



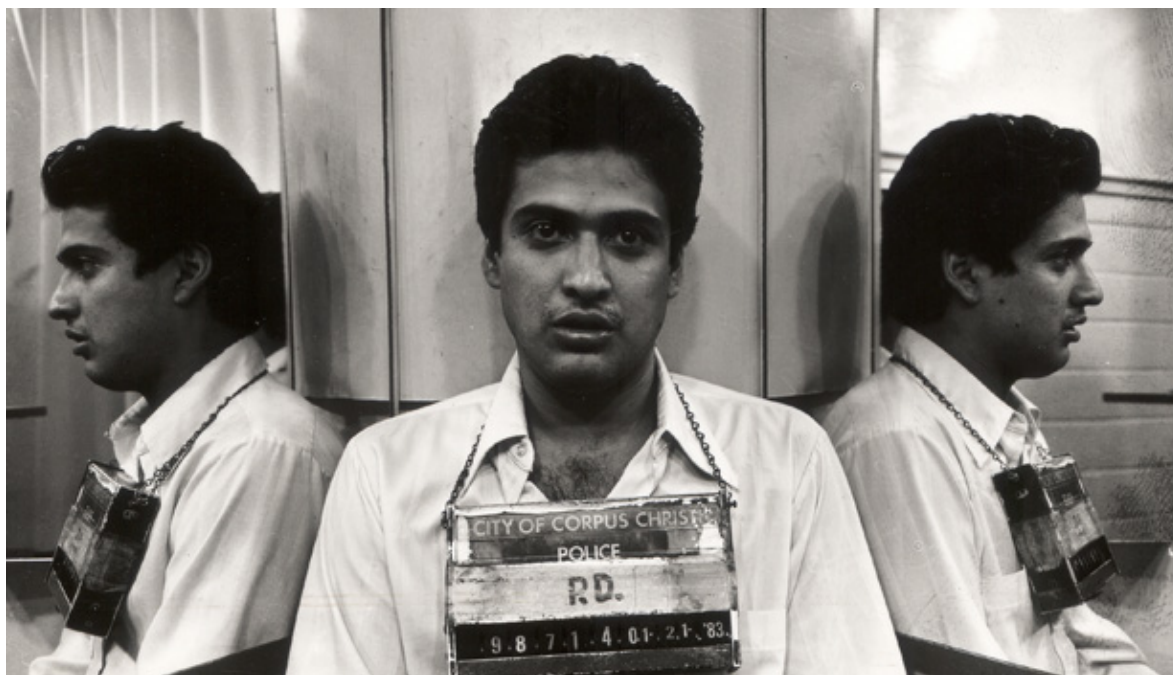
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Flash

# Yes, America, We Have Executed an Innocent Man

By Andrew Cohen

*Carlos DeLuna was put to death in December 1989 for a murder in Corpus Christi. But he didn't commit the crime. Today, his case reminds us of the glaring flaws of capital punishment.*



Carlos DeLuna

(Corpus Christi Police Department)

## THE JUDGE

Even for Justice Antonin Scalia, the crassest of the current United States Supreme Court justices, it was a particularly callous piece of writing. In 2006, in a case styled *Kansas v. Marsh*, the Court's five conservatives had just upheld a portion of Kansas' capital punishment law. The statute was interpreted to direct a sentence of death even if a jury found the "aggravating" and "mitigating" sentencing factors in equilibrium -- "equipoise," the Court lyrically called it. A tie, in other words, would mean death, not life.

For the majority, Justice Clarence Thomas had bent over backward to overturn a ruling by the Kansas Supreme Court that had declared the law unconstitutional. The High Court's four liberal justices had voted to uphold the Kansas ruling. Justice John Paul Stevens, the Ford appointee, chastised Thomas for reaching out so aggressively to overturn a state court on a matter of state law. And Justice David Souter, the Bush I appointee, wrote about how such "equipoise" necessarily precluded a death sentence.

Mocking the rationale of both, and unsatisfied with the scope of Justice Thomas' majority opinion, Justice Scalia wrote a concurrence he will have to live with the rest of his life. As he sought to destroy Justice Souter's argument about the doubts reasonable people have about the accuracy and reliability of America's death penalty regime, Justice Scalia described a criminal justice system unfamiliar to anyone who has ever covered a murder case, read a book about one, or watched television news. Justice Scalia wrote:

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.

And then...

Capital cases are given especially close scrutiny at every level, which is why in most cases many years elapse before the sentence is executed. And of course capital cases receive special attention in the application of executive clemency. Indeed, one of the arguments made by abolitionists is that the process of finally completing all the appeals and reexaminations of capital sentences is so lengthy, and thus so expensive for the State, that the game is not worth the candle.

The proof of the pudding, of course, is that as far as anyone can determine (and many are looking), *none* of cases included in the .027% error rate for American verdicts involved a capital defendant erroneously executed.

There are two obvious and basic explanations for Justice Scalia's strident concurrence. Either he truly believed that capital cases are "given especially close scrutiny at every level," in which case he hadn't been paying attention to his work all those years. Or he did not truly believe that "capital cases [receive special attention](#) in the application of executive clemency," in which case his concurrence was just a thoughtless, reflexive reaction to Justice Souter's compelling case. Either way, he was wrong. Terribly wrong.

## THE ARTICLE

*The DeLuna case was flawed at virtually every level.*

At 11 p.m Monday, the [Columbia University Human Rights Review](#) published and posted its Spring 2012 issue -- devoted entirely to a single piece of work about the life and death of two troubled and troublesome South Texas men. In explaining to their readers why an entire issue would be devoted to just one story, the editors of *the Review* said straightly that the "gravity

of the subject matter of the Article and the possible far-reaching policy ramifications of its publication necessitated this decision."

The article is titled "*Los Tocayos Carlos: Anatomy of a Wrongful Execution*" and it was written by James S. Liebman, Shawn Crowley, Andrew Markquart, Lauren Rosenberg, Lauren Gallo White, Lauren Rosenberg and Daniel Zharkovsky. *Los Tacayos* can be translated from Spanish as "namesakes" and the two men at the heart of the story were, indeed, named Carlos DeLuna and Carlos Hernandez.. On December 7, 1989, this intense piece establishes beyond any reasonable doubt, Texas executed the former for a murder the latter had committed.

The *Review* article is an astonishing blend of narrative journalism, legal research, and gumshoe detective work. And it ought to end all reasonable debate in this country about whether an innocent man or woman has yet been executed in America since the modern capital punishment regime was recognized by the Supreme Court in 1976. The article is also a clear and powerful retort to Justice Scalia in *Kansas v. Marsh*: Our capital cases don't have nearly the procedural safeguards he wants to pretend they do.

Soon to be published as a book, *Los Tacayos Carlos* is a seminal piece of online advocacy as well. Not only is the article itself now available on the web in its entirety (at [www.thewrongcarlos.net](http://www.thewrongcarlos.net)) but so are all of its supporting materials. "The web version of the Article contains approximately 3,469 footnotes," *the Review* editors tell us, which in turn "provide hyperlinks to view the cited sources," including a great deal of the evidence relevant to the case. Now, everyone in the world who is interested can learn how bad it all can go when human beings try to administer what's supposed to be a fair, just and accurate death penalty.

## THE HISTORY

*Kansas v. Marsh* was decided on June 26, 2006. The very next day, on June 27, 2006, two decorated *Chicago Tribune* reporters, Steve Mills and Maurice Possley, published the *last* of a three-part, groundbreaking series about the legal and factual problems with the DeLuna case. The headline that day was: "[The Secret That Wasn't](#)" and here was their lede:

CORPUS CHRISTI, Texas -- It was a secret they all shared. Some kept it out of fear. Some because no one ever asked. Whatever their reasons, it was a secret that might have saved Carlos De Luna from the execution chamber. Twenty-three years after Wanda Lopez was murdered in the gas station where she worked, family members and acquaintances of another man, Carlos Hernandez, have broken their silence to support what De Luna had long asserted: Hernandez, a violent felon, killed Lopez in 1983.

A Tribune investigation has identified five people who say Hernandez told them that he stabbed Lopez and that De Luna, whom he called his "stupid tocapo," or namesake, went to Death Row in his place. They also say he admitted killing another woman, in 1979, a crime for which he was indicted but never tried. Although some aspects of De Luna's actions on the night of Lopez's killing remain suspicious, the Tribune uncovered substantial evidence that undermines his conviction.

I met Possley while we were both covering the McVeigh bombing trial. That was before his [groundbreaking work](#) a decade ago exposing the arbitrary and capricious nature of the death penalty in Illinois. Last year, when Illinois ended its [experiment](#) with capital punishment, it was in large part because of the *Tribune* and the work of Mills, Possley and fellow reporter Ken Armstrong. So why had he chosen back in 2005 to focus upon the DeLuna case? What had struck him? Last week, Possley told me via email:

When I reflect back on the series, what I think about most is how this case was a sensational case in a small arena. It didn't play out on a national stage and it happened so quickly -- so little time between arrest, conviction and execution. I remember that what really got me interested in the case was seeing the crime scene photos with all of the blood and then learning that there was no blood on DeLuna. It just didn't seem possible that he committed such a crime and was caught so quickly and had no blood on his clothing. That fact was so startling to me.

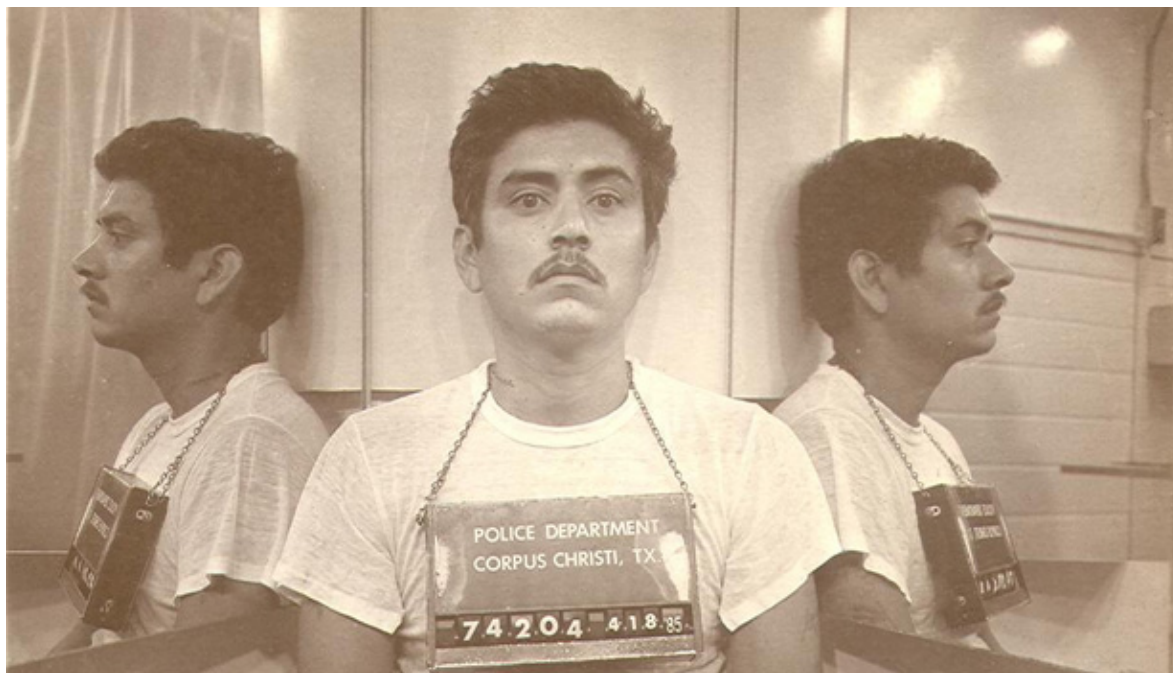
I really haven't changed my view of the case from back then. I thought it was a colossal, global failure of every corner of the criminal justice system. The media failed to question the case (not unusual in smaller markets where police and prosecutors are the best sources) as well.

Possley says the new piece "takes a giant step beyond our reporting because it's such a comprehensive and detailed account" of the DeLuna case. And why wouldn't it be? It was Liebman who first came to Possley and Mills, in November 2005, to see if the two veteran journalists couldn't independently investigate what his own team had discovered about the two Carloses. The resultant series became a finalist that year for a Pulitzer Prize in National Reporting. Someone *was* shouting from the rooftops, Justice Scalia.

Like a Karmic game of leapfrog, the two investigations have enabled one another. For their 2006 series, Possley and Mills got new information that Liebman initially had not uncovered. And now, today, Liebman has uncovered new information that in 2006 was unavailable to Possley and Mills. And what is the point of all? Why spend the inordinate time and energy writing about the guilt or innocence of a man dead now more than 20 years? In the Epilogue, Liebman makes it clear:

With the publication of this book, we make our voices heard. At the same time, we have attempted to present the case so that our readers can consider the evidence for themselves, reach their own conclusions about what happened, and let their own consciences dictate how much tolerance for doubt is allowable when human life is on the line. Whatever else is true, we owe it to the Carlos DeLunas of our nation, as well as the Wanda Lopezes, to ask these questions and to shout out the answers.

## THE STORY



Carlos Hernandez

(Corpus Christi Police Department)

Like Possley and Mills in 2006, I don't have the space here to do justice to the facts of the DeLuna case. But I will try. Carlos DeLuna was executed in December 1989 for murdering Wanda Lopez in a February 1983 robbery in Corpus Christi. A jury convicted him in an afternoon of deliberation and sentenced him to death shortly thereafter. No appellate courts came to his rescue. And the six years it took from crime to execution was surprisingly -- suspiciously -- fast; nationwide, it's usually twice that long.

Texas convicted and executed DeLuna, all right, despite the fact that there was no blood or DNA evidence linking him to the scene of the crime. The state executed him despite the fact that the only eyewitness to the crime identified DeLuna while the suspect was sitting in the back of a police car parked in a dimly lit lot in front of the crime scene. Texas executed him despite the lack of DeLuna's fingerprints at the crime scene and the lack of the victim's hair and fibers on DeLuna. From a bloody scene, there was nothing.

*No one can ever say again with a straight face that America doesn't execute innocent men. No one.*

Texas convicted and executed DeLuna despite the fact that the police and prosecutors knew or should have known that Lopez's real murderer was a man named Carlos Hernandez, a violent criminal who looked almost exactly like DeLuna. Why? Because Hernandez was known to use the sort of knife used as the murder weapon. Because he matched initial descriptions of the suspect. Because he was known to be violent toward women. Oh, and because he evidently couldn't stop bragging about how he had murdered Lopez and gotten someone else to take the fall

for him.

"... [It] is no overstatement to call it 'common knowledge' in 1980s Corpus Christi that Carlos Gonzalez Hernandez killed Wanda Lopez," Liebman and Co. conclude. Yet Texas executed DeLuna despite the fact that key evidence in the case went missing both before and after trial; that DeLuna initially was

appointed a lawyer without criminal law experience; and that law enforcement failed to provide the defense with exculpatory evidence. Any one of these factors might warrant a new trial. Taken together they portray appalling injustice.

## **THE BACKSTORY**

Reading through the manuscript last weekend, jarred by what I was seeing, I began to jot down a list of things that went terribly wrong in the DeLuna case -- issues of fact, of evidence, of testimony, of motives, of incompetence, of indifference, of fraud, of morality, of integrity, of constitutionality -- that should have been raised and answered long before DeLuna was convicted, much less executed, back in the 1980s. I stopped when I got to 10. Here's the list.

1. There was no DNA or blood evidence on DeLuna despite bloody murder scene. There were no fingerprints. There was only one eyewitness and he was sketchy about what he had seen.
2. Police/prosecutors knew the whereabouts of another, more likely, suspect. But they didn't tell the defense this before or after the trial.
3. When the defendant identified the likely killer shortly before trial, the police and prosecutors did not reasonably follow up even though they knew that the man identified was capable of committing the crime.
4. Based upon early witness reports, the police at first sought another suspect. They did not share this information with the defense even though the two men (the two Carloses) looked eerily like one another.
5. The police officer collecting witness accounts relayed inaccurate and incomplete descriptions of suspects to the police dispatcher, who radioed them to officers in manhunt.
6. Police investigators botched the crime scene by turning it back to the store manager just two hours after the murder to be washed down and reopened immediately.
7. Evidence from the initial investigation was checked out by a prosecutor the day after the trial and was never returned. Any usable DNA thus was lost.
8. The trial judge appointed a solo civil practitioner without any criminal trial experience much less any capital trial experience. The defense did not call a single "mitigating" witness in the sentencing phase of trial.
9. Police investigators did not measure a bloody footprint they photographed at the scene of the crime or test a cigarette butt they found on the floor of the store where the victim died.
10. A 9-11 dispatcher failed to quickly dispatch police to the scene of the crime, despite the fact that the victim had called for help. Later, the "manhunt tape" made by dispatchers was taped over and not turned over to the defense by the police.

Surely this epic malfeasance and misfeasance cannot be what Justice Scalia had in mind when he wrote in *Marsh* about capital cases getting "especially close scrutiny at every level." Indeed, as here, the opposite was true. The DeLuna case was flawed at virtually every level. And all it would have taken to

do justice would have been for one prosecutor or cop, one judge or witness, to step up and tell the truth. That didn't happen. And when it did, thanks to Liebman, Mills and Possley, it was too late for Carlos DeLuna.

What do I think happened? All of the things that go wrong every day in capital cases in this country, all of the human failings and official, institutional biases and prejudices and self-justifications and self-delusions that turn Justice Scalia's *Marsh* concurrence into a farce. The bottom line? The criminal justice system decided, combustibly, that Carlos DeLuna was bad enough to be executed without a remotely fair process. The community was fine with the result. The media didn't care. And the rule of law "covered" it all.

## THE EXPERTS

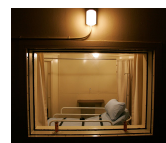
The answer to *Los Tocayos Carlos*, if there can be one, is that the case is so old its failings are now outdated and irrelevant. The district attorney lobbyists will argue that capital cases, in Texas and elsewhere, are handled much more professionally today than they were 30 years ago. And because both of the Carloses are now long dead, there isn't much of a media hook here, either. Posthumous exonerations don't give the cameras the just-out-of-prison "walk shot" television producers love.

But it would be a shame if we were to view the DeLuna case through the prism of legal history. There is nothing ancient about the lessons it teaches. DeLuna may be gone. But the problems his case represents still are here, in virtually every jurisdiction that still imposes capital punishment. So last week I asked some of the most prominent death penalty experts in the country to look at my DeLuna "list" and then identify pending cases that were similarly marked with such obvious reasonable doubts.

I asked Richard Dieter, at the [Death Penalty Information Center](#), and Barry Scheck, co-director of the [Innocence Project](#). I reached out to professors like Eric Freedman, Sean O'Brien and Bennett Gershman, to practitioners like [George Kendall](#), and to earnest other lawyers who handle capital cases from more of a ground-level view. They all agreed that today in America there are plenty of more recent cases where these sorts of issues have arisen or could arise. Here are links to just a few of the cases they cited (again, I stopped at the count of 10)

[D'Ambrosio v. Bagley](#) (Ohio- faulty crime scene analysis, information withheld by law enforcement, other known viable suspects.)

### MORE ON THE DEATH PENALTY



[Racial Bias in Death Penalty Cases: A North Carolina Test](#)



[The Looming Death of the Death Penalty](#)



[Why Lawyers and Judges Should Watch Executions](#)



[Why America's Death Penalty Just Got Us Sanctioned by Europe](#)



[The Appeal of Death Row](#)

*Elmore v. Ozmint* (South Carolina--ineffective counsel, no eyewitnesses, evidence fabricated)

*Keith v. Bobby* (Ohio-- no DNA, blood or fingerprint evidence, other known viable suspects)

*Noling v. Bradshaw* (Ohio--unreliable eyewitness identification, other known viable suspects)

*Arkansas v. Howard* (Arkansas -- DNA withheld)

*Skinner v. Switzer* (Texas -- DNA withheld following Supreme Court intervention.)

In Georgia, Troy Davis was executed last year **despite a dearth** of physical evidence and only a single eyewitness linking him to the crime. In Texas, Claude Jones was executed in 2000 because of DNA evidence **we now know** did not belong to him. In North Carolina, it took officials *ten years* to **release Darryl Hunt** after DNA tests exonerated him of murder. Justice Scalia is either kidding himself, or being disingenuous, when he proclaims the justice system goes out of its way to protect these people.

## THE LESSON

On the day, **sooner than you think**, when the United States Supreme Court again outlaws the death penalty, the justices will almost certainly cited the DeLuna case as one of the prime reasons why. It is not the first recent instance where smart, **reasonable people have compellingly proven** that an innocent man was executed in Texas. And it's certainly not the first time we've read the details of a capital case where the work of government officials -- police, prosecutors, judges -- was so profoundly and consistently shoddy.

But there is something especially compelling about the DeLuna case. It's what drew Possley to it. It's what haunted the lone eyewitness for all these years. A legendary case of injustice deserved -- it needed -- a legendary treatment. And it got one. No one can ever say again with a straight face that America doesn't execute innocent men. No one. Barry Scheck told me Friday: "If Carlos DeLuna were still alive, [the Article] would form the basis of a *habeas* petition that would have exonerated him."

Anyone who cares about the integrity of our justice system, and the constitutional values it is supposed to reflect, should expect Justice Scalia to read the *Review* article this summer -- and certainly before he writes another word for the Court about the death penalty. We'll see. I also especially recommend *Los Tocayos Carlos* to anyone and everyone -- judge, prosecutor, police official, witness, medical expert, etc -- who had anything at all to do with making the DeLuna case the symbol it will now become.

DeLuna was reportedly slow as a child and tested as mildly mentally retarded as a juvenile. Later, he was in and out of trouble with the law until he was found (and was perhaps beaten) by the police on the night of the Lopez murder. There is great doubt even today that he fully understood the magnitude of the trouble he was in, even as he was nearing the end in 1989, which is why he made such a perfect patsy for Carlos Hernandez.

The ultimate villain of this awful story, Hernandez died in prison, in 1999, boasting to the end that he had killed Wanda Lopez and allowed another man to take the fall for it. The cops knew this. The



prosecutors knew or should have known it. Witnesses knew it. And yet no one did anything to stop the state executioners from carrying out their job. Why no one listened to Hernandez for all those years, and why no one hears the cries of others today, is a question Justice Scalia and many others have to answer for themselves.

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