No. 19-5460 &19A2000

In the Supreme Court of the United States

IN RE LARRY RAY SWEARINGEN,
*Petitioner,*

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

# REPLY BRIEF IN SUPPORT OF ORIGINAL PETITION

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

Larry Swearingen is scheduled for execution today, August 21, 2019, for a rape and murder despite the established presence of male DNA that is *not Mr. Swearingen's* that was found under the victim's fingernails, and a lack of any DNA evidence of Mr. Swearingen's on any other critical evidence including the rape kit, the murder weapon, and the victim's clothing. Even more pressing, in just the past few weeks, DPS has issued retractions and corrections of prior testimony offered by two of its witnesses. Such testimony had been offered under the guise of scientific analysis, and had been key testimony trumpeted by the prosecution, thus leading to Mr. Swearingen's conviction. The State's plea to disregard this troubling and entirely false testimony in order to proceed with an execution of someone who has a demonstrable path for demonstrating innocence should be disavowed.

In 2009, the Court of Appeals for the Fifth Circuit authorized a successor petition, pursuant to 28 U.S.C. §2244, based on Mr. Swearingen's threshold showing of innocence. *In Re Swearingen*, 556 F.3d 344 (5th Cir. 2009); *see also id.* at 349 (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). Thus, even without the recent recantation of critical testimony regarding contamination of the exclusionary DNA evidence and without the gross overstatement regarding the comparison of pieces of pantyhose evidence, there is precedent confirming that this is a close case with a credible case for innocence.

In its Opposition, the State's recitation of the evidence of record simply parrots the State-sponsored evidence discussed in prior opinions of the Texas Court of Criminal Appeals. Such a listing is incomplete and misleading.

For example:

- Contrary to the State's discussion, no one saw Mr. Swearingen and Ms. Trotter leave the college together. In fact, 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).

> Q. Do you think if you saw him again; you could
> 2 recognize him?
> 3 A. I'm not sure. I didn't think so earlier when
> 4 I looked at pictures of the defendant.

*Id.* at 7

> 12 Q. In your statement, you indicated that the male
> 13 that you saw Melissa with that day had light hair; is
> 14 that correct?
> 15 A. He appeared to have light hair, but the

16 lighting isn't -- that's what it looked like to me at
17 the time.

*Id.*

- Setting aside the resort to cell phone data "science" which has repeatedly been called into quest, the 3:00 PM cell phone call Respondent refers to was picked up by Tower south of Mr. Swearingen's trailer and is **not** consistent with movement to the crime scene.

9. A. No.4, located there. NO.4 is based on a 3:03 p.m. phone call made on December 8th, '98, which shows the defendant approximately south of FM 1097, and this was utilizing the Willis Tower Site, Sector 2, which is here. It's the Willis Tower Site, this is the NO.2 Sector. That is shown as No.4.

27 RR 67

- Mr. Swearingen's wife testified she did not smoke, but admitted on cross-examination that she occasionally bummed cigarettes, which means that she actually did smoke.

1 Q. Never bummed cigarettes from your relatives?
2 A, Yes.
3 Q. What kind of cigarettes were they?
4 A, Marlboro.
5 Q. Marlboro Lights?

6 A. No, just --
7 Q. Or you don't know for sure?
8 A, I don't know for sure.

29 RR 179.

Respondent's recitation of forensic science fares worse. For example, Carter could not identify the fungal-mold Respondent refers to at the 2012 evidentiary hearing, although shown the very same autopsy photos from which she testified at trial. Then there is the regurgitation of testimony regarding Trotter's stomach contents, which the 2012 hearing proved were not consistent with a mythical, unproven meal at McDonald's which Respondent refer to. The forensically important fact is there was a stomach, intact with mucosal lining present. After 25 days the stomach would disintegrate.

Finally, Swearingen's pathologist at trial, Raul Lede, questioned the 25 day PMI, which Carter rendered at trial without temperature data or knowledge of the crime scene, facts Carter admitted in 2012 were necessary in order to give a PMI. Post-conviction Carter changed her estimate to 14 days or less in a 2007 affidavit and then flipped to 14 days or more at the 2012 evidentiary hearing.

In any event, reliance on a prior determination by a Court of Appeals should not replace the holistic evaluation of the evidence as a whole as is required under *Schlup v. Delo*, 513 U.S. 298 (1995). As discussed in Mr. Swearingen's moving papers, a fulsome *Schlup* analysis must be undertaken weighing the recantation of the testimony regarding contamination of the evidence found under the

victim's fingernails in light of the lack of any other DNA evidence identifying Mr. Swearingen, and the voluminous scientific evidence from the postconviction record showing that the victim must have died while Mr. Swearingen was already incarcerated on other charges must be undertaken. Accuracy and integrity, and equitable principles of justice that a gateway innocence exception is meant to enshrine, require that the well-established *Schlup* principles, which Congress did not expressly change, be retained.

With regard to falsity of the testimony in question, the State's Opposition fails to even address the numerous cases cited by Mr. Swearingen construing invalid scientific testimony as false testimony under *Napue v. People of Ill.*, 360 U.S. 264 (1959). *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.

Finally, with regard to the State's suggestion that this filing is nothing more than a delay tactic, we note that Mr. Swearingen submitted filings within days of DPS issuing its corrections. Back 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. And it was not until August 8, 2019 that Texas DPS issued a second letter reversing Ms. Carradine's false testimony on DNA contamination. Likewise, DPS only recognized that Ms. Musialowski used improper terminology that would not be used today only on July 19, 2019. There has therefore not been any earlier opportunity for Mr. Swearingen to raise these issues.

Because extensive, credible scientific evidence in the record suggests that Mr. Swearingen did not commit the crime for which he has been sentenced to die, and in light of new evidence revealing that prior testimony allegedly based on science was in fact false and improper, the Court should grant Mr. Swearingen's petition and stay his execution.

Respectfully submitted,

PHILIP H. HILDER
JAMES G. RYTTING*
*Counsel of Record*
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Houston, TX 77006
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