Case No. 09-70036

United States Court of Appeals

for the

Fifth Circuit

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 DIVISION

BRIEF OF *AMICI CURIAE* INNOCENCE PROJECT AND INNOCENCE NETWORK

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CONSENT OF PARTIES

Pursuant to Fed. R. App. P. 29(a), this brief is filed with the consent of all parties.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL AUTHORITIES

STATE AUTHORITIES

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE

The Innocence Network (the "Network") is an association of organizations – including the Innocence Project – dedicated to providing pro bono legal and investigative services to prisoners, whose actual innocence may be proved through post-conviction evidence. The fifty-eight members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand. The Network and its members are dedicated to improving the reliability of the criminal justice system and preventing wrongful convictions by researching their causes and pursuing legislative and administrative reforms to enhance the truth-seeking functions of the criminal justice system.

STATEMENT OF ISSUES

(1) Whether petitioner Larry Swearingen's ("Swearingen") actual innocence constitutes a freestanding constitutional claim that satisfies the fundamental miscarriage of justice standard of *Schlup v. Delo*, 513 U.S. 298 (1995), and, thus, warrants habeas corpus relief.

(2) Whether the District Court erred in failing to find that Swearingen's new, previously unavailable evidence was (i) obtained through due diligence and, (ii) when viewed in light of the evidence as a whole, clearly and convincingly demonstrates that Swearingen could not have committed the murder for which he was convicted, satisfying 28 U.S.C. § 2244(b)(2)(B).

SUMMARY OF ARGUMENT

On December 8, 1998, Melissa Trotter ("Trotter") disappeared. On December 11, 1998, Larry Swearingen was arrested and has remained imprisoned ever since. On January 2, 1999, Trotter's body was found in the Sam Houston National Forest. In June 2000, Swearingen was convicted of capital murder and subsequently sentenced to death. But, as now confirmed by *unanimous* post-trial scientific evidence, Swearingen was incarcerated when Trotter died and therefore could not have committed the murder.

Heart, nerve and vascular tissue taken from Trotter's body during autopsy and preserved in a paraffin block – exculpatory evidence omitted from the autopsy report and whose existence was denied by the Medical Examiner and only discovered in 2009 – establish that Trotter died no earlier than December 26, 1998 – two weeks after Swearingen was arrested. The Harris County Medical Examiner ("HCME"), Dr. Joye Carter, who performed the autopsy and testified at trial for the State that Trotter died 25 days before her discovery, has now *retracted* that testimony and endorsed the new, undisputed forensic reports that Trotter did not die until *after* Swearingen's arrest. The undisputed forensic analysis of the newly-discovered tissue samples and Dr. Carter's recantation conclusively establish that Swearingen is actually innocent.

The District Court's dismissal of Swearingen's successive petition

should be reversed. First, Swearingen's actual innocence renders his conviction and death sentence unconstitutional. Both the Eighth and Fourteenth Amendments bar the conviction and execution of an actually innocent individual and Swearingen has unquestionably met the applicable "gateway" standard, *i.e.*, that "it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." *House v. Bell*, 547 U.S. 518, 537 (2006) (citing *Schlup v. Delo,* 513 U.S. 298, 327 (1995)).

Second, the District Court misapplied the Antiterrorism and Effective Death Penalty Act's ("AEDPA") two-pronged test for successive habeas petitions. *See* 28 U.S.C. §2244(b)(2)(B). As to the first prong, the District Court incorrectly found that Swearingen failed to demonstrate "due diligence" in the discovery of "the factual predicate for [his] claim." *Id.* at §2244(b)(2)(B)(i). (District Court Opinion ("Op.") 21-31.) The District Court erroneously concluded that the newly-revealed heart, nerve and vascular tissue could have been discovered earlier, in misguided reliance upon a December 21, 2004 letter from Dr. Luis Sanchez, then the HCME. (*See* Op.29-30 (citing 04-cv-2058 (S.D.Tx.) Dkt No. 29, Exh.A ("Sanchez Letter").) The District Court overlooked that the Sanchez Letter (a) did not disclose that heart, nerve, and vascular tissue – the most forensically precise for dating death – had been preserved and misleadingly stated that only one slide containing lung and fatty tissue had been prepared while "no other paraffin blocks

were found in the histology laboratory" (Sanchez Letter at 1); and, besides, (b) was sent seven months *after* Swearingen's first federal habeas petition was filed. Further, the autopsy report and all state witnesses, evidence and experts were silent as to the existence, or possible existence, of the key paraffin block until 2009 when the tissue was discovered.

The District Court also erred in concluding Swearingen was negligent in not obtaining Dr. Carter's retraction earlier. Swearingen secured that retraction as soon as he obtained the opinions of forensic pathologists *directly exposing the inconsistencies between Dr. Carter's testimony and her own autopsy report*.

As to the AEDPA test's second prong, the District Court (a) ignored the requirement that evidentiary allegations asserted in a successive petition must be assumed "proven", and (b) without any evidentiary hearing, discredited the uniform new expert evidence that places the time of death after Swearingen's incarceration, because it purportedly did not conform to the non-scientific circumstantial evidence. (Op.31-45.) The District Court overstepped the boundaries of the narrow review mandated by the AEDPA and misapplied its requirements for a successive petition.

ARGUMENT

I. SWEARINGEN'S CONVICTION IS UNCONSTITUTIONAL BECAUSE HE IS ACTUALLY INNOCENT

There can be little doubt that innocent individuals have been mistakenly put to death despite the procedural safeguards of our judicial system. The increase in exonerations of death row inmates[1] only reinforces the likelihood that innocent individuals have been, or may be, executed.[2] Here, under the District Court's approach, Larry Swearingen will be sacrificed, not by mistake, but on the altar of procedure. This is not a case where an otherwise reliable system broke down. Here, the system is leading to the execution of an innocent man. The scientific evidence on which his claim rests is as strong as evidence that has freed others

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[1] Since 1973, 138 people from 26 states have been released from death row with evidence of their innocence. *See* Death Penalty Information Center, *Innocence and the Death Penalty*, http://www.deathpenaltyinfo.org/innocence-and-death-penalty (last visited April 18, 2010).

[2] *See* Arson Review Comm., The Innocence Project, *Report on the Peer Review of the Expert Testimony in the Cases of* State of Texas v. Cameron Todd Willingham *and* State of Texas v. Ernest Ray Willis (2006), *available at* http://www.innocenceproject.org/docs/ArsonReviewReport.pdf; Lise Olsen, *The Cantu Case: Death and Doubt: Did Texas Execute an Innocent Man?*, Houston Chronicle, July 24, 2006, *available at* http://www.chron.com/disp/story.mpl/front/3472872.html; Raymond Bonner & Sara Rimer, *A Closer Look at Five Cases That Resulted in Executions of Texas Inmates*, N.Y. Times, May 14, 2000, *available at* http://www.nytimes.com/2000/05/14/us/a-closer-look-at-five-cases-that-resulted-in-executions-of-texas-inmates.html?pagewanted=all.

from death row.[3] His experts' reports conclusively prove that Swearingen could not have murdered Trotter. Yet, he may well be deliberately executed because he supposedly failed to prove at an earlier point that he could not have committed the murder.

A. Newly-Discovered Evidence Conclusively Establishes That Swearingen Was Incarcerated When Trotter Died and Therefore Could Not Have Murdered Her

1. Examination of Tissue Samples Discovered in 2009 Demonstrate That Trotter Died After December 11, 1998

The critical histological evidence discovered by Swearingen's counsel in January 2009 has been examined by two experts, Dr. Lloyd White, forensic pathologist, and Dr. Stephen Pustilnik, Chief Medical Examiner of Galveston County. (Exhs.A.2-A.3[4]; Petitioner's Brief ("P-Br.") 17-18.) Both agree that the tissues belong to the body of a person who died only *days* before the tissues were extracted, and thus, necessarily *after* Swearingen was arrested.

Dr. White concluded that

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[3] *See, e.g.*, *Gell v. Town of Aulander*, 05-CV-00021, 2008 WL 4845823 (E.D.N.C. Nov. 4, 2008) (explaining defendant was acquitted after re-trial based, *inter alia*, on new evidence that changed the date of death, thus establishing that defendant was out of state or in jail at the time of the victim's murder).

[4] Reference to "Exh(s). __" refer to exhibits to District Court docket entry 20, as cited in the Brief of Petitioner-Appellant.

> it is therefore *scientifically certain that Ms. Trotter['s] 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*.

(Exh.A.2 at 17.)[5]

Dr. Pustilnik, having reviewed the tissue slides, original autopsy report, temperature data, as well Dr. White's and Dr. Carter's previous affidavits, concurred with Dr. White and calculated that death occurred "on or about December 26, 1998." (Exh.A.3 at 2.)

2. Dr. Carter's 2007 Retraction Also Establishes Swearingen's Innocence

In a 2007 affidavit, Dr. Carter retracted her trial testimony that Trotter's body had been in the woods for 25 days. Confronted for the first time with the totality of the then-available evidence, including "forensically important" information the State had not provided her before and her own autopsy report, Dr. Carter stated that, were she to testify again in 2007, she would opine that Trotter's body had been "left in the woods within two weeks of the date of discovery" (Exh.A at 3) – after Swearingen's incarceration.

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[5] Unless otherwise noted, emphases in quotations have been added.

3. Additional Evidence Further Establishes Swearingen's Innocence

Beyond the newly-discovered tissues, other scientific evidence developed post-trial demonstrates Swearingen's actual innocence. Every expert – including entomologists and pathologists – opining on Trotter's death has concluded that Trotter could not have been dead in the forest until after Swearingen's arrest. (*See* P-Br.6, 17-18, 39-42, 49-53.) Additional evidence existing at the time of trial, but inexplicably not developed by Swearingen's counsel, also casts substantial doubt on Swearingen's guilt. (P-Br.6-11.)

B. Because Swearingen Is Actually Innocent, His Conviction Is Unconstitutional

1. The Eighth and Fourteenth Amendments Preclude the Conviction and Execution of Innocent People

Amici are aware that this Court has "rejected th[e] possibility" that a freestanding actual innocence claim is cognizable in the federal habeas context. *See Graves v. Cockrell*, 351 F.3d 143, 151 (5th Cir. 2003). Nonetheless, Amici respectfully submit that the conviction and execution of an innocent person violates the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment, both of which require an adequate forum for the consideration of newly-discovered evidence demonstrating the innocence of a capital petitioner. The right to claim innocence based on newly-discovered evidence exists independently of the presence of additional constitutional violations and constitutes

a separately cognizable basis for federal habeas relief.

The Eighth Amendment protects against "cruel and unusual punishments," but "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). "Nothing could be more contrary to contemporary standards of decency, or more shocking to the conscience than to execute a person who is actually innocent." *Herrera v. Collins*, 506 U.S. 390, 430 (1993) (Blackmun, J., dissenting) (citations omitted).

Indeed, the Supreme Court has held that imposition of the death penalty for offenses less severe than murder violates the Eighth Amendment. *See Kennedy v. Louisiana*, 128 S. Ct. 2641, 2646 (2008) (Constitution prohibits death penalty for crimes that did not, or were not intended to, result in death). Likewise, the execution of mentally retarded persons and juvenile offenders violates the Eighth Amendment because such persons lack the criminal culpability necessary to justify execution. *See Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005). *A fortiori*, the Eighth Amendment prohibits the execution of an innocent person.

The Fourteenth Amendment also protects citizens from unconscionable state action. "'[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) (citations omitted); *see* U.S. Const. amend. XIV. There can be no official action more shocking or unjustifiable than the execution of an innocent person. "The quintessential miscarriage of justice is the execution of a person who is entirely innocent. Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Schlup*, 513 U.S. at 324-25. To execute an innocent person "is the 'ultimate arbitrary impositio[n]'" because it is one "for which one can never be compensated." *Herrera*, 506 U.S. at 437 (Blackmun, J., dissenting) (citation omitted).

2. Policy Considerations

The execution of an innocent person cannot possibly serve either of capital punishment's twin goals of retribution and deterrence. *See Kennedy*, 128 S. Ct. at 2661; *see Coker v. Georgia*, 433 U.S. 584, 592 (1977) ("[A] punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.").

The Supreme Court looks to "the evolving standards of decency that mark the progress of a maturing society" to determine the requirements of the

Eighth Amendment. *Trop*, 356 U.S. at 101. "The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989). Punishments have been held to violate the Eighth Amendment when there is evidence of legislative consensus against them. *See*, *e.g.*, *Thompson v. Oklahoma*, 487 U.S. 815, 826-30 (1988) (invalidating capital punishment for offenders under age sixteen where eighteen state legislatures had rejected the practice); *Enmund v. Florida*, 458 U.S. 782, 789-93 (1982) (holding death penalty unconstitutional for types of felony-murder which was capital offense in only eight death penalty jurisdictions); *Coker*, 433 U.S. at 593-96 (invalidating capital punishment for rape where only four states imposed death for rape).

Today, twenty-five states and the District of Columbia recognize freestanding claims of actual innocence based on newly-discovered evidence as a basis for habeas relief either on statutory or constitutional grounds.[6] It is therefore

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[6] *See* Ala. R. Crim. P. 32.1(e); Alaska Stat. § 12.72.010(4); Colo. Rev. Stat. § 18-1-410(e); Haw. R. Penal. P. 40(a)(1)(iv); Idaho Code Ann. § 19-4901(4); Ind. R. Post-Conviction Remedies 1(4); Iowa Code § 822.2(20); Mass. R. Crim. P. 30; Miss. Code Ann. § 99-39-5(27.1); N.J. Court Rules R. 3:20-1; N.D. Cent. Code § 29-32.1-01; Okla. Stat. Ann. tit. 22, § 1080(35); 42 Pa. Stat. Ann. § 9543; R.I. Gen. Laws § 10-9.1-1; S.C. Code Ann. § 17-27-20; Utah Code Ann. § 78B-9-104(16); Vir. Code Ann. § 19.2-327.11; Wash. Crim. R. 7.8; D.C. Code § 22-4135. *See also In re Clark*, 5 Cal. 4th 750 (Cal. 1993); *Summerville v. Warden*, 641 A.2d 1356, 1369 (Conn. 1994); *Downes v. Delaware,* 771 A.2d 289, 291 (Del. 2001); *Jones v. Florida*, 591 So. 2d 911, 915 (Fla. 1991); *Hester v.*

(cont'd)

becoming increasingly clear that a broad national consensus has developed against the execution of innocent persons. *See Atkins*, 536 U.S. at 315-16. Congress' passage of the 2004 Justice for All Act to promote DNA testing programs, further underscores that consensus. *See* H.R. 5107, 108th Cong., §§ 411-413 (2004).

3. Supreme Court Decisions Recognize the Viability of Actual Innocence As A Cognizable Constitutional Claim

In *Graves*, 351 F.3d at 151, this Court acknowledged that the Supreme Court "left open whether a truly persuasive actual innocence claim may establish a constitutional violation sufficient to state a claim for habeas relief." *Id.* (citing *Herrera*, 506 U.S. at 417). Indeed, recent decisions of the Supreme Court admit the potential cognizability of a constitutionally-based actual innocence claim. *In re Davis*, 130 S. Ct. 1 (2009), in fact, presupposes that a freestanding actual innocence claim is cognizable under the Constitution. In *Davis*, a case that did not

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Georgia, 647 S.E.2d 60, 63 (Ga. 2007); *Ill. v. Washington*, 665 N.E.2d 1330, 1336-37 (Ill. 1996); *McHenry v. Kansas*, 177 P.3d 981, 986 (Kan. Ct. App. 2008); *Brown v. Kentucky*, 932 S.W.2d 359, 362 (Ky. 1996); *Michigan v. Woods*, No.249036, 2004 WL 2601236, at *1 (Mich. Ct. App. Nov. 16, 2004); *Gustafson v. Minnesota*, 754 N.W.2d 343, 348 (Minn. 2008); *Montana v. Graham*, 57 P.3d 54, 57 (Mont. 2002); *Nebraska v. El-Tabech*, 610 N.W.2d 737, 743-44 (Neb. 2000); *Montoya v. Ulibarri*, 163 P.3d 476, 484-85 (N.M. 2007); *State of New York v. Tankleff*, 49 A.D.3d 160, 179 (N.Y. App. Div. 2007); *North Carolina v. Hall*, 669 S.E.2d 30, 35 (N.C. Ct. App. 2008), *appeal dismissed*, 679 S.E.2d 393 (N.C. 2009); *Gregory v. Class*, 584 N.W.2d 873, 878 (S.D. 1998); *Tex. ex rel. Holmes v. Court of Appeals*, 885 S.W.2d 389, 397-98 (Tex. Crim. App. 1994), *modified in part*, *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. Dec 18, 1996).

present any other constitutional violation, the Court remanded to the district court to determine whether newly-discovered evidence would establish a death row inmate's actual innocence. *Id.* at 1. If a constitutional actual innocence claim were not an independently cognizable constitutional claim, the remand would have been pointless. While the Court did not explicitly hold that an innocence claim is constitutionally cognizable, the three-Justice concurrence acknowledged that the "decisions of [the Supreme Court] 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 (quoting *Davis*, 565 F.3d 810, 830 (11th Cir. 2009) (Barkett, J., dissenting)).

While this Court relied heavily on *Herrera* in foreclosing habeas review of freestanding actual innocence claims, *Herrera* does not support that conclusion. Indeed, the *Herrera* court declared 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 claim." 506 U.S at 417. Crucially, six justices agreed that the execution of an actually innocent person would violate the Constitution. *Id.* at 419-20 (O'Connor and Kennedy, J.J., concurring), 430 (White, J., concurring), 430-31 (Blackmun, Stevens, and Souter, J.J., dissenting).

While some Circuits, like this one, have eschewed freestanding actual

innocence claims, several others have acknowledged that the Supreme Court left the question open and even assumed that such claims exist. *See Osborne v. Dist. Attorney's Office for the Third Judicial Dist.*, 521 F.3d 1118, 1130-31 (9th Cir. 2008), *rev'd on other grounds*, 129 S. Ct. 2308 (2009); *Whitfield v. Bowersox*, 324 F.3d 1009, 1020 (8th Cir.), *vacated in part on denial of reh'g*, 343 F.3d 950 (8th Cir. 2003) (en banc); *Clayton v. Gibson*, 199 F.3d 1162, 1180 (10th Cir. 1999); *O'Dell v. Netherland*, 95 F.3d 1214, 1246-47 (4th Cir. 1996), *aff'd*, 521 U.S. 151 (1997); *Milone v. Camp*, 22 F.3d 693, 700 (7th Cir. 1994). This case presents an opportunity for this Court to revisit its jurisprudence and, in the wake of *Davis*, recognize the constitutional validity of freestanding actual innocence claims.[7] Given Swearingen's overwhelming evidence of actual innocence (*see* §I.A., *supra*), his execution would be unconstitutional.

C. Swearingen Has Met The "More Likely Than Not" *Schlup* Standard

There is no question that Swearingen's "truly 'extraordinary'" actual innocence claim, *House*, 547 U.S. at 518 (quoting *McCleskey v. Zant*, 499 U.S. 467,

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[7] Justice Wiener, concurring in the Court's allowance of Swearingen's successive petition, *In re Swearingen*, 556 F.3d 344, 350 (5th Cir. 2009), perceived "the elephant . . . in the corner of this room: actual innocence" and that "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. To me, this question is a brooding omnipresence in capital habeas jurisprudence that has been left unanswered for too long."

494 (1991)), and the evidence Swearingen presented to the District Court, satisfies the *Schlup v. Delo,* 513 U.S. 298 (1995), standard that "it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." *House*, 547 U.S. at 518 (citing *Schlup,* 513 U.S. at 327). Swearingen's petition has "raised sufficient doubt about [his] guilt to undermine confidence in the result of the trial without the assurance that that trial was untainted by constitutional error;" hence, "a review of the merits" of Swearingen's constitutional claim of actual innocence is justified. *Id.* (quoting *Schlup*, 513 U.S. at 317).[8]

II. SWEARINGEN HAS MET THE AEDPA'S SUCCESSIVE FILING REQUIREMENTS

Independent of the freestanding actual innocence claim, Swearingen's petition satisfied both prongs of §2244(b)(2)(B)'s "gateway" for successive

[8] Any doubt as to the continued validity of *Schlup* after the enactment of the AEDPA is dispelled by this Court's recent application of *Schlup* in *In re Flowers*, 595 F.3d 204 (5th Cir. 2009) (*per curiam*) (holding that "Flowers has offered no new evidence demonstrating that it is more likely than not that no reasonable jury would have convicted him"); *cf. Cooper v. Woodford,* 358 F.3d 1117, 1119-20 (9th Cir. 2004) (holding that "whether the *Schlup* standard or the standard of 28 U.S.C. § 2244(b)(2)(B) applies[,] . . . Cooper is entitled to file a second or successor habeas application."). Indeed, just as the *Schlup* Court itself acknowledged that the "miscarriage of justice" exception provided the basis for the Court to grant successive habeas petitions claiming actual innocence *despite* Congress' amendment of §2244 to remove the "ends of justice" provision, *Schlup*, 513 U.S. at 863, likewise here, the 1995-1996 AEDPA amendments do not override the Court's inherent power to grant habeas relief where the petitioner demonstrates evidence of actual innocence and execution would work a fundamental miscarriage of justice.

petitions. Swearingen's petition is (i) predicated on new evidence that "could not have been discovered previously through the exercise of due diligence," §2244(b)(2)(B)(i), and (ii) alleges violations of constitutional rights, which, "if proven and viewed in light of the evidence as a whole" establish, clearly and convincingly, that, but for the alleged constitutional errors, "no reasonable factfinder" would have convicted Swearingen, §2244(b)(2)(B)(ii).

A. Swearingen Exercised Due Diligence in Discovering the New Evidence

To determine whether a petitioner has exercised due diligence, courts apply an "objective standard," *Johnson v. Dretke*, 442 F.3d 901, 908 (5th Cir. 2006), and consider only what would have been discoverable through "a reasonable and diligent investigation." *McCleskey v. Zant*, 499 U.S. 467, 498 (1991); *see In re Boshears*, 110 F.3d 1538, 1540 (11th Cir. 1997). "28 U.S.C. § 2244 does not require 'the maximum feasible diligence' but only 'due, or reasonable diligence.'" *Starns v. Andrews*, 524 F.3d 612, 618 (5th Cir. 2008) (citation omitted). "The essential question is not whether the relevant information was known by a large number of people, but whether the petitioner should be expected to take actions which should lead him to the information." *Wilson v. Beard*, 426 F.3d 653, 662 (3d Cir. 2005). Courts must also take into account a petitioner's circumstances as part of the due diligence inquiry. *See Wims v. United States*, 225 F.3d 186, 190 (2d Cir. 2000) ("The proper task . . . is to determine when a duly

diligent person in petitioner's circumstances would have discovered that no appeal had been filed."); *Easterwood v. Champion*, 213 F.3d 1321, 1323 (10th Cir. 2000) (considering circumstances such as "the realit[ies] of the prison system"); *accord Dicenzi v. Rose*, 452 F.3d 465, 470 (6th Cir. 2006); *Schlueter v. Varner*, 384 F.3d 69, 74 (3d Cir. 2004).[9] The District Court failed to apply that standard.

1. The District Court Erred by Concluding Swearingen Did Not Exercise Due Diligence in Discovering the Exculpatory Histological Evidence

In finding Swearingen negligent for not earlier discovering the exculpatory heart, nerve and vascular tissue, the District Court placed misguided reliance on habeas counsel's receipt of the Sanchez Letter on December 21, 2004, seven months after the first federal petition was filed. (Op.29; P-Br.13-14, 22-33.) By holding that the Sanchez Letter put Swearingen "on notice that the block existed" the District Court not only misconstrued the Sanchez Letter, but also held Swearingen to an unreasonable standard of diligence.

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[9] Although these cases that define the reasonableness standard of "due diligence" arise in the context of §2244(d)(1)(D), they apply with equal force here. Pursuant to §2244(d)(1)(D), the relevant limitation period runs from "*the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence*." Pursuant to well-established principles that "'equivalent words have equivalent meaning when repeated in the same statute,'" *Carrieri v. Jobs.com, Inc.*, 393 F.3d 508, 520 (5th Cir. 2004) (citation omitted), this Court should accord the same interpretation to "due diligence" in §2241(d)(1)(D) and §2244(b)(2)(B)(i).

The Sanchez Letter stated: "[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 under case number OC99-02." (Sanchez Letter at 1.) No mention was made of the heart, nerve and vascular tissue which are the dispositive tissue types for dating death. (P-Br.3, 23-26.) Instead, the Sanchez Letter represented that, other than lung and fatty tissue, there were *no other* tissues preserved. Counsel was entitled to rely on the County's Chief Medical Examiner's representation that no other paraffin blocks existed. *See Starns*, 524 F.3d at 619; *Willis v. Jones*, 329 F. App'x 7, 17 (6th Cir. 2009) ("[Petitioner] was entitled to rely on the state's representation that it did not have . . . evidence . . . meaning that due diligence did not require him to request the records before the state turned them over.").

In *Starns*, although the state gave the contact information for a potentially exculpatory witness, the state had "severely downplayed the importance of [the witness'] testimony" and defense counsel did not contact the witness for trial. 524 F.3d at 619. Petitioner did not discover the witness' exculpatory testimony until a post-trial wrongful death suit. *Id.* The Court held:

> [T]here is no indication here that Starns or his trial counsel had any idea of the importance of [witness'] testimony, particularly given the state's position. . . . While Starns probably now regrets his lawyer's decision not to interview [the witness] before the trial . . . *hindsight is 20/20; at the time Starns learned of [witness'] existence, there was no*

> *requirement that Starns act diligently to investigate further assuming the state could be taken at its word.*

Id. (citation omitted).

Likewise here, it is unreasonable to expect Swearingen to have recognized the significance of the paraffin block in 2004, given that (1) the autopsy report did not mention the paraffin block (*see* Exh.F); (2) at trial, Dr. Carter, along with the State, remained silent when defendant's expert testified about the lack of slides (P-Br.27); (3) the original toxicology report stated all samples would be destroyed within one year (P-Br.25-26); and (4) the Sanchez Letter disclaimed the existence of other slides. If the state's pathologist was unaware of the tissues preserved in the paraffin block, *counsel* can hardly be charged with such knowledge.

It was not until 2007 that Dr. Arends noted, for the first time, that the internal organs described in the autopsy report did not comport with a date of death earlier than Swearingen's arrest. This led Swearingen to the pathologists who put him on the path to unearthing the tissue slides that enabled Drs. White and Pustilnik to establish that Trotter's body could not have been dead for more than several *days* before discovery. (P-Br.18, 41-42, 49.)

The District Court failed to consider these circumstances. Instead, it held Swearingen to the insurmountable burden of deciphering nebulous references, made in a different context (P-Br.13), to a "paraffin block" and "lung and fatty

tissue" in the Sanchez Letter, even though that letter denied the existence of *any* other tissue, including the very heart, nerve and vascular tissue that decisively established the date of death.

2. Swearingen Exercised Due Diligence in Obtaining Dr. Carter's Retraction

The District Court found that "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." (Op.26.) Thus, according to the District Court, Swearingen was required to have approached Dr. Carter in 2004, when he merely disagreed with her 25-day post mortem interval ("PMI") opinion, but before he had any new scientific information impeaching her trial testimony. Requiring a petitioner to seek a recantation just because he disagrees with the witness' trial testimony would, essentially, require every petitioner to immediately demand a recantation from every state witness to show "due diligence" even without any prospect of obtaining one.

The District Court's conclusion not only defies common sense, it is unsupported by the law. The District Court mistakenly relied on *In re Schwab*, 531 F.3d 1365 (11th Cir. 2008), which denied a successive petition where the purported "new" evidence was a "clarification" – not a retraction – by an expert who merely *amplified* the expert's previous testimony about petitioner's psychological development. *Id.* at 1366. Here, Dr. Carter's 2007 affidavit expressly *reversed* her

testimony by *abandoning* the 25-day PMI and replacing it with the exculpatory two-week interval. Despite the expert's "clarification" in *Schwab*, the substance of the testimony remained unchanged, whereas here, if Dr. Carter had testified in accordance with her 2007 recantation, Swearingen *could not have been convicted*.[10]

It was not unreasonable for Swearingen to assume Dr. Carter was testifying truthfully at trial and that the prosecutor was not knowingly supporting such misleading testimony. *Cf. Banks v. Dretke*, 540 U.S. 668, 694 (2004) ("[I]t was also appropriate for Banks to assume that his prosecutors would not stoop to improper litigation conduct to advance prospects for gaining a conviction."); *Willis* 329 F. App'x at 17 ("[Petitioner] was entitled to rely on the state's representation

[10] The District Court also cited *In re Nealy*, 223 F. App'x 358, 365 (5th Cir. 2007) and *Boshears*, 110 F.3d at 1540 (Op.26), which are also inapposite. First, in *In re Nealy*, this Court held that the retractions by trial witnesses were not newly-discovered because petitioner learned of a leniency deal granted one of the witnesses before the first habeas petition and was thus on notice to pursue the witness for a retraction. Additionally, both witnesses' testimony at trial consisted of statements the *petitioner* allegedly made so petitioner had *personal knowledge that the testimony was false*. *Nealy*, 223 F. App'x at 365-66. Here, since Swearingen was incarcerated since December 11, 1998 and maintained his innocence, he cannot possibly be charged with having any personal knowledge of, or basis to challenge, the erroneous PMI (information only the perpetrator could have). The **first** indication that Dr. Carter had given misleading trial testimony occurred in 2007 – well after the first habeas petition was filed in 2004. Second, *Boshears* is not even a recantation case. *See* 110 F.3d at 1540-42.

that it did not have . . . evidence . . . meaning that due diligence did not require him to request the records before the state turned them over.").

As Petitioner's Brief details, it was not until 2007 that Swearingen had any indication that Dr. Carter's testimony was scientifically unreliable, after the pathologists first analyzed the evidence and cast doubt on not just the 25-day PMI estimate itself but the veracity of Dr. Carter's testimony. When pathologists reviewed the autopsy report and Dr. Carter's testimony, they raised the possibility that either the autopsy report was fabricated or Dr. Carter's testimony was misleading. (P-Br.15-16.) Armed with those inconsistencies in Dr. Carter's own report, Swearingen diligently sought and obtained the retraction.

B. Swearingen's New Constitutional Claims Establish Clearly and Convincingly That Swearingen Could Not Have Committed Trotter's Murder

> A court's inquiry under [28 U.S.C. §2244(b)(2)(B)(ii)]
>
> essentially has three steps. First, [the court] must identify "the facts underlying the [applicant's] claim" and accept them as true for purposes of evaluating the application. [The court] next must decide whether these facts establish a constitutional error. Finally, [the court] evaluate[s] these facts in light of the evidence as a whole to determine whether, had the applicant known these facts at the time of his or her trial, the application clearly proves that the applicant could not have been convicted.

Boshears, 110 F.3d at 1541; (*see* P-Br.38.)

Conducting an analysis flawed in both method and outcome, the

District Court concluded that the result of Swearingen's trial would have been the same even if a reasonable jury had seen all the post-trial evidence demonstrating Swearingen's *actual* innocence. (Op.44-45.) Yet that evidence – particularly the previously unavailable tissue samples – not only casts reasonable doubt on Swearingen's guilt, but also *excludes* the possibility that Swearingen could have committed the crime.

1. The District Court Erred in Discrediting the New Evidence, Instead of Assuming It As "Proven"

Section 2244(b)(2)(B)(ii) requires that, in examining the second prong of the gateway, the factual allegations in the petition and the credibility of the newly-discovered evidence on which the petition relies must be assumed as "proven."

Swearingen's petition alleges 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 [the] 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." (Op.16.) Swearingen argues that those allegations establish (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" – errors which this Court, after a *prima*

facie review, remanded for review. (Op.17.)

Pursuant to the explicit statutory mandate, the District Court should have assumed that:

- "'[Swearingen] can prove the prosecutor[s] knowingly and purposefully introduced false and misleading testimony regarding'" Trotter's time of death, "'in violation of his constitutional rights.'" *See LaFevers v. Gibson*, 238 F.3d 1263, 1266 (10th Cir. 2001) (assuming as true petitioner's *Giglio* allegations (citation omitted));
- Swearingen's counsel would have confronted Dr. Carter with her own autopsy findings, contesting her 25-day PMI estimate and pressing her to provide a scientific assessment of the time of Trotter's death based on the descriptions of the internal organs in the autopsy report;
- Dr. Carter would have testified consistently with her 2007 affidavit, endorsing as scientifically sound expert assessments that Trotter died no "more than two weeks" prior to discovery (*supra* at 8);
- Swearingen's counsel would have sought and discovered the paraffin-preserved tissue samples from Trotter's body, for forensic pathologists to analyze;

- Examination of the tissue samples would have produced the same exculpatory results as Drs. White's and Pustilnik's conclusions that Trotter died while Swearingen was incarcerated.

The District Court erred by failing to assume the truthfulness and accuracy of these propositions. *In re Wright*, 298 F. App'x 342, 344-45 (5th Cir. 2008) (assuming credibility of possibly exculpatory DNA evidence); *Kutzner v. Cockrell*, 303 F.3d 333, 337 (5th Cir. 2002) (assuming that stray hair petitioner proposed to be DNA-tested "is tested and it is determined not to belong to [petitioner]").

Despite acknowledging that "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" (Op.32), the District Court failed to accept that proposition as "proven." Instead, in violation of §2244(b)(2)(B)(ii), the District Court assumed "a long period of exposure." (Op.38). This conclusion ignored the gateway's "if proven" clause, which requires that courts assume as true the propositions which, if taken at full face value, "the evidence that [petitioner] says was not previously discoverable tends to establish." *Keith v. Bobby*, 551 F.3d 555, 557 (6th Cir. 2009) ("fully crediting all the allegations against" other potential murder suspect); s*ee McLeod v. Peguese*, 337 F. App'x 316, 327 (4th Cir. 2009) ("accepting as proven fact the evidence allegedly provided by [the new witness], and *that to which it leads*").

The District Court's unprecedented analysis rendered the "if proven" clause meaningless, abdicating its "duty to 'give effect, if possible, to every clause and word of a statute.'" *Young v. Hosemann*, 598 F.3d 184, 191 (5th Cir. 2010) (citation omitted).

The District Court's flawed approach conflicts with courts in other circuits that strictly construe §2244(b)(2)(B)(ii)'s "if proven" clause. *See*, *e.g.*, *Albrecht v. Horn*, 485 F.3d 103, 120-21 (3d Cir. 2007) (affirming crediting, for purposes of the gateway inquiry, of an expert's *habeas* testimony); *Thompson v. Calderon*, 151 F.3d 918, 925 (9th Cir. 1998) ("assuming [the newly-discovered witness] made the statements and they were true"); *In re Buenoano*, 137 F.3d 1445, 1446 (11th Cir. 1998) (assuming petitioner's new evidence "eras[ed] . . . entirely" prosecution's trial witness' testimony about the results of that witness' laboratory examination of crucial evidence); *Boshears*, 110 F.3d at 1542 (assuming allegedly "withheld information is sufficiently exculpatory to establish a constitutional violation under *Brady*"); *Ferranti v. United States*, No. 65-CV-5222, 2010 WL 307445, at *12 (E.D.N.Y. Jan. 26, 2010) ("assuming that [new witness'] declaration is credible"); *Beltran v. Dexter*, 568 F. Supp. 2d 1099, 1105-06, 1108 (C.D. Cal. 2008) ("[a]ssuming *arguendo*" that inadmissible, obviously inaccurate, unreliable translations of affidavits in Spanish, in which "'critical prosecution witnesses'" allegedly recanted their earlier testimonies, "were competent, credible

evidence" and "even assuming the truth of [the] statements") (citation omitted); *Garcia v. Portuondo*, 459 F. Supp. 2d 267, 291 (S.D.N.Y. 2006) (chastising the prosecution for "mistak[ing] the function of the habeas court," which "is not . . . to try the case. Rather, it is to determine whether . . . failure to offer [the new] evidence at trial, and thus to give the jury the opportunity to evaluate its trustworthiness, prejudiced [petitioner's] case.").

In dismissing Swearingen's petition, the District Court "mis[took] the function of the habeas court." *See Garcia*, 459 F. Supp. 2d at 291. It only gave lip service to §2244(b)(2)(B)(ii)'s *requirement* that a successive petition's allegations and the credibility of newly-discovered evidence the petition purports to introduce be first assumed as "proven." That alone requires reversal.

2. Had the District Court Correctly Applied §2244(b)(2)(B)(ii), It Would Have Concluded That Swearingen Could Not Have Been Found Guilty

The District Court also erred because it concluded, without any hearing, that the expert reports were "hardly credible" (Op.42) because they did not "conform to all the evidence." (*Id.* at 39.)[11] If the District Court had conducted the proper analysis, it would have been compelled to credit the dispositive exculpatory value of Swearingen's new evidence and, thus, necessarily conclude that, "in light

[11] There is, of course, no authority for the novel proposition that an expert's opinion "must conform to all the evidence" and the District Court cites none.

of the evidence as a whole," §2244(b)(2)(B)(ii), "the verdict in this case would have been different had the jury seen and heard" the new evidence, *see Garcia*, 459 F. Supp. 2d at 292. Indeed, the District Court acknowledged that "[t]aken at face value, Swearingen's new scientific evidence appears highly exculpatory." (Op.36.) That acknowledgement should have concluded the gateway inquiry.

Had the District Court viewed the evidence as a whole, it would have contemplated a trial setting, where (1) "*all* experts' opinions are . . . in agreement that Ms. Trotter's body could not have been in the woods for a 25-day period" (Op.35) and, (2) the testifying medical examiner, when confronted with the new histological evidence and her *own* autopsy descriptions of Trotter's internal organs, *endorses* the scientific reliability of experts opinions that "the body was not exposed . . . until sometime after December 12, 1998." (*Id.* at 34.) (The new evidence also included Trotter's co-worker Lisa Roberts' affidavit testifying that she told police days after Trotter disappeared that another man had repeatedly threatened to kill and strangle Trotter (before stangulation was even known to be the cause of death) – testimony undisclosed by police, unavailable at trial and completely ignored below. (P-Br.16-17.)) *No* reasonable factfinder presented with such potent evidence of innocence would have convicted Swearingen. The new evidence not only "cast[s] significant doubt on [Swearingen's] guilt," *In re Siggers*, 132 F.3d 333, 337 (6th Cir. 1997), but expressly exculpates Swearingen for the

murder for which he was convicted.

Significantly, unlike in *LaFevers*, 238 F.3d at 1266, where "the trial record [was] replete with independent, direct evidence," or *Ferranti*, 2010 WL 307445, at *12, where "the weight of the other incriminating evidence against [petitioner] [was] crushing," Swearingen's conviction was based on highly dubious circumstantial evidence. (P-Br.6-11.) Certainly, no "reasonable factfinder" would or could have found that the circumstantial evidence against Swearingen was "left uncontroverted by the[] propositions" Swearingen's expert opinions would have established, *i.e.*, that Trotter could not have died before Swearingen was incarcerated. *See Keith*, 551 F.3d at 559.

In short, the new evidence is "of such a magnitude that a reasonable juror would rely on that evidence to the exclusion of all of the other evidence" that had supported conviction. *LaFevers*, 238 F.3d at 1267. Swearingen has thus shown clearly and convincingly that "[he] would have been acquitted if [his trial counsel] had done his job competently," *Garcia*, 459 F. Supp. 2d at 292, if the prosecution had not elicited misleading testimony from Dr. Carter, and if a "reasonable factfinder" had been presented with the "highly exculpatory" (Op.36) scientific evidence contained in the new expert reports.[12]

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[12] If the AEDPA's procedural test is construed to preclude actually innocent defendants from obtaining habeas relief, it is inconsistent with the Eighth and *(cont'd)*

CONCLUSION

For the foregoing reasons, the District Court's decision should be reversed and remanded for a hearing on the merits of Swearingen's petition.

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Respectfully submitted,

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Fourteenth Amendments and should be stricken as unconstitutional. (*See* §I.B pp. 9-16, *supra*). That interpretation should be avoided. "'[I]t is a cardinal principle' of statutory interpretation . . . that when an Act of Congress raises 'a serious doubt' as to its constitutionality, '[courts] will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

CERTIFICATION

I hereby certify that any required privacy redactions have been made; that the electronic submission is an exact copy of the paper document; and that the document has been scanned for viruses with the most recent version of a commercial virus-scanning program and is free of viruses.

/s/ *Jeffrey A. Mishkin*
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CERTIFICATE OF SERVICE

On April 26, 2010, a copy of the foregoing Brief of Amici Curiae Innocence Project and Innocence Network was served upon Petitioner-Appellant and Respondent-Appellee via the ECF electronic filing system and by U.S. Mail.

/s/ *Jeffrey A. Mishkin*
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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1. This brief complies with type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 6,969 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

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