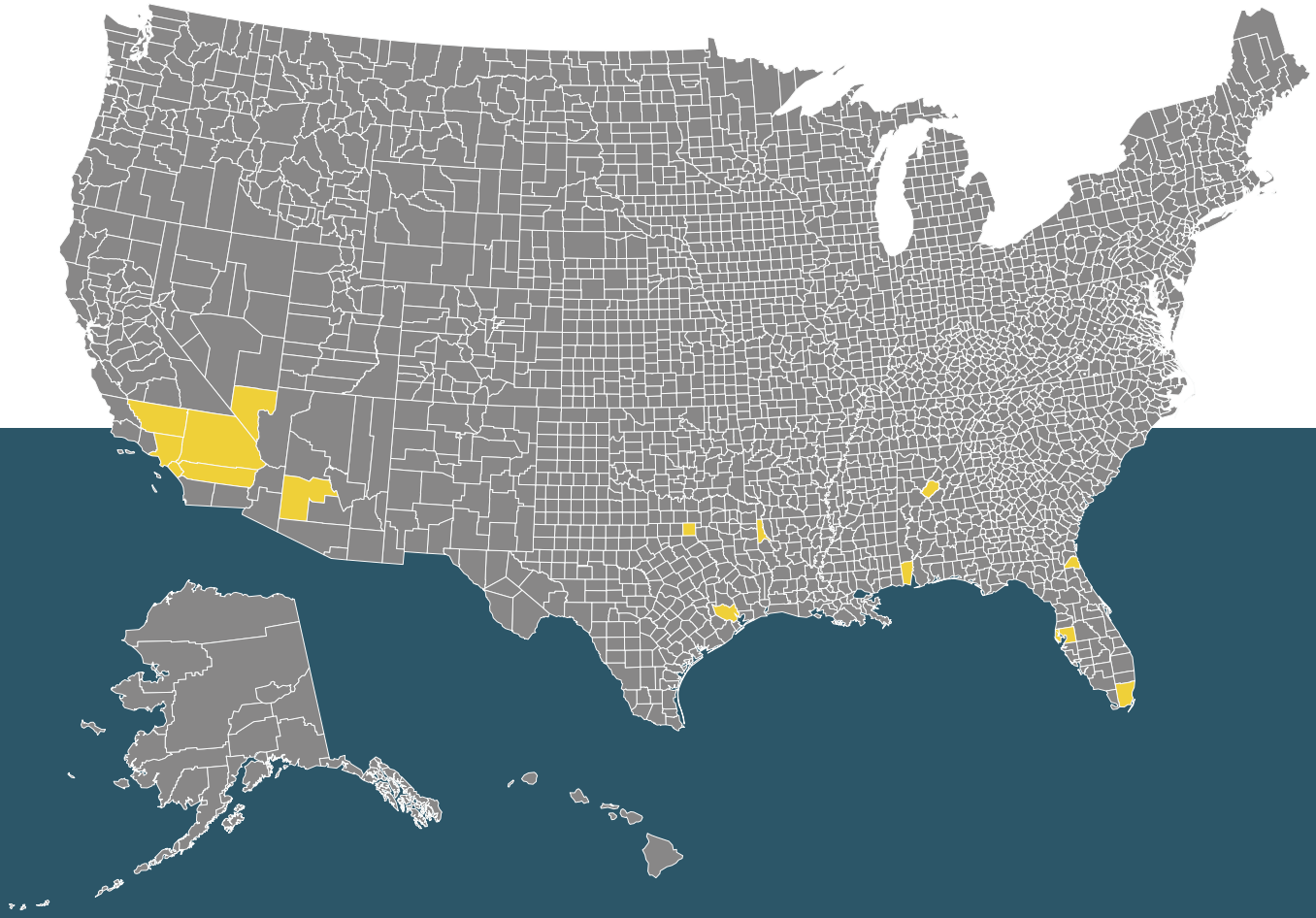
FAIR PUNISHMENT PROJECT



Too Broken to Fix: Part II

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

SEPTEMBER 2016

INTRODUCTION

As we noted in Part I of this report, the death penalty in America is dying.

In 2015, juries only returned 49 death sentences—the fewest number since the death penalty was reinstated in 1976.[1] Of the 31 states that legally retain the death penalty,[2] only 14—or less than half—imposed a single death sentence in 2015.[3] When we look at 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 33 counties—or one percent—imposed a death sentence in 2015. Just 16—or one half of one percent—imposed five or more death sentences between 2010 and 2015.[4] Among these outliers, six 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.[5] Of the remaining 10 counties, five are located the in highly-populated Southern California region (Kern, Los Angeles, Orange, Riverside, and San Bernardino). The others include Caddo Parish (LA), Clark (NV), Dallas (TX), Harris (TX), and Maricopa (AZ). As Justice Stephen Breyer noted in his 2015 dissent in *Glossip v. Gross*,[6] "the number of active death penalty counties is small and getting smaller."[7]

In this two-part report, we have endeavored to figure out what makes these 16 counties different by examining how capital punishment operates on the ground in these outlier death-sentencing counties. In Part II, we highlight Dallas (TX), Jefferson

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

2 *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).

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

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

5 *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/.

6 Glossip v. Gross, 135 S.Ct. 2726 (2015).

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

(AL), San Bernardino (CA), Los Angeles (CA), Orange (CA), Miami-Dade (FL), Hillsborough (FL), and Pinellas (FL) counties.

Our review of these counties, like the places profiled in Part I, 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.

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 significant mental impairments. 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.

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 combined 131 death sentences,[9] the equivalent of one in every 25 people on death row in America

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).

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

today, and they had remarkably high rates of misconduct.[10] Strikingly, once these types of prosecutors leave office, death-sentencing rates ultimately plummet in their respective counties.[11] 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.[12] Their willingness to cut corners, even in cases that literally involve life and death decisions,[13] 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."[14] 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,[15] which ultimately leads to unmitigated prosecutorial abuse, disproportionately harsh sentences, and the conviction of innocent people.[16] In Part II of 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.

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

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 supra* note 9.

12 *See id.*

13 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.

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

15 *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).

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

discrimination based on the race of the victim, the race of the defendant, or both."[17] 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.[18] 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. We also include several historical and contemporary examples of how racial bias has permeated many aspects of the justice system in these counties. These examples seek to illustrate how a broader climate of bias can foster disparate outcomes in capital sentencing.

EXCESSIVE PUNISHMENT

The Eighth Amendment limits the death penalty to offenders with "a consciousness materially more depraved" than the "typical murderer."[19] 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.[20] However, there are many defendants who also have a diminished culpability similar to these "categorically exempted" defendants, but fall through the cracks of justice.[21] These include people with borderline intellectual functioning (people with IQs in the 70s and low 80s);[22] persons under 21 years old;[23] persons who have suffered extreme childhood trauma, including physical or sexual abuse;[24] persons with severe mental illnesses (SMI);[25] and those with organic brain damage.[26] The latest neuroscience research indicates that the parts of the brain responsible

17 *Arbitrariness*, Death Penalty 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).

18 *See* Jennifer L. Eberhardt, P.G. Davies, Valerie J. Purdie-Vaughns & Sheri Lynn Johnson, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 J. of Psychol. Sci. 383, 383-385 (2006).

19 Robert J. Smith, Sophie Cull, and Zoë Robinson, The Failure of Mitigation?, 65 Hastings L. J. 1221, 1222 (2014).

20 *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).

21 *See, e.g., Recommendation 122A*, Am. Bar Ass'n, 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).

22 *See id.* at 4; *see also Intellectual Disability*, Am. Psychol. Ass'n (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.

23 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. Res. 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.

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

25 *See Recommendation 122A*, *supra* note 21, at 6-9.

26 *See id.* at 5.

for key functions, such as impulse control and judgment, are not fully formed until an individual is in his mid-20s.[27] 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.[28] Nearly half of these exonerations have occurred since the start of 2000 with the development of more reliable scientific techniques.[29] Exonerations are common in jurisdictions with overly aggressive prosecutors and inadequate defenders. Sixty-one percent of these exonerations involved defendants of color.[30] The 16 outlier counties discussed in this report have accounted for at least 10 percent of the nation's death row exonerations.

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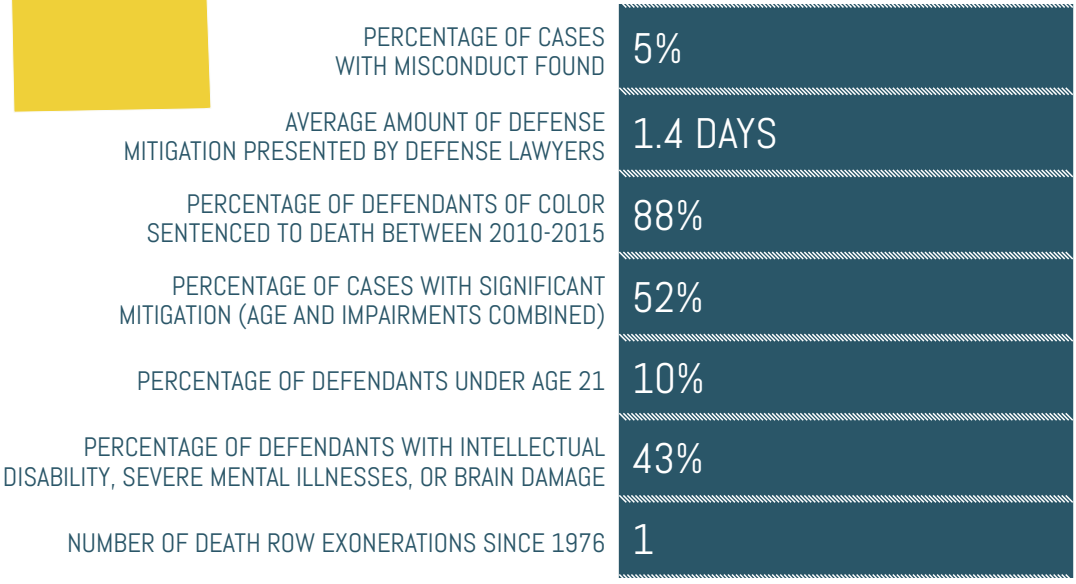
THE DEATH PENALTY IN DALLAS COUNTY, TX



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

Dallas County imposed seven new death sentences, and one resentence, for a total of eight death sentences between 2010 and 2015. Overall, Dallas County juries have sentenced 107 people to death since 1976 (not including resentences),

27 *See, e.g.*, Albert & Steinberg, *supra* note 23, at 212-17.

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

29 *See id.*

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

ranking second among Texas counties to Harris County, which, according to the Texas Department of Criminal Justice, sentenced 294 people to death in this same period.

OVERZEALOUS PROSECUTORS

Dallas County did not seek or sentence anyone to death during District Attorney Susan Hawk's entire tenure, which began in early 2015 and ended with her resignation in September 2016.[31] The last year in which Dallas County imposed a death sentence in a trial involving a new defendant was 2013.[32] However, before this decline in death sentencing began, three prosecutors -- Andy Beach, Pat Kirlin, and Toby Shook -- were responsible for obtaining 13 out of 21 death sentences (62 percent) that were decided on direct appeal between 2006 and 2015.[33] Kirlin alone obtained six, Shook four, and Beach three.[34]

Andy Beach once told reporters that the district attorney office's "sole focus, our sole goal, our sole objective in this case is for . . . [the defendant] to be strapped to the gurney and for the drugs to start to flow."[35] In a different case involving a defendant whose sentence had been overturned, and who was just 21 years old at the time of the crime and had an 18-year record of non-violence in prison,[36] prosector Pat Kirlin opined, "once a psycopath, always a psycopath."[37] Kirlin also noted that this defendant's "physical and emotional abuse" and a "terrible drug addiction" did not "give us cause for concern," with regards to seeking the death penalty again, as it is "all standard fare in death penalty cases."[38] In another case, Kirlin obtained a death sentence against an intellectually impaired man with a below-70 IQ who likely suffered from paranoid delusions when he committed the crime.[39] Toby Shook obtained the death sentence against Michael Anthony Rodriguez, who was molested by a priest as a child.[40]

31 *See Texas Death Penalty Developments in 2015—The Year in Review*, Tex. Coal. to Abolish the Death Penalty (Dec. 15, 2015), http://tcadp.org/wp-content/uploads/2015/12/Texas-Death-Penalty-Developments-in-2015.pdf (stating that "Prosecutors in Dallas and Tarrant Counties did not pursue the death penalty in any new capital murder trials in 2015."); Jennifer Emily, Dallas DA Susan Hawk Resigns: 'My Health Needs My Undivided Attention', Dallas Morning News, Sept. 6, 2016, http://www.dallasnews.com/news/news/2016/09/06/dallas-da-susan-hawk-resigns-governor-will-appoint-replacement.

32 *See Id.*

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

34 *See id.*

35 *Death Penalty News--Texas*, Tex. Coal. to Abolish the Death Penalty (Dec. 11, 2008), http://tcadp.org/2008/12/11/death-penalty-news-texas-266/.

36 *See Id.*

37 Patrick Kirlin, *A New Punishment Hearing for a Mass Murderer*, Tex. Dist. & Cnty. Att'y Ass'n (Sept.-Oct. 2009), http://www.tdcaa.com/node/5257.

38 *See id.*

39 *See* Dallas Direct Appeals, *supra* note 33.

40 *See id.*

Notably, death sentencing in Dallas County has declined sharply since Shook and Beach left the D.A.'s office and Kirlin moved into an administrative role.[41]

INADEQUATE DEFENSE

We examined the mitigation phase proceedings in 19 of the 21 death penalty cases decided on direct appeal since 2006 (two case records were unavailable).[42] Our findings revealed that while at least nine of the 21 individuals (43 percent) sentenced to death had serious mental illnesses, a low IQ, developmental delays, or brain trauma,[43] the average mitigation presentation from the defense lasted less than one and a half days.[44]

Two private defense lawyers, Paul Brauchle and Paul Johnson, represented nearly half of these defendants.[45] They each represented four men independently and co-represented John David Battaglia.[46] Paul Brauchle presented less than a day's worth of mitigation evidence in three of his four cases.[47] Like Brauchle, Johnson's average penalty phase presentation lasted one day, including two cases that lasted less than a single day.[48] Johnson and Brauchle spent less than a day presenting mitigating evidence about Battaglia to the jury, even though Battaglia was mentally impaired and likely psychotic during the offense.[49]

Another case from our review period involves Juan Lizcano, who was sentenced to death despite "several IQ tests that resulted in scores of 69, 62, 60, 53 and 48."[50] At a post-conviction hearing challenging Lizcano's death sentence, mitigation investigator Debbie Nathan testified that Lizcano's attorneys "weren't communicating with [her]" and opined that they "should have done more work

41 *See Former DA Bill Hill Joins Dallas Criminal-Defense Firm*, Tex. Lawyer (Feb. 11, 2008) http://texaslawyer.typepad.com/texas_lawyer_blog/2008/02/former-da-bill.html; *See Leadership, Patrick Kirlin,--Administrative Chief*, Dallas Cnty. Dist. Att'y, https://www.dallascounty.org/department/da/staff/pat_kirlin.php (last visited Sept. 20, 2016).

42 *See supra* note 33.

43 *See id.*

44 *See id.*

45 *See id.*

46 *See id.*

47 *See id.*

48 *See id.* Naim Rasool Muhammad had evidence of childhood trauma, and his mitigation phase lasted one day and a half. In his appeal, counsel argued that there was "evidence of his terrible childhood and his low cognitive functioning to explain his criminal behavior." Another client, Gary Green, who mitigation presentation also lasted one and a half days, had schizoaffective disorder and checked himself into psychiatric hospital shortly before crime.

49 Sarah Mervosh, *Dallas Accountant Battaglia, Who Murdered his 'Little Babies' to be Executed Wednesday*, Dallas Morning News, (Mar. 29, 2016) http://crimeblog.dallasnews.com/2016/03/dallas-accountant-who-murdered-his-little-babies-to-be-executed-wednesday.html/.

50 *See* Brief In Opposition To Petition For A Writ Of Certiorari From The Court of Criminal Appeals Of Texas, Lizcano v. Texas, No.15-65, at 6, 17, available at http://www.scotusblog.com/wp-content/uploads/2015/10/Lizcano-BIO-booklet.pdf.

on the punishment phase."[51] Unfortunately, Lizcano's post-conviction claim of intellectual disability was rejected in a four-paragraph opinion.[52] Had Lizcano's trial attorneys done more to substantiate his disability, this outcome may have been different.

RACIAL BIAS AND EXCLUSION

Racial prejudice and biased policies have plagued the Dallas County D.A.'s office for decades. Beginning in 1963, an office manual instructed prosecutors not to "take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated."[53] Former Dallas D.A. Henry Wade, who served between 1951 and 1987, once reprimanded an assistant prosecutor and warned, "If you ever put another nigger on a jury, you're fired."[54] In *Miller-El v. Dretke*,[55] the U.S. Supreme Court overturned a defendant's 1986 conviction for capital murder after finding that the Dallas County D.A.'s office eliminated 10 of 11 eligible Black jurors on the basis of race.[56] Justice Kennedy noted a "culture of discrimination" in the D.A.'s office that was "suffused with bias against African-Americans."[57]

A review of death sentences between 2010 and 2015 revealed that 88 percent of death sentences in this period were imposed on African-American defendants,[58] which is dramatically higher than the percentage of homicide suspects who are Black.[59] Less than one-quarter of Dallas County's population is African-American.[60]

51 *See* Scott Goldstein, *Investigator For Dallas Cop Killer's Defense Team Testifies That Attorneys Hindered Her Work, Failed To Communicate*, Dallas Morning News, Nov. 2012, http://www.dallasnews.com/news/crime/2012/11/09/investigator-for-dallas-cop-killers-defense-team-testifies-that-attorneys-hindered-her-work-failed-to-communicate.

52 *See* Ex Parte Lizcano, No. WR-68, 348-03 (Tx. Crim. Ct. App. 2015); *Lizcano v. Texas*, SCOTUSblog, http://www.scotusblog.com/case-files/cases/lizcano-v-texas/ (last visited Sept. 28, 2016). Indeed, Justice David Newell of the Texas Court of Criminal Appeals dissented in 2015, noting that the evidence used to defeat Lizcano's intellectual disability claim "merely consisted of evidence that a former girlfriend of six months called applicant 'very bright'; that a deputy at the jail did not think that applicant was mentally impaired and that applicant had no problems with personal hygiene while being held in jail pending trial; and that applicant had the ability to make timely car payments." See Ex Parte Lizcano at 348-03 (Newell, J., dissenting).

53 David G. Savage, *High Court Revisits Case of Racial Bias in Jury Selection*, L.A. Times, (Dec. 7, 2004), http://articles.latimes.com/2004/dec/07/nation/na-death7.

54 *See* Bob Herbert, *In America; Tainted Justice*, N.Y. Times, Aug. 6, 2001, *available at* http://www.nytimes.com/2001/08/06/opinion/in-america-tainted-justice.html?_r=0.

55 *See* Miller-El v. Dretke, 545 U.S. 231 (2005).

56 *See* Miller-El v. Cockrell, 537 U.S. 322, 331 (2003).

57 *Id.* at 347.

58 *See* Frank Baumgartner, *Race of Defendant and Victims 2010-2015*, http://fairpunishment.org/wp-content/uploads/2016/09/RaceofDefendantsandVictims2010-2015.pdf (last updated Sept. 20, 2016).

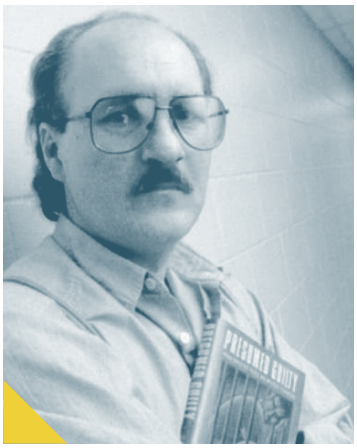
59 *See* Naomi Martin, *Dallas murders jumped 17 percent in 2015, to 136, but rate among lowest in history*, The Dallas Morning News, (Jan. 7, 2016), http://www.dallasnews.com/news/crime/headlines/20160107-dallas-murders-jumped-17-percent-in-2015-to-136-but-rate-among-lowest-in-history.ece.

60 *See QuickFacts for Dallas Cnty.*,U.S. Census Bureau, http://www.census.gov/quickfacts/table/PST045215/48113 (last visited Sept. 21, 2016).

EXCESSIVE PUNISHMENTS

In our review, 11 out of 21 cases, or 52 percent, had evidence of the kind of impairments that render the death penalty disproportionately harsh.[61] This includes nine cases involving serious mental illness, brain damage, or intellectual impairment.[62] Two cases involved defendants under the age of 21.[63] One out of every five cases involved a defendant age 25 or younger.[64]

Under Bill Hill, who served between 1999 and 2006, the D.A.'s office obtained death sentences against a brain-damaged man,[65] a bipolar man,[66] and a man with PTSD.[67] Hill's successor, former D.A. Craig Watkins, sent a borderline intellectually-disabled, schizophrenic man with a history of childhood sexual abuse to death row.[68] Watkins also obtained a death sentence for a man with an IQ of 78 who had schizoaffective bipolar and major depressive disorder, and who was checked into a psychiatric hospital five days before his crime.[69]



Randall Dale Adams

INNOCENCE

Errol Morris's 1988 film, "The Thin Blue Line,"[70] depicts the wrongful conviction of Randall Dale Adams who was convicted of murdering a police officer in 1977 and subsequently sentenced to death (later commuted to life) in Dallas County.[71] It was later discovered that prosecution witnesses had committed perjury, and a document signed by Adams was misrepresented at trial as an admission.[72] Adams was exonerated in 1989 after spending 13 years in prison for a murder he didn't commit, including time on death row.[73]

61 *See supra* note 33.

62 *See id.*

63 *See id.*

64 *See id.*

65 *See* Ochoa v. State, AP-74,663 (Tex. Crim. App. 2005).

66 *See* Battaglia v. State, No. AP-74,348, 2005 WL 1208949, at *3 (Tex. Crim. App. May 18, 2005).

67 *See* Murphy v. State, No. AP-74,851, 2004 WL 1096924 (Tex. Crim. App. Apr. 26, 2006).

68 *See* Cade v. State, No. AP-76,883, 2015 WL 832421, at * 3, 5 (Tex. Crim. App. Feb. 25, 2015).

69 *See* Green v. State, No. AP-76,458, 2012 WL 4673756, at * 29-30 (Tex. Crim. App. Oct. 3, 2012).

70 The Thin Blue Line (distributed by Miramax 1988).

71 *See* Douglas Martin, *Randall Adams, 61, Dies; Freed With Help of Film*, N.Y. Times, Jun. 25, 2011, http://www.nytimes.com/2011/06/26/us/26adams.html?_r=0.

72 *See id.*

73 *See id.*

Mr. Adams is not alone. Since 1989, at least 51 individuals have been exonerated of serious crimes in Dallas County.[74] Christopher Scott, convicted of murder and sentenced to life without parole, was released in 2009.[75] He recalled that he "had 12 white jurors, a white judge, a white prosecutor, a white lawyer. I was the only black person in the courtroom. When I walked in, I knew I was going to be found guilty."[76] Entre Nax Karage was also convicted of murder, sentenced to life, and later exonerated by DNA evidence.[77] James Lee Woodward was convicted of murder and rape, sentenced to life, and exonerated in 2009 by DNA evidence.[78] Prosecutors hid evidence that would have cast significant doubt on Woodward's guilt.[79] Prosecutors also allegedly hid evidence when trying Richard Miles, who was convicted of murder and attempted murder but exonerated in 2012.[80]

THE DEATH PENALTY IN MIAMI-DADE COUNTY, FL

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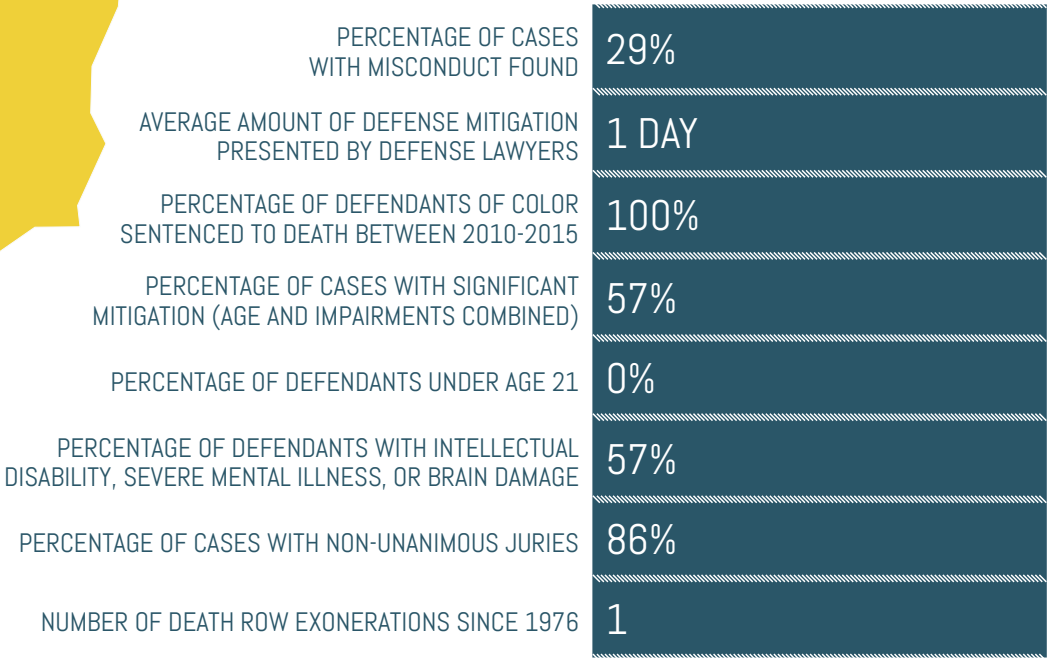


**All calculations are based on direct appeal opinions since 2006 unless otherwise noted.*

74 *See* Nat'l Reg. of Exonerations, U. Mich. Sch. Of L., https://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={B8342AE7-6520-4A32-8A06-4B326208BAF8}&FilterField1=State&FilterValue1=Texas&FilterField2=County&FilterValue2=8_Dallas, (Last visited on September 20, 2016.)

75 *See* Michael May, *Freedom Fighters*, Tex. Observer, May 25, 2011, https://www.texasobserver.org/freedom-fighters/.

76 *See Id.*

77 *See* Jennifer Emily, *Entre Nax Karage: The only Dallas County DNA exoneration not based on eyewitness testimony*, The Dallas Morning News Oct. 17, 2008, http://crimeblog.dallasnews.com/2008/10/entre-nax-karage-the-dallas-co.html/.

78 *See James Lee Woodard*, The Innocence Project, http://www.innocenceproject.org/cases/james-lee-woodard/ (last visited Sept. 21, 2016).

79 *See Id.*

80 *See* Leslie Minora, *Two Years After Wrongfully Convicted Richard Miles Was Released, He's Officially Innocent*, Dallas Observer, Feb. 15, 2012, http://www.dallasobserver.com/news/two-years-after-wrongfully-convicted-richard-miles-was-released-hes-officially-innocent-7108362 (explaining that "when the case was explored years later, it was discovered that two police reports were never turned over to the defense, as is required of the prosecution.").

While Miami-Dade County barely makes this list with only five death sentences between 2010 and 2015, Miami has historically been a major contributor in Florida's outsized pursuit of the death penalty. Even with its relatively low numbers, Miami's death sentencing tally still qualifies the county for inclusion in our list of outliers.

OVERZEALOUS PROSECUTORS

While Miami's rate of death sentencing has decreased over recent years, Florida courts continue to frequently chastise the county's prosecutors' behavior in seeking these sentences. In fact, out of the eight counties we look at in Part II of this report, Miami had the highest rate of prosecutorial misconduct (29 percent), and the second highest rate among the 16 outlier counties.[81]

In 2012, Justice Barbara Pariente took the unusual step of writing a separate opinion in a death penalty case on direct appeal to the Florida Supreme Court to call attention to Miami-Dade prosecutor Abbe Rifkin's "flagrant violations" of conduct norms, mentioning that Rifkin performed "an imaginary script" of the young victim's thoughts before death, inappropriately accused the defense of misconduct, and told jurors that "recommending a life sentence would essentially be an easy way out."[82] In the same year, the Florida Supreme Court reversed Wadada Delhall's death sentence after determining that a different Miami-Dade prosecutor's inappropriate remarks were "overkill."[83] The court wrote that the prosecutor "appeared to be committed to winning a death recommendation rather than simply seeking justice."[84] In 2016, the state Supreme Court reversed another defendant's death sentence because the prosecutor gave an "inflammatory, egregious, and legally improper closing argument."[85]

One former Assistant State Attorney who "supervised or handled every homicide case for a decade, beginning in the 1980s" has been "credited with sending more men to death row than any other Florida prosecutor."[86] In an interview, this prosecutor explained that he was skeptical of the impact that mitigating evidence

81 Clark County, profiled in Part I, had the highest at 47 percent. See Fair Punishment Project, Too Broken To Fix Part I: An In-Depth Look At America's Outlier Death Penalty Counties (Aug. 2016), available at http://fairpunishment.org/wp-content/uploads/2016/08/FPP-TooBroken.pdf.

82 *See* Braddy v. State, 111 So. 3d 810, 850-51 (Fla. 2012).

83 Delhall v. State, 95 So.3d 134, 168 (Fla. 2012).

84 *Id.* at 170.

85 *New trial ordered for Florida woman sentenced to death in killing of 3-year-son*, Reuters, Feb. 18, 2016, http://www.reuters.com/article/us-florida-court-idUSKCN0VS00V.

86 *Miami Death Penalty Prosecutor Retires*, The Crime Report (Apr. 30, 2009), http://thecrimereport.org/2009/04/30/miami-death-penalty-prosecutor-retires/.

should have on determining whether death is the appropriate punishment, saying, "Of course I feel bad that society has created a monster, but should the bad background in the past disable us from imposing an appropriate punishment now?"[87] This same prosecutor appeared dismissive of a defendant's young age, stating "Just because you are six months or 10 months from reaching the magic age of 18, doesn't change the fact you are essentially a broken toy at this point -- and you are not going to get fixed."[88]

INADEQUATE DEFENSE

The average defense mitigation presentation in Miami lasted one day, and at least one case heard on direct appeal between 2006 and 2015 had no mitigation presented at all.[89] While some defense attorneys achieve better results than others, private attorneys frequently lack the resources to spend dozens or even hundreds of hours preparing a compelling mitigation presentation, which includes acquiring expert testimony on their client's mental health, intellectual functioning, and background, in order to resolve the case pre-trial. Despite this lack of resources, six out of seven defendants from our review period were sentenced to death by non-unanimous juries, showing that some jurors were nonetheless swayed by the mitigation presentations.[90]

In contrast to the private bar, the Miami Public Defender's Office Capital Litigation Unit appears to be able to spend significant time and resources investigating cases and presenting mitigation evidence. Edith Georgi, for example, has handled dozens of capital cases, resolving more than 30 cases pre-trial, and trying seven capital cases, only two of which have resulted in a death sentence.[91] In one of Georgi's cases, the mitigation presentation she gave on behalf of her client was approximately double the length of the average mitigation presentation in Miami-Dade County.[92]

In at least two out of the seven cases that had direct appeal opinions in our review period, the vast majority of the testimony presented during the mitigation phase of

87 David McCord, *Switching Juries Midstream: The Perplexities of Penalty-Phase-Only Retrials*, 2 Ohio St. J. Crim. L.215, 250 (2004).

88 Carol Marbin Miller, *Supreme Court to Review Cases of Juveniles Sentenced to Life in Prison*, Truthout Archives, Nov. 9, 2009, http://www.truth-out.org/archive/item/86707:supreme-court-to-review-cases-of-juveniles-sentenced-to-life-in-prison.

89 *See* Miami-Dade County Direct Appeals Spreadsheet 2006-2015, on file with the Fair Punishment Project.

90 *See id.*

91 *See* Margot Moss, *Dade County Bar Association Criminal Justice Award Nomination Edith Georgi Houlihan*, Dec. 12, 2014, *available at* https://www.dadecountybar.org/wp-content/uploads/2015/01/2015-Criminal-Justice-Award-Eidth-Georgi-Houlihan.pdf (last visited Sept. 21, 2016).

92 *See* Miami-Dade Direct Appeals, *supra* note 89.

the trials was from the defendants' family and friends.[93] Unfortunately, the Florida courts give minimal weight to this type of evidence compared to testimony from medical and mental health experts.[94] The mitigation presentation lasted less than one day in one of these cases, and just two days in the other.[95]

RACIAL BIAS AND EXCLUSION

Miami-Dade County is one of just four Florida counties to have executed more than five individuals between 1976 and 2014.[96] One recent study by Professor Frank Baumgartner of the University of North Carolina at Chapel Hill found that a defendant in Florida is 6.5 times more likely to be executed if the victim is a white female than if the victim is a Black male.[97] Between 2010 and 2015, 100 percent of the defendants sentenced to death in Miami-Dade County were Black or Latino.[98]

In 2015, the Miami Beach Police Department faced a major scandal over racist, sexist, and pornographic emails on work servers, which involved more than a dozen officers, including two high-ranking officers.[99] According to CBS News, "One of the racially offensive emails depicted a board game called 'Black Monopoly' in which every square says 'go to jail.'"[100] The implicated officers were involved as witnesses in approximately 540 cases.[101]

EXCESSIVE PUNISHMENTS

Out of seven cases that were decided on direct appeal between 2006 and 2015, more than half had evidence of the kind of crippling impairments that render the death penalty disproportionately harsh.[102] This includes four cases involving

93 *See id.*

94 *See, e.g.*, Hutchinson v. State, No. SC01-500 (Fla. 2004), available at http://caselaw.findlaw.com/fl-supreme-court/1059036.html (discussing weight given to different types of mitigating factors in a death sentencing case in Florida); see generally Calhoun v. State, No. SC12-1086 (Fla. 2013), *available at* http://caselaw.findlaw.com/fl-supreme-court/1648564.html (also discussing how the Florida Supreme Court weighs various mitigating factors in a death case).

95 *See* Miami-Dade Direct Appeals, *supra* note 89.

96 *See* Frank R. Baumgartner, *The Impact of Race, Gender, and Geography on the Florida Death Penalty*, (Jan. 14, 2016), http://www.unc.edu/~fbaum/articles/Baumgartner-Florida-executions-Jan2016.pdf. In contrast, "more than half of all Florida counties (36) have never produced an execution."

97 *See id.*

98 *See* Baumgartner, *Race of Defendants and Victims*, *supra* note 58.

99 *See Chief: Miami Beach police sent hundreds of racist, pornographic emails*, CBS News, (May 15, 2015, 1:28 PM), http://www.cbsnews.com/news/miami-beach-police-sent-hundreds-of-racist-and-pornographic-emails-departments-chief-says/.

100 *See id.*

101 *See id.*

102 *See Miami-Dade Direct Appeals, supra* note 89.

defendants with serious mental illness, brain damage, or intellectual impairment. Two cases involved defendants under the age of 25.[103]

A Miami prosecutor pursued the death penalty for Victor Caraballo, a mentally disabled man who was "the product of child abuse, incest, and neglect."[104] There was a genuine question at trial as to whether Caraballo was competent enough to proceed.[105] Despite the fact that Caraballo did not actually commit the murder,[106] he received the death penalty by a non-unanimous vote.[107] Miami prosecutors also pressed for a death sentence for Michael Seibert, whose trial judge noted that he "had a history of psychological problems."[108] Seibert started abusing drugs at age nine and was placed in a long-term psychiatric facility when he was only 14 years old; while there, he broke both his arms and attempted suicide.[109]

INNOCENCE

Anibal Jaramillo was wrongfully convicted and sentenced to death for three murders in 1981 despite the fact that the jury unanimously recommended a life sentence.[110] His sentence was later overturned by the Florida Supreme Court. He was sentenced by Judge Ellen Morphonios, who was known as "the hanging judge" for her extremely harsh sentences.[111] Judge Morphonios kept a toy electric chair in her chambers, and she personally sentenced at least 15 individuals to death.[112] At least three other individuals have been wrongfully convicted of murder or manslaughter in Miami-Dade County since 1989.[113]

103 *See id.*

104 Madeline BarM-s Diaz, *Attorney Asks Jury to Spare Caraballo*, Sun Sentinel (Apr. 17, 2007), http://articles.sun-sentinel.com/2007-04-17/news/0704160281_1_victor-caraballo-death-penalty-ana-maria-angel.

105 Caraballo v. State, 39 So.3d 1234, 1242, 1250 (Fla. 2010).

106 *See* David Ovalle, *Death Sentence for Defendant in Ana Maria Angel Murder is Overturned*, Miami Herald (June 24, 2010), http://articles.sun-sentinel.com/2010-06-24/news/fl-angel-death-sentence-tossed-20100624_1_penalty-phase-death-penalty-death-sentence (stating that "Caraballo was not the triggerman").

107 *See Caraballo*, 39 So.3d at 1242, 1250.

108 Seibert v. State, 923 So.2d 460, 466 n.3 (Fla. 2006).

109 Amended Initial Brief of Appellant, Seibert v. State, No. SC03-800, at 37-38 (Fla. 2004), available at http://archive.law.fsu.edu/library/flsupct/sc03-800/03-800amdini.pdf.

110 *See Innocence Cases*, Death Penalty Info. Ctr, http://www.deathpenaltyinfo.org/innocence-cases (last visited Sept. 21, 2016).

111 *See* Myrna Oliver, *Ellen J. Morphonios, 73; Idiosyncratic Judge*, L.A. Times (December 26, 2002), http://articles.latimes.com/2002/dec/26/local/me-ellen26.

112 *See Id.*

113 *See* Nat'l Reg. of Exonerations, U. Mich. Sch. Of L. https://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={B8342AE7-6520-4A32-8A06-4B326208BAF8}&FilterField1=State&FilterValue1=Florida&FilterField2=County&FilterValue2=8_Miami-Dade (last visited Sept. 21, 2016).

THE DEATH PENALTY IN SAN BERNARDINO COUNTY, CA

#11

PERCENTAGE OF CASES WITH MISCONDUCT FOUND	7%
AVERAGE AMOUNT OF DEFENSE MITIGATION PRESENTED BY DEFENSE LAWYERS	1.2 DAYS
PERCENTAGE OF DEFENDANTS OF COLOR SENTENCED TO DEATH BETWEEN 2010-2015	40%
PERCENTAGE OF CASES WITH SIGNIFICANT MITIGATION (AGE AND IMPAIRMENTS COMBINED)	64%
PERCENTAGE OF DEFENDANTS UNDER AGE 21	7%
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.*

San Bernardino County sentenced five people to death between 2010 and 2015.[114] The county's rate of death sentencing per 100 homicides is approximately 40 percent higher than the rest of the state of California.[115]

OVERZEALOUS PROSECUTORS

Mike Ramos has served as District Attorney of San Bernardino County since 2002.[116] Ramos is one of the most vocal advocates for Proposition 66,[117] a November 2016 ballot initiative that attempts to speed up executions by requiring inexperienced attorneys to handle capital cases and imposing strict timelines on the appeals process. Several legal experts suggest that Proposition 66 will increase the risk of executing an innocent person.[118]

A review of direct appeals from the past decade reveals that the San Bernardino County District Attorney's office has continuously sought the death penalty for very young adults, individuals with mental illness, and an individual who was convicted

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

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

116 *See Michael A. Ramos*, CA.gov, http://www.vcgcb.ca.gov/board/members.aspx#ramos (last visited Sept. 21, 2016).

117 *See* Melinda Burns, *From FBI Boss to Death Penalty Foe*, Santa Barbara Independent, July 7, 2016, http://www.independent.com/news/2016/jul/07/fbi-boss-death-penalty-foe/.

118 *See* Justin Brooks, *Could Innocent People Be Executed If Proposition Passes?*, San Diego Union-Trib., Sept. 8, 2016, http://www.sandiegouniontribune.com/opinion/commentary/sdut-utbg-innocence-project-prop66-2016sep08-story.html; No On 66, http://nooncaprop66.org/category/hear-from-the-experts/ (last visited Sept. 21, 2016).

of capital murder even though he was not the triggerman.[119] Most recently, Ramos fought to keep Bill Richards in prison for a non-capital murder, despite compelling evidence pointing to his innocence that was presented to a judge nine years ago.[120] Richards was finally released in June of this year after serving 23 years in prison for a crime he didn't commit.[121]

Bill Richards

Moreover, despite multiple death row exonerations in California and rampant problems with the quality of defense lawyering in capital cases, Ramos has claimed that minimum competency requirements for post-conviction defense attorneys handling capital cases are "ridiculous" and "a delay tactic,"[122] and he has suggested that the "countless" pleadings filed by the ACLU and its supporters are responsible for "clogging up our justice system."[123]

INADEQUATE DEFENSE

The average mitigation presentation in the cases we reviewed from San Bernardino lasted 1.2 days.[124] S. Donald Ames represented four men sentenced to death in San Bernardino, including one case that was affirmed on direct appeal during our review period; two of his cases were overturned for ineffective assistance of counsel.[125] According to one article, Ames told the jury deciding Melvin Wade's fate that "execution would help his client."[126] At the sentencing trial for Richard Gamache, who was 18 years old at the time of his crime, Ames asked the jury, "[If] you intend to kill somebody, what the hell difference does it make how young you are?"[127] Ames also represented Stephen Wayne Anderson, but he never spoke

119 *See San Bernardino County Direct Appeals Spreadsheet 2006-2015*, on file with the Fair Punishment Project [hereinafter San Bernardino Direct Appeals].

120 *See* Brooks, *supra* note 118.

121 *See id.*

122 *See San Bernardino County Mike Ramos On The CA Death Penalty*, KFI AM-640, http://kfiam640.iheart.com/onair/john-and-ken-37487/san-bernardino-county-mike-ramos-on-14868495/ (last visited Sept. 23, 2016).

123 *See* Michael Ramos, *Nothing "Safe" About The SAFE California Act*, SBCountyDA.org, http://www.sbcountyda.org/Newsroom/OpEdandCommentary/NothingsafeabouttheSAFECaliforniaAct.aspx (last visited Sept. 21, 2016).

124 For the five California counties, we reviewed death sentences between 2010 and 2015 to calculate these figures. For San Bernardino, we were able to review court transcripts for five out of the five cases from this period. *See* San Bernardino Death Sentences, *supra* note 114.

125 *See* San Bernardino Direct Appeals, *supra* note 119. The four clients include Melvin Wade, Richard Gamache (direct appeal decided in 2010), Demetrie Mayfield, and Stephen Wayne Anderson. The two cases overturned for ineffective assistance of counsel are Wade v. Calderon, 29 F.3d 1312, 1315 (9th Cir. 1994) and *Mayfield v. Woodford*, 270 F. 3d 915 (9th Cir. 2001).

126 *See* Sara Catania, *A Killer Job*, L.A. Weekly, Jan. 23, 2003, http://www.laweekly.com/news/a-killer-job-2134312.

127 People v. Gamache, 227 P.3d 342, 393 (Cal. 2010).

with Anderson outside of trial.[128] Anderson was executed in 2002.[129] Ames also left unspent thousands of dollars in court-approved investigation resources for mitigation.[130]

Michael Belter, a private court-appointed lawyer who has had at least fifteen clients sent to death row in Southern California,[131] represented Rickie Lee Fowler, who was sentenced to death for five deaths resulting from the 2003 'Old Fire.'[132] Fowler, who was in his early twenties at the time, allegedly threw a lit flare into vegetation on the side of the road.[133] This flare was believed to have started the fire, causing the deaths of five middle-aged to elderly men who died of heart attacks due to the physical or emotional strain caused by evacuation and the threat of losing their homes and belongings.[134] Together, Fowler's lawyers spent less than two days presenting mitigation on behalf of their client,[135] despite the fact that their client was sexually molested by a neighbor as a child,[136] subjected to abuse and hunger, and started using meth with his father when he was just eight years old.[137]

A formal deputy public defender represented John Lee Cunningham, a Vietnam with Post-Traumatic Stress Disorder (PTSD) who suffered from child abuse and dissociative symptoms,[138] and apparently failed to inform Cunningham that the court was willing to offer him a retrial with a jury option. The judge then waived this offer and proceeded to determine guilt "based on the attorney's statements ."[139]

RACIAL BIAS AND EXCLUSION

Of the 14 cases with direct appeal opinions from 2006 to 2015, 43 percent of

128 Kevin Fagan, Pamela Podger & Harriet Chang, *Condemned Murderer Executed At San Quentin For 1980 Slaying*, SFGATE, Jan. 29, 2002, http://www.sfgate.com/news/article/Condemned-murderer-executed-at-San-Quentin-for-2878245.php.

129 *See id.*

130 *See* Catania, *supra* note 126.

131 *See* Direct Appeals Spreadsheets for Riverside, Orange, and Los Angeles Counties, on file with the Fair Punishment Project; see also Joe Nelson, *Ballot Measure To Determine Convicted Old Fire Arsonist's Fate*, SAN BERNARDINO SUN, Sept. 27, 2012, http://www.sbsun.com/general-news/20120927/ballot-measure-to-determine-convicted-old-fire-arsonists-fate.

132 *See* Lori Fowler, *Old Fire Arsonist Rickie Lee Fowler Sentenced To Death*, L.A. Daily News, Jan. 1, 2013, http://www.dailynews.com/article/ZZ/20130128/NEWS/130128542.

133 *See* Phil Willon, *Arsonist Gets Death Penalty In Fatal Old Fire*, L.A. Times, Sept. 29, 2012, http://articles.latimes.com/2012/sep/29/local/la-me-old-fire-sentencing-20120929.

134 *See id.*

135 *See* San Bernardino Death Sentences, *supra* note 124.

136 Phil Willon, *Prosecutor Urges Death Penalty for Old Fire Arsonist*, L.A. Times, Sept. 7, 2012, http://articles.latimes.com/2012/sep/07/local/la-me-old-fire-20120907.

137 *See* Glen Barr, *Jurors Hear of Fowler's Abuse*, Mtn. News, Sept. 6, 2012, http://www.mountain-news.com/news/crime_log/article_be776a08-f7a4-11e1-9964-001a4bcf887a.html.

138 *See* San Bernardino Direct Appeals, *supra* note 119.

139 Appellant's Reply Brief at 14, People v. Cunningham, 352 P.3d 318 (Cal. 2015) (No. S051342), *available at* http://www.courts.ca.gov/documents/3-s051342-app-reply-brief-061014.pdf.

the condemned prisoners were Black.[140] Similarly, two of the five individuals sentenced to death in San Bernardino County between 2010 and 2015 were Black, while approxiamtely 82 percent of the victims in these cases were white.[141] An examination of homicides that occurred in 2013 reveals that just 13 percent involved white victims.[142] According to 2015 census data, only nine and a half percent of the county's residents are Black.[143]

There were two cases from our review period in which a large percentage of prospective Black jurors were struck for questionable reasons. At Howard Larcell Streeter's trial, 28 percent of the prospective jurors were African-American, but 60 percent of the strikes were against African-Americans. One Black woman was struck because she seemed "distant.[144] In another case, in which Mike Ramos was the prosecutor, he struck four out of five prospective Black jurors. He called two of the Black venire members "non-committal." The California Supreme Court called the strike of one of the Black venire members a "close one."[145] While the California Supreme Court did not find misconduct in either case, the fact that African-American jurors are struck at such high rates is alarming.

EXCESSIVE PUNISHMENTS

Of 14 cases reviewed on direct appeal between 2006-2015, 64 percent involved defendants with impairments that render the death penalty disproportionately harsh.[146] Fifty percent of cases involved defendants with serious mental illness, brain damage, or intellectual impairment, seven percent of cases involved a defendant under the age of 21, and 29 percent involved a defendant age 25 or younger.[147]

Horace Kelly was sentenced to death despite an IQ in the low 60s, and the fact that he suffers from schizophrenia.[148] Another San Bernardino defendant, Cynthia

140 *See* San Bernardino Direct Appeals, *supra* note 119.

141 *See Baumgartner, Race of Defendants and Victims*, *supra* note 58.

142 *See* Melissa Pinion-Whitt, *San Bernardino Sees 46 Homicides In 2013, One Less Than The Year Before*, The Sun, Jan. 4, 2014, http://www.sbsun.com/general-news/20140104/san-bernardino-sees-46-homicides-in-2013-one-less-than-the-year-before.

143 *See QuickFacts for San Bernardino Cnty*., U.S. Census Bureau, http://www.census.gov/quickfacts/table/PST045215/06071(last visited Sept. 21, 2016).

144 *See* People v. Streeter, 54 Cal. 4th 205, 222 (2012).

145 People v. Taylor, 47 Cal. 4th 850, 888 (Cal. 2009).

146 *See* San Bernardino Direct Appeals, *supra* note 119.

147 *See id.*

148 *See* People v Kelly, 822 P2d 385, 393 (1992); Paige St. John, *Schizophrenia, Psychosis and Paranoia. Are These California Death Row Inmates Too Insane to Execute?*, L.A. Times, June 5, 2016, http://www.latimes.com/projects/la-me-ln-death-row-20/ (select "Horace Kelly").

Lynn Coffman, suffered from battered woman syndrome.[149] Coffman's boyfriend, James Marlow, regularly beat her and threatened to kill her son and her family if she ever left him.[150] Marlow had allegedly coerced Coffman into participating in the crime, and shortly beforehand, he beat Coffman, forced her to consume pills, extinguished a cigarette on her face, and stabbed her in the leg.[151] Prosecutors nevertheless sought and obtained a death sentence for Coffman.[152]

Demetrius Charles Howard, an African-American man,[153] was convicted and sentenced to death even though he was not the actual shooter.[154] Christopher Geier suffered from PTSD and bipolar disorder, and likely committed his crime during a manic episode.[155] John Lee Cunningham suffered from PTSD with dissociative symptoms.[156]

INNOCENCE

While San Bernardino has had no capital exonerations, Bill Richards was wrongfully convicted of murdering his wife Pamela in 1993.[157] Bill discovered his wife's body after coming home late at night from work.[158] The police failed to complete a test to determine roughly the time that Bill's wife was killed, which would have been crucial to proving Bill's innocence.[159] At the fourth trial, prosecutors introduced evidence of an alleged bite-mark on Pamela's hand and hired a forensic dentist to testify that the bite uniquely matched Bill's dental structure, but the photo was distorted.[160] Later experts corrected the photo and concluded that the mark was not from Bill.[161] There was also substantial evidence to suggest that a fiber from Richards' shirt was planted under his wife's fingernails.[162] DNA evidence found on the murder weapon

149 *See* People v. Coffman, 96 P.3d 30, 106 (Cal. 2004).

150 *See id.* at 52.

151 *See id.* at 51.

152 *See id.* at 48.

153 *See* San Bernardino Direct Appeals, *supra* note 119.

154 *See id.*

155 *See id.*

156 *See id.*

157 *See William Richards*, Cal. Innocence Proj., https://californiainnocenceproject.org/read-their-stories/william-richards/ (last visited Sept. 21, 2016).

158 *See id.*

159 *See id.*

160 *See* Emily Green, *Forensic Advances Raise New Questions About Old Convictions, NPR, Mar. 20, 2013, http://www.npr.org/2013/03/20/174842256/forensic-advances-raise-new-questions-about-old-convictions.*

161 *See id.*

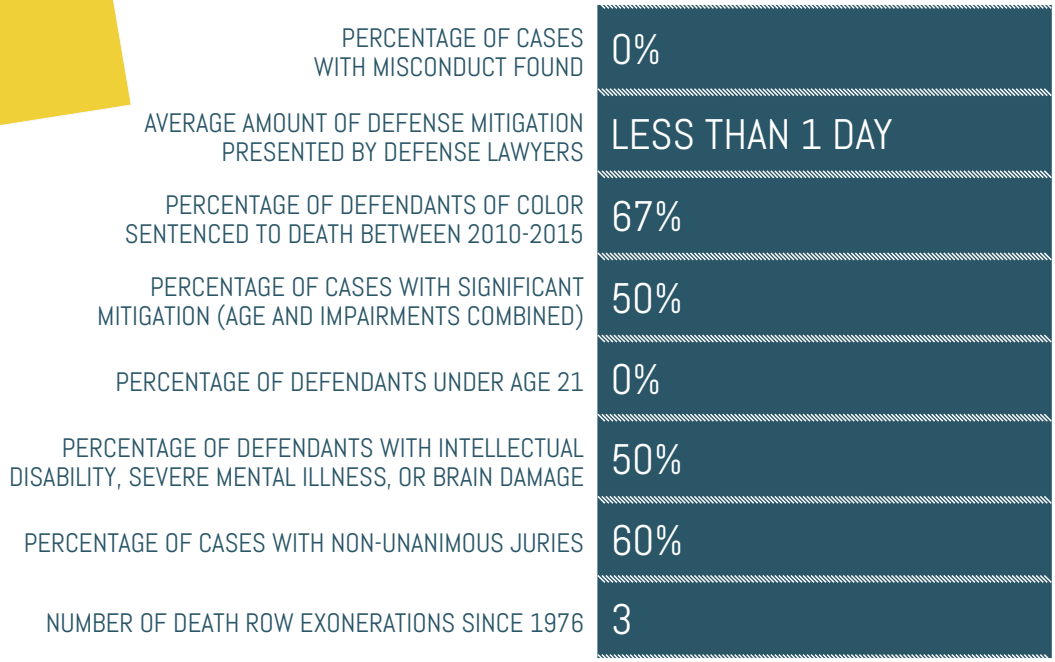
162 *See Richards, supra* note 157.

was eventually tested and it did not belong to Richards,[163] but D.A. Mike Ramos refused to accept all of this new evidence. For nine years, Ramos fought to uphold the conviction and appealed to the California Supreme Court, which reinstated,[164] and then later vacated the conviction.[165] Richards was finally released in June 2016.[166]

In another case, Glenn Boyd was convicted of shooting Kenneth Burley in 1987 based on faulty witness testimony.[167] The witness claimed that he could not recognize any of the assailants because it was dark out at the time and that "all blacks look alike in the dark."[168]After three line-ups, he could not identify Boyd as the shooter.[169] Boyd was released in 2015, and the California Innocence Project is still actively working to prove his innocence.[170]

#12

THE DEATH PENALTY IN HILLSBOROUGH COUNTY, FL



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

163 *See* Jordan Smith, *California Supreme Court Overturns Murder Conviction Based on Flawed Bite-Mark Evidence*, THE INTERCEPT (May 27, 2016), https://theintercept.com/2016/05/27/california-supreme-court-overturns-bill-richardss-murder-conviction-based-on-flawed-bite-mark-evidence/.

164 *See Richards*, *supra* note 157.

165 *See id.*

166 *See id.*

167 *See Glenn Boyd*, Cal. Innocence Proj., https://californiainnocenceproject.org/read-their-stories/glenn-boyd/ (last visited Sept. 21, 2016).

168 *See id.*

169 *See* People v Boyd, 222 Cal.App.3d 541, 550 (1990).

170 *See Boyd*, *supra* note 167.

Hillsborough County sentenced five people to death between 2010 and 2015, one of whom received two separate death sentences in this period.[171] Public Defender Julianne Holt said that between those years, prosecutors filed notices to seek death in approximately one out of every five first-degree murder cases.[172] Holt warned that her office is near a "critical point" where it cannot accept more death penalty cases.[173]

OVERZEALOUS PROSECUTORS

Mark Ober is the current State Attorney for the 13th Judicial Circuit, which includes Hillsborough County.[174] He was first elected in 2000.[175] In 2015, under Ober's leadership, Hillsborough had more death sentences than any other Florida county,[176] and "was one of the top counties in the U.S. for death sentences . . . even as nationwide the use of the death penalty has gone down."[177] Ober defended his office, stating, as if the law did not grant him discretion, "I make no apologies for us following the law of the state of Florida."[178]

Rudolph Holton

In 2012, Mark Ober's office obtained a death sentence for Humberto Delgado, Jr., but the Florida Supreme Court vacated the sentence because Delgado's "extreme mental illness, coupled with the circumstances of the crime, made a death sentence disproportionate as compared with other murder cases."[179]

The prior State Attorney obtained a death sentence for Michael Mordenti based primarily on testimony from his ex-wife, but the Florida Supreme Court reversed his conviction, finding that prosecutors had withheld evidence.[180] Even though Mordenti insisted he was

171 *See Hillsborough County Death Sentences 2010-2015*, on file with the Fair Punishment Project [hereinafter Hillsborough Direct Appeals].

172 *See* Elaine Silvestrini, *Death Penalty Caseload Overwhelming Hillsborough Public Defender's Office*, Tampa Bay Online, Dec. 19, 2015, http://www.tbo.com/news/crime/death-penalty-caseload-overwhelming-hillsborough-courts-20151219/.

173 *See id.*

174 *See Biography*, Office Of The State Attorney, 13th Judicial Circuit, http://www.sao13th.com/bio.htm (last visited Sept. 21, 2016).

175 *See id.*

176 *See Death Sentences in 2015*, Death Penalty Info. Ctr., http://www.deathpenaltyinfo.org/2015-sentencing (last visited Sept. 21, 2016).

177 *See* Silvestrini, *supra* note 172.

178 *See id.*

179 Dan Sullivan, *Supreme Court Overturns Death Sentence For Killer of Tampa Police Corporal*, Tampa Bay Online (Apr. 23, 2015), http://www.tampabay.com/news/courts/criminal/supreme-court-vacates-death-sentence-for-killer-of-tampa-police-corporal/2226733.

180 Mordenti v. State, 894 So. 2d 161, 168 (Fla. 2004); *Alexandra Zayas, To Gain Freedom, Man Pleads Guilty to Crime He Swears He Didn't Commit*, TAMPA BAY TIMES, July 30, 2008, http://www.tampabay.com/news/courts/criminal/to-gain-freedom-man-pleads-guilty-to-crime-he-swears-he-didnt-commit/749572

innocent and there no physical evidence connecting him to the crime, Ober retried him two more times with first degree murder charges and only relented before a fourth trial, offering the 67-year-old Mordenti a second-degree murder plea, which would allow him to go free. None of the three juries heard that the "victim's husband, Larry Royston, told his attorney that prosecutors had charged the wrong man" before Royston eventually committed suicide. Mordenti spent 17 years in prison.[181]

Ober also took exception to the innocence of Rudolph Holton, who was convicted before Ober became the State Attorney.[182] Holton's capital murder trial was riddled with misconduct and error: prosecutors "failed to share some evidence with Holton's lawyers," DNA results "proved a hair believed to be Holton's actually belonged to the victim," and a jailhouse witness' testimony was recanted.[183] Ober said, "I am not saying loud and clear that Rudolph Holton is innocent. I am saying we cannot prove his guilt beyond a reasonable doubt."[184]

Three line prosecutors -- Jay Pruner, Jalal Harb,[185] and Scott Harmon[186] -- obtained 10 of 11, or 91 percent, of the death sentences we examined.[187] Pruner supervised the homicide division of the prosecutor's office in 2004,[188] and was said to handle "the lion's share" of homicide cases for the Hillsborough State Attorney's Office.[189] Pruner obtained two of the six death sentences that were reviewed on direct appeal between 2006 to 2015,[190] and three of the six new sentences that were obtained between 2010 and 2015.[191] He personally prosecuted Humberto Delgado, whose sentence was later reduced when the Florida Supreme Court found the death penalty to be excessive.[192] If Pruner had his way, the death sentence toll would be even higher: a judge overrode the jury's ten to two death recommendation for

181 *See id.*

182 *See* Ron Word, 25 Inmates Exonerated From Florida Death Row, ST. AUGUSTINE RECORD, July 7, 2003, http://staugustine.com/stories/070703/sta_1651936.shtml#.V-KoHzuhQUF.

183 *See id.*

184 *See id.*

185 Jalal Harb, now a judge, obtained three of the 11 Hillsborough County death sentences we studied. *See Hillsborough Direct Appeals*, *supra* note 171.

186 Scott Harmon is still a line prosecutor and obtained three of the death sentences we studied: one in the direct appeals period and two of the six, or 33%, of the 2010-2015 sentences. See Hillsborough Direct Appeals, *supra* note 185.

187 *See id.*

188 *See* Bill Varian, *A Life From The Bottom*, ST. PETERSBURG TIMES, July 18, 2004, http://www.sptimes.com/2004/07/18/news_pf/Hillsborough/A_life_from_the_Bottom.shtml.

189 *See* Colleen Jenkins, *Onstott Murder Trial Set To Start*, TAMPA BAY TIMES, Aug. 9, 2008, http://www.tampabay.com/news/courts/criminal/onstott-murder-trial-set-to-start/765212.

190 *See Hillsborough Direct Appeals*, *supra* note 185.

191 *See id.*

192 *See* Alexandra Zayas, *Jury Finds Humberto Delgado Jr. Guilty Of Murdering Tampa Police Officer*, TAMPA BAY TIMES, Nov. 15, 2011, http://www.tampabay.com/news/courts/criminal/jury-finds-humberto-delgado-jr-guilty-of-murdering-tampa-police-officer/1201784 (explaining that Pruner read the following words written by Delgado: *"So as I am, priceless and free, so will all minds be, I, I, all who stand against this I, I, will understand what it means to die"*); Delgado v. State, 162 So. 3d 971, 983 (Fla. 2015).

Alfred Harris,[193] and a jury spared Julian Ospina-Florez from death row, despite Pruner's protestation that "simple justice cries out for it."[194]

Pruner also planned to seek death for former military officer Julie Schenecker,[195] despite her mental illness.[196] The decision to drop the pursuit of death was made when, according to spokesman Mark Cox, "it was determined that the imposition of the death penalty in this case would not withstand the scrutiny of the Florida Supreme Court."[197] In addition to her mental illness, Schenecker was suicidal, addicted to painkillers, and claimed to have been raped as a young person.[198]

INADEQUATE DEFENSE

The average defense presentation of mitigation in Hillsborough County capital trials is less than one day.[199] In fact, half of the defendants with direct appeals opinions between 2006 and 2015 waived all mitigation.[200] Humberto Delgado's lawyers, Chris Watson and Marcia Perlin, presented a single day's worth of mitigation,[201] even though Delgado suffered from bipolar disorder and other serious mental and emotional impairments.[202]

Robert Fraser represented two of the six defendants whose cases were reviewed on direct appeal 2006 and 2015.[203] Fraser and his co-counsel, Rick Terrana, were accused in Charles Grover Brant's post-conviction appeal of "advising him to plead guilty without consulting a jury expert or researching jury decision-making."[204] Brant also waived a penalty phase jury, and he was sentenced to death by a judge.[205]

193 *See* Christopher Goffard, *Judge Rejects Death For Killer*, St. Petersburg Times, May 7, 2002, http://www.sptimes.com/2002/05/07/TampaBay/Judge_rejects_death_f.shtml.

194 *See* Anna M. Phillips, *Life Sentence For Julian Ospina-Florez, Avila Murderer*, Tampa Bay Times, Sept. 4, 2015, http://www.tampabay.com/news/courts/criminal/avila-murderer-gets-life/2244241.

195 *See* Anna M. Phillips, *Emotions Run High During Jury Selection In Julie Schenecker Murder Trial*, Tampa Bay Times, May 1, 2014, http://www.tampabay.com/news/courts/criminal/emotions-run-high-during-jury-selection-in-julie-schenecker-murder-trial/2177848.

196 *See* Jodie Tillman, *Accused Of Killing Her Kids, Julie Schenecker Places Blame On Their Dad*, Tampa Bay Times, Dec. 5, 2011, http://www.tampabay.com/news/courts/civil/accused-of-killing-her-kids-julie-schenecker-places-blame-on-their-dad/1204980.

197 *See* Anna M. Phillips, *State Won't Seek Death Penalty For Julie Schenecker In Kids' Deaths*, Tampa Bay Times, Apr. 1, 2014, http://www.tampabay.com/news/courts/criminal/prosecutors-will-not-seek-death-penalty-against-new-tampa-woman-accused-of/2172920.

198 *See* Sarina Fazan, *Exclusive: Convicted Killer Julie Schenecker Speaks For First Time Since Murder Convictions*, ABC News, Apr. 23, 2015, http://www.abcactionnews.com/news/local-news/exclusive-convicted-killer-julie-schenecker-speaks-for-first-time-since-murdering-her-two-children.

199 *See Hillsborough County Direct Appeals*, *supra note 185*.

200 *See id.*

201 *See id.*

202 *See* Sullivan, *supra* note 179.

203 *See Hillsborough Direct Appeals*, *supra* note 185.

204 *See* Brant v. State, SC14-2278, 2016 WL 3569418, at *6 (Fla. 2016).

205 *See id.* at *1, *24.

In another case, Khalid Ali Pasha was sentenced to death by a seven to five vote after waiving his right to present mitigation.[206]

John Skye also represented two of six of the cases from the studied period.[207] Each of his cases had a penalty phase mitigation presentation that lasted less than one day.[208] One of his clients was William Taylor, a man with a 74 IQ and a history of suicide attempts.[209] The other was William James Deparvine, who was diagnosed with several mental disorders.[210] The jury voted eight to four for death in both of Deparvine's trials.[211] Had more mitigation evidence been presented, the outcome in both of these cases may have been different.

Together, Syke and Fraser represented two-thirds of the defendants in our review period.

RACIAL BIAS AND EXCLUSION

The PBS website recalls that the Ku Klux Klan "withered away" during the Great Depression, "except in Florida, which had an estimated 30,000 members."[212] Tampa, the largest city in Hillsborough County, and Miami, were among the four "most powerful klaverns."[213] Unfortunately, racism has not been limited to extremists. Retired Judge E.J. Salcines of Florida's Second District Court of Appeal recounted that when he was in 7th grade, he came to court to watch a trial and a bailiff "tapped him on the shoulder and told him to move out of the black section."[214] *The Tampa Bay Times* also reported that Hillsborough County Courthouse water fountains and restrooms were still labeled "white" and "colored" in the 1960s.[215] In addition, "it was 1972 before the Hillsborough County Bar Association changed its charter to allow Black lawyers to join, long after the Civil Rights Act of 1964."[216]

206 *Man Sentenced To Death After Killing Wife, Step-Daughter*, Tampa Bay Online, (May 30, 2008), http://www.tbo.com/news/news/2008/may/30/man-sentenced-death-killing-wife-stepdaughter-ar-139389/; *see also* Pasha v. State, No. SC08-1129 (Fl. 2010).

207 *See Hillsborough Direct Appeals*, *supra* note 185.

208 *See id.*

209 *See id.*

210 *See id*; Respondent's Answer to Petition for Writ of Habeas Corpus at 59-60, Deparvine v. State, 146 So.3d 1071 (Fla. 2014) (No. 8:14-cv-02443-EAK-TGW);

211 *See Id.*

212 *See KKK In Florida*, PBS.ORG, http://www.pbs.org/harrymoore/terror/k.html (last visited Sept. 21, 2016).

213 *See id.*

214 *See* Walt Belcher, *'Before The Law Was Equal' Explores Racism In Court System*, TAMPA BAY ONLINE (Mar. 21, 2014), http://www.tbo.com/events/before-the-law-was-equal-explores-racism-in-court-system-20140321/.

215 *See id.*

216 *See id.*

This legacy of racial bias lingers. Two-thirds of the death sentences handed down between 2010 and 2015 were imposed on people of color; half were for Black men.[217] In contrast, sixty percent of the victims in these cases were white, even though the vast majority of homicide victims in the area appear to be Black.[218] Black people comprised only 17.7 percent of the county's population in 2015.[219]

EXCESSIVE PUNISHMENTS

Out of the six cases with a direct appeal decided between 2006 and 2015, 50 percent had evidence of the kind of crippling impairments that render the death penalty disproportionately harsh.[220] All three of these cases involved defendants with serious mental illness, brain damage, or intellectual impairment, and two of the cases involved individuals with multiple impairments.[221] One defendant was under age 25 at the time of the crime.[222]

Humberto Delgado, Jr. has bipolar disorder, suffers from delusions and paranoia, and was homeless at the time of the crime.[223] Charles Grover Brant had a severe methamphetamine dependence associated with psychotic episodes, suffered from chronic depression, and displayed abnormal brain functioning, including a 25-point difference between his verbal and performance IQs.[224] William Taylor had an IQ of 74, a history of suicide attempts, suffered from a traumatic brain injury and epilepsy, and was under the influence of drugs and alcohol on the date of the crime.[225]

Joaquin Jose Martinez

INNOCENCE

There have been three exonerations of people awaiting execution in Hillsborough County. These include the aforementioned Rudolph Holton, who spent 16 years

217 *See* Baumgartner, *Race of Defendants and Victims*, *supra note 58*.

218 *See id*; Out of the 31 murders committed in Tampa, the largest city in Hillsborough, in 2015 at least 77 percent of the victims were Black. See Dan Sullivan, *String of killings give glimpse into Tampa's recent surge in violence*, Tampa Bay Times, June 6, 2015, *See* Interactive Map: http://www.tampabay.com/news/publicsafety/crime/string-of-killings-give-glimpse-into-tampas-recent-surge-in-violence/2232625 (Last visited on Sept. 20, 2016)

219 *See QuickFacts for Hillsborough County*, U.S. Census Bureau, http://www.census.gov/quickfacts/table/PST045215/12057 (data for 2015) (last visited Sept. 21, 2016).

220 *See Hillsborough Direct Appeals*, *supra* note 185.

221 *See id.*

222 *See id.*

223 *See id.*

224 *See id.*

225 *See id.*

on death row for a crime he didn't commit.[226] Two witnesses in his case pled guilty to perjury,[227] and DNA testing excluded Holton as the source of a hair found in the victim's mouth.[228] Joseph Green Brown came within 15 hours of his execution for a crime he didn't commit.[229] His conviction was overturned in light of evidence suggesting that the prosecution knowingly introduced false testimony.[230] He spent 13 years on death row.[231] Joaquin Jose Martinez was also exonerated.[232] His ex-wife contacted the police and proceeded to allow them to bug her phone and apartment while she coaxed him into confessing.[233] The prosecution also used testimony from five informants and promised deals in return.[234] Martinez received a new trial[235] and was subsequently acquitted after all of the original informants recanted their testimony.[236]

226 *See supra* notes 182-83 and accompanying text.

227 *See supra* notes 182-83 and accompanying text.

228 *See supra* notes 182-83 and accompanying text.

229 *See* Mitch Weiss, *Man Freed From Death Row 26 Years Ago Is Indicted In Wife's Death*, DAILY REPORT ONLINE, Sept. 28, 2012, http://www.dailyreportonline.com/id=1202572924439/Man-freed-from-death-row-26-years-ago-is-indicted-in-wifes-death-?slreturn=20160821121642; In 2013, in a separate incident, Brown plead guilty to the 2nd degree murder of his wife.

230 *See id.*

231 *See id.*

232 *See Joaquin Jose Martinez*, Nat'l Reg. of Exonerations, U. Mich. Sch. of L., https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3800 (last visited Sept. 21, 2016).

233 *See id.*

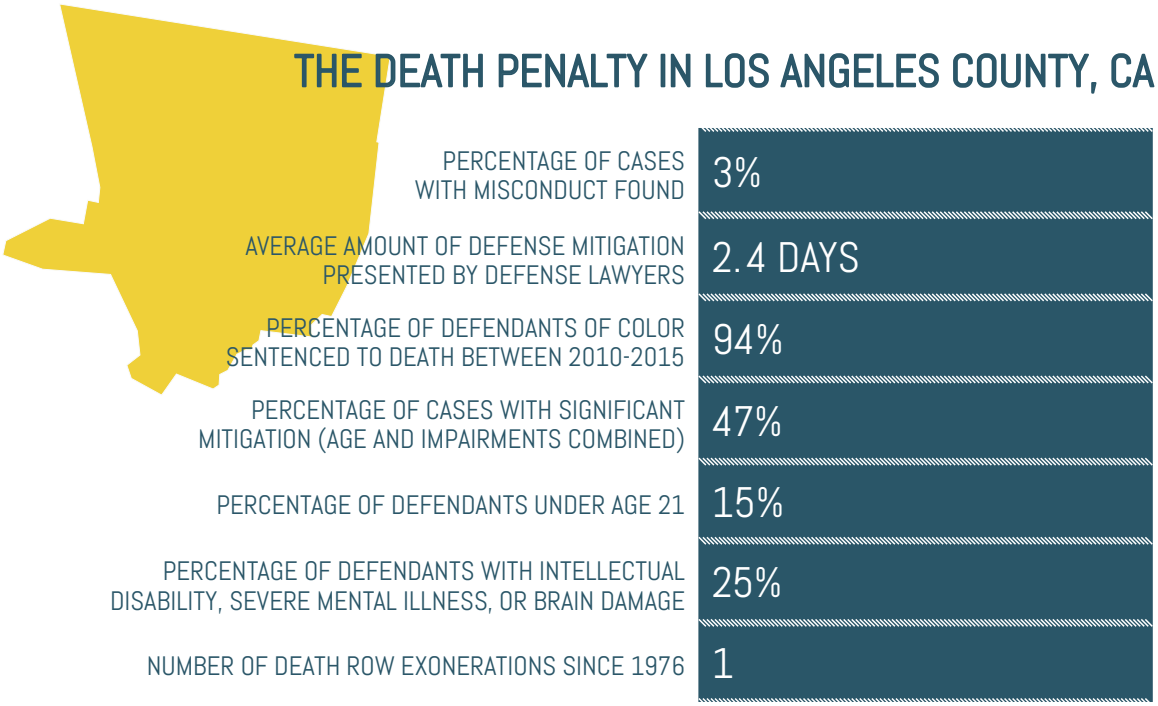
234 *See id.*

235 *See id.*

236 *See id.*

#13

THE DEATH PENALTY IN LOS ANGELES COUNTY, CA



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

Los Angeles County sent 31 people to death row between 2010 and 2015.[237] It is worth noting, however, that Los Angeles County is the largest county out of the 16 outlier counties with a population of approximately 10.1 million.[238] Although a statewide ballot initiative to replace the death penalty with a sentence of life without parole was narrowly defeated in 2012, 54 percent of Los Angeles County residents voted in favor of abolishing the death penalty.[239]

OVERZEALOUS PROSECUTORS

Jackie Lacey was elected as the Los Angeles County District Attorney in late 2012.[240] Jackie Lacey conceded in 2015 that "a lot people probably want to do away with the death penalty,"[241] but she nonetheless continues to pursue death sentences, including against a mentally ill homeless man.[242] In one felony case, her office once handled evidence so badly that Superior Court Judge Kathleen Kennedy "questioned whether the D.A.'s office is capable of handling complex prosecutions"

237 *See Los Angeles County Death Sentences 2010-2015, on file with the Fair Punishment Project.*

238 *See* U.S. Census Bureau, *Quick Facts: Los Angeles County, California*, http://www.census.gov/quickfacts/table/PST045215/06037,00.

239 *California Election Results*, L.A. Times, Nov. 6, 2012, http://graphics.latimes.com/2012-election-results-california/.

240 *See* Los Angeles District Attorney's Office, http://www.da.lacounty.gov/about/meet-the-da.

241 *See* Brian Melley, AP, *DAs, Police, Family of Slain Push for Death Penalty Changes*, L.A. Daily News, Oct. 30, 2015, http://www.dailynews.com/general-news/20151030/das-police-family-of-slain-push-for-death-penalty-changes.

242 *See* Paresh Dave, *Gang Member Sentenced to Death for Four Murders in East L.A.*, L.A. Times, Jan. 17, 2014, http://articles.latimes.com/2014/jan/17/local/la-me-ln-gang-member-death-sentence-20140117.

at all.[243]

In recent years, state and federal courts have reversed a number of older death sentences from Los Angeles County. In May 2015, the California Supreme Court reversed on direct appeal a Los Angeles death sentence from 1999, because the prosecutor introduced improper evidence.[244] In 2010, the Ninth Circuit reversed Bobby Joe Maxwell's non-capital murder conviction because a witness, Sidney Storch, secretly received a lighter sentence in exchange for his testimony.[245] The Los Angeles District Attorney's Office had repeatedly used Storch, whose military discharge called him "a habitual liar."[246] Storch impersonated a CIA officer and hotel chain heir Howard Johnson while serving as a jailhouse informant who helped build "dozens" of murder cases in the 1970s and 80s.[247]

Starting in the late 1970s and going well into the late 1980s, the Los Angeles County District Attorney's office regularly used questionable testimony from jailhouse informants and engaged in questionable prosecutorial practices to obtain murder convictions.[248] In 1990, a grand jury panel wrote, "Either egregious perjurers have been used as prosecution witnesses or law enforcement officials committed shocking malfeasance."[249] More than a dozen prisoners who are on death row today were convicted in Los Angeles County during this period.[250]

Two former Los Angeles County District Attorneys, Gil Garcetti and John Van de Kamp, have spoken out against the death penalty[251] in recent years because of the dysfunction in the appellate system, the risk of executing an innocent person, and the high costs associated with capital punishment. A third former District Attorney, Ira Reiner, has expressed support for a brief moratorium on executions.[252]

243 *See* Op-Ed, *It May Be Time to Worry about the D.A.'s Public Corruption Unit*, L.A. Times, Aug. 9, 2016, http://www.latimes.com/local/lanow/la-me-ln-coliseum-commission-corruption-20160804-snap-story.html.

244 *See California High Court Overturns Killer's Death Penalty* (AP), Napa Valley Register, May 28, 2015, http://napavalleyregister.com/ap/state/california-high-court-overturns-killer-s-death-penalty/article_6992f81d-b198-5a22-89f2-8b0a71d6cc68.html.

245 Maxwell v. Roe, 628 F.3d 486, 491, 513 (9th Cir. 2010).

246 Id. at 498.

247 Maxwell v. Roe, 628 F.3d 486, 498 (9th Cir. 2010); Michael Doyle, *Supreme Court Decision Could Give California's 'Skid Row Stabber' His Release*, s(Jan. 9, 2014, 12:46 PM), http://www.mcclatchydc.com/news/nation-world/national/article24721732.html; see also Jack Leonard, Suspected 70's Serial Killer Indicted in Three Slayings, L.A. Times, Feb. 3, 2015, http://articles.latimes.com/2013/feb/05/local/la-me-skid-row-stabber-20130206.

248 *See* Ted Rohrlich, *L.A. Jailhouse Informant Seized on Perjury Charge : Scandal: He had gained leniency by claiming that fellow inmates had confessed murders to him*, L.A. Times, Feb. 20, 1992, http://articles.latimes.com/1992-02-20/news/mn-3537_1_jailhouse-informant-scandal.

249 *See* Ted Rohrlich, *Grand Jury Criticizes D.A. On Informants*, L.A. Times, Jul. 10, 1990, http://articles.latimes.com/1990-07-10/news/mn-78_1_grand-jury.

250 *See* Ca. Dep't of Corrections and Rehabilitation, *Death Row Tracking System*, http://www.cdcr.ca.gov/capital_punishment/docs/condemnedinmatelistsecure.pdf.

251 *See* Michael Winter, *Californians to Vote on Abolishing the Death Penalty*, USA Today, Apr. 24, 2014, http://content.usatoday.com/communities/ondeadline/post/2012/04/californians-to-vote-on-abolishing-the-death-penalty/1#.V9s0X5MrKRs.

252 *See Legislative Activity – California*, Death Penalty Information Center, http://www.deathpenaltyinfo.org/legislative-activity-california (last visited Sept. 21, 2016).

INADEQUATE DEFENSE

In our review, the average defense mitigation presentation for Los Angeles County lasted only 2.4 days.[253]

The Los Angeles County Public Defender's Office handles roughly half of the trial stage death penalty cases in the county, and the Alternate Public Defender takes an additional twenty percent that the Public Defender's Office cannot.[254] The public defenders in Los Angeles prioritize resources and assign more experienced defenders to the most critical cases.[255] They also investigate mitigating evidence early in the process so that they can negotiate a potential plea.[256] Consequently, these public defenders spend countless hours building trust with the client and preparing the case.[257] In contrast, private bar attorneys appear not to be as well positioned to commit the time and resources that a capital case requires.[258] This discrepancy shows in number of clients that the have ended up on death row -- one represented by the Public Defender's office and three by the Alternate Public Defender's office versus 26 represented by appointed private counsel between 2010 and 2015.[259] Moreover, the single case handled by the Public Defender's office had a mitigation presentation that lasted seven days. For the private bar attorneys, the average presentation was 2.4 days.[260]

Private attorneys Leo B. Newton, Randy Short, and William Ringgold presented one day's worth or less of mitigation evidence on behalf of their clients in the cases they handled between 2012 and 2015.[261] Richard Leonard, who represented Anthony Cain in 2010, presented less than half a day's worth of mitigation in Cain's case.[262] In contrast, the Los Angeles County Public Defender's Office made a seven-day mitigation presentation on behalf of one of their clients during this same period.[263] While defending another client, Leonard, made the following pronouncement after his client was sentenced to death: "If you believe in the death penalty, this case

253 *See Los Angeles County Death Sentences 2010-2015*, *supra* note 237. We reviewed 30 of 31 cases from this period. We were unable to access records for one case from this period.

254 Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 2012 B.C. L. Rev. 227, 262 *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1914638

255 *Id.* at 263.

256 *See id.*

257 *See id.*

258 *See id.*

259 *See* Los Angeles County *Death Sentences Spreadsheet 2010-2015*, *supra* note 237.

260 *See id.*

261 *See id.*

262 *See id.*

263 *See id.*

warrants it." [264] That client, Albert Lewis,[265] had attempted suicide the day before sentencing, which was his fourth attempt in custody.[266] Cynthia LeGardye and Richard LaPan both represented clients sentenced to death between 2010 and 2015.[267]LeGardye's two cases from this period, one of which had a penalty retrial, had mitigation presentations that lasted approximately half a day, one and a quarter days, and less than one day.[268] In 2004, the California Supreme Court overturned the death sentence of a man who had been represented by LaPan and another attorney at trial because they hadn't completed an "adequate investigation" in preparing for penalty phase.[269] Chief Justice Ronald George wrote, "Evidence readily could have been discovered that would have demonstrated the severe emotional and physical abuse suffered by petitioner as a preschooler and a young child."[270]

In addition, many private defenders in Los Angeles have been disbarred. Robert Beswick, Robert Carrasco's counsel, failed to meet with his client or his client's family and had "never represented a [defendant in a] capital case involving the death penalty" until being assigned to Carrasco's case,[271] and was later disbarred for lying to federal agents in a different case.[272] Ronald LeMieux and Douglas McCann worked on George Brett Williams' capital case (Williams' direct appeal was decided in 2013);[273] both were later disbarred for reasons related to client abandonment or misrepresentation to a client.[274] LeMieux also represented Eric Lamont Hinton, whose direct appeal was decided in 2006.[275] While capital defense attorney M.

264 Andrea Ford, *2 Sentenced to Death for Murders in Church: Courts: Albert Lewis and his half brother, Anthony Oliver, were found guilty of 1989 shotgun slaying of two women in South-Central L.A. One victim's widower says justice is served*, L.A. TIMES, May 22, 1993, http://articles.latimes.com/1993-05-22/local/me-38454_1_albert-lewis.Penelope MacMillian, *Defendants, Lawyers Trade Blows During Murder Trial, L.A. Times*, Feb. 2, 1993, http://articles.latimes.com/1993-02-02/local/me-907_1_richard-leonard.

265 Penelope MacMillian, *Defendants, Lawyers Trade Blows During Murder Trial*, L.A. Times, Feb. 2, 1993, http://articles.latimes.com/1993-02-02/local/me-907_1_richard-leonard.

266 *See* Ford, *supra* note 264.

267 *See Los Angeles County Death Sentences Spreadsheet 2010-2015, supra note 237.*

268 *See id.*

269 *See* Harriet Chiang, Death Penalty Tossed For Double Murderer, SAN FRANCISCO CHRONICLE, July 27, 2004, http://www.sfgate.com/bayarea/article/SAN-FRANCISCO-Death-penalty-tossed-for-double-2704950.php

270 *See* id.

271 People v. Carrasco, 59 Cal. 4th 924, 951 (2014).

272 *See* Member Search: Robert Horace Beswick, STATE BAR OF CALIFORNIA http://members.calbar.ca.gov/fal/Member/Detail/85941 (last visited Sept. 21, 2016).

273 People v. Williams, 56 Cal. 4th 630, 692 (2013).

274 *See* Member Search: Douglas Edward McCann, STATE BAR OF CALIFORNIA, http://members.calbar.ca.gov/fal/Member/Detail/119928 (last visited Sept. 21, 2016); see also In re Ronald Lemieux, No. 08-O12944, at 4 (2012), available at http://members.calbar.ca.gov/courtDocs/08-O-12944-3.pdf. In disbarring McCann, Judge Alban Niles noted, "In view of his three prior records of discipline, [McCann] has repeatedly committed acts of client abandonments and other misconduct from 1991 to the present." See Disbarments, CAL. BAR J. (2004), *available at* http://archive.calbar.ca.gov/%5CArchive.aspx?articleId=55834&categoryId=55827&month=4&year=2004.

275 *See* Los Angeles County Direct Appeals Spreadsheet 2006-2015, on file with the Fair Punishment Project. LeMieux represented Hinton in the penalty phase only.

David Houchin has never been disciplined,[276] he once hired a psychiatric expert who had been removed from Los Angeles' panel of approved forensic psychiatrists for fraudulently altering patient notes to testify in a capital case.[277] The doctor was actively facing a new disciplinary hearing over his writing of prescriptions at the time of trial.[278]In that 2012 case, Houchin and co-counsel Csaba Palfi put on a defense mitigation presentation that lasted less than one full day.[279]

RACIAL EXCLUSION AND BIAS

As author Lawrence Ross told the *Huffington Post*, "California has a rich history of discrimination," despite not sharing a history of slavery with the South.[280] Out of the 31 people Los Angeles County put on death row between 2010 and 2015, 42 percent are Black, 45 percent are Latino, and six percent are Asian American or Asian Pacific Islander.[281] Just two defendants -- or a mere six percent -- are white.[282] The Los Angeles Times approximates that African-Americans represent eight percent of the county's population and commit 32 percent of its homicides.[283] African-Americans are clearly overrepresented in the population being sentenced to death.[284]

In 2014, a study that examined the attitudes of 500 white and Latino individuals called for jury duty in Southern California concluded that "white jurors were more likely to impose the death penalty in cases where the defendant was Latino and poor" than in cases where the defendant was white. Latino jurors exhibited no such bias. The researchers also concluded that given the apparent bias of many white jurors, the presentation of mitigation evidence, especially in cases with Latino defendants, was important to ensuring that defendants didn't receive a death sentence. The white jurors recommended death for Latino defendants with weak mitigating evidence at twice the rate of white defendants with weak mitigating evidence. In cases with stronger mitigation evidence, the racial disparities were

276 *See* Member Search: Michael David Houchin, STATE BAR OF CALIFORNIA, http://members.calbar.ca.gov/fal/Member/Detail/103719 (last visited Sept. 21, 2016).

277 People v. Espinoza, No. BA337461-01, Clerk's Transcript V.12, 2617, 2625 (May 18, 2012).

278 *Id.* at 2630-31.

279 *See Los Angeles County Death Sentences Spreadsheet 2010-2015*, *supra* note 237

280 C. Robert Shorette, II, *The Ignored History of Racism in California*, Huff. Post, Mar. 1, 2016, http://www.huffingtonpost.com/c-rob-shorette-ii-phd/the-ignored-history-of-ra_b_9349900.html.

281 *See* Baumgartner, Race of Defendants and Victims, *supra* note 58.

282 See *Id.*

283 *See The Homicide Report*, L.A. Times, *The Homicide Report*, http://homicide.latimes.com/about/#race.

284 Matt Ford, *Racism and the Execution Chamber*, Atlantic, Jun. 23, 2014, http://www.theatlantic.com/politics/archive/2014/06/race-and-the-death-penalty/373081/; Sophia Kirby, *The Top 10 Most Startling Facts about People of Color and Criminal Justice in the United States*, Center for American Progress (Mar. 13, 2013), https://www.americanprogress.org/issues/race/news/2012/03/13/11351/the-top-10-most-startling-facts-about-people-of-color-and-criminal-justice-in-the-united-states/.

somewhat reduced.[285]

EXCESSIVE PUNISHMENT

We reviewed 75 cases from Los Angeles that had a direct appeal opinion rendered between 2006 and 2015, and found that 47 percent of the cases involved a defendant with significant mitigation.[286] Fifteen percent of the cases involved defendants under the age of 21, and almost half (49 percent) involved defendants aged 25 and younger.[287] Approximately one quarter of the cases involved defendants with severe mental illnesses, intellectual disabilities, or brain damage.[288] One in six cases had evidence of severe childhood or sexual trauma.[289]

Oscar Lee Morris

Among those sentenced to death was Leroy Wheeler, who was only 20 at the time of his offense.[290] His mother abused Secobarbital, a barbiturate, during her pregnancy with Wheeler.[291] Drugs of this class are known to cause "birth defects and behavioral problems in babies born to women who have abused these drugs" while pregnant.[292] William Tupua Satele, also age 20 at the time of his crime,[293] is borderline intellectually disabled and has the emotional maturity of a 12-year-old.[294] Gerardo Romero was also 20 years old and has an IQ score of 77.[295] Raymond Oscar Butler, who was just 18 years old at the time of his offense, was a "slow learner" with major depression and a cocaine-induced psychotic disorder.[296] He suffered from delusions and started drinking alcohol at the age of eight.[297]

A significant number of the cases involved multiple impairments. John Irvin Lewis II,

285 Leslie Reed, *UNL Study Examines Racial Bias in Death-Penalty Decisions*, Nebraska Today, http://news.unl.edu/newsrooms/unltoday/article/unl-study-examines-racial-bias-in-death-penalty-decisions/.

286 *See Los Angeles Direct Appeals Spreadsheet* 2006-2015, *supra* note 275.

287 *See Id.*

288 *See Id.*

289 *See Id.*

290 *See Condemned Inmate List*, Cal. Dept. of Corrections and Rehabilitation, http://www.cdcr.ca.gov/capital_punishment/docs/condemnedinmatelistsecure.pdf (updated Sept. 9, 2016).

291 *See* People v. Bryant, 334 P.3d 573 (2014).

292 *See* MO Dep't of Mental Health, Division of Alcohol and Abuse, "Sedative-Hypnotics," http://www.well.com/user/woa/fsseda.htm.

293 *See Condemned Inmate List*, *supra* note 290.

294 *See* People v. Nunez, 302 P.3d 981, 996 (Cal. 2013).

295 *See Condemned Inmate List*, *supra* note 290; People v. Romero, 187 P.3d 56, 66 (Cal. 2008).

296 *See id*; *See* also People v. Butler, 209 P.3d 596, 602 (Cal. 2009).

297 *See Butler*, 209 P.3d. at 602.

who was just 21 years old at the time of his offense, had brain damage, was severely physically abused by his stepfather, had been sexually abused, and lost his mother to a drug overdose when he was just 13 years old.[298] Donald Franklin Smith, a man with a below-average IQ who was "vulnerable to psychotic deterioration," had been beaten by his father with belts and cords while naked.[299] His father also molested his sister in front of him.[300] Bernard Nelson's father physically abused him and his mother so seriously that his mother was hospitalized;[301] James, his then 2-year-old brother, died from his father's abuse.[302] When Nelson's parents separated, his father threatened to kill his whole family.[303] Nelson was just 25 at the time of the crime.[304]

INNOCENCE

Los Angeles County has had at least 59 exonerations since 1989, including one death row exoneration.[305]

Oscar Lee Morris was convicted of first degree murder in 1983 and sentenced to death after an informant came forward.[306] The informant, a former friend of Morris with whom he had experienced a falling out, testified that Morris confessed to the murder, and that he did not receive any special treatment for his testimony in the case.[307] In reality, the informant received a reduced sentence on an unrelated charge, which was not revealed to the defense.[308] He later recanted his testimony implicating Morris on his deathbed.[309] Morris was released after 17 years of imprisonment for a crime he didn't commit.[310] The lead prosecutor on the case, Arthur Jean, Jr., went on to serve as a Los Angeles County Superior Court Judge for

298 *See Condemned Inmate List*, *supra* note 290; People v. Lewis, 181 P.3d 947, 968 (Cal. 2008).

299 *See id.* Appellant's Opening Brief, People v. Smith, No. A711739, at 42 (Dec. 15, 2004), available at http://www.courts.ca.gov/documents/4-s049596-app-smith-opening-brief-121504.pdf.

300 *See Bryant*, 335 P.3d. at 608.

301 *See* People v. Nelson, 246 P.3d 301, 310 (Cal. 2011).

302 *See id.*

303 *See id.*

304 *See Condemned Inmate List*, *supra* note 290.

305 *See* Nat'l Reg. of Exonerations, U. of Mich. Sch. of L., https://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={B8342AE7-6520-4A32-8A06-4B326208BAF8}&FilterField1=State&FilterValue1=California&FilterField2=County&FilterValue2=8_Los%20Angeles (sorted for Los Angeles County) (last visited Sept. 21, 2016).

306 *See Oscar Morris*, Nat'l Reg. of Exonerations, U. of Mich. Sch. of L., https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3493 (last visited Sept. 21, 2016).

307 *See id.*

308 *See id.*

309 *See id.*

310 *See id.*

almost 20 years.[311]

In 1978, Thomas Goldstein was convicted of murder and sentenced to life imprisonment, due primarily to the testimony of a fellow inmate and heroin addict named Edward Fink.[312] Fink claimed that Goldstein had confessed to him.[313] The informant's credibility was later called into serious question.[314] Prosecutors also failed to tell Goldstein's defense lawyer of the deal they struck with the informant.[315] Goldstein's conviction was eventually overturned.[316] He ultimately spent 24 years in prison based on this wrongful conviction.[317]

THE DEATH PENALTY IN PINELLAS COUNTY, FL

#14

PERCENTAGE OF CASES WITH MISCONDUCT FOUND	17%
AVERAGE AMOUNT OF DEFENSE MITIGATION PRESENTED BY DEFENSE LAWYERS	LESS THAN 1 DAY
PERCENTAGE OF DEFENDANTS OF COLOR SENTENCED TO DEATH BETWEEN 2010-2015	60%
PERCENTAGE OF CASES WITH SIGNIFICANT MITIGATION (AGE AND IMPAIRMENTS COMBINED)	83%
PERCENTAGE OF DEFENDANTS UNDER AGE 21	17%
PERCENTAGE OF DEFENDANTS WITH INTELLECTUAL DISABILITY, SEVERE MENTAL ILLNESS, OR BRAIN DAMAGE	67%
PERCENTAGE OF CASES WITH NON-UNANIMOUS JURIES	100%

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

Pinellas County, a county with just under one million residents,[318] had five death sentences between 2010 and 2015.[319] The death-sentencing rate is approximately

311 *See Los Angeles Superior Court Judge Arthur Jean to Retire*, Met. News-Enterprise, Mar. 27, 2015, *available at* http://www.metnews.com/articles/2015/jean032715.htm.

312 *See Thomas Lee Goldstein*, Nat'l Reg. of Exonerations, U. of Mich. Sch. of L., https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3244 (last visited Sept. 21, 2016).

313 *See id.*

314 *See id.*

315 *See id.*

316 *See id.*

317 *See id.*

318 *See QuickFacts for Pinellas County, Florida*, U.S. Census Bureau, http://www.census.gov/quickfacts/table/HSD310214/12103.

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

1.61 death sentences per 100 homicides,[320] which is the second highest rate among the four Florida counties that made it into the top 16 outlier death penalty counties. Only Duval County's rate is higher.[321]

OVERZEALOUS PROSECUTORS

Bernie McCabe has been the District Attorney in Pinellas County since November 1992.[322] He began his tenure in the office as a line prosecutor in 1972.[323] His office has been rebuked by legal experts and reporters for relying on faulty testimony from the medical examiner and other experts to obtain convictions in first degree murder cases, including capital cases.[324] The Florida Supreme Court lambasted one of his former assistants, James Loughery, for insinuating "unsubstantiated and incriminating facts" and making other inappropriate remarks in a death penalty case.[325] The Court referred to Loughery by name, noting that another court had previously reprimanded him for "his arrogance and his inappropriate comments."[326]

Our review of direct appeal opinions from 2006-2015 found that one out of the six cases from this period involved prosecutorial misconduct,[327] and the sentence in that case was reversed.[328]

INADEQUATE DEFENSE

Pinellas County has a history of shoddy defense representation. For instance, in 1997 the Florida Supreme Court vacated Larry Clark's death sentence due to ineffective assistance of counsel [329] because his attorney "indicated his own doubts or distaste for the case" and "attacked Clark's character and emphasized the seriousness of the crime." [330]

Every case decided on direct appeal since 2006 involved the presentation of a day

320 *See* Baumgartner, Rate of Death Sentencing, *supra* note 115.

321 *See id.*

322 *About State Attorney—Bernie McCabe*, State Attorney, Sixth Judicial Circuit (FL), http://www.sao6.org/aboutsa.htm.

323 *See id.*

324 *See* Christopher Slobogin, *The Death Penalty In Florida*, 1 Elon. L. Rev. 17, 29-30, *available at* http://www.elon.edu/docs/e-web/law/law_review/Issues/Slobogin.pdf.

325 Evans v. State, No. SC-12-2160, at *2 (Fl. 2015), *available at* http://www.floridasupremecourt.org/decisions/2015/sc12-2160.pdf.

326 *Id.* at *24, note 7.

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

328 *See id.*

329 Clark v. State, 690 So. 2d 1280 (1997)

330 *See id.*

or less worth of mitigation evidence.[331] Richard Watts was the defense lawyer in half of those cases.[332] In spite of his client's PTSD and prior suicide attempts, Watts failed to request a competency exam and could not persuade his client Kenneth Dessaure not to waive both a penalty phase jury and the presentation of mitigation evidence.[333] In another case, Richard Todd Robards was sentenced to death by a seven-to-five jury vote. Robards had organic brain damage and mental health issues, but it appears Watts decided a jury would not significantly weigh "brain abnormalities" and chose not to introduce evidence regarding his client's mental health and brain function. Just one more vote would have spared Robards the death penalty.[334]

RACIAL EXCLUSION AND BIAS

Pinellas County has a history of deeply embedded racial prejudice and disparity. In 2014, city worker Robin Wynn said that St. Petersburg, the largest city in Pinellas County, "promotes institutional racism."[335] In that incident, a white supervisor in Wynn's department "spray-painted marks on the back of a black man's work vest and made reference to the Ku Klux Klan," and the city only suspended him for ten days, despite the fact that city "guidelines called for termination."[336] Additionally, school arrests for "common misbehavior" are racially skewed. In 2014-15, Black children comprised only 19 percent of the Pinellas County School District population.[337] Yet they were the subject of nearly 60 percent of these school-based arrests as well as 71 percent of the district's disorderly conduct arrests.[338] In some schools, at least 80 percent of students arrested were Black.[339]

Not surprisingly, this systemic problem of racial bias permeates through courthouse doors. Black men received 60 percent of Pinellas County's death sentences between 2010 and 2015.[340] According to Census data, Black residents were 10.3 percent of the county's population in 2010 and 11 percent in 2015.[341] Sixty-seven

331 *See* Pinellas County Direct Appeals, *supra* note 327.

332 *See id.*

333 *See* Dessaure v. Sec'y of Dep't of Corr., No. 8:11-cv-500-T-30TBM, 2011 U.S. Dist. LEXIS 143387, at *40 (M.D. Fla. Dec. 13, 2011).

334 *See Pinellas Direct Appeals*, *supra* note 327; Robards v. State, 112 So. 3d 1256, 1264 (Fl. 2013).

335 *See* Kameel Stanley, *Black Workers Take Concerns, Complaints to City Council*, Tampa Bay Times, Aug. 28, 2014, http://www.tampabay.com/news/localgovernment/black-workers-take-concerns-complaints-to-st-pete-city-council/2195209.

336 *See id.*

337 *See SPLC Files Federal Complaint Over Discriminatory Police Practices In Pinellas County, Florida, Schools*, SPLC (Aug. 31, 2016), https://www.splcenter.org/news/2016/08/31/splc-files-federal-complaint-over-discriminatory-police-practices-pinellas-county-florida.

338 *See id.*

339 *See id.*

340 *See* Baumgartner, Race of Defendants and Victims, *supra* note 58.

341 *See QuickFacts for Pinellas County*, U.S. Census Bureau, http://www.census.gov/quickfacts/table/RHI225215/12103 (last visited Sept. 22, 2016).

percent of the victims in these cases from this period were white, even though it is probable, based on data from the surrounding area, that a much smaller percentage of all homicide victims in the area are white.[342]

EXCESSIVE PUNISHMENT

Out of six cases decided on direct appeals between 2006 to 2015, five defendants, or 83 percent, had evidence of the kind of impairments that render the death penalty disproportionately harsh.[343] This was the highest rate for any of the 16 outlier death penalty counties. This figure includes four cases involving defendants with serious mental illnesses, brain damage, or intellectual impairment.[344] Another defendant was only 18 years old at the time of his offense, and was diagnosed with paranoia.[345]

Multiple psychiatric expert witnesses testified that Genghis Kocaker, who suffered childhood sexual abuse, was schizophrenic as well as actively psychotic during his crime.[346] Kocaker had attempted suicide twice, and he was hospitalized in a psychiatric unit for swallowing razor blades.[347] One expert opined that Kocaker had an IQ of 70 and had suffered organic brain damage.[348] Charles Peterson had an IQ score of 77,[349] well within the range of borderline intellectual disability.[350] Richard Todd Robards had organic brain damage and was sentenced to death by a seven-to-five vote.[351] A trial court found that John Lee Hampton suffered from mental health issues,[352] but sentenced him to death regardless.[353]

All six of the cases we reviewed from this period had non-unanimous jury decisions.[354] Only two of the six cases would have met the current requirement of at least 10 jurors voting for death.[355]

342 *See* Sullivan, *supra* note 218.

343 *See* Pinellas Direct Appeals, *supra* note 327.

344 *See id.*

345 *See id.*

346 *See id. Kocaker v. State, 119 So. 3d 1214, 1222-23 (Fla. 2013).*

347 *See id.*

348 *See id.*

349 *See id. Peterson v. State, 2 So. 3d 146, 152 (Fla. 2009).*

350 *See supra* note 22 and accompanying text.

351 *See* Robards v. State, 112 So. 3d 1256, 1264, 1267 (Fla. 2013).

352 *See* Hampton v. State, 103 So. 3d 98, 109 (Fla. 2012).

353 *See id.*

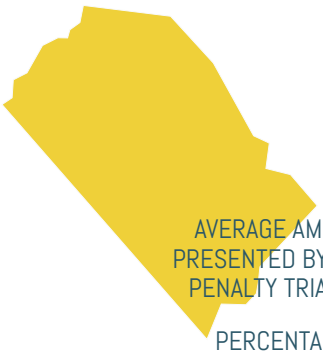
354 *See id.*

355 *See id.*

INNOCENCE

While Pinellas has not had any death row exonerations, John Peel was originally charged with first degree murder in an alleged Shaken Baby Syndrome case.[356] He maintained his innocence but "pled no-contest to a lesser manslaughter charge in order to avoid a possible life sentence."[357] He was exonerated in 2002 after a review of the autopsy report revealed no "brain and retinal hemorrhaging that Dr. [Joan] Wood claimed to have seen."[358]

#15



THE DEATH PENALTY IN ORANGE COUNTY, CA

PERCENTAGE OF CASES WITH MISCONDUCT FOUND	4%
AVERAGE AMOUNT OF DEFENSE MITIGATION PRESENTED BY DEFENSE LAWYERS IN DEATH PENALTY TRIALS BETWEEN 2010 AND 2015.	2.5 DAYS
PERCENTAGE OF DEFENDANTS OF COLOR SENTENCED TO DEATH BETWEEN 2010-2015	89%
PERCENTAGE OF CASES WITH SIGNIFICANT MITIGATION (AGE AND IMPAIRMENTS COMBINED)	50%
PERCENTAGE OF DEFENDANTS UNDER AGE 21	17%
PERCENTAGE OF DEFENDANTS WITH INTELLECTUAL DISABILITY, SEVERE MENTAL ILLNESS, OR BRAIN DAMAGE	33%

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

Orange County sent nine people to death row between 2010 and 2015. The county's rate of death sentencing for this period was 5.4 times the rate in the rest of the state per 100 homicides.[359] Nearly three percent of the county's homicides result in a death sentence, which is the second-highest rate in the state.[360] Only Riverside County had a higher rate.[361]

356 *See John Peel*, Nat'l Reg. of Exonerations, U. of Mich. Sch. of L., http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3813 (last visited Sept. 22, 2016).

357 *See id.*

358 *See id.*

359 *See* Baumgartner, *Rate of Death Sentencing*, *supra* note 115. The figure for rest of the state excludes all five of the top death sentencing counties discussed in this two-part report (Riverside, Orange, Los Angeles, Kern, and San Bernardino).

360 *See id.*

361 *See id.*

OVERZEALOUS PROSECUTORS

Orange County has been rocked by several scandals involving the District Attorney's office. In 2015, California Superior Court Judge Thomas Goethals removed Orange County D.A. Tony Rackauckas and the entire District Attorney's office from Scott Dekraai's capital case because several sheriffs' deputies "intentionally lied or willfully withheld material evidence from the court."[362] The judge explained that the office was ultimately responsible for the actions of these deputies, who "habitually ignored the law over an extended period of time."[363] Judge Goethals also found that three law enforcement officials (one prosecutor and two special sheriff's deputies) had falsely testified - two of which were part of the special unit in charge of handling informants.[364] The judge further noted that Rackauckas "cannot or will not in this case comply with the discovery orders of this court and the related constitutional and statutory mandates that guarantee this defendant's right to due process and a fair trial."[365] Rackauckas continues to deny wrongdoing, despite mounting evidence to the contrary.[366] Instead, his office has retaliated against Judge Goethals by attempting to disqualify him from other murder cases.[367]

Beth Webb, whose sister Laura was murdered by Scott Dekraai and whose mother was seriously injured by him, has repeatedly asked the office to drop the pursuit of the death penalty because the case has dragged on for five years due to the mishandling of the case.[368] Webb has noted that the death penalty process in California is dysfunctional, and believes it to be a "false promise" to victims, but the office has continued to pursue a death sentence.[369]

The Dekraai case, however, is just the tip of the iceberg. The District's Office has also been embroiled in a much larger controversy over their use of jailhouse informants, which may impact more than three dozen criminal cases.[370] According

362 Tony Saavedra and Kelly Puente, *In Rare Move, Judge Kicks Orange County D.A. Off Case of Seal Beach Mass Shooting Killer Scott Dekraai*, O.C. Register, Mar. 12, 2015, http://www.ocregister.com/articles/attorney-654000-county-case.html.

363 *See id.*

364 *See id.*

365 *See Judge Removes DA's Office in Orange County Murder Case Because Office Will Not Comply with Constitution*, The Open File (Mar. 12, 2015), http://www.prosecutorialaccountability.com/2015/03/12/ca-judge-removes-das-office-in-orange-county-murder-case-because-office-will-not-comply-with-constitution/.

366 *See* Ahn Do and Christopher Goffard, O.C. *district attorney and supervisor go another round in public feud,* L. A. TIMES, May 31, 2016, http://www.latimes.com/local/lanow/la-me-ln-spitzer-da-20160531-snap-story.html

367 *See* Christopher Goffard, *O.C. Prosecutors Steering Cases Away From Judge Goethals*, The Los Angeles Times (Mar. 13, 2015) http://www.latimes.com/local/orangecounty/la-me-jailhouse-snitch-20150314-story.html.

368 *See* Tom Berg, Families of Those Killed as Seal Beach Salon Still Struggling For Justice, O.C. Register, Jan. 6, 2016, http://www.ocregister.com/articles/says-687026-webb-dekraai.html.

369 *See id.*

370 *See* Radley Balko, *The Jaw-Dropping Police/Prosecutor Scandal in Orange County, Calif.*, Washington Post (Jul. 13, 2015) https://www.washingtonpost.com/news/the-watch/wp/2015/07/13/the-jaw-dropping-policeprosecutor-scandal-in-orange-county-calif/?utm_term=.c21b2754f131.

to Jordan Smith of *The Intercept*, "Alexandra Natapoff, a law professor at Loyola Law School in Los Angeles and the nation's leading expert on the use of snitches, said the fact that Orange County officials engaged in unconstitutional behavior similar to what made headlines years earlier in Los Angeles County reveals the 'entrenched' nature of the practice of using snitches in questionable ways."[371] The D.A.'s office has refused to prosecute police officers who have perjured themselves.[372]

Tony Rackauckas was first elected as Orange County District Attorney in 1998.[373] He has been described as a head prosecutor with a "win-at-all-cost mentality," who "lacks maturity," and "tolerates ethical lapses, evidence hiding, and law-enforcement perjury."[374] Between 1997 and 2009, there were 58 instances of misconduct from his office.[375]

Overzealousness in this office isn't limited to Rackauckus, however. Nine out of 24 cases that were decided on direct appeal between 2006 and 2015 were prosecuted by Jim Mulgrew.[376] While it is widely accepted that one shouldn't serve on a jury if prejudiced toward the facts before trial, Mulgrew once challenged a defense survey submitted to the court as part of a change of venue request[377] which showed that "83 percent of the prospective jurors [in Orange County] were aware of" the defendant's alleged crime, and "58 percent believe he is guilty and should be sentenced to death."[378] He stated, "that still leaves a very large number of residents."[379] Arguing against a defense motion in a different case, Mulgrew implied in open court that fibers on the victim's body could have come from a hotel room allegedly registered to the suspect in her slaying." Hours later, the district attorney's office discounted the evidence and his statement.[380]

371 Jordan Smith, *Anatomy of a Snitch Scandal*, The Intercept, May 14, 2016, https://theintercept.com/2016/05/14/orange-county-scandal-jailhouse-informants/.

372 *See* Radley Balko, *The Orange County Informant Scandal Just Got a Lot Nuttier*, The Washington Post (Mar. 11, 2016) https://www.washingtonpost.com/news/the-watch/wp/2016/03/11/the-orange-county-informant-scandal-just-got-a-lot-nuttier/?utm_term=.eb939dc183e6.

373 "District Attorney Tony Raukauckas," OCDA, http://orangecountyda.org/office/ocda.asp.

374 *See* R. Scott Moxley, *Overcharging And Bullying Show OCDA Lacks Maturity*, O.C Weekly, Aug. 18, 2016, http://www.ocweekly.com/news/overcharging-and-bullying-show-ocda-lacks-maturity-7434438.

375 *See* Radley Balko, *Counties That Send The Most People To Death Row Show A Questionable Commitment To Justice*, Huffington Post, Nov.25, 2013, http://www.huffingtonpost.com/2013/11/21/counties-that-send-the-mo_n_4317245.html.

376 See Orange County Direct Appeals Spreadsheet 2006-2015, on file with the Fair Punishment Project.

377 Greg Hernandez, *Famalaro's Attorneys Cite Pretrial Publicity, Seek Change of Venue*, L. A. TIMES, Jan. 22, 1997, http://articles.latimes.com/1997-01-22/local/me-23074_1_pretrial-publicity; Greg Hernandez, *Prosecutors Fight Moving Famalaro Trial*, L.A. Times, Feb. 6, 1997, http://articles.latimes.com/1997-02-06/local/me-26133_1_fair-trial

378 *See id.*

379 *See id.*

380 *California Judge OKs Evidence in Murder Case of 5-year-old Girl Abducted from her Front Yard*, The Northwest Indiana Times, Aug. 2, 2003, http://www.nwitimes.com/news/state-and-regional/california-judge-oks-evidence-in-murder-case-of--year/article_96c9604a-6026-53ff-96e7-19d9dc8bbf36.html.

INADEQUATE DEFENSE

In reviewing seven out of the nine cases for which data was available that resulted in a death sentence between 2010 and 2015, we found the average defense mitigation presentation lasted two and a half days.[381]

In one case handled by a private attorney, defendant John C. Abel was sentenced to death after only four hours of jury deliberation, despite the fact that one of the two eyewitnesses presented by prosecutors couldn't identify him in court.[382] The defense didn't present any mitigation when trying to spare Abel from death row.[383]

One private lawyer, George Peters, has had at least seven clients sentenced to death in Orange County.[384] Peters defended Fred B. Douglas in 1984, but in 2003 the U.S. Ninth Circuit Court of Appeals ruled that Peters failed to investigate Douglas' social history and mental health history.[385] Records from an earlier case against Douglas indicated that he suffered from mental illness and neurological problems, but Peters never investigated them. Peters presented less than one hour of penalty phase testimony.[386] The three judge panel ruled that Douglas provided inadequate representation and remanded the case back to district court with the instruction to either grant a new penalty phase trial or vacate the sentence.[387] In 2011, George Peters represented another client who was sentenced to death. Two separate juries had not been able to agree upon a sentence, but at the third penalty trial, in which Peters put on approximately 11.5 hours of mitigation evidence, the jury sentenced him to death.[388]

381 *See* Orange County Death Sentences Spreadsheet 2010-2015, on file with the Fair Punishment Project.

382 Christopher Goffard, *Death Row Inmate Hoping California Supreme Court Sides With Him*, The Los Angeles Times, Oct. 9, 2012, http://articles.latimes.com/2012/oct/09/local/me-stickup-man-20121010.

383 People v. Abel, 53 Cal. 4th 891, 271 P.3d 1040 (2012)

384 The seven clients are: Fred. B. Douglas, Rodney Alcala, Jonathan D'Arcy, Hung "Henry" Thanh Mai, John George Brown, Carlos Martinez, and Jason Richardson. *See* Claire Luna and Seema Mehta, *Defendant Is Now Called Serial Killer*, L. A. Times, Sept. 20, 2005, http://articles.latimes.com/2005/sep/20/local/me-alcala20/2; Anna Cekola, *Man Who Set Bookkeeper On Fire Gets Death Penalty*, L.A. Times, Apr. 12, 1997, http://articles.latimes.com/1997-04-12/local/me-47861_1_death-penalty; Richard Marosi, *CHP Officer's Killer Sent To Toughest U.S. Prison*,L.A. Times, Jul. 3, 2000, http://articles.latimes.com/2000/jul/03/local/me-47327; Douglas v. Woodford, 316 F.3d 1079, 1089 (9th Cir. 2003); Larry Welborn, *Before Sentenced to Death, Home Depot Killer Shouts: I'm Innocent'*, O.C. REGISTER, Nov. 28, 2011, http://www.ocregister.com/articles/richardson-328969-egan-death.html; Jerry Hicks, *Slain Officer's Family Is Still Awaiting Justice*, L. A. TIMES, Dec. 16, 1999, http://articles.latimes.com/1999/dec/16/local/me-44566; Larry Welborn, *Jury Recommends Death For Man Who Killed Couple*, O.C. Register, July 1, 2009, http://www.ocregister.com/articles/martinez-168355-jury-baytieh.html.

385 *See Douglas*, 316 F.3d at 1089; *See also* Henry Weinstein, *Death Penalty Nullified for Killer of 2 Teens*, The Los Angeles Times (Jan. 25, 2003) http://articles.latimes.com/2003/jan/25/local/me-death25.

386 *See id.* at 1086.

387 *See Douglas*, 316 F.3d at 1095.

388 *See* Orange County Death Sentences Spreadsheet, *supra* note 381.

RACIAL EXCLUSION AND BIAS

Of the nine individuals sentenced to die in Orange County from 2010 to 2015, 89 percent were people of color.[389] Four of the nine (44 percent) were Black men, even though the entire Black population in Orange County is approximately two percent of the county's total population.[390] Sixty percent of the victims were white in the cases involving Black defendants.[391]

Tommy Thompson

There were at least three death penalty cases from Orange County that were decided on direct appeal between 2006 and 2015 in which racially-biased jury selection was alleged. To be very clear, the California Supreme Court found no *Batson or Wheeler* violations in any of these cases, however we were still troubled by the racial dynamics in many of the cases we reviewed from this period, and in the new sentences from 2010 to 2015, because a substantial number of cases involved defendants of color and white victims. When former prosecutor Bob Gannon (now a judge) and Jim Mulgrew tried Richard Lucio De Hoyos, a Latino male accused of killing a Latina child, they used five of 16 total peremptory strikes to excuse Latino and African-American venire members. The final jury included one person who identified as Mexican-American in a county in which one-third of the residents identify as Latino or Hispanic.[392] Even if all of the strikes in this case were constitutional, the outcome is a jury that doesn't resemble the diversity of the community, which is concerning.

EXCESSIVE PUNISHMENT

Out of the 24 cases that were decided on direct appeal between 2006 and 2015, 50 percent, had evidence of the kind of impairments that render the death penalty disproportionately harsh.[393] This includes eight cases involving defendants with serious mental illnesses, brain damage, or intellectual impairment.[394] Seventeen percent of cases had defendants who were under the age of 21 at the crime, and 38

389 *See Baumgartner, Race of Defendants and Victims, supra* note 58.

390 Theresa Walker, *O.C. Has a Growing Ethnic Population With One Exception: African Americans*, O.C. Register, Feb. 9, 2014, http://www.ocregister.com/articles/coun2ty-600949-orange-african.html. *See QuickFacts for Orange County*, U.S. CENSUS BUREAU, http://www.census.gov/quickfacts/table/RHI225215/06059 (Last visited Oct. 2, 2016).

391 *See* Baumgartner, *Race of Defendants and Victims, supra* note 58.

392 These cases include Dung Dinh Anh Trinh, Hung Thanh Mai, and Richard DeHoyos. *See* People v. DeHoyos, 303 P.3d 1, 21-23 (Cal. 2013).

393 *See Orange County Direct Appeals Spreadsheet 2006-2015, supra* note 376.

394 *See id.*

percent were age 25 or younger.[395]

One example from this period is Jonathan Daniel D'arcy, whose mother tied him up in bed so she could sleep, and had forced him to eat feces.[396] He had psychiatric evaluations as young as ages five and eight, and suffered from hallucinations, paranoid schizophrenia; and a probable psychotic break at time of his crime.[397] Maria Del Rosio Alfaro was raped when she was only nine years old.[398] She was 18, pregnant, addicted to drugs, and had an IQ in the 70s when she committed her offense.[399] Robert Mark Edwards suffered daily childhood beatings at the hands of his father, who also punished him by making him rub his excrement on himself and eat food covered in animal fur.[400] And several defendants, like Dung Dinh Anh Trihn and Hung Thanh Mai, were traumatized refugees from the Vietnam War; both specifically asked the jury to sentence them to death for alleged "moral reasons."[401] Kevin Dewayn Boyce had an IQ of 69 and brain damage, and a former teacher described him as the "most learning-disabled student" she had seen in her 30-year career.[402]

INNOCENCE

Orange County has had 10 exonerations in serious felony cases since 1989, including four murder cases.[403] One of these men, Dewayne McKinney, spent 19 years behind bars for a murder he didn't commit.[404] Orange County prosecutors had attempted to get a death sentence for McKinney, but the jury deadlocked and he was sentenced to life without parole instead.[405]

Justice Stephen Reinhardt of the Ninth Circuit Court of Appeals believes that Tommy Thompson, who was convicted in Orange County and executed in 1998,

395 *See id.*

396 People v. D'Arcy, 226 P.3d 949 (Cal. 2010).

397 *See id.*

398 People v. Alfaro, 163 P.3d 118 (Cal. 2007).

399 *See id.*

400 People v. Edwards, 306 P.3d 1049 (Cal. 2013); See also Appellant's Opening Brief, People v. Edwards, Case No. S073316, at 25, *available at* http://www.courts.ca.gov/documents/1-s073316-app-opening-brief-122806.pdf.

401 *See* People v. Trinh, 326 P.3d 939 (Cal. 2014); People v. Mai, 305 P.3d 1175 (Cal. 2013).

402 People v. Boyce, 330 P.3d 812 (Cal. 2014).

403 *See* Nat'l Reg. of Exonerations, U. Mich. Sch. Of L., https://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={B8342AE7-6520-4A32-8A06-4B326208BAF8}&FilterField1=State&FilterValue1=California&FilterField2=County&FilterValue2=8_Orange (last visited Sept. 21, 2016).

404 Stuart Pfiefer, *Millionaire Ex-Inmate Dies in Crash*, The Los Angeles Times (Oct. 8, 2008) http://articles.latimes.com/2008/oct/08/local/me-mckinney8.

405 *See id.*

could have been innocent.[406] Justice Reinhardt and an en banc panel of the Ninth Circuit attempted to block the execution by reversing the death sentence after new evidence had come to their attention,[407] but the U.S. Supreme Court reversed the decision on a technicality,[408] saying they had acted too late.[409] Thompson's substantive claims of innocence were never heard.[410] Prosecutors gave conflicting accounts of the crime to two separate juries.[411] In Thompson's case, they argued that he was the primary killer, and in his co-defendant's trial they argued that the co-defendant was primarily responsible for the victim's death.[412] The California Supreme Court ruled this tactic was not permissible in 2005, seven years after Thompson's execution.[413] Despite switching theories to pin the crime on Thompson's co-defendant, the prosecution did not attempt to notify Thompson's trial judge that the evidence no longer implicated Thompson as the actual murderer.[414] Prosecutors also relied upon questionable testimony from a jailhouse informant.[415]

406 Darrell Satzman, *Did an Innocent Man Go to His Death at San Quentin?*, KCRW (Jun. 2, 2015) http://curious.kcrw.com/2015/06/did-an-innocent-man-go-to-his-death-at-san-quentin.

407 *See* Thompson v. Calderon, 120 F.3d 1045 (9th Cir.1997) (en banc).

408 *See* Calderon v. Thompson, 523 U.S. 538, 565 (1998).

409 *See id.*

410 Henry Weinstein, *Judge Says High Court Unfairly Limits Appeals*, L. A. TIMES, Oct. 21, 1998, http://articles.latimes.com/1998/oct/21/news/mn-34760.

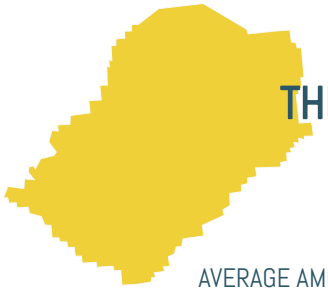
411 *See* Satzman, *supra* note 406.

412 *Id.*

413 In re Sakarias, 106 P.3d 931, 945 (Cal. 2005).

414 Liliana Segura, *Ten Years After Last Execution, California's Death Row Continues to Grow*, The Intercept (Jan. 17, 2016) https://theintercept.com/2016/01/17/ten-years-after-last-execution-californias-death-row-continues-to-grow/.

415 *See id.*



THE DEATH PENALTY IN JEFFERSON COUNTY, AL

#16

PERCENTAGE OF CASES WITH MISCONDUCT FOUND	6%
AVERAGE AMOUNT OF DEFENSE MITIGATION PRESENTED BY DEFENSE LAWYERS	LESS THAN 1 DAY
PERCENTAGE OF DEFENDANTS OF COLOR SENTENCED TO DEATH BETWEEN 2010-2015	100%
PERCENTAGE OF CASES WITH SIGNIFICANT MITIGATION (AGE AND IMPAIRMENTS COMBINED)	50%
PERCENTAGE OF DEFENDANTS UNDER AGE 21	17%
PERCENTAGE OF DEFENDANTS WITH INTELLECTUAL DISABILITY, SEVERE MENTAL ILLNESS, OR BRAIN DAMAGE	33%
PERCENTAGE OF CASES WITH NON-UNANIMOUS JURIES	100%
PERCENTAGE OF CASES IN WHICH A JUDGE OVERRODE A JURY'S RECOMMENDATION FOR A LIFE SENTENCE	44%
NUMBER OF DEATH ROW EXONERATIONS SINCE 1976	3

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

Between 2010 and 2015, Jefferson County prosecutors obtained five death sentences, all of which were imposed on African-American men.[416] Jefferson is the most populous county in Alabama, and includes the city of Birmingham.[417] The county imposes approximately 1.47 death sentences per 100 homicides.[418] Because of its size, this ratio makes Jefferson a primary driver of the death penalty, although the state of Alabama as a whole has notably high rates of capital sentencing.[419]

We reviewed 18 cases that were decided on direct appeal from Jefferson County between 2006 and 2015. Two of these cases were from Bessemer Division, and 16 were from the Birmingham Division of Jefferson County. While the two divisions of Jefferson County have different prosecutor offices, they share many of the same defense attorneys, as well as other characteristics, so we discuss cases from both in the section below.

416 *See Jefferson County Death Sentences, 2010-2015*, on file with the Fair Punishment Project. There were no sentences from Bessemer during this period.

417 Phil Pierce, *Census 2010: Jefferson County Population Dips, But It's Still by Far Alabama's Largest County*, AL.COM, Feb. 24, 2011, http://blog.al.com/spotnews/2011/02/jefferson_county_population_di.html.

418 See Baumgartner, *Rate of Death Sentencing*, *supra* 115.

419 *See* Brenden Kirby, *Death Penalty Capital: Alabama Has Nation's Most Death Row Inmates Per Capita*, AL.COM (May 1, 2015, 6:00 AM), http://www.al.com/news/index.ssf/2015/05/death_penalty_capital_alabama.html.

OVERZEALOUS PROSECUTORS

With 27 individuals on death row and at least 10 executions since 1983,[420] Jefferson County has produced more death row inmates any county in Alabama.[421]

Deputy District Attorney Mike Anderton, who has prosecuted four of the 16 cases (25 percent) from the Birmingham Division that were decided on direct appeal between 2006 and 2015,[422] claimed one defendant, who has an IQ of 56, was faking mental retardation in order to avoid the death penalty.[423] Montez Spradley, another individual Anderton prosecuted and sent to death row, is now free after sitting on death row for a decade for murder he did not commit.[424] Anderton dismissed allegations that he paid Spradley's girlfriend to testify; however, documents from Anderton's office indicated Spradley's girlfriend was paid $5,000 through a private fund after she had received another $5,000 from the governor's office.[425] Anderton also prosecuted 18 year-old Brandon Washington, who was sentenced to death in the 2005 shooting of a RadioShack employee.[426] Washington had no criminal history, and there was no physical evidence linking him to the crime.[427] The prosecution team secured a death sentence after presenting illegal evidence to the jury.[428] Upon appeal, Washington was re-sentenced to life in prison without parole.[429]

Anthony Ray Hinton

420 *See* Alabama Dep't of Corrections, *Alabama Inmates Currently on Death Row*, http://www.doc.state.al.us/DeathRow.aspx (last visited on Sept. 29, 2016); See also Alabama Dep't of Corrections *Executions*, http://www.doc.state.al.us/Executions.aspx (last visited on Sept. 29, 2016).

421 *See* Kirby, *supra* note 419.

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

423 *See* Kent Faulk, *Jefferson County Prosecutor Believes Birmingham Man Faked Mental Retardation to Avoid Return to Death Row*, AL.com, Dec. 31, 2012, http://blog.al.com/spotnews/2012/12/jefferson_county_prosecutor_be.html.

424 *See* Kent Faulk, *Alabama Man Who Once Spent Time on Death Row: "I'm so glad to be alive,"* AL.com (Sept. 10, 2015, 12:56 PM), http://www.al.com/news/birmingham/index.ssf/2015/09/once_on_death_row_in_slaying_o.html; Anna Arceneax, *Montez Spradley, an Innocent Man Once on Death Row, Is Free*, ACLU (Sept. 10, 2015, 12:00 PM), https://www.aclu.org/blog/speak-freely/montez-spradley-innocent-man-once-death-row-free.

425 Radley Balko, *The Outrageous Conviction of Montez Spradley*, Wash. Post, Sept. 21, 2015, https://www.washingtonpost.com/news/the-watch/wp/2015/09/21/the-outrageous-conviction-of-montez-spradley/.

426 *Former Alabama Death Row Prisoner Receives Life Sentence*, Equal Justice Initiative (Apr. 6, 2012), http://eji.org/news/former-alabama-death-row-prisoner-brandon-washington-sentenced-to-life; Death Sentences Today, *Alabama*, http://deathsentencestoday.wix.com/davidmccord#!alabama-2006/c1m8g.

427 *See id.*

428 *See id.*

429 *See id.*

INADEQUATE DEFENSE

Our examination of the 18 cases decided on direct appeal between 2006 and 2015 revealed that defense lawyers presented less than one day's worth of mitigation evidence in every single case, and in one case no mitigation evidence was presented.[430]

The Alabama Court of Criminal Appeals found that the trial court's failure to grant Alfonso Morris's attorney the "funds to hire an independent mental-health expert left him with no defense at the guilt phase of trial."[431] Morris has an extremely low IQ score of 53 and "lifelong cognitive and adaptive deficits," but his counsel could not afford an independent expert witness.[432] Instead, he retained the same state doctor who earlier performed a competency evaluation at the behest of the state.[433] When cross-examined, this expert witness agreed with the "unsubstantiated assertion" that "pro se, handwritten pleadings and the handwritten letters...in the record" were written by Morris.[434] The prosecutor privately told the doctor that this was the case before the sentencing hearing.[435]

Until 2012, Jefferson County had no Public Defender's Office.[436] In Jefferson County, poor criminal defendants were assigned private practice attorneys, who were reimbursed by the state for their work.[437] Even now, judges who doubt the public defenders' qualifications have continued to appoint private attorneys in serious criminal cases.[438] However, this alternative means that elected, partisan judges continue to appoint capital defense lawyers.[439] As Jefferson County Circuit Judge Tracie Todd noted, "Locally, it is an 'open secret' that an attorney all too often receives case appointments in the criminal division based on his campaign contribution, and not squarely on his legal expertise."[440]

430 *See Jefferson County Direct Appeals 2006-2015, supra* note 422.

431 Morris v. State, 956 So. 2d 431, 452 (Ala. Crim. App. 2005).

432 *Id.* at 452-53.

433 *See Id.*

434 *Id.* at 452.

435 *See Id.*

436 *See* Kent Faulk, *Birmingham Lawyer Kira Fonteneau Hired to Lead Jefferson County's First Public Defender's Office*, AL.com, Nov. 28, 2012, http://blog.al.com/spotnews/2012/11/birmingham_lawyer_kira_fontene.html.

437 *See Id.*

438 *See* Kent Faulk, *Jefferson County Judge Hopes New Public Defender in Place by Labor Day*, AL.com, Jul. 22, 2016, http://www.al.com/news/birmingham/index.ssf/2016/07/jefferson_county_judge_hopes_n.html.

439 *See Id.*

440 *See* Kent Faulk, *JeffCo Judge: Alabama Death Sentence Unconstitutional*, AL.com, Mar. 3, 2016, http://www.al.com/news/birmingham/index.ssf/2016/03/jeffco_judge_rules_alabama_dea.html.

RACIAL BIAS AND EXCLUSION

There is no question that Alabama has a history filled with racism and exclusion. Martin Luther King, Jr.'s experience in the Birmingham jail was a defining moment for the Civil Rights Movement.[441] King advocated for non-violent resistance to protest the city's extreme racial segregation.[442] But despite King's efforts, Jefferson County has not overcome its racially-charged past.[443] Nowhere is this more evident than in the county's system of capital punishment.[444]

Of the cases decided on direct appeal between 2006 and 2015, 89 percent involved African-American defendants,[445] and 100 percent of Jefferson County's death sentences from 2010 to 2015 were given to Black men.[446]

Anthony Ray Hinton, who was exonerated and released from prison after spending nearly 30 years on death row, says his case was "built around racism and a lie."[447] Hinton claims that when he was taken into custody, the police said to him, "First of all you're Black, second of all you've been in prison before, third, you're going to have a white judge, fourth, you're more than likely to have a white jury, and fifth, when the prosecution get to putting this case together, you know what that spells? Conviction, conviction, conviction, conviction, conviction."[448]

In 2010, the Alabama Supreme Court remanded the case of Bessemer death row prisoner Demetrius Jackson back to the lower courts because he never had an opportunity to argue that he was subjected to racially biased jury selection. The Court noted that the prosecutor excluded 79 percent of the qualified African-Americans from the jury. Later, after reviewing the evidence, the Alabama Supreme Court rejected the claim that the jurors had been excluded on the basis of race.[449] However, they again remanded the case back to the trial court, this time based on the fact that the trial judge overrode the jury's 10 to two recommendation for a life sentence for no apparent reason. A new trial judge resentenced Jackson to life

441 *Martin Luther King, Jr.'s 'Letter from Birmingham Jail,'* Atlantic, Apr. 16, 2013, http://www.theatlantic.com/politics/archive/2013/04/martin-luther-kings-letter-from-birmingham-jail/274668/

442 *See id.*

443 *See* Peter C. Meyers, *Martin Luther King Jr., and the American Dream*, Heritage Foundation, Mar. 24, 2014, http://www.heritage.org/research/reports/2014/03/martin-luther-king-jr-and-the-american-dream.

444 *See* Brenden Kirby, *Death Penalty Capital: Alabama Has Nation's Most Death Row Inmates Per Capita*, AL.com, May 1, 2015, http://www.al.com/news/index.ssf/2015/05/death_penalty_capital_alabama.html.

445 *See Jefferson County Direct Appeals Spreadsheet*, *supra* note 422.

446 *See Baumgartner, Race of Defendants and Victims*, *supra* note 58.

447 *See Anthony Ray Hinton Blames Racism for Wrongful Jailing*, BBC, Apr. 7, 2015, http://www.bbc.com/news/world-us-canada-32200813.

448 See *Id.*

449 *See* Jackson v. State, 169 So. 3d 1, 15 (Ala. Crim. App. 2010); Court Remands EJI Death Penalty Case After Showing of Racial Discrimination, EQUAL JUSTICE INITIATIVE, Dec. 20, 2010, http://eji.org/news/alabama-court-remands-demetrius-jackson-case.

in prison.[450] Despite the Court's failure to find a *Batson* violation, the high rate at which African-Americans were excluded from serving on the jury is troubling.

In a case from the Birmingham Divison of Jefferson County, prosecutors struck eight out of 14 prospective Black jurors when prosecuting Anthony Lane, an African-American defendant who was sentenced to death in 2011.[451]

EXCESSIVE PUNISHMENT

Out of the 18 direct appeals opinions we reviewed, 50 percent had evidence of the kind of impairments that render the death penalty disproportionately harsh.[452] This includes six cases involving defendants with serious mental illnesses, brain damage, or intellectual impairment.[453] In three of these cases, the defendants were younger than 21 years old.[454] Fifty percent involved defendants who were age 25 or younger.[455]

Jefferson County prosecutors sought death for men with severe intellectual disabilities including Esaw Jackson, who has an IQ score of 56, one of the lowest seen in this study.[456] His death sentence was vacated in 2012.[457] Anthony Lane had an IQ score of 72.[458] On October 5, 2015, the U.S. Supreme Court vacated Lane's sentence[459] in light of *Hall v. Florida*, which invalidated a strict IQ cutoff scheme for determining intellectual disability.[460] Strikingly, on April 19, 2016, the Alabama Court of Criminal Appeals reaffirmed the death sentence.[461] Kerry Spencer was sentenced to death by judicial override.[462] His post-conviction relief psychiatrist attested to Spencer's brain damage and PTSD.[463] In another case, Dontae Callen

450 *See* Kelsey Stein, *Formerly Condemned to Death, Fairfield Man Sentenced to Life in Prison for Police Officer's Slaying*, AL.com, July 23, 2013, http://blog.al.com/spotnews/2013/07/formerly_condemned_to_death_fa.html.

451 Pet. for Writ of Cert., Lane v. Alabama, at 32 (June 1, 2015), *available at* http://eji.org/sites/default/files/anthony-lane-us-supreme-court-cert-petition-06-01-15.pdf.

452 *See Jefferson County Direct Appeals Spreadsheet*, *supra* note 422.

453 *See id.*

454 *See id.*

455 *See id.*

456 *See Id.*; *Intellectually Disabled Former Alabama Death Row Prisoner Sentenced to Life*, Equal Justice Initiative (Jan. 3, 2013), http://eji.org/news/alabama-death-row-inmate-esaw-jackson-sentenced-to-life.

457 *See Jefferson County Direct Appeals Spreadsheet*, *supra* note 422.

458 *See* Lane v. State, CR-10-1343, 2016 WL 1728753, at *5 (Ala. Crim. App. 2016). Lane was also just 19 years old at the time of the crime.

459 *See* U.S. ––––, 136 S.Ct. 91, 193 L.Ed.2d 7 (2016).

460 *See* Hall v. Florida, 134 S.Ct. 1986 (2014).

461 *See* Lane v. State, CR-10-1343, 2016 WL 1728753, at *5 (Ala. Crim. App. 2016).

462 *See Death Penalty in Alabama: Judge Override*, Equal Justice Initiative, http://eji.org/reports/death-penalty-alabama-judge-override (last visited Sept. 21, 2016).

463 *See* Spencer v. State, CR-12-1837, 2015 WL 5055353, at *25 (Ala. Crim. App. 2015).

was not even two months past his eighteenth birthday with a low IQ and PTSD when he committed his crime.[464]

INNOCENCE

Three people have been released from Jefferson County's death row, including the aforementioned Anthony Hinton,[465] Wesley Quick, and Montez Spradley.[466] The only evidence in Spradley's case was the testimony of his "disgruntled ex-girlfriend" and a "jailhouse snitch." In fact, jurors originally recommended a life sentenced by a 10 to two vote, however, the judge overrode their recommendation and imposed a deaths sentence. His conviction was overturned in 2011, and he was released in 2015.[467]

Anthony Hinton served 30 years on death row for a murder he did not commit.[468] He was working 15 miles away when the crime was committed.[469] His attorney failed to hire a qualified firearms expert for trial, and instead hired someone known to be inadequate.[470] Three firearms experts later testified in 2002, that the bullets used in the crime could not be matched to a weapon owned by Hinton.[471] In 2014, the U.S. Supreme Court reversed his conviction and sentenced due to the poor representation he had received, and prosecutors admitted they had insufficient evidence with which to retry him.[472]

The third wrongful conviction involved Wesley Quick, who was just 18 years old at the time of the alleged crime.[473] At his third trial in 2003, a jury acquitted Quick of all charges.[474]

464 *See Jefferson County Direct Appeals Spreadsheet, supra* note 422.

465 *See* Kirby, *supra* note 419.

466 *See* Anna Arceneax, *Montez Spradley, an Innocent Man Once on Death Row, Is Free*, ACLU (Sept. 10, 2015), https://www.aclu.org/blog/speak-freely/montez-spradley-innocent-man-once-death-row-free; Radley Balko, The outrageous conviction of Montez Spradley, Wash. Post, Sept. 21, 2015, https://www.washingtonpost.com/news/the-watch/wp/2015/09/21/the-outrageous-conviction-of-montez-spradley/.

467 *See id.* The state offered Spradley an Alford plea after his conviction was overturned, and he accepted it rather than live through the ordeal of another trial. This means that Spradley maintains his innocence, while the state simultaneously maintains it has enough evidence to prove his guilt. He was resentenced and released a few years later. We include Spradley among the number of individuals wrongfully convicted and sentenced to death in Jefferson due to the outrageous circumstances of his conviction.

468 *See Innocence: Anthony Ray Hinton Exonerated After 30 Years on Alabama's Death Row*, Death Penalty Information Center (last visited Sept. 21, 2016 at 5:50PM), http://www.deathpenaltyinfo.org/node/6095.

469 *See id.*

470 *See id.*

471 *See id.*

472 *See id.*

473 *Innocence Cases*, Death Penalty Info. Cntr., http://www.deathpenaltyinfo.org/innocence-cases, (last visited Sept. 21, 2016).

474 See Wesley Quick, NAT'L REG. OF EXONERATIONS, U. MICH. SCH. OF L., https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3556 (last visited Sept. 21, 2016).

CONCLUSION

As we noted in Part I of this two-part report, the death penalty is on life support. Only 16 counties out of more than 3,100 imposed five or more death sentences between 2010 and 2015. In Part I, we looked at half of these 16 counties, including: Caddo Parish (LA), Clark (NV), Duval (FL), Harris (TX), Maricopa (AZ), Mobile (AL), Kern (CA), and Riverside (CA).

Part II of this report took an in-depth look into how the death penalty operates in practice in the other half of these outlier counties, including: Dallas (TX), Jefferson (AL), Pinellas (FL), Miami-Dade (FL), Hillsborough (FL), Los Angeles (CA), San Bernardino (CA), and Orange (CA).

One of the most striking findings across the 16 counties 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 16 counties, we reviewed direct appeals opinions handed down between 2006 and 2015, and found that 15 percent--or approximately in six--involved a person under the age of 21, and 40 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. In Part II of this report, we discovered that the overall percentage of cases with significant mitigation evidence ranged from 83 percent of cases in Pinellas County, the highest rate of any of the 16 counties, to 47 percent of cases in Los Angeles. The average across the 16 counties is 56 percent.

We also found a pattern of prosecutorial over-aggression, and in several of the counties, persistent misconduct. In Miami and Pinellas counties, for example, courts found some form of misconduct in 29 percent and 17 percent of cases respectively. The average across all 16 counties was 10 percent, or around one out of every 10 cases. A number of the counties reflected an extreme concentration of death sentences in the hands of a few prosecutors. In Dallas, for example, just three prosecutors obtained 62 percent of the death sentences that we reviewed on direct appeal between 2006 and 2015.

We also discovered a troubling number of wrongful convictions and exonerations from these 16 counties. Ten of the 16 counties had at least one person exonerated

from death row, including five counties mentioned in Part II of this report. Jefferson County and Hillsborough each had three men released from death row. Outside of the death penalty context, some of these counties have had numerous exonerations in serious felony cases. Los Angeles County alone has had 59 exonerations in serious felony cases since 1989, including one death penalty case.[475] 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.[476]

We found inadequate defense lawyering in all of these counties. In most of the counties we reviewed, the average mitigation presentation at the penalty phase of the trial lasted approximately less than one and half days. In Jefferson County, not one case had a defense mitigation presentation longer than one 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 or a serious lack of resources. As we noted in Part I of this report, we frequently found the same defense lawyers repeatedly represented clients who ended up on death row. The quality of defense lawyers ranged from those who were simply under-resourced to those who were extremely detrimental in some of the cases with the most egregious lawyering.

An examination of the six outlier counties that don't require juries to be unanimous, revealed that 91 percent of the cases from our review period had non-unanimous verdicts.[477]

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 16 counties, there were racial disparities with regards to the race of the defendants and the race of victims. In 14 of the 16 counties, not a single white person received a death sentence for killing a Black person. In contrast, in 14 out of 16 counties at least one Black person was sentenced to death for the killing of a white person. In Orange County, 60 percent of the victims were white in the cases involving a Black defendant, even though research has shown that the vast majority of homicides are committed intra-race. In Hillsborough and Pinellas this figure was 40 percent,

475 *See supra* note 305

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

477 This refers to the two outlier counties from Alabama (Mobile and Jefferson), and the four from Florida (Miami-Dade, Pinellas, Hillsborough, and Duval).

and in San Bernardino it was 33 percent. Out of all of the death sentences obtained in these 16 counties between 2010 and 2015, 46 percent were given to African-American defendants, and 73 percent were given to people of color. Moreover, we saw the continued exclusion of Black and Latino 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.

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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.