

**Texas Death Penalty Developments in 2009**  
**The Year in Review**

**Texas Coalition to Abolish the Death Penalty**  
**December 2009**

## Texas Death Penalty Developments in 2009: The Year in Review

The Texas Coalition to Abolish the Death Penalty (TCADP) publishes this annual report to inform citizens and elected officials about issues associated with the death penalty in Texas in the past year. This is the third such annual report published by TCADP. It presents information on executions, stays, and new death sentences; exonerations; legislative developments; and other issues affecting the criminal justice system in the nation's most active death penalty state. The report is available online at <http://www.tcadp.org/uploads/documents/2009annualreport.pdf>.

### Executions

The State of Texas executed 24 people in 2009, once again accounting for nearly half of all U.S. executions for the year. Ten other states carried out executions in 2009. Texas now has executed a total of 447 people since 1982, out of 1,188 executions nationwide since 1977; 208 executions have occurred during the administration of Texas Governor Rick Perry.

U.S. Executions in 2009	
<b>Texas</b>	<b>24</b>
Alabama	6
Ohio	5
Georgia	3
Oklahoma	3
Virginia	3
Florida	2
South Carolina	2
Tennessee	2
Montana	1
Indiana	1
<b>Total</b>	<b>52</b>

Of the 24 people executed in Texas in 2009, 14 were African American<sup>1</sup>, 7 were Hispanic/Latino, and 3 were white. All were male. Six inmates had been convicted in Harris County, which alone accounts for more executions (112) than any state in the country besides Texas. The Commonwealth of Virginia, which is the second-highest executing state, has carried out 105 executions. Tarrant County had convicted 5 of the 24 executed inmates in 2009, while Bexar County had convicted 4 inmates.

Among those executed in 2009, the following cases illustrate some of the issues that continue to impact the administration of the death penalty in Texas:

- **Willie Pondexter** was executed by the State of Texas on March 3, 2009 for the 1993 burglary and murder of Martha Lennox. He was 19 years old at the time of the crime and had no previous prison record. Pondexter had repeatedly expressed remorse for the crime. Over the course of his 14 years on death row, he was considered to be a helpful, respectful inmate with no disciplinary problems. At least one corrections officer stepped forward to support his clemency petition.
- **Khristian Oliver** was executed by the State of Texas on November 5, 2009. He had been sentenced to death in 1999 for the murder of Joe Collins, which was committed during a burglary in Nacogdoches County. During the punishment phase of Oliver's trial, several members of the jury consulted the Bible – including text in support of the death penalty – as part of their deliberations. The U.S. Court of Appeals for the 5th Circuit found that jurors had “crossed an important line” by referencing specific passages in the Bible that described the facts at issue in the case. The court said that this amounted to an “external influence” on the jury, which is prohibited by the U.S. Constitution.

Despite serious questions about the impartiality of the jury that sentenced Oliver to death, the 5th Circuit deferred to the judgment of state courts and concluded that Oliver had failed to prove that he had been prejudiced by the jurors' behavior. The U.S. Supreme Court declined to hear the case.

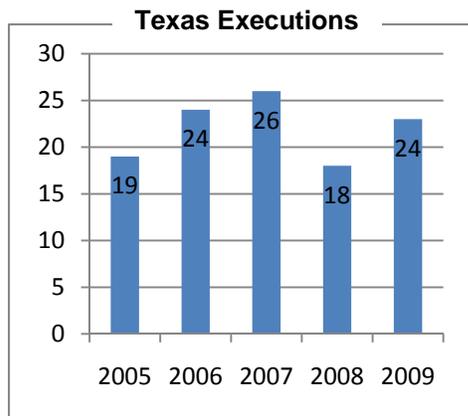
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<sup>1</sup> The Texas Department of Criminal Justice lists Khristian Oliver's race as white, but he was African American.

- **Robert Lee Thompson** was executed on November 19, 2009. Less than an hour before his execution, Governor Perry announced that he had rejected a recommendation for clemency from the Texas Board of Pardons and Paroles and declined to commute Thompson's death sentence. Thompson was sentenced to death for the murder of Mansoor Rahim, even though he was not the triggerman. He had been convicted under the law of parties, under which no distinction is made between the principal actor and the accomplice in a crime; each defendant may be held equally responsible and eligible for the death penalty in cases involving felony murder. Thompson's co-defendant, Sammy Butler, the actual killer of Mr. Rahim, was tried separately and convicted on a lesser charge. Butler is serving a life sentence and will be eligible for parole at a future date.

This was only the fourth recommendation for clemency from the Board of Pardons and Paroles in a case where the inmate faced imminent execution, but it constitutes the second time that Governor Perry has disregarded the Board, whose members he appoints. Perry previously rejected a recommendation for clemency in 2004 when he allowed the execution of Kelsey Patterson, a man with severe mental illness, to proceed.

In 2007, Perry granted clemency to Kenneth Foster and commuted his sentence to life in prison. Foster had been convicted under the law of parties for the 1996 murder of Michael LaHood; he was sitting in a car 80 feet away at the time of the crime. The man who had actually killed LaHood – Mauriceo Brown – was executed in 2006. Foster's case was the only instance where Perry has voluntarily commuted a death sentence; the governor has commuted other sentences in compliance with decisions by the U.S. Supreme Court regarding juvenile offenders and persons with mental retardation. In justifying Foster's commutation, Perry expressed concern about a



Texas law that allows capital murder defendants to be tried simultaneously and he urged the legislature to examine the issue (see Legislative Developments below).

Approximately 80 Texas death row inmates have been prosecuted under the law of parties. According to the *Austin American-Statesman*, more than half a dozen Texas inmates have been executed under the law of parties in recent years.

#### Stays of Execution

Seven inmates scheduled for execution in 2009 received last-minute stays due to mitigating factors, new forensic

evidence relating to innocence, or the possibility of mental retardation or mental illness. A comparable number of stays have been granted in recent years (six in 2008 and seven in 2007).

- The U.S. Court of Appeals for the 5th Circuit granted a stay of execution to **Larry Swearingen** on January 26, 2009, the day before his scheduled execution, based on new forensic evidence. Several pathologists, including the original medical examiner in the case, reported that Swearingen could not have committed the 1998 murder of 19-year-old Melissa Trotter because he was in police custody at the time of her death. Prosecutors originally theorized that Trotter had been dead for 25 days when her body was found, but new examinations suggest this is timeframe is impossible based on the preservation of her body. If such evidence is correct, Swearingen could not have committed the murder because he was in jail for traffic violations for the three weeks preceding the discovery of her body. The stay was allowed to grant further review of his second habeas petition for a new trial.
- **Jose Garcia Briseno** received a stay from the Texas Court of Criminal Appeals on April 7, 2009, the day of his scheduled execution, to consider whether the jury was able to give proper weight to the

mitigating evidence of childhood deprivation, abandonment by his parents, limited intellectual functioning, alcoholism, drug abuse, and lifelong poverty. Briseno was convicted in 1992 of the robbery and murder of Sheriff Ben Murray.

- **Kenneth Mosley** was first granted a stay on July 14, 2009, two days before his scheduled execution. His defense lawyers asked to postpone the execution because Mosley was waiting to hear on unresolved appeals pending before the U.S. Supreme Court; the execution was rescheduled for September 24. On the day of his second scheduled execution, Mosley received a last-minute stay from the U.S. Supreme Court, which agreed to halt his execution until it resolved a case from Alabama that raised similar issues regarding ineffective assistance of counsel.

Mosley was convicted in 1997 in the killing of a Garland police officer. His lawyers argued that as with the case being reviewed from Alabama, Mosley's trial attorneys were deficient for failing to raise objections during the punishment phase. In late October 2009, the U.S. Supreme Court refused to hear Mosley's appeal. A new execution date has been set for January 7, 2010.

- The Texas Court of Criminal Appeals granted **David Leonard Wood** a stay on August 19, 2009, the day before his scheduled execution. The stay was granted on a claim of mental retardation by his defense attorneys. Wood was convicted of the serial murders of six females in El Paso in 1992. He is entitled to a hearing to pursue claims that he is mentally impaired and ineligible for execution, in accordance with the U.S. Supreme Court decision *Atkins v. Virginia* (2002).
- The Texas Court of Criminal Appeals granted a reprieve to **Roderick Newton** on July 22, 2009, a day before his scheduled execution, with the support of the Dallas County District Attorney's Office. The Appeals Court ordered a district court to determine if Newton deserved a new trial based on evidence that had not been made available to the defense at the time of trial. The court also ordered an examination of Newton's claim of mental retardation.

Newton was found guilty in 2000 of kidnapping and murdering 20-year-old Jesus Montoya. During his original trial, police failed to supply both defense and prosecuting attorneys with the first of three written statements made by Newton's co-defendant, who testified against him. The newly-released evidence would have undermined the credibility of the co-defendant.

- The U.S. Court of Appeals for the 5th Circuit granted **David Balentine** a stay on September 29, 2009, the day before he was to be executed. The Court stayed the execution to determine if lower courts had properly resolved Balentine's appeals.

Balentine was sentenced to death for the 1998 killing of three teenagers in Amarillo. He confessed after being arrested in Houston six months after the murders. During his appeal, Balentine's attorneys argued that his court-appointed trial lawyers were unqualified or deficient in their representation and had failed to develop mitigating evidence to show Balentine's childhood of poverty, domestic violence, and abuse.

On November 2, 2009, the U.S. Supreme Court refused to hear appeals from three Texas death row inmates, including Balentine. He will likely be reassigned an execution date for early next year.

- On November 17, 2009, U.S. District Judge Lee Rosenthal granted **Gerald Eldridge** a 90-day stay, two hours before his scheduled lethal injection was to take place. Eldridge was nearly finished with his last meal when he was informed of the stay.

Eldridge was sentenced to death for the January 1993 murders of his ex-girlfriend and her nine-year-old daughter. His attorney argued during his appeal that Eldridge might be seriously mentally ill and incompetent to be executed (to be deemed competent, an inmate must be aware of his impending execution and understand the reason for it). In a preliminary psychiatric evaluation, a psychologist found Eldridge suffered hallucinations and probable delusional thinking. Judge Rosenthal recommended that Eldridge undergo further psychological testing over the next three months and authorized \$7,500 in expenditures.

### **Reduced Sentences**

Six inmates were removed permanently from death row in 2009; their sentences were changed to life in prison. This includes several inmates whose convictions and/or death sentences had been overturned due to evidence of mental illness, mental retardation, or other mitigating circumstances not presented during the original trial. Additionally, two former inmates no longer reside on death row: **Shozdijji Shisinday**, also known as Danny Thomas, died of natural causes in August while **Michael Toney** was removed from death row after the Texas Court of Appeals ruled his original trial unconstitutional (see Exonerations below for more details on Toney).

- In April, **Charles Mines** was removed from death row after the U.S. Court of Appeals for the 5th Circuit threw out his original death sentence. In February 2008, the court stated that Mines deserved a new sentencing hearing because jurors did not properly consider evidence of his mental illness. Mines had pled not guilty by reason of insanity during his trial for the 1988 murder of Vivian Moreno. A psychiatric evaluation that took place at a state hospital a week before the murder showed that he suffered from a mixed personality disorder with paranoia, passive-aggressive, and anti-social features.

During his latest trial, Mines pled guilty and accepted a life sentence for capital murder. In addition, he pled guilty to two new charges of aggravated robbery and accepted life sentences on each of those convictions. Mines also waived all credit for time already served and waived his rights to appeal. Prosecutors reserved the right to seek the death penalty again if he files an appeal.

- In May, former death row inmate **Robert Tennard** agreed to a life sentence during a new punishment hearing for his 1986 capital murder conviction. He also agreed that he would never ask for parole. Tennard's original death sentence had been sent back to Harris County for review so that jurors could consider his IQ of 67 (in general, those with an IQ below 70 are considered mentally retarded). Tennard's case had been heard by the U.S. Supreme Court in 2004, during which he argued that his low IQ was neither adequately presented nor considered by the jury during the penalty phase of his trial. The Court held that not considering a defendant's claim of mental retardation would breach his Eighth Amendment rights and constitute cruel and unusual punishment.

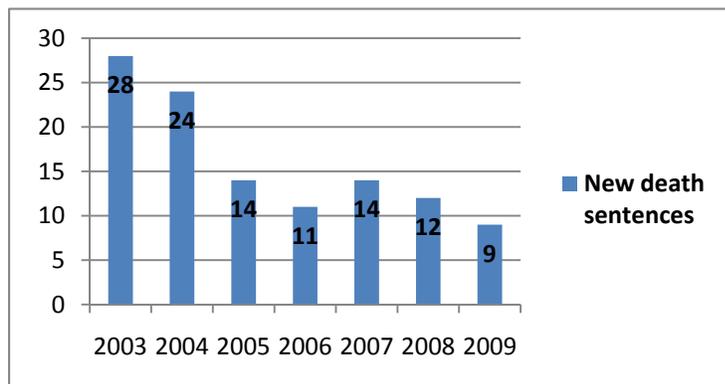
The U.S. Supreme Court decision *Atkins v. Virginia* (2002) prohibits the application of the death penalty to persons with mental retardation. At least 12 inmates have been removed from Texas' death row since 2002 in compliance with *Atkins*.

- In May, **Mariano Rosales** entered a final plea of guilty in exchange for consecutive life sentences. Rosales's case had been presented to the U.S. Court of Appeals in 2006, regarding a claim that prosecutors had intentionally excluded people of color from his jury in violation of *Batson v. Kentucky*. A District Court granted a new hearing, and in December 2008, after agreeing with the claim, it vacated both Rosales's conviction and death sentence. The Harris County District Attorney's Office agreed to a life sentence for the 70-year-old man.

**Jose Moreno, Deryl Madison, and Gene Hathorn** also received reduced sentences and were removed from death row.

## Death Sentences

According to data compiled from news sources and the Texas Department of Criminal Justice, juries condemned nine new individuals to death in Texas in 2009.<sup>2</sup> This represents the lowest number of new death sentences since the U.S. Supreme Court upheld Texas' revised death penalty statute in 1976.<sup>3</sup> The continued decline in new death sentences in Texas is consistent with national trends. It also is a steep departure from the late 1990s, when as many as 48 people in Texas were sent to death row in a single year.



Nine counties accounted for the new death row inmates: Bexar; Brazos; Collin; Dallas; El Paso; Leon; Smith; Tarrant; and Travis. Three of the new inmates are African American, three are Hispanic/Latino, and three are white. Currently there are 332 inmates on death row in Texas (322 men and 10 women).

Notably, for the second consecutive year Harris County did not condemn any new defendants to death. In the 1990s, it often

sent as many as 15 people a year to death row. Harris County juries did return two inmates to death row, however: Raymond Martinez and Robert Fratta (see below for details). While Harris County still accounts for a third of all Texas inmates awaiting execution (106 of 332), it has just newly sentenced seven people to death in the last four years.

Juries rejected the death penalty in four capital murder cases in 2009, resulting in sentences of life in prison without the possibility of parole. In numerous other capital murder trials, jurors convicted the defendant on a charge less than capital murder, which took the death penalty off the table.

- On February 10, 2009, a Bexar County jury rejected the death penalty for **Russell Knowles**, who had been found guilty of the capital murder of Ramon “Raymond” Solis during a botched robbery of a convenience store. Knowles claimed that the shooting of Solis, a customer at the store, was an accident.
- On September 28, 2009, a Hidalgo County jury rejected the death penalty for **Mario Quintanilla**, who had been convicted of the murder of a 23-year-old recent college graduate during a botched home invasion. Defense attorneys argued Quintanilla’s innocence, claiming his rough upbringing had led to their client’s gang involvement and made him an easy scapegoat for the crime. Quintanilla testified in the sentencing phase, during which he maintained his innocence but suggested to the jury that he would accept a death sentence if it provided closure to the murder victim’s family. Prosecutors assert that Quintanilla’s testimony led the jury to spare his life.
- A Travis County jury rejected the death penalty for **Albert Segura** on October 1, 2009 and sentenced him to life in prison without parole for the 2007 murders of Billy Gene Ferguson and Patricia Smith.

<sup>2</sup> Three inmates who appear on the Texas Department of Criminal Justice list of Offenders on Death Row as “received” in 2009 had been sentenced to death toward the end of 2008: Robert Sparks; Hector Medina; and John Ramirez.

<sup>3</sup> When this report was originally released on December 7, there had been eight new death sentences. A jury in Leon County sentenced Jerry Martin to death on December 8, 2009, raising the number of sentences to nine.

- **Levi King** was spared a sentence of death in Lubbock County by a single vote on October 8, 2009. King had pled guilty to the murders of three family members in Gray County in 2005; he was already serving two consecutive life sentences in the state of Missouri for murder. The trial had been moved from Gray County to Lubbock County due in part to pre-trial publicity. According to the jury foreman in the King trial, a single juror voted against the death penalty because she could not definitively say that there was no evidence that warranted sparing his life. According to reports, several other jurors also struggled as they weighed the mitigating circumstances that the defense had presented.

It took nearly two months to pick the jury in this case. The preliminary costs for the defense of Levi King amounted to nearly \$750,000, a tenth of the fiscal budget for rural Gray County. The cost incurred was just for the punishment phase of the trial; it does not yet include attorneys' fees or a potential bill from Lubbock County, where the trial took place. The District Attorney's Office spent \$88,000 to prosecute King. That figure also is expected to increase.

According to Joe Marr Wilson, one of the attorneys appointed to represent King, the same result of life without parole could have been achieved for \$10,000 if prosecutors had not tried King in Texas. The cost to Gray County for seeking a death sentence for Levi King was a contributing factor in the county commission's decision to withhold employee raises and increase tax rates.<sup>4</sup>

The following five inmates were resentenced to death in 2009:

- **Brent Ray Brewer** (Randall County) and **Mark Robertson** (Dallas County) received new sentencing hearings after courts ruled that the juries in their original trials had been given confusing instructions about how to consider mitigating factors in their cases. In July, jurors sent Robertson back to death row for the 1989 killing Edna Brau. In August, jurors sentenced Brewer to death for the second time for the 1990 murder of Robert Laminack.
- **Robert Fratta** (Harris County) received a new trial and sentencing hearing after an appeals court ruled that the confessions of his co-conspirators should not have been admitted into evidence because Fratta's lawyers could not cross-examine them. In May, a jury found Fratta guilty of the murder-for-hire of his wife and sent him back to death row.
- **Raymond Martinez** (Harris County) was sentenced to death for a third time in March for the 1983 killing of Herman Chavis. He is 63 years old.
- An Ector County jury resentenced **Michael Dean Gonzales** to death in May for the 1994 murders of his then-next door neighbors Manuel Aguirre and Merced "Bita" Aguirre. His death sentence had been overturned because an expert witness had testified that Gonzales' ethnicity should be considered as a factor in determining whether or not he posed a future threat to society. Half a dozen Texas death row inmates have received new sentencing hearings because of such testimony by Walter Quijano, former chief psychologist for the Texas Department of Criminal Justice.<sup>5</sup>

### **Exonerations**

According to the Death Penalty Information Center, 139 individuals have been released from death rows nationwide due to evidence of their wrongful conviction (since 1973). Nine of these exonerations occurred in 2009 and include these two Texas cases:

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<sup>4</sup> *The Lubbock Avalanche-Journal*, October 20, 2009

<sup>5</sup> Associated Press, February 5, 2009

- **Michael Toney** was released from a Tarrant County jail on September 1, 2009 after nearly a decade on Texas' death row and nine months after the Texas Court of Criminal Appeals overturned his conviction and granted him the right to a new trial. The state's high court ruled last December that during the original trial, the lead prosecutor withheld evidence favorable to the defense – an assertion that the Tarrant County District Attorney's Office did not dispute. According to the *Fort Worth Star-Telegram*, prosecutors withheld at least 14 documents that cast doubt on the accounts of crucial witnesses against Toney, namely his ex-wife and his former best friend. No physical evidence connected Toney with the 1985 bombing of a Lake Worth trailer for which he was convicted and sentenced to death.<sup>6</sup>

The Texas Attorney General's Office dropped the charges against him but said it would continue its investigation and reserved the right to prosecute him later. Toney was killed in a car accident on October 3, 2009, just one month after his release from jail. According to the Texas Department of Public Safety, the truck he was driving veered off of the east side of the road and rolled on top of him.

- On October 28, 2009, Travis County prosecutors moved to dismiss all charges against **Michael Scott** and **Robert Springsteen**, who had been convicted of the 1991 murder of four teens in an Austin yogurt shop. (Springsteen was convicted and sentenced to death in 2001; Scott was convicted and sentenced to life in prison in 2002.) Springsteen, who was 17 at the time of the crime, was removed from death row in 2005 and sentenced to life in prison in compliance with the U.S. Supreme Court decision *Roper v. Simmons*, which prohibited the death penalty for juvenile offenders. The Texas Court of Criminal Appeals overturned the convictions of both men in 2007 because they had not been adequately allowed to cross examine each other. Both claim that their confessions had been coerced.

New testing of DNA evidence in 2008 revealed an unknown male profile on swabs that had been taken from the youngest victim – the profile does not match Scott, Springsteen, or other previous suspects. State District Judge Mike Lynch released both men on bond in June 2009, pending a retrial. Prosecutors had sought more time to identify the source of the DNA evidence. The judge later accepted the state's motion to dismiss all charges against Scott and Springsteen after prosecutors announced that they still were not prepared to go to trial. The Travis County District Attorney's Office is still trying to match the DNA from the crime scene with a new defendant.

A total of 11 people have been exonerated from death row in Texas since 1973.

### **Possible Innocence**

Developments in the case of **Cameron Todd Willingham** dominated the media in 2009. Willingham was executed by the State of Texas on February 17, 2004. He had been convicted and sentenced to death for setting a fire to his Corsicana home in 1991 that killed his three young daughters. An investigative report by David Grann that appeared in the September 7 issue of the *New Yorker* deconstructed every aspect of the case, including the forensic science, jailhouse snitch testimony, witness testimony, and circumstantial evidence. It persuasively illustrates that none of the evidence used to convict Willingham was valid and points to his wrongful execution.

The *New Yorker* article came on the heels of a report filed with the Texas Forensic Science Commission in August by fire scientist Craig L. Beyler. The commission was created in 2005 by the state legislature to investigate allegations of professional negligence or misconduct in forensic analysis. In 2008 it agreed to a request from the Innocence Project to examine the possibility of forensic misconduct in the cases of

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<sup>6</sup> See <http://www.star-telegram.com/local/story/1583440.html>.

Willingham and Ernest Ray Willis<sup>7</sup> and it hired Beyler, an independent expert, to review the evidence. In his report, Beyler found that the investigators in Willingham's case had a "poor understanding of fire science" and relied on outdated theories to justify their determination that the fire had been set deliberately. Beyler's report confirmed the judgment of eight other fire experts who have examined the case since the time of conviction and determined there was no evidence to support the finding of arson.

The Texas Forensic Science Commission was set to meet on October 2, 2009 to hear from Beyler. It had planned to issue its own findings with regard to the allegations of forensic misconduct in the Willingham case in 2010. Two days before the meeting, however, Governor Perry moved to replace three commission members, including the chair (he later replaced a fourth member). The newly-appointed chair, Williamson County District Attorney John Bradley, cancelled the meeting so that the new members could get up to speed on the case and other issues that the commission is addressing.

On November 10, 2009 Bradley testified before a special hearing of the Texas Senate Criminal Justice Committee, during which he told state legislators that the Forensic Science Commission must develop new rules before it can proceed with the Willingham inquiry. He reportedly plans to convene a meeting of the commission in January to discuss developing such rules, but declined to speculate on how long that process might take. Bradley also told legislators that some of the commission's preliminary communications and discussions of cases may need to be kept confidential. Since the special hearing, it has emerged that commission members have been asked by Bradley to delete all email correspondence related to their work. It remains unclear as to when the commission's investigation of the Willingham case will resume.

### **Legislative Developments**

During the 81<sup>st</sup> Texas Legislature Regular Session, lawmakers considered numerous bills related to capital punishment, including a bill to repeal the death penalty and replace it with life in prison without the possibility of parole. This legislation, **House Bill 682**, was sponsored by State Representative Jessica Farrar (D-Houston) and co-sponsored by Representatives Lon Burnam (D-Ft. Worth), Al Edwards (D-Houston), Terri Hodge (D-Dallas), and Marissa Marquez (D-El Paso). It received a hearing by the House

Criminal Jurisprudence Committee's Subcommittee on Capital Punishment; the bill was left pending in the subcommittee without further action.

Several bills received full consideration by the House of Representatives and Senate. The following bills were passed and signed into law by the Governor:

- **Indigent Defense (House Bill 2058):** This bill provides for specific standards for attorneys representing indigent defendants in the appeals process in capital cases.
- **Compensation for Wrongful Conviction (House Bill 1736):** HB 1736 increases the compensation (from \$50,000 to \$80,000 for every year of incarceration) paid to persons who have been wrongfully convicted and incarcerated for crimes they did not commit. The bill was named in honor of Tim

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<sup>7</sup> Ernest Ray Willis was exonerated from death row in Texas on October 6, 2004. He had been sentenced to death for the 1986 deaths of two women who died in a house fire that was ruled arson. Seventeen years later, Pecos County District Attorney Ori T. White revisited the case after a federal judge overturned Willis' conviction. White hired an arson specialist to review the original evidence, and the specialist concluded that there was no evidence of arson. In 2004, prosecutors dropped all charges against Willis.

Cole, who died in prison while serving time for a crime he did not commit. He was later exonerated by DNA evidence.

- **Establishment of a Capital Writs Office (Senate Bill 1091):** This legislation establishes a state-wide office that will employ specialized attorneys and investigators to help indigent death row inmates in state habeas cases.
- **Innocence Commission (House Bill 498):** This bill establishes an advisory panel to assist with a study regarding the prevention of wrongful convictions.

Legislation related to **jail house “snitch” testimony (Senate Bill 1681)** also passed and became law without the signature of the governor. This legislation prohibits the conviction of a defendant based on testimony provided by someone who was incarcerated with the defendant unless that testimony is corroborated by other evidence.

Two bills that called for criminal justice reforms passed the full Senate and the House Criminal Jurisprudence Committee, but did not reach the House floor:

- **Recording of Interrogations (Senate Bill 116):** This bill would have required an electronic recording of the custodial interrogation of a defendant or suspect, including a juvenile, where the person is charged with a felony, in order for the person’s written or oral statement to be used in court.
- **Eyewitness Identification (Senate Bill 117):** This bill would have required the Texas Commission on Law Enforcement Officer Standards and Education to develop and disseminate a model policy and associated training materials to local law enforcement agencies regarding eyewitness identification procedures. It also would have required all Texas law enforcement agencies to adopt written eyewitness identification policies.

The following legislation passed the full House of Representatives and the Senate Criminal Justice Committee, but did not reach the Senate floor:

- **Law of Parties/Separation of Trials (House Bill 2267):** This bill called for the separate prosecution of two or more defendants who have been charged with capital murder. The original version of the bill also addressed the extent of a defendant’s criminal responsibility for the conduct of a co-conspirator in capital felony cases. It stated that a defendant who is found guilty in a capital murder case only as a party under Section 7.02(b) of the Texas Penal Code (the “law of parties”) may not be sentenced to death, and the state may not seek the death penalty in any case in which the defendant’s liability is based solely on that section. The provision related to the law of parties was struck after the House passed the bill, as the result of a threat of veto from Governor Perry.
- **Authority to Grant Reprieves (House Bill 1148 and House Joint Resolution 58):** This legislation related to the authority of the governor to grant one or more reprieves in a capital case. The joint resolution proposed a constitutional amendment authorizing the governor to grant one or more reprieves in a capital case. Currently, the governor only has the authority to grant a one-time 30-day stay of execution, unless he receives a recommendation from the Board of Pardons and Paroles.

On the national level, the state of New Mexico abolished the death penalty in March 2009. There are now 15 states without the death penalty. In signing the bill to repeal the death penalty, New Mexico Governor Bill Richardson expressed concerns about the fallibility of the system, stating:

I do not have confidence in the criminal justice system as it currently operates to be the final arbiter when it comes to who lives and who dies for their crime. If the State is going to undertake this awesome responsibility, the system to impose this ultimate penalty must be perfect and can never be wrong.<sup>8</sup>

At least nine other states considered abolition legislation in 2009. Several states made significant legislative progress toward abolishing or limiting the application of the death penalty:

- The Connecticut State Legislature voted to abolish the death penalty, but Governor Jodi Rell vetoed the bill.
- Repeal bills passed the Republican-controlled Montana Senate, the New Hampshire House, and the Colorado House but did not succeed in the other legislative chamber.
- Abolition bills were seriously considered by legislators in Kansas and Maryland. Maryland now has the most limited death penalty statute in the country; prosecutors can only pursue the death penalty in cases with biological or DNA evidence of guilt, a videotaped confession, or a videotape linking the defendant to a homicide.
- North Carolina passed a Racial Justice Act, which allows pre-trial defendants and death row inmates to challenge racial bias in the death penalty system through the use of statistical studies.

### **Other Developments**

One of the cases that grabbed headlines in 2008 suffered a setback this fall. Last year, attorneys for Charles Dean Hood raised concerns about an alleged romantic relationship that existed between the trial judge, Verla Sue Holland, and the Collin County District Attorney, Tom O'Connell, which called into question whether Hood had received a fair trial. After a flurry of legal activity, Holland and O'Connell acknowledged under oath that they had an intimate relationship at the time of Hood's trial. Hood received a stay of execution on a procedural claim unrelated to evidence of the improper relationship. The stay cited "developments in the law regarding (jury) nullification instructions" as the.

In September 2009, the Texas Court of Criminal Appeals ruled 6-3 that Charles Dean Hood should have raised concerns about the affair in earlier appeals. The ruling overturned a lower court's recommendation that Hood be able to make his case for a new trial based on the affair. A future appeal on the same grounds must go to the U.S. Supreme Court. Hood's appeal regarding whether the jury instructions were flawed is still pending. A favorable ruling could result in a new sentencing hearing but not a new trial.

Another case that dominated the news in 2009 did not involve a death row inmate but rather the Presiding Judge of the Texas Court of Criminal Appeals, Sharon Keller. In February, the State Commission on Judicial Conduct filed five charges against Keller, accusing her of bringing "public discredit" to the judiciary and violating the rights of death row inmate Michael Wayne Richard in 2007 in her handling of his appeal.

On September 25, 2007 the U.S. Supreme Court announced that it would hear a Kentucky case, *Baze v. Rees*, which challenged the constitutionality of the lethal injection process. Richard's lawyers scrambled to file a last-minute appeal in light of this significant legal development, but computer problems prevented them from delivering the paperwork to the Texas Court of Criminal Appeals by 5:00 PM. Judge Keller unilaterally denied the attorneys' request to stay open for an extra 20 minutes to accept the appeal, even though other judges had remained in their offices late that evening, anticipating that they would be called upon to take action in the case. The commission said Keller's "willful and persistent failure" to follow the court's execution-day procedures constituted incompetence.<sup>9</sup>

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<sup>8</sup> See [http://www.governor.state.nm.us/press/2009/march/031809\\_02.pdf](http://www.governor.state.nm.us/press/2009/march/031809_02.pdf).

<sup>9</sup> See <http://www.scjc.state.tx.us/pdf/skeller/NoticeOfFormalProceedings-FileStamped.pdf>.

San Antonio-based District Judge David Berchermann Jr., appointed as a “special master,” oversaw Judge Keller’s trial, which took place in August 2009 and focused on the charges of judicial misconduct. Judge Berchermann will prepare “findings of fact” for the Commission on Judicial Conduct, which will decide whether to drop the case, issue a public censure, or recommend Keller’s removal from the court.

### New Voices

In 2009, a number of individuals with diverse experiences relating to capital punishment emerged as “new voices” in opposition to the death penalty.

- **Former Texas Governor Mark White** served as the state attorney general from 1979-1983 and as governor from 1983-1987. While serving in these roles, he was involved with 20 executions. During his bid for reelection in 1990, White and the two other Democratic gubernatorial candidates competed against one another in terms of who was responsible for sending more individuals to the death chamber.

This fall, however, the former governor was quoted first in the *Houston Chronicle* and later in the *Dallas Morning News* as expressing support for doing away with the death penalty and replacing it with life without parole:

We’re very tough on crime in Texas. ... But as tough as old Mark was on crime and for the death penalty, when I review it today, I have very, very serious reservations about trusting our system of government making the right decision every time and not executing an innocent person.<sup>10</sup>

Governor White’s comments came in the wake of ongoing concerns about the likely wrongful execution of Cameron Todd Willingham. He also expressed concerns about the system’s inefficiency as a crime deterrent and the unjust administration of death sentences.

- In 1981 **James A. Fry** was a newly-appointed Dallas County assistant district attorney who successfully prosecuted Charles Chatman for aggravated rape. Chatman sat in jail for nearly three decades until 2008, when DNA evidence proved that he was an innocent man. Earlier this year, Fry spoke out against the death penalty: “For years I supported capital punishment, but I have come to believe that our criminal justice system is incapable of adequately distinguishing between the innocent and guilty. It is reprehensible and immoral to gamble with life and death.”<sup>11</sup>

Since Chatman’s exoneration, Mr. Fry has advocated for reform of the criminal justice system, including more accurate use of forensic science and improvements to eyewitness identification procedures.

- **Senior District Judge C.C. Cooke**, now serving in his 34<sup>th</sup> term, has sentenced three defendants to death over the course of his career. The senior judge now calls the sentence of life without parole “more palatable” both in terms of potential innocence and the outrageous cost of trying death penalty cases.

Judge Cooke was the presiding justice in the case of Richard Wayne Jones, who was executed by the state in 2000. The judge now says that he consistently doubted Jones’s guilt, stating in an article for the *Cleburne Times-Review* on April 13, 2009: “I would have been more comfortable if he could have been locked away for life without parole.” Additionally, Judge Cooke points to the expense of a death

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<sup>10</sup> *Dallas Morning News*, October 19, 2009

<sup>11</sup> Op-Ed for the *Dallas Morning News*, May 14, 2009

penalty trial compared to the lesser cost of life in prison. According to the judge, “a capital trial costs over \$3 million...well, we can keep a person in prison for life for about \$500,000.”<sup>12</sup>

- **Richard A. Viguerie**, of Texas, has been called “one of the creators of the modern conservative movement.” As the current chairman of Conservative Headquarters, Viguerie wrote an Op-Ed piece for *Sojourners Magazine* in July 2009 that condemned the practice of capital punishment as inconsistent with the principles of conservative government. Based partly on his Christian faith, which opposes the death penalty, and partly on his political philosophy, which opposes inefficient government, Viguerie writes, “I don’t understand why more conservatives don’t oppose the death penalty.” He went on to state:

Conservatives have every reason to believe the death penalty system is no different from any politicized, costly, inefficient, bureaucratic, government-run operation, which we conservatives know are rife with injustice. But here the end result is the end of someone’s life. In other words, it’s a government system that kills people.<sup>13</sup>

### **Conclusion**

2009 stands as a critical year in Texas’s experience with the death penalty. Concerns about innocence, arbitrariness, cost, and fairness generated unprecedented scrutiny of the administration of justice in the nation’s most active death penalty state.

Texas accounted for half of all executions that took place in the United States in 2009. New death sentences reached a historic low level, however, as prosecutors and juries increasingly accept the alternative punishment of life in prison without the possibility of parole (LWOP) as a reliable way to punish the guilty, protect society, and guard against convicting and executing innocent people. New death sentences have declined 60% in the past six years in Texas.

Unease surrounding the likely wrongful execution of Cameron Todd Willingham and other evidence of fatal mistakes has led to waning confidence in the reliability of the state’s criminal justice system. Despite the shifting death penalty landscape in Texas, elected officials have not yet caught up with increasing public recognition of the flaws and failures of the state’s capital punishment system. TCADP expects these issues to play a dominant role in Texans’ ongoing dialogue about the utility and necessity of the death penalty.

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<sup>12</sup> See [http://www.cleburnetimesreview.com/johnsoncounty/local\\_story\\_103163555.html](http://www.cleburnetimesreview.com/johnsoncounty/local_story_103163555.html).

<sup>13</sup> See <http://www.sojo.net/index.cfm?action=magazine.article&issue=soj0907&article=when-governments-kill>.



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