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**HOUSTON**

# DNA testing debate clouds fate of convicted killer

## Man has dodged execution 5 times in teen's murder

By **Cindy Horswell** | June 9, 2015 | Updated: June 10, 2015 11:09am

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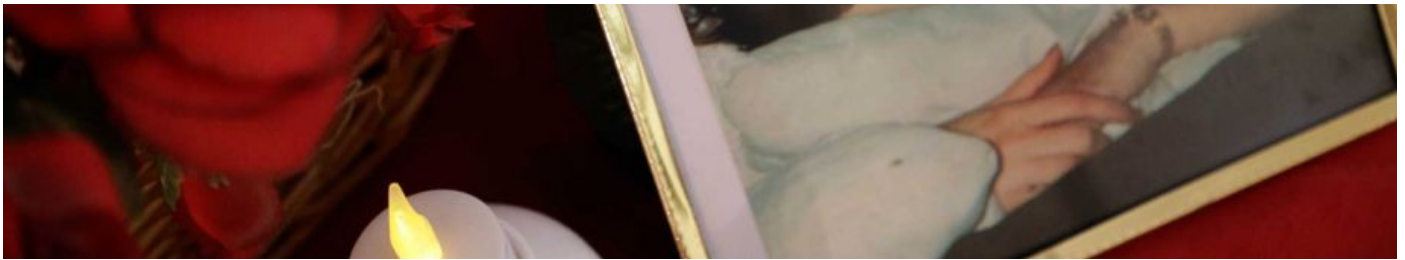


Photo: Billy Smith II

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## IMAGE 1 OF 3

Melissa Trotter, 19, was a student at Lone Star College when she was raped and murdered in 1999.

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The cross that Sandy Trotter has worn around her neck for the past 16 years once belonged to her daughter, Melissa, a freshman at Lone Star College's Montgomery campus.

Trotter wants to remember her daughter wearing that cross, not the graphic police photos showing pantyhose wrapped around her neck after she was found strangled in the Sam Houston National Forest.

"It's horrible thinking what she went through," the retired nurse said of her daughter, and "having to relive those last images, over and over."

But she has done just that as Larry Ray Swearingen, her daughter's convicted killer, has avoided execution five times for the 1998 kidnapping, rape and murder of Melissa Trotter of Willis.

Swearingen was 29 when he was first locked in a small cell on death row. Although Texas ranks first in the nation in number of executions, Swearingen has lived to middle age - 44 - while kept in isolation, except for a TV and an occasional hour outside alone in the recreation yard.

Swearingen, who shaves his head now and wears wire-rim glasses, continues to profess his innocence.

"The way I look at it, I'm a POW of Texas," the electrician has told the media. "It's my army against their army."

Meanwhile, his capital murder case continues to lie at the center of a debate over when post-conviction DNA testing should be allowed in Texas.

Swearingen's attorneys and Montgomery County prosecutors say the case prompted two changes to state law that broaden a convicted criminal's access to DNA testing - including one signed recently by Gov. Rick Abbott.

Both sides strongly disagree over whether these changes will alter or have any impact on Swearingen's planned execution. The first change to state law, passed in 2011, made any evidence containing biological material available for testing even if a DNA issue was never raised in the original trial.

The newest change removes the hurdle of proving biological material exists that might be invisible to the eye such as saliva, sweat and skin cells - instead requiring only that there be a "reasonable likelihood" it exists.

"DNA testing has already exonerated 52 innocent Texans and the real criminals were later identified in 21 of those cases," said Texas Sen. Rodney Ellis, D-Houston, who sponsored the changes. He believes the changes will prevent even more miscarriages of justice.

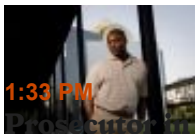
### ***Defense emphatic***

Barry Scheck, co-director of the New York-based Innocence Project, which has

represented Swearingen, said Texas lawmakers have "made it clear that DNA testing should be allowed when there is a possibility it could help prove innocence, and the testing that Mr. Swearingen is seeking could shed light on many unanswered questions in his case."

His other attorney, James Rytting of Houston, agreed. "We believe this testing could help show Swearingen was not the last person with the victim, that she was with someone else," Rytting said.

Montgomery County prosecutor Bill Delmore does not believe these changes will reverse Swearingen's conviction or help him succeed with his fifth motion for DNA testing, now pending before the Texas Court of Criminal Appeals. The appellate courts



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the torn panty hose found on her body - the other half of which was found in Swearingen's trailer by his landlord, who said it was a microscopic match to the exclusion of all others to the one around her neck," Delmore said.

He stressed that a lot of DNA testing has already been done, such as matching Swearingen's DNA profile to a hair found on the panty-hose fragment in his trailer. Also, two hairs removed by the root were discovered inside Swearingen's truck that match Melissa's DNA profile, Delmore noted.

Witnesses testified that Swearingen, who was married, bragged of his plans to meet the victim for lunch on Dec. 8, 1998 and, if all went well, he "would then have her for lunch," Delmore said. Witnesses also reported seeing them together that day by the campus library, where the victim's car was later found abandoned.

Swearingen maintains he left her on campus. He has said someone else later "planted" the damaging evidence at his trailer.

His motion requests DNA testing of several items - portions of which have already been tested - including fingernail scrapings, clothing, cigarette butts, panty-hose ligature, the

rape kit and some stray hairs. Prosecutors conceded the revised law will eliminate one of the appellate court's previous objections to further DNA testing, because Swearingen will no longer have the burden of proving biological material exists for testing. But he must still address two other key requirements that the appeals court has said he failed to meet, Delmore said.

Swearingen would have to show new DNA analysis could overcome the "overwhelming mountain of evidence" against him and lead to a different verdict.

The defense would also have to show items requested for testing have been properly secured to prevent contamination, tampering or substitution.

The appellate court has previously ruled that simply finding stray DNA from another person might "muddy the waters" and not necessarily exclude Swearingen as the killer.

"The panty hose, for example, were sent to defense experts in California and Ontario for testing without any supervision by a state representative," Delmore said. "And nobody has addressed how the clothing and other evidence has been handled while stored by the district clerk and sheriff for the last 16 years."

### ***Covering his tracks***

State District Judge Kelly Case found no reason to believe there had been contamination when he approved Swearingen's motion for DNA testing, which is pending on appeal. He found the "mountain of evidence" against Swearingen might be overcome if a new DNA profile were developed and then linked to several different pieces of evidence from the crime scene.

Case also declared some "factual findings" from Swearingen's trial to be "clearly erroneous."

For instance, in the original trial, experts testified they found fibers uniquely similar to Swearingen's bedroom carpet and his jacket that had been transferred to the victim's jacket. Experts also said they'd found fibers similar to the victim's jacket inside

Swearingen's truck.

But Judge Case noted the autopsy said the victim had been wearing a sweater, not a jacket.

Delmore scoffed at that finding, saying the court record showed witnesses had positively identified that piece of clothing, which was referred to as both a jacket and a sweater.

Swearingen, he added, has gone to great extremes to cover his tracks, including fabricating a letter written in Spanish that was purported to be from the real killer.

"We're very confident that we have the right guy. We've executed on far less," he said.

"Three other women even testified during the punishment phase that between 1992 and 1998 he had also kidnapped and sexually assaulted them, including instances that involved panty hose."

Rytting countered that his client was never charged with any of these crimes. In fact, the defense believes Swearingen was in jail when the victim was actually killed.

Three days after the young coed vanished, Swearingen was arrested on some outstanding traffic tickets. Her body was not found in the forest until a month later. Swearingen's attorneys have produced statements from three medical examiners and a forensic pathologist who say the victim's body was too well-preserved to have been lying outside in the forest since Swearingen's arrest.

"These forensic scientists stand by their reports and testimony, which exonerate Mr. Swearingen. That is why we continue to defend him and why we are anxious for DNA testing," Rytting said.

### *Unanswered questions*

Delmore pointed to a two-week court hearing at which, he says, renowned forensic pathologists such as Werner Spitz refuted those claims - and the appeals court concurred.

"Bottom line is that you can't accurately predict time of death when a body is found

several days out," Delmore said.

Rytting said other questions remain unanswered. For example, earlier DNA testing showed that blood found under the victim's fingernails belonged to a man, but not Swearingen.

Meanwhile, the victim's parents believe Swearingen's appeals should have ended years ago. "He's become the poster child for those with an anti-death penalty agenda. This has nothing to do with guilt or innocence," said Charles Trotter, a retired Houston computer technician. "Some on death row may be innocent, but he's not one of them."

Swearingen filed a motion on his own two months ago, decrying poor treatment and asking the courts to terminate his appeals and set an execution date. He withdrew it days later.

## **Cindy Horswell**

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