DEATH PENALTY INFORMATION CENTER

THE DEATH PENALTY IN 2017: YEAR END REPORT

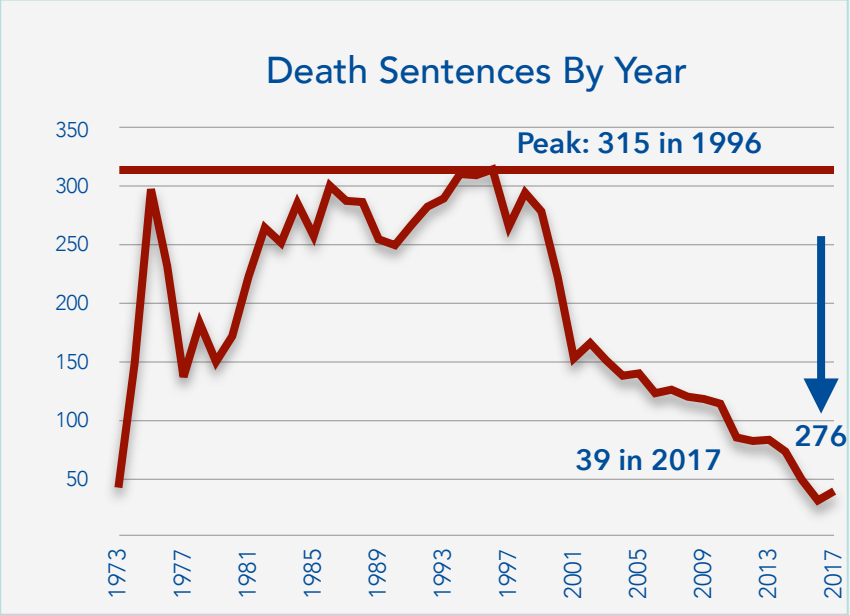
DEATH SENTENCES, EXECUTIONS SECOND LOWEST IN A QUARTER CENTURY

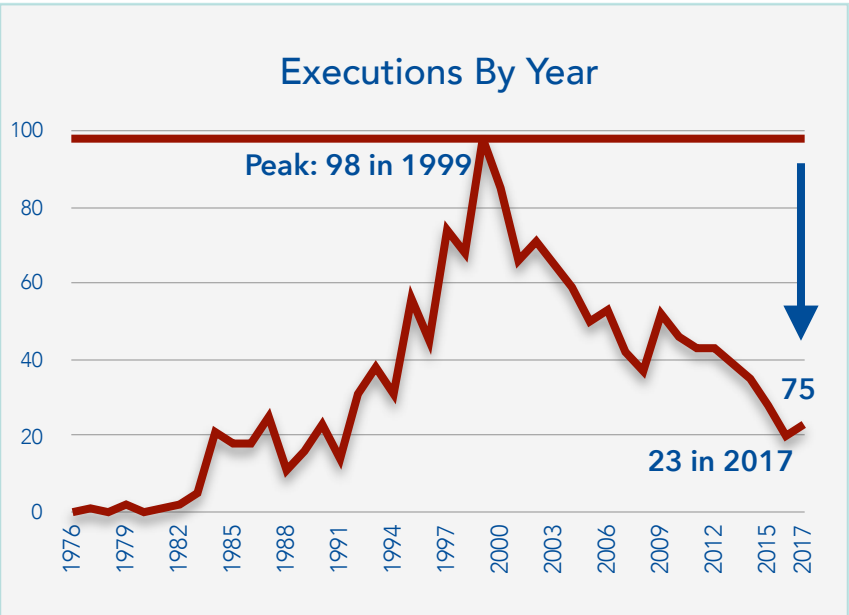
PUBLIC SUPPORT FOR DEATH PENALTY REACHES 45-YEAR LOW

FLORIDA, ALABAMA LEGISLATURES END OUTLIER PRACTICES

KEY FINDINGS

- The 39 **death sentences** imposed in 2017 are the second lowest annual total of death sentences in the U.S. since 1972.
- The 23 **executions** in 2017 were the second fewest since 1991.
- **Gallup Poll**: 55% say they support the death penalty, the lowest since March 1972.
- **Florida** ended non-unanimous jury recommendations for death; **Alabama** ended judicial override of jury votes for life.





DEATH-PENALTY USE REMAINS LOW IN U.S. IN 2017[1]

Executions and new death sentences remained near historic lows in 2017, as the annual Gallup Poll on the death penalty measured support for capital punishment at its lowest level in 45 years. Both the 23 executions and 39 new death sentences in 2017 were the second lowest totals in more than a quarter-century. For the 17th consecutive year, the number of prisoners on the nation's death rows fell, as the combination of exonerations, non-capital resentencings, and deaths by natural causes again outpaced new death sentences imposed.

Executions by State	2017	2016
Texas	7	7
Arkansas	4	0
Alabama	3	2
Florida	3	1
Ohio	2	0
Virginia	2	0
Georgia	1	9
Missouri	1	1
Totals	23	20

Florida and Alabama adopted reforms abolishing outlier practices that had contributed disproportionately to the nation's death sentences. Florida abolished non-unanimous jury recommendations for death, requiring jury unanimity before a judge can impose the death penalty. Alabama abolished the practice of judicial override, which had allowed judges to impose death sentences despite a jury recommendation for life.

Use of the death penalty remained geographically concentrated, with executions carried out in just eight states and new death sentences imposed by fourteen states and the federal government. Two states—Texas and Arkansas—accounted for nearly half (48%) of all executions in 2017, with Alabama and Florida, despite the reforms, accounting for an additional quarter. More than 30% of the new death sentences nationwide came from just three counties—Riverside, California; Clark, Nevada; and Maricopa, Arizona. Harris County, Texas is symbolic of the change in capital punishment in the United States. Harris has executed more prisoners than any other county, but for the first time since 1974, it neither executed any prisoner nor sentenced any defendant to death.

Public support for the death penalty fell five percentage points in the last year, and ten percentage points among Republicans, according to the October 2017 Gallup Poll. The 55% of Americans telling Gallup they support the death penalty for a person convicted of murder declined to its lowest level since March 1972.

Symbolizing the death-penalty decline, for the first time since 1974, Harris County—the nation's most prolific county for executions—neither executed anyone nor sentenced anyone to death.

Five more people were exonerated from death row in 2017, bringing the total of exonerations since 1973 to 161. Those five cases highlighted systemic problems of racial bias, flawed forensic testimony, inadequate access to quality representation, and police and prosecutorial misconduct. But at the same time, four prisoners were executed despite substantial concerns about their guilt and more than

[1] After the release of the original report on December 14, 2017, there has been another exoneration and another grant of clemency. This version of the report, released January 3, 2018, is updated to include those developments.

90% of those executed had significant evidence of mental illness, intellectual disability, severe trauma, and/or innocence.

Three U.S. Supreme Court decisions struck down outlier practices related to mental-health evidence and the death penalty. In *Moore v. Texas*, the Court unanimously rejected the state's non-scientific standard for evaluating intellectual disability in death-penalty cases, and in *McWilliams v. Dunn*, the Court granted an Alabama prisoner the assistance of an independent mental-health expert. The Court also granted relief to Texas prisoner Duane Buck, whose death sentence had been tainted by his lawyer's presentation of a mental-health expert who provided racially biased and scientifically false testimony that Buck posed an increased risk of future violence because he is black.

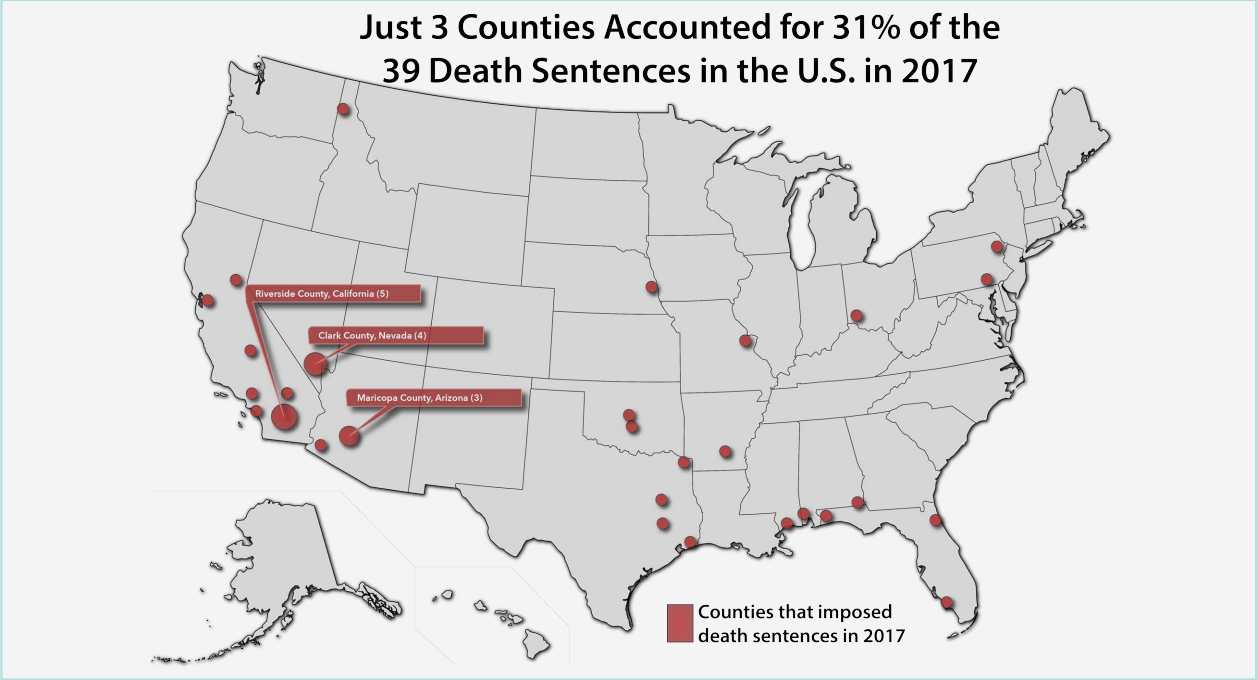
LONG-TERM TRENDS REFLECT CONTINUING DECLINE OF DEATH PENALTY

The years 2016 and 2017 produced the two lowest annual totals of new death sentences since states began re-enacting new death-penalty statutes in response to the U.S. Supreme Court's 1972 *Furman v. Georgia* decision striking down existing death-penalty laws. The 3-, 5-, and 10-year periods ending in 2017 had the lowest numbers of death sentences of any corresponding periods since 1976, continuing the nation's long-term decline in the use of the death penalty. The 39 new death sentences imposed in 2017 trailed only 2016's record-low 31 new death sentences. For the third consecutive year, fewer death sentences were imposed over the last decade than in the decade preceding the *Furman* decision.

Executions also remained near historic lows, with the totals in 2016 and 2017 the lowest in more than a quarter century. As with new death sentences, the 23 executions in 2017 trailed only the 20 carried out in 2016 as the fewest since 1991. Seventy-four percent of 2017 executions took place in just four states

Death Row By State	2017†	2016†
California	746	741
Florida	374	396
Texas	243	254
Alabama	191	194
Pennsylvania	169	175
North Carolina	152	155
Ohio	144	142
Arizona	125	126
Nevada	82	80
Louisiana	73	77
Tennessee	62	69
Georgia	61	68
US Government	61	62
Mississippi	48	48
Oklahoma	47	47
South Carolina	41	43
Kentucky	33	34
Oregon	33	34
Arkansas	32	36
Missouri	24	26
Indiana	12	12
Nebraska	11	10
Kansas	10	10
Utah	9	9
Idaho	8	9
Washington	8	9
US Military	5	6
Virginia	5	7
Colorado	3	3
South Dakota	3	3
Montana	2	2
New Mexico	2	2
New Hampshire	1	1
Wyoming	1	1
Delaware*	0	18
Total	2,817‡	2,905‡

* 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



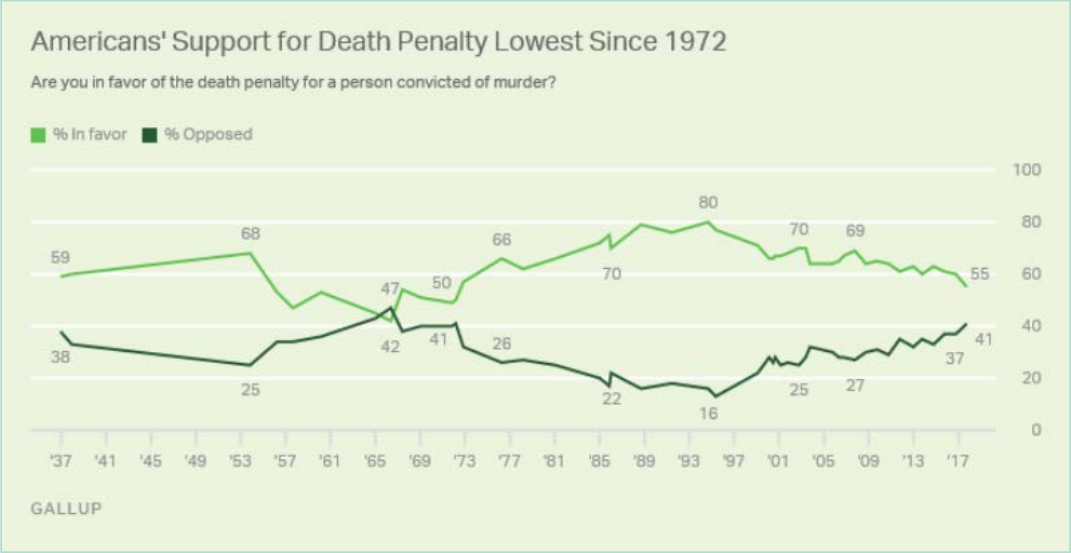
–Texas (7), Arkansas (4), Florida (3), and Alabama (3). The seven executions conducted in Texas matched 2016's total as the fewest executions in the state since 1996. For the first time since 1985, Harris County carried out no executions. It also imposed no death sentences, making this the first year since Texas reinstated the death penalty that Harris County neither executed any prisoner nor sentenced any defendant to death. Oklahoma–which has carried out the third-most executions of any state since 1976–has gone nearly three years since its last execution and, with no execution protocol in place, will soon surpass its previous record for the longest period with no executions.

States scheduled 81 execution dates in 2017; 58 of them (71.6%) were never carried out. Thirty-nine executions were stayed by courts; governors issued three reprieves and one commutation that stopped executions; and 15 other execution dates were rescheduled. Arkansas resumed executions after an 11-year hiatus, scheduling an unprecedented eight executions in an 11-day period, ostensibly to carry them out before the expiration date of one of the execution drugs. Half of those executions were stayed, and one of the men whose execution was stayed was subsequently granted clemency. Throughout the country, executions raised questions about the fairness of the death-penalty system, as prisoners were executed despite denial of judicial review, innocence claims, and problems with lethal-injection protocols.

The number of prisoners on state and federal death rows declined for the 17th consecutive year, as more prisoners were released from death row by exoneration, commutation, or resentencing or died on death row than were newly sentenced to death. The NAACP Legal Defense and Educational Fund reported 2,817 prisoners facing active death sentences or potential death-penalty resentencing proceedings as of July 1, 2017, down from 2,905 at the same time in 2016.

PUBLIC SUPPORT FOR CAPITAL PUNISHMENT REACHES 45–YEAR LOW

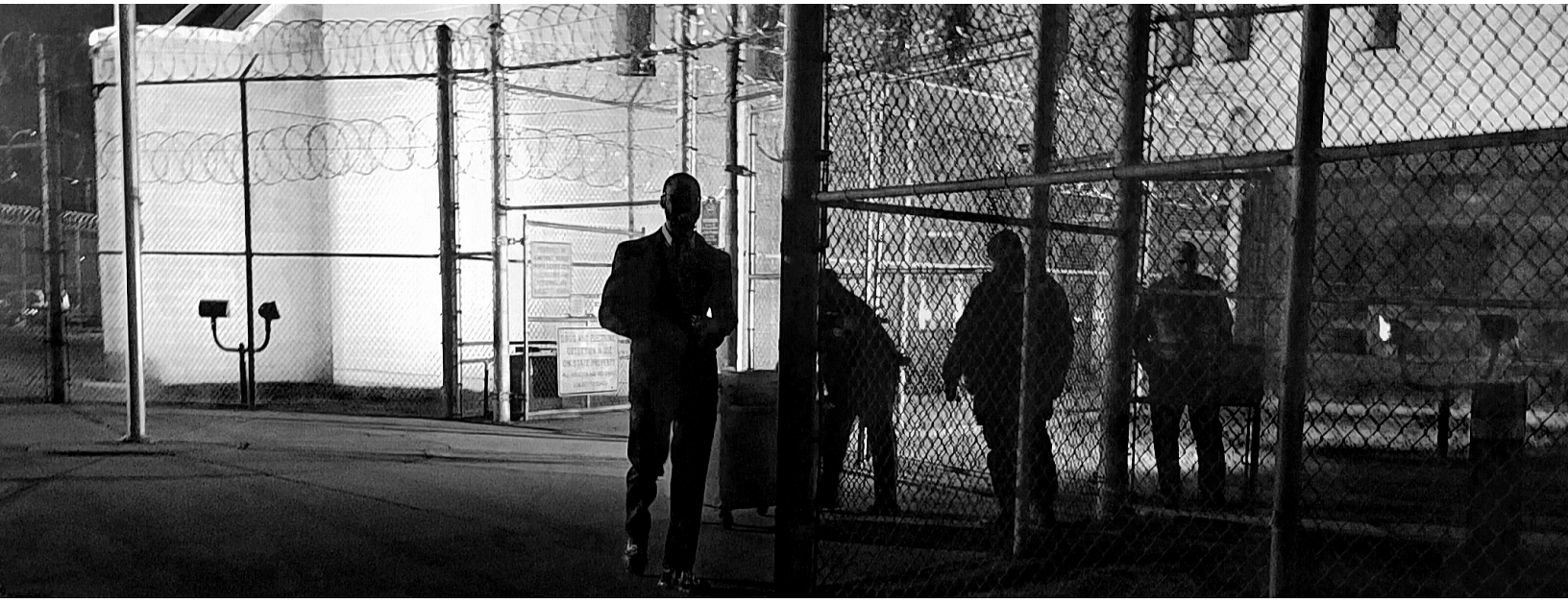
Public support for the death penalty fell to its lowest level in 45 years, according to an October 2017 national Gallup Poll. **Gallup reported that 55% of Americans said they support the death penalty for people convicted of murder, a five-percentage-point decline in one year.** The poll measured opposition to the death penalty at its highest level in 45 years, with 41% of Americans saying they oppose the practice. The last time support for capital punishment was below 55% was in March 1972, three months before the U.S. Supreme Court declared the nation's death-penalty laws unconstitutional in *Furman v. Georgia*.



Death-penalty support fell among both Democrats and Republicans, though the decline was particularly dramatic among Republicans. Thirty-nine percent of Democrats said they support capital punishment, a three-percentage-point drop since Gallup's October 2016 poll. Support for the death penalty among Republicans dropped 10 percentage points since October 2016, with 72% now saying they support capital punishment.

A report by the conservative advocacy group, Conservatives Concerned About the Death Penalty, documented the increasingly vocal Republican opposition to the death penalty. The report, "The Right Way," traced what it described as "the dramatic rise in Republican sponsorship of bills to end the death penalty." As political conservatives have increasingly questioned the administration of the death penalty in the United States, more Republican lawmakers have taken the lead in legislation to abolish capital punishment. The report, released in October 2017, documented that 31% of repeal-bill sponsors in 2016 were Republicans, a six-fold increase since 2007.

The campaign for District Attorney in Philadelphia reflected the changing public discourse on capital punishment. Larry Krasner–an outspoken critic of the death penalty who ran on a platform of broad criminal justice reform–was easily elected in a county that has one of the largest county death rows in the country.



Delaware death-row exoneree Isaiah McCoy walks to freedom upon his release from the Howard R. Young Correctional Institution in Wilmington in January 2017. Photograph courtesy of Attorney Herbert Mondros.

EXONERATIONS AND COMMUTATIONS IN 2017

There were five more exonerations from death row in the United States in 2017, bringing the total to 161 men and women exonerated since 1973, and the sentences of five condemned men were commuted to life imprisonment.

In January, Isaiah McCoy was acquitted of murder, five years after having been wrongly convicted and sentenced to death in Delaware as a result of what the state's supreme court called "pervasive unprofessional conduct" by the trial prosecutor, Deputy Attorney General R. David Favata. Favata was temporarily suspended from practice after belittling McCoy for choosing to represent himself, making intimidating comments during a break in proceedings, then lying to the judge about making the comments. No physical evidence linked McCoy to the murder and his two alleged accomplices—one of whom received a sentence reduction for his testimony—gave contradictory testimony against him.

Rodricus Crawford was exonerated in Caddo Parish, Louisiana, in a case of highly suspect forensics that drew national attention because of the racially-biased practices and inflammatory remarks made by lead prosecutor Dale Cox. Crawford had been sentenced to death in 2012 for the alleged murder of his one-year-old son, despite compelling evidence that the baby had died from natural causes. An internal memorandum by Cox said that Crawford "deserves as much physical suffering as it is humanly possible to endure before he dies." The Louisiana Supreme Court granted Crawford a new trial because Cox had unconstitutionally excluded black jurors on the basis of race. A new prosecutorial administration then reviewed the evidence in the case and dropped the charges against Crawford.

The five exonerations in 2017 raised the total number of exonerations since 1973 to 161.

Ralph Daniel Wright, Jr., who was sentenced to death by a 7–5 jury vote under a Florida sentencing law that has since been declared unconstitutional, was exonerated in May when the state supreme court found that the "purely circumstantial" evidence in the case was insufficient to convict. DNA tests on a glove allegedly worn by the perpetrator excluded Wright as the source of the DNA, and no tests had been done to compare the DNA to that of an alternative suspect. Nineteen of the 21 death-row exonerations from Florida in which the jury vote is known involved non-unanimous jury recommendations of a death sentence or judicial override of a jury recommendation of life.

Rickey Dale Newman was exonerated in Arkansas nearly 16 years after he was convicted. Despite major depression, post-traumatic stress disorder, and an IQ that placed him in the intellectually disabled range, Newman was found competent to stand trial and represent himself. In 2005, his execution was stayed just four days before it was to be carried out. Prosecutors had withheld evidence that contradicted details from Newman's confession, and DNA testing of hair found on Newman's clothes disproved prosecutors' claims that it had come from the victim. After learning that the state doctor had made significant errors in administering and scoring the psychological tests on which he based his competency opinion, the Arkansas Supreme Court overturned Newman's conviction and barred the use of his false confession. Prosecutors then dropped the charges against him.

Former Illinois death-row prisoner Gabriel Solache was exonerated on December 21. His death sentence was one of 157 commuted by Governor George Ryan in 2003, prior to Illinois' abolition of the death penalty. Solache's conviction was overturned because of misconduct by Chicago detective Reynaldo Guevara, who a court said told "bald-faced lies" under oath when he claimed to have no memory of interrogating Solache and his co-defendant Arturo Reyes and denied torturing the men to coerce them to confess. Over three days of interrogation, Solache and Reyes were beaten, deprived of sleep, and given little food or drink. The two defendants, who are Mexican citizens, were also denied the assistance

of the Mexican consulate, in violation of international treaties. Solache's purported confession was written entirely in English, though he could neither speak nor read the language. Nine defendants have been released in cases in which Guevara allegedly beat suspects or coerced false testimony.

Five death-row prisoners received commutations in 2017. On January 17, President Barack Obama commuted the death sentences of Abelardo Arboleda Ortiz, an intellectually disabled federal death-row prisoner, and Dwight Loving, a prisoner on the U.S. military death row. On April 20, Virginia Governor Terry McAuliffe commuted the death sentence of Ivan Teleguz, whose sentence was obtained through false testimony that he had been implicated in a second murder, when in fact the supposed second murder had never occurred. On December 29, McAuliffe commuted the death sentence of William Burns, who had been declared mentally incompetent. Jason McGehee was granted clemency by Arkansas Governor Asa Hutchinson in October. Hutchinson cited a variety of reasons for the commutation, including the disproportionality of McGehee's sentence compared to those of his co-defendants

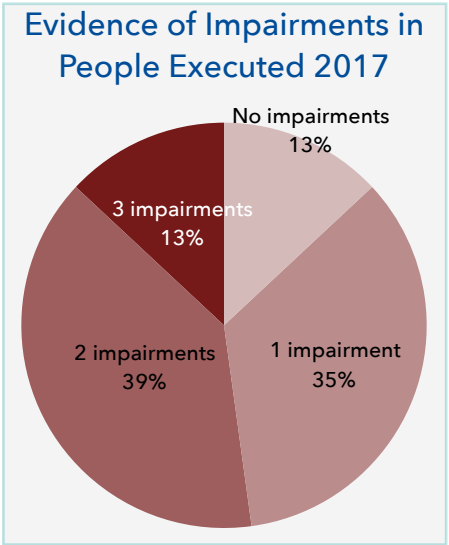
2017 EXECUTIONS RAISE ONGOING CONCERNS WITH FAIRNESS, PROPORTIONALITY

The 23 executions carried out in 2017 continue to highlight systemic problems that have long plagued America's death penalty. A DPIC review of these executions reveals that an alarming 90% of these cases presented significant evidence of mental illness, intellectual disability, brain damage, severe trauma, and/or innocence. Four prisoners were executed despite substantial concerns about their guilt. The cases from 2017 also suggest that prisoners continue to be executed despite serious concerns about inadequate representation and insufficient judicial review.

Data compiled by the Fair Punishment Project indicates that at least 20 of the 23 people executed in 2017 (87%) had one or more of the following impairments:

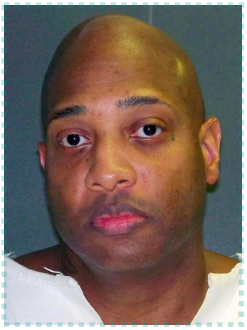
- significant evidence of mental illness (6);
- evidence of brain injury, developmental brain damage, or an IQ in the intellectually disabled range (10);
- serious childhood trauma, neglect, and/or abuse (18).

Eight were under age 21 at the time of the offense for which they were sentenced to death, all of whom had experienced serious trauma. Far from constituting the worst of the worst, the characteristics of the prisoners executed in 2017 suggest that executions were carried out against those who were among the most mentally and emotionally impaired, with deficits in functioning and diminished culpability similar to that of juveniles, the intellectually disabled, and those who are mentally incompetent.



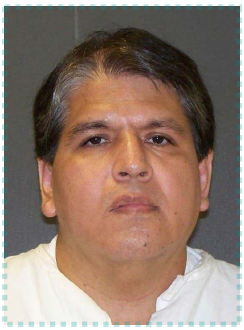
One of the most disturbing features of the 2017 executions was the execution of prisoners who had never received meaningful review of important issues in their cases. Many of those executed in 2017 had received glaringly deficient legal representation or were denied substantial judicial review.

Mark Christeson was executed in Missouri on January 31 without any substantive review of his claims by a federal court. He was abandoned by the lawyers appointed to represent him in his federal habeas corpus proceedings, who failed to meet with him until they had already missed his filing deadline. After the Missouri federal courts refused to appoint him new counsel, the U.S. Supreme Court intervened, but the federal district court refused to provide funds necessary for the new lawyers to investigate his case. When the U.S. Court of Appeals for the Eighth Circuit granted an appeal to review this denial of funding, Missouri issued a death warrant and the Supreme Court allowed the execution to proceed without new counsel ever having the chance to investigate the issues in the case.



TaiChin Preyor was executed in Texas after receiving similarly inadequate representation. His federal habeas appeal was written by a disbarred lawyer and filed by a probate and estate planning lawyer who had no capital case experience. That lawyer showed up in court relying on Wikipedia as her source of legal research on Texas's death-penalty law. After the federal petition was denied, the court noted that counsel had been utterly unqualified to represent Preyor, and appointed new counsel. However, the federal appeals court waited months to approve counsel's requested investigative budget, and Texas scheduled Preyor to be executed before the investigation could be completed. The Supreme Court refused to intervene.

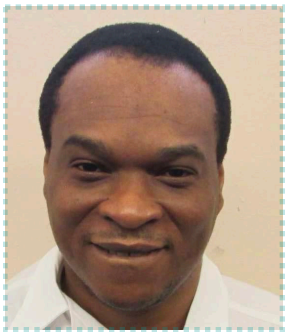
Alabama executed Torrey McNabb amid questions of state interference in the judicial process. A federal appeals court had determined that McNabb was entitled to an evidentiary hearing on his challenge to the state's execution protocol. But the Supreme Court vacated the stay of execution the lower courts had issued that would have permitted that hearing to take place.



The execution of Mexican national Ruben Ramírez Cárdenas was allowed to proceed in Texas despite an adjudication by an international human rights tribunal that Cárdenas had been denied access to Mexican government assistance in his case, in violation of international law and U.S. treaty obligations. No physical evidence linked Cárdenas to the crime, but the Texas courts denied his request for DNA testing that could have substantiated his innocence claim. Arkansas executed Ledell Lee on April 20 after denying him DNA testing of hair and blood evidence that potentially could have proven his innocence. None of the fingerprints found at the bloody crime scene matched Lee, and no physical evidence directly implicated him. Previous DNA testing with 1995 technology had been inconclusive.

Lee and Cárdenas were not alone in raising serious claims of innocence prior to their executions. Texas executed Robert Pruett on October 12 even though no physical evidence linked him to the crime, and DNA from the murder weapon did not match either Pruett or the murdered corrections officer, Daniel Nagle. Officer Nagle had been working to identify

corrupt officers who were helping prison gangs launder drug money, and his name was discovered on a secret note from an inmate saying that a prison gang wanted him dead. The unidentified DNA, Pruett's lawyers suggested, may belong "to the person [who] killed Nagle" and that Pruett was framed for the murder.

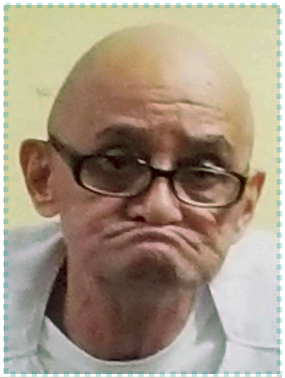


Robert Melson was linked to a murder by the later-recanted statement of a 17-year-old intellectually disabled boy who had been identified as one of the assailants involved in the murder, and by unreliable shoeprint evidence processed from a rainy drainage ditch five days after the killing. Melson never received any review of his challenge to the evidence because his post-conviction lawyers—an inexperienced volunteer who was not licensed in Alabama and a local lawyer who had a history of malpractice—did not properly file his petition, then filed an appeal in the wrong court. Melson did not learn that his state appeal had been denied until after his deadline for seeking federal review had passed. Alabama executed him on June 8.

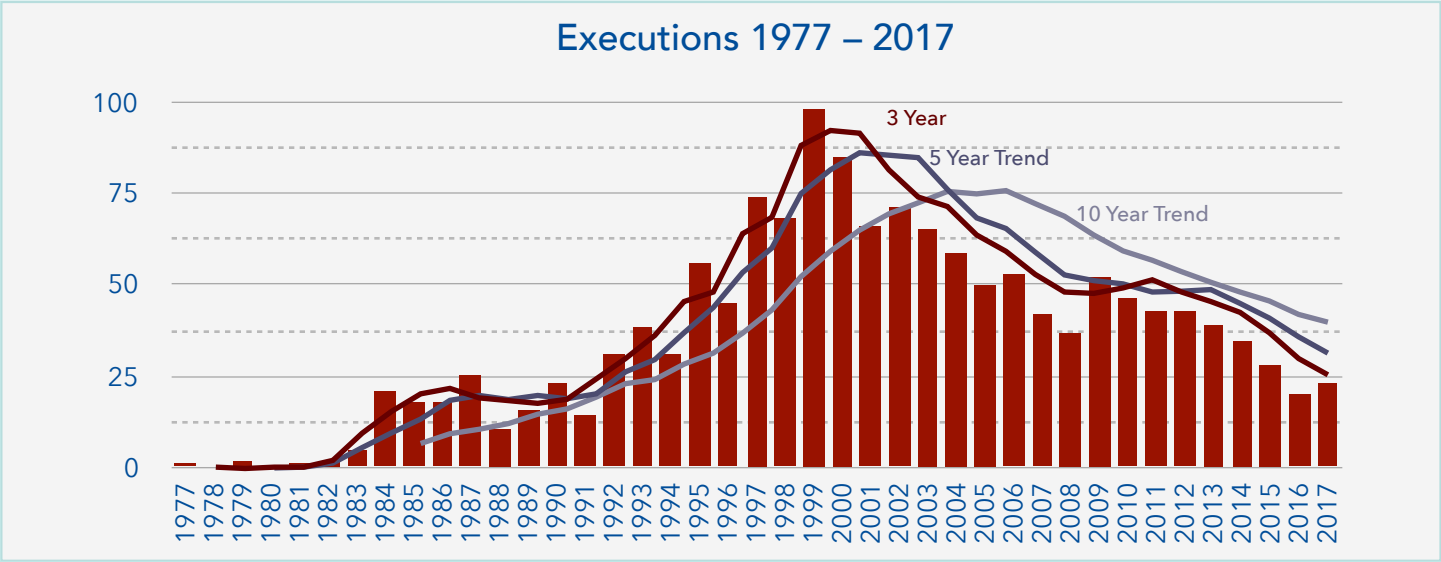
Kenneth Williams presented both the state and federal courts with a claim of intellectual disability that, if credited, would have rendered him ineligible for execution under the 2002 U.S. Supreme Court ruling, *Atkins v. Virginia*. He was denied a stay of execution that would have permitted him to obtain review of that claim.

William Morva, a Virginia prisoner with a severe delusional disorder that prevented him from distinguishing his delusions from reality, was denied clemency, even as the state legislature considered a bill that would eliminate the death penalty for defendants with serious mental illnesses. Because of an initial misdiagnosis, Morva's jury never heard evidence of his condition, which went untreated during his time on death row, causing his mental health to further deteriorate.

Problems with lethal injection persisted in 2017, as states continued the questionable use of the sedative midazolam as the first drug in their execution protocols. Witnesses reported problems in the executions of Jack Jones and Kenneth Williams in Arkansas, Torrey McNabb in Alabama, Gary Otte in Ohio, and Ricky Gray in Virginia. Witnesses to these executions noted reactions including convulsions, gasping for air, and grimacing. All five men had challenged their states' execution protocols. An independent pathologist who reviewed Gray's autopsy report stated, "The anatomic changes described in Ricky Gray's lungs are more often seen in the aftermath of a sarin gas attack than in a routine hospital autopsy." Prison personnel had struggled to set an IV for Gray's execution, but after his execution, Virginia's response was to increase secrecy by preventing witnesses from seeing the prisoner enter the execution chamber, thus obscuring the time at which the procedure begins.



In Ohio, the execution of gravely ill, 69-year-old Alva Campbell was called off after numerous unsuccessful attempts to set an IV. Campbell's attorneys had warned state officials that Campbell's many health problems had rendered his veins unusable for an IV. It was Ohio's fifth botched execution since 2006.



The similarities between the cases in which stays of execution were granted and those in which courts permitted executions to go forward raised questions concerning the apparent arbitrariness of the death penalty. Texas courts stayed the executions of Clinton Lee Young, Tilon Cater, and Kosoul Chanthakoummane to permit judicial review of forensic evidence, but denied a stay to allow time for DNA testing for Ruben Ramírez Cárdenas. Stacey Johnson, who was scheduled for execution the same night as Ledell Lee in Arkansas, received a stay of execution to provide time for testing of DNA evidence in his case, but Lee—whose DNA claim was virtually indistinguishable from Johnson's—did not.

UNRELIABLE NEW DEATH SENTENCES

Thirty-nine new death sentences were imposed in 2017. Although the number of new death sentences was the second lowest since states resumed capital punishment following the *Furman* decision in the 1970s, they were far from trouble free. Even before courts have the opportunity to review the performance of counsel in these cases, the new death sentences imposed in 2017 raise serious questions as to the arbitrariness of the process and the reliability of the results.

Several of the death sentences imposed in 2017 were the product of outlier practices that are the subject of on-going constitutional challenges. In both of Alabama's death sentences, trial judges imposed the death penalty despite non-unanimous jury sentencing recommendations. Alabama is the only state that still permits a trial judge to impose the death penalty based upon a non-unanimous jury recommendation for death. In Missouri, Marvin Rice's jury voted 11–1 to sentence him to life. However, under Missouri law, this is considered a hung jury, which requires the trial judge to determine the sentence. Despite the jury's vote, the trial judge sentenced Rice to death.

The age of defendants who were sentenced to death in 2017 raised questions concerning the appropriateness of those sentences. The U.S. Supreme Court has ruled that, because of their immaturity, reduced culpability, and greater capacity for rehabilitation, it is unconstitutional to apply the death penalty to defendants younger than age 18 at the time of

the offense. Based on new scientific evidence about brain development, trial courts in Kentucky ruled in two cases in 2017 that this prohibition should be extended to include defendants who were not yet 21 at the time of the crime. Six of the defendants sentenced to death in 2017 were under age 21 at the time of the crime.

In five cases in which the death penalty was imposed, defendants represented themselves at trial, sentencing, or both. Court documents revealed that Dylann Roof feared being labeled mentally ill more than being sentenced to death. Calling psychology "a Jewish invention [that] does nothing but invent diseases and tell people they have problems when they dont [sic]," he waived counsel, represented himself in the penalty phase, and refused to allow the jury to hear evidence that he suffered from delusions, a crippling anxiety disorder, depression, and autism. Two defendants pleaded guilty and waived their right to have a jury decide the sentence. One of those defendants, Mesac Damas, reportedly told police that he had been driven by the devil to kill his family. While in jail, he fasted in hopes of starving out the demons he claimed possessed him.

SUPREME COURT CASES IN 2017

The U.S. Supreme Court granted relief to death-row prisoners in 2017 in three cases that raised significant mental health-related issues.

In an Alabama case, ***McWilliams v. Dunn***, the Court ruled that its case precedent gave an indigent defendant the right to an independent mental-health expert to assist in evaluating, preparing, and presenting his defense. The Court held that Alabama had violated James McWilliams's right to due process when the trial court denied his lawyer's request to consult with an expert to review mental-health records about his client that had been produced on the eve of the penalty-phase hearing. The case had an immediate impact, even before it was decided. In April, the Arkansas Supreme Court stayed the executions of Bruce Ward and Don Davis, which presented related mental-health issues, pending the outcome of *McWilliams*.

In ***Moore v. Texas***, the Court unanimously rejected[2] Texas's use of an unscientific standard for evaluating intellectual disability in capital cases—a standard that the Court

[2] Although the Justices unanimously agreed that Texas's standard was unconstitutional, three would have upheld the state court's rejection of Moore's intellectual-disability claim on other grounds.

described as an "invention" by the state courts that was "untied to any acknowledged source" and lacked support from "any authority, medical or judicial." In addition to declaring Texas's outlier standard to be unconstitutional, the Court held that a state court's determination of intellectual disability must be "informed by the medical community's diagnostic framework." Since deciding *Moore*, the Court has remanded six cases to the lower courts for further consideration of the issue—four have been from Texas, one from Florida, and one from Alabama—signaling that its decision has broader national implications.

In another Texas case, the Supreme Court granted relief to death-row prisoner Duane Buck, whose trial lawyer had presented mental-health testimony from a psychologist who told the jury Buck was more likely to commit future acts of violence because he is black. In ***Buck v. Davis***, the Court (7–2) explained that the "law punishes people for what they do, not who they are." In his opinion for the Court, Chief Justice Roberts wrote that stereotyping black men as more prone to violence because of their race invoked a "particularly noxious strain of racial prejudice." He rejected the state's argument that the introduction of race into Buck's trial had been fleeting and harmless, explaining that "[s]ome toxins can be deadly in small doses."

ACTIVITY IN THE STATES

Activity in the states reflected two contradictory trends. On the one hand, states enacted legislation ending some of the most egregious outlier practices that had both disproportionately produced death sentences and disproportionately produced death sentences that were arbitrary and unreliable. On the other hand, states undertook increasingly extreme measures to expedite and carry out executions.

Alabama enacted two major laws that affected death-penalty cases. Faced with mounting challenges to the constitutionality of its death-penalty statute, the state ended its practice of permitting judges to override a jury's sentencing recommendation. Historically, judges had used this power to impose death sentences against the wishes of the jury: 101 of 112 times in which Alabama judges overrode a capital jury's sentencing recommendation (more than 90%), the trial court imposed a death sentence over a jury's recommendation of life. An estimated 20% of all Alabama death sentences had been the product of such judicial overrides.

Shortly after ending judicial override, the legislature enacted a law to expedite executions by curtailing access to the appellate courts. The so-called "Fair Justice Act," which constricts the time for death-penalty appeals, drew harsh criticism from attorneys, law professors, and death-row exonerees. Exoneree Anthony Ray Hinton, who gained his freedom after 30 years on Alabama's death row said that, under the new appeals system, "I would have been executed despite my innocence."

Florida took legislative action that enabled it to resume both capital sentencing and executions, after state and federal supreme court decisions declaring the state's sentencing statute unconstitutional had put both on hold in 2016. In March, Governor Rick Scott signed a bill that required jury unanimity in death sentencing, bringing Florida's sentencing procedure

in line with the U.S. Supreme Court's ruling in *Hurst v. Florida* and subsequent Florida Supreme Court rulings. The Florida Supreme Court ruled that it would apply the decision requiring unanimity only in cases that were reviewed on direct appeal after June 2002. When the state resumed executions, it moved forward in cases with prisoners who had been sentenced to death under the old, unconstitutional system. Two of the three men executed in Florida in 2017 had been sentenced to death by judges after non-unanimous sentencing recommendations from juries.

Death-penalty cases in Florida became the subject of national attention in March, when Orange-Osceola County State Attorney Aramis Ayala announced that her office would not seek death sentences during her tenure. Governor Scott removed Ayala from more than two dozen first-degree murder cases over the protests of the Florida chapters of the NAACP and the ACLU, the Florida Black Caucus, and the parents of a murder victim in one of the cases. The Florida Supreme Court sided with the governor, and Ayala formed a death-penalty review committee to determine case-by-case whether to pursue the death penalty in the future.

Florida also became the first state to use the drug etomidate in executions. Janssen Pharmaceuticals, the creator of etomidate, publicly opposed the use of its product in executions, saying: "We do not condone the use of our medicines in lethal injections for capital punishment." Nevada and Nebraska proposed never-before-tried execution protocols using the opioid fentanyl citrate. Both protocols also called for the use of diazepam (Valium) and the paralytic cisatracurium besylate. Nebraska also included as the last drug in the sequence, potassium chloride, a chemical which causes excruciating pain and burning upon administration before inducing cardiac arrest.

Pharmaceutical company restrictions on the distribution of midazolam prompted Arkansas to schedule an unprecedented eight executions during an 11-day period in April in an attempt to carry out the executions before its existing supply expired. But it was the

ARKANSAS PRISONERS SCHEDULED FOR EXECUTION IN 2017

second drug, vecuronium bromide, that drew the opposition of pharmaceutical distributor McKesson Medical-Surgical, which sued the state for violating the distributor's agreements and obtaining the drug under false pretenses. Arkansas carried out four of the eight planned executions, using vecuronium bromide in each. McKesson's litigation is still pending before the Arkansas Supreme Court. A separate ruling from the Arkansas Supreme Court required the state to release copies of the pharmaceutical drug and packaging labels for execution drugs, with only the batch and lot numbers redacted, effectively permitting the public and the pharmaceutical industry to identify the source of the drugs. Arkansas later obtained additional drugs for the execution of Jack Greene in November, but the state supreme court stayed his execution to consider issues relating to mental illness. Prior to April, Arkansas had not carried out an execution since 2005.

In July, Ohio also resumed executions after a nearly three-year hiatus, performing its first execution since the botched execution of Dennis McGuire in January 2014. A diverse coalition, including public officials, death-row exonerees, murder victims' families, correctional officials, and religious leaders, expressed opposition to the state's resumption of executions. Ohio scheduled 26 executions over the next several years, and a report from the Fair Punishment Project found that at least 17 of the prisoners slated to die had experienced serious childhood trauma, 11 have evidence of intellectual disability or cognitive impairments, and six "appear to suffer from a mental illness."

Efforts to shroud the lethal-injection process in secrecy continued in 2017, with South Carolina providing a dramatic example of states' efforts to carry out executions without public scrutiny. On November 20, Governor Henry McMaster held a press conference outside the barbed-wire fences of the state's execution facility urging state legislators to enact a drug secrecy law, claiming that a lack of drugs was preventing the state from executing Bobby Wayne Stone. However, the execution emergency was contrived. State officials knew Stone's December 1 execution date was never going to be carried out. The death warrant was legally premature, as Stone had never had federal court review of his case—a fact that led the state attorney general's office to agree that a stay was necessary. One day after the governor's media pronouncement, a federal district court granted Stone a stay.

Executions remained on hold in Oklahoma, as the state still lacks an execution protocol. The hiatus in executions will be the longest since the state resumed executions in the 1980s. The blue-ribbon, private Oklahoma Death Penalty Review Commission released its report on April 25. It called its findings "disturbing" and unanimously recommended that the state not carry out executions "until significant reforms are accomplished." The report recommended more than 40 reforms to address wrongful convictions, training of prosecutors, defense attorneys, and judges, clemency procedures, and the execution process itself.

The California Supreme Court allowed Proposition 66—the voter initiative intended to speed up death-penalty appeals and executions—to go into effect, but severely limited its scope by declaring that its core provisions on time limits were not mandatory.

NOTABLE VOICES FROM 2017

"Our law punishes people for what they do, not who they are. … When a jury hears expert testimony that expressly makes a defendant's race directly pertinent on the question of life or death, the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses."

— Chief Justice John Roberts in his opinion for the Court in Buck v. Davis

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"What gives me a right to take life like he did? … I want to face my God, the same God he'll one day face, with clean hands."

— Tracy Casas on why she supported the decision of prosecutors in Vernon Parish, Louisiana, not to seek the death penalty against the man who murdered her daughter, Misty Marshall, and grandson Day-Min Marshall

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"Paul Storey's execution will not bring our son back, will not atone for the loss of our son and will not bring comfort or closure."

— Letter from Glenn and Judy Cherry asking Texas officials not to execute the man convicted of murdering their son, Jonas Cherry

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"The death penalty is an inhumane measure that humiliates, in any way it is pursued, human dignity. It is, of itself, contrary to the Gospel because it is freely decided to suppress a human life that is always sacred."

— Pope Francis

"If I were queen, there would be no death penalty."

— Justice Ruth Bader Ginsburg, during a talk with students at Stanford Law School

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"I've heard various arguments, absurd arguments for executing and some rather obscene arguments for executing, but I don't really think I've heard many more obscene ones or absurd ones than the fact that the drugs for executing had reached their sell-by date."

— United Nations Assistant Secretary-General for Human Rights Andrew Gilmour

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CONCLUSION

The long-term national decline of the death penalty continued in 2017, despite efforts by the few states that scheduled executions to carry them out at all costs. Executions and new death sentences remained below their 2015 levels, trailing only the historic lows set in 2016. Public support for the death penalty sank to its lowest level in 45 years, with only 55% of Americans in the national Gallup Poll saying they support capital punishment. Symbolizing the death-penalty decline, for the first time since 1974, Harris County–the nation's most prolific county for executions–neither executed anyone nor sentenced anyone to death.

The few who were executed in 2017 disproportionally represented not the worst offenders, but those who received the poorest representation or the least judicial review, or whose states were willing to go to the greatest lengths to carry out executions. Serious questions about mental illness, brain damage, intellectual disability, severe trauma, and/or innocence were present in nearly all the cases. And witnesses reported problems in more than 20% of the executions states attempted to carry out.

New death sentences also reflected the geographic arbitrariness of the death penalty, with nearly one-third of new death sentences coming from just three counties.

Five more people were exonerated and released from death row, bringing the total to 161. These cases highlighted persistent problems in the application of the death penalty: racial bias, prosecutorial misconduct, mental illness, and poor representation.

As use of the death penalty dwindles, one might expect that the few cases that result in death sentences and the even fewer that result in executions would truly be the most egregious crimes and the most culpable offenders. But events in 2017 show once again that is not the case. Instead, states appear to be clinging to the death penalty by executing any prisoner unlucky enough to have reached the end of the appeals process without competent representation or rigorous judicial review and by doing so by any means at their disposal. These objectionable practices raise questions about the viability of the capital punishment system, as prisoners who are mentally ill, intellectually impaired, and victims of severe trauma are subjected to botched executions and potentially torturous deaths. Public support for the death penalty continues to erode, and these may be some of the reasons why.

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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, M. Quinn Delaney, 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.