

WR-53,613

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

**SUCCESSOR APPLICATION FOR WRIT OF HABEAS CORPUS PURSUANT
TO 11.071 § 5 OF THE TEXAS CODE OF CRIMINAL PROCEDURES**

THIS IS A DEATH PENALTY CASE

MR. SWEARINGEN'S EXECUTION IS SCHEDULED FOR JANUARY 24, 2007.

Respectfully submitted,

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INTRODUCTION

This is a successive application under Section 5, Article 11.071 of the Texas Code of Criminal Procedures. Applicant raises for the first time in this Court a due process claim under *Brady v. Maryland* based on the suppression of entomological evidence. He also re-alleges an ineffective assistance of counsel based on new facts that the State and convicting court prevented him from developing.

During Mr. Swearingen's initial State habeas proceedings, the State refused to turn over *petri* dishes in State's trial exhibit # 218. Prior to submitting his original application for state habeas writ, Mr. Swearingen, through State habeas counsel, Robert Morrow, requested release of this essential material. State habeas counsel retained an expert entomologist who explained the unique importance of the evidence to an entomological investigation to the State and the convicting court. *See, Original Application for Writ of Habeas Corpus* ("OAW"), p. 10. The State refused to disclose it. State habeas counsel filed a motion to compel the release of the insect evidence, specifically requesting release of evidence in State's Exhibit #218. The State opposed it and the convicting court denied the motion. The State justified its refusal on the ground that applicant "fail[ed] to prove that any insect evidence exists in this case." *States Answer In Opposition to Applicant's Application for Writ of Habeas Corpus* ("SAO"). However, Mr. Swearingen had clearly explained to the convicting court that useful evidence was available, and why it hindered the investigation:

I observed many blow fly larvae, and a new pupa in the autopsy photographs. Photographs also indicate that insect samples were collected.... Due to the Judge's refusal to release the evidence I was unable to specifically determine the species of blow fly."

OAW, Append. 'B', p. 1.

This Court should keenly consider that in denying Mr. Swearingen's original Sixth Amendment claim for relief it adopted findings of fact that the State and convicting court had prevented Mr. Swearingen from disputing. The convicting court explicitly found that there was "no proof that there may be insect material among the evidence in this case," Exh. 'A', *Ex Parte Larry Ray Swearingen*, no. 99-11-06435-CR, Findings of Fact, ("FF"), ¶ 12. It found that samples were not sufficient for entomological analysis. *Id.*, ¶¶ 18-22. The convicting court went so far as to recommend denying relief based on the finding that Mr. Swearingen's "entomologist has never seen the alleged insect specimens in this case," and had to base her calculations "on an assumption." *Id.* ¶ 23. In short the convicting court refused to let Mr. Swearingen's expert analyze basic evidence, then criticized Mr. Swearingen doing the only thing left to him during state proceedings, which was to make an educated guess. That should strike anyone as an injustice.

The uniquely important evidence in Exhibit #218 was not provided to Mr. Swearingen until after his initial state habeas was over, and a federal judge ordered the State to release it. *Swearingen v. Dretke*, 4:04-cv-02058 (S.D. Tex.) (Doc. entry. ## 17, 18). Upon analysis, it was clear that the State's allegation about the evidence and the convicting court's findings were utterly false. The exhibit contained hundreds of insect samples taken from the crime scene. Exh. 'B' (January 2007, Entomological Report). Through microscopic and DNA analysis of specimens in State's Exhibit #218, *C. cadeverina* was positively identified as the species colonizing Ms. Trotter's corpse. Exh. 'B', at 4.

Based on the precise determination of species, Mr. Swearingen's entomological expert was able to estimate that the date that Ms. Trotter's body was deposited in the San

Jacinto National Forest was as late as December 18, 1998. *Id.*, at 1, 6. Dr. James R. Arends recently reviewed data upon which Ms. Morris based her conclusion. He too determined that the date Ms. Trotter's body was left in the San Jacinto National Forest where it was found was **after** December 11, 1998. Exh. 'C'. **Mr. Swearingen, however, was arrested and incarcerated on that date, and has remained in permanent custody of the State ever since.** Because the State's case for the murder, as well as the kidnapping and aggravated sexual assault charges underlying capital charged centered on the theory that Mr. Swearingen transported Ms. Trotter, dead or alive, to the San Jacinto National Forest and left her body there, it is absolutely clear that the evidence withheld by the State was favorable and material to the defense.

Mr. Swearingen's arrest soon after Ms. Trotter's appearance made establishing a date of death was critical to the state's case. In order to convict Mr. Swearingen, it was essential for the State to show that she died after December 8, 1998 and before December 11, 1998, when Mr. Swearingen was taken into custody by Montgomery County Sheriff's Department Detective, Scott Davis. *Tr. Transc.* vol. 25, 112-127. Trial counsel, however, failed to investigate means for challenging an easily anticipated, but clearly essential, aspect of the State's case. In his initial application for relief in this Court, Mr. Swearingen therefore raised a Sixth Amendment claim in which he alleged that trial counsel was ineffective for not retaining an entomologist at trial to determine the date of death. Exh 'A'. By withholding crucial evidence, the State prevented Mr. Swearingen from demonstrating that counsel's performance was deficient and prejudicial. Consequently, Mr. Swearingen respectfully requests that the Texas Court of Criminal Appeals grant this successive writ and remand this case to the convicting court for an evidentiary hearing on

his *Brady* allegation and on the Sixth Amendment ineffectiveness of counsel claim that the State prevented him from supporting in his initial application. Mr. Swearingen also respectfully requests that this Court issue the writ of habeas corpus and recommend relief be granted by reversal of the judgment of conviction on the grounds that he is innocent of murder and innocent of aggravated sexual assault and kidnapping charges underlying capital charges against him.

JURISDICTION

This Court has jurisdiction over, this Mr. Swearingen's, successive application pursuant to Article 11.071, V.A.C.C.P.

PROCEDURAL HISTORY

Mr. Swearingen was indicted for the Capital Murder of Melissa Trotter in Cause Number 99-11-06435-CR in the 9th District Court of Montgomery County, Texas. The first indictment, filed January 26, 1999, alleged Applicant killed Ms. Trotter on December 8, 1998 by strangling her with a piece of hosiery while in the course of committing, and attempting to commit, the kidnapping of Ms. Trotter. Clerks Record ("CR"), vol. 1, p. 3. The trial court appointed attorneys, Mr. Jerald Crow and Ms. Mary Ann Turner, to represent Mr. Swearingen. CR, vol. 1, p. 7. On November 2, 1999, the Grand Jury reindicted Applicant, adding the allegation that Mr. Swearingen had caused the complainant's death by strangling her with a piece of hosiery while "in the course of committing or attempting to commit the offense of kidnapping or sexual assault." Tr. Transc., vol 1, at 8, 12. On June 28, 2000, the jury found Mr. Swearingen of capital murder. 20 CR 2882. At the conclusion of the punishment hearing, the jury answered the first special issue under TEX. CODE CRIM. P., ART. 37.071, V.A.C.C.P., the continuing

threat question, affirmatively and answered the second special issue, the “mitigation” issue, negatively. The Court therefore imposed the death penalty. Court Record (“CR”), vol. 20, 2904-2907.

Mr. Stephen Christopher Taylor was appointed on direct appeal. Mr. Robert Morrow was appointed post-conviction counsel. On July 8, 2001, Mr. Taylor filed Mr. Swearingen’s appellate brief. On March 11, 2002, Mr. Morrow filed Mr. Swearingen’s application for a writ of habeas corpus. On August 19, 2002, before the higher court ruled on direct appeal, the convicting court issued findings of fact and conclusions of law recommending that relief be denied on Mr. Swearingen’s state habeas application. On March 26, 2003, the Texas Court of Criminal Appeal issued its opinion on direct appeal. *Swearingen v. State*, 101 S.W.3d 89. On May 21, 2003, in an unpublished decision, the Texas Court of Criminal Appeals adopted the convicting courts findings and recommendation and denied all claims for relief in Mr. Swearingen’s initial application for writ of habeas corpus. *Ex Parte Swearingen*, WR-53,613-01 (Tex. Crim. App.).

Mr. Swearingen filed an original petition for writ of habeas corpus in federal court. On September 9, 2005, the Court issued a memorandum and order denying relief. *Swearingen v. Dretke*, Civil Action No. H-04-2058 (S.D. Tex.). Mr. Swearingen appealed to the United States Court of Appeals for the Fifth Circuit. On July 31, 2006, the Fifth Circuit denied relief. *Swearingen v. Quarterman*, No. 05-70055 (5th Cir.).

Current Proceedings

On October 17, 2006, the 9th District Court of Montgomery County, Texas, set an execution date. The 9th District Court ordered Mr. Swearingen executed on January 24, 2007. On November 22, 2006, Mr. Swearingen filed a petition for writ of certiorari in the

Supreme Court of the United States. On December 27, 2006, the State filed its brief in opposition. The case is pending in the Supreme Court.

STATEMENT OF THE FACTS

According to the State, December 8, 1998, was the last time Ms. Trotter was seen alive. On direct appeal, the Court of Criminal Appeals upheld verdict for murder, and for charges alleging kidnapping and aggravated sexual assault, based on the following factual recitations:

On Tuesday, December 8, Swearingen met Trotter in the college library around 1:30 p.m., after Trotter had purchased some tater-tots from the school cafeteria. After sitting by the computers and talking amicably with Swearingen for some amount of time, Trotter left the library with Swearingen around 2 p.m. Trotter's vehicle remained in the college parking lot.

At 2:05 p.m., Swearingen returned a page he received and said he would have to call back later because he was at lunch with a friend. Swearingen returned to his trailer sometime before 3:30 p.m. and left between 2:00 p.m. and 3:30 p.m., then returned again to the trailer sometime before 5:30 p.m., asked his landlord some questions, then left again between 4:30 p.m. and 5:30 p.m., to pick up his wife, Terry Swearingen, from his mother's house. His neighbor, seeing Swearingen's truck come and go, was not able to see through the tinted windows or see who got in and out of the truck.

When Swearingen and his wife returned home, a package of Marlboro Light cigarettes and a red lighter were on top of the television. The evidence showed that Trotter smoked Marlboro Lights and that neither appellant or his wife smoked. That evening, Swearingen called Phyllis Morrison, a former girlfriend, and told her that he was in trouble and the police might be after him.

On December 11, Swearingen was arrested pursuant to several outstanding warrants, and while being handcuffed, said that his wrist and ribs were sore from a bar fight he had been in the week before.

Trotter's body was found in the Sam Houston National Forest on January 2, 1999, with a piece of hosiery still tied, as a ligature, around her neck. The state of the body's decomposition was

consistent with having been in the woods approximately 25 days, supporting December 8 as the date of death. The location where Trotter's body was found was heavily wooded, secluded, and remote. The police had previously searched the area three times without finding the body. One had to be within twenty feet of the body before seeing it. Swearingen knew his way around this area; he had driven a date around the vicinity a few months earlier in his red pickup.

Trotter's body was on its back in a pile of bushes, her right arm was above her head and slightly to the left. Her top and bra were pulled up under her arms, exposing her breasts and back. There were creases on her back from her neck to her waist that could have been caused by laying on the debris in the bushes for a period of time after she had died. Her jeans were on and the fly was closed, but the right rear pocket was torn downwards exposing part of her buttocks. She was wearing red underwear. There were no scratches found on her exposed skin as one would expect to find if she had been dragged to the location. However, there was no soil on Trotter's shoes. She had only one shoe on; the other shoe was lying nearby.

Trotter died from asphyxia, lack of oxygen, by ligature strangulation. The nylon ligature was a section cut from a pair of pantyhose; the matching complementary portion of the pantyhose was found in Swearingen's trailer. There also appeared to be a sharp-forced injury on Trotter's neck that would have been inflicted before Trotter died, while her blood continued to circulate. Although there was subsequent animal activity and tooth marks on the neck organs at that area, a cut with a sharp object, like a knife, could not be ruled out. The lack of defensive wounds, such as broken fingernails, and the difficulty of tying an elastic piece of nylon around a struggling victim, suggested that Trotter may have been unconscious when the ligature was applied. Although the state of decomposition made it difficult to determine, the left side of Trotter's face was much darker and at a more advanced stage of decomposition, which could be consistent with having sustained a bruise on the left side of her face. Evidence showed that animals are drawn to blood and a bruise would collect blood close to the skin's surface. There was also a deep bruise on Trotter's tongue, like a bite or a cut, consistent both with being struck under the chin, which would push the lower jaw up onto the tongue, and with biting down on the tongue while being strangled or suffering a seizure. There was also discoloration on Trotter's vaginal wall, a bruise that could have been caused by sexual intercourse on the day of her disappearance.

There were fibers found on Trotter similar to fibers from

Swearingen's jacket, others similar to the seat and head-liner in Swearingen's truck, and others similar to the carpet in Swearingen's master bedroom. There were also fibers found in Swearingen's truck that were similar to fibers from Trotter's jacket. There were hairs in Swearingen's truck that appeared to have been forcibly removed from Trotter's head.

An internal examination revealed that Trotter's stomach contained not only what appeared to be a form of potato, but also what appeared to be chicken and a small amount of greenish vegetable material.

While in jail awaiting trial, Swearingen sent a letter to his mother that the evidence showed Swearingen had written, with the help of an English-Spanish dictionary and had his cellmate copy. The letter stated it was written by a girl named Robin who could identify Trotter's murderer as someone other than Swearingen and who knew the details of the murder.

Swearingen v. State, 101 S.W.3d 89, 93-94 (2003).

Recently developed entomological evidence demonstrates that the body of Melissa Trotter was not exposed in the San Jacinto National Forest until several days **after** December 11, 1998, the date Mr. Swearingen was arrested and placed in custody. Forensic entomological evidence shows insects began colonizing Ms. Trotter's corpse a week after December 11, 1998. Exh. 'B', at 1, 6. Montgomery County deputies arrested and incarcerated Mr. Swearingen on December 11, 1998. He was not released on bond, and has remained in custody ever since.

During state habeas proceedings Mr. Swearingen retained an expert to provide expert entomological assistance in determining the date on which Ms. Trotter's body was left exposed in the woods. Because the State withheld primary evidence, a very limited investigation based on photographic evidence, the state of decay visible in crime scene and autopsy photographs, and on textbook information about the type of flies likely to colonize bodies in the area of the San Jacinto National forest was all that was possible.

OAW, App. 'B'. As a result, Ms. Swearingen was prevented from determining what species of blowfly had first colonized the body. *OAW*, App. 'B'. Because length of larval and pupation stages differs significantly depending on the blow fly specie, his expert was reduced to making rough estimates about when Ms. Trotter's body was left in the San Jacinto National Forest. *OAW*, App. 'B'.

In federal habeas proceedings, Mr. Swearingen filed two motions for release of entomological evidence. *Swearingen v. Dretke*, 4:04-cv-02058 (S.D. Tex.) (Doc. entry. ## 15, 16). The federal district court granted the motions. *Id.* (Doc. entry ## 17, 18). Pursuant to the federal court's order, the Montgomery County Sheriff's Department released stacks of *petri* dishes containing and insect evidence, as well as clothing taken from the victim and other physical evidence taken from the crime scene. The clothing contained hundreds of insect samples. Identification of species through classical taxonomic examination by microscope made identification possible. Exh. 'B' at 3. Furthermore, samples were present in sufficient quantities for genetic analysis. *Id.* at 4. Exhibit 218, a *petri* dish, contained hundreds of insect specimens. *Id.* at 3. Laboratory analysis using DNA techniques ultimately determined that the species of blowfly that had colonized Ms. Trotter's body was *C. cadaverina*. *Id.* at 4.

The blowflies that are key to the scientific dating of the death in this case go through well known developmental stages, known as "instar" stages. Exh. 'B'. Established scientific studies have determined the length of time that it takes to reach particular stages and how long the developing insect spends in each stage. *See, id.* at 6-7 (citing references). Scientists have found that ovipositing on a host occurs immediately and is completed within a short window of time. Furthermore, there is very little

variance within species in the length of time between developmental stages and for the entire developmental period. The crucial variable that causes variation in the length of any given stage and in the developmental process as a whole is temperature. However, tables have been worked out that permit rigorous calculations of the date of death once temperature conditions have been properly determined.

The location of Ms. Trotter's body was not discovered until January 2, 1999. Tr. Transc. vol. 27, at 3. Temperature data from the crime scene at the National Forest obviously could not have been collected during the very time that Ms. Trotter's corpse lay exposed in the woods. As a result, temperatures at the crime scene had to be estimated using data collected in 2003 from the spot where the body was found and using historical weather data for the Conroe area collected by the National Oceanographic and Atmospheric Administration (NOAA or "Administration"). Hourly data was obtained from the former crime scene during the period from December 2003 to January 2004. This was compared to hourly temperature for this same interval in 2003-2004 collected by NOAA at two sites near Conroe, Texas.

A statistical pairwise comparison test (Wilcoxin signed-ranks) compared hourly 2003 to 2004 death scene temperatures to airport temperature data for the same times to determine if there were any significant differences in temperatures between the two locations and between ground level and ambient temperatures at the death scene. Approximately 1000 hours of temperature data points for identical times from each data set were employed.

Results indicated there were no significant differences between any of the 3 temperature data sets collected during the end of 2003 to early 2004 using the placed datalogger recorders compared to Montgomery temperatures at the same time. Indeed, the correlations between the data sets was quite high and the probabilities of error in these correlations were extremely low indicating a high degree of confidence.

Exh. 'B' at 3. This indicated that Montgomery (Conroe) airport data from December 1998- January 1999 could be relied upon as a source for crime scene temperatures during that same period.

Although, the corrected NOAA data counsel obtained is comprised of daily highs and lows, this data was still adequate for forensic investigation. Exh. 'B'. Based on this data, Dr. James J. Arend agrees with Ms. Morris that Dr. Carter's estimate of the date of death was unsupportable, and that the body of Ms. Trotter was deposited in the San Jacinto National Forest **after** Mr. Swearingen was incarcerated,

"Melissa Trotter's body according to the autopsy was recovered in January 2, 1999, from the San Jacinto National Forest, located in Southeast Texas, near Conroe, Texas. Dr. Carter did not provide a date of death in her autopsy report, but apparently testified that fungal growth and insect activity, in her opinion, indicated that Ms. Trotter had been dead for 25 days, which put her death exactly on the December 8, 1998, the date she was last scene by state witnesses.

The autopsy report contains several remarkable observations that indicate a date of death later than December 11, 1998. Dr. Carter description of internal organs indicates substantially less autolization than would be expected if Ms. Trotter had been dead under temperature conditions indicated by the Conroe, TX data. The weight in grams for internal organs in Dr. Carter's reports indicate only a reduction in weight due to dehydration of only 30 percent, which again indicates exposure in the San Jacinto Forest after December 11, 1998. By autopsy, there is also a remarkable absence of animal activity, which is unlikely in a corpse exposed for 22 days in the environment where it was found. Finally, Ms. Morris identified a single species of blow fly, *C. Cadeverina*, from the insect material collected from the evidence in this case, whereas a body exposed outdoors for the length of time that the State maintains would in all probability exhibit colonization by several species.

The entomological report identifies *C. Cadeverina* as the blow fly specie in all samples Ms. Morris subjected to DNA testing. Review of the scientific literature on this species shows it is primarily a northern species, but its range extends throughout the area in which

the body was found. It is also active and prevalent in the under fall conditions such as those represented in the Conroe temperature data for December 1998.

It is my forensic entomological opinion, based on the information that I have been presented, ... the temperature conditions for December 1998 and the developmental stages of fly larvae and pupae reported by Ms. Morris, that Ms. Trotter's body was exposed and colonized by blow flies after December 11, 1998. It is also my opinion, based on the information that I have been presented, that if death occurred before December 11, 1998, the body would have to have been covered and stored in such a way as to prevent fly colonization and inhibit autolysis."

Exh. 'C' (January 2007, Statement of Dr. James J. Arend).

The forensic entomological findings by these two forensic entomologists are an important part of a body of scientific evidence that points to someone other than Mr. Swearingen as the murderer. Key pieces of evidence discovered by the State's own forensic team tended to exclude Mr. Swearingen. Dr. Joye M. Carter, who, at the time of trial, was the Chief Medical Examiner for Harris County, conducted the autopsy of Ms. Trotter's body. Dr. Carter recovered pubic hairs from the sexual organ using a vaginal swab. *Tr. Transc.*, vol 3, at 77-78. Analysis of this hair sample by Texas Department of Public Safety (DPS) forensic specialists positively excluded Mr. Swearingen as the donor. *Id.* Dr. Carter also collected scrapings from beneath the fingernails from the victim. The scrapings were packaged and sent to DPS laboratories for review. DNA specialist, Cassie Carradine, located traces of blood in the scrapings. The findings when cumulated provided a sample the size of a pinhead, which was sufficient for genetic testing. Once more, the scientific results definitively excluded Mr. Swearingen. *Tr. Transc.*, vol. 30, at 126-128.

Q. Were you able to see or were you able to obtain a DNA profile on that particular speck or fleck?

A. Yes, I was.

Q. And were you able to determine a donor for that particular flake or whatever, of blood?

A. I was not able to determine a donor fro that. It was inconsistent with the individuals in this case.

Q. I wasn't consistent with the victim, Melissa Trotter.

A. Right.

Q. It wasn't consistent with the defendant, Larry Swearingen, and it wasn't consistent with the defendant's wife, Terry Swearingen; is that correct.

A. Right.

Id.

At trial, the State did sponsor forensic testimony regarding the date of death through Dr. Carter. However, this testimony is not only controvertible, it is highly suspect scientifically and professionally. Dr. Carter stated that it was her forensic opinion that the body had been exposed in the woods twenty-five (25) days before recovery on January 2, 1999. *Tr. Transc. vol. 29, at 45-46.* This put the date of death at December 8, 1998, which was the date she was last seen by witnesses at the Montgomery County Community College. Dr. Carter's opinion was based on gross visual observations of fungal growth and insect and animal activity. *Id.* She did not conduct a microscopic investigation of the tissue or of the organisms colonizing it. Dr. Carter did not identify the species of flora or fauna present on the corpse. She admitted that she was not familiar with the life cycle of insects involved in the decomposition process, *id.*, which is essential information for formulating a forensic opinion about the date of death based on entomological evidence. Nonetheless, she testified to a specific date on which the body was exposed; the date coincided exactly with the date on which the State maintained Ms.

Trotter disappeared.

Subsequent to Mr. Swearingen's trial, the Harris County Medical Examiner's Office was publicly criticized. Exh. 'D'. Under Dr. Carter, the office permitted unlicensed practitioners to perform autopsies, and ruled deaths as homicides in several cases where the evidence of the manner of death was inconclusive. *Id.* The current Medical Examiner, Dr. Luis Sanchez had to take the unusual step of re-evaluating cases conducted under his predecessor. Dr. Sanchez ultimately had to change several findings. Because of these developments at the Medical Examiner's office, Mr. Swearingen requested re-evaluation of the autopsy performed on Ms. Trotter. Exh. 'E'. Mr. Swearingen complained, in particular, that her diagnosis of a vaginal bruise was unwarranted.

After reviewing Dr. Carter's autopsy report and trial testimony, Dr. Sanchez reversed Dr. Carter, finding that the diagnosis even of possible bruising was unsupported by the forensic evidence. *Id.* Dr. Sanchez also confirmed that microscope slides needed for such a diagnosis had never been made. Importantly, the Texas Court of Criminal Appeals majority in considering the sufficiency of the State's evidence supporting the felony sexual assault charge that rendered Mr. Swearingen eligible for the death penalty relied heavily on what we now know was spurious testimony about vaginal bruising.

ARTICLE 11.071, SECTION 5, STANDARDS

A claim raised in a second 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). The Texas Court of Criminal Appeals has clarified that a defendant does not have to win his case in his initial application. Instead, in order to obtain a hearing, the specific facts must raise a *prima facie* case entitling him to relief. As stated in *Ex Parte Williams*, petitioners must plead “sufficient specific factual allegations which, if true, would entitle the application to relief.” *Ex Parte Williams*, No. 43, 907-02 (Tex. Crim. App., Feb. 26, 2003) (Cochran, J., concurring)(unpublished slip opinion); *see also Ex Parte Rivera*, 2003 WL 21752841, No. 27, 065-02 (Tex. Crim. App. 2003) (unpublished slip opinion) (stating that sufficient facts establishing a *prima facie* case for relief must be provided in order to meet requirements of art. 11.071 § 5).

A. Factual basis of Mr. Swearingen’s successor claims was not available.

TEX. CODE CRIM. PROC. art. 11.071 § 5(a)(1) states that a successive application may be considered if:

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 claim was unavailable on the date the applicant filed the previous application.

Id. The statute explains that:

a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before the date.

TEX. CODE CRIM. PROC. art. 11.071 § 5(e).

In this instance, Mr. Swearingen attempted to procure entomological evidence in the possession of the State. State habeas counsel sought to inspect the insect evidence contained in State’s Exhibits in the possession of the Montgomery County Clerk and

Sheriff's offices. The evidence sought included State's Exhibit #218 which contained petri dishes with samples from the crime scene. Among the contents were what State investigators concede was evidence that "appeared to be dried maggots." Mr. Swearingen also retained an entomological expert who explained to the state why the evidence was vital to a valid forensic investigation. Despite proof of the existence of evidence and a clear showing of why it would be favorable and material, the State refused to disclose evidence. As a result, state habeas counsel asked the convicting court to order evidence released so that his expert could conduct tests needed to provide a scientifically valid estimate of the time of death. The State opposed Mr. Swearingen's motion. The convicting court, moreover, sided with the state and ordered Mr. Swearingen's motion for release of insect evidence denied.

State action that prevents a defendant from developing evidence completely excuses a defendant from presenting facts in an initial state habeas petition. Here, the entomological evidence at issue was collected by the State and remained in its sole possession. Equivalent evidence clearly did not exist. Mr. Swearingen had to have samples collected from the crime scene at the time the body was discovered. State's exhibit #218 contained precisely what Mr. Swearingen required. Clearly, in this case, it clearly cannot be denied that Mr. Swearingen acted diligently to procure evidence during initial state habeas proceedings, nor can it be denied that the State was the exclusive reason why he was unable to present facts dependent in his first application for relief under §11.071.

B. But for a violation's of Mr. Swearingen's Due Process and Sixth Amendment Rights no rational juror could have found Mr. Swearingen's guilty beyond a reasonable doubt.

Without actual insect material collected from the crime scene, Mr. Swearingen was unable to identify the blowfly specie that had colonized Ms. Trotter's body when she was deposited in the San Jacinto National Forest. As the State itself argued, species identification was absolutely essential in order to make a reliable estimate of the time of death in this case. After the federal district court ordered the evidence released, Mr. Swearingen was able to positively identify the blowfly specie as *C. cadaverina*.

Based on known developmental times for this species Mr. Swearingen was able to develop, for the first time, scientific evidence showing that Ms. Trotter's body was not removed to the San Jacinto National Forest until **after** December 11, 1998. On December 11, 1998, Mr. Swearingen was arrested and incarcerated. He has never been released. Hence it is clear Mr. Swearingen did not place Ms. Trotter's body in the woods after Mr. Swearingen was taken into custody.

Clearly, in the context of this case, evidence that someone else, not Mr. Swearingen, was in possession of Ms. Trotter's body and transported it to the San Jacinto National Forest makes the requisite showing by a preponderance of the evidence that no rational juror would have convicted Mr. Swearingen of murder or convicted him of the aggravating felonies underlying his capital conviction.

ARGUMENT AND AUTHORITIES

PART I. IN VIOLATION OF MR. SWEARINGEN'S DUE PROCESS AND SIXTH AMENDMENT RIGHTS THE STATE SUPPRESSED MATERIAL EVIDENCE FAVORABLE TO MR. SWEARINGEN.

If the State comes into possession of material evidence favorable to the defendant, the State has a duty to disclose it. *Brady v. Maryland*, 373 U.S. 83 (1963). To establish that the state has breached this duty, the defendant must show that (1) the state withheld

evidence, (2) the evidence is favorable to the accused, and (3) the evidence is material to guilt or punishment. *United States v. Bagley*, 473 U.S. 667, 674 (1985).

The duty to disclose *Brady* material extends beyond conviction. See *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976) ("After a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction."); *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) ("The duty to disclose is ongoing."). In fact, "[n]ondisclosure is as unfair where it prevents defendant from taking full advantage of postconviction relief as it is when it results in the forfeiture of the defendant's right to a fair trial." *Monroe v. Butler*, 690 F. Supp. 521, 525 (E.D. La.), aff'd, 883 F.2d 331 (5th Cir.), cert. denied, 487 U.S. 1247 (1988).

CLAIM # 1

THE STATE WITHHELD FAVORABLE, MATERIAL EVIDENCE SHOWING THAT MR. SWEARINGEN DID NOT COMMIT MURDER.

Federal habeas counsel diligently pursued discovery of entomological evidence in this case.¹ When developing claims for his initial 11.071 application, Mr. Swearingen filed motions seeking release of evidence for review and analysis by Dael Morris. In particular, counsel sought release of State's Exhibit 218.

A. The State Suppressed Evidence.

In State habeas proceedings, the State conceded that the petri dish did, in fact, contain insect evidence. *State's Answer in Opposition to Applicant's Application for Writ of Habeas Corpus*, at p. 8-9. Mr. Swearingen's investigator, Cynthia Patterson, examined

¹ Mr. Swearingen can show due diligence; however, "there is no requirement under *Schlup* that the factual claim was not discoverable through the exercise of due diligence." *Cooper v. Woodford*, 358 F.3d 1117, 1119 (9th Cir. 2004)

the Exhibit 218 and reported back to the Montgomery District Attorney's Office that it contained "what appears to [be] dried maggots." *Id.* Instead of releasing the evidence, the State attempted to justify its decision not to release this evidence on the ground that no one recognized that "what appeared to be dried maggots" would be valuable entomological evidence. *Id.* Part of this justification is that the individuals that State had review the evidence for insect material "d[id] **not** 'pretend to be any kind of specialist in th[e] field' of entomology." *Id.* at 8 (quoting Appellate Motion RR-2 at 3, 5). Amazingly, the State tried to shift the blame to Mr. Swearingen. According to the State, Mr. Swearingen was obliged to hire an expert from a local university to travel to the evidence room, inspect the material and inform the State that "dried maggots" were insects. *Id.* at 10. The State did not identify who this expert might be, or establish that there were any such local experts to be found who were willing to take on the task. However, the main point is that Mr. Swearingen clearly did not need to retain a **second** specialist, which would require additional motions and approval from the court. As demonstrated in federal habeas proceedings, after the Judge Harmon ordered the State to release State's Exhibit #218 – a petri dish – the task of collecting and shipping the maggots could be accomplished without major costs or effort.

As noted above, in opposing release of the evidence, the State argued its attorneys and investigators were untrained in entomology. Indeed, their basic knowledge of insects was so deficient that the State was unable to determine whether dried maggots constituted insect evidence. Despite this conceded ignorance, however, the State launched into a technical argument regarding this forensic science based on internet sources. *Id.* at 15-17. This argument is not only meritless not only because the

Montgomery District Attorney's Office, admittedly, was unqualified to render an opinion, it serves to highlight why it was vital for the State to release State's Exh. #218 and other evidence.

The thrust of the State's technical argument was that a forensic entomologist could not arrive at an accurate opinion of the date of death because the State had failed to collect adequate information. SAO, at 12-18.. The State acknowledged that identification of the blow fly species colonizing the victim was crucial for determining the date of death. *Id.* According to the State, preservation of live specimens was necessary in order to accurately determine the species of fly that colonized the body in this case. *Id.* The State stresses that without knowledge of the species it is impossible to arrive at an accurate estimate of the date of death based on developmental stages. *Id.* Although different species of blow flies go through the same developmental stages, they do so at different rates. Without knowing the species the rate cannot be determined as a function of temperature. To underscore its claim that forensic entomological estimate that Mr. Swearingen was forced to submit during State proceedings was inadequate, the State points out that tables relating development to temperature have not been worked out for some species, making estimates impossible unless the investigator is able to raise live specimens under crime scene conditions and essentially figure out the timetables him or herself. *Id.* In order to demonstrate that the evidence necessary for a proper identification of fly species was lacking, the State stresses the inadequate techniques used at the crime scene to preserve insect specimens as well as the similarly inadequate techniques used by pathologists during autopsy. Montgomery County investigators and Harris County Medical examiners failed to collect and store live specimens.

The State's justification for not turning over insect evidence in Exhibit #218 depends on a disastrous misunderstanding of the science and an equally erroneous view of what constitutes exculpatory, material evidence under Supreme Court law. Species identification can be determined visually through microscopic investigation and it can be determined genetically from insect material. Indeed, that is exactly what Mr. Swearingen was able to do once the State was compelled by federal court order to release the evidence. Exh. 'B'. A DNA profile for the fly species was obtained from samples in State's Exh. #218 that identified the colonizing blowfly in this case positively and precisely as *C. cadaverina*. *Id.* at 4. Moreover, for this species of fly, the relationship between developmental time and temperature had been rigorously worked out and published in the scientific literature. As a result, a date of death for Ms. Trotter could be determined without rearing adult insects using live samples taken from the crime scene or autopsy. *Id.* at 1, 6.

B. The Evidence the State Suppressed was Favorable to Mr. Swearingen.

Evidence showing that Mr. Swearingen was incarcerated prior to the time that Ms. Trotter body was removed to the San Jacinto National Forest is obviously favorable. The State argued that on December 8, 1998, Mr. Swearingen either killed Ms. Trotter in the San Jacinto National Forest or else dumped her body there after he killed her at his trailer home. It went to length to demonstrate that Mr. Swearingen was near and in the National Forest on May 8, 1998. The State argued further that Mr. Swearingen was familiar with the forest in order to show that it would be a likely place for him to deposit the body after he allegedly killed Ms. Trotter. Proof that Mr. Swearingen was in jail at the time Ms. Trotter's body was deposited in the forest clearly implicates someone else in the murder,

undermines the prosecution's theory, and exonerates Mr. Swearingen. It obviously favors the defense.

C. Suppressed Evidence was Material.

Evidence showing that Mr. Swearingen was in prison when Ms. Trotter's body was left in the San Jacinto National Forest clearly raises a reasonable probability of a different verdict on homicide charges. As the federal district court remarked, the state put on a "largely inferential" case. *Swearingen v. Dretke*, no. H-04-2058, (S.D.Tex., Sept. 9, 2005) (Memorandum and Order, at 25). The principle piece of evidence was a ligature made of a length of torn pantyhose found tied around Ms. Trotter's throat. After the discovery of the body, police recovered another length of pantyhose in trash outside Mr. Swearingen's trailer. Mr. Swearingen's landlord said he had found this second length of hose inside the trailer. Mr. Swearingen's wife testified that the second piece came from a pair of hose she owned. The also put on evidence establishing that the two lengths matched. They had been cut from the same pair. The State also sponsored testimony from a Mr. Swearingen's fellow inmate who testified that at one point Mr. Swearingen had said "I did mine."²

For the most part, however, the State's case depended on establishing that Mr. Swearingen had taken Ms. Trotter to the San Jacinto National Forest and concealed her body in the woods after killing her or assaulting her at his home. Lengthy efforts to trace his whereabouts using records from cell phone towers were designed to show that he had traveled to his home, then to the San Jacinto National Forest.³ As noted above, the State

² The foregoing facts are recited in *Swearingen*, 101 S.W.3d, at 90-94.

³ See, Tr. Transc., vol. 27, 50-104, testimony of Hal Buckholts, Director of Operations for GTE Wireless and related exhibits.

argued that Mr. Swearingen knew the area in which the body was found very well. The State also sponsored an English rendition of a letter that Mr. Swearingen had fabricated. Mr. Swearingen had attempted to compose the letter originally in Spanish with the aid of a dictionary. It was so badly garbled and ungrammatical according to the State's translator that it did not make much a lot of sense.⁴ However, a fictional narrative in which somebody named Ronnie takes Ms. Trotter to the San Jacinto Forest and strangles her there was discernible in the translation. *Swearingen*, 101 S.W.3d, at 104 (setting forth translation of 'Spanish' letter). In the face of proof that someone else, not Mr. Swearingen had deposited Ms. Trotter's body in the woods, this evidence would be completely undermined.

Review of the State's closing argument confirms that the theory that Mr. Swearingen disposed of the body in the San Jacinto National Forest was essential to the State's case. Prosecutors argued the Spanish letter indicated Mr. Swearingen "took [Ms. Trotter] to the woods."⁵ Tr. Transc., vol 34, at 84. Referring to the crime scene, prosecutors contended that Mr. Swearingen had "secreted her somewhere where she's not likely to be found," and punctuated the importance of this to its case, stating "[s]o we're there." *Id.* at 87. The phone records, according to the State indicated that Mr. Swearingen returned to Willis, Texas, after "dumping the body" in the woods. *Id.* at 88 (also stating,

⁴ State's translator, Geneveva Perez, testified that the 'Spanish' letter was "very difficult even to read." Tr. Transc. vol. 31, p. 65. For one thing, it "was written with all the verbs in the infinitive form." *Id.*, p. 67. Ms. Perez was forced to add "comments" "in parenthesis and in bold" "about certain words that actually didn't mean what they were intended to mean." *Id.* p. 68. But the intention was not clear either. Ms Perez "absolutely" agreed that "three or four Spanish-speaking people could have different interpretations of ... the language." *Id.* p. 71. When the State tried to rehabilitate by asking whether Spanish speakers would agree about the "conversational context," Ms. Perez replied, "Well, in my opinion, yes. I tried to follow the context of what was being said ... this was my personal interpretation of what I read. I just tried to make sense of what I had. The letter was very scrambled." *Id.* p. 72.

⁵ Whether the letter bears this reading is another matter. Here what is important is the prosecutor's use of it.

“[H]e has already dumped the body.” *Id.* at 88. Clearly, evidence that Mr. Swearingen could not have been the person who transported the victim to the forest clearly would have raised a reasonable doubt in the mind of at least one juror as to whether it was Mr. Swearingen who had killed Ms. Trotter. Indeed, no reasonable jury would have convicted if it had been provided with scientific evidence showing Mr. Swearingen did not “dump the body” in the San Jacinto National Forest, and in fact was incarcerated when the body was removed to the woods.

CLAIM #2

IN VIOLATION OF DUE PROCESS THE STATE WITHHELD FAVORABLE, MATERIAL EVIDENCE EXCULPATING HIM OF THE KIDNAPPING AND AGGRAVATED SEXUAL ASSAULT CHARGES UNDERLYING HIS CAPITAL CONVICTION.

If there is one adult victim, and the victim is not a police officer, Texas must demonstrate that a defendant committed murder in the course of committing another felony in order to obtain a capital conviction. TEX. CODE CRIM. P. § 19.03. Here the State charged Mr. Swearingen with several aggravated felonies in order to bring a capital case. The State alleged that Mr. Swearingen kidnapped or attempted to kidnap Ms. Trotter. In the alternative, the State alleged that he was guilty of aggravated sexual assault or attempted aggravated sexual assault. *See, Swearingen*, 101 S.W.3d, at 92.

On direct appeal, a majority of the Texas Court of Criminal Appeals barely found the evidence, such as it was at the time, sufficient to uphold convictions on the underlying felonies. According to the majority, the supporting evidence was “weak and tentative.” *Id.* at 94. Judge Johnson and Judge Price dissented arguing that the evidence of an underlying felony was not factually sufficient to warrant a capital conviction. *Id.* at

101 – 107. In federal proceedings, the United States District Court noted that “[t]he physical evidence provided cloudy insight into the [aggravating] circumstances surrounding [Ms. Trotter’s] death.” *Swearingen v. Dretke*, at 33. The Court managed to uphold the Texas Court of Criminal Appeals’ decision only by applying a “doubly differential” standard. *Id.* at 30. Even so, the Court found “that reasonable jurists may find the resolution of Swearingen’s insufficiency-of-the-evidence claim debatable” even under this “doubly differential” standard. *Id.* at 53.

A. The State suppressed evidence.

Facts an argument alleged in Claim 1, section A, *supra*, are incorporated by reference and re-alleged as if fully set forth herein.

B. Suppressed evidence was favorable to Mr. Swearingen’s defense against aggravating felony charges.

Evidence showing that someone else, not Mr. Swearingen, possessed the body and removed it to the woods is clearly favorable to Mr. Swearingen. None of the evidence that the state maintains showed he kidnapped Ms. Trotter has probative value without evidence that Mr. Swearingen left Ms. Trotter’s body in the woods before he was incarcerated on December 11, 1998. Evidence of aggravated rape could not be substantiated without proof that Mr. Swearingen deposited Ms. Trotter’s remains in the woods. When coupled with biological evidence of intimate contact with another man, not Mr. Swearingen, such as the pubic hair found by vaginal swab and the male blood found in fingernail scrapings, proof Ms. Trotter’s corpse was left in the woods by someone else clearly is favorable to the defense.

C. Evidence the state withheld was material

As this court’s opinion clearly reflects, the State’s case against Mr. Swearingen on

the aggravating felonies underlying his capital conviction depends on the premise that Mr. Swearingen took Ms. Trotter in the woods to kill her or else killed her then left her remains in the woods. *Swearingen*, 101 S.W.3d, at 96. Proof undermining this premise is clearly material evidence exonerating Mr. Swearingen of the underlying aggravating felonies.

CLAIM #3

THE STATE PREVENTED MR. SWEARINGEN FROM ESTABLISHING THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY DUE PROCESS AND THE SIXTH AMENDMENT. *STRICKLAND v. WASHINGTON*, 466 U.S. 688 (1984).

Standard of Review

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. Trial counsel failure to conduct an investigation into the date of death was deficient.

Any reasonable attorney would have realized that the date of death was crucial to the State’s case. The State’s theory was transparent long before trial. It was that Mr. Swearingen had taken Ms. Trotter from Montgomery County Community College on the afternoon of December 8, 1998, killed her and deposited her body in the San Jacinto National Forest on that date. Counsel also realized that the State had arrested Mr. Swearingen three days later on December 11, 1998, and had held him in custody since that date. Clearly, given this three day window, evidence refuting the State’s date of death would be essential.

At the time of trial, entomology was a well established science used to provide important evidence dating death in criminal cases. *See, e.g., Milburn v. State*, 135 Idaho 701, 703 (App. 2000); *People v. Buss*, 187 Ill.2d 144, 168-89 (1999); *Commonwealth v. Aufer*, 545 Pa. 521, 546 (1996); *State v. Trull*, 349 N.C. 428, 444 (1998); *Stevens v. State*, 691 N.E.2d 412, 419 (Ind. 1997). Trial counsel, however, did not investigate the possibility of challenging the date of death using forensic entomology. In state habeas proceedings, counsel admitted that he was unable to evaluate the significance of entomological evidence himself. Far from excusing counsel, as the State argued in previous habeas proceedings, this made it imperative for counsel to consult with his expert pathologist, other experienced capital defendants or other natural scientists

regarding the feasibility of determining the date of death through entomology. However, counsel did not take any of these steps, each clearly necessary in light of his own lack of expertise. Trial counsel, furthermore, did not interview Dr. Carter prior to trial in order to ascertain what she would opine at trial, showing that he neglected completely to make reasonable inquiries into this crucial issue.

B. Trial counsel's performance was prejudicial to Mr. Swearingen's defense against murder charges.

The prejudice standard governing ineffectiveness claim is identical to the materiality standard governing *Brady* claims. *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995); *United States v. Bagley*, 473 U.S. 667, 682 (1985) (adopting *Strickland's* prejudice formula for analysis of *Brady* materiality). Hence, Mr. Swearingen incorporates by reference and re-alleges facts and arguments demonstrating materiality in the Statement of Facts and in Claim #1, Section, C, as if fully set forth herein.

C. Trial counsel's performance was prejudicial to Mr. Swearingen's defense against aggravating felony charges.

The prejudice standard governing ineffectiveness claim is identical to the materiality standard governing *Brady* claims. *Kyles, supra; Bagley, supra*. Hence, Mr. Swearingen incorporates by reference and re-alleges facts and arguments demonstrating materiality in the Statement of Facts and in Claim #1, Section, C, and Claim #2, Section, C, as if fully set forth herein.

D. No reasonable juror would have convicted Mr. Swearingen of murder but for trial counsel's ineffectiveness.

Mr. Swearingen incorporates by reference and re-alleges facts and arguments

demonstrating materiality in the Statement of Facts and in Claim #1, Section, C, as if fully set forth herein. Evidence proving materiality of the evidence that the State prevented him from developing to prove trial counsel's ineffectiveness also shows that he meets standards for relief under 11.071 § 5 from his conviction for murder.

The date of death is of inestimable importance in this case given the narrow window of time from December 8, 1998 to December 11, 1998, in which the State had to prove Mr. Swearingen killed Ms. Trotter. Indeed, the State's case depended on showing Ms. Trotter died the date she disappeared. The convicting court's finding based on pathological testimony that she died exactly 25 days after her body was recovered is illustrative of how vital the timing of death was. FF, ¶ 26. Scientific evidence positively excluding a date of death before December 11, 1998, clearly serves to exculpate Mr. Swearingen of murder charges in what all courts have recognized is a largely inferential case.

Because counsel unreasonably failed to explore and develop this evidence it is clear that no reasonable juror would have convicted Mr. Swearingen but for this violation of his Sixth Amendment rights. Relief under Texas successor statute is in order. A hearing must be convened.

E. No reasonable juror would have convicted Mr. Swearingen of the aggravated felonies with which he was charged but for trial counsel's ineffectiveness.

Mr. Swearingen incorporates by reference and re-alleges facts and arguments demonstrating materiality in the Statement of Facts and in Claim #2, Section, C, as if fully set forth herein. Evidence proving materiality of the evidence that the State prevented him from developing to prove trial counsel's ineffectiveness also shows that he

meets standards for relief under 11.071 § 5 from his conviction for committing or attempting to commit kidnapping or aggravated sexual assault.

It should be obvious that no reasonable juror would find that Mr. Swearingen kidnapped, raped or attempted either crime if presented with evidence showing that someone else, not Mr. Swearingen, removed Ms. Trotter's body to the woods. As the federal district court noted, the prosecution maintained that Ms. Trotter accompanied Mr. Swearingen to his trailer willingly. *Swearingen v. Dretke*, at 34 (noting that "the prosecution never alleged that Swearingen kidnapped Ms. Trotter from the campus, instead arguing that the kidnapping probably never occurred until the two went to Swearingen's residence, at the earliest."). No reasonable juror could therefore attribute evidence found in Mr. Swearingen's trailer or truck to criminal conduct. Indeed, as this Court's rendition of the facts it considered inculpatory makes clear, an essential part of the proof of both the kidnapping and aggravated sexual assault charges was evidence that Mr. Swearingen "dumped" Ms. Trotter in the forest, *Swearingen*, 101 S.W.3d, at 96, along with evidence at the crime scene. *Id.* at 95-97.

Even without proof that Mr. Swearingen did not deposit Ms. Trotter in the forest, this Court's opinion shows it considered the State's case for aggravating felonies to be very close call. Given proof that Mr. Swearingen did not secret Ms. Trotter's body in the San Jacinto National Forest, surely no rational juror would be able to find beyond a reasonable doubt that Mr. Swearingen committed the kidnapping or aggravated sexual assault charges underlying his capital conviction. It is even more obvious that this evidence shows by preponderance of the evidence, as required for relief under 11.071 § 5, that no reasonable jury would return a guilty verdict on any of these felony offenses.

PART II. MR. SWEARINGEN IS ACTUALLY INNOCENT UNDER HERRERA v. COLLINS, 506 U.S. 390 (1993)

Standard of Review

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, 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.*

Innocence claims can be advanced not only against the verdict finding a defendant guilty of a homicide, but also against the verdict finding the defendant guilty of the aggravating felonies that rendered the defendant eligible for the death penalty. A fundamental miscarriage of justice can be demonstrated by a showing that the defendant is actually innocent of the crime or is ineligible for the death penalty. The Supreme Court has made clear that the "miscarriage of justice" exception extends to cases in which "[t]he Constitutional violation has probably resulted in the imposition of a death sentence upon one who is actually innocent of a death sentence." *Hertz & Liebman*, § 26.4, at 1369 (internal citations omitted); *see also Dugger v. Adams*, 489 U.S. 401, 411 n. 6 (1989). This means that a petitioner can invoke the "miscarriage of justice" exception if, but for the failure to exhaust, "the petitioner would have not been eligible for the death penalty because some constitutional or state statutory prerequisite for the imposition of a death sentence could not have been satisfied." *Hertz & Liebman, supra*, § 26.4, at 1369-71; *see also Sawyer v. Whitley*, 505 U.S. 333, 343, 345-50 (1992).

CLAIM #4

ENTOMOLOGICAL EVIDENCE SHOWS THAT MR. SWEARINGEN IS ACTUALLY INNOCENT OF CAPITAL MURDER.

A. For the purpose of 11.071 §5 Ms. Morris Report is New Data.

Clearly, it was not because of a lack of due diligence that counsel was unable to procure the evidence necessary to present the facts underlying his current innocence claim. Instead, it was state action that prevented Mr. Swearingen Mr.

Swearingen's expert from developing important evidence indicating that he did not kill Ms. Trotter. Federal authority and the Texas Court of Criminal Appeals have recognized that this type of interference by the State will excuse an applicant's failure to present claims or supporting evidence in his initial application for habeas relief in their respective *fora*. See, Title 28 U.S.C. § 2244(d)(1)(B); *Ex Parte Chavez*, AP-75,245 (Tex. Crim. App. 11-22-2006) ("Malfeasance of this kind on the part of any member of the prosecution "team" may be attributable to the State for due-process purposes.") (citing, *Strickler v. Greene*, 517 U.S. 263, 280 (1999)).

In the instant, case the insect material withheld by the State was absolutely essential for a scientific estimation of the time of death. A forensic scientist must know the species of fly colonizing the body in order to make a forensic finding regarding the time of death. This is because different species require different lengths of time to develop and mature. Without the evidence contained in exhibits released pursuant to federal court order (Obviously this mechanism for obtaining evidence was not available to Mr. Swearingen during state habeas proceeding.), the species of fly that had had colonized Ms. Trotter's body had to be guessed based on the literature regarding the types of flies commonly found in the woods such as the San Jacinto National Forrest.

B. The new evidence unquestionably establishes that Mr. Swearingen did not commit murder.

As the Montgomery County District Attorney has stated, the science underlying of entomology underlying the forensic opinion in this case is not being questioned. In an interview with the Houston Chronicle, the District Attorney's Office state that the "scientific method is sound," but repeated the erroneous excuse used in State proceedings for not to disclosing evidence. The District Attorney contended again that "the inspect

specimens taken from [Ms.] Trotter's body were insufficient." 5/28/2004 Houston Chronicle. That erroneous assumption must now be discarded and the clear and convincing implications of Mr. Swearingen's expert entomologist's reports faced.

The scientific evidence of death now sooner than December 14, 1998, is clear and convincing evidence that Mr. Swearingen did not kill Ms. Trotter. Police took Mr. Swearingen into custody on December 11, 1998 at least three days before the soonest date that the body could have been disposed in the woods. In the light of the new forensic findings, for Mr. Swearingen to be guilty the following completely fantastic scenario would have to occur. Mr. Swearingen would have to have kill Ms. Trotter sometime before December 11, 1998; the body would have to be stored somewhere in a manner that prevented colonization by insects; and, finally, someone else would have to take the corpse and deposit in the woods at least three days later. As this exercise shows, the insect evidence is powerful proof that Ms. Trotter died when Mr. Swearingen was in the custody of Montgomery County police. It is therefore the type of evidence that shows Mr. Swearingen is unquestionably innocence.

CLAIM #5

ENTOMOLOGICAL EVIDENCE SHOWS THAT MR. SWEARINGEN IS ACTUALLY INNOCENT OF AGGRAVATING FELONY CHARGES

- A. State action deprived Mr. Swearingen of evidence demonstrating he is innocent of kidnapping, aggravated sexual assault, or attempt**

Facts alleged in Claim 1, section A, are incorporated by reference and re-alleged as if fully set forth herein.

- B. The new entomological evidence unquestionably establishes that Mr. Swearingen did not kidnapping or aggravated assault offenses.**

The evidence for kidnapping and aggravated sexual assault in Mr. Swearingen's case has always been largely circumstantial and heavily dependent on "weak and tentative" opinions. As the TCCA stated in its opinion on direct appeal,

Each piece of evidence supporting the findings of kidnapping or sexual assault might appear weak and tentative when viewed in isolation, even in the light most favorable to the verdict. The forensic evidence was inconclusive, and in many cases the expert witnesses could not conclude that one explanation was more likely than not.

Swearingen, 101 S.W.3d, at 96. Because the case against Mr. Swearingen on the underlying felonies was so filamentous, his insufficiency argument drew two strongly worded dissents. *Id.* at 101 (Johnson, J., Price, J., dissenting). The federal district court upheld the insufficiency argument but only because the court was constrained to view majority opinion through the "doubly differential" standard imposed by Title 28 U.S.C. § 2254. *Swearingen v. Dretke*, Civil Action No. H-04-2058, (S.D.Tex. 2005)(Memorandum and Order, pp. 30-31) (Hereafter, "USDC, Memo and Order").

The State has always maintained that Mr. Swearingen committed the aggravating felonies underlying his capital conviction in the course of committing the murder. Indeed, the State's specific theory is that the offenses were committed simultaneously. In federal proceedings, the State argued that the method of death, strangling, showed kidnapping. In attempting to find a basis for upholding the aggravating felony conviction for kidnapping that federal court adopted the kidnapping-by-strangling allegation. *USDC, Memo and Order*, at 36-37. The TCCA's majority, in upholding the sufficiency of the evidence on the underlying felonies, imagines a scenario in which commission of murder and both of the aggravating offenses occurs practically at once. *Swearingen*, 101

S.W.3d, at 97 (“The scenario that Swearingen killed Melissa Trotter in the course of kidnapping her in order to sexually assault her after she rejected his sexual advances is supported by the evidence, thus, the evidence is legally sufficient to support the verdict.”)

In light of the horribly weak proof on which the convictions for aggravating felonies in this case rests, new, scientific evidence showing that Mr. Swearingen was incarcerated when Ms. Trotter’s body was exposed in the San Jacinto Forest, by exculpating him of the murder charge, unquestionably exculpates him of the kidnapping and aggravated sexual assault charges. Because it is clear from the entomological evidence that on or about December 14, 1998, at the soonest someone else transported Ms. Trotter’s body to the woods order to convict Mr. Swearingen the jury would have to find that he committed an aggravated assault, or kidnapped her, but that a confederate committed the murder and transported the body to the woods or else sequestered the corpse for several days before so transporting it. These hypotheses are simply fantastic. The physical evidence that State says indicates a struggle amounting to kidnapping by restraint or attempted aggravated sexual assault cannot be attributed to Mr. Swearingen if another person is involved in handling Ms. Trotter whether alive or dead. The disarrayed state of Ms. Trotter’s clothing – the ripped pantpocket and sweater and bra pushed over her breast – which the State has emphasized to prove both kidnapping and attempted aggravated sexual assault simply cannot be connected to Mr. Swearingen if someone else removed Ms. Trotter to the woods.

CLAIM #6

FORENSIC OPINION OF HARRIS COUNTY MEDICAL EXAMINER IS CLEAR AND CONVINCING EVIDENCE THAT MR. SWEARINGEN DID NOT COMMIT AGGRAVATING FELONIES UNDERLYING HIS CAPITAL CONVICTION.

A. New expert opinion counts as recently discovered evidence.

On or about November 17, 2004, Mr. Swearingen sought review from the Harris County Medical Examiner's office Dr. Carter's findings. Exh. 'E'. The motive for seeking review Dr. Carter's testimony and pathological diagnosis of the body of Melissa Trotter, and the possibility for obtaining such review, did not materialize until after Mr. Swearingen's had filed his first Article 11.071 application for habeas relief. Mr. Swearingen filed his initial application on March 11, 2002, but it was not until 2004 that information surfaced showing that the Medical Examiner's Office under Dr. Carter's direction was unjustifiably reporting pathological findings favoring the prosecution. Exh. 'D'. Furthermore, Dr. Carter was Chief Medical Examiner for Harris County from 1996-2002, through the period, that is, when Mr. Swearingen filed his initial state writ. In order for Mr. Swearingen to obtain a different opinion from the Medical Examiner's Office, Dr. Carter would have to reverse herself. The idea that this was even a faint possibility is easily dismissed. Dr. Carter may very well have set the tone through her pattern and practice of testimony badly skewed toward the prosecution that led to problems with Harris County autopsy reports revealed by news reporters in 2004. A month after Mr. Swearingen's trial, in *State of Texas v. Jonathan Marcus Green*, 00-10-06435-CR, in the 221st District Court of Montgomery County, the Montgomery County District Attorney called on Dr. Carter to give similarly unsupportable forensic testimony about the significance of discoloration seen on the vaginal wall of another decomposed

victim. She duly testified that the discoloration was consistent with forced penetration.

B. Harris County Medical Examiner’s revision of the autopsy findings unquestionably proves that Mr. Swearingen did not commit aggravated felonies with which he was charged.

Evidence of a vaginal bruise played a significant role in the TCCA majority’s decision to uphold Mr. Swearingen’s eligibility for the death penalty. Swearingen, 101 S.W.3d, 96-97. The presumption of vaginal bruising was not only instrumental to the TCCA’s decision to find that the evidence was sufficient to show that Ms. Trotter was raped, but also to the TCCA’s decision to uphold the verdict regarding kidnapping. This is because the majority clearly considered the kidnapping and rape evidence as inextricably intertwined. The majority clearly considered what it took to be evidence of rape as evidence that Mr. Swearingen restrained Ms. Trotter, when characterized the significance of the evidence as follows:

A rational jury could also have concluded that at some point during the restraint, knowing that Trotter was unconscious or physically unable to resist, Swearingen intentionally committed acts in furtherance of his intent to have sexual relations with her, such as pulling up her bra and possibly penetrating her vagina. A rational jury could conclude that Swearingen compelled Trotter to submit or participate in such action by the use of physical force and without Trotter's consent, as indicated by Trotter's statement that she needed to go home when the conversation turned to sex. A rational jury could then find that Swearingen did attempt to, and succeeded in causing Trotter's death in the course of the same criminal episode.

Id. at 96.

Dr. Sanchez’s opinion pursuant to review of “the autopsy report, photographs and court testimony of Dr. Joye M. Carter” clearly and convincingly reverses forensic findings and testimony central to the States case for the aggravating felonies. Dr. Sanchez stated that,

I did not find any description regarding vaginal trauma in the autopsy report and only two photographs of the vaginal cavity are identified in the case file. It is my impression that at least one photograph, identified in court as State's Exhibit 270, is missing. The two photographs I have available show multiple patch areas of red discoloration on the vaginal portion of the cervix consistent with congestion, must likely due to postmortem settling of blood. One photograph shows an area (approximately 1.4 cm) of red discoloration in the vaginal wall with parallel incisions (cuts), which were made by the pathologist, and demonstrates the lack of extravasated blood in the underlying tissue, which, therefore, **indicates a lack of trauma.**"

Exh. 'E', p. 1 (emphasis added).

PART III. MR. SWEARINGEN IS INNOCENT UNDER *SCHLUP V. DELO*.

Standard of Review

The standard of proof needed to establish innocence when the innocence claim is intertwined with other constitutional error is substantially lower. In that case, the petitioner must present evidence of innocence "so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of non-harmless constitutional error." *Ex Parte Elizondo*, 947 S.W.2d, at 208. The lesser burden reflects the fact that this second type of innocence claim is not a stand alone claim. Instead, it represents a threshold that petitioner's must meet before the Court can reach the merits of the constitutional claim with which it is intertwined. *Id.* (stating that once proof of innocence shakes confidence in the trial, "the petitioner may pass through the gateway and argue the merits of his underlying claims.").

CLAIM #7

BECAUSE NEW ENTOMOLOGICAL EVIDENCE RAISES A MORE LIKELY THAN NOT THAT NO REASONABLE JUROR WOULD FIND MR. SWEARINGEN INNOCENT OF CAPITAL MURDER, THIS COURT SHOULD REACH THE MERITS OF MR. SWEARINGEN'S SIXTH AMENDMENT AND DUE PROCESS CLAIMS AND GRANT RELIEF.

A. New Evidence showing Mr. Swearingen is innocent of capital murder under *Herrera v. Collins*, a fortiori, shows he is innocent under *Schlup v. Delo*.

Evidence and argument advanced in Claim 1, sections A, and B, to show Mr. Swearingen meets the unquestionably innocent standard set in *Herrera v. Collins* is hereby incorporated by reference and re-alleged as if full set forth herein.

B. Mr. Swearingen's conviction is constitutionally flawed because State action prevented him from obtaining post-conviction relief in the form of a fair trial.

The right to put on an adequate defense is fundamental. For this reason, the State may not limit defendants from developing or sponsoring evidence probative of innocence or from impeaching the State's case. *See, Chambers v. Mississippi*, 410 U.S. 284, 300 (1973); *Davis v. Alaska*, 415 U.S. 308, 318 (1974). During state post-conviction proceedings, Mr. Swearingen provided the State with an expert evaluation demonstrating that the insect evidence was highly material. State habeas counsel explained the significance of entomological analysis and notified the State that insect evidence was available that would allow this analysis to go forward. He provided a forensic entomological opinion based on the evidence to which counsel was limited. The opinion was supported by a detailed argument and reference to relevant literature. The State was therefore clearly on notice that the evidence was highly "material" in the sense of the term set forth in *Brady v. Maryland*, as it could well establish, scientifically that the date

on which Ms. Trotter body was first colonized by insects in the East Texas woods was **after** the date on which Mr. Swearingen was incarcerated.

Because Mr. Swearingen provided a report showing the exculpatory value of entomological evidence in the State's possession, the State's decision to withhold petri dishes and clothing items containing the evidence necessary for forensic analysis must count as deliberate. The State did not employ an expert to review the evidence to see if it was suitable for entomological purposes. Attorneys for the State were in no position to make this judgment unaided, nor was the trial court. Nonetheless, the State continued to withhold this critical evidence. The decision is completely inexplicable in light of the State's public admission that it did **not** disagree with the underlying science that Mr. Swearingen explained could clearly be used to exculpate him.

By intentionally withholding material evidence the State prevented Mr. Swearingen from obtaining post-conviction relief. The relief he was entitled to was a trial by reasonable jury. New evidence establishing scientifically that Ms. Trotter body was transported and exposed to the woods after Mr. Swearingen was incarcerated surely shows that in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." This Court should therefore grant the relief which Mr. Swearingen was wrongly denied.

CLAIM #8

NEW FORENSIC EVIDENCE ENTITLES MR. SWEARINGEN TO RAISE DEFAULTED CLAIM THAT THE TRIAL COURT ERRONEOUSLY LIMITED MR. SWEARINGEN'S RIGHT TO INTRODUCE EVIDENCE OF MS. TROTTER'S SEXUAL PAST IN VIOLATION OF MR. SWEARINGEN'S CONSTITUTIONAL RIGHTS.

- A. New entomological evidence makes it more likely than not that no jurors would convict Mr. Swearingen of aggravated felonies underlying his capital conviction.**

Facts and argument alleged in Claim 2, Sections A and B, and Claim 3, Sections A and B, are incorporated by reference and re-alleged as if fully set forth herein.

- B. The trial court's refusal to allow cross-examination about Ms. Trotter's sexual history violated Mr. Swearingen's sixth amendment and due process rights.**

As the Judge Johnson wrote in dissent in *Swearingen v. State*,

Because we know little of Trotter's life in the days before her death, we are left with important, unanswered questions. For example, was she sexually active? If so, did she have sexual relations with someone else in the three days before her death?

Id. 101 S.W.3d, at 106. The jury did not hear answers to these important questions because the trial court limited cross examination regarding the sexual relations between Ms. Trotter's boyfriends about the couple's sexual history.

State's witness, John Novotny, testified that he had been dating Melissa Trotter for "approximately three and a half months" before her disappearance on December 8, 1998. Tr. Transc., vol. 29, at 237. He saw her last, he said, on December 5 and 6 of 1998, on which dates Ms. Trotter and he had parked in his truck for five or six hours until 3:00 AM in the morning. *Id.* at 245. On December 7, 1998, Mr. Novotny, by telephone, last spoke with Ms. Trotter. On direct, the State asked Mr. Novotny if Ms. Trotter and he

had engaged in intercourse on the fifth or sixth of December. Mr. Novotny testified they had not.

On voir dire outside the presence of the jury, Mr. Novotny admitted that on the 24th of November, “Thanksgiving Day,” Ms. Trotter and he had sexual relations. *Id.* at 244. Counsel urged that evidence of specific sexual conduct with Mr. Novotny was important, as it was probative of the defenses theory that consensual sex caused the discoloration Dr. Carter indicated was a bruise. *Id.* at 240 -241, 243. The Court, however, accepted as fact, Dr. Carter’s contention that the alleged bruising had to have occurred within three days of Ms. Trotter’s death:

MR. CROW: The State’s offered scientific evidence of a bruise on the interior of her vaginal wall.

THE COURT: Right, so if he was admitting he had sex with her in the two- or three-day period, then it would be extremely relevant to your case, but since he’s saying it occurred almost two weeks, near Thanksgiving, is that correct?

MR. CROW: That’s what he says, yes, sir.

THE COURT: Then there is no relevancy here.

MR. CROW: Well, we’ve made a record.

THE COURT: You’re instructed not to go into this at all.

Id.

Clearly, the Court prohibited impeachment vital to Mr. Swearingen’s defense against the underlying crime of rape. In *Swearingen v. State* the evidence of rape was “essentially non-existent.” *Swearingen*, 101 S.W.3d, at 106 (Johnson, J., dissenting). Ms. Trotter was discovered clothed with he pants zipped and buttoned. The Medical Examiner admitted that there was no evidence of vaginal, anal or oral penetration. The

only suggestion except for the testimony by State's medical examiner that autopsy revealed a bruise on Ms. Trotter's vaginal wall.

Whatever probative force this testimony had was a result of the trial Court's refusal to allow impeachment of Mr. Novotny. As the dissent pointed out, "because we know little of Trotter's life in the days before her death, we are left with important, unanswered questions. For example, was she sexually active? If so, did she have sexual relations with someone else." Swearingen, 101 S.W.3d, at 106 (Johnson, J., dissenting). The jury, however, was left with the impression that Ms. Trotter had a single boyfriend from a respected school closely associated with military virtue, who along with Ms. Trotter was inclined towards abstinence.

Evidence that Mr. Novotny and Ms. Trotter had engaged in premarital sex as recently as November 24, 1998, raised the issue of whether any injury to Ms. Trotter's genitalia could have been caused then. It would also cast doubt on the credibility of Mr. Novotny's testimony that upon seeing Ms. Trotter after ten days separation that he and Ms. Trotter had spent six hours from approximately 9:00 PM, December 5, 1998, until 3:00 AM, December 6, 1998, without engaging in sexual relations capable of causing the "bruise" Dr. Carter said she spotted.

Given the paucity of evidence supporting the rape allegation, the trial court's refusal to allow impeachment of Ms. Trotter's lover about their sexual activity, or lack thereof, close to the time the State contended Mr. Swearingen raped her clearly made trial on the underlying charge of aggravated sexual assault unfair. This Court should therefore order relief on Mr. Swearingen's claim he was deprived of his rights under the Sixth Amendment to confront witnesses against him.

1. Appellate Attorney's Decision Not to Raise Confrontation Clause Objection Was Deficient.

Mr. Swearingen's appellate counsel cannot justify the exclusion of any colorable claim on strategic grounds. It goes without saying that the Fourth Amendment governs suppression issues. Yet, appellate counsel's tenth claim is that, "The trial court erred, in that the trial court denied appellant's motion to suppress evidence seized pursuant to search warrants issued on December 15, 1998, and December 18, 1998, in violation of U.S. CONST., AMEND. IX." The roman numeral for "nine" is not a misprint. Appellate counsel cites the text of the Ninth Amendment in the body of his briefing as a legal basis for suppressing evidence. Appellate counsel also objected to searches on Fifth and Sixth Amendment grounds, expending space and time meritless contentions.

By proceeding seriatim, appellate counsel managed to cite the enumerated right that governs search and seizure, but the suppression issues he raised under the Fourth Amendment does not salvage his deficient performance. It is well settled that defendant's do not have privacy interest in stolen property. The State established that Larry Swearingen stole the truck police searched. But appellant counsel sought relief on the ground that the evidence seized from the truck was not suppressed. Appellate counsel did argue for reversal of clearly established law contradicting his position. He did not find cases that might by analogy be extended to the situation on which he based his claim for relief, nor could he because such cases do not exist. The only conclusion is that counsel was ignorant of the law and facts pertaining to suppression issues in Mr. Swearingen's case. As the Texas Court of Criminal Appeals found, appellate counsel failed "fails, in his brief, to apply the law to the facts as required under the appellate rules. *See*, TEX. R. APP. P. 38.1."

2. Failure to Raise Confrontation Clause Violation Prejudiced Mr. Swearingen

a. Texas Standards for Effective Appellate Representation Should Apply

When a state grants criminal defendants certain statutory rights, it may create "a substantial and legitimate expectation" on their part that they will not be deprived of their liberty in violation of such rights. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980). Certain claims for relief should be viewed through the prism of standards applicable in state proceedings, so long as those standards do not fall short of constitutional minima; for example, in order to determine whether failure to give a lesser included offense charge was unconstitutional, the Court in *Cordova v. Lynaugh*, 838 F.2d 764, 767 (5th Cir.), cert. denied, 486 U.S. 1061 (1988), applied Texas's test. *See, also, East v. Scott*, 55 F.3d 996 (5th Cir. 1995). Taking into account State standards is particularly appropriate when dealing with ineffectiveness claims, since the Supreme Court in *Strickland* required federal courts to evaluate performance of counsel in relationship to prevailing professional standards within the jurisdiction in which the case arose. *See Strickland*, 466 U.S., at 688 (stating that performance is deficient if it falls below an objective standard of reasonableness, which is defined in terms of prevailing professional norms).

Under Texas law, the prejudice prong of an ineffectiveness of counsel claim turns on whether it is reasonably probable that claims counsel should have, but failed, to raise would have resulted in appellate relief. Mr. Swearingen therefore should be afforded relief upon determination that appellate counsel failed to argue reversible, constitutional error. Thus, if the Court finds that the Court violated the Sixth Amendment issue Mr. Swearingen raises here, then prejudice analysis involves applying the test in *Chapman v.*

California, 386 U.S. 18 (1967). Under *Chapman* reversal is necessary unless the state demonstrates that constitutional error was harmless beyond a reasonable doubt.

b. Relief Is Necessary Because of Reasonable Probability that Trial Court's Limitation of Cross Examination Affected the Jury's Verdict on Underlying Felony of Sexual Assault.

The question of prejudice is not whether but for appellate counsel's error, the defendant would have prevailed on appeal, but whether the appellate counsel failed to raise issues that made the trial fundamentally unfair. *Goodwin v. Johnson*, 132 F.3d 162, 174-75 (1997). In other words, petitioner must demonstrate a reasonable probability of a different verdict, had errors, which appellate counsel failed to brief, not occurred at trial. But showing a reasonable probability of a different outcome does not mean showing that more likely than not defendant would have prevailed at trial. Instead, petitioner has to show that the trial errors appellate counsel failed to raise were serious enough to shake confidence in the verdict. *See Kyle v. Whitley*, 514 U.S. 419, 434 (1995) (citing *Bagley*, 473 U.S. at 678).

In Mr. Swearingen's case, the issue is whether the limitations on Mr. Swearingen's defense against the charge of sexual assault imposed by the trial courts misapplication of Rule 412 of the Texas Rule of Evidence was prejudicial. In analyzing Texas cases, the Fifth Circuit has framed the analysis of issues such as this in terms of whether it is there exists a reasonable probability that at least one juror would not have been convinced that the state had proved sexual assault beyond a reasonable doubt if the defense had been allowed to introduce evidence the court excluded.

As this Court noted in *Swearingen v. State*, as things stood, the evidence supporting sexual assault was based on "weak and tentative" evidence. *Id.* 101 S.W.3d, at

96. Cross-examination of Mr. Novotny about Ms. Trotter's sexual activity would have undermined the meager foundation beneath the state's case. Relative to the weight of the evidence, cross-examination was too important to justify the State's rape-shield concerns.

The limitation on cross-examination of Novotny is similar to what happened in *Davis v. Alaska, supra*. Alaskan police confronted Richard Green about a stolen safe found on his property. Investigators questioned Green at the station, and Green said that he had seen two blacks in a truck stopped near the safe. Green made an identification via photographs and live line-up. Defense counsel sought to impeach Green based on his juvenile records. The Alaskan trial court issued a protective order citing state law privileges, and forbade cross examination about Green's two adjudications of delinquency for burglary. At trial, Green testified on cross that he had never been questioned by investigators in this manner before, and insisted that the idea the police might suspect he stole the safe really did not enter his mind or make him anxious. The Supreme Court instructed that since it was "probable that Green underwent some questioning by police when he was arrested for the burglaries on which his juvenile adjudication of delinquency rested, the answer can be regarded as highly suspect at the very least. The witness was in effect asserting, under protection of the trial court's ruling, a right to give a questionably truthful answer to a cross examiner pursuing a relevant line of inquiry." *Davis*, 415 U.S., at 314. According to the Court, this situation "clearly illustrate[d] the need for cross examination." *Id.* State privileges therefore had to give way, and the Court reversed and remanded for a new trial.

Trial on the underlying sexual assault charge was just as unfair in Mr. Swearingen's case as trial in *Davis*' on theft charges because Mr. Swearingen's trial court

deferred to state privileges. In Mr. Swearingen's case, excluding consensual intercourse as the cause of the alleged bruise on Ms. Trotter's vagina was necessary in order for the State to preserve whatever probative force the diagnoses had for the charge of rape. Mr. Novotny's flat denial that he did not have sexual relations with Ms. Trotter after ten days absence although the two "parked" until 3:00 a.m. is suspect. His answer was given "under protection of the trial court's ruling" that defense counsel could not raise any questions about his sexual relationship with Ms. Trotter. Relative to Mr. Swearingen's ability to defend against the underlying charge of sexual assault, the ruling, like the one in *Davis*, was "constitutional error of the first magnitude." *Davis*, 415 U.S., at 318. Relief from conviction for capital murder should therefore be ordered granted.

WHEREFORE, Larry Ray Swearingen requests that this Court:

1. Issue a writ of habeas corpus to have him brought before it, to the end that he may be discharged from his unconstitutional confinement and restraint and/or relieved of his unconstitutional sentence of death.
2. Grant him an evidentiary hearing at which he may present evidence in support of the foregoing claims, and allow him a reasonable period of time subsequent to any hearing this Court determines to conduct, in which to brief the issues of fact and of law raised by this petition or such hearing.
4. Grant such other relief as law and justice require.

CERTIFICATE OF SERVICE

The foregoing pleading was served upon the Montgomery County District Attorney's Office, Conroe, Texas by hand delivery, U.S. Mail and/or electronically.

By: _____
James G. Rytting