DEATH PENALTY INFORMATION CENTER

THE DEATH PENALTY IN 2016: YEAR END REPORT

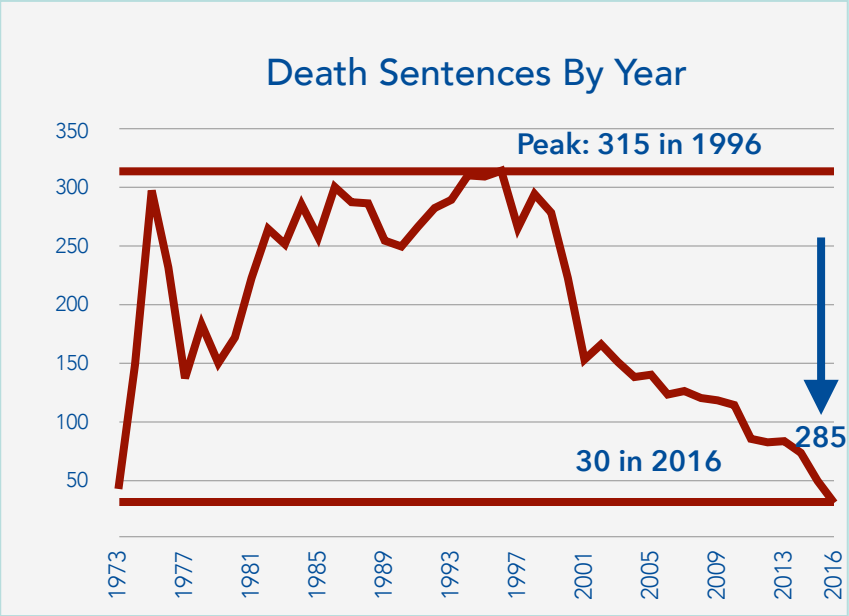
ANOTHER RECORD DECLINE IN DEATH PENALTY USE

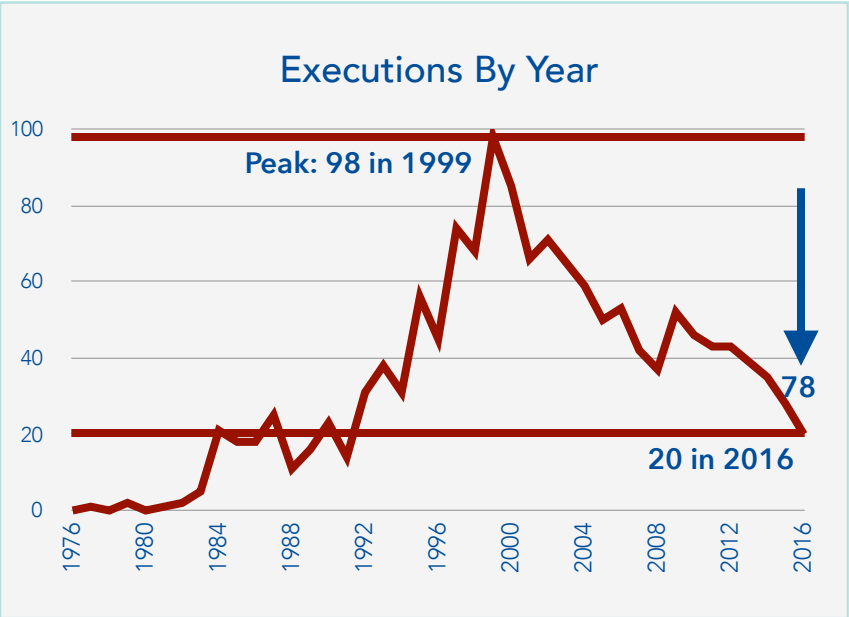
DEATH SENTENCES, EXECUTIONS, AND PUBLIC SUPPORT FOR DEATH PENALTY AT HISTORIC LOWS

COURTS BAR UNCONSTITUTIONAL PRACTICES IN 4 STATES

KEY FINDINGS

- There will be approximately 30 **death sentences** in 2016, down 39% from the record low set last year.
- The 20 **executions** in 2016 were the fewest since 1991.
- Fewer new death sentences were imposed in the past decade than in the decade preceding the Supreme Court's invalidation of capital punishment in 1972.
- State courts in **Florida** and **Delaware** declared their death sentencing statutes unconstitutional.





RECORD DECLINE IN USE OF DEATH PENALTY CONTINUES ACROSS U.S. IN 2016

Executions by State	2016	2015
Georgia	9	5
Texas	7	13
Alabama	2	0
Missouri	1	6
Florida	1	2
Oklahoma	0	1
Virginia	0	1
Totals	20	28

Use of the death penalty fell to historic lows across the United States in 2016. States imposed the fewest death sentences in the modern era of capital punishment, since states began re-enacting death penalty statutes in 1973. New death sentences are predicted to be down 39% from 2015's 40-year low. Executions declined more than 25% to their lowest level in 25 years, and public opinion polls also measured support for capital punishment at a four-decade low.

The numbers continued to demonstrate the geographic isolation of the death penalty and its disproportionate overuse by a handful of jurisdictions. The number of state and federal jurisdictions imposing death sentences fell by more than half, from 60 counties and the federal government in 2012, to only 27 counties this year. More than 60% of those sentences came from a 2% segment of U.S. counties that has historically produced more than half of all death sentences.

Voters reacted by replacing prosecutors in four of the 16 counties that imposed the most death sentences in the U.S. from 2010-2015, but the Election Day message was mixed, as voters in three states decided to retain the death penalty or add it to the state constitution. Courts also took action that could reduce future death sentences, striking down outlier practices that had contributed to disproportionately high death sentencing rates in Arizona, Delaware, Florida, and Oklahoma.

Few states and counties imposed death sentences in 2016, and even fewer carried out executions. For the first time in more than 40 years, no state imposed ten or more death sentences. Just two states—Texas and Georgia—accounted for 80% of all the executions in the U.S. in 2016. With Missouri, the three states combined to carry out 41 executions in 2015 and 2016, accounting for 85% of all executions in those years. But reflecting the decline in support for the death penalty, Texas juries imposed only four new death sentences in 2016, and juries in Georgia and Missouri did not impose *any* in either 2015 or 2016.

The number of people on death rows across the United States continued to decline in 2016, as the number of prisoners obtaining relief from their convictions or death sentences or dying in custody outpaced the number of new death sentences imposed in most states, and as states like Georgia, Missouri, and Texas executed more prisoners than they sentenced to death.

2016 will see the fewest death sentences imposed in the U.S. in any year since the Supreme Court struck down the nation's death penalty laws in 1972.

FEWEST NEW DEATH SENTENCES IMPOSED IN MODERN ERA OF U.S. DEATH PENALTY

Fewer death sentences will be imposed in 2016 than in any other year since the Supreme Court declared U.S. death penalty statutes unconstitutional in *Furman v. Georgia* in 1972. With two weeks remaining in 2016, DPIC has confirmed that 29 new death sentences have been imposed and one hearing is scheduled before the end of the year in which a judge is expected to formally impose a death verdict that jurors had returned at trial. **The 30 death sentences expected to be imposed in 2016 represent a 39% decline from last year's 42-year low, and are down more than 90% from the 315 death sentences imposed during the peak death-sentencing year of 1996**.

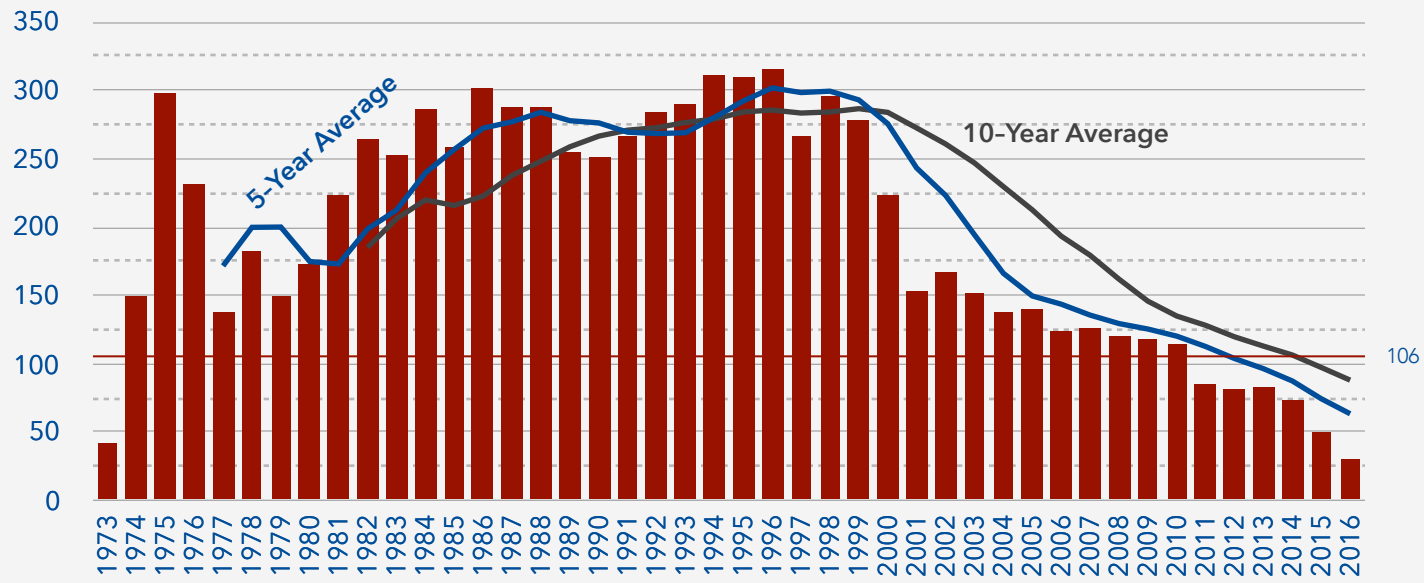
This was the sixth consecutive year in which fewer than 100 death sentences were imposed in the U.S. The multi-year trends illustrate the consistent direction of this historic decline. Fewer death sentences were imposed over the past five years than during any other 5-year period since *Furman*, and the 5-year annual average of new death sentences has now dropped for 18 consecutive years.

The 10-year trends are perhaps even more significant. Much like the 5-year trends, fewer death sentences were imposed in the past decade than during any other 10-year period since *Furman*. The 10-year annual average of new death sentences has fallen below 90 death sentences per year for the first time in the modern era of the U.S. death penalty. For the second consecutive year, fewer death sentences were imposed in the United States over the past decade than in the decade before the Supreme Court's decision in *Furman*.

2016 marked the first time in at least 40 years that no state imposed 10 or more death sentences. As of mid-December, only five states had imposed more than one death sentence. California imposed the most, with nine; the others were Ohio (4), Texas (4), Alabama (3), and Florida (2). The growing list of states that did not sentence anyone to death included Georgia, Kentucky, Missouri, Mississippi, South Carolina, and Virginia. The death sentences continued to be

Death Row By State	2016†	2015†
California	741	746
Florida	396	400
Texas	254	265
Alabama	194	195
Pennsylvania	175	183
North Carolina	155	156
Ohio	142	146
Arizona	126	124
Nevada	80	78
Louisiana	77	83
Tennessee	69	72
Georgia	68	84
US Government	62	62
Mississippi	48	48
Oklahoma	47	50
South Carolina	43	44
Arkansas	36	36
Kentucky	34	34
Oregon	34	35
Missouri	26	31
Delaware	18	17
Indiana	12	14
Kansas	10	9
Nebraska	10	10
Idaho	9	11
Utah	9	9
Washington	9	9
Virginia	7	8
US Military	6	6
Colorado	3	3
South Dakota	3	3
Montana	2	2
New Mexico*	2	2
New Hampshire	1	1
Wyoming	1	1
Connecticut*	0	12
Total	2,905‡	2,984‡

* Abolished death penalty
† Data from NAACP Legal Defense and Educational Fund for July 1 of the year shown
‡ Persons with death sentences in multiple states are only included once



disproportionately concentrated in a small number of outlier counties and the product of outlier practices. All nine of California's death sentences, and 19 of the 30 total, were imposed in the 2% of U.S. counties that DPIC found in 2013 accounted for 56% of the prisoners on death row across the country. Eight of the California death sentences were from counties identified in the Harvard University Fair Punishment Project's list of the 16 outlier counties that had produced the most death sentences in the U.S. from 2010-2015. **However, death sentences were down significantly even in these counties, falling 39% from the 2015 total of 31 and by more than half from the 2013 total of 41.** Los Angeles County imposed four death sentences, the most of any county, but as of December 15, no other 2% county had imposed more than one death sentence.

NUMBER OF JURISDICTIONS IMPOSING NEW DEATH SENTENCES, 2012-2016

Years	State Jurisdictions		Federal Jurisdictions		Jurisdictions	
	Counties	States	Fed Gvt	Military	Total	% Decrease
2012	60	18	1	0	61	–
2013	56	15	1	1	58	4.9%
2014	56	20	1	0	57	6.6%
2015	35	14	1	0	36	41.0%
2016	27	13	0	0	27	55.7%

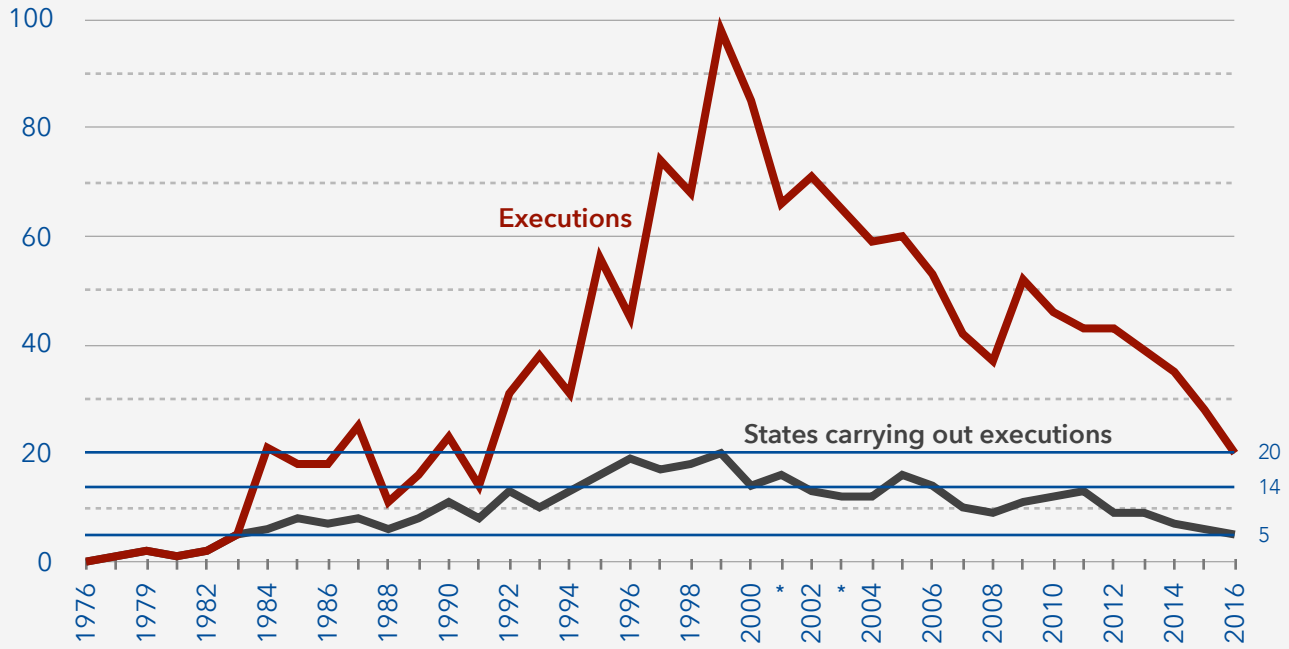
Going into 2016, only three states allowed judges to impose death sentences if juries recommended life or reached non-unanimous recommendations of death. This outlier practice produced three of the five death sentences imposed in Florida and Alabama, with the defendant pleading guilty and asking for the death penalty in one of the other cases. But with Florida's death sentencing statute declared unconstitutional by both the U.S. and Florida Supreme Courts, the non-unanimous death sentences fell dramatically from 13 one year ago. The Florida Supreme Court ruling striking down the practice in October will likely require overturning the one non-unanimous Florida death verdict this year.

U.S. EXECUTIONS DROP 29%; FALL TO 25-YEAR LOW

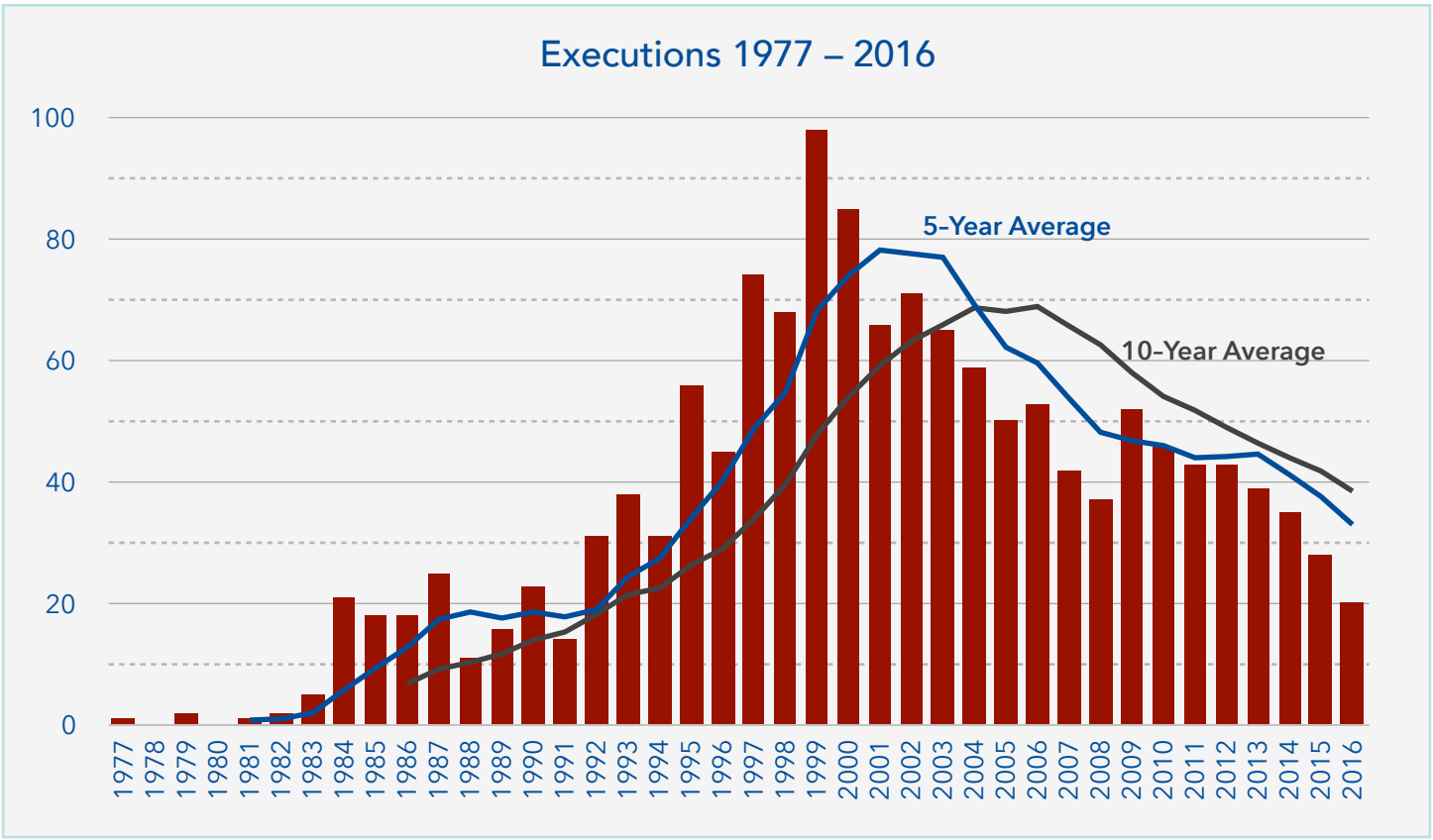
Executions continued their historic decline in 2016, with 20 executions carried out by just five states. It was the fewest number of executions in the U.S. since 1991 and the fewest number of states carrying them out since 1983. This continuing decline reflects both the increasing geographic isolation and outlier application of capital punishment in the United States, but is unquestionably also affected by measures the American pharmaceutical industry have undertaken to prevent states from obtaining their medicines for use in executions, human rights regulations adopted by the European Union to prevent export of materials and supplies that can be used in executions or for purposes of torture, and a court order directing the federal Food and Drug Administration to prevent the illegal importation of execution drugs.

Four states that are responsible for 90% of the executions in the U.S. in 2016—Georgia (9), Texas (7), Florida (1), and Missouri (1)—have also carried out more than 85% of the country's 83 executions over the past three years (Texas (27), Missouri (17), Georgia (16), and

U.S. Executions at Lowest Level in 25 Years



*The federal government also carried out two executions in 2001 and one in 2003.



Florida (11)). 80% of all executions in the U.S. in 2016 took place in either Georgia or Texas. Although Georgia carried out more executions than at any time since the 1950s, juries in the state did not impose a single new death sentence in either 2015 or 2016. The state had the dubious distinction of supplanting Texas as the country's leading executioner, only the third time since 1985 that any other state had executed more prisoners than Texas. The seven executions in Texas were the fewest in the state in two decades, and for only the second time since 1982, Texas did not execute any African American prisoners. The Texas Court of Criminal Appeals stayed executions in seven cases. In four of those cases, the stays were issued to permit prisoners to obtain review of new evidence relating to innocence or the prosecution's use of false, unreliable, or unscientific expert testimony.

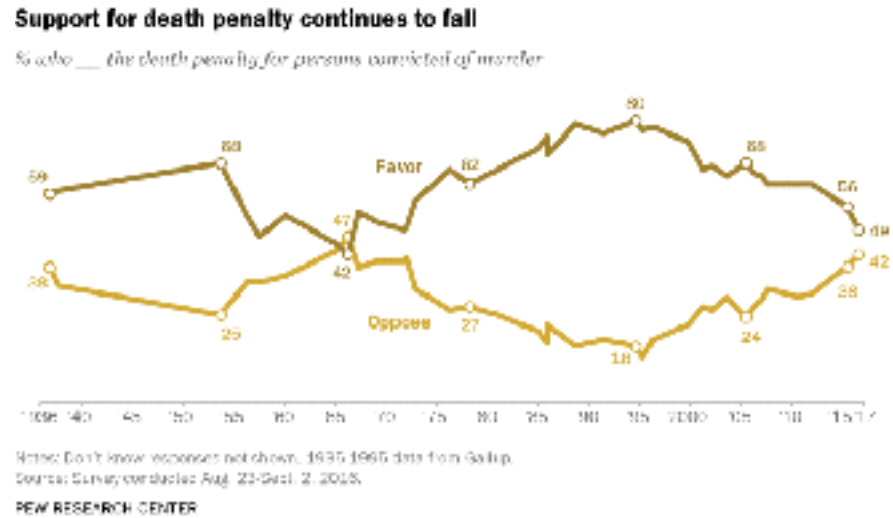
Executions fell 28.6% from last year's already 24-year low, and were $^{4}/_{5}^{ths}$ below the nation's peak of 98 executions in 1999. It was the 7th consecutive year that the number of executions in the U.S. declined or held steady from the preceding year and the 9th time in the past ten years. Executions were down more than 62% from the 53 executions carried out by 14 states a decade ago.

The multi-year execution numbers even more graphically illustrate the consistency and durability of the decline in executions across the country. Executions have fallen 58% from the peak 5-year average of 78.2 executions per year in 2001 to a 5-year average of 32.8 in 2016.

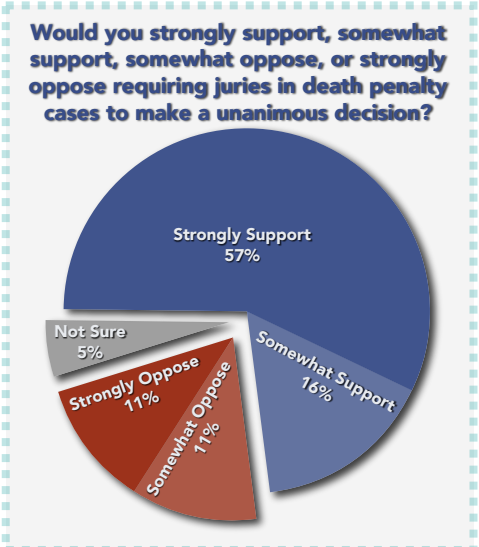
The 10-year average number of executions in the U.S. has dropped every year since 2006 when it peaked at 68.9 executions per year. The average number of annual executions over the last 10 years is now 38.4, down 44% from the 10-year annual execution rate a decade ago.

POLLS REPORT HISTORIC DECLINES IN DEATH PENALTY SUPPORT

Public opinion polls in 2016 reported historic lows in support for the death penalty. Pew Research Center found that just 49% of Americans favor capital punishment, a one-year drop of 7 points and the first time in 45 years that support for the death penalty had fallen below 50%. **Gallup** reported a higher level of support, at 60%, a nine-point drop in the last decade and the lowest level of support it had recorded since 1972. Despite some inconsistency, both polls reported declining support for the death penalty across nearly all demographic categories and found the highest level of opposition to the death penalty since *Furman*. Pew measured opposition to the death penalty at 42%, the highest it has been since 1966, while Gallup reported opposition at 37%, its highest level since 1972.



State-level polls found declining support for the death penalty across the country and a growing preference for sentencing alternatives like life without parole, even in heavy-use death penalty states.



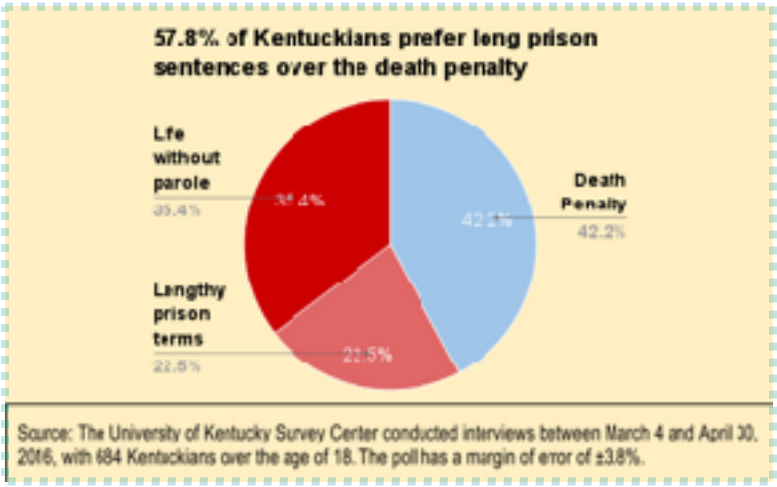
A poll by Public Policy Polling released in February found that 62% of all **Floridians** preferred some form of life in prison over the death penalty for people convicted of murder. Coming on the heels of the U.S. Supreme Court decision in *Hurst v. Florida*, the poll also asked about support for requiring jury unanimity to impose a death sentence. 73% of respondents favored a unanimity requirement. Several months later, the Florida Supreme Court ruled that death sentences could only be imposed after a unanimous jury recommendation. According to a poll released in August, Floridians favored life imprisonment without parole over death by 57% to 43%, and this preference held true across all racial groups, genders, educational levels, and religious affiliation.

Louisianans similarly preferred alternative sentences to the death penalty. In a March 2016 poll by Multi Quest, 57.7% selected either a lengthy prison sentence or life without parole as the appropriate punishment for first-degree murder, with just 24.3% choosing the death penalty.

In **Oklahoma,** the state with the second-highest number of executions since 1976, a majority (53%) of SoonerPoll respondents said they favored abolishing capital punishment and replacing it with a sentence of life without parole, plus restitution to victims' families. Support crossed party lines, with majorities of Democrats (58%) and independents (57%) in favor, along with a plurality of Republicans (48%).

Death penalty support continued to decline in **Houston,** once the "death penalty capital of America." Just 27% of Houston-area residents in the annual Rice University **Kinder Institute** survey said they prefer the death penalty over life sentences for people convicted of murder. Changing attitudes in Houston are evident in the fact that Harris County, which once sentenced 44 people to death in a three-year period, has not imposed any new death sentences since 2014.

A **University of Kentucky** survey released in August indicated that a strong majority of **Kentuckians** (72.4%) favor a moratorium on executions. Even among those who said they support the death penalty, nearly two-thirds (62.6%) favored halting executions to address problems in the administration of capital punishment. The poll found that overall, 57.8% of respondents preferred life without parole or a lengthy prison term over the death penalty for people convicted of first-degree murder.



ELECTION RESULTS SHOW CONTINUED DIVISION ACROSS U.S. ON USE OF THE DEATH PENALTY

The 2016 elections exposed continuing deep divisions on Americans' views of capital punishment. The dramatic drop in new death sentences and executions reflects the public's growing discomfort with the death penalty, as jurors increasingly are voting for life and state and local voters select public officials who seek and carry out the death penalty less. On the other hand, voters in three states voted to retain capital punishment, defeating ballot measures that would have abolished the death penalty and approving measures that would limit judicial oversight in death penalty cases.

STATE REFERENDA RESULTS RETAIN DEATH PENALTY, LIMIT REVIEW OF ERROR IN DEATH PENALTY CASES

In **Nebraska,** voters overturned the state legislature's repeal of the state's capital punishment statute, which had been suspended pending the outcome of the referendum. 60.6% of Nebraska voters cast ballots to "repeal" the legislature's abolition of the death penalty, with 39.4% voting to "retain" the legislative repeal.

California voters faced competing ballot initiatives on the death penalty, rejecting **Proposition 62** (53.2%-46.8%), which would have abolished the state's death penalty in favor of life without possibility of parole plus restitution, and narrowly approving **Proposition 66** (51.1%-48.9%), which seeks to limit state court death penalty appeals and expedite executions. Death penalty opponents have filed suit to block implementation of Proposition 66.

In **Oklahoma,** voters approved **State Question 776** by a margin of 66.4%-33.6%. The vote approved a state constitutional amendment that constitutionalizes the state legislature's existing power to adopt any execution method not prohibited by the U.S. Constitution and specifically prohibits Oklahoma's state courts from declaring the death penalty cruel and unusual punishment.

VOTERS RETAIN GOVERNORS WHO IMPOSED EXECUTION MORATORIA, JUSTICES WHO ENFORCED CONSTITUTIONAL PROTECTIONS IN DEATH PENALTY CASES

In two states, voters returned to office governors who had declared or extended moratoria on executions.

Washington voters re-elected **Governor Jay Inslee,** who had imposed a moratorium on executions in February 2014, by a 10-percentage-point margin. In **Oregon, Governor Kate Brown** won a special election to serve as governor for the remainder of the unexpired term of her predecessor, John Kitzhaber. Kitzhaber had imposed a moratorium on executions in Oregon in 2011. Governor Brown extended the moratorium when she took office in February 2015 and expressed her personal opposition to the death penalty and support for the moratorium during the campaign. She received 50.1% of the vote, compared to 43.9% for her nearest opponent.

In **Kansas**, pro-death penalty groups targeted four justices of the state supreme court and spent more than $1 million in an attempt to oust them for their votes overturning several Kansas death sentences. Voters retained all four Justices.

VOTERS ELECT NEW PROSECUTORS IN HEAVY-USE DEATH PENALTY COUNTIES

Local voters continued an emerging trend of replacing local elected officials in counties perceived to be outliers for employing the death penalty too aggressively and engaging in other overly harsh penal practices.

Prosecutors in four of the 16 counties that imposed the most death sentences in the U.S. between 2010 and 2015 were defeated by candidates who expressed personal opposition to the death penalty or pledged to institute reforms in the county's death penalty practices.

Voters in the September 2016 **Duval County, Florida** Republican primary election ousted controversial State Attorney **Angela Corey.** Duval County had sentenced 25 defendants to death between 2010-2015. Corey and Public Defender **Matt Shirk** suffered landslide losses in the election to reform candidate **Melissa Nelson** and retired judge and

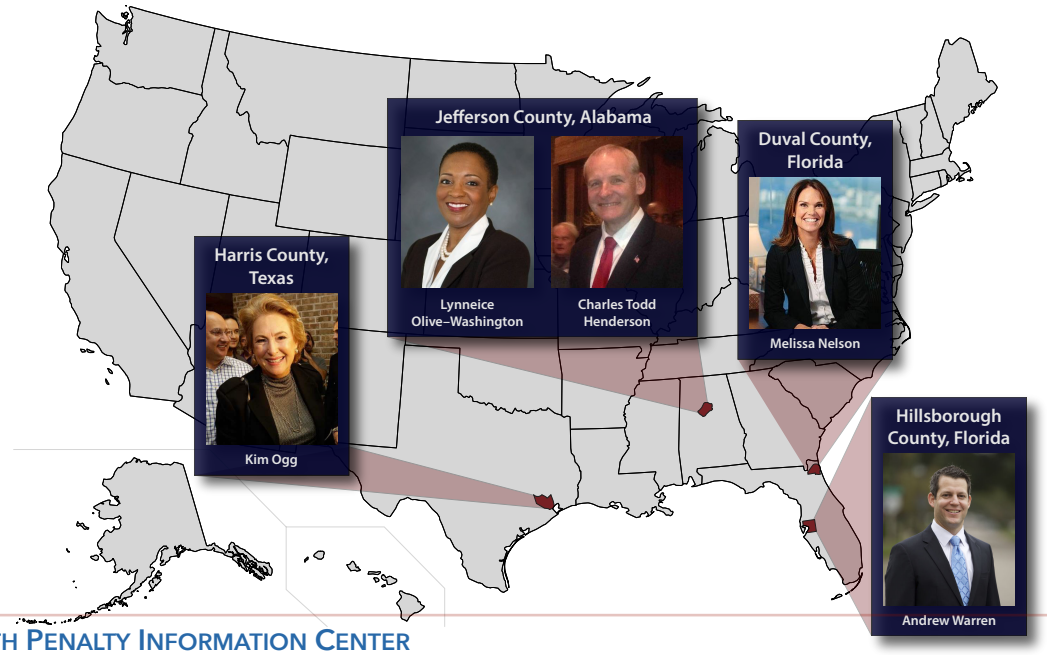
former assistant public defender **Charlie Cofer.** Shirk had fired the most experienced death penalty lawyers in the public defender's office and named as chief of homicide a lawyer who had 16 clients on death row and had been found to have provided ineffective representation in several death penalty cases. Nelson has said she intends to create a conviction integrity unit to investigate potential innocence cases and establish a review board to make decisions on whether to seek the death penalty in individual cases, instead of leaving that decision to individual prosecutors.

In the November general election, incumbent **Harris County, Texas** District Attorney **Devon Anderson** lost to challenger **Kim Ogg.** Harris County has carried out more executions than any other county in the U.S., and Ogg said during the course of the campaign that the death penalty had created "a terrible image for our city [Houston] and our county." She pledged that, "[u]nder an Ogg administration, you will see very few death penalty prosecutions."

Similarly, reform candidate **Andrew Warren** defeated incumbent **Hillsborough County, Florida** State Attorney **Mark Ober,** whom public defenders said had been seeking death in 20% of all murder cases, overburdening their office to a "critical point" at which it might not be able to take more cases. Warren said that "[o]ur use of the death penalty needs to be fair, consistent, and rare." He has proposed the creation of a conviction integrity unit to identify and redress wrongful convictions in Hillsborough County.

Jefferson County, Alabama has two elected District Attorneys, both of whom were ousted in the November general election. Voters in the Birmingham division of the county replaced incumbent **Brandon Falls** with challenger **Charles Todd Henderson,** who has criticized Alabama's judicial override policy that permits trial judges to impose death sentences even when a jury has recommended life.

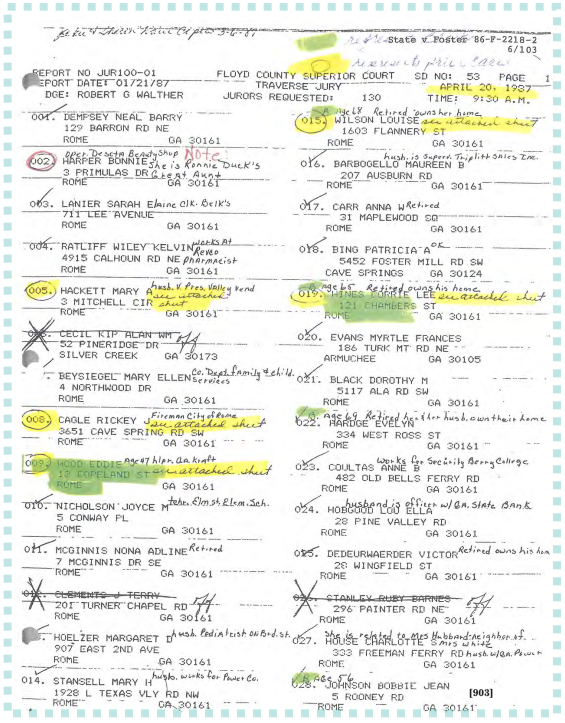
Lynneice Olive-Washington became Alabama's first African-American woman to be elected as District Attorney, narrowly defeating the incumbent, **Bill Veitch** in the DA race in the Bessemer division. Both Henderson and Olive-Washington have indicated that they are personally opposed to the death penalty.



THE DEATH PENALTY IN THE COURTS IN 2016

The U.S. Supreme Court granted relief to death row prisoners in several highly publicized cases of prosecutorial or judicial misconduct in 2016 and struck down a series of practices that deviated sharply from the norms of most death penalty states had systemic prejudicial impact on capital defendants at trial. State supreme courts declared death penalty statutes in Florida and Delaware to be unconstitutional in opinions that, if followed elsewhere, could potentially overturn death penalty statutes in four other states.

In one of the most anticipated decisions of the Court's 2015-2016 Term, the Supreme Court in ***Foster v. Chatman*** granted a new trial to **Timothy Foster,** finding that **Georgia** prosecutors had exercised their discretionary jury strikes to unconstitutionally remove African Americans from the jury on the basis of race. The prosecution struck every available black juror from the case, leaving Foster—a poor, intellectually disabled, black teenager charged with the murder of a white woman—to be tried by an all-white jury. The prosecution then argued to the jury that they should sentence Foster to death to "deter other people out there in the projects"—a clear reference to the jury's racial fears.


State v. Foster 86-F-2218-2
6/103
REPORT NO JUR100-01 FLOYD COUNTY SUPERIOR COURT SD NO: 53 PAGE 1
EPORT DATE: 01/21/87 TRAVERSE JURY APRIL 20, 1987
DGE: ROBERT G WALTHER JURORS REQUESTED: 130 TIME: 9:30 A.M.
001. DEMPSEY NEAL BARRY
129 BARRON RD NE
ROME GA 30161
002. HARPER BONNIE
3 PRIMULAS DR
ROME GA 30161
003. LANIER SARAH Elaine
711 LEE AVENUE
ROME GA 30161
004. RATLIFF WILEY KELVIN
4915 CALHOUN RD NE
ROME GA 30161
005. HACKETT MARY
3 MITCHELL CIR
ROME GA 30161
006. CECIL KIP ALAN MM
52 PINERIDGE DR
SILVER CREEK GA 30173
007. BEYSIEGEL MARY ELLEN
4 NORTHWOOD DR
ROME GA 30161
008. CAGLE RICKEY
3651 CAVE SPRING RD SW
ROME GA 30161
009. HODD EDDIE
13 COPELAND ST
ROME GA 30161
010. NICHOLSON JOYCE M
5 CONWAY PL
ROME GA 30161
011. MCGINNIS NONA ADLINE
7 MCGINNIS DR SE
ROME GA 30161
012. CLEMENTS J TERRY
201 TURNER CHAPEL RD
ROME GA 30161
013. HOELZER MARGARET D
907 EAST 2ND AVE
ROME GA 30161
014. STANSELL MARY H
1928 L TEXAS VLY RD NW
ROME GA 30161
015. WILSON LOUISE
1603 FLANNERY ST
ROME GA 30161
016. BARBOGELLO MAUREEN B
207 AUSBURN RD
ROME GA 30161
017. CARR ANNA W
31 MAPLEWOOD SQ
ROME GA 30161
018. BING PATRICIA A
5452 FOSTER MILL RD SW
CAVE SPRINGS GA 30124
019. [illegible] LEE
121 CHAMBERS ST
ROME GA 30161
020. EVANS MYRTLE FRANCES
186 TURK MT RD NE
ARMUCHEE GA 30105
021. BLACK DOROTHY M
5117 ALA RD SW
ROME GA 30161
022. HARDGE EVELYN
334 WEST ROSS ST
ROME GA 30161
023. COULTAS ANNE B
482 OLD BELLS FERRY RD
ROME GA 30161
024. HOBGOOD LOU ELLA
28 PINE VALLEY RD
ROME GA 30161
025. DEDEURWAERDER VICTOR
28 WINFIELD ST
ROME GA 30161
026. STANLEY RUBY BARNES
296 PAINTER RD NE
ROME GA 30161
027. HOUSE CHARLOTTE SMITH
333 FREEMAN FERRY RD
ROME GA 30161
028. JOHNSON BOBBIE JEAN
5 ROONEY RD
ROME GA 30161
[903]

Nearly 20 years after his trial, Foster obtained the prosecution's jury lists and notes of jury selection through Georgia's Open Records Act. Those notes showed that the prosecution placed a "B" next to the names of each of the black prospective jurors and highlighted the name of each black juror in green. The prosecution listed all black jurors as "Definite Nos," then ranked the black prospective jurors against each other in case "it comes down to having to pick one of the black jurors."

Chief Justice Roberts, writing for the Court, said that "[t]he contents of the prosecution's file … plainly belie the State's claim that it exercised its strikes in a 'color-blind' manner." Instead, the Court found, "the focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury."

The Supreme Court also sided with capital petitioner **Terry Williams** on an issue of judicial bias when the District Attorney who personally approved the decision to pursue the death penalty against Williams later became a justice of the Pennsylvania Supreme Court and in that capacity participated in deciding an appeal in the same case. The trial court had overturned Williams' death sentence for prosecutorial misconduct and the former District Attorney refused to recuse himself from the state's appeal, participating in an appellate decision that reversed the grant of relief and restored the death sentence. Ruling that "[a] constitutionally intolerable probability of bias exists when the same person serves as both accuser and adjudicator in a case," the Court in ***Williams v. Pennsylvania*** ordered that Williams be given a new appeal.

The Supreme Court case with the most far-reaching impact was ***Hurst v. Florida,*** which struck down **Florida's** death penalty statute as violating capital defendants' Sixth Amendment right to a jury trial. The Court explained that, under its 2002 decision in *Ring v. Arizona*, "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." The decision overturned Florida's death-sentencing statute and placed in question the death sentences imposed on nearly all of the 400 prisoners on Florida's death row. Death-row prisoners had been challenging Florida's sentencing procedures since *Ring* was decided, and 47 prisoners sentenced under the unconstitutional statute had been executed.

The language of the Supreme Court's decision in *Hurst* also led to challenges to the constitutionality of judicial death-sentencing schemes in other states, particularly the statutes in Alabama and Delaware that, like Florida, permitted sentencing judges to override a jury's recommendation of a life sentence or impose a death sentence despite a jury's non-unanimous death-sentencing recommendation. That practice has accounted for more than 75% of the recent death sentences imposed in those states and more than 20% of all death sentences nationwide. When Florida's legislature amended the state's death penalty statute in March to require that the jury unanimously find an aggravating circumstance before a judge could impose a death penalty, it outlawed judicial override of a jury's recommendation for a life sentence, but still allowed a death sentence to be imposed following a non-unanimous jury recommendation of death. Legal experts warned that the non-unanimity provision invited constitutional challenge, and in October, the Florida Supreme Court struck down the new statute, declaring in *Hurst v. State and Perry v. State* that the Sixth Amendment and the Florida state constitution require a unanimous jury recommendation for death before the trial judge can consider imposing a death sentence.

On August 2, in ***Rauf v. State***, the Delaware Supreme Court declared its death-sentencing statute unconstitutional under *Hurst,* ruling that the Sixth Amendment right to penalty-phase jury fact finding announced in *Ring* and applied in *Hurst* encompassed both the finding of aggravating circumstances and the weighing of aggravating and mitigating circumstances. It

held that a death sentence imposed by a judge without a unanimous jury fact-finding that aggravating circumstances outweigh mitigating circumstances violated the Sixth Amendment. Delaware's decision left Alabama as the only state that permits judicial override of a jury's life recommendation or permits the judge to impose death following a non-unanimous jury recommendation for death.

Although the Supreme Court has permitted two Alabama executions to proceed in 2016, it vacated decisions of the Alabama Court of Criminal Appeals in four cases with directions for that court to reconsider the constitutionality of the Alabama's death penalty statute in light of *Hurst*. In another case, *State v. Bohannon*, the Alabama Supreme Court ruled that its death penalty is constitutional. Alabama's statute, as well as judicial sentencing schemes in **Indiana, Montana,** and **Nebraska** would be unconstitutional under the reasoning of the Delaware and Florida Supreme Courts in *Rauf, Hurst,* and *Perry*.

On December 15, in ***Powell v. State***, the Delaware Supreme Court held that its decision in *Rauf* has retroactive application, suggesting that the 13 prisoners on its death row and four others awaiting capital re-sentencing proceedings would be re-sentenced to life without parole. The Florida Supreme Court has ruled that prisoners who show that their rights under *Hurst* have been violated will not automatically be re-sentenced to life, but will be afforded new sentencing hearings. The Court still must decide whether to enforce the rights announced in *Hurst* to all prisoners sentenced to death under the state's unconstitutional procedures or to limit its application to certain prisoners depending upon the date on which their convictions and death sentences became final. The **Connecticut** Supreme Court also reaffirmed a decision retroactively applying repeal of the death penalty to those prisoners already on death row.

The Supreme Court also struck down outlier practices in **Oklahoma** and **Arizona** that increased the likelihood that defendants would be sentenced to death. On May 31, it decided ***Lynch v. Arizona***, overturning the death sentence imposed on **Shawn Patrick Lynch** when Arizona prosecutors presented evidence suggesting that Lynch would pose a future danger to society unless he were sentenced to death. The court prevented defense counsel from informing the jury that Lynch would be ineligible for parole if they sentenced him to life. Arizona courts have repeatedly prevented juries from learning the truth about its life sentencing option. Nearly every other death penalty state routinely instructs capital sentencing juries when the defendant will be ineligible for parole if sentenced to life in prison.

In a unanimous decision issued October 11 in ***Bosse v. Oklahoma***, the Supreme Court held that Oklahoma prosecutors had improperly presented testimony from members of the victims' families asking the jury to sentence Bosse to death. From 1997 until the Supreme Court decision in *Bosse,* Oklahoma's courts stood alone in permitting the prosecution to present such testimony, and Oklahoma juries sentenced more than 90 capital defendants to death during this period.

Not all rulings during the Term favored defendants. In ***Kansas v. Carr***, the Supreme Court reversed the Kansas Supreme Court's finding that there was a federal constitutional right to have specific jury instructions regarding mitigating factors.

TROUBLING DEATH PENALTY CASES ACROSS THE COUNTRY THROUGHOUT 2016

PROBLEMATIC EXECUTIONS

The 20 executions carried out in 2016 continued to challenge the notion that those executed in the United States are the "worst of the worst." In his dissent from the denial of certiorari review in the case of ***Sireci v. Florida,*** Justice Stephen Breyer suggested that "individuals who are executed are not the 'worst of the worst,' but, rather, are individuals chosen at random, on the basis, perhaps of geography, perhaps of the views of individual prosecutors, or still worse on the basis of race." The evidence from 2016 suggests that, in a significant number of cases, death row prisoners who are executed continue to be those who are the most vulnerable, those who have had the poorest representation, or those who have been afforded the least searching judicial review.

A DPIC review of the 2016 executions indicated **that at least 60% of the prisoners executed showed significant evidence of mental illness, brain impairment, and/or low intellectual functioning.** At least 12 (60%) exhibited a combination of significant mental health issues:

- At least 6 (30%) prisoners presented symptoms or diagnoses of mental illness.
- At least 5 (25%) prisoners presented evidence of brain impairment.
- At least 3 (15%) prisoners presented evidence of intellectual disability.

Texas executed **Adam Ward,** a mentally ill prisoner who had consistently exhibited signs of severe mental illness since infancy and was twice hospitalized for multi-week periods because of his illness. By the time Ward was 18, he was "diagnosed with bipolar disorder, depression, learning disorders, and attention deficit hyperactivity disorder, and was taking Depakote and lithium." Although the courts recognized that Ward had" been afflicted with mental illness his entire life," they allowed his execution to proceed.

Three prisoners were executed despite compelling evidence of intellectual disability that should have made them ineligible for execution. One, **Coy Wesbrook**, was executed by Texas, after the state applied non-scientific factors rejected by mental health professionals in deciding his case. Two others (John Conner and Kenneth Fults) were executed by Georgia after courts found they had not met the high burden–required only by that state–of proving the existence of Intellectual Disability beyond a reasonable doubt.

Kenneth Fults, who is black, was sentenced to death by a racist juror who admitted that once Fults pled guilty, he would vote for death because "that's what that n✶✶✶✶✶ deserved." Fults' trial lawyer never presented any evidence of Fults' intellectual disability to the jury and slept through portions of the trial. Fults' new lawyers presented significant evidence of intellectual disability in his state post-conviction proceedings, but Georgia's state courts denied his claim. The federal appeals court wrote: "some of the arguments advanced by Mr. Fults–e.g., that [the court appointed expert] opinions were

not based on thorough or proper testing for mental retardation, that his own evidence was stronger than the state habeas court thought—are not without some force." However, required under the federal habeas corpus statute to treat the state court fact findings with deference, the court viewed itself as powerless to exercise independent judgment and ultimately denied Fults relief.

The 2016 executions continued to highlight the plight of veterans and the death penalty. States executed four prisoners (20%) who had served in the military or the reserves. **Brandon Jones** and **William Sallie,** both executed by **Georgia**, had served in the Army; **Ronald Smith (AL)** in the Army Reserves. **Travis Hittson,** also executed by Georgia, had served in the Navy.

States continued to execute prisoners in 2016 who were barely adults at the time of the crimes and whose brains were still physiologically immature. Six (30%) of the prisoners executed were 21 years of age or younger at the time of the offense. Moreover, the **sentences several of these young defendants received were disproportionate to the sentences imposed upon older co-defendants who were at least as culpable or more culpable.**

Travis Hittson, a Navy sailor who was 21 at the time of the crime, was executed in Georgia. Hittson's punishment was grossly disproportionate to that of his more culpable co-defendant, Edward Vollmer, Hittson's superior officer. Georgia prosecutors permitted Vollmer, the mastermind of the murder, to plead guilty in exchange for a life sentence. Four of the jurors who sat on Hittson's trial supported clemency and said they would have voted for life without parole if it had been an option at the time.

Georgia also executed **Joshua Bishop**, who was 19 at the time he and 36-year-old Mark Braxley beat an associate to death after a day of drinking. Although there was no evidence indicating which of the two had delivered the fatal blow, prosecutors permitted Braxley to plead guilty and to receive a life sentence with the possibility of release in exchange for his cooperation in Bishop's capital prosecution. As in Hittson's case, four jurors submitted affidavits supporting clemency for Bishop.

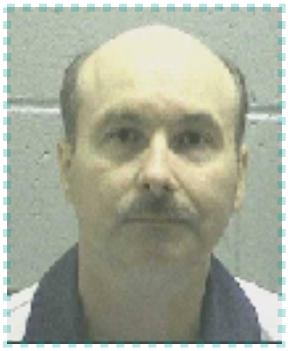
Finally, Texas executed a prisoner, **Richard Masterson** who was likely innocent of murder. Charges against Masterson were based upon the opinion of medical examiner Paul Shrode that the victim had been murdered by strangulation. In post-conviction proceedings, the defense presented evidence from two pathologists that Shrode was unqualified to perform the autopsy and had botched the findings. After examining the autopsy data, they concluded that there had been no homicide and that the decedent most likely died of a heart attack. The defense also presented evidence that Shrode had falsified his credentials, lied to get his job in Texas, and had testified falsely in other capital murder trials.

Significant procedural shortcomings also undermined confidence in the reliability of a number of the court proceedings that resulted in executions in 2016.

- Seven (35%) of the prisoners who were executed in 2016 had been denied a certificate of appealability (COA) during federal habeas review. Without a COA, neither the federal courts of appeal nor the Supreme Court could review the merits of the prisoners' claims.

- Three (15%) of the prisoners who were executed had been denied federal court review of their cases because their state appeals lawyers had missed state filing deadlines or had improperly filed a state pleading.

The cases of William Sallie (GA) and Ronald Smith (AL) epitomize the procedural failures that often result in executions without any federal review of the constitutional issues in a condemned prisoner's case. Georgia and Alabama stand alone among all death penalty states in not providing death-row prisoners the right to a lawyer to represent them in state post-conviction proceedings.



William Sallie was executed by Georgia on December 6, 2016, without any court reviewing a well-documented claim of extreme juror misconduct, that included a juror lying to the court about her history with the legal system, that should have entitled him to a new, fair trial and sentencing proceeding. During a period in which he was denied post-conviction counsel, Sallie missed a filing deadline by 8 days. The Georgia courts refused to consider his petition, deeming it untimely, and the federal courts ruled that because of this state court procedural failure, he could not receive federal review of the clear constitutional violation in his case. One veteran legal analyst described the state and federal court refusal to address the constitutional violation in his case as an outcome that "should shock the conscience of every person who believes [in] due process of law."

Ronald Smith was executed by Alabama on December 9, 2016. At trial, Smith's jury voted 7-5 to recommend that he be sentenced to life. In a procedure that no state other than Alabama still permits, Smith's trial judge overrode the jury's recommendation and sentenced him to death. Smith's state post-conviction lawyer—who suffered from substance abuse and mental illness that ultimately led to his suicide—failed to pay a $25 filing fee at the time he filed Smith's appeal. The federal courts ruled that because of this state court procedural failure, Smith was not entitled to federal judicial review of his case. During his death warrant, Smith filed a new challenge to his death sentence arguing that Alabama's practice of judicial override was unconstitutional. The Court deadlocked at 4-4 on whether to grant a stay—enough for the Court to accept a case for review, but not the 5 votes necessary to keep a condemned prisoner alive long enough for that review to occur—and Smith was executed.

States continue to adopt laws expanding the secrecy surrounding the lethal-injection drugs they are using and the execution process itself; this year **Mississippi** and **Virginia** both passed laws preventing the public from learning the identities of contractors who were providing these drugs to the states. The states' lack of transparency has raised concerns even for some state officials. **Oklahoma's** mishandling of executions in 2015 resulted in Oklahoma Attorney General Scott Pruitt launching a grand jury investigation, and in May, the grand jury report was released. The report characterized the conduct by Oklahoma state officials as "negligent," "careless," and in some instances "reckless" regarding execution procedures. The grand jury found that the prison officials' judgment at every stage of the execution process was "clouded" by the state's "paranoia" about keeping execution information secret, "caus[ing] administrators to blatantly

violate their own policies." As a result of the prisoners' court challenge and the Attorney General's grand jury investigation, Oklahoma did not execute anyone in 2016.

Witnesses reported problems in at least 15% of the 20 executions that were carried out. Three executions used the controversial drug midazolam (one in Florida; two in Alabama), the drug that was the subject of a challenge before the Supreme Court in 2015. The executions in Alabama provided further evidence of the risks inherent when states attempt to use midazolam as an anesthetic in executions. During Alabama's execution of Ronald Smith, witnesses reported that he gasped, heaved, and struggled for breath for almost fifteen minutes after the midazolam was administered. Similarly, one witness to Christopher Brook's execution reported seeing his eye pop open after midazolam had been administered. In Georgia, executioners spent nearly one hour attempting to set an IV during the execution of Brandon Jones, and ultimately had to create an incision in his groin to place a femoral line. Witnesses to Jones' execution noted that "his eyes popped open" six minutes after the warden left the execution chamber.

NEW DEATH SENTENCES CONTINUE TO SPOTLIGHT PROBLEMS WITH THE DEATH PENALTY

Even as new death sentences significantly decline, they continue to expose endemic problems in the administration of the death penalty across the United States. Just as the executions in 2016 highlight the continuing use of the death penalty against vulnerable defendants with serious mental health concerns, at least eleven of the 29 individuals sentenced to death in 2016 to-date have evidence of intellectual disability, severe mental illness, and/or were age 21 or younger at the time of their crimes. This suggests that a substantial number of these death-sentenced defendants have impairments similar to ones the Supreme Court has said should constitutionally exclude them from execution.

Several examples illustrate this issue. In **Alabama**, Justice Knight was capitally charged with killing his friend over tax-return money. Knight's lawyer disputed that Knight was the triggerman. Knight, an African American, was only 20 years old at the time the murder occurred. A judge sentenced him to death following the non-unanimous recommendation of the trial jury. Knight has a history of psychological impairments, he entered the foster care system at a young age, and his mother allegedly used drugs and alcohol while she was pregnant with him

In **Oklahoma,** Albert Johnson was sentenced to death for the murder of Rachel Rogers. During his trial, a forensic psychologist testified that Johnson has an IQ of 77, and a neurological expert testified that the trauma Johnson experienced while growing up, including being raped and abused as a child, likely affected the development of his brain. Evidence was presented indicating that he suffers from Post-Traumatic Stress Disorder (PTSD) and Intermittent Explosive Disorder. He was under the influence of alcohol at the time of the crime.

NOTABLE VOICES FROM 2016

"I ask my conservative friends what they think government does extremely well. And then I ask them what they think government does perfectly. And they usually say, 'It doesn't do anything perfectly.' And then I ask, 'Yet we're going to give ourselves the godlike power over life and death?'"

–Utah State Rep. Stephen Urquhart (R), who sponsored a bill to repeal Utah's death penalty

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"Despite the anger I am still coping with from my mother's death, I don't believe in the death penalty, even for the man who killed her."

–Sharon Risher, daughter of Ethel Lance who was killed in the 2015 shooting at Emanuel African Methodist Episcopal Church in Charleston, South Carolina

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"The death penalty is the ultimate punishment that should be reserved for the most blameworthy individuals who commit the worst crimes – and it does not serve any effective or appropriate purpose when it is applied to individuals with severe mental illness."

–American Bar Association, in a white paper on Severe Mental Illness and the Death Penalty

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"The inaccurate Texas standard reinforces one of the most damaging stereotypes about people with intellectual disability—that they can't be 'good' at anything.… Labels have consequences. What we may allow in public discourse, we should not and cannot tolerate in law. It's time for the Supreme Court to remind our nation that the Constitution and the vision of rights it embodies have no place for ill-informed and deadly stigmas."

–Timothy Shriver, the Chairman of the Special Olympics, speaking about case pending before Supreme Court (Moore v. Texas)

"We arrest and convict innocent people almost every day in this country. As long as we have a death penalty in America, we will continue to execute innocent people."

–Tom Parker, former FBI agent and homicide detective

"Pfizer makes its products to enhance and save the lives of the patients we serve. Consistent with these values, Pfizer strongly objects to the use of its products as lethal injections for capital punishment."

–Pfizer, announcing distribution controls to block states from using its products in executions

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"I am convinced that the death penalty is just not worth it any more, and I don't think it can be fixed.… If we're going to have the death penalty, then it must not be carried out until the legislature implements the task force's reforms intended to ensure fairness and accuracy."

–Jim Petro, former Ohio Attorney General

CONCLUSION

2016 saw historic lows in death sentences, executions, and public support for the death penalty. Executions and death sentences grew increasingly isolated, with a small number of outlier jurisdictions responsible for most of the death penalty's use. Just two states –Texas and Georgia–accounted for 80% of this year's executions, and just three–California, Ohio, and Texas - produced more than half of this year's death sentences.

Courts struck down unconstitutional practices in Arizona, Delaware, Florida, and Oklahoma. Delaware and Florida's state Supreme Courts responded to the U.S. Supreme Court's decision in *Hurst v. Florida* by ending the practice of allowing death sentences without a unanimous jury recommendation. Those decisions call into question the constitutionality of hundreds of death sentences in those states.

The 2016 elections produced mixed results. Voters in three states chose to retain the death penalty or write it into the state constitution, but local elections showed support for candidates who ran on platforms of death penalty reform. Two governors who had imposed or continued death penalty moratoria were safely re-elected, and voters ousted five prosecutors who had aggressively sought death sentences, replacing them with candidates who opposed the death penalty or vowed to reduce its use.

As in past years, those executed in 2016 often did not represent the "worst of the worst," but rather those defendants who had mental health problems, inadequate representation, or insufficient judicial review. 60% of the 20 people executed in 2016 showed significant evidence of mental illness, brain impairment, and/or low intellectual functioning.

This year's events signal a continuation of the United States' movement away from the death penalty. As the public grows increasingly skeptical of capital punishment and courts strike down outlier practices that have inflated the numbers of executions and death sentences, the death penalty's failures become ever more evident.

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The Death Penalty Information Center is a non-profit organization serving the media and the public with information and analysis on capital punishment. The Center provides in-depth reports, conducts briefings for journalists, promotes informed discussion, and serves as a resource to those working on this issue. Robert Dunham, DPIC's Executive Director, wrote this report with assistance from DPIC's staff. Further sources for facts and quotations are available upon request. The Center is funded through the generosity of individual donors and foundations, including the MacArthur Justice Center, the Open Society Foundations, Atlantic Philanthropies, and the Proteus Action League. The views expressed in this report are those of DPIC and do not necessarily reflect the opinions of its donors.