



# Capital Punishment in Texas:

## *Images of Injustice*



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# A Brief Overview

The issue of the death penalty can easily generate an array of emotions, especially within the state of Texas. However, evidence to advocate its continuance or abolition should not be based on emotional response. Instead, to fairly evaluate capital punishment, we must carefully review data that examines all aspects of the system. While doing such research, one can find indications that the death penalty process in Texas has serious flaws. The faults of capital punishment have resulted in the wrongful imprisonment and execution of citizens of Texas and the degradation of our state in the eyes of many across the country.

The feelings and trauma of the crime victims and their families obviously are a very important consideration. However, the death penalty offers only a false or temporary condolence to those victims while a never-ending cycle of violence continues. The death penalty is unnecessary in the 21<sup>st</sup> century. It does not decrease the crime rate and it uses monetary resources that could be spent for other crime prevention programs. The use of long-term incarceration and life without parole can protect Texans from criminals while punishing the guilty.

The 1972 *Furman v. Georgia* case resulted in the United States Supreme Court declaring that the death penalty, as it was then being applied in America, was cruel and unusual.<sup>2</sup> This decision was not arrived at because the Court believed that the death penalty as a form of punishment was unconstitutional, but because it was applied in an "arbitrary, capricious, and discriminatory manner contrary to the Eight and Fourteenth Amendments of the Constitution."<sup>3</sup> Justice Potter Stewart, writing for the majority, concluded that "death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual... I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."<sup>4</sup>

The Texas legislature, along with those in many other states, acted quickly to answer the objections of the Supreme Court, and by 1976, there was a new death penalty statute.<sup>5</sup> Since then, the state of Texas has executed over 362 individuals.<sup>6</sup> In 2005 alone, Texas was responsible for the deaths of nineteen of the sixty individuals executed nationwide, continuing its dubious distinction of being the leading capital punishment state.<sup>7</sup> Of those who have been convicted in Texas under the new statute, eight have been exonerated while on death row due to evidence of their innocence.<sup>8</sup> Unfortunately, mistakes in other trials were revealed too late.

Because of errors that have led to the deaths of several individuals, it is necessary to take action to reform the criminal justice system, and eventually to abolish capital punishment in the state of Texas. There is strong evidence to support the notion that this form of punishment is still being administered unconstitutionally, just as the Supreme Court ruled over thirty-four years ago.

# Mortal Mistakes

Texas continues to be infamous for its controversial cases. Among them, questions of inaccuracies such as unreliable witnesses, lack of evidence, incorrect experts, official misconduct, and inadequate defense attorneys often seem to arise. These issues present a picture of a system that often does not protect the innocent or punish the guilty.

## Unreliable Witnesses

### GARY GRAHAM – Executed June 22, 2000



The case of Gary Graham can be used as an example of questionable testimony. Graham grew up in near poverty conditions in Houston and had a history of mental illness on his mother's side and alcohol abuse on his father's side. While his mother was in and out of mental institutions, his father sent him to one relative after another until Graham dropped out of school after seventh grade.<sup>1</sup>

Graham began a crime spree in 1981 and was arrested for allegedly killing a man outside a Houston grocery store. The case had no fingerprints, DNA, or physical proof of the seventeen-year-old Graham's guilt. Of the eight people who witnessed the attack, seven could not identify Graham as the killer. Only one person, Ms. Bernadine Skillern, identified Graham.<sup>2</sup>

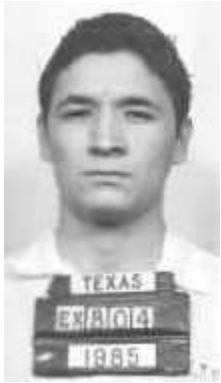
Skillern's testimony was questionable because she saw the culprit from thirty feet away in the evening, after dark. Skillern testified to the courts that she saw Graham's face after he allegedly shot the white drug dealer,<sup>3</sup> for a "second or a split second." Her testimony was crucial in his conviction because she was the only witness on record identifying Graham.<sup>4</sup> The other seven witnesses told stories that differed from Skillern's. Besides not identifying Graham as the killer, they said that the gunman was shorter than Graham, who was 5'10".<sup>5</sup>

Additionally, Graham's defense lawyers at his original trial failed to call to the stand two people who would have testified to Graham's innocence.<sup>6</sup> These alibi witnesses included family members who said Graham was drinking with them outside of their apartment from 6:00 p.m. until after midnight the night of the murder.<sup>7</sup> Three former jurors said they would not have voted against Graham if they had heard from those witnesses.<sup>8</sup>

Graham's case gained national attention due to these inconsistencies. The National Association for the Advancement of Colored People President Kweisi Mfume called his execution "a gross travesty of justice" while Reverend Jesse Jackson maintained that, if the court had heard all the evidence, it would have "exonerated Graham."<sup>9</sup>

Though many maintain racial prejudice and inadequate counsel were also to blame in the execution of Gary Graham, the willingness of Texas courts to execute someone based solely on the testimony of one person highlights a gross error in our capital punishment system.

## RUBEN CANTU-Executed August 24, 1993



Ruben Cantu was only seventeen years old when he was arrested and charged with murder. At eighteen, he was sentenced to death for the murder of Pedro Gomez and the attempted murder of Juan Moreno, who had been shot nine times. In November 2005, twelve years after Cantu was executed by the state of Texas at the age of twenty-six, Moreno, the surviving victim and sole witness in the trial, admitted that Cantu was not the man who shot him and killed Gomez.<sup>10</sup>

Moreno said that Cantu was not even at the scene of the crime.<sup>11</sup> "They put the blame on the wrong person," Moreno said. "Cantu was innocent, I am sure."<sup>12</sup>

Moreno claims he provided the false testimony because police persuaded him to identify Cantu as the killer. Moreno, who was an undocumented immigrant at the time of Cantu's trial, repeatedly failed to pick Cantu out of a photo lineup. However, after the authorities repeatedly questioned him with similar lineups, he changed his story and accused Cantu.<sup>13</sup>

David Garza, Cantu's fifteen-year-old co-defendant, had signed an affidavit stating that Cantu was not with him on the night of the murder. However, the police claimed Garza had told them that he was. Garza called the accusations of the police complete fabrications.<sup>14</sup> Since then, Garza has named another man who he believes is guilty of the murder. Additionally, Eloy Gonzales of San Antonio said that he was with Cantu in Waco at the time of the crime. Yet, Gonzales was never asked to testify at the trial.<sup>15</sup>

The uncertainty surrounding the Cantu execution made headlines nationally and provoked political concern over the death penalty in Texas. Texas state senator Rodney Ellis said, "If the facts we now have are accurate, this was a catastrophic failure of the entire Texas criminal justice system and demands investigation."<sup>16</sup>

Those who were involved in convicting Cantu also expressed their remorse. Sam D. Millsap, Jr., the district attorney who handled the Cantu case, said that he should not have sought the death penalty since it was based solely on the testimony of one witness.<sup>17</sup> "The state of Texas needs to be looking at the fundamental question of whether or not the system is reliable enough to produce the level of certainty that ought to be required in civilized society before people are executed," Millsap said.<sup>18</sup>

The jury that convicted Cantu felt as though the system failed them as well, forcing them to give a sentence that was unjust. The head juror of the case also said, "We did the best we could with the information we had, but with a little extra work, a little extra effort, maybe we'd have gotten the right information...the bottom line is, an innocent person was put to death for it."<sup>19</sup>

Though the cases of Gary Graham and Ruben Cantu are tragic, they are only some of the executions that have and can occur due to testimony that is not factual. The capital punishment system in the state of Texas is inherently flawed because convictions and executions occur based solely on the testimony of one person.

## CARLOS DeLUNA- Executed December 7, 1989



On a Friday night in February 1983, George Aguirre pulled his van into a gas station and noticed a man outside with a knife. Aguirre went inside and warned Wanda Lopez, the twenty-four year old clerk. Aguirre left and Lopez called 911. During the 911 call, she was attacked and stabbed. Meanwhile, Kevin Baker pulled up for gas and saw the attack from his view outside the building. The criminal fled and Lopez staggered outside. Baker grabbed paper towels and attempted to keep her from bleeding. By the time police arrived, Lopez had died. Police surrounded a truck parked a few hundred yards from the station and apprehended Carlos DeLuna. He was handcuffed, placed in a police car and driven to the gas station for identification. Police shined a flashlight into the dark car and Aguirre and Baker identified DeLuna as the killer.<sup>20</sup>

The attack had been brutal and the area behind the gas station counter was a bloody mess. Splatters of blood were on the machine that activated the gas pump and large smears and pools of blood were on the floor. The knife had been left at the scene as well. The fingerprints found were of such poor quality that they were deemed worthless for trial. Surprisingly, no blood samples were taken.<sup>21</sup>

Despite the lack of incriminating physical evidence against DeLuna, he was charged with murder and taken to trial. The defense challenged the identification of DeLuna since he was wearing a white dress shirt when he was arrested and police broadcasts said that the suspect was wearing a gray sweatshirt or flannel shirt. In addition, there was no blood on Deluna's white shirt and shoes, which would have been impossible due to the severity of the crime.<sup>22</sup>

The lack of physical evidence, and the insistence by DeLuna that an acquaintance named Carlos Hernandez had committed the crime, was not enough. DeLuna was convicted on the basis of the quick on-the-scene identification by the witnesses. The prosecution had argued that Hernandez was a "phantom" even though Hernandez was no stranger to the law and had a history of knife attacks similar to the one that had killed Lopez.<sup>23</sup>

On December 7, 1989, DeLuna suffered a violent execution. His execution sent then prison chaplain Rev. Carroll Pickett into therapy. Pickett stated that DeLuna acted more like a withdrawn and frightened teenager than a hardened criminal. An execution requires three different injections. DeLuna's pulse continued after the first one. His ankle then jerked after the second injection. After fifteen seconds, DeLuna lifted his head and tried to speak. He was given the third drug and ten seconds later, he raised his head again, looked at the chaplain and again tried to speak. After the last movement, he finally died.<sup>24</sup>

Years after Carlos Hernandez died in prison in 1999, and sixteen years after DeLuna's execution, Hernandez's friends and family came forward and recounted how Hernandez, a violent felon, had bragged repeatedly that DeLuna went to death row for a murder he committed. Hernandez and DeLuna had been strikingly similar in appearance and Hernandez claimed he escaped due to the witnesses' mistaken identification.<sup>25</sup>

## Lack of Evidence

Individuals in Texas have been convicted and executed based on inaccurate or minimal evidence presented at trial. With a lack of credible evidence, a conviction “beyond a reasonable doubt” is impossible and should automatically prevent a defendant from receiving the death penalty. However, a complete lack of evidence, or even planted evidence, has not saved some from legal execution.

### ODELL BARNES-Executed March 2, 2000



Odell Barnes of Wichita Falls was convicted and sentenced to death in 1991 for the 1989 murder of forty-two year old Helen Bass. Bass was a vocational nurse at the Wichita Falls state hospital. Mary Barnes, a fellow nurse and the mother of Odell Barnes, asked a neighbor to check on Bass when she failed to show up to work on November 30, 1989. When the neighbor, Sharon Mergerson, entered Bass’ home, she found a horrific crime scene: the victim had been bludgeoned with a blunt object, stabbed, and shot in the head.

The walls of her bedroom were smeared with blood and it appeared that she had been brutally raped. This was yet another blow to the small community, which had been suffering in the aftermath of several other violent crimes. The police were feeling the pressure to make an arrest.<sup>26</sup>

Barnes’ trial, however, was full of botched evidence. Prosecutors told the jury that Barnes’ fingerprints were on the lamp that was used to hit Bass. Yet the defense failed to point out that the lamp had actually belonged to Barnes before he had given it to Bass, with whom he was having a consensual relationship. The sperm found from the alleged sexual assault also matched Barnes. Later, special protein testing of the semen sample revealed that the sperm had been deposited 48 hours prior to the victim’s death, indicating that Barnes did not rape her that night.<sup>27</sup>

These mistakes proved to be a deadly combination. The investigation was so inadequate, in fact, that private investigator and former policeman Mike Ward asked, “What happened to actually working on a case? What happened to following every possible lead? When did it change to ‘Let’s just get a conviction, period?’”<sup>28</sup>

The biggest error was yet to come. Two small blood stains on Barnes’ coveralls matched Bass’ DNA. This evidence was the prime focus of the trial. The stains were later discovered to contain a citric acid blood preservative, the type found in forensic or medical laboratories.<sup>29</sup> Kevin Ballard, the blood-preservative expert who found the traces of citric acid, concluded that the stains were either accidentally spilled from a vial or deliberately planted there. Ballard said that it was “the most blatant case of tainted evidence I’ve ever seen.”<sup>30</sup>

The Barnes case attracted international attention with demonstrations outside of U.S. Consulates. International campaigners for Barnes raised money for him in the hope that his case would be reviewed.<sup>31</sup> Barnes filed an application for a stay of execution to the United States Supreme Court. However, the petition for a writ of habeas corpus was denied on March 1, 2000, the day before he was to die.<sup>32</sup> Barnes became yet another victim of the Texas capital punishment system on March 2, 2000.<sup>33</sup>

## DAVID WAYNE SPENCE-Executed April 3, 1996



In two trials in 1984 and 1985, David Wayne Spence was convicted of kidnapping and murdering sixteen-year-old Jill Montgomery and seventeen-year-old Kenneth Franks. The two teenagers were stabbed to death on July 13, 1982 near Lake Waco. Jill had also been raped.<sup>34</sup>

The prosecution charged that Spence had been hired to kill another girl and mistakenly murdered Montgomery. Supposedly, Kenneth Franks was killed by Spence and two co-defendants because he witnessed the crime.<sup>35</sup> Prosecutors told the jury that the two co-defendants helped dump the bodies in the park and that Spence's bite marks were found on the two victims.<sup>36</sup>

Later, after the trial, a "blind panel" of forensic odontologists examined the bite marks. After reviewing the evidence and comparing it to dental models of five people, including Spence, the experts ruled that Spence's teeth were not consistent with the bite marks on the victims' bodies.<sup>37</sup> Other discrepancies included the fact that the palm prints and fingerprints taken from the victims' car did not match that of Spence. Furthermore, the FBI compared pubic and head hairs found on the victims' clothing and binding with samples from Spence and his co-defendants. The results were negative.<sup>38</sup>

The evidence did, however, point to the guilt of Terry Harper. Harper was a convicted felon with a violent past. Independent witnesses came forward to the police because they had heard Harper brag about the crimes even before the bodies had been found. His boasts were highly detailed. He spoke of how one of the victim's nipples was severed in the attack, a fact that had not been made public by law officials. Though the prosecution said his criminal history did not include violence, he had been arrested twenty-five times for assault. Of these, one assault was with intent to murder and another was committed against a minor child. Harper later committed suicide in 1994, nearly ten years after Spence's conviction, when police attempted to arrest him for stabbing an elderly man.<sup>39</sup>

Several people associated with the trial also believed that Spence was actually innocent. Under sworn testimony, Marvin Horton, the lieutenant of the police investigation, said during the trial "I do not think David Spence committed this crime." The homicide detective who investigated the murders, Ramon Salinas, concurred and stated, "My opinion is that David Spence was innocent. Nothing from the investigation ever led us to any evidence that he was involved."<sup>40</sup>

Spence had also asked businessman Brian Pardo to underwrite an investigation to prove his innocence. Pardo, who doubted Spence's innocence initially, agreed on the condition that if some evidence proving Spence's guilt turned up, the investigation would stop. None ever did. "I'm a Republican," Pardo said. "I'm for the death penalty generally. But this has shaken my belief in the justice system."<sup>41</sup>

Spence's petition for clemency was denied and he was executed on April 3, 1996.<sup>42</sup> The trials of Barnes and Spence demonstrate how easy it is to be sentenced to death, even with a lack of evidence or with only questionable evidence. In both cases, the rule of "beyond a reasonable doubt" was disregarded in exchange for a quick conviction.



## Incompetent Experts

Expert witness testimony presents a unique set of circumstances. Often such testimony is accepted without challenge because it comes from an "expert". In some death penalty cases, experts for the prosecution have not been qualified to present evidence. Botched autopsy cases and exaggerated psychoanalyses have led to death sentences for the accused.

### CASES INVOLVING FLAWED AUTOPSY EVIDENCE

#### DR. RALPH ERDMANN



Authorities routinely order autopsies when a victim has died under questionable circumstances. The examiner is then usually asked to testify as an expert witness.<sup>43</sup> Though pathologist Dr. Ralph Erdmann presented evidence with a German accent and last name, he was born Rafael Rodriguez in Chihuahua, Mexico.<sup>44</sup> He had performed autopsies on a table made of a door laid over two 55 gallon drums and also saved time by estimating the weights of organs, not by removing and studying them.<sup>45</sup>

Erdmann's unprofessional manner was well known. Randall County District Attorney Randy Sherrod, who used Erdmann in dozens of criminal cases, acknowledged Erdmann exaggerated his qualifications; for example, claiming he was a ballistics expert. Sherrod also said that Erdmann would "confuse left with right and say 'up' when he meant 'down' because he wouldn't prepare for trials."<sup>46</sup> Sherrod continued, "some of his work habits are strange...he'll take his thirteen year old child to an autopsy" and "had a fascination with carrying around body parts and storing them in his refrigerator."<sup>47</sup>

Erdmann was involved in many capital murder cases. Zane Hamm, a Lubbock warehouse worker, was charged in 1986 with the death of toddler, Amber Lawson. Erdmann testified that he could tell from her autopsy that she had been beaten, and pinpointed her time of death, which was when Hamm had contact with the girl. Since there was not much more evidence to go by, jurors convicted Hamm. However, Dr. Vincent DiMaio, a Bexar County medical examiner and nationally known expert in pathology said, "The time of death is not like in the movies or television. It's very hard. You can be off by a tremendous amount of time. You can literally be off by days."<sup>48</sup>

In 1992, Johnny Lee Rey was convicted and given the death sentence for the murder of 72-year-old Hilton Merriman. Though Rey's defense tried to show that Merriman could have died of a heart attack, Erdmann "proved" to the jury that this was not possible by exhibiting samples of Merriman's healthy heart. It was later discovered that Erdmann used a heart tissue slide of a 29-year-old man. Rey's sentence was reduced to life.<sup>49</sup>

The incompetence of Dr. Erdmann was finally brought to public attention when he fabricated the weight of a man's spleen on an autopsy report and concluded he died of a cocaine overdose. The man's family, convinced he was not a drug user, pointed out his spleen was removed years ago.<sup>50</sup> Texas State Judge John McFall named a special prosecutor to investigate the pathologist. Lubbock attorney, Tommy Turner, discovered that out of 100 of Erdmann's autopsies he sampled, 30 were falsified in some way.<sup>51</sup>

## CASES INVOLVING FLAWED PSYCHOLOGICAL EVIDENCE

### DR. JAMES GRIGSON



Dallas forensic psychiatrist Dr. James Grigson was commonly known as “Dr. Death” by the media as well as many defense attorneys. Grigson’s claim to predict future dangerousness in criminals convinced many jurors of a defendant’s guilt, even though Grigson did not always personally examine the defendant. Grigson measured the accused on a 1 to 10 scale with 10 being the worst sociopath. However, it was not uncommon for him to place many defendants past that point at 12, 13, or even 14.<sup>52</sup> Jurors regularly admitted that it was Grigson’s testimony that convinced them to use the death penalty, especially since he routinely used phrases like “beyond any doubt”, “absolutely”, and “without any question” when speaking of a defendant’s likeliness to commit another crime.<sup>53</sup> Former juror, Myron Grisham, said, “You couldn’t help but listen to what he was saying. He’s a doctor. He had a lot of influence on what we decided.”<sup>54</sup>

Grigson testified in the 1977 trial of Randall Dale Adams. Adams recalled, “Dr. Grigson interviewed me for fifteen minutes. He did not ask about the crime, only about my family. The only thing he wanted to know was my interpretation of ‘a rolling stone gathers no moss’ and of ‘a bird in the hand is worth two in the bush.’ At trial he testified for two hours—one and a half hours about his background, awards, expertise, etc.; half an hour about our interview.” Dr Grigson told the jury that he would place Adams, who had no criminal record, “at the very extreme, worse or severe end of the scale. You can’t go beyond that.” In addition, Grigson said, “There is nothing known in the world today that is going to change this man, we don’t have anything.”<sup>55</sup> Adams was sent to death row for the murder of Dallas police officer Robert Wood. He maintained his innocence but judicial authorities would not review his case and its lack of evidence until Adams’ story inspired the film *The Thin Blue Line*. Eventually, an appellate court threw out his conviction in March of 1989.<sup>56</sup>

The American Psychiatric Association objected to Grigson’s use of psychiatric testimony because it was beyond a psychiatrist’s abilities to predict future dangerousness in patients.<sup>57</sup> The Association reprimanded Grigson twice in the 1980s for his practices.<sup>58</sup> Grigson did not heed the association’s warning and continued to diagnose future dangerousness and evaluate individuals without meeting them. The American Psychiatric Association expelled him from their membership in 1995.<sup>59</sup> They issued a statement that said Grigson violated the organization’s code of ethics by “arriving at a psychiatric diagnosis without first having examined the individuals in question, and for indicating, while testifying in court as an expert witness, that he could predict with 100 percent certainty that the individuals would engage in future violent acts.”<sup>60</sup>

This expulsion did not stop the state of Texas from using Grigson in capital trials. On August 9, 2000, Grigson was appointed to determine whether or not Jeffrey Caldwell was competent to be executed, as required under a Supreme Court decision prohibiting the execution of the insane. Other psychiatrists found him to have serious mental illnesses resulting from organic brain damage. The court, however, would only appoint Grigson to officially evaluate him for the trial. Caldwell’s lawyer, who knew Grigson’s notorious reputation, objected to his use. The court refused to appoint anyone other than Grigson. Caldwell was executed on August 30, 2000.<sup>61</sup>

## **A CASE OF FLAWED PSYCHOLOGICAL AND SCIENTIFIC EVIDENCE**

### **CAMERON WILLINGHAM- Executed February 17, 2004**



In 1991, a large house fire in Corsicana, Texas killed three little girls. Their father, Cameron Willingham, was accused of arson and arrested for murder.<sup>62</sup>

Evidence during his trial included a supposed confession to a jailhouse snitch and neighbors' claims that he did not try hard enough to save his children. The testimony that seemed to seal the deal was that of arson investigators.<sup>63</sup> The investigators stated that the fire was deliberately set by using an accelerant in three different areas of the wood frame, one story home. The experts also told the jury that they had found "twenty indicators of arson" including web-like patterns found on glass at the scene of the crime and the charring of wood under the aluminum threshold. Willingham was found guilty.<sup>64</sup>

Dr. James Grigson testified for the state at the punishment stage of the trial. According to his testimony, Willingham fit the profile of a sociopath whose conduct becomes more violent over time, and who lacks a conscience. Grigson explained that a person with this degree of sociopathy commonly has no regard for other people's property or for other human beings. He expressed his opinion that an individual demonstrating this type of behavior can not be rehabilitated in any manner, and that such a person certainly poses a continuing threat to society.

Only a few weeks before Willingham's scheduled execution, his cousin, Pat Cox, watched a television program featuring Gerald Hurst, an industry-renowned fire expert. Willingham's attorney, Walter Reaves, contacted Hurst and asked him to review his client's case. Hurst did so free of charge.<sup>65</sup>

When Hurst reviewed the evidence, he found that the testimony of the original arson investigators was based upon outdated theories. Only six weeks after the Willingham fire, The National Fire Protection Association (NFPA) had released NFPA 921, a document that contained proven guidelines to determine arson. Unfortunately, original investigators were unaware of these recent developments in fire knowledge. One new revelation had been that the web-like patterns on glass were not induced by fire. Rather, the patterns occurred when water used to extinguish the flames hit the hot glass.<sup>66</sup>

Hurst and his consultants, including Louisiana Fire Chief and Louisiana State University fire instructor, Kendall Ryland, said that the arson indicators used by the original experts were unreliable. Evidence indicated that the fire had advanced to flashover, and accelerant patterns could not be visually identified after that point. They also found that new discoveries had disproved many of the original investigators' arson indicators.<sup>67</sup>

Hurst, also a Cambridge University educated chemist, wrote a report regarding the inaccuracies in the first trial. Reaves, Willingham's attorney, believed that his client would be granted a hearing since Hurst had been instrumental in helping exonerate others in Willingham's position.<sup>68</sup> Reaves took the report to the Texas Court of Criminal Appeals and asked them to review it due to the recent scientific discoveries that had occurred since the trial. However, new scientific knowledge did not fall under the category of newly discovered evidence. The judges and Governor Perry refused to even consider the report.

Cameron Willingham was executed on February 17, 2004.<sup>69</sup>

## Official Misconduct

Sometimes the errors that result in an individual being sentenced to death occur before the trial even begins. In several cases, there has been evidence of prosecutorial and police misconduct, errors that are overlooked in an effort to secure a conviction.

### **JAMES LEE BEATHARD-Executed December 9, 1999**



On the evening of October 9, 1984, Gene Hathorn, Sr., 45, his wife Linda Sue, 34, and their son Marcus, 14, were shot to death while they were watching television in their trailer home outside of Groveton, a small town in east Texas.<sup>70</sup> James Lee Beathard and Gene Hathorn, Jr. were arrested for the murders.<sup>71</sup>

James Lee Beathard was prosecuted first. Beathard claimed that Hathorn acted alone and that he ran away from the trailer and into the woods when Hathorn started to shoot.<sup>72</sup> Prosecutor Joe L. Price presented a different story. He had Hathorn testify that he had fired once through the back window but Beathard burst through the back door and shot everyone inside. Though Hathorn's testimony was the only evidence presented, Price said that Hathorn was "telling the truth. He told the truth before and he is telling it again, and he told it again in here." Beathard was found guilty and sentenced to death.<sup>73</sup>

At Gene Hathorn's trial, however, Price presented the same scenarios, but reversed the roles. Price told the jury that the testimony Hathorn had given at Beathard's trial was false. Price said, "If he told you the truth, I'm a one-eyed hunting dog. It ain't him [Beathard]." Hathorn was found guilty for the same crime that Beathard had been convicted of and was also sentenced to death.<sup>74</sup>

Hathorn later admitted that he murdered his family the evening of October 9, 1984. Hathorn wanted to kill his family in order to collect a modest inheritance. After he had killed them, however, he discovered he had been written out of his father's will.<sup>75</sup> Hathorn stated that in exchange for his testimony in Beathard's trial, prosecutors promised Hathorn that they would not prosecute him for capital murder, but they eventually did.<sup>76</sup>

Beathard was denied clemency even after a review of the case and the defendants' histories. Beathard, an employee at a state psychiatric hospital, had no criminal record. Hathorn, on the other hand, had a violent past and extensive experience with guns.<sup>77</sup>

The courts acknowledged the fact that the prosecutor must have known "that both stories could not be true." They ruled, however, that a defendant's due process rights are not violated when a State prosecutor uses a theory he or she does not necessarily believe in.<sup>78</sup>

Price is still not sure who did exactly what on the night of the crime. "I'll be honest with you, I've vacillated on that one over the years," Price said.<sup>79</sup>

Beathard was executed on December 9, 1999. Hathorn still sits on death row.<sup>80</sup>

## DAVID STOKER-Executed June 16, 1997



David Stoker, a handyman and carpenter, was arrested for the murder of convenience store clerk, David Manrique. Manrique was shot three times and robbed of \$96.<sup>81</sup> The crime took place at Allsup's convenience store in Hale Center, Texas in the early morning of November 9, 1986.<sup>82</sup> However, no physical evidence placed Stoker at the store or established that he owned the gun that killed Manrique.<sup>83</sup> Stoker's subsequent conviction was based on the testimony of three witnesses, psychiatrist Dr. Grigson, and a bullet seized from Stoker's car.<sup>84</sup>

Carey Todd, and Ronnie and Debbie Thompson were the three main witnesses. Todd told the police that Stoker had confessed to him and had given him the murder weapon, which Todd then gave to the police. During the trial, Todd denied under oath that the prosecution gave him any incentives to testify against Stoker. Police Chief Richard Cordell also denied under oath that any reward was paid to the witnesses for their testimony. Additionally, Ronnie and Debbie Thompson said Stoker had confessed the murder to them.<sup>85</sup>

Dr. James Grigson was used as a witness even though he did not personally examine Stoker.<sup>86</sup> Grigson testified that Stoker was a sociopath and would "absolutely" be violent again.<sup>87</sup> Prosecutors claimed a shell found in Stoker's car linked him to the murder but Stoker didn't own the car when the crime occurred. Stoker had actually bought the vehicle months later.<sup>88</sup>

In post-conviction proceedings, Ronnie Thompson recanted his trial testimony. Thompson said he had signed the statement written by his wife without reading it because she had claimed Stoker had raped her, a claim he later found to be false. He claimed the prosecutors threatened to try him for perjury if his trial testimony was any different than the affidavit.<sup>89</sup>

Local police officials obstructed the investigation by giving reward money to Todd. Though they initially testified that no such payment had been made, they changed their testimony after Stoker's post-conviction counsel subpoenaed a cancelled check with which officials had paid a Crimestopper money award to Todd. Hale Center's police chief, Cordell, had testified there was no local Crimestoppers but later admitted he was one of the group's founders.<sup>90</sup>

Todd also had a pending drug charge in a neighboring county that was mysteriously dismissed after Stoker's trial. During post-conviction proceedings, Stoker's lawyers found a note in the prosecutor's file that read "Dismissed: this defendant helped Terry McEachern D.A. solve a murder case."<sup>91</sup> Debbie Thompson never recanted her testimony but during the proceedings, she left Ronnie and moved in with Todd. They then split the Crimestoppers reward, which local officials had denied existed.<sup>92</sup>

Stoker's case was so troubling that Thomas Moss, a Bush appointee to the Board of Pardon and Paroles, voted to grant Stoker clemency, one of only two times he had done so. This did not stop Stoker's execution. Later, police chief Cordell acknowledged there was no "direct tie" between Stoker and the crime. "I was really surprised we did what we did with the amount of evidence we had," he said.<sup>93</sup>

## Inadequate Defense

Though all problems within the capital punishment system in Texas deserve attention, appointed defense attorneys have often been found to be inadequate when defending their clients. Several of these cases have made state, national, and international news. Yet, the problem still exists. Defense lawyers usually wield the most influence in saving the life of an accused individual, but many have come to trials ill prepared, under the influence of substances, or simply a little sleepy.

### **CARL JOHNSON-Executed September 19, 1995**



Carl Johnson, a former soldier, had returned to Houston in the late 1970's with a severe heroin habit. In October of 1978, friend Carl Baltimore convinced Johnson to burglarize Wayne's Food Market. However, both men were met at the scene by elderly security guard, Ed Thompson. There was an exchange of gunfire and Thompson was killed.<sup>94</sup>

Baltimore was given a 40-year sentence, of which he served eight years and was then paroled. Johnson was sent to trial for capital murder, and attorney Joe Cannon was appointed as his defense. Every single one of Cannon's clients prior to Johnson's trial had ended up on death row. At one point in the early 1990's, one in five death row inmates from Harris County had been represented by Cannon.<sup>95</sup> Cannon's co-counsel, Philip Scardino, was an attorney less than one year out of law school.<sup>96</sup>

Cannon's record continued in his representation of Johnson. Cannon actually fell asleep through the proceedings.<sup>97</sup> Cannon napped during the jury selection and also did not interview witnesses before placing them on the stand. Transcripts of the trial indicate that during long periods in which the State was asking questions of individual jurors, Johnson's lawyer said nothing at all.<sup>98</sup> Additionally, transcripts gave the impression that Johnson's lawyer was not present in the courtroom. He was, but he was asleep.<sup>99</sup> Later the jury sent a note to the judge asking him if they could "consider rehabilitation in determining the answer to the second charge [that is, the one concerning whether Johnson would be dangerous in the future]?" Though the judge was supposed to answer in the affirmative to that specific question, he replied, "I can only refer you to the evidence you have heard and the charge of the court." Cannon did not complain or object about the ambiguity of his answer.<sup>100</sup> Carl Johnson was convicted and sentenced to death.

Johnson filed an appeal and in it he stated that Cannon "slept during jury selection and parts of the defense itself."<sup>101</sup> Philip Scardino, Cannon's co-counsel, stated in an affidavit that Cannon slept through "significant periods on numerous occasions" during jury selection.<sup>102</sup> However, both the Texas Court of Criminal Appeals and the United States Court of Appeals for the Fifth Circuit ruled that Johnson was not denied his Sixth Amendment right to counsel. Neither court published its opinion.<sup>103</sup>

Cannon was later disciplined for incompetence in another death penalty case.<sup>104</sup> "I'm not the sort of lawyer who takes a lot of notes," Cannon said.<sup>105</sup> Though Johnson's trial was full of error, he was still executed on September 19, 1995.<sup>106</sup>

## **BILLY CONN GARDNER- Executed February 16, 1995**



Billy Conn Gardner became acquainted with drugs early in his life. At the age of nine, Gardner was given his first hit of heroin by a relative. This began his life as a drug runner. Although almost always in trouble, Gardner was never violent.<sup>107</sup>

In 1983, Thelma Row, a cafeteria supervisor at Lake Highlands High School in Dallas, Texas, was shot in the chest with a .357-caliber pistol. She suffered severe wounds and died eleven days later. Row, 64, had been counting the day's receipts in a back room when a robber shot her and fled with \$1,600.<sup>108</sup>

Gardner was arrested and sent to trial for the crime. The prosecution did not present a strong case. Two witnesses, Carolyn Sims and school custodian Lester Matthews, described the gunman as having reddish-blond hair and a goatee. Gardner had black hair and was clean shaven. The State was unable to produce a single witness or piece of evidence, such as a photo, to prove that Gardner was ever a reddish-blond with a goatee. Additionally, Matthews did not know Gardner and said that he had only seen the killer for three to four seconds. Yet, after viewing police lineups, Matthews fingered Gardner. Matthews was unable to do so until his third police interview, three months after the crime. Another witness, Paula Sanders, a co-worker of Row, had told her husband that thousands of dollars in cafeteria receipts were processed in the back room. Melvin Sanders, Paula's husband, admitted to being a part of the crime but claimed he had only driven the getaway car and Gardner had shot the gun. Paula also told authorities that she could provide no description of the assailant because her back was turned.<sup>109</sup>

Though there was no physical evidence that Gardner committed the crime, Gardner's appointed defense attorney was less than adequate. In fact, he did not point out the aforementioned inconsistencies in the State's case. He also did not interview Paula Sanders, one of the key witnesses in the case. Probably the most detrimental aspect was his relationship with Gardner. He met with the defendant only once before going to trial. The meeting lasted for fifteen minutes before jury selection began.<sup>110</sup> Gardner was eventually sentenced to death.

Gardner fought to have his sentence overturned and in 1988, Christine Wiseman, attorney and associate professor of Marquette University in Milwaukee, Wisconsin, volunteered to represent Gardner. "Woe to you if you're poor," Wiseman said in reference to the inadequate counsel who are assigned in Texas to those who cannot afford their own, "There are no moneyed people sitting on death row." She continued to say that in Texas, "You can buy all the justice you want." Wiseman represented Gardner for seven years up until his death.

Gardner denied his guilt until the end. Just before he was executed, Gardner said, "I forgive all of you and hope God forgives all of you." Even though his case was riddled with uncertainty and his defense was almost non-existent, Gardner, 51, was executed just past midnight on February 16, 1995. "Don't let anyone tell you this is a peaceful way to die, it's a lie, it's a lie, it's a lie," Gardner's sister Barbara Gray said after watching him gasp and jerk during his execution.<sup>111</sup>

# Protection for Texans

The goal of any criminal justice system should be to protect and serve the citizens. While the death penalty has existed in Texas, individuals have been unfairly convicted, the violent crime rate has not declined, and innocent people have died. These are traits of an institution that is the antithesis of its purpose and the justice it is supposed to serve.

## Beyond a Reasonable Doubt?

The justice system should punish the guilty and protect the innocent. The previous Texas cases exhibit how convicted individuals were executed even with serious questions surrounding their guilt. The possibility of any error should concern not only those who are against the death penalty but those who support it as well. If people are to champion a particular policy, they should at least have the assurance that it carries out the task for which it has been created. Unfortunately, twenty-three documented cases have proven otherwise.<sup>1</sup>

*Miscarriages of Justice in Potentially Capital Cases*, a thorough study by professors Hugo Bedau and Michael Radelet, found 343 cases since the turn of the century in which a defendant, facing a possible death penalty, was wrongfully convicted. Of these wrongfully convicted defendants, twenty-five innocent individuals were executed.<sup>2</sup> This number has probably increased since the study was published in 1987.

In another study, James Marquart and Jonathan Sorenson of Sam Houston State University in Huntsville, Texas researched 558 inmates in 30 states and Washington D.C., who had been on death row when their executions were commuted to prison terms by the 1972 *Furman v. Georgia* Supreme Court case. Of these, four killed again while in prison and only one killed again when released. Another four, however, were found to be innocent of their charges. Marquart and Sorenson concluded that "executing all of them would not have greatly protected society. We would have executed nearly 600 convicts to protect us from five. And we would have killed at least four innocent people in the process."<sup>3</sup>

Texas wrongfully convicted and sentenced to death 101 individuals between 1973 and 1998.<sup>4</sup> If the state alone admits to this high number of wrongful conviction of death row inmates, then the chance that innocent citizens may be put to death should be reason enough to at least suspend all executions. Exoneration of the innocent continues even in the most recent years. In 1999 eight innocent people were released from death row across the United States while another fifteen were freed between 2000 and 2005.<sup>5</sup> Other convicted inmates, later proven innocent, were not as fortunate.

As the previous case studies show, the rule of "beyond a reasonable doubt" does not always apply to cases tried in the state of Texas. To prevent innocent people from being killed in the future, as part of a state-sanctioned order, a new system must be implemented.



## A Deterrence?

Another aspect that should be examined is the ability of the death penalty to deter crime. Since capital punishment is touted as a method to punish, not to avenge, it should possess the ability to deter violent crime. A well-respected study performed by Thorstein Sellin of the University of Pennsylvania compared the murder rates of states with the death penalty to states without the death penalty between the years of 1920 and 1958. To promote further accuracy, each state was compared with another state that had similar geographic, economic and social characteristics. The results showed that there were no significant differences between the murder rates of those that used the death penalty and those that did not. In more modern studies, the results remain the same. The thirteen states without the death penalty had a murder rate of as low as 3.7 per 100,000 people in 1997. Those with the death penalty, on the other hand, had a murder rate of up to 8.2 per 100,000.<sup>6</sup>

In "Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas," researchers John Sorenson and Robert Wrinkle, of the University of Texas, and Victoria Brewer and James Marquart, of Sam Houston State University, studied Texas executions between the years of 1984 and 1997. While examining executions and murder rates in Texas, they found no evidence of a deterrent effect when the death penalty was implemented.<sup>7</sup> In fact, the number of executions has actually risen in Texas. It increased from eleven in 1977 to twenty-three in 2004.<sup>8</sup> The following graph illustrates the increase of persons under sentence of death across the nation since the death penalty was first abolished. And although the number of persons under death sentence has risen significantly, there is no corresponding drop in the murder rate. Thus, a death sentence is not a deterrent to violent crime.

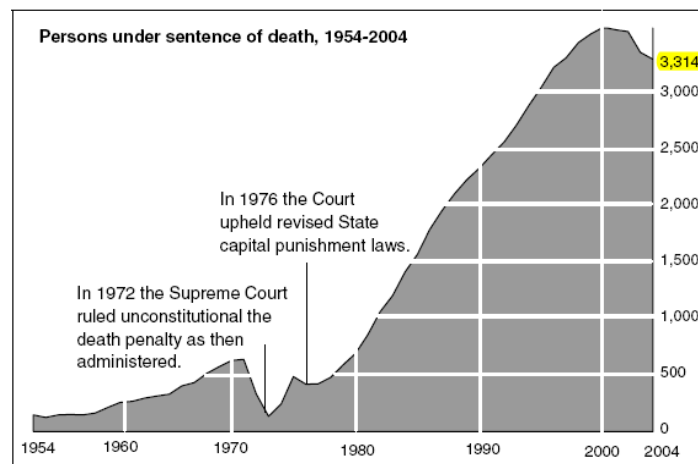


Table 1.1<sup>9</sup>

While the general public may believe that capital punishment deters violent crime, criminologists trained in the field believe otherwise. In a 1991 Gallup poll, 41% of American citizens believed that the death penalty did not lower the murder rate compared to 83.6% of experts who felt likewise. 86.5% of criminologists also agreed that abolishing the death penalty in a particular state would not have any significant effect on the murder rate in that state.<sup>10</sup> President and former Governor of Texas George W. Bush had even voiced his opinion that the death penalty would be futile unless it decreased crime. Bush said, "that's the only reason to be for it." He went on to say that revenge was not enough to justify sentencing someone to death.<sup>11</sup>

## Still Arbitrarily Administered?

As stated previously, the U.S. Supreme Court ruled in 1972 that the death penalty was unconstitutional. The justices held that "...as the statutes are administered...the imposition and carrying out of the death penalty [constitute] cruel and unusual punishment in violation of the Eighth and Fourteenth amendments." The Honorable Justice William O. Douglas quoted former Attorney General Ramsey Clark by stating the following: "It is the poor, the sick, the ignorant, the powerless, and the hated who are executed... [because the law] leaves to the uncontrolled discretion of judges and juries the determination whether defendants committing these crimes should die or be imprisoned. These discretionary statutes are unconstitutional."<sup>12</sup>

When the death penalty was reinstated in Texas in 1976, it was under the assumption that the system had been reformed to no longer be "cruel or unusual", and gave the defendant their "due process under law." However, many cases have shown that the "the poor, the sick, the ignorant, the powerless, and the hated" continue to be targets of a system that is still subjectively administered. A perverse example of the subjectivity of the capital punishment system is the Texas execution of convicted killer David Long. In December 1999, Long tried to take his life before his execution, by overdosing on his anti-psychotic medication. He was taken to a hospital where he was revived but then removed so that he could be lethally injected.<sup>13</sup>

An attempt to apply capital punishment in Texas in a less arbitrary manner occurred in 1999 when the Texas Senate's Criminal Justice Committee passed Senate Bill 326, which would have prohibited sentencing the mentally retarded to death. The bill did not pass into law, a surprise since 73 percent of Texans are opposed to the execution of the mentally retarded.<sup>14</sup> Executing the mentally retarded is cruel but not unusual. Currently, this group constitutes 10 percent of the individuals on death row across the nation.<sup>15</sup> This is the epitome of unconstitutionality since these individuals do not have the mental capacity to defend themselves. James W. Ellis, president of the American Association of Mental Retardation, and Ruth W. Luckasson, a professor of special education, said, "A defendant with retardation may plead guilty to a crime which he did not commit because he believes the blame should be assigned to someone. Similarly, some people with mental retardation will eagerly assume blame to please or curry favor with an accuser."<sup>16</sup>

Ninety percent of death row inmates cannot afford their own attorney at their trial. Poverty prevents many of them from receiving a fair trial.<sup>17</sup> Their sentences, therefore, are not necessarily a reflection of the crimes they supposedly committed but of their socioeconomic status. In the case of Joe Lee Guy, Guy's state appointed attorney used cocaine before his trial and drank alcohol during the court breaks. Guy was subsequently sentenced to death.<sup>18</sup>

Racial issues permeate our capital system. Clarence Brandley, an African American, was sentenced to death in 1980 by an all white jury. Only eleven months after his conviction, his attorneys discovered that 166 of the 309 exhibits used at his trial had mysteriously vanished. The Texas Court of Criminal Appeals ordered an evidentiary hearing resulting in Brandley's release in 1990. The court stated that "...the color of Clarence Brandley's skin was a substantial factor which pervaded all aspects of the State's capital prosecution of him."<sup>19</sup>

# Suggestions for Reform

The research presented has led us to formulate several conclusions about reforming the criminal justice system in the state of Texas. Although the work that needs to be done is extensive, a more reliable and fairer system that helps all Texans and protects all citizens is mandatory.

## **Implement measures to eliminate official and trial misconduct.**

After Republican Illinois governor, George H. Ryan, enacted a moratorium in his state, he created the Commission on Capital Punishment to guide him with recommendations.<sup>1</sup> In the area of misguided police practices, the Commission found the following areas in need of utmost improvement: general police practices, custodial interrogations, eyewitness identification procedures, and law enforcement training.<sup>2</sup> What is appropriate in Illinois is appropriate in the State of Texas.

### Complete Investigations.

First and foremost, after a suspect is identified, police and investigators should be required to investigate all leads, even if they point away from the suspect in custody. This will obligate investigators to solve the crime itself. Additionally, the police should be required to create a schedule of all items that may be of relevant evidence and allow both the prosecution and defense equal access to them.<sup>3</sup>

### Video Tape Interrogations.

To prevent coerced confessions, all interrogations should be videotaped. The police should also make a reasonable attempt to analyze the suspect's mental capacity before interrogation. In case the suspect is mentally retarded, he will not be led to admit to a crime he has not committed. Eyewitnesses should be told that the suspected perpetrator may not be in a lineup. This way, they will not feel pressured to identify someone who may not have committed a crime. If the eyewitness does identify a suspect, he should be required to write a statement to specify the level of confidence he has in that person's guilt. Finally, all police who work on homicide cases should receive periodic training to further their knowledge of the risks of false testimony, wrongful convictions, interrogation methods, forensic evidence, and false confessions.<sup>4</sup>

### Qualified Legal Representation.

All judges and defense lawyers participating in capital cases should be adequately trained in hearing and representing a capital punishment case. A process should be implemented to certify that both the judge and the defense attorney are qualified through experience, training, or both. They should also receive periodic training equal to that of the law enforcement officials mentioned previously.<sup>5</sup>

### Mental Capacity. Future Danger.

During a trial, testimony from psychiatrists who claim to be able to predict "future dangerousness" should be excluded. On the other end of the spectrum, defendants whose IQ's place them at the mental retardation level should not be sentenced to death. Any deviation from these rules can be seen as trial misconduct as well.

## Review of Claimed Misconduct.

An independent body should be created to investigate claims of official and trial misconduct. Cases should be reviewed for any mistakes that may have resulted in an unfair conviction. Criminal or disciplinary charges should be made against the perpetrators .<sup>6</sup>

### **Instate a statewide public defender system and/or provide public defenders with access to adequate funding for qualified/independent experts, consultation, and tests.**

A two-year study released by the Spangenberg Group, a nationally recognized consulting firm that specializes in improving justice programs, called the indigent defense situation in Texas “desperate” and described it as the worst among the death penalty states. Texas is actually one of only seven states that currently does not provide funds for capital representation to those who cannot afford it.<sup>7</sup> The responsibility for paying indigent defense attorneys rests with Texas counties.

In the state of Texas, private lawyers are appointed but inadequately funded. Though the study found problems to exist in every step of the capital punishment process, the “crisis” stage occurred in state habeas corpus proceedings. Lawyers are rarely appointed to death row inmates and those who are appointed are under-compensated for their work. The state has been reduced to relying on a small supply of volunteer lawyers who cannot handle the large volume of death row appeals.<sup>8</sup>

Texas should instate a statewide capital public defender system, or short of this, provide adequate monetary funding to a trial support unit. Statewide statutory standards for capital trial counsel should also be implemented. A peer review system and capital trial training should also be required. Defense attorneys who do not meet the established standards should not be appointed to defend a suspect. The public defenders should be kept on a Court of Criminal Appeals’ list of qualified counsel and should be removed from the list if their performance is ever mediocre.<sup>9</sup>

Regarding funding, the Spangenberg Group research recommended the state pay half of the costs of providing two defense lawyers for capital trials and all of the costs of two lawyers in state habeas proceedings. Currently, an appointed defense attorney may be paid as little as \$12 per hour.<sup>10</sup>

To increase funding for attorneys representing indigent clients, the governor and state legislature would need to work closely with the Court of Criminal Appeals to allocate funds. Currently, the Fair Defense Act governs these issues and requires counties to annually write plans on how they will fairly appoint indigent defense counsel in all criminal cases. The judges who provide these written details are required to submit them to the Texas Task Force on Indigent Defense. Instead of having to create an entirely new statute, however, lawmakers could just amend the already existing Fair Defense Act. Since the Texas Task Force on Indigent Defense is already authorized to develop statewide policies and standards governing capital representation, amendments could authorize them to petition for certification of expenses for necessary litigation expenses.<sup>11</sup> The cap on fees paid to capital habeas corpus attorneys should be removed. Instead, the counsel should be paid fairly for their time and work.<sup>12</sup>

These changes are especially important since it has been proven time and time again that ineffective counsel can lead to a guilty verdict.

**Make DNA testing a mandatory procedure in capital cases  
where DNA evidence is available and allow death row prisoners  
the right to be DNA tested.**

DNA tests have been used in the past to prove someone's guilt, and they are now being used to exonerate the innocent. Since the late 1990s, dozens of prisoners, some on death row, were proven through DNA tests to be wrongly convicted.<sup>13</sup> A statute was recently created to provide defendants access to testing physical evidence. However, the Court of Criminal Appeals has limited the use of that statute and has thus prevented access to DNA evidence in many cases of proposed innocence.<sup>14</sup> Because of the accuracy of DNA testing; it should be a mandatory procedure in capital cases where such evidence is available.

Attorneys of those on death row should be allowed to use current DNA technology. All procedural technicalities should be put aside when untested physical evidence could prove or disprove the inmate's guilt.<sup>15</sup> State rules must be flexible enough to correct these errors "after the fact."<sup>16</sup> Courts need to be receptive to new tests that may prove the actual innocence of those already convicted.<sup>17</sup>

The cost of DNA "fingerprinting" has decreased. When tests were first administered, they cost around \$5000. Now, the newest versions cost around \$100.<sup>18</sup> Complaints that say these tests are too expensive and time consuming are unfounded.<sup>19</sup> Funding earmarked for DNA testing for indigent defendants should be established to ensure a fair trial.<sup>20</sup>

Minimum standards for DNA evidence should also be established. In the state of Texas, it is the responsibility of the district attorney to turn over evidence that may establish the innocence of an accused individual. Texas does not have a law that requires the full disclosure of evidence pertaining to DNA results. Since this law is absent, requests for these results are usually denied by the Court of Criminal Appeals.<sup>21</sup>

Not only would mandatory DNA testing more accurately prove someone's guilt or innocence in capital punishment cases, but DNA testing would also greatly decrease the statistical probability of bias. Bias, whether it is against an individual's gender, race, or sexual orientation, has often been proved to be sufficient to set aside a conviction. In many Texas cases, it has been sufficient to also sentence a defendant to death. DNA testing may be the only way to offset the biases of a law enforcement officer, lawyer, judge, or jury. A conviction based on proof rather than prejudice would reduce biases and help reform our capital punishment system.<sup>22</sup>

# An Interim Plan

Texas should instate an immediate moratorium on executions.

To successfully implement a moratorium, Texas could follow the guidelines as outlined by the American Bar Association. During the American Bar Association Midyear Meeting held in San Antonio, Texas in 1997, the ABA voted to urge jurisdictions not to carry out death sentences until the following goals were met:

- Competent legal counsel was provided at all stages of the conviction, sentencing and appeals processes.
- Due process was preserved, especially in adjudication of constitutional claims in state post conviction proceedings and in federal habeas corpus proceedings.
- Racial discrimination that resulted in death sentences was eliminated.
- Executions of the mentally retarded and those that committed the offense when they were under the age of 18 were prevented.

Former American Bar Association President John J. Curtin said that their resolution "is not a referendum on the death penalty. It expressly takes no position on the death penalty." Curtin reiterated that this move was made because "We need to reaffirm our commitment to justice."<sup>1</sup> At the time of the outline of these goals, ABA President Anthony Amsterdam said, "Whatever one's views about capital punishment in the abstract, there are compelling reasons to believe that the way it is practiced in the United States today is fatally unjust and prone to error."<sup>2</sup>

Death sentences given before the instatement of a moratorium would be commuted to life imprisonment. Those convicted of violent crimes during the moratorium would also be sentenced to life in prison without parole. An innocence commission should then be created to review all claims of innocence that may exist in our criminal justice system.<sup>3</sup> In Illinois, Governor George Ryan also appointed a commission to study whether the conditions of the criminal justice system that led to the near executions of 13 innocent individuals could be fixed. The taskforce had both pro- and anti-capital punishment advocates. This provided an opportunity for a consensus and gave Congress and the courts the opportunity to appoint a commission to ask tough policy questions.<sup>4</sup>

Texas would not be alone in these efforts. Moratoriums are currently under consideration in several other capital punishment states.<sup>5</sup> Texas now has a number of examples of state level moratoriums as guides, in addition to the regulations set forth by the American Bar Association and the state of Illinois. A death penalty moratorium would not be equal to the abolition of the death penalty all together. Rather, it would allow a debate on the topic and an opportunity to arrive at a more efficient and just system in capital cases. At the same time, the convicted could wait for the resolution of their appeals without fear and with greater confidence in the Texas judicial system.

## Appendix A

Though the very thought of abolishing the death penalty has been met with reluctance by both federal and state lawmakers, some American states and, many foreign nations have already passed such legislation. Those U.S. states that have abolished the death penalty seem to have fared much better than Texas when it comes to violent crime.

### A United States Perspective

There have been 362 executions in the state of Texas since the death penalty was reinstated in 1976. Though this high number may not be shocking, what is surprising is that the state with the next highest number of executions since 1976, Virginia, has executed only ninety-four. Texas continually leads the country in the number of people it sentences to die and kills each year.<sup>1</sup> As of September, 2006, Texas was once again leading the country in the number of executions.

STATE	TOTAL EXECUTIONS	EXECUTIONS IN 2006, January - September	EXECUTIONS IN 2005
TEXAS	375	20	19
VIRGINIA	97	3	0
OKLAHOMA	83	4	4
MISSOURI	66	0	5
FLORIDA	60	0	1
NORTH CAROLINA	40	4	5
GEORGIA	39	0	3
SOUTH CAROLINA	35	1	3
ALABAMA	34	0	4
LOUISIANA	27	0	0

Table 2.1<sup>2</sup>

Twelve states and the District of Columbia, however, have abolished the death penalty: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin.<sup>3</sup> None of these jurisdictions are in the South, which has the highest murder rate in the country even though it accounts for 80% of America's executions. The Northeast, which commits only 1% of the country's executions, has the lowest average murder rate at only 4.2 per every 100,000. This analysis is expressed in the following chart representing 1976 through the year 2005:

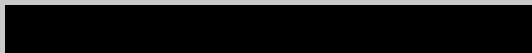




<b>EXECUTIONS BY REGION OF THE US</b>		
<b>REGION</b>		<b>TOTAL</b>
<b>SOUTH</b>		<b>854</b>
<b>MIDWEST</b>		<b>121</b>
<b>WEST</b>		<b>66</b>
<b>NORTHEAST</b>		<b>4</b>
<b>TEXAS &amp; VIRGINIA ALONE</b>		<b>472</b>

Table 2.2<sup>5</sup>

### **A Worldwide Perspective**

From a worldwide perspective, the United States has not been progressive in capital punishment issues. More than half of the countries in the world have now abolished the death penalty. Seventy-six have for all crimes, sixteen have for all but war crimes, and twenty can be considered “retentionist” countries since capital punishment is still in law but has not been used in over ten years.<sup>6</sup>

The death penalty had not been carried out in some European countries since as early as 1826. Finland was the first country to suspend the use of capital punishment and following Finland’s lead were Portugal, the Netherlands, Romania, Italy and Switzerland, all before the twentieth century.<sup>7</sup> The majority of European countries continued to abolish the practice and since 1990, Azerbaijan, Bulgaria, Cyprus, Georgia, Poland, Serbia, Montenegro, Turkmenistan, and the Ukraine have done so as well. However, 1,526 people were still executed in 2002. Of these executions, 81% were administered by China, Iran, and the United States of America.<sup>8</sup>

In fact, the countries that are known to have carried out legal executions in 2002 include the following: Belarus, China, Egypt, Equatorial Guinea, India, Iran, Iraq, Japan, Jordan, Kazakhstan, North Korea, Kuwait, Malaysia, Nigeria, Pakistan, Palestine, Saudi Arabia, Singapore, Somalia, Sudan, Syria, Taiwan, Tajikistan, Thailand, Uganda, United Arab Emirates, Uzbekistan, Vietnam, Yemen, Zimbabwe, and the United States.<sup>9</sup>

America’s decision to diverge from the practices of countries that “share with it a common political heritage and culture” has led to it being the only country in the Western world to still use capital punishment.<sup>10</sup>



# Appendix B

## Cost of the Death Penalty

Another aspect to consider is the amount of money the state of Texas spends compared to states that just use Life without Parole. A 1992 study disclosed that Texas spends an average of \$2.3 million per execution vs. Life in Prison at \$750,000.<sup>1</sup> This cost estimate may have increased since that research took place over fourteen years ago. The appeals and retrials noted in this document are necessary to catch the many fallacies in the system.

The expenditures result from the large number of indigent people who are prosecuted. These defendants, as mentioned earlier, are unable to pay for their own defense. Their expenses, and additional court fees, rest upon the state and the county in which they are prosecuted.<sup>2</sup> Jasper County, Texas ran up a bill of \$1.02 million, with other expenses expected, forcing a 6.7% increase in property taxes over 2 years to pay for the death penalty trial of the 3 men accused of killing James Byrd, Jr.<sup>3</sup>

It is important to note that since the state of Texas does not have a public defenders office the quality of legal representation varies greatly from county to county, and attorney to attorney appointed to represent capital clients. The financial outlay provided by Texas counties is generally not sufficient to cover the traditional costs of hiring experts and private investigators to provide a quality defense. Thus the cost estimate for a capital trial is also on the cheaper end of the scale, quantity vs., quality.

### TEXAS: Average Cost of a Death Penalty Case in Texas

TRIAL: court personnel \$ 74,000  
jury panel \$ 17,220  
2 defense attorneys, expert  
witnesses, investigators \$112,400  
3 prosecuting attorneys \$ 38,052  
judge \$ 23,968  
**total \$265,640**

STATE APPEALS: defense \$15,000  
prosecution \$29,000  
reproducing trial records \$20,000  
court of criminal appeals\$30,240  
**total \$94,240**

FEDERAL APPEAL:  
defense counsel \$ 92,000  
state attorney general's office  
\$ 19,600  
appellate court \$ 1,708,000  
**total \$ 1,819,600**

DEATH ROW INCARCERATION:  
1 inmate \$ 136,875  
**TOTAL COST: \$ 2,316,355**

(source: Dallas County, Dallas Morning News, March 8, 1992)

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# Contact and Researcher Information

## The Texas Coalition to Abolish the Death Penalty

The Texas Coalition to Abolish the Death Penalty (TCADP) is a Texas grassroots organization dedicated to ending the death penalty in the state of Texas. TCADP is made up of human rights activists, death row prisoners and their families, crime victims and their families, persons working within the criminal justice system, persons opposed to capital punishment due to religious and moral grounds, and individuals and organizations who oppose capital punishment for other reasons.

TCADP educates citizens in churches, schools, and other organizations. TCADP provides support to victims of crime and their families and friends, and prisoners on death row and their families and friends. TCADP also assists in developing international support for the abolition of the death penalty through close contact with international abolition supporters. Most importantly, TCADP supports federal and state legislation aimed at making the judicial process more fair and, ultimately, abolition of the death penalty.

TCADP invites and solicits support from all people of any class and race, within and outside the state of Texas. TCADP is affiliated with the National Coalition to Abolish the Death Penalty.

TCADP may be reached on the web at <http://www.tcadp.org>, by phone at (512) 441-1808, and at the following mailing address:

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