

No. 11-233

**In the
Supreme Court of the United States**

LARRY RAY SWEARINGEN,
Petitioner,

v.

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

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

In *Herrera v. Collins*, the Court “assume[d], 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.” 506 U.S. 390, 417 (1993). In addition to executive clemency, Texas provides an avenue to process *Herrera*-type actual-innocence claims through its judicial system.

Petitioner Larry Swearingen has repeatedly invoked those procedures: six of his seven state habeas corpus applications have asserted actual-innocence claims. State courts are currently considering his most recent actual-innocence claim, and an evidentiary hearing will take place in February 2012 regarding the merits of that claim.

Swearingen’s petition raises the following questions:

1. Does Swearingen’s case require the Court to resolve the question whether a freestanding actual-innocence claim is cognizable in federal court?
2. Did the courts below correctly dismiss Swearingen’s successive federal habeas petition because it failed to satisfy the requirements of 28 U.S.C. § 2244(b)?

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BRIEF IN OPPOSITION

STATEMENT

I. SWEARINGEN IS CONVICTED OF THE CAPITAL MURDER OF MELISSA TROTTER

On December 8, 1998, Melissa Trotter, a 19-year-old student at Montgomery County Community College, disappeared. 25.RR.18.¹ Her body was discovered in the Sam Houston National Forest on January 2, 1999. 28.RR.11-13. Petitioner Larry Ray Swearingen was charged with capital murder. 01.SHCR.483. A jury convicted Swearingen in 2000, and he received a death sentence. 01.SHCR.484-487.

A. Events Preceding Melissa's Disappearance

Two nights before her disappearance, on December 6, 1998, Swearingen and Melissa were seen together for the first time by several witnesses at a convenience store. 24.RR.37-47, 104-112. They spoke for about two

1. Citations of “_RR.” refer to the reporter’s record from Swearingen’s trial, preceded by the volume number and followed by the page numbers. Citations of “SHRR.” refer by page number to the state habeas evidentiary hearing held in July 2007. Citations of “_SHCR.” refer by page number to the clerk’s record for each of Swearingen’s state habeas corpus proceedings. Each application will be identified using as a numerical prefix the numerical suffix used by the Texas Court of Criminal Appeals. Thus, Swearingen’s state habeas applications will be identified by the prefixes “01” (first application), “04” (second), “05” (third), “08” (fourth), “09” (fifth), “10” (sixth), and “11” (seventh). The other numerical suffixes, “02,” “03,” “06,” etc., were assigned to other pleadings seeking non-habeas relief. Citations of “USCA5.” refer to pages of the federal district court record. Citations of “DE.” refer by docket entry number to documents filed in the federal district court. Citations of “App.” refer to the appendices to Swearingen’s certiorari petition.

hours, he gave her his pager number, and they made plans to meet. 24.RR.26-28. This meeting was recorded on the store's security camera. 24.RR.37-40, 50-51, 67-71, 79-91; State's Ex. 9, 9-A. At trial, Swearingen initially claimed he only spoke to Melissa for a few minutes, 32.RR.136, but when confronted with the surveillance video, admitted he was lying, 33.RR.10-11.

On December 7, while helping an acquaintance, Bryan Foster, move a chest of drawers, 24.RR.166-169, 171-173, Swearingen received a message on his pager, 24.RR.173. Swearingen commented that he was going to be meeting a young woman for lunch the next day, and suggested that the meeting would involve a sexual liaison. 24.RR.173-175. When they arrived at Foster's home, Swearingen asked if he could use the phone to call a girl named Melissa Trotter. 24.RR.176-177, 198-199.

B. Events Surrounding Melissa's Disappearance

On the morning of December 8, Melissa left her parents' home to study at Montgomery College. 25.RR.3-8, 10. Her brother had just returned from the Army, and the family made plans together for that evening. 25.RR.4-5, 7-8.

A classmate, Nichole Bailey, saw Melissa that morning. 27.RR.44-45. Nichole needed Melissa to contact her later, so she wrote her own name and number on a piece of paper and gave it to Melissa. 27.RR.43-47. Cafeteria worker Jonathan Lavergne saw Melissa come in, order tater tots, and leave the

cafeteria with her food sometime between noon and 1:00 p.m. 25.RR.52-55.

Melissa left a review session around 1:15 p.m., telling her instructor that "she had to meet somebody." 26.RR.5. Several witnesses saw her talking to a man in the computer lab shortly after that. 26.RR.6; 25.RR.29, 44; 25.RR.182-183. Witnesses described this person as a "tall, heavy-set" man, 25.RR.184; see also 25.RR.37, and identified him as Swearingen, 25.RR.29; 25.RR.212-213. Then they both left, with one witness seeing them walk out together. 25.RR.188; 26.RR.8-9. Melissa's car was left in the school parking lot, and her family never saw her again. 24.RR.127; 25.RR.7, 9-10; 28.RR.128.

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

Around 3:00 p.m., Swearingen's landlord saw Swearingen's truck leaving from behind his trailer home. 26.RR.11-15. At 3:03 p.m., Swearingen made a call using a cell tower in Willis near Farm-to-Market Road (FM) 1097, which would be consistent with Swearingen traveling from his trailer to the Sam Houston National Forest. 27.RR.67, 72-73; State's Ex. 63.

At approximately 4:00 p.m., Swearingen's wife paged him from his stepfather's home. 29.RR.166.

Swearingen called her at 4:25 p.m, utilizing a cell tower near his trailer home. 27.RR.67-68; 29.RR.166, 182-183. Shortly thereafter, Swearingen picked up his wife and daughter. 29.RR.166, 182-183. They arrived back home at around 5:30 or 6:00 p.m. 29.RR.167-169; 26.RR.14-15, 22-23.

When they returned, the home looked "ransacked" to Swearingen's wife. 29.RR.172-173. Swearingen claimed that someone had been in the house, but nothing was missing. 29.RR.169. A package of Marlboro Lights cigarettes and a red lighter were sitting on their television. 29.RR.169-170, 172. Neither Swearingen nor his wife smoked. 29.RR.169-170. Trial testimony showed that Melissa owned such a lighter and smoked Marlboro Lights. 29.RR.238. Markings on the cigarette package indicated that it had come from a store a quarter mile from Montgomery College. 27.RR.131, 166-168, 193, 196-199. Swearingen's wife also noticed that it looked like someone had been on their bed, because it was not the way she left it that morning. 29.RR.172-173.

At 7:09 p.m., 27.RR.69, Swearingen called Phyllis Morrison, a woman he previously dated. 25.RR.228-230. He told Morrison that he was "in some kind of trouble" and that the police might be looking for him. 25.RR.230-231. Cell phone records indicated that Swearingen was traveling on Interstate 45 at the time, using a cellular tower that overlapped with the area where Melissa's body was found. 27.RR.69, 71, 92-94.

At 8:05 p.m., Swearingen called the police and reported a burglary. 27.RR.3, 6-8; State's Ex. 258.

Swearingen lied to the investigating officer, claiming that he had been out of town from 11:00 a.m. on December 7th until 7:30 p.m. on December 8th. 27.RR.11, 20. He also claimed that someone had rifled through his belongings, and stolen his VCR and jet ski. 27.RR.14. In fact, Swearingen had taken his jet ski in for repairs. 27.RR.25-28, 36-39.

On December 9 or 10, Bryan Foster and his wife learned that Melissa Trotter was missing. 24.RR.178, 200-201. They recognized the name and contacted Swearingen, seeking to confirm that Melissa Trotter was the young woman he had called earlier. 24.RR.178, 180-181, 197-202. Swearingen was very terse, denying that her last name was "Trotter." 24.RR.180-181. Swearingen claimed that Melissa's last name was "Childers or Childress or something like that." 24.RR.202. When Mrs. Foster told Swearingen that she remembered he had said the girl's last name was "Trotter," and that a girl named Melissa Trotter was now missing, the phone went dead. 24.RR.202-203.

C. Swearingen's Arrest

On December 11, 1998, Swearingen told an acquaintance that he anticipated he would soon be arrested. 25.RR.103-104, 107. That day, Scott Davis, a plain-clothes detective investigating Melissa's disappearance, went to the convenience store where Swearingen had met Melissa to pick up the store's surveillance tape. 25.RR.108, 110-111, 114-115, 119, 147, 169-170. Davis saw Swearingen's truck at the store and radioed it in because Swearingen had been identified as a potential witness in the case.

25.RR.113-116, 147. Swearingen saw Davis using the radio, returned to his truck, and sped away. 25.RR.116, 172-173.

Swearingen led Davis on a high-speed chase before finally stopping at his parents' house. 25.RR.116-117, 148-149. Davis told Swearingen that he was investigating Trotter's disappearance. 25.RR.117-118, 149-150. Swearingen told Davis that he had met Trotter on December 6, they had "talked briefly, five to ten minutes, he gave her the pager number, and that was it." 25.RR.121, 151-152.

When other officers arrived on the scene, Swearingen was arrested on outstanding warrants. 25.RR.119, 122, 148, 152-154. They noticed that his neck, cheek, ear, hair line, back, and shoulders all had redness, resembling "[s]cratch marks." 26.RR.41-42; State's Exs. 58, 60-61.

D. Melissa's Body Is Found

On January 2, 1999, several men searching for misplaced hunting gear in the Sam Houston National Forest came across a dead body, which was ultimately identified as Melissa's. 28.RR.11-14, 23-25, 27, 32-34; 29.RR.3-4, 123-124. She was found in the same clothes that she had worn on December 8. 25.RR.6-7. It appeared that her body had been dragged to its resting place. 28.RR.92-93, 103-104, 107; 29.RR.47-48; State's Exs. 122-124, 127-128. Her right shoe had come off and was lying alongside her body. 28.RR.14, 92; State's Exs. 121, 126, 130.

Dr. Joye Carter, then the Chief Medical Examiner for Harris County, Texas, performed an autopsy.

29.RR.12, 16. There was a ligature around Melissa's neck, part of a nylon stocking, which was "damp" from blood and "liquefying of the [neck] tissue." 29.RR.29, 32, State's Ex. 149. There was also a "sharp, forced injury" to the neck, along with subsequent animal activity. 29.RR.34; State's Ex. 151. Dr. Carter concluded that Melissa died from asphyxia due to strangulation with the ligature. 29.RR.47.

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

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

The internal examination revealed what appeared to be chicken and a form of potato in Melissa's stomach, together with a small amount of greenish vegetable material. 29.RR.38. Dr. Carter testified that in the digestive process, a person's stomach usually will not

empty in less than two hours, and any food within the stomach at the time of death will remain there. 29.RR.38-39.

Based on the state of decomposition, the fungal development, and insect progression, Dr. Carter concluded that Melissa had been dead for approximately 25 days. 29.RR.44-45.

Swearingen's expert, pathologist Raul Lede, agreed that Melissa died from ligature strangulation, had her throat cut, and that the evidence of bruising on the left side of her face was consistent with being struck. 32.RR.59, 111, 119-121. Dr. Lede also testified that the bruising of Melissa's tongue was caused by a blow to her jaw. 32.RR.117-118.²

The note Nichole Bailey had given her the day she disappeared was found in one of the pockets of Melissa's jeans. 27.RR.46; 29.RR.50; State's Ex. 139.

E. Additional Evidence Developed During the Investigation

Police searched Swearingen's trailer home, his truck, and his parents' home, 27.RR.106-110, 119-120, and found incriminating evidence. The Marlboro Lights cigarettes and the red lighter were in one garbage bag in his home, and a McDonald's french fry bag and Chicken McNuggets box were found inside the

2. Dr. Lede also confirmed Dr. Carter's findings regarding the date and time of death (i.e., "Melissa Trotter had died on the date of her disappearance. . . . within about 4 hours of having eaten her last meal"). 04.SHCR.302 (Affidavit of Jerald Crow, Defense Trial Counsel, State's Answer to Second State Application).

kitchen garbage. 27.RR.119, 129-131, 159-161, 167-168, 192-194, 196-198; 29.RR.238. Police also obtained the jacket Swearingen was wearing the day Melissa disappeared and carpet fiber samples from his master bedroom. 25.RR.84, 155; 27.RR.126, 153, 156-157.

Hair, fiber, fabric, and paint samples were collected from Swearingen's truck. 27.RR.169, 171-175, 180; 28.RR.4, 6-8. Police could not test the seats of his truck for blood because they appeared to have been cleaned with Armor All protectant wipes, which causes false positives. 27.RR.176-178. Two empty containers of Armor All were found in the garbage at Swearingen's home. 27.RR.159, 161, 178.

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

When cleaning out Swearingen's abandoned trailer home on January 6, 1999, Swearingen's landlord found some pantyhose with one of the legs cut off. 29.RR.128-131. The pantyhose had cut crotch, and a

run down to the "jagged, cut area[.]" 29.RR.202-203. The pantyhose at Swearingen's home were determined to be a "unique physical match," "to the exclusion of all other pantyhose," with the ligature found around Melissa's neck. 30.RR.60; see also 30.RR.57-60; State's Exs. 211-214. Though the police had searched Swearingen's trailer before, the house was carpeted in clothing, and "[a]t the time, pantyhose didn't mean anything to [them] because [they] hadn't found the body yet." 27.RR.143.

On December 17, before Melissa's body was found, a man who lived down the street from Swearingen's parents found a torn piece of paper bearing Melissa Trotter's name lying along the road. 28.RR.133-136, 145; 29.RR.167; 31.RR.4-5; 33.RR.81. He collected additional pieces of paper and turned them over to the authorities. 28.RR.136-139, 145-149, 154-156, 158. The torn paper proved to be three items: (1) Melissa's class schedule; (2) a form necessary to keep Melissa on her father's health insurance plan; and (3) an envelope for mailing the form. 28.RR.162-163, 169-173; State's Exs. 170-A, B, C. Melissa's father had asked her to have the school complete part of the form and then put the form in the mail. 28.RR.169-173. Melissa's fingerprints were also on the documents. 28.RR.164-165.

F. Swearingen Continues To Incriminate Himself While in Jail.

Swearingen continued to incriminate himself through his post-arrest conduct. A friend of Swearingen's, Elyese Ripley, testified that she visited him in jail on January 9, 1999. 30.RR.167, 169, 180,

182. Swearingen wrote on a piece of paper as he spoke to Ripley, and then held the paper up against the glass partition. 30.RR.171-172. The note asked Ripley to lie and say that she had been with Swearingen on December 8, the day that Melissa disappeared. 30.RR.173-174. After Ripley read the note, Swearingen destroyed it. 30.RR.174-175.

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

Swearingen sent the copied version of the letter to his mother, claiming he had received it in jail. 31.RR.5, 11-13. Swearingen's stepfather took the letter to a friend in the Willis Police Department, who realized that the letter contained an account of Melissa Trotter's murder by someone alleging to have personal knowledge. 31.RR.4-6, 11-12, 15-19. A professional translator and interpreter determined that the letter was written with an English grammatical structure, as though someone had simply translated English words within English sentences directly into Spanish with a language dictionary. 31.RR.62-63, 67.

The letter provided details of Melissa's murder, and read in part:

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

State's Exs. 181-A, 181-B. The letter claimed that Melissa was murdered by a man named "Ronnie," and was signed with the name "Robin." See *id*; see also 31.RR.69.

Within Swearingen's cell, authorities found a handwritten list of Spanish-to-English word translations containing dozens of words used within the letter. 31.RR.31-32; State's Exs. 184-185. A handwriting analyst concluded that Swearingen had written the Spanish-to-English translation list, and that Coleman had written the letter Swearingen sent to his mother. 31.RR.41, 46-47. Swearingen's and Coleman's fingerprints were found on the letter. Swearingen's fingerprints were also found on the translation list. 31.RR.75-76.

On May 17, 2000, Swearingen was joined in his cell by Bill Kory. 31.RR.91-93. When Kory told Swearingen that he was in jail because he had a bond revoked, Swearingen replied, "That's nothing. I'm in here for [capital] murder of someone." 31.RR.94-96, 103. Kory asked whether he actually committed the crime, and Swearingen responded, "Fuck, yeah, I did it." 31.RR.96. Swearingen told Kory that he was just trying to beat the death penalty. 31.RR.96-97.

G. Punishment-Phase Evidence

Several women testified to Swearingen's longstanding, savage proclivity for threatening, abducting, binding, beating, raping, and strangling women.

Laura Meier

Ex-girlfriend Laura Meier testified that after she broke up with Swearingen, he came over to her home and attacked her. 35.RR.84, 86-87. Swearingen strangled her, wrestled her to the floor, and attempted to handcuff her. 35.RR.98-102. He then told her to get dressed because they "were going to go for a ride." 35.RR.103. When Meier tried to stall, Swearingen struck her and raped her. 35.RR.103-105.

A few days later, Swearingen broke into her house by shooting out her window, trapped her at gunpoint in her bedroom, and kidnapped her in her own car. 35.RR.112-116, 297-298. When Meier tried to escape, Swearingen attempted to pull her back in by her hair, and then forced her back into the car by threatening to shoot her. 35.RR.117-120. He then drove her through a heavily wooded area in the Sam Houston National

Forest, to a spot within one mile of where Melissa's body was found, before driving back to her home. 35.RR.124-128, 267.

Cecilia Castellanos

When Swearingen caught Cecilia Castellanos, a former live-in girlfriend, discussing going home to see her family in Los Angeles, he "started getting physical." 35.RR.205-209, 212. He pushed Castellanos into their bedroom, locked her in the closet, and bound and gagged her. 35.RR.213-215, 217. Castellanos testified that Swearingen struck her repeatedly and threatened her with a knife when she tried to scream for help. 35.RR.217. He then ordered her to take a bath and put on some crotchless black pantyhose. 35.RR.217-218. Swearingen then raped her, tied her up and gagged her again, and locked her back in the closet. 35.RR.218-219.

Michelle Cates

Michelle Cates, Swearingen's first ex-wife, 36.RR.56-58, described a marriage characterized by frequent beatings and strangulation. 36.RR.60-61. During one incident, Swearingen raked her face with a carpet stretcher (a device with claw-like nails on one end), telling her that "if [she] left him, he'd make sure that nobody else would want [her]," then hit her and tried to strangle her. 36.RR.60. Cates left Swearingen and moved in with her brother. 36.RR.61.

Swearingen later showed up to her work and lured her over to his truck by claiming that her child had been injured. 36.RR.63. He then grabbed Cates, beat her, and abducted her, 36.RR.63-64.

On another occasion, Swearingen followed Cates home from work brandishing a gun, shooting at her car, and trying to run her off the road. 36.RR.67-68. When Cates stopped, Swearingen punched her, put a knife to her throat, abducted her again, and raped her. 36.RR.69-70, 74-75.

Teresa Castleschouldt

Teresa Castleschouldt, a neighbor of Swearingen's parents, testified that one day he appeared at her house looking for a dog. 36.RR.156-160. He used her phone to make a call, left his number on a piece of paper in the kitchen in case she saw the dog, and then departed. 36.RR.166-169. Castleschouldt left her home, and when she returned, she saw signs that her house had been broken into, and the paper with Swearingen's number on it was missing. 36.RR.178-183. She fled her home and went to a neighbor's to call the police. 36.RR.183-184.

Swearingen then reappeared, coming from Castleschouldt's property to the neighbor's house. 36.RR.185-186. He said to Castleschouldt, "I just come to tell you that I found my dog." 36.RR.187. There was no dog with Swearingen. 36.RR.185-187.

After the police arrived, the Castleschouldt home was searched and a pair of her pantyhose were found in her bathroom. The legs of the pantyhose had been cut out. 36.RR.191-194. A pair of her underwear had also been left on her bed. 36.RR.197-198.

II. Swearingen's Direct Appeal and State and Federal Habeas Proceedings

Since his first habeas application in March 2002, Swearingen has been asserting the same three arguments in piecemeal: forensic science conclusively demonstrates his innocence, his trial attorney was ineffective for not eliciting that fact, and the State conspired against him by withholding, ignoring, or fabricating evidence.

Swearingen has asserted his claims in one direct appeal, ten habeas applications, and two evidentiary hearings. He has two more state applications scheduled for an evidentiary hearing in February 2012. In each subsequent application, he reasserts the old claims as true, even where the reviewing judge rejected them. Compare, *e.g.*, Pet. 12 (“The State falsely denied that the [entomological] evidence existed, despite having it on hand”) with, *e.g.*, 04.SHCR.517-522, Findings of Fact and Conclusions of Law, WR-53,613-04, 13 (D.Ct. Montgomery County, Tex. September 13, 2007) (finding the State neither knew of nor possessed that evidence).

A. Direct Appeal and Initial Habeas Proceedings

The Texas Court of Criminal Appeals (CCA) affirmed Swearingen’s conviction and sentence, *Swearingen v. State*, 101 S.W.3d 89, 97, 101 (Tex. Crim. App. 2003), and he did not file a certiorari petition. In his first state application, Swearingen unsuccessfully claimed newly discovered entomological evidence proved his innocence. 01.SHCR.13-29; *Ex parte Swearingen*, No. WR-53,613-01 (Tex. Crim. App. May 21, 2003).

In his initial federal petition, Swearingen also unsuccessfully alleged actual innocence based on entomological evidence. *Swearingen v. Dretke*, No. 4:04-cv-02058 (Petition), DE.19 at 22-30 (S.D. Tex. May 21, 2004); *Swearingen v. Dretke*, No. 4:04-cv-02058, DE.39 (S.D. Tex. Sept. 9, 2005), *aff'd*, *Swearingen v. Quarterman*, 192 F. App'x 300 (5th Cir. 2006), *cert. denied*, *Swearingen v. Quarterman*, 549 U.S. 1216 (2007).

B. Second and Third State Habeas Applications

Swearingen's second state habeas application also alleged that new forensic evidence demonstrated his innocence. 04.SHCR.11-17. After a full evidentiary hearing, this claim was rejected. *Ex parte Swearingen*, No. WR-53,613-04 (Tex. Crim. App. Jan. 23, 2007) (remand for hearing); 04.SHCR.505-543 (findings and conclusions); *Ex parte Swearingen*, No. WR-53,613-04, 2008 WL 152720 (Tex. Crim. App. Jan. 16, 2008) (relief denied).

The same day that his second state habeas application was denied, Swearingen filed his third such application, alleging that newly discovered pathological evidence demonstrated his innocence. 05.SHCR.2-4. After another evidentiary hearing, this claim was rejected. *Ex parte Swearingen*, No. WR-53,613-05, 2008 WL 650306 (Tex. Crim. App. Mar. 5, 2008) (remand for hearing); 05.SHCR.Supp.163-87 (findings and conclusions); *Ex parte Swearingen*, No. WR-53,613-05, 2008 WL 5245348 (Tex. Crim. App. Dec. 17, 2008) (relief denied).

**C. Fourth and Fifth State Habeas
Applications and Second and Third
Federal Habeas Petitions**

On January 23, 2009, Swearingen's fourth and fifth state habeas petitions were filed, claiming, among other things, that new histological evidence proved his innocence. 08.SHCR.2-15; 09.SHCR.2-48. The CCA dismissed both filings. *Ex parte Swearingen*, No. WR-53,613-08, 2009 WL 249759 (Tex. Crim. App. Jan. 27, 2009); *Ex parte Swearingen*, WR-53,613-09, 2009 WL 249778 (Tex. Crim. App. Jan. 27, 2009).

Meanwhile, on January 20, 2009, Swearingen filed in the Fifth Circuit a petition seeking authorization to file a successive federal habeas petition based on the same histological evidence. *In re Swearingen*, No. 09-20024 (Pet. for Authorization to File Successive Habeas Pet.). The Fifth Circuit remanded to the district court to determine whether Swearingen met the requirements for filing a successive federal habeas petition. *In re Swearingen*, 556 F.3d 344 (5th Cir. 2009); App.68a-81a. That is this case.

In a detailed opinion, the district court concluded that Swearingen had not met the requirements for a successive petition. *Swearingen v. Thaler*, No. H-09-300, 2009 WL 4433221, App.4a-67a (S.D. Tex. Nov. 18, 2009). The Fifth Circuit affirmed. *Swearingen v. Thaler*, 421 F. App'x 413, App.1a-3a (5th Cir. 2011) (reh'g denied).

On April 5, 2011, Swearingen filed a third federal habeas petition and simultaneously moved to transfer the petition to the Fifth Circuit. *Swearingen v. Thaler*,

No. 4:11-cv-01219 (Petition), DE.1 (filed S.D. Tex. April 21, 2011) (Third Pet.). The Fifth Circuit declined to authorize the successive filing. *Swearingen v. Thaler*, No. 11-20276 (5th Cir. May 9, 2011).

D. Sixth and Seventh State Habeas Applications

On June 22, 2011, Swearingen filed his sixth state habeas application, alleging actual innocence based on forensic anthropological and entomological evidence. *Ex parte Swearingen*, No. WR-53,613-10 (Petition), at 2-3 (filed D.Ct. Montgomery County June 22, 2011). On July 11, 2011, he filed a document entitled "Supplemental Briefing," which the CCA has treated as a seventh application because it raised new and separate due-process claims. *Ex parte Swearingen*, Nos. WR-53, 613-10 and WR-53, 613-11, 2011 WL 3273901 (July 28, 2011).

The CCA has remanded Swearingen's sixth and seventh applications for merits review. *Id.* The evidentiary hearing on these applications is currently scheduled for February 2012.

REASONS TO DENY THE PETITION

I. SWEARINGEN'S CASE PROVIDES NO REASON FOR THE COURT TO REVISIT THE COGNIZABILITY OF FREESTANDING ACTUAL-INNOCENCE CLAIMS.

"Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera v. Collins*, 506 U.S.

390, 400 (1993). To the contrary, “the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.” *Id.* (quoting *Townsend v. Sain*, 372 U.S. 293, 317 (1963)) (emphasis removed).

In *Herrera*, the Court “assume[d], 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.” *Herrera*, 506 U.S. at 417; accord *House v. Bell*, 547 U.S. 518, 554-555 (2006). Thus, the Court hypothesized that circumstances *might exist* that would permit the assertion of a cognizable “actual innocence” claim, but *Herrera* did not recognize such a claim. Indeed, the facts established that Herrera was undoubtedly guilty. See *Herrera*, 506 U.S. at 417-419; see also *id.* at 421 (O’Connor, J., concurring).³

Likewise, Swearingen’s case is not an appropriate vehicle for the Court to address the cognizability of a freestanding actual-innocence claim. *Herrera* presumed a case in which (1) after trial the inmate provided a “truly persuasive demonstration of ‘actual innocence,’” and (2) “there [was] no state avenue open to process such a claim.” *Herrera*, 506 U.S. at 417. Swearingen’s case fails both conditions.

3. The issue whether a freestanding actual-innocence claim exists has arisen twice since *Herrera*, but it has not been necessary to resolve the question. See *House*, 547 U.S. at 554-555; *Davis v. Humphrey*, 131 S. Ct. 1788 (2011).

A. Swearingen Does Not Demonstrate Actual Innocence.

A potential *Herrera* claimant must make a “truly persuasive demonstration of ‘actual innocence’” *Schlup v. Delo*, 513 U.S. 298, 316 n.32 (1995) (quoting *Herrera*, 506 U.S. at 418), by presenting newly discovered evidence that “unquestionably establish[es]” his innocence, *id.* at 317. Swearingen falls far short of that standard.

1. There is no “scientific consensus” demonstrating that Swearingen is actually innocent.

Swearingen’s petition erroneously asserts that the evidence in this case “overwhelmingly proves [his] actual innocence.” Pet. 28. This claim is premised on Swearingen’s belief that there is a “scientific consensus” concerning the date Melissa Trotter’s body was left in the Sam Houston National Forest and/or the date of her death that excludes him as her killer. Pet. 22.

But the lower courts correctly concluded otherwise. The various scientists who have testified demonstrate little agreement concerning the date Melissa’s body was dumped in the woods and the date of her death. See *Swearingen v. Thaler*, 2009 WL 4433221, at *18-19, App. 46a–52a (S.D.Tex. Nov. 18, 2009) (table). There is certainly no consensus that excludes Swearingen as Melissa’s killer. Rather, as one of the many judges who have examined Swearingen’s case remarked, he focuses “solely on a couple of twigs of

apparently exculpatory evidence instead of the veritable forest of inculpatory evidence.” *Ex parte Swearingen*, 2009 WL 249759, at *1 (Cochran, J., concurring).

Based on microscopic examination of tissues from her internal organs, most of the pathologists have opined that Melissa was killed only a few days before her discovery. App.46a-52a.⁴ As for his entomologists, two offer the theory that Melissa was killed, then refrigerated and stored, before later being dumped in the forest, see *id.*, and the third claims that the fly *C. cadaverina* began colonizing Melissa’s body on December 18, the first day after her disappearance when it was warm enough to do so, USCA5.561 (January 2007 Report of Dr. Dael Morris).

Swearingen makes no attempt to reconcile these differences; instead he incorrectly claims that all the

4. Swearingen makes much of Dr. Carter’s 2007 affidavit, noting that Melissa’s body had decomposed more extensively externally than internally. See Dr. Carter Aff., Oct. 31, 2007, App.95a. She noted “substantial” external decomposition, including insect and mammalian scavenging, skeletonization in the head and neck regions, and skin and scalp slippage, *id.* at 95, but that condition of the internal organs was “consistent with a date of exposure . . . within fourteen days of discovery, and incompatible with exposure for a longer period of time,” *id.* at 96a–97a. But “Dr. Carter did not reconcile her internal and external observations Importantly, [she] did not revise or recant the observations she made in the autopsy report.” App.21a. Instead, she merely offers her forensic opinions about the significance of the internal examination, which “represent what [she] would have testified to at trial if [she] had been provided the significance of findings made pursuant to the internal examination of Ms. Trotter[s] body.” App.95a.

experts reject a December 8th date of death. See Pet. 30. This claim is both factually untrue, and misleading because many of the experts in this case have focused only on the date Melissa's body was dumped in the forest, not the date of her death. See App.46a-52a.⁵

As the District Court noted, the inconsistencies in the forensic testimony appear to derive from the gaps in the evidence used by the various experts. "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." App.55a.⁶

5. In declaring his "scientific consensus," Swearingen completely ignores the State's entomologist, Dr. Jeffery Tomberlin. See SHRR.84-85. Dr. Tomberlin agreed with the estimate of one of Swearingen's experts, Dr. Morris, that around December 18 a carrion fly, *C. cadaverina*, colonized Melissa's body. *Id.* at 96, 98. Dr. Tomberlin identified *C. cadaverina* as a secondary or late colonizer that would not infest a body until it had actually decomposed to some extent. *Id.* at 87-91. He concluded that a December 18 colonization date of this fly was consistent with the estimated 25-day exposure period. *Id.* at 111.

6. In fact, as learned treatises in the field have explained, there are significant limitations on scientists' ability to conclusively determine time of death. "[A]ll methods now in use to determine the time of death are to a degree unreliable and inaccurate. They usually give vague or dubious answers," particularly over longer intervals. Vincent J. DiMaio & Dominick DiMaio, *FORENSIC PATHOLOGY* (2d Ed. 2001) 21. Accord Werner U. Spitz & Daniel J. Spitz (eds.), *MEDICOLEGAL INVESTIGATION OF DEATH* (4th Ed. 2006) 127 ("none of the methods used in establishing the time of death are totally reliable and mathematically precise. Dogmatic and pinpoint accuracy in this matter is clearly not achievable."). Swearingen's experts agree. Dr. Lede testified that estimating the time of death "is probably one of the most challenging

But that has not happened in this case. “Some of Swearingen’s experts have looked at insects, some have looked at cells, and some have reviewed photographs . . . None of Swearingen’s experts have credibly considered the condition of Ms. Trotter’s body in light of the evidence as a whole.” *Id.* (quotation marks omitted); see also *id.* at App. 46a-52a.

2. Swearingen ignores the “forest” of inculpatory evidence.

Although Swearingen’s current experts are apparently concerned only with looking at a few pieces of histological evidence, “[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.” App.62a. Thus, a jury would have to “plug the narrow conclusions made by Swearingen’s experts into the broad facts [adduced at trial] which pointed to him as the killer.” *Id.*

In this regard, “[t]he hallmark of a scientifically sound hypothesis is that it is consistent with, and accounts for, the totality of the known facts.” *Ex parte Swearingen*, 2009 WL 249759, at *7 (Cochran, J., concurring). Swearingen hypothesizes that histological evidence conclusively proves that Melissa died only a few hours or days before her body was found on January 2, 1999, therefore he is actually innocent of her murder. But his hypothesis fails to account for the rest of the facts the jury considered, for example:

question[s] for a pathologist” and “the answer is one of the least dependable answers that a pathologist can provide[.]” 32.RR.72; see also Affidavit of Dr. Dael Morris, 01.SHCR.146.

- Swearingen was the last person seen with Melissa.
- On the night Melissa disappeared, Swearingen lied about his whereabouts, tried to fabricate an alibi, made false police reports, and told an ex-girlfriend that the police would be after him. A few days later, he fled from police.
- Melissa's class schedule and insurance papers were found near his stepfather's home days after her disappearance.
- Half a pair of pantyhose belonging to Swearingen's wife was found in Swearingen's home, and the other half was tied around Melissa's neck.
- Hair that was forcibly removed from Melissa's head was found in Swearingen's truck.
- Fibers similar to Swearingen's jacket, from the rug of his trailer home, and from his truck were found on Melissa's body.
- Swearingen asked a friend who visited him in jail to lie and say that she had been with him on December 8.
- In jail, Swearingen wrote a letter setting out many details only the killer would know, including: Melissa was wearing red underwear, the murderer had hit her on the left side of her face, and one of her shoes came off when he "jerked" her into the bushes.
- Swearingen told a cellmate that he murdered Melissa. 31.RR.96.

See *supra* Statement, Part I; see also App.62a-64a; *Ex parte Swearingen*, 2009 WL 249759, at *7-8 (Cochran, J., concurring).

Of course, no facts explain “[Swearingen’s] hypothesis that Melissa magically ‘disappeared’ 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.” *Ex parte Swearingen*, 2009 WL 249759, at *8 (Cochran, J., concurring). Likewise, Swearingen’s hypothesis fails to explain how Melissa’s “supposedly living body [was] infested with ‘secondary colonization’ carrion flies on December 18th.” *Id.*

Swearingen cannot make a truly persuasive demonstration of actual innocence, and likewise falls far short of “unquestionably establishing” that he did not murder Melissa Trotter. Just as in *Herrera*, there is no reason for the Court to resolve the cognizability of an actual-innocence claim in this case.

B. Texas Provides Avenues To Process Swearingen’s Actual-Innocence Claim.

In *Herrera*, the Court made clear that a second necessary predicate to its potential consideration of an actual-innocence claim is that no state avenue exists “to process such a claim.” 506 U.S. at 417. But Texas provides avenues to process *Herrera*-type actual-innocence claims through both its judicial system and executive clemency. Indeed, Texas courts have repeatedly considered Swearingen’s actual-innocence claims, and are currently in the process of doing so once

again regarding his pending sixth state habeas application. See *supra* Statement, Part II.

In *State ex rel. Holmes v. Third Court of Appeals*, the CCA held that the “execution of an innocent person would violate the Due Process Clause of the Fourteenth Amendment,” and that this was a viable ground for habeas-corpus relief. 885 S.W.2d 389, 397 (Tex. Crim. App. 1994). The CCA has since described this type of claim as a “bare claim of innocence” or a “free-standing” claim of innocence. *Ex parte Brown*, 205 S.W.3d 538, 544-45 (Tex. Crim. App. 2006). This claim requires the applicant to present newly discovered evidence that “unquestionably establish[es]” his innocence. *Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996) (internal quotation marks and citation omitted); see also *Ex parte Franklin*, 72 S.W.3d 671, 677 (Tex. Crim. App. 2002) (“applicants must produce evidence that proves their innocence and not merely raises doubt about their guilt”).

Thus, Texas provides an avenue through its court system for inmates like Swearingen to assert *Herrera*-type actual-innocence claims, and Swearingen has repeatedly done so. Two of Swearingen’s applications resulted in evidentiary hearings on the merits. See *id.* Swearingen’s current actual-innocence application in state habeas court is being considered on the merits, and an evidentiary hearing is scheduled for February 2012. See *id.*

Texas also provides an avenue for processing *Herrera*-type actual-innocence claims—like those asserted by Swearingen—through its clemency procedures. *Herrera*, 506 U.S. at 416. The Governor of

Texas has the power, upon the recommendation and advice of the Texas Board of Pardons and Paroles, to grant reprieves and commutations of punishment and pardons. TEX. CONST., art. IV, § 11; TEX. CODE CRIM PROC. Art. 48.01; see also TEX. ADMIN. CODE, Tit. 37, § 143. Texas has also established specific clemency procedures for actual-innocence claims. *Id.* § 143.2(a).

In sum, the concern raised in *Herrera*, that the Court might need to intervene where a State has no process to consider actual-innocence claims based on new evidence, simply is not present here.

II. The Lower Courts' Decisions That Swearingen Failed to Satisfy Section 2244(b)(2)(B)'s Successive-Petition Requirements Does Not Warrant the Court's Review.

The Antiterrorism and Effective Death Penalty Act of 1996 (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). When an inmate asserts a claim that he already made in a prior federal habeas petition, “the claim must be dismissed in all cases.” *Id.* (citing 28 U.S.C. § 2244(b)(1)). And when a claim is asserted that was not raised in a prior federal habeas petition, it must be dismissed unless it falls within one of the narrow exceptions provided in 28 U.S.C. § 2244(b)(2). *Id.* at 661-662.

Here, Swearingen has invoked the exception provided in section 2244(b)(2)(B) for claims premised

on “newly discovered facts that call into question the accuracy of a guilty verdict.” *Id.* (citing 28 U.S.C. § 2244(b)(2)(B)). Under section 2244(b)(2)(B), Swearingen’s successive petition must 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 applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2)(B).

Under AEDPA’s bifurcated procedure for determining whether the merits of a successive federal habeas petition will be considered, the court of appeals must first determine whether the applicant has made a *prima facie* showing that he can meet section 2244(b)(2)’s requirements. If an application meets this requirement, the court of appeals may authorize the filing of the application. 28 U.S.C. § 2244(b)(3)(C). Once the court of appeals authorizes the filing of the successive application, the District Court must then decide whether the applicant has *actually satisfied* section 2244(b)(2)’s requirements, allowing consideration of the merits of the successive habeas petition. See, e.g., *In re Morris*, 328 F.3d 739, 741 (5th Cir. 2003) (referring to the District Court as the second

“gate” through which the successive habeas petition must pass before it will be considered on the merits); *Reyes-Requena v. United States*, 243 F.3d 893, 899 (5th Cir. 2001) (same).

In this case, applying section 2244(b)(3)(C), the Fifth Circuit authorized Swearingen to file a successive petition on two issues. First, whether the State, in violation of *Giglio v. United States*, 405 U.S. 150 (1972), sponsored false and misleading forensic testimony concerning when Melissa Trotter’s body was left in the forest. *In re Swearingen*, 556 F.3d at 347, 349; App.78a. And second, whether, in violation of *Strickland v. Washington*, 466 U.S. 668 (1984), Swearingen’s trial counsel failed to effectively cross-examine Dr. Joye Carter and failed to develop histological, pathological, and entomological evidence regarding when Melissa’s body was left in the forest. *Id.* at 349; App.78a. The District Court was then required to make a determination whether either or both of these claims satisfied section 2244(b)(2)(B). The District Court correctly concluded, and the Fifth Circuit correctly affirmed, that Swearingen’s successive petition did not.

Swearingen’s petition challenges the substance of those decisions, Pet. 31-36, but his effort falls short. He also suggests that the dismissal of his successive petition creates a split of authority concerning the application of section 2244(b)(2)(B) that is worthy of the Court’s review. Pet. 34-35. There is no confusion, however, among the courts requiring resolution by this Court. Indeed, the petition impliedly recognizes as much, asking the Court to take this case on an

error-correction basis. Pet. 31 n.11. But there is no error to correct, so the Court's resources are better spent elsewhere.

A. The Lower Courts Properly Applied Section 2244(b)(2)(B)(i)'s Due-Diligence Requirement.

The Court has described 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). In determining whether an applicant has met section 2244(b)(2)(B)(i), a court must decide whether the evidence submitted by the applicant “was not previously discovered or discoverable[.]” *Leal Garcia v. Quarterman*, 573 F.3d 214, 221 (5th Cir. 2009).

Swearingen asserts that the courts below applied section 2244(b)(2)(B)(i) too strictly, asking only whether the evidence he relies upon in his successive petition “existed” prior to the filing of his first federal habeas petition, and not whether Swearingen “could reasonably have learned that it existed.” Pet. 32. But this is simply untrue. The District Court carefully examined whether the evidence Swearingen relies upon in his successive petition could have been discovered previously through the exercise of due diligence. See App.31a-32a.

As the District Court explained, Swearingen's claims rely on two factual predicates: “(1) information concerning 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." App.32a. The lower courts correctly concluded that Swearingen did not meet section 2244(b)(2)(B)(i) because he failed to show that these factual predicates "could not have been discovered before he filed his first habeas application." App.32a.

In regard to Dr. Carter, Swearingen was required to show that knowledge about the State's interaction with her, reflected in her 2007 affidavit, could not have been discovered previously through the exercise of due diligence. Swearingen failed to establish that Dr. Carter would not have provided the same information described in her 2007 affidavit "if someone had only asked her earlier." App.36a. The evidence relied upon by Dr. Carter in the affidavit, the crime-scene video and the weight and temperature data, were available before and at trial. App.36a n.9. Further, in his first federal habeas petition, Swearingen challenged the date of Melissa Trotter's death, and in his first state habeas application, he included an affidavit from an entomological expert that considered weather conditions, as well as newspaper stories referencing Melissa's weight. App.36a n.9. Likewise, the topics addressed by the State during its examination of Dr. Carter at trial, and necessarily the topics not addressed by the State, were obvious. App.36a-37a. Thus, nothing impeded Swearingen or his attorneys from previously obtaining the information Dr. Carter included in her 2007 affidavit.

Swearingen stated that he "tried to locate Dr. Carter before [his third state habeas application he

filed on January 16, 2008] but he could not. She quit pathology after leaving the [Harris County Medical Examiner's Office] in about 2002, and did not resume practice for several years. She apparently was reclusive." App.37a. As the District Court explained, Swearingen's statement does not hold water. In fact, a 2004 news article about Dr. Carter, published several months before Swearingen filed his first federal habeas petition, explained that Dr. Carter had left the medical examiner's office and opened a forensic consulting firm in Houston. App.38a. Swearingen cited this article in a Fifth Circuit filing. *Id.* Thus, "[d]uring the time period contemporaneous with Swearingen's initial [federal] habeas action, Dr. Carter was actively consulting with attorneys in the Houston area." *Id.*

The truth is that, "while busily challenging his conviction on other grounds," *id.*, and through other forensic experts, Swearingen and his attorneys simply did not think to secure an affidavit from Dr. Carter.

The lower courts also correctly determined that Swearingen's second factual predicate, evidence derived from the microscopic examination of tissue from Melissa's internal organs, could have been discovered previously through the exercise of due diligence.

Swearingen has asserted that he became aware only weeks prior to his scheduled execution that the medical examiner's office had retained tissue samples in a paraffin block. App.39a. But this is inaccurate. As the District Court explained, the record establishes that during his initial federal habeas proceedings Swearingen should have been aware that the paraffin

block remained in the custody of the Harris County Medical Examiner's Office. *Id.* at App.40a. In fact, a December 21, 2004 letter from Dr. Luis A. Sanchez, the Chief Medical Examiner at the Harris County Medical Examiner's Office, "explicitly informed Swearingen that Dr. Carter had taken tissue samples and preserved them[.]" App.40a-41a. Swearingen filed this letter twice in federal district court during his first federal habeas proceeding. App.41a. In it, "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." *Id.*

In sum, Swearingen failed to establish 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." App.42a. Indeed, as the District Court aptly noted, Swearingen's ineffective-assistance-of-counsel claim turns in part on his claim that "a trial attorney exerting reasonable efforts should have inquired into [this] histological evidence," but he "presents no reason why federal habeas counsel should not be held to that same expectation." App.43a.

Because Swearingen could not satisfy section 2244(b)(2)(B)(i), the lower courts were "required to dismiss" his successive petition. *Tyler*, 533 U.S. at 667; see also 28 U.S.C. § 2244(b)(4).⁷

7. Contrary to Swearingen's assertions, Pet. 32-33, the application of section 2244(b)(2)(B)(i) by the District Court and the

**B. Swearingen Misunderstands the Inquiry
Required by Section 2244(b)(2)(B)(ii).**

Swearingen also cannot satisfy section 2244(b)(2)(B)(ii), which provides that a successive petition must be dismissed unless “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.” The section 2244(b)(2)(B)(ii) inquiry has been described as requiring “a strict form of ‘innocence’ . . . roughly equivalent to [this] Court’s definition of ‘innocence’ or ‘manifest miscarriage of justice’ in *Sawyer v. Whitley* [505 U.S. 333 (1992)].” *Johnson v. Dretke*, 442 F.3d 901, 911 (5th Cir. 2006) (additional quotation omitted). As the Court noted in *House*, AEDPA replaced the *Schlup* standard with a stricter test for successive claims in section 2244(b)(2)(B)(ii). 547 U.S. at 539 (citing *Sawyer*’s language requiring “clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty”).

Fifth Circuit in this case is consistent with other circuits’ treatment of the issue. *E.g.*, *In re Schwab*, 531 F.3d 1365, 1366 (11th Cir. 2008) (refusing to allow a successive petition on the changed testimony of a trial witness when the petitioner could have presented the expert additional information and obtained an affidavit at any time following trial); *In re Boshears*, 110 F.3d 1538, 1540 (11th Cir. 1997) (merely alleging that the petitioner did not know the facts underlying the claim does not satisfy the due-diligence standard).

For the sound reasons described in its opinion and detailed herein, the District Court concluded that Swearingen did not meet these stringent requirements. See App.44a-66a. Swearingen's assertion that he met the requirements of section 2244(b)(2)(B)(ii) is premised on a misinterpretation of the statute. Swearingen correctly notes that the District Court found his purportedly new scientific evidence "highly exculpatory" when taken at "face value." Pet. 35 (quoting Pet. 54a). But he goes on to claim that this "admission" established that he had satisfied section 2244(b)(2)(B)(ii) and should have ended the District Court's review. *Id.*

Not so. Even assuming that the facts underlying his successive petition were proven, AEDPA plainly required the District Court to review those facts "*in light of the evidence as a whole*," to determine whether they would be "sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [Swearingen] guilty." 28 U.S.C. § 2244(b)(2)(B)(ii) (emphasis added). As the District Court explained, "[t]he question is how a reasonable jury would respond" when "looking at the evidence as a whole." App.61a-62a. Correctly applying that standard, the District Court concluded that "[t]he 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." App.66a; see also *supra* Part I.

Swearingen's suggestion that the lower courts' application of section 2244(b)(2)(B)(ii) creates a split of authority, Pet. 34-35, is equally misguided. In fact, the cases he cites all recognize that new evidence submitted with a successive application is to be considered in light of all of the other evidence. *E.g.*, *Keith v. Bobby*, 551 F.3d 555, 559 (6th Cir. 2009); *LaFavers v. Gibson*, 238 F.3d 1263, 1267 (10th Cir. 2001).

In light of the mountain of evidence that Swearingen is guilty of capital murder, the lower courts correctly determined that new evidence raising some question as to exactly when Melissa Trotter's dead body might have been dumped into the woods cannot satisfy section 2244(b)(2)(B)(ii)'s exacting requirement.

CONCLUSION

The petition for a writ of certiorari should be denied.

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