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IN THE
SUPREME COURT OF THE UNITED STATES

LARRY RAY SWEARINGEN,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

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

**CAPITAL CASE: EXECUTION SCHEDULED
FOR WEDNESDAY, AUGUST 21, 2019**

TO THE HONORABLE JUSTICES OF THIS COURT:

Petitioner LARRY RAY SWEARINGEN, a death-sentenced prisoner in the State of Texas, requests that this Court stay his execution, currently scheduled for Wednesday, August 21, 2019, until further Order of this Court, in order to permit the consideration and disposition of this petition, which encompasses resolution of a circuit split on a critical question of law.

PROPOSED QUESTIONS PRESENTED

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?

JURISDICTION

Mr. Swearingen invokes this Court’s jurisdiction to stay his execution pending the filing and disposition of a Petition for Extraordinary Writ under 28 U.S.C. § 1651(a) and Supreme Court Rule 20, and an Original Petition for Writ of Habeas Corpus under 28 U.S.C. §§ 2241 and 2242 and Supreme Court Rule 20.

PROCEDURAL HISTORY

In 2000, Mr. Swearingen was convicted and sentenced to death by a jury in the 9th District Court for the rape and murder of Melissa Trotter. Since his conviction, Mr. Swearingen has maintained his innocence and has sought relief from the courts. Mr. Swearingen's conviction was affirmed on appeal, *Swearingen v. State*, 101 S.W.3d 89 (Tex. Crim. App. 2003), and the following habeas petitions have been denied or dismissed. *Ex parte Swearingen*, No. WR-53,613-01 (Tex. Crim. App. May 21, 2003); *Ex parte Swearingen*, No. WR-53613-04, 2008 WL 152720 (Tex. Crim. App. Jan. 16, 2008); *Ex parte Swearingen*, No. WR-53613-05, 2008 WL 650306 (Tex. Crim. App. Mar. 5, 2008); *Ex parte Swearingen*, No. WR-53613-05 (Tex. Crim. App. Dec. 17, 2008) (not designated for publication); *Ex parte Swearingen*, No. WR-53613-08 (Tex. Crim. App. Jan. 27, 2009) (not designated for publication); *Ex parte Swearingen*, No. WR-53613-09 (Tex. Crim. App. Jan. 27, 2009) (not designated for publication); *Ex parte Swearingen*,

Nos. WR-513613-10, WR-53613-11, 2011 WL 3273901 (Tex. Crim. App. July 28, 2011); *Swearingen v. Thaler*, No. H-09-300, 2009 WL 4433221 (S.D. Tex. Nov. 18, 2009); *Swearingen v. Thaler*, 421 Fed. App'x 413 (5th Cir. 2011); *Ex parte Swearingen*, Nos. WR-53613-10, WR-53613-11, 2012 WL 6200431 (Tex. Crim. App. Dec. 12, 2012); *State v. Swearingen*, 478 S.W.3d 716 (Tex. Crim. App. 2015).

On August 14, 2019, 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 pursuant 28 U.S.C. § 2244(b)(2)(B). The filing stemmed from new information provided to Mr. Swearingen by the Texas Department of Public Safety Crime Laboratory ("DPS") in the past month stating that DPS had provided inaccurate testimony. Specifically, DPS's expert had an "insufficient basis" for her testimony and, in fact, "no direct knowledge" that the only male DNA identified on the murder victim - which excluded Mr. Swearingen - was the result of contamination. In addition, DPS conceded that its trace analyst should not have provided testimony that 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) were a "unique" match or a match "to the exclusion of all other pantyhose." The Fifth Circuit denied this application, holding that the recent DPS concessions, alone, would not exonerate Mr. Swearingen. The Fifth Circuit further rejected Mr. Swearingen's classification of the DPS statements as "false" testimony.

REASONS FOR GRANTING A STAY

In order to receive a stay of execution, a petition must show: (1) irreparable injury if no stay is granted; and (2) a "reasonable probability that four (4) members of the Court will consider the issue [presented] sufficiently meritorious" to grant review, *Graves v. Burnes*, 406 U.S. 1201

(1972) (Powell, Circuit Justice); or a reasonable probability that a plurality of the Court would grant relief on an original habeas petition, and a likelihood of success on the merits, *see Barefoot v. Estelle*, 463 U.S. 880, 893 (1983); *see also Fare v. Michael C.*, 439 U.S. 1210 (1978) (Rehnquist, Circuit Justice). Mr. Swearingen respectfully submits that he meets both standards.

A. Irreparable Injury

If this Court does not grant a stay, Mr. Swearingen will be executed on August 21, 2019. This clearly constitutes irreparable injury. *See, e.g., Evan b. Bennett*, 440 U.S. 1301, 1306 (1979) (Rehnquist, Circuit Justice) (granting a stay of execution and noting the “obvious irreversible nature of the death penalty”); *O’Bryan v. Estelle*, 491 F.2d 706, 708 (5th Cir. 1982) (the “irreversible nature of the death penalty” constitutes irreparable injury and weighs heavily in favor of granting a stay).

Further, Mr. Swearingen’s claims address whether the Fifth, Sixth and Fourteenth Amendments permit his execution. The potential injury is not only his death, but a death that does not comport with those provisions, which hold that a death sentence is unconstitutional unless a jury, and not a judge, has found each of the facts required for its imposition. Given these concerns, a stay of execution will not prejudice the State.

B. Probability That The Court Will Grant The Writ, and Likelihood of Success

First, there is a strong probability that the Court will grant the petition for extraordinary writ, because it presents a unique opportunity to resolve a troubling circuit split on a substantial issue of law. Namely, 28 U.S.C. § 2244 permits successive habeas petitions only where "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."

However, the circuits have reached two opposing views of the term "the evidence as a whole":

[F]irst, 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.

Case v. Hatch, 731 F.3d 1015, 1033 (10th Cir. 2013). This split involves issues that "are debatable among jurists of reason"; which "a court could resolve [in a different manner]"; and which involve "questions [that] are 'adequate to deserve encouragement to proceed further.'"

Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983) (first alteration in original) (citations omitted).

The questions raised are worthy of scrutiny as they will undoubtedly arise in future applications pursuant to Section 2244.

Moreover, due to the procedural constraints of Section 2244, Mr. Swearingen's case presents a unique opportunity to resolve this circuit split, which further increases the odds that Court will grant the review. Namely, 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.

Second, if “the petition demonstrates a likelihood of success in at least some respects,” a court should grant a stay. *Bundy v. Wainwright*, 808 F.2d 1410, 1421 (11th Cir. 1987). The facts of Mr. Swearingen's' case satisfy this standard. In his petition, Mr. Swearingen has detailed how his execution will violate his constitutional rights. Specifically, this case concerns (1) the scope of a Court of Appeals’ innocence inquiry in considering authorization to file a successive federal habeas petition under 28 U.S.C. § 2244(b)(2)(B)(ii) 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. *Napue v. People of Ill.*, 360 U.S. 264 (1959). In addition, 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*. There is a reasonable likelihood that this Court would grant the relief requested, and that he would ultimately prevail on the merits of his claim.

Mr. Swearingen should not be executed as a result of the State's improper interpretations of a statute weighing recent DPS revelations that State-sponsored testimony was scientifically invalid. He certainly should not be executed before receiving the opportunity even to be heard by this Court.

CONCLUSION

Wherefore, Mr. Swearingen respectfully requests an Order staying his execution pending consideration of his Petition for Extraordinary Writ and Original Petition for Writ of Habeas Corpus.

Dated, this the 20th day of August, 2019.

Respectfully submitted,

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