

EX PARTE) **No. 99-11-06435-CR(2)**
) **IN THE DISTRICT COURT**
LARRY RAY SWEARINGEN) **9TH JUDICIAL DISTRICT**
(WR-53,613-04)) **MONTGOMERY COUNTY, TEXAS**

**SUPPLEMENTAL BRIEFING TO SECOND APPLICATION FOR WRIT OF
HABEAS CORPUS; OR, IN THE ALTERNATIVE, PETITIONER’S THIRD
APPLICATION FOR WRIT OF HABEAS CORPUS PURSUANT TO ARTICLE
11.071 § 5 OF THE TEXAS CODE OF CRIMINAL PROCEDURE**

Petitioner, Larry Swearingen, files this supplemental briefing to his second application for writ of habeas corpus, or, in the in the alternative, his third application for a writ of habeas corpus as follows:

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I. INTRODUCTION

The State's theory that on December 8, 1998, Larry Swearingen killed Melissa Trotter and dumped her body in the Sam Houston National Forest where it was recovered **twenty five days later** on January 2, 1999, no longer has any foundation. Former Harris County Chief Medical Examiner's, Dr. Joye M. Carter's, trial testimony that the date of death was approximately 25 days before recovery of the body was instrumental to the State's case. Dr. Carter recently reviewed her January 3, 1999, autopsy report and reviewed temperature data and crime scene photographs that neither the State nor defense counsel had provided to her at trial. *Exhibit 'A', October 31, 2007, Statement of Dr. Joye M. Carter; Exh. 'B'; Autopsy Report; Exh. 'C', Temperature Table; Exh. 'D', NOAA certified temperature data.*¹ **Dr. Carter's present opinion that the body was left in the woods within fourteen days of recovery (Exh. A, at 2-3) means that someone else left the body in the woods at least one week after the date on which Mr. Swearingen was taken into custody, which was on December 11, 1998.** *Tr. Transc., vol. 25, at 115, 122.*

Dr. Carter's conclusion is confirmed by the testimony of three other pathologists, including the present Harris County Medical Examiner, Louis Sanchez, forensic pathologist Dr. Gerald Larkin, and Deputy Tarrant County Medical Examiner Dr. Lloyd White. *Exhs. 'E', 'F', and 'G'.* All concur that **the very earliest date** on which Trotter's body could have been dumped in the Sam Houston National Forest was fourteen days before recovery, or about December 18, 1998. Drs. Larkin and White, in particular, stress that the fourteen day figure is an outside estimate. Based on their careful review of

¹ The crime scene video reviewed by Dr. Carter in preparing her October 31, 2007, statement is the video entered into evidence as Defense Exhibit 42 at the July 2, 2007 evidentiary hearing convened in the course of Mr. Swearingen's second habeas proceedings.

the forensic evidence, including photographs of internal organs that look like they were taken from a “recently deceased” individual, *see, Exh. ‘G’, at 2, Drs. Larkin and White conclude that the soonest that body could have been dumped in the woods was around December 23, 1998, and that in all likelihood the exposure of the body in the forest occurred only four or five days before recovery, or more than two weeks after Mr. Swearingen was put in jail. Exh. ‘F’ and ‘G’.*

Furthermore, it is now evident that the State hid extraordinary evidence leading to another culprit. Early on in the investigation, detectives for the Montgomery County Sheriff’s Department learned that Ms. Trotter had received life threatening phone calls at her telemarketing job at League Line Marina & Resort on Lake Conroe, Conroe, Texas. *Exh. ‘H’.* Melissa was so distraught she broke down in tears. A co-worker picked up Melissa’s phone and was subjected to a foul tirade in which the caller threatened to strangle and rape Trotter. *Id.* In lurid, depraved language he insisted that he would kiss her lips and lick her cheeks one last time before taking her life. *Id.* Co-workers tried to “*-6-9” the phone call in order to identify the caller, but were unsuccessful. *Id.* The caller was **not** Larry Swearingen. The co-worker, who took the phone call meant for Melissa, knew Mr. Swearingen from high school and knew it was not his voice. *Id.*

Police also suppressed evidence that Trotter was deathly afraid of another man who came to pick her up after work at the resort at least three times. *Id.* Melissa would not reveal his identity to her League Line co-workers and, at first, there seemed to be nothing for anyone to worry about. *Id.* However, Melissa’s worries about the man became known the second time he came to get her from work. *Id.* The next time he arrived after that Melissa was clearly terrified, so much so that her co-workers tried to

dissuade he from getting in the stranger's truck and, when that failed, insisted that she call them when she arrived home. *Id.* Once again, Mr. Swearingen was not the person of whom Melissa Trotter was so afraid. *Id.* Trotter had confided to her friends that she liked Larry and was dating him. *Id.*

Right after Melissa disappeared, Melissa's former co-workers called the Montgomery Sheriff's Office to report the threatening phone calls. *Id.* Two detectives arrived at the League Line resort and interviewed the witness who had heard the vile threats against Melissa's life. *Id.* The detectives were informed of the calls, of the threats, and of the man who terrified Melissa. *Id.* They were also told that Mr. Swearingen and Trotter were seeing each other and that Mr. Swearingen might know where she had recently been. None of this information is in the police reports that were provided to trial counsel or to Mr. Swearingen's state habeas attorneys.

Scientific evidence shows an innocent man has been condemned to death. On top of that, the State withheld evidence implicating another person. The Texas Court of Criminal Appeals should therefore acquit Mr. Swearingen or order a new trial; or the convicting court should treat the present pleading as a successor petition and order it transmitted to the Texas Court of Criminal Appeals pursuant to Article 11.071 § 5.

II. JURISDICTION

Jurisdiction over this supplemental briefing, or subsequent application, may be exercised pursuant to Article 11.071, V.A.C.C.P.

III. PRIOR STATE COURT PROCEEDINGS

On December 11, 1998, three days after Trotter's disappearance from the Montgomery County Community College campus, deputies arrested Mr. Swearingen on unrelated charges. *Tr. Transc.*, vol. 25, at 115, 122. On June 28, 2000, a Montgomery County jury convicted Mr. Swearingen of capital murder. *Id.* vol. 34, at 102. On July 11, 2000, the jury answered special issues in a manner that compelled the 9th District Court to impose the penalty of death. *Id.*, vol. 38, at 91-92.

Appeal was taken to the Texas Court of Criminal Appeals, which denied relief on all claims in *State v. Swearingen*, 101 S.W.3d 89 (Tex. Crim. App. 2003). Judges Johnson and Price dissented from the majority's decision to uphold the factual sufficiency of evidence supporting convictions on aggravating felony offenses of kidnapping and sexual assault. *Id.*

On September 12, 2002, Mr. Swearingen filed his initial application for a writ of habeas corpus pursuant to Article 11.071. Mr. Swearingen raised an actual innocence claim and raised an ineffectiveness of counsel claim based on counsel's failure to challenge the date of death using forensic evidence, particularly entomological evidence. On May 21, 2003, the Texas Court of Criminal Appeals denied Mr. Swearingen's initial application for a writ of habeas corpus.

On October 17, 2006, the 9th District Court of Montgomery County set an execution date for January 24, 2007. On January 22, 2007, Mr. Swearingen filed a second application for a writ of habeas corpus, pursuant to 11.071 §5, in which he alleged that he was actually innocent, that the State had suppressed exculpatory entomological evidence, and that he had received ineffective assistance of counsel. On January 23,

2007, one day before Mr. Swearingen was scheduled to be put to death, the Texas Court of Criminal Appeals vacated the execution date and remanded six causes of action for proceedings in the 9th District Court under §11.071 § 6-9.

On June 18, 2007, the 9th District Court ordered a hearing for July 2, 2007, for the purpose of considering the following issues:

1. Whether the entomological evidence is favorable and material evidence showing that Applicant did not commit murder.
2. Whether the entomological evidence shows that Applicant is actually innocent of capital murder.
3. Whether the entomological evidence shows that Applicant is actually innocent of the aggravating felony charges [of kidnapping and sexual assault].
4. Whether the entomological evidence presented in these successor proceedings is favorable and material evidence showing that Applicant did not commit or attempt to commit kidnapping.
5. Whether the entomological evidence presented in these successor proceedings is favorable and material evidence showing that the Applicant did not commit or attempt to commit sexual assault.

On July 29 and 30, 2007, parties filed proposed findings of fact and conclusions of law.

On or about September 23, 2007, the 9th District Court adopted the State's proposed findings, recommended that relief be denied, and ordered the clerk of the court to transmit files and transcripts to the Texas Court of Criminal Appeals.

IV. FACTUAL BACKGROUND

Melissa Trotter, the niece of a State Senator,² disappeared from the Montgomery County College campus on **December 8, 1998**. In the early morning hours of December 9, 1998, her car was found in the college parking-lot. *Id.* at 9-10. Immediately, the

² Exh. 'I' (Newclipping). The case was high profile, even for a capital case. The Montgomery County District Attorney, Michael McDougal, attended the January 3, 1999, autopsy of Trotter's body. He was one of several law enforcement "guests" at the autopsy, to use Dr. Carter's term. *Tr. Transc. vol. 29* at 75.

Conroe, Texas community formed search teams. Police interviewed dozens of potential witnesses. *Tr. Transc.*, vol. 25, at 114-115. Three days later, on **December 11, 1998**, Montgomery County deputies arrested and incarcerated Mr. Swearingen on unrelated charges. *Id.*, at 115, 122. However, Mr. Swearingen was considered to be one of the last persons to have seen Trotter alive. The arresting officer was searching for Mr. Swearingen in order to question him about Trotter. *Id.* at 112. Police interviewed Mr. Swearingen about Ms. Trotter's disappearance and searched his trailer and car for evidence that he killed Trotter. *Id.*, vol. 27, at 137, 140. The searches of the trailer and car took place well before the District Attorney announced that the State would seek an indictment on capital murder charges. *Exh. 'J'*.

On January 2, 1999, twenty two days after Mr. Swearingen's was thrown in jail, hunters found Mr. Trotter's body in the woods and notified the Montgomery County Sheriff's Department. *Tr. Transc. vol. 28*, at 11-13, 22. Trotter's corpse was visible from a distance of at least 20 feet. *Id.* at 34. The body was so well preserved that at first the hunters thought the body was a "manikin." *Id.* at 13. One of them touched it to see if it was real,

Well, when I walked up to it, because of the way the flesh looked, I still really couldn't tell if it was a human body or not, so I touched it.... It felt like flesh to me."

Id. at 14.

The deputy that arrived at the crime scene remarked that the body showed very little decomposition. *Exh. 'K'*. There was no odor coming from the body. *Id.* Crime scene and autopsy photos reveal that the lower extremities were found clad in blue jeans and socks that were barely soiled. *Exh. 'L'* and *'M'*. One shoe was located nearby; the

other was still on Trotter's foot. A sweater and bra were bunched around the neck, leaving Trotter's torso and breasts nude. *Exh. 'N'*.³ Below the neck there was no visible sign of scavenging by vultures, crows, wild pigs, or by other avian and mammalian scavengers that populate the East Texas woods, (*see, Figure 4*, p. 29, below) and scavenging below the neck was not described at autopsy. *See Exh. 'B'* (autopsy report).

Crime scene videos and still photographs document that Trotter's body was found in a relatively open space, only partially shaded by brush and trees.

Figure 1, crime scene photo of the body of Melissa Trotter (deleted)

³ In appellate briefing the State points out the clothing bunched under Trotter's arms and exposing her breast "indicat[ed] her body had been dragged by someone using her armpits as anchor points." *State's [2001] Appellate Brief*, at 12 (citing *Tr. Transc. vol 28* at 92-93, 103-14, 107, *et passim*). In order to procure a capital conviction based on an aggravating felony of sexual assault, the prosecutor during closing arguments tried to put a different spin on it: "I submit to you that her shirt was up and her bra was up because [Swearingen] wanted to cup a feel." *Tr. Transc. vol. 34*, at 26.

Exh. 'O'. The corpse was laid out nearly supine in the grassy area. *Fig. 1* and *Exh. 'N'*. The video show the body was visible from a considerable distance.⁴ Police reports reveal that Game Wardens told Montgomery County law enforcement that “there had been numerous deer and duck hunters in the area in the last few days and that three deer had been shot and cleaned near where the body was found.” *Exh. 'K'*; and see, *Tr. Transc., vol. 28, 27-29*. Officers of the United States Forest Service and Texas Department of Parks and Wildlife regularly patrolled the area. *Id., vol. 28, at 36, 39*. Police and volunteers had searched the area several times looking for Trotter’s body, and may have searched at least once with dogs, but they did not discover anything. *Id., vol. 28, at 65; vol. 34, at 27*. The vicinity of the crime scene was also a popular place for teens and young adults to hang out. *Exh. 'H'*. However, no one reported a body until January 2, 1999.

At trial, the State sponsored eyewitness testimony placing Mr. Swearingen with Ms. Trotter at Montgomery Community College in the early afternoon of December 8, 1998. *Tr. Transc., vol. 25, at 33*. The State called several acquaintances of Mr. Swearingen to try to show that Mr. Swearingen’s interest in Trotter was sexual. *Id., vol. 24, at 172, 174, 210*. Phone records showed that Trotter had paged Mr. Swearingen and that he had called her back the day before she disappeared. *Id at 172-173*. His workmates at his electrician’s job on the Community College Campus indicated that Mr. Swearingen had made a lunch date with Trotter for December 7, 1998, and appeared upset when she broke it. *Id., at 153-158*.

The State introduced fiber evidence, cell phone records, and the testimony of former Harris County Medical Examiner Joye M. Carter to show that on December 8,

⁴ See *Ex Parte Swearingen*, July 2, 2007, Evidentiary Hearing, Defense Exhibit 42 (video).

1998, Mr. Swearingen killed Trotter and dumped her body in the Sam Houston National Forest. The fiber evidence consisted of “several questioned fibers” recovered from the victim’s jacket, which Texas Department of Public Safety officer, Sandra Musialowski, said “appear[ed] to be known fibers from [Mr. Swearingen’s] jacket.” *Id.*, vol. 30, at 37-39. Musialowski testified several fibers found on Trotter were “similar to seat material of [Mr. Swearingen’s] vehicle.” *Id.* at 40. A few other strands were “similar” to fibers from his truck’s headliner and from the carpet in Swearingen’s mobile home. *Id.* at 42, 43. The State found three hairs in Mr. Swearingen’s truck that it claimed were “microscopically similar” to Trotter’s hairs. *Id.* at 49, 50. The State also pointed to a paint fleck found on Trotter’s clothing. DPS officer, Ivan Wilson, said that the quantity was “an insufficient amount to do all the testing that I normally do.” *Id.* at 17. However, she testified that the “fleck[s]” were similar in appearance to paint on Swearingen’s red pickup truck. *Id.*, 18.

Cell phone records were introduced in an attempt to show the jurors Mr. Swearingen’s movements during the morning and afternoon of December 8, 1998. One in particular, which was received by a tower in Willis, Texas, was stressed as especially significant. In the State’s closing argument it was referred to as proof that on December 8, 1998, at approximately 4:30 PM, Mr. Swearingen had dumped the body in the Sam Houston Forest and was calling his father while on his way back to his residence. *Id.* vol. 34, at 87-88 (closing argument). On the other hand, Swearingen and his parents lived within range of the tower. *Id.*, vol. 27, at 97-98.

What the State called its “smoking gun” was half a pair of pantyhose. *Id.*, vol. 34, at 82-83 (closing argument). On January 6, 1999, four days after Trotter’s body was found with a pantyhose ligature tied around her neck, Montgomery County Deputies

recovered a half pair of hose from trash outside Swearingen's trailer. *Id.*, vol 29, at 212. The half that the Deputies fetched from the trash was matched to the half length of pantyhose that was apparently was used to strangle Trotter. *Id.*, vol 30, at 60. Mr. Swearingen's landlord, John Harrell, testified he had found the torn hose in Mr. Swearingen's trailer as he and his wife were cleaning it to get it ready for another tenant. *Id.* vol. 29, at 131. Mr. Swearingen's wife testified that the ripped pantyhose leg found in the trailer came from a pair she owned.

Police had searched the mobile home trailer twice before, once on December 15, 1998, and again on December 18, 1998. *Id.*, vol. 27, at 137, 140. Five or six deputies, among them two crime scene investigators, searched the trailer on the first occasion. *Id.* at 134, 150, 152. The officers searched every room, looked through the trash and looked through boxes of clothes. *Id.* at 135-136. "As thorough a search" was conducted three days later. *Id.* at 138. However, law enforcement did not discover a ripped pair of hose.

Another key piece of evidence was forensic pathological testimony of Dr. Carter. Based on the external appearance of Trotter's body, Dr. Carter testified that Trotter died twenty-five days before her body was recovered. *Id.* vol. 29, at 45. Since deputies found her body in the Sam Houston National Forest on January 2, 1999, this testimony indicated a date of death on December 8, 1998, when, according to the State, she was last seen in the company of Mr. Swearingen. Police records show that Dr. Carter had formulated this opinion upon receiving the body at the morgue. *Exh.* 'P'. The opinion was based on her initial view of Trotter's corpse upon removal of the clothing in which it was found, but before the internal examination of the body began. *Id.* It was also based on "a copy of the original missing persons report" regarding Trotter's disappearance from

the community college campus, which Montgomery County deputies supplied. *Id.*

According to police reports,

“Dr. Carter stated due to the larvae, maggots, and degree of decomposition, and the body was dressed similar to the missing person report, she felt the victim had probably been deceased, 24 to 25 days, consistent with the time Melissa disappeared.”

Id. At trial, Dr. Carter also testified that Mr. Trotter may have been struck in the head and could have sustained a vaginal injury from blunt trauma. Her testimony was based on decompositional changes and on discoloration of the vaginal wall.⁵

During initial State habeas proceedings, Mr. Swearingen attempted to present entomological evidence demonstrating that Trotter’s died after Mr. Swearingen was incarcerated on December 11, 1998. However, the State opposed Mr. Swearingen’s motion for release of evidence, at first on the ground that the forensic entomological testing would just support the State’s theory. At a hearing on post-conviction motions that State argued:

“Specifically, the insects, obviously, the State assumes this stuff is going to get examined and corroborate the evidence at trial. In the unlikely event it shows a few days less than 24 days, 18 days or something, the question is, will the Court then be able to find that there’s a reasonable probability the outcome of the trial would have been different with that information. And based on all the other facts in the case, I don’t think you can say that, because we still know, based on other facts, Larry took her with him that day, Larry killed her that day, because she still had food contents, what was presumably food in her stomach.”

Transc., Appellate Motions, at 6. Later, the State switched positions and insisted that the entomological evidence did not exist. *State’s [2002] Proposed Findings of Fact and*

⁵ Subsequently, Dr. Carter’s successor at the Harris County Medical Examiner’s Office, Chief Medical Examiner, Dr. Louis Sanchez, corrected Dr. Carter’s testimony. According to Dr. Sanchez, the evidence indicated that the discoloration, in fact, was not caused by a bruise. The Medical Examiner’s letter retracting Dr. Carter’s opinion is attached to Mr. Swearingen’s second application for a writ of habeas corpus, filed January 22, 2007, as Exhibit ‘E’.

Conclusions of Law, at ¶ 12.⁶ The convicting court accepted each of the State's representations. It denied Mr. Swearingen's motion to release the grubs and dried larva that Mr. Swearingen's investigator had identified in State's Exhibit 218, and later in recommending that relief on Mr. Swearingen's initial habeas application be denied, the convicting court adopted the State's proposed finding that forensically valuable insect evidence had not been collected in this case.

However, in federal proceedings the United States District Court for the Southern District of Texas ordered Montgomery County to provide Mr. Swearingen with State's Exhibit 218. *Swearingen v. Dretke*, no. 4:04-cv-02058, *docket entry* # 17. The petri dish contained numerous desiccated pupae, larva and insect parts. *Exh. 'Q'*. Forensic entomologist Dael Morris ultimately produced a report that indicated that blow-flies colonized Ms. Trotter's body no sooner than December 18, 1998. *Id.*⁷

In Mr. Swearingen's second application for habeas relief, which he filed January 22, 2007, Mr. Swearingen presented Morris' findings along with the findings of Dr. James Arends, who based his opinion on crime scene reports and photos, autopsy results and photos, and Morris' data and conclusions. On February 15, 2007, the State filed an Answer to Mr. Swearingen's second application in which the State argued that Morris'

⁶ In support of the nonexistence of evidence thesis, the State, in 2002 state habeas proceedings, filed the affidavit of the lead prosecutor at trial in which he states, "I concur with [defense counsel] Mr. Crow's statement that there were no labeled containers or documentation indicating that maggots or other insect materials were collected." This affidavit is also attached to the State's 2007 Answer to Mr. Swearingen's second application as Exhibit 'C'. Crow, in his 2002, affidavit, however, did not say evidence did not exist. He said that he didn't recall seeing anything labeled "insect specimens," and he said "he would not have recognized evidence of entomological value at first glance." Crow's 2002 affidavit is also attached to the State's 2007 Answer as Exhibit 'B'.

⁷ Dr. Arends January 2007 Statement is attached as an exhibit to Mr. Swearingen's January 22, 2007, application.

report was not material because she suggested that temperatures for egg-laying by blowflies were not high enough until December 18, 1998.

In his reply to the State's 2007 Answer, Mr. Swearingen filed an affidavit from Morris explaining why the State's assumption was mistaken, and that temperature data showed opportunities for egg laying between the date Trotter disappeared on December 8, 1998 and December 18, 1998. *Exh. 'R'*. Mr. Swearingen also filed affidavits of Dr. Larkin and White confirming that Trotter's body had been exposed in the woods for a considerably shorter time than that the twenty-five days the State alleged. *Exhs, 'S and 'T'*. After Mr. Swearingen filed his Reply, the Montgomery County District Attorney agreed that unresolved questions of material fact remained.

At the July 2, 2007, evidentiary hearing Mr. Swearingen sponsored the testimony of forensic entomologist James Arends, who testified that the entomologically relevant evidence did not support the State's theory that Trotter's body had been dumped in the woods 25 days before it was recovered. *Transc., July 2, 2007, Hearing, at 72-73*. Dr. Arends pointed to the absence of insect activity in the anal and vaginal regions. *Id.* at 42. Dr. Arends also stressed the body showed no signs of significant decomposition except in the region of the head and neck. He pointed out how unusual this is if, as in this case, the body "is not buried, it is not partially buried, it's just laying out there," *id* at 74, in a relatively open space. *Id.* at 46; *and see, fig. 1, supra*. Dr. Arends pointed out, further, that scavenging by birds and mammals was far less than what would be expected, seeing that the body was uncovered, partially nude, and located in forest environment that is known to have substantial populations of mammalian and avian scavengers, including pigs, vultures, crows, raccoons and coyotes. *Id.*, at 42-43. Dr. Arends concluded that the

body had not been in the woods for more than a week based on this evidence and the findings of Mr. Swearingen's pathological experts. *Id.*, at 74. Based on his "evaluation of this body," Dr. Arends concluded "it probably had not been in that environment more than a few days, five, maybe slightly longer." *Id.* at 42.

Three pathologists – Harris County Medical Examiner, Louis Sanchez; Deputy Tarrant County Medical Examiner, Lloyd White; and forensic pathologist, Gerald Larkin – corroborated Dr. Arends' conclusion that Trotter's body was in the forest for far less time than 25 days. At the July 2, 2007, evidentiary hearing, Dr. Sanchez testified that "[t]hat body most likely was not in that forest for more than two weeks. It probably was some place else before that, but not in that forest." *Id.* at 17. Dr. Sanchez emphasized that fourteen days, even ten days, was a maximum limit. In his view, "it is unlikely that the body was there in that field for over 10 to 15 days." *Id.* at 17. Hence, December 18 or 19, 1998, was the very earliest date the body could have been dumped in the woods, and a date as late as December 22 or 23, 1998, was a reasonable outside limit. Nonetheless, the 9th District Court once again adopted the State's proposed findings of fact and conclusions of law, and recommended that the Texas Court of Criminal Appeals deny relief on Mr. Swearingen's second application for a writ of habeas corpus. In doing so, the Court adopted the identical proposed finding that the State first filed in 2002, which states that Dr. Carter's testimony that Trotter had died 25 days before the recovery of her body was credible.

However, the forensic evidence upon which Drs. Arends, Sanchez, Larkin, and White based their opinions cannot be ignored. Among the remarkable findings are the following: the pancreas, which would have turned to sludge within a few days under

temperature conditions prevailing in the Sam Houston National Forest, was present at autopsy. Dr. Carter resected the pancreas and sectioned it. *Exh. 'C'*, at 5. The liver also rapidly decomposes. However, Dr. Carter was able to remove the liver and section it serially. *Id.*. The liver was not crepitant, which is to say that gaseous bubbles that characterize the early stages of decomposition of this organ had not yet formed within the tissue. *Exh. 'F'* at ¶10. Gall bladder, stomach and intestines were intact, and their mucosal linings, which disintegrate sometimes within hours, were examined and rinsed. *Exh. at C*, at 5-6. The spleen, which, like the pancreas, would have liquefied in a matter of four or five days, *Exh. 'G'*, at 2-3, was removed and dissected. *Exh. 'C'*. at '5'. In the autopsy photographs, the spleen appears to be that of a recently deceased person. *See Fig. 2, infra*, p. 26. Breast tissue was described as firm and intact and was sectioned. *Exh. 'C'*, at 4. According to the autopsy report, internal organs “retained their normal position.” *Id.*, at 4. Finally, Trotter’s corpse weighed 105 pounds nude at autopsy, *id.*, **exactly** what Trotter was reported to weigh when she disappeared, *Exh. 'U'*, and only four pounds less than her weight at her doctor’s office two weeks earlier. *Exh. 'V'*.

After the July 2, 2007, evidentiary hearing in Mr. Swearingen’s case, Mr. Swearingen developed additional evidence supporting his claim of innocence and his insistence that his trial was riddled with constitutional error. Present habeas counsel finally was able to contact Dr. Joye M. Carter at her new position as Chief Forensic Pathologist for Marion County, Indiana. Upon reviewing temperature data, and crime scene evidence unavailable to her at trial, Dr. Carter added her voice to the opinions of Drs. Sanchez, White and Larkin. *Exh. 'A'*. Based on her re-evaluation of the January 3,

1999, autopsy results, Dr. Carter stated that Trotter's body was left in the woods within fourteen days of recovery. *Id.*

Furthermore, after the July 2, 2007, evidentiary hearing, counsel was able to develop evidence showing that in order to convict Mr. Swearingen, the State withheld extraordinary exculpatory evidence that pointed toward the real killer. Days before she disappeared, Melissa Trotter received horrific, life threatening phone calls at her telemarketing job at League Line Resort. *Exh. 'H'*. The caller threatened to choke her, rape her and kill her. *Id.* A terrified Trotter broke down in tears before co-workers. She was also picked up from the Resort by a man of whom she was deathly afraid, but felt she could not disobey nor reveal his name. *Id.* After she disappeared, Trotter's coworkers called police and told them of the threats and the dreaded companion. *Id.* The State never disclosed this explosive information to Mr. Swearingen's attorneys, although police knew Mr. Swearingen was neither the caller nor the stranger. If this Court does not order a new trial, Texas will execute an innocent man while the real killer goes free.

Mr. Swearingen is therefore compelled to add the following evidence and claims for relief to those presently before this Court.

V. STANDARDS FOR SUBSEQUENT PETITIONS

A claim raised in a subsequent application under §11.071 may be considered by the Court if an applicant presents sufficient specific facts which establish that (1) the current claims and issues have not been and could not have been presented in a timely initial application because the factual or legal basis of the claims was unavailable, and (2) that by a preponderance of the evidence, but for a violation of the United States

Constitution no rational juror could have found him guilty beyond a reasonable doubt. See TEX. CODE CRIM. PROC. art. 11.071 § 5(a)(1)&(2).

In 1996, the Texas Court of Criminal Appeals recognized that "the incarceration of an innocent person is as much a violation of the Due Process Clause as is the execution of such a person." Additionally, the Court instructed that "we have held that claims of actual innocence based upon newly discovered evidence are cognizable on post-conviction writs of habeas corpus. This is true regardless of whether the applicant pled guilty or had a jury trial; an applicant can bring an actual-innocence claim based on newly discovered evidence in either situation." In fact, the Texas Court of Criminal Appeals now recognizes two types of "innocence" claims. The first—a *Herrera* claim—is a substantive claim in which the person asserts a "bare claim of innocence" based solely on newly discovered evidence. *Ex parte Tuley*, 109 S.W.3d 388, 390 (Tex.Crim.App. 2002). The other type of innocence claim — a *Schlup* claim — is one that "does not by itself provide a basis for relief," but is intertwined with constitutional error that renders a person's conviction constitutionally invalid.

In order to prevail on a "bare claim of innocence," a petitioner must demonstrate that new evidence demonstrates that he is "unquestionably innocent" of the crime in question. *Ex Parte Elizondo* 947 S.W.2d 202, 209 (Tex.Cr.App. 1996) (citing *Schlup v. Delo*, 513 U.S. 298 (1995)). The *Elizondo* Court noted that the Supreme Court had not defined the phrase "unquestionably innocent." However, the TCCA reasoned that the standard was high. Accordingly, it interpreted the phrase "unquestionably establishes" to mean by "clear and convincing" proof, and held that, as in the federal system, the tribunal "hearing the habeas application must be convinced that the new evidence does,

by itself, unquestionably establish, that is, prove by clear and convincing evidence, the applicant's innocence.” *Id.*

In considering Mr. Swearingen’s claims based on innocence, the Court reviews State’s evidence *de novo*. See *Killian v. Poole*, 282 F.3d 1204, 1208 (9th Cir.2002); *Cornell v. Nix*, 976 F.2d 376, 382 (8th Cir. 1992). A *de novo* standard also applies to the prosecutorial misconduct. When considering either type of claim, the Court looks at the evidence in light of the legitimately admitted evidence and discounts other evidence that the State sponsored in violation of the law.

VI. CLAIMS FOR RELIEF

ACTUAL INNOCENCE

CLAIM #1

FORENSIC EVIDENCE CONCLUSIVELY DEMONSTRATES THAT MR. SWEARINGEN DID NOT MURDER MELISSA TROTTER

In all stages of the proceedings in this case, the State has contended that Mr. Swearingen killed Ms. Trotter in the afternoon of December 8, 1998, and deposited her body soon thereafter in the Sam Houston National Forest. At trial, the State put on testimony that Trotter left the community college with Mr. Swearingen on December 8, 1998. The State next attempted to trace Mr. Swearingen’s movements on December 8, 1998, from Montgomery College to his home and to the Sam Houston National Forest. The State sponsored hair and fiber evidence linking Trotter to the truck and Swearingen’s mobile home. Finally, the State introduced evidence that Trotter was strangled using a ligature made from a torn pantyhose, and contended that the other half was found in Swearingen’s trailer a month after she disappeared.

The State's case was entirely circumstantial. *Id.*, vol. 34, at 21. In the TCCA's words, the forensic evidence on which Mr. Swearingen's conviction depended was "weak and tentative." *Swearingen v. State*, 101 S.W.3d 89, 96 (2003). On appeal, therefore, the State pointed to a Spanish letter drafted by Mr. Swearingen as the "clearest evidence of precisely what transpired in the afternoon of December 8, 1998." *State's [2001] Brief on Appeal*, at 30. According to the State, the Spanish letter supported the conclusion that between approximately 2:00 and 4:30 PM "Appellant secreted [Trotter's] body in the woods and committed his final act of stabbing her before leaving her to die of asphyxiation." *Id.* at 34. However, the State's own translator testified that the Spanish in which this "clearest piece of evidence" was composed was so badly garbled that it hardly made sense, and that other translators could interpret what it said differently. *Tr. Transc. vol. XXXI*, at 67-68, 71. As the dissent in *Swearingen v. State* noted, "the letter was not a confession or testimony presented by the defendant as the truth, which the jury could believe or disbelieve based on their evaluation of his credibility." *Id.* at 96.

During Mr. Swearingen's first State habeas proceeding, initiated on March 11, 2002, the State insisted that at trial it had "presented a great deal of evidence showing that on December 8, 1998, Applicant abducted Melissa [Trotter], killed her, and left her body in the Sam Houston National Forest. *State's [2001] Answer in Opposition to Applicant's Application for Writ of Habeas Corpus*, at 26. Once again, the State emphasized the Spanish letter, fiber evidence and the ligature made of a pantyhose leg found around Trotter's neck. *Id.* at 26. "However," the State argued, "there is more,"

"Harris County Chief Medical Examiner Dr. Joye Carter conducted the autopsy of Melissa's body. Based on the state of decomposition and fungal development present, as well as insect progression the Medical Examiner observed, Dr. Carter estimated that Melissa had

been dead for approximately twenty-five days, and testified that a death on December 8, 1998, was consistent with the finding. Of particular significance is the fact that during the internal examination, the Medical Examiner located what appeared to be chicken and a form of potato, like french fries. In Melissa's stomach, along with a small amount of greenish vegetable material."

Id. at 26-27. As "a final comment on the evidence proving that Applicant killed Melissa on December 8, 1998," *id.* at 29, the State "point[ed] out that a note that had been given to Melissa by another student on December 8 was found in a pocket of Melissa's jeans during the autopsy." *Id.*

In Mr. Swearingen's second habeas proceedings, which commenced on January 22, 2007, the State insisted on its theory of the case without a single variance, despite the opinions of three pathologists, including current Harris County Chief Medical Examiner Louis Sanchez's, all of whom conclude that Trotter's body could not have been left in the woods until at least December 18, 1998, ten days after disappearance and a week after Mr. Swearingen was incarcerated.⁸ In proposed findings of fact, the State again resorted to Dr. Carter's estimation, based on the external appearance of the body, that Trotter's death "occurred twenty-five days prior to the discovery of her corpse." *State's [2007] Proposed Findings of Fact and Conclusions of Law*, at 9. The State contended, further, that "[b]ased on Dr. Carter's credible testimony at trial, the state of decomposition of Melissa Trotter's body, particularly the presence of fungi that take "several weeks' time" to develop, was indicative of a body that had been left in the woods for 25 days." *Id.* at 25.

⁸ As emphasized above the pathologists' conclusion that the body was left in the woods a week after Mr. Swearingen was jailed is an outside limit. The pathological evidence indicates the body was not dumped into the woods until around December 27, 1998, more than two weeks after Mr. Swearingen was incarcerated.

A. No Reasonable Jury Would have Convicted Mr. Swearingen If Informed of Dr. Joye M. Carter's Forensic Conclusion that Trotter's Body Had Been In the Sam Houston National Forest Less than Fourteen Days Before It Was Discovered.

The State's central piece of evidence in support of its theory that Mr. Swearingen killed Trotter and left her body in the woods is thoroughly undermined by Dr. Carter's re-evaluation of autopsy evidence. Upon reviewing findings that she made pursuant to her internal examination of the body, Dr. Carter confirms that Trotter's corpse was not in the forest for more than fourteen days, which means that the body was not dumped there until at least one week **after** the December 11, 1998 date on which Mr. Swearingen was incarcerated. In her recent affidavit, Dr. Carter carefully explains that,

Pancreas, spleen and liver tissue is known to autolyze quickly. At room temperature, it is not unusual for these organs to liquefy within days. In this case, the body was found exposed in relatively open, only partially shaded space. Temperature data indicates an average temperature of approximately 50 degrees, with high temperatures occasionally reaching the mid-seventies. The presence of these organs in the condition described at autopsy supports a forensic opinion that the body of Ms. Trotter was not exposed in the Sam Houston National Forest until some time after December 12, 1998. Based on these internal findings, a forensic opinion that the body had not been exposed more than two weeks in the forest environment is reasonable.

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

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

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

Exh. 'A' (October 31, 2007, Affidavit of Joye M. Carter, M.D.).

Clearly, a jury faced with testimony from the forensic expert sponsored by the State that entailed that someone else dumped Trotter's body in the woods a week after Mr. Swearingen was permanently jailed would have voted to acquit him of all charges. The only reasonable inference a jury could draw would be that someone else killed Trotter and dumped her body in the woods.

B. No Reasonable Jury Would Have Convicted Mr. Swearingen of Capital Murder, or of the Aggravating Felonies of Kidnapping or Rape, if the Jury Were Informed of the Forensic Conclusions of Highly Experienced and Qualified Forensic Scientists Confirming that Someone Else Left Trotter's Body in the Woods Long After Mr. Swearingen Was Incarcerated.

Four pathologists, including current Harris County Medical Examiner, Louis Sanchez, former Harris County Medical Examiner, Joye M. Carter, Assistant Tarrant County Medical Examiner, Lloyd White, and forensic pathologist, Gerald Larkin, concluded that autopsy findings prove that Trotter's body was in the forest no more than fourteen days making December 18 or 19, 1998, the earliest date the body could have been placed there. *Exh. 'E', 'F', 'G'*. White and Larkin, in particular, stress that the

evidence strongly supports a first exposure date five to seven days before discovery, as does Dr. Arends. *Ex Parte Swearingen, Transc., July 2, 2007, Evidentiary Hearing*, at 74.

Dr. Larkin, who wrote chapters on dating death based on pathological findings for a well known treatise, reviewed the evidence in this case. *Exh. 'F'*, p. 1 (giving qualifications and material reviewed). Dr. Larkin states without hesitation that autopsy evidence supports the conclusion that,

December 23, 2007, is the soonest that Trotter's body could have been left in the woods, which is to say 12 days after Mr. Swearingen was incarcerated. Furthermore, it is important to stress that forensic evidence strongly supports the conclusion that the body in this case was deposited in the Sam Houston National Forest several days after December 23, 1998. Indeed, undisputed forensic evidence, namely, the external appearances and the description of the internal organs and tissues, and photographs of resected organs strongly support a date as late as December 30, 1998, which is to say nineteen days after Mr. Swearingen was incarcerated and three weeks later than the date the State maintains Trotter's body was left in the Sam Houston National Forest.

Id., at ¶2. Turning to fragile tissue called mucosa, for example, Dr. Larkin stresses that,

In Trotter's case, the conditions in which the mucosa were preserved allowed Dr. Carter to identify them, examine them for pathology, and subject them to mechanical processes such as dissection and rinsing. It is a medical certainty, that these tissues would not have retained the integrity seen at autopsy unless the body had been left in the Sam Houston National Forest less than ten days prior to the date of recovery. Indeed, it is very unlikely, that Dr. Carter would have found these tissues in the condition described at autopsy unless the body had only been exposed in the woods for substantially less time – a matter of 3 to 4 days. A similar conclusion follows from Dr. Carter's description of the mucosal lining of the gall bladder.

Id., at ¶ 12.

As Dr. Larkin points out, the State's reliance on the external appearance of the body is completely misplaced. What the State fails to understand is the total lack of

changes normally seen in a body exposed for 25 days under conditions prevailing in the Sam Houston National Forest during December 1998,

Positive findings by autopsy establish that Trotter's body was not left exposed in the Sam Houston National Forest until December 23, 1998, at the very earliest. Besides positive findings, the absence of expected decompositional changes indicates exposure well after the date on which Mr. Swearingen was incarcerated. Bloating, for example, normally occurs after two or three days. It distorts breast and genital tissues, causing them to inflate grossly out of proportion. It also causes perforation of the stomach and intestines. However, Trotter's body did not exhibit any of the distorting changes caused by bloating and her gut was intact.

In wilderness areas, such as the Sam Houston National Forest, considerable scavenging by birds and mammals take[s] place, but the body from the neck down did not exhibit any insults that could clearly be attributable to animal activity even though crime scene photos show that the body was found with torso exposed, as were the upper extremities, which again, did not exhibit any scavenging at all.

The following forensic conclusion is therefore not reasonably debatable amongst competent forensic pathologists: Without question, Mr. Swearingen was not the person who left Ms. Trotter's body in the Sam Houston National Forest.

Id. at ¶¶17-19.

Dr. Lloyd White, former Chief Medical Examiner of Nueces County, and currently a Deputy Medical Examiner with Tarrant County, concurs with Dr. Larkin's conclusions and reasoning. *Exh. 'G'*. Dr. White singles out for comment autopsy photos that corroborate the written description of internal findings made by Dr. Carter. *Id.*

Figure 2, below, is a photograph taken of the spleen that Dr. Carter removed during the January 3, 1999, autopsy of Melissa Trotter's body:



Figure 2, autopsy photo of the spleen removed from the body of Melissa Trotter.

Addressing the significance of the appearance and the autopsy operations that Dr. Carter was able to perform, Dr. White notes that,

The spleen removed from Trotter has been dissected [and] there is a longitudinal incision through the spleen's capsular surface and into the parenchyma. The capsular surface is smooth and glistening. The edges of the incision are sharp. Autolysis appears to be minimal. The photograph of the spleen has the appearance of splenic tissue taken from a recently deceased individual. The spleen obviously has not liquefied and disintegrated as is typical in individuals who have been dead for several days.

Exh. 'G', ¶ 4.a. Autopsy photos of the heart, seen in Figure 3, below, reinforce the conclusion that Trotter's body was in the woods for approximately a week at most:

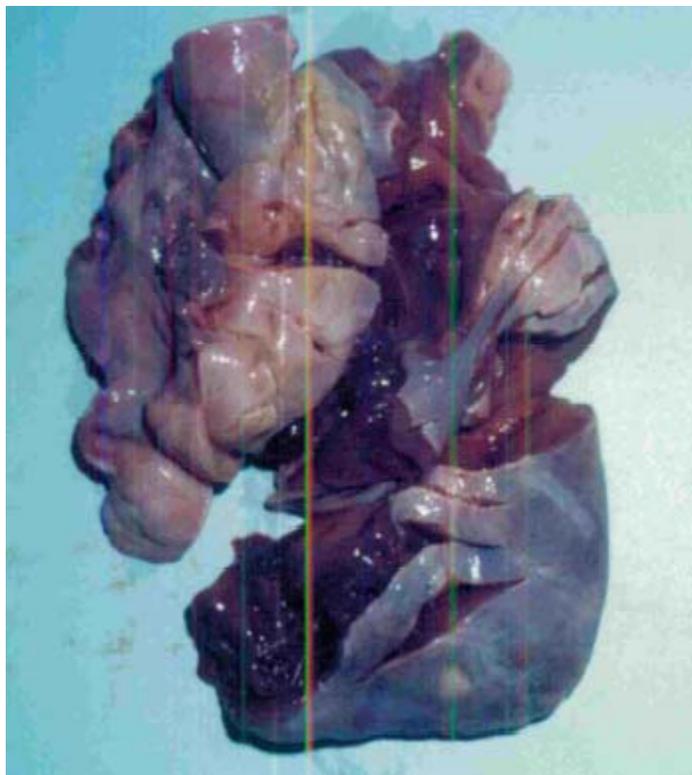


Figure 3, autopsy photo of the heart removed from the body of Melissa Trotter

Considering once more the appearance of the tissue and the procedures that Dr. Carter was able to perform during autopsy, Dr. White points out that,

Photographs of Trotter's heart show that the muscle is still red and relatively fresh looking. There are several long incisions and several shorter ones. The edges of the incisions are sharp. Pericardial fat is seen in the upper left part of the photo surrounding the aorta. It is glistening and intact. The pericardium, except for the incisions, is otherwise intact and the surface is smooth and glistening. Again the appearance of the heart is what one would expect to find upon autopsy of a recently deceased individual.

Id., ¶ 4.b.

The factual basis for the scientific conclusions that Trotter's body was left in the woods well after Mr. Swearingen was incarcerated is not in dispute. It consists in Dr. Carter's autopsy report, autopsy photos, crime scene photos and tapes, and temperature

data collected by the National Oceanographic and Atmospheric Administration. Faced with confident expert opinions, based on this information, confirming that Mr. Swearingen was in jail long before Trotter's body was thrown in the woods, any reasonable juror would have quickly acquitted Mr. Swearingen.

Furthermore, considerable evidence readily comprehensible to laypersons corroborate the forensic pathologists' conclusion reached by Drs. Sanchez, Carter, White, Larkin, and Arends. The lack of significant animal scavenging is completely at odds with the State's theory of the crime. Jurors would know that vultures, wild pigs, raccoons and crows inhabit the East Texas woods in which Trotter's body was found. Invariably the extremities, particularly the digits are subject to small and large animal scavenging, but in this case Trotter's limbs and fingers were found well preserved and undisturbed. Exh. 'Y'; *and see, Fig. 4*. A reasonable jury would not believe that a body could remain in the woods for three weeks in the East Texas woods and exhibit no sign of scavenging except for minimal animal activity around the head and neck region.

The absence of bloating, which is a regular post mortem phenomena caused by gas producing bacteria in the stomach and gut, is another fact that jurors would clearly understand and find completely aberrant in relation to the State's theory that Trotter's body had lain exposed in the east Texas woods for 25 days. In her October 31, 2007, affidavit, Dr. Carter points to the preserved condition in which she found the gastrointestinal tract as evidence supporting the forensic conclusion that Trotter's body was in the forest no more than fourteen days:

Mild and moderate decompositional changes were noted in some regions; however, the gastrointestinal system was found intact. Furthermore, gastric mucosa, a fragile tissue which decomposes quickly, was still present and was rinsed and described.

Exh. 'A', p. 2. Dr. Larkin points out that bloating occurs early on in the post mortem process and leaves an indelible mark,

Bloating, for example, normally occurs after two or three days. It distorts breast and genital tissues, causing them to inflate grossly out of proportion. It also causes perforation of the stomach and intestines. However, Trotter's body did not exhibit any of the distorting changes caused by bloating and her gut was intact.

Exh. 'F', paragraph 17. Photographs that show that Trotter's body did not bloat at all, but rather retained a form preserved so well that the hunter who found it thought it was a manikin, graphically confirm Drs. Carter's and Larkin's findings and conclusions.

Figure 4, autopsy photo of Melissa Trotter's torso and upper and lower limbs [photo deleted in this pdf]

To anyone the least bit observant of what happens to carcasses left in a field or the side of a road, this testimony, and the accompanying photographs,⁹ would be powerful evidence that Mr. Swearingen did not dump Trotter's body in the woods and that he State was trying to convict the wrong man.

Medical records, which trial counsel submitted as an exhibit for appellate purposes, showed that Mr. Trotter weighed 109 pounds just two weeks prior to her

⁹ The image in Figure 4 is attached as Exhibit 'Y'. The following exhibit, Exhibit 'Z', shows similarly remarkable preservation of tissues; the leaves plastered to Trotter's gluteus in Exhibit 'Z' are also bright green.

disappearance. *Exh. 'V'*. Newspaper reports give her weight at disappearance as 105 pounds. Trotter's weight nude at autopsy was 105 pounds. *Exh. 'U'*. Clearly, a reasonably effective attorney would be able to impress upon the jury that a body could not lay exposed in the Sam Houston National Forest for twenty-five days, or twenty days, or two weeks and lose no more than four pounds due to dehydration, desiccation, and animal scavenging. An acquittal in this case would have been a certainty had counsel properly presented crime scene, pathological and entomological evidence.

C. Scientific Evidence Showing that Mr. Swearingen did not Dump Trotter's Body in the Woods Must be Viewed Against the State's Weak, Circumstantial Case.

As the State conceded in closing, “[t]his is a case primarily of circumstantial evidence.” *Id.*, vol. 34, at 21. Moreover, the circumstantial evidence was very problematic, starting with the identification of Mr. Swearingen as the person with whom Trotter left campus on December 8, 1998. Swearingen had dark hair and eyes. Eyewitnesses called to place Trotter and Swearingen at the college campus at first said Trotter was with a “big, blonde-headed” man or else could not identify her companion. *Id.*, vol. 25, at 37; *id.*, vol. 26, at 6-7.

Testimony sponsored in an effort to prove that Mr. Swearingen took Trotter from the college campus, to lunch, then his trailer, and finally to the Sam Houston National Forest, was wavering and uncertain. Swearingen's landlord, John Harrell, testified that he saw Mr. Swearingen several times on the afternoon of December 8, 1998. Harrell never saw anyone with Mr. Swearingen, and Harrell's testimony about the timing of Mr. Swearingen's departures changed substantially. Harrell initially said he saw Mr. Swearingen arrive at Brandon Road between 11:00 or 11:30 AM and he saw him leave

“right after lunch.” *Id.*, vol. 26, at 13, 16. Harrell also said that Mr. Swearingen returned between 3:30 and 4:00 PM:

Q: Did you see him arrive any time that afternoon, back to the house?

A. It was later on that day. I was out, putting up Christmas lights, decorating my house.

Q. Could you give us an estimate of the time?

A. Oh, I don’t know, probably, I’d say between 3:30 and 4:00 o’clock.

Id. at 12. Harrell also was not clear, at first, whether Mr. Swearingen came and went from Brandon Road two or three times. *Id.*

Harrell’s recollections, however, did not fit with the State’s theory that Mr. Swearingen picked Trotter up at the community college at 1:30-2:00 PM, drove her to his trailer, and then took her to the woods. The State, however, was allowed to “clear up” Harrell’s testimony. Harrell changed his testimony averring under the State’s lead that he saw Swearingen leave Brandon Road around 11:00, and leave again between 2:00 and 3:00 PM. *Id.* at 24. However, Harrell said he did not see Mr. Swearingen return during the 2-3:00 PM interval; he just saw him leave. *Id.* This required further direction from the State:

Q. Okay. You saw him arrive back around 2:15, 2:45, 3:00 o’clock, in that area?”

A. It was in the middle of the afternoon.

Q. Then you saw him leave, what, 30 minutes later?

A. Yes, he wasn’t there just a few minutes, then he left.

Harrell also changed his testimony about the time he last saw Swearingen at Brandon Road, switching from 3:30-4:00 PM, which is what he first said, to 4:30 PM, and finally

ending up supposing that Swearingen might have left as late as 5:30 PM. *Id.* at 22-23. However, this last temporal reference conflicted with the testimony of State's witness, Terry Kendrick Swearingen, who testified that she paged Mr. Swearingen and remembered that he returned the page shortly after 4:00 and picked her up "maybe 4:30 or 5:00" as it "was getting close to dark." *Id.*, vol. 28, at 166.

The State's reliance on cell phone records which the State can only say "*would be consistent* with Applicant driving from his home to the Sam Houston National Forest on December 8, 1998," is similarly fitful. *State's [2007] Answer*, at 41 (emphasis added). At trial, the State sponsored testimony showing that the Willis [cell phone] Tower Site, Sector 2, picked up a call placed at 3:03 PM by Mr. Swearingen. *Tr. Transc. vol. 27*, at 67. The State said that this would have been consistent with Appellant heading from his trailer to the Sam Houston National Forest. *State's [2001] Appellate Brief*, at 7 (citing *Tr. Transc.*, vol. 27, at 67). The State also put on evidence that at 4:25 PM, the Willis Tower Site, Sector 1, picked up another call placed by Mr. Swearingen. *Id.* (citing *Tr. Transc. vol. 27*, at 67-68). At trial, the State argued this telephone call showed Mr. Swearingen was returning from the forest after having dumped the body. *Tr. Transc. vol. 34* at 88.

However, the fact that on December 8, 1998, Mr. Swearingen traveled near enough to the Sam Houston Forest for a cell phone tower located in Willis several miles from the crime scene to pick up the call is not the least bit incriminating in the face of forensic proof that Trotter's body was not dumped in the forest until December 18, 1998, ten days *later*, at the very soonest. It should not have been incriminating in the first place, since Swearingen lived in Willis, Texas within the tower's range, *id. vol. 27*, at 95,

his parents living about 4 miles away in Willis, and Swearingen worked in nearby Conroe, Texas. He commuted constantly in the area on business and for family matters.

Another strong indication that the State's case was threadbare is the fact that the Spanish letter is a centerpiece.¹⁰ However, this letter was too garbled to make much sense, and the Texas Court of Criminal Appeals ruled it could not be treated as a credible confession. *Swearingen*, 101 S.W.3d at 96. The State's contention that the letter contained information only the killer could know is false. Mr. Swearingen drafted the letter **after** the State provided the autopsy report and photos to the defense, after information about the discovery of the body made the news, and after the State's theory of the case was apparent. In short, Mr. Swearingen learned all the "explicit details" the State says the letter contained from these sources. In view of this sequence of events, the State's allegation that State investigators and the former Harris County Medical Examiner *confirmed* the letter's contents is erroneous.

The strongest evidence the State developed was the half pantyhose ligature found around Ms. Trotter's neck. The State matched this to a half pair of hose that Mr. Swearingen's landlord found in Mr. Swearingen's trailer. However, the State recovered the half pantyhose one month after Trotter disappeared and four days after the recovery of the body. Law enforcement had searched Mr. Swearingen's very thoroughly on two occasions before Trotter's body was discovered but did not find the length of hose.¹¹ Mr. Swearingen's trailer was not a secure structure and the culprit whose existence the State

¹⁰ See *State's [2007] Answer* at 44; and see, *State's [2001] Appellate Brief*, at 30 (stating "Appellant's letter is the clearest evidence of precisely what transpired on the afternoon of December 8, 1998").

¹¹ The searches are described above, with references to the record, in this pleading on pages 10-11.

suppressed (*Exh. 'AA', ¶11* (filed under seal)) knew where Swearingen lived, and may have been the previous tenant.

The matching of the ligature to the length of hose found in the trailer was not based on scientific or forensic principles.¹² The pantyhose material of the ligature can be easily stretched and distorted, so “matching” may easily be an artifact of the examiner’s manipulations, whether intentional or unconscious. The material from which the hose was made is common, so nothing could be read into the fact that the type of fiber in the ligature and the half hose from the trailer were similar. As one authority has stated, referring to fiber evidence in general, “we ought to remain humble and remember that some of these sciences have a lot of art involved in them—perhaps more art than science—that they may be on tomorrow’s junk heap of acceptability. Fiber analysis is an example that was mentioned earlier that would fall into this category. Similarly, bullet lead content analysis, bite mark analysis, and hair match testimony are all suspect.” *See, The Role of Scientific Evidence*, 80 *Ind. L.J.* 69, 80 (2005).

D. The Significance of Forensic Proof Showing that Someone Else Dumped Trotter’s Body in the Woods Must be Considered in Conjunction With Significant DNA Evidence Introduced at Trial Which Implicated Another Man in Trotter’s Murder.

The evidence at trial that was based on solid scientific principles and methods implicated someone else. Dr. Carter found a pubic hair by vaginal swab. *Tr. Transc., vol* 30, at 77-78. Genetic analysis shows that this pubic hair came from another man, but not from Mr. Swearingen. *Id.* Clearly, Trotter was sexually intimate with another man, whether consensually or by force near the time she disappeared or near the time she died.

¹² For example, no effort appears to have been made to ensure that the testing was blind. There is little doubt that Musialowski, who examined the material, knew Swearingen was the prime suspect, knew that strangulation by ligature was the State’s theory, and knew that the State wanted to show that the two sections of ripped hose came from the same pair.

In either case, this evidence exonerates Swearingen especially when combined with proof that Mr. Swearingen was incarcerated when Trotter's body was left in the woods.

DNA testing of blood found in Trotter's fingernail scrapings also excluded Mr. Swearingen. *Id.* at 126-128. At trial and in post trial pleadings, the State argued that the blood found in the scrapings was contamination. It conjured up several wild scenarios to explain how contamination might occur: one of them was that the blood came from a deputy present during the autopsy who said he had cut himself shaving that morning. *Tr. Transc.*, vol. 28, at 124-125. Another was that a freshet of blood circulating through the morgue's air conditioning system was spewed out a vent and landed in the shavings. *Id.* vol. 29, at 115-116. In proceedings under Chapter 64 of the Texas Code of Criminal Procedure that Mr. Swearingen filed *pro se*, the State suggested that the blood flakes found in the shavings "could have been accidentally introduced at any time by someone at the scene because the fingers of Melissa's right hand were exposed and it was windy in the area."¹³ The idea, apparently, is that the wind could have blown droplets of blood up underneath Trotter's fingernails.

The State's main argument, however, was that the blood from another man found in Trotter's fingernail shavings was fresh in appearance and, therefore, had to have dropped amidst the scrapings well after death. The State had problems with this theory too. At trial, officer Musialowski, who found the blood evidence, at first admitted that she "honestly don't recall exactly how red it was," *Id.*, vol. 30, at 96. Ultimately she agreed with the prosecutor that it was "a bright red." *Id.*, vol. 30, at 97. That was enough for the State, in closing, to insist that the fresh appearance meant that the blood could not

¹³ *State's [March 29, 2005] Response in Opposition to Defendant's Motion for Forensic DNA Testing*, at 6.

have been the result of a physical conflict between Trotter and another man near the time she died. *Id.*, vol. 34, at 85-86.

In the face of evidence showing that Trotter was killed and her body dumped in the forest near the date on which it was recovered the closing argument that the blood had to be contamination because it was too red in appearance to have been deposited near the time of Trotter's death loses all of its force for the prosecution. Instead, the blood evidence becomes striking evidence for the defense indicating that the foul play involving Trotter was someone else's doing.

CLAIMS BROUGHT PURSUANT TO *SCHLUP V. DELO*

Under *Schlup*, this Court may reach the merits of claims #2, #3, and #4, because Mr. Swearingen has presented credible evidence of actual innocence, here and in previous proceedings connected with his second application for a writ of habeas corpus. The law governing subsequent claims brought on the ground that innocence excuses the failure to allege these claims in an initial petition is set forth in section IV, above. Facts supporting actual innocence under *Schlup* include those facts alleged in section V and Claim # 1, above. These facts and the relevant legal standards are incorporated by reference as if fully set forth herein.

CLAIM #2

MR. SWEARINGEN RECEIVED INEFFECTIVE ASSISTANCE BECAUSE TRIAL COUNSEL DID NOT PROVIDE THE JURY WITH EXTRAORDINARY FORENSIC EVIDENCE DEMONSTRATING THAT SOMEONE ELSE DUMPED TROTTER'S BODY IN THE WOODS LONG AFTER MR. SWEARINGEN WAS INCARCERATED.

A. LEGAL STANDARDS GOVERNING INEFFECTIVE ASSISTANCE OF COUNSEL

To prove ineffective assistance of counsel, appellant must show that (1) trial counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms and (2) the result of the proceeding would have been different but for trial counsel's deficient performance. *Strickland*, 466 U.S. at 688-92. Appellant has the burden of proving his claim by a preponderance of the evidence. *Jackson v. State*, 973 S.W.2d 954, 956 (Tex.Crim.App. 1998). Reviewing courts apply a strong presumption that trial counsel was competent and that his or her decisions were reasonably professional and motivated by sound trial strategy. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). However, the Supreme Court has also instructed that there are limits to deference:

“[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances.”

Strickland, 466 U.S., at 691-92.

A. Counsel's Performance Was Deficient.

Counsel realized that Mr. Swearingen was incarcerated only three days after Trotter's disappearance, and a full three weeks before her body was recovered from the Sam Houston National Forest. However, trial counsel failed to contest the State's allegation that Mr. Swearingen killed Trotter and dumped her body in the woods on December 8, 1998, by sponsoring evidence showing that the body was not left in the woods until well after the State incarcerated his client. Although counsel interviewed Dr. Carter, he did not collect temperature data for her to review or inquire into whether she was familiar with the environment or the circumstances in which the body was found. However, crime scene videos available to counsel showed the body was left a relatively open, sunlight space in the forest, and temperature data collected near the crime scene at the Conroe airport showed that temperatures for the period that the State alleged Trotter's body was exposed averaged over 50 degrees Fahrenheit, with average highs over 60°.

When Dr. Carter took the stand, trial counsel failed to inquire into the significance of Dr. Carter's internal examination of the body, and failed to cross examine her about whether she had reviewed temperature data or crime scene evidence in formulating her opinion of the date of death. Trial counsel failed to stress the fact that Trotter's body below the neck showed no sign of animal activity even though the torso was nude from navel to above the breasts, and, as mentioned above, crime scene videos showed that the body was left in a relatively open, only partially shaded area in the Sam Houston National Forest. Counsel failed to cross-examine Dr. Carter about the absence of any sign of bloating. Counsel also failed to emphasize that the lack of insect activity in vaginal and anal regions, although these regions were accessible to the insects; Trotter's jeans were

torn in back and she was clad in bikini-type underwear, which were not a barrier to insect intrusion and egg-laying.

Counsel also failed to present evidence of another astounding finding that jurors could easily comprehend and would unquestionably find highly probative of Mr. Swearingen's innocence which is the fact that Trotter's body lost little to no weight between the date of disappearance and recovery of the body twenty-five (25) days later. Finally, counsel failed to inquire into the significance of the findings Dr. Carter made pursuant to her examination of specific internal organs, including the pancreas, liver, spleen, and gastro-intestinal tract which displayed the appearance and properties of tissues taken from a recently deceased individual rather than tissue taken from a corpse that had lain exposed in the east Texas woods for 25 days.

B. Counsel Did Not Make a Reasonable Strategic Decision.

Affidavits submitted by trial counsel in prior proceedings explicitly state that his strategy was to contest evidence that the State said showed Mr. Swearingen had raped and kidnapped Ms. Trotter. *Exh. 'BB'*. As a result, trial counsel did not contest vigorously the December 8, 1998, date that the State said Ms. Trotter was killed and her body left in the forest. Trial counsel states in his 2007 affidavit, that he interviewed Dr. Carter and was informed by Dr. Carter that she had concluded that the date of death occurred 25 days prior to discovery. *Id.* However, in the first place, this did not absolve trial counsel of the need to challenge this opinion. In the second place, trial counsel did not adequately probe the basis of this opinion. Had he done so he would have learned that Dr. Carter had not been provided forensic evidence critical to a determination of a date of death, including crime scene videos and temperature *data*. Furthermore, he would have

found that the opinion was based on limited information about the *external* appearance of the body.

Trial counsel's cross examination of Dr. Carter confirms that counsel hewed to a line of defense that challenged foremost the evidence of underlying aggravating felonies. Defense counsel's efforts, instead, centered on the issue of vaginal bruising as it related to the underlying rape allegation. Counsel also attempted to cross examine Dr. Carter regarding her confidence in the specific manner of death. The State argued strangulation by ligature to prove murder and, simultaneously, to establish kidnapping. Counsel contended that the evidence did not support Dr. Carter's determination that death was by strangulation by ligature because of the way the ligature – a length of pantyhose in this case – was knotted and the size of the loop that was formed.

Contesting the date on which Trotter was killed and her body left in the forest would not have detracted from a defense against the underlying felonies or from the theory that death occurred by some means other than ligature. Indeed, evidence that Mr. Swearingen did not leave the body in the woods would obviously undermine that State's contention that Mr. Swearingen had kidnapped or raped Trotter as well as vitiate its case for murder.

C. Counsel's Performance Prejudiced Mr. Swearingen.

For reasons stated in Claim #1, and fully incorporated by reference as if fully set forth herein, the evidence counsel failed to investigate and present was material, and counsel's performance therefore prejudiced Mr. Swearingen.