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## EXECUTING THE INNOCENT

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## INTRODUCTION

Our system of capital punishment occasionally executes an innocent person.<sup>1</sup> In this article, we use standard statistical analysis to predict how often this event occurs in the state of Texas. We assert that executing innocent persons violates the Eighth<sup>2</sup> and Fourteenth<sup>3</sup> Amendments to the Constitution of the United States.<sup>4</sup>

Executing the innocent constitutes cruel and unusual punishment under the Eighth Amendment<sup>5</sup> and is a deprivation of substantive due process in violation of the Fourteenth Amendment.<sup>6</sup> The risk of executing innocent persons in Texas is higher than in other states because of the volume of executions in Texas—the highest in the nation<sup>7</sup>—and statistical analysis shows that an unacceptable level of risk exists, which the Texas death penalty system fails to address adequately. In this article, we seek to show that execution of innocent persons is an inevitable reality and that our American standards of justice and morality forbid the continuing use of this kind of punishment in our criminal justice systems.

## I. THE ESTABLISHED FACT OF EXECUTION OF THE INNOCENT

We know beyond question that the systems of justice utilized in all of those jurisdictions that still retain the death penalty<sup>8</sup> operate occasionally to execute innocent persons.<sup>9</sup>

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1. As Justice Blackmun put it in 1994, “[t]he problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants . . .” *Callins v. Collins*, 510 U.S. 1141, 1145-46 (1994) (Blackmun, J., dissenting).

2. U.S. CONST. amend. VIII.

3. U.S. CONST. amend. XIV.

4. These arguments regarding the death penalty violating the Eighth and Fourteenth Amendments have been made previously and are not original with us. See Ursula Bentele, *Does the Death Penalty, by Risking Execution of the Innocent, Violate Substantive Due Process?*, 40 HOUS. L. REV. 1359 (2004); see also Elizabeth R. Jungman, Note, *Beyond All Doubt*, 91 GEO. L.J. 1065, 1079 (2003). Our focus in the present article is on the statistical probability of execution of innocent persons, rather than on an extended discussion and analysis of Eighth and Fourteenth Amendment applicability.

5. See *Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O’Connor, J., concurring).

6. See *id.* at 435 (Blackmun, J., dissenting).

7. *Facts About the Death Penalty*, DEATH PENALTY INFORMATION CENTER, at 3 (Jan. 27, 2012), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>.

8. Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Federal Govern-

Associate Justice Sandra Day O'Connor has rightly concluded, "[T]he execution of a legally and factually innocent person would be a constitutionally intolerable event."<sup>10</sup> We know, however, that this intolerable event takes place with some regularity in the death penalty jurisdictions. How often does it occur?

Texas leads all other states and the federal government in the number of executions each year. In particular, we seek to answer: Has Texas executed an innocent person? Has the "constitutionally intolerable event" already occurred in Texas?

## II. TEXAS AND EXECUTION OF THE INNOCENT

Has Texas executed an innocent person? Almost certainly it has. This question haunts not only the Texas judicial system but also the judicial systems of the other jurisdictions employing capital punishment and our larger society as well. We must face the fact that we are tolerating the ongoing repetition of this "intolerable event" as characterized by Justice O'Connor,<sup>11</sup> and it is therefore essential in an analysis of the capital punishment system to know the empirical probability of this event.

It remains true today that as Justice Stewart observed in *Furman v. Georgia*<sup>12</sup> almost four decades ago, "[D]eath sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual[,] imposed only upon a "random handful" of defendants.<sup>13</sup> And in executing *innocent persons*, the death penalty is surely still being imposed "freakishly and wantonly," in the words of Justice Stewart.<sup>14</sup> It is legitimate to ask what could possibly be more "freakish" or "wanton" than executing an innocent person and the dreadful role of the courts in the present situation.<sup>15</sup>

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ment, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, U. S. Military, Utah, Virginia, Washington, and Wyoming. *Facts About the Death Penalty*, *supra* note 7, at 1 (last visited Feb. 26, 2012). Massachusetts and New York have death penalty statutes, but those statutes have been held unconstitutional under their respective state constitutions. *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116 (Mass. 1984); *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004); *People v. Taylor*, 878 N.E.2d 969 (N.Y. 2007).

9. *Callins*, 510 U.S. at 1145-46 (Blackmun, J., dissenting); see generally CHARLES L. BLACK, JR., *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* (2d ed. 1981); James S. Liebman, Jeffrey Fagan, Valerie West & Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839 (2000).

10. *Herrera*, 506 U.S. at 419 (O'Connor, J., concurring).

11. *Id.*

12. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

13. *Id.* at 309, 310 (Stewart, J., concurring).

14. Authors' paraphrase of Justice Stewart's concurrence.

15. Professor Anthony Amsterdam stated:

. . . [T]he courts are given the task of defending themselves against the claims of condemned inmates. This now becomes their focus, instead of defending condemned inmates against the risks of fatal

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In this article, we calculate the probability that Texas has executed an innocent person, and we argue that this violates the Eighth Amendment's prohibition against cruel and unusual punishment and violates the Fourteenth Amendment's requirement of substantive due process.

The Constitution cannot tolerate the execution of innocent persons. There is no argument, no circumstance, no set of conditions that could ever make this event acceptable. The death penalty system in Texas, as in the other jurisdictions still using capital punishment, cannot infallibly distinguish the guilty from the innocent. That is more than clear.<sup>16</sup> The ultimate penalty, death, should never be an option in a system so flawed. In choosing between our inalienable rights and any system, it is our rights that must be preserved—not the defective machinery of death.

Previous arguments to find the death penalty unconstitutional, as in *Herrera v. Collins*,<sup>17</sup> have focused on the Eighth Amendment clause forbidding cruel and unusual punishment. Concurring opinions in *Herrera* found execution of the innocent would offend every articulation of the Eighth Amendment.<sup>18</sup>

The Supreme Court struck down the death penalty in 1972 in *Furman v. Georgia*,<sup>19</sup> because for those persons who received the death penalty, and for what crimes, and under which rules, the death penalty was arbitrary and capricious, “wantonly and . . . freakishly imposed,”<sup>20</sup> and thus constituted cruel and unusual punishment in violation of the Eighth and the Fourteenth Amendments. Because of these systemic flaws, the death penalty was suspended until it could be corrected. The rulings in *Gregg v. Georgia*,<sup>21</sup> *Proffitt v. Florida*,<sup>22</sup> and *Jurek v. Texas*<sup>23</sup> in 1976 allowed reins-

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errors.

We appreciate that this is a dreadful thing to say. But it must be said because it is the lesson of history that our children's children will read if courts accept a regime of capital punishment without facing up to the reality that they are thereby putting themselves in thrall to its corrosive, all-corrupting influence. Anthony Amsterdam, et al., *Brief of Amici Curiae in Court of Appeals of the State of New York, People of the State of New York, Against Darrel K. Harris*, 27 N.Y.U. REV. L. & SOC. CHANGE 399, 462-463 (2002) (citations omitted).

16. See James S. Liebman et al, *A Broken System: Error Rates in Capital Cases, 1973-1995*, at i (June 12, 2000), [http://www2.law.columbia.edu/instructionalservices/liebman\\_final.pdf](http://www2.law.columbia.edu/instructionalservices/liebman_final.pdf) (Professor Liebman commented that the “death penalty system [is] collapsing under the weight of its own mistakes.”); James S. Liebman et al, *A Broken System Part II: Why There is So Much Error in Capital Cases, and What Can Be Done About It* (Feb. 11, 2002), <http://www2.law.columbia.edu/broken-system2/index2.html>.

17. *Supra* note 5.

18. See *Herrera*, 506 U.S. at 419 (O'Connor, J., concurring) (“I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution.”); *Id.* at 428 (Scalia, J., concurring) (writing that it is “an embarrassing question” to question whether our justice system could have innocent men facing the death penalty.).

19. *Furman*, 408 U.S. at 310 (Stewart, J., concurring).

20. *Id.* at 310 (Stewart, J., concurring).

21. *Gregg v. Georgia*, 428 U.S. 153 (1976).

22. *Proffitt v. Florida*, 428 U.S. 242 (1976).

23. *Jurek v. Texas*, 428 U.S. 262 (1976).

tatement of the death penalty in Georgia, Florida, and Texas after the Court was persuaded that certain (cosmetic) “fixes” to the system had apparently corrected the flaws that violated constitutional rights. Georgia, Florida, and Texas had instituted statutory rules and procedures, narrowing and specifically listing those crimes that were death penalty eligible, such as the murder of a police officer or a child under six. Other similar criteria, conditions, and adjustments have been made in the death penalty states, in the federal system, and in the military justice system, or added on a consistent basis, for the past thirty-eight years. Recently, however, the execution of the mentally retarded<sup>24</sup> and the execution of juveniles have been categorically deemed unconstitutional.<sup>25</sup> We suggest that execution of innocent persons should also be categorically deemed unconstitutional and ended.

We can calculate statistically the probabilities of executing innocent persons, as we shall demonstrate in this article. The death penalty continues to violate fundamental rights and liberties. The time has come to declare that innocent persons constitute a category and that the execution of innocent persons violates the Eighth and Fourteenth Amendments to the Constitution of the United States as cruel and unusual punishment and as a deprivation of substantive due process.

This article calculates the odds of the execution of an innocent person in Texas based upon real empirical data and argues that our present system violates the Eighth and the Fourteenth Amendments. No death penalty system can seek to rationalize capital punishment as constituting anything other than cruel and unusual punishment if it *cannot* accurately distinguish the innocent from the guilty, a point made by Justice Blackmun in his 1994 dissent in *Callins v. Collins*.<sup>26</sup> A death penalty system that allows for the execution of the innocent, as the present system does, should be declared unconstitutional. The Supreme Court must once again—as it began to do initially and tentatively in *Furman*—look at the ghastly reality of the situation and see this shocking reality for what it is, and then strike down the death penalty definitively and finally, since the monstrous injustices that continue to be produced by this inherent flaw cannot be remedied otherwise. Abolition is the only effective and sure remedy.

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24. *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the execution of the mentally retarded is prohibited).

25. *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the execution of juvenile offenders is prohibited).

26. *Callins*, 510 U.S. at 1145 (asking whether the death penalty system can “accurately and consistently determine which defendants deserve to die”).

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III. WRONGFUL CONVICTIONS, EXONERATIONS, AND  
“ACTUALLY INNOCENT”

In calculating the probability that Texas has executed an innocent person, we employ a very conservative and very narrow definition of innocence. An *innocent*, as we define the term, is someone *who did not commit the crime for which he or she has been convicted*, a condition increasingly referred to by the courts as “actually innocent.”<sup>27</sup> This is opposed to defendants who are found not guilty or have their convictions reversed under procedural requirements of the law, such as cases where evidence was collected without a search warrant, significant procedural errors during trial, or other legal technicalities that result in sentences being overturned. But as to actual innocence—putting aside both logic and common sense in favor of rules designed to attain orderly appellate procedure—the Supreme Court has held that a claim of actual innocence is not an independent basis for federal habeas corpus relief.<sup>28</sup>

In any event, we confine our analysis in this article to Texas and the death penalty as it is employed in Texas. We demonstrate the objective, empirical likelihood that the execution of an innocent has already occurred.

We confront Justice Scalia, his position expressed at some length in his concurring opinion in *Kansas v. Marsh*,<sup>29</sup> who assures himself that the constitutionally intolerable event has not occurred because no one can give him the *name* of an innocent who has been executed.<sup>30</sup> “Show me the one,” his logic implores. He stated in his concurring opinion in the *Marsh* case:

It should be noted at the outset that the dissent does not discuss a single case—not one—in which it is clear that a person was executed for a crime he did not commit. If such an event had occurred in recent years, we would not have to hunt for it; the innocent’s name would be shouted from the rooftops by the abolition lobby.<sup>31</sup>

Justice Scalia continued: “Instead of identifying and discussing any particular case or cases of mistaken execution, the dissent simply cites a

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27. For discussion of the development of the actual innocence doctrine, see Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970); Limin Zheng, Comment, *Actual Innocence as a Gateway Through the Statute of Limitations Bar on the Filing of Federal Habeas Corpus Petitions*, 90 CAL. L. REV. 2101, 2118-27 (2002).

28. See *Herrera*, 506 U.S. at 393.

29. *Kansas v. Marsh*, 548 U.S. 163, 188-91 (2006) (Scalia, J., concurring).

30. *Id.* at 188-89, 199.

31. *Id.* at 188.

handful of studies that bemoan the alleged prevalence of wrongful death sentences.<sup>32</sup> Insisting that concerns of the kind we are expressing in this article are “ideologically driven,” Justice Scalia reiterated in his concurrence in *Marsh*: “This explains why those ideologically driven to ferret out and proclaim a mistaken modern execution have not a single verifiable case to point to.”<sup>33</sup> We wonder, in passing, why persons who oppose execution of the innocent and who want to determine whether that has happened are described by Justice Scalia as “ideologically driven.” One would hope that it is not a matter of “ideology,” as that term is ordinarily used, to be against the execution of innocent persons— persons who committed no capital crime. Any decent individual in our nation, it would seem, would oppose execution of the innocent, regardless of the “ideology” to which such a person might subscribe.

We suggest that providing an individual name is an unreasonable criterion and is a completely misguided threshold. Empirical facts combined with standard statistical analysis are enough to demonstrate that *the event must have occurred*. Providing a name, and thus identifying “a single case,”<sup>34</sup> is not a necessary to prove that innocent persons have been executed. Providing a name is not necessary to prove that people drowned when the *Titanic* sank. While we review several cases of actual innocence, it is only to support the empirical data we used in calculating the likelihood that an innocent has already been executed, which is the main thrust of this article.

We believe we may be the first to calculate the probability of the execution of an innocent in Texas, subjecting the available data to standard statistical analysis, and on the basis of that analysis, we call for abolition of capital punishment. We believe our conclusions to be accurate because we have employed an extremely conservative bias—erring on the side of ultra-conservative caution—by using empirical, irrefutable data that has been endorsed by the justice system and by subjecting it to standard techniques of statistical analysis.

We distinguish wrongful conviction, exoneration, and “actual innocence” in order to pare down to a very conservative calculation. People

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32. *Id.* at 189.

33. *Id.* at 199. Justice Scalia has also subsequently noted:

This Court has never held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is ‘actually’ innocent. Quite to the contrary, we have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on alleged ‘actual innocence’ is constitutionally cognizable.

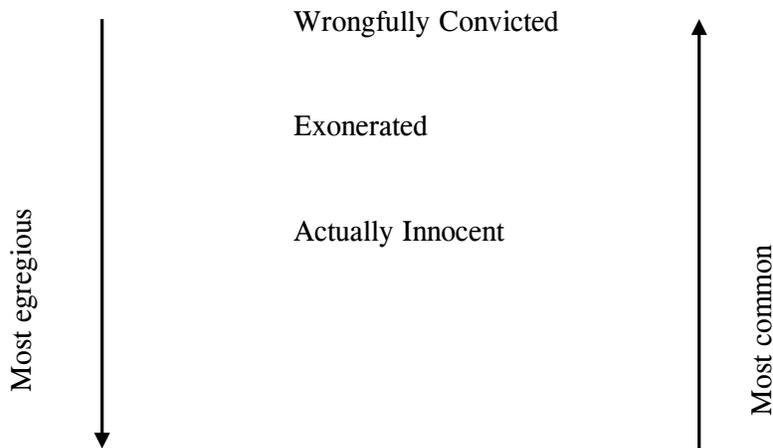
*In re Troy Anthony Davis*, 130 S. Ct. 1, 3 (2009) (emphasis omitted). Justice Scalia insisted that “Federal courts may order the release of convicted state prisoners only in accordance with the restrictions imposed by the Antiterrorism and Effective Death Penalty Act of 1996.” *Id.* at 2; see 28 U.S.C. § 2554(d)(1). And Justice Scalia is clearly satisfied that actual innocence does not come within “the restrictions” imposed by the Act.

34. *Marsh*, 548 U.S. at 188.

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leave Death Row legally for a variety of reasons. Our concern is the “actually innocent,” a number much smaller than those listed as having been wrongfully convicted or subsequently exonerated. Common terminology used to describe the disposition of various cases includes: wrongful conviction, exonerated, completely exonerated, and more recently “actually innocent.” Phrases such as “completely exonerated by DNA” seem to distinguish different levels of exoneration.

We divided those who have been released from Death Row into three categories: (1) wrongfully convicted; (2) exonerated; and (3) “actually innocent” (with “complete exoneration by DNA” as one way a defendant may be considered “actually innocent” under our strict criteria).



### A. *Wrongful Convictions*

The number of wrongful convictions is very large. Death penalty convictions are so routinely overturned that the shock in our American society has now worn off. In a review of capital cases spanning twenty-three years, state courts found serious, reversible trial errors in almost 70% of death penalty cases.<sup>35</sup> State courts threw out 47% of the death sentences, almost 2,400 cases.<sup>36</sup> It is difficult to track what happens once a retrial is awarded to a defendant. For instance, the same evidence that warranted a retrial might also convince a prosecutor to dismiss the original charges, or the defendant may now accept a plea bargain for a reduced sentence. While this is not considered an exoneration, it is not rare for prosecutors to make various declarations of innocence in dropping charges, such as

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35. Liebman et al., *supra* note 9, at 1853.

36. *Id.* at 1865 n.37.

renewed pledges to solve the case, including explicit proclamations of innocence regarding the freed defendant.

The prospect of wrongful conviction no longer surprises or offends us, and this fact speaks to the widespread acquiescence by our citizenry in the cruel operations of our extremely flawed death penalty system. When and how, one wonders, did such acquiescence supplant outrage? Was it after one hundred wrongful death penalty convictions had been overturned? Two hundred? A thousand? Evidently, the injustice crept upon us so subtly and inconspicuously that we have developed immunity to the shame. How else could it be that our society would accept a system, operating in our name, that tolerates conviction and execution of innocent men and women?

### *B. Exoneration*

Exonerations are the few cases out of the many, many wrongful convictions that are rectified and in which defendants are granted some type of relief. For the purposes of this article, we do not take exoneration as an indication of innocence. It is a necessary, but not sufficient, criteria to be included in our count of “actual innocents.” For example, even though a defendant was exonerated, prosecutors might not have pursued retrial for a myriad of reasons, making a hard decision to instead dismiss the charges. Sometimes, key witnesses are no longer willing to testify, making it almost impossible for prosecutors to retry the case. For these reasons, we do not simply count “exonerated” as innocent. We employ an even more conservative standard.

### *C. Actually Innocent*

Just as there is no official legal status of exonerated, there is also no way a court can declare a defendant innocent. Even a finding of “not guilty” does not constitute an affirmative finding of innocence. However, the Supreme Court has used the term “actually innocent” in describing criteria even higher than exoneration.<sup>37</sup> Other language to describe “actually innocent” is exemplified by the term “complete exoneration by DNA.” Of the 140 exonerations since reinstatement of the death penalty, a growing number have involved DNA evidence. *Herrera v. Collins* used the terms “actually innocent” and “actual innocence” in discussing the chances that someone who is innocent may be executed.<sup>38</sup>

To determine whether an exonerated defendant could be counted as “actually innocent,” we reviewed the rulings and case details. We con-

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37. See, e.g., *In re Davis*, 130 S.Ct. at 1-2; *Herrera*, 506 U.S. at 393, 396, 404, 406, 407, 417.

38. See *Herrera*, 506 U.S. at 393, 396, 404, 405, 407, 417.

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tacted lawyers involved in the appeals. While we count “complete exoneration by DNA” as “actually innocent,” there are other ways to confidently establish that defendants were “actually innocent.” Sometimes the prosecutor declared the defendant’s innocence. Depending upon the facts of the individual cases, there are many reasons for declaring conclusively a defendant’s innocence.

### IV. EMPIRICAL EVIDENCE

At the time of press, the Texas Department of Criminal Justice lists 287 people who are “no longer on death row.”<sup>39</sup> Some have died awaiting execution. Others had sentences reduced for a variety of reasons, including mental retardation. Many of the death sentences were commuted to life once the execution of minors was ruled unconstitutional (30 cases). But it should be noted that this is not to say that none of the minors also had innocence claims. For example, Robert Springsteen is listed having left Death Row by “sentence commuted to life” because he was 17-years-old at the time of the offense.<sup>40</sup> However, he was subsequently completely exonerated by DNA of the crime that sent him to Death Row.<sup>41</sup> How do we evaluate such a case? Or what do we make of those who had convictions overturned but died awaiting new trials? To remain conservative, we did not include cases where the defendant died. However, Springsteen’s case provides irrefutable evidence of an “actually innocent” person sentenced to death in Texas. Several others have walked off Death Row as innocent men. While these defendants were cleared before their execution date, this points to a possibility of innocents who have been executed. The real, empirical data of innocents who have been sentenced to death (and later cleared) can be used to accurately calculate the possibility that an innocent has been executed in Texas.

The Texas Department of Criminal Justice does not keep exoneration records.<sup>42</sup> They do list defendants who have had their convictions reversed or overturned.<sup>43</sup> Of the 287 people no longer on Death Row, people released because of “wrongful conviction” make up 34 of those people.<sup>44</sup> Of those 34 wrongful convictions, 12 people have been subsequently exone-

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39. For the current figures, see the website of the Texas Department of Criminal Justice, Death Row Information, available at: [http://www.tdcj.state.tx.us/death\\_row/dr\\_offenders\\_no\\_longer\\_on\\_dr.html](http://www.tdcj.state.tx.us/death_row/dr_offenders_no_longer_on_dr.html) (last visited March 29, 2012).

40. *See id.*

41. *All Charges Dismissed Against Former Texas Death Row Inmate--139th Exoneration Nationally*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/all-charges-dismissed-against-former-texas-death-row-inmate-139th-exoneration-nationally>.

42. *See Texas Department of Criminal Justice*, [http://www.tdcj.state.tx.us/death\\_row/](http://www.tdcj.state.tx.us/death_row/).

43. *Id.*

44. *Id.*

rated.<sup>45</sup> Of those 12 exonerations, we identify 10 defendants who were “actually innocent.”<sup>46</sup>

#### V. THE CALCULATION: PROBABILITY OF AN EXECUTION OF AN INNOCENT IN TEXAS

Insofar as we have been able to determine, no one has ever calculated the probability that an innocent person has already been executed in Texas, though there have been discussions and estimates of the possibility as outlined above. We urge that the 140 national exonerations from Death Row are an indicator of innocence.<sup>47</sup> Using the number of exonerations from death row, one researcher, Ursula Bentele, took an actuarial approach and found that the execution of the innocent was “all but inevitable.”<sup>48</sup> We take an empirical approach using real data to calculate the probability.

To make our calculation, we began with the actual number of those sentenced to death that turned out to be “actually innocent,” a bar higher than exoneration. We used that number to calculate the empirical probability that an innocent has already been executed.

Since 1972, there have been 1,071 people sentenced to death in Texas.<sup>49</sup> 486 have been executed, 298 are currently on death row, and 287 are listed as “no longer on death row.”<sup>50</sup> Of those 1,071 sentenced to death, 34 have been wrongfully convicted, 12 have been exonerated, and 10 met our even higher standard for “actual innocence.”<sup>51</sup> This gives us a .009337 probability that someone sentenced to death in Texas is actually innocent:

$$10/1071 = .0093370$$

$$p = .0093370$$

The simple, straightforward calculation of **P**, the probability that Texas has executed an innocent uses the following formula:

$$P = 1 - (1-p)^n$$

Where:

**P** is the probability an innocent has already been executed, with 100% as a maximum;

**p** is the probability someone sentenced to death is actually innocent; and

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45. *Id.*

46. *See infra* Table 1.

47. Indeed it is difficult to imagine how they could be anything else.

48. Bentele, *supra* note 4, at 1365 (quoting Franklin Zimring).

49. *See* Texas Department of Criminal Justice, *supra* note 39.

50. *Id.*

51. *Id.*



A. *Some Things to Note About the Calculations and Graph*

It is clear that there is a 99% chance Texas has already executed an innocent, even when the probability that someone sentenced to death is actually innocent is as low as .0093370. Even if the probability that someone innocent is sentenced to death is reduced to one-half of one percent (.005), there is still a 90% chance Texas has already executed an innocent person. If we used the 12 exonerations—as most would—as an indication of innocence, the probability that Texas has executed an innocent is nearly 100%. For any probability of innocence, as  $n$  (the number of executions) increases, the execution of an innocent becomes unavoidable. The strength of the findings presents a startling juxtaposition: *Even though the chance of being actually innocent and sentenced to death is admittedly very, very low, the probability that at least one of those innocents has been executed remains astoundingly high.*

B. *Show You the One? Not Necessary.*

In his concurring opinion in *Kansas v. Marsh*,<sup>52</sup> Justice Scalia implores us to show him the case of a single innocent defendant who has been executed.<sup>53</sup> He claims that there has not been “a single case—not one—in which it is clear that a person was executed for a crime he did not commit. If such an event had occurred in recent years, we would not have to hunt for it; the innocent’s name would be shouted from the rooftops.”<sup>54</sup> We argue that this criterion, which Justice Scalia insists upon—perhaps, to him—is plainly irrational as a means of determining whether an innocent person must have been executed.

Justice Scalia’s comments were in response to a dissent by Justice Souter (joined by Stevens, Ginsburg, and Breyer), where Souter addressed the constitutionality of the execution of the innocent in light of recent facts regarding “repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests.”<sup>55</sup> Souter goes on to cite research studies on false convictions in capital cases.<sup>56</sup>

Justice Scalia criticizes the various exoneration claims, and he does “take the trouble to point out”<sup>57</sup> that the dissenting opinion has “nothing substantial to support it.”<sup>58</sup> Scalia questions Souter’s willingness to “accept

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52. See generally *Marsh*, 548 U.S. 163 (Scalia, J., concurring).

53. *Id.* at 188 (Scalia, J., concurring).

54. *Id.*

55. *Id.* at 208.

56. *Id.* at 207-211.

57. *Id.* at 188.

58. *Marsh*, 548 U.S. at 188.

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anybody's say-so."<sup>59</sup> Scalia then quotes approvingly from the inept attempt of Joshua Marquis, an Oregon district attorney, in 2006 to calculate correctly the meaning of the available data.<sup>60</sup> Scalia noted District Attorney Marquis's claim that "the error rate [is] .027 percent[—]or, to put it another way, a success rate of 99.973 percent."<sup>61</sup> Marquis's mistake, and Justice Scalia's apparent uncritical adoption of it, is almost too rudimentary to address.<sup>62</sup> The elementary mistake is that Marquis compares apples to oranges. Professor Samuel Gross also clearly explains this elementary mistake.<sup>63</sup> We favor straightforward simplicity over alarming confusion. We use exonerations from Death Row divided by the total number sentenced to death, all confined to Texas since the death penalty reinstatement. We further trim that number. It is indisputably accurate and conservative.

We agree that the data on the "true number" of wrongful convictions, as Professor Gross argues, is "unknown and frustratingly unknowable."<sup>64</sup> This is why we decided to stick to convictions overturned or reversed. We do not take anyone to be exonerated until the court itself—or a court and a jury—say they are innocent. We imagine Justice Scalia would strongly approve of using these rulings—the same system he showers with accolades, claiming "a success rate of 99.973 percent."<sup>65</sup>

Finally, we need to point out explicitly how Justice Scalia's challenge to "show me the one" does not at all confound the likelihood that an innocent has already been executed. Our empirical approach does not identify "the one," only that the event—execution of an innocent— has already occurred.

Our simple calculation is illustrated by "the birthday paradox." This describes the phenomena that as the number of people in a room rises, the chances that two share the same birthday increase dramatically. With fifty people, you can be almost certain that two will share the same birthday. The calculation does not identify *which* two people share a birthday, only that the event is bound to occur.

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59. *Id.* at 193.

60. *Id.* at 197-198. See also Joshua Marquis, *The Innocent and the Shammed*, N.Y. TIMES (Jan. 26, 2006), available at <http://www.nytimes.com/2006/01/26/opinion/26marquis.html>; Samuel R. Gross, *Souter Passant, Scalia Rampant: Combat in the Marsh*, 105 MICH. L. REV. FIRST IMPRESSIONS 67, 67-72 (2006).

61. *Marsh*, 548 U.S. at 198.

62. Just as an exercise, let us entertain Marquis's numbers. Taking that ridiculous underestimate of a .00027 error rate as our "p," and changing our "n" to 1304 to reflect the number of executions nationwide, even that comically low estimate *still* gives us a 30% probability that an innocent has been executed in the U.S.

63. See Gross, *supra* note 60, at 69.

64. *Id.*

65. *Marsh*, 548 U.S. at 198.

Consider the following hypothetical. Imagine that Justice Scalia is standing at a podium before a crowd of several hundred, say four hundred eighty-six.

We turn to him and say, “We guarantee that two of the people in this auditorium share the same birthday.”

“Really?” he might ask.

“We would bet our lives on it. There are three hundred sixty-five days in a year, and four hundred eighty-six people in the auditorium.”

“But who!?” he might ask, as a demand for proof.

Our baffled looks might be lost on him. Would Justice Scalia bet his own life using the same “logic” he uses to bet the lives of others?

Naming *who* is not a criterion necessary to prove the *certainty* of the event.

It should be noted that there are indeed people who have speculated as to who “the one” is in Texas. But they did not find only one. They found five people with legitimate claims to innocence who have already been executed before they were able to be exonerated.<sup>66</sup>

But to answer the question that calls for action: “Has Texas ever executed an innocent man?”

Yes.

## VI. CRUEL AND UNUSUAL

The Constitution guarantees two types of due process: procedural and substantive due process. Procedural due process ensures that proper methods are used when depriving a citizen of life, liberty, or property. Substantive due process ensures that the deprivation of life, liberty, or property is justified. There is no justification for the execution of the innocent. It serves no government or public interest. On that basis, the execution of an innocent is unconstitutional, and any system that allows it cannot be tolerated.

Substantive due process also indicates that certain fundamental rights are protected—that is, the *right itself* is protected—and not only the procedures by which it may be infringed upon.

The due process clause of the Fourteenth Amendment states “*nor shall any State deprive any person of life, liberty, or property, without due process of law.*”<sup>67</sup> States must use sufficiently fair and just legal proce-

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66. See David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, NEW YORKER (Sept. 7, 2009), [http://www.newyorker.com/reporting/2009/09/07/090907fa\\_fact\\_grann?printable=true](http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann?printable=true) (last visited Mar. 29, 2012); see Michael Hall, *Death Isn't Fair*, TEXAS MONTHLY (Dec. 2002), available at <http://www.texasmonthly.com/preview/2002-12-01/feature2>; see *Executed But Possibly Innocent*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/executed-possibly-innocent> (last visited Mar. 29, 2012).

67. U.S. CONST. amend. XIV § 1.

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dures whenever the State is going to lawfully take away a person's life, liberty, or property. Before a person can be executed, imprisoned, or fined for a crime, they must get a fair trial, based on legitimate evidence, with an opportunity to cross-examine witnesses against them, in front of a jury, etc. These are procedural rights. The courts have done well establishing, updating, and ensuring procedural due process.

When facing the death penalty, one should not be convicted or executed without due process. In determining how much due process a person is provided, the Supreme Court establishes a balancing test, comparing the level of deprivation a defendant faces to an appropriate level of due process. Extraordinary efforts to provide for due process are strictly adhered to because the level of deprivation (life) is the ultimate. Compare this to trials with less at stake. Much evidence is ruled irrelevant because it has little probative value, or it is redundant or cumulative evidence that wastes the court and jury's time. But in death penalty trials, the level of deprivation is the ultimate; the standard of due process is the highest.

Substantive due process applies to the substance of rights themselves, not just the procedures governing their deprivation. The Supreme Court recognizes substantive due process as a constitutionally-based "liberty," and any laws that limit such a liberty are unconstitutional.<sup>68</sup> Substantive due process holds that the Due Process Clause of the Fourteenth Amendment guarantees not only that appropriate and just procedures are to be used whenever the government takes away a person's liberty, but also that a person's liberty cannot be taken without appropriate governmental justification, *regardless* of the procedures used to do the taking.<sup>69</sup>

Substantive due process dictates an examination of the government's objective in engaging in activities that threaten the life and liberty of its citizens<sup>70</sup> and bars "certain government actions regardless of the fairness of the procedures used to implement them."<sup>71</sup> One such government action barred should be the execution of an innocent. Our position is that when a system is so flawed that it allows for the execution of the innocent, the ultimate penalty of death should not be an option.

Having established both the undisputable unconstitutionality of the execution of an innocent and that it has already occurred—which places us in need of an immediate remedy—we have two tangential issues to address before we make our concluding point (which is that abolition is the only remedy).

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68. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846-847 (1992).

69. See *Substantive Due Process*, STANFORD, <http://www.stanford.edu/group/psylawseminar/Substantive%20Due%20Process.htm> (last visited Mar. 29, 2012).

70. Bentele, *supra* note 4, at 1368.

71. *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

First, the strict constitutionalists claim that the founders listed all the rights, and that if they had intended a right be protected, it is explicitly listed in the Constitution. But substantive due process dictates that rights do not have to be listed to be protected. They need only be fundamental or rooted in our history. This recognizes that some rights are so basic and fundamental they are unequivocal. They are inalienable rights and need not be enumerated in the Constitution to warrant their protection. Indeed, liberty cannot be defined by a distinct criteria or checklist.

Secondly, it should be clear by now that substantive due process and procedural due process are rights that are independent of each other. That is, the government can violate substantive due process without violating procedural due process, and vice versa. No amount of procedural due process guarantees any amount of substantive due process. To draw a comparison to a medical procedure, imagine a technically perfect surgery, following all the proper medical procedures with surgical perfection, performed on the wrong patient. There is no justification for taking a life when the government cannot accurately distinguish the innocent from the guilty, especially when proper procedures are followed. The Constitution currently offers no protection or redress for those “actual innocents” whose substantive rights have been violated, even though procedural due process was adhered to.

#### VII. THE ONLY REMEDY IS ABOLITION OF CAPITAL PUNISHMENT

The execution of an innocent is a violation of the Eighth and Fourteenth Amendments to the Constitution of the United States, and because our system of capital punishment inevitably executes innocent persons, the only effective remedy is abolition of the death penalty.

Now that we know the execution of an innocent has occurred, that the “constitutionally intolerable” event has already happened, the courts must act.

The courts are our only recourse. There is no mechanism to grant relief for the actually innocent even though procedural due process has been followed. So the incomprehensible situation may arise where the Supreme Court has decided that a defendant is “actually innocent,” but that his or her death sentence must be upheld because there were no procedural violations; thus, rigorous adherence to the complex rules of orderly appellate procedure is more important than innocent life. Paradoxically, the courts repeatedly hold proper procedure is not followed, but they say that they have no way to remedy substantive mistakes that cost the lives of innocent defendants.

The empirical facts provide no choice. We must remedy this injustice. Just as *Furman* stopped the death penalty at least briefly, and then *Gregg*,

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*Proffitt*, and *Jurek* viewed the problem as corrected, capital punishment must now be stopped again by the Supreme Court—permanently.

## VIII. CONCLUSION

Execution of the innocent is an abomination even to the most meager aspirations of our society.

We have used real, empirical data on the number of exonerations involving defendants who were “actually innocent,” to determine accurately the probability that someone sentenced to death is actually innocent. Using that probability, we calculate a 99% probability that Texas has already executed an innocent person. This is far beyond any reasonable doubt.

Given that fact—once again, in very familiar and unobjectionable fashion—the intervention of the Supreme Court is required. We have been here before. The Supreme Court can point out the fault—that the death penalty constitutes cruel and unusual punishment and it violates substantive due process because it cannot distinguish the innocent from the guilty at a level of accuracy that justifies the deprivation of life. Given the reality of our lack of infallibility in administering our criminal justice system, it is unlikely that any system of capital punishment can ever guarantee that innocent men and woman will not be executed.

We are experiencing, repeatedly, an event the Constitution cannot tolerate: execution of the innocent. If we as a society tolerate it, we undermine the rights the Constitution provides for all of us and we weaken our society. Though inalienable, these rights must still be actively protected.

Table 1. *Sub-Set of the 287 Defendants no Longer on Death Row*

<b>Defendant</b>	<b>Wrongfully Convicted (34)</b>	<b>Exonerated<sup>72</sup> (12)</b>	<b>Actually innocent (10)</b>
Adams, Randal	Conviction reversed.	Exonerated.	Actually Innocent.
Beltran, Noe	Conviction reserved. Serving time on other charges.		
Blair, Michael	Sentence overturned. Serving time on other charges.	Exonerated.	Actually Innocent.

72. See *The Innocence List*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited Feb. 7, 2012). Exonerated defendants must have been convicted, sentenced to death and subsequently either: (a) their conviction was overturned OR (b) they were either acquitted at re-trial or all charges were dropped. DPIC and most any court would recognize exonerated as innocent, but we have a more conservative standard.

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Brandley, Clarence	Reversed and dismissed.	Exonerated.	
Burdine, Clavin	Conviction overturned. Serving time on other charges.		
Bush, Paul	Conviction overturned. Deceased.		
Cass, Mark	Conviction reversed. Not retried.		
Cook, Kerry	Sentence overturned. Released.		
Cruz, Justin	Conviction overturned. Serving time on other charges.		
Deeb, Muneer	Acquitted.	Exonerated.	Actually Innocent.
Dunn, Thomas	Conviction reversed. Serving time on other charges.		
Graves, Anthony	Conviction overturned. Released.	Exonerated.	Actually Innocent.
Guerra, Ricardo	Reversed and dismissed. Released (deported to Mexico).	Exonerated.	Actually Innocent.
Guzman, Jose	Acquitted.		
Irwin, Bonnie	Conviction reversed. Serving time on other charges.		
Kleason, Robert	Conviction reversed. Facing federal charges.		
Macias, Frederico	Indictment quashed.	Exonerated.	Actually Innocent.
McManus, Vernon	Reversed and Dismissed.	Exonerated.	
Munoz, Jesus	Conviction overturned. Serving time on other charges.		
Rice, Tony	Conviction reserved. Serving time on other charges.		
Richardson, Damon	Conviction reversed. Serving time on other charges.		
Richardson, James	Conviction reversed and charges dismissed.		
Skelton, John	Acquitted.	Exonerated.	Actually innocent.
Sonion, Charles	Conviction overturned. Deceased.		
Stogsdill,	Conviction reversed.		

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Kenneth			
Springsteen, Robert	Conviction reversed and dismissed.	Exonerated.	Actually Innocent.
Toney, Michael	“The CCA issued a mandate granting relief. Case was reversed and remanded back to the trial court.” Dismissed.	Exonerated.	Actually Innocent.
Urbano, Gilbert	Conviction reversed. Serving time on other charges.		
Vodochsky, Kenneth	Sentence overturned. Serving time on other charges.		
Washington, Herbert	Conviction overturned. Serving time on other sentence.		
Whitmore, James	Conviction reversed.		
Wilkerson, Claude	Conviction reversed and charges dismissed.		
Willis, Ernest	Conviction overturned. Released.	Exonerated.	Actually Innocent.
Zimmerman, John	Conviction overturned. Serving time on other charges.		

Wrongfully convicted: 34

Exonerated: 12

Actually innocent: 10

Table 2. *Executed Defendants with Legitimate Claims of Innocence*

Carlos DeLuna	Executed 1989.
Ruben Cantu	Executed 1993.
David Spence	Executed 1997.
Gary Graham	Executed 2000.
Cameron Willingham	Executed 2004.

## APPENDIX 1:

*The Actually Innocent*

**Adams, Randall.**<sup>73</sup> *Texas Conviction: 1977, Charges Dismissed: 1989.*

“Patrolman Robert Wood was shot to death during a traffic stop on November 28, 1976, by sixteen-year-old David Ray Harris, who framed Adams to avoid prosecution himself. Another factor in the wrongful conviction was the surprise—and partly perjured—testimony of three eyewitnesses whose existence had been concealed from the defense until the witnesses appeared in the courtroom. A third factor was a statement Adams signed during interrogation that the prosecution construed as an admission that he had been at the scene of the crime.”<sup>74</sup>

**Blair, Michael.**<sup>75</sup> *Texas Conviction: 1994, Charges Dismissed: 2008.*

Michael Blair was sentenced to death for the 1993 murder of seven-year-old Ashley Estell. The Texas Court of Criminal Appeals upheld the decision of the Collin County trial court that:

The post-conviction DNA results and the evidence discovered in the State's new investigation have substantially eroded the State's trial case against [applicant]. This new evidence in light of the remaining inculpatory evidence in the record, has established by clear and convincing evidence that no reasonable juror would have convicted [applicant] in light of newly discovered evidence.<sup>76</sup>

In May 2008, following a re-investigation of the case by the Collin County prosecutor's office, District Attorney John Roach announced that in light of the results of advanced DNA testing and the absence of any other evidence linking him to the crime, Mr. Blair's conviction could no longer be upheld. Although the court recommended that a new trial be granted, the prosecution, in light of the evidence, chose not to pursue a retrial. In a dismissal motion filed in August 2008, prosecutors determined that “this case should be dismissed in the interest of justice so that the of-

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73. See generally *Ex parte Adams*, 768 S.W.2d 281 (Tex. Crim. App. 1989).

74. Michael Raadelet, *Randall Dale Adams: A Filmmaker Helped Free an Innocent Man*, NW. L. (Feb. 23, 2012, 9:52 p.m.), <http://law.northwestern.edu/cwc/exonerations/txAdamsSummary.html>.

75. See *Texas DNA Exoneration of Death Row Inmate Michael Blair Brings Innocence Total to 130*, DEATH PENALTY INFORMATION CENTER, <http://deathpenaltyinfo.org/texas-dna-exoneration-death-row-inmate-michael-blair-brings-innocence-total-130> (last visited Mar. 29, 2012).

76. *Ex parte Blair*, Nos. AP-75954, 2008 WL 2514174, at \*1 (Tex. Crim. App. June 25, 2008) (per curiam). See generally *Death Penalty Information Center: Innocence Cases 2004-Present*, <http://deathpenaltyinfo.org/innocence-cases-2004-present> (last visited Mar. 29, 2012, 12:00 p.m.).

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fense charged in the indictment can be further investigated.”<sup>77</sup> All charges against Mr. Blair in this case were dismissed in August 2008. He remains in prison serving out life sentences for other crimes.

**Deeb, Muneer.**<sup>78</sup> *Texas Conviction: 1985, Acquitted: 1993.*

“Prosecutors alleged that Deeb had agreed to pay \$5,000 for the murder. There was no evidence of such a payment, however, and other evidence of the plot was weak and circumstantial. None of the alleged co-conspirators testified—although they too were charged with capital murder and, therefore, were in a position to negotiate leniency for themselves in exchange for testifying against the purported mastermind of the plot.”

In 1991, the Texas Court of Criminal Appeals reversed and remanded the conviction “on the ground that the jailhouse informant's hearsay would (sic) not have been admitted . . . A jury acquitted Deeb two years later.”<sup>79</sup>

**Graves, Anthony.**<sup>80</sup> *Texas Conviction: 1994, Charges Dismissed: 2010.*

Anthony Graves's conviction was overturned, and in deciding whether to pursue a retrial, the prosecutor filed a motion to dismiss charges that had sent Graves to Texas' Death Row for 18 years. “‘He's an innocent man,’ [the district attorney] said, noting that his office investigated the case for five months. ‘There is nothing that connects Anthony Graves to this crime. I did what I did because that's the right thing to do.’”<sup>81</sup>

**Guerra, Ricardo A.**<sup>82</sup> *Texas Conviction: 1982, Charges Dismissed: 1997.*

“Guerra was sentenced to death for the murder of a police officer in Houston. Federal District Judge Kenneth Hoyt ruled on Nov. 15, 1994 that Guerra should either be retried in 30 days or released, stating that the actions of the police and prosecutors in this case were ‘outrageous,’ ‘intentional’ and ‘done in bad faith.’ He further said that their misconduct ‘was designed and calculated to obtain . . . another ‘notch in their guns.’”<sup>83</sup> Judge Hoyt's ruling was unanimously upheld by the United States Court of

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77. See *Texas DNA Exoneration*, *supra* note 75.

78. Rob Warden, *Muneer Deeb: A Rumor on the Jailhouse Grapevine Led to Muneer Deeb's Death Sentence*, NW L. CENTER ON WRONGFUL CONVICTIONS (Feb. 26, 2012 1:13 P.M.), <http://www.law.northwestern.edu/wrongfulconvictions/exonerations/txDeebSummary.html>.

79. *Id.* See also *Deeb v. Texas*, 815 S.W.2d 692 (Tex. Crim. App. 1991).

80. See generally *Graves v. State*, 950 S.W. 2d 374 (Tex. Crim. App. 1997).

81. Brian Rogers & Cindy George, *Texas Sets Man Free From Death Row*, HOUSTON CHRONICLE, Oct. 27, 2010, <http://www.chron.com/news/houston-texas/article/Texas-sets-man-free-from-death-row-1619337.php>.

82. See generally *Guerra v. Collins*, 916 F. Supp. 620 (S.D. Tex., 1995).

83. *Death Penalty Information Center: Innocence Cases 1994-2003*, <http://www.deathpenaltyinfo.org/innocence-cases-1994-2003> (last visited Mar. 29, 2012) (quoting *Guerra*, 916 F. Supp. at 637).

Appeals.<sup>84</sup> Although Guerra was granted a new trial, Houston District Attorney Johnny Holmes dropped charges on April 16, 1997 instead.

**Macias, Frederico.** *Texas Conviction 1984, Indictment quashed 1993.*

Macias's conviction was overturned due to ineffective assistance of counsel. "[A] grand jury refused to reindict because of lack of evidence."<sup>85</sup>

**Skelton, John C.** *Texas Conviction 1983, Acquitted 1990.*

"Despite several witnesses who testified that he was 800 miles from the scene of the murder, Skelton was convicted and sentenced to death for killing a man by exploding dynamite in his pickup truck. The evidence against him was purely circumstantial and the Texas Court of Criminal Appeals found that it was insufficient to support a guilty verdict. The Court reversed the conviction and entered a directed verdict of acquittal."<sup>86</sup>

**Springsteen, Robert.** *Texas Conviction: 2001, Charges Dismissed: 2009.*

"On October 28, 2009, Travis County, Texas, prosecutors moved to dismiss all charges against Michael Scott and Robert Springsteen, who had been convicted of the murder of four teens in an Austin yogurt shop in 1991. Springsteen had been sentenced to death and Scott was sentenced to life in prison. The convictions of both men were overturned by the Texas Court of Criminal Appeals because they had not been adequately allowed to cross examine each other . . . . However, sophisticated DNA analysis of evidence from the crime scene did not match either defendant and the prosecution announced it was not prepared to go to trial. The judge accepted the state's motion to dismiss all charges. Prosecutors are still trying to match the DNA from crime with a new defendant."<sup>87</sup>

To demonstrate how inaccurate Texas Department of Criminal Justice information is, Springsteen is listed as "sentence commuted . . . offender was 17 at time of offense."<sup>88</sup>

**Toney, Michael.** *Texas Conviction: 1999, Charges Dismissed: 2009.*

The state of Texas dropped all charges against Toney for a 1985 bombing that killed three people, and the Texas Court of Criminal Appeals overturned Toney's conviction on December 17, 2008, because the prosecution had suppressed evidence. The Tarrant County District Attorney's Office subsequently withdrew from the case based on the misconduct findings. In September 2009, the Attorney General's Office, which had been

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84. Guerra v. Johnson, 90 F.3d 1075 (5th Cir. 1996).

85. *Death Penalty Information Center: Innocence Cases 1984-1993*, <http://www.deathpenaltyinfo.org/innocence-cases-1984-1993> (last visited Mar. 29, 2012).

86. *Id.* See generally Skelton v. State, 795 S.W.2d 162 (Tex. Crim. App. 1989).

87. *Death Penalty Information Center: Innocence Cases 2004-Present*, supra note 76. See generally Springsteen v. Texas, No. AP-74223, 2006 WL 141224 (Tex. Crim. App. May 24, 2006).

88. Texas Department of Criminal Justice, *Offenders No Longer on Death Row* (Feb. 9, 2012), [http://www.tdcj.state.tx.us/death\\_row/dr\\_offenders\\_no\\_longer\\_on\\_dr.html](http://www.tdcj.state.tx.us/death_row/dr_offenders_no_longer_on_dr.html).

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specially appointed to the case in the wake of Tarrant County's withdrawal, dismissed the indictment.<sup>89</sup>

**Willis, Ernest Ray.** *Texas Conviction: 1987, Charges Dismissed: 2004.*

"Ernest Ray Willis was sentenced to death for the 1986 deaths of two women who died in a house fire that was ruled an arson. Seventeen years later, Pecos County District Attorney Ori T. White revisited the case after a federal judge overturned Willis' conviction. . . . White hired an arson specialist to review the original evidence, and the specialist concluded that there was no evidence of arson."<sup>90</sup> Texas Department of Criminal Justice lists his status as "Conviction overturned, released."<sup>91</sup> Willingham, already executed, had nearly identical circumstances to Willis.

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89. *Death Penalty Information Center: Innocence Cases 2004-Present*, *supra* note 76. *See generally* Ex parte Toney, No. AP 76056, 2008 WL 5245324 (Tex. Crim. App. Dec. 17, 2008).

90. *Death Penalty Information Center: Innocence Cases 2004-Present*, *supra* note 76. *See generally* Willis v. Cockrell, No. P-01-CA-20, 2004 WL 1812698 (W.D. Tex. Aug. 9, 2004).

91. Texas Department of Criminal Justice, *Offenders No Longer on Death Row*, *supra* note 88.