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### Bold move by DA

#### DA tells her prosecutors to stay silent during judge's inquiry

By BRIAN ROGERS  
HOUSTON CHRONICLE  
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**Melissa Phillip Chronicle**  
John Edward Green Jr. is awaiting trial on charges he fatally shot a **Huong Thien Nguyen**, 34, of Houston, and wounded her sister **My Houng Nguyen** during a June 2008 robbery.

Harris County District Attorney Pat Lykos on Monday ordered prosecutors in her office to "stand mute" during a rare hearing to determine whether the death penalty in Texas is unconstitutional.

The last-ditch strategy to end state District Judge Kevin Fine's judicial inquiry into the procedures surrounding the state's death penalty statute makes an observer out of the largest district attorney's office in Texas.

The hearing, stemming from a death penalty case before Fine's court, began Monday and is expected to last two weeks.

"It's arrogant, and it's contemptuous for the state to decide to not participate when they're trying to put my client to death," defense lawyer Casey Keirnan said in court.

Prosecutor Alan Curry told Fine he was ordered to answer that he is to remain mute instead of objecting, cross-examining or putting on witnesses at the hearing.

"I'm not allowing you to not participate," Fine said.

Curry said he and other prosecutors will remain seated at counsel tables, but that they will not speak.

Fine could have held the office in contempt for the move. Instead of deadlocking the proceedings, Fine allowed prosecutors to listen without objection to testimony from anti-death penalty experts, legal scholars and investigators.

Death penalty opponents and courthouse observers turned out in droves early Monday because the hearing is believed to be the first time a court will consider the constitutionality of the Texas death penalty in the context of analyzing whether there is a substantial risk of convicting the innocent.

#### Lawyer: Client 'at risk'

Defense lawyers for John Edward Green are arguing that Texas has executed two innocent defendants, and the procedures surrounding the death penalty in Texas are unconstitutional because there are not enough safeguards. "He is at risk of being wrongfully convicted, wrongfully sentenced and wrongfully executed," said defense lawyer Richard Burr.

Green, 25, faces the death penalty, accused of a 2008 robbery and slaying in southwest Houston.

Burr said Green is innocent.

Before they staked their position, Curry and other prosecutors argued that the law surrounding the death penalty is well settled.

They also argued that Green has not been convicted of anything and therefore lacks standing to argue against the death penalty.

Curry said early Monday that hearing testimony or gathering evidence is unnecessary.

"This is a legal issue, not an evidentiary issue," Curry said.

"I believe I need to hear evidence," the judge answered.

Curry, the head of the appellate division of the district attorney's office, also lodged at least 19 other objections in writing.

#### 'It's disrespectful'

Curry and other representatives of the office declined to comment on the hearing or their strategy Monday.

Defense lawyers watching the hearing collectively shook their heads after listening to the district attorney's position.

"It's disrespectful," said Mark Bennett, a past-president of the Harris County Criminal Lawyers Association. "This is the most serious matter in this man's life and the district attorney's office is playing a game. Pat Lykos is ordering her subordinates to play games."

Witnesses expected to testify in the hearing include former Texas Gov. Mark White, who last month spoke in Houston with New York lawyer Barry Scheck of the Innocence Project.

White has called for legislative changes citing problems with the capital cases of Claude Jones and Cameron Willingham, both of whom have been executed.

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### Ruling at March hearing

Scheck, who is expected to appear and call witnesses about those two cases, is seeking a moratorium on executions.

Scheck will try to convince the judge that Jones and Willingham were actually innocent and that Texas has almost certainly executed other innocents.

During a March hearing in Green's case, Fine declared the procedures surrounding the death penalty in Texas unconstitutional, then rescinded his ruling and asked attorneys on both sides to present more evidence.

Burr said three factors in Green's case — eyewitness identification, partial fingerprint evidence and information provided by informants — were also used to convict Jones and Willingham.

Because Fine has once ruled that the procedures surrounding the death penalty are unconstitutional saying that innocent people may have been executed, Fine is expected to rule the same way again.

Instead of trying to convince the judge, evidence presented at the hearing is destined for the appellate courts, which most observers say will overturn Fine's ruling.

### 'Judicial activism'

Attorneys for Green hope the tug-of-war will ultimately end the death penalty, although they parse their words carefully saying the system has flaws that create an unacceptable risk that innocent people, including Green, will be executed in the future.

Fine, a Democrat who took the bench in 2008, was accused of "judicial activism" by Lykos, Texas Attorney General Greg Abbott and Gov. Rick Perry after his initial ruling in March.

Lykos at that time said the constitutionality of the death penalty was well-settled law, one of the positions her office took Monday.

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**synical** 8:44 AM on December 7, 2010

You go girl!!! Send Scheck and his liberal crybabies back to Kalifornia. The left wingers, and the Lame Stream Media would have us kiss up to all killers and other dirt bags. How can they say everybody is innocent? I guess there are no killers and thieves in the world, it is all a fig of our imaginations. If the killers went after the left wing lawyers and the Lame Stream Media, who by the way are probably also un-armed, we would not have any more problems :<)

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