

Texas Death Penalty Developments in 2011
The Year in Review

Texas Coalition to Abolish the Death Penalty
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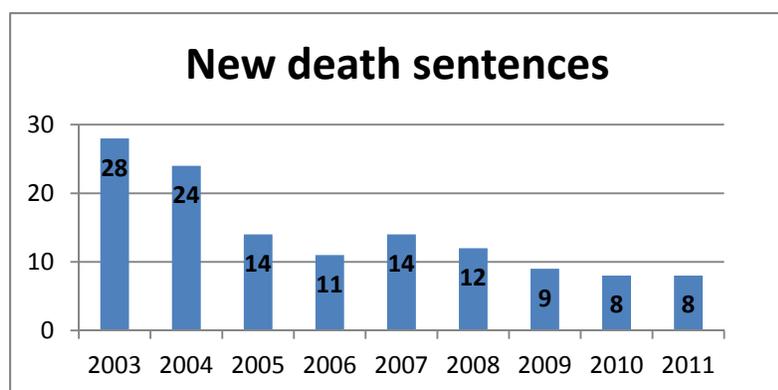
The Texas Coalition to Abolish the Death Penalty (TCADP) publishes this annual report to inform citizens and elected officials about issues associated with the death penalty in Texas during the past year. It presents information on new death sentences, executions, and stays; reduced sentences; legislative developments; and other issues affecting the criminal justice system in the nation's most active death penalty state. The report is available online at www.tcadp.org/TexasDeathPenaltyDevelopments2011.pdf.

Death Sentences

New Death Sentences

New death sentences in Texas have dropped more than 70% since 2003 and remained at a historic low level in 2011. According to data compiled from news sources and the Texas Department of Criminal Justice (TDCJ), juries condemned eight new individuals to death in Texas in 2011. This remains the lowest number of new death sentences since the U.S. Supreme Court upheld Texas' revised death penalty statute in 1976.

As in 2010, just six counties in the state of Texas accounted for the new death row inmates: Fort Bend (1); Galveston (1); Harris (3); Harrison (1); Tarrant (1); and Travis (1). This represents 2% of all Texas counties. While five of these counties have imposed multiple death sentences over the years, this was



only the second death sentence imposed in Harrison County since 1976.

An analysis of data from 2007 to 2011 reveals that only 23 Texas counties have imposed death sentences over the last 5 years; of these, only 10 counties have done so in the last 2 years. Out of a total 51 death sentences imposed in this time period, Harris County leads with 9; it is followed by Dallas County, with 7

new sentences since 2007, and Tarrant and Travis Counties, with 4 new sentences each. The other 19 counties imposed 1-3 sentences each. Together, these 23 counties represent just 9% of the 254 counties in Texas. View maps of new death sentences by county from 2007 to 2011 and from 1976 to 2011 at www.tcadp.org.

Among the highest sentencing counties in Texas, there were several noteworthy developments in 2011:

- No new death sentences were imposed in Dallas County for the first time in five years (read more in Jury Rejections/Convictions on Lesser Charges and Reduced Sentences below). Overall, Dallas County accounts for 102 death sentences since 1976 (7 of these have been imposed since 2007).
- Harris County accounted for more than a third of the new death sentences, with nine new death sentences overall since 2007. Still, this is a significant departure from the 1990s, when Harris County sent as many as 15 people to death row in a year.
- Bexar County, which has sentenced the third highest number of people to death in Texas, has not imposed any new death sentences since 2009.

Texas' Highest Sentencing Counties, 2007-2011							
	2007	2008	2009	2010	2011	Total 2007-2011	Total Since 1976
Harris	4	0	0	2	3	9	289
Dallas	1	3	1	2	0	7	102
Travis	1	0	1	1	1	4	19
Tarrant	0	2	1	0	1	4	70
Bexar	2	0	1	0	0	3	75
Total:	8	5	4	5	5	27	555

- While Tarrant County has sentenced 70 people to death since 1976, this was its first new death sentence in two years.
- The case of Areli Carbajal Escobar, a Mexican national, represented the tenth time that Travis County prosecutors have asked a jury to impose the death penalty in the past decade. In those cases, juries have chosen life in prison four times and death six times.¹ It was the third new death sentence in Travis County in as many years and the nineteenth since 1976.

Four of the new death row inmates in 2011 are African American, two are Hispanic/Latino, and two are white. Over the last five years, nearly three-fourths of all death sentences in Texas have been imposed on people of color – 41% African American, 29% Hispanic/Latino, and 2% other.

In Harris County, where these patterns are even more pronounced, 12 of the last 13 defendants sentenced to death have been African American. The thirteenth death sentence was imposed in October 2011 on Jaime Cole, who is Hispanic. The last death sentence imposed on a white defendant in Harris County occurred in November 2004, when serial killer Anthony Shore was sent to death row. According to an investigation by the *Houston Chronicle*:

- Eight of 12 African Americans were sentenced to death during the tenure of Chuck Rosenthal, who resigned as district attorney in 2008 over sexually-charged and racially-tinged emails.
- Under [current Harris County District Attorney Patricia] Lykos, four more African Americans and one Hispanic also were sentenced to die.
- More than a third of the state's current 304 death row inmates came from Harris County, as did half of the 121 African American inmates on death row.
- An analysis of more than 300 recent court cases shows that African Americans account for about half of recent murder arrests in Harris County, but they more often get charged with capital murder than whites or Hispanics.²

While African Americans comprise only 12% of the population of Texas, they comprise 39.8% of death row inmates.³ Hispanics/Latinos comprise 29.3% of the death row population, and whites comprise 29.6%. As of November 17, 2011, TDCJ counted 304 death row inmates, which includes 10 women.⁴ Texas holds the third-largest death row population in the nation, after California (721) and Florida (394).

See Appendix A for a list of new death row inmates in Texas.

¹ "Escobar sentenced to death for slaying of 17-year-old," *Austin American-Statesman*, May 20, 2011

² "Harris death penalties show racial pattern," *Houston Chronicle*, November 14, 2011

³ See <http://quickfacts.census.gov/qfd/states/48000.html> for more information.

⁴ Chelsea Richardson, Ricky Kerr, and Fernando Garcia, who received reduced sentences late in the year, still appear on TDCJ's list of "Offenders on Death Row".

Jury Rejections/Convictions on Lesser Charges

Jurors rejected the death penalty during the punishment phase in one capital murder trial in 2011, resulting in a sentence of life in prison without the possibility of parole. In two other cases, death-qualified jurors convicted the defendant on a charge less than capital murder, which removed the death penalty as a sentencing option. Over the last four years, death-qualified juries have rejected the death penalty in at least 14 capital murder trials.

- On August 26, 2011, a jury in Hidalgo County rejected the death penalty for Roberto Rojas, a Mexican national who was convicted of killing his mother-in-law, Amelia Rivera Flores, and three young children in 2008. The youngest child, 2-year-old Osiel, was Rojas' son, and Silvestre and Mauro Garza, ages 6 and 8, were his stepsons. He also shot his ex-wife, Amelia Flores, who survived the assault. According to *The Monitor*, which covers the Rio Grande Valley, the jury deliberated for seven hours before reaching consensus. While they determined it was probable that Rojas will commit a violent act in the future, at least ten jurors agreed on the second question that some mitigating factors should save him from death.⁵ Rojas has been sentenced to life in prison without the possibility of parole.

This is the second time in the last two years that a jury in Hidalgo County has rejected the death penalty in a capital murder case. On September 28, 2009, jurors rejected the death penalty for Mario Quintanilla, who was convicted of the murder of 23-year-old Larissa Cavazos during a botched home invasion. Quintanilla testified in the sentencing phase, during which he 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.

Another recent case in the Rio Grande Valley shares some similarities with the Rojas case and highlights the arbitrary imposition of the death penalty, particularly in light of alternative sentencing options. On July 29, 2010, a Hidalgo County jury resentenced John Allen Rubio to death for murdering his common-law wife's three children in 2003. The case was moved from Cameron County due to pretrial publicity. The Texas Court of Criminal Appeals overturned Rubio's original conviction and death sentence in 2007. The court found that statements from Angela Camacho, the mother of the children and Rubio's common-law wife, had been improperly admitted as evidence in the original trial. Camacho pled guilty to her role in the murders and is serving a life sentence.

During his retrial, Rubio's lawyers presented experts who testified that their client suffered from paranoid schizophrenia and believed that the children were possessed by demons. The jury rejected his plea of not guilty by reason of insanity, however, and resentenced him to death. Jurors did not have the option of sentencing Rubio to life in prison without the possibility of parole, since this form of punishment did not become law in Texas until September 2005.

- On June 10, 2011, the jury in the Dallas County case of Charles Payne rejected the charge of capital murder and instead found him guilty of murder in the shooting of police officer Senior Cpl. Norm Smith. Because the jury found him guilty of a lesser charge than capital murder, Payne was no longer eligible for the death penalty. According to the *Dallas Morning News*, "This is the 1st time since 1996 that Dallas County prosecutors seeking the death penalty have not won a capital murder conviction. In the case from that year, the jury gave the defendant a life sentence for murder."⁶

Payne claimed that he did not know that Senior Cpl. Smith was a police officer when he appeared at the door of his apartment and instead thought he was an intruder. Jurors rejected his claim of self-defense, however, and sentenced him to life in prison for the shooting.

⁵ "Roberto Rojas granted life," *The Monitor*, August 27, 2011

⁶ "Murder verdict means Dallas officer's killer won't face death penalty", *Dallas Morning News*, June 10, 2011

- On November 23, 2011, a Cameron County jury found Wilfred Padilla guilty of murder and engaging in organized crime, but acquitted him of capital murder. He was convicted of ordering the 2003 murder of JoAnn Chavez. Prosecutors had sought the death penalty. Based on the lesser charges, jurors sentenced Padilla to 50 years in prison and a \$10,000 dollar fine for the murder charge and 30 years in prison and a \$10,000 fine for the engaging in organized criminal activity charge. The two sentences will run consecutively.⁷

Resentences

On March 9, 2011, a Harris County jury resentenced Brian Edward Davis to death for the 1991 murder of Michael Alan Foster. The Texas Court of Criminal Appeals ordered a new punishment hearing in 2009 after determining that flawed instructions given to jurors in his original trial did not allow them to properly consider mitigating factors that might have rendered the death penalty inappropriate. According to the *Houston Chronicle*, Harris County has resentenced five men to death since November 2004.⁸

Other Case Developments

In July, the capital murder trial of John Edward Green, which was in its sixth week of jury selection, ended abruptly when Harris County prosecutors accepted an offer from the defense. In the deal, Green pled guilty to a lesser murder charge in exchange for a 40-year prison term; he had faced a possible death sentence if convicted on the charges of robbing and fatally shooting Huong Thien Nguyen, a 34-year-old mother of two, and wounding her sister, My Huong Nguyen, in 2008.

In March 2010, a pre-trial motion in the Green case led Harris County District Judge Kevin Fine to declare the administration of the death penalty unconstitutional, due to the risk of executing the innocent. Judge Fine later rescinded his ruling but called for a hearing on the issue. That hearing, which took place in December 2010, resulted in two days of unprecedented testimony on the risk of wrongful conviction before it was halted by the Texas Court of Criminal Appeals. The court later ruled in favor of a motion from the Harris County District Attorney's office to bar the proceedings.

A press release from Harris County District Attorney Patricia Lykos regarding the plea deal in the Green case noted that, "The victim's husband and sister (who is also a victim in this case) related that they wanted finality and certainty of sentence. They expressed grave concerns regarding the pretrial proceedings and previous rulings in this case. We shared their concerns."⁹

Executions

The State of Texas carried out 13 executions in 2011, the lowest number for the state since 1996 and 50% less than in 2007.¹⁰ It accounted for 30% of U.S. executions this year, once again a smaller percentage than years past but still twice as many as any other state.¹¹ Texas has executed a total of 477 people since 1982; 238 executions have occurred during the administration of Texas Governor Rick Perry (2001 to the present), more than any other governor in U.S. history.

Of the 13 people executed in Texas this year, six were white, four were Hispanic/Latino, and three were African American. All were male.

⁷ "Mexican Mafia member gets 50 years for Harlingen woman's murder," ValleyCentral.com, December 1, 2011

⁸ "Harris death penalties show racial pattern", *Houston Chronicle*, November 14, 2011

⁹ "Victims' family OK with plea deal in death penalty case," *Houston Chronicle*, July 7, 2011

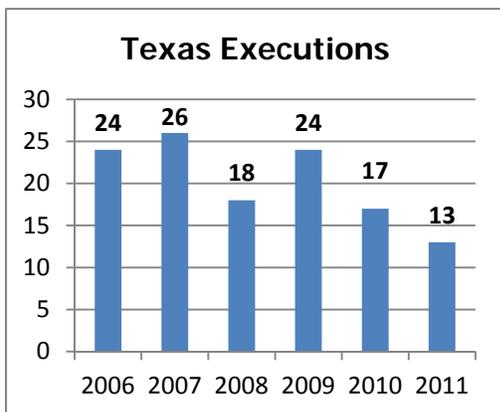
¹⁰ There were three executions in 1996. In 1995, the Texas Legislature passed a state habeas reform measure that, for the first time under Texas law, provided appointed counsel in state habeas proceedings, established a process for appointment, and payment for counsel. A large number of death row inmates were eligible for appointed counsel for state habeas, which impacted executions the next year.

¹¹ In 2010, Texas accounted for 37% of U.S. executions. From 2005 to 2009, it accounted for 45-62% of all executions nationwide.

Just three counties – Bexar, Dallas, and Tarrant – accounted for more than half of the executions (53%). Three inmates had been convicted in Bexar County and two each were convicted in Dallas and Tarrant Counties. Other counties of conviction were: Bowie; Brazos; Denton; Fort Bend; Harris; and Nueces.

Among those executed in 2011, the following cases illustrate some of the issues that impact the administration of the death penalty in Texas:

- On February 22, 2011, the State of Texas executed Timothy Adams, despite the pleas of his family, nearly 100 faith leaders representing diverse traditions, and three of the jurors who originally sentenced him to death. He was convicted of killing his son, Timothy Jr., while planning his own suicide in 2002. Members of his family, who are also the victim's family members, along with his church community, urged the Texas Board of Pardons and Paroles and Governor Rick Perry to show mercy by commuting Adams' sentence to life. His family noted that an execution would do nothing to repair the loss and anguish they have experienced since the time of the crime.



Adams was a devoutly religious military veteran who took full responsibility for his actions by pleading guilty at trial. He had no criminal history before his crime, and none after. In his eight years on death row, Adams was a model prisoner - he did not have a single disciplinary write-up.¹²

- On May 3, 2011, the State of Texas carried out the execution of Cary Kerr under a new lethal injection protocol that uses pentobarbital rather than sodium thiopental as the first drug in the process. He was sentenced to death in 2003 for the rape and murder of Pamela Horton in a Fort Worth suburb. This was the first execution since 1982 that used a different cocktail of drugs. See Other Developments below for more details on the change in the lethal injection protocol.
- On June 21, 2011, the State of Texas executed Milton Mathis for the 1998 murders of Travis Brown and Daniel Hibbard in Fort Bend County. He was 19 years old at the time of the crime. Mathis was executed despite compelling evidence of his mental retardation, including IQ tests on which he scored as low as 62, well below the threshold for intellectual disabilities in most states. In an op-ed that appeared in the *Dallas Morning News*, former Texas Governor Mark White called for a federal review of the merits of his claim of mental retardation, noting that:

The U.S. Supreme Court ruled almost a decade ago that the execution of those with mental retardation is unconstitutional. Unfortunately for Mathis, this ruling came weeks after his capital conviction was finalized. So Mathis has had to navigate the confusing labyrinth of state and federal law that govern legal claims after convictions in order to present the evidence of his mental retardation to a court. ...¹³

The U.S. Supreme Court decision *Atkins v. Virginia* (2002) prohibits the application of the death penalty to persons with intellectual disabilities. At least 13 inmates have been removed from Texas' death row since 2002 in compliance with *Atkins*.

¹² <http://www.timothywayneadams.com/>

¹³ "Justice demands a review in Texas death penalty case," *Dallas Morning News*, June 17, 2011

- Humberto Leal was executed on July 7, 2011 for the 1994 rape and murder of Adria Saucedo in San Antonio. At his trial, Leal was represented by two inexperienced attorneys who did not challenge the junk science used to convict him; they also neglected to present mitigating evidence that might have resulted in a sentence other than death. As a Mexican national, Leal was legally entitled to seek assistance from the Mexican consulate. Texas authorities failed to inform him of this right, which is afforded to Americans and foreigners who travel abroad by the Vienna Convention on Consular Relations. If the government of Mexico had been informed of Leal's arrest, it could have provided him with highly qualified and experienced legal counsel, as well as funding for necessary experts and investigators. Instead, Leal received grossly inadequate representation from his court-appointed attorneys, one of whom has been reprimanded or suspended from the practice of law on multiple occasions as a result of ethical violations.

Given the national and international implications of this case, a bipartisan group of U.S. diplomats, retired military leaders, former judges and prosecutors, and the leading organizations that represent Americans abroad called on the Texas Board of Pardons and Paroles and Governor Perry to grant Leal a stay of execution to allow time for Congress to remedy the violations in his case.¹⁴ Additionally, U.S. Solicitor General Donald Verrilli urged the U.S. Supreme Court to stay the execution, arguing "that U.S. interests will be undermined if Texas executes Mr. Leal without allowing for judicial review of his conviction and sentence to determine if he was harmed by the violation of his consular rights. ..."¹⁵

In the aftermath of Leal's execution, a group of U.S. diplomats released a statement expressing serious concern about this violation of international law:

The United States was founded on a commitment to the rule of law, and we believe it still stands for that commitment. But today's execution of a foreign national of our critical international partner Mexico violates a binding legal obligation and threatens to undermine the strength of our credibility in the eyes of our international partners. We are disappointed that Texas has chosen not to comply with the clear international legal obligations of the United States under the U.N. Charter and unanimously confirmed by the Supreme Court.¹⁶

According to the Texas Department of Criminal Justice, there currently are 13 Mexican nationals on death row in Texas.¹⁷

- The State of Texas executed Mark Stroman on July 20, 2011 after a three-hour delay while courts considered a final appeal from his surviving shooting victim, Rais Bhuiyan. Stroman was sentenced to death for the racially-motivated killing of Vasudev Patel, an Indian of the Hindu faith who owned a gas station and convenience store in Mesquite. The murder occurred during a crime rampage by Stroman that he claims was fueled by the September 11, 2001 attacks in New York City and that left two people dead and Bhuiyan severely wounded.

As reported by the Associated Press, "The execution's brief delay was caused by appeals from Rais Bhuiyan, a Bangladesh native who said his Muslim religion allowed him to forgive Stroman. Bhuiyan, who was blinded in one eye in the shooting, insisted that state officials had prevented him from meeting with Stroman and engaging in a remediation program to learn more about his shooting spree, which also killed another man."¹⁸

¹⁴ See <http://tcadp.org/2011/06/07/diplomats-military-leaders-and-law-enforcement-urge-clemency-for-humberto-leal/> and <http://www.humbertoleal.org/supporters.html>.

¹⁵ "Solicitor General joins plea to stay execution of Humberto Leal," Law.com, July 1, 2011

¹⁶ See <http://www.humbertoleal.org/>.

¹⁷ Areli Escobar, a Mexican national who was sentenced to death in 2011, does not yet appear on this list.

¹⁸ "Survivor of post-9/11 attack asks for mercy, can't stop execution," *Houston Chronicle/Associated Press*, July 20, 2011

See Appendix B for a complete list of executions carried out in Texas in 2011. Seven executions are scheduled already in Texas in 2012, primarily from Bexar and Dallas Counties.

U.S Executions in 2011														
	DE	VA	ID	SC	MO	FL	MS	OK	GA	AZ	OH	AL	TX	Total
Executions:	1	1	1	1	1	2	2	2	4	4	5	6	13	43

Stays of Execution/Date Withdrawn

Five inmates scheduled for execution in 2011 received stays, while the execution date for another inmate – Ivan Cantu (August 30) – was withdrawn. Death row inmate Cleve Foster received three separate stays of execution this year from the U.S. Supreme Court.

- On January 11, Cleve Foster, the first person scheduled to be executed in Texas in 2011, received a last-minute stay from the U.S. Supreme Court to review an appeal in his case. He was convicted of the 2002 murder of Nyaneur “Mary” Pal in Fort Worth. The petition on which the Court granted the stay raised questions about the right to effective assistance of habeas counsel and related claims of ineffective assistance of counsel and innocence. The Court later denied cert and lifted the stay.

Foster’s execution was rescheduled for April 5, 2011. In the wake of the Supreme Court’s grant of certiorari in *Martinez v. Ryan*, Foster’s lawyers returned with an out of time petition for rehearing of the January order denying cert. The Court stayed Foster’s execution and ordered the state to respond. Eventually, the Court denied rehearing and again lifted the stay of execution.

A third execution date was set for September 20, 2011. That same day, the Court once more stayed the execution on the basis of a cert petition again raising the question of the constitutional right to the effective assistance of habeas counsel and related claims of ineffective assistance of counsel and innocence. The Court has not yet ruled on the petition for writ of certiorari, but it is likely that the case is stayed pending the Court’s resolution of the *Maples* and *Martinez* cases.

- On June 15, 2011, John Balentine received a last-minute reprieve from the U.S. Supreme Court. News from the Court arrived just an hour before Balentine’s scheduled execution; he had already eaten his “last meal.” He was convicted of the 1998 murders of his ex-girlfriend’s brother, Mark Caylor, Jr., 17, and two other boys, Kai Geyer, 15, and Steven Watson, 15. The Court stopped the execution to review a petition from Balentine’s lawyer that contended his legal representation at trial and in the early stages of his appeal was deficient.
- On July 28, 2011, the Texas Court of Criminal Appeals stayed the execution of Larry Swearingen. He was scheduled to be executed on August 18 for the 1998 rape and murder of 19-year-old Melissa Trotter, a student at Montgomery Community College. Her body was discovered in the Sam Houston National Forest on January 2, 1999, nearly a month after she disappeared from campus. According to the *Texas Tribune*, “Swearingen’s lawyers have filed repeated pleas in state and federal court urging jurists to consider their arguments that forensic science proves that the 40-year-old inmate could not have committed the crime, because he was in jail when Trotter was murdered.”¹⁹ The attorneys seek a full court hearing on the forensic science.

The U.S. Court of Appeals for the Fifth Circuit had granted a stay of execution to Swearingen on January 26, 2009, the day before his scheduled execution, based on new forensic evidence. Prosecutors originally theorized that Trotter had been dead for 25 days when her body was found, but further examinations suggest this is timeframe is impossible based on the preservation of her body. That stay was allowed to grant further review of Swearingen’s second habeas petition for a new trial.

¹⁹ “Criminal appeals court grants rare execution stay,” *Texas Tribune*, July 28, 2011

- On September 15, 2011, at the 11th hour, the U.S. Supreme Court temporarily stayed the execution of Duane Buck, pending a conference on his cert petition. Buck received the death penalty for the 1995 murders of his ex-girlfriend, Debra Gardner, and Kenneth Butler in Houston. During his trial, psychologist Walter Quijano, a witness for the defense, testified on cross-examination that the fact that Buck was African American increased the likelihood of his being dangerous in the future. Such improperly elicited, racially-based testimony by Dr. Quijano led to new sentencing hearings in six other cases where the State of Texas conceded error, but not for Duane Buck, whose case also was cited by then-Attorney General John Cornyn.

Among those advocating for a reprieve and a new sentencing hearing for Buck were State Senator Rodney Ellis, former Assistant District Attorney Linda Geffin, who served as one of the prosecutors in Buck's original trial, and surviving shooting victim Phyllis Taylor.

On November 7, 2011, the Court declined to review Buck's case. More than 60 prominent civil rights leaders, faith leaders, elected officials, and former presidents of the American Bar Association have called upon Harris County District Attorney Patricia Lykos to provide remedy in this case.²⁰ The case is still pending.

- On November 7, 2011, the Texas Court of Criminal Appeals issued a stay to Henry "Hank" Skinner, who was scheduled to be executed on November 9. Key pieces of evidence collected at the crime scene have never been subjected to DNA testing, and for the last 10 years state officials have refused to release it for analysis. This was the second stay of execution for Skinner in two years. On March 24, 2010, the U.S. Supreme Court granted a last-minute stay to determine whether to hear his appeal. Skinner was scheduled to be executed that evening for the 1993 murders of his girlfriend Twila Busby and her two developmentally disabled adult sons. See U.S. Supreme Court Developments below for more information.

In granting the recent stay, the Texas court referenced changes in the Texas Code of Criminal Procedure Chapter 64 related to DNA testing.²¹ Earlier in the year, the Texas Legislature passed Senate Bill 122, which increased access to post-conviction DNA testing; it was signed into law by Governor Perry and went into effect on September 1, 2011. The court stayed the execution to consider Skinner's case in light of these changes in the statute. Read more in Legislative Developments below.

In his original trial, Skinner was represented by a former district attorney who had previously prosecuted him for theft and assault. That attorney chose not to seek DNA testing, despite the fact that Skinner steadfastly protested his innocence of the crime.

Among those supporting Skinner's request for DNA testing are current and former elected officials, former judges, prosecutors and law enforcement officers in Texas; 26 wrongly convicted individuals released from death rows nationwide; editorial boards in Texas and across the country; the Secretary General of the Council of Europe; the French Ministry of Foreign Affairs; and more than 120,000 individuals who signed a petition calling for testing of the DNA evidence.

A comparable number of stays have been granted in recent years (seven in 2009, six in 2008 and seven in 2007). Last year, three inmates received stays of execution and the date for another inmate was withdrawn.

²⁰ <http://tcadp.org/2011/11/07/prominent-leaders-call-on-harris-county-d-a-to-remedy-duane-buck-case/>

²¹ http://standdown.typepad.com/SKINNER-CCA-DNA_ORDER.pdf

Reduced Sentences/Inmates No Longer on Death Row

Six inmates received reduced sentences in 2011.

- On October 6, 2011, a Dallas County jury found Johnathan Bruce Reed guilty of the 1978 murder of Wanda Jean Wadle. This was the third time that Reed was convicted of this crime; his two previous convictions were overturned on appeal. In 2009, the U.S. Court of Appeals for the Fifth Circuit granted Reed a new trial – 26 years after the jury returned its verdict in his second trial – after determining that prosecutors had improperly excluded African Americans from his jury.

Upon Reed's conviction, the Dallas County District Attorney's Office withdrew its attempt to seek the death penalty and agreed to a life sentence. In a press release, District Attorney Craig Watkins noted that, "We have been dealing with this case since 1978 and in order to maintain the credibility we have established with the citizens of Dallas County over the last four years, we concluded that a life sentence was appropriate."²²

- On April 21, 2011, former death row inmate Adrian Estrada accepted a new sentence of life in prison without parole in exchange for admitting guilt and forgoing any further appeals in his case. Estrada was convicted and sentenced to death in Bexar County in 2007 for the murders of his 17-year-old girlfriend, Stephanie Sanchez, and her unborn child. Last year, the Texas Court of Criminal Appeals ordered a new punishment hearing for Estrada after finding that during his trial, an expert for the prosecution presented misleading evidence concerning the future danger that he could pose to society if he was sentenced to life without parole instead of the death penalty. The court found that A.P. Merillat, who investigates prison crimes for Texas, inaccurately testified that if he was allowed to live, Estrada could receive a prisoner classification that would allow him to leave the prison grounds. This testimony led the jury to find that Estrada posed a future threat to society. Notes from the jury strongly indicated that this evidence played a significant role in the jury's final decision to sentence Estrada to death.

The Bexar County District Attorney's Office intended to seek the death penalty again, but offered the deal after assessing the case and noting that Estrada had no prior criminal record and was a model prisoner during the four years he spent on death row.

- In June, the Galveston County District Attorney's Office announced that it would not seek another death sentence for Gaylon Walbey, who was sent to death row for the 1993 murder of Marionette Beyah, his former foster mother. In 2009, the U.S. Court of Appeals for the Fifth Circuit ordered the state district court to conduct a new punishment hearing for Walbey after finding that his trial attorney failed to investigate his horrific childhood and other potentially mitigating evidence, including evidence of his severe mental illness. Later that year, Kurt Sistrunk, the Galveston County District Attorney at the time, announced his decision to seek another death sentence. Jack Roady, who was elected District Attorney in 2010, decided to end the case against Walbey after reviewing the evidence and speaking with the victim's family. Walbey, who was 18 at the time of the crime, will now serve a sentence of life in prison.
- On November 2, 2011, the Texas Court of Criminal Appeals overturned the death sentence of Chelsea Richardson after ruling that the punishment phase of her trial was affected by misconduct by former Tarrant County prosecutor Mike Parrish, who withheld evidence from the defense. Richardson was sent to death row for helping her boyfriend, Andrew Wamsley, kill his parents, Rick and Suzanna Wamsley, in 2003. Andrew Wamsley was convicted of capital murder and sentenced to life in prison. Their friend Susana Toledano – who testified that she did most of the shooting and stabbing – struck

²² "Jury Convicts Johnathan Bruce Reed of Capital Murder, State Agrees to Life Sentence," October 6, 2011, <http://www.dallasda.com/>

a deal with prosecutors and received a life sentence in exchange for pleading guilty to murder and testifying against Wamsley and Richardson. The evidence withheld from the defense included notes from a psychologist who interviewed Toledano, which might have undermined the state's theory that Richardson was the mastermind behind the plot to kill the Wamsleys.

Earlier in the year, Tarrant County prosecutors agreed that Richardson should be resentenced to life in prison if the court agreed to the new punishment hearing. According to the *Fort Worth Star-Telegram*, the agreement between the defense attorneys and prosecutors "marks the second time in three years that the district attorney's office has agreed to change the outcome of a death penalty case handled by ex-prosecutor Mike Parrish. In both cases, Parrish – who retired in 2008 amid the controversy – committed prosecutorial misconduct by withholding evidence that could have been useful to the defense."²³

In the earlier case, 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 found that prosecutors withheld at least 14 documents that cast doubt on the accounts of crucial witnesses against Toney. No physical evidence connected Toney with the 1985 bombing of a Lake Worth trailer for which he was convicted and sentenced to death. The Texas Attorney General's Office dropped the charges against him but planned to continue its investigation and reserved the right to prosecute him later. Toney died in a car accident on October 3, 2009, just one month after his release from jail.

Chelsea Richardson was one of ten women on death row in Texas.

- On November 22, 2011, Ricky Kerr pleaded guilty to Capital Murder, Aggravated Assault, and Felon in Possession of a Firearm and, in return, received a life sentence. Kerr received the death penalty in 1995 for the 1994 murders of Elizabeth McDaniel and Gary Barbier in San Antonio. In 1998, his execution was stayed one day before he was to die. Subsequently, the Texas Court of Criminal Appeals ordered a new state habeas proceeding for Kerr after finding that his original state habeas lawyer had not effectively represented him. In 2009, the court granted a new punishment trial for Kerr after it was shown that his original trial counsel failed to discover compelling facts about his life history that would have justified a life sentence.
- Fernando Garcia pleaded to three life sentences on December 5, 2011, after spending more than two decades on Texas' death row. Garcia was convicted 24 years ago of the rape and murder of three-year-old Veronica Rodriguez in Dallas. His sentence was overturned based on *Penry* error, meaning the jury instructions at the punishment phase failed to adequately instruct the jury about how to use mitigating evidence to support a life sentence. The Dallas County District Attorney agreed to the life sentences with the condition that there be a detailed, videotaped confession.

In addition to these reduced sentences, one death row inmate died in prison this year. John Selvage, who was sentenced to death for the 1979 murder of Harris County sheriff's Deputy Albert Garza, was found unresponsive in his cell at the Jester IV Unit near Richmond on November 2, 2011. He had been receiving treatment at the psychiatric unit since 2010. According to the Associated Press, Selvage had faced lethal injection at least five times, but received stays each time.²⁴

Potential Wrongful Execution

On July 29, 2011, the Attorney General of Texas ruled that the Texas Forensic Science Commission did not have the authority to examine the evidence in the Cameron Todd Willingham case, as it predates September 1, 2005, when the commission was created. Willingham was executed in 2004 for setting his

²³ "Death sentence will likely change for woman in Mansfield slayings," *Fort Worth Star-Telegram*, June 1, 2011

²⁴ "Death row inmate convicted of killing Harris Co. deputy dies in prison," *Associated Press*, November 3, 2011

Corsicana home on fire, killing his three young daughters in 1991. The commission originally agreed to investigate the possibility of misconduct and negligence in the case. Nine fire experts who have examined the case since the time of conviction all have concluded that the evidence did not support the finding of arson.

On October 29, 2011, the commission officially closed its inquiry into the Willingham case. While it declined to issue any finding regarding alleged misconduct or negligence by the State Fire Marshal's Office or City of Corsicana, its final report acknowledged that the fire science used to convict Willingham was unreliable.²⁵ The commission also issued 17 recommendations aimed at improving arson investigations in Texas. According to the *Austin American Statesman*, "The agency's final report includes a commitment from the state fire marshal's office — whose investigator was the chief prosecution witness at Willingham's trial — to review old arson rulings to determine whether convictions were based on now-debunked assumptions."²⁶ The recommendations also include new certification criteria for expert witnesses and additional rules and regulations aimed at preventing the use of outdated science and improving the quality of testimony and analysis.

The commission's report effectively brings to a close one of the most contentious cases in which there is a high degree of probability that an individual was wrongfully executed in Texas.

U.S. Supreme Court Developments

On March 7, 2011, the U.S. Supreme Court ruled that Texas death row inmate Hank Skinner can pursue his request for DNA testing through the federal Civil Rights Act. Skinner came within an hour of execution the previous year before the Court granted him a last-minute stay. Key pieces of evidence collected at the crime scene have never been subjected to DNA testing, and officials have refused to release it for analysis for the last 10 years.

The Court heard arguments in the case of *Skinner vs. Switzer* on October 13, 2010. By a vote of 6-3, the Justices allowed Skinner to pursue his civil rights claim, though their ruling does not guarantee that he will succeed in securing DNA testing and it did not prevent the state from setting another execution date. As noted above, the Texas Court of Criminal Appeals granted a stay to Skinner on November 7, just days before his scheduled execution.

Legislative Developments

During the 82nd 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. House Bill 819 was jointly authored by State Representatives Jessica Farrar (D-Houston), Marissa Marquez (D-El Paso), and Alma Allen (D-Houston). State Representative Lon Burnam (D-Ft. Worth) co-authored the bill. It received a hearing by the full House Criminal Jurisprudence Committee on March 29, 2011 and was left pending in the committee 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:

- The House and Senate unanimously approved House Bill 215, which requires police departments to adopt written guidelines for how they conduct eyewitness identification procedures. Mistaken eyewitness identification is the leading cause of wrongful conviction nationwide and was a factor in 38 of 45 Texas exonerations based on DNA testing.

²⁵ "Texas forensic board recommends review of arson convictions," *Associated Press*, October 28, 2011

²⁶ "Willingham inquiry ends, but effects linger," *Austin American-Statesman*, October 29, 2011

- The legislature also approved House Bill 417, relating to claims for compensation for wrongful conviction. Among other provisions, the bill stipulates that:

a person is entitled to compensation if... the district court's dismissal order is based on a motion to dismiss in which the state's attorney states that no credible evidence exists that inculpatates the defendant and, either in the motion or in an affidavit, the state's attorney states that the state's attorney believes that the defendant is actually innocent of the crime for which the person was sentenced.

This provision addressed the case of 2010 exonoree Anthony Graves, who initially was denied compensation by the State Comptroller's Office because the order releasing him did not contain the words "actual innocence." The bill also provides exonorees with access to health insurance through the Texas Department of Criminal Justice.

- Senate Bill 122 provides greater access to post-conviction DNA testing in cases where the evidence was not previously subjected to DNA testing or could benefit from newer testing techniques. Both SB 122 and HB 215 were recommendations from the Timothy Cole Advisory Panel on Wrongful Convictions, which the legislature created in 2009 to assist with a study regarding the prevention of wrongful convictions.
- Senate Bill 377 expands the scope of the death penalty in Texas by making the murder of a child who is less than 10 years of age a capital offense. The previous capital statute applied to the murder of children under age six.

On the national level, the State of Illinois abolished the death penalty in March 2011. There are now 16 states without the death penalty. In signing the bill to repeal the death penalty, Illinois Governor Pat Quinn wrote that "Since our experience has shown that there is no way to design a perfect death penalty system, free from the numerous flaws that can lead to wrongful convictions or discriminatory treatment, I have concluded that the proper course of action is to abolish it."²⁷

Other Developments

Lethal Injection

On March 16, 2011, the Texas Department of Criminal Justice (TDCJ) announced that it was changing the way executions are carried out in Texas, substituting pentobarbital for sodium thiopental as the first drug in the three-drug cocktail used for lethal injections. Pentobarbital also is commonly used to euthanize animals. TDCJ's supply of sodium thiopental had expired earlier that month; the sole U.S.-based manufacturer of that drug, Hospira, announced earlier this year that it would no longer produce it.

On April 1, 2011, Travis County District Court Judge Stephen Yelenosky denied efforts by Texas death row inmate Cleve Foster to invalidate this new protocol for carrying out executions. Foster was scheduled for execution on April 5, 2011 under the new protocol. According to the *Associated Press*, Foster's attorneys contended that the change in protocol violated the Texas Administrative Procedures Act, which requires notice and an opportunity for public comment. They sought to block the new procedure and require executions to be carried out under the previous protocol. In a news release, Maurie Levin, counsel for Foster, asserted that "executions, and the manner in which we carry them out, are of unique public interest and importance, and precisely the sort of decisions and procedures that should be aired in the light of day."²⁸ Judge Yelenosky ruled, however, that state law allows prison officials to make certain decisions – including those related to the execution process – without public scrutiny or input.

²⁷ <http://www.illinois.gov/pressreleases/ShowPressRelease.cfm?SubjectID=2&RecNum=9265>

²⁸ "Judge denies request to block execution drug," *Associated Press*, April 2, 2011

Foster received a stay of execution on unrelated issues. Cary Kerr was the first Texas inmate put to death using pentobarbital, on May 3, 2011.

The End of Last Meals

This fall, TDCJ decided that it would no longer provide “last meals” to those facing imminent execution. The change came at the request of Texas State Senator John Whitmire, the chair of the Senate Criminal Justice Committee, who was outraged by the elaborate meal requested by Lawrence Brewer before his execution on September 21, 2011.

Media Developments

The editors of the *Houston Chronicle* began the year with a call to end the death penalty in Texas. In a January 2, 2011 editorial entitled “It’s time for capital punishment to become Texas history,” they cited awareness of the risk of wrongful conviction and the fact that jurors and prosecutors are imposing it less often as evidence that Texans are moving away from the death penalty. The editors also noted the cases of Anthony Graves, Cameron Todd Willingham, Claude Jones, which have raised significant questions about the reliability and fairness of the system.

The *Houston Chronicle* joined the *Dallas Morning News* and the *Austin American-Statesman* in endorsing abolition of the death penalty. These other Texas newspapers have called for a moratorium on executions: *Abilene Reporter-News*; *Bryan-College Station Eagle*; *Corpus Christi Caller-Times*; *Daily Texan*; *El Paso Times*; *Fort Worth Star-Telegram*; *Galveston Daily News*; *San Antonio Express-News*; *Victoria Advocate*; and *Wichita Falls Times Record*.

Conclusion

The continued low number of new death sentences in Texas, along with the reduced sentences for a significant number of death row inmates and the decline in executions, demonstrates growing acceptance of alternative punishments among both jurors and prosecutors. In addition, the number of Texas counties devoting resources to costly death penalty trials continues to dwindle to an isolated few. Still, longstanding concerns about the arbitrary and biased administration of the death penalty persist. The risk of wrongful conviction also remains a glaring problem and casts doubt on the fairness and accuracy of the system. TCADP urges ongoing dialogue about the flaws and failures of the death penalty system in Texas among the public and elected officials.

Appendix A: New Death Sentences in 2011

Last Name	First Name	Date of Birth	Gender	Race	Date Received	County
Cole	Jaime		M	Hispanic		Harris
Batiste	Tedderick	12/30/1987	M	Black	07/27/2011	Harris
Hummel	John	11/14/1975	M	White	06/29/2011	Tarrant
Jean	Joseph	06/25/1972	M	Black	06/23/2011	Harris
Turner	Albert	01/11/1965	M	Black	06/10/2011	Fort Bend
Escobar	Areli	04/23/1979	M	Hispanic	05/26/2011	Travis
Mullis	Travis	09/20/1986	M	White	05/23/2011	Galveston
Robinson	Cortne	12/15/1990	M	Black	03/23/2011	Harrison

(Source: Texas Department of Criminal Justice and *Houston Chronicle*)

Appendix B: Executions in 2011

Execution	Last Name	First Name	Age	Date	Race	County
477	Esparza	Guadalupe	46	11/16/2011	Hispanic	Bexar
476	Garcia	Frank	39	10/27/2011	Hispanic	Bexar
475	Brewer	Lawrence	44	09/21/11	White	Brazos
474	Woods	Steven	31	09/13/2011	White	Denton
473	Robles	Martin	33	08/10/2011	Hispanic	Nueces
472	Stroman	Mark	42	07/20/11	White	Dallas
471	Leal	Humberto	38	07/07/2011	Hispanic	Bexar
470	Mathis	Milton	32	06/21/2011	Black	Fort Bend
469	Taylor	Lee	32	06/16/2011	White	Bowie
468	Bradford	Gayland	42	06/01/2011	Black	Dallas
467	Kerr	Cary	46	05/03/2011	White	Tarrant
466	Adams	Timothy	42	02/22/2011	Black	Harris
465	Hall	Michael	31	02/15/2011	White	Tarrant

(Source: Texas Department of Criminal Justice)



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