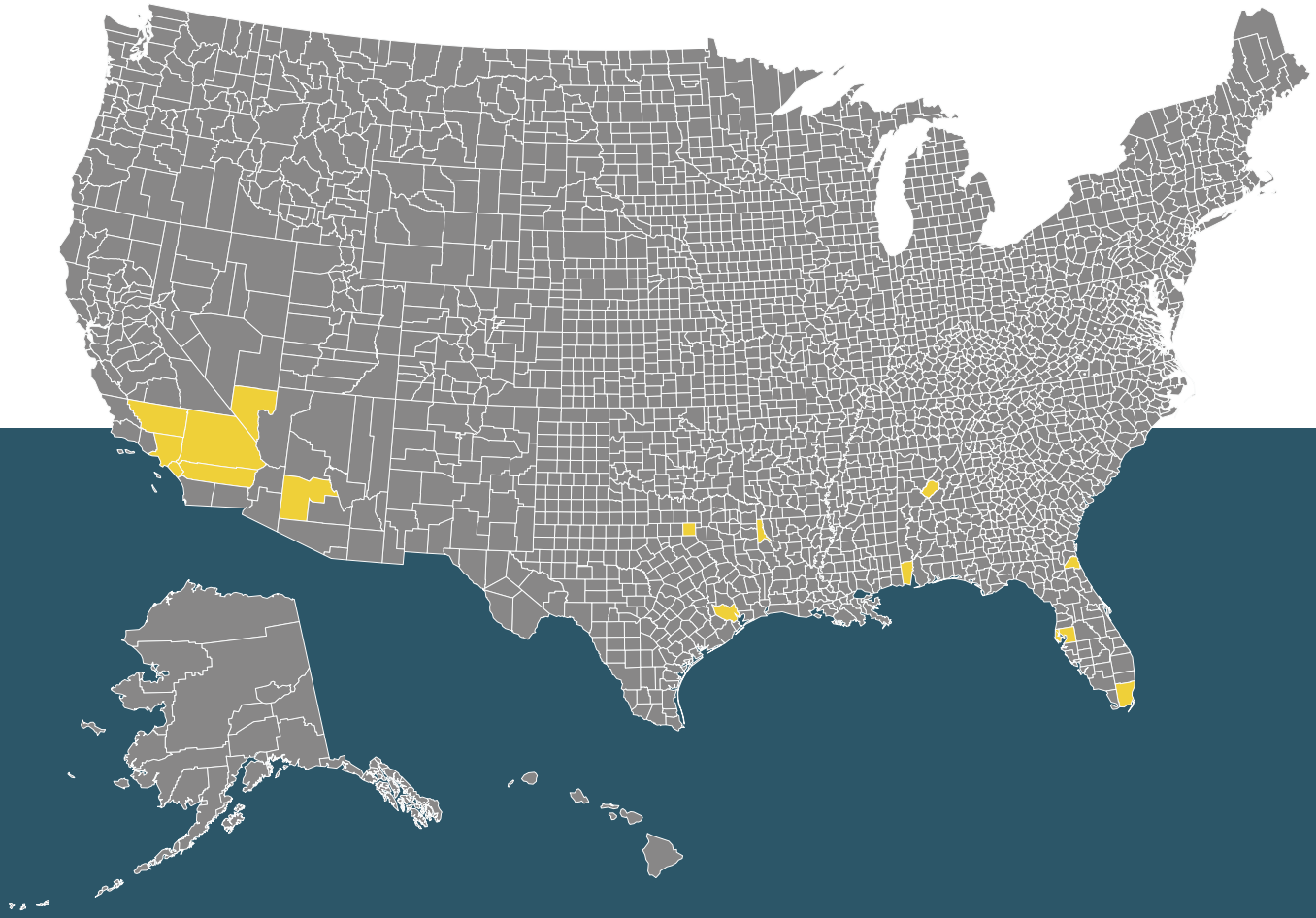
FAIR PUNISHMENT PROJECT



Too Broken to Fix: Part I

An In-depth Look at America's Outlier Death Penalty Counties

AUGUST 2016

INTRODUCTION

The death penalty in America is dying.

The trends are clear. In 2015, juries returned the fewest number of new death sentences—49—since the death penalty was reinstated in 1976.[1] The number of death sentences in 2015 has declined by more than 50 percent since 2009, which saw 118 death sentences, and by more than 600 percent since the peak of 315 sentences in 1996.[2] Of the 31 states that legally retain the death penalty,[3] only 14—or less than half—imposed a single death sentence in 2015.[4]

When we drill down to the county level, the large-scale abandonment of the death penalty in the country becomes even more apparent. Of the 3,143 county or county equivalents in the United States, only 16—or one half of one percent—imposed five or more death sentences between 2010 and 2015.[5] Six of those counties are in Alabama (Jefferson and Mobile) and Florida (Duval, Hillsborough, Miami-Dade and Pinellas)—the only two states that currently permit non-unanimous death verdicts.[6] Of the remaining 10 counties, five are located in highly-populated Southern California (Kern, Los Angeles, Orange, Riverside, and San Bernardino). The others include Caddo (LA), Clark (NV), Dallas (TX), Harris (TX) and Maricopa (AZ). As Justice Stephen Breyer noted in his 2015 dissent in *Glossip v. Gross*, "the number of active death penalty counties is small and getting smaller."[7]

1 *See Death Sentences in 2015*, Death Penalty Info. Ctr., http://www.deathpenaltyinfo.org/2015-sentencing (last visited Aug. 1, 2016).

2 *See Death Sentences in the United States from 1977 by State and Year*, Death Penalty Info. Ctr., http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008 (last visited Aug. 1, 2016).

3 *See States With and Without the Death Penalty*, Death Penalty Info. Ctr., http://deathpenaltyinfo.org/states-and-without-death-penalty (last visited Aug. 9, 2016)

4 *See Death Sentences in 2015*, *supra* note 1.

5 *See Death Sentences 2010-2015*, on file with the Fair Punishment Project.

6 *See* Erik Eckholm, *Delaware Supreme Court Rules State's Death Penalty Unconstitutional, N.Y. Times, Aug. 2, 2016*, http://www.nytimes.com/2016/08/03/us/delaware-supreme-court-rules-states-death-penalty-unconstitutional.html?_r=0; Anna M. Phillips, *How The Nation's Lowest Bar for the Death Penalty Has Shaped Death Row*, Tampa Bay Times, Jan 31, 2016, http://www.tampabay.com/projects/2016/florida-executions/jury-votes/.

7 135 S. Ct. at 2774 (Breyer, J., dissenting).

There are myriad reasons why the death penalty has fallen out of favor in most of the country and among a growing number of influential groups of victims' families, law enforcement, faith leaders, professional associations, and conservatives. Studies have shown it to be extremely expensive, prone to error, applied in discriminatory ways, and imposed upon the most vulnerable, rather than the most culpable people. The ever-growing ranks of the wrongfully convicted remind us of the profound injustices inherent in this system, and of the near-certainty that innocent people have been executed.

What, then, makes these 16 counties different? Why do they continue to push out death sentences with regularity, bucking an overwhelming trend in the other direction? Do they have a citizenry with an unusually strong attachment to capital punishment? Do they care less about legal safeguards?

Part I of this report takes a close look at how capital punishment operates on the ground in half of these active death-sentencing counties. In this first report, we dig deep into Caddo, Clark, Duval, Harris, Maricopa, Mobile, Kern, and Riverside counties. Our review reveals that these counties frequently share at least three systemic deficiencies: a history of overzealous prosecutions, inadequate defense lawyering, and a pattern of racial bias and exclusion. These structural failings regularly produce two types of unjust outcomes which disproportionately impact people of color: the wrongful conviction of innocent people, and the excessive punishment of persons who are young or suffer from severe mental illnesses, brain damage, trauma, and intellectual disabilities.

OVERZEALOUS PROSECUTORS

While jurors and judges recommend and impose death sentences, prosecutors decide whether to seek the death penalty. In a nation that endures approximately 14,000 homicides annually[8] and yet imposed only 49 death sentences in 2015, it is safe to conclude that most prosecutors do not seek the death penalty in most of the cases in which the punishment is available. One might presume that this is the result of great prosecutorial restraint—that the punishment is being reserved for the most culpable offenders convicted of the most heinous crimes—but our research doesn't support this claim. Since 1976, the year capital punishment resumed in America, a tiny handful of prosecutors account for a wildly disproportionate number of death sentences. Indeed, just three prosecutors personally obtained a

8 *See* FBI, Uniform Crime Report 2 (2015), https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/offenses-known-to-law-enforcement/murder/murder/murder.pdf (reporting an estimated 14,249 murders in 2014).

combined 131 death sentences,[9] the equivalent of one in every 25 people on death row in America today.[10] Those same prosecutors amassed findings of misconduct in 33 percent, 37 percent, and 46 percent of their cases, respectively.[11] Strikingly, once these types of prosecutors leave office, death-sentencing rates ultimately plummet in their respective counties.[12] The same personality-driven phenomenon exists in most of the active death sentencing counties. The prosecutors who have obtained the most death sentences in these counties tend to exhibit an obsession with winning death sentences at almost any cost, even in cases with less culpable defendants.[13] Their willingness to cut corners, even in cases that literally involve life and death decisions,[14] casts grave doubt on the legitimacy of capital punishment – and also tarnishes the entire justice system in America.

INADEQUATE DEFENSE

Prosecutors who abuse their discretion are not the only people to blame for the brokenness of capital punishment. Twenty years ago, law professor Stephen Bright wrote that the death penalty in America was handed down not "for the worst crime, but for the worst lawyer."[15] In too many cases today, defendants are stuck with attorneys who lack the time, resources, or ability to zealously represent their clients as guaranteed by the Constitution,[16] which ultimately leads to unmitigated prosecutorial abuse, disproportionately harsh sentences, and the conviction of innocent people.[17] In this report, we look at the number of hours of mitigation evidence that capital defense lawyers put on during the penalty phase of the trial as one proxy for evaluating the quality of defense in these counties.

9 Fair Punishment Project, America's Top Five Deadliest Prosecutors: How Overzealous Personalities Drive The Death Penalty 18 (2016) [hereinafter *Deadliest Prosecutors*], *available at* http://fairpunishment.org/wp-content/uploads/2016/06/FPP-Top5Report_FINAL.pdf.

10 *See Death Row Inmates by State*, Death Penalty Info. Ctr., http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year?scid=9&did=188#state (last updated Jan. 1, 2016).

11 *See Deadliest Prosecutors*, *supra* note 9 (providing statistics on Joe Freeman Britt of North Carolina; Robert H. Macy of Oklahoma; and Donald V. Myers of South Carolina).

12 *See id.*

13 *See id.*

14 Three of the top five "deadliest prosecutors" had misconduct findings in over one-third of their death penalty cases. *See Deadliest Prosecutors*, *supra* note 9.

15 *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Y. L. J. 1835 (1994).

16 *See* Strickland v. Washington, 466 U.S. 668 (1984) (holding that the Sixth Amendment right to counsel is a right to a reasonable standard of effectiveness).

17 *See Ineffective Assistance of Counsel*, Cal. Innocence Project, https://californiainnocenceproject.org/issues-we-face/ineffective-assistance-of-counsel/ (last visited Aug. 1, 2016).

RACIAL BIAS AND EXCLUSION

Racial bias infects every aspect of death penalty cases, from jury selection to sentencing, from the decision to seek death to the ability to access effective representation. Indeed, in 96 percent of states where the relationship between race and the death penalty has been analyzed, researchers have "found a pattern of discrimination based on the race of the victim, the race of the defendant, or both."[18] Additionally, one study has shown that the more "stereotypically Black" a defendant appeared, the more likely it was that he would be sentenced to death. [19] A closer look at the outlier counties where the death sentence is used most frequently reveals a history of racial bias. In this report, we utilize research from Political Science Professor Frank Baumgartner of the University of North Carolina at Chapel Hill to evaluate the race of defendants and the race of the victims in capital cases from these counties.

EXCESSIVE PUNISHMENT

The Eighth Amendment limits the death penalty to offenders with "a consciousness materially more depraved" than the "typical murderer."[20] The U.S. Supreme Court has held that juvenile offenders and persons with intellectual disabilities do not, as a class of offenders, possess the requisite moral culpability and therefore cannot be executed.[21] However, there are many defendants who also have a diminished culpability similar to these "categorically exempted" defendants, but fall through the cracks of justice.[22] These include people with borderline intellectual functioning (people with IQs in the 70s and low 80s);[23] persons under 21 years old;[24] persons who have suffered extreme childhood trauma, including physical or sexual abuse;[25]

18 *Arbitrariness*, Death Penatly Info. Ctr., http://www.deathpenaltyinfo.org/arbitrariness (citing David Baldus et al., *In The Post-Furman Era: An Empirical And Legal Overview, With Recent Findings From Philadelphia*, 83 Cornell L. Rev. 1638 (1998)) (last visited Aug. 1, 2016).

19 *See* Jennifer Eberhardt et al., *Looking Deadworthy*: Perceived *Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 J. Of Psychol. Sci. 383, 383-385 (2006).

20 Robert J. Smith et al., *The Failure of Mitigation*., 65 Hashtings L. J. 1221, 1222 (2014).

21 *See* Roper v. Simmons, 543 U.S. 551, 569-71 (2005) (prohibiting the death penalty for juveniles); Atkins v. Virginia, 536 U.S. 304, 320-21 (2002) (prohibiting the death penalty for the intellectually disabled).

22 *See*, e.g., ABA, *Recommendation* 122A, *available at* http://www.deathpenaltyinfo.org/documents/122AReport.pdf (recommending that individuals with other types of impaired mental conditions should be exempt from the death penalty) (last visited Aug. 1, 2016).

23 *See* id. at 4; see also APA, Intellectual Disability (2013), http://www.dsm5.org/documents/intellectual%20disability%20fact%20sheet.pd; Jerrold Pollack & John J. Miller, *A Call to DSM-V to Focus on the Designation of Borderline Intellectual Functioning*, *Psychiatric Times* (Dec. 8, 2009), http://www.psychiatrictimes.com/articles/call-dsm-v-focus-designation-borderline-intellectual-functioning.

24 Mild neuroscience holds that the prefrontal cortex, which enables impulse control, is not finished developing until approximately age 25. See Dustin Albert & Laurence Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. Research On Adolescence 211, 220 (2011). For our purposes, we use under the age of 21 -- when all legal rights are bestowed upon an individual, despite the fact that one cannot yet rent a car from a private rental company.

25 *See* Janet Currie & Erdal Tekin, *Does Child Abuse Cause Crime?* (NBER Working Paper No. 12171, 2006), *available at* http://www.nber.org/papers/w12171 (concluding that child abuse and neglect doubles the likelihood of criminal activity).

persons with severe mental illnesses (SMI);[26] and those with organic brain damage.[27] The latest neuroscience research indicates the parts of the brain responsible for key functions, such as impulse control and judgment, are not fully formed until an individual is in his mid-20s.[28] Some of the most concerning cases that we discuss below involve persons with more than one of these impairments.

INNOCENCE

Since 1976, there have been more than 150 individuals exonerated from death row.[29] Nearly half of these exonerations have occurred since the start of 2000 with the development of more reliable scientific techniques.[30] Exonerations are common in jurisdictions with overly aggressive prosecutors and inadequate defenders. Sixty-one percent of these exonerations involved defendants of color.[31]

A recent case from Caddo Parish, Louisiana, involving Lamondre Tucker, an 18-year-old Black teenager with significant intellectual impairments,[32] offers a stark illustration of how these structural deficiencies interact with one another. The Parish is sometimes referred to as "Bloody Caddo"[33] because it was the site of the second highest number of mob-led lynchings in the country between 1877 and 1950.[34] Dale Cox, the former District Attorney who prosecuted Tucker, suggested that we should "kill more people" when asked about the appropriateness of the death penalty.[35] Remarkably, Cox's eagerness to expand capital sentencing took place in response to the release of Glenn Ford – a man with Stage

Glenn Ford

26 *See Recommendation*, *supra* note 22, at 6-9.

27 *See* id. at 5.

28 *See* e.g. Dustin Albert & Laurence Steinberg, Judgment and Decision Making in Adolescence, 21 J. Res. on Adolescence 211, 212-17 (2011).

29 *The Innocence List*, Death Penalty Info. Ctr., http://deathpenaltyinfo.org/innocence-list-those-freed-death-row (last visited Aug. 1, 2016).

30 *See id*.

31 *See* Exonerations by Race, Death Penalty Info. Ctr., http://deathpenaltyinfo.org/innocence-and-death-penalty#race (last visited Aug. 1, 2016).

32 *See* Pet. for Writ of Cert. at 5, Tucker v. Louisiana, 136 S. Ct. 1801 (2016), *available at* http://www.scotusblog.com/wp-content/uploads/2016/05/Tucker-cert.-pet.1.25.pdf.

33 Gilles Vandal, "*Bloody Caddo*": *White Violence Against Blacks in a Louisiana Parish*, 1865-1876, J. Soc. Sci. 25, 373-88 (1991), *available at* http://redriversankofa.org/images/bloodycaddo_Vandal.pdf.

34 *See* John Andrew Prime, *Lynchings' Bloody Terror Toll Studied*, Shreveport Times, Feb. 16, 2015, http://www.shreveporttimes.com/story/news/local/2015/02/15/lynchings-bloody-terror-toll-studied/23458327/

35 *See* Campbell Robertson, *The Prosecutor Who Says Louisiana Should Kill More People*, N.Y. Times, July 7, 2015, http://www.nytimes.com/2015/07/08/us/louisiana-prosecutor-becomes-blunt-spokesman-for-death-penalty.html

4 lung cancer who had spent nearly three decades on death row for a crime he did not commit.[36] During his tenure as District Attorney, Cox and his assistants struck Black residents from juries three times more often than they did white residents.[37] Kurt Goins, Tucker's defense attorney, put on no defense at the guilt phase of the trial and less than one day's worth of evidence at the mitigation phase.[38] Outside the courthouse, a Confederate flag flew on the front lawn.[39] The result was almost inevitable: a death sentence rendered against a teenager with a crippling intellectual impairment. It is hardly surprising that Supreme Court Justices Breyer and Ginsburg questioned whether "geography" and not "the comparative egregiousness of his crime" accounted for his death sentence.[40]

This is what capital punishment in America looks like today. While the vast majority of counties have abandoned the practice altogether, what remains is the culmination of one systemic deficiency layered atop another. Those who receive death sentences do not represent the so-called "worst of the worst." Rather, they live in counties with overzealous and often reckless prosecutors, are frequently deprived access to competent and effective representation, and are affected by systemic racial bias. These individuals are often young, and many have intellectual impairments, severe mental illnesses, or have suffered from brain damage, abuse, and trauma. Some are likely innocent. This pattern offers further proof that, whatever the death penalty has been in the past, today it is both cruel and unusual, and therefore unconstitutional under the Eighth Amendment.

36 Vickie Welborn, *Updated: ADA on Death Penalty: 'We need to kill more people'*, Shreveport Times, Mar. 27, 2015, http://www.shreveporttimes.com/story/news/local/2015/03/27/glenn-ford-dale-cox-charles-scott-caddo-parish-death-penalty-execution-marty-stroud/70529188/.

37 Ursula Noye, Repreive Australia, Blackstrikes 10-11 (2015), available at https://blackstrikes.com/.

38 *See* Caddo Parish Defense Mitigation and Jury Deliberations Times, on file with the Fair Punishment Project.

39 *See* Petition, *supra* note 32, at 34.

40 Tucker v. Louisiana, 136 S. Ct. 1801, 1801-02 (2016) (Breyer, J. & Ginsburg, J., dissenting from the denial of certiorari).

#1

THE DEATH PENALTY IN MARICOPA COUNTY, AZ

PERCENTAGE OF CASES WITH MISCONDUCT FOUND	21%
AVERAGE AMOUNT OF DEFENSE MITIGATION PRESENTED BY DEFENSE LAWYERS	2.25 DAYS
PERCENTAGE OF DEFENDANTS OF COLOR SENTENCED TO DEATH BETWEEN 2010-2015	57%
PERCENTAGE OF CASES WITH SIGNIFICANT MITIGATION (AGE AND IMPAIRMENTS COMBINED)	70%
PERCENTAGE OF DEFENDANTS UNDER AGE 21	11%
PERCENTAGE OF DEFENDANTS WITH INTELLECTUAL DISABILITY, SEVERE MENTAL ILLNESS, OR BRAIN DAMAGE	62%
NUMBER OF DEATH ROW EXONERATIONS SINCE 1976	5

**All calculations are based on direct appeal opinions since 2006 unless otherwise noted.*

Between 2010 and 2015, Maricopa County had 28 death sentences. Maricopa's rate of death sentencing per 100 homicides is approximately 2.3 times higher than the rate for the rest of Arizona.[41] Though Maricopa has one percent of the nation's population,[42] it accounts for 3.6 percent of the death sentences returned nationally between 2010 and 2015.[43]

OVERZEALOUS PROSECUTORS

Andrew Thomas was elected to serve as Maricopa's County Attorney in 2004.[44] He began pursuing capital charges at nearly twice the rate of his predecessor.[45] This new policy contributed to a "backlog of capital cases [that] crippled the county's public defender system" and left approximately a dozen murder defendants without lawyers.[46] This would become known as Maricopa's "capital case crisis."[47]

41 *See* Frank Baumgartner, *Rate of Death Sentencing 2006-2015*, http://fairpunishment.org/wp-content/uploads/2016/08/RateofDeathSentencing2006-2015.pdf.

42 *See* QuickFacts for Maricopa County, U.S. Census Bureau, http://www.census.gov/quickfacts/table/PST045215/04013,00 (last visited Aug. 8, 2016).

43 *See Death Sentences By Year: 1976-2014*, Death Penalty Info. Ctr., http://www.deathpenaltyinfo.org/death-sentences-year-1977-2009 (last visited Aug. 2, 2016).

44 *See John Rudolf, Andrew Thomas, Phoenix Prosecutor, Disbarred for 'Defiled' Public Trust*, Huff. Post (Apr. 11, 2012), http://www.huffingtonpost.com/2012/04/11/andrew-thomas-disbarred-phoenix-prosecutor_n_1415815.html.

45 *See* Jennifer Steinhauer, *Policy Shift on Death Penalty Overwhelms Arizona Court*, N.Y. Times, Mar. 5, 2007, http://www.nytimes.com/2007/03/05/us/05death.html.

46 *See id.*

47 *See* Ray Stern, *Death Penalty: Judge Outlines Reason Cases Take Years To Complete*, Phoenix New Times, Apr.10, 2009, http://www.phoenixnewtimes.com/news/death-penalty-judge-outlines-reason-cases-take-years-to-complete-6626916.

In 2012, a three-member panel of Arizona Supreme Court voted unanimously to disbar Thomas. In an extensive 247-page opinion,[48] the panel found that Thomas "outrageously exploited power, flagrantly fostered fear, and disgracefully misused the law."[49] He purportedly used his office and its powers to bring baseless criminal and civil charges against political opponents, including four state judges and the state Attorney General.[50]

With Thomas gone, Maricopa has sought and obtained fewer death sentences.[51] Today, three prosecutors who all served under Thomas—Jeannette Gallagher, Juan Martinez, and Vincent Imbordino—account for more than one-third of all of the capital cases—21 of 61[52] —that the Arizona Supreme Court has decided on direct appeal since 2006.[53] They amassed findings of improper behavior in eight of those cases.[54] Juan Martinez once compared a Jewish defense lawyer to Adolf Hitler and his "Big Lie," a tactic the Arizona Court of Appeals deemed "reprehensible."[55] The Arizona Supreme Court has called out Martinez by name during oral argument,[56] and found that he committed misconduct in at least three capital cases,[57] including *Lynch v. Arizona*,[58] a case that the U.S. Supreme Court reversed this year for unrelated reasons.[59] The state court found 17 instances in which Juan Martinez acted inappropriately in that one death penalty case alone.[60] The Arizona Supreme Court has condemned Jeannette Gallagher's conduct, labeling it as "improper,"[61] "very troubling,"[62] and "entirely unprofessional."[63] Gallagher, who heads Maricopa's capital case unit, has personally obtained at least nine death sentences,[64] including against a military veteran diagnosed with paranoid schizophrenia and a brain-

48 *See* Rudolf, *supra* note 44.

49 *See id.*

50 *See id.*

51 *See* Maricopa County Death Sentences Spreadsheet 2004-2016, on file with the Fair Punishment Project. Between 2004 and mid-2010, the office averaged 8.5 sentences/year. Between mid-2010 and mid-2016, the office averaged 4.5 sentences/year.

52 *See* Maricopa County Direct Appeals Spreadsheet 2006-2015, on file with the Fair Punishment Project.

53 *See id.*

54 *See id.*

55 *See* Michael Kiefer, *Objections Raised to Juan Martinez's Conduct in Jodi Arias Trial*, Ariz. Republic, Feb. 28, 2014, http://archive.azcentral.com/news/articles/20131028jodi-arias-juan-martinez-conduct-day3.html.

56 *See id.*

57 *See* Maricopa County Direct Appeals Spreadsheet 2006-2015, *supra* note 52.

58 136 S. Ct. 1818, 578 U.S. ___ (2016) (per curiam), *available at* https://www.supremecourt.gov/opinions/15pdf/15-8366_e18f.pdf.

59 *See id.* (reversing where defendant not given opportunity to inform jury of parole ineligibility).

60 Pet. for Writ of Cert. at 6, Lynch v. Arizona, 136 S. Ct. 1818 (2016), *available at* http://www.scotusblog.com/wp-content/uploads/2016/05/15-8366-Lynch-Shawn-Patrick-Petition-for-Writ-of-Certiorari-Final-Filed.pdf.

61 *Deadliest Prosecutors*, *supra* note 9, at 24 (quoting State v. Velazquez, 166 P.3d 91, 102 (Ariz. 2007)).

62 *Id.* (quoting State v. Martinez, 282 P.3d 409, 416 (Ariz. 2012)).

63 *Id.* (quoting State v. Speer, 212 P.3d 787, 796 (Ariz. 2009)).

64 *Deadliest Prosecutors*, *supra* note 9, at 24.

damaged child whom she described to the jury as "16 going on 35."[65]

INADEQUATE DEFENSE

The quality of the defense counsel in Maricopa County varies widely. Even at the level of superficial appearances, some lawyers spend weeks presenting evidence during the penalty phase of a capital trial, while others hardly muster a few hours worth of mitigation to save their client's lives. To understand why Maricopa has had such a disproportionate number of death sentences, even for a place with such a large population, one need look no further than the 24 percent of cases decided or pending on direct review since 2006 in which Herman Alcantar, Nathaniel Carr, Rodrick Carter, or Randy Craig represented the defendants.[66]

Herman Alcantar, who once was called "arguably the busiest capital defense attorney in the entire United States,"[67] defended six cases that resulted in death over this period.[68] In five of the six cases, his presentation of mitigation evidence lasted under one day.[69] One month before trial, in one of the cases, Alcantar had neither filed a single substantive motion nor visited his client in more than a year.[70] In a different case, Alcantar billed just 43 hours on mitigation-related activities, and his client ultimately waived the right to put on mitigation evidence at trial.[71] After the trial, the client's new lawyers discovered that he was addicted to heroin at birth, endured head injuries from being thrown down flights of stairs and beaten with a broomstick, and had both neuropsychological impairments and symptoms of fetal alcohol syndrome.[72] This new information caused one of the jurors who voted for death to write: "Knowing all of that, I would have voted for life, no doubt about it."[73]

Nathanial Carr shares many of Alcantar's deficiencies. He represented four clients who were sent to death, and the mitigation presentation in each case lasted under two days.[74] He once wrote that his client, a man with a 72 IQ score, "looks

65 *See* Paul Rubin, *Off with Their Heads*, Phoenix New Times, June 26, 2003, http://www.phoenixnewtimes.com/news/off-with-their-heads-6408253.

66 *See* Maricopa County Direct Appeals Spreadsheet 2006-2015, *supra* note 52.

67 Robert J. Smith, *The Worst Lawyers*, Slate (Nov. 4, 2015), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/11/the_worst_defense_lawyers_for_death_penalty_cases_in_arizona_florida_louisiana.html.

68 *See* Maricopa County Defense Mitigation Presentation and Jury Deliberation Times, on file with the Fair Punishment Project.

69 *See id.*

70 *See* Smith, *Worst Lawyers*, *supra* note 67.

71 *See* Pet. for Post-Conv. Relief, State v. Womble, No. CR2002-010926(B) (Ariz. 2015).

72 *See id.*

73 *See id.*

74 *See* Maricopa County Defense Times, *supra* note 68.

like a killer, not a retard."[75] A different client sent his trial judge a letter requesting that Carr be removed from his case because he had "lost all trust and faith" in Carr because, among other things, Carr and his co-counsel had visited that client only a few times in 15 months.[76] Part of Carr's unavailability was attributed to his side job as a high school football coach, which caused him to be "unavailable to clients and co-counsel on most weekday afternoons during football season—and always on game days."[77] Carr, who has been called "the king of Maricopa County's contract criminal-defense attorneys when it comes to collecting money," billed the county $2.4 million dollars between 2006 and 2012, including $450,000 for a single death penalty case, some of which was for work that appears to not have happened.[78]

Rodrick Carter has had five clients sent to death row, and in four of those cases he put on less than a day's worth of mitigation.[79] He once billed the county $2.2 million dollars over five and a half years, and reportedly a big chunk of that money was to represent a man who ultimately waived the right to put on mitigation.[80] Two out of three of Randy Craig's capital cases resulted in death sentences in 2015, and five of his former clients are on death row.[81] In four of those cases, Craig put on no mitigation evidence, which is partly a function of the fact that those clients also waived their right to put on mitigation.[82] In the fifth case, Craig put on under three hours worth of mitigation.[83] He once conducted a mitigation investigation for a Mexican national facing a death sentence so poorly that the Mexican government intervened to ask the trial judge to evaluate the quality of Craig's representation.[84]

RACIAL BIAS AND EXCLUSION

Between 2010 and 2015, 57 percent of the defendants sentenced to death in Maricopa County were people of color.[85] In that same period, none of the

75 *See* Paul Rubin, *Death-Penalty Lawyers are Making a Killing off Maricopa Taxpayers*, Phoenix New Times, July 19, 2012, http://www.phoenixnewtimes.com/news/death-penalty-lawyers-are-making-a-killing-off-maricopa-taxpayers-6454923.

76 *See* Smith, *Worst Lawyers*, *supra* note 67.

77 *See* Rubin, *Death-Penalty Lawyers*, *supra* note 75.

78 *See id.*

79 *See* Maricopa County Defense Times, *supra* note 68.

80 *See* Rubin, *Death-Penalty Lawyers*, *supra* note 75; Oral Arg. Case Summary, State v. Goudeau, No. CR-11-0406-AP (2015), *available at* http://lmgcorporate.com/phxdigital/news/10-13-15/October132015CR110406APGoudeau.pdf.

81 Charles Hamilton Houston Inst. for Race & Just., Harv. L. Sch., America Has Abandoned the Death Penalty (2015), http://www.deathpenaltyinfo.org/documents/2015-CHHIRJ-Death-Penalty-Report.pdf.

82 *See* Maricopa County Defense Times, *supra* note 68; Maricopa County Direct Appeals Spreadsheet 2006-2015, *supra* note 52.

83 *See* Maricopa County Defense Times, *supra* note 68.

84 *See* Mot. to Det. Counsel, State v. Tabera, No. CR2004-023095-001-SE (Ariz. 2009).

85 *See* Frank Baumgartner, *Race of Defendant and Victims 2010-2015*, August 15, 2016, http://fairpunishment.org/wp-content/uploads/2016/08/RaceofDefendantsandVictims2010-2015.pdf

defendants sentenced to death elsewhere in the state were people of color.[86] Most notably, 18 percent of the defendants from Maricopa were African-American, even though African-Americans are just six percent of Maricopa's population.[87]

In terms of the broader context, one of the most powerful figures in law enforcement in the country is Maricopa County Sheriff Joe Arpaio. A recent U.S. Department of Justice review of Sheriff Joe's office concluded "that [Maricopa County Sheriff's Office], through the actions of its deputies, supervisory staff, and command staff, engages in racial profiling of Latinos; unlawfully stops, detains, and arrests Latinos; and unlawfully retaliates against individuals who complain about or criticize MCSO's policies or practices..."[88] One DOJ expert concluded that, "Arpaio oversaw the worst pattern of racial profiling by a law enforcement agency in U.S. history"[89]

EXCESSIVE PUNISHMENTS

A striking 70 percent of cases that the Arizona Supreme Court decided on direct appeal since 2006 involve defendants with the type of severe mitigation evidence that strongly suggests excessive punishment.[90] For instance, 11 percent of the cases involved a defendant not old enough to buy a beer.[91] Consider, for example, Efren Medina, age 18, who suffers from "paranoia, confused thinking and extreme agitation," characteristics of schizophrenia and bipolar disorder, and has been labeled "profoundly disabled."[92] Sixty-two percent of Maricopa's cases involved defendants with intellectual impairment, brain damage, or a serious mental illness.[93] For example, Israel Naranjo, whom Mr. Carr represented, has an IQ score between 69-74, and has been diagnosed with bipolar disorder.[94] Gilbert Martinez, a schizophrenic man with a 68 IQ, was prosecuted by Jeanette Gallagher and sent to death row despite his significant impairments.[95]

86 *See id.*

87 *See id*; *QuickFacts for Maricopa County*, U.S. Census Bureau, http://www.census.gov/quickfacts/table/PST045215/04013,00 (last visited Aug. 8, 2016).

88 *See* Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. DOJ, Civ. Rts. Div., to Bill Montgomery, Maricopa Cnty. Att'y 2 (Dec. 15, 2011), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf.

89 *See* Ray Stern, *Sheriff Joe Arpaio's Office Commits Worst Racial Profiling in U.S. History, Concludes DOJ Investigation*, Dec. 15, 2011, Phoenix New Times, http://www.phoenixnewtimes.com/news/sheriff-joe-arpaios-office-commits-worst-racial-profiling-in-us-history-concludes-doj-investigation-6655328.

90 *See* Maricopa County Direct Appeals Spreadsheet 2006-2015, *supra* note 52.

91 *See id.*

92 *See* Appellant's Opening Brief, State v. Medina, CR-10-0031-AP, WL 9368243 (Ariz. 2011).

93 *See* Maricopa County Direct Appeals Spreadsheet 2006-2015, *supra* note 52.

94 *See* State v. Naranjo, 321 P.3d 398, 408-09 (Ariz. 2014); Smith, *Worst Lawyers*, *supra* note 67.

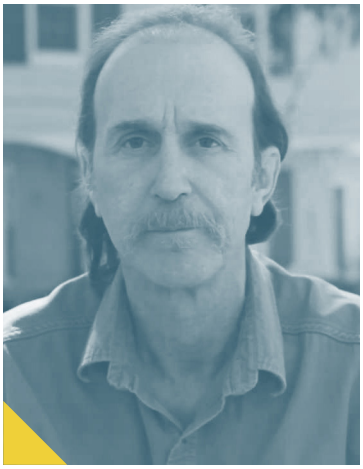
95 *See* State v. Martinez, 282 P.3d 409, 412 (Ariz. 2012); Pet. for Post-Conv. Relief at 27, State v. Martinez, 282 P.3d 409 (Ariz. 2012).

INNOCENCE

Maricopa County has had five death row exonerations.[96] Debra Milke spent 22 years on death row after her 4-year-old son was murdered in 1989.[97] Phoenix police detective Armando Saldate claimed Milke had confessed to being part of the killing, although he never recorded the statement in any fashion.[98] Yet, Saldate's personnel file, which the state never disclosed to the defense, revealed numerous instances of misconduct--including the fact that Saldate "habitually lied under oath [and] took advantage of women he had in his power."[99] In 2013, in the proceeding that ultimately led to her release, an appellate court called the misconduct that led to Milke's wrongful conviction "egregious" and "a severe stain on the Arizona justice system."[100]

Debra Milke

In 2002, the Arizona Supreme Court dismissed murder charges against Ray Krone after DNA evidence revealed his innocence.[101] At the time he was sentenced to death, Krone had no criminal record and had been honorably discharged from military service.[102] Krone spent more than ten years in prison before being exonerated through DNA testing.[103] Notably, his conviction stemmed from junk science[104] that the prosecutor bolstered by claiming falsely that "bite marks are as unique as fingerprints."[105] The same prosecutor refused to listen to experts for years as evidence of Krone's innocence amassed.[106] When Krone sued the City of Phoenix and Maricopa County for his wrongful conviction, the representative for Maricopa County shrugged off what had happened: "Unfortunately, there are situations where innocent people are convicted. That doesn't mean we did anything



Ray Krone

96 The five cases are Debra Milke, Ray Krone, James Robison, Jonathan Treadaway, and Robert Cruz. See Innocence Database, Death Penalty Info. Ctr., http://www.deathpenaltyinfo.org/innocence?inno_name=&exonerated=&state_innocence=1&race=All&dna=All (last visited Aug. 8, 2016).

97 *See* Saeed Ahmed & Greg Botelho, *Debra Milke, Who Spent 22 Years On Arizona Death Row, Has Murder Case Tossed*, CNN, Mar. 24, 2015, http://www.cnn.com/2015/03/24/justice/arizona-debra-milke-death-sentence/.

98 *See* Milke v. Ryan, 711 F.3d 998, 1002 (9th Cir. 2013).

99 *Id.* at 1019.

100 Milke v. Mroz, 339 P.3d 659, 661, 666 (Ariz. App. 1st Div. 2014).

101 *See Sentenced To Death For A Crime He Didn't Commit*, AZ Just. Proj., http://azjusticeproject.org/profiles/ray-krone/ (last visited Aug. 2, 2016).

102 *See id.*

103 *See id.*

104 *See* Fernarda Santos, *Evidence From Bite Marks, It Turns Out, Is Not So Elementary*, N.Y. Times, Jan.28, 2007, http://www.nytimes.com/2007/01/28/weekinreview/28santos.html.

105 Jim Fisher, Forensics Under Fire: Are Bad Science and Dueling Experts Corrupting Criminal Justice? (2008), p. 162.

106 *See id.* at pp. 163-164.

wrong."[107] Krone received a combined total of $4.4 million dollars from the two jurisdictions in a settlement.[108]

THE DEATH PENALTY IN DUVAL COUNTY, FL

#2

PERCENTAGE OF CASES WITH MISCONDUCT FOUND	16%
AVERAGE AMOUNT OF DEFENSE MITIGATION PRESENTED BY DEFENSE LAWYERS	LESS THAN 1 DAY
PERCENTAGE OF DEFENDANTS OF COLOR SENTENCED TO DEATH BETWEEN 2010-2015	87%
PERCENTAGE OF CASES WITH SIGNIFICANT MITIGATION (AGE AND IMPAIRMENTS COMBINED)	60%
PERCENTAGE OF DEFENDANTS UNDER AGE 21	20%
PERCENTAGE OF DEFENDANTS WITH INTELLECTUAL DISABILITY, SEVERE MENTAL ILLNESS, OR BRAIN DAMAGE	48%
PERCENTAGE OF CASES WITH NON-UNANIMOUS JURIES	88%

**All calculations are based on direct appeal opinions since 2006 unless otherwise noted.*

Between 2010 and 2015, roughly one-quarter of Florida's death sentences came from Duval County, a county that holds only five percent of the state's population.[109] One reason for this disproportionate concentration of death sentences is that only three out of the 25 death sentences from Duval County that the Florida Supreme Court has reviewed on direct appeal since 2006 were imposed by a unanimous jury.[110] Two-thirds of these cases had at least three juror votes for life,[111] an outcome that would preclude a death sentence under Florida's new capital sentencing statute.[112] The absence of a unanimity requirement also helps to explain why the average deliberation on whether to impose a death sentence took just one hour and six minutes in these cases.[113] The death-sentencing rate in Duval County

107 Jana Bommersbach, *Arizona Sent An Innocent Man To Death Row*, Phoenix Mag. (2004), *available at* http://janabommersbach.com/arizona-sent-an-innocent-man-to-death-row/.

108 *See Ray Krone*, Nat'l Reg. of Exonerations, U. Mich. Sch. of L., https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3365 (last visited Aug. 8, 2016).

109 *See* Robert J. Smith, *America's Deadliest Prosecutors*, Slate (May 14, 2015), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/05/america_s_deadliest_prosecutors_death_penalty_sentences_in_louisiana_florida.html; *Duval County, Florida, Leader in Death Sentences*, Death Penalty Info. Ctr., http://www.deathpenaltyinfo.org/node/5955 (last visited Aug. 2, 2016).

110 *See* Duval County Direct Appeals Spreadsheet 2006-2015, on file with the Fair Punishment Project.

111 *See id.*

112 Larry Hannan, *Florida's Death Row Could See Vacancies If Supreme Court Rules Juries Must Be Unanimous*, St. Augustine Record, Apr. 25, 2015, http://staugustine.com/news/florida-news/2015-04-25/floridas-death-row-could-see-vacancies-if-supreme-court-rules-juries.

113 *See* Duval County Defense Mitigation and Jury Deliberation Times, on file with the Fair Punishment Project.

per 100 homicides is more than 40 percent higher than in the rest of the state.[114]

OVERZEALOUS PROSECUTORS

Two people share a lot of responsibility for Duval's outlier status: elected prosecutor Angela Corey, who is "known for her tough-as-nails charges," "disgusting," and "disgraceful" trial tactics, and "personal vendettas" which "seem to be her specialty,"[115] and first assistant prosecutor Bernie de la Rionda, who personally "put more people on death row than just about any other prosecutor in Florida."[116] De la Rionda personally tried 47 percent of the capital cases decided or pending on direct appeal since 2006, and he played an active role in at least one additional case.[117]

Corey personally sought the death penalty for a man with a 67 IQ score who was diagnosed with "bipolar disorder" with "psychotic features," and was "prescribed antipsychotic medication and antidepressant medication" for "hearing voices."[118] The trial judge found that the defendant, Thomas Brown, was under the "influence of extreme mental or emotional disturbance at the time he committed the murder" and noted that Corey refused the man's offer to plead guilty and accept a life without parole sentence.[119] The jury voted seven to five to impose a death sentence,[120] a vote that would now result in a life sentence.[121] Outside of the death penalty context, Corey once threatened a physically and sexually abused 12-year-old boy with a life sentence for a murder charge she brought in adult court.[122] She also sent Marissa Alexander, a woman with no criminal record, to jail for 20 years for firing a warning shot at her abusive husband.[123] She did the same to a military veteran who fired two shots in the ground to scare off a couple of teenagers.[124]

114 *See* Baumgartner, *Rate of Death Sentencing*, *supra* note 41. The figure for rest of the state excludes all four of the top death sentencing counties discussed in this report (Duval, Miami-Dade, Hillsborough, and Pinellas).

115 Ian Tuttle, *Angela Corey's Checkered Past*, Nat'l Rev., July 17, 2013, http://www.nationalreview.com/article/353633/angela-coreys-checkered-past-ian-tuttle.

116 *See Deadliest Prosecutors*, *supra* note 9, at 23.

117 *See* Duval County Direct Appeals Spreadsheet, *supra* note 110.

118 Brown v. State, 126 So.3d 211, 215-16 (Fl. 2013).

119 *Id.* at 220.

120 *See* Hannan, *supra* note 112.

121 Michael Mayo, *With Florida's Death Penalty On Trial, What Should Happen To 390 On Death Row?*, Sun Sentinel, May 6, 2016, http://www.sun-sentinel.com/news/fl-death-penalty-florida-mayocol-b050816-20160506-column.html (explaining that "In response to the U.S. Supreme Court ruling [in Hurst v. Florida], the Legislature changed the law this year so that a minimum 10-2 majority is required to impose death).

122 *See* Larry Hannan, *Lethal Justice: State Attorney Corey Far Outpaces Florida's Prosecutors In Sending People To Death Row*, Fla. Times-Union, Mar. 8, 2014, http://jacksonville.com/news/crime/2014-03-08/story/lethal-justice-state-attorney-corey-far-outpaces-floridas-prosecutors (explaining that the Miami-Dade D.A. generally does not pursue the death penalty for someone repeatedly abused as a child, but "Corey has not shown the same restraint"); *see also* Smith, *America's Deadliest Prosecutors*, *supra* note 106.

123 *See* Julia Dahl, Fla. *Woman Marissa Alexander Gets 20 Years for "Warning Shot:" Did she Stand Her Ground?*, CBS News (May 16, 2012), http://www.cbsnews.com/news/fla-woman-marissa-alexander-gets-20-years- for-warning-shot-did-she-stand-her-ground/; Smith, *America's Deadliest Prosecutors*, *supra* note 109.

124 *See* Cinky Swirko, *Due to Mandatory Minimum, Keyston Veteran Gets a Sentence the Judge Didn't Want to Give*, Gainesville Sun, Jun. 14,

All told, of the death sentences that the Florida Supreme Court has reviewed from Duval County since 2006, one in every six cases involved a finding of inappropriate behavior, misuse of discretion, or prosecutorial misconduct,[125] including two recent death sentences tried by Bernie de la Rionda that the Florida Supreme Court vacated due to their excessive harshness.[126] We do not include a case where there is evidence to suggest inappropriate conduct, but defense counsel failed to preserve the claim, nor do we include another case with an improper argument, in this calculation.

INADEQUATE DEFENSE

The penalty phase of a capital trial often lasts for weeks and sometimes even months; however, in Duval County, the average length is one day.[127] Frequently, opening statements take place in the morning and the jury returns a death verdict that same day, meaning that the defense only puts on a few hours of mitigation evidence at most. At even the most superficial level, the quality of defense in Duval is abysmal.

It's bad enough when defendants receive inferior counsel; it's even worse when the elected Public Defender runs for office by essentially promising to protect police officers at the expense of defendants his office is charged with representing. Matt Shirk, the elected public defender for Duval, Florida, campaigned on a promise to be "less confrontational when dealing with police in court, ensuring his employees would never call a cop a liar."[128] When Shirk took over, he fired 10 lawyers,[129] including two senior capital litigators whose representation of a wrongfully arrested 15-year-old was the subject of an Oscar-winning documentary film, *Murder on a Sunday Morning*.[130] In 2015, a Grand Jury concluded an investigation into Shirk's management practice, and while they did not return an indictment, the Grand Jury did recommend that Shirk resign from office.[131]

2012, http://www.gainesville.com/news/20120614/due-to-mandatory-minimum-keystone-veteran-gets-a-sentence-that-a-judge-didnt-want-to-give.

125 *See* Duval County Direct Appeals Spreadsheet, *supra* note 110.

126 *See* Scott v. State, 66 So. 3d 923, 937 (Fla. 2011); Yacob v. State, 136 So. 3d 539, 550 (Fla. 2014).

127 *See* Duval County Defense Times, *supra* note 113.

128 Gwynedd Stuart, *Courting Disaster*, Folioweekly, Dec. 16-22, 2008, *available at* http://docplayer.net/6854488-Incoming-public-defender-matt-shirk-is-changing-the-office-in-ways-many-believe-will-diminish-its-powers.html.

129 *See* Julie Kay, *Mass Firings of Fla. State Attorneys Roil the Ranks*, Nat'l L. J., Dec. 9, 2008, http://www.nationallawjournal.com/id=1202426580968/Mass-Firings-of-Fla-State-Attorneys-Roil-the-Ranks?slreturn=20160627161243.

130 According to Patrick McGuiness, one of the lawyers featured in the documentary, Shirk never interviewed the lawyers fired. And Shirk admitted he did not look at their personnel files until after he had fired them. See Paul Pinkham, *Public Defender-Elect Fires 10 Seasoned Attorneys*, Fla. Times-Union, Nov. 29, 2008, http://jacksonville.com/tu-online/stories/112908/met_361369960.shtml#.V5kWJmVlE4.

131 *See* Andrew Pantazi, *Public Defender Matt Shirk Apologizes; Florida Ethics Commission Finds Probable Cause That He Violated Policies*, Fla. Times-Union, Jun. 8, 2016, http://jacksonville.com/news/metro/2016-06-08/story/public-defender-matt-shirk-apologizes-florida-

With his experienced capital litigators gone, Shirk hired Refik Eler to be his deputy chief and head of the homicide unit.[132] Eler has been a defense lawyer on at least 16 cases that resulted in a death sentence.[133] Last November, a Florida judge overturned the conviction and death sentence of Raymond Morrison after finding that Eler failed to conduct a basic factual investigation of the circumstances of the crime, failed to secure the testimony of alibi witnesses, and also failed to investigate evidence of Morrison's "organic brain damage and intellectual disability."[134] Morrison's new attorney, Mark McClain, noted, "It was like [Morrison] had no attorney."[135] In 2013, the Florida Supreme Court reversed the death sentence of Michael Shellito on the grounds that he had ineffective assistance of counsel.[136] Eler was his lawyer, too. The court found that Eler did not conduct a "true follow-up on the matters indicated in the various reports" of his mental health expert, and that he only "made a marginal attempt to present organic brain damage and other impairment as mitigation."[137] Shellito's new lawyers discovered that he has bipolar disorder, "a mental age of fourteen or fifteen years, an emotional age of twelve or thirteen years, an IQ in the low-average range, the presence of organic brain damage," "a prior head injury," and that he endured "verified physical and sexual abuse."[138] In *State v. Douglas*,[139] the Florida Supreme Court found that Eler provided a third capital client with ineffective assistance, but that it was not "prejudicial."[140] A fourth claim is pending before the Florida Supreme Court,[141] and pointed questioning from the justices during argument last month suggests that Eler could be found ineffective once again.[142]

In the Thomas Brown case, the one Corey prosecuted personally,[143] the mentally-disturbed Brown--who has a 67 IQ score--was represented by Fred Canaan Gazelah.[144] Gazelah filed a motion "withdrawing his previously filed Motion for

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ethics-commission-finds.

132 *See* Pinkham, *supra* note 130.

133 *See* Duval County Defense Times, *supra* note 113.

134 Larry Hannan, *Jacksonville Man Gets Off Death Row After Judge Finds Original Lawyer Was Ineffective*, Fla. Times-Union, Oct. 5, 2015, http://jacksonville.com/news/crime/2015-10-05/story/jacksonville-man-gets-death-row-after-judge-finds-original-lawyer-was.

135 *Id.*

136 Shellito v. State, 121 So. 3d 445, 454 (Fla. 2013).

137 *Id.* at 456-57.

138 *Id.* at 457.

139 141 So. 3d 107 (Fla. 2012).

140 *See id.* at 121-23.

141 *See* Smith, *The Worst Lawyers*, *supra* note 67.

142 *See id.*

143 *See* Duval County Direct Appeals Spreadsheet, *supra* note 110.

144 *See* Brown v. State, 126 So. 3d 211, 216 (Fla. 2013); Duval County Defense Times, *supra* note 113.

Determination of Mental Retardation as a Bar to Execution,"[145] noting that "the Defendant consents to the filing of this notice and the abandonment of the defense of mental retardation."[146] Unfortunately, the motion does not elaborate on the absurdity of having an intellectually impaired, mentally disturbed man decide to abandon an intellectual disability defense. Notably, Refik Eler appeared on the record multiple times in that case, but does not appear to have tried the case to the jury.[147]

RACIAL BIAS AND EXCLUSION

Earlier this year, Duval County Judge Mark Hulsey allegedly told his assistant that he "wished all blacks could be sent back to Africa on a boat."[148] Hulsey presided over the 2012 capital murder trial of Terrance Tyrone Phillips, an 18-year-old Black teenager.[149] The Florida Judicial Qualifications Commission issued a formal ethics charge because of this comment and other "improper behavior,"[150] including reportedly calling a staff attorney at the courthouse a "cunt."[151]

Between 1991-2009, 62 percent of death sentences from Duval County were imposed against African-American defendants,[152] compared to just 33 percent in the rest of Florida.[153] Since 2010, one year after Angela Corey took office, 87 percent of death sentences have been imposed against African-American defendants, compared to 44 percent in the rest of the state.[154] African-Americans make up approximately 30 percent of Duval's population, and 17 percent of the state's population.[155]

145 *See* Am. Initial Br. of Appellant at 2-3, Brown v. State, 126 So. 3d 211 (2012); *see generally*, David Hunt, *Disturbed Man Recommended for Death in Slaying of Jacksonville Wendy's Co-Worker*, Fla. Times-Union, June 14, 2011, http://jacksonville.com/news/crime/2011-06-14/story/disturbed-man-recommended-death-slaying-jacksonville-wendys-co-worker ("Defense attorneys made Brown out to be a disturbed man . . . .").

146 *See* Am. Initial Br. of Appellant, *supra* note 145.

147 *See* Duval County Clerk of Court Records, on file with the Fair Punishment Project.

148 Kumasi Aaron, *Group of Pastors Call for Judge to Resign*, WJXT (Jun. 14, 2016), http://www.news4jax.com/news/local/jacksonville/group-of-pastors-call-for-judge-to-resign.

149 Larry Hannan, *Lawyers Seek to Overturn Death Penalty in Jacksonville Double Murder*, Fla. Times-Union, Mar. 14, 2016, http://jacksonville.com/news/crime/2016-03-14/story/lawyers-seek-overturn-death-penalty-jacksonville-double-murder.

150 Fla. Jud. Qualifications Comm'n, Notice of Formal Charges (July 19, 2009), *available at* http://jacksonville.com/community/2016-07-20/story/formal-notice-charges-against-circuit-judge-mark-hulsey.

151 *See* Steve Patterson & Larry Hannan, *Jacksonville Circuit Judge Reassigned After Complaint of Racist Comments, Foul Language*, Fla. Times-Union, Jul. 20, 2016, http://jacksonville.com/news/crime/2016-07-20/story/jacksonville-circuit-judge-reassigned-after-complaint-racial-comments.

152 Frank Baumgartner, *Race of Defendants in Death Penalty Cases: Duval County Compared to the Rest of Florida*, http://fairpunishment.org/wp-content/uploads/2016/08/RaceofDefendantDuvalCounty.pdf

153 *See id.*

154 *See id.*

155 *See QuickFacts for Florida & Duval County*, U.S. Census Bureau, https://www.census.gov/quickfacts/table/PST045215/12,12031,00 (last visited Aug. 8, 2016).

EXCESSIVE PUNISHMENTS

Of the cases that the Florida Supreme Court decided on direct appeal since 2006, 60 percent involve defendants with mitigation comparable in severity to the kind of mitigation evidence that renders the death penalty categorically excessive. One in five people sentenced to death had not yet reached their 21st birthday, and 48 percent were age 25 and under.[156] For example, Bernie de la Rionda obtained a death sentence against Randall Deviney, age 18, who introduced evidence that his mother's drug dealer sexually abused him as a child.[157] Nearly half (48 percent) of the cases involved individuals with intellectual impairment, brain damage, or severe mental illnesses,[158] including Thomas Bevel, one of Refik Eler's clients who was age 22 at the time of the crime and has a 65 IQ score.[159] Nearly one-quarter of the cases involved defendants who suffered horrific childhood trauma.[160] One example is Tiffany Cole, who was age 23 at the time of the crime and suffers from chronic depression.[161] Cole was sexually molested by her biological father when she was 16 or 17 years old, and the abuse persisted for approximately two years.[162] She also witnessed her stepfather break the neck of a puppy.[163]

INNOCENCE

While Duval County has had no capital exonerations as of yet, Chad Heins was wrongfully convicted of first-degree murder and spent over 13 years in prison before being exonerated in 2007 by DNA testing; the actual perpetrator is still at large.[164] Brenton Butler's conviction and ensuing exoneration were the centerpiece of *Murder on a Sunday Morning*.[165] In the case of death row prisoner Cecil Shyron King, his public defender, Quentin Till, said King is "adamant he's innocent."[166] King's new attorneys called his trial counsel ineffective and alleged that the prosecutor,

156 *See* Duval County Direct Appeals Spreadsheet, *supra* note 110.

157 *See* Derrick Gilliam, *Randall Deviney Testifies He Killed 65-Year-Old Woman After 'Losing It'*, Fla.Times-Union, Jul.16, 2015, http://jacksonville.com/news/crime/2015-07-16/story/randall-deviney-testifies-he-killed-65-year-old-woman-after-losing-it.

158 *See* Duval County Direct Appeals Spreadsheet, *supra* note 110.

159 *See* Bevel v. Florida, 983 So.2d 505, 515 (Fl. 2008).

160 *See* Duval County Direct Appeals Spreadsheet, *supra* note 110.

161 Initial Brief of Appellant at 4, Cole v. State, 36 So.3d 597 (Fl. 2010), *available at* http://archive.law.fsu.edu/library/flsupct/sc08-528/08-528ini.pdf..

162 *See id.* at 31.

163 *See id.*

164 *See Chad Heins*, Innocent Proj. of Fla., http://floridainnocence.org/content/?page_id=51 (last visited Aug. 3, 2016).

165 Radley Balko, *Counties That Sentence The Most People To Death Row Show A Questionable Commitment To Justice*, Huff. Post (Nov. 21, 2013), http://www.huffingtonpost.com/2013/11/21/counties-that-send-the-mo_n_4317245.html?utm_hp_ref=the-agitator.

166 David Hunt, *Trial Begins For Jacksonville Suspect In Elderly Woman's Hammer Beating Death*, Fla. Times-Union, Apr. 5, 2011, http://jacksonville.com/news/crime/2011-04-05/story/trial-begins-jacksonville-suspect-elderly-womans-hammer-beating-death.

Bernie de la Rionda, withheld *Brady* information.[167] Indeed, considering that de la Rionda had "no fingerprints and no weapon to tie" King to the murder, and that the only physical evidence was potentially tainted DNA from a piece of cantaloupe, his innocence is not implausible.[168]

THE DEATH PENALTY IN CLARK COUNTY, NV

#3

PERCENTAGE OF CASES WITH MISCONDUCT FOUND	47%
AVERAGE AMOUNT OF DEFENSE MITIGATION PRESENTED BY DEFENSE LAWYERS	1.1 DAYS
PERCENTAGE OF DEFENDANTS OF COLOR SENTENCED TO DEATH BETWEEN 2010-2015	45%
PERCENTAGE OF CASES WITH SIGNIFICANT MITIGATION (AGE AND IMPAIRMENTS COMBINED)	41%
PERCENTAGE OF DEFENDANTS UNDER AGE 21	12%
PERCENTAGE OF DEFENDANTS WITH INTELLECTUAL DISABILITY, SEVERE MENTAL ILLNESS, OR BRAIN DAMAGE	24%
NUMBER OF DEATH ROW EXONERATIONS SINCE 1976	1

**All calculations are based on direct appeal opinions since 2006 unless otherwise noted.*

Between 2010 and 2015, Clark County had nine death sentences, which accounted for 100% of Nevada's death sentences over the same period.[169]

OVERZEALOUS PROSECUTORS

Since 2006, the Nevada Supreme Court has found prosecutorial misconduct in 47 percent of the Clark County death penalty cases that it has reviewed on direct appeal.[170] This is the highest percentage of inappropriate behavior that we found in any of the outlier counties. One explanation for these problems is the sloppiness that comes along with overextended lawyers. In 2011, Clark County had more

167 Def.'s 3.851 Mot. for Post-Conv. Relief at 46, 48-49, King v. State, SC11-2258. March, 14 2016

168 *See* David Hunt, *No Prints, No Weapon, Attorneys Grapple Over Cantaloupe In Jacksonville Death Penalty Case*, Fla. Times-Union, Apr. 7, 2011, http://jacksonville.com/news/crime/2011-04-07/story/no-prints-no-weapon-attorneys-grapple-over-cantaloupe-jacksonville-death.

169 *See* Clark County Death Sentences 2010-2015, on file with the Fair Punishment Project.

170 *See* Clark County Direct Appeals Spreadsheet, on file with the Fair Punishment Project.

pending capital cases per capita than any other urban area in the country.[171] David Roger, the District Attorney at the time, refused to offer or accept plea deals in death penalty cases.[172] Roger resigned in 2012.[173] Steve Wolfson subsequently became the District Attorney and seems to be keeping his promise to reduce the number of pending capital cases.[174] Nonetheless, since Wolfson assumed his role, the office has secured six death sentences.[175]

Another explanation is the continued presence of prosecutor David Stanton, who rose to his current position during Roger's era,[176] and has obtained at least eight death sentences in his career,[177] including four since 2012 when Wolfson took office.[178] After obtaining a death sentence against a 20-year-old, mentally disturbed man with a 71 IQ, Stanton said: "I'm not saying this man invented Radiology, but he's not an idiot. He knows what's going on."[179] Stanton came to Clark County after being forced to resign from his job as a prosecutor in Washoe County.[180] After being pulled over for driving nearly three times the legal speed limit, Stanton allegedly screamed at the officer and resisted arrest.[181] The Washoe County District Attorney reportedly cited multiple instances of Stanton losing control of his anger when asking for his resignation.[182] The trial judge in the case sent Stanton to anger management class and instructed him to get his "anger under control" and implored him to "learn different ways to control [his] anger."[183]

In August 2013, a public records request revealed that the Clark County District Attorney's office had been paying witnesses' bills and rent payments "using a checking account kept off the county's budget," including in capital cases, since

171 *See* Jane Ann Morrison, *Death Penalty Numbers Add Up For District Attorney, Taxpayers*, Las Vegas Rev.-J., Apr. 25, 2011, http://www.reviewjournal.com/jane-ann-morrison/death-penalty-numbers-add-district-attorney-taxpayers?ref=454.

172 *See id.*

173 *See* Jeff German, Francis McCabe, & Kristi Jourdan, *District Attorney Makes Retirement Official*, Las Vegas Rev.-J., Nov. 1, 2011, http://www.reviewjournal.com/news/government/district-attorney-makes-retirement-official (explaining that D.A. Roger made "his Jan. 3 [2012] retirement official in an email to members of the Las Vegas news media").

174 *See* Op-Ed, *For Clark County District Attorney, Public Administrator, Recorder*, Las Vegas Rev.-J., Oct.1, 2014, http://www.reviewjournal.com/opinion/editorial-clark-county-district-attorney-public-administrator-recorder.

175 *See Death Sentences in the United States*, *supra* note 2. This includes one death sentence that a jury returned in 2015, but the judge formally imposed on January 4, 2016. See David Ferrara, *Judge Sentences Ammar Harris to Death for Strip Shooting That Left 3 Dead*, Las Vegas Rev.-J., Jan. 4, 2016, http://www.reviewjournal.com/news/las-vegas/judge-sentences-ammar-harris-death-strip-shooting-left-3-dead-video.

176 *See*, e.g., *D.A. Steps In For Lawyer Attacked By Killer*, Reno Gazette-J., Dec. 17, 2003, at 3C.

177 *See* Clark County Direct Appeals Spreadsheet, *supra* note 170.

178 *See id.*

179 Frank Mullen, *Execution Is Final Chapter Of Grisly Story*, Reno Gazette-J., Apr. 6, 1999, at 4A.

180 *See Former Washoe County Prosecutor Ordered To Undergo Anger Counseling*, Las Vegas Sun, Dec. 21, 1999, http://lasvegassun.com/news/1999/dec/21/former-washoe-county-prosecutor-ordered-to-undergo/.

181 *See id.*

182 *See* Bill O'Driscoll, *Prosecutor Quits After Traffic Incident*, Reno Gazette-J., Oct. 30, 1999, at 1B.

183 *See Former Washoe County Prosecutor*, *supra* note 180.

1989.[184] In other words, the state was giving money to witnesses who testified against defendants and not telling the defense about it. Wolfson said the program was "probably inappropriate," and promised both to end it and to notify defense lawyers.[185] Stanton, however, expressed a different attitude towards the policy. In 2014, when a judge asked him if he would "concede that a $500 rent payment should have been disclosed," Stanton replied, "not necessarily."[186] Professor Bennett Gershman, a leading ethics expert, told the *Las Vegas Review-Journal* that "it's so plain and obvious that [the prosecutor] has to disclose this [information] . . . a good professional office would not tolerate this, where the DA is making policy and his assistants aren't conforming."[187]

INADEQUATE DEFENSE

Clark County has struggled for decades to provide zealous trial level representation in death penalty cases. In 1996, the Nevada Supreme Court reversed Roberto Miranda's conviction and death sentence, but not before he spent 14 years on death row.[188] The court found that the public defender assigned to Miranda's case, a newly minted lawyer, did very little in the way of pretrial investigation.[189] During post-conviction proceedings, it became increasingly clear that Miranda had been wrongfully convicted as a number of witnesses helped to corroborate his innocence.[190]

Miranda later sued the County, alleging that two public defender policies contributed to his wrongful conviction.[191] First, Miranda discussed a "lie detector" test that the public defenders would give clients to help the lawyers better allocate resources to people who appeared to be innocent.[192] Second, the office frequently assigned inexperienced attorneys to represent clients facing the death penalty.[193] As a federal appellate court later explained, the County's response to the latter

184 *See* Bethany Barnes, *DA Says One Thing, Prosecutors Argue Another on Witness Payments*, Las Vegas Rev.-J., Sept. 21, 2014, http://www.reviewjournal.com/news/las-vegas/da-says-one-thing-prosecutors-argue-another-witness-payments.

185 *See id.*

186 *See id.*

187 *See id.*

188 See Miranda v. Clark County, Nevada, 279 F.3d 1102, 1105 (9th Cir. 2002), rev'd by Miranda v. Clark County, Nevada, 319 F.3d 465 (9th Cir. 2003) (explaining that "in August 1981, a jury found Miranda guilty of all charges. He was later sentenced to death. . . . In February 1996, his sustained campaign for postconviction relief finally bore fruit when the Nevada Supreme Court overturned his conviction due to the ineffectiveness of Rigsby's counsel.").

189 *See Roberto Miranda*, Nat'l Reg. of Exonerations, U. of Mich. Sch. of L., https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3477 (last visited Aug. 9, 2016) (explaining that a Clark County District Court judge granted habeas relief and noted "the lack of pretrial investigation and preparation by trial counsel cannot be justified").

190 *See Miranda*, 319 F.3d at 468.

191 *See id.* at 467.

192 *See id.*

193 *See id.*

allegation was illuminating: "As a matter of law, attorneys who have graduated from law school and passed the bar should be considered adequately trained to handle capital murder cases."[194]

Capital cases are incredibly complex and require thousands of hours of investigation into both the facts of the crime and the background and character of the accused.[195] A thorough mitigation investigation often means that the lawyers and the mitigation specialist interview in-person dozens or hundreds of witnesses; unearth school, hospital, prison, and other types of records; and consult with psychologists, psychiatrists, and neurologists.[196]

Unfortunately, though, the culture of defense practice in Clark does not appear to have kept pace with the national standards of practice. Indeed, of the Clark County death penalty cases decided on direct appeal since 2006, the typical mitigation presentation at trial lasted just over one day.[197] Like a number of the other outlier counties in this report, there are two defense lawyers who represented a combined 41 percent of the individuals who received death sentences.[198] But perhaps the most telling tidbit comes from the most recent death sentence: while representing Ammar Harris, Robert Langford also moonlighted as an actor in a local play, a job that required a lot of his time and attention.[199] Indeed, he "takes his acting ... almost as seriously as his legal work."[200] As the *Las Vegas Review-Journal* reported, Langford performs many roles at once: defense lawyer, special prosecutor, impassioned amateur actor, and "master scuba diving instructor, [a job] which he admits pays a little better than acting."[201] Langford put on less than a full day's worth of mitigation in the Harris case.[202]

Nearly three decades after Roberto Miranda's capital trial, the seriousness of purpose still seems to be missing from the culture of capital defense in Clark County.

194 *Id. at* 471.

195 *See* Emily Hughes, *Arbitrary Death: An Empirical Study of Mitigation*, 89 Wash U. L. Rev. 581, 632 (2012), *available* at http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1015&context=law_lawreview.

196 *See id.*

197 *See* Clark County Defense Mitigation and Jury Deliberations Times, on file with the Fair Punishment Project.

198 *See id.*

199 *See* David Ferrara, *Lawyer In High-Profile Criminal Cases Moonlights As Actor*, Las Vegas Rev.-J., Dec. 6, 2015, http://www.reviewjournal.com/news/crime-courts/lawyer-high-profile-criminal-cases-moonlights-actor.

200 *Id.*

201 *Id.*

202 *See* Clark County Defense Times, *supra* note 197.

RACE BIAS AND EXCLUSION

"This isn't the first time we've been in the rodeo on [discriminatory jury selection] with the Clark County District Attorney's Office," a Justice on the Nevada Supreme Court reminded a Clark County prosecutor during argument in a capital case last year.[203] The Justice went on to say, "I just don't understand knocking these two Black women off … I just don't understand why it's so necessary in these cases. You're so afraid of losing a case that you're knocking off African-Americans consistently."[204] Five months later, the Nevada Supreme Court reversed another death penalty case because prosecutors engaged in illegal race discrimination.[205] The Clark County District Attorney's office has had two separate convictions overturned in less than two years because of racially discriminatory jury selection.[206]

Clark County's problems with racial bias extend far beyond jury selection. Thirty-six percent of the individuals sentenced to death in Clark County between 2010 and 2015 were African-American,[207] despite the fact that African-Americans make up less than 12 percent of the county's population.[208] Sixty-seven percent of the victims of those African-American defendants were white, while none of the white defendants sentenced to death in the same period were convicted of killing Black victims.[209] The vast majority of homicides in the U.S. involve perpetrators and victims of the same race, making the numbers in Clark County notable.[210] In cases that resulted in a death sentence during this period, 71 percent of the victims were white,[211] even though white victims make up approximately 33 percent of murder victims in the area.[212]

203 Fair Punishment Project, *Clark County, Nevada, "Rodeo on Batson" Continues*, http://fairpunishment.org/clark-county-nevada-rodeo-on-batson-continues/ (last visited August 9, 2016).

204 Robert J. Smith, *There's No Separating The Death Penalty And Race*, Slate (May 5, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/05/foster_v_chatman_race_infects_death_penalty_to_the_core.html.

205 *See* McCarty v. State, 371 P.3d 1002, 1010 (Nev. 2016).

206 *See* Brass v. State, 291 P.3d 145, 149 (Nev. 2012); Conner v. State, 327 P.3d 503, 511 (Nev. 2014).

207 *See Baumgartner, Race of Defendant and Victims*, *supra* note 85.

208 *See QuickFacts for Clark County*, U.S. Census Bureau, http://www.census.gov/quickfacts/table/PST045215/32003 (last visited Aug. 4, 2016).

209 *See Baumgartner, Race of Defendant and Victims*, *supra* note 85.

210 According to the FBI's 2014 annual Uniform Crime Report, 82 percent of white victims were killed by white perpetrators nationally, and 90 percent of Black victims were killed by Black perpetrators. *See* FBI, *supra* note 8, ("Expanded Homicide Data Table 6"), https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/expanded-homicide-data/expanded_homicide_data_table_6_murder_race_and_sex_of_vicitm_by_race_and_sex_of_offender_2014.xls

211 *See* Baumgartner, *Race of Defendant and Victims*, *supra* note 85.

212 Approximately three-quarters of all Clark County homicides in 2015 were in the city of Las Vegas, where the percentage of white victims in homicides was approximately 33 percent. See Las Vegas Met. Pol. Dept., *Homicide Log*, available at http://www.lvmpd.com/Portals/0/homicide/2015HomicideLog_FINAL.pdf (last visited Aug. 9, 2016); Rachel Crosby, *Homicide Numbers Climb to Highest Level in Las Vegas Since 2006*, Las Vegas Rev.-J., Jan. 2, 2016, http://www.reviewjournal.com/news/las-vegas/homicide-numbers-climb-highest-level-las-vegas-2006.

EXCESSIVE PUNISHMENT

More than 40 percent of the death sentences from Clark County that we reviewed involved defendants with mitigation evidence similar in severity to the impairments that render a person categorically ineligible for the death penalty.[213] Two of the people sent to death row were under 21 years old,[214] including a 19-year-old who had approximately the same problem solving capabilities of a 10 year-old child.[215] Moreover, roughly one-quarter of the cases ending in death involved defendants with intellectual impairment, brain damage, or severe mental illness.[216] One of the men sentenced to death was a combat veteran in Vietnam who the Department of Veterans Affairs designated as 100 percent disabled after he was diagnosed with post-traumatic stress disorder (PTSD).[217] Since then, this defendant has tried to take his own life on at least two occasions.[218] Another man sentenced to death had previously been found to be legally insane, and suffers from schizophrenia.[219]

INNOCENCE

Since 1989, five people from Clark County have been wrongfully convicted of serious crimes, including two men who were exonerated on the charge of murder.[220] One of those people is Roberto Miranda who spent 14 years on death row for a crime he didn't commit.[221] The Clark County District Attorney offered him a plea deal that would have left him eligible for parole after ten years, but Miranda rejected the deal and persisted in his innocence claim.[222]

213 *See* Clark County Direct Appeals Spreadsheet, *supra* note 170.

214 *See id.*

215 *See* Maestas v. State, 275 P.3d 74, 79 n.3 (Nev. 2012).

216 *See* Clark County Direct Appeals Spreadsheet, *supra* note 170.

217 *See Death Sentence For Vietnam Vet Upheld*, CBS Las Vegas, May 24, 2012, http://lasvegas.cbslocal.com/2012/05/24/death-sentence-for-vietnam-vet-upheld/.

218 *See* Ed Vogel, *Death Sentence Upheld For Man Who Killed Las Vegas Woman*, May 24, 2012, http://www.reviewjournal.com/news/crime-courts/death-sentence-upheld-man-who-killed-las-vegas-woman.

219 *See* Watson v. State, 335 P.3d 157 (2014).

220 *See Clark County*, NV, Nat'l Reg. of Exonerations, U. of Mich. Sch. of L., http://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={B8342AE7-6520-4A32-8A06-4B326208BAF8}&FilterField1=State&FilterValue1=Nevada&FilterField2=County&FilterValue2=8_Clark (last visited Aug. 9, 2016).

221 *See* Rebecca Clifford-Cruz, *Wrongfully convicted: A look at 5 cases*, Las Vegas Sun, July 29, 2011 http://lasvegassun.com/news/2011/jul/29/wrongfully-convicted/.

222 *See Roberto Miranda*, Nat'l Reg. of Exonerations, U. of Mich. Sch. of L., https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3477 (last visited Aug. 9, 2016).

#4

THE DEATH PENALTY IN MOBILE COUNTY, AL

PERCENTAGE OF CASES WITH MISCONDUCT FOUND	10%
AVERAGE AMOUNT OF DEFENSE MITIGATION PRESENTED BY DEFENSE LAWYERS	LESS THAN 1 DAY
PERCENTAGE OF DEFENDANTS OF COLOR SENTENCED TO DEATH BETWEEN 2010-2015	38
PERCENTAGE OF CASES WITH SIGNIFICANT MITIGATION (AGE AND IMPAIRMENTS COMBINED)	70%
PERCENTAGE OF DEFENDANTS UNDER AGE 21	10%
PERCENTAGE OF DEFENDANTS WITH INTELLECTUAL DISABILITY, SEVERE MENTAL ILLNESS, OR BRAIN DAMAGE	60%
PERCENTAGE OF CASES WITH NON-UNANIMOUS JURIES	80%

**All calculations are based on direct appeal opinions since 2006 unless otherwise noted.*

Between 2010 and 2015, Mobile County had 8 death sentences.[223] One of the reasons why Mobile makes the outlier counties list is that Alabama, like Florida, permits non-unanimous jury verdicts.[224] Of the Mobile death penalty cases decided on direct appeal since 2006, only two of 10 involved unanimous juries.[225] Alabama also permits the judge to override a jury's recommendation for life.[226] That happened one time in our sample. In 2010, a jury voted 8 to 4 to impose a life sentence upon Thomas Robert Lane.[227] The judge overrode that recommendation and imposed a death sentence instead.[228]

OVERZEALOUS PROSECUTORS

Since 2006, just two prosecutors, Ashley Rich and Jo Beth Murphee, account for nine out of 10 Mobile County death sentences reviewed on direct appeal.[229] Rich alone secured 50 percent of those death sentences, and she also secured both

223 *See* Mobile County Direct Appeals Spreadsheet, on file with the Fair Punishment Project.

224 *See* Kent Faulk, *Alabama 'Outlier' In National Death Sentence Decline*, AL.com (Dec.16, 2015), http://www.al.com/news/birmingham/index.ssf/2015/12/report_alabama_outlier_in_nati.html.

225 *See* Mobile County Direct Appeals Spreadsheet, *supra* note 223.

226 *See* Judge Override, EJI, http://www.eji.org/deathpenalty/override (last visited Aug. 4, 2016).

227 *See* Lane v. State, 80 So. 3d 280, 283 (Ala. Crim. App. 2010).

228 *See id.* at 284.

229 *See* Mobile County Direct Appeals Spreadsheet, *supra* note 223.

of the death sentences in the two cases pending on direct appeal.[230] In 2014, the Alabama Court of Criminal Appeals reversed the death sentence of an intellectually impaired man after Rich introduced and repeatedly referred to improper and highly inflammatory evidence.[231] Last year, Rich secured a death sentence against a bipolar woman charged with killing her young children.[232] Throughout the trial, Rich kept two faceless sculptures with her in the courtroom facing the jury, which she named "Sister and Brother" and used as stand-ins for the dead children.[233]

Earlier this year, the Alabama Court of Criminal Appeals reversed a death sentence that Jo Beth Murphee obtained against Derek Tyler Horton, an 18-year-old mentally disturbed man, after finding that the prosecution improperly "buttress[ed] its weak case" by introducing inappropriate evidence.[234] In the weeks before the murder, Horton showed symptoms of severe mental and cognitive impairment, telling his girlfriend that "God had a mission for him to send judgment if we didn't pray right."[235] He also claimed he "talked to the mirrors" and "to the devil," even making a sacrifice by burning various personal items that were "evil" in the fire pit.[236] The prosecution told the jury that this bizarre behavior was "not unusual for criminals."[237] After reversing the conviction in this case, the court went out of its way to note that the trial court had also permitted the prosecution to introduce other kinds of improper evidence.[238]

INADEQUATE DEFENSE

The average defense presentation of mitigation evidence in Mobile County capital trials lasts less than one full day.[239] One defense lawyer, Greg Hughes, defended 40 percent of the people whose death sentences have been reviewed on direct appeal by the Alabama courts since 2006.[240] When Hughes defended 18-year-old Derek Tyler Horton, he failed to object to prosecutorial misconduct that would later cause the Alabama Criminal Court of Appeals to vacate both the conviction and death

230 *See id.* (showing that the direct appeals of John DeBlase and Heather Leavell-Keaton are still pending).

231 *See* Penn v. State, 189 So.3d 107, 118-19 (Ala.Crim.App. 2014).

232 Casey Toner, *Heather Leavell-Keaton Becomes First Mobile County Woman Sentenced to Death*, AL.com (Aug, 20, 2015), http://www.al.com/news/mobile/index.ssf/2015/08/heather_leavell-keaton_sentenc.html.

233 *See id*

234 Horton v. State, CR-12-0381, 2016 WL 1084721 at *28 (Ala. Crim. App. 2016).

235 *Id.*

236 *Id.* at *8-9.

237 *Id.* at *28.

238 *Id.*

239 *See* Mobile County Defense Mitigation and Jury Deliberation Times, on file with the Fair Punishment Project.

240 *See id.*

sentence.[241] During the penalty phase of the case, Hughes offered only that Horton was "born to a drug addicted mother and never knew his father."[242]

Habib Yadzi, who is occasionally co-counsel to Hughes, is by one trial judge's estimation a "C+ lawyer," but his availability, the same judge said, gets him appointed to cases. Indeed, he gets appointed to a lot of criminal cases.[243] Yazdi made "$267,193 in fiscal year 2009" with "a total caseload of 516 appointments."[244] He previously received a 90-day suspension of his law license because he took a gun out of a suitcase during a mediation conference.[245] An Alabama Circuit Court Judge found that Yazdi and Hughes "failed to provide the most basic defense" to John Ziegler, who received the death penalty,[246] because, for example, their mitigation specialist only spoke to two witnesses outside of Ziegler's family.[247] Neither attorney even spoke to those two witnesses.[248] In granting Ziegler a new trial, Mobile County Circuit Judge Sarah Stewart found that "one of the attorneys actually [threw] away key evidence that could have allowed them to make a compelling argument" to save their client's life.[249]

In perhaps the most telling case, Art Powell, a lawyer who represented at least three clients sent to death row out of Mobile County,[250] had a client who waived his right to present mitigation evidence after the court would not allow the client to fire his lawyers and represent himself.[251] After that conviction was reversed on appeal, the client, Carlos Kennedy, represented himself and received a life sentence.[252]

241 *See Horton*, CR-12-0381 at *36-37.

242 Brendan Kirby, *Jury Recommends Death Penalty for Derek Horton in 2010 Grand Bay Slaying*, AL.com (Aug. 31, 2012), http://blog.al.com/live/2012/08/murderers_grandmother_on_her_d.html.

243 *See* Peter Teske, A Lethal Defense?, Lagniappe Weekly, Apr. 5, 2011, http://classic.lagniappemobile.com/article.asp?articleID=4371.

244 David M. Reutter, *Alabama's Indigent Defense System 'Perfect Storm' For Ineffective Assistance*, Prison Legal News, Sept. 15, 2010, https://www.prisonlegalnews.org/news/2010/sep/15/alabamas-indigent-defense-system-perfect-storm-for-ineffective-assistance/.

245 *See* Rob Holbert, *Yazdi Most Often Chosen for Defense Work*, Lagniappe Weekly, Apr. 5, 2009, http://classic.lagniappemobile.com/article.asp?articleID=192 (explaining that Yazdi required a special waiver to practice in Alabama; that he was suspended for 90 days for pulling out a semi-automatic after a deposition in his divorce case; and that he also was disciplined for extorting an indigent defendant's mother).

246 *See* Brendan Kirby, *How the System Failed William Ziegler: Perjured Testimony, Trashed Evidence*, Lying Jurors, AL.com (Feb. 1, 2013), http://blog.al.com/live/2013/02/how_the_system_failed_william.html.

247 *See id.*

248 *See id.*

249 *Id.*

250 *See* Mobile County Defense Times, *supra* note 239.

251 *See Alabama Death Row Prisoner Wins New Trial*, EJI (Jul.13, 2015), http://www.eji.org/node/1118.

252 *See Alabama Man Formerly On Death Row Is Sentenced To Life*, EJI (May 9, 2016), http://www.eji.org/former-death-row-inmate-sentenced-to-life.

RACIAL BIAS AND EXCLUSION

Mobile, Alabama, has a long history of lynching[253] and was the site of a public lynching in which two members of the Ku Klux Klan hung a 19-year-old Black man, Michael Donald, from a tree in 1981.[254] This history of racial oppression still lingers today. Seven out of eight (88 percent) of the defendants who received death sentences in Mobile County between 2010 and 2015 were convicted of killing white victims.[255]

Judge Ferrill McRae, a Mobile judge who by 2001 has overridden a jury's decision to grant life instead of death "more than any other Alabama magistrate,"[256] reportedly refused to sign a bail-reduction application in one non-capital case because he "first wanted to know the client's 'color.'"[257] In another case, this same judge allegedly told an attorney not to provide zealous representation "because we need more niggers in jail."[258]

Racial discrimination in jury selection has been a problem for a long time in Mobile. In the eight years following the U.S. Supreme Court's ruling outlawing race-based strikes in jury selection, *Batson v. Kentucky*,[259] Alabama courts found Mobile County prosecutors in violation of that ruling on seven separate occasions.[260] In one case from that era, prosecutors struck numerous Black venire members from Bobby Ray Jessie's jury before trial, and offered as an allegedly "race-neutral" explanation that one of the potential African-American jurors lived in a "high crime" area.[261] And worse still, the trial transcript shows that a prosecutor claimed he struck potential juror, Carolyn Hall, because "she works at a retarded place."[262] Ms. Hall is an African-American woman who cares for the disabled.[263] More recently, in Donald Whatley's death penalty trial, the Mobile County prosecutor struck 17 of 22 potential Black jurors.[264] Since no race-neutral reasons were given, the Alabama Court of Criminal

253 *See Talk of the Nation: The 'Last Lynching': How Far Have We Come?*, NPR (Oct. 13, 2008), http://www.npr.org/templates/story/story.php?storyId=95672737.

254 *See id.*

255 *See* Baumgartner, *Race of Defendants and Victims*, *supra* note 85.

256 Ken Silverstein, *The Judge as Lynch Mob*, in Machinery of Death: The Reality of America's Death Penalty Regime 79 (David R. Dow & Mark Dow eds., 2002).

257 *Id.* at 80.

258 *Id.*

259 476 U.S. 79 (1986).

260 *Madison v. Comm'r*, Ala. Dep't of Corr, 761 F.3d 1240, 1252 (11th Cir. 2014).

261 *See* Jessie v. State, 659 So. 2d 167, 168 (Ala. Crim. App. 1994).

262 EJI, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy 30 (2010), http://www.eji.org/files/EJI%20Race%20and%20Jury%20Report.pdf.

263 *See id.*

264 *See* Whatley v. State, 146 So. 3d 437, 453-54 (Ala. Crim. App. 2011).

Appeals remanded the case in 2010 for further investigation.[265]

EXCESSIVE PUNISHMENT

Of the Mobile death sentences reviewed on direct appeal since 2006, 70 percent involved defendants with mitigation evidence similar in severity to the categorical exemptions that render a person ineligible for the death penalty.[266] One defendant, Derek Horton, was age 18 at the time of the offense and showed symptoms of severe mental and cognitive impairment several weeks before the criminal act occurred.[267] Of the 10 cases decided on direct appeal, six involved defendants with brain damage, intellectual impairment, or severe mental illness.[268] For example, Michael Woolf, a man with bipolar disorder and a 74 IQ score that places his intelligence in the disabled range, was among those receiving a death sentence.[269]

INNOCENCE

In 2015, Mobile County dropped all charges again Evan Lee Deakle, Jr., a man convicted of sexually assaulting his step granddaughter, after concluding that subsequent events rendered the alleged victim's account untenable.[270] Several other cases raise serious claims of innocence. For instance, Mobile County recently settled a lawsuit with a man who was just 17 years old at the time of his arrest and spent nearly three decades in prison on a murder conviction.[271] He confessed to the murders, but it was later discovered that the confession might have been the result of coercion.[272] That man, Michael Pardue, has always maintained his innocence.[273]Another man, William Zeigler, spent 15 years on death row before his 2015 release from prison.[274] His conviction was vacated due to prosecutorial

265 *See id.* at 449.

266 *See* Mobile County Direct Appeals Spreadsheet, *supra* note 223.

267 *See Horton*, CR-12-0381, 2016 WL 1084721 at *7-9 (Ala. Crim. App. 2016).

268 *See* Mobile County Direct Appeals Spreadsheet, *supra* note 223.

269 Brendan Kirby, *Michael Woolf Murder Trial: Lawyers Put Psychologist On Stand To Bolster Mental Defect Defense*, AL.com (Oct. 29, 2010), http://blog.al.com/live/2010/10/woolf_lawyers_in_murder_trial.html.

270 *See Evan Lee Deakle, Jr.*, Nat'l Reg. of Exonerations, U. Mich. Sch. of L., http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4810 (last visited August 10, 2016).

271 See David Ferrara, *Michael Pardue, Saraland Settle Imprisonment Lawsuit*, AL.com (April 8, 2010), http://blog.al.com/live/2010/04/michael_pardue_saraland_settle.html; Rick Bragg, *Conviction Set Aside, but in Prison for Life*, N.Y. Times, May 30, 1998, http://www.nytimes.com/1998/05/30/us/conviction-set-aside-but-in-prison-for-life.html?pagewanted=all.

272 *See* Pardue v. State, 695 So. 2d 199, 205 (Ala. Crim. App. 1996)

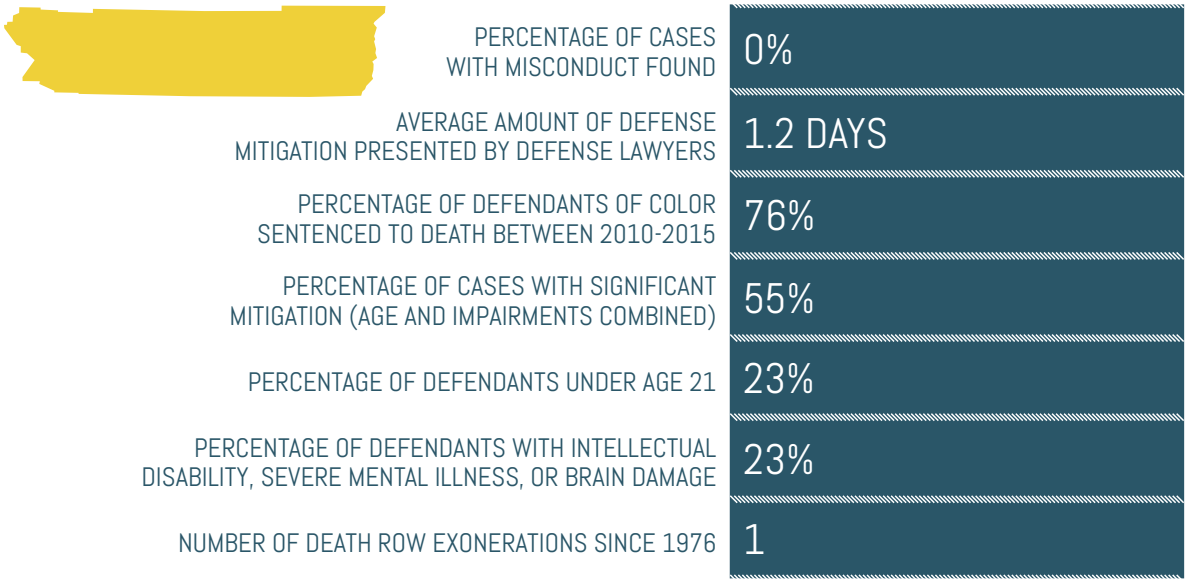
273 *See* Anne Good, *The Cycle of Injustice: The Story of Michael Pardue*, http://www.justicedenied.org/michael.htm (last visited August 10, 2016).

274 *See* Gabriel Tynes, *On His Conviction, Appeal and the "Innocent" Inmates He Left Behind: An Interview With Former Alabama Death Row*

misconduct and ineffective assistance of counsel,[275] and the state offered him a plea deal that included time served in exchange for his immediate release.[276] Zeigler, too, maintains his innocence.[277]

THE DEATH PENALTY IN RIVERSIDE COUNTY, CA

#5



**All calculations are based on direct appeal opinions since 2006 unless otherwise noted.*

Riverside County has become the nation's leading producer of death sentences. In 2015, with eight new death sentences, Riverside sent more people to death row last year than every other state in the country except Florida and California itself.[278] Between 2010 and 2015, Riverside amassed 29 death sentences (not including re-sentences), the second most of any county in America.[279] Riverside's rate of death sentencing per 100 homicides was nearly nine times the rate for the rest of California.[280]

Inmate William Ziegler, Lagniappe Weekly, April 17, 2015 http://lagniappemobile.com/conviction-appeal-innocent-inmates-left-behind-interview-former-alabama-death-row-inmate-william-ziegler/.

275 *See* Brendan Kirby, *How the system failed William Ziegler: Perjured testimony, trashed evidence, lying jurors*, AL.com, Feb. 1, 2013, http://blog.al.com/live/2013/02/how_the_system_failed_william.html

276 *See* Tynes, *supra* note 274.

277 *See id.*

278 *See Death Sentences in 2015*, *supra* note 1.

279 *See Death Sentences 2010-2015*, *supra* note 5.

280 *See* Baumgartner, *Rate of Death Sentencing*, *supra* note 41. The figure for rest of the state excludes all five of the top death sentencing counties discussed in this report (Riverside, Orange, Los Angeles, Kern, and San Bernardino).

OVERZEALOUS PROSECUTORS

Before being sworn in as District Attorney of Riverside County in January 2015,[281] Michael Hestrin personally obtained seven death sentences as a trial prosecutor in the same office.[282] Due to lengthy delays in the review of death sentences in California, it appears as though the state Supreme Court has not yet reviewed any allegations of inappropriate behavior in cases that Hestrin personally tried.[283] However, in 2011, a federal magistrate judge accused the Riverside County District Attorney's Office of "turn[ing] a blind eye to fundamental principles of justice" to obtain a murder conviction.[284] When the same case reached the federal appellate court, Chief Judge Alex Kozinski asked the state's lawyer to ask California Attorney General Kamala Harris "if she really wants to stick by a prosecution that was obtained by lying prosecutors."[285] Judge Kozinski then wondered aloud why two former Riverside County prosecutors -- Robert Spira and Paul Vinegrad -- were not being prosecuted for perjury.[286] This conduct occurred before Hestrin became the District Attorney, yet his response to the misconduct was telling: he refused to admit that either prosecutor intentionally committed misconduct and promised to retry the defendant.[287]

The county has had a long history of zealously pursuing the death penalty. Former Riverside District Attorney Rod Pacheco frequently sought the death penalty, even though the cases "rarely ended in execution penalties."[288] When Pacheco lost re-election to Paul Zellerbach, Zellerbach inherited 40 pending capital cases—more than the much more populous Los Angeles County had pending at the time.[289]

Prosecutorial misconduct was alleged in 84 percent of the cases we reviewed where a direct appeal decision had been issued between 2006 and 2015.[290] However, the California Supreme Court noted an inappropriate comment by prosecutors

281 *See Meet The D.A.*, Riverside Cnty. Dist. Att'y's Office, http://www.rivcoda.org/opencms/daoffice/meetda.html (last visited Aug. 4, 2016).

282 *See* Riverside County Direct Appeals Spreadsheet 2006-2015, on file with the Fair Punishment Project.

283 *See id.*

284 Maura Dolan, *U.S. Judges See 'Epidemic' of Prosecutorial Misconduct in State*, L.A. Times, Jan. 31, 2015, http://www.latimes.com/local/politics/la-me-lying-prosecutors-20150201-story.html; Baca v. Adams, No. CV 08-683-MMM, 2011 U.S. Dist. LEXIS 157443, at *44 (C.D. Cal. June 22, 2011).

285 Robert J. Smith, *Is Southern California the New Deep South?*, Slate (Sep.7, 2015), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/09/southern_california_sentences_more_people_to_death_than_texas_georgia_south.html.

286 *See id.*

287 *See id.*

288 Mike Daniels, *DA To Review All Pending Death Penalty Cases*, KESQ (Sep. 27, 2011), http://www.kesq.com/DA-To-Review-All-Pending-Death-Penalty-Cases/492318.

289 *See id.*

290 *See* Riverside County Direct Appeals Spreadsheet, *supra* note 282.

in only one of the 31 cases, and found misconduct in none of them.[291] This is not particularly surprising given that according to the *San Jose Mercury News*, "The state court, one of the most conservative in the nation, reverses 10 percent of death sentences, one of the lowest rates in the country. But federal courts have reversed 62 percent of the sentences affirmed by the California court, the highest rate nationally."[292] However, given the long delays in the state's capital case process, we were not able to systematically review federal opinions for findings of misconduct.

INADEQUATE DEFENSE

In Riverside County, court-appointed defense attorneys are paid based on whether a murder case is charged as a capital case, and whether it goes to trial.[293] When the prosecution decides not to seek the death penalty before the start of trial, the defense attorney's total fee is reduced by half.[294] If the case is then resolved with a plea before the start of trial, the attorney receives just one-quarter of the original fee.[295] When the original capital murder charges are not reduced, the attorney only receives 30 percent of their total fee if the client then takes a plea.[296] As a result, defense attorneys are not incentivized to make earnest efforts to negotiate with prosecutors to obtain plea agreements favorable to their clients. This means that early investment in essential mitigation investigation, which can be one of the most time and dollar intensive parts of capital defense representation, and is widely considered to be the biggest driver for prosecutors deciding not to seek the death penalty, is also disincentivized. According to the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, such an arrangement is considered presumptively inappropriate.[297] Of the eight people sentenced to death in 2015, only one was represented by the public defender's office, whereas the other seven were represented by court appointed private lawyers who were compensated according to this problematic fee system.[298]

Half of the Riverside County death sentences reviewed on direct appeal between 2006 and 2015 involved the equivalent of one full day's worth or less of mitigation

291 *See id.*

292 Howard Mintz, *Death Sentence Reversals Cast Doubt On System*, Apr. 13, 2002, available at http://www.deathpenaltyinfo.org/node/534.

293 *See* Memorandum from the Executive Office to the Riverside County Board of Supervisors (Sept. 16, 2013), *available at* http://rivcocob.org/agenda/2013/09_24_13/03-10.pdf.

294 *See id.*

295 *See id.*

296 *See id.*

297 ABA, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 981-82 (rev. ed. 2003), http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf.

298 *See* Riverside County Direct Appeals Spreadsheet, *supra* note 282.

evidence, and two-thirds of the cases involved two days or less.[299] On average, only seven hours of mitigation evidence was presented during trial, and 12 percent of cases--approximately one out of every 10-- had zero hours of mitigation presented.[300] There are a handful of lawyers who account for a disproportionate number of death sentences in Riverside who also tend to present very little in the way of mitigation. For example, one court-appointed lawyer had six former clients sent to death row, including five during our review period.[301] In a 2010 case that resulted in death, this attorney put on just 100 minutes worth of mitigation evidence.[302] In a 2015 case, the same lawyer logged just two and a half hours worth of mitigation evidence.[303]

Michael Belter, a private court-appointed lawyer who takes cases in Riverside County, defended fifteen people sent to death row, including two from Riverside during our review period.[304] In 2015, one client ended up on death row after Belter presented roughly two hours of mitigation evidence at trial.[305] Belter also represented David Earl Williams.[306] At his trial, Belter did not ask a single cross-examination question of the prosecution's star witness, Margaret Williams, even though police allegedly threatened her with a murder charge, and she purportedly only testified under a grant of immunity.[307] The Magistrate presiding over a pretrial hearing noted that Margaret Williams's testimony "could very well have been the product of the original coercion by the police."[308] After the prosecution rested its case at trial, Belter did not call a single witness.[309] During the penalty phase, Belter let the prosecutor invoke religion as justification for the death sentence without objection.[310] The California Supreme Court found prosecutorial misconduct, stating that the prosecutor's arguments were impermissible because they "plainly invoked a religious justification for the death penalty," but it did not reverse Williams's conviction.[311]

299 *See* Riverside Defense Mitigation and Jury Deliberation Times, on file with the Fair Punishment Project.

300 *See id.*

301 *See id.*

302 *See id.*

303 *See id.*

304 *See id.*

305 *See id.*

306 *See id.*

307 *See* People v. Williams, 233 P.3d 1000, 1012 (Cal. 2010).

308 *See id.* at 1038.

309 *See id.* at 1014.

310 *See id.* at 1044.

311 *Id.* at 1046.

RACIAL BIAS AND EXCLUSION

While the history of overt racial bias and exclusion in Riverside has certainly not been as pronounced as it has been in Caddo or Mobile, incidents still occur. In 2011, two justices of the California Supreme Court dissented from the majority in a capital case from Riverside involving an African-American defendant.[312] According to the *Los Angeles Times*, Justices Werdegar and Moreno dissented "on grounds that the prosecutors' reasons for excusing three of five black prospective jurors were not backed by the evidence, and that the trial judge failed to probe the prosecutor properly."[313]

It's also noteworthy that 76 percent of defendants convicted and sentenced to death in Riverside between 2010 and 2015 were people of color.[314] While African-Americans make up just seven percent of the county's population,[315] they constituted 24 percent of those sentenced to death in this time frame.[316]

EXCESSIVE PUNISHMENT

Of the Riverside death sentences that the California Supreme Court decided on direct appeal since 2006, over half (55 percent) involve evidence of severe functional impairment.[317] Approximately 23 percent of cases involved a defendant under 21 years old, including five defendants (16 percent) who were 18 at the time of the offense.[318] Forty-two percent of cases involved defendants age 25 and under.[319] Nearly one-quarter of cases involved a defendant with an intellectual impairment, brain damage, or severe mental illness.[320] For example, one case involved a "severely emotionally disturbed" 22-year-old man who had been diagnosed with schizophrenia.[321] Another defendant had a 68 IQ score in childhood and a 77 IQ score at trial, which placed him at the bottom six percent of the

312 *See* People v. Jones, 247 P.3d 82, 110 (Cal. 2011).

313 Maura Dolan, *State Supreme Court Upholds Death Sentence in Riverside County Case, But Two Justices Express Concern About Racial Bias in Jury Selection*, L.A. Times, Jan. 31, 2011, http://latimesblogs.latimes.com/lanow/2011/01/california-supreme-court-riverside-county-death-sentence.html.

314 *See* Baumgartner, *Race of Defendants and Victims*, *supra* note 85.

315 *See QuickFacts for Riverside County*, U.S. Census Bureau http://www.census.gov/quickfacts/table/PST045215/06065 (last visited Aug. 4, 2016).

316 *See* Baumgartner, *Race of Defendants and Victims*, *supra* note 85.

317 *See* Riverside County Direct Appeals Spreadsheet, *supra* note 282.

318 *See id.*

319 *See id.*

320 *See id.*

321 *See* People v. Scott, 257 P.3d 703, 718 (Cal. 2011).

population.[322]

INNOCENCE

Lee Perry Farmer, Jr. was released from death row in 1999 after serving 18 years in prison and eight years on death row for a murder he didn't commit.[323] His death sentence was first overturned by the California Supreme Court.[324] Riverside jurors reduced his sentence to life without parole in a 1991 penalty phase retrial.[325] His murder conviction was later overturned in 1997 by the Ninth Circuit Court of Appeals because his lawyer had ignored a confession by Farmer's co-defendant.[326] In January 1999, Farmer was finally acquitted of the murder in a retrial.[327]

Multiple other exonerations in non-capital cases prosecuted by the Riverside District Attorney's office call into question the near infallibility that people expect from death sentences. Herman Atkins was exonerated by DNA evidence in 2000 after serving 12 years on a rape conviction.[328] Jason Rivera was released in 2014 after serving 19 years on a murder conviction.[329] Rivera was present at the time of the shooting, but insists that he did not know the shooter or know that anyone had a gun.[330]

322 *See* People v. Montes, 320 P.3d 729, 751 (Cal. 2014).

323 *See* Death Penalty Focus, Wrongful Convictions in California Capital Cases 4-5 (2008), http://netk.net.au/Death/Death1.pdf.

324 *See id.* at 4.

325 *See id.*

326 *See id.*

327 *See id.*

328 *See Herman Atkins*, Innocence Proj., http://www.innocenceproject.org/cases/herman-atkins/ (last visited Aug. 4, 2016).

329 *See* Jason Rivera, Cal. Innocence Proj., https://californiainnocenceproject.org/read-their-stories/jason-rivera/ (last visited Aug. 4, 2016).

330 *See id.*

#6

THE DEATH PENALTY IN KERN COUNTY, CA

PERCENTAGE OF CASES WITH MISCONDUCT FOUND	0%
AVERAGE AMOUNT OF DEFENSE MITIGATION PRESENTED BY DEFENSE LAWYERS	2.6 DAYS
PERCENTAGE OF DEFENDANTS OF COLOR SENTENCED TO DEATH BETWEEN 2010-2015	50%
PERCENTAGE OF CASES WITH SIGNIFICANT MITIGATION (AGE AND IMPAIRMENTS COMBINED)	63%
PERCENTAGE OF DEFENDANTS UNDER AGE 21	13%
PERCENTAGE OF DEFENDANTS WITH INTELLECTUAL DISABILITY, SEVERE MENTAL ILLNESS, OR BRAIN DAMAGE	50%

**All calculations are based on direct appeal opinions since 2006 unless otherwise noted.*

Between 2010 and 2015, Kern County prosecutors obtained six death sentences.[331] Kern's rate of death sentencing per 100 homicides was 2.3 times higher than the rest of the state for the 10-year period from 2006 to 2015.[332]

OVERZEALOUS PROSECUTORS

When Rose Bird was ousted as the Chief Justice of California, along with two other justices, over their votes in death penalty cases, it seriously tarnished the idea of judicial independence in criminal cases.[333] Ed Jagels, the long-time District Attorney of Kern County, led the campaign against Justice Bird.[334] He would later boast about Kern leading the state in its incarceration rate,[335] and brushed off more than two dozen wrongful convictions that he secured in a mostly-fabricated sex abuse scandal.[336] Jagels also permitted a line prosecutor to keep his job after he hid unfavorable blood evidence results produced by a state crime lab and subsequently lied about having asked a state lab technician to preserve the evidence, which was

331 *See* Death Sentences 2010-2015, *supra* note 5.

332 *See* Baumgartner, *Rate of Death Sentencing*, *supra* note 41. The figure for rest of the state excludes all five of the top death sentencing counties discussed in this report (Riverside, Orange, Los Angeles, Kern, and San Bernardino).

333 *See* Maura Dolan, *Ex-Chief Justice Rose Bird Dies of Cancer at 63*, L.A. Times, Dec. 5, 1999, http://articles.latimes.com/1999/dec/05/news/mn-40743 ("Bird lost a retention election in 1986 largely because she had voted to overturn every death penalty case she reviewed.").

334 *See* Ted Rohrlich, *Rose Bird's Opponents Elated by Death Ruling*, L.A. Times, Oct. 14, 1987, http://articles.latimes.com/1987-10-14/news/mn-9303_1_death-penalty.

335 *See* Radley Balko, *Kern County's Monstrous D.A.*, Reason.com (Dec. 21, 2009), http://reason.com/archives/2009/12/21/kern-countys-monstrous-da ("Ed Jagels boasts that 'During Jagels' tenure as District Attorney, Kern County has had the highest per capita prison commitment rate of any major California County.").

336 *See* Garance Burke, *D.A. Who Wrongfully Had Dozens Jailed to Retire*, SFGate.com, Nov. 25, 2009, http://www.sfgate.com/bayarea/article/D-A-who-wrongfully-had-dozens-jailed-to-retire-3210029.php.

later destroyed.[337] In 2015, a state appellate court found that the same prosecutor, Robert Murray, "deliberately altered an interrogation transcript to include a confession that could be used to justify charges that carry a life sentence."[338] In 2010, prosecutor Lisa Green, who worked for Jagels, was elected to the position of District Attorney.[339] She promptly promised to continue to be an example of aggressive prosecution.[340]

INADEQUATE DEFENSE

Of the Kern County capital cases decided on direct appeal between 2006 and 2015, the defense presentation of mitigation evidence ranged from under one day to over a week.[341] The typical presentation lasted less than three days.[342] Defense lawyer James Soreno had two clients sentenced to death, and he presented one day's or less worth of mitigation in both cases.[343]

James Lorenz put on less than one day's worth of mitigation in his representation of David Rogers.[344] The California Supreme Court remanded the case for a determination of whether a witness in the penalty phase had provided reliable testimony when she said that Rogers assaulted her.[345] As the *Bakersfield Californian* recently reported, Lorenz "failed to obtain a complete file of the woman's criminal history and her interview with investigators. [Rogers' current lawyer] said Lorenz could have used that information to impeach her testimony but didn't bother to acquire it."[346] In another capital case, the trial judge had to substitute counsel when Lorenz, who had been lead counsel, "inexplicably failed to appear in court on several days during the jury selection."[347]

Of the six death sentences imposed between 2010 and 2015, one lawyer, Michael

337 *See* Jason Kotowski, *Prosecutor Under Investigation For Allegedly Falsifying Transcript*, Bakersfield Californian, Nov. 12, 2013, http://www.bakersfield.com/news/2013/11/13/prosecutor-under-investigation-for-allegedly-falsifying-transcript.html.

338 People v. Velasco-Palacios, 235 Cal. App. 4th 439, 447 (2015), *available at* http://www.courts.ca.gov/opinions/nonpub/F068833.PDF.

339 *See* Kern County District Attorney, http://www.co.kern.ca.us/DA/About.aspx?tab=0#.V6zJkZMrKRs (last visited Aug. 10, 2016)

340 *See* Op-Ed, *Green Has All the Right Credentials for Kern County DA*, Bakersfield Californian, May 11, 2010, http://www.bakersfield.com/news/opinion/2010/05/12/green-has-all-the-right-credentials-for-kern-county-da.html.

341 *See* Kern County Defense Mitigation and Jury Deliberation Times Spreadsheet, on file with the Fair Punishment Project.

342 *See id.*

343 *See id.*

344 *See id.*

345 *See* Steve E. Swenson, *Former Deputy Who Murdered Prostitutes to Get New Hearing, Death Penalty May Be Thrown Out*, Bakersfield Californian, Nov. 12, 2009, http://www.bakersfield.com/news/2009/11/13/former-deputy-who-murdered-prostitutes-to-get-new-hearing-death-penalty-may-be-thrown-out.html.

346 Jason Kotowski, *Judge to Consider Validity of Testimony that Influenced Death Penalty Sentence*, Bakersfield Californian, May 7, 2015, http://www.bakersfield.com/news/2015/05/08/judge-to-consider-validity-of-testimony-that-influenced-death-penalty-sentence-1.html.

347 In re Sixto, 774 P.2d 164, 169 (Cal. 1989).

Lukehart, represented three of the clients.[348] In 2014, Lukehart's client, Francisco Beltran, a Mexican National, was sentenced to death.[349] The Mexican Government intervened after the death verdict, urging a new trial due to Lukehart's and his co-counsel's alleged ineffectiveness.[350] The Motion for a New Trial notes that the defense did not even bother to question 10 of the 12 jurors who ultimately were selected to hear the case, including one juror who initially answered a written question about her views on the death penalty by circling the option that read: "I favor the death penalty, but believe there are rare cases in which it should not be imposed for the deliberate taking of a life."[351]

The mitigation specialist on the case told the lawyers from the Mexican Capital Legal Assistance Program "that neither Mr. Carter nor Mr. Lukehart provided feedback on any of the mitigation memoranda she had given counsel, and that neither counsel provided her with any guidance in directing or supervising the mitigation investigation."[352] The mitigation specialist also emailed Lukehart and his co-counsel, Ronald Carter, to inform them that the client was upset that the lawyers had not visited him in a long while, and that the relationship seemed to be reaching a breaking point.[353] Mr. Carter responded via email: "I appreciate your concern – but I do wish you would concentrate on your job which is to do a social history of the Beltran family."[354] At that point, Mr. Carter "could not recall when he had last seen Mr. Beltran, and said that it had probably been over a year since he last visited him at the jail."[355] When the mitigation specialist suggested investigating Mr. Beltran's childhood as part of a trauma investigation, Lukehart shut down the suggestion, allegedly saying, "I hate PTSD."[356] According to the mitigation specialist, Lukehart also said that "in Kern County, the only good mitigation is positive adjustment to an institution[.]"[357]

Months before trial, Carter, who Lukehart designated to handle the penalty phase of the trial, sent a telling email: "I don't know what a penalty trial really looks like—it's starting to concern me."[358]

348 *See* Kern County Death Sentences Spreadsheet, on file with the Fair Punishment Project.

349 *See* Jason Kotowski, *Convicted Killer Appointed New Attorney for Future Court Hearings*, Bakersfield Californian, Dec. 4, 2013, http://www.bakersfield.com/news/2013/12/04/convicted-killer-appointed-new-attorney-for-future-court-hearings.html.

350 *See id.*

351 Supp. To Mtn. For New Trial 3, Line 2, People v. Beltran, No. BF130784A (Cal. 2014).

352 Declaration of Cloud Chavez, Item 16 (Def.'s Ex. Y) Supp. To Mtn. For New Trial, People v. Beltran, No. BF130784A (Cal. 2014).

353 *See id*. at Item 6.

354 *Id.*

355 Declaration of Skyla V. Olds, Item 26 (Def.'s Ex. W), Supp. To Mtn. For New Trial, People v. Beltran, No. BF130784A (Cal. 2014).

356 Declaration of Cloud Chavez, *supra* note 352, at Item 13.

357 Supp. To Mtn. For New Trial 44, Line 9-10, People v. Beltran, No. BF130784A (Cal. 2014).

358 Declaration of Skyla V. Olds, *supra* note 355, at Item 21.

RACIAL BIAS AND EXCLUSION

Like Riverside, Kern County has not had the same level of overt racial bias and exclusion as some of the Southern counties. However, we encountered a few troubling findings. According to a 2014 report by the office of California's Attorney General, an average of just 20 percent of homicide victims in the state were white between 2009-2014.[359] In contrast, 50 percent of the homicide victims in Kern County death penalty cases between 2010 and 2015 were white.[360] Also notable is the fact that 17 percent of the defendants sentenced to death during the same period were African-American,[361] even though just six percent of the county's population is African-American.[362]

Earlier this year a California appellate court reversed a Kern County case on race discrimination grounds after the prosecution struck each of the Black prospective jurors and provided implausibly race-neutral grounds for one of those strikes, mischaracterized the prospective juror's words, and argued extensively with defense counsel about whether the juror was Black or not.[363] In a capital case decided by the Ninth Circuit Court of Appeals in 2012, Judge Harry Pregerson dissented from the rest of the justices noting that the failure to challenge what appeared to have been racially biased jury selection amounted to ineffective assistance of counsel.[364] In that case, prosecutors struck 75 percent of jurors with Spanish surnames.[365] In contrast, they struck just 27 percent of individuals with non-Spanish-surnamed whites.[366] Justice Pregerson noted that the striking of one juror was especially "problematic," and that the violation was sufficient for a reversal.[367]

EXCESSIVE PUNISHMENT

Of the cases decided on direct appeal since 2006, half involved defendants with

359 Kamala D. Harris, Cal. DOJ, Homicide in California 1 (2014) https://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/homicide/hm14/hm14.pdf.

360 *See* Baumgartner, *Race of Defendants and Victims*, *supra* note 85.

361 *See id.*

362 *See Quickfacts for Kern County*, U.S. Census Bureau, http://www.census.gov/quickfacts/table/PST045215/06029 (last visited Aug. 10, 2016).

363 People v. Arellano, 245 Cal. App. 4th 1139, 1165-66 (2016).

364 *See Panel Upholds Death Sentence in Mojave Motel Murders*, Met News-Ent., Nov. 7, 2012, *available at* http://www.metnews.com/articles/2012/care110712.htm

365 *See id.*

366 *See id.*

367 *See id.*

crippling intellectual disability, brain damage, or mental illness.[368] Thirteen percent involved individuals under age 21, and 38 percent involved defendants who were age 25 and younger.[369] Bob Williams, who endured sexual abuse as a child and was placed in foster care at age seven, was just 18 years old at the time of the offense that landed him on death row.[370] Another case involved a man who suffered from dissociative disorder and endured horrific sexual and physical abuse as a child.[371] Willie Harris, a black man whom prosecutors called "Willie Horton"[372] during closing arguments in the penalty phase of his trial,[373] has an IQ score in the 70s, placing him in the intellectually disabled range.[374]

INNOCENCE

According to the National Registry of Exonerations, Kern has had at least 24 known wrongful convictions since 1989.[375] The vast majority of those cases involved official misconduct.[376] In addition to the extensively-written about child abuse sex scandal,[377] in which police used highly suggestive questioning techniques to elicit false testimony and prosecutors blocked medical exams of the children involved in the case,[378] two of the exonerations involved wrongful murder convictions. One of the cases involved Offord Rollins, a Black teenager who was just 17 years old when he was wrongfully convicted of murder.[379] According to the Registry, "The trial was hotly contested and controversial because the only four black potential jurors were all excused by the prosecution. Rollins ... was tried by a jury comprised of 11 whites and one Hispanic."[380] In reversing the conviction, the California Supreme

368 *See* Kern County Direct Appeals Spreadsheet 2006-2015, on file with the Fair Punishment Project.

369 *See id.*

370 *See* People v. Williams, 148 P.3d 47, 55 (Cal. 2006).

371 *See* People v. Rogers, 141 P.3d 135, 149-50 (Cal. 2006).

372 Willie Horton is an African-American man who was serving a sentence of life in prison without parole in Massachusetts when he raped a white woman and committed assault while on a weekend furlough. Horton's story was prominently used in TV ads with racial undertones to attack former governor Michael Dukakis when he ran for president in 1988. See John Sides, *It's Time to Stop the Endless Hype of the 'Willie Horton' Ad*, Wash. Post, Jan. 6, 2016, https://www.washingtonpost.com/news/monkey-cage/wp/2016/01/06/its-time-to-stop-the-endless-hype-of-the-willie-horton-ad/.

373 *See* People v. Harris, 306 P.3d 1195, 1237 (Cal. 2013).

374 Pet. of Writ of Habeas Corpus at 85, Item 218, In re Willie Leo Harris, No. S081700 (Cal. 2013).

375 *See* Nat'l Reg. of Exonerations, U. of Mich. Sch. of L., http://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View=%7BB8342AE7-6520-4A32-8A06-4B326208BAF8%7D&FilterField1=State&FilterValue1=California&FilterField2=County&FilterValue2=8_Kern (filtered for Kern County) (last visited Aug. 10, 2016).

376 *See id.*

377 *See* Maggie Jones, *Who Was Abused?*, N.Y. Times, Sept. 19, 2004, http://www.nytimes.com/2004/09/19/magazine/who-was-abused.html?_r=0.

378 *See* John Stall, Nat'l Reg. of Exonerations, U. of Mich. Sch. of L., http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=3667 (last visited Aug. 10, 2016).

379 *See* Offord Rollins, IV, Nat'l Reg. of Exonerations, U. of Mich. Sch. of L., http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4005 (last visited Aug. 10, 2016).

380 *Id.*

Court found, "numerous instances" of misconduct, including "racist stereotypes (comparing Rollins to boxer Mike Tyson, who was convicted of raping a woman), improper inquiries into the sex lives of Rollins and other defense witnesses, and … inflammatory comments and arguments based on facts that were not presented in the evidence."[381]

#7

THE DEATH PENALTY IN CADDO PARISH, LA

PERCENTAGE OF CASES WITH MISCONDUCT FOUND	14%
AVERAGE AMOUNT OF DEFENSE MITIGATION PRESENTED BY DEFENSE LAWYERS	LESS THAN 1 DAY
PERCENTAGE OF DEFENDANTS OF COLOR SENTENCED TO DEATH BETWEEN 2010-2015	80%
PERCENTAGE OF CASES WITH SIGNIFICANT MITIGATION (AGE AND IMPAIRMENTS COMBINED)	71%
PERCENTAGE OF DEFENDANTS UNDER AGE 21	29%
PERCENTAGE OF DEFENDANTS WITH INTELLECTUAL DISABILITY, SEVERE MENTAL ILLNESS, OR BRAIN DAMAGE	57%
NUMBER OF DEATH ROW EXONERATIONS SINCE 1976	1

**All calculations are based on direct appeal opinions since 2006 unless otherwise noted.*

Caddo Parish has sentenced five people to die since 2010.[382] This means that while Caddo has only five percent of Louisiana's population, it has 38 percent of the state's death sentences.[383] Caddo's death sentencing rate per 100 homicides was nearly eight times higher than that of the rest of the state between 2006 and 2015.[384]

OVERZEALOUS PROSECUTORS

Dale Cox, who served as Caddo Parish's acting District Attorney, personally prosecuted one-third of Louisiana's death sentences between 2010 and 2015.[385] When Maya Lau, a local reporter, questioned Cox about the release of Glenn Ford,

381 *Id.*

382 *See* Death Sentences 2010-2015, *supra* note 5.

383 *See Quick Facts: Louisiana*, U.S. Census Bureau, http://www.census.gov/quickfacts/table/PST045215/22,22017.; http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008 (last visited Aug. 1, 2016).

384 *See* Baumgartner, *Rate of Death Sentencing*, *supra* note 41.

385 *See Deadliest Prosecutors*, *supra* note 9, at 2 (quoting *1 County, 2 Prosecutors Responsible for 3/4 of Recent Louisiana Death Sentences, Amid Charges of Prosecutorial Misconduct*, Death Penalty Info. Ctr. (2015), http://www.deathpenaltyinfo.org/node/6097).

a man with Stage 4 lung cancer who spent nearly three decades on death row for a crime he did not commit, Cox said: "I think we need to kill more people."[386] Cox later clarified his enthusiasm for the death penalty: "Revenge is important for society as a whole," and it "brings to us a visceral satisfaction."[387] In 2014, Cox obtained a death sentence against a father, Rodricus Crawford, convicted of killing his infant son, despite the medical examiner's uncertainty that the death was a homicide.[388] At trial, Cox told the jury that Jesus demanded his disciples kill any child abuser and quoted a Bible verse: "You shall have a millstone cast around your neck and you will be thrown into the sea."[389] In a 2015 death penalty trial, Cox threatened opposing counsel, saying: "I want to kill everyone in here. I want to cut their fucking throats. I'm just being honest, and if any of them want to go outside we can do it right now."[390]

Cox, along with two other former Caddo Parish prosecutors, Hugo Holland and Lea Hall, account for 75 percent of all Louisiana death sentences since 2010.[391] In 2012, Holland and Hall were asked to resign after obtaining assault rifles from the Federal Property Assistance Agency for a fake investigation with the local sheriff's office.[392] Lea Hall pulled a gun on a co-worker's husband in a later incident.[393] However, both still serve as special contract trial prosecutors in death penalty cases throughout Louisiana.[394]

INADEQUATE DEFENSE

Louisiana death sentences dropped significantly in recent years.[395] One important component of that drop is a set of new performance standards for lawyers representing defendants in capital cases.[396] Over the past decade, 75 percent of

386 Vickie Welborn, *supra* note 36.

387 Rachel Aviv, *Revenge Killing: Race and the Death Penalty in a Louisiana Parish*, The New Yorker (July 6 & 13, 2015), http://www.newyorker.com/magazine/2015/07/06/revenge-killing.

388 *See Deadliest Prosecutors*, *supra* note 9, at 22.

389 Alexandria Burris, *Clergy: Cox Used Bible to Advocate for Death Penalty*, Shreveport Times, Oct. 16, 2015, http://www.shreveporttimes.com/story/news/watchdog/2015/10/15/100-religious-leaders-object-dale-coxs-use-bible-argue-death-penalty/74004172/

390 *Outlier Death Penalty Counties Defined by Overzealous Prosecutors*, Fair Punishment Project (March 9, 2016), http://fairpunishment.org/outlierdeathpenaltyprosecutors/.

391 *See* James Gill, *Capital Punishment a Cottage Industry in Caddo Parish*, New Orleans Advocate, Apr. 11, 2015, http://www.theadvocate.com/new_orleans/opinion/james_gill/article_1be535cf-daf0- 592c-bf59-32f231f1a7ce.html.

392 *See id.* Holland and Hall also apparently "outfit[ed] their vehicles with lights and sirens, making stops, and wearing SWAT-type clothing during work hours." Pet. for Damages, Ashley v. Scott, No. SS8-321A, (La. 2015).

393 *See* Gill, supra note 390.

394 *LA: Prosecutors Procure M-16's in Caddo Parish*, Louisiana, Open File Blog (Aug. 28, 2014), http://www.prosecutorialaccountability.com/2014/08/28/la-prosecutors-procure-m-16s-in-caddo-parish/

395 *See Louisiana Death Sentences* 1977-2015, Death Penalty Info. Ctr., http://www.deathpenaltyinfo.org/louisiana-1#sent (last visited Aug. 10, 2016).

396 *See Louisiana Public Defender Act*, La. Pub. Defender Bd., http://lpdb.la.gov/Serving%20The%20Public/Legislation/Louisiana%20Public%20Defender%20Act.php (last visited Aug. 10, 2016).

people sent to death row from Caddo Parish had at least one lawyer who is not certified to try capital cases under the new standards.[397] This low standard of representation is reflected in the fact that the typical penalty phase of the trial lasts less than two days.[398] The defense tends to put on less than a full day's worth of mitigation evidence.[399] And, perhaps unsurprisingly given the sparse defense presentation, the typical jury in Caddo Parish takes under 90 minutes to decide to send a person to death row.[400]

Daryl Gold is one of the defense lawyers in Caddo Parish who exemplifies the low standard of representation. During a ten-year stretch between 2005 and 2014, Gold was the lawyer for 20 percent of new death row admissions in Louisiana.[401] In his last trial, which was the case where the state's medical examiner testified that he did not know for certain whether a crime happened, Gold offered less than a day's worth of mitigation, and Rodricus Crawford was sentenced to death.[402] Gold has been suspended from the practice of law three times and "received fourteen private reprimands or admonitions for neglecting legal matters, failing to communicate with clients, failing to refund unearned fees, and failing to cooperate in a disciplinary investigation.[403]

The Louisiana Supreme Court has not issued opinions yet in the two of the most recent Caddo Parish cases resulting in death sentences. However, of the cases that the Court decided on direct appeal since 2006, Kurt Goins represented half of the defendants.[404] Goins put on less than a day's worth of mitigation in each of those cases.[405] In one case, in which his intellectually impaired and mentally disturbed client with an IQ of 67 sought to represent himself at trial, Goins appears not to have even requested that the trial court conduct a competency evaluation. That client represented himself, appeared delusional during the proceedings, and antagonized the jurors during jury selection.[406] Not surprisingly, he was sentenced to death. In the Lamondre Tucker case, Goins conceded Tucker's guilt (reportedly over his client's objection) and offered no evidence in the guilt phase of the trial.[407]

397 *See* Smith, *Worst Lawyers*, *supra* note 67.

398 *See* Caddo Parish Defense Mitigation and Jury Deliberation Times 2006-2015, on file with the Fair Punishment Project.

399 *See id.*

400 *See id.*

401 *Deadliest Prosecutors, Worst Defense Lawyers Linked to High Rates of Death Sentences in Heavy-Use Counties*, Death Penalty Info. Ctr., http://www.deathpenaltyinfo.org/node/6291 (last visited Aug. 2, 2016).

402 *See* Smith, *Worst Lawyers*, *supra* note 67.

403 In re Gold, 59 So. 3d 396, 397 (La. 2011).

404 *See* Caddo Parish Direct Appeals Spreadsheet 2006-2015, on file with the Fair Punishment Project.

405 *See id.*

406 *See* State v. Campbell, 983 So. 2d 810 (La. 2008).

407 *See* State v. Tucker, 181 So. 3d 590, 618 (La. 2015).

RACIAL BIAS AND EXCLUSION

In 1914, the *Shreveport Times* editorial board rebuked "suggestions from some of the newspapers" that Louisiana should "abolish the death penalty" by arguing that abolition would stoke "the vengeance of an outraged citizenship" and thus produce an "increase in the number of lynchings."[408] This is the kind of argument one took seriously in Shreveport, the last city in America to surrender to the Union. Shreveport is the most populous city in "Bloody Caddo" Parish, the county equivalent that produced the second highest number of lynchings in the nation.[409] In 1976, the same year that the U.S. Supreme Court gave its constitutional blessing to capital punishment, a federal judge described the still present "official racial discrimination and unresponsiveness which long have affected all aspects of the lives of Shreveport's black citizens."[410] It took another 35 years—until 2011—for Caddo to remove a Confederate flag that flew atop a Confederate memorial outside the courthouse where death penalty trials take place.[411] In 2009, a Black man, Carl Staples, was struck from the jury pool in a death penalty case after he pointed out the injustice of asking jurors to serve under the flag, which he called a symbol of "one of the most heinous crimes ever committed."[412] The monument is still there.[413] Despite this history, last year Dale Cox referred to society as "a jungle" to explain why the death penalty was necessary.[414] No white person has ever been executed for killing a Black person in Caddo Parish.[415]

The Caddo Parish District Attorney's Office has specifically come under fire for its discriminatory jury selection practices.[416] Although about half of the parish's population is Black, a recent study showed that only about a third of jurors between 2003 and 2012 were also Black.[417] Further, Caddo prosecutors used peremptory strikes on 46 percent of potential Black jurors, while only using peremptory strikes on 15 percent of all other potential jurors.[418] Mr. Cox himself struck Black jurors

408 *See* Robert J. Smith, *There's No Separating the Death Penalty and Race*, SLATE (May 5, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/05/foster_v_chatman_race_infects_death_penalty_to_the_core.html.

409 *See* id.; Prime, *supra* note 34.

410 Blacks United v. City of Shreveport, 71 F.R.D. 623, 635 (W.D.La. 1976).

411 *See* Lex Talamo, *Caddo Commissioners Debate Removal of Confederate Monument*, Shreveport Times, June 9, 2016, http://www.shreveporttimes.com/story/news/2016/06/09/caddo-commission-debates-removal-confederate-monument/85666352/.

412 Cecelia Trenticosta & William C. Collins, *Death and Dixie: How the Courthouse Confederate Flag Influences Capital Cases in Louisiana*, 27 Harv.. J. Racial & Ethnic Just. 125, 156 (2011).

413 *See* Talamo, *supra* note 411.

414 *See* Aviv, *supra* note 387.

415 *See id.*

416 *See* Noye, *supra* note 37.

417 *See id.* at 10.

418 *See id.* at 8.

almost three times as often as he struck white jurors.[419] In 2007, the Louisiana Supreme Court reversed Robert Glen Coleman's death sentence because the prosecutors'—Hugo Holland and Lea Hall—"explicit interjection of race ... renders implausible any explanation other than the decision to strike this prospective juror was not race-neutral[.]"[420] Eighty percent of defendants sentenced to death between 2010 and 2015 in Caddo have been Black.[421]

EXCESSIVE PUNISHMENTS

Of the Caddo death sentences that the Louisiana Supreme Court has reviewed on direct appeal since 2006, 71 percent involve mitigation evidence that rivals or outpaces the severity of impairment associated with juvenile status or intellectual disability.[422] Both Lamondre Tucker and Laderrick Campbell were 18 years old at the time of the offenses for which they were convicted, and thus mere months away from categorical ineligibility for the death penalty.[423] Tucker (74 IQ) and Campbell (67 IQ)[424] were also among the 57 percent of defendants who exhibited an intellectual impairment.[425] Several defendants had multiple impairments. Brandy Holmes, who was named after her mother's favorite drink while pregnant, has fetal alcohol syndrome and a 77 IQ score.[426] She also attempted suicide after she was raped as a child.[427]

INNOCENCE

An all-white jury convicted Glenn Ford of murder and recommended the death penalty.[428] Ford's defense team consisted of two appointed attorneys, neither of whom had ever represented a criminal defendant at trial or been trained in capital defense.[429] Throughout years of post-trial proceedings, Ford's appellate lawyers provided significant evidence that Ford's trial had been corrupted by misinterpreted

419 *See id.* at 10.

420 State v. Coleman, 970 So. 2d 511, 516 (La. 2007).

421 *See* Baumgartner, *Race of Defendants and Victims*, *supra* note 85.

422 *See* Caddo Parish Defense Mitigation and Jury Deliberation Times 2006-2015, *supra* note 398.

423 *See* Tucker v. Louisiana, 136 S. Ct. 1801, 1801 (2016); *Campbell*, 983 So. 2d at 830.

424 *See Tucker*, 136 S. Ct. at 1801; *Campbell*, 983 So. 2d at 825.

425 *See* Caddo Parish Defense Mitigation and Jury Deliberation Times 2006-2015, *supra* note 398.

426 *See* State v. Holmes, 5 So. 3d 42, 60 (La. 2008); Charles Ogletree, *The Death Penalty's Last Stand*, SLATE (Jan. 6, 2016),

427 *See* Ogletree, *supra* note 426.

428 *See* Matt Schudel, *Glenn Ford, Wrongfully Convicted in Louisiana Murder Case, Dies at 65*, Wash. Post, July 4, 2015, https://www.washingtonpost.com/national/glenn-ford-wrongfully-convicted-in-louisiana-murder-case-dies-at-65/2015/07/04/0dfa3cec-2266-11e5-84d5-eb37ee8eaa61_story.html.

429 *See* Glenn Ford, Innocense Project New Orleans, http://www.ip-no.org/exonoree-profile/glenn-ford (last visited Aug. 2, 2016).

forensic evidence, inadequate legal representation, and false testimony by both witnesses and police officers.[430] Yet the courts refused to grant Ford a new trial.[431] In 2013, the Caddo Parish District Attorney's Office revealed that someone else had confessed to the crime.[432] The charges against Ford were dismissed, and he was released from prison in March 2014 after three decades of wrongful incarceration.[433] Attorney A.M. "Marty" Stroud III, the lead prosecutor in Ford's case, published an emotional public apology in 2015, saying that in 1984, he "was not as interested in justice as [he] was in winning."[434] Ford died of lung cancer a year later.[435]

THE DEATH PENALTY IN HARRIS COUNTY, TX

#8

PERCENTAGE OF CASES WITH MISCONDUCT FOUND	5%
AVERAGE AMOUNT OF DEFENSE MITIGATION PRESENTED BY DEFENSE LAWYERS	1.1 DAYS
PERCENTAGE OF DEFENDANTS OF COLOR SENTENCED TO DEATH BETWEEN 2010-2015	78% (100% NOT INCLUDING RESENTENCES)
PERCENTAGE OF CASES WITH SIGNIFICANT MITIGATION (AGE AND IMPAIRMENTS COMBINED)	53%
PERCENTAGE OF DEFENDANTS UNDER AGE 21	26%
PERCENTAGE OF DEFENDANTS WITH INTELLECTUAL DISABILITY, SEVERE MENTAL ILLNESS, OR BRAIN DAMAGE	26%
NUMBER OF DEATH ROW EXONERATIONS SINCE 1976	3

**All calculations are based on direct appeal opinions since 2006 unless otherwise noted.*

Harris County easily makes the list of active death sentencing counties. However, there are two important details that are worth noting. First, Harris is one of the most populous counties in America.[436] Second, death sentences have declined precipitously in the last decade.[437] Between 1998 and 2003, Harris had 53 new

430 *See id.*

431 *See Glenn Ford*, *supra* note 428.

432 *See id.*

433 *See id.*

434 *See* A.M. "Marty" Stroud III, *Lead Prosecutor Apologizes for Role in Sending Man to Death Row*, Shreveport Times, Mar. 20, 2015, http://www.shreveporttimes.com/story/opinion/readers/2015/03/20/lead-prosecutor-offers-apology-in-the-case-of-exonerated-death-row-inmate-glenn-ford/25049063/.

435 *See* Schudel, *supra* note 428.

436 *See* Harris Cnty. Budget Mgmt., *Population Study* (Jan 2014), http://www.harriscountytx.gov/CmpDocuments/74/Budget/Population%20Study%20January%202014.pdf (noting that Harris County is the "nation's third most populous county with an estimated 4.34 million residents as of June 30, 2013, and one of the fastest growing counties in the U.S. with a population increase of 28% since 2000 and 54% since 1990").

437 *See* Harris County Death Sentences Spreadsheet 1998-2016, on file with the Fair Punishment Project.

death sentences. Between 2004 and 2009, it had 16. Since 2010, it has had 10. No Harris County jury has imposed the death penalty in a case involving a new defendant since August 2014.[438]

OVERZEALOUS PROSECUTORS

District Attorney Johnny Holmes's office sent at least 200 people to death row back when Harris County was known as the buckle of the death belt.[439] Since 2006, two of Holmes' protégés, Kelly Siegler and Lyn McClellen, are responsible for 28 percent of the death penalty cases that the Texas Court of Criminal Appeals has decided on direct appeal.[440] Kelly Siegler earned the nickname "the Giant Killer" for personally obtaining at least 19 death sentences.[441] She once "had the bloodstained bed from [the victim's] bedroom brought into the courtroom," and then "straddled her colleague, raised one of the actual knives that [the defendant allegedly] used to kill her husband, and reenacted the stabbings."[442] Last year, a Texas court found that Siegler committed 36 instances of misconduct in a single murder case.[443] Meanwhile, McClellen amassed approximately 30 death sentences,[444] including one against a brain-damaged and intellectually impaired man named Max Soffar.[445] A federal appellate court reversed Soffar's conviction, which it labeled a "thin case consisting only of an uncorroborated confession."[446] Despite the weak case against Soffar, and evidence that pointed towards serial killer Paul Reid as the true killer,[447] McClellen successfully sought the death penalty in a new trial.[448] Soffar, who steadfastly maintained his innocence, died of cancer while awaiting federal court review.[449]

438 *See id.* (These numbers do not include resentences during this period. The Harris County DA's Office sought the death penalty in the capital murder trial of Jonathan Sanchez case in 2015, but the jury rejected it and instead sentenced him to life.)

439 *See Deadliest Prosecutors*, *supra* note 9, at 16.

440 *See* Harris County Direct Appeals Spreadsheet 2006-2015, on file with the Fair Punishment Project.

441 *See* Biography for Kelly Siegler, "Cold Justice", TntDrama, http://mobile19.tntdrama.com/series/cold-justice/ (last visited Aug. 3, 2016); *Deadliest Prosecutors*, supra note 9, at 17.

442 This refers to the non-capital murder case (State v. Susan Wright). Skip Hollandsworth, 193, Tex. Monthly, Feb. 2010, *available at* http://www.texasmonthly.com/articles/193/.

443 *See* Brian Rogers, *Judge Cites Prosecutorial Misconduct in Temple Case*, Houston Chron., Jul. 8, 2015, http://www.expressnews.com/news/local/article/Judge-cites-prosecutorial-misconduct-in-Temple-6374157.php; *Ex parte* Temple, No. 1008763-A (178th Crim. D. Ct. of Harris Cnty., Tex., July 6, 2015), https://assets.documentcloud.org/ documents/2159552/judge-cites-prosecutorial-misconduct-in-temple.pdf.

444 Tommy Witherspoon, *McLennan County Prosecutor Likely Holds Active Death Row Record*, Waco Trib., May 24, 2014, http://www.wacotrib.com/news/courts_and_trials/mclennan-county-prosecutor-likely-holds-active-death-row-record/article_548a4b86-4742-5f0a-aa35-bce4a41ad89a.html.

445 *See Deadliest Prosecutors*, *supra* note 9, at 16-17.

446 Soffar v. Dretke, 368 F.3d 441, 479 (5th Cir. 2004).

447 *See id*; Maurice Chammah, *'80 Murder Confession Prompts Call to Require Police to Record Interrogations*, N.Y. Times, Dec. 27, 2012, http://www.nytimes.com/2012/12/28/us/murder-confession-prompts-calls-in-texas-for-recording-interrogations.html.

448 *See* Brian Rogers, *Longtime Prosecutor McClellan Praised for His Service*, Houston Chron., Nov. 27, 2008, http://www.chron.com/news/houston-texas/article/Longtime-prosecutor-McClellan-praised-for-his-1776508.php.

449 *See* Allan Turner, *Twice-Convicted Houston Killer Max Soffar, Suffering Cancer, Dies in Prison*, Houston Chron., Apr. 25, 2016,

In 2014, the Texas Court of Criminal Appeals reversed a conviction and death sentence after finding that Harris prosecutor, Dan Rizzo, withheld critical evidence from the defense.[450] Also in 2014, Devon Anderson, the current District Attorney, personally prosecuted a 21-year-old man despite the fact that the man has an "IQ in the 70s" and is, as his lawyer put it, "just spitting distance from retarded."[451]

INADEQUATE DEFENSE

Harris County became synonymous with terrible capital defense lawyering back in the 1990s when a judge told a defendant who complained that his lawyer kept falling asleep at trial that "the Constitution does not say that the lawyer has to be awake."[452] Another lawyer, Joe Frank Cannon, known for trying death penalty cases like "greased lightning,"[453] also fell asleep in at least two capital trials.[454]

Unfortunately, the state of defense is not much better today. Of the cases decided on direct appeal since 2006, the typical lawyer in a Harris County death penalty trial puts on just one day's worth of mitigation evidence.[455] There are at least two structural reasons for this facially embarrassing statistic. First, elected judges appoint defense lawyers to capital trials in Harris County.[456] This can mean that requesting more money for experts, filing numerous defense motions, or requesting hearings that take up court resources are factors that the judge may consider before re-appointing defense lawyers to another case. Second, and relatedly, defense lawyers are paid a flat fee for their representation.[457] In cases that are resolved pretrial with a plea bargain, the trial court has the option to reduce the flat fee, which creates incentives for lawyers to spend as little time as possible trying to obtain a plea for a sentence less than death.[458] Appointed counsel must also request additional sums for things like secretarial expenses and expert witnesses.[459]

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http://www.chron.com/news/houston-texas/houston/article/Twice-convicted-Houston-killer-Max-Soffar-7307734.php.

450 *See* Brian Rogers, *Man Sent to Death Row in Officer's Killing is Freed*, Houston Chron., June 8, 2015, http://www.chron.com/news/houston-texas/article/DA-6314119.php; Brown v. State, 270 S.W.3d 564 (Tex. Crim. App. 2008); Ex parte Brown, WR-68,876-01, 2014 WL 5745499, at *1 (Tex. Crim. App. Nov. 5, 2014).

451 *See* Brian Rogers, *Jurors Hear Background of Police Officer's Killer*, Houston Chron., Jul. 21, 2014, http://www.chron.com/neighborhood/bellaire/crime-courts/article/Jurors-to-hear-about-cop-killer-s-background-5635651.php.

452 *See* Bruce Shapiro, *Sleeping Lawyer Syndrome*, The Nation, April 7, 1997, 27-29, *available at* https://www.highbeam.com/doc/1G1-19286056.html (quoting Judge Doug Shaver); McFarland v. State, 928 S.W. 2d 482, 507-08 (Tex. Crim. App. 1996).

453 *See* Leonard Pitts, *Justice Is Blind—Unless, Of Course, You're Rich*, Chi. Trib., Aug. 21, 2001, http://articles.chicagotribune.com/2001-08-21/news/0108210027_1_joe-frank-cannon-calvin-burdine-court-appointed-attorney.

454 *See* Debating the Death Penalty 170-72 (Hugo Bedau & Paul Cassell, eds. 2004).

455 *See* Harris County Direct Appeals Spreadsheet 2006-2015, *supra* note 440.

456 *See* Harris Cnty. Courts, Local Rule 24.9, Mar. 28, 2016, *available at* http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=442; Emily DePrang, *Poor Judgment*, Tex. Observer, Oct. 12, 2015, https://www.texasobserver.org/poor-judgment/.

457 *See* Local Rule 24, *supra* note 456, at 24.12.1.

458 *See id.* at 24.12.4.

459 *See id*. at 24.12.5.

Gerald Bourque represented one of every five—or 21 percent—of the individuals whose death sentences have been decided on direct appeal since 2006.[460] He put on one day's or less worth of mitigation evidence in five of the six cases;[461] and two of his clients waived their right to offer mitigation altogether.[462] In the sixth case, his client had been diagnosed with schizophrenia, but the state's expert suggested that he was malingering.[463] During closing argument, Bourque took an unusual and highly ineffective approach to challenging the credibility of the prosecution's expert. He told the jury that "the Government [was] treating [them] like you're a bunch of fascists,"[464] called the state's expert "a liar, pure and simple"[465] and announced that "what [he had] to say in response [would] put me in jail."[466] On appeal, the defendant raised a claim that the expert acted improperly during the trial, but the Texas Court of Criminal Appeals noted that Bourque did not lodge a contemporaneous objection, and thus "slept on his rights and prevented the system's curative process."[467] Though he did not make the necessary objection at trial, Bourque did remember to taunt the state's expert in front of the jury: "I would invite Dr. Moeller, if he's offended by me calling him a liar, my phone number is (713)862-7766. Give me a call. My office address is 24 Waterway, Suite Number 660 in the Woodlands. Come see me. I'm asking you to call Dr. Moeller the liar that he is."[468]

Another lawyer, Jerome Godinich, who had two death sentences during this period,[469] is well known in legal circles because he thrice missed deadlines that resulted in his death-sentenced clients waiving federal court review.[470] He put on only one hour of mitigation evidence for a man who endured severe abuse as a child, suffered from childhood epilepsy that his father attributed to "spirits," had been committed to psychiatric hospitals, and had been found not guilty by reason of insanity in a prior case.[471]

460 *See* Harris County Direct Appeals Spreadsheet 2006-2015, *supra* note 440.

461 *See* Harris County Defense Mitigation and Jury Deliberation Times, on file with the Fair Punishment Project.

462 *See* Williams v. State, 273 S.W.3d 200 (Tx. Crim. Ct. App. 2008); Shore v. State 2007 WL 4375939 (Tx. Crim. Ct. App. 2007).

463 Trial On Merits at 9, Harper v. State, AP-76,452 (Tx. 2010).

464 Closing Statement by Bourque at 39, Harper v. State, AP-76,452 (Tx. 2010).

465 *Id.* at 38.

466 *Id.* at 39.

467 Harper v. State, AP-76,452, 2012 WL 4833834, at *5 (Tex. Crim. App. 2012).

468 Closing Statement, *supra* note 464, at 39.

469 *See* Harris County Defense Times, *supra* note 461.

470 *See* Lise Olsen, *Tardy Texas Lawyers in Capital Cases Still Paid Thousands*, Houston Chron., Apr. 19, 2009, http://www.chron.com/news/houston-texas/article/Tardy-Texas-lawyers-in-capital-cases-still-paid-1739659.php; *Even Sleeping Lawyers Allowed By Courts In Texas Capital Cases*, Second Class Justice (Oct. 26, 2010), http://www.secondclassjustice.com/?p=196.

471 *See* Harris County Defense Times, *supra* note 461; see also Martinez v. State, 327 S.W.3d 727, 731 (Tx. Crim. Ct. App. 2010).

RACIAL BIAS AND EXCLUSION

All 18 men who have been newly sentenced to death in Harris County since November 2004 have been people of color (this does not include a handful of individuals who were re-sentenced to death during this period).[472] If one takes into account those resentences, between 2010 and 2015, 79 percent of the individuals sentenced to death have been people of color.[473]

Former Harris County District Attorney Chuck Rosenthal, whose term ran from January of 2001 to February of 2008, and who oversaw the imposition of approximately 40 death sentences during that period, resigned from the office after civil litigation revealed that he had sent and received racist jokes using his county email account.[474] Rosenthal boasted of having personally put 14 people on death row.[475]

This fall, the U.S. Supreme Court will hear oral arguments in a death penalty case out of Harris County, Texas, in which Duane Buck's own trial counsel introduced testimony from a psychologist who said that Buck was more likely to commit violent crimes in the future because he is Black.[476] In Juan Garcia's case, also out of Harris County, an expert for the State testified that "race plays a role in that among dangerous people, minority people are overrepresented in this population," and "race" cannot be "eliminated" as a risk factor through incarceration.[477] Texas executed Mr. Garcia in 2015.[478]

EXCESSIVE PUNISHMENT

Over half (53 percent) of Harris County death penalty cases decided on direct appeal since 2006 involved significant mitigation evidence.[479] Approximately one

472 Tx. Defender Service, *All new death sentences in Harris County since Nov. 2004 have been handed down against men of color, http://fairpunishment.org/wp-content/uploads/2016/08/Harris-County-Death-Sentences-since-November-2004.pdf* (last accessed Aug. 10, 2016).

473 *See* Baumgartner, *Race of Defendants and Victims*, *supra* note 85.

474 Brian Rogers, et al., *More emails emerge in Harris County DA scandal: County GOP says Chuck Rosenthal should resign*, Houston Chronicle, Jan. 9, 2008, http://www.chron.com/news/houston-texas/article/More-e-mails-emerge-in-Harris-County-DA-scandal-1754858.php; see also Brian Rogers, et al., *Rosenthal cites prescription drugs in resignation as DA*, Houston Chronicle, Feb. 15, 2008, http://www.chron.com/news/houston-texas/article/Rosenthal-cites-prescription-drugs-in-resignation-1600712.php.

475 Mike Tolson, *Part 1: A Deadly Distinction -- Harris County is a pipeline to death row*, Houston Chronicle, Feb. 4, 2001, http://www.chron.com/news/article/Part-1-A-Deadly-Distinction-Harris-County-is-2002524.php.

476 *See* Lincoln Caplan, *Racial Discrimination and Capital Punishment: The Indefensible Death Sentence of Duane Buck*, The New Yorker, Apr. 20, 2016, http://www.newyorker.com/news/news-desk/racial-discrimination-and-capital-punishment-the-indefensible-death-sentence-of-duane-buck.

477 *See Five Reminders That The Death Penalty Is Still Racist*, Fair Punishment Project, http://fairpunishment.org/five-reminders-that-the-death-penalty-is-still-racist/ (last visited Aug. 3, 2016).

478 *See id.*

479 *See* Harris County Direct Appeals Spreadsheet 2006-2015, *supra* note 440.

quarter of the cases (26 percent) involved a defendant under age 21, including three cases where the defendant was only 18 years old at the time of the offense.[480] Forty-five percent involved defendants age 25 and under.[481] Another quarter of the cases involved a defendant with an intellectual disability, brain damage, or severe mental illness.[482] As mentioned above, one of Jerome Godinich's clients had a history of psychiatric hospitalization,[483] and one of Gerald Bourque's clients suffered from schizophrenia.[484]

INNOCENCE

Harris County has had three death row exonerations.[485] In 2014, the Texas Court of Criminal Appeals reversed Alfred Dewayne Brown's conviction and death sentence because prosecutors withheld evidence that could have helped him confirm his alibi.[486] In 2015, District Attorney Devon Anderson acknowledged that the state did not have enough evidence to convict Mr. Brown and that Harris County would not retry him.[487]

Alfred Dewayne Brown

CONCLUSION

Across the country, the death penalty is on life support. Yet, a few isolated counties continue to hold on, imposing death sentences with some regularity. Part I of this report took an in-depth look into how the death penalty operates in practice in half of these 16 outlier counties. We chose at least one county from each of the seven states that contains an active death-sentencing jurisdiction, and included two counties from California, since five of the 16 outlier counties are from Southern California.

480 *See id.*

481 *See id.*

482 *See id.*

483 *See id.*

484 *See* Harris County Defense Times, *supra* note 461; see also Martinez v. State, 327 S.W.3d 727, 731 (Tx. Crim. Ct. App. 2010).

485 The three exonerees are Ricardo Aldape Guerra, Vernon McManus, and Alfred Dewayne Brown. *See Innocence Database*, *supra* note 95.

486 *See* Brian Rogers, *Man Sent to Death Row*, *supra* note 450.

487 *See id.*

One of the most striking findings is the frequency and seriousness of the mitigation evidence we found in the cases that we reviewed. If it is inappropriate to inflict the death penalty on juveniles and persons with intellectual disabilities due to their insufficient moral culpability, then death sentences for people with similar or even greater levels of impairment should be exceedingly rare. They are not. Across the eight counties, we reviewed direct appeals opinions handed down between 2006 and 2015, and found that 18 percent of cases involved a person under the age of 21, and 44 percent involved someone who had an intellectual disability, brain damage, or severe mental illness. This is significant given that the latest neuroscience research indicates that the portions of the brain responsible for judgment and impulse control aren't fully developed until individuals reach their mid-20s. We also discovered that the overall percentage of cases with significant mitigation evidence ranged from 41 percent of cases in Clark County to 71 percent of cases in Caddo Parish. The average across the eight counties is 60 percent.

We also found a pattern of prosecutorial over-aggression; and in several of the counties, persistent misconduct. In Maricopa and Clark counties, for example, courts found some form of misconduct in 21 percent and 47 percent of cases respectively. The average across all eight counties was 15 percent, or around one out of every seven cases. A number of the counties reflected an extreme concentration of death sentences in the hands of a few prosecutors. In Mobile, for example, two prosecutors have tried 11 of the past 12 cases resulting in death sentences. Along with these high numbers of sentences comes an aggressive style of prosecution, one that might not be suitable for making life and death decisions, and the appearance of a personality driven death penalty.

We also discovered a troubling number of exonerations from these eight counties. Five of the eight counties had at least one person exonerated from death row. Harris County has had three death row exonerations, and Maricopa has had five. Outside of the death penalty context, some of these counties have had numerous exonerations in serious felony cases. Kern County alone has had 24 wrongful convictions in serious felony cases since 1989.[488] The pattern of non-capital exonerations is important because it shows inaccurate outcomes from the same offices, and often the same set of felony prosecutors, that try death penalty cases. This is especially important in states like California, where death penalty review can take several decades and the state Supreme Court has a particularly high affirmance rate in capital cases.[489]

488 *See* Nat'l Reg. of Exonerations, U. of Mich. Sch. of L., http://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View=%7BB8342AE7-6520-4A32-8A06-4B326208BAF8%7D&FilterField1=State&FilterValue1=California&FilterField2=County&FilterValue2=8_Kern (filtered for Kern County).

489 *See* Mintz, *supra* note 292.

We found a mirror image of the overzealous prosecutor problem in the inadequate defense lawyering on display across these counties. In most of the counties we reviewed, the average mitigation presentation at the penalty phase of the trial lasted approximately one day. In Duval County, Florida, the entire penalty phase of the trial and the jury verdict often came in the same day. Length of the proceedings itself is not always an indicator of quality, and courts have found ineffectiveness claims in penalty phase proceedings that lasted weeks, but a single day's worth of mitigation evidence is almost always a sign of subpar lawyering. Not surprisingly, then, when we dug beneath the surface of these cases, we frequently found the same defense lawyers repeatedly represented clients who ended up on death row. The quality of defense lawyers ranged from moderately deficient to extremely detrimental in some of the cases with the most egregious lawyering.

Finally, a definitive pattern of persistent racial bias and exclusion emerged from these counties. In looking at the death sentences between 2010 and 2015 for the eight counties, we found just three white defendants sentenced to death for killing Black victims. One of those cases was from Riverside, and in that case the defendant was also convicted of killing two additional white victims. The two other cases were from Duval. In contrast, in Mobile County 67 percent of the Black defendants sentenced to death were convicted of killing white victims. In Clark, 67 percent of victims were white in cases involving a Black defendant. Out of all of the death sentences obtained in these counties, 41 percent were given to African-American defendants, and 69 percent were given to people of color. In Duval, 87 percent of defendants were Black. Moreover, we saw the continued exclusion of Black jurors from capital trials, meaning that these citizens tend to be excluded from the most important life or death decision that a state asks its citizens to make. Finally, in several counties, we noted historical biases and racism that still lingers.

Our findings, taken together, suggest that the small handful of counties that are still using the death penalty are plagued by persistent problems of overzealous prosecutors, ineffective defense lawyers, and racial bias, resulting in the conviction of innocent people and the excessively harsh punishment of people with significant impairments that are on par with, or even worse than, the categorical exclusions that the Court has said should exempt individuals from execution due to lessened culpability.

In Part II of this report, we will similarly examine the record of the remaining eight outlier counties, which include: Dallas (TX), Jefferson (AL), Pinellas (FL), Miami-Dade (FL), Hillsborough (FL), Los Angeles (CA), San Bernardino (CA), and Orange (CA).

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ABOUT THE FAIR PUNISHMENT PROJECT:

The Fair Punishment Project uses legal research and educational initiatives to ensure that the U.S. justice system is fair and accountable. As a joint initiative of Harvard Law School's Charles Hamilton Houston Institute for Race & Justice and its Criminal Justice Institute, we work to highlight the gross injustices resulting from prosecutorial misconduct, ineffective defense lawyers, and racial bias, and to illuminate the laws that result in excessive punishment. For more information visit: www.fairpunishment.org.