



RACIAL JUSTICE COALITION

Texas

TEXAS RACIAL JUSTICE ACT: FACT SHEET

Under current constitutional framework, capital defendants cannot use statistical evidence of racial bias in their trial to appeal. This bill would allow for defendants to use statistical evidence to support a claim that race played a substantial role in their sentence. If successful, these defendants would be able to reduce their death sentence.

Racial Bias and Disparities in Texas’s Death Penalty:

Racial bias can influence various parts of a capital trial—from jury selection to charging decisions to sentencing itself. As a result of this bias, there are significant racial disparities in who is sentenced to death and who is ultimately executed.

Jury Selection:

During the jury selection process, peremptory strikes are often disproportionately used to remove BIPOC potential jurors. While the Supreme Court held that striking a person for their race is unconstitutional, the standard for reviewing this is incredibly low.¹ The prosecutor’s justification for a strike does not have to be “persuasive, or even plausible... unless a discriminatory intent is inherent in the prosecutor’s explanation.”² As a result, the following strikes challenged as racially discriminatory in Texas have been upheld:

- A Black potential juror was wearing “bling,” which the prosecutor argued was an outward manifestation of his liberal tendencies.³
- Five Black potential jurors were removed for not looking particularly state oriented.⁴
- A Black potential juror was struck because the prosecutor had an “instinct” he would not make a good juror.⁵
- A Black potential juror was unemployed and was born in Liberia.⁶

¹ *Batson v. Kentucky*, 476 U.S. 79, 106 (1986).

² *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

³ *Sauls v. Texas*, Nos. 05-00-00538-CR, 05-00-00539-CR, 05-00-00638-CR, 2001 WL 406582, at *1 (Tex. Ct. App. Apr. 23, 2001).

⁴ *Fuentes v. Texas*, 991 S.W.2d 267, 278-79 (Tex. Crim. App. 2002).

⁵ *Chamberlain v. Texas*, 998 S.W.2d 230, 236 (Tex. Crim. App. 1999). This reason was upheld because the Court concluded that the reason for a peremptory strike may be more intuitive than rational as long as it is race neutral. The Court did not discuss how to determine when a prosecutor’s *intuition* is influenced by racial bias.

⁶ *Wamget v. State*, 67 S.W.3d 851, 852 (Tex. Crim. App. 2001). The Court upheld the strike, noting that race may be a factor in a strike if it is co-existing with a non-racial reason.

While it may be that implicit bias is the predominant reason for this disparity, intentional discrimination is also a factor. The history of prosecutors intentionally excluding BIPOC from juries is evident in Texas.⁷ However, this trend was not solely relegated to the past. In 2016, prosecutors in the Wharton County District Attorney's Office alleged that the District Attorney at the time instructed them to strike Black potential jurors as a method of trial strategy.⁸

Data from Texas capital juries shows that whether implicit or intentional, racial bias leads to the heightened exclusion of BIPOC jurors. A 2005 report found that prosecutors in Dallas County excluded Black jurors at a rate twice that of the rate they excluded white jurors, even when they gave similar answers to the prosecutor's questions.⁹ Accordingly, white seated jurors made up an average 68% of final juries, while white people represented only 49% of the population.¹⁰

The exclusion of Black people from capital trials is concerning for several reasons. Notably, the mere presence of one Black person on a capital jury can mean the difference between life and death.¹¹ Just one Black person on a capital jury decreases the likelihood of the jury sentencing a defendant to death by 29%.¹²

Charging Decisions:

The decision of whether or not to pursue a capital murder conviction or a death sentence is left to the discretion of the prosecutor. In Texas, this often disproportionately harms defendants of color. Between 2004 and 2014, Harris County sought the death penalty in 23 of 292 capital cases; all 23 of those cases were against non-white defendants.¹³ This is particularly stark when considering that Black defendants on death row are less likely than white defendants to commit the most heinous of murders.¹⁴

In addition to the role the race of a defendant plays in charging decisions, the race of the victim also plays a role. Between a Black defendant who kills a Black person and a Black defendant who kills a white person, the state is more likely to pursue a death sentence

⁷ See *Miller-El v. Dretke*, 545 U.S. 231 (2005), which discusses the history of excluding Black jurors in Texas, particularly in Dallas County which had a manual circulating in the late 1970s which instructed prosecutors to do so.

⁸ Brian Rogers, *Local DA encourages blocking Blacks from juries*, Houston Chronicle, Mar. 22, 2016. <https://www.houstonchronicle.com/news/houston-texas/houston/article/Local-DA-encourages-blocking-blacks-from-juries-6975314.php>.

⁹ Steve McGonigle, et. al, *Striking Differences*, Dallas Morning News, Aug. 21, 2005.

¹⁰ *Id.*

¹¹ William J. Bowers et. al, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant is Black and the Victim is White*, 53 DEPAUL L. REV. 1497, 1501 (2003).

¹² William J. Bowers, Benjamin D. Steiner, & Maria Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 193 (2001).

¹³ Amended Petition for a Writ of Habeas Corpus for Gerald Marshall (2020) at 255.

¹⁴ Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 HOUS. L. REV. 809, 826-830 (2008). To measure heinousness, Phillips considered aggravating factors such as the vulnerability of the victim, whether the victim was subjected to long and unnecessary pain, and whether the killing was necessary to complete the felony.

against the defendant who killed the white person.¹⁵ This devaluation of Black victims is also true in cases where the defendant is white. Only 21 of the 852 white defendants executed since 1976 had a Black victim.¹⁶

Sentencing and Executions:

Sentencing decisions also reflect the effects of racial bias in Texas; BIPOC represent a disproportionately large portion of the State's death row. Out of the 213 people currently awaiting execution in Texas, 150 of them are non-white.¹⁷ While Black people make up less than 13% of the Texas population, they account for 43.9% of death row inmates.¹⁸

Looking at some of Texas's largest counties, these disparities in sentencing are even more pronounced. Of the last 20 defendants sentenced to death in Harris County, 19 of them were non-white.¹⁹ In Dallas County, where only 22% of the county is Black, 44% of the executions are of Black defendants. Further raising concern, when looking at exonerations, the disparity often flips the other way.²⁰ Of the 24 people exonerated by DNA evidence in Dallas County, 17 were Black.²¹

These disparities in sentencing are further increased in actual executions, particularly when the race of the victim is also factored in. While a defendant who kills a white person is four times more likely to be sentenced to death than one who kills a Black person, they are 17 times likely to be executed.²² Further, Black defendants who kill white people are 14 times more likely to be executed than white defendants who murder white people.²³

Addressing Racial Bias in Capital Punishment

As discussed above, racial bias permeates all parts of a capital trial. However, while the data makes it clear that racial bias is leading to racial disparities in who lives and who dies, the current constitutional framework does not provide defendants with relief. Accordingly, the RJA is intended to provide these defendants with a means of relief.

¹⁵ Daniel S. Medwed, *Black Deaths Matter: The Race-of-Victim Effect and Capital Punishment*, Northeastern Public Law and Theory Faculty Research Papers Series No. 367-2020 at 10 (2020).

¹⁶ *Executions by Race and Race of Victims*, Death Penalty Info. Ctr., (Apr 4, 2020).

<https://deathpenaltyinfo.org/executions/executions-overview/executions-by-race-and-race-of-victim>

¹⁷ The racial composition of Texas's Death Row was calculated from the Texas Department of Criminal Justice website, which lists the race of each offender. Texas Department of Criminal Justice, Offenders on Death Row, <http://www.tdcj.state.tx.us/stat/offendersondrow.htm> (last visited Aug. 9, 2020).

¹⁸ *Id.*

¹⁹ *DPIC Analysis: Racial Disparities Persisted in U.S. Death Sentences and Executions in 2019*, Death Penalty Info. Ctr. (Jan. 21, 2020) <https://deathpenaltyinfo.org/news/dpic-analysis-racial-disparities-persisted-in-the-u-s-death-sentences-and-executions-in-2019>.

²⁰ Gross, Possley, Stephens. *Race and Wrongful Convictions in the United States*, National Registry of Exonerations Newkirk Center for Science and Society (Mar. 7, 2017). https://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf.

²¹ *Dallas County Cases Where DNA Has Proven Innocence*, Innocence Project (Feb. 1, 2007).

<https://www.innocenceproject.org/dallas-county-cases-where-dna-has-proven-innocence/>

²² Scott Phillips and Justin F. Marceau, *Whom the State Kills*, HARV. C.R.-C.L. L. REV., 602 at 622 (forthcoming 2020).

²³ *Id.*

Current Constitutional Framework:

In *McCleskey v. Kemp*, the Court held that a showing of discriminatory effect is not enough to establish an equal protection violation—a defendant must also show that there is purposeful discrimination.²⁴ Exceptionally clear proof of purposeful discrimination is needed to successfully show that a defendant’s constitutional rights have been violated.²⁵ Statistical evidence is not exceptionally clear proof that purposeful discrimination has occurred in a case.²⁶

The standard set in *McCleskey*—that a defendant challenging his capital punishment sentence must provide exceptionally clear proof of purposeful discrimination—is nearly impossible to satisfy. By not allowing defendants to rely on statistical evidence to make their claims, many whose cases were affected by racial bias remain on death row.

The RJA

While the Court in *McCleskey* severely limited the ability of defendants to present evidence of racial bias in their trial, it did not shut the door on the use of statistical evidence.²⁷ Instead, it gave the power to state legislatures to adjust as they see fit—and a couple have. In many cases, this remedy takes the form of the RJA.

- In 1998, Kentucky passed its own version of the RJA.²⁸
- In 2009, North Carolina also passed the RJA.²⁹ During the four years that it was in effect, four inmates were successful in challenging their sentence and 130 others made claims.³⁰
- In 2013, both the Texas House and the Senate introduced versions of the RJA. Notably, this legislation was supported by several District and County Attorneys.³¹
- In 2020, Utah’s Sentencing Commission approved guidelines that will allow minority defendants to appeal for lower sentences if they can show evidence of racial bias.³²
- In 2020, California’s Senate passed a version of the RJA that applies to sentences for all felonies, not just capital punishment.³³

²⁴ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

²⁵ *McCleskey* at 481.

²⁶ *Id.*

²⁷ *Id.* at 319 (quoting *Gregg v. Georgia*, *supra*, 428 U.S., at 186, 96 S.Ct., at 2931)(holding that legislatures are best fit to address racial bias claims and can also “evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.”).

²⁸ Ky. Rev. Stat. § 532.300.

²⁹ Madeleine Carlisle. *N.C. Supreme Court Rules Over 100 Death Row Inmates Have Chance to Prove Racism Affected Their Sentences*, Times (Jun. 5, 2020). <https://time.com/5849203/north-carolina-death-row-surpeme-court-racism/>.

³⁰ *Id.*

³¹ Maurice Chammah. *Lawmakers Discuss Race-Related Evidence in Death Penalty Cases*. Texas Tribune (Apr. 16, 2013). <https://www.texastribune.org/2013/04/16/lawmakers-discuss-race-testimony-death-penalty-cas/>.

³² *Utah offenders can raise racial bias concerns at sentencing*, Associated Press (Jul. 25, 2020). <https://apnews.com/9f9ba7bf28da5d3e9cd8957efac6f6e7>

³³ California Assembly Bill (“AB”) 2542 (2020).

The RJA in Texas:

Our proposed RJA would allow defendants to reduce their death sentence if there is evidence showing that race played a significant factor in their sentence. It would allow defendants to use statistical evidence to support claims that racial bias influenced their trial at any point during the trial, from jury selection and charging decisions to the trial itself and sentencing. By doing this, the RJA would provide a remedy to the racial bias and disparities that still exist in the Texas death penalty.

Relevant Texas Cases:

Duane Buck:

During Duane Buck's trial, a psychologist called to the stand by Buck's own attorney testified that Buck was more likely to commit future crimes because he was Black.³⁴ At the sentencing portion of the trial, the prosecutor relied on this testimony to argue that Buck should receive a death sentence.³⁵ This argument was successful, and Buck was sentenced to death.

In the Supreme Court decision ordering Buck's resentencing trial, Chief Justice John Roberts wrote, "When a jury hears expert testimony that expressly makes a defendant's race directly pertinent on the question of life or death, the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses."³⁶

Rodney Reed:

Rodney Reed was not the first suspect in the killing of Stacey Stites; however, once police learned that Stites, a white woman, had been having an affair with Reed, a Black man, he became the sole focus of the investigation.³⁷ Despite various witnesses corroborating the claim that the relationship was consensual, the prosecutors relied on stereotypes about Black men preying on white women and alleged that Reed had sexually assaulted Stites.³⁸ As a result, Reed's all white jury sentenced him to death.³⁹

In Reed's case there is more than a small dose of racial bias. From the narrative presented by the prosecutor to the exclusion of any non-white jurors, racial bias was allowed to poison the trial. Following through with the jury's sentence in this case, without remedying the role racial bias played, would be an insult to the Texas justice system. There cannot be actual justice if we allow racial bias to influence trials and sentencing.

³⁴ Brief of Petitioner Duane Edward Buck, *Buck v. Davis*, 580 U.S. ____ (2016) (No. 15-8049) at 7 https://www.naacpldf.org/wp-content/uploads/Buck_Brief_for_Petitioner-1.pdf.

³⁵ *Id.* at 8. To sentence a defendant to death in Texas, the jury must believe the defendant poses a continuing threat to society. The psychologist's racially charged testimony was used to argue that point—that Buck would continue to be a risk because he is Black.

³⁶ *Buck v. Davis*, 137 S. Ct. 759, 197 L. Ed. 2d 1 (2017).

³⁷ George M. Johnson, *The Execution of Rodney Reed Has Been Stopped*, *Vox* (Nov. 16, 2019). <https://www.vox.com/identities/2019/11/5/20948639/rodney-reed-execution>

³⁸ *Id.*

³⁹ *Id.*