

PUBLIC

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Further information on UA 17/09 (AMR 51/008/2009, 21 January 2009) – Death penalty / Legal concern

USA (Texas) Larry Ray Swearingen (m), white, aged 37

Larry Swearingen was granted a stay of execution on 26 January by a three-judge panel of the US Court of Appeals for the Fifth Circuit, the federal court one level below the US Supreme Court with jurisdiction over Texas cases. He was scheduled to be put to death in Texas on the evening of 27 January.

Larry Swearingen was sentenced to death in 2000 for the murder of Melissa Trotter in 1998. Melissa Trotter went missing on 8 December 1998. Larry Swearingen was arrested three days later, and has been incarcerated ever since. The body of Melissa Trotter was found in a forest on 2 January 1999. Larry Swearingen was tried for her murder, and sentenced to death.

He maintains his innocence of the murder. Several forensic experts have provided statements and testimony that support his claim. One of these experts, Dr Joye Carter, is the former Chief Medical Examiner of Harris County in Texas who performed the autopsy of Melissa Trotter and testified at Larry Swearingen's trial that in her opinion, Melissa Trotter had died 25 days before her body was found. In an affidavit signed in 2007, Dr Carter stated that she had looked again at the case and changed her opinion. She concluded that Melissa Trotter's body had been left in the forest within two weeks of it being found. If accurate, this would mean that the body was dumped at a time when Larry Swearingen was already in custody. Other experts have stated that the body may have been left in the woods only a few days before it was found (see original UA).

The Fifth Circuit panel did not address the merits of Larry Swearingen's innocence claims, but only considered whether they were sufficient to overcome the obstacles under federal law preventing the court from authorizing the filing of a successive habeas corpus petition in the lower District Court. Under this federal statute, the prisoner must show that "(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense".

The Fifth Circuit said that there were "two independent gates" through which a motion to file a successive petition must pass before the merits of the prisoner's claim will be addressed. First, the Fifth Circuit would have to determine whether the motion made a *prima facie* (on first sight) case that the above requirements of the federal statute were met, including that there is "a sufficient showing of possible merit to warrant a fuller exploration by the District Court". Secondly, once the case was remanded to the District Court, the latter would also have to determine whether the requirements of the federal statute had been met before it could address the merits of the successive petition.

The Fifth Circuit court held that "given the importance of Dr Carter's expert testimony to the State's case, we find that Swearingen has made a *prima facie* showing that but for the constitutional error of the State sponsoring the false testimony of Dr Carter, no reasonable juror could find guilt beyond a reasonable doubt". The constitutional precedent on this issue is the 1972 Supreme Court ruling in *Giglio v. United States*. The Fifth Circuit also found that Larry Swearingen had made a *prima facie* case that his legal representation at trial had been constitutionally deficient, including in cross-examining Dr Carter. Here the precedent is *Strickland v. Washington* (1984). The Fifth Circuit panel therefore authorized Larry Swearingen to file a successive habeas corpus petition in the District Court limited to these issues. The court stressed that "this grant is tentative" in that the District Court "must dismiss" the petition, "without reaching the merits", if that

court were to find that Swearingen had not satisfied the federal statutory requirements relating to successive petitions.

One of the three Fifth Circuit judges wrote a separate, concurring opinion. He said that he wished to address “the elephant that I perceive in the corner of this room: actual innocence”. Judge Jacques Wiener continued: “Consistently repeating the mantra that, to date, the Supreme Court of the United States has never expressly recognized actual innocence as a basis for habeas corpus relief in a death penalty case, this court has uniformly rejected stand-alone claims of actual innocence as a constitutional ground for prohibiting imposition of the death penalty.” Judge Wiener noted, however, that the Supreme Court had made certain statements that “at least strongly signal that, under the right circumstances, it might add those capital defendants who are actually innocent to the list of persons who – like the insane, the mentally retarded, and the very young – are constitutionally ineligible for the death penalty”.

Judge Wiener said that could foresee the “real possibility” that the District Court might interpret the expert forensic opinion as clear and convincing evidence that Larry Swearingen could not possibly have killed Melissa Trotter and yet still “find it impossible to force the actual-innocence camel through the eye of either the *Giglio* or *Strickland* needle, and thus have no choice but to deny habeas relief to an actually innocent person”. As such, Judge Wiener suggested, Swearingen’s predicament might be “the very case” for the full Fifth Circuit Court or the US Supreme Court to “recognize actual innocence as a ground for federal habeas relief”. He concluded that “to me, this question is a brooding omnipresence in capital habeas jurisprudence that has been left unanswered for too long”.

There have been five executions in the USA this year, three of them in Texas. Since executions resumed in 1977, there have been 1,141 executions in the USA, 426 of them in Texas. Among those who have been put to death by the state are people whose guilt was in doubt to the end. Since 1977, more than 100 people have been released from death rows in the USA on grounds of innocence. The average time between being sentenced to death and exoneration in these cases was nearly 10 years.

No further action by the UA Network is requested at present. Many thanks to all who sent appeals.