USA

TEXAS – STILL DOING ITS WORST

250TH EXECUTION UNDER CURRENT GOVERNOR IMMINENT

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TEXAS – STILL DOING ITS WORST

Texans know that the air that we breathe, the water that we drink, the land that we inhabit, they are all a reflection of the majesty and the beauty of our wonderful Creator. We must preserve His image. Like most Texans, I am a proponent of capital punishment because it affirms the high value we place on innocent life. We have a good system of justice in Texas, but it can be better

Texas Governor Rick Perry, State of the State address, 25 January 2001[1]

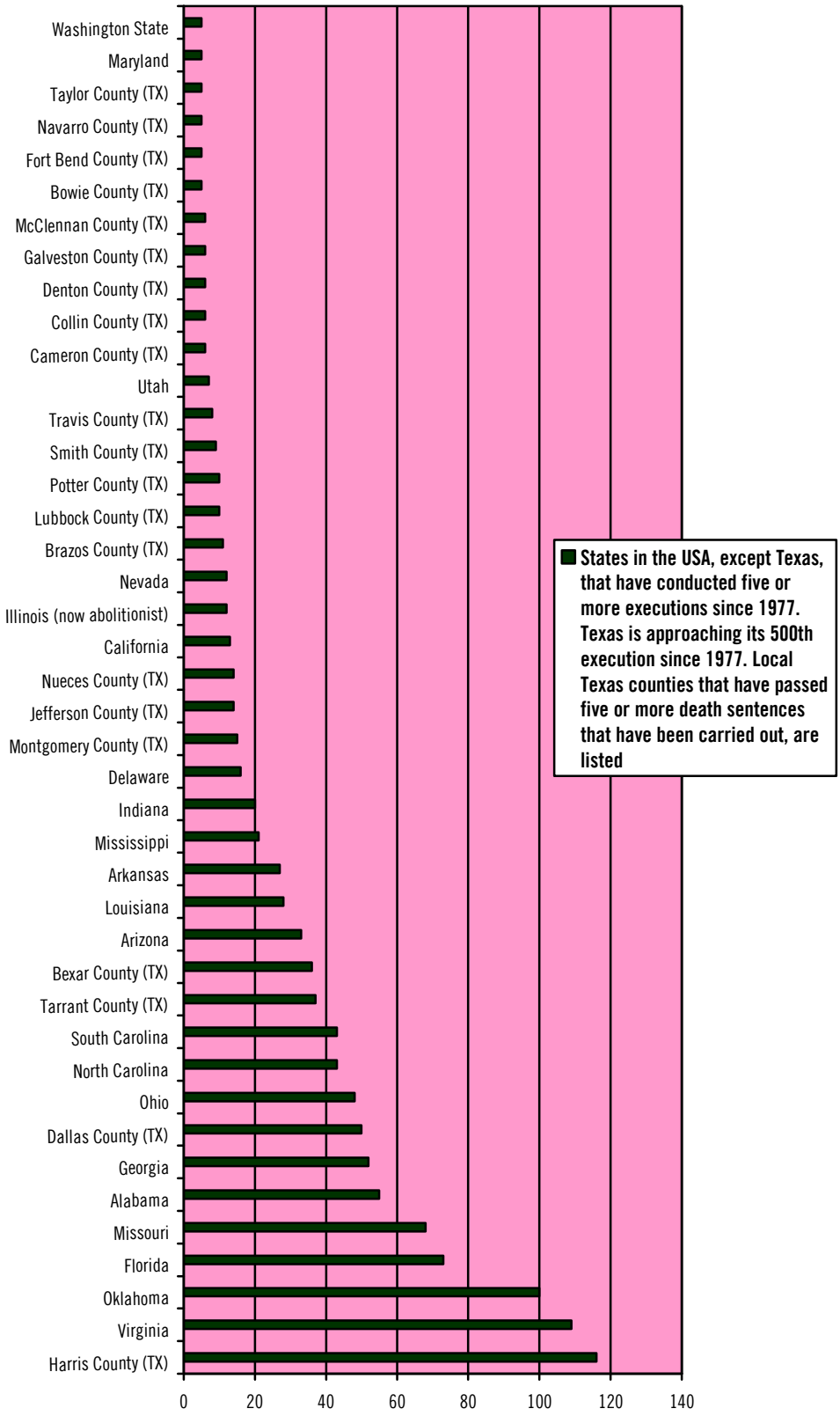
If Governor Rick Perry really meant to put the death penalty on a par with the life-giving necessities of air and water in his 2001 State of the State address, and to place his support for executions directly alongside his religious beliefs, perhaps it helps to explain why the State of Texas remains in a world of its own when it comes to judicial killing. In under a dozen years, Texas has killed more than twice as many people in its lethal injection chamber as any other state in the USA has put to death in the *three and a half decades* since the US Supreme Court allowed executions to resume under new capital laws. Texas is now set to carry out its 250th execution under Governor Perry.[2] The next two most active death chambers – in Virginia and Oklahoma, combined – have seen 209 executions in the past 35 years. More people have been executed in Texas who were convicted in one of its jurisdictions, Harris County, than have been executed in either one of these two other states (see table).

Geographic disparity on a grand scale – tilted heavily towards the southern states – is just one hallmark of the USA's death penalty. Others include discrimination and error, along with the inescapable cruelty and incompatibility with human dignity that defines this punishment wherever and whenever it occurs. In 2008, after more than 30 years on the US Supreme Court, its then most senior Justice described the death penalty as "patently excessive and cruel" and executions as the "pointless and needless extinction of life".[3] Until a majority of the Justices reach such a conclusion, however, we look for principled human rights leadership from elected officials. In the Texas governor's office, such leadership has been sadly lacking and the quality of mercy emanating from there and from the Governor's appointees on the state Board of Pardons and Paroles (BPP) remains particularly strained.

On the eve of the second execution to have taken place on his watch, Governor Perry stated his belief that "capital punishment affirms the high value we place on innocent life because it tells those who would prey on our citizens that you will pay the ultimate price for their [sic] unthinkable acts of violence".[4] Even if one were to accept the notion that taking a prisoner from his or her cell, strapping them down and killing them, can somehow promote respect for life rather than erode it, the state's "high value" label apparently attaches only to the lives of a few murder victims. There have been around 15,000 murders in Texas since 2001, and 249 executions. While that is 249 executions too many, it is clearly a highly selective approach to retributive killing. This begs the question of how the state chooses who to kill.

The US Supreme Court has said that the death penalty must be limited to "those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution." While international human rights standards expect governments to narrow the scope of the death penalty, with a view to its abolition, it is also the case that a majority of countries have stopped executing *anyone,* whether or not the state considers it possible to determine who the "worst of the worst" are. Moreover, the international community has agreed that the death penalty should not be an option even for those convicted in the International Criminal Court and other international tribunals of crimes such as genocide, torture, crimes against humanity and war crimes.

If the USA's claim that it reliably limits its death penalty to the "worst of the worst" conjures images of rational, calculating, remorseless killers going to their execution under a capital justice system that weeds out errors and inequities, this picture tends to dissolve when one takes a look at who ends up in the country's death chambers and how they got there.


Washington State
Maryland
Taylor County (TX)
Navarro County (TX)
Fort Bend County (TX)
Bowie County (TX)
McClennan County (TX)
Galveston County (TX)
Denton County (TX)
Collin County (TX)
Cameron County (TX)
Utah
Travis County (TX)
Smith County (TX)
Potter County (TX)
Lubbock County (TX)
Brazos County (TX)
Nevada
Illinois (now abolitionist)
California
Nueces County (TX)
Jefferson County (TX)
Montgomery County (TX)
Delaware
Indiana
Mississippi
Arkansas
Louisiana
Arizona
Bexar County (TX)
Tarrant County (TX)
South Carolina
North Carolina
Ohio
Dallas County (TX)
Georgia
Alabama
Missouri
Florida
Oklahoma
Virginia
Harris County (TX)
0
20
40
60
80
100
120
140
States in the USA, except Texas, that have conducted five or more executions since 1977. Texas is approaching its 500th execution since 1977. Local Texas counties that have passed five or more death sentences that have been carried out, are listed

OFFENDERS WITH SERIOUS MENTAL ILLNESS

A number of prisoners with histories of serious mental illness have gone to their death in Texas and other such individuals remain on death row there.[5] Even for such prisoners, executive clemency seems only a remote possibility in Texas, while elsewhere a number of similarly situated inmates have had their sentences commuted.

In August 2005, for example, Indiana Governor Mitchell Daniels commuted the death sentence of Arthur Baird who was facing execution for the murder of his pregnant wife and his parents. In his executive order, Governor Daniels noted:

> "Courts recognized Mr Baird as suffering from mental illness at the time he committed the murders, and Indiana Supreme Court Justice Ted Boehm recently wrote that Mr Baird is 'insane in the ordinary sense of the word.' It is difficult to find reasons not to agree."[6]

In Texas the previous year, there was no doubt that Kelsey Patterson suffered from serious mental illness as his execution approached, so much so that the Texas Board of Pardons and Parole issued a rare recommendation to the Governor that he commute the death sentence. Neither did their seem any doubt that Kelsey Patterson had been suffering from mental illness at the time he committed the double murder in 1992 for which he was sentenced to death. After shooting the victims, he put down the gun, undressed and was pacing up and down the street in his socks, shouting incomprehensibly, when the police arrived. In 2000 a federal judge wrote:

> "Patterson had no motive for the killings – he claims he commits acts involuntarily and outside forces control him through implants in his brain and body.... All of the professionals who have tried to examine him agree that he is mentally ill. The most common diagnosis is paranoid schizophrenia."[7]

For Governor Perry, however, neither such judicial finding nor the BPP's commutation recommendation was allowed to get in the way of the execution, and he refused clemency. The inmate's delusions apparently persisted into his final minutes of life. Asked if he wanted to make a last statement before being executed, Kelsey Patterson responded:

> "Statement to what? State 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."

The state declined to include part of Kelsey Patterson's final statement in the public record due to what the Texas Department of Criminal Justice called "profanity".[8] The authorities did not consider the execution to be an affront to human dignity, however, as Kelsey Patterson became the 83rd prisoner to be put to death under Rick Perry's governorship.

Four years later, in June 2008, the Governor of Virginia, Tim Kaine, commuted the death sentence of Percy Walton who was facing execution for a triple murder. The commutation, in a state which lay second only to Texas in the number of executions carried out since 1977, was on the grounds of Percy Walton's serious mental illness, diagnosed as paranoid schizophrenia. Governor Kaine also cited the fact that Percy Walton was only 18 at the time of the crime (see below).[9]

No such mercy has been forthcoming in Texas. On 10 October 2012, Jonathan Green became the 248th prisoner executed during Governor Perry's time in office. Two days earlier, a federal judge had granted a stay of execution in Jonathan Green's case. His lawyer had submitted compelling evidence that Green suffered from schizophrenia and believed that he was going to be killed "as a result of demons conducting spiritual warfare over him". A mental health expert retained by the defence, who had "performed numerous psychological tests on Green, interviewed him extensively and reviewed extensive records", concluded that Jonathan Green was suffering from "severe delusions, hallucinations, and formal thought disorders". The federal judge also noted that prison records dating back to 2003 showed

> "progressing mental illness, including visual, auditory, and somatic hallucinations. For instance, Green has stuffed toilet paper in his ears to try to stop the voices in his head. On several occasions, he required medical attention to remove the impacted toilet paper from his ears".

The judge noted that the state's expert had met with Jonathan Green only twice, "apparently for less than an hour on each occasion", and "performed no tests". This expert acknowledged that Jonathan Green suffered from mental illness, including hallucinations, but disagreed that he had schizophrenia.

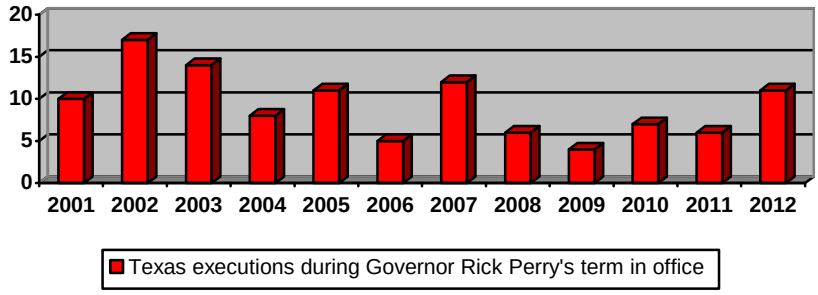
The federal judge concluded that Green had "made a substantial threshold showing of insanity", including through the submission of evidence from lay observers about his "bizarre behavior and his delusional statements" corroborated by the expert evidence that "he is likely psychotic". She issued a stay of execution.

The US Court of Appeals for the Fifth Circuit granted the state's motion to lift the stay, however. Surely this was the sort of situation for which the power of executive clemency exists. Nearly nine decades ago, the US Supreme Court said that

> "Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt".[10]

Neither the US Supreme Court nor Governor Perry intervened, however, and the execution went ahead. This time the final statement of the prisoner was recorded as: "I'm an innocent man. I did not kill anyone. Ya'll are killing an innocent man. My left arm is killing me. It hurts bad."

With this killing, Texas put another hole in the USA's assertions that it is a champion of human rights.



OFFENDERS WITH INTELLECTUAL DISABILITIES

In 2002, the US Supreme Court banned the execution of people with "mental retardation" as categorically exempted from the "worst of the worst" label due to their diminished culpability. The Court did not define retardation, although it pointed to definitions used by professional bodies Under such definitions, mental retardation is a disability, manifested before the age of 18, characterized by significantly sub-average intellectual functioning (generally indicated by an IQ of less than 70) accompanied by limitations in two or more adaptive skill areas such as communication, self-care, work, and functioning in the community. The Court left it to the states as to how to comply with the *Atkins v. Virginia* ruling. Over 10 years later, the Texas legislature has still not enacted a law to do so. In the absence of such legislation, in 2004 the Texas Court of Criminal Appeals (TCCA) issued guidelines, a "temporary" solution which has caused growing concern.

On 7 August 2012, Marvin Wilson became the 245th prisoner to be put to death during Governor Perry's time in office. In 2003, Marvin Wilson's lawyers had challenged his death sentence under *Atkins*. In 2004, a court-appointed neuro-psychologist with 22 years of clinical experience concluded that Wilson had "mental retardation". He personally conducted nine different tests of varying sorts and reviewed existing materials and records. He noted that over the years, Marvin Wilson's IQ had been assessed between 61 and 75, the lowest being that most recently conducted, under a test widely considered to be the most accurate. Marvin Wilson had been in special education classes throughout his schooling as a child and the expert found that as an adult his language development was "well within the impaired range", his reading comprehension was "very limited", and his conceptual and practical skills were substantially impaired.

A Texas trial-level court rejected Marvin Wilson's *Atkins* claim in November 2004. The TCCA and the federal courts upheld this decision, despite the fact that the state had not presented any expert testimony to rebut the defence expert's conclusion that Marvin Wilson met the criteria for a diagnosis of mild mental retardation. The state court addressed the question of adaptive deficits and the question of onset of mental retardation before the age of 18 in a single paragraph. Indeed it made no explicit findings about whether Marvin Wilson had significant limitations in adaptive functioning. Instead, it made findings under the 2004 "temporary" guidelines drawn up the TCCA [known as the "Briseño" factors as they were developed in the case of death row inmate José Briseño]. Thus, for example, the state court found that there was no evidence that Marvin Wilson was a follower, that he was capable of lying when he felt it in his best interest, that the crime had displayed deliberate forethought and planning, and that there was no evidence that anyone had considered or diagnosed him as having mental retardation before the age of 18.

In 2011, the Fifth Circuit Court of Appeals noted that "other fact-finders might reach a different conclusion as to whether Wilson is mentally retarded on the evidence" before the state court. However, it ruled that under the deferential standards federal courts are required to give state court rulings under US law, Marvin Wilson had failed to overcome the "presumption of correctness" attached to the state court's decision. Wilson's lawyers sought review by the US Supreme Court, including on the question of whether Texas – and the Fifth Circuit as the federal court overseeing capital cases out of Texas – had become "extreme outliers" in providing deficient protection under *Atkins* as a result of relying on the "Briseño factors". The Supreme Court refused to intervene, as did Governor Perry. Marvin Wilson's lawyers issued a statement after the execution, asserting that it was

> "outrageous that the state of Texas continues to utilize unscientific guidelines, called the Briseño factors, to determine which citizens with intellectual disability are exempt

> from execution. The Briseño factors are not scientific tools, they are the decayed remainder of an uninformed stereotype that has been widely discredited by the nation's leading groups on intellectual disability... That neither the courts nor state officials have stopped this execution is not only a shocking failure of a once-promising constitutional commitment, it is also a reminder that, as a society, we haven't come quite that far in understanding how so many of those around us live with intellectual disabilities."

In its 2002 *Atkins* decision, the Supreme Court had noted that on 17 June 2001 Governor Perry had vetoed a bill exempting people with mental retardation from the death penalty. The Supreme Court also noted that in his veto statement Governor Perry had said that Texas did not execute such prisoners. It also noted that Texas was only one of five states since 1989 to "have executed offenders possessing a known IQ less than 70". In a statement responding to the *Atkins* decision, Governor Perry said that "Texas does not execute mentally retarded individuals who meet the three-pronged test cited in the High Court's decision". Clearly the state had been sentencing defendants with mental retardation to death, however, given that at least 10 Texas prisoners have had their death sentences commuted to life imprisonment on the grounds of mental retardation as a result of the *Atkins* ruling.[11] And before the *Atkins* decision, Texas accounted for nine of 44 of the USA's executions since 1977 of people assessed as having mental retardation, more than any other state.[12]

A decade after the *Atkins* ruling, the Texas legislature, Governor Perry and his appointees on the BPP continue to take an approach to the decision that at best leaves the impression that this state is only prepared to do the bare minimum to comply with constitutional protections. And by such an approach, Texas plays a large role in leaving the USA as a whole increasingly an "outlier" on the death penalty on the global stage. Even if the Texas authorities do not care, their counterparts in the rest of the country should.

TEENAGED OFFENDERS

One in six of the prisoners put to death in Texas since January 2001 was 17, 18 or 19 at the time of the crime. Before the US Supreme Court in 2005 outlawed the death penalty against those who were under 18 at the time of the crime on the grounds of their categorically diminished culpability, four of the last five such offenders executed in the USA were put to death in Texas after Governor Perry and the Board of Pardons and Paroles refused to stop these internationally unlawful killings.

In its 2005 ruling, *Roper v. Simmons*, the Supreme Court recognized the immaturity, impulsiveness, and poor judgment associated with youth, as well as a young person's particular capacity for growth and change. While this ruling does not exempt from the death penalty in US law an individual who was 18 or 19 at the time of the crime, the ruling noted that "the qualities that distinguish juveniles from adults do not disappear when an individual turns 18".

As early as 1989, in a death penalty case, four Supreme Court Justices had noted that "age 18 is a necessarily arbitrary social choice as a point at which to acknowledge a person's maturity and responsibility, given the different developmental rates of individuals", and "it is in fact a conservative estimate of the dividing line between adolescence and adulthood. Many of the psychological and emotional changes that an adolescent experiences in maturing do not actually occur until the early 20s."[13] Although the Court had upheld the death sentence against the 17-year-old offender in that case, in 2003 the Governor of Kentucky commuted it, saying that the justice system had "perpetuated an injustice" because of the prisoner's young age at the time of the crime. Since then, scientific research has continued to show that development of the brain and psychological and emotional maturation continues at least into a person's early 20s. As an expert in this area has written:

> "Adolescent immaturity has a clear neuro-developmental basis. To explain, brain

> development of the frontal lobes continues into the early 20s... Executive functions associated with frontal lobe functioning include insight, judgment, impulse control, frustration tolerance, recognition and appreciation of the emotional reaction of others, and recognition of consequences. Significant age related growth in these capabilities, conventionally referred to as 'maturing' or 'growing up', occurs between the ages of 19 and 22 in all individuals... All 19 year olds are thus 'immature' in brain development and in relation to adults. This neurological immaturity is reflected in limitations in psychological functioning and behavioral control, and accounts for the poor decision-making and poor impulse control often observed in adolescents, even in their late teens".[14]

Joseph Murphy was scheduled to be executed in Ohio on 18 October 2011. In September 2011, Governor John Kasich commuted the death sentence. In his statement, the Governor said that "considering Joseph Murphy's brutally abusive upbringing and the relatively young age at which he committed this terrible crime, the death penalty is not appropriate in this case."[15] Joseph Murphy was one month short of 22 years old at the time of the murder.

This is an issue ripe for serious consideration by executive clemency and prosecutorial authorities, but as the Texas roll call of executed teenaged offenders illustrates, it is one that is gaining little or no traction in Texas. The authorities should take a new approach. There are nearly 40 prisoners still on death row in Texas for crimes committed when they were 18 or 19 years old.[16] Prosecutors continue to seek to add to this total.[17]

Writing off teenaged offenders

The following prisoners have been executed in Texas since January 2001 for crimes committed when they were younger than 20 years old.

Bobby Hines (19 at crime / executed 2012); Yokamon Hearn (19 / 2012); Beunka Adams (19 / 2012); Milton Mathis (19 / 2011); Michael Hall 18 / 2011); Michael Perry (19 / 2010); Peter Cantu (18 / 2010); George Jones (19 / 2010); Reginald Blanton (18 / 2009); Derrick Johnson (18 / 2009); Willie Pondexter (19 / 2009); Joseph Ries (19 / 2008); José Medellin (18 / 2008); Carlton Turner (19 / 2008); John Amador (18 / 2007); DaRoyce Mosley (19 / 2007); Kenneth Parr (18 /2007); Joseph Nichols (19 / 2007); Ryan Dickson (18 / 2007); Vincent Gutierrez (18 / 2007); Willie Shannon (19 / 2006); Justin Fuller (18 / 2006); Derrick O'Brien (18 / 2006); Jermaine Herron (18 / 2006); Clyde Smith (18 / 2006); Troy Kunkle (18 / 2005); Ronald Howard (18 / 2005); Robert Shields (19 / 2005); Demarco McCullum (19 / 2004); Dominique Green (18 / 2004); Edward Green (18 / 2004); Jasen Busby (19 / 2004); Kenneth Bruce (19 / 2004); Cedric Ransom (18 / 2003); Henry Dunn (19 / 2003); Granville Riddle (19 / 2003); Javier Suárez Medina (19 / 2002); Reginald Reeves (19 / 2002); Monty Delk (19 / 2002); Napoleon Beazley (17 / 2002); T.J. Jones (17 / 2002); Toronto Patterson (17 / 2002); Emerson Rudd (18 / 2001); Gerald Mitchell (17 / 2001).

The US Supreme Court said in 1993 – in the case of a death row prisoner who was 19 years old at the time of the crime – that "there is no dispute that a defendant's youth is a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury" given that

> "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and psychological damage. A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill considered actions and decisions. A sentencer in a capital case must be allowed to consider the mitigating qualities of youth in the course of its deliberations over the appropriate sentence."[18]

This presupposes that defence lawyers make the mitigation case to the trial jury. All too often there has been highly questionable representation of young capital defendants in this regard.

On 18 October 2012, Anthony Haynes was due to become the 249th person to be executed under Governor Perry, and the 44th prisoner who was a teenager at the time of the crime. Anthony Haynes' jury – on which there was only one African American after four black prospective jurors had been peremptorily dismissed by the prosecutor during jury selection for the trial of this African American teenager accused of shooting a white off-duty police officer – had been presented with a cursory case for a life sentence by his defence lawyers, and with no expert testimony either on the defendant's history of mental health problems or on the mitigating effects of youth. The state-appointed appeal lawyer failed to raise this failure in the state habeas corpus petition, causing the claim to be "procedurally defaulted", that is barred, from federal judicial review. Governor Perry's appointees on the Board of Pardons and Paroles voted unanimously against clemency. The execution was stopped by the US Supreme Court, however, two and a half hours before it was due to be carried out. The stay was so the Court could consider whether to review the claim of inadequate defence representation and whether procedural default could be overcome. Its decision as to whether to take the case was pending at the time of writing.

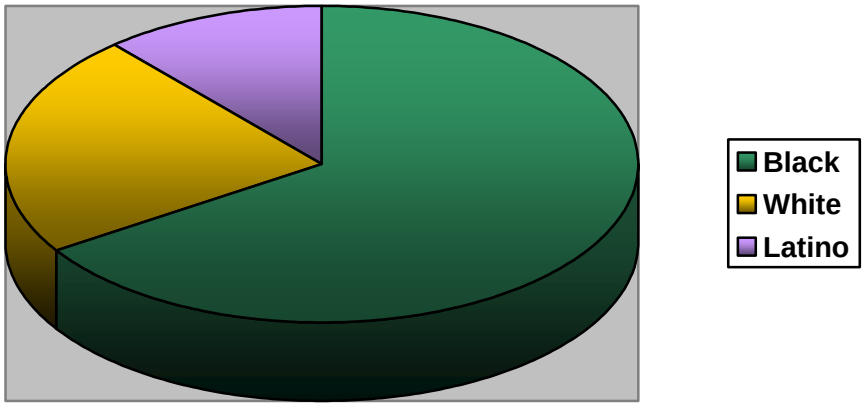


Chart A – 44 teenaged offenders executed in Texas, 2001-2012, by race of inmate

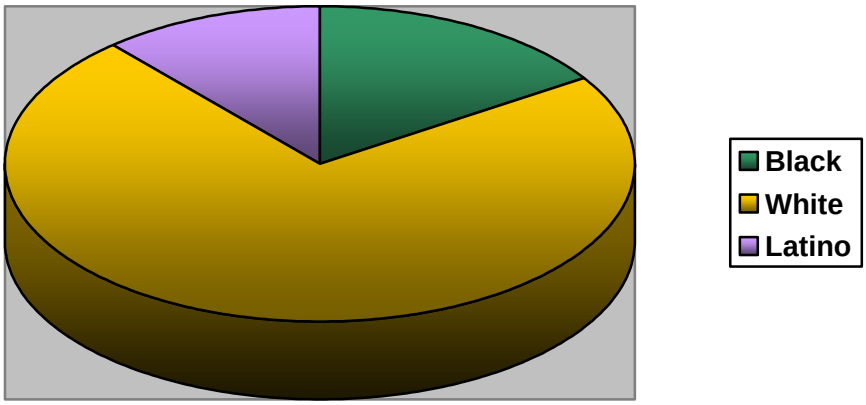


Chart B – 44 teenaged offenders executed in Texas, 2001-2012, by race of murder victim

If the Court decides not to take the Haynes case, the stay of execution will dissolve, freeing up the Texas authorities to set another execution date. In any event, it was not long before Texas had another prisoner strapped down in its death chamber to be killed for a crime committed when he was a teenager. One week after it was blocked from executing Anthony Haynes, the state killed Bobby Lee Hines for a murder committed when he was 19 years old and emerging from a childhood of severe abuse, deprivation, abandonment and poverty.

Bobby Hines, convicted in March 1992 of the murder of 26-year-old Michelle Haupt during a burglary five months earlier, spent half of his life on death row. At his sentencing hearing, his jury heard a small amount of information about his childhood of abuse and neglect, but no expert testimony was presented as to how it might have affected his conduct.

It has been said that those who get the death penalty in the USA are those with the worst lawyers rather than necessarily those who commit the worst crimes.[19] Claims of inadequate legal representation provided to indigent capital defendants, both at trial and for state-level appeals, remain a recurring theme in Texas capital justice.

An expert in mitigation who reviewed the Bobby Hines case after the trial concluded that the mitigating factors in the case were "numerous and complex", and included the defendant's youth, low intellectual functioning, impaired adaptive functioning, and issues of "complex trauma" relating to abuse, abandonment, rejection, poverty and neglect. She asserted that the failure of the trial lawyers to present expert testimony had deprived the jurors of "critical mitigating factors that could have impacted their decision whether to sentence Bobby to life or death".

The mitigation expert described Bobby Hines' childhood as "a nightmarish hell, full of fear, pain and despair", particularly due to the violence inflicted by the alcoholic father (who is now serving a life sentence for the aggravated sexual assault of a child). The mother took the brunt of the violence (before she abandoned the family to escape the abuse), violence that was witnessed by the children. Bobby was "a close second" recipient of abuse due to the father's apparent belief that the boy was not his biological son. The children experienced frequent hunger and homelessness as the father used much of the family's money on alcohol.

The failure of the defence to present a comprehensive case in mitigation facilitated the prosecution's portrayal of Bobby Hines as an "incorrigible" individual who would be a future risk to society if allowed to live, even in prison. It is this "future dangerousness" question that must be answered in the affirmative by the jury before a death sentence can be passed in Texas.

As the execution approached, Bobby Hines' appeal lawyer sought to be allowed back into state court to argue the claim of inadequate legal representation that the previous state-appointed appeal lawyer had failed to raise. On 15 October 2012, the Texas Court of Criminal Appeals refused the petition and denied the motion for a stay of execution.

On that same day, 15 October 2012, a capital sentencing began in San Antonio, Texas, in the case of 34-year-old James Morrison who had been convicted the previous week of the murder in 2009 of his former girlfriend's sister and her mother. He had also shot his ex-girlfriend, who had survived. Four and a half months pregnant by Morrison, she had miscarried, and the defendant was also charged with causing this.

The sentencing phase lasted a week, unlike two decades earlier when Bobby Hines' penalty hearing was over in a day. And unlike at Bobby Hines' trial, the lawyers for James Morrison presented expert as well as lay mitigation testimony to the jury in support of a verdict of life

rather than death.

The prosecution presented a stream of witnesses in its effort to persuade the jury to vote 'yes' to the future dangerousness question, or as the local media described it "Prosecutors spent the bulk of this week eliciting testimony" that, "when added together, painted Morrison as a monster."[20] The prosecutors presented evidence that he was a disciplinary problem in pre-trial custody, as well as evidence of his conviction in relation to a fatal hit-and-run car accident, and of previous acts of violence and threats of violence.

James Morrison's lawyers presented a case in mitigation that challenged the prosecution's case for the death penalty. The jury heard that his parents were drug and alcohol addicts and how, when he was a baby, he had been found in a rubbish bin at a petrol station in a small town in Indiana. A video deposition was played to the jury from the police officer who had found the baby. Throughout his childhood, the jury was told, Morrison had been taunted with names such as "trash baby" and "garbage can kid", and according to expert and lay witnesses, was never able to come to terms with his abandonment.

The defence presented a special education expert and a forensic psychologist who testified that the school system had ignored warning signs that James Morrison had some serious emotional problems, and the necessary mental health treatment was not provided. The defence also presented a humanizing picture of a defendant who, despite what he had done, cared for his adoptive parents before they died, who worked hard, helped others, and liked reading and chess, among other things.

On 22 October 2012, the jury voted no to the future dangerousness question, meaning that James Morrison could not be sentenced to death. He was sentenced to life imprisonment without parole instead. Two days later, the death sentence imposed on Bobby Hines in 1992 by a jury which was not presented with the available mitigation case was carried out in the Texas death chamber. In his final statement before being killed, Bobby Hines said:

> "To the victim's family, I am sure I know that I took somebody special from ya'll. I know it wasn't right, it was wrong. I wish I could give it back, but I know I can't. If giving my life in return makes it right, so be it. I ask that ya'll forgive me... I don't believe that taking my life will solve anything... I wish there was something I could do."

After witnessing the execution by lethal injection, the father of the murder victim was quoted in the media as saying that

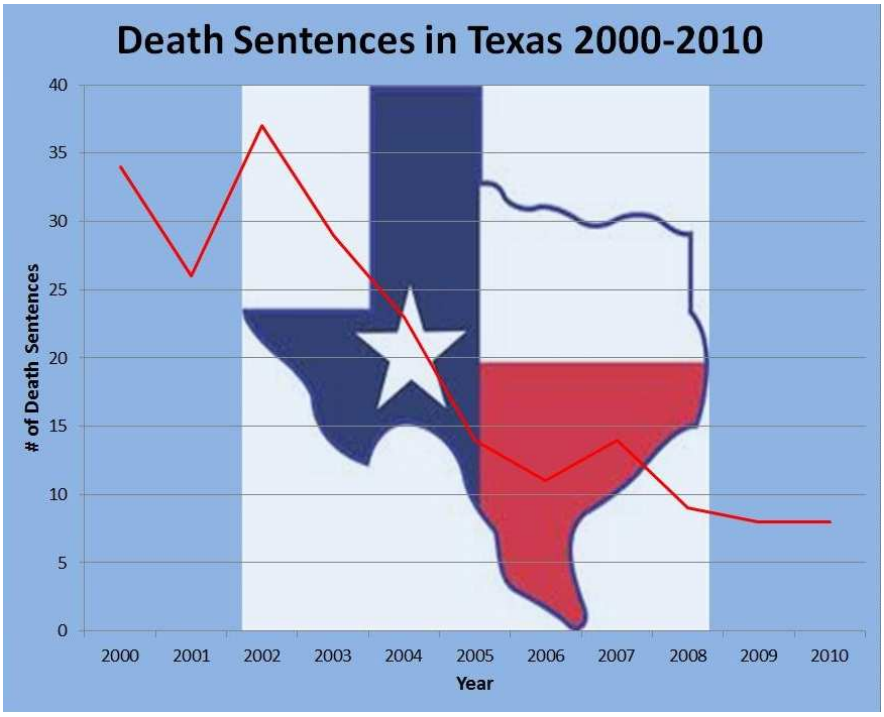
> "Bobby Hines paid the ultimate price, a life for a life, and that's the good news. The bad news is it took 21 years, a lot of taxpayer money and all he did was go to sleep. He didn't suffer like my daughter did. He got like a forever sleeping pill."

Retributive sentiment is understandable on the part of those who have lost their loved ones to murder. But it is also the case that this father's daughter was one of nearly 5,000 people murdered in Texas in 1991 and 1992. Bobby Hines was one of 57 people sentenced to death in the state in those two years.

According to the justification for the death penalty Governor Perry gave after taking office 11 and a half years ago, cited in the introduction above, the execution of Bobby Hines "affirms the high value we place on innocent life". It is a justification that does not bear scrutiny.

BEHIND THE CURVE

While it is impossible to know whether Bobby Hines' jury would have voted for life if it had been presented with the compelling mitigation case that was available to the defence, the juxtaposition of his case and that of James Morrison raises the question of whether jurors today are less likely to vote for death than they were two decades ago.



The prosecution's unsuccessful bid to obtain the death penalty against James Morrison in October 2012 was the fourth consecutive failed attempt by the Bexar County District Attorney's office to persuade a jury to vote for death at a capital murder trial. Between 1977 and the end of October 2012, 36 people who had been sentenced to death in Bexar County had been executed and another 18 remained on death row after being sent there from Bexar County (see table on page 2). Yet the last person sentence to death by a Bexar County jury was Armando Leza in June 2009.

In recent years, the number of death sentences handed out in Texas and across the USA has substantially declined. In the five years from 2006 to 2010, some 578 death sentences were handed down across the USA. In the five years from 1992 to 1996, the figure was 1,515 death sentences. The figures for Texas during these two five-year periods are 174 in the earlier period and 50 in the more recent one. In 1992, for example, Bobby Hines was one of 31 defendants sentenced to death in Texas and 287 nationally. In 1999, Anthony Haynes was one of 48 defendants sent to death row in Texas and 277 nationally. Just over 100 defendants were sentenced to death in the USA in each of the years 2009 and 2010, with eight of these new death row inmates each year being sentenced in Texas.[21]

Perhaps the decline in death sentences in the USA reflects a growing domestic preference for the sentence of life imprisonment without the possibility of parole, a sentence that in Texas has been available to capital jurors since September 2005. Perhaps it reflects also a growing recognition that the death penalty comes with unacceptable costs and risks and is a punishment with no measurable benefit for society.

There is nothing that says Texas must carry on killing prisoners in its execution chamber. This is a policy choice, not a legal requirement. Prosecutors can choose to go for life. If they choose to pursue death and persuade jurors to vote for execution, the Board of Pardons and Paroles and the Governor can ensure that these death sentences are not carried out if the sentences survive the appeals process. The legislature, meanwhile, can work to remove the death penalty from the statute books. All it takes is political will and principled human rights leadership.

A country that on the one hand labels itself as a progressive force for human rights, while on the other hand kills a selection of prisoners in its executions chambers, surely has some explaining to do on the international stage in an increasingly abolitionist world. There is no human-rights-consistent explanation for a state's failure to work against the death penalty, however, and so the USA resorts instead to telling the international community about the theory rather than the human reality of this punishment. Reporting to the United Nations Human Rights Committee in 2011, for example, the US administration wrote:

> "Heightened procedural protections apply in the context of capital punishment. Under Supreme Court decisions, a defendant eligible for the death penalty is entitled to an individualized determination that the death sentence is appropriate in his case, and the jury must be able to consider and give effect to any mitigating evidence that a defendant proffers as a basis for a sentence less than death."

The notion that "heightened procedural protections" could eliminate error and unfairness in the death penalty was described by a US Supreme Court Justice as a "delusion". The effort had been "futile", he said, and it was "virtually self evident" that

> "no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies... The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution."[22]

That was written nearly two decades ago, in February 1994 – in a Texas case. There have been more than one thousand executions in the USA since then, some 38 per cent of them carried out in Texas under the current Governor and his predecessor. The delusion that the death penalty has a constructive role to play in society, and that it can be applied without error or inequity, persists.

While death sentences have declined quite precipitously in recent years in Texas as elsewhere, the rate of executions in Texas has seen a slower fall. For example, the 152 executions carried out under the previous governorship of George W. Bush were conducted at a rate of about one every 14 days. The 249 executions so far carried out under Governor Rick Perry's term in office have been conducted at a rate of one every 17 days.

The Texas executioners have been reined in by major rulings by the US Supreme Court in 2002 and 2005, banning the execution of offenders assessed as having "mental retardation" and those who committed their crimes when younger than 18 years old. Texas accounted for more executions than other states in both categories before the Supreme Court stepped in to issue these bans based on its assessment of "evolving standards of decency" at a national level.

The coming weeks should give Texas further pause for thought. On 7 December 2012, it will be the 30th anniversary of the resumption of executions in Texas.[23] The first execution, after

18 years without them, was of Charlie Brooks who was killed in its death chamber on 7 December 1982. This African American man had been sentenced to death in 1978 for the abduction and murder of a 26-year-old white mechanic in order to steal a car. Charlie Brooks' co-defendant had his death sentence overturned on appeal and later received a 40-year prison sentence as a result of a plea bargain. It was not known which of the two men had actually shot the victim. Questions of arbitrariness were present from day one of executions in Texas.

The power of the Texas governor to intervene in death penalty cases is somewhat circumscribed. Under Texas law, while the governor has unfettered authority to issue a one-off 30-day reprieve for anyone facing execution, he or she cannot grant a longer reprieve or commute a death sentence without a recommendation to do so from a majority of the members of the state Board of Pardons and Paroles. At the same time, the governor can reject such a recommendation, as Governor Perry did in the case of Kelsey Patterson, above.

Nevertheless, it would be surprising if the governor would not have substantial influence with the Board if he or she chose to take stands in favour of clemency in capital cases. The governor appoints the Board's members (with state Senate confirmation), and the seven current members were all appointed by Governor Perry. Moreover, under the Texas Administrative Code, "The board shall investigate and consider a recommendation of commutation of sentence in any case, upon the written request of the governor." Before the Board decides on a case, then, the Governor could inform them that he favoured clemency. Following clemency denials by the Board, the Governor could use his power of reprieve to send such cases back with a clear message that he favours commutation. Like his predecessor, however, Governor Perry has rarely exercised the power of reprieve.

In his January 2001 State of the State address quoted at the beginning of this report, Governor Rick Perry asserted: "We have a good system of justice in Texas, but it can be better". Nearly a dozen years and more than 240 executions later, Texas is still doing its worst. Texas – its legislators, its executive, its judiciary, its police, its prosecutors and its electorate – should recognize that the only way to eradicate the discrimination, error, unfairness and cruelty associated with the death penalty is to abolish it.

ENDNOTES

[1] Available at http://governor.state.tx.us/news/speech/67/

[2] The execution of Jack Clark on 9 January 2001 was the first to be carried out under the governorship of Richard Perry, the Lieutenant Governor who had been sworn in as the state's 47th Governor three weeks earlier, on 21 December 2000, following the election of the previous governor, George W. Bush, to the office of US President. At the time of writing, the 250th execution was due to be carried out on the evening of 31 October 2012 (of Donnie Lee Roberts). This report is a companion to and updates USA: Too much cruelty, too little clemency: Texas nears 200th execution under current governor, April 2009, http://www.amnesty.org/en/library/info/AMR51/057/2009/en

[3] *Baze v. Rees*, US Supreme Court, 16 April 2008, Justice Stevens concurring in the judgment.

[4] Remarks of Governor Rick Perry to the Texas Broadcasters Association, 17 January 2001, http://governor.state.tx.us/news/speech/5553/

[5] For example, see USA: "Where is the compassion?" The imminent execution of Scott Panetti, mentally ill offender, January 2004, http://www.amnesty.org/en/library/info/AMR51/011/2004/en (Scott Panetti remains on Texas death row).

[6] Executive Order 5-23. Clemency for Arthur Paul Baird II, 29 August 2005, http://www.in.gov/gov/files/EO_05-23_Clemency_Arthur_Baird_II.pdf

[7] USA: Another Texas injustice: The case of Kelsey Patterson, mentally ill man facing execution, March 2004, http://www.amnesty.org/en/library/info/AMR51/047/2004/en

[8] See http://www.tdcj.state.tx.us/stat/dr_info/pattersonkelseylast.html

[9] See Amnesty International Urgent Action update, 12 June 2008, http://www.amnesty.org/en/library/info/AMR51/060/2008/en

[10] *Ex parte Grossman*, 267 U.S. 87, 2 March 1925.

[11] Walter Bell, Darrell Carr, David DeBlanc, Doil Lane, Willie Moddon, Demetrius Simms, Robert Smith, Exzavier Stevenson, Alberto Valdez, Gregory van Alstyne.

[12] See http://www.deathpenaltyinfo.org/list-defendants-mental-retardation-executed-united-states.

[13] *Stanford v. Kentucky* (1989), Justice Brennan dissenting (& Justices Marshall, Blackmun, Stevens).

[14] Declaration of Mark D. Cunningham. Re: Anthony Cardell Haynes. 2005. See USA: The less than one percent doctrine: Texas set to execute another inmate for crime committed as teenager, October 2012, http://www.amnesty.org/en/library/info/AMR51/084/2012/en

[15] Kasich commutes Murphy death sentence to life without parole, 26 September 2011, http://governor.ohio.gov/Portals/0/pdf/news/09.26.11%20Kasich%20Commutes%20Joseph%20Murphy.pdf

[16] Cortne Robinson (18 at crime); Blaine Milam (18); James Brodnax (19); Christian Olsen (19); Dexter Johnson (18); LeJames Norman (19); Juan Ramirez (18); Anthony Doyle (18); Damon Matthews (18); Richard Cobb (18); Charles Derrick (18); Clinton Young (18); Irving Davis (18); Perry Williams (19); Miguel Paredes (18); Obie Weathers (18); Larry Estrada (18); Alvin Braziel (18); Robert Woodard (19); Juan Garcia (18); Ray Jasper (19); Anthony Haynes (19); Richard Vasquez (18); Felix Rocha (18); Julius Murphy (18); Howard Guidry (18) Jose Martinez (18); Pablo Melendez (18); Erica Shepphard (19); Billy Wardlow (18); Tony Ford (18); Randolph Greer (18); Robert Campbell (18); Kim Ly Lim (19); Gustavo Garcia (18); Brent Brewer (19); Marlin Nelson (19); Harvey Earvin (18).

[17] For example, at the time of writing Gabriel Hall was facing a death penalty trial in the 272nd District Court of Brazos County, charged with capital murder committed in April 2012 when he was 18 years old.

[18] *Texas v. Johnson* (1993).

[19] Counsel for the poor: the death penalty not for the worst crime but for the worst lawyer. Stephen B. Bright, Volume 03, Yale Law Journal page 1835 (1994).

[20] Called 'Trash Baby,' capital murder defendant had early red flags, San Antonio Express News, 20 October 2012. http://www.mysanantonio.com/news/local_news/article/Called-Trash-Baby-capital-murder-defendant-3965667.php#ixzz2AObo7qGH

[21] Source for statistics (including for chart): Death Penalty Information Center, Washington, DC.

[22] *Callins v. Collins*, Justice Blackmun dissenting from denial of certiorari, 22 February 1994.

[23] The last execution in Texas before the US Supreme Court overturned existing capital statutes in the USA, in *Furman v. Georgia* in 1972, was that of Joseph Johnson, an African American man killed in the state's electric chair on 30 July 1964. He had been convicted of a murder committed during a robbery of a grocery store. His was the last execution in Texas using the electric chair. All executions in the "modern" era in Texas – that is, since the US Supreme Court allowed executions to resume under revised laws in *Gregg v. Georgia* in 1976 – have been by lethal injection.