.

2. The Sole Piece of DNA Evidence in the case.

Before trial, DNA testing performed on scrapings under the victim's fingernails revealed the blood of an unidentified male profile that was not Mr. Swearingen's (and not the victim's) DNA. Reporter's Record, volume 30 at 126:2-127:22, *Texas v. Swearingen*, No. 99-11-06435 CR (Tex. Dist. Ct. June 10, 2013) [hereinafter 30 RR]. The obvious explanation is that this DNA belongs to Ms. Trotter's actual attacker. However, this powerful evidence of third-party guilt was neutralized at trial when Texas DPS Crime Lab DNA scientist Cassie Carradine testified that the blood had somehow (she did not know how) been "contaminated," and that in her view it was not from the killer. Specifically, Ms. Carradine testified that the blood collected by DPS from Ms. Trotter's fingernail looked "fresh" and, therefore, the blood must have resulted from in-lab contamination. 30 RR, *supra*, at 128: 1-20.

To bolster this theory, the State elicited speculation from several witnesses that the blood could have come from an officer present at the crime scene who may have cut himself while shaving. Reporter's Record, volume 28 at 113:14-22, *Texas v. Swearingen*, No. 99-11-06435 CR (Tex. Dist. Ct. June 10, 2013). Indeed, the State further justified such baseless speculation in post-conviction briefing, alleging that blood from investigators may have blown under the victim's fingernails due to winds at the crime scene or the whir of helicopters involved in the search. Appellee Larry

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[1] Pubic hair uncovered during the autopsy was inexplicably lost "[t]hrough no fault of appellant." *Swearingen v. Texas*, 303 S.W.3d 728, 734 (Tex. Crim. App. 2010).

Ray Swearingen's Motion for Rehearing at 18 n.9, *Texas v. Swearingen*, 478 S.W.3d 716 (Tex. Crim. App. 2015) (No. AP-77,043). The State also presented another spurious theory that a small drop of blood circulating through the morgue's air conditioning system somehow exited a vent and landed in the scrapings from Ms. Trotter's fingernails. Reporter's Record, volume 29 at 114:23-115:23, *Texas v. Swearingen*, No. 99-11-06435 CR (Tex. Dist. Ct. June 10, 2013) [hereafter 29 RR]. Such fantastical theories were presented under the guise of scientifically valid conclusions due to Ms. Carradine's affirmative dismissal of such evidence as contamination.

After his conviction, Mr. Swearingen repeatedly sought DNA testing of critical evidence including the rape kit, the ligature used to strangle the victim, articles of the victim's clothing and other evidence found near the victim. *See, e.g., Swearingen v. Texas*, 189 S.W.3d 779 (Tex. Crim. App. 2006); *Swearingen v. Texas*, 303 S.W.3d 728 (Tex. Crim. App. 2010); *Swearingen v. Texas*, No. 99-11-06435-CR (Tex. Dist. Ct. June 10, 2013); *Texas v. Swearingen (Swearingen II)*, 424 S.W.3d 32 (Tex. Crim. App. 2014); *Texas v. Swearingen,* 478 S.W.3d 716 (Tex. Crim. App. 2015). Mr. Swearingen was finally able to obtain such testing over seventeen years after his conviction. Unfortunately, the evidence had degraded such that no conclusive results were available.

Accordingly, the only DNA evidence in this case continues to exclude Mr. Swearingen. As there is no evidence that there was more than one perpetrator of this crime, the sole male DNA profile found under the victim's fingernails should have been highly exculpatory, but was, in fact, disregarded, to the extreme prejudice of Mr. Swearingen, due to the now thoroughly discredited testimony regarding DNA contamination.

3. <u>The murder weapon</u>.

The State's case focused primarily on an ostensibly scientific determination of "match" between the murder weapon (which was ligature made of a pantyhose leg found tied around the victim's neck and a pair of pantyhose found in Mr. Swearingen's trailer[2] that had a leg cut off. The State sponsored testimony from Department of Public Safety ("DPS") fiber analyst Sandy Musialowski that the two pieces were a "unique physical match" and that the ligature came from the hose "to the exclusion of all other pantyhose." 30 RR, *supra,* 59:21-60:16.

At trial, she testified as follows:

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[2] The circumstances of the discovery of the cut-off pantyhose were also troubling: on January 6, 1999—after two prior searches had revealed nothing and after Mr. Swearingen's wife had vacated the trailer—this leg of pantyhose was allegedly located in a trash area outside of Mr. Swearingen's trailer, where Mr. Swearingen's landlord told the police that he had thrown the trailer's remaining contents. *Swearingen I*, 101 S.W.3d at 101.

Q: [C]an you kind of give the ladies and gentlemen of the jury an idea of what exactly you used in making your determination of this match?

A: Again, I used the foam board and the straight pins, and I just looked to see the pattern and see how it fit together like a jigsaw puzzle[3] to determine it was a **unique physical match** between the ligature and the partial pantyhose from the suspect's residence.

Q: Ms. Musialowski, do you have an opinion about whether or not State's Exhibit No. 169 came from 175?

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A: My opinion is that the ligature from the victim's neck physically fits to the partial pantyhose from the suspect's residence, making it a **unique physical match, meaning that the ligature came from that pair of pantyhose to the exclusion of all other pantyhose**.

30 RR, *supra*, at 59:23-60:18, 60:11-16 (emphasis added).

4. DPS Retractions on DNA Contamination.

In October 2018, Mr. Swearingen asked Texas DPS Crime Lab Director, Brady Mills, to evaluate Ms. Carradine's trial testimony regarding evidence contamination. Nine months later, on July 25, 2019, Texas DPS responded, defending Ms. Carradine's trial testimony. (App.-3a) However, on August 8, 2019, Texas DPS issued a second letter reversing Ms. Carradine's false testimony with the following remarkable criticisms:

- Ms. Carradine issued an opinion about contamination outside the Crime Lab when "she had no direct knowledge about how the evidence was collected and stored prior to its submission to DPS."
- Ms. Carradine "could not speak to the possibility of contamination of the samples when they were outside the control of the DPS laboratory."
- Ms. Carradine had an "insufficient basis upon which to develop an opinion regarding contamination of the samples."
- Ms. Carradine erroneously "expressed an opinion that the profile from a particular sample was the product of contamination based on the color of the samples and lack of degradation of the DNA profile."

Letter from Brady W. Mills, Crime Laboratory Director, Texas Department of Public Safety to Bryce Benjet, Senior Staff Attorney, Innocence Project (Aug. 9, 2019).

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[3] The Criminalist's testimony that she used a foam board and pins to "see how [the pantyhose] fit together," 30 RR, *supra*, at 60:2-3, reveals her presupposition that these two pieces did fit together. It is thus no surprise that when she stretched the fabric over the foam board and pinned it into place, the manufactured result "supported" her predetermined conclusion.

Texas DPS's reversal and retraction of Ms. Carradine's testimony was not available until thirteen days from Swearingen's execution date.

The materiality of Carradine's false and misleading testimony is reflected by its influence on the Court's decisions. In 2009, the Court noted the convicting court's findings that Carradine provided "credible testimony … [that] the small, red blood flakes discovered during the second examination of the fingernail scrapings were both visibly and structurally too well-preserved to have been exposed to the elements for more than a couple of hours or days at most, and appeared consistent with a recent contamination." *Ex parte Swearingen,* No. WR-53,613-09, 2009 WL 249778, at *5 (Tex. Crim. App. Jan. 27, 2009) (not designated for publication). In 2014, the Court denied DNA testing on additional fingernail scrapings because "[t]he jury chose to believe that the foreign DNA either was contamination or that it came from outside the context of the crime. If the jury already knew of exculpatory results obtained from under the victim's nails and disregarded them, we have no reason to believe that it would be any different with regards to the remainder of the fingernail scrapings." *Swearingen II*, 424 S.W.3d at 39.

5. DPS Correction on Pantyhose Comparison.

In a July 19, 2019, letter DPS recognized that Musialowski's conclusion that there was a unique physical match expressed "the highest level of association we make." (App.-1a–2a) The letter confirmed, however, that DPS criminologists would not utilize such a term today, and specifically would not use the statement "to the exclusion of all others" in connection with tear mark testimony. *Id.*

Texas DPS's July 19, 2019, letter acknowledges, furthermore, that similar testimony was common in the discipline of "footwear/tire comparisons when accidental characteristics were located," but such testimony has been discredited because of pretensions to precision that the techniques and data do not permit.

The FBI and Department of Justice have found this type of overstatement to constitute unacceptable error. For instance, an overstatement in the context of the comparison of hair strands has been deemed not scientifically credible:

> Error Type 1: The examiner stated or implied that the evidentiary hair could be associated with a specific individual to the exclusion of others. This type of testimony exceeds the limits of science.

U.S. Dep't of Justice, Microscopic Hair Comparison Analysis 1 (Nov. 9, 2012), https://www.mtacdl.org/attachments/CPE/Nelson/FBI_Limits_of_Science__%20Microscopic_Hair_Comparison.pdf (emphasis added); *see generally FBI/DOJ Microscopic Hair Comparison Analysis Review*, Fed. Bureau of Investigation, https://www.fbi.gov/services/laboratory/scientific-analysis/fbidoj-microscopic-hair-comparison-analysis-review (last visited July 31, 2019).

6. Postconviction Forensic Evidence Regarding Date of Death Shows Mr. Swearingen Could Not Have Committed This Crime.

Mr. Swearingen has already presented evidence of innocence sufficient to make a prima facie showing under 28 U.S.C. § 2244(b)(2)(B)(ii). *See In re Swearingen (Swearingen III)*, 556 F.3d 344 (5th Cir. 2009). The Fifth Circuit's prior finding that Mr. Swearingen met the innocence standard was based on new evidence indicating that it would have been impossible for Mr. Swearingen to have committed this crime since he was already in prison when Ms. Trotter was killed. Ms. Trotter disappeared on December 8, 1998, and Mr. Swearingen was arrested on unrelated charges three days later, on December 11, 1998. Ms. Trotter's body was discovered in the Sam Houston National Forest on January 2, 1999—25 days after her disappearance, and 22 days after Mr. Swearingen's arrest. Throughout trial and postconviction proceedings, the State has insisted that Mr. Swearingen must have killed Ms. Trotter and disposed of her body in the forest on the day of her disappearance. However, forensic evidence demonstrates that the State's theory is fatally flawed.

At trial, the State relied heavily on the testimony of Dr. Joye Carter, the former Harris County Chief Medical Examiner. Dr. Carter conducted the autopsy on Ms. Trotter's body and testified that, based on the appearance of the body, it had been left in the woods for approximately 25 days. 29 RR, *supra*, at 45:6-12. However, the undisputed circumstances surrounding Dr. Carter's initial testimony show that testimony to be highly suspect. For example, Police officers and Montgomery County District Attorney, Mike McDougal, attended the autopsy, likely influencing Dr. Carter's determination as to time of death. *See id.* at 78:25-79:4. In addition, Dr. Carter apparently concluded that the victim had been deceased for "25 days or so" before she even made her first incision. *Id.* at 45:6-12.

Dr. Carter also did not account for the fact that the decomposition of Ms. Trotter's body was reported as "minimal" by deputies at the crime scene, with "no noticeable odor," or that Ms. Trotter's body weighed just four pounds less than the weight measured by her physician approximately two weeks before her disappearance, Petition for a Writ of Certiorari at 97a, *Swearingen v. Thaler,* 565 U.S. 1241 (2012) (No. 11-233)[hereafter 2011 Pet.].[4] Despite Dr. Carter's pinpoint estimate conveniently implicating Mr. Swearingen, Dr. Carter noted during the autopsy that Ms. Trotter's organs remained intact. Autopsy Report 4-7. Upon death, internal organs break down and liquefy, and yet the liquefaction process had barely begun. *See* Larkin Report, *supra*, ¶¶ 3-4; Autopsy Report 5 (describing the pancreas as "intact"). Indeed, finding an intact pancreas "is unheard of in cases where bodies have decomposed over a period of 25 days." Larkin Report, *supra,* ¶ 7.

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[4] After death, bodies tend to lose mass quickly, due to dehydration, desiccation and animal scavenging, among other factors. *See* Report of Dr. Glenn M. Larkin ¶ 4, *Ex parte Swearingen*, No. 99-11-06435-CR-2 (Tex. Dist. Ct. June 10, 2013); 2011 Pet., *supra.* In fact, Dr. Glen Larkin testified that bodies left exposed to the elements in the manner Ms. Trotter's was found generally lose up to 90% of their body weight in less time than 25 days. (Addendum to Medical Report of Dr. Larkin 5).

Dr. Carter also did not review photographs showing that Ms. Trotter's body was left in a relatively open, only partially shaded portion of the forest, and thus did not take into account the decomposition that would be expected as a result of a body's exposure to sunlight for 25 days in Texas. *See* 2011 Pet., *supra*, at 95a. Nor did Dr. Carter consider that Ms. Trotter's body had been found unclothed from the navel to above the breasts and thus she failed to take into account the decomposition that would have occurred as a result of exposed flesh having been left in a forest for days when making her determination as to time of death. *See id.*

In 2007, Dr. Carter signed an affidavit that directly contradicted her trial testimony that Ms. Trotter had died 25 days before being found. Specifically, in this affidavit, Dr. Carter agreed that the evidence supported a post-mortem interval "within fourteen days of discovery" and "incompatible with exposure for a longer period of time." 2011 Pet., *supra*, at 96a. Dr. Carter based her revised conclusion on "forensically important" information which she did not consider previously. *Id.* at 94a. This included video records of the crime scene, the victim's medical records showing her weight prior to her disappearance and weather data. Dr. Carter's revised testimony thus indicated that Ms. Trotter's body was not left in the forest until at least one week ***after*** Mr. Swearingen's December 11, 1998 arrest.

However, during a subsequent hearing in 2012, Dr. Carter changed positions, yet again, revealing additional errors and inaccuracies in her original trial testimony. At this hearing, Dr. Carter now claimed a possible range of post-mortem intervals between 14 and 25 days, contradicting both her original pinpoint assessment of 25 days as well as her 2007 conclusion of not more than 14 days. Writ of Habeas Corpus, volume 7 at 73:19-74:2, *Texas v. Swearingen*, No. 99-11-06435-CR (Tex. Dist. Ct. June 10, 2013). This vacillating opinion on the time of Ms. Trotter's death undermines Dr. Carter's credibility and casts serious doubt as to whether the State's theory of this crime is even plausible.

Moreover, at least three other pathologists, who have reviewed the autopsy and crime scene evidence in this case, are convinced that Ms. Trotter was killed and left in the woods at least 10 days after Mr. Swearingen was incarcerated. For example, forensic pathologist Dr. Glen Larkin, who has written chapters on dating death based on pathological findings for a well-known treatise, opined that:

> December 23, 2007, is the soonest that Trotter's body could have been left in the woods, which is to say 12 days after Mr. Swearingen was incarcerated. Furthermore, it is important to stress that forensic evidence strongly supports the conclusion that the body in this case was deposited in the Sam Houston National Forest several days after December 23, 1998. Indeed, undisputed forensic evidence, namely, the external appearances and the description of the internal organs and tissues, and photographs of resected organs strongly support a date as late as December 30, 1998, which is to say nineteen days after Mr. Swearingen was incarcerated and three weeks later than the date the

> State maintains Trotter's body was left in the Sam Houston National Forest.

(Addendum to Medical Report of Dr. Larkin 1-2).

Similarly, Dr. Lloyd White, former Chief Medical Examiner of Nueces County, and currently a Deputy Medical Examiner with Tarrant County, Texas, concurred with Dr. Larkin. Dr. White specifically singled out autopsy photos that corroborate Dr. Carter's written findings about Ms. Trotter's organs:

> The spleen removed from Trotter has been dissected and there is a longitudinal incision through the spleen's capsular surface and into the parenchyma. The capsular surface is smooth and glistening. The edges of the incision are sharp. Autolysis appears to be minimal. The photograph of the spleen has the appearance of splenic tissue taken from a recently deceased individual. The spleen obviously has not liquefied and disintegrated as is typical in individuals who have been dead for several days.
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> ***
>
> Photographs of Trotter's heart show that the muscle is still red and relatively fresh looking... There are several long incisions and several shorter ones. The edges of the incisions are sharp. Pericardial fat is seen in the upper left part of the photo surrounding the aorta. It is glistening and intact. The pericardium, except for the incisions, is otherwise intact and the surface is smooth and glistening. Again, the appearance of the heart is what one would expect to find upon autopsy of a recently deceased individual.

(Statement of White, M.D. ¶¶ 4(a-b) (attached as Ex. R)).

Dr. White concluded that "bearing in mind that this body [of the victim Melissa Trotter] was found in the national forest on 2 January 1999, the microscopic appearance of the tissue in this section is entirely incompatible with the body having been left at this location earlier than 29 or 30 December, 1998," more than two weeks after Mr. Swearingen's arrest on December 11, 1998. (Sworn Statement of Dr. White 3).

Finally, Dr. Pustilnik testified that certain blood cells "look[ed] almost as good as if [they] came from a patient in surgery at the hospital." Writ of Habeas Corpus, volume 4 at 197:14-198:1, *Texas v. Swearingen*, No. 99-11-06435-CR (Tex. Dist. Ct. June 10, 2013). Based on this and the state of several of Ms. Trotter's organs, Dr. Pustilnik concluded that Ms. Trotter "was not deceased more than seven days" before she was found. *Id.* at 181:8-11. Based on this evidence, it would have been impossible for Mr. Swearingen to have killed Ms. Trotter before he was arrested. *See Swearingen III*, 556 F.3d at 349 (Wiener, J., specially concurring) (stating that "the

elephant that I perceive in the corner of this room: actual innocence" is shown by new scientific evidence relating to post-mortem interval).

C. Fifth Circuit's Denial of Application To File Successive Petition

On August 16, 2019, the Fifth Circuit denied Mr. Swearingen's application for a successive petition under 28 U.S.C. § 2244. *In re Swearingen*, No. 19-20565, 2019 WL 3883687 (5th Cir. Aug. 16, 2019). In its denial, the Court provided what it described as a "skeletal" recitation of the facts, and described the weight of the State's case as "massive," [5] but made no reference to any of the aforementioned facts that cast the most serious doubt over Mr. Swearingen's conviction. *See infra*

In ruling that Mr. Swearingen did not make a prima facie showing that he can meet the requirements of § 2224, the Fifth Circuit considered each new development separately, as opposed to collectively and in view of all other exculpatory evidence.

With regard to the August 9, 2019 letter from DPS acknowledging that DPS analyst Carradine, the Fifth Circuit deemed Ms. Carradine's testimony to be merely "cumulative" of State Dr. Carter's testimony. Id, at *7. Yet this analysis fails to mention the serious flaws in Dr. Carter's own testimony, which taken together with a drastic change in Ms. Carradine's testimony would have had an impact on any reasonable jury.

The Fifth Circuit also cited a Texas Court of Criminal Appeals' ("CCA") decision which had found that the existence of another DNA donor need not exonerate Mr. Swearingen in view of the alleged "mountain of evidence". *Id.* at *7 (citing *Texas v. Swearingen*, 424 S.W.3d 32, 38-39 (Tex. Crim. App. 2014)), even though this assessment predated the subsequent DNA testing of multiple critical pieces of evidence including the rape kit, murder weapon and items of the victim's clothing – none of which revealed any conclusive results linking Mr. Swearingen to the crime scene as well as the additional recent clarification by DPS concerning improper testimony on the pantyhose evidence.

The Fifth Circuit minimized the impact of the DNA evidence that excluded Mr. Swearingen as merely "theoretically possible" to have swayed the jury absent testimony about contamination. Id. at *8. Yet, the cited 2014 CCA decision actually conceded that a CODIS hit to a third-party offender on DNA evidence would

[5] Remarkably, the lower courts' assessment of the strength of the State's case at trial has grown as more exculpatory evidence has revealed just how weak that case really is. On direct appeal, prior to any meaningful challenge to the forensic evidence the Court of Criminal Appeals acknowledged the "relative weakness of each individual piece of evidence tending to prove guilt" but believed that the "corroboration between the forensic evidence" and other evidence of guilt were sufficiently strong. *Swearingen I,* 101 S.W.3d at 98.

"certainly overcome any mountain of inculpatory evidence." *Swearingen II*, 424 S.W.3d at 37.

With regard to the recent DPS letter stating that State criminologist Musialowski's testimony would not, today, include the statement that the two pieces of pantyhose matched "to the exclusion of all others", the Fifth Circuit rejected the notion that such correction would have had any impact on the jury's determination of guilt or innocence. Id. at *9, Again the Fifth Circuit assessed the impact of this development in a vacuum as opposed to in conjunction with changed testimony on the DNA evidence to exclude contamination as well as the other scientific evidence of record that has been unearthed through the postconviction proceedings.

The Fifth Circuit also rejected Mr. Swearingen's claim that Ms. Carradine's testimony was false and misleading even though the August 9, 2019 letter stated that Ms. Carradine's testimony was inappropriate and that she had an "'insufficient basis' to opine regarding contamination.". *Id.* at *5 (reciting the portion of the August 9, 2019 DPS letter stating that it would have been "more appropriate" to have testified that "she could not speak to the possibility of contamination of the samples when they were outside the control of the DPS laboratory"). As a result, even though the Fifth Circuit acknowledged that Ms. Carradine "should have testified that '[t]he full range of possibilities include contamination or that it was not contamination and the [DNA] profile did come from the evidence'", the Fifth Circuit rejected the characterization of Ms. Carradine's testimony – which affirmed that the DNA profile was the result of contamination – "at most lacked a foundation" and simply should have recognized a "nuance". *In re Swearingen*, No. 19-20565, 2019 WL 3883687, at *5 (5th Cir. Aug. 16, 2019).

REASONS FOR GRANTING THE WRIT

This case presents an ideal vehicle for clarifying the scope of the innocence inquiry required under 28 U.S.C. § 2244(b)(2)(B)(ii) and an applicant's ability to demonstrate actual innocence with new scientific evidence which retracts or explains the prior testimony that was offered at trial under the guise of scientific certainty.

I. Section 2244(b)(2)(B)(ii) Anticipates a Schlup v. Delo Type Innocence Inquiry

This Court should grant review to make clear that, for a prisoner to have a meaningful opportunity to demonstrate actual innocence under 28 U.S.C. § 2244(b)(2)(B), such statute should be construed to weigh all evidence in the record with regard to whether actual innocence can be proven. Section 2244(b) requires the Court to assess the claim "in light of the evidence as a whole." There is a developing split between Circuits on how to apply this statutory language to measure new evidence of innocence. This Court should resolve the split to hold that any interpretation of this statute that precludes consideration of other probative evidence, which when taken together, magnifies the importance of the evidence in question runs afoul of the letter and spirit of this statute.

A. CIRCUIT SPLIT ON INTERPRETING § 2244

The Circuit of Appeals for the Tenth Circuit, in *Case v. Hatch*, 731 F.3d 1015, 1033 (10th Cir. 2013), determined that "in light of the evidence as a whole" presented two possible interpretations:

> "[t]wo possibilities are presented: first, whether we consider only evidence presented at the time of trial, adjusted for evidence that would have been admitted or excluded 'but for constitutional error,' or, second, whether we also consider newly developed facts that only became available after trial and that are not linked to constitutional errors occurring during trial. *See* 28 U.S.C. § 2244(b)(2)(B); *see also Nooner v. Hobbs*, 689 F.3d 921, 933 (8th Cir.2012).

The *Case* court concluded that the § 2244(b)(2)(B)(ii) inquiry is only concerned with the evidence presented at trial, properly adjusted for evidence that Case alleges was erroneously excluded due to trial-related constitutional error. Accordingly, the Court proceeded in three steps: (1) we start with the body of evidence produced at trial, (2) add "evidence allegedly kept from the jury due to an alleged [constitutional] violation," *Sawyer v. Whitley*, 505 U.S. 333, 349 (1992), and (3) determine whether it is "clear and convincing," "in light of the evidence as a whole," that "no reasonable factfinder would have" convicted Case. 28 U.S.C. § 2244(b)(2)(B)(ii).

In the Third Circuit, a district court used the opposite approach. In *Munchinski v. Wilson*, 807 F. Supp. 2d 242, 290 (W.D. Pa. 2011), *aff'd*, 694 F.3d 308 (3d Cir. 2012), the court held that "[a]ll the evidence as a whole," therefore, means all the evidence new and old in the record, including the habeas record, as it traditionally has under

Schlup. Because the petitioner adduced new, credible evidence of his innocence, and it is clear that, in light of that evidence along with the 30–plus–year record as a whole, no reasonable trier of fact could have convicted Petitioner of the crimes with which he was charged, but for the multitude of constitutional violations that occurred in this case.

The Ninth Circuit appears to be in accord with *Munchinski*'s approach, in that it identified but two ways in which the AEDPA requirements for a second or successive application are stricter than the Schlup standard.

> First, § 2244(b)(2)(B)(i) requires that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence." There is no requirement under Schlup that the factual claim was not discoverable through the exercise of due diligence. Second, § 2244(b)(2)(B)(ii) requires that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." (Emphasis added.) Schlup requires only that an applicant show that it is "more likely than not" that no reasonable fact-finder would have found him guilty.

Cooper v. Woodford, 358 F.3d 1117, 1119 (9th Cir. 2004).

Otherwise § 2244(b)'s requirements are "well within the compass" of the evolving equitable principles that have traditionally informed when courts may entertain successive petitions. *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996). At the heart of the equitable principles animating Schlup is the prerequisite that "[a]ll the evidence as a whole" must encompass evidence new and old in the record, including the habeas record. After all, the central purpose of *Schlup* was to create an exception to procedural bars that prevent review of the constitutional infirmity of trials even in light of strong evidence of evidence.

B. The Case Should be Remanded for the Fifth Circuit to Properly Consider all of the Evidence of Innocence.

When considered in conjunction with all of the other evidence, the new evidence rejecting the contamination theory offered at trial satisfies the materiality threshold of § 2244(b)(2)(B). The convicting court found that Ms. Carradine convinced the jury with "credible testimony … that the small, red blood flakes discovered during the second examination of the fingernail scrapings were both visibly and structurally too well-preserved to have been exposed to the elements for more than a couple of hours or days at most, and appeared consistent with a recent contamination." *Ex parte Swearingen*, 2009 WL 249778, at *5.

But for sponsoring inappropriate forensic testimony attributing foreign blood and DNA to contamination, any rational juror, faced with eye witness testimony placing

Ms. Trotter last with a large blond man, would conclude, that the blood under Ms. Trotter's fingernails came from the person who strangled Ms. Trotter. This constellation of facts, in conjunction with the lack of any other DNA evidence found at the crime scene, on the victim's clothing, on the murder weapon or in the rape kit connecting Mr. Swearingen to this crime, and the voluminous scientific evidence showing that Mr. Swearingen was already incarcerated at the time Ms. Trotter actually died, would leave an immediate, indelible impression of reasonable doubt on any juror as to Swearingen's responsibility for the murder.

Seen against the evidence as a whole, the new evidence is capable of showing that the state sponsored a false contamination theory would result in swift and certain acquittal by any rational jury, thus satisfying a proper interpretation of § 2244. Accordingly, the case should be remanded for consideration under a proper interpretation of § 2244(b)(2)(B)(ii).

II. The Fifth Circuit Incorrectly Exempted Invalid Scientific Testimony From This Court's Due Process/False Testimony Jurisprudence.

A *Napue* violation occurs when the government introduces false or misleading testimony and fails to correct it even though the government knew or should have known that the testimony was false or misleading. *Longus v. United States,* 52 A.3d 836, 844-45 (D.D.C. 2012) ("A bedrock principle of due process in a criminal trial is that the government may either adduce or use false testimony nor allow testimony known to be false to stand uncorrected"). Under *Napue,* the introduction of false testimony deprives a defendant of a fair trial as guaranteed by the Fifth and Sixth Amendments of the U.S. Constitution. *See Longus*, 52 A.3d at 844-45. The introduction of false or misleading testimony is material if the evidence "could … in any reasonable likely have affected the judgment of the jury." *Giglio v. United States*, 405 U.S. 150, 154 (alternation in original) (quoting *Napue*, 360 U.S. at 271). Because a defendant need only show that the false testimony "undermine[s] confidence in the verdict", *Smith v. Cain*, 565 U.S. 73, 81 (2012), the D.C. Circuit has deemed this standard to be "quite easily satisfied." *United States v. Williams*, 233 F.3d 592, 594 (D.C. Cir. 2000).

In Mr. Swearingen's case, the government has now acknowledged that testimony regarding DNA contamination was offered despite the witness having "no direct knowledge" of any such contamination and with an "insufficient basis". DPS's gross overstatement concerning a "unique" match of the pantyhose "to the exclusion of all other pantyhose" likewise perpetuated a falsehood of scientific certainty. The failure of the Fifth Circuit to classify such improper testimony as "false" violates due process.

The falsity of the testimony regarding contamination is clear on its face. The State's theory of the case was that Ms. Trotter died in the course of physical and sexual assault. Any rational jury would believe that DNA was bound to transfer, and yet the jury in Mr. Swearingen's case completely overlooked the exclusionary DNA evidence directly as Ms. Carradine's testimony.

The importance of finding a man's blood under the victim's fingernails cannot be understated. Especially in a sexually oriented strangulation case, the presence of a person's DNA—and more so blood—is powerful evidence of the identity of the murderer. *See Cotton v. Mississippi*, 144 So. 3d 137, 142 (Miss. 2014) (DNA under murder victim's fingernail that was "inconsistent with casual contact" sufficient to prove identity of murderer beyond reasonable doubt); *Missouri. v. Abdelmalik*, 237 S.W.3d 61, 66 (Mo. Ct. App. 2008) (finding Defendant's DNA under strangulation victim's fingernails is sufficient evidence to prove capital murder beyond reasonable doubt); *Louisiana v. Scott*, 97 So. 3d 1046, 1052 (La. Ct. App. 2012) (DNA under fingernail of rape victim sufficient to prove identity of assailant beyond reasonable doubt); *North Dakota v. Gibbs*, 763 N.W.2d 430, 443 (ND 2009).

Fingernail clippings and scrapings are routinely collected in cases (like Ms. Trotter's murder) where the victim may have struggled with his or her assailant. The Forensic Pathology Treatise, Spitz & Fisher at 553 reports an estimated 25% success rate in identifying the perpetrator when fingernail samples are collected at autopsy. This is because foreign DNA under a person's fingernails is strongly correlated with recent intimate contact or a physical struggle. *See e.g.*, Malsom *et al.*, The prevalence of mixed DNA profiles in fingernail samples taken from couples who co-habit using autosomal and Y-STRs, *Forensic Science Int.: Genetics,* 3 2009, 57 -62 ("Foreign DNA can accumulate under the fingernails of victims by scratching the perpetrator during a defensive action and under the perpetrator's fingernails during a sexual or aggressive act. Debris present in the hyponychium is 'protected' and for this reason detection of additional components in a profile can be a valuable source of evidence."); Dowlman *et al.*, The prevalence of mixed DNA profiles on fingernail swabs, *Science and Justice*, 50, 2010 64-71; Matte *et al.*, Prevalence and persistence of foreign DNA beneath fingernails, *Forensic Science Int.: Genetics*, 6 2012 236-43. The forensic DNA community has performed a number of studies to assess the value of finding foreign DNA under an individual's fingernails and the data demonstrates that the presence of foreign DNA under the fingernails of individuals in the general population is low, and thus supports the evidentiary value of testing victims' fingernails. Matte at 236; *see also* Dowlman at 70 ("The fact that most of the profiles obtained were not mixed profiles and the majority of low level profiles consisted of only 1 to 4 [alleles] suggests that there is little transfer of DNA to people's fingernails in every day living. These results are consistent with previous studies, which concluded that the incidence of secondary or foreign DNA under fingernails was low.").

A number of independent studies have demonstrated the probative value of DNA from fingernail clippings in violent crimes. Notably, these studies have demonstrated two relevant findings. First, that individuals do not have foreign DNA on their fingernails, however, when they do it is not the result of casual contact with another individual during the course of normal daily activities. *See* A.R. Henderson *et al.*, Prevalence of Foreign DNA Under Fingernails, *Inst. of Envtl. Sci. & Research Ltd.* (finding that the most likely source of foreign DNA under fingernails is "an individual

with whom the donor has had intimate contact"). Where DNA evidence from blood under Ms. Trotter's fingernail was otherwise so strongly exculpatory—supporting the obvious inference that Ms. Trotter scratched her attacker—the failure to consider the falsity of Ms. Carradine's scientifically invalid testimony to discount the DNA results constituted a violation of due process.

Improper testimony offered under the guise of scientific validity has been routinely found to constitute false testimony in violation of due process in the context of improper microscopic comparison of hair evidence. Following the FBI's acknowledgment that its trace evidence analysts routinely overstated the scientific reliability of their hair associations, jurisdictions across the country have closely reexamined cases that utilized hair microscopy. *See*, *inter alia*: *Verdugo-Urquidez v. United States,* 2017 U.S. Dist. LEXIS 222780; *Matta-Ballesteros v. United States*, 2017 U.S. Dist. LEXIS 222781*; In re Wogenstahl*, 902 F.3d 621; *United States v. Nelson*, 2017 D.C. Super. LEXIS 20; *Pitts v. Arkansas*, 2016 Ark. 345; *Pennsylvania v. Chmiel*, 643 Pa. 216; *Pennsylvania v. Taft*, 2018 Pa. Super. Unpub. LEXIS 2552.

In *United States v. Butler*, 278 F. Supp. 3d 461 (D.D.C. 2017), a federal court confronted almost identical statements as those made by the DPS trace analyst in Mr. Swearingen's case:

> The specific types of errors identified included an FBI examiner testifying that hair comparison analysis can identify "a specific individual to the exclusion of all others," which "exceeds the limits of the science."

Id. at 476. The court then noted an opinion letter from the Department of Justice which advocated that in cases where the certainty of a hair association was overstated by FBI agents, procedural barriers should not bar review and that the underlying testimony should be considered false:

> In this letter, the government confirmed that it would "not dispute that [hair evidence] should be treated as false evidence and that knowledge of the falsity should be imputed to the prosecution . . . . [T]he government ... will not contest that the erroneous evidence was false or misleading or that the government as a whole should have known that it was false or misleading."

Id. In *Jones v. United States*, 202 A.3d 1154 (D.C. 2019), the D.C. Court of Appeals noted that following multiple DNA exonerations where comparisons of physical evidence had been based on hair microscopy analysis, the Department of Justice undertook a review of past cases where FBI examiners had provided such an analysis. *Id.* at 1162. The Court referenced a letter from the FBI to the U.S. Attorney for D.C., which stated that in Jones's case, the FBI examiner's statements "exceeded the limits of science" and "were, therefore, invalid." *Id.* First among those statements, per the letter, was that "the examiner stated or implied that the evidentiary hair could be associated with a specific individual *to the exclusion of all others." Id.* (emphasis

added). The Court, in turn, reversed the denial of Jones's motion to vacate his convictions under D.C. Code § 23-110. *Id.* at 1173.

Similarly, in *United States v. Ausby*, 916 F.3d 1089 (D.C. Cir. 2019), the FBI and Department of Justice determined that the government's testimony about identifications using microscopic hair comparison was false testimony that amounted to a *Napue* violation. Similar to Mr. Swearingen's circumstances, the comparison testimony was the "primary evidence that directly contradicted [the] defense theory" and such testimony was emphasized by the prosecution during closing. *See Ausby*, 916 F.3d at 1095; *see also Jones* 202 A.3d at 1168 (noting that the testimony at issue was unrefuted and presented with photographic exhibits "to enhance its credibility and impact").

False hair microscopy evidence was also deemed to constitute a due process violation in *North Carolina v Bridges*, No. 90 CRS 23102-04, 2015 WL 12670468 (N.C. Super. Ct. Oct. 1, 2015) , where the government had put forth testimony that the hair evidence was associated with a specific individual and the hair evidence was the only physical evidence introduced against the Defendant.

The FBI, the United States Department of Justice, and numerous courts have found the exact same overstatement of the certainty of a trace evidence association constitutes unacceptable error which should be considered as false testimony that violates a defendant's due process rights. Ms. Musialowski's assertion that the pantyhose matched "to the exclusion of all others" falls squarely into the first category of testimony that the FBI singled out as scientifically unsound:

> Error Type 1: The examiner stated or implied that the evidentiary hair could be associated with a specific individual to the exclusion of others. This type of testimony *exceeds the limits of science*.[6]

Indeed, this false, misleading, invalid, and changed testimony regarding the pantyhose "match" is arguably more prejudicial than the hair comparison cases because there is no method to confirm or refute the underlying association. In the FBI hair cases where examiners previously claimed almost complete certainty, FBI DNA testing demonstrated that a sample of those associations were disproved by DNA evidence more than 11% of the time. Spencer Hsu, *FBI Admits Flaws in Hair Analysis Over Decades*, Washington Post, April 18, 2015. The Court should reasonably consider that the potential for false association of elastic, loosely-woven material such as pantyhose would be at least as great.

Accordingly, the Court should remand Mr. Swearingen's case so that the Fifth Circuit may consider DPS's invalid scientific conclusions as false testimony under this Court's due process jurisprudence.

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[6] F.B.I., Microscopic Hair Comparison Analysis, U.S. Dep't Just., https://www.mtacdl.org/attachments/CPE/Nelson/FBI_Limits_of_Science__%20Microscopic_H air Comparison.pdf (last updated Nov. 9, 2012).

CONCLUSION AND PRAYER

For the foregoing reasons, the Petition for Extraordinary Relief and Original Petition for Writ of Habeas Corpus should be granted.

Respectfully submitted,

PHILIP H. HILDER
JAMES G. RYTTING*
Counsel of Record
HILDER & ASSOCIATES, P.C.
819 Lovett Boulevard
Houston, TX 77006
(713) 655-9111
james@hilderlaw.com

BRYCE BENJET
THE INNOCENCE PROJECT
40 Worth Street, Ste. 701
New York, NY 10013
(212) 364-5980

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