

# Larry Swearingen On Death Row For Murder Committed When He Was In Jail

By Hans Sherrer

**M**elissa Aline Trotter was a 19-year-old freshman at Montgomery College in Conroe, Texas when she was last seen by family and friends on December 8, 1998. Twenty-five days later her clothed body was found on January 2, 1999 by hunters in the Sam Houston National Forest north of Conroe. Her body was in such good condition that at first the hunters thought she was a mannequin.

Three days after Ms. Trotter was last seen 27-year-old Larry Ray Swearingen was arrested on December 11 for outstanding traffic tickets. He was in custody from then until Ms. Trotter's body was found three weeks later. He was subsequently charged with kidnapping, raping, and murdering her.

The prosecution's circumstantial case during Swearingen's trial in 2000 was short on facts and long on speculation. There was no direct evidence he was Ms. Trotter's assailant. DNA testing excluded him as the source of blood under her fingernails that was identified as originating from a male, and he was excluded as the source of a pubic hair recovered from a vaginal swab.

During his trial there was testimony Swearingen first met MS. Trotter on December 6 and asked her out. On December 8 they were seen together on the college campus, although he wasn't seen leaving with her.

The prosecution's speculation of a scenario of how he could have abducted and killed her was buttressed by the testimony of Harris County Chief Medical Examiner Joye Carter: She testified Ms. Trotter's body was placed in the forest approximately 25 days prior to its discovery. That estimate matched the day she was last seen on December 8.

The jury convicted Swearingen of kidnapping, raping and murdering Ms. Trotter. He was subsequently sentenced to death.

Swearingen's convictions were affirmed on direct appeal, and his state and federal post-conviction petitions were denied.

## 2007 New Scientific Evidence

More than seven years after Swearingen's



Larry Swearingen  
(Tex. DOC)

less than several weeks prior to her disappearance, and the weather in the weeks before discovery of her body, "supports a forensic opinion that Ms. Trotter's body was left in the woods within two weeks of the date of discovery on January 2, 1999." The earliest date Ms. Trotter could have been left in the forest based on Carter's analysis is December 19.

In addition to Carter, five other experts in 2007 – two forensic entomologists and three forensic pathologists – provided an affidavit, report, or testimony during an evidentiary hearing concerning their professional opinion of when Ms. Trotter's body was placed in the forest. Their determinations of *the earliest* it could have occurred ranged from December 18 to December 23. Two of the pathologists – Dr. Glenn Larkin and Dr. Lloyd White – opined that the minimal deterioration of her pancreas and other internal organs suggests she wasn't left in the forest until *after December 28*.

The significance of the new evidence provided by the six experts is the earliest Ms. Trotter's body could have been left where it was found, was a week after Swearingen was jailed on December 11. Consequently, it is not physically possible he abducted and murdered her.

## 2009 New Scientific Evidence

In January 2009 heart, nerve and vascular tissue taken from Trotter's body during her autopsy were discovered preserved in a paraffin block. There was no mention of the preserved tissue in Ms. Trotter's autopsy report. Analysis of those tissues provides the most accurate determination of when Ms. Trotter died, because shortly after a person dies enzymes begin to digest the cells in their major organs. This process usually begins within a few days in organs

conviction Dr. Carter recanted her trial testimony about Ms. Trotter's time of death. Dr. Carter [explained in an affidavit](#) dated October 31, 2007, that the condition of Ms. Trotter's torso, her internal organs, her body weight that

such as the heart and liver. The tissue samples were microscopically examined by Dr. Lloyd White, Tarrant County Deputy Medical Examiner, who reported in April 2009:

The slides ... clearly showed tissue architecture and subcellular details that disappear within two or three days of death, unless the tissue is fixed and preserved. It is therefore scientifically certain that Ms. Trotter's body was recovered no more than two or three days after it was left in the National Forest. Without evidence that the body was preserved in another location before being deposited in the National Forest, the microscopic evidence permits only one forensic conclusion, and that is that *Ms. Trotter died no sooner than December 29 or December 30, 1998*.

[\(Pathological Opinion of Dr. Lloyd White, Tarrant County Deputy Medical Examiner, April 14, 2009.\)](#)

Dr. Stephen Pustilnik, Chief Medical Examiner of Galveston County, Texas also microscopically examined the new tissue evidence. He reported in April 2009:

In summary, without prior refrigeration the deceased was killed within reasonable certainty between five to seven days prior to her discovery. This would put the *date of death on or about December 26, 1998*. [\(Findings of Dr. Stephen Pustilnik, Chief Medical Examiner of Galveston County, Texas, April 14, 2009.\)](#)

The expert analysis of the new medical evidence didn't just confirm the earlier evidence that Ms. Trotter died no earlier than December 18, but narrowed it to no earlier than December 26 – which was 15 days after Swearingen was jailed.

Forensic pathologist Dr. Glenn Larkin, a leading authority at medically determining time of death, provided a report in 2007 that the earliest Ms. Trotter could have been placed in forest was December 23, 1998. He also opined that the condition of her body, and the condition of her pancreas, suggested her death may not have occurred until at least December 29. Dr. Larkin was quoted in the [January 2009 issue](#) of *Texas Monthly*:

"As a forensic scientist since 1973, I always kept an objective stance when called to testify; however, there comes a point when as a human, and as a Christian, there is a mandate to speak in the interest of justice. This is a moral issue

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now; *no rational and intellectually honest person can look at the evidence and conclude Larry Swearingen is guilty of this horrible crime.*" (Italics added)

### Appeals based on new evidence denied

Even though DNA and forensic evidence (medical and entomology) supports the conclusion that he did not murder Ms. Trotter – Swearingen's state habeas petition seeking a new trial based on his actual innocence was denied.

A day before Swearingen's scheduled execution on January 27, 2009, a federal judge issued a stay for review of his successive federal habeas petition. The judge eventually denied Swearingen's petition, ruling that although he didn't exercise the "due diligence" required by federal law in discovering his new evidence, that didn't make any difference because Swearingen did not present "clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [Swearingen] guilty of the underlying offense." (*Swearingen v. Thaler*, No. H-09-300, 2009 WL 4433221 (S.D. Tex. Nov. 18, 2009) Since the U.S. Supreme Court hasn't ruled that executing a possibly innocent person is a constitutional violation, Swearingen's new evidence of his innocence didn't warrant federal habeas relief.

Swearingen appealed to the federal Fifth Circuit Court of Appeals, which [affirmed the denial](#) of his petition in April 2011. (*Swearingen v. Rick Thaler*, No. 09-70036 (5th Cir. 2011))

In July 2011, the Texas Court of Criminal Appeals stayed Swearingen's third execution date and remanded the case back to the trial court to review and resolve Swearingen's state habeas claim of actual innocence and due process violations.

The trial court conducted an evidentiary hearing in February and March 2012, after which the trial judge recommended the denial of Swearingen's petition. On December 12, 2012, The TCCA adopted the trial judge's findings and conclusions.

Two days later, on December 14, then trial judge Fred Edwards issued a new death warrant for Swearingen, and set his fourth execution date for February 27, 2013.

On January 17, 2013 Swearingen filed a fourth petition for DNA testing of the avail-

able evidence by state of the art techniques. During a hearing held on January 30, 2013, new 9th state District Court Judge Kelly Case – who defeated Edwards' bid for reelection – issued an indefinite stay of execution. She stressed the need for "certainty over finality" because of the issue of the requested DNA testing.

Judge Case ordered, on June 10, 2013, DNA testing. Then in May 2014 Judge Case granted Swearingen's fifth petition for DNA testing. The evidence to be tested included hair, Trotter's rape kit, cigarette butts, ligature, and Trotter's underwear, shirt, sweater and blue jeans.

The Montgomery County District Attorneys Office appealed each of Judge Case's orders.

In October 2015 the Texas Court of Criminal Appeals voted 7 to 3 to reverse Judge Case's orders for DNA testing, and remanded the case back to the trial court. The majority ruled that Swearingen failed to satisfy the requirements for post-conviction DNA testing under Texas Code of Criminal Procedure Chapter 64. (*State v. Swearingen*, 424 SW 3d 32 (Tex. Ct of Crim Appeals 2014)) Three justices dissented, arguing that the DNA testing should be allowed to be conducted. Judge Alcalá wrote in his dissent:

"I conclude that, ... DNA testing on the hair evidence and the rape kit linking a different person to this offense would, by a preponderance of the evidence, show that Swearingen would not have been convicted. I, therefore, respectfully dissent from this Court's judgment that, for the third time in over a decade, denies Swearingen access to DNA testing under Chapter 64 of the Code of Criminal Procedure." *Id.*, Alcalá dissent, *op. cite*, 2

In November 2015, Swearingen's defense team filed a motion for rehearing in the Texas Court of Criminal Appeals. The motion was supported by an [amicus brief submitted](#) by five forensic scientists.

The motion for rehearing was denied on February 10, 2016. That clears the way for the district attorney's office to file another motion to set a date of execution.

### Conclusion

In spite of the fact there is no direct, eyewitness or confession evidence that Larry Swearingen murdered Melissa Trotter, while there is compelling medical and scientific evidence establishing she was placed in the national forest when he was incarcer-

ated in the Montgomery County Jail, the State of Texas continues to defend his conviction and seeks his execution.

Having the perfect alibi: being in custody when Ms. Trotter was murdered, has thus far not been enough under state or federal post-conviction laws for Swearingen to be granted a new trial, during which his jurors could hear all the exculpatory evidence that his jurors in 2000 were unaware existed.

The person or persons who murdered Ms. Trotter should be held responsible for their terrible act. However, it doesn't serve any rational purpose for an innocent person to be convicted, sentenced to death, and sit on death row for 16 years awaiting execution for her murder.

Click here to read [Justice Denied's Editorial](#) in January 2009 when Larry Swearingen was previously scheduled to be executed: "Larry Swearingen Scheduled For Execution Based On "Seat Of The Pants" Evidence."

[Click here to read Justice Denied's](#) article in Issue 49 (Winter 2012): "Larry Swearingen's Execution Is Stayed So His Actual Innocence Claim Can Be Considered"

[Click here for a timeline](#) of Swearingen's case in an article by The Courier (Montgomery County, TX)

### Sources:

[Swearingen v. Rick Thaler](#), No. 09-70036 (5th Cir. 2011)

[State v. Swearingen](#), 424 SW 3d 32 (Tex. Ct of Crim Appeals 2014) (Reversing district court order for DNA testing)

[State v. Swearingen](#), No. 77,043 & 77,044 (Tex. Ct of Crim Appeals 2014) (Motion for rehearing)

[DNA testing still unresolved](#) in Montgomery County's death row case against Larry Swearingen, The Courier (Montgomery County, TX), Jan. 4, 2015 (Detailed timeline of Swearingen's case.)



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