

# URGENT ACTION

## EXPERTS RULE MAN OUT AS KILLER, EXECUTION SET

**Larry Swearingen, aged 40, is due to be executed in Texas on 18 August. He was sentenced to death in 2000 for a murder in 1998. He maintains his innocence. Since his trial, a number of forensic experts have ruled him out as the murderer.**

Melissa Trotter, a 19-year-old woman, went missing on 8 December 1998. **Larry Swearingen**, who was seen with her that day, was arrested on 11 December 1998, and has been incarcerated ever since. Melissa Trotter's body was found by hunters in a forest on 2 January 1999. Larry Swearingen was charged with her murder. In the absence of a confession or eyewitnesses to the crime, the state built a circumstantial case against him.

At the trial, Dr Joye Carter, then Chief Medical Examiner of Harris County in Texas who had performed the autopsy on Melissa Trotter's body, testified that in her opinion, death had occurred approximately 25 days before the body was found. In 2007, Dr Carter recanted her trial testimony, stating that she had reviewed the autopsy evidence, and had concluded that it was "incompatible with exposure for a longer period of time" than two weeks. In a brief filed in federal court in 2009, rejecting the contention that the state had knowingly presented false evidence, the Texas Attorney General acknowledged that if Dr Carter had at the time "determined that the body could not have been exposed in the forest for more than fourteen days, the prosecutor then would have known that he had jailed the wrong man or that Swearingen had an accomplice," a theory for which the State has not produced any evidence.

Five forensic pathologists, including four current or former Chief Medical Examiners from Texas have reviewed the case and concluded that the body had been in the forest for far less than 25 days. After tissue preserved since autopsy for microscopic examination was located in December 2008 at the Harris County Medical Examiner's morgue, the forensic specialists who reviewed it concluded that Melissa Trotter died very close to the date her body was found, and long after Larry Swearingen was jailed. The Chief Medical Examiner of Galveston County, Texas, concluded that Melissa Trotter had been killed "between five to seven days prior to her discovery" putting the date of death "on or about December 26, 1998". In 2010, the Director of the Center for Human Identification and of the Forensic Anthropology Laboratory of the University of North Texas concluded that Melissa Trotter "had been dead no more than ten days, and likely fewer, prior to discovery." Two other experts – both of them current deputy Medical Examiners in Texas – examined tissue samples preserved from the autopsy under a high powered microscope and concluded that Melissa Trotter died no more than three days before her body was found. In their words, "it isn't possible that Melissa Trotter was killed and her body left in that location by Mr Larry Swearingen, who had been in jail for 23 days when the body was found." The US courts have denied appeals to hear these forensic scientists in open court. The US Supreme Court has stated that executive clemency is the "fail-safe" in the criminal justice system, to provide the possibility for remedy or relief not provided by the judiciary (see overleaf).

### **PLEASE WRITE IMMEDIATELY in your own language (include prisoner number #999361 in your appeals):**

- Acknowledge the seriousness of the crime for which Larry Swearingen was sentenced to death;
- Note that Larry Swearingen was convicted on circumstantial evidence and that several Texas forensic specialists have ruled out Larry Swearingen as the murderer and punctured the state's theory of the crime it presented to the jury;
- Call for this execution to be stopped and clemency granted.

### **PLEASE SEND APPEALS AS SOON AS POSSIBLE, AND BEFORE 18 AUGUST 2011 TO:**

Clemency Section, Texas Board of Pardons and Paroles  
8610 Shoal Creek Blvd. Austin, TX 78757-6814, USA

Fax +1 512 467 0945

Email: [bpp-pio@tdcj.state.tx.us](mailto:bpp-pio@tdcj.state.tx.us)

Salutation: Dear Board members

Governor Rick Perry, Office of the Governor,  
PO Box 12428, Austin, Texas 78711-2428, USA

Fax: + 1 512 463 1849

Salutation: Dear Governor

Also send copies to diplomatic representatives of the USA accredited to your country.

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### ADDITIONAL INFORMATION

Larry Swearingen was a day from execution in January 2009 when the US Court of Appeals for the Fifth Circuit granted a stay. The Fifth Circuit panel considered whether his claims were sufficient to overcome the obstacles under federal law preventing the court from authorizing the filing of a successive habeas corpus petition. Under this federal law – the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), which places severe restrictions on state prisoners raising claims in federal court, in part in a bid to facilitate executions – the inmate 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 authorized Larry Swearingen to file a successive petition in District Court, but stressed that it “must dismiss” the petition “without reaching the merits” if it were to find that Swearingen had not satisfied the AEDPA’s requirements. This is what happened. In November 2009, the District Court ruled among other things that “through the exercise of due diligence”, Larry Swearingen could have obtained Dr Carter’s affidavit earlier than 2007 and should have been aware that there was tissue from the autopsy in the possession of the Harris County Medical Examiner’s Office that could be forensically tested. The District Court concluded that “only now, over nine years [after the trial], he has marshaled all the available information, but the record does not show that he could not have done so before waiting until the eve of his execution in January 2009”. Failing to meet the requirement of the AEDPA, the judge ruled, “deprives this Court of jurisdiction over the merits of his successive habeas claims”.

The District Court judge said that “taken at face value, Swearingen’s new scientific evidence appears highly exculpatory”, but added that while the experts agreed that the body had been “exposed to the elements after he was jailed on December 11, 1998”, they had “not looked at every piece of the evidentiary puzzle in making that assessment”. A jury, he said, would “have to plug the narrow conclusions made by Swearingen’s experts into the broad facts the State adduced which pointed to him as the killer”. The District Court judge suggested that while some “piece of the puzzle” relating to the question of when Melissa Trotter’s body had been left in the forest was likely “still missing”, it was not the duty of the court “to neatly decide which theory, if any, is more correct.” This, he said, was “especially the case on habeas review where the presumption of innocence has run its course” and principles such as finality of judgments “lean steeply in favour of upholding the verdict”.

Amnesty International opposes the death penalty, in all cases, unconditionally. International human rights law, while abolitionist in outlook, recognizes that some countries retain the death penalty. Pending abolition, the international community has agreed safeguards for capital cases. One such international standard holds that: “Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts”. Although there is circumstantial evidence against Larry Swearingen, the expert evidence since the trial casts serious doubt on his conviction, and would render his execution in contravention of this safeguard. Executive clemency must act as a failsafe against injustice where the courts have been unwilling or unable to act. In September 2010, for example, Ohio’s Governor commuted the death sentence of Kevin Keith to life imprisonment. The governor said that despite circumstantial evidence linking Kevin Keith to the crime, “many legitimate questions have been raised regarding the evidence in support of the conviction and the investigation which led to it” (see <http://www.amnesty.org/en/library/info/AMR51/079/2010/en>).

There have been 1,263 executions in the USA since judicial killing resumed there in 1977, 472 of which have been carried out in Texas. There have been 29 executions this year, eight of them in Texas. Since 1976, more than 130 people have been released from death rows in the USA on grounds of innocence.

Name: Larry Swearingen

Gender: m

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