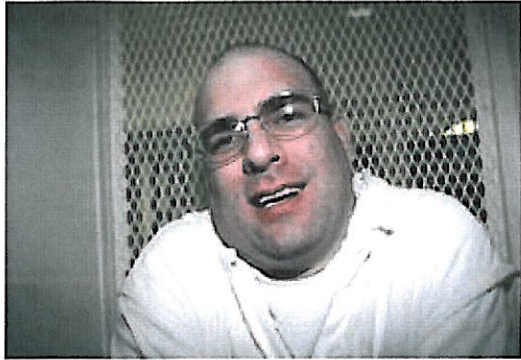


Commentary: Innocent plea needs court hearing

By LISA FALKENBERG Copyright 2009 Houston Chronicle

Jan. 26, 2009, 9:22PM



Mike Graczyk AP

Larry Swearingen had been set to die today (Jan. 27) before the appeals court ruling.

If evidence shows Larry Ray Swearingen is innocent, but there's no court that will hear it, does actual innocence even matter?

That seems to be the question posed Monday by one lone judge, Jacques L. Wiener Jr., on the U.S. Court of Appeals for the 5th Circuit.

A three-judge panel granted Swearingen a stay of execution one day before he was scheduled to die by lethal injection for the 1998 murder of 19-year-old Montgomery College student Melissa Trotter.

Swearingen, an electrician from Willis with a prior rape conviction, was convicted in 2000 based on circumstantial evidence.

Swearingen maintained his innocence from the beginning and his appellate attorneys have filed numerous appeals based on forensic evidence that suggests Swearingen was actually locked up in jail on an unrelated charge when Trotter's lifeless body was dumped in the Sam Houston National Forest.

Courts have consistently refused to consider the evidence on its merits and instead allowed procedural roadblocks to prevent a fair hearing on the forensics. Monday's stay of execution was granted only to give a district court time to consider two of Swearingen's claims: whether he had ineffective counsel and whether he was denied due process because the state sponsored false testimony.

His claim of actual innocence, however, wasn't even considered. While the U.S. Supreme Court has determined that it's unconstitutional to execute the mentally retarded, the insane and the very young, the issue of executing the innocent is still up for debate.

The nation's highest court hasn't directly addressed whether a claim of actual innocence can be made in late appeals, so federal appeals courts are left to their own interpretations. The 5th Circuit takes the easy route: it uniformly rejects them.

But, apparently, refreshingly, there's at least one member of the court who disagrees: Judge


Advertisement



Loan Modification DVD + Software

as seen on



MODIFY YOUR MORTGAGE YOURSELF

A COMPLETE STEP BY STEP GUIDE

Visit GetYourLoanModDVD.com Now!

Print Powered By  FormatDynamics™

Wiener.

In concurring with the stay, he wrote a special statement after Monday's order to address what he called "the elephant" in the room.

Wiener writes that even though the U.S. Supreme Court never "expressly" recognized the right to claim actual innocence in late appeals, justices have made statements that suggest they view the truly innocent in the same light as the insane or the mentally retarded.

Wiener quotes Justice O'Connor: "I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution."

One would certainly think.

There's a very real possibility, Wiener writes, that the lower court to which Swearingen's case was returned "could view the newly discovered medical expert reports as clear and convincing evidence that he victim in this case could not possibly have been killed by the defendant."

Swearingen's attorney, James Rytting, has presented evidence from several forensic scientists and physicians, including the former Harris County medical examiner whose original testimony helped convict him, who all agree that Trotter's body was left in the woods well after Swearingen's arrest.

But the newest, most compelling evidence comes from preserved tissue from Trotter's autopsy only recently discovered at the ME's office. After

examining the tissue's fully formed cells, Tarrant County's deputy medical examiner's sworn affidavit concludes that Trotter could have been dead only two or three days.

The New York-based Innocence Project is helping with appeals and advocating for more DNA testing.

And yet, Wiener writes, because precedent dictates that the lower court not consider actual innocence a good reason for relief, the court may be forced to deny the claim if it can't find another reason, such as ineffective counsel or due process violations.

If that happens, Wiener argues, Swearingen's case might be the perfect opportunity for the whole 5th Circuit, or perhaps the U.S. Supreme Court to finally, explicitly recognize actual innocence as a ground for late appeal.

"To me," Wiener writes, "this question is a brooding omnipresence in capital habeas jurisprudence that has been left unanswered for too long."

As long as it's unanswered, there's the chance it could cost an innocent Death Row inmate his or her life, not to mention the continued effects on non-capital cases such as rapes.

"Thank God he said it," the Innocence Project's Barry Scheck said of the judge's statement.

"It isn't right," said Swearingen's attorney James Rytting, "to kill people because they've proved themselves absolutely innocent later in the day,

Advertisement



Loan Modification DVD + Software

as seen on     

MODIFY YOUR MORTGAGE YOURSELF

A COMPLETE STEP BY STEP GUIDE

Visit GetYourLoanModDVD.com Now!

Print Powered By  FormatDynamics

☆ **chron**.com | *Where Houston lives*

instead of earlier in the day.”

lisa.falkenberg@chron.com

Advertisement



Loan Modification DVD + Software

as seen on     **YAHOO!**

MODIFY YOUR MORTGAGE YOURSELF
A COMPLETE STEP BY STEP GUIDE

Visit GetYourLoanModDVD.com Now!

Print Powered By  **FormatDynamics™**