LARRY RAY SWEARINGEN	**)**	**No. _____**
vs.	**)**	**IN THE DISTRICT COURT**
STATE OF TEXAS	**)**	**9TH JUDICIAL DISTRICT**
	)	**MONTGOMERY COUNTY, TEXAS**

MOTION FOR POST-CONVICTION DNA TESTING

TO THE HONORABLE DISTRICT JUDGE KELLY CASE:

Pursuant to Chapter 64 of the Texas Code of Criminal Procedure, Larry Ray Swearingen asks this Court to allow him to conduct post-conviction DNA testing in order to prove his innocence of the murder of Melisa Trotter. In 2011, the Texas Legislature amended Chapter 64 to specifically address the reasons cited by the Court of Criminal appeals in denying Mr. Swearingen's earlier requests for DNA testing. In light of these important statutory changes, Mr. Swearingen's request falls easily within the right to DNA testing under Chapter 64. All DNA testing should be conducted at the Orchid Cellmark Laboratory in Dallas, Texas.[1]

I.
Introduction

The basic facts of this case are well-known in this jurisdiction: Melissa Trotter was last seen on December 8, 1998; Mr. Swearingen was taken into custody on December 11, 1998; and Ms. Trotter's body was discovered on January 2, 1999, twenty-five days after she disappeared

[1] Chapter 64 allows a district court to order DNA testing to be performed at the State's expense at a lab that contracts with the Texas Department of Public Safety to conduct DNA testing. *See* Tex. Code Crim. Proc. 64.03(c)(2). Cellmark has such a contract and is ready and able to perform the testing. *See* Exhibit 1 (Affidavit of Huma Nasir, M.S.). Even though the statute contemplates state funded testing under a DPS contract, the Innocence Project is prepared to pay for the testing to allay any of the Court's concerns about the cost of using a private lab.

and twenty-two days after Mr. Swearingen was incarcerated. Mr. Swearingen was convicted of capital murder in June 2000 and sentenced to death, but he has maintained his innocence since his arrest over 14 years ago. On post-conviction review, no less than five forensic experts have testified that it is likely impossible for Mr. Swearingen to have murdered Ms. Trotter because she was still alive as of December 11 when Mr. Swearingen was incarcerated.

Evidence containing – or likely to contain – biological material was collected during the investigation including:

- fingernail scrapings from Ms. Trotter's left and right hands,
- items of Ms. Trotter's clothing bunched and torn in an apparent struggle,
- the ligature used to strangle Ms. Trotter,
- the torn pantyhose found near Mr. Swearingen's house,
- cigarette butts found near Ms. Trotter's body.

Before trial, the state tested flakes found in the fingernail scrapings of Ms. Trotter's left hand, and that testing yielded a male profile that did not belong to Mr. Swearingen. *See Swearingen v. State*, 303 S.W.3d 728, 735 (Tex. Crim. App. 2010). The rest of the evidence identified above has never been subjected to DNA testing despite Mr. Swearingen's repeated requests, but it is still in the State's possession. DNA testing of this evidence can both exonerate Mr. Swearingen and identify the actual murderer of Ms. Trotter.

II.
Requested Testing

Mr. Swearingen seeks an order compelling DNA testing of the following items of evidence using the most probative and advanced means of testing, including STR or mini-STR testing, Y-STR testing, as well as mitochondrial DNA testing:[2]

1. fingernail scrapings of the left and right hands;[3]
2. ligature;
3. torn pantyhose found near Mr. Swearingen's home;
4. ripped jeans for contact or touch DNA;
5. areas of the victim's clothing where her clothes were moved;
6. cigarette butts recovered from the crime scene.

All profiles from such testing should be ordered compared to the CODIS database and any other relevant DNA profiles. *See* Tex. Code Crim. Proc. Art. 64.035.

III.
Procedural History

A. Direct Appeal and Initial Habeas

Mr. Swearingen was convicted of the capital murder of Melissa Trotter in a trial presided over by the Hon. Fred Edwards. The evidence against Mr. Swearingen is detailed at length in the 2003 opinion of the Court of Criminal Appeals affirming the capital murder conviction and death

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[2] The items identified include any extracts or samples taken from these items through prior forensic analysis.

[3] Pre-trial DNA testing was only performed on blood flakes obtained from scrapings taken from the left hand.

sentence. *See Swearingen v. State*, 101 S.W.3d 89 (Tex. Crim. App. 2003). The Court of Criminal Appeals denied Mr. Swearingen's initial application for writ of habeas corpus on May 21, 2003, less than two months after ruling on the direct appeal. *See Ex Parte Swearingen*, No. 53, 613-01 (Tex. Crim. App. May 21, 2003).

B. Prior DNA Litigation

Mr. Swearingen first sought post-conviction DNA testing by motion filed in this Court on October 19, 2004. *See Swearingen v.* State, 189 S.W.3d 779, 780 (Tex. Crim. App. 2006). Judge Edwards denied DNA testing and related motions in April 2005. *See id*. The Court of Criminal Appeals then dismissed Mr. Swearingen's appeal from the denial of DNA testing because his counsel did not timely file a notice of appeal. *See id*. at 781.

A second motion for DNA testing was filed pro se by Mr. Swearingen in May 2008 which was supplemented by a third motion filed with counsel on January 6, 2009—three weeks before Mr. Swearingen's then-scheduled execution. *See Swearingen v. State*, 303 S.W.3d 728, 730 (Tex. Crim. App. 2010). Judge Edwards again denied DNA testing approximately one week before the scheduled execution. *See id*. Because a stay of execution was granted by the United States Court of Appeals for the Fifth Circuit, the Texas Court of Criminal Appeals considered Mr. Swearingen's appeal from the denial of DNA testing in due course. The Court of Criminal Appeals then affirmed the denial of DNA testing in an opinion dated February 10, 2010. *See id*.

The statutory standard for DNA testing was amended in 2011 based in part on inadequacies highlighted by the 2010 Court of Criminal Appeals Opinion in Mr. Swearingen's case. One witness testifying during a Senate hearing on the 2011 amendment made clear that:

> Currently, the statute does not have an express definition of the term biological evidence. But we've noticed through several Court of Criminal Appeals decisions recently that this is something the court is very concerned with, and it is something that the legislature can help clear up. . . . For example, in *Swearingen v. State*, it's a 2010 decision out of the Court of Criminal Appeals; one of the trial court's reason for denying testing was essentially that it said it had not been proven, that fingernail clippings, ligatures and scrapings from a pair of blue jeans contained biological evidence that was suitable for testing. The Court of Criminal Appeals affirmed the trial court's denial of DNA testing . . . in part because it wasn't clear what the term biological evidence means as it is set forth in the statute. . . . What we know now, from all these exoneration cases and also from the evolving nature of DNA technology, is that rape kits are not the only type of biological evidence that we can collect from crime scenes and victims that will prove probative in these types of cases. Modern DNA testing techniques such as touch DNA and mitochondrial DNA are sensitive enough to detect DNA profiles where we once thought they could not exist. . . . So therefore, it's critical that a definition of biological evidence include things like fingernail scrapings, hairs, bones and other bodily fluids, because not only would this be in conformance with DNA testing technologies, but it would help clear up the ambiguities in the statute that currently exist and that the Court of Criminal Appeals has seen a need to address.

Senate Committee on Criminal Justice, Public Hearing on SB 122, 82nd Leg., R.S. (March 22, 2011) (Testimony of N. Retzel, Chief Staff Attorney of the Innocence Project of Texas);[4] *see also infra* Part V(E)(2) (discussing 2011 amendments to Chapter 64).

C. Additional Habeas Litigation

In addition to the unsuccessful motions for DNA testing discussed above, Mr. Swearingen has presented compelling proof of innocence though other forensic evidence. In the face of a January 2007 execution date, Mr. Swearingen filed an application for writ of habeas corpus raising exculpatory forensic entomological evidence that demonstrated his innocence. The Court of Criminal Appeals stayed Mr. Swearingen's execution and remanded his application for a hearing on whether the decomposition of Ms. Trotter's body indicated that she was alive

[4] This testimony can be found online in the Texas Legislature Online Committee Hearing Archives at hour 1:17:30 – 1:22:10 of the committee hearing.

after Mr. Swearingen was incarcerated. *See Ex Parte Swearingen*, WR53-613-04 (Tex. Crim. App. January 23, 2007); *Swearingen v. Thaler,* H-09-300, 2009 WL 4433221, *7 (S.D. Tex. 2009). However, the Court of Criminal Appeals later adopted findings of fact and conclusions of law signed by Judge Edwards recommending the denial of Mr. Swearingen's claims. *See Swearingen v. Thaler*, 2009 WL 4433221, *7.

While this application was pending, Mr. Swearingen filed another application for writ of habeas corpus asserting additional claims relating to the forensics as well as claims involving the State's investigation of another man, Robbie Grove, as the perpetrator of the murder. *See Ex Parte Swearingen*, No. WR 53,613-05 (Tex. Crim. App. January 16, 2008). The Court of Criminal Appeals remanded these claims for a live evidentiary hearing. *See id*. After a hearing, Judge Edwards signed findings of fact and conclusions of law denying these claims, which were then adopted by the Texas Court of Criminal Appeals. *See Ex Parte Swearingen*, No. WR 53-613-05 (Tex. Crim. App. December 17, 2008). Another execution date was promptly set.

Mr. Swearingen then filed a motion in the United States Court of Appeals for a stay of execution and seeking leave to file a successive petition for writ of habeas corpus. *See In re Swearingen*, 556 F.3d 344, 346 (5th Cir. 2009). Although the Fifth Circuit stayed the execution and conditionally authorized the filing of a petition, the federal district court ultimately held that Mr. Swearingen failed to meet the stringent requirements for filing a second federal habeas petition. *See Swearingen v. Thaler*, 2009 WL 4433221, *24. This determination was affirmed by the Fifth Circuit on April 7, 2011. *See Swearingen v. Thaler*, 421 F. Appx. 413 (5th Cir. 2011). Following this decision, Judge Edwards set another execution date for August 2011.

In advance of this next execution date, Mr. Swearingen filed additional claims for writ of habeas corpus after forensic pathologist Joye Carter—who conducted the autopsy of Ms.

Trotter—gave an affidavit stating her belief that Ms. Trotter may not have been dead more than 14 days before the discovery of her body. The Court of Criminal Appeals stayed Mr. Swearingen's execution and remanded these claims for consideration by the trial court. *See Ex Parte Swearingen*, No. WR 53, 613-10. -11, 2011 WL 3273901, *1 (Tex. Crim. App. July 28, 2011). After a hearing, Judge Edwards again adopted the State's findings of fact and conclusions of law recommending that relief be denied. The vast majority of these findings were adopted in part by the Court of Criminal Appeals, which denied habeas relief without additional explanation. *See Ex Parte Swearingen*, 2012 WL 6200431, *1 (Tex. Crim. App. December 12, 2012).[5] On the day after the Court of Criminal Appeals denied relief, and without prior notice to counsel for Mr. Swearingen, Judge Edwards set another execution date for February 27, 2013. *See* Exhibit 2 (Motion and Order setting execution date filed and signed on December 13, 2012). This Motion for DNA testing is brought as soon as possible after notice of the denial of Mr. Swearingen's habeas application and in conjunction with a soon to be filed motion for reconsideration of the Court of Criminal Appeals' decision.

IV.
Factual Background

A. Melissa Trotter's Body was Found on January 2, 1999, 22 Days after Mr. Swearingen Was Taken into Custody.

On December 8, 1998, Melissa Trotter disappeared from the Montgomery Community College. *See Swearingen*, 101 S.W.3d at 93. On December 11, 1998, Montgomery County

[5] The judgment of the Court of Criminal Appeals was unexpected because it was entered less than two months after the transcript of the hearing was filed, and without any notice to Mr. Swearingen's counsel that the case had been submitted. *See* Docket Report, *Ex Parte Swearingen*, No. 53, 613-10 (Tex. Crim. App.).

police arrested Mr. Swearingen on unrelated charges, and he has remained incarcerated ever since. *See id*. On January 2, 1999, twenty-five days after Ms. Trotter disappeared, hunters found her body in the Sam Houston National Forest, northwest of Conroe, Texas, in a partly sunlit glade. *See id*.; Exhibit 3 (crime scene photo). Ms. Trotter's shirt had been pulled up underneath her arms and above her breasts, her pants had been torn, and the pantyhose leg used as a ligature was still around her neck. *See id*.

Mr. Swearingen was suspected of the murder, as witnesses recalled seeing the two together on the day of her disappearance. The two met for lunch on the Montgomery College campus on December 8, 1998, around 1:30 p.m. *Swearingen v. State*, 101 S.W.3d 89, 93 (Tex. Crim. App. 2003). But virtually every detail of what happened next was disputed at trial, and the "picture of events becomes very cloudy after 1:30 p.m." *Id.* at 105 (Johnson, J., dissenting). Varying reports had Ms. Trotter leaving with a man at 2 p.m., *id*. at 93, and as late as after 2:30. Petition, *Swearingen v. Dretke*, No. 04-cv-002058 (S.D. Tex.) (Docket # 19) at 5-6 ["1st Fed. Pet."]. However, Swearingen testified that he left Ms. Trotter at the college in the company of another man. *See Swearingen*, 101 S.W.3d at 98. And two witness reported seeing Ms. Trotter in the company of a large man with light hair. *See* S.F. Vol. 25:32; Vol. 32:29. Ms. Trotter's biology teacher also saw her leaving with a light haired man. S.F. Vol. 26:7-9. Mr. Swearingen has black hair.

Mr. Swearingen returned to his trailer home in Willis, Texas and left again sometime between 2:30 and 3:30 p.m., when his landlord reported seeing his truck at the trailer. *Swearingen*, 101 S.W.3d at 93. Cell phone records suggest Mr. Swearingen was traveling south from his trailer home at 3:03 pm, away from the national forest. S.F. Vol. 27:67. Mr. Swearingen was seen at a marina at 3:45. 1st Fed. Pet. at 5. At 4 p.m., he received a page from

his wife, Terry, who was at Mr. Swearingen's stepfather's house. Respondent's Answer to Petition, *Swearingen v. Dretke*, No. 04-cv-002058 (S.D. Tex.) (Docket # 25) at 6. Mr. Swearingen's return of the page was recorded on a cell phone tower near his trailer. *Id.* He arrived at his stepfather's house fifteen to twenty minutes later. *Id.*

B. The State's Case Against Mr. Swearingen

The State's theory at trial was that Mr. Swearingen kidnapped, sexually assaulted and killed Ms. Trotter before dumping her body in the forest sometime in the period between their alleged departure from campus and Swearingen's arrival at his stepfather's house. The National Forest was 25 miles from Mr. Swearingen's house, and 40 miles from the Montgomery College campus. *See* 1st Fed. Pet. at 5-6. And the secluded area where Ms. Trotter's body was found was accessible only by single-lane dirt roads. *Id.* Accordingly, the State alleged that Mr. Swearingen kidnapped, sexually assaulted and murdered Ms. Trotter, drove 40 miles to the National Forest, dragged Ms. Trotter into the woods, and then drove another 25 miles to his home—all in approximately 1 hour. This was an unlikely if not impossible scenario.

The proposed motive—that Mr. Swearingen became angry when Ms. Trotter resisted his sexual advances—was even less plausible. The evidence of any sexual contact was "non-existent," *Swearingen*, 101 S.W.3d at 106 (Johnson, J., dissenting): hair found in Mr. Swearingen's bed was not Ms. Trotter's, *id.*; no evidence was ever found "of any penetration of Trotter's vagina, anus, or mouth," 1st Fed. Pet. at 60; and a pubic hair found during Ms. Trotter's autopsy was found not be Mr. Swearingen's. *Id.* at 6 n.4. There were no defensive wounds on Trotter's body. *See Swearingen*, 101 S.W.3d at 94. Male DNA was found in scrapings of Ms. Trotter's fingernails—suggesting a struggle with *someone*—but DNA testing excluded Mr. Swearingen. *See Swearingen*, 303 S.W.3d at 735.

Instead, the State's case rested heavily on two other pieces of evidence: (1) a ligature found tied around Ms. Trotter's neck; and (2) a letter Mr. Swearingen wrote from jail. The State argued the ligature, consisting of one leg of a pair of pantyhose, was significant because the other half of the pantyhose was ostensibly "found in Swearingen's trailer." *Swearingen*, 101 S.W.3d at 93. But the circumstances of this discovery were troubling: the pantyhose were only discovered on January 6, 1999, after two prior searches had revealed nothing and after Mrs. Swearingen had vacated the trailer, *id.* at 101; and they were discovered in a trash area outside the trailer, where the Swearingens' landlord told the police that he had thrown the trailer's remaining contents. *See id.*

The State also relied heavily on a letter Mr. Swearingen wrote from jail in May 1999 while awaiting trial. *See* 1st Fed. Pet. at 21. In it, he enclosed a second letter, written in Spanish, that he claimed to have received in the mail from a woman named "Robin." 101 S.W.3d at 94-95 (providing one translation of the letter). In reality, Mr. Swearingen had written the letter. *Id.* at 94. Mr. Swearingen did not know Spanish, and he used a Spanish-English dictionary to write it, with predictable results: it contained "poor grammatical structure and improper use of words," making precise translation "impossible" and leaving it open to "multiple interpretations." *Id.* at 103 (Johnson, J., dissenting).[6]

[6] Whatever its precise meaning, the letter's apparent purpose was to bolster Mr. Swearingen's claims of innocence by identifying another man, "Ronnie," as Trotter's killer. 101 S.W.3d at 94-95. According to the Texas Court of Criminal Appeals, the letter was a "fabrication" that "contained some information contrary to the remainder of the evidence," "other information consistent with undisputed facts," and "some information that could have been truth or fiction." 101 S.W.3d at 96. To the extent the letter included facts not disputed at trial, some (for example, the color of Trotter's underwear) had not been made public, 101 S.W.3d at 104 (Johnson, J., dissenting), but would have been known both to the State and to Swearingen through Dr. Carter's January 3, 1999 autopsy report. *See* Exhibit 4 (Autopsy Report). In other respects, the letter got the facts wrong: it referred, for example, to the murder occurring after breakfast. *Swearingen*, 101 S.W.3d at 94.

The State also relied on even more tenuous pieces of evidence. Medical Examiner Joye Carter testified that Ms. Trotter's stomach was found to contain remnants of chicken and a french fry-like form of potato, which was described as being consistent with Trotter's last known meal of tater-tots as well as with Chicken McNuggets, which she is believed to have purchased on December 8, 1998. *Ex parte Swearingen*, 2009 WL 249778, *2 (Tex.Crim.App. 2009); *Swearingen v. Thaler*, 2009 WL 4433221. *4 (S.D.Tex.,2009). However, there was no evidence that these foods were an unusual meal for Ms. Trotter.[7] More importantly, Dr. Stephen Pustilink, Chief Medical Examiner for Galveston County, has since testified that "there's nothing there that looks like french fries" and that meat in the stomach appears to be "red meat", "not chicken" and "not ground meat." *See* 2012 Hearing, Vol. 5 at 34-35. Scientific reports have also cited the intact state of the stomach as support for a very short postmortem interval. *See* 2012 Hearing, Vol. 5 at 43-45.

In addition, the State suggested that fibers found on Ms. Trotter's sweater, pants and under her nails came from Mr. Swearingen's jacket, truck head-liner and trailer-home carpet, *Swearingen*, 101 S.W.3d at 94, but the fiber analysis excluded each as the source of the fibers. S.F. Vol. 30:83-84.) The State also pointed to the fact that Mr. Swearingen's wife had found a lighter and a pack of cigarettes matching Ms. Trotter's preferred brand in the couple's trailer despite the fact that neither she nor Swearingen smoked, *Swearingen*, 101 S.W.3d at 93, but DNA testing on cigarette butts excluded Ms. Trotter. S.F. Vol. 30:136. Finally, the State cited conduct it thought reflected consciousness of guilt—for example, Mr. Swearingen's statement

[7] A recent survey in Great Britain indicated that 1 in 3 people eat the same lunch every day. *See http://www.dailymail.co.uk/news/article-2147512/Do-need-break-lunch-One-Britons-meal-lunch-EVERY-DAY-half-say-eating-SIX-years.html.*

the night of December 8 to a former girlfriend that the police might be after him, *id.*, and his supposed jailhouse confession, *Swearingen*, 101 S.W.3dat 102 n.1 (Johnson, J., dissenting).

C. Pretrial DNA Testing Did Not Implicate Mr. Swearingen

Before trial, Montgomery County investigators attempted to tie Mr. Swearingen to the victim, Melissa Trotter, using DNA evidence. Biological samples were obtained from Mr. Swearingen, the victim, from several suspects and from Mr. Swearingen's wife at the time. The material was sent to the Texas Department of Public Safety laboratories in Austin, Texas, and to the Federal Bureau of Investigation's crime lab. Among the evidence that the State collected was a pubic hair found by a vaginal swab of the victim, blood samples from under the fingernails of the victim, and head hair samples. *See generally Swearingen v. State*, 303 S.W.3d 728 (Tex. Crim. App. 2010) (discussing evidence in context of prior request for DNA testing). The State's goal before trial was to obtain a positive match between the DNA profiles obtained from the samples that Mr. Swearingen gave police after he was taken into custody and the profile obtained from the crime scene samples. Such a match undoubtedly would have inculpated him.

Despite the State's efforts, pretrial forensic analysis, including DNA testing, failed to implicate Mr. Swearingen. DNA analysis of the blood in the victim's fingernail scrapings confirmed that the blood was from a male, but it excluded Mr. Swearingen as the donor. S.F. Vol. 30:126-128. Microscopic examination of the pubic hair found by the vaginal swab also excluded Mr. Swearingen as the donor. *Id.* at 78-79. Unfortunately, DNA analysis could not be performed on this pubic hair because the State reported that it lost this specimen. *See Swearingen*, 303 S.W.3d at 734-35. Mitochondrial DNA testing also determined that pubic hairs recovered from the pantyhose leg found near Mr. Swearingen's trailer excluded Trotter and

Swearingen's wife which casts doubt on the State's theory about the origins of both lengths of hosiery.

D. Mr. Swearingen has Already Presented Substantial Evidence Indicating that it is Impossible for him to have Murdered Ms. Trotter.

Multiple, reputed scientists have already testified that Ms. Trotter could not have been left in the forest long enough for Mr. Swearingen to have committed her murder. A brief summary of such testimony is provided below:

- Dr. Lloyd White, the Deputy Medical Examiner for Tarrant County, concluded with "scientific certainty", that a 22-day post mortem interval or time between death and recovery of the remains ("PMI"), and even a 14-day PMI can be excluded; in fact, Dr. White concluded that instead Ms. Trotter had been deceased for no more than "just a few days" when discovered. *See* 2012 Hearing, Vol. 3, at 121. Dr. White arrived at this conclusion based upon pathological evidence including that Ms. Trotter's pancreas, liver, gall bladder, spleen, esophagus, kidney, brain, lungs, and heart had weights, textures and/or appearances that were wholly inconsistent with a PMI of 22 days and instead were indicative of a PMI less than 14 days. *See* 2012 Hearing, Vol. 3, 94-98, 101-105-108, 110, 117-124, 127-131; *id*., Vol. 4, at 59-60. Dr. White also discussed photomicrographs (photographs taken through a microscope of a slide of tissue[8]), which showed "fresh

8 Although no blocks of tissue were prepared by Dr. Carter during the autopsy of Ms. Trotter, certain tissue was preserved, and when Dr. Luis Sanchez replaced Dr. Carter in the Medical Examiner's office, he had a paraffin block of Ms. Trotter's tissue prepared. 2012 Hearing, Vol. 8 at 8-9, 16-17, 21-22. While the State attempted to cast doubt as to whether the slides from the paraffin block in question contained Ms. Trotter's tissue, and Judge Edwards adopted the State's proposed findings to this effect, *see* Oct. 1, 2012 Trial finding B(17), Dr. Sanchez confirmed that he had no reason to believe that the paraffin block came from anyone other than Ms. Trotter. 2012 Hearing, Vol. 8, at 26; *see also id.*, Vol. 8, 52-53.

tissue", "intact" blood vessels, and blood cells, as well as a lack of hemoloysis, or break down of the blood cells, which would have occurred shortly after death. *See, e.g., id.*, Vol. 3, at 36-37, 40-41, 43-44, 47-48, 53-55, 60, 70-72, 74-75, 80, 83; *id.*, Vol. 4, at 52-53, 130-131, 134. Dr. White also discussed other evidence which supported his conclusion, including, that Ms. Trotter's weight at her autopsy was less than 5 pounds less than her weight as previously recorded by a physician prior to her disappearance, noting that the victim would have weighed 40-50 pounds less if her PMI had been 25 days. *Id.*, Vol. 3, at 142-143; *id.*, Vol. 4, at 25-26.

- Dr. Stephen Pustilnik, Chief Medical Examiner for Galveston County and assistant professor of pathology at the University of Texas Medical Branch, testified that Ms. Trotter's PMI could not have exceeded 7 days. *Id.*, Vol. 4 at181. In arriving at this conclusion, Dr. Pustilnik also focused on the condition of Ms. Trotter's liver, pancreas, spleen, kidney and heart, noting that the weight, appearances and/or ability of the medical examiner to section certain of these organs during the autopsy ruled out a PMI of 22 days. *Id.*, Vol. 4, 208-209, 217-218; *id.*, Vol. 5, at 14-15, 17-18, 22, 27, 29, 50-51, 72-73, 76-77. Dr. Pustilnik also focused on the fact that cell nuclei in lung tissue, red blood cells and heart tissue were visible in the slides of Ms. Trotter's tissue and that certain blood cells "look[] almost as good as if it came from a patient in surgery at the hospital." *Id.*, Vol. 4, at 189-199; *see also id.*, Vol. 4 at 198-199 (testifying that the nerve section observed appeared to be "almost as good histology as if this came from a surgical specimen in the hospital"). Dr. Pustilnik also found Ms. Trotter's consistent weight and the fact that Ms. Trotter's hair was still affixed to the scalp, while hair would normally fall out in 14 days or less, to be persuasive. *Id.*, Vol. 5, 80, 98; *see also* Exhibit 4 (Report

of Stephen Pustilnik, M.D.) (noting that "the autopsy photographs as well as scene photographs demonstrate a remarkably well preserved body," and that the prevailing temperatures in December "would have promoted a far more advanced state of decomposition" had the body been exposed since December 8).

- Dr. Harrell Gill-King, the director of the laboratory in anthropology and co-director of the Center for Human Identification at the University of North Texas also opined that Ms. Trotter's PMI was "no more than a few days". 2012 Hearing, Vol. 10, at 38-39. Dr. Gill-King testified that nothing his review of photographs of the external appearance of the body in the field and in the morgue photographs as well as in his review of the internal findings discussed in Dr. Carter's autopsy report supported a PMI of more than 10 days. *Id.*, Vol. 10, at 48-50. Additional evidence which further supported Dr. Gill-King's conclusions, included, for example, the fact that Ms. Trotter's body was not significantly lighter than had been recorded while she was alive, and the "intactness of cells in cardiac muscle, lung, [and] fat." *Id.*, Vol. 10 at 37, 47.

- Dr. Luis Sanchez, Dr. Carter's replacement as Chief Medical Examiner in Montgomery County, testified at a hearing on state habeas review in July 2007 that the pathological evidence showed "that the body was not in" the forest "for more than two weeks," *i.e.*, after Swearingen was jailed. *See Ex Parte Swearingen*, No. WR-53,613-04, 2007 Hearing RR at 16.

- Forensic pathologist, Dr. Glenn Larkin, who has performed over 2000 autopsies and testified in over 100 cases, and whose publications include *Time of Death*, a chapter in C.H. Wecht's *Forensic Sciences*, a standard text in the field, concluded, based on the

gross anatomy of Trotter's body, that she died less than ten days before autopsy. Dr. Larkin also relied on the intact status of nearly all of Trotter's internal organs, in concluding that Dr. Carter's 25-day PMI estimate was incorrect. *See* Exhibit 5 at Rpt. at 2 (Reports of Glen Larkin) (noting that the condition of Ms. Trotter's organs – particularly the intact pancreas, "is unheard of in cases where bodies have decomposed over a period of 25 days"). Dr. Larkin also noted other important evidence: Trotter's breast tissue was firm and intact; no odor was detected by crime scene investigators; the body weight was virtually unchanged; there was no bloating or perforation of the stomach; and scavenging was minimal. *Id.* at Addendum at 5-7. Accordingly, it was "not reasonably debatable amongst competent forensic scientists" that "Mr. Swearingen was not the person who left Ms. Trotter's body in" the forest. *Id.* at 7.

Evidence offered by the State in response was suspect. A Forensic Pathologist from Michigan, Werner Spitz testified that 2012 evidentiary hearing that all the evidence in the case was consistent with a 25 day post mortem interval which incriminates Applicant. However, Spitz admitted that the histology and gross anatomical findings in the case supported a post mortem interval of 14 days or less, 2012 Hearing Vol. 6 at 79, 139.

A Forensic Entomologist from Indiana, Neil Haskell, calculated a PMI placing the time of fly colonization of the victims remains between December 5, 1998 and December 10, 1998. However, Haskell's technique was invalid for this case. Haskell relied on photographic evidence, not physical specimens, but he conceded that the photographic evidence on which his post mortem interval calculations were exclusively based did not permit him to make species identifications that were essential for his technique to work. 2012 Hearing Vol. 8 at 86, 140. He

also assumed that Trotter died in the woods and admitted his data and calculations would be skewed if this conjecture, which even the State cannot support, were wrong. *Id*. at 155.

And finally, Dr. Joye Carter has repeatedly contradicted herself under oath. At Applicant's June 2000 trial that the PMI in this case was 25 days or so. In 2007, Carter provided an affidavit stating that the PMI was 14 days or less. At the 2012, hearing Carter said the affidavit did not express her forensic opinion just "a forensic opinion," and that her belief throughout was the PMI in this case was 14 days or longer. At the same 2012 hearing she admitted that the post mortem changes she maintained justified a longer PMI could occur in as little as six days after death under conditions prevailing at the crime scene. 2012 Hearing Vol. 7 at 90-91. Furthermore, Carter formulated her original incriminating opinion of a "25 day or so" (i) without any weather data, although she knew this information was essential, and (ii) in reliance upon entomological and mycological (fungus) evidence about which she had no specialized knowledge. *Id* at 62, 76-77.

V.
Argument

A. Standard for DNA Testing

Chapter 64 of the Code of Criminal Procedure provides the standards and procedures for post-conviction DNA testing. Through amendments to Chapter 64 enacted in 2011, the Legislature has afforded a broad right to conduct DNA testing on essentially all crime scene evidence that can yield probative evidence of innocence. A person may seek DNA testing of any "biological evidence that may be suitable for DNA testing" including "blood, semen, hair,

saliva, skin tissue or cells, fingernail scrapings, bone, or bodily fluids." *See* Tex. Code Crim. Proc. art. 64.01(a)(1).

To be eligible for testing, such evidence must have been secured in relation to the challenged offense and been in the possession of the State at the time of trial, but:

> (1) not previously subjected to DNA testing; or
>
> (2) although previously subjected to DNA testing, can be subjected to testing with newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test.

Id. at art.64.01(b).

A Court must order DNA testing where the following elements are established:

1) the evidence exists in a condition making DNA testing possible and has been subjected to a chain of custody sufficient to show that it has not been substituted, tampered with, replaced, or materially altered;

2) identity was an issue at trial;

3) the person would probably not have been convicted if exculpatory DNA results had been obtained; and

4) the request for DNA testing is probably not made to unreasonably delay the execution of sentence or administration of justice.

Tex. Code Crim. Proc. Art. 64.03(a)(1), (2). Of these four elements, there is no burden of proof regarding 1 and 2, and the Court must simply make findings as to these factual questions. *Cf Prystash v. State*, 3 S.W.3d 522, 535 (Tex. Crim. App. 1999) (no burden of proof on mitigation special issue in capital cases).[9] The movant must prove elements 3 and 4 by a preponderance of the evidence. *See id.*

[9] Because evidence subject to a Chapter 64 motion must be in the possession of the State, pacing the burden to demonstrate the existence and condition of the evidence on movant would be manifestly unfair because access to

In considering whether a person has met his burden of proving that he would probably not have been convicted if exculpatory results were obtained, the court may not weigh the likelihood that favorable results will be obtained—favorable results must be presumed. *See In re Morton*, 326 S.W.3d 634, 641 (Tex. App.—Austin 2010, no pet.); *Routier v. State*, 273 S.W.3d 241, 257 (Tex. Crim. App. 2008). Further, the Court must consider all exculpatory results including the possible identification of a third party offender as the source of the DNA as well as the possibility of finding redundant DNA profiles on separate items of evidence. *See Routier*, 273 S.W.3d at 259. The required presumption that testing will identify a known offender is clear from the Legislature's addition of a requirement that the court order a DNA profile compared to state and federal DNA databases of known offenders. Tex. Code Crim. Proc. art. 64.035. In fact, approximately 50% of all DNA exonerations result in the identification of the real perpetrator.[10]

And finally, the exculpatory DNA results need not directly undermine the other evidence of guilt. In *Routier*, for example, the State argued that exculpatory DNA results would not affect the evidence of guilt presented at trial:

> The State argues that the presence of an unknown person's DNA could not have changed the jury's verdict because "it would not refute the evidence physically linking appellant to the murders and to the manipulation of the evidence at the scene. At a minimum, appellant would undoubtedly have been convicted as a party."

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the evidence is exclusive to the State. If the Court determines that the burden is on Mr. Swearingen to establish this element, then a robust right to discovery must be implied in this cause of action.

[10] http://www.innocenceproject.org/know/

273 S.W.3d at 259. The Court of Criminal Appeals rejected the State's revision of its trial theory, holding that DNA results implicating an unknown offender would corroborate Routier's contention that someone else committed the murder and create at least a 51% likelihood that the jury would not have convicted. *See id.*

A. The Evidence Exists and is Suitable for Testing

In previous DNA litigation, the State has not contested the existence of the evidence sought to be tested in this motion or its suitability for testing. Moreover, the existence of this evidence is well documented as follows:

- **Fingernail Scrapings**
  Fingernail scrapings were collected at autopsy and forwarded to DPS for testing. *See* Exhibit 6 (Autopsy Report), 7 (DPS Notes re: fingernail scrapings). These scrapings are believed to be retained by either DPS or the Montgomery County Sheriff's Department.

- **Victim's clothing**
  The victim's clothing was collected at autopsy, *see* Exhibit 6, and has been examined by both DPS and a defense expert. However, the defense expert returned the clothing to the Montgomery County District Attorney's Office in 2007. *See* Exhibit 8 (Report of Deal Morris). This evidence is believed to be in the possession of the Montgomery County District Attorney's Office or the Montgomery County Sheriff's Department.

- **Ligature**
  The ligature was collected at autopsy and transported to DPS for examination. *See* Exhibit 9 (Montgomery County Sheriff's Department Report re: autopsy 2/11/99).

- **Torn Pantyhose**
  The torn pantyhose was collected by the Montgomery County Sheriff's Department and submitted to DPS for testing. *See* Exhibit 10 (DPS Submission Form)

- **Cigarette Butts**
  The Cigarette Butts were collected by the Montgomery County Sheriff's Department and are believed to be still in the possession of that office. *See* Exhibit 11 (Montgomery County Sheriff's Office Report re: discovery of body).[11]

[11] The testimony was in dispute as to whether some or all of the cigarette butts were left by the group of men who discovered the body. Daniel Ragland testified that no one in the group touched or disturbed the body after he first kicked it to determine that it was real. S.F. Vol.28:22. When asked if anyone in the group was smoker, he

DNA Analyst Huma Nasir, M.S. has examined the documents relating to the collection of the evidence and it is her professional opinion that the evidence is suitable for testing:

> It is my understanding that the majority of the evidence was collected by Harris County Medical Examiner's office. From our experience in working with evidence sent by the Harris County Medical Examiner's office, it appears that they follow standard procedures in evidence collection, evidence handling and shipping. Therefore, it is unlikely that the evidence would be tampered with or contaminated and thus this evidence would be suitable for DNA testing.

Exhibit 1 at ¶12. Moreover, there is nothing in the record that indicates that any of the evidence identified in this motion has been compromised.

The State has exclusive knowledge of the existence, location, and condition of the evidence in its possession. If the State does not stipulate to the existence of the evidence and its suitability for testing, Mr. Swearingen requests that the Court order discovery requiring the state to fully document the location and condition of all evidence identified in this motion. This Court cannot fulfill its independent duty to make findings on this element without such information.

B. Identity Was At Issue.

There is no doubt that identity has been a hotly contested issue in this case. Mr. Swearingen proclaimed his innocence at trial and has never wavered. *See Swearingen v. Thaler*, 2009 WL 4433221 at *6.

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testified that "at least one of them smoked." S.F. Vol. 28:20. However, Mr. Ragland could not remember the brand of cigarettes. Montgomery County Sheriff's Sgt. Duroy gave mixed testimony about the cigarettes. He first stated that "I can't tell you what kinds of cigarettes were found." S.F. Vol. 28:120. But he then listed brands that he said various people in the group were smoking and assured the jury that all of the cigarette butts collected near the body belong to the group. S.F. Vol. 28:120-21. He did not explain how he arrived at this conclusion. DNA testing can conclusively determine if these cigarette butts came from the group who found the body or is one or more was instead left by the assailant.

C. The Evidence Identified Contains Biological Material

Many of the items Mr. Swearingen is seeking to test were manipulated and touched by Ms. Trotter's assailant and have not been previously tested for contact or touch DNA. These items include the bra, shirt, sweater, pants, and panties in which the body was found clad. S.F. Vol. 28:92-93. Touched items also include the ligature found around Ms. Trotter's neck and the portion of pantyhose from which the ligature was alleged to have been torn. Further, Mr. Swearingen seeks to test fingernail scrapings from Ms. Trotter and cigarette butts found near her body.

In briefing filed on direct appeal, the State concluded from the disarray of the bra, shirt and sweater, which were bunched over the breasts when Ms. Trotter's body was found, that Ms. Trotter was grabbed under the arms and hauled through the underbrush.[12] Additionally, the back pocket of Ms. Trotter's jeans was severely ripped.[13] The State argued that her assailant tore through the denim fabric in an attempt to rape her. Another explanation for the rip is that the pocket was used as a handle to lift the body to move it, and the pocket was ripped during the process. In either event, Ms. Trotter's upper garments were obviously grabbed with considerable force, more than enough to dislodge skin cells and other biological evidence from the person who carried her into the woods. DNA from clothing has been accepted as probative evidence identifying an assailant.[14]

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[12] According to the State, the clothing bunched under Trotter's arms and exposing her breast "indicat[ed] her body had been dragged by someone using her armpits as anchor points." State's [2001] Appellate Brief, at 12 (citing S.F. Vol. 28 :92-93, 103-14, 107, *et passim*).

[13] *See Swearingen v. State*, 101 S.W.3d 89, 93-94 (2003) (summarizing the evidence at trial).

[14] *Commonwealth v. Conway*, 2011 PA Super 7, 29-30 (Pa. Super. Ct. 2011) (granting appellant's request for exculpatory DNA evidence to test "clothing [that] was ripped in such a way that indicated extensive contact with

Similarly, the State's theory that Ms. Trotter was strangled by the panty hose ligature that was found around her neck means that someone manipulated and touched this item. The force needed to strangle someone by ligature also would have abraded testable biological material from the hands of the attacker. DNA on ligatures is also recognized in the case law as probative evidence of guilt.[15]

Hama Nasir, an experienced DNA analyst with the Orchid Cellmark Laboratory in Dallas, Texas explains that the contact involved in a sexual assault and strangulation is likely to leave biological material where the perpetrator forcefully handled the victim's clothing or a ligature:

> An individual's biological material, namely skin cells, is transferred onto objects or surfaces that are touched or handled. This is called "contact" or "touch" DNA. Because an assailant's genetic material is often shed onto objects or clothing used to strangle or bind victims, ligatures are a prime source of DNA collection.[16] Advances in DNA technology since the time of Mr. Swearingen's trial enable us to obtain touch DNA profiles from microscopic amounts (i.e., cellular-sized samples) of an individual's biological material left on ligatures and clothing.

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the hands of her assailant because "there is no question that the development of additional evidence — evidence that can be easily obtained by DNA testing — will add to the reliability of the reconstruction of the events of that tragic day."); *Commonwealth v. McKeither*, 2009 Phila. Ct. Com. Pl. LEXIS 299 at *35 (Pa. C.P. 2009) (upholding conviction based on defendant's DNA that was found on victim's clothes during assault when victim was grabbed and tied); *In re Pers. Restraint of Bradford*, 140 Wn. App. 124, 131 (Wash. Ct. App. 2007) (finding that new DNA evidence exonerated petitioner where third-party's DNA was found on a mask put on victim that was repeatedly touched during the assault).

[15] *Salazar v. State*, 2009 Tex. App. LEXIS 1601, 14-15 (Tex. App. Houston 1st Dist. Mar. 5, 2009) (upholding jury verdict for kidnapping based on testimony of DNA expert that skin cells on the socks used to bind the complainant did not "exclude appellant"); *State v. Dwyer*, 2009 ME 127, P32 (Me. 2009) (evidence presented at trial of DNA from both suspect and the victim found on the ligature taken from the victim's right wrist); *Commonwealth v. Conway*, 2011 PA Super 7, 29-30 (Pa. Super. Ct. 2011) (granting appellant's request for exculpatory DNA evidence to test ligatures).

[16] An object that is suspected to contain skin cells can be tested using the same DNA technology that is used to test for other biological fluids such as blood, saliva or semen.

> Touch DNA is not visible to the naked eye. Thus, in seeking skin cells on evidence, different methods are used on different textures of evidence to achieve the best possible result in obtaining a DNA profile. Cellmark uses a scraping and swabbing method in order to lift and collect skin cells from an object. A large surface area is covered with the scraping and swabbing method to maximize the number of cells collected from that object. By using this method of collection we have been successfully able to obtain DNA profiles from fabric materials.
>
> Law enforcement reports and the autopsy in this case indicate that the victim was strangled with a piece of pantyhose that was tied in a knot. A ligature used to strangle a person is likely to contain biological material from both the victim and the assailant. In this case, the pantyhose was tied in a knot, was used to strangle the victim, and left a "dark purple, 2-1/2 inch raised mark" on the victim's neck. Thus the pantyhose was probably handled by the assailant with some force and likely contains his biological material that is suitable for DNA testing.
>
> During my review of this case I was also told that a torn portion of pantyhose was located in Mr. Swearingen's house. Biological material from any wearer of this pantyhose and anyone who tore the pantyhose is likely to be detected on this item using modern DNA testing.
>
> ***
>
> Touch DNA analysis should also be performed on the victim's clothing. In this case, the back pocket of the victim's jeans was torn and her upper garments (her bra, shirt and sweater) were found bunched over her breasts. Where there has been such obvious and forceful contact with the victim's clothing, the biological material of the victim and the perpetrator is likely to be deposited on the clothing. As with the ligature, an STR profile from the clothing can be uploaded into the Texas and national CODIS databases. Therefore, it may be possible that a known offender will be linked to the crime. Even if such a link is not made, the same DNA profile on the ligature, fingernail scrapings, and clothing will provide powerful scientific evidence that the DNA came from the assailant and not through an isolated instance of contamination.

Exhibit 1 at ¶¶18-22, 24 (Affidavit of Huma Nasir, M.S.).

In addition to the items handled by the perpetrator, Mr. Swearingen is seeking testing of the fingernail scrapings taken from the victim. The presence of foreign biology under Melissa Trotter's fingernails clearly supports the conclusion that Ms. Trotter was in physical contact with another male, not Mr. Swearingen, at or near the time of her death. Indeed, it is not uncommon for the victim to have the DNA of the perpetrator under her fingernails where the cause of death

involves strangulation or a struggle. Evidence such as this is commonly considered highly probative of a defensive struggle against an attacker.[17]

Under the Statute, fingernail scrapings are included in the definition of "biological material." Tex. Crim. App. Art. 64.01(a)(1). And DNA Analyst Huma Nasir confirms that the fingernail scrapings in this case will contain biological material:

> The autopsy report in this case indicates that fingernail scrapings were taken from both hands of the victim. Generally, a forensic scientist obtains fingernail scrapings by taking a scalpel or other sharp object and scraping the fingernails. The debris from the scraping may consist of the fingernail itself as well as any dirt or other material that may be deposited under the fingernail. Thus, fingernail scrapings contain biological material because they are themselves biological material.
>
> Foreign DNA under a person's nails can be deposited through consensual sexual activity or violent, close range struggles. In homicide cases, it is not uncommon to find the assailant's DNA underneath the victim's fingernails.

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[17] *See Raby v. State*, 2005 Tex. Crim. App. LEXIS 2194 at *24 (Tex. Crim. App. June 29, 2005) (allowing DNA testing of fingernail scrapings because a "reasonable probability exists that DNA tests would be exculpatory"); *Matthews v. State*, 2003 Tex. Crim. App. LEXIS 146 (Tex. Crim. App. July 2, 2003) (upholding jury verdict of sexual assault and murder where no semen was found but defendant's DNA matched scrapings taken from victim's fingernails on both hands) *Brancaccio v. Warren*, 2011 U.S. Dist. LEXIS 51186 at *26, 76-77 (E.D. Mich. Mar. 29, 2011) (rejecting defendant's challenge to evidence where sample drawn from under victim's right hand fingernails showed a mixture of victim's DNA and that of an additional donor, which was a match with the defendant's DNA at 12 of the possible 13 locations); *State v. Ayers*, 185 Ohio App. 3d 168, 179 (Ohio Ct. App., Cuyahoga County 2009) (allowing additional DNA testing by convicted because "more sensitive tests could show the existence of biological material under the victim's fingernails when testing conducted nearly ten years ago could not. Given evidence that the victim had wounds that indicated she tried to defend herself, a positive identification of such material would likely point to the murderer."); *Harper v. Cain*, 2009 U.S. Dist. LEXIS 27678 at *5 (E.D. La. Mar. 18, 2009) ("Courtney Felps, a forensic DNA analyst, testified at trial that fingernail scrapings from S.B.'s left hand were obtained from the victim's rape kit. Upon examination, Felps found that the DNA from the fingernail scrapings was a mixture from two individuals. Felps determined that out of 1.56 million people, the only two people who could have donated the markers in that profile were the victim and the defendant. Felps further testified that breaking of the skin is not necessarily required to obtain DNA under a victim's fingernails. She noted that DNA samples can be obtained where there is contact with the skin, such as by grabbing."); *State v. Corbett*, 281 Kan. 294, 310 (Kan. 2006) (upholding sufficiency of evidence where a DNA expert testified that defendant's DNA could not be excluded as a contributor to the DNA found from swabs under victim's fingernails and that 1 in 52,000 Caucasians would have the same partial DNA profile as defendant).

> Based on my review of the records and conversation with Mr. Benjet, I understand that pre-trial DNA analysis by DPS suggested the presence of red flakes in the fingernail scrapings from the victim's left hand. The testimony records indicate that testing of these red flakes yielded a male profile that excluded Mr. Swearingen. If that DNA testing yielded a partial profile, the sample should be re-tested using today's advanced STR technology, which can develop a more complete profile of the male contributor. Even if prior DNA testing yielded a complete profile, the sample should be re-tested because modern DNA testing may detect other foreign DNA profiles in that sample that could have been missed using the older, less sensitive testing used over a decade ago.
>
> Because this was a strangulation case, and male DNA has already been detected in some of the scrapings from the victim's left hand, DNA testing should also be conducted on (a) any other material obtained from the fingernail scrapings of the victim's left hand; and (b) the fingernail scrapings from the victim's right hand. Such testing can detect whether a consistent male DNA profile (that is, the same male contributor) is found in multiple scrapings.

Id. at ¶¶ 14-17.

Furthermore, there is also likely to be biological material on the cigarette butts found near Ms. Trotter's body because cigarettes are both handled by the smoker and placed in the smoker's mouth. Ms. Nasir explains in her affidavit:

> Law enforcement documents indicate that cigarette butts were found near the victim's body. Mr. Benjet told me this evidence was never subjected to DNA testing. Cigarette butts are common items of crime scene evidence submitted for DNA testing. Because cigarettes are both manually handled and placed in a person's mouth, skin cells and epithelial cells from saliva were likely deposited on the cigarettes, rendering them suitable for DNA analysis. Any resulting STR profile from testing of the cigarette butts can be compared to the CODIS database and match the profile of a known offender who could be investigated as the perpetrator. Also, the same DNA profile on the ligature, fingernail scrapings, clothing and cigarette butts would strongly support the inference that the person whose profile is present may have participated in the murder.

Id. ¶ 25. DNA obtained from a cigarette butt found in the woods near a body was the key evidence that exonerated Roy Criner who was wrongly convicted of rape and murder in this

Court. *See* David DeFoore, *Postconviction DNA Testing: A Cry for Justice from the Wrongly Convicted*, 33 Tex. Tech L. Rev. 491, 515 (2002) (describing the evidence in the Criner case).[18]

All of the biological material described above can be subjected to DNA testing that may reveal one or more probative DNA profiles. *See generally* Exhibit 1 (Affidavit of Huma Nasir, M.S.). If a full STR profile is obtained, that profile can be run through the CODIS database for comparison to known offenders. *See id*.

D. Mr. Swearingen Would Probably Not Have Been Convicted If Exculpatory Results Are Obtained.

DNA Testing of Ms. Trotter's clothing, the ligature, the pantyhose, fingernail scrapings, and cigarette butts found at the scene of the crime can exonerate Mr. Swearingen and even identify the actual perpetrator of this offense. Chapter 64 was amended in 2011 to expressly contemplate the comparison of DNA profiles to the CODIS database of known offenders. *See* Tex. Code Crim. Proc. art. 64.035. One way in which DNA testing can exonerate Mr. Swearingen is to identify the true perpetrator. This is one of the unique aspects of DNA evidence that makes such testing so powerful. *See District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52 (2009) ("DNA has an unparalleled ability both to exonerate the wrongly convicted and identify the guilty."). And even if a CODIS "hit" is not obtained, the presence of an unidentified profile on various items of crime scene evidence, such

[18] *See also Brown v. State*, 163 S.W.3d 818, 828-829 (Tex. App.—Dallas 2005) (evidence of DNA from cigarette butts consistent with defendant's DNA); *People v. Morales*, 2012 COA 2, P47 (Colo. Ct. App. 2012) (evidence at trial established that cigarette butt contained DNA matching defendant's DNA sufficient for burglary conviction); *State v. Wilson*, 289 P.3d 1082 at 28 (Kan. 2012) (defendant's DNA profile on cigarette butts found at the home of murder victim as well as other burglary sites supports conviction).

as the ligature, victim's clothing, pantyhose, fingernail scrapings, and cigarette butts will raise sufficient doubt about Mr. Swearingen's guilt to meet the Chapter 64 standard. *See Routier*, 273 S.W.3d at 259.

1. A CODIS "hit" from one or more pieces of evidence will exonerate Mr. Swearingen.

As explained in Ms. Nasir's affidavit, DNA testing of the clothes, ligature, pantyhose, fingernail scrapings and cigarette butts may produce a DNA profile that can be compared to the state and national CODIS DNA databases. The CODIS DNA database is compiled from all 50 states and includes more than 10 million DNA profiles of known offenders.[19] A hit to a known offender in the CODIS database can exonerate Mr. Swearingen by identifying the real perpetrator.

The State has consistently alleged that Mr. Swearingen murdered Ms. Trotter alone, and this is the theory that the jury accepted. *See Swearingen*, 101 S.W.3d at 96 (reviewing evidence). Accordingly, there could be no innocent explanation for finding the DNA profile of a known offender on the ligature, under Ms. Trotter's fingernails, pantyhose, on her clothing, or on cigarette butts found at the scene. If, for example, the DNA of convicted and executed serial killer Angel Maturino Resendiz[20] was found on the ligature, clothing, fingernail scrapings, and cigarette butts, the circumstantial case against Mr. Swearingen would evaporate—a jury would clearly not convict Mr. Swearingen in the face of physical evidence showing that Ms. Trotter had

[19] http://www.fbi.gov/news/stories/2011/november/dna_112311.

[20] Although there is no evidence indicating Resendiz's involvement, he did rape and murder another woman in the Houston area within a month of Ms. Trotter's death. *See Resendiz v. State*, 112 S.W.3d 541, 543 (Tex. Crim. App. 2003).

scratched a violent felon and that this same man had handled the ligature used to kill Ms. Trotter, grabbed her clothing, touched the panty hose leg found outside Swearingen's house, and left cigarette butts near her body. It is precisely this sort of exculpatory result that must be assumed in determining whether or not to grant DNA testing. *See In re Morton*, 326 S.W.3d 634, 641 (Tex. App.—Austin 2010, no pet.); *Routier v. State*, 273 S.W.3d 241, 257 (Tex. Crim. App. 2008).

Importantly, the case against Mr. Swearingen was not based on forensic evidence tying him to the crime scene or Ms. Trotter's body. The jury accepted circumstantial evidence of guilt including Mr. Swearingen's own ill-advised attempts to deceive law enforcement and exculpate himself. However, the record now contains substantial forensic testimony that Ms. Trotter's body was not left in the woods for 25 days as alleged by the State. Five separate forensic experts have concluded that Ms. Trotter was either not dead or at least not at the crime scene until after Mr. Swearingen was arrested. *See* supra, Part II(D). Thus, the experts strongly suggest that Mr. Swearingen could not possibly have committed the murder.

Although Judge Edwards and the Court of Criminal Appeals were not persuaded that this testimony alone met the high bar of the *Elizondo* standard, a CODIS hit to a known offender would paint the case in an entirely new light. This would clearly meet the lower standard under Chapter 64 to prove that Mr. Swearingen would "probably" not have been convicted considering all of the evidence in the case. *See Routier*, 273 S.W.3d at 259 n.75 (threshold showing of innocence under Chapter 64 lower than *Elizondo* standard). Indeed, relief under *Elizondo* has been granted in numerous cases in which DNA testing pointed to a known third party. *Ex Parte Michael Morton*, No. AP-76,663 (Tex. Crim. App. October 12, 2011) (habeas relief based on DNA linking third party offender to crime); *Ex parte Phillips* 2008 WL 4417288 (Tex. Crim.

App. October 1, 2008) (not designated for publication) (granting habeas relief after "post-conviction DNA testing and investigation, indicat[ed] that it was another individual, and not Applicant, who committed at least one" of five offenses of which he had been convicted); *Ex Parte Giles*, No. AP-75,712, 2007 WL 1776009 (Tex. Crim. App. June 20, 2007) (granting habeas relief in rape case based on post-conviction DNA evidence and investigation indicating "that it was another individual, and not Applicant, who committed this offense"); *Ex parte Karage*, No. AP-75,253, 2005 WL 2374440 (Tex. Crim. App. Sept. 28, 2005) (granting habeas relief after semen and spermatazoa recovered from a crime victim 'hit' to a convicted offender through CODIS).

2. Mr. Swearingen would probably not have been convicted if a DNA profile was found on various items of evidence matching the profile obtained from (1) the flakes under Ms. Trotter's fingernails or (2) another suspect.

A CODIS "hit" is not the only way in which exculpatory DNA results will exonerate Mr. Swearingen. Most importantly, the DNA of an unidentified male was found under Melissa Trotter's fingernails, indicating that Trotter scratched a man who was not Mr. Swearingen, at or near the time of her death. Indeed, it is not uncommon for the victim to have the DNA of the perpetrator under her fingernails where the cause of death involves strangulation or a struggle. *See* Exhibit 1 (Affidavit of Huma Nasir); supra note 17 (listing cases involving DNA taken from fingernail scrapings). And evidence such as this is commonly sponsored by the State as highly probative of a defensive struggle against an attacker. *See id.*

At trial and in post-conviction proceedings, the State has tried to dismiss the significance of the DNA from Ms. Trotter's fingernails on the ground that it could have been the result of

contamination.[21] However, the exculpatory value can readily be confirmed by testing the profile of the DNA from the fingernails against any DNA obtained from testing the ligature, victim's clothing, remaining fingernail scrapings, pantyhose, and the cigarette butts. A match between the DNA profile from any of these items evidence and the DNA profile obtained from the flakes found under the victim' nails would refute the State's contamination argument and provide conclusive evidence of Mr. Swearingen's innocence; it would demonstrate that the DNA from under the victim's fingernails was from the male perpetrator who strangled Ms. Trotter and dragged her body into the woods.

Moreover, law enforcement entertained other suspects. The DNA profile from under Ms. Trotter's fingernails was compared by the State to the profiles a potential alternative suspects including William Mathews and Robbie Lynn Grove. *See* Exhibit 9 (DPS submission form, notes, and reports re: Grove and Mathews). Any DNA profile obtained from the evidence listed in this motion should be compared to the profiles of these individuals and any other alternate suspects. This was the case in the exoneration of Tim Masters in Colorado. *See* Special

[21] At trial, the State speculated that the biological material from the fingernail scraping was blood that came from an officer present during autopsy who may have cut himself while shaving hours before. S.F. vol. 28:124-125. The officer question on this matter did not think such contamination was likely. *See id.* The medical examiner at the autopsy, Dr. Carter, has since testified that the fingernail scrapings were collected at the beginning of the autopsy in a separate room where everyone was "gloved and masked" to prevent contamination. 2012 Hearing Tr., Vol. 7 at 192. Another theory was that a freshet of blood circulating through the morgue's air conditioning system was spewed out a vent and landed in the shavings. S.F. vol. 29:115-116. Dr. Lloyd White, Deputy Medical Examiner of Tarrant County, has since testified that this theory is "preposterous." 2012 Hearing Tr., Vol. 4, at 70. In opposing Mr. Swearingen's pro se motions for DNA testing, the State has also supposed that blood from investigators may have blown under the fingernails due to winds at the crime scene or the whir of helicopters involved in the search. State's [March 29, 2005] Response in Opposition to Defendant's Motion for Forensic DNA Testing, at 6. These highly speculative - and suspect - theories in no way excuse the need for the additional testing Mr. Swearingen seeks.

Prosecutor's Report, *People v. Masters*, No. 98 CR 1149 (February 15, 2008).[22] Masters obtained DNA testing of the victims clothing based on the fact that the perpetrator had dragged the victim. *See id*. at 13. A DNA profile was obtained only from skin cells left on the victim's clothes by the perpetrator. *See id*. This DNA profile matched the profile of one of the alternative suspects in the case. *See id*. Based on this and other evidence of innocence, all charges against Mr. Masters were dismissed. *See id.* at 5. If a DNA profile from the evidence identified in this Motion matches that of another suspect in the Trotter murder, than the outcome should be no different for Mr. Swearingen.

3. Mr. Swearingen would probably not have been convicted if an unknown DNA profile was found on additional probative items of evidence.

And even absent a match to the DNA profile from under Ms. Trotter's fingernails or an alternate suspect, Mr. Swearingen would probably not have been convicted if DNA evidence were presented showing an unknown male profile on probative items of evidence in addition to the existing unknown profile from Ms. Trotter's fingernails. For example, DNA testing could reveal an unknown male DNA profile on the ligature, torn and bunched clothing, fingernail scrapings, and cigarette butts—or some lesser combination of these items. The presence of such a DNA profile on the ligature and fingernail scrapings would be powerfully exculpatory because it is evidence that the unknown person, and not Mr. Swearingen, strangled and was scratched by Ms. Trotter. As the Court of Criminal Appeals recognized in *Routier*, finding even an unknown

[22] http://www.adamsbroomfieldda.org/pdfs/Masters_Special_Prosecutors_Report.pdf.

DNA profile on probative evidence can be enough to overcome the otherwise persuasive and un-rebutted evidence of guilt at trial. *See* 273 S.W.3d at 259.

E. DNA Testing is Not Sought to Unreasonably Delay Execution of Sentence

The history of the litigation in this case demonstrates that this motion for DNA testing is brought as a good faith effort to prove Mr. Swearingen's innocence and not for the purposes of delay. Mr. Swearingen has consistently sought DNA testing since 2004, and this motion could not have been filed prior to his latest post-conviction proceeding. In fact, the legal basis for this motion was not even available until the Legislature changed the statute in 2011.

1. Standard for determining unreasonable delay.

Chapter 64 does not define what it means to "unreasonably delay execution of sentence or the administration of justice." Tex. Code Crim. Proc. art. 64.03(a)(2)(B). However, the Court of Criminal Appeals has previously cited the successive application provision of the capital habeas statute as a guide. *See Kutzner v. State*, 75 S.W.3d 427, 442 (Tex. Crim. App. 2002) (citing Tex. Code Crim. Proc., art. 11.071§5). Section 5 of article 11.071 allows for the filing of a successive habeas corpus application only where the new claims brought were unavailable at the time the prior application was made. *See* Tex. Code Crim. Proc. Art. 11.071 §5(a)(1). A claim is defined as "unavailable" under section five if the legal basis for the claim was not yet recognized at the time the prior application was filed. *See id.* §5(d).

The guidance provided by the standard in article 11.071 §5 is demonstrated in *Kutzner* where the Court of Criminal Appeals rejected the motion because Kutzner's request for DNA testing could have been brought previously in conjunction with related habeas applications. *See id.* ("He offers no excuse for not previously requesting DNA testing" despite raising similar claims previously). The Court of Criminal Appeals' prior opinion on Mr. Swearingen's DNA motion

likewise measured the reasonableness of the timing of the motion on whether the claims could have been brought at the time a prior pleading was filed. *See Swearingen*, 303 S.W.3d at 736 ("Appellant could have requested DNA testing and retesting of all materials involved in this case when he filed his first and second Chapter 64 motions."). But despite this finding, the Court held earlier in its opinion that DNA testing was foreclosed on other legal grounds. *See id*. Thus, there was no legal basis for testing at the time any of Mr. Swearingen's prior motions for DNA testing were filed.

2. The legal basis for the DNA testing requested in this motion was not available at the time Mr. Swearingen filed his prior post-conviction proceedings.

The Court of Criminal Appeals affirmed the denial of Mr. Swearingen's prior motion for DNA testing in large part because Mr. Swearingen could not prove that the evidence contained "biological material." *See Swearingen*, 303 S.W.3d at 733 ("record is void of any concrete evidence that biological material existed on the evidence sought to be tested"); 734 (no showing that fingernail scrapings "contain" biological material). The Court of Criminal Appeals noted that their construction of the statute, requiring proof of the existence of even microscopic amounts of biological material, could lead to instances in which probative DNA testing is denied. *See id*. at 732. But the court held that this was a matter for the Legislature to address. *See id*. The Court of Criminal Appeals also failed to consider submission of any test results to the CODIS DNA database because Chapter 64—as it existed in 2010—did not provide for such relief. *See id*. at 736 (Chapter 64 provides for testing and retesting of evidence, not for database entry).

In response to the Court of Criminal Appeals' decision in *Swearingen*, the 82nd Legislature amended Chapter 64 in two important ways. First, the Legislature added a broad

definition of "biological material" that included "skin cells," "fingernail scrapings," and a catch all provision for "other identifiable biological material that may be suitable for forensic DNA testing." Tex. Code Crim. Proc. Art. 64.01(a)(1). The legislative record demonstrates that this change was made in response to the denial of Mr. Swearingen's Motion for DNA Testing. Testimony in both the House and Senate Committees specifically cited the need to address the Court of Criminal Appeals' holdings that (1) a movant must prove the existence of biological material and (2) that Chapter 64 does not provide for submission of DNA profiles to the CODIS database.

During the legislative process, the Innocence Project told both the House and Senate committees considering the amendments that the definition of "biological material" should be broadened in light of the opinion in *Swearingen*:

> ***"Biological material" and advanced DNA technology.***
> Art. 64.01 should also be amended to clarify the definition of "biological material" that may be subject to an order for DNA testing (a term that is currently undefined, but which should include a wide array of evidence that may yield exculpatory DNA results).
>
> The need for this amendment arises from the Court of Criminal Appeal's (CCA) opinions in Swearingen v. State, 303 S.W.3d 728 (Tex. Crim. App. 2010) and Routier v. State, 273 S.W.3d 241 (Tex. Crim. App. 2008). In each case, the CCA narrowly interpreted "biological material" to deny DNA testing. For example, among other things, Swearingen sought to test fingernail clippings, a ligature, and contact DNA from the victim's clothing. The trial court denied the testing, in part, because Swearingen could not show that these items contained biological material suitable for DNA testing. However, in doing so, the CCA recognized that its narrow interpretation of biological material might "lead to the deprivation of DNA testing in the rare case simply because of the inability to ascertain whether or not biological material exists." Swearingen at 732. ***The CCA recognized that while its hands were tied, it invited the legislature to correct this glitch in the statute by providing a definition of "biological material."***

> A clarifying amendment to Art. 64.01 would reflect the reality of how biological evidence is collected and DNA testing is performed. For example, it is precisely because fingernail clippings often contain DNA from perpetrators that they are routinely collected from victims after violent crimes. Indeed, fingernail clippings are collected even without knowing in advance that they definitively contain skin cells or other DNA from the perpetrator. It is only after the DNA testing is performed that the full probative value of the fingernail clippings is known. The same analysis is true for ligatures.

Exhibit 13 (Hearing on SB 122 Before Senate Crim. Justice Comm., 82nd Leg., R.S. (March 22, 2011) (Written Testimony of the Innocence Project)) (emphasis added); *see also* Hearing on SB 122 Before Senate Crim. Justice Comm., 82nd Leg., R.S. (March 22, 2011) (Oral Testimony of Natalie Retzel, Chief Staff Attorney Innocence Project of Texas); Exhibit 13 (Hearing on SB 122 Before House Criminal Jurisprudence Committee, 82nd Leg., R.S. (May 10, 2011) (Written Testimony of the Innocence Project). Likewise, the addition of the CODIS provision in 2011 and the rejection of the right to such a comparison in the *Swearingen* opinion make it clear that the Legislature intended to remedy the limited holding of the Court of Criminal Appeals in Mr. Swearingen's case. *See* Exhibit13 (Innocence Project Testimony on CODIS provisions). There was little debate on these popular amendments, and they passed the Senate unanimously and the House by vote of 145(y)-4(n)-1(nv). *See* S.J. of Tex., 82nd Leg. R.S. 955 (2011); H.J. of Tex., 82nd Leg., R.S. 4364 (2011).[23]

These statutory responses to the denial of Mr. Swearingen's prior DNA motion did not become effective until September 1, 2011. And the expanded definition of "biological material" and the new CODIS provision clearly and intentionally provide Mr. Swearingen a new legal basis for his request for DNA testing. Because Mr. Swearingen's last habeas application and

[23] All representatives of Montgomery County in the House and Senate voted in favor of the bill.

DNA motion were filed before the September 1, 2011 amendments to Chapter 64, the legal basis for his current DNA motion was "unavailable". *See* Tex. Code Crim. Proc. Art. 11.071§5(a),(d). Accordingly, his new motion—brought under the new provisions of Chapter 64—cannot be considered brought for the purposes of delay. *See Kutzner*, 75 S.W.3d at 442.

3. Other Equitable Factors Favor Consideration of Mr. Swearingen's Motion.

This Motion also cannot reasonably be construed as an effort to unreasonably delay the execution of sentence because it is merely a continuation of Mr. Swearingen's ongoing and diligent efforts to secure testing that began soon after his conviction became final and long before an execution date was set. Mr. Swearingen's first motion for DNA testing was filed in 2004. At that time, Mr. Swearingen had initiated federal habeas proceedings, and his counsel was pursuing potentially fruitful claims relating to the condition of the victim's body. *See* Exhibit 14 (Docket Report, *Swearingen v. Dretke*, No. 4:04-cv-0258 (SD Tex.). Judge Edwards denied this first request for DNA testing, and through an error of his counsel, Mr. Swearingen lost his right to appeal that decision. *See Swearingen v. State*, 189 S.W.3d 779, 780 (Tex. Crim. App. 2006). Mr. Swearingen again filed a motion for DNA testing in May of 2008, after a prior execution date was stayed by the Court of Criminal Appeals in 2007 for other reasons. *See Swearingen*, 303 S.W.3d at 730. This motion and a supplement was considered in due course after another execution date was stayed by the United States Court of Appeals for the Fifth Circuit for consideration of an unrelated successive federal habeas petition. However, the Court of Criminal Appeals denied testing in a 2010 opinion. *See id.* at 729. Having been denied DNA testing a second time, Mr. Swearingen presented another habeas application raising other exculpatory forensic evidence, and the Court of Criminal Appeals again stayed Mr. Swearingen's execution. *See Ex Parte Swearingen*, 2011 WL 3273901, *1. While this application for writ of

habeas corpus was pending, the Texas Legislature amended Chapter 64 in 2011 to specifically address some of the reasons why Mr. Swearingen's DNA motion had been denied. *See supra* Part V(E)(2). Mr. Swearingen has tried over and over again to have the evidence in his case tested. He should not be faulted for his continued efforts under the new law.

Furthermore, Mr. Swearingen cannot be blamed for the need to withdraw or modify an execution date. At 1:00 pm on December 13, 2012—the day after the Court of Criminal Appeals denied Mr. Swearingen's habeas application—Judge Edwards filed an order setting Mr. Swearingen's execution date for February 27, 2013. Although it is unclear whether Judge Edwards signed this order on his own or met with the State *ex parte* regarding this matter, Counsel for Mr. Swearingen received the State's motion for an execution date via e-mail at 10:47 a.m. on December 13, 2012, and had no opportunity to be heard on the matter. *See* Exhibit 2 (emailed motion to set execution date and Order). Had counsel been consulted, the Court would have been informed of the need for a DNA motion, and the execution date would either not have been set or would have been set much later to facilitate consideration of the motion and for completion of DNA testing. Accordingly, the need for a delay of the scheduled execution date is a product of Judge Edwards's premature, ex parte order rather than some imagined abuse or delay by Mr. Swearingen's legal team.

F. All DNA Profiles Must Be Compared to State and Federal DNA Databases

As discussed *supra*, the Legislature amended Chapter 64 in 2011 to require that all eligible DNA profiles be uploaded into the State and federal DNA databases of convicted offenders. *See* Tex. Code. Crim. Proc., art. 64.035. Mr. Swearingen sought such relief in his prior motions, but was denied in 2010 based on the absence of a statutory provision like article 64.035. *See Sewaringen*, 303 S.W.3d at 736 (request for CODIS comparison "beyond the scope

of Chapter 64"). Comparison of the existing DNA profile obtained from Ms. Trotter's fingernail scrapings and any other eligible profiles obtained through testing pursuant to this Motion may identify the actual perpetrator of this crime. Accordingly, this Court should enter an order requiring (1) all eligible DNA profiles compared in the state and federal DNA databases and (2) disclosure of the results of the comparison to all parties so that a hearing on Mr. Swearingen's innocence may be conducted pursuant to article 64.04.

Conclusion and Prayer

Mr. Swearingen has been asking the Court to allow him to conduct DNA testing on extremely probative evidence that can conclusively demonstrate his innocence since 2004. Just last year, the Legislature amended Chapter 64 to specifically address the reasons that Mr. Swearingen's prior motions were denied. Based on the evidence presented in this Motion, this Court must grant the DNA testing requested so that Mr. Swearingen may ultimately prove his innocence of the murder of Melissa Trotter.

FOR THE REASONS STATED ABOVE, Mr. Swearingen respectfully requests that this Court:

1. Withdraw or modify the execution date currently scheduled for February 27, 2013 to allow full consideration of this motion and subsequent DNA testing;

2. Take judicial notice of the record of Mr. Swearingen's trial and all prior post-conviction proceedings;

3. Grant all DNA testing requested in this Motion;

4. Order the comparison of the all DNA profiles obtained though this Motion as well as the unknown male DNA profile obtained in pre-trial testing to CODIS and release the results to Mr. Swearingen;

5. Grant all necessary discovery; and

6. Grant all other relief that justice requires.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On the 17th day of January 2013, a copy of the foregoing motion was served upon the Montgomery County District Attorney by U.S. Mail or hand delivery.

_____
James G. Rytting