Newsweek

Innocent Until Executed

We have no right to exoneration.

By **Dahlia Lithwick** | NEWSWEEK
Published Sep 3, 2009
From the magazine issue dated Sep 14, 2009

For years, death-penalty opponents and supporters have been working their way toward a moment in which each side would rethink things. They were seeking a case in which a clearly innocent defendant was wrongly put to death. In a 2005 Supreme Court case that actually had nothing to do with the execution of innocents, Justices David Souter and Antonin Scalia tangled over the possibility that such a creature even existed. Souter fretted that "the period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests." To which Scalia retorted: "The dissent makes much of the newfound capacity of DNA testing to establish innocence. But in every case of an executed defendant of which I am aware, that technology has confirmed guilt." Scalia went on to blast "sanctimonious" death-penalty opponents and a 1987 study on innocent exonerations whose "obsolescence began at the moment of publication," then concluded that there was not "a single case—not one—in which it is clear that a person was executed for a crime he did not commit."

This suggested that if anyone found such a case, the Scalias of the world would rethink matters. As of today, the Innocence Project, a national organization dedicated to exonerating the wrongfully convicted through DNA testing, claims there have been 241 postconviction DNA exonerations, of which 17 were former death-row inmates spared execution. The gap between their facts and Scalia's widens every year. And now we may have found that case of an innocent put to death: Cameron Todd Willingham, executed by the state of Texas in 2004 for allegedly setting a 1991 house fire that killed his three young daughters.

David Grann, who wrote a remarkable piece about the case in last week's *New Yorker*, sifted through the evidence against Willingham to reveal that the entire prosecution was a train wreck. And at every step in his appeal, Willingham's claims of innocence were met with the response that he'd already had more than enough due process for a baby killer.

But you needn't take Grann's word for it. In 2004 Gerald Hurst, an acclaimed scientist and fire investigator, conducted an independent investigation of the evidence in the Willingham case and came away with little doubt that it was an accidental fire—likely caused by a space heater or bad wiring. Hurst found no evidence of arson, and wrote a report to try to stay the execution. According to documents obtained by the Innocence Project, it appears nobody at the state

Board of Pardons and Paroles or the Texas governor's office even took note of Hurst's conclusions. Just before Willingham was executed, he told the Associated Press, "[T]he most distressing thing is the state of Texas will kill an innocent man and doesn't care they're making a mistake."

Since Willingham's death, two other independent inquiries found no evidence of arson. In 2007 the state of Texas commissioned another renowned arson expert, Craig Beyler, to examine the Willingham evidence. Beyler's report, issued two weeks ago, concluded that investigators had no scientific basis for claiming the fire was arson.

One might think that all this would give a boost to death-penalty opponents, who have long contended that conclusive proof of an innocent murdered by the state would fundamentally change the debate. But that was before the goalposts began to shift this summer. In June, by a 5–4 margin, the Supreme Court ruled that a prisoner did not have a constitutional right to demand DNA testing of evidence in police files, even at his own expense. "A criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man," wrote Chief Justice John Roberts. And two months later, Justices Scalia and Clarence Thomas went even further when the Supreme Court ordered a new hearing in Troy Davis's murder case, after seven of nine eyewitnesses recanted their testimony. Justice Scalia, dissenting from that order, wrote for himself and Thomas, "[T]his 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."

As a constitutional matter, Scalia's assertion is not wrong. The court has never found a constitutional right for the actually innocent to be free from execution. When the court flirted with the question in 1993, a majority ruled against the accused, but Chief Justice William Rehnquist left open the possibility that it may be unconstitutional to execute someone with a "truly persuasive demonstration" of innocence. Now, in Scalia's America, the Cameron Todd Willingham whose very existence was once in doubt is legally irrelevant. We may execute a man for an accidental house fire, while the Constitution itself stands silently by.

Lithwick also writes for slate.com.