

DETOUR TO
DEATH ROW

By David Atwood, Founder
Texas Coalition to Abolish the Death Penalty

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"Detour To Death Row"
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Detour to Death Row

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Never doubt that
a small group of
thoughtful, committed
citizens can change the
world. Indeed, it's the
only thing that ever has.

Margaret Mead

Foreword

Eleven years ago—in 1997—Ann Helmke, the animating director of the San Antonio peaceCENTER, and I flew to Washington, D.C. to attend the first national conference of Organizing the Religious Community Against the Death Penalty.

Every time the state of Texas was mentioned, the audience hissed. They booed. We felt mocked and forsaken by hundreds of good, forgiving and godly people. We Texans lived in the death penalty capital of the world. We Texans executed more people in a year than most countries. We Texans were the enemy, the evil empire. We Texans were the killers. Boo. Hiss.

We slumped down into our chairs in shame, trying to be inconspicuous. Maybe we shouldn't have come.

On the last day of the conference we got brave – and maybe a little angry. Knees shaking and holding hands to draw strength from each other, Ann and I approached the microphone.

“You’re not helping us,” we told the assembled group. “There are good people in Texas who work hard every day to abolish the death penalty, who visit prisoners on death row, who comfort the families of the victims and the condemned, who write letters to the editor, who speak to faith groups and community organizations, who march on the street and meet with legislators. We don’t need your ridicule and scorn: we get enough of that back home in Texas. We need your support.”

Then we stepped off the edge of the cliff, not knowing whether we would crash at the bottom of the abyss, or if we would grow wings and fly.

“Why don’t you have your next conference in Texas? Bring your insight, your energy, your forgiveness and your faith to the place where it is needed most.”

We flew! Two years later, 300 religious death penalty activists met in San Antonio. Slowly, slowly Texans grasp that the death penalty does not work. Slowly, slowly the people of Texas sense the absurdity of killing people to show people that killing people is wrong. Slowly,

slowly the arc of the Texas universe bends towards justice – but it bends.

One of those good people in Texas who has worked tirelessly to abolish the death penalty— one of those people who have slowly, slowly bent the arc of the universe towards justice—is David Atwood. In more than 15 years of tireless activism he has done all of those things we recounted at the conference in Washington: written countless letters, delivered innumerable speeches, met with prisoners and witnessed their executions, testified before the legislature and wept with families. Countless times he has driven the 150-mile round trip to Huntsville to stand vigil on the eve of executions.

David has experienced ridicule and scorn. People have wished him dead. This perfectly respectable retired oil company engineer has been jailed for civil disobedience. Dorothy Day, the founder of the Catholic Worker Movement, once wrote, “An act of love, a voluntary taking on oneself of some of the pain of the world, increases the courage and love and hope of all.”

In the life he has chosen (or, perhaps, that has chosen him) David has taken on some of the pain of the world. His faith-filled witness and prophetic voice have increased our courage, ignited our hope, and taught us the meaning of selfless love. The peaceCENTER is excited to publish this book—a combination of a memoir and a manifesto —and to share David’s passion and faithful diligence with the world.

Rosalyn Falcón Collier, peaceCENTER
San Antonio, Texas, August, 2008

INTRODUCTION

When I moved to Texas with my family in 1971, I had no idea that I would end up visiting prisoners on death row, witnessing the execution of three people or spending five days in the county jail for committing an act of civil disobedience during an execution. Nor did I have any idea that I would devote more than ten years of my life working to abolish the death penalty in Texas, the most prolific state in the nation for executions. None of this was in my "life plan."

In 1971, executions were not being carried out in Texas, nor in any other state in the nation. However, they started up again in Texas in 1982 with the execution of Charlie Brooks by lethal injection, the first time this method of execution was used in the United States.

Since 1982, more than 400 executions have taken place in Texas. One hundred fifty two of those executions took place when George W. Bush was governor, and as of July 1, 2008, 166 have occurred under Gov. Rick Perry. No other state in the nation executes its citizens like Texas, a state that clearly has a love affair with the death penalty.

Most of the people who end up on death row in Texas are poor and cannot afford a good lawyer. A popular saying here is that "those without the *capital*, get the *punishment*." Texas has also sent a number of innocent people to death row over the years and, undoubtedly, several innocent people have been executed.

I first became interested in the death penalty while working as a volunteer on the Catholic Campaign for Human Development in Houston in the late 1980s. Later on, I was asked to visit some prisoners on Texas death row. These visits have helped me to understand that no one ends up there by mere chance. Most of the people on death row have had horrible childhoods; many have mental disabilities as well as drug and alcohol problems. Some are on Death Row because they were running in a gang. Many inmates become rehabilitated while on death row. The person that the state executes is rarely the same person who committed the terrible crime many years earlier.

After learning about capital punishment, I soon realized that there was no statewide, organized effort to fight the death penalty in Texas. Subsequently I worked to establish the Texas Coalition to Abolish the Death Penalty (TCADP). This organization started in Houston in 1995, but has since expanded to many other Texas cities. The primary work of the TCADP is to educate Texas citizens

regarding the criminal justice system and the death penalty. We also promote legislation to improve the criminal justice system, try to save the lives of individual prisoners, work to improve death row conditions, assist the victims of crime and promote effective crime prevention measures in the state.

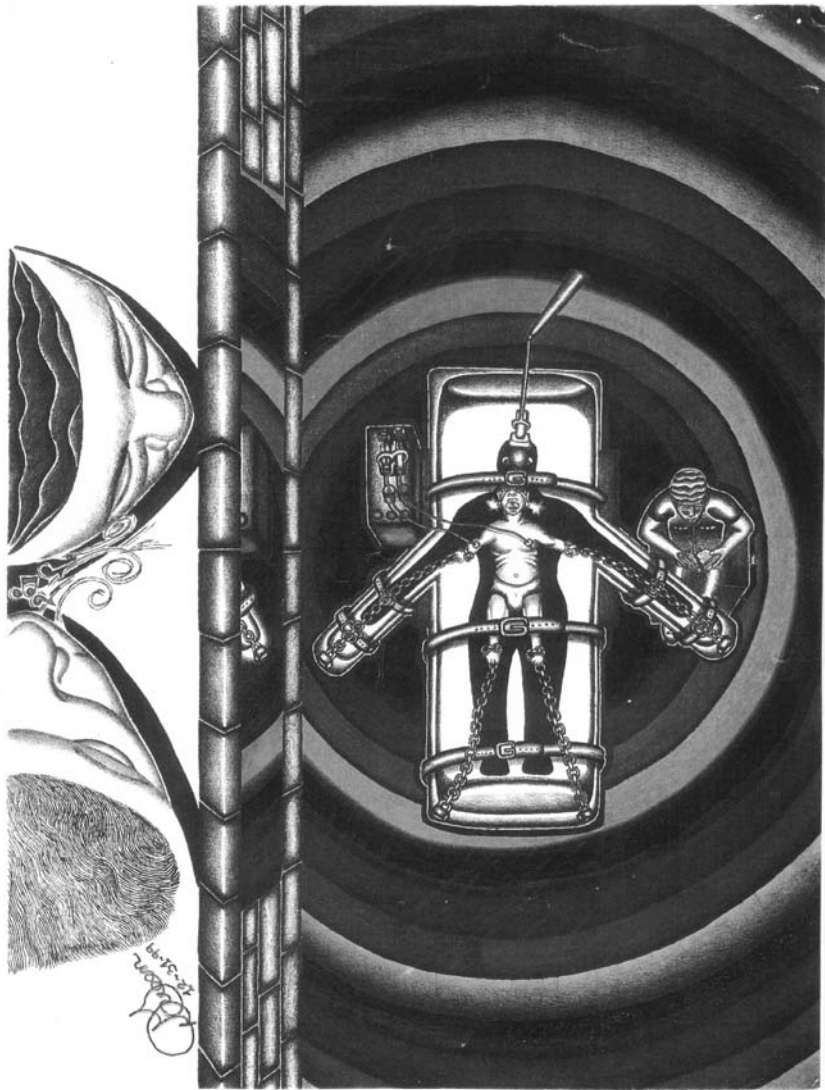
During the past 15 years, I have come to understand the historical, political and legal forces that perpetuate the death penalty in Texas. I have seen how the criminal justice system in the state is a flawed and biased structure that has resulted in innocent people being sent to death row. This system, from the original trial through the clemency process, is heavily influenced by politics and needs to be drastically renovated to ensure basic fairness.

I have worked closely with the faith community in Texas to promote abolition of the death penalty. At one time, the faith community was relatively silent on this issue. Thankfully, that is no longer the case.

My work to abolish the death penalty has also carried me into the international arena. I am convinced that international pressure is extremely important to abolishing the death penalty in the United States.

Anyone who works for abolition soon becomes aware of the pain of the victims of crime and their families. I try to be very sensitive to their grief as I work to abolish the death penalty. While I reject the argument that an execution brings closure or healing to the families of victims, I understand that the families have suffered grievously and are often re-victimized by the criminal justice system. I believe that the churches must do much more to bring healing to the victims of crime.

My work to abolish the death penalty has helped me to better understand the root causes of violent crime in our society. I have become convinced that the death penalty does nothing to address those root causes and, in fact, is a diversion. If our society truly wants to reduce violent crime, then we must do a much better job in addressing its source.



The Execution Chamber: drawing by Dominique Green

CHAPTER 6

THE TEXAS DEATH MACHINE

My detour to death row taught me a lot about the attitudes of Texans regarding crime and punishment as well as how the Texas criminal justice system works. The state has had more than 400 executions in the past 25 years, which is more than one third of the total number of executions in the United States. In some circles, the state has become known as the "Death Penalty Capital of the Western World."

Why are there so many executions in Texas? A former employee of the Texas Department of Criminal Justice once said that Texas was the “victims’ rights state.” But that is misleading. Polls have shown that Texans aren’t that much different than other U.S. citizens when it comes to the death penalty. In fact, a 2008 poll conducted in Houston by Rice University Professor Steven Klineberg showed that 55% of the people surveyed favored life without parole or a long prison sentence versus 38% who favored the death penalty for someone who had committed capital murder. Remember, Houston is in Harris County, which has more death sentences than any other county in the nation.

However, there is certainly a tradition of “frontier justice” in Texas that goes back many years. In the past, people were hung for stealing horses and other crimes less than murder. And Texas, like other states in the South, has a history of lynching African-Americans. This is described in the book *The Rope, the Chair and the Needle: Capital Punishment in Texas 1923-1990*, by James Marquart, Sheldon Ekland-Olson and Jonathan R. Sorensen (University of Texas Press, 1994) Today, some people describe executions as “legal lynchings.”

Christian fundamentalism is also strong in Texas. Many fundamentalists believe that the death penalty is justified in the Bible. They often refer to texts in the Old Testament to support their position and downplay the teachings of Jesus on compassion, forgiveness and mercy. Dale Recinella’s book, *The Biblical Truth about America’s Death Penalty* (Northeastern, 2004) explores the biblical basis for the death penalty. Please note that many Jewish scholars dispute the suggestion that the Hebrew Scriptures promote the death penalty. (Appendix K)

Naked politics also plays a role in who lives and dies in Texas. Most politicians in Texas believe that they must support the death penalty in order to get elected. The governor and the state representatives and senators are, of course, all elected. The district attorneys are all elected. The criminal court judges, including those who serve on the highest criminal court in the state, the Texas Court of Criminal Appeals (TCCA), are all elected officials as well.

U.S. Supreme Court Justice John Paul Stevens once cautioned against judicial activism when he said: “*Present day capital judges [face] a political climate in which judges who covet higher office — or who merely wish to remain judges — must constantly profess their loyalty to the death penalty.*” It is a fact that the only two moderate judges on the Texas Court of Criminal

Appeals in recent history, Charles Baird and Morris Overstreet, were voted out office.

The Texas Criminal Justice System

I have learned a lot about the Texas criminal justice system through my work on the death penalty. Before I got involved, I assumed that the criminal justice system was basically fair and treated everyone equally. The idea that politics, economics or race could determine the outcome of a trial was beyond my comprehension, as was the idea that an innocent person could end up on death row. However, I soon learned that I was dealing with a flawed system that was organized and operated to ensure that executions were carried out efficiently, regardless of whether justice was ultimately served

Texas law permits the death penalty to be used as a punishment for several types of capital crimes such as murder of a young child, murder of a police officer, murder of more than one person, and murder committed in conjunction with another felony, such as a robbery. If you have the death penalty on the books, you must have juries that can give that punishment for people found guilty of capital murder. Someone who has qualms about the death penalty will not be allowed to serve as a juror in a capital trial. This puts an immediate pro-death penalty bias into the criminal justice system.

Most district attorneys in Texas support the death penalty, a fact not surprising. However, what a lot of people don't realize is that criminal court judges are often former district attorneys. And when you look closely at the Texas Court of Criminal Appeals, you discover that most judges on that court very publicly support the death penalty.

Unlike many states, Texas does not have a statewide public defender system. A defendant charged with capital murder in Texas who cannot afford his own private attorney is provided with a court-appointed attorney who may be inexperienced, under-funded or uninterested in providing a high quality legal defense for his or her poor client. Often these attorneys are appointed by judges who want the attorneys to cooperate in moving their cases quickly through the system. Some of the appointed attorneys contribute to the judges' campaigns to get re-elected.

In 2001, U.S. Supreme Court Justice Ruth Bader Ginsburg noted in a lecture, *"I have yet to see a death case among the dozens coming to the Supreme Court on the eve-of-execution stay applications in which the defendant was well represented at trial. ."*

Although there was an effort to improve legal defense for indigents through The Texas Fair Defense Act of 2001, a well-staffed and well-funded public defender system still does not exist in many counties in the state. For example, in Harris County where many death sentences are handed out, judges still have the power to appoint attorneys for indigent defendants. Defendants without a lot of financial resources are still at a huge disadvantage in the courts when compared to someone who has the resources to hire his own high-quality legal defense team. It is a fact that just about everyone on Texas Death Row is poor.

Someone who is convicted of capital murder in Texas is able to appeal his conviction to the Texas Court of Criminal Appeals (TCCA). However, this court has a history of determining that egregious errors in the trial court (such as incompetent legal defense and the infamous sleeping lawyer) are merely "harmless errors." The TCCA has been accused of adopting the findings of prosecutors without question. Even Texas Attorney General John Cornyn, a conservative Republican who is now a U.S. Senator, once criticized the TCCA saying, *"A court is more than just a processor of cases on a conveyor belt. It appears that the [TCCA] is more concerned about the process than about justice."*

If the person convicted of capital murder and sentenced to death does not get relief from the Texas Court of Criminal Appeals, he or she may appeal his or her case to a Federal judge in the U.S. District Court, then to the 5th U.S. Circuit Court of Appeals and ultimately to the U.S. Supreme Court. However, the 5th U.S. Circuit Court of Appeals, like the TCCA, has traditionally been very supportive of the death penalty. The U.S. Supreme Court is also quite conservative and hears very few cases. Furthermore, in the mid-1990s, in an effort to speed up executions, laws were passed at both the state and federal levels to limit appeals. Thus, a person with some very good legal issues may have his or her arguments rejected in the federal courts or may not be able to even get into court to have the issues heard.

This, of course, brings up another point: the quality of legal defense during appeals. Attorneys who work on state appeals are appointed by the Texas Court of Criminal Appeals unless the prisoner is fortunate to be able to hire a private attorney or have one work for him pro-bono. Studies have shown that some attorneys appointed by this court are grossly incompetent and many are under-funded to do a proper job. This is particularly lethal because, if important legal issues are not raised in the state courts, they can be lost forever to the person convicted of murder

and can never be appealed. If a defendant with legal issues that might exclude him from the death penalty receives poor legal assistance during his original trial and state appeals, he could very well be executed.

Racism in the System

Although the primary bias in the death penalty system is economic in nature, the system is also tainted with racism. Approximately 40% of the people on Texas death row are African-American versus about 12% in the general population.

Racism can enter into decisions by the district attorney as to when to seek the death penalty. Professors Jonathan Sorensen and James Marquart have concluded that, all other things being equal, a Texan who commits capital murder of a white person is five times more likely to be sentenced to death than a Texan who commits capital murder of an African-American. Furthermore, with the rarest exception, white people in Texas have not received death sentences for the capital murder of African-Americans. The 1998 murder of James Byrd Jr. in Jasper, Texas was one of those exceptions. Two of the three white men involved in Byrd's murder received the death penalty.

This isn't just a Texas issue. Amnesty International reports: *"Since 1977, the overwhelming majority of death row defendants [in the U.S.] have been executed for killing white victims, although African-Americans make up about half of all homicide victims. African-Americans account for one in three people executed since 1977."*

In 1994, U.S. Supreme Court Justice Harry Blackmun also warned of the role of racism in the death penalty: *"Even under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die. Perhaps it should not be surprising that the biases and prejudices that infect society generally would influence the determination of who is sentenced to death...."*

Racial factors can also be involved in decisions regarding the jury selection. A study published in *The Dallas Morning News* in 1986 showed that African-Americans had a 1 in 12 chance of being selected to serve on a death penalty case, while Latinos had a 1 in 4 chance and whites had a 1 in 3 chance. In 2005, the U.S. Supreme Court ruled that **Thomas Miller-El**, who had been convicted of capital murder in Dallas in 1986, and who had spent 20 years on death row and faced at least 10 execution dates, either had to be released from prison or retried since it was obvious

that race had entered into the selection of jurors during his trial. I believe that this has happened many times in Texas. Miller-El's case is the one that finally got the attention of the U.S. Supreme Court.

On March 18, 2008, Miller-El's attorneys worked out a plea deal in which the death penalty would be taken off the table, but he would have to spend the rest of his life behind bars.

With the spotlight on race provided by the Miller-El case, the problem of racism in the selection of jurors will hopefully be diminished in Texas and in other states.

Racism is the reason **Clarence Brandley** spent nine years on death row. He was almost executed before being found innocent and released from prison in 1990.

In 1980, a young white girl named Cheryl Ferguson was murdered at Conroe High School. The police suspected that the crime was committed by a janitor at the school. A Texas Ranger, when interrogating Brandley and a white janitor at the school, said, "*One of you is going to hang for this.*" Then he turned to Brandley and said, "*Since you're the nigger, you're elected.*" Brandley had an all-white jury at his trial and was railroaded to death row.

When it later became evident that Brandley had not committed the crime, Conroe authorities never admitted that they had made a mistake. They also did not pursue the two white janitors, when suspicions arose that they were the men responsible for the crime.

Brandley's story is told in Nick Davies' book, *White Lies: Rape, Murder and Justice Texas Style* (Pantheon, 1991), and the 2002 movie, *Whitewash*.

Racism was also clearly a factor in the case of **Napoleon Beazley**, a 17-year old from Grapeland, Texas, who, with two other young men, was involved in a 1994 robbery in Tyler, Texas. During the robbery, Napoleon shot and killed John E. Luttig, the father of a federal judge. At the time of the crime, Napoleon was president of his senior high school class and involved in sports. He did not have a criminal record and planned to go to college after graduating from high school. It was a tragic mistake on the part of Napoleon.

Napoleon's trial was clearly tainted with racism. He, too, was tried by an all-white jury. At the end of his trial, in which Napoleon was given the death penalty, one of the jurors stated publicly, "*The nigger got what he deserved.*"

Napoleon had an excellent appeals lawyer — Walter Long from Austin. At Walter's invitation, Priscilla and I and some other anti-death penalty activists from Houston went to Napoleon's hometown to participate in a prayer service for Napoleon. I also

went to the church in Houston where Napoleon's sister worked and had them sign petitions to the Texas Board of Pardons and Paroles asking that they grant clemency to Napoleon. (See petition cards in Appendix P)

Napoleon's mother and father, Rena and Ireland Beazley, both wonderful people, spoke out strongly for his life. They realized that he had committed a horrible crime, but knew that he was very young and did not receive justice during his trial.

Despite the best efforts of everyone involved — attorney Walter Long, the Beazley family and the activist community — Napoleon was executed on May 28, 2002. His last words were:

"The act I committed to put me here was not just heinous, it was senseless. But the person who committed that act is no longer here — I am...Tonight we tell the world that there are no second chances in the eyes of justice...Tonight we tell our children that in some instances, in some cases, killing is right...there are a lot of men like me on death row — good men — who fell into the same misguided emotions, but may not have recovered as I have. Give those men a chance to do what is right. Give them a chance to undo their wrongs. A lot of them want to fix the mess they started, but don't know how. The problem is not that people aren't willing to help them find out, but the system is telling them it won't matter anyway. No one wins tonight. No one gets closure. No one walks away victorious."

Napoleon was a young man who made a fatal mistake that caused a lot of pain for many people. However, he was repentant for what he had done and wanted to make amends. He should never have been executed. In 2005, the U.S. Supreme Court decided in *Roper v. Simmons* to abolish the death penalty for juvenile offenders, but its decision came three years too late for Napoleon.

Racism can be found everywhere, and I found much of it in Tyler, Texas. I traveled there in November 2000 to hold a press conference to protest the execution of **Stacey Lawton** and **Tony Chambers**, two African-American men who were scheduled for execution that month. When I returned to Houston that evening, there was a threatening message on the answering machine in our office warning me to never go back to Tyler. The caller said, *"Don't you ever come back to Tyler. We'll take care of our Blacks up here."*

I didn't return to Tyler until 2007 when Tony Chambers' mother, Ida Cheatham, asked me to join her in speaking out

against the death penalty there. Ida is a very courageous woman. Stacey Lawton was executed on Nov. 14, 2000.

Ida's son Tony was executed the next day.

On May 1, 2008, the results of a study on racism and the death penalty by Professor Scott Phillips of the University of Denver were published in *The Houston Chronicle*. The study concluded that African-Americans in Harris County, Texas, were more likely to get the death penalty than white people by a factor of 17-12.

It is very clear that African-Americans are treated more harshly by the criminal justice system when they are accused of crimes and their lives are seen as less valuable when they are victims of violent crimes. Is this not a classic definition of racism?

No Exclusion of the Mentally Ill

Although the execution of people with mental retardation was prohibited by the U.S. Supreme Court in the 2002 *Atkins* decision, there is no such prohibition for people who are severely mentally ill. At least 20 people with documented diagnoses of paranoid schizophrenia, bipolar disorder and other severe mental illnesses have been executed by the state of Texas in the past 25 years. (*Mental Illness and the Death Penalty Resource Guide* by Kristin Houle, September, 2007.)

Three people with whom I am quite familiar with are Larry Robison, James Colburn and Kelsey Patterson.

Larry Robison was diagnosed as paranoid schizophrenic at the age of 21. I know his parents, Ken and Lois Robison, who were both teachers and are wonderful people. Lois told me that mental illness ran in her family. Ken and Lois tried in vain to get Larry proper treatment. His treatment was sporadic because he was not covered by their health insurance and did not have insurance of his own. Mental health professionals told the Robisons that Larry was not well and would get worse without treatment, but hospitals routinely discharged him after 30-day stays because he was "not violent" and they "needed the bed." They were told that if Larry became violent, he would get the long-term treatment that everyone agreed he needed. In 1982 Larry had a psychotic episode during which he killed five people. In spite of his well-documented mental illness, he was given the death penalty and was executed on Feb. 21, 2000. Many of us who worked with Lois and Ken to save Larry's life stood with them outside the Walls Unit in Huntsville on the day Larry was executed. I will never forget the pain of a mother and father whose son is being executed. (See

picture in Appendix P)

Ken and Lois have often spoken out about the need to improve mental health services in Texas. They ask, *"How can a modern, civilized society choose to exterminate its ill citizens rather than treat them?"*

James Colburn was diagnosed as paranoid schizophrenic as a teenager. He was raped at age 16, used alcohol and drugs and tried to commit suicide several times. He was in and out of mental institutions and crisis centers many times and spent several years in prison for various crimes. The treatment of his mental illness was sporadic because he did not have health insurance. In 1994 James murdered Peggy Murphy and received the death penalty for the crime.

Colburn's appeals attorney, James Rytting, and Colburn's sister, Tina Morris, fought hard to save James' life, but he was executed on March 26, 2003. A Swiss photographer, Fabian Biasio, photographed Tina during the days leading up to the execution and on the day of the execution itself. The photo exhibit, titled *Diary of an Execution*, portrayed Tina's suffering. (See page 48) In 2005, the TCADP and Amnesty International co-sponsored the photo exhibit at the ArtCar Museum in Houston and held a panel discussion to highlight the injustice of executing severely mentally ill people. In 2006, Amnesty International USA published a detailed report on this subject, *The United States of America: The Execution of Mentally Ill Offenders*.

Kelsey Patterson was diagnosed with paranoid schizophrenia in 1981 and spent much of the 1980s in and out of jails and mental hospitals. Finally, in 1992, Patterson killed Louis Oates and his secretary, Dorothy Kaye Harris, in Palestine, Texas.

There was no apparent motive for the murders. Kelsey was given the death penalty and an execution date of May 18, 2004, was set. In a highly unusual move, the Texas Board of Pardons and Paroles voted 5 to 1 to commute his sentence to life in prison. However, to the amazement of all involved, this vote was turned down by Governor Rick Perry and Kelsey was executed as scheduled.

Patterson's mental illness was reflected in his last statement as he lay on the gurney: *"Statement to what? I am not guilty of the charge of capital murder. Steal me and my family's money. My truth will always be my truth. There is no kin and no friend; no fear what you do to me. No kin to you undertaker. Murderer...Get my money. Give me my rights. Give me my rights. Give me my rights. Give me my life back."*

Andrea Pia Yates is a severely mentally ill woman who

killed her five children on June 20, 2001 in Houston by drowning them in the bathtub. The entire nation was shocked by the crime. Harris County District Attorney, Chuck Rosenthal, decided to seek the death penalty for Andrea.

In an effort to support Andrea and educate the public on the reality of mental illness, the Andrea Pia Yates Support Coalition was formed in 2001. In conjunction with Murder Victims Families for Reconciliation (MVFR), we held vigils outside the courthouse where Andrea was being tried and sponsored a special program at the Rothko Chapel in Houston. No one in her family wanted Andrea to receive the death penalty or even life in prison. They believed that she should receive long-term treatment for her illness in a mental hospital.

Andrea did not receive the death penalty, but instead got a sentence of "life in prison." Later, her sentence was overturned because an expert for the prosecution had misled the jury. In the second trial she was found "not guilty by reason of insanity" and was sent to a mental hospital for treatment. This should have been the outcome of her first trial.

A high profile case that is in the courts as this book goes to press is that of **Scott Panetti**. Scott was sent to death row for the murder of his mother-in-law and father-in-law in 1992. He has a long history of mental illness and was hospitalized 14 times between 1981 and 1992 for symptoms of schizophrenia, manic depression, auditory hallucinations and paranoid delusions.

A jury decided that Scott was competent to stand trial in spite of his obvious mental illness. He defended himself at trial dressed in a cowboy outfit. During the trial he wanted to call Jesus Christ and John F. Kennedy as his witnesses. No one can deny that his trial was a judicial farce.

In 2007, the U.S. Supreme Court blocked Scott's execution and sent his case back to a federal district judge to determine if he was "competent to be executed." To be "competent to be executed," one has to understand the connection between the crime and the punishment. In 2008, U.S. District Judge Sam Sparks ruled that Panetti was "competent to be executed." The case is again being appealed to the U.S. Supreme Court. It is obvious that Scott Panetti is a seriously mentally ill man. In the opinion of many mental health experts, a person who is seriously mentally ill is not as culpable as one who is not ill and, therefore, should be ineligible for the death penalty.

The State of Texas has spent millions of dollars on expensive death penalty trials for mentally ill defendants while its mental health system remains chronically under-funded. Texas ranks 47th

in terms of *per capita* spending on mental health care according to the National Alliance on Mental Illness - NAMI. Many people with serious mental illness still languish on death row, waiting to be found “competent to be executed.”

District Attorneys

District attorneys are elected officials who have a lot of power. If a case qualifies for capital murder in Texas, the DA has the authority to decide whether he or she will pursue the death penalty or the optional punishment of “life without parole.” (“Life without parole” was passed by the Texas Legislature in 2005 and replaced a “life sentence” whereby a person could be eligible for parole after serving 40 years.)

One district attorney might seek death for a certain capital crime, while another might seek a lesser sentence for a variety of reasons such as:

1. The DA does not think that the crime qualifies as being the “worst of the worst.”
2. The defendant does not have a criminal record.
3. The DA does not think that he has a strong case.
4. The defendant has a very good defense attorney.
5. The victim of the crime is perceived to be unimportant in the community.
6. The family of the victim does not want the death penalty sought for the defendant.
7. The DA does not want to drain the county coffers to prosecute the case.
8. The DA sees no need to seek the death penalty when society will be protected by long-term incarceration of the defendant.

All these factors mean that the death penalty is applied unevenly among counties within the same state. In places such as Harris County, where Houston is located, the district attorney often chooses to pursue the death penalty. Thus, about ¼ of all people on Texas death row are from Harris County. To put this into perspective, there are 254 counties in Texas.

The Harris County District Attorney’s office is well-funded and staffed. Because it has tried so many death penalty cases, it has become very proficient at doing so. When you stack the

DA's office up against a court-appointed attorney who may be inexperienced, uninterested and/or under-funded, it is easy to predict the outcome.

Unfortunately, some district attorneys resort to unethical practices to get a conviction.

Randall Dale Adams was in prison for more than 12 years and almost executed before being exonerated and released in 1989. When the Texas Court of Criminal Appeals finally overturned Adams' conviction after the U.S. Supreme Court intervened, it said: *"The State was guilty of suppressing evidence favorable to the accused, deceiving the trial court during the applicant's trial, and knowingly used perjured testimony."* Randall's story is told in Errol Morris' 1988 film, *The Thin Blue Line*, and Adams' own book, *Adams vs. Texas* (St. Martin's Press, 1991)

Kerry Max Cook was in prison for 22 years before being released in 1997, at which time the court released a statement: *"Prosecutorial and police misconduct has tainted this entire matter from the outset."* Kerry's story is told in Jessica Blank and Eric Jensen's gripping 2002 Off Broadway play, *The Exonerated*, and Kerry's own book, *Chasing Justice: My Story of Freeing Myself After Decades on Death Row for a Crime I Didn't Commit* (William Morrow, 2007)

U.S. District Judge Kenneth M. Hoyt ruled on Nov. 15, 1994, that **Ricardo Aldape Guerra**, who been sentenced to death in 1982 for the murder of a Houston police officer, should be either retried or released from prison. Judge Hoyt stated that the actions of the police and prosecutors involved in the case were *"outrageous, intentional and done in bad faith."* He further stated that their misconduct was *"designed and calculated to obtain... another 'notch' in their guns."* The Harris County District Attorney, Johnny Holmes, decided to drop the charges against Guerra in 1997, rather than retry him.

When **Delma Banks Jr.** received a stay of execution from the U.S. Supreme Court in 2003, his attorney, George Kendall, of New York City, stated:

"The Delma Banks case was fraught with material and intentional state misconduct. The State first promised to disclose impeachment and exculpatory evidence bearing directly on questions of Mr. Banks' guilt, innocence and eligibility for the death penalty, then failed in its legal and ethical duty to disclose it. The State also allowed its key witnesses repeatedly to lie to the court and jury... This misconduct by the State was exacerbated by its racially

discriminatory and patently unconstitutional jury selection practices. Mr. Banks, an African-American, accused of killing a white victim, was sentenced to death by an all-white jury."

In 2004 when the U.S. Supreme Court overturned Banks' death sentence, U.S. Supreme Court Justice Ruth Bader Ginsburg wrote, "*When police or prosecutors conceal significant exculpatory or impeaching material, it is ordinarily incumbent on the state to set the record straight...*"

District attorneys will often say they are just carrying out the law. However, it is also true that they are politicians. Some of them travel to the State Capitol during the legislative session to lobby and testify in order to maintain the *status quo* and impose tougher laws. For example, some district attorneys fought tooth and nail against a law that would give juries in Texas the option of "life without parole" (LWOP) for someone convicted of capital murder, even though polls showed that Texas citizens would like to have that option.

When asked why they didn't support LWOP, the Harris County D.A. said that it would eliminate all death sentences, cost taxpayers more than executions, result in prison overcrowding, confuse jurors and create a dangerous situation in prison (see letter to editor in Appendix P). However, this has not happened in other states that have life without parole. All states that have the death penalty, with the exception of New Mexico, have LWOP as an optional punishment for capital murder. On June 17, 2005, life without parole was finally passed by the Texas Legislature, over the objection of the Harris County district attorney.

Future Dangerousness and Mitigating Circumstances

In order for someone who has been found guilty of capital murder to receive the death penalty in Texas, the jury must decide that the person will be a "future danger to society" and that mitigating circumstances such as mental illness and/or child abuse are insufficient to avoid the death penalty. District attorneys in Texas hire experts to testify that a person who has been convicted of murder will be a "future danger to society." One of these "experts," Dr. James Grigson, became so notorious for that testimony that he was nicknamed "Dr. Death." Grigson would often testify in court that a defendant would be a future danger to society although he had not even examined the person or given him a cursory examination! He even predicted that people who were

later shown to be innocent would be a future danger to society. Randall Dale Adams—who was exonerated and released in 1989—was one of them.

An independent study carried out by the Texas Defender Service in 2004 (*Deadly Speculation: Misleading Texas Capital Juries with False Predictions of Future Dangerousness*) found that experts predicting a defendant's future dangerousness were proved wrong in 95% of the 155 cases reviewed.

The concept of predicting "future dangerousness" was rejected by the American Psychiatric Association in 1983. Most people on death row have not been violent while in prison.

A Flawed Clemency Procedure

If someone has been given the death penalty in Texas, and his state and federal appeals have all failed, the only way his life can be spared is through the clemency procedure. Clemency is meant to correct errors that were not addressed earlier in the legal process. It is also an opportunity for the state to show mercy in particular cases.

In Texas, the clemency procedure as administered by the governor and the Texas Board of Pardons and Paroles usually fails to correct mistakes or show mercy. When George W. Bush was governor he said that he would stop an execution if he had concerns that someone might be innocent or had not received a fair trial. That is a good sound bite, but the reality is that the evaluation procedure used by Bush and his staff was very superficial, at best. Otherwise, Bush would have discovered that many prisoners had ineffective legal counsel and there were serious questions of guilt in a number of cases. One hundred fifty two people went to their death under Bush's watch. I am convinced that there were a number of innocent people among those 152.

Governor Rick Perry has carried on Bush's merciless legacy and has presided over 166 executions by midyear of 2008!

Theoretically, the governor cannot grant clemency in Texas unless he receives a recommendation to do so from the Texas Board of Pardons and Paroles: a board that he appoints. Unfortunately, the Board does not meet to consider cases and has no written criteria for the approval of clemency applications. Rehabilitation of a prisoner is never taken into account. This system has been severely criticized by legal experts.

U.S. District Judge Sam Sparks once commented, "*It is abundantly clear that the Texas clemency procedure is extremely*

poor and certainly minimal. A flip of the coin would be more merciful than these votes."

It goes without saying that there is little mercy in the Texas system. Even people like Karla Faye Tucker, who was considered reformed by everyone who met her, was not granted clemency by Governor Bush.

Kelsey Patterson, a severely mentally ill man, was denied clemency by Governor Rick Perry in 2004 despite the fact that the Texas Board of Pardons and Paroles had voted for clemency.

Innocents on Death Row

In July, 2001, in a speech before the Minnesota Women Lawyers, U.S. Supreme Court Justice Sandra Day O'Connor expressed her fear of the possibility of executing those who are innocent: *"If statistics are any indication, the system may well be allowing some innocent defendants to be executed."*

If you consider the obvious bias in favor of the death penalty in the courts, ineffective legal assistance for the poor, racism in the system, prosecutorial misconduct, limits on appeals and the lack of a true clemency procedure, it is easy to understand how innocent people could end up on death row and be executed.

Randall Dale Adams, Clarence Brandley, Ricardo Aldape Guerra and Kerry Max Cook were released after it became evident that they were innocent.

Ernest Willis was also released, in October 2004, after being convicted of capital murder in the arson death of two women in Iraan, a West Texas town. Willis spent 17 years on death row before an arson expert ruled that the fire was likely an accident. These men are the "lucky ones" in the sense that they were not put to death. However, several men with strong claims of innocence have been executed.

One of the first people I came to know on death row was **Richard Jones**. I met Richard when friends from Ravenna, Italy, Arianna Ballotta and Biagio Santoro, asked me to maintain contact with him after they returned to Italy.

Richard was a soft-spoken man with a great sense of humor. He was not anything like what I would expect a death row prisoner to be based on what you see in the media. Richard was on death row after he was convicted of murdering Tammy Livingston in Fort Worth during a 1986 robbery. As time went on, I learned more and more about his case and came to the conclusion that he was not guilty of murder and confessed to avoid implicating his sister who,

he claimed, told him that she and her boyfriend committed the crimes.

After Richard had been on death row for many years, the State of Texas set his execution date for Aug. 22, 2000. His friends from Europe, including Arianna and Biagio, Michela and Carlo from Naples and Wendy and Jakob from Switzerland, came to Texas to visit him during his last days. In the afternoon on the day of his execution, we all gathered in the Hospitality House in Huntsville where the family and friends of the person scheduled for execution often stay prior to the execution. The prisoner can call the Hospitality House from death chamber holding cell late in the afternoon. When Richard called, he spoke primarily to Arianna and his other supporters, but then Arianna asked if I would like to talk to him.

Truthfully, I was scared to talk to Richard. I didn't know what I could say. We had all worked hard to save his life, but it looked like we had failed. He was now scheduled to die in the execution chamber at the Walls Unit in Huntsville at 6 p.m.

I somewhat reluctantly took the phone from Arianna and asked Richard how he was doing. He replied in a low, despondent voice that he was not doing too well, but that he really appreciated everything that had been done to save his life.

I told Richard that he was in our hearts and prayers. He thanked me and I handed the phone back to Arianna. I was devastated. I had never had a conversation with someone just before he was about to die. I couldn't imagine what Richard was feeling.

About two hours later, just before 6 p.m., I stood with Arianna and other protesters outside the Walls Unit. Arianna was distraught because she believed in Richard's innocence and thought that this day would never arrive. None of us thought he would really be executed. We were all distraught.

Biagio, Michela, Carlo, Wendy and Jakob witnessed the execution. Richard's last words before the lethal drugs took effect were, *"I want the victim's family to know that I didn't commit this crime. I didn't kill your loved one. Sharen Wilson, y'all convicted an innocent man and you know it. There are some lawyers hired that is gonna prove that, and I hope you can live with it. To my family and loved ones, I love you. Thank you for supporting me. Y'all stay strong. Warden, bring it on."*

Richard Jones was the first death row prisoner I met. He helped me realize that prisoners on death row were human beings, not the monsters often portrayed by the news media.

Odell Barnes Jr. received the death penalty for the 1989 murder of Helen Bass in Wichita Falls. I never met Odell, but I met his family and became familiar with his case. His appeals attorneys, Mike Charlton and Gary Taylor, had evidence that raised serious questions about Odell's guilt.

One piece of evidence was a blood stain on his clothing that matched the blood of the victim. As Odell's execution date got closer, his attorneys had the blood stain carefully analyzed and discovered that it contained a chemical used to preserve blood in a test tube. In other words, the blood could not have come directly from the victim during the course of the crime. The logical explanation was that it may have been planted on his clothing. This discrepancy and other information that created strong doubts about Odell's guilt were presented to the courts, the Texas Board of Pardons and Paroles and the Governor, but to no avail.

Odell's case received considerable international attention, particularly in France. Jack Lang, Chairman of the French National Assembly's Foreign Affairs Committee, came to Texas to visit Odell and to hold a press conference to protest his execution. We worked with the French Consulate in Houston and participated in the press conference which was held in Huntsville. There was a lot of French press at the conference, but the Texas media was typically sparse. After all, this was just another execution in Texas.

After Odell's execution, Mr. Lang stated, *"The execution of Odell Barnes is an assassination...How can Governor Bush pretend to aspire to be the President of the United States after having perpetrated such a crime? What credit would he have to demand respect for human rights around the world when he was the instigator of such a barbaric act?"*

Well said, I thought. By this time I was convinced that human rights, and even innocence, were not Bush's concerns. Odell's case was one of the first times that I became fully convinced that innocent people were in danger of being executed in Texas.

Gary Graham, also known by his African name, Shaka Sankofa, was executed on June 22, 2000. Although Gary had been involved in some criminal activity, it appeared that he was innocent of the murder for which he had received the death penalty.

Gary's legal defense during his trial had been abysmal. He was convicted of the murder of Bobby Lambert, a drug dealer, during a robbery outside a Houston supermarket. The only evidence against him was the testimony of one eyewitness who was not that close to the crime scene. Although the motive of the crime was supposedly robbery, the police found a large amount of money on Lambert's body.

As Gary's execution date approached, two very credible eyewitnesses came forward to say that Gary was not the person who had committed the crime. Also, the gun in Gary's possession when he was arrested did not match the gun used in the murder. This information had not been presented to the jury during Gary's trial.

Although Gary had excellent appellate lawyers, Dick Burr and Mandy Welch, they were unable to get back into court to present this new evidence because of changes in the law. Also, the Harris County District Attorney and the pro-death penalty organization, Justice for All, strongly lobbied for Gary's execution.

As Gary's execution date approached, we held a prayer service on his behalf at a Catholic church in Houston where his defense committee had met in earlier days. Many of his supporters from Houston and around the USA attended the service.

On the day of execution, hundreds of people gathered outside the Walls Unit in Huntsville to protest the execution. Members of the Ku Klux Klan were also there to support the execution. I thought to myself, "The Harris County District Attorney, Justice for All and the Governor of Texas all have good company today – the Ku Klux Klan!"

Despite the credible evidence pointing to Gary's innocence, Texas proceeded to execute him anyway. In his last statement Gary said:

"I would like to say that I did not kill Bobby Lambert, that I'm an innocent black man who is being murdered. This is a lynching that is happening in America tonight. There's overwhelming and compelling evidence of my defense that has never been heard in any court of America. What is happening here is an outrage for any civilized country to anybody, anywhere to look at. What is happening here is wrong."

In 2007, *The Houston Chronicle* reported on the case of **Ruben Cantu** who was executed in 1993 for the murder of Pedro Gomez during a 1984 robbery in San Antonio. An investigation by *The Chronicle* indicated that Cantu may have been innocent. An eyewitness to the crime who had identified Cantu as the murderer later recanted his statement, claiming that he had been intimidated by the police. Subsequently, the trial judge and lead prosecutor acknowledged that Cantu's convictions seemed to have been built on lies and omissions.

Also in 2007, *The Chicago Tribune* reported on two Texas cases in which innocent people appear to have been executed.

Carlos De Luna was executed in 1989 for killing Wanda Jean Lopez in 1983 during a robbery. *The Tribune* investigation showed that there was no forensic evidence linking De Luna to the crime. An eyewitness who had testified against him later said that he was not sure that De Luna was the robber. Furthermore, the police failed to pursue an alternative suspect who looked like De Luna and who admitted to others that he had committed the crime. Minutes before De Luna was executed he said, *"I hold no grudge. I hate no one. I love my family. Tell everyone on death row to keep the faith and don't give up."*

The Chicago Tribune also reported on the case of **Cameron Todd Willingham** who was executed on Feb. 17, 2004, for setting a house on fire, killing three of his own children. *The Tribune* reported that the initial investigation of the fire was seriously flawed and used archaic techniques. An arson investigator who later reviewed the case stated, *"There is nothing to suggest to any reasonable arson investigator that this was an arson fire. It was just a fire."*

The Texas criminal justice system is severely compromised when it is discovered that innocent people have been sent to death row and executed. It raises many questions about how many other innocent people are on death row and how many other innocents have been executed.



From top, left: snapshots of death row inmates. Tina Morris holding a picture of herself and her brother James Colburn. James was executed on March 26, 2003: Tina say goodbye to her brother, James, at the funeral home.

Photos © Fabian Biasio, part of the "Diary of an Execution" photo exhibit.

The entire exhibit is online at www.biasio.com. Follow the links to *Projekte & Todesstrafe*.

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