No. 11-233

In the Supreme Court of the United States

LARRY RAY SWEARINGEN,
Petitioner,

v.

RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE INNOCENCE NETWORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

LORI R. MASON
Counsel of Record
CHRISTOPHER B. DURBIN
ORION ARMON
COOLEY LLP
Five Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306
(650) 843-5000
lmason@cooley.com

Counsel for *Amicus Curiae* The Innocence Network

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF *AMICUS CURIAE*

The Innocence Network ("the Network") is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post conviction can provide conclusive proof of innocence.[1] The 66 current members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand.[2] The Network

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[1] *Amicus curiae* certifies that the counsel of record for all parties received timely 10-day notice of *amicus curiae*'s intent to file an *amicus curiae* brief, and all parties consented to the filing of this brief. SUP. CT. R. 37.2. *Amicus curiae* further certifies that no party or counsel for a party authored any portion of this brief or made a monetary contribution intended to fund its preparation or submission. SUP. CT. R. 37.6. No person other than *amicus curiae*, its members, or its counsel have made such a monetary contribution. *Id.*

[2] The Network's member organizations include the Alaska Innocence Project, Association in Defense of the Wrongly Convicted (Canada), California Innocence Project, Center on Wrongful Convictions, Connecticut Innocence Project, Downstate Illinois Innocence Project, Duke Center for Criminal Justice and Professional Responsibility, The Exoneration Initiative, Georgia Innocence Project, Hawaii Innocence Project, Idaho Innocence Project, Innocence Network UK, Innocence Project, Innocence Project Arkansas, Innocence Project at UVA School of Law, Innocence Project New Orleans, Innocence Project New Zealand, Innocence Project Northwest Clinic, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of South Dakota, Innocence Project of Texas, Justice Project, Inc., Kentucky Innocence Project, Maryland Innocence Project, Medill Innocence Project, Michigan Innocence Clinic, Mid-Atlantic Innocence Project, Midwestern Innocence Project, Mississippi Innocence Project, Montana Innocence

and its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons learned from cases in which the system convicted innocent persons, the Network advocates reforms designed to enhance the truth-seeking functions of the criminal justice system and thereby prevent future wrongful convictions.

In this case, the Network seeks to present a broad legal and scientific perspective on reliable forensic evidence to the end of informing the Court's determination whether the lower courts' continued difficulties in assessing the exculpatory effect of genuinely scientific expert testimony regarding pathology and histology studies serves the interests of justice or perpetuates the risk of convicting the innocent and allowing the guilty to escape justice.

Project, Nebraska Innocence Project, New England Innocence Project, Northern Arizona Justice Project, Northern California Innocence Project, Office of the Public Defender (State of Delaware), Office of the Ohio Public Defender, Wrongful Conviction Project, Ohio Innocence Project, Osgoode Hall Innocence Project (Canada), Pace Post-Conviction Project, Palmetto Innocence Project, Pennsylvania Innocence Project, Reinvestigation Project (Office of the Appellate Defender), Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review Project (Australia), Texas Center for Actual Innocence, Texas Innocence Network, Thomas M. Cooley Law School Innocence Project, Thurgood Marshall School of Law Innocence Project, University of British Columbia Law Innocence Project (Canada), Wake Forest University Law School Innocence and Justice Clinic, Wesleyan Innocence Project, Wisconsin Innocence Project, and Wrongful Conviction Clinic.

SUMMARY OF THE ARGUMENT

Swearingen's petition presents a question of exceptional importance arising from this Court's repeated references to the existence of a freestanding constitutional claim of actual innocence. Although the Court's precedents have indicated that the execution of a habeas petitioner who presents a compelling post-trial showing of actual innocence would violate the Eighth and Fourteenth Amendments—even without an accompanying claim of constitutional error—the Court has yet to recognize a freestanding actual-innocence claim. In the wake of these cases, the circuits have split regarding the existence of a right to habeas relief upon a showing of actual innocence, as well as the standards that would govern such a claim.

Based on this Court's habeas opinions in capital cases, it is undeniable that the execution of an actually innocent person is inconsistent with the Constitution. Indeed, both the Eighth and Fourteenth Amendments prohibit executing an innocent person. The Eighth Amendment's requirement that capital punishment be imposed in only the most egregious cases—*i.e.*, extreme and unquestionable culpability of the most heinous crimes—forbids imposing the ultimate punishment on an innocent person.

In addition, state legislatures have overwhelmingly declared their opposition to the imposition of capital punishment on a petitioner who can persuasively prove his innocence with post-conviction evidence. These states recognize that executing an innocent person serves no penological purpose and erodes society's faith in our criminal justice system. For similar reasons, the execution of an innocent person

would "shock the conscience" in violation of the Fourteenth Amendment.

The Court has explained that a cognizable actual-innocence claim must be reserved for only the most extraordinary of circumstances, but Swearingen's case falls squarely into that category. Swearingen presents reliable scientific evidence refuting the core forensic testimony against him at trial and conclusively demonstrating that he is innocent of the crime underlying his conviction and capital sentence. As such, his petition compels the Court to take the long-deferred step of recognizing a freestanding constitutional right to federal habeas relief upon a persuasive showing of actual innocence.

Simply put, the evidence supporting Swearingen's petition conclusively exonerates him of the murder for which the State intends to execute him. Each of the forensic scientists who has examined the pathological and histological evidence—including the State's sole forensic witness at trial—has concluded to a scientific certainty that the victim died *after* Swearingen was incarcerated. As one of these medical examiners stated, it is "not reasonably debatable amongst competent forensic scientists" that the well-preserved nature of the victim's tissues *precludes* Swearingen's involvement in her murder.

Unlike prior cases such as *Herrera* and *House*, in which the Court was skeptical of the proffered evidence, Swearingen's newly discovered and unrebutted scientific evidence consists in rigorously conducted scientific analyses by well-respected medical doctors, many of whom work as county medical examiners in Texas.

Such compelling evidence of actual innocence allows this Court to grant Swearingen's requested habeas relief without the risk of opening the proverbial floodgates. *Amicus curiae* respectfully requests that the Court safeguard Swearingen's constitutional rights by recognizing his freestanding claim of actual innocence.

ARGUMENT

I. THIS CASE PRESENTS A COMPELLING VEHICLE FOR THIS COURT TO HOLD THAT EXECUTION OF AN INNOCENT PERSON IS UNCONSTITUTIONAL.

This case presents the truly extraordinary circumstance that the Court has repeatedly signaled would support a holding that the execution of an innocent person is unconstitutional: a convincing showing of actual innocence in a successive habeas petition found to be procedurally barred. Swearingen has presented to the state and federal courts reliable and undisputed scientific evidence that conclusively demonstrates his actual innocence. Swearingen may nonetheless be executed because the lower courts' assessments of the reliability and credibility of the evidence supporting his claim have been incomplete, fundamentally unfair, and inconsistent with this Court's precedents. In short, Swearingen's evidentiary showing entitles him not only to a full and fair hearing to present the newly discovered scientific evidence that conclusively exonerates him, but ultimately merits federal habeas relief. Absent such relief, the State of Texas may execute an innocent man.

A. This Court's Precedents Support the Recognition of a Freestanding Claim for Habeas Relief Upon a Persuasive Showing of Actual Innocence.

Nearly 20 years after *Herrera v. Collins*, 506 U.S. 390 (1993), the Court has not squarely decided whether the Constitution protects an innocent person from execution when his conviction is untainted by constitutional error. *See Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2321 (2009); *House v. Bell*, 547 U.S. 518, 555 (2006). Although the *Herrera* Court fell short of recognizing a freestanding actual-innocence claim, six Justices would have recognized that the Constitution prohibits the execution of an innocent person.[3]

This Court has also assumed, without deciding, that in extraordinary circumstances a convincing showing of actual innocence would support a

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[3] *See Herrera*, 506 U.S. at 419 (O'Connor, J., concurring, joined by Kennedy, J.), ("I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution."); *id*. at 435 (Blackmun, J., joined by Stevens and Souter, J.J., dissenting) ("I believe it contrary to any standard of decency to execute someone who is actually innocent."); *id*. at 429 (White, J., concurring) ("I assume that a persuasive showing of 'actual innocence' made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case."); *see also id.* at 417 (maj. op.) ("We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim.").

freestanding Eighth-Amendment claim. *See House*, 547 U.S. at 555 ("[W]hatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it."); *In re Davis*, 130 S. Ct. 1, 1 (2009) (granting original habeas petition and remanding for consideration of evidence probative of actual innocence).

In fact, this Court's decisions are replete with unequivocal statements that executing an innocent person would be fundamentally unconstitutional. *See Davis*, 130 S. Ct. at 1-2 ("[I]t would be an atrocious violation of our Constitution and the principles upon which it is based to execute an innocent person.") (Stevens, J., concurring) (internal quotation and citation omitted); *Pulley v. Harris*, 465 U.S. 37, 68 (1984) ("[T]he execution of someone who is completely innocent . . . [is] the ultimate horror case.") (Brennan, J., dissenting) (internal quotations omitted); *cf. Schlup v. Delo*, 513 U.S. 298, 324-25 (1995) ("The quintessential miscarriage of justice is the execution of a person who is entirely innocent.").[4]

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[4] The following hypothetical illustrates the unconstitutionality of executing an innocent person:

> A defendant is convicted of the murder of his child after a full and fair trial, and he is then sentenced to death. Ten years later, the defendant discovers the 'murdered' child has been safely living on a remote island, conclusively disproving defendant's guilt. The defendant then goes before the state with his living child, but is denied relief and the state prepares to move forward with his execution. The challenge under these circumstances is whether, in spite of the truly persuasive proof of innocence, the state may proceed with the execution

Following these decisions, inconsistency has developed among the circuits. Three circuits have interpreted *Herrera* to reject the existence of a freestanding actual-innocence claim. *See United States v. Quinones*, 313 F.3d 49, 67 (2d Cir. 2002); *Moore v. Quarterman*, 534 F.3d 454, 465 n.19 (5th Cir. 2008); *Rouse v. Lee*, 339 F.3d 238, 255 (4th Cir. 2003). Conversely, the Ninth Circuit has expressly assumed that the Constitution recognizes such claims and has articulated the applicable standard. *See Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997) ("[A] habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent."). The remaining circuits acknowledge that such a claim may exist in appropriate circumstances, but have been hesitant to state under what standard relief would be warranted. *See United States v. Sampson*, 486 F.3d 13, 27-28 (1st Cir. 2007); *Albrecht v. Horn*, 485 F.3d 103, 121-22 (3d Cir. 2007); *House v. Bell*, 311 F.3d 767, 768 (6th Cir. 2002); *Cornell v. Nix*, 119 F.3d 1329, 1334 (8th Cir. 1997); *Felker v. Turpin*, 83 F.3d 1303, 1312-13 (11th Cir. 1996).

This Court's recognition of a freestanding actual-innocence claim may be the only means to avoid the "ultimate horror case" presented by this case: unrefuted scientific evidence establishes conclusively that Swearingen could not have committed the crime for which the State of Texas intends to execute him.

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without violating the Eighth Amendment of the United States Constitution.

In re Davis, No. CV409-130, 2010 WL 3385081, at *40 n.24 (S.D. Ga. Aug. 24, 2010).

Swearingen's petition thus presents a compelling opportunity for the Court to recognize a freestanding actual-innocence claim. *See In re Swearingen*, 556 F.3d 344, 350 (5th Cir. 2009) (Wiener, J., concurring) ("[T]his might be the very case for . . . the U.S. Supreme Court . . . to recognize actual innocence as a ground for federal habeas relief.").

B. The Eighth Amendment Prohibits the Execution of an Innocent Person.

An innocent person's constitutional right not to be executed is found in the Eighth Amendment, which protects against excessive and cruel and unusual punishment by mandating that the "State's power to punish 'be exercised within the limits of civilized standards.'" *Kennedy v. Louisiana*, 554 U.S. 407, 435 (2008) (quoting *Trop v. Dulles*, 356 U.S. 86, 99 (1958)). When a State chooses to punish by death, "it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." *Id*. at 420. Accordingly, the death penalty is to be imposed only on those offenders who commit the most serious of crimes and "whose extreme culpability makes them 'the most deserving of execution.'" *Id*. (quoting *Roper v. Simmons*, 543 U.S. 551, 568 (2005)).

The Court's determination of whether the death penalty is unconstitutionally disproportionate to the crime requires an examination of the "standards elaborated by controlling precedents"; the Court's "own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose"; and whether there is a national consensus against the sentencing practice by considering state legislative

enactments and practices. *Graham v. Florida*, 130 S. Ct. 2011, 2022 (2010).

This analytical framework has led the Court to hold that the Eighth Amendment forbids the execution of, *e.g.*, (1) a defendant convicted of raping his eight-year-old stepdaughter, *Kennedy*, 554 U.S. at 421; (2) a seventeen-year-old convicted of capital murder, *Roper*, 543 U.S. at 568; (3) a mentally retarded defendant convicted of capital murder, *Atkins v. Virginia*, 536 U.S. 304, 321 (2002); and (4) a defendant convicted of aiding and abetting a robbery in which two senior citizens were murdered, *Enmund v. Florida*, 458 U.S. 782, 788 (1982). If the Eighth Amendment prohibits execution under these circumstances, surely it prohibits the execution of a man who has committed no crime at all.

Indeed, this Court's jurisprudence establishes that the Constitution proscribes the *mere punishment* of an innocent person. *See, e.g.*, *Robinson v. California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."); *United States v. U.S. Coin & Currency*, 401 U.S. 715, 726 (1971) (Brennan, J., concurring) ("[T]he government has no legitimate interest in punishing those innocent of wrongdoing."); *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (citing "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free"). The fundamental concept cited by Justice Harlan has been declared by great thinkers throughout history, including Aristotle, Voltaire, and Blackstone. *See generally* Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173 (1997).

This Court has made it equally clear that imposing the death penalty is unconstitutional when the petitioner has diminished culpability, *Atkins*, 536 U.S. at 319, or has not killed, *Graham*, 130 S. Ct. at 2027. Because a petitioner exonerated by post-trial evidence has no culpability for *any* crime, let alone the heinous crimes for which capital punishment has traditionally been imposed, it must be unconstitutional to execute him.

1. Executing an innocent person fails to serve the penological goals of retribution and deterrence.

It is self-evident that imposing capital punishment on an innocent petitioner would violate the Eighth Amendment by failing to fulfill the social purposes of the death penalty recognized by this Court: "retribution and deterrence of capital crimes." *Kennedy*, 554 U.S. at 441.

Because the goal of retribution "reflects society's and the victim's interests in seeing that the offender is repaid for the hurt he caused," *id.* at 442, the severity of punishment must be "directly related to the personal culpability of the criminal offender," *Tison v. Arizona*, 481 U.S. 137, 149 (1987). For example, the Court has held that the retributive goal of capital punishment would not be served by executing a defendant who aided and abetted a robbery that resulted in the death of an elderly couple: "Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts." *Enmund*, 458 U.S. at 801. If Enmund

lacked the requisite culpability to achieve the retributive goal of capital punishment, that goal cannot be served by executing an innocent man who lacks any culpability. Because he has caused no harm, neither society nor the victim has any interest in seeing him punished.

The Court has also recognized that "[t]he theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct." *Atkins*, 536 U.S. at 320. As a result, "the threat that the death penalty will be imposed for murder will [not] measurably deter one who *does not kill* and *has no intention* or purpose that life will be taken." *Enmund*, 458 U.S. at 798-99 (emphasis added). Deterrence is not served when there is no conduct to deter.

2. Society has voiced its objection to the execution of the innocent.

State legislation demonstrates a consensus that society will not tolerate the execution of innocent defendants, regardless whether their innocence is proven after trial. Since *Herrera*, 47 states and the District of Columbia have enacted statutes designed to help the wrongfully convicted prove their innocence.[5] *Davis*, 2010 WL 3385081, at *40 n.29. Moreover, 34 of the 35 states that authorize the death penalty provide

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[5] *See also* Kathleen Callahan, *In Limbo:* In re Davis *and the Future of* Herrera *Innocence Claims in Federal Habeas Proceedings*, 53 ARIZ. L. REV. 629, 643 n.96 (2011) (listing state courts recognizing freestanding actual-innocence claims since *Herrera*).

statutory avenues for the wrongfully convicted to prove their innocence after conviction. *Id*. at n.27.

The states' enactment of this legislation represents "[t]he clearest and most reliable objective evidence of contemporary values" reflecting society's strong opposition to imposing capital punishment on an innocent person. *See Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), *abrogated on other grounds by Atkins*, 536 U.S. 304.

C. Executing an Innocent Person Would Also Violate the Fourteenth Amendment.

Because "concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system," *Schlup*, 513 U.S. at 324-25, the execution of an innocent person would "shock[] the conscience" and thus violate the Fourteenth Amendment's Due Process Clause. *See Rochin v. California*, 342 U.S. 165, 172 (1952).

As noted by Justice Blackmun's dissent in *Herrera*, "substantive due process" protects citizens from governmental action that "shocks the conscience or interferes with rights implicit in the concept of ordered liberty." *Herrera*, 506 U.S. at 435-36 (Blackmun, J., dissenting) (internal quotations and citations omitted); *see also id.* at 430 (Blackmun, J., dissenting) ("Nothing could be more contrary to contemporary standards of decency, or more shocking to the conscience than to execute a person who is actually innocent.") (citations omitted).

To be clear, an actual-innocence claim does not necessarily arise from the state's failure to implement adequate post-conviction procedures. Notwithstanding the availability of such post-trial procedural protections, the Constitution forbids the state's execution of a petitioner who can demonstrate his actual innocence. Here, even assuming that Swearingen received "all the process that our society has traditionally deemed adequate," *Herrera*, 506 U.S. at 428 (Scalia, J., concurring), his execution would nonetheless constitute a grievous violation of his substantive due-process rights.

D. Only a Freestanding Actual-Innocence Claim Can Safeguard Swearingen's Constitutional Rights.

In this case, existing statutory protections for petitioners who can make a convincing showing of actual innocence may not be enough to prevent the execution of an innocent man. *See* 28 U.S.C. § 2244(b)(2)(B)(ii) (providing relief to petitioners who can "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). In recognition of the equitable nature of habeas corpus, *Schlup*, 513 U.S. at 319, Swearingen presents the "truly persuasive demonstration of 'actual innocence,'" *Herrera*, 506 U.S. at 417, that would warrant federal habeas relief even without accompanying constitutional error.[6]

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[6] Recognizing Swearingen's freestanding actual-innocence claim will not lead to an avalanche of similar claims, nor will it disrupt the need for finality in capital cases. As the Court recognized in

As Judge Wiener stated below, the question whether such a freestanding actual-innocence claim is viable "is a brooding omnipresence in capital habeas jurisprudence that has been left unanswered for too long." *Swearingen*, 556 F.3d at 350 (Wiener, J., concurring).[7] This question is answered by the evidence presented by Swearingen, viewed in the context of *Herrera* and *House*: the Court should grant Swearingen's petition, hold that federal habeas relief is available upon a showing of actual innocence, and finally dispense with the assumption that federal courts "should not and could not intervene to prevent an execution so long as the prisoner had been convicted after a constitutionally adequate trial." *Herrera*, 506 U.S. at 421 (O'Connor, J., concurring).

Schlup, only an extremely rare petitioner can advance a truly persuasive claim of actual innocence. 513 U.S. at 321. Moreover, petitioners can already assert actual-innocence claims when coupled with another constitutional claim. *See* 28 U.S.C. 2244(b)(2)(B)(ii).

[7] Because Swearingen has made a persuasive showing of actual innocence, his life should not depend on the grace of the executive branch. Clemency is not an adequate "fail safe" because of the system's well-documented biases and flaws. As this Court has recognized, there is an inherent bias when the ultimate decision rests with the same branch of government "responsible for initiating every stage of the prosecution of the condemned from arrest through sentencing." *Ford v. Wainwright*, 477 U.S. 399, 416 (1986). In addition, the Texas clemency system is not modeled after the "deeply rooted" "Anglo-American tradition" described in *Herrera*, 506 U.S. at 411-12. *See* TEX. CODE CRIM. PROC. art. 48.01 (preventing Governor from granting pardon unless Board of Pardons and Paroles so recommends). This system does not adequately protect the rights of petitioners who can make a persuasive actual-innocence showing.

1. Scientific evidence compellingly demonstrates Swearingen's actual innocence.

The *Herrera* Court assumed that federal habeas relief would be warranted in capital cases where the petitioner could make a "truly persuasive" demonstration of actual innocence. While declining to articulate an exact standard of proof, the Court has twice rejected actual-innocence claims for failing to meet the required threshold. *See Herrera*, 506 U.S. at 418-19; *House,* 547 U.S. at 555; *see also Osborne*, 129 S. Ct. at 2321.

In contrast to the evidence presented in *Herrera* and *House*, the scientific evidence presented by Swearingen conclusively establishes his actual innocence. Whatever standard the Court applies, Swearingen has made the truly persuasive showing necessary to support a freestanding actual-innocence claim.

a. Swearingen's evidence is much more reliable and persuasive than the evidence in *Herrera*.

In *Herrera*, the Court concluded that the petitioner's new evidence was untrustworthy because the affidavits (1) were offered at the eleventh hour with no reasonable explanation for a 10-year delay, 506 U.S. at 417; (2) "conveniently blame[d] a dead man—someone who [would] neither contest the allegations nor suffer punishment as a result of them," *id.* at 423 (O'Connor, J., concurring); and (3) contained material contradictions, *id.* at 418. The record failed

to demonstrate that the petitioner was, in fact, innocent.

Swearingen's petition presents a far more compelling showing based on reliable scientific evidence of actual innocence. Forensic scientists with expertise in the specific types of histology and pathology studies at issue in this case—most of whom are employed as medical examiners in several different Texas counties—have examined Dr. Carter's original autopsy report, crime-scene photos and videos, atmospheric records of the location of the victim's body, and the cellular structures of preserved tissue samples. Each of the experts has concluded with scientific certainty that the victim could not have been deceased nearly long enough to inculpate Swearingen. (*See* Pet. for Cert. at 12-19.) Without repeating the detailed recitation of the evidence in Swearingen's certiorari petition (*see id.*), it bears emphasis that neither the reliability of the forensic evidence on which these experts relied, nor the rigor of their scientific analyses, have encountered any substantive critique by the State. As the district court correctly observed—before embarking on a misguided effort to discredit scientific consensus with circumstantial evidence—"[t]aken at face value, Swearingen's new scientific evidence appears highly exculpatory."[8]

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[8] *See infra*, Section I.D.2. At a minimum, the district court's observation demonstrates that Swearingen presented sufficient evidence to meet *Schlup*'s "gateway" standard and thus entitle him to an evidentiary hearing. Based on much less compelling evidence, the district court in *House* conducted an extensive evidentiary hearing to assess the credibility and reliability of petitioner's actual-innocence claim. *See* 547 U.S. at 534-35. Although *amicus* submits that Swearingen's petition also satisfies

(App.-55a.) Notwithstanding the circumstantial evidence cited by the district court, the scientific evidence from which the experts drew their conclusions is dispositive regarding the victim's time of death.

Unsurprisingly, after revisiting her autopsy report in light of the pathological and histological analyses of these experts, the prosecution's only forensic witness (Dr. Joye Carter) abandoned the 25-day post-mortem interval ("PMI") to which she testified at trial and concluded that the victim could not have died before Swearingen was incarcerated. (App.-97a (stating under oath that forensic evidence was "incompatible with exposure" for more than two weeks).)

Unlike the evidence in *Herrera*, there is no reason to question the trustworthiness of the evidence offered by Swearingen: (1) the affidavits are from well-respected doctors with impeccable credentials, most of whom do not typically appear for the defense; (2) the experts are not friends or relatives of Swearingen and have no other motive to be less than truthful; (3) the new evidence does not place blame on a dead person; and (4) there is a reasonable explanation for the delay in presenting the evidence, which was not disclosed to Swearingen until well after trial. Most importantly, the experts have unanimously concluded that the victim's body was placed in the forest *after* Swearingen

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the more-stringent *Herrera* standard, he has made "a convincing *Schlup* gateway showing" that "'raise[es] sufficient doubt about [his] guilt to undermine confidence in the result of the trial.'" *House*, 547 U.S. at 537 (quoting *Schlup*, 513 U.S. at 317).

was incarcerated on December 11, 1998. As one commentator has explained,

> Both *Schlup* and *Herrera* are replete with concern . . . to circumvent the difficulties inherent in attempts to determine the truth through a new trial conducted years after the original conviction. Such concerns may make more sense when the evidence is of the sort unearthed in *Herrera* . . . . New statements by witnesses are not by themselves considered 'truly persuasive' by the Court. . . . Newly discovered exculpatory DNA evidence and *other types of emerging, highly reliable exonerative scientific evidence*, however, *do not raise these difficulties* . . . .

Development in the Law: Confronting the New Challenges of Scientific Evidence, Part V, DNA Evidence and the Criminal Defense, 108 HARV. L. REV. 1557, 1580-81 (May 1995) (emphasis added and citations omitted) [hereinafter *DNA Evidence*].

The exculpatory impact of the evidence presented by Swearingen's petition is best described by the Texas Attorney General's statement that, "[h]ad Dr. Carter determined that the body could not have been exposed in the forest for more than fourteen days, the prosecutor then would have known that *he had jailed the wrong man* . . . ." (Resp.'s Ans. to Pet. for Habeas Corpus, at 23, *Swearingen v. Quarterman*, No. 09-cv-00300 (S.D. Tex., filed June 15, 2009) (emphasis added).)

Like every other forensic expert in this case, Dr. Carter has, in fact, concluded that the "body could not

have been [exposed in the forest] for more than fourteen days." (*See* App.-117a.) Because Swearingen's evidence reliably and persuasively proves that he was in jail when the victim was killed, he meets the "extraordinarily high" threshold described in *Herrera*.

b. Swearingen's evidence proves conclusively that he did not commit murder.

Swearingen's evidence also is more persuasive than what was offered in *House*, where the petitioner submitted evidence that the semen on the victim's underwear was her husband's. 547 U.S. at 540. Although House relied on newly discovered scientific evidence, this Court held that the evidence undermined the prosecution's theories of motive and guilt rather than proving House's innocence. *See id.* at 541, 547-48.

In contrast, Swearingen's evidence establishes an airtight alibi—he was in jail when the victim was murdered—thereby conclusively establishing his innocence. *See, e.g.*, *Giesberg v. State*, 984 S.W.2d 245, 248 (Tex. Crim. App. 1998) (stating that alibi "serves to negate a *necessary element of proof* in the State's case—the defendant's presence at the time and location of the commission of the crime") (emphasis added).

2. The scientific evidence in this case is uniquely capable of establishing actual innocence.

Swearingen's petition is remarkable not only for the quantum of evidence presented—representing a showing of actual innocence well beyond those in *Herrera* and *House*—but also for the highly reliable and credible scientific nature of the evidence.

Swearingen's petition presents not only newly discovered evidence—*i.e.*, tissue samples preserved in paraffin blocks—but also meaningful advances in scientific knowledge per se—*e.g.*, examination of those tissues under cutting-edge high-powered microscopes. As such, this is a case in which, as a Texas Court of Criminal Appeals judge has described, "the prior verdict might have seemed accurate at the time, but everyone later recognizes that it might not have been accurate because it was *based upon scientific expertise that has been rejected*—[] by the scientific community [and] *the original scientist herself*[.]" *Ex Parte Robbins*, No. AP-76464, 2011 Tex. Crim. App. LEXIS 910, at *70 (Tex. Crim App. June 29, 2011) (Cochrane, J., dissenting) (emphasis added).[9] To adequately protect the rights of petitioners like Swearingen, the courts must accept that newly discovered scientific evidence can—and in this case, *does*—demonstrate

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[9] *See also id.* ("I suspect that the Supreme Court will one day hold that a conviction *later found to be based upon unreliable scientific evidence* deprives the defendant of a fundamentally fair trial . . . because it raises an intolerable risk of an inaccurate verdict and undermines the integrity of our criminal justice system.") (emphasis added).

actual innocence notwithstanding seemingly inculpatory circumstantial evidence.

The district court's analysis exemplifies the failure to comprehend the exculpatory effect of reliable scientific evidence. Rather than convene a hearing and undertake a meaningful analysis of the reliability of the forensic experts' medical conclusions, the court fell back on Dr. Carter's statements that the body "was in an advanced state of decomposition" and had undergone "significant decompositional changes." (App.-56-57a.) As a matter of sound forensic science, neither of these statements—which Dr. Carter herself no longer believes support a PMI that inculpates Swearingen—nor the less reliable fungal or entomological evidence (*see* Pet. for Cert. at 12-13; App.-117a, -122-23a), undermines the consensus of expert opinion that now exists around the most-reliable scientific discipline that has been used to study the evidence in this case. Indeed, as one expert explained, in "the hierarchy of the sciences at issue" in this case, "[h]istology is indisputably the most accurate scientific tool for determining post mortem interval in the short term . . . ." (Amicus Br. of Dr. Harrell Gill-King, *Swearingen v. Thaler*, No. 09-70036, at 9 (5th Cir., filed Apr. 26, 2010).) Put differently, "[w]here, as here, proper histological estimates of post mortem interval have been conducted, *histology is the lens through which all other evidence of post mortem interval should be viewed* and *the method with which other approaches must be reconciled*, not vice versa." (*Id.* at 10 (citing Marcus Nashalskey & Patricia McFeeley, *Time of Death*, HANDBOOK OF FORENSIC PATHOLOGY 2d (2003)) (emphasis added).)

Even more egregious is the district court's conclusion that new scientific evidence cannot credibly establish innocence if it fails to account for circumstantial evidence offered at trial.[10] (*See* App.-63a (finding that experts offered "hardly credible testimony" that "does not conclusively change the manner in which the jury would view the 'evidence as a whole.'" (quoting 28 U.S.C. § 2244(b)(2)(B)(ii)).)

The district court's analysis ignores one of the scientific method's foundational principles: a hypothesis cannot be verified if it is *falsified* by reliable scientific evidence. *See* Randall K. Noon, SCIENTIFIC METHOD: APPLICATIONS IN FAILURE INVESTIGATION AND FORENSIC SCIENCE 27 (2009). The point is not whether the experts agree as to the *precise* time of death, nor even whether circumstantial evidence strongly suggests a connection between Swearingen and the victim's death. What matters is that the forensic experts' conclusions have falsified the *only* hypothesis supporting Swearingen's conviction: the prosecution's theory that Swearingen killed the victim before December 11th. The district court erred by declining to order a hearing and instead formulating an *ad hoc* hypothesis—*i.e.*, that "some other piece of the puzzle is missing"—in an effort to

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[10] (*See* App.-63-64a (citing, *e.g.*, victim's stomach contents containing her purported last meal; cell-phone records indicating petitioner's location near where body was found; petitioner's supposed jail-house confession; note written on December 8th found in victim's pants; and police's recovery of pantyhose belonging to petitioner's wife from victim's neck).)

explain away the experts' opinions and the reliable, verifiable evidence on which they relied. (App.-65a.)[11]

In sum, Swearingen has presented a consensus of forensic experts that definitively establishes his actual innocence. For this reason, and because his petition does not rest on the species of unreliable or inconclusive evidence that has previously led this Court and the lower federal courts to reject other freestanding actual-innocence claims, Swearingen is entitled to federal habeas relief. Indeed, in a case like this one, because

> the evidence palpably shows actual innocence, the legitimacy of the state is unequivocally and transparently at stake. Continued incarceration cannot be charitably construed as reflecting the difficulties of weighing conflicting new and old evidence or as reflecting a systemic concern to place the burden of timely complaint on the defendant. Blinking at the evidence of innocence may have been understandable in *Herrera*, but it should be unthinkable here.

DNA Evidence, 108 HARV. L. REV. at 1582.

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[11] "The law must seek decisions that fall within the boundaries of scientifically sound knowledge. Even this more modest objective is sometimes difficult to achieve in practice. . . [because] most judges lack the scientific training that might facilitate the evaluation of scientific claims or the evaluation of expert witnesses who make such claims." Stephen Breyer, *Introduction*, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, at 4 (Fed. Judicial Ctr., 2nd ed. 2000).

CONCLUSION

For the reasons set forth above, *amicus curiae* The Innocence Network respectfully urges the Court to grant Swearingen's petition for a writ of certiorari.

Respectfully Submitted,

LORI R. MASON
Counsel of Record
CHRISTOPHER B. DURBIN
ORION ARMON
COOLEY LLP
Five Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306
(650) 843-5000
lmason@cooley.com

Counsel for *Amicus Curiae*
THE INNOCENCE NETWORK

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