No. 19-5640 & 19A2000

IN THE

# Supreme Court of the United States

IN RE LARRY RAY SWEARINGEN,
*Petitioner*,

On Original Petition for Writ of Habeas Corpus and Application for Stay of Execution

**RESPONDENT'S BRIEF IN OPPOSITION**


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**THIS IS A CAPITAL CASE**

## QUESTION PRESENTED

Whether this Court's original habeas jurisdiction should be invoked where the petitioner is plainly attempting to circumvent AEDPA's restriction on appealing the denial of authorization to file a successive petition, and where the underlying claims of false testimony and actual innocence are wholly without merit.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes

## BRIEF IN OPPOSITION

Petitioner Larry Ray Swearingen is scheduled for execution after 6:00 p.m. on August 21, 2019 for the capital murders of Melissa Trotter. Swearingen has repeatedly and unsuccessfully challenged the constitutionality of his Texas capital murder conviction and his death sentence in both state and federal courts. Less than two weeks prior to his scheduled execution, Swearingen unsuccessfully sought to file a subsequent application for writ of habeas corpus and a motion for stay of execution in the Texas Court of Criminal Appeals (CCA), under Articles 11.071 and 11.073 of the Texas Code of Criminal Procedure arguing that new scientific evidence proves the State sponsored false testimony at trial and establishes his actual innocence of capital murder. He also unsuccessfully sought authorization to file a successive federal habeas petition and a stay of execution in the Fifth Circuit.

Swearingen now asks this Court for the extraordinary remedy of an original writ of habeas corpus to circumvent the statute precluding appeal of the denial of his motion for authorization to file a successive federal habeas petition. But Swearingen's is not the case to make such a leap of law. He is not innocent, and he fails to prove the testimony at issue is false. His petition does not merit any further review.

## STATEMENT OF JURISDICTION

The Court has jurisdiction to consider original writs of habeas corpus under 28 U.S.C. § 2241(a). *See Felker v. Turpin*, 518 U.S. 651, 660–62 (1996).

## STATEMENT OF THE CASE

### I. FACTS ESTABLISHING SWEARINGEN'S GUILT

On the morning of December 8, 1998, Melissa Trotter left her parents' home to study at Montgomery College. 25 RR 3–8, 10. A classmate, Nichole Bailey, saw Trotter that morning. 27 RR 44–45. She asked Trotter to contact her later, so she wrote her own name and number on a piece of paper and gave it to Trotter. 27 RR 43–47. Trotter left Montgomery College with Swearingen later that day. 25 RR 188; 26 RR 8–9. Her family never saw her again. 24 RR 127; 25 RR 7, 9–10; 28 RR 128. Almost one month later, Trotter's body was discovered in the Sam Houston National Forest wearing the same clothes she wore on December 8, 25 RR 6–7, and with the note from Nichole Bailey in her pocket. 27 RR 46; 29 RR 50; SX 139.

#### A. TROTTER'S PRIOR MEETING WITH SWEARINGEN

On December 6, 1998, two nights before her disappearance, Melissa Trotter and Swearingen were seen together at a convenience store. 24 RR 37–47, 104–12. They spoke for about two hours, Swearingen gave Trotter his pager number, and they made plans to meet. 24 RR 26–28. This meeting was captured on the store's security camera. 24 RR 37–40, 50–51, 67–71, 79–91; SX 9, 9-A.

On December 7, while helping an acquaintance, Bryan Foster, move furniture, Swearingen received a message on his pager. 24 RR 166-69, 171-73. Swearingen said he was going to meet a young woman for lunch the

next day and suggested that the meeting would involve a sexual liaison. 24 RR 173–75. When they arrived at Foster's home, Swearingen asked if he could use the phone to call a girl named "Melissa Trotter." 24 RR 176–77, 198–99.

### B. TROTTER'S DISAPPEARANCE

On December 8, a cafeteria worker saw Trotter leave the Montgomery College cafeteria between noon and 1 p.m. 25 RR 52–55. Leaving a review session about 1:15 p.m., Trotter told her instructor that "she had to meet somebody." 26 RR 5. Shortly after that, several witnesses saw her in the computer lab talking to a man. 25 RR 29, 44, 182–83; 26 RR 6. Witnesses described the man as "tall" and "heavy-set" and identified him as Swearingen. 25 RR 29, 37, 194, 212-13. One witness saw them walk out together. 25 RR 188; 26 RR 8–9. Trotter's car was left in the school parking lot, and her family never saw her again. 24 RR 127; 25 RR 7, 9–10; 28 RR 128.

At 2:05 p.m., Swearingen returned a page from Sarah Searle using his stepfather's cell phone. 25 RR 258–59; 27 RR 57–58, 66. He told Searle he was in a "real big hurry" and had to call her back because he was at lunch with a friend. 25 RR 259. Swearingen's call used a cell tower near Montgomery College. 27 RR 58–59, 66.

Around 3 p.m., Swearingen's landlord saw Swearingen's truck leaving from behind Swearingen's trailer home. 26 RR 11–15. At 3:03 p.m., Swearingen made a call using a cell tower in Willis near Farm-to-Market Road (FM) 1097, which would have been consistent with his traveling from his trailer to the Sam

Houston National Forest. 27 RR 67, 72–73; SX 63.

At about 4 p.m., Swearingen's wife paged him from his stepfather's home. 29 RR 166. Swearingen called her at 4:25 p.m., using a cell tower near his trailer home. 27 RR 67–68; 29 RR 166, 182–83. Shortly thereafter, Swearingen picked up his wife and daughter. 29 RR 166, 182–83. They arrived home at around 5:30 or 6 p.m. 26 RR 14–15, 22–23; 29 RR 167–69.

Swearingen's wife said that when they returned, the home looked "ransacked." 29 RR 172–73. Swearingen said that someone had been in the house, but nothing appeared to be missing. 29 RR 169. Lying atop the television set were a pack of Marlboro Lights cigarettes and a red lighter. 29 RR 169–70, 172. Swearingen's wife testified that no one in the family smoked. 29 RR 169–70. Trial testimony showed that Trotter owned such a lighter and smoked Marlboro Lights. 29 RR 238. Inventory marks on the cigarette pack showed that it had come from a store a quarter mile from Montgomery College. 27 RR 131, 166–68, 193, 196–99. Swearingen's wife also noticed that it appeared that someone had been in their bed. 29 RR 172–73.

At 7:09 p.m. 27 RR 69, Swearingen called Phyllis Morrison, a woman he previously dated. 25 RR 228–30. He told her that he was "in some kind of trouble" and that the police might be looking for him. 25 RR 230–31. Cell phone records showed that Swearingen was traveling on Interstate 45 at the time, using a cell tower that overlapped with the area where Trotter's body was found. 27 RR 69, 71, 92–94.

At 8:05 p.m., Swearingen called the police and

reported a burglary. 27 RR 3, 6–8; SX 258. Lying to the police, Swearingen said that he had been out of town from 11 a.m. December 7 until 7:30 p.m. December 8. 27 RR 11, 20. He said that someone had stolen his VCR and Jet Ski. 27 RR 14. Evidence showed, however, that Swearingen had taken his jet ski to a repair shop. 27 RR 25–28, 36–39.

On December 9 or 10, Bryan Foster and his wife learned of Trotter's disappearance. 24 RR 178, 200–01. They recognized the name and contacted Swearingen to confirm that Trotter was the young woman he had called on December 7. 24 RR 178, 180–81, 197–202. Swearingen was terse and denied calling anyone named "Trotter." 24 RR 180–81. Swearingen said that the woman he contacted had the last name of "Childers or Childress or something like that." 24 RR 202. When Mrs. Foster told Swearingen that she remembered he had said the girl's last name was "Trotter" and that a girl named Melissa Trotter was now missing, the phone went dead. 24 RR 202–03.

### C. SWEARINGEN'S ARREST

On December 11, 1998, Swearingen told an acquaintance that he expected he would soon be arrested. 25 RR 103–04, 107. By then, he had been identified as a potential witness in the case. 25 RR 116, 172–73. That day, Scott Davis, a plain-clothes detective investigating Trotter's disappearance, saw Swearingen's truck at a convenience store and radioed it in. 25 RR 113–16, 147. Swearingen saw Davis using the radio and sped away. 25 RR 116, 172–73.

Swearingen led Davis on a high-speed chase

before stopping at his parents' house. 25 RR 116–17, 148–49. Davis told Swearingen that he was investigating Trotter's disappearance. 25 RR 117–18, 149–50. Omitting the fact that he met with Trotter on December 8, Swearingen told Davis that he had met Trotter on December 6, they had "talked briefly, five to ten minutes, he gave her the pager number, and that was it." 25 RR 121, 151–52.

When other officers arrived on the scene, Swearingen was arrested on unrelated outstanding warrants. 25 RR 119, 122, 148, 152–54. The officers noticed that Swearingen's neck, cheek, ear, hair line, back, and shoulders bore red marks resembling scratches. 26 RR 41–42; SX 58, 60–61.

### D. RECOVERY OF TROTTER'S BODY AND AUTOPSY FINDINGS

On January 2, 1999, Trotter's body was discovered by hunters in the Sam Houston National Forest. 28 RR 11–14, 23–25, 27, 32–34; 29 RR 3–4, 123–24. She was found in the same clothes that she had worn on December 8. 25 RR 6–7. It appeared that her body had been dragged to its resting place. 28 RR 92–93, 103–04, 107; 29 RR 47–48; SX 122–24, 127–28. Her right shoe had come off and was lying alongside her body. 28 RR 14, 92; SX 121, 126, 130. In Trotter's jean pocket was the note Nichole Bailey had given her the day she disappeared. 27 RR 46; 29 RR 50; SX 139.

Dr. Joye Carter, the chief medical examiner for Harris County, Texas, performed an autopsy. 29 RR 12, 16. There was a ligature around Trotter's neck, a leg cut from a pair of nylon pantyhose, which was "damp" from

blood and "liquefying of the [neck] tissue." 29 RR 29, 32, SX 149. There was also a "sharp, forced injury" to the neck, along with subsequent animal activity. 29 RR 34; SX 151. Dr. Carter concluded that Trotter died from asphyxia due to strangulation with the ligature. 29 RR 47.

Dr. Carter noted that there was fungal growth consistent with several weeks in a "dark and dank and wet" environment. 29 RR 27–28. She also noted "dark discoloration" on Trotter's face and neck area, indicating "postmortem activity by insects and animals," blood, and "a lot of more advanced decomposition." 29 RR 30–31; SX 147. There was mold and bright red fungus growing on her skin, and her blood was breaking down. 29 RR 31, 37–38; SX 148.

Dr. Carter noted significant, advanced decomposition and a gaping defect from scavenger activity on the left side of Trotter's face, indicating that the area had been bruised. 29 RR 21–22, 31, 43–45; SX 147. It also appeared that Trotter had bitten her tongue deeply, consistent with her being struck under the chin. 29 RR 42, 52. There were maggots in the face, mouth, neck, and gastro-intestinal tract. 29 RR 44–46.

The internal examination revealed what appeared to be chicken and a form of potato in Trotter's stomach, together with a small amount of greenish vegetable material. 29 RR 38. Dr. Carter testified that a person's stomach usually will not empty in less than two hours, and any food in the stomach at the time of death will remain there. 29 RR 38–39.

Based on the state of decomposition, the fungal

development, and insect development, Dr. Carter concluded that Trotter had been dead for about twenty-five days. 29 RR 44–45.

Swearingen's expert, Dr. Raul Lede, a pathologist, confirmed Dr. Carter's findings regarding the date and time of death. He agreed that Trotter died from ligature strangulation, had her throat cut, and that the evidence of bruising on the left side of her face was consistent with being struck. 32 RR 59, 111, 119–21. Dr. Lede also testified that the bruising of Trotter's tongue was caused by a blow to her jaw. 32 RR 117–18.

### E. POLICE INVESTIGATION

Police searched Swearingen's trailer home, his truck, and his parents' home 27 RR 106–10, 119–20) and found incriminating evidence. The Marlboro Lights cigarettes and the red lighter were in one garbage bag in his home, and a McDonald's french fry bag and Chicken McNuggets box were found inside the kitchen garbage. 27 RR 119, 129–31, 159–61, 167–68, 192–94, 196–98; 29 RR 238. Police also obtained the jacket Swearingen was wearing the day Trotter disappeared and carpet fiber samples from his master bedroom. 25 RR 84, 155; 27 RR 126, 153, 156–57.

Hair, fiber, fabric, and paint samples were collected from Swearingen's truck. 27 RR 169, 171–75, 180; 28 RR 4, 6–8. Police could not test the seats of his truck for blood because they appeared to have been cleaned with Armor All protectant wipes, which causes false positives. 27 RR 176–78. Two empty containers of Armor All were found in the garbage at Swearingen's home. 27 RR 159, 161, 178.

Materials recovered from Trotter's body matched Swearingen's clothing, truck, and home. Fibers matching Swearingen's jacket, the seat of his truck, the headliner of his truck, and the carpet of his master bedroom were found on Trotter's jacket. 30 RR 37–43, 54–55, 87. Police found fibers matching Trotter's jacket on Swearingen's jacket and found Trotter's hairs in Swearingen's truck. 30 RR 45–46, 49; see also 30 RR 115, 117, 120 (DNA testing confirmed a genetic match). Two hairs still bore the anagen root, indicating that they had been removed from her head forcibly. 30 RR 49, 55–56. Trotter's pants also had paint on them of the same type as on the bed of Swearingen's truck. 30 RR 18.

When cleaning out Swearingen's home on January 6, 1999, Swearingen's landlord found some pantyhose with one of the legs cut off. 29 RR 128–31. These pantyhose were determined to be a "unique physical match," "to the exclusion of all other pantyhose," with the ligature found around Trotter's neck. 30 RR 60; see also 30 RR 57–60; SX 211–14.

On December 17, before Trotter's body was found, a man who lived down the street from Swearingen's parents found papers bearing Trotter's name lying along the road and turned them over to investigators. 28 RR 133–36, 145; 29 RR 167; 31 RR 4–5; 33 RR 81. The papers proved to be Trotter's class schedule and some insurance forms her father had given her. 28 RR 162–63, 169–73; SX 170-A, B, C. The documents bore Trotter's fingerprints. 28 RR 164–65.

### F. SWEARINGEN'S ATTEMPTS TO FABRICATE EXCULPATORY EVIDENCE

Swearingen's friend Elyese Ripley visited him in

jail on January 9, 1999. 30 RR 167, 169, 180, 182. She testified that Swearingen wrote on a piece of paper as he spoke to her and then held the paper up to the glass partition. 30 RR 171–72. The note asked Ripley to lie and say that she had been with Swearingen on December 8, the day Trotter disappeared. 30 RR. 173–74. After Ripley read the note, Swearingen destroyed it. 30 RR 174–75.

While awaiting trial, Swearingen gave his cellmate, Ronnie Coleman, a letter that appeared to be written in Spanish and asked Coleman to copy it onto another piece of paper. 31 RR 39, 50–56. Swearingen told Coleman that it was a letter to his Spanish-speaking grandmother. Swearingen asked Coleman to transcribe the letter because, he said, his grandmother had difficulty reading his handwriting. 31 RR 54–55. Coleman, who was neither literate nor conversant in Spanish, complied. 31 RR 53–56. When Coleman asked why his name, "Ronnie," was written within the letter, Swearingen said that he was just telling his grandmother about Coleman. 31 RR 55.

Swearingen sent the copied version of the letter to his mother, telling her that he had received it in jail. 31 RR 5, 11–13. Swearingen's stepfather took the letter to investigators. The letter purported to be an account of Trotter's murder by someone alleging to have personal knowledge. 31 RR 4–6, 11–12, 15–19. A professional translator and interpreter determined that the letter was written with an English grammatical structure, as though someone had simply translated English words within English sentences directly into Spanish with a language dictionary. 31 RR 62–63, 67. The letter read in part:

> I saw everything that happened to Melissa . . . . [He] began to talk about sex when she said she had to go home. He hit her in the left eye, and she fell to the floor of her car. He took her to the wood[s] and began to choke her with his hands at first, then he jerked . . . her to the bushes. He cut her throat to make sure that she was dead. Her shoe came off when he jerked . . . her into the bushes. . . . To make sure that you know, I am telling you the truth. She was wearing red panties when R.D. murdered her . . . . When he dragged her from the car, he put her in the shrub[s] on her back . . . .

SX 181-A, 181-B. The letter alleged that Trotter was killed by a man named "Ronnie" and was signed with the name "Robin." See id; see also 31 RR 69.

In Swearingen's cell, authorities found a handwritten list of Spanish-to-English word translations containing dozens of words used in the letter. 31 RR 31–32; SX 184–85. A handwriting analyst concluded that Swearingen had written the Spanish-to-English translation list and that the letter sent to Swearingen's mother was in Coleman's hand. 31 RR 41, 46–47. Swearingen's and Coleman's fingerprints were found on the letter, and Swearingen's fingerprints were found on the translation list. 31 RR 75–76.

On May 17, 2000, Bill Kory joined Swearingen as his cell mate. 31 RR 91–93. At trial, Kory testified that Swearingen told him he was in jail for murder. 31 RR 94–96, 103. Asked whether he had committed the crime, Swearingen said, "Fuck, yeah, I did it." 31 RR 96.

Swearingen told Kory that he was just trying to beat the death penalty. 31 RR 96–97.

## II. POSTCONVICTION PROCEEDINGS

In July 2000, Swearingen was convicted of capital murder and sentenced to death for killing Melissa Trotter during the course of committing or attempting to commit aggravated sexual assault. 1 CR 12 (indictment), 20 CR 2904-07 (judgment).[1]

### A. DIRECT APPEAL AND STATE HABEAS APPLICATIONS

The conviction and sentence were affirmed on appeal, *Swearingen v. State*, 101 S.W.3d 89 (Tex. Crim. App. 2003), and Swearingen did not seek certiorari review. Since the finality of his conviction Swearingen has filed a convoluted tangle of state habeas applications, all of which were rejected by the Texas Court of Criminal Appeals (CCA). *Ex parte Swearingen*, No. 53,613-01 (Tex. Crim. App. May 21, 2003); No. WR-53,613-04, 2008 WL 152720 (Jan. 16, 2008); No. WR-53,613-05, 2008 WL 5245348 (Dec. 17, 2008), *cert. denied*, 129 S. Ct. 1383 (2009); No. WR-53,613-08 and -09, 2009 WL 249759, 2009 WL 249778 (Jan. 27, 2009); Nos. WR-53613-10 & -11, 2012 WL 6200431 (Dec. 12, 2012).

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[1] "CR" refers to the clerk's record of papers filed in the trial court preceded by the volume number and followed by the page numbers.

### B. FEDERAL HABEAS PROCEEDINGS

His initial federal habeas petition also was denied. *Swearingen v. Dretke*, No. 4:04-cv-02058 (S.D. Tex. Sept. 8, 2005) (Docket # 39). The Fifth Circuit affirmed that decision, *Swearingen v. Quarterman*, 192 F. App'x 300 (5th Cir. 2006), and certiorari review was denied, 549 U.S. 1216 (2007). After his execution was scheduled for January 27, 2009, Swearingen sought permission from the Fifth Circuit to file a successive federal habeas petition. Though permission was granted to file the petition, it was ultimately dismissed as successive. *Swearingen v. Thaler*, 421 Fed. Appx. 413 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 1632 (Feb. 27, 2012).

### C. MOTIONS FOR DNA TESTING

Swearingen filed three previous motions for postconviction DNA testing under Chapter 64 of the Texas Code of Criminal Procedure in October 2004, May 2008, and January 2009; all were denied by the trial judge. *State v. Swearingen*, 478 S.W.3d 716, 719 (Tex. Crim. App. 2016). In January 2013, he filed a fourth motion that was granted by the trial judge, but the CCA reversed. *State v. Swearingen*, 424 S.W.3d 32 (Tex. Crim. App. 2014). The trial court then granted a fifth postconviction DNA testing motion, but the CCA again reversed in 2016. *Swearingen*, 478 S.W.3d at 717. This Court denied certiorari review. *Swearingen v. Texas*, 137 S. Ct. 60 (2016).

### D. LITIGATION LEADING UP TO SWEARINGEN'S AUGUST 21, 2019 EXECUTION DATE

Swearingen's execution is currently set for August 21, 2019. On August 8, 2019, he filed yet another subsequent state habeas application in the trial court seeking relief under Articles 11.071 and 11.073 of the Texas Code of Criminal Procedure, raising similar claims to those asserted here. *Ex parte Swearingen*, WR 53,613-14, slip. op (Tex. Crim. App. Aug. 16, 2019). That application was dismissed by the CCA as an abuse of the writ. *Id*. He also filed a motion in the Fifth Circuit for authorization to file a successive federal habeas petition making similar arguments to those asserted here; it was also rejected. *In re Swearingen*, No. 19-20565, 2019 WL 3854457 (5th Cir. Aug. 16, 2019). Swearingen now files this original petition for habeas corpus relief.

## REASONS FOR DENYING THE WRIT

Swearingen asks the Court to exercise its power to grant an extraordinary writ and rewrite the requirements necessary to prove a due process violation under *Giglio*[1] and to overturn *Herrera*[2] to permit free-standing claims of actual innocence. But he fails to justify the extraordinary remedy he seeks.

Supreme Court Rule 20.4 (a) provides that, "[t]o justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers,

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1 *Giglio v. United States*, 405 U.S. 150 (1972).

2 *Herrera v. Collins*, 506 U.S. 390 (1993).

and that adequate relief cannot be obtained in any other form or from any other court. This writ is rarely granted." See *Felker*, 518 U.S. at 665 (explaining that Rule 20.4 (a) delineates the standards under which the Court grants such writs). For the reasons explained below, Swearingen fails to advance a compelling or exceptional reason for the Court to exercise its discretionary powers to issue a writ of habeas corpus in this case.

## I. SWEARINGEN IS NOT ENTITLED TO THE EXTRAORDINARY REMEDY HE SEEKS.

First, Swearingen is not entitled to the extraordinary remedy of a writ of habeas corpus by way of an original petition because he had a remedy in state and federal court. But, as made plain by the lower Fifth Circuit's denial of his motion for authorization to file a successive federal habeas petition, s*ee In re Swearingen*, 2019 WL 3854457 at *2–5, and the state court's dismissal of his subsequent habeas application raising identical issues, *see Ex parte Swearingen*, No. WR-54,613-14, slip op. at 5, his underlying assertions that the State convicted him on the basis of testimony it knew to be false and scientifically invalid and that he has proven his innocence do not merit relief.

Furthermore, Swearingen's petition is a thinly veiled attempt to circumvent this Court's holding in *Herrera*, which forecloses free-standing claims of actual innocence. Not only are there other remedies available under state law, as set out previously, Swearingen has availed himself of these avenues repeatedly—and been afforded mutliple evidentiary hearings—over the last two decades to prove his innocence, and failed.

Consequently, Swearingen fails to show that "adequate relief [could] not be obtained in any other forum or from any other court," and his assertions here are without merit. As such, he is not entitled to the extraordinary relief he seeks in this Court. *Felker*, 518 U.S. at 652.

Moreover, the fact that Swearingen failed in the court of appeals below and is now filing an original petition for habeas relief asserting identical claims based on identical facts demonstrates that he is clearly attempting to circumvent the plain language of AEDPA that precludes appeal of that decision. *See* 28 U.S.C. § 2244(b)(3)(E) ("the grant or denial of an authorization by a court of appeal 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."). His attempt to do so should not be condoned.

## II. ANY OPINION BY THIS COURT ON THE ISSUES SWEARINGEN PRESENTS HERE WOULD BE AN ADVISORY ONE.

Swearingen filed his original writ to contest the court of appeals' analysis of the actual innocence portion of 28 U.S.C § 2244(b)(2)(B). But a showing of actual innocence is not all that the statute requires to authorize a successive petition. Rather, a court is required to reject any motion for authorization to file a successive petition that does not make a prima facie showing of the following:

> (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.

28 U.S.C. § 2244(b)(2)(B). Because Swearingen did not make a prima facie showing that the factual predicate for the claim was previously unavailable or that there was constitutional error, any remand for reconsideration of his innocence arguments would produce the same result.

### A. SWEARINGEN FAILED TO DEMONSTRATE THAT THE FACTUAL PREDICATE FOR HIS CONTAMINATION CLAIM WAS NOT PREVIOUSLY AVAILABLE.

The Fifth Circuit, in fact, found that Swearingen did not make a prima facie showing that the factual predicate for his claims was previously unavailable. *See In re Swearingen,* 2019 WL 3854457, at *4 (5th Cir. 2019). Specifically, with respect Swearingen's claim contesting the blood evidence, the court found that

> the claim's "factual predicate"—that Carradine lacked a foundation for her testimony regarding possible contamination—could have been discovered long before the DPS letter was sent in August 2019. Indeed, the record shows that

> Swearingen's attorneys were *already* aware of the issue: His trial attorneys objected to Carradine's testimony on this point as "speculative," they cross-examined her on how she received and handled the fingernail scrapings, and they elicited an admission that she had "no way of knowing" how the samples were handled before arriving at DPS. More broadly, whether the blood flecks came from contamination was vigorously contested at trial. *See, e.g., Swearingen*, 424 S.W.3d at 39 (observing that "[t]he jury chose to believe that the foreign DNA either was contamination or that it came from outside the context of the crime"); *Swearingen*, 2009 WL 249778 at *5 n.7 (Cochran, J., concurring) (listing post-conviction court's findings on blood flakes). Any "reasonable attorney would have been put on notice" that they should have probed the basis for Carradine's testimony on this issue—and Swearingen's attorneys did just that at trial. *See Blackman v. Davis*, 909 F.3d 772, 779 (5th Cir. 2018), *cert. denied*, —— U.S. ——, 139 S. Ct. 1215, 203 L.Ed.2d 236 (2019).

*Id*.

Swearingen does not even address this finding here. This finding, however, renders the question he raises regarding the Court's analysis of subsection (ii) superfluous. Thus, any opinion by the court regarding whether this evidence proves his actual innocence would be advisory only.

### B. SWEARINGEN WHOLLY FAILED TO MAKE A PRIMA FACIE CASE THAT HIS TRIAL WAS TAINTED BY FALSE OR SCIENTIFICALLY INVALID TESTIMONY.

Swearingen's motion for authorization alleging the State sponsored false and scientific evidence was supported by two letters from the Texas Department of Public Safety (DPS) Crime Laboratory. As set out below, Swearingen's motion to the Fifth Circuit misrepresented both the letters and the record in an eleventh-hour attempt to delay his execution. Because the underlying facts presented to the court of appeals failed to establish the trial testimony at issue was false, much less the State knew it was false, there is no reason for the court to consider the question Swearingen presents here.

The prosecutor's knowing use of false testimony violates due process. *Giglio*, 405 U.S. at 154. Prosecutors have a duty to correct false or misleading testimony when it comes to their attention. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). But petitioner bears the burden here of proving that the testimony was false or misleading, that the prosecution was aware the testimony was false, and that the testimony was material. *Giglio*, 405 U.S. at 153-54. Evidence is material where the false testimony could "in any reasonable likelihood have impacted the judgment of the jury." *Giglio*, 405 U.S. at 154.

### 1. SWEARINGEN HAS NOT SHOWN THAT THE TRIAL TESTIMONY REGARDING THE DNA FOUND UNDER TROTTER'S FINGERNAILS IS FALSE OR SCIENTIFICALLY INVALID.

At trial, DPS analyst Cassie Carradine testified that she observed tiny, "bright red" flakes during her microscopic examination of the left-hand fingernail scraping collected from the victim in this case. 30 RR 125–126. Carradine testified that she collected them with a sterile swab then performed a presumptive test and confirmed that the flakes were blood. 30 RR 126. Subsequent DNA testing of the flakes yielded a single-source DNA profile that was inconsistent with the individuals in the case, including Swearingen. 30 RR 127. She further testified that, " It's a very, very tiny sample. And for something that small to type as well, to do a full profile on it, it would tend to indicate to me it was a very well preserved, fresh blood sample that really has not been exposed to the elements." 30 RR 127. Finally, when asked whether this indicates anything "in terms of maybe how that blood sample got there," Carridine replied, "I would tend to expect that that sample was deposited on, either in that piece of paper or on that stick at a time after the sample, either at the time of the sample was being collected or after the sample was being collected." 20 RR 128–129.

Carradine's brief observations about the possibility of contamination were cumulative of the extensive testimony offered by respected pathologist Joye Carter, M.D., who testified that the color of the flecks of blood found on the specimen was inconsistent with the color of Trotter's blood at the time of the

autopsy, and that the flecks were likely the result of contamination. 29 RR 53–55, 114–16, 118–19. In particular, Dr. Carter testified as follows:

> Q. If, if a bright red fleck of blood were discovered later by DPS personnel during examination, what would that indicate to you?
>
> A. If bright red blood was discovered, examining this tissue?
>
> Q. Yes, ma'am.
>
> A. That would indicate some contamination. With sensitivity of the tests that are being performed now, perhaps a fleck of blood in the air, in the environment could have somehow gotten into the tissue.
>
> Q. And actually, that could have gotten there from anywhere. Would that be a fair statement?
>
> A. Yes, it would.
>
> Q. Would a bright red fleck of blood be consistent with your findings at autopsy?
>
> A. Not with Ms. Trotter's body, not the bright red.
>
> Q. So if a bright red fleck of blood were found, you deem that to be caused by contamination at some stage?

A. It could be.

29 RR 53–55.

Swearingen claims that an August 9, 2019 Letter from the Texas Department of Public Safety (DPS) Crime Lab proves the State's contamination theory false. But it does not.

Initially, that August 9, 2019 DPS letter Swearingen relies upon here addressed the testimony of "the DPS witness" only, not Dr. Carter. Swearingen's attempt to apply the contents of the letter to both witnesses is insupportable. Nothing in the August 9 DPS Letter challenges Dr. Carter's qualifications to give her opinion that the color of the flecks of blood on the fingernail scraping specimen were inconsistent with the color of Trotter's blood at the time of autopsy, and that the color deviation strongly suggested the likelihood of contamination of the sample. As such her testimony remains uncontradicted.

Nor does the letter does prove that Carradine testified falsely in expressing her opinion on possible contamination. The Fifth Circuit observed in denying Swearingen permission to file a successive petition to raise this same false testimony claim that he "mischaracterizes what the DPS letters say." *In re Swearingen*, 2019 WL 3854459 at * 4. The Court further stated, "[Swearingen] claims that the letter 'proves' that Carradine's testimony was 'false and misleading' and thus 'demonstrates that the State sponsored false contamination theory for the purposes of misleading the jury.' "The letter … says nothing like that" *Id*. The lower court also noted that the record "tell[s] a different story,"

and went on to explain:

> The letter first notes that Carradine "was qualified" to opine about contamination "within the DPS laboratory or based on the packaging and condition of the evidence," but that she lacked "direct knowledge" about how the evidence was "collected or stored prior to its submission to DPS" (emphasis added). Thus, the letter states that a "more appropriate answer" from Carradine "would have been that she could not speak to the possibility of contamination of the samples when they were outside the control of the DPS laboratory." Next, the letter states that Carradine had an "insufficient basis" to opine regarding contamination and that, therefore, she 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." Contrary to Swearingen's characterization, the letter does not say that Carradine testified "falsely" and says nothing to suggest that the State "sponsored" a "false contamination theory" to "mislead" the jury. Instead, the letter says at most that Carradine lacked a foundation to opine on contamination that may have occurred when the samples were outside DPS custody, and that her answers should have recognized that nuance.

*Id*. at 5–6.

Swearingen offers nothing here demonstrating that the court's characterization of the August 9 DPS letter is incorrect. Nor could he. The letter speaks for

itself. As such, he fails to show that Carradine's testimony was false, and there is nothing for this Court to review.

### 2. SWEARINGEN ALSO HAS NOT SHOWN THAT SANDY MUSIALOWSKI'S TESTIMONY REGARDING THE PANTYHOSE MATCH WAS FALSE.

Musialowski testified at trial that she compared the portion of pantyhose used as a ligature in Trotter's murder to the portion of pantyhose found in the Swearingen's trailer. She concluded that, in her opinion, "the ligature from the victim's neck physically fits 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 60. Swearingen claims that State misled the jury by displaying the pantyhose in a way that created the illusion of a match. He also claims that Musialowski's testimony that the two pieces of hosiery were a unique physical match is demonstrably false. But the letter he relies upon to prove Musialowski's testimony false does not do so.

The most Swearingen can establish with respect to Musialowski's testimony on the pantyhose is that she overstated the certainty of her conclusion. The Fifth Circuit in denying Swearingen's motion for authorization also rejected his assertion that the July 19, 2019 DPS Letter repudiated Musialowski's trial testimony opining that the portion of the pantyhose used as a ligature to strangle Trotter matched the cut portion of hosiery recovered from Swearingen's trailer. *In re Swearingen*, 2019 WL 3854457 at * 4. Specifically, the

Court found,

> The [false testimony] claim turns on a July 19, 2019 letter from DPS that Swearingen again misrepresents. The letter … does not "retract" Musialowski's testimony—it merely says her testimony about the match between the ligature and the torn pantyhose would today use different terminology. "Today," says DPS, "we would report that the two pieces [of pantyhose] were once joined, but would not include the statement 'to the exclusion of all others.'" At the same time, the letter affirms that Musialowski "did not err in her reporting or testimony regarding [the pantyhose match]."

*Id.*.

Again, Swearingen offers nothing here showing that the Fifth Circuit inaccurately characterized the July 19 DPS letter. Nor could he. This letter also speaks for itself. Because the facts he alleges to prove his false testimony claims are not themselves, true, there is nothing here for the Court to consider.

### 3. EVEN IF THE TESTIMONY WERE FALSE IN THE MANNER SWEARINGEN ALLEGES, THERE IS NO EVIDENCE THE STATE HAD KNOWLEDGE OF THIS.

Also fatal to Swearingen's false testimony claim is his attempt to sidestep a requirement under federal law: that the prosecution obtains a conviction via false evidence "*known to be such* by representatives of the State." *Giglio*, *Napue*, 360 U.S. at 268 (emphasis added). Swearingen made no attempt in the court below or in the present petition to prove the allegedly false testimony was knowingly sponsored by the State. Nor can he. With respect to Carradine's testimony, the State could not or should not have known the evidence was false or misleading given that Dr. Carter offered similar testimony. Pertaining to Musialowski's testimony on the pantyhose, there is no way the State could know at the trial that DPS would years later espouse different terminology with respect to stating forensic conclusions. Consequently, there was no error of constitutional dimension.

By asking this Court to find a due process violation without proof that the allegedly false testimony was knowingly sponsored by the State, Swearingen is implicitly asking this Court to recognize a new rule of constitutional law. But he fails to address how the new constitutional rule he seeks could be applied despite the non-retroactivity doctrine recognized in *Teague v. Lane*, 489 U.S. 288, 309–10 (1989). Unless a new constitutional rule falls within a *Teague* exception, the "new constitutional rules . . . will not be applicable *to cases which have become final before the new rules are*

*announced*." *Teague*, 489 U.S. at 310 (emphasis added). And *Teague* defines a non-final case as one "'pending on direct review or not yet final.'" *Id*. at 305–6 (quoting *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)). Swearingen's conviction has long been final for purposes of *Teague*, hence any new constitutional rule recognized by this Court could not be applicable to him unless he meets a *Teague* exception. *See Jones v. Davis*, 806 F.3d 538, 552 (9th Cir. 2015) (finding that petitioner's *Lackey* claim was *Teague*-barred and his argument that he proposed a new substantive rule was an "expansive description of this exception [that] finds no support in the cases. Nor is it supported by logic"); *White v. Johnson*, 79 F.3d 432, 437–38 (5th Cir. 1996).

In other words, because an invocation of original habeas corpus jurisdiction in this Court would have the same impact upon the finality of Swearingen's conviction as a federal habeas petition, the Court is bound to consider the issues raised only in light of clearly established constitutional principles dictated by precedent as of the time Swearingen's conviction became final.

### 5. BEYOND THAT, THE ALLEGEDLY FALSE EVIDENCE IS IMMATERIAL.

Evidence is material where the false testimony could "in any reasonable likelihood have impacted the judgment of the jury." *Giglio*, 405 U.S. at 154. There is no likelihood the allegedly false testimony would have impacted on the jury's verdict on guilt–innocence.

As stated, Carradine's testimony—the only testimony at issue in the August 9 DPS Letter—was

cumulative of the more substantial testimony given by Dr. Carter. The letter does not undermine Dr. Carter's testimony and is immaterial for that reason alone. Even so, the marginal impeachment of either Carradine or Dr. Carter provided by this letter would have no impact on the jury's verdict in this case. Swearingen vigorously challenged the State's theory of contamination at trial, arguing extensively against the credibility of the notion that the blood sample could possibly have resulted from contamination. *See* 34 RR 53–54, 59–60,66–69. The jury was presented with compelling argument on this point but rejected it in light of the other evidence overwhelmingly pointing to Swearingen's guilt. *See* Statement of Facts, *supra.*

Furthermore, even assuming Musialowski's testimony were revised from "the ligature and the pantyhose were a unique match to the exclusion of all others," to "the ligature and the pantyhose were once joined," there is no likelihood the would impact the jury's verdict on guilt. *See In re Swearingen*, 2019 WL 3854457 at *4.

Because Swearingen failed to establish a prima facie case showing a due process violation under *Giglio*, there is nothing that warrants review. Absent a constitutional violation, there is no cause for this Court to consider whether "but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *See* 28 U.S.C. § 2244(b)(2)(B)(ii).

## IV. EVEN SO, THE COURT OF APPEALS DID AS SWEARINGEN ASKS AND CONSIDERED THE "EVIDENCE AS A WHOLE"

Swearingen asserts a circuit split regarding courts' actual innocence analyses under 28 U.S.C. § 2244(b)(2)(B)(ii). Specifically, he urges this Court to accept that assessing a petitioner's innocence "in light of the evidence as a whole" requires consideration of both facts presented at trial and those developed after, regardless of whether they are linked to the alleged constitutional error. Petition at 14–16. The extraordinary remedy afforded by the grant of an original petition for habeas relief is not warranted here because the court of appeals did as Swearingen asks.

According to Swearingen, "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." Petition at 15–16. The Fifth Circuit, however, considered this very possibility in denying the motion for authorization:

> And even if we assume the foreign DNA under Trotter's fingernails was not from contamination, that would not clearly and convincingly exonerate Swearingen. We cannot improve on the TCCA's reasoning on this point:
>
> > We are not persuaded that results showing the presence of another DNA donor in the fingernail scrapings would overcome the

> "mountain of evidence" of the appellee's guilt. Primarily, this is because the victim's having encountered another person would not factually exclude the appellee from having killed her.

*In re Swearingen*, 2019 WL 3854457 *3 (quoting *Swearingen*, 424 S.W.3d at 38–39).

Swearingen further claims that Court should have considered "the voluminous scientific evidence showing that Mr. Swearingen was already incarcerated at the time Ms. Trotter actually died." Petition at 16. But the court below did that also. After determining that the allegedly suppressed bench notes of Musialowski would not have led to an acquittal, the Court stated,

> That conclusion is particularly compelling given that § 2244(b) requires us to assess the claim "in light of the evidence as a whole." § 2244(b)(2)(B)(ii). We have before alluded to the "mountain of inculpatory evidence," discussed in detail by numerous courts, state and federal, that seals Swearingen's guilt for Trotter's murder. *Swearingen*, 303 S.W.3d at 736.

*Id*. at *4–5. The Court then went on to quote the federal district court's "succinct summary" of the evidence wherein the district court rejected—after lengthy analysis—Swearingen's then newly presented evidence challenging the time of death. *Id*. at *5.[3] Clearly, the Fifth Circuit was considering the entire record in

[3] That quote by the federal district court is set out in Section V, *infra*.

Swearingen's case, both at trial and in his numerous subsequent appeals. And because the lower court already did as Swearingen asks this Court to order here, there is no basis upon which to grant the writ.

## V. SWEARINGEN IS NOT INNOCENT.

There is no reason for this Court to grant habeas relief here because Swearingen is guilty of capital murder, regardless of what evidence is considered. As previously observed by the federal court, "Swearingen has advanced a variety of unsuccessful attempts to prove that his is actually innocent of Ms. Trotter's murder. State and federal courts have provided exceptional opportunities for Swearingen to develop his actual–innocence arguments." *Swearingen v. Thaler*, 2009 WL 4433221 *1 (S.D. Tex. Nov. 18, 2009). These opportunities include multiple evidentiary hearings. Yet, despite all this, Swearingen has never succeeded. Courts have consistently observed that the evidence establishing Swearingen's guilt is simply too overwhelming.

The Fifth Circuit, for example, in considering the "new" evidence put forth in Swearingen's most recent attempt to prove his innocence, quoted the federal district court's "succinct summary" of the evidence against Swearingen "which underscores why [his] 'new' claims … could not possibly have made any difference in the outcome of his trial:"

> …Swearingen was the last person that Ms. Trotter was seen with alive. Ms. Trotter had been in Swearingen's truck, where he forcibly removed hair follicles. Swearingen's histological evidence

> does not explain why she was in his house that day, why it was later found to be in disarray, and why he falsely claimed that there had been a burglary there. The [cell phone] evidence itself does not explain why papers belonging to Ms. Trotter were found near the house of Swearingen's parents and her cigarettes were in Swearingen's house. The new information does not explain why Ms. Trotter was found wearing the same clothes as when she disappeared and why she had a note given to her by a friend on December 8 in her back pocket. The new evidence does not show why cell phone records traced Swearingen to a location near where Ms. Trotter was found. Histology does not explain why half of a pair of pantyhose belonging to Swearingen's wife was found in Swearingen's house and the other half around Ms. Trotter's neck. The new evidence does not explain why the same meal Ms. Trotter was last seen eating was found in her stomach. Swearingen lied about his whereabouts, tried to fabricate an alibi, made false police reports, fled from the police, asked friends to lie in his behalf, told others that the police would be after him, and crafted an ultimately inculpatory letter to throw attention away from himself. Swearingen told other inmates, "Fuck, yeah, I did it."

*In re Swearingen*, 2019 WL 3854457at * 5 (quoting *Swearingen v. Thaler*, 2009 WL 4433221 * 23).

The CCA dismissed an eleventh-hour state application for habeas relief in 2009 wherein Swearingen urged new forensic evidence proved his

innocence. *Ex parte Swearingen*, 2009 WL 249778 (Jan. 27, 2009). Judge Cochran stated in her concurrence:

> [Swearingen] files last-minute, but facially appealing, claims of actual innocence of this capital murder based upon (1) affidavits from three medical examiner pathologists that the murder victim must have died within a day or two of December 30, 1998, which was some twenty days after applicant had been arrested and continuously jailed; and (2) specks of blood found under the victim's fingernails that contain DNA that does not match that of applicant. These claims are not new. This is applicant's eighth writ application and most of this evidence has been previously considered and rejected by Texas courts. More importantly, this is an instance of focusing solely on a couple of twigs of apparently exculpatory evidence instead of the veritable forest of inculpatory evidence.

*Id.* (Cochran, J., concurring) (emphasis added).

Moreover, the underlying evidence his false testimony claims changes nothing. Despite what Swearingen claims, he has not undermined the validity of the damning testimony regarding the pantyhose found in his trailer, or the possibility of contamination as the source of the unknown DNA under the fingernails.[4] *See* Section II, *supra.* Because he cannot

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[4] Swearingen's innocence is also belied by his repeated attempts to fabricate exculpatory evidence. This began prior trial when he asked a friend to lie and provide him an alibi the day Trotter disappeared. 30 RR 171–175. He

prove innocence despite having been afforded numerous opportunities to do so, there is no basis to grant the extraordinary remedy he seeks here. Swearingen's petition should be denied.

## VI. SWEARINGEN IS NOT ENTITLED TO A STAY OF EXECUTION.

The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [judicial] discretion." *Nken v. Holder*, 556 U.S. 418, 433–34 (2009). Before utilizing that discretion, a court must consider:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties

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also tricked his cellmate into writing a letter in Spanish confessing to the crime, describing with explicit detail what to Trotter on the day she disappeared. 31 RR 5–19, 51–69; SX 184–85. Swearingen continued his efforts to falsely implicate someone else in Trotter's murder in the weeks leading up to his previously scheduled execution date. Anthony Shore was interviewed by Texas Rangers and district attorney's investigators before his execution, and told them he had agreed to falsely confess to Trotter's murder in order to try to prevent Swearingen's execution. *See* Appendix B. He also stated that Swearingen gave him items pertaining to Trotter's murder to familiarize him with the facts of the case and enable him to take credit for the murder. *Id*. Swearingen gave Shore a map which purportedly depicted the location where the Swearingen discarded Trotter's backpack, which has never been recovered. *Id*. This is hardly indicative of innocence.

> interested in the proceeding; and (4) where the public interest lies.

*Id*. at 434 (citations omitted) (internal quotation marks omitted). A stay of execution "is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill v. McDonough,* 547 U.S. 573, 584 (2006). "A court considering a stay must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" *Id*. (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)).

As discussed above, Swearingen cannot demonstrate a strong likelihood of success on the merits. His due process claims are grounded solely is what the Fifth Circuit found as a mischaracterization of the evidence, and are therefore insupportable. Certainly, the State has a strong interest in carrying out a death sentence imposed for a horrific capital murder that occurred nearly twenty years ago. See *Hill*, 547 U.S. at 584. Indeed, the public's interest lies in executing a sentence duly assessed and for which more than a decade worth of judicial review has terminated without finding reversible error. Both state and federal courts have afforded Swearingen ample opportunity to litigate his continued protestations of innocence. The public's interest is not advanced by staying Swearingen's execution yet again to consider procedurally defaulted and meritless claim. This Court should not further delay justice. See *Martel v. Clair*, 565 U.S. 648, 662 (2012) ("Protecting against abusive delay is an interest of

justice." (emphasis in original)). Considering all of the circumstances in this case, equity favors Texas, and this Court should deny Swearingen's application for stay of execution.

## CONCLUSION

The petition for writ of habeas corpus should be denied.

Respectfully submitted,

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