

## OPINION

### Op-Ed Update

# Judge withdraws execution date

By JOSEPHINE YALOVITSER

In a motion filed on Jan. 25 with the state's Ninth District Court in Montgomery County, James Rytting, a lawyer for Larry Swearingen, and lawyers from the New York-based Innocence Project asked the court for a fourth time to allow DNA testing on evidence they say could prove Swearingen's innocence in the death of 19-year-old Melissa Trotter and perhaps lead to her real killer.

Prosecutors agreed to the testing—a major development following many years of opposition to it—and asked for the evidence to be submitted to a lab and analyzed in an expedited manner. Their hope, they said, is to get the testing done quickly enough to prevent the delay of Swearingen's execution date, the fourth one he has faced since his conviction in 2000.

But Barry Scheck, co-director of the New York-based Innocence Project, and one of Swearingen's lawyers, said: "The nature of the evidence requires complicated testing that could involve several different types of analysis. That work will take more time than is left before Swearingen's execution date. County District Attorney Brett Ligon's proposal to conduct expedited testing would compromise Swearingen's ability to get the reliable testing results that could prove his innocence."

Back in 2000, despite the State's efforts, pretrial forensic analysis, including DNA testing, failed to implicate Mr. Swearingen. DNA analysis of the blood in the victim's

finger nail scrapings confirmed that the blood was from a male, but it excluded Mr. Swearingen as the donor. At trial, the State speculated that the biological material from the finger nail scraping was blood that came from an officer present during autopsy who may have cut himself while shaving hours before. Another theory was that a freshet of blood circulating through the morgue's air conditioning system was spewed out a vent and landed in the shavings. In opposing Mr. Swearingen's pro se motions for DNA testing, the State has also supposed that blood from investigators may have blown under the fingernails due to winds at the crime scene or the whirl of helicopters involved in the search.

Larry Swearingen's case, so far, is not the only case that illustrates mistakes in our legal system. In 2010 Kathryn Schulz interviewed Peter Neufeld, Innocence Project co-founder, about the origins of wrongful convictions, and asked for some examples. Here is what Peter Neufeld said:

*"We took a deposition last week of a guy who was the lead detective in the prosecution of a young man named Jeffrey Deskovic. Jeff Deskovic was a 16-year-old white kid in Peekskill, N.Y., with no criminal record, when a 15-year-old girl was raped and murdered on her way home from school. This was in 1990. Jeffrey went to the police and said, 'I knew her, I liked her, is there's anything I can do to help you solve this crime?'" Well, the detective he spoke to had been told by somebody in the police academy that people who commit crimes often come forward of-*

*fering to help. So this guy locked his sights on Jeffrey and after multiple encounters, the kid confesses. They then did DNA testing on the semen recovered from the girl, and Jeffrey was excluded. But [the prosecutors] never disclosed that; they simply dropped the rape charge and argued at trial that she must have had consensual sex with somebody else and Jeffrey was the murderer. Twenty-five years later, we took that DNA profile and ran it through the convicted felons database, and the profile of the semen matched a serial rape-murderer who was serving life in prison for attacking and killing another teenage girl in another town in Westchester a year and a half after the victim in Jeff's case was killed. Steven Cunningham subsequently confessed to the crime for which Jeff Deskovic served nearly 16 years.*

*In the spring of 1981, a 12-year-old boy was beaten and forced to watch as his 11-year-old female cousin was raped by a stranger in a park in Cleveland, Ohio. Several weeks later, a man named Raymond Towler was stopped by a ranger for running a stop sign in the same park and brought into the police station for questioning. After hesitating for 10 and 15 minutes, respectively, both the boy and the girl eventually chose Towler's picture from a photo array. On the basis of that identification, and despite testimony by multiple witnesses that Towler had been home at the time of the crime, he was convicted and sentenced to life in prison. After 28 years behind bars, Towler was exonerated when DNA evidence showed that he was not the*

*girl's rapist. He was 24 on the day he was convicted and 52 on the day he walked out of prison."*

Going back to the Larry Swearingen case: On Wednesday, Jan. 30, Montgomery County state district court Judge Kelly Case withdrew an order that had set the execution of Swearingen for Feb. 27. The judge's decision came after a hearing in which Swearingen's lawyers argued that more time was required to accomplish DNA testing they believe will prove his innocence. Just before his ruling, Judge Case said, "I think we need certainty before we have finality."

The Innocence Project Club is very grateful to the residents of the Rye Brook/Port Chester community who responded to the piece that appeared in the Westmore News on Jan. 25 and sent the donations that would help the Innocence Project use DNA evidence to overturn wrongful convictions, while also advocating for reforms to the criminal justice system to help prevent future mistakes. Let's fight for Mr. Swearingen's chance to prove his innocence. Please, send your donations to:

Innocence Project  
c/o Josephine Yalovitsker  
54 Talcott Rd.  
Rye Brook, NY 10573

All donations are 100% tax-deductible. The Innocence Project's Tax ID number is 32-0077563.

Josephine Yalovitsker is a junior at Blind Brook High School.