No. 11-_____

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Melissa Trotter disappeared on December 8, 1998. Larry Ray Swearingen was arrested three days later and has remained incarcerated ever since. Trotter's body was discovered in the Sam Houston National Forest on January 2, 1999. Swearingen was charged with her murder. Dr. Joye Carter, the State's medical examiner, testified that her external observations of decomposition were consistent with a date of death of December 8, while Swearingen was out of jail. Swearingen was convicted and sentenced to death.

Since trial, Swearingen has discovered forensic evidence that proves his innocence. In 2007, Dr. Carter agreed that her internal findings meant Trotter's body was left in the forest *after* Swearingen was incarcerated. In 2009 and 2010, the medical examiners, who reviewed under light microscope tissue that Dr. Carter failed to report, concluded that Trotter died within days – not weeks – of the autopsy. For the scientists, the case is not even close: Swearingen could not be the killer. Yet he has faced execution dates three times, coming within hours of death on two occasions.

The questions presented are as follows:

1. Is a freestanding claim of actual innocence a cognizable basis for federal habeas corpus relief?

2. In deciding whether a successive habeas petition meets the gateway criteria of 28 U.S.C. § 2244(b)(2)(B):

a. should a district court consider the petitioner's efforts to discover new exculpatory evidence, in order

to determine due diligence rather than simply ask whether such evidence existed at an earlier date?

b. should a district court evaluate a petitioner's factual allegations as "if proven," rather than making findings, without conducting an evidentiary hearing, that a finder of fact would make?

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Petitioner Larry Ray Swearingen respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion affirming the dismissal of Swearingen's successive petition (App.-1a) and the District Court's decision (App.-4a) are not reported, but are available at 2011 WL 1332175 (CA5 Apr. 7, 2011), and 2009 WL 4433221 (S.D. Tex. Nov. 18, 2009), respectively. The Fifth Circuit's order authorizing the filing of a successive petition (App.-68a) is reported at 556 F.3d 344. The Fifth Circuit's denial of rehearing en banc (App.-82a) is not reported.

JURISDICTION

The Court of Appeals entered its decision on April 7, 2011. Swearingen's petition for rehearing en banc was denied on May 24, 2011. (App.-82a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in the Appendix. (App.-84-92a.)

STATEMENT

Melissa Trotter disappeared on December 8, 1998. Swearingen was arrested on unrelated charges on December 11, 1998. Trotter's body was discovered in the Sam Houston National Forest on January 2, 1999. Swearingen was then charged with her murder.

The case against him was wholly circumstantial. Because Swearingen was in jail when Trotter's body

was discovered, the State's case turned on one crucial fact: the testimony of Dr. Joye Carter, the Chief Medical Examiner for Harris County, that the body had been "dead for approximately 25 days or so, based upon the appearance." (App.-15a.)

No scientist that has since examined the evidence still thinks this is true – *including Dr. Carter* herself, who in 2007 concluded from the gross anatomy that Trotter's body "had not been exposed more than two weeks in the forest environment" where she was found, *i.e.*, over a week *after* Swearingen was jailed. Dr. Luis Sanchez, Dr. Carter's replacement as Chief Medical Examiner, previously reached a similar conclusion. Dr. Lloyd White, the Deputy Medical Examiner for Tarrant County, Texas, and forensic pathologist Glenn Larkin concluded, based on the gross anatomy of Trotter's body, that she died less than ten days before autopsy. By the end of 2007, a startling scientific consensus had been reached against the guilt of a man sentenced to die.

On January 15, 2009, despite previously denying any tissue samples had been retained from Trotter's body, the Harris County Medical Examiner's Office produced a paraffin block with valuable heart, nerve, lung and fatty tissue. Dr. White analyzed these tissue samples under light microscope and reached a stunning conclusion: the tissues had come from "an individual that has been dead no more than two or three days." (App.-115a.) Indeed, microscopic examination revealed intact cell membranes and abundant nuclei in all tissue types. (App.-102a-111a.) Dr. Stephen Pustilnik, another Chief Medical Examiner from Texas, confirmed that the tissues were

"consistent with a death having taken place within only several days prior to discovery." (App.-122a.)

Based on these new findings, in January 2009, the Fifth Circuit stayed Swearingen's execution and granted leave to file a successive habeas corpus petition – on grounds, however, other than freestanding "actual innocence." (App.-76a, 78-79a.) Writing separately, Judge Jacques Wiener noted the strength of the new exculpatory evidence and stressed that "this might be the very case for" this Court "to recognize actual innocence as a ground for federal habeas relief." (App.-81a.)

1. The State's circumstantial case. Swearingen, an electrician, met Trotter, a 19-year-old college student, on the Montgomery College campus on December 8, 1998, around 1:30 p.m. After that point, the "picture of events becomes very cloudy." *Swearingen v. State*, 101 S.W.3d 89, 105 (Tex. Crim. App. 2003) (Johnson, J., dissenting). Varying reports had Trotter leaving campus with a male at 2 p.m., *id.* at 93, and as late as after 2:30 (Pet., FHD.19, at 5).[1] Two witnesses saw Trotter in the student center with a large blond man. (25 TR. at 32; 32 TR. at 29.) Trotter's biology instructor also saw her leaving with a light haired man. Swearingen's hair was black. (26 TR. at 7-9.)

[1] Citations to "FHD" are to the docket in Swearingen's first federal habeas proceedings, No. 4:04-cv-2058 in the U.S. District Court for the Southern District of Texas. Citations to "SHD" are to the docket in the second habeas proceedings in the same court, No. 4:09-cv-300. Citations to "TR." are to the trial transcript.

According to his landlord, Swearingen returned to his trailer home in Willis, Texas, and left again sometime between 2:30 and 3:00 p.m. *Swearingen*, 101 S.W.3d at 93. Cell phone records indicate Swearingen was traveling south from his trailer home at 3:03 PM, *away* from the National Forest. (27 TR. at 67.) His landlord thought he returned home once more after that. (29 TR. at 135.)

At 4 p.m., Swearingen received a page from his wife, who was at Swearingen's stepfather's house. (Ans., FHD.25, at 6.) His return of the page was recorded on a cell-phone tower near his trailer. (*Id.*) Swearingen arrived at his stepfather's house fifteen to twenty minutes later. (*Id.*)

The State's theory at trial was that Swearingen kidnapped, sexually assaulted and killed Trotter before dumping her body in the forest sometime between their departure from campus and Swearingen's arrival at his stepfather's house. Even under the most favorable view of the facts, this would have been a challenging feat. The National Forest was 25 miles from Swearingen's house, and 40 miles from the college campus. (Pet., FHD.19, at 5-6.) The secluded area where Trotter's body was found was accessible only by single-lane dirt roads. (*Id.*)

The proposed motive (that Trotter angered Swearingen by resisting his advances) was implausible. Evidence of sexual contact was "non-existent," *Swearingen*, 101 S.W.3d at 106 (Johnson, J., dissenting): hair found in Swearingen's bed was not Trotter's, *id.*; no evidence was ever found "of any penetration of Trotter's vagina, anus, or mouth" (Pet., FHD.19, at 60); and a pubic hair discovered during autopsy was not Swearingen's (*id.* at 6 n.4).

Evidence of use of force was likewise scant. Two hairs were found in Swearingen's truck with the roots intact. The State "suggested that they had been forcibly removed" (Ans., FHD.25, at 11), but they were not positively identified as Trotter's (30 TR. at 49-50), and there were no defensive wounds on Trotter's body. *Swearingen*, 101 S.W.3d at 94. Male blood was found in scrapings from Trotter's fingernails – suggesting a struggle with *someone* – but DNA testing *excluded* Swearingen. (Reply, FHD.29, at 1 n.1.)

The State's case rested primarily on (1) a ligature found tied around Trotter's neck; (2) papers of Trotter's found near Swearingen's parents' home; and (3) a letter Swearingen wrote from jail.

The State argued the ligature (half a pair of pantyhose) was significant because it forensically matched to a pantyhose leg "found in Swearingen's trailer" through visual comparison of the tear lines. But the circumstances of this discovery were troubling. The pantyhose were discovered on January 6, 1999 – *after* two prior searches had revealed nothing and after Mrs. Swearingen had vacated the trailer – and in a trash area outside the trailer, where Swearingen's landlord told the police that he had thrown the trailer's remaining contents. *Swearingen*, 101 S.W.3d at 93, 101.

The discovery of Trotter's torn papers near Swearingen's parents' house was also problematic. A neighbor six houses down found the pieces strewn along a ditch when he retrieved his empty trashcan nearly a week *after* Swearingen was jailed. Two trash days had intervened, but on neither occasion

did the neighbor see the paper trail, which allegedly extended for 100 yards. (28 TR. at 134-41.)

The State also relied heavily on a letter Swearingen wrote to his father from jail in May 1999 while awaiting trial. (Pet., FHD.19, at 21.) In it he enclosed a second letter, in Spanish, that he claimed to have received from a woman named "Robin." 101 S.W.3d at 94-95 (providing one translation of the letter). In reality, Swearingen had written the letter. *Id.* at 94. But because he did not know Spanish and used a dictionary to write it, the letter contained "poor grammatical structure and improper use of words," making precise translation "impossible" and leaving it open to "multiple interpretations." *Id.* at 103 (Johnson, J., dissenting).

The letter's apparent purpose was to bolster Swearingen's innocence by identifying another man, "Ronnie," as Trotter's killer. 101 S.W.3d at 94-95. According to the state appellate court, the letter was a "fabrication" that "contained some information contrary to the remainder of the evidence," "other information consistent with undisputed facts," and "some information that could have been truth or fiction." *Id.* at 96. The State argued that the letter's unverifiable assertions (*e.g.*, that Trotter "said she had to go home" when "Ronnie" started "to talk about sex") reflected knowledge that only Swearingen could have about the crime. *Id.* at 97. The State also maintained that the letter contained information that only the killer would know, such as the color of Trotter's panties; yet that information was disclosed to Swearingen and others through Dr. Carter's January 1999 autopsy report, which described the state in which the body was received, its wounds and every

piece of clothing. (Pet., FHD.19, at 21; Pet. Ex. F, SHD.1-6 ("Autopsy"), at 3.) In other respects, the letter was contrary to the State's theory of the case, referring, for instance, to the murder occurring after breakfast. *Swearingen*, 101 S.W.3d at 94.

The State also relied on even more tenuous evidence. It suggested that fibers found on Trotter's sweater, pants and under her nails came from Swearingen's jacket, truck head-liner and trailer-home carpet, *id.*, but the fiber analysis excluded each as the source of the fibers (30 TR. at 83-84). Swearingen's wife found a lighter and a pack of cigarettes matching Trotter's preferred brand in the trailer home, *Swearingen*, 101 S.W.3d at 93, but DNA testing on cigarette butts excluded Trotter (30 TR. at 136). The State also cited conduct allegedly reflecting consciousness of guilt: Swearingen's statement the night of December 8 to a former girlfriend that the police might be after him, *Swearingen*, 101 S.W.3d at 93; and his supposed confession to a jailhouse inmate, *id.* at 102 n.1 (Johnson, J., dissenting).[2]

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[2] Other allegedly incriminating evidence was, if anything, exculpatory. The contents of Trotter's stomach, for example, were described as consistent with Trotter's last known meal of "tater-tots." *Id.* at 93-94. But later scientific reports cited the intact state of the stomach as support for a very short postmortem interval. (App.-114a, 117-18a.) Similarly, the fresh condition of the clothes found on the body, which appear to match those Trotter wore the day she disappeared, was thought by some courts to show it unlikely that Trotter was alive for "21 more days." *Ex parte Swearingen*, 2009 WL 249759, at *7 (Tex. Crim. App. Jan. 27, 2009) (Cochran, J., concurring).

2. The scientific evidence at trial. As the State well understood, none of this evidence mattered unless it could prove one crucial fact: that Trotter was murdered on one of the four days between December 8, when she disappeared, and December 11, when Swearingen was taken into custody, where he has remained ever since. As there was no eyewitness to the murder, the State turned to Dr. Carter.

Dr. Carter, as Chief Medical Examiner, said she performed the autopsy because this was a "high-profile" case that had received "a lot of media attention." The media, in fact, had covered not only Trotter's death, but the Sheriff's Department's theory that Swearingen was a "good suspect." Trotter's autopsy was even more unusual for its audience, which included two officials from the Sheriff's Department and the District Attorney, whom Dr. Carter described as her "guests." (Pet., FHD.19 at 24, 26.)

Although the autopsy report itself contains no estimation of the date of death, Dr. Carter was able to appease her "guests." Sheriff's Department records report Dr. Carter stating, upon removal of the corpse from the body bag, that "she felt the victim had probably been deceased, 24 to 25 days" (*i.e.*, on December 8 or 9, 1998). The estimate was apparently based on "the larvae, maggots" in the oral cavity; the "degree of decomposition"; and the fact that the "body was dressed similar to the missing person report."[3] (Pet. Ex. Z, SHD.1-8, at 29.). But Dr. Carter had yet

[3] But this evidence actually weighs more strongly against of the body's exposure to the elements for over three weeks.

to make an incision; the autopsy began approximately two hours later.

Incredibly, this pinpoint estimate of the postmortem interval was not disputed at trial. Swearingen's forensic pathologist, Dr. Raul Lede, offered the bland retort that the time of death "is probably one of the most challenging question[s] for a pathologist" (App.-16a) and apparently informed Swearingen's appointed trial counsel that he could not dispute Dr. Carter's findings regarding the time of death. (*Id.*).

Unfortunately, Dr. Lede's corroboration, though fundamentally mistaken, effectively masked his own incompetence – and deterred Swearingen and his counsel from challenging the pathology for years. As it would later be made clear to them, no forensic pathologist could have possibly pinpointed a time of death as far out as 24 or 25 days. It is elemental that, at least when relying on appearance alone, as Dr. Carter did, "[p]athology is unable to scientifically estimate the time of death beyond a post-mortem period of about 72 hours" with the precision Dr. Carter claimed. (Pet., FHD.19, at 23.)

A competent expert would have looked further. Even going strictly by the body's "appearance" (the principal basis of Dr. Carter's estimate), the evidence would raise questions for a forensic pathologist. Dr. Carter focused almost exclusively on the head and the neck, which exhibited advanced decomposition. (App.-93a.) But virtually all other aspects of the body's appearance were inconsistent with a lengthy postmortem interval. Most notably, Trotter's body weighed 105 pounds at autopsy, the same weight reported in a newspaper article reporting her disappearance (Pet. Ex. U, SHD.1-6, at 17), and just

four pounds lighter than the weight reported in medical records made shortly before her disappearance (Pet. Ex. V, SHD.1-8, at 19). This should have been shocking: a body exposed for 25 days in the then-prevailing temperature conditions would ordinarily "lose up to 90% of its weight." (Pet. Ex. D, SHD.1-3, at 6.) Dr. Carter later admitted she had not ascertained Trotter's pre-death weight, and the startling fact that the body had "lost less than 4% of its weight" suggested to her that Trotter's "body was left in the woods within two weeks of the date of discovery." (App.-97a.)

Also remarkable was the lack of bloating, which "normally occurs after two or three days" and can expand the body to as much as "twice the size" (Pet. Ex. D, SHD.1-3, at 6), distorting "the placement of clothing and perhaps even causing ruptures [in skin] and rips in clothing." (Pet. Ex. E, SHD.1-4, at 19.) Trotter's body showed no bloating and, at least outside the head and neck area, only very preliminary signs of decomposition. (*Compare, e.g.*, Autopsy at 5 ("The breast tissue was firm and intact.") *with* Pet. Ex. D, D.1-3, at 5 ("The condition of this tissue" is inconsistent with a 25-day postmortem interval.).) Moreover, a police report noted that "decomposition appeared to be minimal" and recorded "no noticeable odor" – unlikely facts for a body left in a damp forest for nearly a month. (Pet. Ex. D, SHD.1-3, at 5.)

Far more critical were Dr. Carter's internal findings, which reported that "[a]ll organs maintained their usual anatomic relationships." (Autopsy at 5.) That finding was significant because upon death, internal organs break down and liquefy. (Pet. Ex. B, D.1-1, at 25.) As Dr. Carter's autopsy revealed, liqui-

fication had barely begun. The "pancreas was intact," allowing "sectioning." (Autopsy at 6.) Yet in most cases a pancreas liquefies very quickly, almost always within days and sometimes within hours, as Dr. Carter herself acknowledged. (App.-96a.) Indeed, the finding of an intact pancreas "is unheard of in cases where bodies have decomposed over a period of 25 days." (Pet. Ex. J, SHD.1-6, at 30.)

The same is true for the other organs Dr. Carter found intact and semi-intact, including the spleen and liver. (Autopsy at 5-7.) The spleen "typically" is found "liquefied and disintegrated" in "individuals who have been dead for several days." (Pet. Ex. C, SHD.1-2, at 2.) The liver likewise "loses integrity and autolyzes relatively rapidly." (Pet. Ex. D, SHD.1-3, at 4.) As Dr. Carter later admitted, the condition of the spleen and liver "support[] a forensic opinion that that Ms. Trotter's body was left in the woods within two weeks of the date of discovery on January 2, 1999." (App.-97a.)

Swearingen's expert failed to realize the significance of these facts. The time of death was, thus, not disputed at trial.[4] Swearingen was convicted and sentenced to death.[5]

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[4] Instead, the defense focused almost exclusively on the aggravating charges of kidnapping and sexual assault, as to which there also was, in the words of the majority of the Texas Court of Criminal Appeals, only "weak and tentative" evidence. 101 S.W.3d at 96.

[5] The Court of Appeals summarized the history of Swearingen's post-conviction proceedings in its order authorizing a successive petition. (App.-68-71a.)

3. Post-conviction proceedings: the entomological evidence. Troubled by the obvious infirmities in Dr. Carter's testimony, Swearingen's post-conviction counsel attempted to determine whether there was any basis to challenge her time-of-death estimate. The best evidence would have been microscopic analysis of tissue samples, but it appeared that no such samples were available. Dr. Carter's records indicated that the only tissue samples she took were preserved in formalin (Autopsy at 9), which renders samples unusable after a year's time – i.e., even before Swearingen's initial state post-conviction proceedings commenced. Indeed, despite inquiries to the Medical Examiner's Office, Swearingen's counsel was assured that Dr. Carter's formalin samples had been discarded. (Pet., SHD.20, at 45-46, 50.)

Swearingen's post-conviction counsel then turned to entomological evidence. Obtaining insect evidence had not been easy. The State falsely denied that the evidence existed, despite having it in hand, and prevailed on these grounds in state post-conviction proceedings. (Pet., FHD.19, at 98.) Ultimately, in 2004, the federal district court ordered the release of insect evidence in connection with Swearingen's first habeas petition. (*Id.* at 3 n.4.)

Dr. Dael Morris, Swearingen's first entomological expert, theorized that the maggots found in Trotter's oral cavity had produced heat through their own metabolic processes, accelerating decomposition in the head by raising the "local temperature," which could help explain the uneven pattern of decomposition on Trotter's body. (*Id.* at 100.)

Based on flawed weather data and improperly collected insect evidence, Dr. Morris's first report

confirmed Dr. Carter's 25-day postmortem interval. It was not until 2006 when Swearingen himself discovered a significant error in the temperature data considered by Dr. Morris, forcing her to redo her analysis. She eventually estimated that the postmortem interval was 15 days, putting Trotter's death on or about December 18, 1998.

But the entomological evidence proved misleading for purposes of determining a postmortem interval. Dr. Morris's report reflected that none of the protocols for collecting and preserving insect specimens had been followed. The State had not killed and preserved the "[l]ive insect specimens," as it should have,[6] but allowed them to continue "to develop" on a Petri dish containing various predators that consumed the insect samples, thus making reliable estimation of a postmortem interval impossible. (Pet. Ex. G, SHD.1-6, at 17.)

4. The undisputed science today. Today, no scientist who has examined the complete evidence believes that Trotter's body could have been deposited in the forest before December 18, 1998. Six scientists' opinions have been offered in support of Swearingen's petition here, including that of Dr. Carter, the only scientist who testified against him at trial; the State has offered zero in response.

a. *Pathological evidence.* Parallel to seeking the ultimately unhelpful entomological evidence, Swearingen's post-conviction counsel explored possible challenges to Dr. Carter's pathological

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[6] *See, e.g.*, Wells & Lamotte, *Estimating the Postmortem Interval*, *in* Forensic Entomology 367, at 372 (Byrd & Castner eds., 2d ed. 2010).

conclusions. By 2004, the Medical Examiner's Office had been publicly criticized for allowing unlicensed practitioners to perform autopsies and ruling several deaths to be homicides despite contrary evidence. (State Successor Pet. at 15.) Dr. Carter's successor, Dr. Sanchez, had reviewed and reversed a number of her cases.[7]

Pursuant to such a review, and in response to Swearingen's counsel's request for microscopic slides, Dr. Sanchez reversed Dr. Carter's conclusion that the evidence suggested sexual assault and noted that Carter's conclusions were based entirely on "gross findings": "[o]nly one microscopic glass slide was prepared for the entire case, which contains a piece of lung and fatty tissue. *No other paraffin blocks* were found in the histology laboratory." (Reply, FHD.29, at 26 (emphasis added).)

Later, while reviewing the entomological evidence, Dr. Arends observed that Dr. Carter's evaluations of the organs in Trotter's body were irreconcilable with her estimated postmortem interval. (Pet., SHD.20, at 44.) He also thought the forest an unlikely place for a body to remain so well preserved for 25 days, since things "left lying about in the woods" in Texas "don't last very long." (Pet. Ex. E, SHD.1-4, at 20.) Swearingen's counsel then consulted two forensic pathologists: Dr. White, and Dr. Glenn Larkin, a forensic expert who has performed over 2000 autopsies and testified in over 100 cases, and whose

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[7] Carter's tenure as Harris County's medical examiner was controversial. (*See*, *e.g.*, http://advanceindiana.blogspot.com/2006/11/more-trouble-ahead-for-coroners-office.html.)

publications include *Time of Death*, a chapter in C.H. Wecht's *Forensic Sciences*, a standard text in the field.

White and Larkin were astonished at what they saw in the autopsy report. (Pet., SHD.20, at 44-45.) Based primarily on the intact status of nearly all of Trotter's internal organs, as substantiated both by Carter's report and photographs of the organs themselves (*e.g.*, Pet. Ex. A.2, SHD.17-13, at 2), both doctors concluded in March 2007 that Dr. Carter's 25-day estimate was unmistakably *wrong*.

As Dr. White put it, "Dr. Carter's testimony … is without support in the medical literature. In fact, it is contrary to what is taught and should be practiced in forensic pathology." (Pet. Ex. I, D.1-6, at 26.) Both he and Dr. Larkin agreed that the condition of Trotter's organs – particularly the intact pancreas, "which is unheard of in cases where bodies have decomposed over a period of 25 days" (Pet. Ex. J, SHD.1-6, at 30 (Larkin)) – proved Dr. Carter's estimate inaccurate. (*Id*.)

In sworn testimony at a hearing on state habeas review in July 2007, Dr. Sanchez agreed that the pathological evidence showed "that the body was not in" the forest "for more than two weeks," *i.e.*, after Swearingen was jailed. (Pet. Ex. B, SHD.1-1, at 23.)

Dr. Larkin completed an additional report in October of 2007, concluding that Trotter's body could not have been left in the forest earlier than December 23, 1998, and likely was left thereafter. (Pet. Ex. SHD, D.1-3, at 2.) He relied primarily on "Dr. Carter's description of specific internal organs," which "establish[ed] with certainty that Trotter's body was not left exposed in the woods until well af-

ter December 11, 1998." (*Id.* at 3.) He also noted other important evidence: Trotter's breast tissue was firm and intact; no odor was detected by crime scene investigators; the body weight was virtually unchanged; there was no bloating or perforation of the stomach; and scavenging was minimal. (*Id.* at 5-7.) According to Dr. Larkin, it was "not reasonably debatable amongst competent forensic scientists" that "Mr. Swearingen was not the person who left Ms. Trotter's body in" the forest. (*Id.* at 7.)[8]

These truly compelling conclusions were confirmed by Dr. Carter herself, who, when approached by post-conviction counsel with evidence she had never seen before, admitted in an October 2007 sworn affidavit that Trotter's body likely was left in the forest not "more than two weeks" before it was found on January 2, 1999 (App.-96a), the same range reported by Drs. Sanchez and White. Like her colleagues, Dr. Carter focused primarily on the organs, noting that the "[p]ancreas, spleen and liver tissues [are] known to autolyze quickly. At room temperature, it is not unusual for these organs to liquefy within days." (*Id.*) Thus, the "presence of these organs in the condition described at autopsy" suggested that her 25-day estimate was incorrect. "Several other findings," such as the intact state of the "breast tissue … and the gallbladder mucosa" (*id.*), supported the same conclusion. Finally, the weight of the body at autopsy "increase[d] the level of confidence" that

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[8] In a supplemental report, Dr. White concluded that "Ms. Trotter's body was left in the woods at least one week after … December 11, 1998, and probably more than two weeks after." (Pet. Ex. C, SHD.1-2, at 1.)

"Trotter's body was left in the woods within two weeks of the date of discovery." (App.-97a.)

b. *Histological evidence.* By late 2007, the medical examiners agreed: Trotter's body had been left in the forest at least a week *after* Swearingen was jailed. Citing this evidence, Swearingen sought state habeas relief on several grounds, among them a freestanding claim of actual innocence and a claim, under *Brady v. Maryland*, 373 U.S. 83 (1963), that the State had withheld evidence that another man had made repeated threats against Trotter's life just weeks before she disappeared. (*See* Pet. Ex. M., SHD.1-6, at 43-45.) The state appellate court dismissed the actual-innocence claim but remanded the *Brady* claim, for which relief was denied. *See Ex parte Swearingen*, 2008 WL 5245348, at *1 (Tex. Crim. App. Dec. 17, 2008) (*per curiam*). An execution date was set for January 23, 2009.

At that point, Swearingen's counsel once more asked the Medical Examiner's Office if there was any testable material in Ms. Trotter's case. (Pet., SHD.20, at 46.) The Office responded that it had retained a paraffin block with a "piece of fat and lung." (*Id.*) The forensic value of that tissue was far from apparent. (*Id.*) But counsel requested the block anyway, based on a consulting pathologist's opinion that other tissue types may have been sampled. (*Id.* at 47.)

This proved correct. The block also included forensically valuable heart and nerve tissue that provided the most convincing scientific evidence yet. (*Id.*) As Dr. White explained, the "[o]verall architecture" of the cells he observed was "intact, including alveolar walls, blood vessels, fat cells and cardiac muscle cells," and "[v]irtually all cells contain nuclei."

Because "[i]ntact nuclei" typically "disappear from cardiac muscle within two or three days after death unless the body is preserved by freezing or refrigeration at temperatures below 40 degrees," Dr. White reasoned, "the tissues are of an individual that has been dead no more than two or three days." (Pet. Ex. A.1, SHD.1-1, at 8-9.)[9]

Dr. Stephen Pustilnik, Chief Medical Examiner for Galveston County, also agreed to review the gross and microscopic evidence. He explained that "the microscopic slides demonstrate multiple tissue types in a remarkably good state of preservation," showing "little, if any, degradation of nuclear or cytoplasmic detail." (App.-120a.) Dr. Pustilnik compared these observations with photographs of the body, noting that "the autopsy photographs as well as scene photographs demonstrate a remarkably well preserved body," and that the prevailing temperatures in December "would have promoted a far more advanced state of decomposition" had the body been exposed since December 8. (App.-122a.) Dr. Pustilnik also noted the well-preserved states of the organs, in particular the spleen. He concluded "that the [histological evidence of] decomposition" is "consistent with a death having taken place within only several days prior to discovery of the deceased." (*Id.*) He only disagreed with Dr. White on the outer range of three days. As Dr. Pustilnik explained, "since the night time temperatures for the last week extended down to the mid 30's it would not be unreasonable to extend this period … by one or two days," which would better reconcile the histological findings with

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[9] Dr. White elaborated his findings in a subsequent report. (*See* App.-92a.)

the state of decomposition observed in Trotter's head and neck. (*Id.*)

4. Successive federal habeas petition. Citing the newly discovered histological evidence, Swearingen sought stays of execution and leave to file successive habeas petitions in state and federal court. The Texas Court of Criminal Appeals denied relief, with four judges dissenting. *Ex parte Swearingen*, 2009 WL 249778, at *1 (Tex. Crim. App. Jan. 27, 2009) (*per curiam*).

But a unanimous panel of the Fifth Circuit stayed the execution and granted Swearingen leave under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") to file a successive petition in federal court. Leave was expressly denied as to a freestanding actual-innocence claim, as the "Fifth Circuit does not recognize" such claims. (App.-76a.) But leave was granted on two claims of constitutional error: (1) that the State sponsored Dr. Carter's false or misleading testimony at trial concerning the estimated date of death; and (2) that Swearingen's trial counsel ineffectively assisted him by failing to conduct a meaningful cross-examination of Dr. Carter and failing to develop the histological evidence showing that Swearingen could not have killed Trotter. (App.-78-79a.)

Concurring, Judge Wiener identified "the elephant" in "the room: actual innocence." (App.-79a.) Judge Wiener thought it a "real possibility" that the District Court would find the "newly discovered medical expert reports" to be "clear and convincing evidence" that Swearingen was innocent, "yet find it impossible to force the actual-innocence camel through the eye of either the *Giglio* or the *Strickland*

needle, and thus have no choice but to deny habeas relief to an actually innocent person." (App.-80-81a.) Thus, in Judge Wiener's view, "this might be the very case for this court en banc – or the U.S. Supreme Court if we should demur – to recognize actual innocence as a ground for federal habeas relief." (App.-81a.)

In assessing whether Swearingen's petition met the gateway requirements of 28 U.S.C. § 2244(b)(2)(B), the District Court indeed declined to allow the petition to move to the merits stage or hold an evidentiary hearing, partly on the grounds predicted by Judge Wiener. First, the court held that Swearingen had failed to exercise due diligence because "the factual predicate for the [constitutional] claims *existed* well before Swearingen's successive petition." (App.-31a (capitalization altered) (emphasis added).) The court concluded that Swearingen's counsel should have been able to obtain an affidavit from Dr. Carter before 2007, since the facts informing the affidavit (temperature data, crime scene videos, and records showing Trotter's pre-death weight) existed prior to trial. (App.-38-39a.) Similarly, the court concluded that Swearingen should have discovered the paraffin block when Dr. Sanchez first wrote to report that "[o]nly one microscopic glass slide was prepared for the entire case, which contains a piece of lung and fatty tissue," although (1) even by 2009, the specific tissue samples described in Dr. Sanchez's letter were not likely to be forensically useful (Pet., SHD.20, at 47), and (2) Dr. Sanchez suggested there were no "other paraffin blocks," such as heart tissue, from the autopsy. (App.-39-43a.)

The District Court alternatively concluded that Swearingen had failed to "establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense," as mandated by § 2244(b)(2)(B)(ii). The court conceded that, "[t]aken at face value, Swearingen's new scientific evidence appears highly exculpatory." (App.-54a.) But it nonetheless found the scientific evidence unreliable.

Specifically, the District Court held, *first*, that the experts' differing estimated dates of death undermined each one's credibility, even though they all agreed "Ms. Trotter's body could not have been in the woods for a 25-day period." (App.-52a.) The court observed that the inconsistencies "apparently flow from" the different evidence considered by each, while ostensibly none had "looked at every piece of the evidentiary puzzle." (App.-54a.)

Second, the District Court criticized the experts for failing to accommodate the State's circumstantial evidence at trial. It presumed that, "[l]ikely, some other piece of the puzzle is missing," and speculated that "the conditions on the forest floor … could have been cooler and wetter than reported elsewhere" (App.-65a), even though Swearingen's experts had already provided uncontradicted statistical evidence that the weather data from the nearby NOAA station accurately reflected temperatures prevailing in the area of the crime scene. (Pet. Ex. G, SHD.1-6, at 18.) On these bases, the District Court dismissed the petition. (App.-66-67a.)

On appeal, Swearingen enlisted the assistance of Dr. Harrell Gill-King, a forensic anthropologist with decades of experience. Dr. Gill-King explained that

estimates of postmortem intervals routinely "yield a reliable range of conclusions"; "[w]here that range is supported by a volume of opinion, it does not become less powerful, let alone unreliable, merely because it operates as a range." Here, the salient fact that Trotter died *after* Swearingen was jailed, supported by seven different scientists, should have been regarded as unassailable. By holding otherwise, the District Court "simply imposed a criterion on science that science itself does not require and cannot countenance." (*See* Amicus Br. of Dr. Harrell Gill-King, *Swearingen v. Thaler*, No. 09-70036 ("Gill-King Br."), at 1-7 (CA5 filed Apr. 26, 2010).)[10]

Dr. Gill-King also addressed the District Court's "remarkabl[e]" holding that the scientists failed to address "non-scientific evidence." As he explained, "[s]cientific evidence – assuming the underlying methodology is sound – is by definition independent of, and not subject to impeachment by, non-scientific evidence." (*Id.* at 14.)

The Fifth Circuit affirmed the District Court's conclusions without analysis and denied rehearing en banc. (App.-2-3a.) This petition follows.[11]

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[10] Dr. Gill-King similarly explained that the histological evidence was more reliable (and thus need not be reconciled with) subjective assessments of decomposition. (Gill-King Br. at 9-11.)

[11] On July 28, the Texas Court of Criminal Appeals allowed a successive state habeas petition claiming actual innocence to proceed on the basis of the histological and other evidence at issue in this case. Those proceedings have not begun and their parameters are undefined. This Court should proceed to review this case because it is the

REASONS FOR GRANTING THE WRIT

This is an "extraordinary" case, unparalleled in reported habeas cases, in which the evidence of the petitioner's innocence is so compelling that his execution would violate the Constitution, even absent proof of any other constitutional violation.

The unrebutted scientific evidence here *proves* innocence. None of the eight scientists who have looked at the evidence in this case, *including* Dr. Carter, thinks Trotter's body could have been left in the forest by December 11, the last date Swearingen was free from custody.

The record, if short of proving a separate constitutional violation, is nonetheless extremely disturbing. Swearingen's trial counsel did not challenge the date of death despite multiple clues that Dr. Carter's estimate was wildly inaccurate and likely influenced by pressure from the Sheriff's Office. On direct appeal, the appellate court barely affirmed Swearingen's capital conviction, noting the evidence of aggravating offenses was "weak and tentative." Since then, besides the incredible scientific consensus that has emerged, Dr. Carter's office was revealed to have wrongly ruled several deaths to be murders; the same office botched the preservation of entomological evidence; the State then denied that any such evidence existed; Swearingen's counsel discovered that the police had been told that another person had repeatedly threatened Trotter's life right before she

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only vehicle for this Court to address the precedent-setting errors of the courts below and to resolve competing approaches in the federal appellate courts concerning the questions presented in this case.

died; and the Medical Examiner's Office failed to realize, even at the very end, that critical histological evidence existed.

In any event, there *was* strong evidence of independent constitutional errors here. The record shows that Swearingen's trial counsel was ineffective because he ignored the issue of Trotter's time of death at trial and failed to seek (let alone investigate) histological evidence demonstrating his client was jailed when the crime was committed. Any competent counsel would have confronted Dr. Carter with such evidence and would have challenged, on cross-examination, her implausible estimate of Trotter's time of death. Swearingen's trial counsel did not even explore this critical line of defense.

In short, this case deserves a closer look. The Court should grant review and reverse.

I. This Is the "Very Case" in Which the Court Should Make Clear that Freestanding Claims of Actual Innocence Are a Basis for Federal Habeas Corpus Relief.

This case squarely presents a fundamental constitutional question that remains unresolved by this Court: whether the execution of a defendant who after trial has demonstrated actual innocence, but has shown no other constitutional error, would violate the Eighth Amendment's proscription against cruel and unusual punishment and the Fourteenth Amendment's due process guarantees, and thus warrant federal habeas relief. As Judge Wiener suggested, this is "the very case" to answer this question because Swearingen has presented overwhelming scientific evidence that he was jailed

when Trotter died. Swearingen should at least be afforded the opportunity to present exculpatory evidence at a hearing.

A. The Question Is Unsettled and the Lower Courts Are Divided.

This Court has repeatedly suggested, without deciding, that the execution of an actually innocent defendant would violate the Constitution.

In *Herrera v. Collins*, the petitioner advanced a freestanding actual-innocence claim in a successive habeas petition. 506 U.S. 390, 396-97, 417-18 (1993). The Court assumed "for the sake of argument" 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." *Id.* at 417. But it did not decide this question in light of the meager evidence of innocence presented there. *Id.* at 396. In dissenting and concurring opinions, however, six Justices expressed support for the idea of a freestanding claim of actual innocence.

Recently, in *In re Davis*, this Court transferred an original habeas petition advancing a stand-alone claim of actual innocence for consideration by a district court. 130 S. Ct. 1, 1 (2009). In a concurrence, Justice Stevens, joined by Justices Ginsburg and Breyer, concluded that this Court's decisions "clearly support the proposition that it 'would be an atrocious violation of our Constitution and the principles upon which it is based' to execute an innocent person," *id.* at 1-2, and further suggested that AEDPA is "arguably unconstitutional to the extent it bars relief for a

death row inmate who has established actual innocence," *id.* at 1.

Lacking further direction from this Court, the federal courts of appeals have adopted discordant approaches to freestanding actual-innocence claims. The First, Fourth, Eighth, Ninth and Eleventh Circuits have assumed, without deciding, that under the right circumstances, a freestanding claim of actual innocence may warrant habeas relief. *See, e.g.*, *David v. Hall*, 318 F.3d 343, 347-48 (CA1 2003); *Hooks v. Branker*, 348 F. App'x 854, 860 (CA4 2009); *Cox v. Burger*, 398 F.3d 1025, 1031 (CA8 2005); *Osborne v. Dist. Attorney's Office*, 521 F.3d 1118, 1131 (CA9 2008), *rev'd on other grounds*, 129 S. Ct. 2308 (2009); *In re Lambrix*, 624 F.3d 1355, 1367 (CA11 2010). In contrast, the Seventh and Tenth Circuits have held that at least in non-capital cases, standalone actual innocence claims are not cognizable. *See Milone v. Camp*, 22 F.3d 693, 700 (CA7 1994); *Pettit v. Addison*, 150 F. App'x 923, 926 (CA10 2005). The Fifth Circuit has repeatedly held that claims of actual innocence are impermissible even in capital cases. *Cantu v. Thaler*, 632 F.3d 157, 167 (CA5 2011).

The Court should therefore grant the writ and clarify that freestanding actual innocence claims are a proper basis for federal habeas review.

B. Execution of an Innocent Person Violates the Constitution.

The execution of a person who has proven his innocence violates the Constitution and federal habeas review is a proper vehicle by which to vindicate that violation. This Court has very nearly held as much: six Justices agreed in *Herrera* that executing an ac-

tually innocent person would violate the Constitution; and the Court's transfer of the original habeas petition in *Davis* presupposes the cognizability of such a claim.

The right of a person not to be executed once he has proven his innocence has strong constitutional underpinnings. The Eighth Amendment protects against "cruel and unusual punishments," a bulwark founded in the basic "dignity of man." *Trop v. Dulles*, 356 U.S. 86, 99-100 (1958). It is common ground that "the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." *Ford v. Wainright*, 477 U.S. 399, 405 (1986). And the founding generation would not have tolerated execution, or even detention, of an actually innocent person. *See, e.g.*, *Calder v. Bull*, 3 Dall. 386, 388-89 (1798) (Chase, J.) ("The legislature … cannot change innocence into guilt; or punish innocence as a crime," and a contrary argument would be "political heresy, altogether inadmissible in our free republican governments."); 4 Blackstone, *Commentaries* *27 ("It is better that 10 guilty persons escape than one innocent suffer.").

Allowing the execution of innocent persons under the Eighth Amendment would be a striking anomaly from this Court's modern jurisprudence. The Court has held that the Eighth Amendment will not tolerate execution of other classes of individuals, including "the insane, the mentally retarded, and the very young." (App.-80a (Wiener, J.) (collecting cases).) If the classes of individuals identified in these cases cannot be executed because they are deemed insuffi-

ciently culpable, it would pervert logic to reach a contrary conclusion as to an *actually* innocent person.

Execution of an innocent person would also contravene the Fourteenth Amendment's Due Process Clause. "'[S]ubstantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.'" *United States v. Salerno*, 481 U.S. 739, 746 (1987). There can be no official action more "shocking," nor any greater insult to "ordered liberty," than the execution of an innocent person. "The quintessential miscarriage of justice is the execution of a person who is entirely innocent." *Schlup v. Delo*, 513 U.S. 298, 324-25 (1995). Thus, even absent evidence of other constitutional violations, "courts properly ought to take the fact that an innocent person may have been convicted" as "one, among other, indicators that an unconstitutional breakdown in the process has occurred." 1 Hertz & Liebman, *Federal Habeas Corpus Practice & Procedure* § 2.5, at 97 (6th ed. 2011).

Accordingly, this Court should grant the writ to decide that a freestanding claim of actual innocence *is* a distinct basis for federal habeas review.

C. The Evidence Here Overwhelmingly Proves Actual Innocence.

As Judge Wiener suggested, this is the "very case" in which the Court should clear the record on actual-innocence claims.

This Court has previously held that claims of actual innocence are particularly strong when they challenge scientific claims by the prosecution that are fundamental to its theory of the case. *See*, *e.g.*, *House*

v. Bell, 547 U.S. 518, 553-54 (2006); *Schlup*, 513 U.S. at 324 ("credible" actual-innocence claims are likely to rest on "exculpatory scientific evidence" or "critical physical evidence," among other things). In *House*, for example, the Court granted the petition of a man whose murder conviction was obtained with the help of scientific evidence purportedly identifying his semen on the victim's underwear. 547 U.S. at 528-29. After the first round of post-conviction proceedings, however, "DNA testing … established that the semen … came from her husband," not petitioner. *Id.* at 540. The Court held that this evidence, along with evidence implicating the victim's husband, justified habeas review, because "the central forensic proof … has been called into question." *Id.* at 554. Accordingly, House's was one of the "rare case[s]" warranting habeas review under *Schlup*, which set forth the governing standard for actual-innocence claims coupled with claims of constitutional error. *Id.*

This is an even "rare[r] case," as it not only "call[s] into question," but conclusively refutes, the "central forensic proof connecting [the defendant] to the crime." *Id.* Indeed, it is rarer still in that, unlike *House*, no witness remains who is willing to defend the State's scientific theory of the case. This makes it truly "exceptional" in that the "State's key witness[] ha[s] recanted," *Davis*, 130 S. Ct. at 1, or, at least, substantially revised her prior testimony in a manner that precludes Swearingen's guilt.

The lower courts' views of the evidence were largely premised on the erroneous belief that *none* of Swearingen's experts is credible simply because they did not offer identical estimates of the postmortem interval in this case. But there is no need for such an

agreement, as Dr. Gill-King has explained. What matters is that *each of the seven* scientific reports excludes the possibility that Trotter was left in the forest earlier than December 18, 1998.

The district court was also wrong to dwell on the nonscientific, circumstantial evidence of Swearingen's guilt. Whatever probative value such evidence might have in a case bereft of scientific proof, such value fades to zero in a case in which scientific evidence unanimously proves that Trotter's body was left in the forest on a date when Swearingen was in jail. No reasonable jury would have convicted Swearingen of murder in the face of such evidence.

The District Court may have been right that "some other piece of the puzzle is still missing." (App.-65a.) That missing piece is the identity of Trotter's actual murderer. But this fact only dramatizes the importance of review. Substantial evidence that Swearingen *did not* murder Trotter is, at the same time, substantial evidence that *someone else did* – and that a murderer remains at large. Indeed, the police were presented with evidence that others could have committed this crime: one man, not matching Swearingen's description, who had been seen with Trotter on campus on December 8 (Pet., SHD.20, at 30); and another who had threatened her life in the weeks prior to her disappearance.

For all these reasons, the Court should grant review and vacate Swearingen's conviction in light of the clear and undisputed scientific evidence of his innocence. At a minimum, it should reverse for a full hearing on Swearingen's actual-innocence claim.

II. The Court Should Also Grant Review To Clarify the Necessary Showing of a Constitutional Violation at the Gateway Stage of a Successive Habeas Petition.

The Court should also grant review to clarify the showing a successive petition should make to pass the gateway under 28 U.S.C. § 2244(b)(2)(B). Under that provision, successive federal habeas petitions raising a claim not presented in a prior application are authorized where (among other circumstances), (i) "the factual predicate for the claim could not have been discovered previously through 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."

In examining the newly discovered histological evidence below, the District Court applied (and the Fifth Circuit endorsed) a level of scrutiny far exceeding that applied by other courts as to both prongs of the analysis. Because of these departures from other appellate courts, and particularly because erroneous analysis may condemn an innocent man to die, this Court should grant review and reverse.[12]

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[12] Review is also appropriate here because, as the Justices of this Court have repeatedly stated, error correction "may be warranted" "in death cases." *Calderon v. Thompson*, 523 U.S. 538, 569 (1998) (Souter, J., dissenting) (citing *Kyles v. Whitley*, 514 U.S. 419 (1995)).

A. The Lower Courts Applied Far Too Exacting a Standard of Due Diligence.

First, the Court should grant review to clarify the due-diligence requirement of § 2244(b)(2)(B)(i). The District Court applied a very high standard, asking whether the evidence "existed" prior to Swearingen's first federal habeas petition, App.-31a, not whether Swearingen could reasonably have learned that it existed or that it could help prove his innocence. (App.-31-32a (declaring it irrelevant "whether the inmate himself was diligent in seeking the new factual predicate").)

Accordingly, the District Court faulted Swearingen for failing to discover the histological evidence in this case at an earlier date – despite the fact that he had repeatedly been told that no such evidence existed. The District Court relied primarily on Dr. Sanchez's 2004 letter, which ambiguously referred to a slide of lung and fatty tissue, while at the same time stating that "[n]o other paraffin blocks were found in the histology laboratory." (App.-41a.) The District Court concluded that due diligence required Swearingen to seek court orders requiring production of the evidence. (App.-40a.)

This approach was erroneous and conflicts with that of other courts. In construing the similar diligence requirement under 28 U.S.C. § 2255, for example, the Eleventh Circuit explained that an inmate's efforts *are* relevant to the inquiry because "if a court finds that a petitioner exercised due diligence, then … the dates of actual and possible discovery would be identical." *Aron v. United States*, 291 F.3d 708, 711-12 (CA11 2002) ("[T]he due diligence inquiry is an individualized one …."). Moreover, the court

held, due diligence "does not require a prisoner to undertake repeated exercises in futility or to exhaust every imaginable option, but rather to make reasonable efforts." *Id.* at 712. Thus, in *Aron*, despite the fact that the petitioner's counsel's performance obviously "existed" before the petitioner became aware of it, he was not charged with knowledge of it until he discovered it in an appellate opinion affirming his conviction. *Id.*; *accord, e.g.*, *Souliotes v. Evans*, 622 F.3d 1173, 1178 (CA9 2010) (rejecting "maximum diligence" approach); *cf., e.g.*, *Fairchild v. Lockhart*, 979 F.2d 636, 640 (CA8 1992) (petitioner entitled to rely on prosecution's claims of full disclosure).

Under the proper standard, Swearingen clearly exercised proper diligence. Even if the District Court were correct that Dr. Sanchez's letter should have put Swearingen on notice that lung and fatty tissue had been preserved – a dubious proposition – it is undisputed that, even as of 2009, Swearingen had no reason to believe lung and fatty tissue could help him. The most probative evidence found in the paraffin block was the heart and nerve tissue that was *never* known to Swearingen. The District Court's conclusion that Swearingen was required to seek court orders for production of evidence no one knew existed improperly called for more than "due" diligence.[13]

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[13] The due-diligence requirement, even if properly applied below, should not apply to Swearingen's stand-alone actual-innocence claim. To do so would work a manifest injustice that, as Justice Stevens stated in his *Davis* concurrence, would render the requirement "arguably unconstitutional." 130 S. Ct. at 1.

B. The Lower Courts Held Swearingen's Evidence of Constitutional Error to Too High a Standard at the Gateway Stage.

Second, the Court should grant review to clarify the standard applicable to a district court's review of the factual allegations underlying a claim of constitutional error in a successive petition. Despite the clear language of § 2244(b)(2)(B)(ii) that such allegations are to be taken as "proven," the courts below did no such thing, instead concluding the contrary – in essence, that the factual allegations had *not* been proven.[14]

This approach rendered the statutory "if proven" language nugatory, in violation of cardinal principles of statutory interpretation long recognized by this Court. *Corley v. United States*, 129 S. Ct. 1558, 1560 (2009) (no statutory term should be rendered "'inoperative or superfluous, void or insignificant'") (citations omitted). Not surprisingly, the approach is also contrary to that of at least five other federal courts of appeals, which have all held or suggested that district courts should assume the truth of the allegations made in a petition and then examine whether a jury confronted with this new evidence and these new factual allegations would have still convicted the petitioner. *See Keith v. Bobby*, 551 F.3d 555, 557 (CA6 2009) (court must accept description of new evidence at "face value"); *McLeod v. Peguese*, 337

[14] As a result, the District Court did not reach the merits of Swearingen's constitutional claims, and the Court of Appeals erred to the extent it suggested otherwise. (*See* App.-2a (intimating District Court had rejected Swearingen's ineffective-assistance claims).)

F. App'x 316, 327 (CA4 2009) (treating new evidence "and *that to which it leads*" "as proven fact") (emphasis added); *LaFevers v. Gibson*, 238 F.3d 1263, 1266 (CA10 2001) (similar); *Thompson v. Calderon*, 151 F.3d 918, 925 (CA9 1998) (similar); *In re Buenoano*, 137 F.3d 1445, 1446 (CA11 1998) (similar).

Had the District Court followed the prevailing approach and considered the evidence proffered by Swearingen at "face value," *Keith*, 551 F.3d at 557, it would have found it to be a "clear and convincing" showing that no jury could have convicted Swearingen of murdering Trotter. This is not a matter of speculation; indeed, the District Court expressly acknowledged that, "[t]aken at face value, Swearingen's new scientific evidence appears highly exculpatory." (App.-54a.) That admission should have been the end of the matter.

But the District Court went much further, rejecting the unanimous view of Swearingen's experts "that histological and other evidence proves that Ms. Trotter could only have been dead a few days when her body was discovered on January 2, 1999" (App.-45a.) Instead, the District Court assumed "a long period of exposure" (App.-57a) that the forensic pathologists uniformly reject and concluded that the expert reports were "hardly credible" (App.-62a), because they did not "conform to all the evidence." (App.-58a.)

These conclusions were contrary to clear statutory language. Of course, new evidence must be "viewed in light of the evidence as a whole," but here the evidence as a whole proves that Swearingen is innocent. The District Court's only bases for holding otherwise – the supposed inconsistencies in the experts' esti-

mates of postmortem interval and the circumstantial evidence of guilt – are not valid, as previously explained. It is the experts' *agreement* that all plausible postmortem intervals place Trotter's body in the forest December 18 or later that is scientifically important. And because of the strength of that scientific conclusion, the evidence clearly and convincingly trumps the "cloudy" circumstantial evidence of guilt.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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United States Court of Appeals,
Fifth Circuit.
Larry Ray SWEARINGEN, Petitioner–Appellant
v.
Rick THALER, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent–Appellee.

No. 09–70036.
April 7, 2011.

Before JONES, Chief Judge, and JOLLY and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:[1]

Appellant Larry Ray Swearingen was scheduled for execution on January 27, 2009. He sought permission to file a successive petition for writ of habeas corpus, which this court granted in part the day before his execution. *In re Swearingen,* 556 F.3d 344 (5th Cir. 2009). On remand, however, the district court concluded that Swearingen failed to satisfy the requirements of 28 U.S.C. § 2244(b)(2)(B)(i) and (ii). *Swearingen v. Thaler,* No. H–09–300, 2009 WL 4433221 (S.D.Tex. Nov. 18, 2009). He appeals that decision.

A successive habeas petition is appropriate where:

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[1] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

> (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). Swearingen contends that he learned for the first time in 2008 of tissue samples that exonerate him of the murder of Melissa Trotter. He further contends that he could not have discovered the existence of the samples prior to 2008 and that his attorneys provided constitutionally ineffective assistance by failing to uncover and employ this evidence. As the district court explained, however, these arguments are unavailing. The evidence existed at the time of trial, 2009 WL 4433221 at *16-17, and even if it were not discoverable through due diligence, it does not constitute "clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [Swearingen] guilty of the underlying offense." *See Johnson v. Dretke,* 442 F.3d 901, 911(5th Cir. 2006) (explaining the high threshold for § 2244(b)(2)(B)(ii) innocence showing). Likewise, we affirm the district court's conclusion that Swearingen has not demonstrated ineffective assistance of counsel. Swearingen's trial counsel developed a reasonable strategy, including expert

testimony regarding the time of Trotter's death. *See Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

We AFFIRM the dismissal of Swearingen's successive habeas corpus petition.

AFFIRMED.

United States District Court,
S.D. Texas,
Houston Division.
Larry Ray SWEARINGEN, Petitioner,
v.
Rick THALER, Respondent.

Civil Action No. H-09-300.
Nov. 18, 2009.

MEMORANDUM AND ORDER

MELINDA HARMON, District Judge.

On December 8, 1998, Melissa Trotter disappeared after last being seen with Larry Ray Swearingen. The police arrested Swearingen on December 11, 1998, for charges unrelated to her disappearance. Swearingen has been in custody ever since. On January 2, 1999, hunters discovered Ms. Trotter's decomposing body in the Sam Houston National Forest. The State of Texas charged Swearingen with the capital murder of Ms. Trotter committed during the course of either a kidnapping or a sexual assault. A jury convicted Swearingen in 2000 and he received a death sentence.

Swearingen has aggressively challenged his conviction and sentence, including in one full round of federal habeas proceedings. Since his first state habeas action, Swearingen has advanced a variety of unsuccessful attempts to prove that he is actually innocent of Ms. Trotter's murder. State and federal courts have provided exceptional opportunities for Swearingen to develop his actual-innocence arguments. On January 26, 2009, the day before his scheduled execution, the Court of Appeals for the

Fifth Circuit tentatively authorized Swearingen to file a successive federal habeas petition. *In re Swearingen*, 556 F.3d 344 (5th Cir.2009). Swearingen now hopes to litigate claims based on his argument that Ms. Trotter did not die until well after the police took him into custody on December 11, 1998.

Congress has limited this Court's jurisdiction at this stage of the proceedings solely to the question of whether the Anti-Terrorism and Effective Death Penalty Act allows Swearingen to litigate another federal habeas action. As indicated below, the Court finds that Swearingen has not met the AEDPA's requirements for filing a successive petition. Accordingly, the Court dismisses Swearingen's habeas petition.

I. Background

Courts have previously set forth the facts surrounding Ms. Trotter's murder, but they bear repeating here because they provide important context to the issues now before this Court. As previously noted, Melissa Trotter disappeared from the Montgomery County Community College campus on December 8, 1998. No one saw her again until her body was discovered in a densely forested area on January 2, 1999.

The condition of Ms. Trotter's corpse when found has been a vital matter. On January 3, 1999, Dr. Joye M. Carter, Chief Medical Examiner for Harris County, Texas, performed an autopsy on Ms. Trotter's body. Dr. Carter described the corpse as "that of a young Caucasian female whose facial appearance

was distorted due to decomposition change characterized by skin slipping, greenish-black discoloration of the facial skin, and marbling of the skin of the legs, arms, chest and back." Dr. Carter described the body as "cool and damp." The autopsy report pointed to several signs of decomposition on the corpse. For instance, "[t]he skin of the body diffusely showed splotchy areas of red, green, and gray discoloration secondary to post-mortem mold growth. There was generalized skin slippage with discoloration and marbling over the entire body surface." Dr. Carter noted that several parts of Ms. Trotter's body-such as her chest, upper extremities, lower extremities, anal and vaginal orifices-were "remarkable only for decompostional change." Dr. Carter's report emphasized the marked decomposition of Ms. Trotter's head:

> The scalp hair was slipping due to decompositional change.... The facial skin appeared to have been removed due to decompositional change and post-mortem insect and animal activity. Upon reflecting the residual soft tissue around the right eye, rodent teeth impressions were identified. The nasal cartilage was intact. Soft tissue was absent from the nose and midfacial areas.... The tongue was protruding and dark black in color due to decompositional change. The oral cavity contained fly larvae.... Both ears were markedly discolored due to decompositional change.... The neck was remarkable for a brown stocking ligature which was tied in the back in a simple knot. There was a 3 by 2-3/4 inch defect on the anterior neck with liquefaction of tissue, maggot activity, and blood present.

In addition to her external observations, Dr. Carter performed an extensive internal examination. To summarize, some of Ms. Trotter's internal organs "maintained their usual anatomic relationships" and were "intact," though some organs were "remarkable for decompositional change" or had "mild decompositional change." For instance, Dr. Carter observed "loss of the normal tissue architecture" in the pancreas, "[t]he left and right adrenal glands were markedly autolyzed," and the kidneys had "architectural change [that was] obscured due to decompositional change." The brain was "semi-liquid" and had a "complete loss of normal tissue architecture when remove[d]." Dr. Carter observed that the contents of Ms. Trotter's stomach included a "tan liquid in which large pieces of white meat, consistent with chicken, and pieces of potato, consistent with french fries were observed." The record contains numerous photographs from the crime scene and autopsy which reflect Dr. Carter's observations.

Dr. Carter's report stated that she preserved tissue samples for both toxicological and histological examination.[1] Specifically, "[r]epresentative sections of all major organs were retained in formalin." Dr. Carter never performed a microscopic examination of any tissue.

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[1] The subsequent toxology report states that "[u]nless otherwise requested, specimens will be discarded one year after the date of receipt." The record does not include a histological report or any statement about the potential destruction of tissue samples preserved for microscopic examination.

Dr. Carter's report listed the cause of death as "asphyxia due to ligature strangulation." Her report, however, did not estimate on what date Ms. Trotter died.

Trial Testimony and Evidence

The State of Texas charged Swearingen with capital murder committed in the course of a kidnapping or sexual assault. Because no eyewitness to her murder came forward and Swearingen provided no confession to the crime, the State of Texas built its case on circumstantial evidence proving Swearingen's culpability. One reviewing court has listed the extensive evidence of guilt which the State adduced at trial as follows:

• On the evening of December 7, 1998, two of [Swearingen's] acquaintances, the Fosters, witnessed a phone conversation in which [Swearingen] arranged for a lunch meeting with a girl at a library the following day, and [Swearingen] then told the Fosters that the girl was Melissa Trotter, a college student from Willis;

• Three witnesses saw [Swearingen] sitting with Melissa in the Montgomery College library between 11:30 a.m. and 1:30 p.m. on December 8, 1998;

• Melissa's Biology teacher saw Melissa leave the Montgomery College library with a male shortly after 1:30 p.m.;

• Melissa's car remained in the Montgomery College parking lot following her disappearance on December 8, 1998;

• At 2:05 p.m. on December 8, 1998, [Swearingen] called Sarah Searle and said that he was at lunch with a friend;

• Sometime around 3:00 p.m. on December 8, 1998, [Swearingen's] landlord saw [Swearingen's] truck leaving from behind his home;

• At 3:03 p.m. on December 8, 1998, [Swearingen] placed a cell phone call that utilized a cell tower near FM 1097 in Willis, Texas, which would be consistent with [Swearingen] driving from his home to the Sam Houston National Forest;

• [Swearingen's] wife testified that she found their home in disarray on the evening of December 8, 1998, but none of the Swearingen's property was missing;

• [Swearingen's] wife observed Melissa's cigarettes and lighter in [Swearingen's] home that evening, and those items were subsequently recovered from [Swearingen's] home during the investigation;

• [Swearingen] contacted police that evening and reported an alleged burglary of his home, at which time he falsely claimed to have been out of town from 11:00 a.m. on December 7, 1998, through 7:30 p.m. on December 8, 1998, and also falsely claimed that someone had stolen his VCR and jet ski;

• There was no sign of any prying mechanism having been used on the door to [Swearingen's] home, and his jet ski was subsequently found at a repair shop where [Swearingen] had dropped it off for maintenance prior to Melissa's disappearance;

• [Swearingen] called an ex-girlfriend on the evening of December 8, 1998, and told her that he was in trouble and that the police might be after him;

• When the Fosters heard that Melissa Trotter was missing on December 9, 1998, they contacted [Swearingen], who claimed he did not remember the last name of the girl with whom he had met the day before;

• When Mrs. Foster then told [Swearingen] that she recalled him saying the last name "Trotter," and that a girl named Melissa Trotter was now missing, the phone went dead;

• On December 11, 1998, [Swearingen] told an acquaintance that he anticipated being arrested by Montgomery County authorities;

• Later in the day on December 11, 1998, after [Swearingen] observed an officer radio in his truck's license plate number, [Swearingen] sped away and led the officer on a high speed chase that ended in front of the home of [Swearingen's] mother and stepfather;

• [Swearingen] was arrested on several outstanding warrants following the high-speed chase, at which time he asked that his hands be placed in front of

him rather than behind because his arm and ribs were sore;

• Following [Swearingen's] arrest, law enforcement authorities observed and photographed red marks on [Swearingen's] neck, cheek, and back;

• On December 17, 1998, two neighbors of [Swearingen's] mother and stepfather collected numerous pieces of torn paper from along their street, which turned out to be Melissa Trotter's class schedule and some health insurance paper work Melissa's father had given to her;

• Melissa's body was discovered in an area of the Sam Houston National Forest with which [Swearingen] would have been familiar from previous time spent there;

• The ligature used to asphyxiate Melissa was a single leg torn from a pair of panty hose belonging to [Swearingen's] wife, the remainder of which was recovered from [Swearingen's] home during the investigation;

• The Harris County Chief Medical Examiner testified that during the digestive process, a person's stomach will usually not empty in less than two hours, and any food within the stomach at death will remain there;

• The contents of Melissa's stomach at the autopsy, which included what appeared to be chicken and a french fry-like form of potato, were consistent with the tater tots she had eaten at Montgomery College

shortly before leaving with [Swearingen] and the Chicken McNuggets she and [Swearingen] had apparently purchased at the nearby McDonald's on December 8, 1998;

• Based on the state of decomposition of Melissa Trotter's body, including the presence of fungi that take "several weeks' time" to develop, the Harris County Chief Medical Examiner estimated Melissa Trotter's death to have occurred twenty-five days prior to the discovery of her corpse, which is consistent with December 8, 1998;

• A note that had been given to Melissa by another student on the morning of December 8, 1998, was found in a pocket of Melissa's jeans during the autopsy;

• There were numerous cross-matches of fibers, hairs, and paint between Melissa's body and clothing and [Swearingen's] jacket, master bedroom, and truck;

• Two of Melissa's hairs that were recovered from [Swearingen's] truck still contained the anagen root, indicating they had been forcibly removed from Melissa's head;

• A Luminal test on the seats of [Swearingen's] truck indicated that they had been wiped down with Armor All, and two empty containers of Armor All wipes were found in the garbage at [Swearingen's] home;

• When [Swearingen's] good friend, Elyese Ripley, visited him in jail on January 9, 1999, [Swearingen] asked her to lie and say that she had been with him

on the day Melissa disappeared and that they had gone to the Texaco-McDonald's near Montgomery College;

• Around early May of 1999, [Swearingen] fabricated a purportedly anonymous exculpatory letter that described the murder with explicit details that were confirmed by investigators, the medical examiner, and [Swearingen's] own medical expert, including the facts that Melissa was injured on the left side of her face, her neck was cut, one of her shoes had fallen off, she was laid among the bushes on her back, and she was wearing red underwear;

• Later in May of 1999, [Swearingen] was asked by a cell mate whether he had committed the murder and [Swearingen] replied, "Fuck, yeah, I did it," and stated that he was just trying to avoid the death penalty.

Ex parte Swearingen, No. WR-53,613-04, Supplemental Record at 510-15.[2]

The State called Dr. Carter as a witness in the guilt/innocence phase. The State's examination of Dr. Carter did not comprehensively discuss the date on which Ms. Trotter was murdered. Instead, the State's

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[2] The Court of Criminal Appeals found that the record supported these findings and adopted them without alteration. See Ex parte Swearingen, 2008 WL 152720 (Tex.Crim.App.2008). The state courts relied on this same list of inculpatory factors in denying Swearingen's third state habeas application. *Ex parte Swearingen*, WR-53,613-05, at 169-73.

questioning focused on: (1) whether Swearingen had raped her and (2) whether he killed her by strangling her with pantyhose or by stabbing her in the neck. The date of Ms. Trotter's death was only a tangential and somewhat inferential issue at trial.

Dr. Carter, nonetheless, conveyed her external observations of the body. Dr. Carter testified that "[t]he body was received in a state of moderate, decomposition, that means the body tissue had begun to break down, change color and become very soft and liquidy." Tr. Vol. 28 at 18-19. She explained that "there is a lot of damage and decmpositional change [to the front of the body], darkening to facial skin." Tr. Vol. 28 at 30-31. She explained that photographs showed "some skin discoloration in the stomach area ... [which] is part of the body breaking down ... and there appears to be some fungal organisms gathering between the layers of skin tissue[.]" Tr. Vol. 28 at 22-23. She explained that fungal growth would grow in "dank and wet" conditions after "several weeks' time have elapsed." Tr. Vol. 28 at 27-28. Dr. Carter testified that the fungal growth "assists us in engaging a time of death." Tr. Vol. 28 at 28. The stomach contents, according to Dr. Carter's testimony, provided another factor that could help tell when Ms. Trotter died. Tr. Vol. 28 at 38-39. Dr. Carter commented that "cool temperature somewhat slows down decomposition. Warm temperature will accelerate, speed it up, usually." Tr. Vol. 28 at 50.

The State's questioning about internal organs, however, was brief. The State inquired whether Dr. Carter saw anything "remarkable or unremarkable"

about "the abdominal region," "the heart area," "the lungs," and the "pancreas and spleen." Tr. Vol. 28 at 42-43. Dr. Carter answered that she observed nothing remarkable, "just decompositional change." Tr. Vol. 28 at 42-43.

In the only interchange relating directly to the date that Ms. Trotter died, the State asked Dr. Carter: "Based on the evidence that you saw and the evidence you've since gathered, do you have an opinion as to how long that body had been there?" Tr. Vol. 28 at 45. Dr. Carter replied that she "arrived at the opinion of the body being dead for approximately 25 days or so, based upon the appearance." Tr. Vol. 28 at 45.

Cross-examination of Dr. Carter focused on the manner of death, whether she had facial bruising, and the possibility that she had been sexually assaulted. The questioning briefly turned to how long the stomach contents would take to digest, Tr. Vol. 28 at 91-94, but otherwise did not address the evidence that would establish a date of death.

After investigating those facts establishing Swearingen's identity as the murderer, his trial attorneys focused their efforts on attacking the dual aggravators in the indictment that made his a capital offense. Trial counsel argued that, even if Swearingen killed Ms. Trotter, the evidence did not conclusively prove that he kidnapped or sexually assaulted her. To that end, trial counsel retained the services of Dr. Raul Lede, a pathologist, largely to counter testimony that Swearingen strangled or

raped Ms. Trotter. In a post-judgment affidavit, trial counsel explained that "Dr. Lede ... confirmed the findings of Dr. Carter regarding the date and time of death." Thus, Dr. Lede's testimony did not dwell on the time of death, other than to comment that it "is probably one of the most challenging question[s] for a pathologist" and that "the answer is one of the least dependable answers that a pathologist can provide[.]" Tr. Vol. 32 at 72. Trial counsel briefly asked Dr. Lede about the length of time it took to digest a meal. Tr. Vol. 32 at 72-73. On cross-examination, however, Dr. Lede opined that, if Ms. Trotter's body had been exposed to the elements for 25 days, the ligature around her neck "would have gotten tighter." Tr. Vol. 32 at 112.

Swearingen took the stand at trial and proclaimed his innocence. He testified that, after he had lunch with Ms. Trotter on December 8, he left her in the company of another man and then visited his grandmother. The trial evidence and testimony soundly proved that Swearingen fabricated his alibi.[3] The jury found Swearingen guilty of capital murder.

In a separate punishment phase, the prosecution presented evidence of numerous extraneous offenses committed by Swearingen, including aggravated kidnappings, aggravated sexual assaults, false imprisonment, burglary, false identification as a police officer, and theft. Many of the kidnapping and

[3] While Swearingen now claims to be actually innocent, he does not explicitly rely on the alibi he proffered at trial nor provide new evidence to support that story.

sexual assault offenses bore striking similarity to the killing of Ms. Trotter. While incarcerated before trial, Swearingen was a penological problem as he attempted to escape, possessed a weapon, and fought in jail. The jury answered Texas' special issues in a manner requiring the imposition of a death sentence. The Texas Court of Criminal Appeals affirmed Swearingen's conviction and sentence on direct appeal, specifically finding that the evidence sufficiently supported the jury's verdict. *Swearingen v. State*, 101 S.W.3d 89 (Tex.Crim.App.2003).

Post-Conviction Litigation

Since the finality of his conviction, Swearingen has filed a convoluted tangle of habeas applications, pro se motions, mandamus actions, and amended pleadings. Throughout, Swearingen has tried to cast doubt on various aspects of the trial evidence against him. Swearingen's challenges have taken evolving and overlapping paths, though no court to this point has seriously questioned the integrity of his conviction.

Swearingen maintained his innocence at trial. The most prominent feature of Swearingen's post-judgment litigation has been his reliance on science to limit the amount of time that Ms. Trotter's corpse could have been on the forest floor. At each level of post-judgment review, Swearingen has renovated and modified different habeas claims which, at their core, assert his innocence on the grounds that Ms. Trotter was killed after the police arrested him on December 11, 1998.

In his first state habeas action, Swearingen relied on expert affidavits which suggested that the progression of insect development associated with Ms. Trotter's corpse could only have started in mid-December. Swearingen initially faulted trial counsel for not "using forensic evidence, particularly entomological evidence" to "challenge the date of death." (Instrument No. 20 at 10). Swearingen's post-conviction entomological expert placed Ms. Trotter's death in a narrow window during mid-December when weather conditions were favorable for insect colonization. The state court, however, found that Swearingen provided insufficient data, especially concerning weather conditions immediately around the body, to question the jury's verdict. *Ex parte Swearingen*, No. 53,619-01, at 475-76. More importantly, the state habeas court observed that Swearingen's argument that Ms. Trotter died in mid-December fatally conflicted with unimpeached information about the contents of her stomach, "the state of decomposition of Melissa Trotter's body, the fungal development present, and visible insect progression[.]" *Ex parte Swearingen*, No. 53,619-01, at 476.

In his first federal habeas action, this Court funded expert assistance to investigate entomological evidence further, though Swearingen did not explicitly raise an actual-innocence claim. Swearingen's petition also accused Dr. Carter of having "pro-prosecution bias," "intentionally skew[ing] her testimony in order to ensure a capital conviction," "shap[ing] her testimony to fit the State's theory of the case," and "abandon[ing] scientific and medical

objectivity," though he did not seek relief on that basis. (*Swearingen v. Dretke*, 04-cv-2058, Instrument No. 21 at 6-7). This Court denied Swearingen's petition and the Fifth Circuit affirmed, *Swearingen v. Quarterman*, 192 F. App'x 300 (5th Cir.2006).

Swearingen returned to state court and refined his arguments about entomological evidence. A second state habeas action extensively examined whether the insect colonization found on Ms. Trotter's body indicated a limited period of exposure to the elements that postdated Swearingen's December 11, 1998 arrest. Swearingen's expert witnesses there considered entomological evidence and a variety of additional information, including: the effects of the climate as shown by official reports and Swearingen's research; the unique environmental conditions in which her body was found as shown by crime scene videos and photographs; and Ms. Trotter's weight both before death and during the autopsy.

The state district court held an evidentiary hearing on Swearingen's second state habeas application. The uneven decomposition of Ms. Trotter's corpse was a prominent issue in the hearing. According to Swearingen's experts, parts of her body, including her face, showed marked decomposition but other areas showed much less or almost no decomposition. Swearingen's experts opined that Ms. Trotter's corpse had probably not been exposed to the elements for more than a week or two. Nevertheless, Swearingen's experts could not reconcile entomological evidence with Dr. Carter's observation that some parts of Ms. Trotter's body showed distinct decay. As

this Court will discuss later, Swearingen's experts clumsily tried to square their findings with the uneven decomposition and the known facts about the crime. Ultimately, the state court found that Swearingen's efforts did not exculpate him, largely because his experts could not harmonize their findings with the circumstances of the crime and all the scientific evidence. *Ex parte Swearingen*, No. 53,619-04, at 505-42. On January 16, 2008, the Court of Criminal Appeals adopted the lower court's findings and denied relief.

Swearingen then filed a third state habeas action challenging the date of death (among other issues). This time, Swearingen supported his claims with an affidavit from Dr. Carter. Dr. Carter's affidavit explained that she had focused her trial testimony only on external features of the body, especially "marked decomposition of the head and neck region," "the degree of maggot activity in this region of the body," and "fungal growth," because the attorneys' questioning shaped her answers. Her affidavit stated:

I was not asked by prosecutors, or by defense counsel, to address the significance of my internal examination of Ms. Trotter's body. Nor was I asked to address in detail the question of how long Ms. Trotter's body had been left exposed in the Sam Houston National Forest. Instead, the focus of the prosecution and the defense was on whether the forensic evidence indicated a rape or kidnapping had occurred. The majority of the questions from both sides were directed at whether autopsy findings indicated vaginal bruising, blunt trauma to the head, and whether the

cause of death was asphyxiation by ligature or a sharp forced entry wound to the neck.

Dr. Carter's affidavit noted that "[d]ecomposition in this case was strikingly uneven. The decomposition seen in during [sic] the external examination of the body, particularly of the head and neck region, was substantial." In particular, she noted "partial skeletonization of the head and neck region due to decomposition and insect and mammalian scavenging. As stated in the report, soft tissue was absent from the nose and midfacial areas, and the tongue was dark due to decompositional changes, and there was skin slippage and slippage of the scalp." But she also recognized that the decomposition of the internal organs "appears less advanced." Dr. Carter opined that the characteristics of the internal organs and Ms Trotter's weight would "support [ ] a forensic opinion that the body had not been exposed more than two weeks in the forest environment," though she did not explicitly state how that opinion would impact her earlier testimony.

Dr. Carter did not reconcile her internal and external observations, nor explain how the limited internal decomposition fit into the other facts known about the crime. Importantly, Dr. Carter did not revise or recant the observations she made in the autopsy report. *See Swearingen*, 556 F.3d 348 ("Dr. Carter does not address the correctness of her original testimony based on decomposition and fungal growth[.]"). In fact, her affidavit reinforced her earlier opinion that external evidence of decomposition,

especially of the head and neck region, was substantial.

Swearingen tried to raise actual-innocence and ineffective-assistance-of-counsel claims based on Dr. Carter's affidavit, but the Texas Court of Criminal Appeals found that those claims did not meet Texas' stringent requirements for filing a successive habeas application. *See* TEX.CODE CRIM. PRO. art 11.071 § 5.[4]

Claims Swearingen Championed on the Eve of Execution

Facing an execution date of January 27, 2009, Swearingen filed a fourth successive state habeas action. Swearingen based this action on a "factual basis ... [that] was unavailable until the recent microscopic examination of the tissues in this case." *Ex parte Swearingen*, No. 53,619-09, at 11. Swearingen based his state habeas claim on histological tissue from the autopsy that the medical examiner's office had preserved in a paraffin block. Swearingen outlined his efforts to obtain tissue samples from the autopsy, emphasizing his interaction with Dr. Luis Sanchez from the Harris County Medical Examiner's Office, whom he had relied on as an expert witness in earlier habeas proceedings. Swearingen stated that "Dr. Sanchez did not indicate at any of these times that microscopic evidence might be relevant to [the

[4] The Court of Criminal Appeals authorized consideration of a claim that the prosecution had presented false evidence on a different factual basis than the one Swearingen raises in this federal action.

date Ms. Trotter was killed and left in the woods] and, it appears that he did not prepare or review any of it." *Ex parte Swearingen*, No. 53,619-09, at 12. On December 17, 2008, "upon hearing that the [Texas Court of Criminal Appeals] had denied relief on his third application for writ of habeas corpus," Swearingen "contacted Dr. Sanchez's office by telephone and asked that the [medical examiner] look for any tissue." *Ex parte Swearingen*, No. 53,619-09, at 12. Swearingen told the Court of Criminal Appeals that he previously "did not have any reason to believe that there was a paraffin block at the [medical examier's] office that included samples of forensically important muscle and nerve tissue," the medical examiner's office "reported that it had a paraffin block containing lung and unidentified fatty tissue" on January 15, 2009. *Ex parte Swearingen*, No. 53,619-09, at 13.

Swearingen had slides of the tissue prepared and sent to Dr. Lloyd White, a Deputy Medical Examiner for Tarrant County, Texas who had previously provided affidavits relating to the timing of Ms Trotter's death. After a microscopic analysis, Dr. White concluded that the "tissues are of an individual who has been dead no more than two or three days." Dr. White limited his conclusion to the newly analyzed tissue, without regard to additional information known about the condition of Ms. Trotter's body or the circumstances of her death. He notably did not reconcile his findings with the incongruous evidence showing extensive decomposition on other parts of Ms. Trotter's body. Dr. White also did not square his new opinion that Ms. Trotter had been dead for only two or three days with earlier affidavits provided by

Swearingen's experts that suggested a longer period of exposure in the woods.

In a succinct order, the Court of Criminal Appeals refused to allow Swearingen to proceed in another successive habeas action based, in part, on Dr. White's affidavit. *Ex parte Swearingen*, 2009 WL 249778 (Tex.Crim.App. Jan. 27, 2009).

Swearingen had contemporaneously filed a motion in the Fifth Circuit asking permission to litigate a second federal habeas petition. Among other issues, Swearingen argued that: he is actually innocent; the prosecution presented false and misleading testimony from Dr. Carter by not asking her questions about the internal conditions in Ms. Trotter's corpse; trial counsel failed to investigate the internal findings; and his trial attorneys should have developed the same evidence which Dr. White did through examining the paraffin block. The Fifth Circuit authorized this Court to consider whether a successive federal action should proceed on three issues: "(1) Giglio violations in the State's presentation of Dr. Carter's testimony; and (2) Strickland violations in trial counsel's cross-examination of Dr. Carter, and [trial counsel's] failure to develop histological evidence." *Swearingen*, 556 F.3d 349.

This Court, pursuant to the Fifth Circuit's action, must consider whether federal law conclusively allows Swearingen to litigate the merits of a successive federal habeas corpus petition.

II. A District Court's Duty to Determine Whether a Petitioner Meets Successiveness Filing Requirements

Federal habeas review strongly encourages a petitioner to present all legal and factual arguments in one habeas petition. *See McCleskey v. Zant*, 499 U.S. 467, 498 (1991) (recognizing "the principle that petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition"). Accordingly, the AEDPA "greatly restricts the power of federal courts to award relief to state prisoners who file second or successive habeas corpus applications." *Tyler v. Cain*, 533 U.S. 656, 661 (2001). Congress intended its limitation on successive petitions to encourage finality and to preserve comity with the state courts. *See Calderon v. Thompson*, 523 U.S. 538, 559 (1998) ("Section 2244(b) of the statute is grounded in respect for the finality of criminal judgments."); *Johnson v. Dretke*, 442 F.3d 901, 909 (5th Cir.2006) ("One purpose of AEDPA is to enforce the preference for the state's interest in finality of judgment over a prisoner's interest in additional review."). To that end, the AEDPA generally anticipates a "one bite at the post-conviction apple" approach to federal habeas review. *United States v. Barrett*, 178 F.3d 34, 57 (1st Cir.1997).

The AEDPA protects against abuse of the habeas writ by mandating that, "if the prisoner asserts a claim that was not presented in a previous petition, the claim must be dismissed unless it falls within one of two narrow exceptions." *Tyler*, 533 U.S. at 661. The AEDPA sets out a bifurcated procedure before

conferring jurisdiction over an inmate's successive claim. First, a circuit court preliminarily authorizes the filing of a successive action if a petitioner shows that it is "reasonably likely" that his successive petition meets section 2244(b)'s "stringent requirements ." *In re Morris*, 328 F.3d 739, 740 (5th Cir.2003). This determination, however, is " 'tentative' " in that a district court must dismiss the habeas action that the circuit has authorized if the petitioner has not satisfied the statutory requirements. *Reyes-Requena v. United States*, 243 F.3d 893, 899 (5th Cir.2001) (quoting *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir.1997)). Thus, the statute makes the district court a "second-gatekeeper" that "conduct[s] a 'thorough' review to determine if the [petition] 'conclusively' demonstrates that it does not meet AEDPA's second or successive motion requirements." *Reyes-Requena*, 243 F.3d 898, 899 (quoting *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1165 (9th Cir.2000)); see 28 U .S.C. § 2244(b)(4).

The Fifth Circuit's tentative decision that Swearingen has met the AEDPA's filing requirements does not bind this Court. *See Swearingen*, 556 F.3d 349 ("We reiterate that this grant is tentative in that the district court must dismiss the motion that we have allowed the applicant to file, without reaching the merits, if the court finds that the movant has not satisfied the § 2244(b)(2) requirements for the filing of such a motion."); *see also Jordan v. Secretary, Dept. of Corrections*, 485 F.3d 1351, 1358 (11th Cir.2007) (stating that it makes "no sense for the district court to treat [that] prima facie decision as something more than it is or to mine [the circuit court's] order for factual ore to be assayed. The dis-

trict court is to decide the § 2244(b)(1) & (2) issues fresh, or in the legal vernacular, de novo."); *In re Johnson*, 322 F.3d 881, 883 (5th Cir.2003) (finding the circuit court's decision to be "tentative"); *Brown v. Lensing*, 171 F.3d 1031, 1032 (5th Cir.1999) ("[T]he trial court must make its own determination that the statutory prerequisites are satisfied."). This Court "must conduct a thorough review to determine if [Swearingen's pending petition] conclusively demonstrates that it does not meet AEDPA's second or successive motion requirements." *Johnson*, 322 F.3d 883.

The burden of showing statutory compliance rests on the petitioner. *See Moore v. Dretke*, 369 F.3d 844, 845 n.1 (5th Cir.2004) ("The applicant bears the burden of demonstrating that the petition does in fact comply with the statute, and the district court shall dismiss the petition unless that showing is made."); 28 U.S.C. § 2244(b)(4) ("A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.") (emphasis added). If a petitioner fails to meet his burden, this Court is "required to dismiss" the petition. *Tyler*, 533 U.S. at 667.

Before his successive action will continue, Swearingen must prove:

(1) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(2) 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). A petitioner must comply with both prongs of 28 U.S.C. § 2244(b)(2)(B) to proceed in a successive habeas action. *See Johnson*, 442 F.3d 911 (noting that a petitioner's failure to comply with one prong makes it unnecessary to address the second one). In other words, this two-prong statutory requirement only "affords an opportunity to bring new claims where the petitioner can show that he was not at fault for failing to raise those claims previously and where the claim, if meritorious, would sufficiently undermine confidence in the judgment at issue." *Evans v. Smith*, 220 F.3d 306, 323 (4th Cir.2000).

The complex nature of Swearingen's arguments requires much care in sorting out his claims. While the Fifth Circuit only allowed him to proceed on three discrete issues, Swearingen has extensively briefed issues that the Fifth Circuit refused to authorize-such as actual innocence. Swearingen also supports his claims with arguments he developed at trial and thereafter, such as entomological dating. Swearingen's successive federal petition, however, explicitly raises the following grounds for relief:

1. Swearingen is actually innocent of the murder.

2. Trial counsel provided constitutionally ineffective legal assistance by: (a) not adequately investigating histological evidence and (b) inadequately cross-examining Dr. Joye M. Carter, the medical examiner who testified at trial.

3. The State of Texas recklessly or knowingly sponsored false or misleading testimony in violation of *Giglio v. United States*, 405 U.S. 150 (1972), through Dr. Carter's testimony.

This Court has already found that federal law does not recognize actual innocence as a ground for relief.[5] In fact, the Fifth Circuit explicitly refused to allow Swearingen to advance an actual innocence claim. Only the issues designated by the Fifth Circuit are properly before the Court: "(1) Giglio violations in the State's presentation of Dr. Carter's testimony; and (2) Strickland violations in trial counsel's cross-examination of Dr. Carter, and his failure to develop histological evidence." *Swearingen*, 556 F.3d 349. The Court emphasizes that this preliminary review is not an adjudication of the merits of Swearingen's claims or an application of the AEDPA's deferential standards, but the limited and narrowly cabined review Congress has given federal courts before jurisdiction vests to consider successive habeas claims.

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[5] Insofar as Swearingen anticipates that the Supreme Court may eventually sanction an actual-innocence cause of action, he may seek authorization for filing a new action on that "new rule of constitutional law" when it is "made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2244(b)(2) (A).

Swearingen has had a full opportunity to show compliance with the statute. (Instrument Nos. 5 and 6). Swearingen has filed an amended petition and submitted other briefing. (Instrument No. 24).[6] Respondent has filed a pleading arguing that Swearingen has not met the AEDPA's successive petition requirements. (Instrument No. 27). Swearingen has filed a reply. (Instrument No. 34). This Court now finds, under its statutory authority in 28 U.S.C. § 2244(b)(4), that Swearingen has not shown the AEDPA allows him to proceed in another federal habeas action.

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[6] Swearingen's amended petition summarily asks this Court to hold an evidentiary hearing on his compliance with 28 U.S.C. § 2244(b) (2). When Swearingen asked for a hearing in his initial pleadings, the Court noted that Swearingen "did not describe what witnesses or evidence he wishes to present." (Instrument No. 5 at 3). He still has not stated what testimony or evidence he wishes to develop at a hearing. Swearingen must show the need for an evidentiary hearing. He has not shown with any particularity why one is necessary, or even available, at this juncture. Because Swearingen has not indicated what evidence he wishes to present or which witnesses he wants to call, any evidentiary hearing would be a fishing expedition. The Court finds that the objective factors in the record indicate that a hearing is not necessary. In particular, Swearingen has given the Court no reason to believe that additional factual development will aid in deciding whether his successive claims were previously available to him.

III. The Factual Predicate for the Claims Existed Well Before Swearingen's Successive Petition

This Court must first conclusively determine whether "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence." 28 U.S.C. § 2244(b)(2)(B)(i). The Supreme Court refers to section 2244(b) (2)(B)(i) as a gateway for claims based on "new evidence," a "new factual predicate," or "newly discovered" facts. *See Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005); *Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005); *Duncan v. Walker*, 533 U .S. 167, 189-90 (2001) (Breyer, J., dissenting); *Thompson*, 523 U.S. at 554. This Court must decide whether the evidence Swearingen relies on "was not previously discovered or discoverable [.]" *Leal Garcia v. Quarterman*, 573 F.3d 214, 221 (5th Cir.2009).

Section 2244(b) (2)(B)(i) asks whether diligent efforts could have uncovered the factual basis for claims "previously." Presumably, this looks at whether the inmate could have and should have uncovered and advanced his claims in his first federal habeas case. This is an objective inquiry. The statute does not ask if an inmate acted with alacrity and ardor. The Fifth Circuit has instructed that "the plain text of § 2244(b)(2)(B) suggests that due diligence is measured against an objective standard, as opposed to the subjective diligence of the particular petitioner of record." *Johnson*, 442 F.3d 908. In other words, this Court does not evaluate whether the inmate himself was diligent in seeking the new factual predicate; the Court focuses on whether the information

was available with "due diligence." *In re McGinn*, 213 F.3d 884, 885 (5th Cir.2000) (faulting a petitioner for not showing why he could not have advanced his "new" claims earlier). Consequently, a petitioner does not meet the AEDPA showing if the record includes "evidence that would put a reasonable attorney on notice of the existence" of the allegedly new material. *Johnson*, 442 F.3d at 908.[7]

This Court appointed federal counsel for Swearingen on July 24, 2003, he filed his first federal petition on May 21, 2004, and this Court denied relief on September 8, 2005. *Swearingen v. Dretke*, 04-cv-2058 (S.D.Tex.). Swearingen must show that the evidence in this case was unavailable to him before his first habeas action.

The claims that the Fifth Circuit tentatively authorized rely on two factual predicates: (1) information regarding the State's interaction with its witnesses found in Dr. Carter's 2007 affidavit and (2) microscopic analysis of a block of paraffin containing tissue preserved from Ms. Trotter's autopsy. Swearingen has not shown that those two factual predicates "could not have been discovered" before he filed his first habeas action.

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[7] This inquiry is separate from the actual innocence inquiry in 28 U.S.C. § 2244(b)(2)(B)(ii). The relative strength or weakness of the claims, or an inmate's ability to show actual innocence, plays no part in the 28 § 2244(b)(2)(B)(i) analysis. The question is of the availability of evidence, not of its impact.

A. Dr. Carter's Affidavit

As noted above, Dr. Carter signed an affidavit in 2007 wherein she stated that neither the prosecution nor defense asked about her observations of the internal conditions of Ms. Trotter's corpse, and that certain other factors would have better informed her trial testimony. The Fifth Circuit observed that Swearingen's Gigilo claim "rests not on the correctness of [Dr. Carter's testimony] (which could have been disputed at any time) but on the State's interactions with its witnesses, which could not have been known before her affidavit." *Swearingen*, 556 F.3d at 348. To proceed on this successive claim, Swearingen must show that knowledge about the State's interaction with its witnesses, flowing from Dr. Carter's affidavit, "could not have been discovered previously through the exercise of due diligence." 28 U.S.C. § 2244(b)(2)(B)(i). Swearingen has not met this burden.

Swearingen extensively chronicles his efforts to develop this habeas claim. To summarize, during his initial habeas proceedings Swearingen began collecting temperature and entomological data, his efforts in the successive state actions amplified that data, his challenge to the time of death through entomology prompted him to analyze the condition of Ms. Trotter's internal organs, he purportedly sought remaining tissue samples from her autopsy, he consulted with several experts about various factors that would disprove the State's case, and finally he "asked forensic pathologist, Dr. Joye M. Carter, to review the evidence and provide an opinion in support of the innocence claims he raised in his third state application for a writ of habeas corpus." (In-

strument No. 20 at 45). Swearingen claims that he "did not develop the basis for asking Dr. Carter to reconsider her opinion until after he obtained expert forensic opinions from other pathologists demonstrating that the 25 day post-mortem interval ... was unsupported by the evidence." (Instrument No. 34 at 15). Through her affidavit, Swearingen first obtained Dr. Carter's opinion about the information she possessed and the questions the parties asked her at trial. Also, the affidavit was the first opportunity for Dr. Carter to comment on certain pieces of information ("a video of the crime scene dated January 2, 1999"; "medical records giving Melissa Trotter's weight before she was reported missing"; and "temperature date showing daily high, low, and average temperatures in the Conroe, Texas area for the period December 8, 1998 through January 2, 1999").

Swearingen only briefly discusses why he could not have taken Dr. Carter's affidavit before 2007.[8]

[8] Swearingen does state that "his three con-stitutional claims [were] unavailable until the recent microscopic examination of the tissues in this case." (Instrument No. 20 at 43). As Swearingen's production of Dr. Carter's affidavit predates the microscopic examination, the Court summarily rejects this argument to allow consideration of his Giglio claim under the AEDPA standards. As noted by Respondent, "nothing in the pleadings suggests that Dr. Carter has seen the histological evidence, and her reaction to the evidence is unknown." (Instrument No. 24 at 31). Swearingen also mentions that he did not obtain her affidavit until after other pathologists had reconsidered her findings. Dr. Carter's affidavit does not state that she reviewed that information when giving her opinion on the internal conditions of Ms. Trotter's body.

Other than referring to her affidavit as the result of an evolving investigative effort, Swearingen hints that Dr. Carter was "reclusive" (Instrument No. 20 at 45 n. 13) or "stopped practicing pathology altogether" (Instrument No. 34 at 15), so when he began looking for her, he only found her with difficulty late in the habeas process.

Respondent asserts that Swearingen could have and should have sought Dr. Carter's affidavit long before October 31, 2007. Respondent argues that, "[h]ad Swearingen presented the evidence to her earlier, she likely would have formed her opinion earlier. Indeed, the evidence-the temperatures, the crime-scene information, and the weight information-was available before or at trial.... Swearingen waited some seven years to deliver the evidence to Dr. Carter to allow her to form her new opinion. Seven years does not bespeak due diligence." (Instrument No. 24 at 10).

While Swearingen extensively discusses the efforts he has made to uncover evidence about the time of death, the AEDPA inquiry is not whether he was active in trying to obtain relief. The AEDPA does not ask if habeas counsel has acted zealously or actively sought new evidence. The statute deals with the availability of the evidence. The question is an objective one: whether the factual predicate that underlies his claim was available if he acted with due diligence. Swearingen has arguably shown that he has sought various ways of challenging his conviction and sen-

tence. He has pursued several different avenues of attacking the evidence that proved Swearingen was the killer. However, Swearingen has not shown that Dr. Carter would not have provided the same information from in her 2007 affidavit if someone had only asked her earlier.

Swearingen's first habeas application assailed Dr. Carter's opinion on the date Ms. Trotter died. Swearingen could have obtained the empirical evidence on which Dr. Carter based her revised opinion-the temperature, the crime-scene information, and the weight information-before trial or anytime thereafter.[9] The fact that Dr. Carter's trial testimony did not address certain factors (such as Ms. Trotter's weight and the outside temperature) was obviously available at trial. *See In re Nealy*, 223 F. App'x 358, 365 (5th Cir.2007) (finding a prosecutorial misconduct claim was previously discoverable when the factual basis was available at trial).[10] The fact that the

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[9] Swearingen attached an affidavit from his entomological expert in his first state habeas action that considered weather conditions. Swearingen also included newspaper accounts as attachments that referenced Ms. Trotter's weight. The crime scene photographs and video have been available since trial.

[10] Swearingen argues that trial counsel should have realized that important information like weather conditions were missing from Dr. Carter's testimony. The burden placed on trial counsel to investigate such information also falls on Swearingen's appellate and habeas attorneys. Swearingen has not shown why he could not have realized the limited nature of Dr. Carter's testimony, just as he alleged trial counsel should have, which would have

State limited its questioning of her was likewise obvious. Had Swearingen presented the readily available evidence to her earlier, nothing suggests that she would not have formed her opinion earlier. *See In re Boshears*, 110 F.3d 1538, 1540 (11th Cir.1997) (stating that due diligence means the petitioner "must show some good reason why he or she was unable to discover the facts" and that merely alleging that he "did not actually know the facts underlying his or her claim does not pass this test"). Swearingen at any time could have asked Dr. Carter why she limited her testimony, thus providing the same information as he obtained in the 2007 affidavit. *See In re Schwab*, 531 F.3d 1365, 1366 (11th Cir.2008) (refusing to authorize a successive petition on the changed testimony of an expert witness who testified at trial when the petitioner could have presented the expert with additional information and obtained his affidavit at any time after trial). Swearingen has not shown that anything impeded him from taking Dr. Carter's before 2007.

The most concrete statement Swearingen makes about why he only took her affidavit so late in the process was that he "tried to locate Dr. Carter before [his third state application the he filed on January 16, 2008] but he could not. She quit pathology after leaving the HCME office in about 2002, and did not resume practice for several years. She apparently was reclusive." (Instrument No. 20 at 45 n. 13). This statement, however, cannot carry the day. In his

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prompted him to secure her explanation of why she limited her testimony.

"Motion for Order Authorizing Filing and Consideration of Second Petition for Writ of Habeas Corpus under 28 § 2254" which he filed in the Fifth Circuit, Swearingen cited a 2004 news article about Dr. Carter. That article, published several months before Swearingen filed his federal habeas petition in 2004, explains that Dr. Carter left the medical examiner's office and had started a forensic consulting firm in Houston. See Jenna Colley, Former Medical Examiner Probes Different Career, HOUSTON BUSINESS JOURNAL, Jan. 9, 2004. During the time period contemporaneous with Swearingen's initial habeas action, Dr. Carter was actively consulting with attorneys in the Houston area. Swearingen has not shown that diligent investigative efforts could not have found her then.

Here, Swearingen does not show that the evidence "could not have been discovered previously through the exercise of due diligence." Instead, he shows that, while busily challenging his conviction on other grounds, he did not think to pursue the instant theory until 2007. Swearingen has not shown that an assiduous investigator, armed with the readily available empirical data, could not have secured an affidavit from Dr. Carter from any time before 2007.[11] No evidence exists, and he has suggested none, which shows that the information in any way

[11] The state courts found in one of his post-conviction actions that Swearingen "was free to present pathological evidence disputing Dr. Carter's estimate of 25 days either during trial or in conjunction with his first 11.071 application, but he declined to do so." *Ex parte Swearingen*, No. WR-53,613-04 Supplemental Record at 529.

"could not have been discovered previously." Swearingen has shown nothing more than that he did not think to secure her affidavit previously.

B. Histological Evidence

Swearingen claims that trial counsel should have developed a defense based on the microscopic examination of issues taken during Ms. Trotter's autopsy. Swearingen contends that he was unaware until weeks before his scheduled execution that the medical examiner's office retained tissue samples in a paraffin block. On January 20, 2009, a week before his execution, an expert reviewed five slides containing tissue samples that had been preserved in the paraffin histology block. Dr. Lloyd White, an expert who has provided several affidavits on Swearingen's behalf, stated in an affidavit that "the issues are of an individual that has been dead no more than two or three days." (Instrument No. 14, Exhibit A.1). Swearingen argues that he cannot be faulted for not having the paraffin block even "as late as December 17, 2008, ... [when] on that date the Medical Examiner merely reported a histology block with a piece of fat and lung tissue." (Instrument No. 34 at 18). Swearingen apparently informally asked the medical examiner to look for tissue samples while investigating entomological data after his initial round of habeas review. Swearingen suggests that he thought this material may have been destroyed within a year of trial. Thus, he argues, the tissue samples "could not have been discovered previously through the exercise of due diligence." 28 U.S.C. § 2244(b)(2)(B)(i).

Swearingen has made repeated efforts, both in state and federal court, to attack the timing of Ms.

Trotter's death by showing weaknesses in Dr. Carter's autopsy. As part of those efforts, Swearingen consulted with Dr. Luis A. Sanchez, Chief Medical Examiner at the Harris County Medical Examiner's Office. Swearingen states that he made oral requests for tissue samples from Dr. Sanchez, but was told that none existed. Swearingen has not verified when he made oral requests. Swearingen has not shown that oral requests for the production of such evidence constitutes due diligence or whether some other mechanism, such as written requests or court orders, would have produced the histological evidence before the eve of execution. Swearingen possibly could have secured the paraffin block by official requests or by court order.[12]

But more importantly, the record shows that Swearingen should have been aware during his first round of federal habeas proceedings that the paraffin block was still in the custody of the Harris County Medical Examiners' Office. The record does not support Swearingen's assertion that he "did not have any reason to believe [before December 2008] that there was a paraffin block at the [medical examiner's] office that included samples of forensically valuable muscle and nerve tissue." (Instrument No. 20 at 47; *see also Ex parte Swearingen*, No. 53,619-09, at 13). A letter from Dr. Sanchez dated December 21, 2004,

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[12] Swearingen asserts that he only became aware of that paraffin block after he investigated whether entomological evidence could pin down a different death date. Still, Swearingen was aware of the entomological evidence before he filed his initial federal petition. (*Swearingen v. Dretke*, 04-cv2058 [S.D. Tex.], Instrument No. 19 at 6).

explicitly informed Swearingen that Dr. Carter had taken tissue samples and preserved them:

> Only one microscopic glass slide was prepared for the entire case, which contains a piece of lung and fatty tissue. No other paraffin blocks were found in the histology laboratory under case number OC99-02. Dr. Carter only testified as to her gross findings but did not state that she had not taken samples for microscopic evaluation, nor was she asked if she took sections for microscopic evaluation of any of the injuries and the significance of such sampling.

Swearingen, in fact, filed that letter twice with this Court during his initial round of habeas proceedings. (*Swearingen v. Dretke*, 04-cv-2058 (S.D.Tex.), Instrument No. 29, Exhibit A and Instrument 31, Exhibit B). Dr. Sanchez speaks of the paraffin block in the present tense and describes the material it preserved. The letter does not say that it was destroyed, but merely explains that Dr. Carter's trial testimony did not discuss the samples. The letter put Swearingen on notice that the block existed, even if he had not yet decided that he would need to analyze that information.[13]

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[13] In his second state habeas action, Swearingen referenced that letter and commented that Dr. Sanchez "confirmed that microscope slides ... had never been made" to confirm whether Ms. Trotter's corpse showed signs of vaginal bruising, but did not refer to the explicit statement that samples of "lung and fatty tissue" were still available in a paraffin block. *Ex parte Swearingen*, No. 53,613-04, at 17. The Court notes that Swearingen has

Swearingen has not explained why he did not secure that evidence during this initial habeas action, much less show that it was unavailable before that time. Swearingen has not shown that, had he asked about the tissue samples at trial, during the first state habeas action, or anytime before filing his federal petition, the medical examiner's office would not have told him about the paraffin block as it did in 2004.

Dr. Sanchez's letter proves that Swearingen could have discovered the preserved tissue previously

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never raised the claim that the paraffin block was suppressed as under-stood by *Brady v. Maryland*, 373 U.S. 83 (1963). In state court, Swearingen asserted that: "Dr. Carter testified at trial that she had not conducted a microscopic examination, and her histology report did not indicate that tissues had been preserved except in formalin. Undersigned counsel was informed by the Harris County Medical Examiner that these samples had been discarded." *Ex parte Swearingen*, 53-629-09, at 12 (Tex.Crim.App. Jan. 23, 2009). While it is true that Dr. Carter's report mentioned that she took tissue samples and preserved them in formalin, it does not say she made slides, the trial testimony did not discuss whether or not she took those samples. Her silence is not the same as saying she did not preserve samples. Swearingen's expert at trial, however, stated that "the Medical Examiner's Office, not infrequently, and I think one report indicates that they obtain tissues which they save, but not necessarily prepared for microscope examination." Tr. Vol. 29 at 77. Swearingen makes no attempt, and has not suggested that he could, verify that the medical examiner's office said it had destroyed the samples.

through the exercise of due diligence, had he only pursued that line of inquiry. In fact, Swearingen's ineffective-assistance-of-counsel claim presumes that a trial attorney exerting reasonable efforts should have inquired into the histological evidence; Swearingen presents no reason why federal habeas counsel should not be held to that same expectation. Swearingen, by all accounts, only began that line of investigation on the eve of execution. The fact that Swearingen did not yet comprehend how to use that information does not make it objectively unavailable. As recognized by Respondent, "[h]e did not have to wait until Dr. White examined the histological evidence in 2009." (Instrument No. 24 at 54).

C. Conclusion on 28 U.S.C. § 2244(b)(2)(B)(i)

Since his conviction in 2000, Swearingen has commenced a pattern of piecemeal attacks on the date that Ms. Trotter was murdered. Only now, over nine years later, he has marshaled all the available information, but the record does not show that he could not have done so before waiting until the eve of his execution in January 2009. The Court, therefore, finds that Swearingen has not shown that the allegedly new information and evidence was not previously available. Swearingen's failure to meet 28 U.S.C. § 2244(b)(2)(B) (i) deprives this Court of jurisdiction over the merits of his successive habeas claims. For the reasons outlined briefly below, the Court also finds that Swearingen fails to satisfy the second prong of section 22544(b)(2)(B).

IV. Alternatively, Swearingen Has Not Clearly and Convincingly Shown Actual Innocence in Light of the Evidence as a Whole

Even if Swearingen could meet the first prong of the AEDPA's successiveness requirements, he would still need to show "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. § 244(b)(2)(B)(ii). This inquiry, in essence, addresses actual innocence.

The Fifth Circuit has described this standard as " 'a strict form of 'innocence,' ... roughly equivalent to the Supreme Court's definition of 'innocence' or 'manifest miscarriage of justice' in *Sawyer v. Whitley*, [505 U.S. 333 (1992)].' " *Johnson*, 442 F.3d at 911 (quoting 2 Randy Hertz & James S. Liebman, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE § 28.3e, at 1459-60 (5th ed.2005)); *see also House v. Bell*, 547 U.S. 518, 539 (2006) (comparing 28 U.S.C. § 2244(b)(2)(B)(ii) to the standard in *Sawyer*); *In re Brown*, 457 F.3d 392, 395 (5th Cir.2006) (same). This "miscarriage of justice" exception "is concerned with actual as compared to legal innocence," *Sawyer*, 505 U.S. at 339, and "[t]he term 'actual innocence' means factual, as opposed to legal, innocence." *Johnson v. Hargett*, 978 F.2d (5th Cir.1992) (emphasis in original). A petitioner faces a heavy burden in showing factual innocence because the law only recognizes an inmate's actual innocence

in "an extraordinary case." *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

Because of the unsettling proposition that a man could be actually innocent of capital murder, but executed nonetheless due to procedural impediments, the Court will briefly note that Swearingen's evidence of actual innocence falls far short of the AEDPA's standard. Section 2244(b)(2)(B)(ii) asks this Court to evaluate "the facts underlying the claim." Swearingen relies on affidavits from experts who maintain that histological and other evidence proves that Ms. Trotter could only have been dead a few days when her body was discovered on January 2, 1999, meaning that Swearingen, who had been in jail since December 11, 1998, could not have committed the offense. This Court must look at whether "the facts underlying [his] claim ... viewed in light of the evidence as a whole" would show that, "but for constitutional error, no reasonable factfinder would have found" Swearingen guilty. 28 U.S.C. § 2244(b)(2)(B)(ii). This Court will review Swearingen's compliance with section 2244(b)(2)(B)(ii) on all three of his successive claims at the same time, though the result would be the same if the Court analyzed each claim separately.

Since the finality of judgment, Swearingen has relied on the opinion of expert witnesses to exculpate himself. Swearingen has only attached a few of the resultant affidavits to his latest federal petition. This Court, however, must take a longitudinal look at all the evidence he has previously presented. At various

points, Swearingen's experts have provided opinions as expressed in the table below.

Name	Date of Affidavit or Testimony	Evidence Considered by the Expert Witness	Estimated Date of Death or Time of Exposure	Record Citation
Dael E. Morris	February 14, 2002	Crime scene and autopsy photographs, autopsy information, climate and weather conditions, entomological evidence	"insects would have first colonized Ms. Trotter's remains December 16th to 18th, 1998"	*Ex parte Swearingen,* No. 53,619-01 at 146-47; *Swearingen v. Dretke,* 04-cv-2058, Instrument No. 21, Exhibit B
Dael E. Morris	February 14, 2004	Same information as her first affidavit	A more conservative estimate of date than first affidavit "would have yielded a time of death *after* December 18, 1998"	*Swearingen v. Dretke,* 04-cv-2058, Instrument No. 21, Exhibit C
Dael E. Morris	Sometime in 2007	Same information as before but in the context of new temperature data	"oviposition leading to colonization by blow flies ... occurred December	*Ex parte Swearingen,* No. 53,619-04 at 110-15

			18th, 1998"	
Dr. James J. Arends	January 19, 2007	The autopsy report, Ms. Morris' affidavit, temperature data, Dr. Carter's trial testimony	"Ms. Trotter's body was exposed and colonized by blow flies after December 11, 1998 ... if death occurred before December 11, 1998, the body would have to have been covered and stored"	*Ex parte Swearingen,* No. 53,619-04 at 118-19
Dr. James J. Arends	March 26, 2007	Same as first affidavit	Conditions from December 8 to December 18, 1998 did not prevent insect egg deposition	*Ex parte Swearingen,* No. 53,619-04 at 351-56
Dael E. Morris	March 29, 2007	Earlier information and new briefing by the State	While conditions on December 8 and 9th provided opportunities of oviposit-	*Ex parte Swearingen,* No. 53,619-04 at 358-59

			ing, fly development did not suggest such a date before December 18th	
Dr. Lloyd White	March 29, 2007	Crime scene and autopsy information, a letter from Dr. Emilio Sanchez regarding vaginal bruising	States that a pathologist cannot make as precise estimation as Dr. Carter did at trial; autolysis to the pancreas and spleen happen "within a day or so of death, sometimes within hours," meaning that Ms. Trotter was a "recently deceased individual"	*Ex parte Swearingen,* No. 53,619-04 at 369-70
Dr. Glenn M. Larkin	March 29, 2007	Autopsy report	"post-mortem interval is less than twenty-five days"	*Ex parte Swearingen,* No. 53,619-04 at 372-73
Dr. Luis Sanchez	State hearing	Autopsy report and	Not impossible that she	*Ex parte Swearingen,*

	on July 2, 2007	photographs, temperature data	was murdered on December 8 but "that body most likely was not in that forest for more than two weeks. It probably was some place before that, but not in that forest."	No. 53,613-04, Evidentiary Hearing at 17, 23
Dr. James J. Arends	State hearing on July 2, 2007	Autopsy report and photographs, crime scene videotape, Ms. Morris' opinions, weather conditions	"I do not think this body was in the woods probably more than a week" but someone possibly froze her body and moved it	*Ex parte Swearingen,* No. 53,613-04, Evidentiary Hearing at 74-82
Dr. Joye M. Carter	October 31, 2007	Her trial testimony, autopsy report, crime scene video, medical records giving	Condition of pancreas spleen and liver "support[ ] a forensic opinion that	*Ex parte Swearingen,* No. 53,619-05 at 60-62; *Ex parte Swearingen,* No. 53,619-

		Ms. Trotter's weight, temperature data	the body was not exposed ... until sometime after December 12, 1998," as does the condition of breast tissue and the weight at autopsy	09 at 59-61
Dr. Glenn M. Larkin	October 1, 2007	Autopsy report, some trial testimony and photographs, and his earlier report	"December 23, 2007, is the soonest that Trotter's body could have been left in the woods" but other evidence "strongly support[s] a date as late as December 30" meaning "Mr. Swearingen was not person who left Ms. Trotter's body in the ... [f]orest"	*Ex parte Swearingen,* No. 53,619-09 at 88-93
Dr. Lloyd White	December 12, 2007	Autopsy report and photographs,	Concurring with Dr. Carter that	*Ex parte Swearingen,* No. 53,619-

		crime scene photographs, temperature data, medical records, affidavits from Dr. Larkin and Dr. Carter	the internal observations mean that her body "was left in the woods within fourteen days of the discovery of the body" and with Dr. Larkin that "the body was left in the woods at or on about December 23, 1998 at the soonest, and probably left there no sooner than December 27 or 28, 199[8]."	05 at 109-10
Dr. Lloyd White	January 21, 2009	Slides of paraffin histology block, temperature data	"tissue in this section is entirely incompatible with the body having been left at	*Ex parte Swearingen,* No. 53,619-09 at 53-54

			this location earlier that 29 or 30 December 1998"	
Dr. Lloyd White	April 14, 2009	Same data a previous affidavits and additional histological analysis	"Ms. Trotter died no sooner than December 29 or December 30, 1998"	Instrument No. 29, Exhibit A.2
Dr. Stephen Pustilnik	No date	Autopsy report, slides, temperature data, and affidavits from Dr. White and Dr. Carter	"the date of death on or about December 26, 1998"	Instrument No. 29, Exhibit A.3

When remanding this case, the Fifth Circuit noted that inconsistencies among the affidavits would be problematic for Swearingen. *See Swearingen*, 556 F.3d 855, 859 ("Obviously, although each expert opines that the body was not placed in the woods on December 8, 1998, the differences undermine the credibility of their conclusions."); *cf. Dowthitt v. Johnson*, 230 F.3d 733, 742 (5th Cir.2000) (a reviewing court must test affidavits upon which an actual innocence claim rests for "inconsistency with the physical evidence").

Swearingen asserts that his experts' opinions are not in conflict, but are in agreement that that Ms. Trotter's body could not have been in the woods for a

25-day period. The Fifth Circuit recognized that area of confluence, but noted that the different opinions still raised credibility questions. *See Swearingen*, 556 F.3d at 348 n. 6. The Fifth Circuit specifically observed the following differences in the expert opinions: Dr. Carter suggested a two-week period of exposure; Dr. Larkin a three- or four-day period; Dr. Sanchez a ten- to fifteen-day period (with possible refrigeration before that); and Dr. White a two- or three-day period. This Court would note that the other expert opinions exacerbate the lack of consensus observed by the circuit court: Ms. Morris' opined that a secondary colonizing insect oviposited on December 18; Dr. Arends stated that the body had been in the woods for about a week, but was probably frozen before then; and Dr. Pustilnik thought someone dumped her body on December 26. The Court also observes that some of the expert witnesses have given opinions that have progressed, without reconciling earlier ones: Dr. Larkin has gone from a period "less than twenty-five days" to "as late as December 30"; Dr. White has given periods ranging from "a day or so" to "no sooner than December 27 or 28" to no earlier "than 29 or 30 December." At some times, Dr. White has agreed with Dr. Carter's new assessment of a two-week period for some factors, but in other places suggested that some organs which were well-preserved usually degrade "within hours." Each expert has blessed their opinion with scientific certainty.

Swearingen's experts, however, have not consistently described the level of certitude science could place on when Ms. Trotter died. When Swearingen first began attacking the date of death, he first chal-

lenged Dr. Carter's ability to pinpoint when she died with any precision. Dr. White provided an affidavit which stated:

> Pathologists cannot accurately estimate a post mortem interval with the precision that Dr. Carter indicated she was capable of. Pathological estimates of time of death, using the type of evidence on which Dr. Carter relied, cannot be made with confidence after a body has been left unprotected for far less time than 25 days. A pathologist could only estimate a relatively broad range of weeks or even months during which Ms. Trotter died.

Ex parte Swearingen, No. 53,613-05, at 153. As Swearingen's attacks on the evidence have progressed, however, he has with greater and greater conviction estimated the date she died. Dr. White himself, for instance, has now stated "with scientific certainty" that "Ms Trotter died no more than two or three days before the body was recovered on January 2, 1999." (Instrument No. 20, Exhibit A.2). Certainly, "differences undermine the credibility of [the experts'] conclusions." *Swearingen*, 556 F.3d at 348.

Inconsistencies between the various affidavits apparently flow from gaps in the evidence used by the experts. Taken at face value, Swearingen's new scientific evidence appears highly exculpatory. Nevertheless, the credibility of that testimony depends on its relationship to the remainder of the evidence. Swearingen relies on experts who agree that the body had been exposed to the elements after he was jailed on December 11, 1998, though the ex-

perts have not looked at every piece of the evidentiary puzzle in making that assessment. Assuming that science can conclusively determine the length of time Ms. Trotter's body was exposed to the elements, any trustworthy analysis should take into account the entire breadth of the pathological evidence.[14]

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[14] When the Court of Criminal Appeals refused to allow Swearingen to file a successive habeas application raising same claims now before the Court, one judge wrote a concurrence recognizing the inherent weakness in raising an actual innocence claim without taking into account the whole of the evidence: "The hallmark of a scientifically sound hypothesis is that it is consistent with, and accounts for, the totality of the known facts." Assuming the truth of Swearingen's claim, the judge then contrasted it with the weighty evidence against Swearingen. The judge found:

> All of this evidence is wildly inconsistent with the hypothesis that Melissa magically 'disapparated' from the earth for twenty-one days and then reappeared, as if from suspended animation, dead on the floor of the Sam Houston National Forest on December 29th or 30th.... When all of the other known facts and evidence are wholly inconsistent with a particular scientific hypothesis, the reasonably objective sci-entist revisits that original hypothesis, looking for a flaw. Although one does not doubt the honesty and sincerity of these medical examiners, their theory that Melissa did not die until December 29th or 30th because of the relatively intact state of some of her internal organs is flatly contradicted by an incredible wealth of other evidence. They have made no attempt to account for or explain this other evidence or provide an alternate hypothesis.

Some of Swearingen's experts have looked at insects, some have looked at cells, and some have reviewed photographs. Swearingen now provides ample argument about how an earlier death date determined from histological analysis alone would influence his culpability. Yet the experts looking at histological evidence have not reconciled their opinions with entomology, photographic evidence, or the all the facts available to them. None of Swearingen's experts have credibly considered the condition of Ms. Trotter's body "in light of the evidence as a whole."

The record contains evidence which completely contradicts Swearingen's contention that Ms. Trotter died at most three days before her body was discovered. The autopsy report, testimony and evidence at trial, and testimony at the state evidentiary hearing have demonstrated that Ms. Trotter's corpse exhibited obvious decomposition. Early in his first federal action, Swearingen himself admitted that "[t]he body was in an advanced state of decomposition, making autopsy conclusions difficult." (*Swearingen v. Dretke*, Instrument No, 19 at 32) (emphasis added). Swearingen acknowledged the "obvious fact that the body had certainly been dead for over 72 hours" because "the autopsy report noted that 'rigor had passed and livor was obscured due to decompositional change[ ].' " (*Swearingen v. Dretke*, Instrument No, 19 at 32) (emphasis added). Swearingen has elsewhere agreed that the "autopsy revealed significant decompositional changes especially in the head and

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Ex parte Swearingen, 2009 WL 249778, at **7-8 (Tex.Crim.App.2009) (Cochran, J., concurring).

neck area due to exposure and larval and fungal activity." *Swearingen v. Dretke*, No. 05-70039, Appellant's Brief, at 5 (emphasis added). Dr. Carter' affidavit does not diminish the force of those statements because, even to the extent that Dr. Carter may now have added to some of her earlier conclusions, she did not retract her observations. The record amply supports Dr. Carter's statement in her new affidavit that "[t]he decomposition seen in ... the external examination, particularly of the head and neck region, was substantial."

Swearingen's more recent affidavits, however, purport to describe a nearly pristine body, unaffected by time or the elements. Swearingen's experts routinely refer to the corpse as well-preserved. The description of the corpse in Dr. Carter's autopsy report-which is consistent with photographs in the record-differs significantly from that described by Swearingen's experts. Clearly, parts of Ms. Trotter's body had reached a later stage of decomposition while other parts showed less decay. The photographic evidence from trial shows a disturbing disunity in the progression of decay and animal damage. Nearly every affidavit from Swearingen's experts ignores factors most decisively indicating a long period of exposure, such as significant decomposition to the head and neck, the fungal growth observed by Dr. Carter, and the contents of her stomach which still featured the remnants of Ms. Trotter's last meal eaten on December 8, 1998. For the most part, the expert witnesses have commented on portions of the evidence, but apparently have not considered that evidence as it relates to the condition

of the body as a whole.[15] The experts have looked at a few threads of evidence without considering the whole mosaic.

For the experts' opinions to be credible, clear, or convincing, they must conform to all the evidence. Scientific opinion provides the law with the most assistance when it accounts for the totality of the known facts. The history of this case provides little confidence that the credibility of Swearingen's experts would hold up when their opinions are compared to all the facts. At its core, the recently presented histological evidence in Swearingen's latest petition differs little in exculpatory thrust from the entomological evidence that Swearingen relied on in his successive state habeas actions.[16] When con-

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[15] Frustrated with the limited approach taken by the experts in this case, one judge on the Court of Criminal Appeals asked "when did [Ms. Trotter] die?" and answered: "The scientists are all over the board. Theirs is like the Indian tale of the blind men touching the various parts of the elephant and coming to entirely different conclusions about the animal." *Ex parte Swearingen*, 2009 WL 249778, at 6 (Tex.Crim.App. Jan. 27, 2009) (Cochran, J., concurring).

[16] The state habeas court held a hearing in Swearingen's second habeas action. That court specifically considered entomology, and exhibited concerns about delving into the "quality of the pathology report of about any kind of inaccuracies of that report" but stated that "an opinion about how long that body was exposed to the elements, that might be relevant." *Ex parte Swearingen*, No. 53,613-04, Evidentiary Hearing at 16. Oddly, Swearingen has relied on Dr. White consistently throughout his nu-

fronted in the state habeas hearing with evidence showing significant decomposition, Swearingen's experts floundered. They could not reconcile their opinion of insect colonization with other facts known about the crime.

One of Swearingen's experts, Dr. Luis Sanchez, testified that "the pattern of the decomposition in this case is a little bit unusual. It's not what we tend to see in most of our cases, especially with the mold that [Dr. Carter] saw all over her body." *Ex parte Swearingen*, No. 53,613-04, Evidentiary Hearing at 26. Looking at all the facts, Dr. Sanchez would not give an opinion on the date of death, he would only make assumptions about the period of time that Ms. Trotter's body had been exposed to the elements. He said: "That body most likely was not in that forest for more than two weeks. It probably was some place before that, but not in that forest." *Ex parte Swearingen*, No. 53,613-04, Evidentiary Hearing at 17 (emphasis added). Dr. Sanchez could not say that it was impossible for her "to have been murdered on December 8th[.]" *Ex parte Swearingen*, No. 53,613-04, Evidentiary Hearing at 23.

The other expert Swearingen called to testify, Dr. James Arends, also said: "I do not think this body was in the woods probably more than a week." *Ex parte Swearingen*, No. 53,613-04, Evidentiary Hear-

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merous actions to challenge the date of death, but did not call him as a witness in that action.

ing at 74.[17] Dr. Arends, however, could not adequately explain why Ms. Trotter's head "is the only part of the body that has any significant parts of decomposition. That seems really difficult to believe that only the head would decompose when the entire body was laying in the woods the entire time." *Ex parte Swearingen*, No. 53,613-04, Evidentiary Hearing at 82. Dr. Arends agreed that there was a "discrepancy between the rates [of] decomposition," noting it was "[f]rom one end of this body to the other[.]" *Ex parte Swearingen*, No. 53,613-04, Evidentiary Hearing at 82.

With the "significant levels of decomposition" of Ms. Trotter's head, Dr. Arends and Dr. Sanchez created a speculative explanation that does not completely exculpate Swearingen. Both experts could only reconcile their conclusions by conjecturing that someone froze Ms. Trotter's body and then placed it in the woods-a theory which, though originating with his experts, Swearingen now mocks.[18] Given their

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[17] The state habeas court found that Dr. Arends was not a credible witness. *Ex parte Swearingen*, No. 53,613-04, at 527.

[18] For instance, Swearingen told the Fifth Circuit when moving to file a successive action: "The only way out, for the State, is to imagine an accomplice who preserved the body and threw it in the forest more than a week after Mr. Swearingen was jailed. However, the State itself has never resorted to this rank speculation." He did not inform the circuit court that his experts, in fact, had resorted to that speculation. The Court clarifies that it does not adopt the theory that Swearingen murdered Ms. Trotter and then another mysterious individual froze her body and dumped it in the woods. This Court only ob-

testimony, the state habeas court found that the expert witnesses "did not contradict Dr. Carter's testimony about the degree of fungal development" or "concerning Melissa Trotter's stomach contents." *Ex parte Swearingen*, No. 53,613-04 at 529. Swearingen's newly presented affidavits and evidence contain the same evidentiary holes that Dr. Arends and Dr. Sanchez confronted. The question is how a reasonable jury would respond to that information.

To the limited extent that Swearingen's experts have considered factors showing a longer period of exposure in the woods, they have not fared much better than those who testified in the evidentiary hearing. For instance, Dr. Pustilnik is the only expert whose affidavit comments on the condition of Ms. Trotter's head. In direct opposition to the autopsy report, the photographs, and testimony from Dr. Carter, Dr. Sanchez, and Dr. Arends, he attributes all disfigurement on the head and neck to "predatory activity."[19] Dr. Pustilnik, in essence, found hardly any

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serves the fact that Swearingen's experts, and some State actors, have advanced that theory because they cannot come to a scientific conclusion about what happened. This Court's role in considering the actual innocence claim is not to sanction one theory as what really happened to Ms. Trotter. This Court's role is to look at Swearingen's claim in light of all the evidence and record.

[19] Dr. Pustilnik also determines from observing the autopsy photos that Ms. Trotter's stomach contained "whole red meat (not ground meat) and scallions," not the last meal she was seen eating.

evidence of decomposition, making his testimony not credible.

Dr. White's April 14, 2009 affidavit comments on fungal growth, but then only to opine that Dr. Carter did not provide enough information about the fungus she observed. Dr. White, in fact, accuses Dr. Carter of ineptitude by incorrectly identifying typical discoloring seen in decomposition as fungal growth. No other expert has questioned Dr. Carter's findings in that regard. In fact, Swearingen's experts in the state evidentiary hearing adopted her observations after they had seen the same photographs. In the isolated instances where Swearingen's experts have mentioned the evidence Dr. Carter relied on to establish a date of death, they have written off, rather than reconciled, her observations. Swearingen's strained attempts at this late date to challenge the previously unquestioned external observations are not credible.

A jury looking at "the evidence as a whole" could not ignore the facts showing that Ms. Trotter's body had been on the forest floor for more than a few hours or days. *See Swearingen*, 556 F.3d at 348 n. 6 (noting that the credibility of the expert affidavits suffers from not taking into account evidentiary hearing evidence about secondary colonization by insects and the contents of Ms. Trotter's stomach). Importantly, the jury would have to plug the narrow conclusions made by Swearingen's experts into the broad facts the State adduced which pointed to him as the killer. *See Thompson*, 523 U.S. at 565 (stating that a court cannot "ignore the totality of evidence of ... guilt" when considering a claim of actual inno-

cence). Examination of the tissues, and the hardly credible testimony that she was in the forest for only a few hours or days, does not conclusively change the manner in which the jury would view the "evidence as a whole." 28 U.S.C. § 2244(b)(2)(B) (ii).

To reiterate, Swearingen was the last person that Ms. Trotter was seen with alive.[20] Ms. Trotter had

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[20] Swearingen's briefing makes an effort to discount portions of the evidence against him, largely by making arguments cumulative of evidence the jury rejected. *See In re Martinez*, 2009 WL 585616, at *2 (5th Cir.2009) (refusing to find actual innocence based on matters that the jury had already considered). Swearingen also attempts to characterize as weak the evidence that he killed Ms. Trotter. As this Court found in the first federal habeas action, "the trial evidence supported rather strongly a finding that Swearingen caused Ms. Trotter's death, [though]] the generally circumstantial evidence becomes less convincing with respect to the predicate offenses of kidnapping and aggravated sexual assault. (*Swearingen v. Dretke*, No. 04-cv-2058, Instrument No. 39 at 24). Concerns over the strength of the evidence surfaced early on as to the predicate offenses, but the circumstantial evidence showing his identity as the murderer was not nearly as tenuous as Swearingen now argues it was. *See Swearingen*, 101 S.W.3d at 96 (noting that the "evidence supporting the findings of kidnapping or sexual assault might appear weak and tentative when viewed in isolation") (emphasis added). When referring to the integrity of his identity as the murderer, the Texas state courts have noted the "substantial amount of circumstantial evidence of [Swearingen's] guilt." *Ex parte Swearingen*, No. 53,613-04, at 538.

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 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." Finally, Swearingen's experts do not explain where Ms. Trotter was from December 8 until a few days before hunters found her body.

This is not to say that the new evidence would have been disregarded by trial counsel. In fact, the evidence could possibly help create a stronger defense. See *Herrera v. Collins*, 506 U.S. 390, 418-19

(1993) ("This is not to say that petitioner's affidavits are without probative value[.]"); *Keith v. Bobby*, 551 F.3d 555, 559 (6th Cir.2009) (finding that, even if new evidence inserts some questions into the proceedings, that is not the same as "clear and convincing evidence" or dealing a "fatal blow"). But Swearingen has not shown harmony between Dr. Carter's autopsy observations, the trial record, and his new evidence. Likely, some other piece of the puzzle is still missing. The state courts which have considered Swearingen's claims have, both in written orders and in oral questioning, hinted that conditions on the forest floor in 1998-99 could have been cooler and wetter than reported elsewhere. Swearingen dumped his victim in a shady, moist forest. Perhaps the cool and dank conditions of her precise location slowed the internal process of decomposition-a theory consistent with Dr. Carter's autopsy description of her body as "cool and damp."

But this Court's duty is not to neatly decide which theory, if any, is more correct. This is especially the case on habeas review where the presumption of innocence has run its course and principles of comity, federalism, and finality of judgments lean steeply in favor of upholding the verdict. Congress has tethered this Court's analysis to how a reasonable juror would view the whole of the evidence as it was at trial and as it is now. A jury considering Swearingen's new evidence would weigh it against the evidence showing his involvement in Ms. Trotter's murder. In the end, the jury would likely consider the whole of the new scientific evidence in the context of the opinion of Swearingen's expert at trial: "The definition of the time of death is probably the most challenging ques-

tion for a pathologist. A pathologist can only provide some gross parameters, but the reality is that the answer is one of the least dependable answers that a pathologist can provide in regards to what he knows about death." Tr. Vol. 31 at 71-72. The conflicted and incomplete scientific evidence does not make the suggestion that Ms. Trotter had only been dead two or three days a credible hypothesis for a reasonable juror considering all the evidence.

This is not a case where Swearingen's evidence is so compelling that a court cannot have confidence in the outcome of his trial. Thus, Swearingen has not met his burden of showing that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii).

V. Conclusion

This Court has reviewed Swearingen's briefing and evidence under the AEDPA standards. In doing so, this Court's role has not been to substitute its own view of the evidence, blindly adhere to the circuit court's tentative finding, or speculate as to what effect one piece of evidence would have made independent of all other factors. The Court emphasizes that the statutory charge has guided the review. The Court has not and could not engage in any adjudication of the merits which are currently beyond this Court's jurisdiction.

The AEDPA places a heavy duty, independent of the Fifth Circuit's initial review, on an inmate to prove conclusively whether he meets the strict standards enacted by Congress. Swearingen has simply not shown that this Court possesses any authority to consider the merits of his claims. *See In re McGinn*, 213 F.3d 884, 885 (5th Cir.2000) ("We do not suggest that in striving to both convict the guilty and free the innocent, criminal process can look away from exculpatory evidence with such potential explanatory power. Rather, we remind that this is a court of limited jurisdiction, only part of an entire system. We are persuaded that Congress has withheld jurisdiction from this court to grant the requested relief here."). The AEDPA requires this Court to DISMISS Swearignen's successive habeas petition.

In light of the complex record, but noting this Court's confidence in its resolution of this action, the Court will grant Swearingen a Certificate of Appealability because these matters deserve appellate consideration. See 28 U.S.C. § 2253(c); FED.R.APP.P. Rule 22(b); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (allowing a COA to issue when the claims "presented were adequate to deserve encouragement to proceed further.").

United States Court of Appeals,
Fifth Circuit.
In Re: Larry Ray SWEARINGEN, Movant.

No. 09-20024.
Jan. 26, 2009.

PER CURIAM:

Texas inmate Larry Ray Swearingen ("Swearingen"), sentenced to death for the capital murder of Melissa Trotter, seeks a stay of his execution scheduled for January 27, 2009, and authorization to file a successive petition for writ of habeas corpus in the United States District Court for the Southern District of Texas. For the following reasons, we GRANT IN PART AND DENY IN PART the motion and STAY the execution.

I. Factual & Procedural Background

Swearingen was convicted of capital murder by a jury in Montgomery County, Texas and sentenced to death on July 11, 2000. The jury found that on December 8, 1998, he murdered nineteen-year-old Melissa Trotter by ligature strangulation during the commission or attempted commission of either (1) a kidnaping or (2) an aggravated sexual assault. On direct appeal, the Texas Court of Criminal Appeals (TCCA) affirmed his conviction and sentence on March 26, 2003. *Swearingen v. State,* 101 S.W.3d 89 (Tex.Crim.App.2003).

On March 11, 2002, while his direct appeal was still pending, Swearingen filed his first state habeas

petition, which raised ten claims. The TCCA adopted the state trial court's factual findings and legal conclusions and denied relief. *Ex Parte Swearingen,* No. WR-53,613-01 (Tex.Crim.App. May 21, 2003) (online citation unavailable).

On May 21, 2004, Swearingen filed his first federal habeas petition in the United States District Court for the Southern District of Texas. The district court granted the State's summary judgment motion and dismissed the case with prejudice, but it issued a certificate of appealability on Swearingen's sufficiency of the evidence claim under *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).[1] In his first federal habeas petition, Swearingen did not challenge the sufficiency of the evidence that he murdered Trotter; he only challenged the sufficiency of the evidence that he murdered her during the commission or attempted commission of either a kidnaping or an aggravated sexual assault. This position was consistent with his trial strategy. On July 31, 2006, we affirmed the district court's denial of the *Jackson* claim. *Swearingen v. Quarterman,* 192 Fed.Appx. 300 (5th Cir.2006) (per curiam), *cert. denied* 549 U.S. 1216, 127 S.Ct. 1269, 167 L.Ed.2d 93 (2007).[2]

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[1] Swearingen raised seven claims in his first federal habeas petition. The district court held that actual and independent state procedural law barred consideration of four unexhausted claims. It denied the remaining three claims on the merits.

[2] In this opinion, we explicitly warned Swearingen's counsel to avoid the form of timing gamesmanship we now face:

On January 22, 2007, Swearingen filed his first successive state habeas petition. After evaluating whether the claims complied with Article 11.071, Section 5 of the Texas Code of Criminal Procedure, the TCCA remanded six claims to the state trial court. *Ex Parte Swearingen,* No. WR-53,613-04 (Tex.Crim.App. Jan. 23, 2007) (online citation unavailable). The TCCA later adopted the state trial court's factual findings and legal conclusions regarding those six claims and denied relief. *Ex Parte Swearingen,* No. WR-53,613-04, 2008 WL 152720 (Tex.Crim.App. Jan. 16, 2008).

We note also that at various times in his briefings Petitioner states that he intends in the future to raise a claim based on actual innocence. If so, Petitioner must file his claim promptly or run the risk of having that claim deemed dilatory and therefore rejected. Such a dilatory filing could also raise the issue of bad faith on the part of Petitioner's attorneys and lead to the imposition of sanctions.

Swearingen, 192 Fed.Appx. at 300 n. 2. The late filing of this motion demonstrates disrespect for this court and for Swearingen's life; consequently, Swearingen's counsel are ordered to show cause within 7 days from the date hereof as to why this petition could not have been filed before January 20, 2009 in light of the dispositive order of the TCCA dated December 17, 2008.

We commend the State on the quality of its response, particularly given the extremely limited time that Swearingen's counsel's actions allowed us to provide.

On January 16, 2008, Swearingen filed his second successive state habeas petition. After evaluating whether the claims complied with Article 11.071, Section 5 of the Texas Code of Criminal Procedure, the TCCA dismissed four claims as an abuse of the writ and remanded two claims to the state trial court. *Ex Parte Swearingen,* No. WR-53,613-05, 2008 WL 650306 (Tex.Crim.App. March 5, 2008). The TCCA later adopted the state trial court's factual findings and legal conclusions regarding those two claims and denied relief. *Ex Parte Swearingen,* No. WR-53,613-05, 2008 WL 5245348 (Tex.Crim.App. Dec. 17, 2008), *pet. for cert. filed* (U.S. Jan. 14, 2009) (No. 08-8202). On January 14, 2009, Swearingen filed a petition for writ of certiorari regarding the TCCA's denial of the second successive state habeas petition, and he sought a stay of execution.

On January 20, 2009, Swearingen filed his motion for leave to file a second federal habeas petition with this court. He asserts the following claims:[3]

(1) In violation of *Herrera v. Collins,* 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993), the State seeks to execute Swearingen when he is actually in-

[3] The claims identified in Swearingen's motion to file a successive federal habeas petition and the attached proposed petition are not consistent. We have included all the constitutional claims that he raised in either document. On January 23, 2009, Swearingen filed a supplemental brief seeking authorization to file actual innocence and ineffective assistance of counsel claims based on newly discovered histological evidence.

nocent of capital murder based on newly discovered evidence.

(2) In violation of *Herrera v. Collins,* 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993), the State seeks to execute Swearingen when he is actually innocent of kidnaping and aggravated sexual assault based on newly discovered evidence.

(3) In violation of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), Swearingen's trial counsel failed to effectively cross-examine Dr. Joye Carter and failed to develop histological,[4] pathological, and entomological evidence regarding when Trotter's body was left in the forest.

(4) In violation of *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the State sponsored false and misleading forensic testimony regarding when Trotter's body was left in the forest.

(5) In violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the State withheld material, exculpatory entomological evidence col-

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[4] On January 20 and 21, 2009, Dr. Lloyd White reviewed slides prepared from a paraffin block that contained Trotter's body tissue. Swearingen claims that he did not discover this histological evidence sooner because the Harris County Medical Examiner's office repeatedly stated that all samples from the autopsy had been discarded. According to Swearingen, the medical examiner did not disclose that it had the paraffin block until January 15, 2009.

lected at the crime scene.

(6) In violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the State withheld material, exculpatory evidence that another man, not Swearingen, had made serious, credible threats on Trotter's life near the time of her disappearance.

(7) In violation of the Sixth and Fourteenth Amendments, Swearingen was convicted of capital murder under instructions that did not require the jury to agree on one of four alternative theories: attempted aggravated sexual assault, aggravated sexual assault, attempted kidnaping, or kidnaping.

II. Analysis

We do not address the merits of Swearingen's claims and only consider whether to excuse his procedural default of failing to raise them in his first federal habeas petition. This court may authorize a successive habeas petition only if the application "makes a prima facie showing that the application satisfies the requirements of this subsection." 28 U.S.C. § 2244(b)(3)(C). The relevant portion of the subsection requires that a claim be dismissed unless:

> (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 appli-

cant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2)(B).

1 Section 2244 establishes two independent gates through which the motion to file a successive petition must pass before the merits will be addressed.[5] First, this court must determine whether the motion makes a prima facie showing that it can meet the requirements of § 2244(b)(2). This requires "a sufficient showing of possible merit to warrant a fuller exploration by the district court," and permission will be granted when it "appears reasonably likely that the application satisfies the stringent requirement for the filing of a second or successive petition." *In re Morris,* 328 F.3d 739, 740 (5th Cir.2003) (quoting *Bennett v. United States,* 119 F.3d 468, 469-70 (7th Cir.1997)). Second, before addressing the merits of the successive petition, the district court must independently determine whether the petition *actually satisfies* the stringent § 2244(b)(2) requirements. *Id.* at 741.

The TCCA has detailed the facts of this case. *See Swearingen,* 101 S.W.3d at 92-95. In brief, Melissa Trotter disappeared on December 8, 1998. Her body was found in the Sam Houston National Forest on January 2, 1999. Swearingen had been in jail since

[5] State court findings and state procedural bars do not affect whether Swearingen may file his habeas petition but will affect consideration of the merits of his claims, if they are reached. *In re Wilson,* 442 F.3d 872, 878 (5th Cir.2006).

December 11, 1998. The claims he seeks to raise in his successive petition primarily relate to forensic evidence that allegedly proves that Trotter's body was left in the forest after his arrest.[6]

2 Swearingen raises two claims of actual innocence. The Fifth Circuit does not recognize freestanding claims of actual innocence on federal habeas review. *See Graves v. Cockrell,* 351 F.3d 143, 151 (5th Cir.2003) (collecting cases). This panel can-

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[6] We note the inconsistencies in the forensic evidence presented by Swearingen. Dr. Carter's affidavit describes "marked decomposition of the head and neck region" and finds that the body was exposed in the woods "within fourteen days of discovery." Dr. G.M. Larken suggests that the body was in the woods and deceased for 3-4 days. Dr. Luis Sanchez concludes that the body was likely in the field for 10-15 days but was "some place else before that." Dr. James Arends, an entomologist, testified that the body was "stored someplace cold" ("frozen") before being placed in woods based on the different decomposition from one end of the body to another. Finally, Dr. White analyzed tissues that he concluded "are of an individual that has been dead no more than two or three days." Obviously, although each expert opines that the body was not placed in the woods on December 8, 1998, the differences undermine the credibility of their conclusions.

The State presented entomological evidence at evidentiary hearings indicating that the body was colonized by the fly *Cynomyopsis Cadavarina,* a secondary colonizer, on December 18, 1998. Nor does any expert testimony weaken the link between the victim's stomach contents and the meal she ate with Swearingen on December 8, 1998.

not overturn the decision of an earlier panel. *Teague v. City of Flower Mound, Tex.,* 179 F.3d 377, 383 (5th Cir.1999).

3 Swearingen asserts that the State sponsored the false or misleading testimony of Dr. Carter, the Harris County Medical Examiner who testified at trial for the State as to the date of death, in violation of his due process rights as set forth in *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). The factual predicate for this claim is an October 31, 2007 affidavit that casts some doubt on her testimony as to the date of death. At trial, Dr. Carter testified that Trotter's body had been left in the forest for approximately twenty-five days, which was consistent with the State's theory that Swearingen murdered Trotter on December 8, 1998, and left her body in the forest. In her affidavit, Dr. Carter does not address the correctness of her original testimony based on decomposition and fungal growth, but states that if she had been provided certain additional data, she would have testified that the findings of her autopsy "are consistent with a date of exposure in the Sam Houston National Forest within fourteen days of discovery, and incompatible with exposure for a longer period of time." Swearingen has made a prima facie showing that this affidavit could not have been discovered previously with the exercise of due diligence. § 2244(b)(2)(B)(i). Unlike his other claims, this claim rests not on the correctness of her testimony (which could have been disputed at any time) but on the State's interactions with its witness, which could not be known before her affidavit. We assume the merits of Swearingen's asserted constitutional error at this stage, and given the importance of Dr.

Carter's expert testimony to the State's case, we find that Swearingen has made a prima facie showing that but for the alleged constitutional error of the State sponsoring the false testimony of Dr. Carter, no reasonable juror could find guilt beyond a reasonable doubt. § 2244(b)(2)(B)(ii).

4 Swearingen also raises several *Strickland* claims, two of which satisfy the prima facie showing required by § 2244(b)(2)(B). First, Swearingen alleges that his trial counsel performed a constitutionally deficient cross-examination of Dr. Carter. Like his *Giglio* claim, this *Strickland* claim is based in part on Dr. Carter's affidavit. As discussed above, this claim should be permitted to proceed. Second, Swearingen alleges that his trial counsel failed to develop histological evidence involving a paraffin block that contained Trotter's body tissue. Because Swearingen's expert, Dr. White, was unable to analyze this evidence until January 15, 2009, the factual predicate for this claim could not have been previously discovered with the exercise of due diligence. § 2244(b)(2)(B)(i). Swearingen has made a prima facie showing that but for the alleged constitutional error of his trial counsel's failure to develop this histological evidence, no reasonable juror could find guilt beyond a reasonable doubt. § 2244(b)(2)(B)(ii). Swearingen's remaining *Strickland* claims fail to satisfy the criteria of § 2244(b)(2)(B).[7]

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[7] Swearingen claims that his trial counsel's failure to develop entomological and pathological evidence was constitutionally deficient; however, the factual predicate for both of these *Strickland* claims could have been previously discovered with the exercise of due diligence.

The factual predicates for Swearingen's remaining claims were either known at the time of trial or, with the exercise of diligence, could have been discovered in time for presentation in his first federal habeas petition.[8] These claims therefore fail to make a prima facie showing of satisfying § 2244(b)(2)(B) and may not be presented in a successive habeas petition.

Accordingly, we authorize Swearing to file a successive habeas corpus petition with the district court limited to: (1) *Giglio* violations in the State's presentation of Dr. Carter's testimony; and (2) *Strickland* violations in trial counsel's cross-examination of Dr. Carter, and his failure to develop histological evidence. We reiterate that this grant is tentative in that the district court must dismiss the motion that we have allowed the applicant to file, without reaching the merits, if the court finds that the movant has not satisfied the § 2244(b)(2) requirements for the filing of such a motion. *In re Morris,* 328 F.3d at 739 (quoting *Reyes-Requena v. United States,* 243 F.3d 893, 899 (5th Cir.2001)).

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[8] Among his other claims, Swearingen asserts that the State violated *Brady* by withholding exculpatory evidence that another man threatened Trotter. In addition to being discoverable with due diligence, in light of the strong circumstantial case against Swearingen and the cumulative nature of the evidence, this claim fails to make a prima facie showing that he will be able to establish by clear and convincing evidence that, but for the alleged concealment of this statement, no reasonable factfinder would have found the applicant guilty of the underlying offense. This claim thus fails to meet either prong of § 2244(b)(2)(B).

We GRANT the motion for a stay of execution. We GRANT IN PART AND DENY IN PART the motion to file a successive petition for writ of habeas corpus and ORDER counsel to show cause.

WIENER, Circuit Judge, specially concurring:

Although my concurrence in the foregoing opinion makes it unanimous, I write separately to address the elephant that I perceive in the corner of this room: actual innocence. Consistently repeating the mantra that, to date, the Supreme Court of the United States has never expressly recognized actual innocence as a basis for habeas corpus relief in a death penalty case, this court has uniformly rejected standalone claims of actual innocence as a constitutional ground for prohibiting imposition of the death penalty.[1] The Supreme Court has, however, made statements in dicta which at least strongly signal that, under the right circumstances, it might add those capital defendants who are actually innocent to the list of persons who-like the insane,[2] the mentally retarded,[3]

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[1] *See, e.g., Graves v. Cockrell,* 351 F.3d 143, 151 (5th Cir.2003) (citing cases).

[2] *See Ford v. Wainwright,* 477 U.S. 399, 409-10, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986)

[3] *See Atkins v. Virginia,* 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

and the very young[4]-are constitutionally ineligible for the death penalty.[5]

I conceive the real possibility that the district court to which we return this case today could view the newly discovered medical expert reports as clear and convincing evidence that the victim in this case could not possibly have been killed by the defendant, yet find it impossible to force the actual-innocence camel through the eye of either the *Giglio* or the *Strickland* needle, and thus have no choice but to deny habeas relief to an actually innocent person. Should that prove to be so, this might be the very

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[4] *See Roper v. Simmons,* 543 U.S. 551, 568, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (holding that imposition of the death penalty on juvenile offenders under eighteen violates the Eighth Amendment).

[5] *Herrera v. Collins,* 506 U.S. 390, 417, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) ("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."); *see House v. Bell,* 547 U.S. 518, 554-55, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006) (emphasizing that *Herrera* "left open" the hypothetical possibility of a freestanding actual innocence claim); *see also Herrera,* 506 U.S. at 419, 113 S.Ct. 853 (O'Connor, J., concurring) ("I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution."); *David v. Hall,* 318 F.3d 343, 347-48 (1st Cir.2003) ("The actual innocence rubric ... has been firmly disallowed by the Supreme Court as an independent ground of habeas relief, save (possibly) in extraordinary circumstances in a capital case.").

case for this court en banc-or the U.S. Supreme Court if we should demur-to recognize actual innocence as a ground for federal habeas relief.[6] To me, this question is a brooding omnipresence in capital habeas jurisprudence that has been left unanswered for too long.

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[6] The Second Circuit has noted the possibility that-in addition to the obvious Eighth Amendment concerns-the continued incarceration of an innocent person raises an "open and significant due process question." *See Triestman v. United States,* 124 F.3d 361, 379 (2d Cir. 1997). In that case, Judge Calabresi said:

> The Supreme Court has stated that a procedural limitation is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. Concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. It is certainly arguable, therefore, that the continued imprisonment of an actually innocent person would violate just such a fundamental principle.

Id. (internal quotation marks and citations omitted). Although, the Second Circuit did not restrict its analysis to the capital context, the Due Process issue only magnifies if we consider the execution of an actually innocent person.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO.09-70036

LARRY RAY SWEARINGEN

Petitioner –Appellant

v.

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

Respondent – Appellee

Appeal from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Opinion 4/7/11, 5 Cir.,____F.3d_____)

Before JONES, Chief Judge and JOLLY and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Pertition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED

ENTERED FOR THE COURT:
EDITH H. JONES
United States Circuit Judge

Amendment VIII to the United States Constitution

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 28 > PART VI > CHAPTER 153 > § 2244

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

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

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)

(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be

sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)

(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

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

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

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

> **(4)** A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)

> **(1)** A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> > **(A)** the date on which the judgment be came final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

TITLE 28 > PART VI > CHAPTER 153 > § 2254

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)

(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)

(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

> **(3)** A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

> **(1)** In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebut-

ting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously un available; or

(ii) a factual predicate that could not have been previously discov ered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for consti tutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate

State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

COUNTY OF MARION

STATE OF INDIANA

AFFIDAVIT OF JOYE M. CARTER, M.D.

My name is Dr. Joye M. Carter. The following statements are, to the best of my knowledge, true and correct:

I am presently the Chief Forensic Pathologist for Marion County, Indiana. I previously held the position of Chief Medical Examiner of Harris County, Texas. On January 3, 1999, in my capacity as Harris County Medical Examiner, I performed the autopsy of Melissa Trotter (OC 99-2). In June of 2000, I testified in *Swearingen v. State*, cause no. 99-11-06435-CR, in the 9th District Court, Montgomery County, Texas.

At trial in Mr. Swearingen's case I was asked if I had formed an opinion about the date of death in this case. Review of my trial testimony, shows that I testified that I had formed an opinion that the date of death was 25 days prior to disappearance. As reflected in my testimony, this opinion was based primarily on the external appearance of the body, including marked decomposition of the head and neck region, and on the degree of maggot activity in this region of the body. I also remarked on the presence of fungal growth, noting that these organisms thrive

in dark, dank and wet environments and are slow growing.

Review of my testimony reveals that I was not asked by prosecutors, or by defense counsel, to address the significance of my internal examination of Ms. Trotter's body. Nor was I asked to address in detail the question of how long Ms. Trotter's body had been left exposed in the Sam Houston National Forest. Instead, the focus of the prosecution and the defense was on whether the forensic evidence indicated a rape or kidnapping had occurred. The majority of the questions from both sides were directed at whether autopsy findings indicated vaginal bruising, blunt trauma to the head, and whether the cause of death was asphyxiation by ligature or a sharp forced entry wound to the neck.

For the purpose of making this statement, I have reviewed the autopsy report of Melissa Trotter and autopsy photographs of her case. I have also reviewed several pieces of forensically important information, that, to the best of my recollection, were not made available to during trial of pretrial proceedings. This information includes a video of the crime scene dated January 2, 1999, the date the body of Melissa Trotter was recovered from Sam Houston National Forest, medical records giving Melissa Trotter's weight before she was reported missing, and temperature data showing daily high, low and average temperatures in the Conroe, Texas area for the period December 8, 1998 through January 2, 1999.

The medical record shows that Ms. Trotter weighed 109 pounds at her doctor's office on November 23, 1998, two weeks before the date she was

reported missing. The crime scene video reveals that Ms. Trotter's body was found in a relatively open, only partially shaded space in the Sam Houston National Forest, rather than in a dark, enclosed or sheltered space. Her lower extremities were clothed; however the clothing on her upper body was bunched up around her arm pits leaving her torso nude from just below the navel to just above the breasts. The temperature data shows that the average temperature was approximately 62°, and the average low temperature was approximately 40°.

The forensic opinions, herein, address the significance of autopsy findings made during the internal examination of Ms. Trotter body in the context of the foregoing information. They represent what I would have testified to at trial if I had been provided the significance of findings made pursuant to the internal examination of Ms. Trotter's body.

Decomposition in this case was strikingly uneven. The decomposition seen in during the external examination of the body, particularly the head and neck region, was substantial. The autopsy report and photographs show partial skeletonization of the head and neck region due to decomposition and insect and mammalian scavenging. As stated in the report, soft tissue was absent from the nose and midfacial areas, and the tongue was dark due to decompositional changes, and there was skin slippage and slippage of the scalp.

The amount of decomposition described pursuant to the internal examination of the body appears less advanced. The autopsy report reflects that internal organs were in their usual anatomic positions. Several of these organs, including the pancreas, the

spleen and the liver, were dissected out, sectioned, examining for pre-existing pathology, photographed and described. Organ weights were near or within normal range.

Pancreas, spleen and liver tissues is known to autolyze quickly. At room temperature, it is not unusual for these organs to liquefy within days. In this case, the body was found exposed in a relatively open, only partially shaded space. Temperatures data indicates and average temperature of approximately 50 degrees, with high temperatures occasionally reaching mid-seventies. The presence of these organs in the condition described at autopsy supports a forensic opinion that the body had not been exposed more than two weeks in the forest environment.

The description of the gastrointestinal tract also supports the foregoing forensic opinion based on autopsy descriptions of the pancreas, spleen and liver in this case. Mild and moderate decompositional changes were noted in some regions; however, the gastrointestinal system was found intact. Furthermore, gastric mucosa, a fragile tissue which decomposes quickly, was still present and was rinsed and described.

Several other findings pursuant to the internal examination are consistent with a date of exposure in the Sam Houston National Forest within fourteen days of discovery, and incompatible with exposure for a longer period of time. For example, the breast tissues was firm and intact, and the gallbladder mucosa is described as yellow-green and velvety in appearance.

The weight of the Trotter's corpse at autopsy increases the level of confidence that can be placed in the forensic conclusions drawn from the findings made during the internal examination of the body. Whether the process of decomposition results in liquification or in desiccation of body tissues, substantial weight loss will normally occur in bodies left for a three week period in the type of environment in which Ms. Trotter's body was found. In this case, the weight of the body nude at autopsy (105 lbs) was only four pounds less than her weight at her doctor's office (109 lbs) two weeks before her appearance. (A newspaper account at the time of disappearance gives her weight alive as 105 pounds). This indicates that Ms. Trotter's body lose less than 4% of its weight from the time the body was left in the woods to the time is was autopsied, and supports a forensic opinion that Ms. Trotter's body was left in the woods within two weeks of the date of discovery on January 2, 1999.

Signed,
Joye M. Carter, M.D.

SUBSCRIBE and SWORN before me the undersigned authority on 31st day of October, 2007, to certify which the witness my hand and seal of office.

Connie M. Fulp
Notary Public

LLOYD WHITE, MD., Ph.D., S.T.L.

ANATOMIC, CLINICAL AND FORENSIC PATHOLOGY

220 FELIX GWOZDZ PLACE
FORT WORTH, TEXAS 76104

Phone: (817) 920-5700, ext. 516; Fax: (817) 920-5713

RE: Forensic pathological opinion regarding the death of Melissa Trotter, decedent in Harris County Medical Examiner Case No. 99-02, and victim in *State of Texas v. Swearingen,* no. 99-II-06435-CR, in the 9th District Court, Montgomery County, Texas.

REFERRAL: From Hilder & Associates, P.c., Attorneys for Larry Ray Swearingen

CASE: *Swearingen v. Quarterman,* Case No. 4:09-cv-300, in the United States District Court for the Southern District of Texas.

SUMMARY

A forensic opinion was requested regarding the date of death of Melissa Trotter. The specific forensic question was how long the body of Ms. Trotter could have lain dead in the forest environment in which it was discovered. A conclusion was reached based on the examination of microscopic slides made in Harris County Medical Examiner case no. 99-02 in the context of other evidence *(vide infra).*

Tissue architecture and subcellular detail that is clearly visible by routine light microscopy of the heart, nerve, fat and vascular tissue on the slides in this case would have disappeared within two or three days under conditions prevailing in the Sam Houston National Forest where the body was found. Leaving aside speculation that the body was preserved elsewhere by refrigeration before it was left in the National Forest, the following conclusion can be stated with scientific certainty: the microscopic evidence demonstrates that Ms. Trotter died no more than two or three days before the body was recovered on January 2,1999.

MATERIALS REVIEWED

Five microscopic slides in Harris County Medical Examiner case no. 99-02, each containing heart, nerve, fat, vascular, blood and lung tissue, were reviewed by routine light microscopy. The slides were made from a histology block in case no. 99-02. A series of photomicrographs was made of the tissue on the slides and are attached as Group Exhibit 'A'.

The autopsy report authored by Dr. Joye M. Carter in case no. 99-02 was reviewed, along with autopsy photographs and crime scene photographs. The autopsy report is attached as Exhibit '8'. A reproduction of a photograph of the crime scene is attached as Exhibit 'C'. A video tape of the crime scene was also reviewed. The tape was made by the Montgomery County Sheriffs Department and showed the position of the body of the victim and the immediate environment from which it was recovered. A photograph of the body at the crime scene showing the exposed torso is attached as Exhibit 'D'.

Certified daily weather data for the period from December 8, 1998 to January 3, 1999, for the Conroe, Texas area, which was collected at the Montgomery County Airport and published by the National Oceanographic and Atmospheric Administration ("NOAA"), was reviewed, as was the unedited hourly Conroe, Texas area data collected at the Montgomery County Airport and published by the National Oceanographic and Atmospheric Administration ("NOAA"). A summary chart of the daily weather data was also reviewed and is attached as Exhibit 'E'.

The trial testimony of Dr. Joye M. Carter in cause number 99-11-06435-CR was reviewed, as were police reports in Montgomery County Sheriffs Department case no. 98AOl74411/69 describing the crime scene and the discovery of the body.

BACKGROUND

On December 8, 1998, Melissa Trotter was reported missing. On January 2, 1999, the body of Ms. Trotter was recovered from the Sam Houston National Forest (National Forest) north of Conroe, Texas. The body, as seen in crime scene photos and the crime scene video, was found face-up in a relatively open space in the forest. It was exposed to the elements, as opposed to being buried or partially buried or in a container or wrapping. The photos and videotape show that the body is in a supine position, one arm above the head, the other extended. Ms. Trotter's sweater and bra were bunched around the neck, leaving her torso and breasts nude. The lower extremities were clad in blue jeans and socks. These items of clothing appear relatively fresh and unsoiled. Police reports state that the body showed very little

decomposition and that there was no odor emanating from the body.

On December 11, 1998, three days after Ms. Trotter disappeared, the defendant, Larry Ray Swearingen, was arrested by law enforcement, and incarcerated in the Montgomery County Jail. It is my understanding that he has been in custody continuously since that time.

On January 3, 1999, Dr. Joye M. Carter, performed the autopsy of Ms Trotter's body at the Harris County Medical Examiner's Office. Photographs were taken at the autopsy documenting the body's external appearance and the appearance of organs that were dissected out during the internal examination of the body. These include photographs of the spleen and heart and the stomach and its contents. According to the autopsy report, tissue samples were taken from all major organs and preserved in formalin. The report does not mention microscopic slides, the results of microscopic examination, or the preservation of tissue in histological blocks.

A histology block was obtained in this case in January of 2009 that contained samples of heart, nerve, vascular, fat and lung tissue. Five slides were prepared from the histology block by the Harris County Medical Examiner Office and were received on Tuesday, January 20,2009, at the Tarrant County Medical Examiner's Office, 200 Felix Gwozdz Place, Fort worth, Texas. The five slides represent step sections (sections at different levels) through the paraffin tissue block. The slides were stained using a standard H and E (hematoxylin-eosin) stain.

HISTOLOGY RESULTS

Overall architecture is intact in each type of tissue that was sampled at autopsy and preserved in the histology block, including alveolar walls, blood vessels, fat cells and muscle cells. Striations in the cardiac muscle are also discernible and the fragment of nerve is normal. Nuclei are plentiful and well preserved in the cardiomyocytes (heart cells), in the endothelium in lung and vascular tissue, and in smooth muscle and nerve cells. Well-preserved erythrocytes are present in capillaries and larger vessels. Some alveoli contain eosinophilic edema fluid. Amorphous debris and scattered bacteria, typical of postmortem artifact, are present in some areas. Putrefactive changes including mild coagulation of cytoplasm and fading nuclear detail are detectable, but very early.

Heart Tissue

Well-stained nuclei are present in nearly all of cardiomyocytes (heart muscle cells). Bacterial growth is evident that would ordinarily accelerate decomposition; however, the cardiomyocytes are well-preserved and nuclear basophilia is prominent.

Very fine cross striations (Z-bands) are visible in the cardiomyocytes. These bands are caused by actin and myosin protein fibers which disappear after one to two days as they denature. The autolyzed heart tissue then loses this cytoplasmic detail. The cytoplasmic detail present in this tissue would have disappeared within 24-48 hours after death, at which time only cellular outlines with red and purple smudges would remain.

The disappearance of nuclear detail within one or two days of cell death is a phenomenon recognized in all basic medical pathology texts. In heart muscle, the period in which heart muscle loses nuclear detail has been worked out by Genest, et al.[1] According to the Genest criteria, the nuclear basophilia throughout the heart will be lost and nuclear staining will not occur after 48 hours following death of the individual.

The appearance of the cardiomyocytes indicates that death did not occur more than two or three days before recovery of the body from the Sam Houston National Forest.

Nerve Tissue

A piece of nerve tissue which is sectioned longitudinally was present in the Harris County Medical Examiner slides in case no. 99-02. It is represented in photomicrograph DSCN3190. Identification of the tissue as nerve tissue is based on the nuclei which are elongated and pointed. The tissue is also surrounded by fat cells. Smooth muscle tissue, however, can look similar, and additional staining would have to be conducted in order to make a definite identification.

The forensically important details are as follows: (1) there is clear staining of the nuclei of the cells and the nuclei are plentiful and well preserved; (2) There is nuclear staining in the endothelial cells of the small blood vessels in the nerve, and nuclear baso-

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[1] See, Genest DR, Singer DB., Obstet Gynecol. 1992 Oct; 80(4):593-600; Genest DR., Obstet Gynecol. 1992 Oct; 80(4):585-92; Genest DR, Williams MA, Greene MF, Obstet Gynecol. 1992 Oct; 80(4):575-84.

philia are well preserved. The nuclei are plentiful and easily visible in nearly every cell; (3) red blood cells visible in the small blood vessels visible at the periphery of the nerve cell have not lysed, nor have they extravasated; and (4) the large white fat cells bordering the nerve tissue are intact.[2]

The subcellular detail, principally the nuclei seen in this photomicrograph, disappears within a matter of 2 or 3 days after death unless the tissue is fixed and preserved. The appearance of the nerve, fat and blood tissue is that of fresh tissue from a recently deceased person and is nearly identical to that from a live person.

The condition of the tissue depicted in photomicrograph indicates that death did not occur more than two or three days before the body was recovered in this case.

Vascular Tissue and Fat Tissue

Vascular tissue was present in fat and lung tissue on the Harris County Medical Examiner slides. Photomicrograph DSCN3180 depicts the lumen of a blood vessel at a relatively high magnification. The vessel contents include intact red blood cells, which are the round bright pink objects, and coagulating protein which is the lighter pink substance. In the lower right hand quadrant, the darkly stained lobulated object may be a neutrophil (a white blood cell), which ordinarily breaks down within 24 hours. The red

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[2] The brown cloudy looking material is a formalin artifact, which means the tissue was put in a fixative, likely 10% formalin. Formalin tends to concentrate in fatty and bloody tissue. It is not a sign of autolysis.

blood cells also have not clumped. In several examples, the disc shaped appearance typical of red blood cells is apparent.

Photomicrograph DSCN3181 shows the lumen and wall of a blood vessel that has been cut longitudinally (lengthwise). Within the lumen there are numerous red blood cells, which have not clumped or lysed. The endothelial lining is detectable immediately proximate to the luminal space. Nuclei of the endothelium are present and stain normally. Smooth muscle forming the intermediate layer of the vessel is also intact. Nuclei are present, staining and intact in this smooth muscle tissue. As is well documented in basic pathology textbooks,[3] nuclear basophilia disappears within two or three days of cell death whether the phenomena is cell death in a living organism or in a dead organism.

There appears to be some shrinkage of the muscle cells that form the intermediate lining of the blood vessel, but this happens very quickly post-mortem and is seen in virtually all autopsies, even after hospital deaths. The outer tissue layer is collagen. The appearance of the tissue is that of fresh tissue exhibiting architecture and cellular detail that disappears within two to three days after death unless the tissue is fixed and preserved.

Photomicrograph DSCN3182 shows a blood vessel that has been cut transversely and is surrounded by fat tissue. The smooth muscle of the vessel wall is clearly visible and fresh in appearance. Several nuclei are evident and have stained. The absence of

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[3] See, Robbins and Cotran, Pathologic Basis of Disease, at 19-20; Anderson's Pathology, at 574-75.

other nuclei in other cells cannot be attributed to autolysis. It is an artifact of transverse sectioning. The smooth muscle cells are elongated cells. The nuclei in this type of cells may be located peripherally and therefore do not lie in the same transverse plane. The transverse section will therefore miss many nuclei that nonetheless are present. Red blood cells are plentiful, contained entirely within the lumen, and they are intact virtually without exception.

The fat cells are also all intact. Several nuclei of these large globular cells have been captured and stain normally. Fat cells are large (50 to 100 microns and more, as opposed to 7 microns for a red blood cell), and their nuclei are flattened and located at the periphery of the cell. As a result, a microscopic section, whether it is made transversally or longitudinally, is likely to miss the nuclei of many fat cells.

Photomicrograph DSCN3l83 shows well preserved fat cells. The section has captured several nuclei which are staining. The thin pink lines are the thin layers cytoplasm of the fat cells, which is displaced to the periphery by the fat molecules that fill the vacuole of the cell. This tissue is well preserved, which would not be the case if decomposition had progressed much more than 48 hours under conditions in the National Forest.

Photomicrograph DSCN3l84 shows vascular tissue surrounded by fat cells. The left half of the photograph shows a blood vessel that has been cut longitudinally. The cellular detail is remarkably well preserved. Blood cells are plentiful, and intact. They have not clumped or lysed. In the upper left hand quadrant, the connection between two blood vessels

is apparent. In the lower central part of the photo is a relatively large vessel that has been cut transversally. Smaller transversally cut vessels appear above and to the right of this structure. The lumens of all vessels are open and filled with plentiful intact red blood cells. The fat cells, without exception, are intact. The appearance is of tissue of a very recently deceased person.

Photomicrograph DSCN3l85 shows vascular tissue at higher magnifications. At this level, the nuclei of the smooth muscle forming the walls of the blood vessels are easily seen. They are plentiful and stain well. This detail would be lost in a maximum of two or three days after death absent steps to fix and preserve the tissue.

Photomicrograph DSCN3l88 shows capillaries within fat tissue. This is almost perfectly preserved tissue. The red blood cells are bright red. There is dark nuclear staining of the nuclei of the endothelial cells surrounding the capillaries. Autolysis is so minimal that the tissue in this photomicrograph is indistinguishable from a biopsy of similar tissue from a living subject.

If Ms. Trotter's body had been in the National Forest from the date of death until the date it was recovered, the vascular tissue, blood, and fat tissue would not retained its structure and detail unless death occurred no more than two or three days before recovery.

Lung Tissue

Photomicrographs DSCN3173, DSCN3174 and DSCN3l75 are photographs of lung tissue taken at increasingly higher levels of magnification.

Photomicrograph DSCN3l73 is the least magnified. It shows well preserved lung tissue. The walls of the alveoli, which are the small air sacks in which the bronchioles terminate, are intact. The septa or folds of the alveolar walls, which increase surface area, facilitating gas exchange, are evident.

Some of the alveolar spaces have filled with fluid, which is evident particularly in the right upper quadrant of photomicrograph DSCN3173. This may be to cardiogenic shock that occurs during strangulation, which can force fluid into the lung spaces.

What looks like brown flecks is what is known as anthracotic material. This is caused byparticulate matter in air pollution and in cigarette smoke. The record in this case indicated that Ms. Trotter was a smoker.

In the lower left quadrant of DSCN3173, several blood vessels are seen. The lumencontains plentiful blood cells which have not clumped.

Even at low magnification the coloration and the structure of the tissue is that of well preserved tissue that has undergone minimal autolysis. The walls of the alveoli are formed by endothelial cells which are elongated to form a membrane that is only several microns thick. Nonetheless these fragile structures are intact throughout this section of tissue, with the exception of the artificial breaks caused by sectioning the tissue in making the microscope slides.

DSCN3l74 shows lung tissue at higher magnification. The photomicrograph shows that the fine architecture of the alveolar sacs is well preserved. The alveoli are formed by epithelial and endothelial cells. The individual cells are elongated - stretched in

appearance - to form a membrane that is only a few microns thick, yet these structures appear well preserved even at higher magnification.

At the level of magnification used to produce the image in DSCN3l74, subcellular structures, particularly the nuclei appear. Here we see staining of the nuclei of the epithelial or endothelial cells. Unless the tissue is frozen or fixed, this detail disappears after about 96 hours in lung tissue according to Genest, *et aI., supra.*

Photomicrograph DSCN3l74 reveals that the brown flecks that were indistinct in DSCN3l73 and might have been an artifact of slide preparation, are what is called anthracotic material or anthracotic pigmentation. This is fine particulate matter that is inhaled by the individual. It is more abundant in people who live in polluted city environments and in those who smoke. Ms. Trotter's cigarette habit would account for the prevalence of anthracotic material seen here. The anthracotic pigmentation is concentrated in macrophages (white cells responsible for cleaning and extruding foreign material from the body) the outlines of which are discernible. This cellular detail would not be evident under the microscope if Ms. Trotter's body had been in the forest more than two or three days before recovery.

Photomicrograph DSCN3l75 is lung tissue. Nuclei are abundant and clearly staining in the elongated endothelial (or squamous epithelial) cells that form the alveolar walls. The fine structure of the alveoli is illustrated particularly well in this photomicrograph. The cells forming the alveolar walls are highly attenuated, i.e., stretched thin to form a thin membrane of cytoplasm. The width is barely more

than the nuclei contained within, and at some point the membrane appears even thinner than these organelles which are typically 5 microns in diameter. The septae, or folds, of the alveoli are clearly visible.

As in the other photomicrographs, the cellular detail is remarkable, and would have been lost in two to three days after death due to autolysis unless the tissue had been fixed and preserved.

DSCN3176 and DSCN3178 are also photographs of lung tissue. DSCN3176 shows edema and anthracotic pigmentation. The structure of the alveoli in the lower left hand quadrant is intact. The tissue in the right hand portion of the photograph is pink due to the influx of fluid into the alveoli. This is not a consequence of autolysis but of cardiac failure. The concentrations of anthracotic pigmentation are in macrophages.

DSCN3178 is another photomicrograph of lung tissue. The upper central part of the photomicrograph is light pink indicating edema. Macrophages containing anthracotic pigmentation are present throughout with the exception of the upper right hand quadrant. The outline of these white cell is apparent, showing that they are intact. It appears that some endothelial cells have sloughed off into the alveolar spaces in the upper left hand quadrant and in the lower half of the photograph. This is indicative of some autolysis. However, the nuclei are present and staining even in the sloughed cells. The large round cell with the large nucleus shown in the lower left hand quadrant of photomicrograph DSCN3178 is most likely a type II pneumocyte, as it is plump due to the large amount of cytoplasm. The cellular detail

is remarkable. Differentiation of cell types, and cell structures, can readily be made. Autolysis is minimal.

DSCN3179 is a photomicrograph of tissue seem photomicrograph DSCN3178, but at higher magnification. The nuclei of the endothelial that apparently have sloughed into the alveolar space are evident. The outlines of the macrophages are particular clear. Once activated, the life span of these white cells, even in living tissue, is only a day or so. The macrophages in this photograph been activated; they have phagocytized the inhaled anthracotic material, which remains concentrated within these cells showing that cell membranes of the macrophages are intact.

The architecture and cellular detail seen in the lung tissue would not be discernible in a body left in the environment of the National Forest unless death occurred within two or three days of recovery.

GROSS ANATOMY

The internal findings and photographs of internal organs are consistent with the results of the microscopic examination of tissue preserved in the histology block in Harris County Medical Examiner case no. 99-02. The description of tissues and of the autopsy procedures to which Dr. Carter subjected the tissues indicates that the organs are from a recently deceased individual. Dr. Carter was able to remove organs, such as the spleen, liver and pancreas, intact and section them. Dr. Carter was able to obtain samples of every major organ and preserve them in formalin. Photographs show nothing but fresh and well preserved tissues.

Internal Findings

Dr. Carter found the pancreas intact and was able to remove it and section it (cut it in slices for gross examination). She was able to identify the pancreatic duct and describe the parenchyma. The pancreas characteristically liquefies or autolyzes quickly after death. Pancreatic cells produce digestive enzymes. Upon death, metabolic processes that prevent the enzymes from acting on the pancreas' own tissue cease. Liquefaction of the pancreas to the point it loses microscopically recognizable internal structure may occur within 24 to 48 hours even under hospital or morgue conditions where the environment and temperature are controlled.

The condition of Ms. Trotter's spleen at autopsy also supports the conclusion that her body was not exposed in the forest until well after Mr. Swearingen was incarcerated. Like the pancreas, the spleen autolyzes relatively rapidly even under hospital and morgue conditions. The autopsy report's description of the spleen, however, is that of an organ from a recently deceased person.

Dr. Carter's examination of the liver is further proof that Ms. Trotter's body could not have been in the National Forest for more than a few days. The liver is a large solid organ that disintegrates rapidly after death. However, Dr. Carter was able to remove the liver and section it. Gross examination did not reveal perforation in the liver tissue due to gas bubbles, which would have formed soon after death under conditions found in the Conroe area in December 1998 and January 1999.

Dr. Carter's findings upon examining the gastro-intestinal tract indicates that Ms. Trotter's body was exposed in the National Forest for only a short period of time before recovery. Dr. Carter reports that she found the esophagus intact. She dissected the stomach, and was able to rinse and examine the gastric mucosa. She found both the large and small bowel intact and unperforated. The mucosal lining of the intestines was still present at autopsy. Mucosa is a fragile tissue that readily decomposes under temperature conditions such as those reported for the Conroe area in December of 1998 and January of 1999. It is in virtue of metabolic processes in the living organism that the gastric mucosa and intestinal mucosa are not digested by the enzymes that they secrete. After death, these tissues quickly disintegrate.

Dr. Carter reported that the weight of the body clothed was 113 lbs, while the nude body was 105 lbs. Medical records show that approximately two weeks before December 8, 1998, Trotter weighed 109 pounds at her doctor's office. The weights are remarkable in that they demonstrate no loss in body mass or a very insubstantial loss. Even if a corpse is not scavenged by insects or carnivores, it will lose substantial mass in less time than 25 days when exposed under conditions prevailing in the National Forest.

Autopsy photographs

Photographs of the stomach (attached as Exhibit 'F' and 'G') confirm that Dr. Carter was able to remove this organ and dissect it. In bodies that have been exposed for more than several days under conditions in which Ms. Trotter's body was found, the

stomach wall autolyzes and perforates, causing the contents to spill into the surrounding peritoneal space. This is because the stomach contains digestive juices one of which is hydrochloric acid. Upon death, when the tissues of the stomach are no longer producing protective secretions, these juices – gastric enzymes and acids - rapidly eat away the stomach wall causing the organ to disintegrate. Even in living persons, the gastric wall will perforate in a similar manner if subjected to an episode ofischemia.

Attached as Exhibit 'H' to this report is the photograph of the spleen that Dr. Carter removed during autopsy. The spleen is a sponge-like organ that contains many vascular spaces and performs the important physiological function of removing red blood cells that are old or damaged and essentially worn out. After death it autolyzes and liquefies rapidly.

The spleen in Autopsy photograph 002, appears to have been dissected since there is a longitudinal incision through the capsular surface and into the parenchyma. The capsular surface is smooth and glistening and the edges of the incision are sharp. Autolysis appears to be minimal to none, and the photograph of the spleen has the appearance of an organ taken from a live or recently deceased individual.

Photographs of Ms. Trotter's heart show that the muscle was still red and relatively fresh looking at autopsy. Exhibit 'I'. The darkening and shrinkage characteristic of decomposition are absent. There are several long incisions and several shorter ones. The edges of the incisions are sharp. Pericardial fat tissue is seen in the upper left part of the photo surround-

ing the aorta. It is glistening and well preserved. The pericardium, except for the incisions, is otherwise intact and the surface is smooth and glistening. Again, the appearance of the heart is what one would expect to find upon autopsy of a recently deceased individual.

FINDINGS BY OTHERS

I have been asked to address the findings of other pathologists who reviewed this case, and the opinion of the courts with regard to these findings. In its opinion of January 26, 2009, in *In Re Swearingen,* cause no. 09-20024, the Court of Appeals for the Fifth Circuit states that,

> We note the inconsistencies in the forensic evidence presented by Swearingen. Dr. Carter's affidavit describes "marked decomposition of the head and neck region" and finds that the body was exposed in the woods "within fourteen days of discovery." Dr. G. M. Larken suggests that the body was in the woods and deceased for 3-4 days. Dr. Luis Sanchez concludes that the body was likely in the field for 10-15 days but was "some place else before that." Dr. James Arends, an entomologist, testified that the body was "stored someplace cold" ("frozen") before being placed in woods based on the different decomposition from one end of the body to another. Finally, Dr. White analyzed tissues that he concluded "are of an individual that has been dead no more than two or three days." Obviously, although each expert opines that the body was not placed in the woods on December 8, 1998, the differences undermine the credibility of their conclusions.

I have reviewed the affidavits of Dr. Carter and Dr. Larkin, and was present during Dr. Sanchez's testimony. These pathologists had seen the microscopic slides when they gave their opinions.

Dr. Larkin's and my view that that the gross findings indicates that Ms. Trotter's body was in the woods for significantly less time than the fourteen days does not mean that there is doubt among the pathologists about what the evidence shows, nor does it mean that the evidence is inconclusive, regarding whether the body of Melissa Trotter was left in the woods after Mr. Swearingen was incarcerated. The consensus of these forensic pathologists, based on gross anatomy, is that Ms. Trotter's body could not have been in the National Forest more than fourteen days, which means that the pathologists are in agreement that the body was left in the woods at least one week after Mr. Swearingen was incarcerated. Again, it is important to bear in mind that the microscopic appearance of the organs and tissues was unknown and was not taken into consideration by Dr. Carter, Dr. Sanchez or Dr. Larkin at the time these opinions were formulated.

The State and the courts have argued that the Dr. Carter's findings upon dissecting the stomach support the State's theory that Ms. Trotter died at least twenty two days and as much as twenty-five days before her body was found. According to both the State and the courts, the stomach contents contained the remnants of a meal that Ms. Trotter ate either at the College Campus or at McDonald's restaurant on the day she disappeared. These allegations have always been, and remain, pure speculation unsupported by any of the facts in evidence.

Autopsy photographs of the stomach show chyme mixed with some bloody fluid that is probably due to the dissection. The description Dr. Carter gave at trial of the stomach contents is consistent with the ingestion of a wide variety of foodstuffs commonly served at home and at numerous institutions. Dr. Carter described pieces of white meat, some green vegetable material, and some white material that she thought might have been from a potato. Dr. Carter was unable to say what animal the white meat was from or what plant was the source of the green substance. There is, in fact, nothing at all about the stomach contents to suggest, much less conclude beyond reasonable doubt, that Ms. Trotter's body was exposed in the Sam Houston National Forest for more than two or three days.

The State and the courts have also relied on Dr. Carter's testimony that fungi or mold she says that she observed on Melissa Trotter's body indicated that the body had been in the woods for approximately 25 days. Dr. Carter's autopsy report and testimony does not indicate that samples of fungi and mold were taken or the type of fungi or mold identified. The record does not indicate where specifically the fungi or mold was found, nor indicate whether growth was luxuriant or sparse. Autopsy photographs were not taken in order to document the presence of fungal or mold growth. The discoloration of the skin that is seen in those photos that were taken of the body is typical of what is seen in early stages of decomposition and cannot be attributed to the growth of fungi or mold.

CONCLUSION

The slides in Harris County Medical Examiner case no. 99-02, when examined by routine light microscopy, clearly showed tissue architecture and subcellular details that disappear within two or three days of death, unless the tissue is fixed and preserved. It is therefore scientifically certain that Ms. Trotter body was recovered no more than two or three days after it was left in the National Forest. Without evidence that the body was preserved in another location before being deposited in the National Forest, the microscopic evidence permits only one forensic conclusion, and that is that Ms. Trotter died no sooner than December 29 or December 30, 1998.

The gross anatomical findings corroborate the conclusions that must be drawn from the histology in this case. The descriptions and photographs of internal organs are of the tissue of a recently deceased individual.

Larry Swearingen was incarcerated on December 11, 1998, and has remained in custody since that time. The scientific evidence conclusively demonstrates that Mr. Swearingen could not possibly have killed Ms. Trotter and left her body in the National Forest as the State maintains.

Lloyd White, M.D., Ph.D., S.T.L.

Dated: 14 March 2009

THE COUNTY OF GALVESTON

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OUTSIDE CONSULTATION CASE # OC-2009-001

Date: April 14, 2009

To: Attorney James Rytting

From: Stephen Pustilnik, M.D.
Chief Medical Examiner

RE: Review of Harris County Medical Examiner's case # 99-02, Melissa Trotter.

I have reviewed the autopsy report, microscopic slides, the National Oceanographic and Atmospheric Administration's reported temperatures for Mont-

gomery County for the period December 7, 1998 to January 3, 1999, the detailed consultation of Robert Lloyd White, M.D., from Fort Worth, Texas, the autopsy report from Joye Carter, M.D., the autopsy photographs, and the scene photographs of the case involving Melissa Trotter.

The review of the microscopic slides demonstrates multiple tissue types in a remarkably good state of preservation. Nuclear and cytoplasmic details of the tissue and other supportive elements such as lung tissue, myocardium, adipose tissue, blood vessels, blood elements, and connective tissue are all in remarkably good shape showing little, if any, degradation of nuclear or cytoplasmic detail. Bacterial growth is evident in the tissues of the heart and lungs; however, these have not formed typical postmortem colonies. Dr. White accurately characterized these tissues in his consultation.

Review of the autopsy photographs as well as scene photographs demonstrate a remarkably well preserved body without evidence of greening, marbling, or bloating. Skin slippage is prominent and of the superficial layers. The tips of the fingers are without predation and show no mummification changes or desiccation. The tips of the toes are also well preserved and show no mummification or desiccation. The ears are without mummification or desiccation.

A photograph of the gastric contents demonstrates whole red meat (not ground meat) and scallions. A photograph of the gross appearance of the spleen demonstrates a remarkably well preserved cut edge as well as an intact capsule without evidence of liquefaction of the splenic parenchyma. The

photograph of the heart demonstrates well preserved myocardium which has sharp cut margins after the post-mortem examination without evidence of moderate or severe decomposition. The gross appearance of the heart is concordant with the microscopic appearance of the myocardium on the sections reviewed.

Review of the scene photographs demonstrates that the deceased in an open wooded area easily accessible by predatory creatures as well as insect infestation. Photographs at the scene as well as in the morgue prior to disrobing demonstrate one single insect larvae on the posterior surface of the thorax on the outside of the clothing. No maggot activity is identified on the partially skeletonized areas of the head and neck or exposed areas of the abdomen or hands.

The predatory activity to the head and face is something that can take place within the first several hours after death when the deceased is in an appropriate environment with free access to the remains by the local preditors.

Review of the National Oceanographic and Atmospheric Administration's recorded temperatures for Montgomery County and the Conroe airport during the period of December 7, 1998 through January 3, 1999 demonstrates a wide range of maximum temperatures from 34 degrees Fahrenheit to 79 degrees Fahrenheit and a minimum temperature range of 26 degrees Fahrenheit to 49 degrees Fahrenheit. For the last 6 days prior to the discovery of the deceased the maximum temperature range was from 62 degrees to 73 degrees and the minimum temperature range was from 34 degrees to 53 degrees. These temperature ranges from December 7, 1998 to January 3, 1999

would have promoted a far more advanced state of decomposition with greening, marbling, and bloating. These post-mortem changes are absent.

In review of the consultation by Robert Lloyd White, M.D., I am in agreement that the decomposition, specifically the heart and lungs, is consistent with a death having taken place within only several days prior to discovery of the deceased if there was no prior refrigeration. Dr. White limits the outside range of this time of death to three days prior to discovery; however, since the night time temperatures for the last week extended down to the mid 30's it would not be unreasonable to extend this period of retention of normal histologic appearance of the heart tissue by one to two days. Because of the cooling of the deceased to environmental temperature and the subsequent warming during the day, the more superficial layers of the tissues of the deceased may therefore decompose at a slightly different rate than the internal organs which would retain a slightly more constant temperature; however, in the state of decomposition of the deceased, more extensive insect activity with more extensive involvement with fly eggs and maggots would be reasonably expected. These opinions are based upon the assumption that the deceased was not refrigerated prior to exposure to the environment.

In summary, without prior refrigeration the deceased was killed within reasonable certainty between five to seven days prior to her discovery. This would put the date of death on or about December 26, 1998. In addition, the absence of mummification and desiccation to the ears, as well as

to the fingertips is consistent with there not having been prior prolonged refrigeration of the deceased.

Stephen Pustilnik, M.D.