

THE DEATH PENALTY IN 2018: YEAR END REPORT

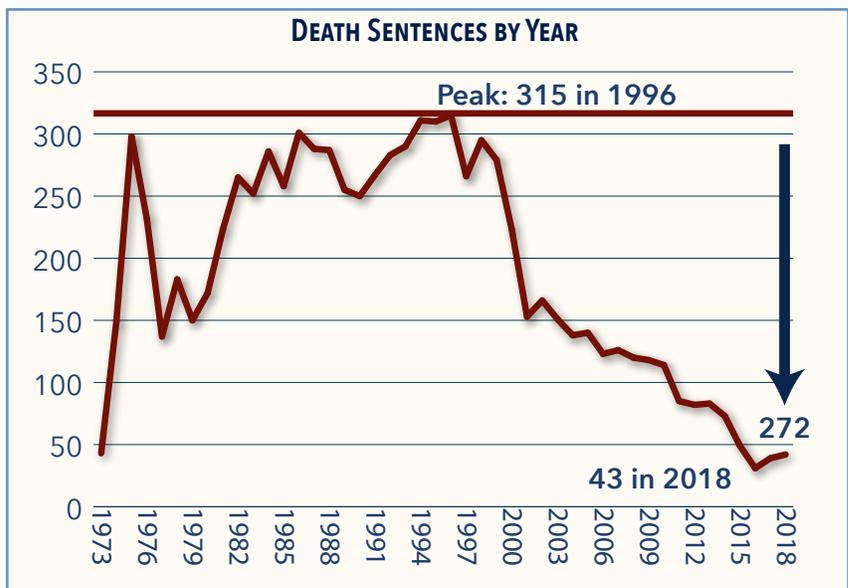
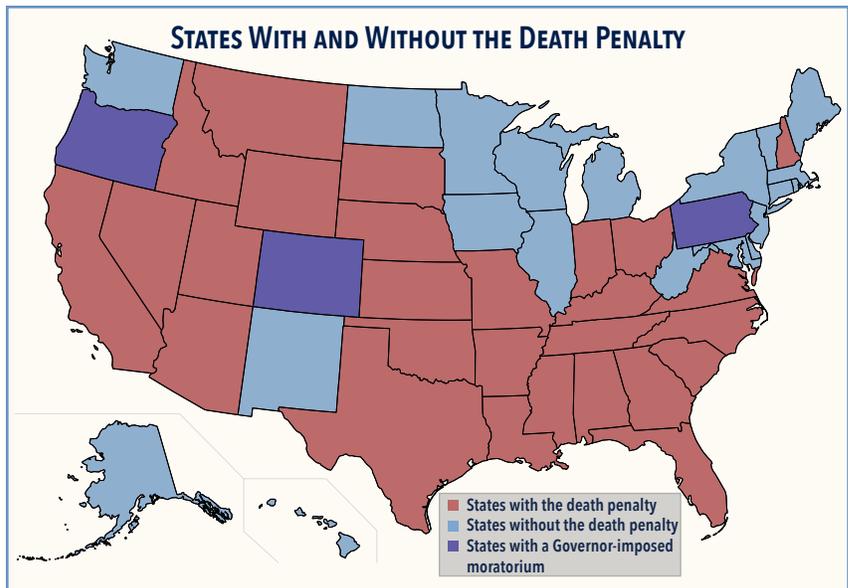
DEATH PENALTY USAGE STAYS NEAR GENERATIONAL LOWS

EXECUTIONS REMAIN BELOW 30, SENTENCES BELOW 50 FOR 4TH YEAR IN A ROW

DEATH ROW POPULATION DECLINES FOR 18TH STRAIGHT YEAR

KEY FINDINGS

- **Washington** becomes the 20th state to abolish the death penalty.
- **Gallup poll:** Fewer than half of Americans believe death penalty is applied fairly.
- For the first time in 25 years, **fewer than 2,500 people** face active death sentences.
- **No U.S. county imposed more than two death sentences** for the first time in the modern era.



New death sentences and executions remained near historic lows in 2018 and a twentieth state abolished capital punishment, as public opinion polls, election results, legislative actions, and court decisions all reflected the continuing erosion of the death penalty across the country.

But even as death row decreased in size for the eighteenth consecutive year and the number of prisoners facing active death sentences reached a 25-year low, the death penalty remained arbitrary where it was applied. Rather than reserving executions and death sentences for the worst of the worst crimes and offenders, capital punishment was instead disproportionately meted out in 2018 in cases involving the most vulnerable defendants and prisoners and the least reliable judicial process.

The 25 executions carried out in 2018 marked the fourth consecutive year with fewer than 30 executions – something that had not occurred in the United States since 1988-1991. More than half (13) of the year’s executions took place in Texas. The other states carried out fewer executions than in any year since 1991, when only nine executions were conducted outside of Texas.

The prolonged decline in new death sentences in the United States reached new historic lows in 2018. The 43¹ new death sentences imposed this year will make 2018 the fourth straight year with fewer than 50 new death sentences. Prior to 2015, that had happened only once since the U.S. Supreme Court struck down the nation’s death penalty statutes in *Furman v. Georgia* in 1972. In 1973, the thirteen states that had reauthorized capital punishment imposed a total of 42 death sentences.

Death sentences have declined by half in the last four years compared to the previous four years. Those years also produced the fewest new death sentences of any four-year period in the modern history of U.S. capital punishment. Fewer new death sentences were imposed in the past decade than in the decade leading up to *Furman*, and the death sentences imposed this year were more than 85% below the peak of more than 300 per year in the mid 1990s.

For the first time in more than 25 years, the number of prisoners facing active death sentences in the United States fell below 2,500 in 2018. Death row in the U.S. has decreased in size every year since 2001, even as the number of executions remains near a generational low. Fueling the decline, the combination of court decisions reversing convictions or death sentences, deaths from non-execution causes, and exonerations now consistently outpaces the number of new death sentences imposed.

Washington became the 20th state to abolish the death penalty when its state Supreme Court unanimously declared that capital punishment violates the state constitution because it “is imposed in an arbitrary and racially biased manner.” New Hampshire’s legislature passed a bill to abolish its death penalty, but failed to marshal the two-thirds supermajority necessary to override Governor Chris Sununu’s veto. In three abolitionist states – Illinois, Iowa, and New Mexico – efforts to reinstate the death penalty failed. Alabama took legislative action to adopt the new, untested execution method of nitrogen hypoxia.

In a major international development, Pope Francis revised the Catechism of the Catholic Church, formally declaring the death penalty “inadmissible.” The revision calls capital punishment “an attack on the inviolability and dignity of the person,” and commits the Church to work “with determination” for the worldwide abolition of the death penalty.

| EXECUTIONS BY STATE 2018 & 2017 | | |
|------------------------------------|-----------|-----------|
| STATE | 2018 | 2017 |
| TEXAS | 13 | 7 |
| TENNESSEE | 3 | 0 |
| ALABAMA | 2 | 3 |
| FLORIDA | 2 | 3 |
| GEORGIA | 2 | 1 |
| NEBRASKA | 1 | 0 |
| OHIO | 1 | 2 |
| SOUTH DAKOTA | 1 | 0 |
| ARKANSAS | 0 | 4 |
| MISSOURI | 0 | 1 |
| VIRGINIA | 0 | 2 |
| TOTAL | 25 | 23 |

¹ DPIC initially confirmed 42 new death sentences in 2018. We subsequently learned of an additional new death sentence imposed in Clark County, Nevada.

| DEATH ROW BY STATE | | |
|--------------------|--------------------------|--------------------------|
| STATE | 2018 [†] | 2017 [†] |
| CALIFORNIA | 740 | 746 |
| FLORIDA | 353 | 374 |
| TEXAS | 232 | 243 |
| ALABAMA | 185 | 191 |
| PENNSYLVANIA | 160 | 169 |
| NORTH CAROLINA | 144 | 152 |
| OHIO | 144 | 144 |
| ARIZONA | 121 | 125 |
| NEVADA | 75 | 82 |
| LOUISIANA | 71 | 73 |
| TENNESSEE | 62 | 62 |
| US GOVERNMENT | 63 | 61 |
| GEORGIA | 56 | 61 |
| OKLAHOMA | 49 | 47 |
| MISSISSIPPI | 47 | 48 |
| SOUTH CAROLINA | 39 | 41 |
| OREGON | 33 | 33 |
| KENTUCKY | 32 | 33 |
| ARKANSAS | 31 | 32 |
| MISSOURI | 25 | 24 |
| INDIANA | 12 | 12 |
| NEBRASKA | 12 | 11 |
| KANSAS | 10 | 10 |
| UTAH | 9 | 9 |
| IDAHO | 9 | 8 |
| WASHINGTON* | 8 | 8 |
| US MILITARY | 5 | 5 |
| COLORADO | 3 | 3 |
| SOUTH DAKOTA | 3 | 3 |
| VIRGINIA | 3 | 5 |
| MONTANA | 2 | 2 |
| NEW MEXICO | 2 | 2 |
| NEW HAMPSHIRE | 1 | 1 |
| WYOMING | 1 | 1 |
| TOTAL | 2,738[‡] | 2,817[‡] |

* Abolished the death penalty October 11, 2018
[†] 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.

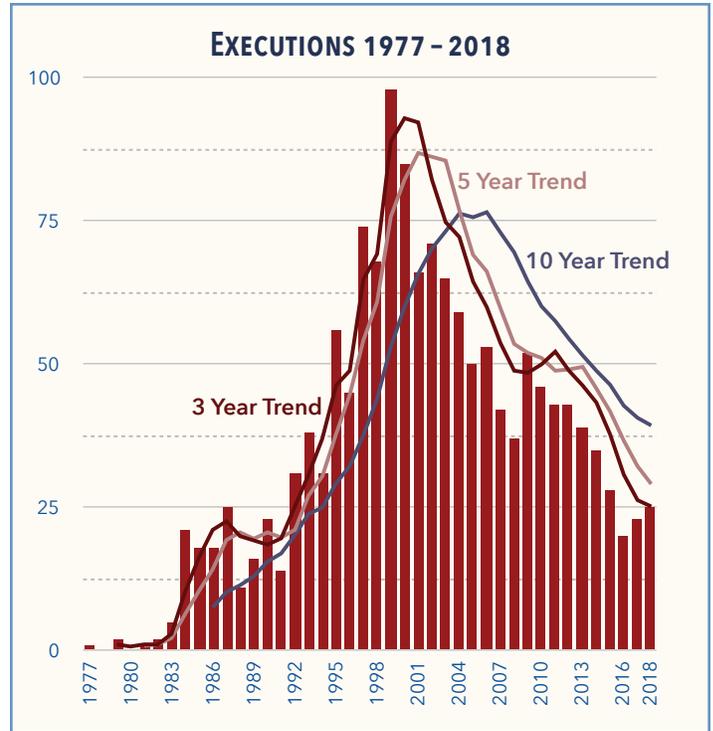
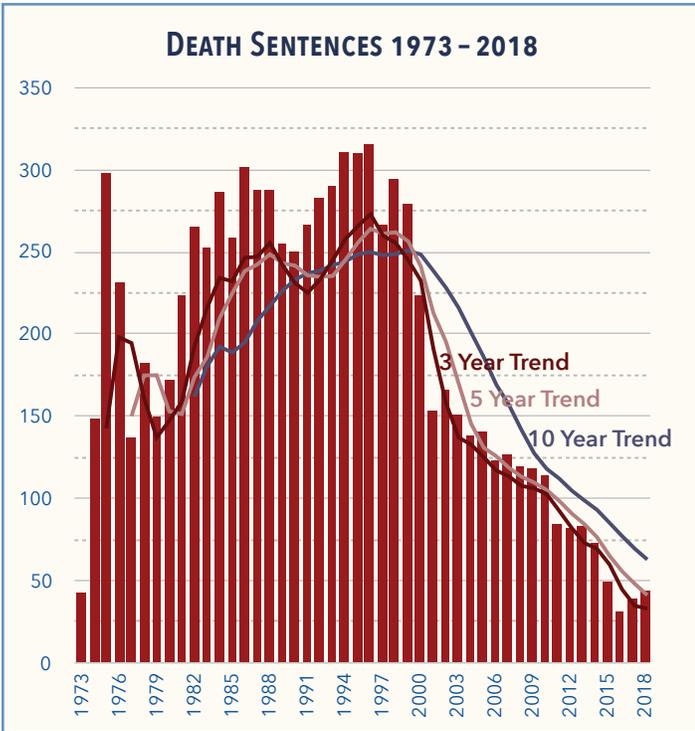
Domestically, the October 2018 Gallup poll on capital punishment found that fewer than half of Americans (49%) now believe the death penalty is “applied fairly” – the lowest level since Gallup began asking that question in 2000. Overall support for the death penalty was essentially unchanged from 2017’s 45-year low. The poll found that 56% of Americans said they support capital punishment and 41% said they oppose it. Gallup’s 2018 numbers were similar to the results of a June 2018 Pew Research Center Poll, which reported that just under 54% of Americans support the death penalty, with 39% opposed. A Quinnipiac poll found that the public overwhelmingly opposes (71%-21%) using the death penalty against people who sell drugs that result in overdose deaths.

Election results in 2018 point towards continued future reduction in the use of capital punishment.

Election results in 2018 also pointed towards continued future reduction in the use of capital punishment. Since 2015, voters have removed prosecutors in 11 of the 30 most prolific death-sentencing counties in the country, replacing most of them with reform candidates. This year, prosecutorial candidates who ran on reform platforms won election in St. Louis County, Missouri; Jefferson County (Birmingham), Alabama; Bexar (San Antonio) and Dallas, Texas. Two of the nation’s most aggressive pro-death-penalty prosecutors also were ousted in Orange and San Bernardino counties in California. Governors in Oregon and Pennsylvania who had imposed or extended moratoria on executions were reelected, and Colorado – the third moratorium state – elected a governor who openly opposed the death penalty. An unpopular incumbent governor in Illinois was unable to salvage reelection with a last-minute attempt to restore capital punishment in the state. At the same time, governors in Nebraska and New Hampshire who vetoed death-penalty repeal bills were reelected.

Two more people were exonerated from death row, bringing to 164 the number of former death-row prisoners exonerated in the U.S. since 1973. The cases illustrated both the dangers of false forensic evidence and the exculpatory power of DNA evidence. Three prisoners received clemency in cases that highlighted a variety of systemic problems that continue to afflict the administration of the U.S. death penalty, including disproportionality, innocence, and inadequate representation.

Secrecy continued to shroud the execution process, and there were numerous reports of problematic executions that had used inappropriate or untested drug protocols or drugs of questionable quality. Two prisoners in Tennessee chose execution by electric chair instead of what they believed would have been an extended torturous lethal-injection execution.



EXECUTION AND SENTENCING TRENDS

Death sentences and executions continued at similar levels to recent years. Long-term trends show that a major shift has taken place in the use of capital punishment.

There were 43 new death sentences imposed in 2018, the third-fewest in 33 years. For the first time in the modern history of the U.S. death penalty, no county in the United States imposed more than two new death sentences. The 3-, 5-, and 10-year periods ending in 2018 had the fewest death sentences of any corresponding periods since *Furman*, and the last ten years had fewer death sentences than the decade preceding *Furman*.

Fifteen states and the federal government imposed death sentences in 2018, but 56% of those sentences came from just four states: Texas and Florida (both with seven) and California and Ohio (both with five). Even as the backlog of cases from two years of uncertainty about the constitutionality of Florida’s sentencing procedures increased the number of capital trials in the state, the new law barring judges from imposing the death penalty without a unanimous jury recommendation for death resulted in at least four life sentences that might previously have produced death verdicts.

While small year-to-year fluctuations in sentencing numbers are to be expected, the nationwide data reflects significantly greater reluctance by prosecutors and juries to seek and impose death sentences than a decade ago or even five years ago. New death sentences imposed across the country during the past four years declined by half from the number imposed in the preceding four years, from 2011-2014.

For the seventh consecutive year, Virginia did not impose any death sentences, and in a [high-profile capital trial](#), the jury spared the life of a disturbed veteran convicted of killing his wife and a police officer. Georgia and South Carolina each had no death sentences for the fourth consecutive year. For the third time since 2015, a Colorado jury handed down a [life sentence](#) in a high-profile capital case. No jury in the state has imposed a death sentence since 2010. [Wake County, North Carolina](#) imposed its ninth consecutive life sentence in a death-penalty case, and has not imposed a death sentence since

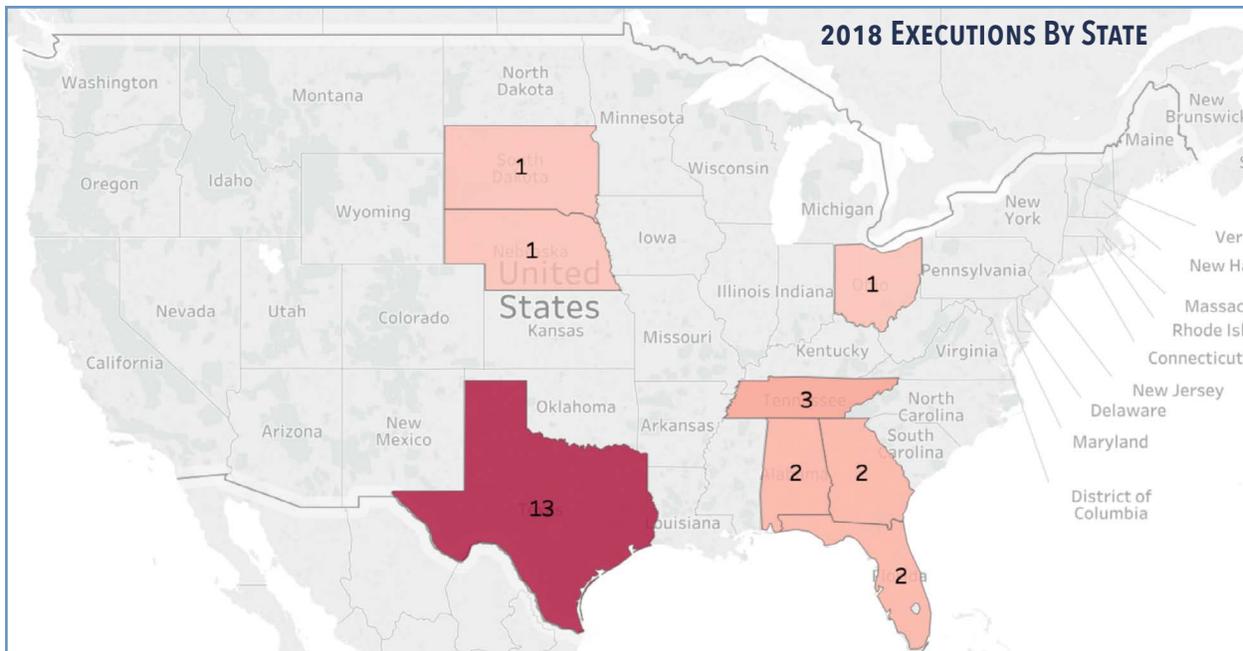
2007. Riverside County, California, which led the nation in death sentences in 2015 and 2017, produced no death sentences.

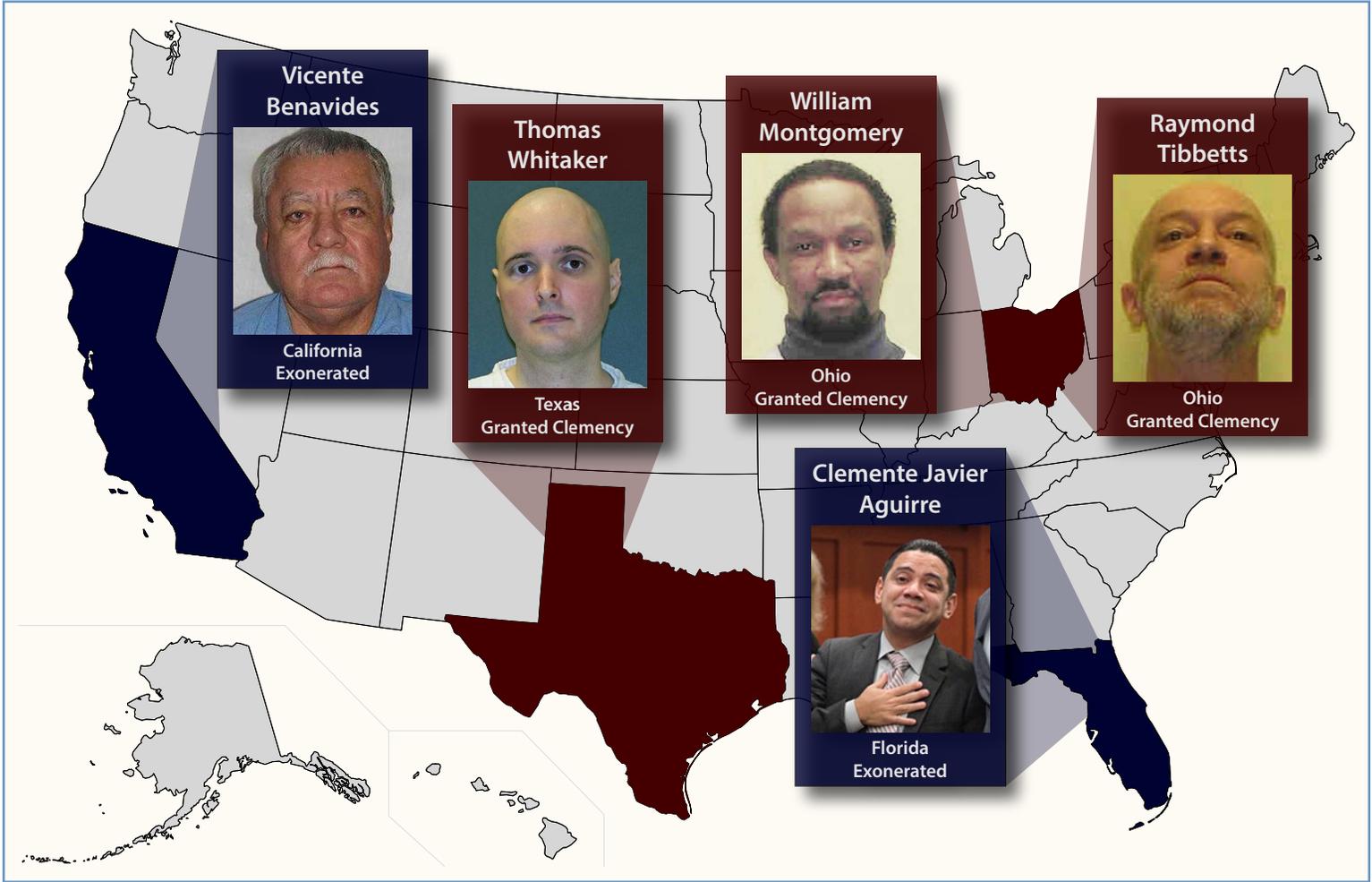
Executions remained near a generational low in 2018, with 25 people executed in eight states. It was the fourth consecutive year with fewer than 30 executions. No other year since 1992 had so few executions. Even as Nebraska, Tennessee, and South Dakota resumed executions after long hiatuses, executions were geographically isolated. Texas accounted for more than half of the nation’s executions with 13. However, there were fewer executions in the rest of the country than in any year since 1991.

Fewer than half of the 62 executions scheduled in 2018 were carried out. Seventeen were stayed for consideration of new evidence and issues ranging from mental competency and quality of representation to methods of execution. Six executions were halted by commutations or reprieves. Thirteen were rescheduled. One execution attempt, that of Doyle Lee Hamm, was halted when execution personnel were unable to set an IV line.

The size of death row fell for the 18th consecutive year. For the first time in 25 years, **fewer than 2,500 prisoners** face active death sentences. As of July 1, 2018, 2,738 men and women were on death rows across the U.S., according to the NAACP Legal Defense Fund. Those figures included 249 people whose convictions or death sentences have been overturned but still face the possibility of being resentenced to death at a new trial or sentencing hearing or whose reversals are still subject to appeal by the state. The remaining 2,489 prisoners face active death sentences. The majority of those removed from death row were not executed, but were resentenced to life or less, were exonerated or received commutations, or died of other causes while on death row.

| STATE | COUNTY | NEW DEATH SENTENCES | |
|------------|----------------|---------------------|------|
| | | 2014 - 2018 | 2018 |
| CALIFORNIA | RIVERSIDE | 17 | 0 |
| CALIFORNIA | LOS ANGELES | 14 | 2 |
| ARIZONA | MARICOPA | 12 | 2 |
| NEVADA | CLARK | 7 | 1 |
| ALABAMA | MOBILE | 6 | 1 |
| CALIFORNIA | ORANGE | 6 | 1 |
| OKLAHOMA | OKLAHOMA | 6 | 1 |
| TEXAS | HARRIS | 5 | 1 |
| CALIFORNIA | KERN | 4 | 0 |
| CALIFORNIA | SAN BERNARDINO | 3 | 0 |



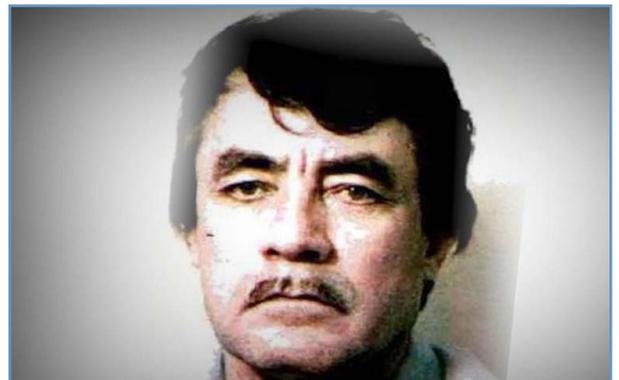


EXONERATIONS AND COMMUTATIONS IN 2018

Two death-sentenced prisoners were exonerated in 2018, bringing the total number of death-row exonerations to 164. The death sentences of three other prisoners were commuted to life in prison.

Both of the men exonerated from death row this year are foreign nationals, highlighting the particular vulnerability of immigrants within the U.S. justice system. While there has been one exoneration for about every nine executions in the U.S. overall, there has been one exoneration of a foreign national for every 6.17 executions of a foreign national, suggesting that foreign nationals may be more likely to face wrongful convictions and death sentences than U.S. citizens.

Vicente Benavides Figueroa was exonerated on April 19, 2018 after spending nearly 26 years on California’s death row. The California Supreme Court had granted him a new trial in March 2018, calling his convictions for sexually assaulting and murdering his girlfriend’s 21-month-old daughter, Consuelo Verdugo, a product of “extensive,” “pervasive,” “impactful,” and “false” forensic testimony. New forensic review of the medical evidence revealed that the toddler had never been sexually assaulted and may actually have died from being hit by a car.





[Clemente Javier Aguirre](#) was exonerated from Florida's death row on November 5, after jury selection for his retrial had already begun. He was the 28th death-row prisoner exonerated in Florida. Aguirre was convicted and sentenced to death in 2006 of the murder of two neighbors – an elderly woman and her adult daughter – in 2004. He steadfastly maintained his innocence, saying he had discovered the women after they had been killed. He did not report the murders to authorities, he said, because he was an undocumented immigrant and feared deportation. The prosecution's chief witness against Aguirre was Samantha

Williams, the mentally ill daughter and granddaughter of the victims. During the post-conviction process, Aguirre's lawyers discovered that Williams had confessed to at least five different people that she had killed her relatives. None of the DNA found on the 84 items from the crime scene that were tested matched Aguirre. Most blood samples matched the two victims, and Samantha Williams's DNA was found on eight bloodstains collected from four different rooms. As with more than 90% of Florida's death-row exonerees, Aguirre had been sentenced to death by non-unanimous jury recommendations under Florida's unconstitutional capital sentencing scheme.

Governors granted clemency to two death-row prisoners in Ohio and one in Texas. On February 22, 2018, less than an hour before [Thomas "Bart" Whitaker](#) was scheduled to be executed in Texas, Governor Greg Abbott commuted Whitaker's sentence to life without parole. Two days earlier, in response to pleas for mercy from Whitaker's father, the sole survivor of the attack that killed his wife and only other son, the Texas Board of Pardons and Paroles unanimously recommended clemency. Whitaker's case was the first in which Abbott had commuted a death sentence. The subsequent execution of [Christopher Young](#), an African American whose South Asian victim's family fought to spare his life, raised charges that the rejection of his clemency application was rooted in racial bias.



Ohio Governor John Kasich granted two clemencies in 2018.

On March 26, Kasich commuted the sentence of [William Montgomery](#). Though the governor did not explain his reasons for clemency, the Ohio Parole Board had [recommended clemency](#) because of doubts about Montgomery's guilt. On July 20, Kasich granted clemency to [Raymond Tibbetts](#) over a negative recommendation from the Ohio Parole Board. After receiving a letter from one of Tibbetts's jurors, the governor said that "fundamental flaws in [the] sentencing phase of [Tibbetts's] trial ... [had] prevented the jury from making an informed decision about whether Tibbetts deserved the death penalty." Juror Ross Geiger said that he

would have voted for a sentence of life without parole if the jurors had not been misled by the prosecution about the severity of Tibbetts's horrifically abusive upbringing and had the defense presented evidence of Tibbetts's drug and alcohol addictions and his unsuccessful efforts to obtain treatment.



SENTENCING 2018

New death sentences remained near record lows in 2018, with 43 death sentences imposed. Court rulings allowing impaired defendants to waive critical trial rights and death sentencing of individuals with obvious impairments raised concerns as to whether the sentences were reserved for “the worst of the worst” offenders or were being imposed upon the most vulnerable defendants in the most unreliable trial and sentencing proceedings.

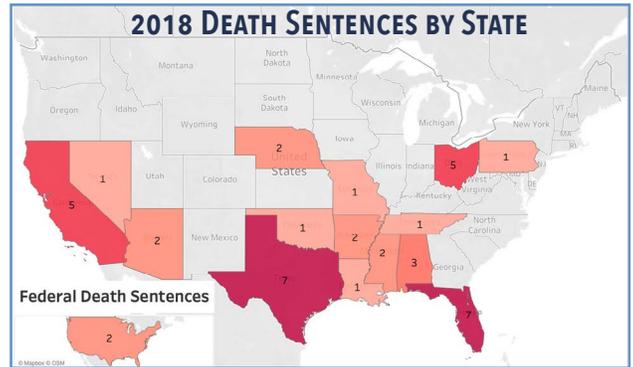
Although capital sentencing decisions are supposed to reflect the conscience of the community, a disproportionate number of death sentences in 2018 were imposed without the unanimous agreement of death-penalty jurors that death was appropriate. One of every seven death sentences was imposed by a judge without a unanimous jury vote, and often after defendants were deemed to have waived crucial trial rights.

Once a jury finds an aggravating circumstance to be present, Nebraska law removes the sentencing decision from the jury and places it in the hands of a 3-judge panel. Nebraska judges imposed two death sentences in 2018. [Anthony Garcia](#) was sentenced to death for four murders after his defense team presented evidence of a history of mental illness that included hospitalization and electroshock therapy. Garcia had not spoken to his defense team in two years and would attend his sentencing hearing only when his presence was compelled by [force](#). A 3-judge panel sentenced [Patrick Schroeder](#) to death after the court had permitted him to fire his court-appointed lawyers and represent himself. Schroeder presented no evidence to spare his life and did not challenge the prosecution’s evidence or arguments in support of the death penalty.

Although Florida and Delaware ended death sentences resulting from non-unanimous jury sentencing recommendations in 2016, split-jury decisions continued to contribute to death sentences in the few states in which they are still possible. States that permit judicial sentencing following split-jury votes produced four death sentences in 2018 and, in three of those cases, juries did not unanimously agree to death.² In the fourth, an Alabama trial judge sentenced [Derrick Dearman](#) to death after Dearman fired his attorney, pleaded guilty, and wrote the judge asking for death. As in Dearman’s case, a number of death sentences occurred after defendants [waived mitigation](#) or [fired or refused to cooperate with counsel](#).

In Ohio, a three-judge panel from Cuyahoga County imposed the death penalty on George Brinkman, Jr. on December 28, after Brinkman pleaded guilty and waived a jury sentencing. It was the 43rd death sentence imposed in 2018 and the sixth without a unanimous jury vote.

The new death sentences in 2018 also reflected the continuing use of capital punishment against several classes of vulnerable offenders: young people, the chronically abused, those with impaired intellectual functioning or serious mental illness, and foreign nationals. Among those newly sentenced to death are at least two foreign nationals, three who were age 21 or younger at the time of the crime, and several who exhibited clear signs of serious mental illness.



² Alabama allows trial judges to impose death sentences based on a 10-2 or 11-1 non-unanimous jury recommendation for death. Alabama judges sentenced Benjamin Young and Peter Capote to death after jury recommendations of 11-1 and 10-2, respectively. Missouri considers a non-unanimous jury vote a hung jury, after which it gives the trial judge exclusive authority to determine sentence. No Missouri jury has imposed a death sentence since 2013. However, a Missouri judge sentenced Craig Wood to death in 2018 after the jury deadlocked at 10-2 in the penalty phase. Indiana, which also provides for judge sentencing when a jury is not unanimous, had no death sentences in 2018.

LETHAL INJECTION

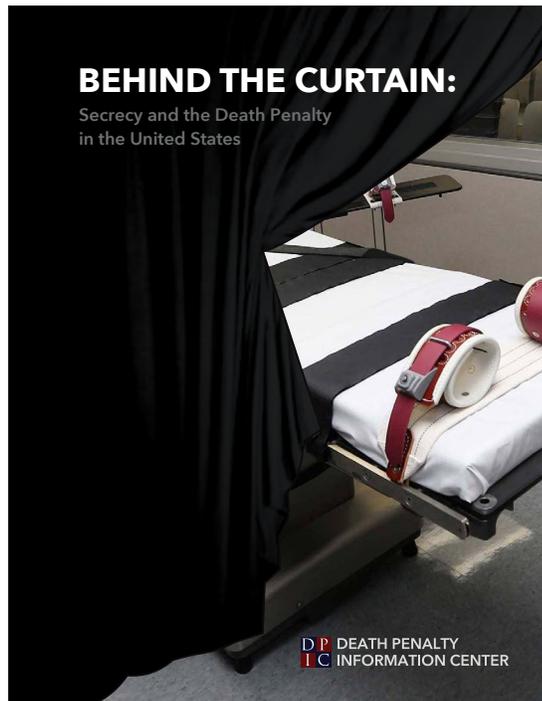
Controversy surrounding lethal injection intensified with the resumption of executions in Nebraska, Tennessee, and South Dakota after long hiatuses. In most cases, expanded state execution secrecy policies kept the public, prisoners, and attorneys from learning the sources of execution drugs, but investigative reporting revealed significant problems at pharmacies that had provided drugs to Missouri and Texas. Pharmaceutical companies continued to fight state diversion of their medicines to use in executions, but their efforts were impeded by secrecy and subterfuge on the part of the states.

The Death Penalty Information Center issued a major new report in November 2018 that examined the scope and consequences of secrecy in the application of the death penalty in the United States. *Behind the Curtain: Secrecy and the Death Penalty in the United States* detailed the extent to which states have used secrecy laws to conceal evidence of illegal or improper activity in obtaining lethal-injection drugs, including lying to pharmaceutical companies, contracting with suppliers that have histories of safety violations, and swapping drugs with other states.

The year was bookended by revelations that two lethal-injection drug suppliers had committed serious safety violations. In February, investigative reporter Chris McDaniel of BuzzFeed News uncovered evidence that [Missouri](#) had executed seventeen prisoners using drugs from a suburban St. Louis compounding pharmacy called Foundation Care. The Food and Drug Administration had deemed Foundation Care “high risk” because of its history of repeated significant health violations. The pharmacy had also engaged in illegal practices including Medicaid fraud and reselling drugs returned by patients.

At the end of November, McDaniel reported that [Texas](#) had purchased execution drugs from Greenpark Compounding Pharmacy, a Houston-based compounding pharmacy whose license is on probation. Greenpark had been cited for 48 safety violations in the last eight years, including inadequate sanitary practices and stocking out-of-date drugs, and it had been sued for providing the wrong drug to three children, causing one of the children to require emergency hospital care. The state’s relationship with Greenpark coincided with increased questions about the quality of the drugs Texas was using to carry out executions. Execution witnesses reported that five of the thirteen prisoners executed with compounded pentobarbital by Texas in 2018 said they felt burning or pain after the lethal-injection drug was administered. A sixth was observed writhing on the gurney and grimacing. South Dakota’s execution of Rodney Berget also raised questions about the source and manufacturing of that state’s execution drugs. Berget – a former Special Olympics participant who waived appeals relating to his intellectual disability – questioned, “Is it supposed to feel like that?,” as he was injected with pentobarbital from an undisclosed source. South Dakota’s secrecy laws are so restrictive that the state did not even reveal prior to the execution what drug it intended to use in the execution.

Pharmaceutical companies took states to court in [Nevada](#) and [Nebraska](#), alleging that the two states had violated distribution agreements to obtain medicines from companies that oppose the use of their products in executions. In July, the generic-drug manufacturer Alvogen, Inc. persuaded a Nevada judge to issue a temporary restraining order to prevent



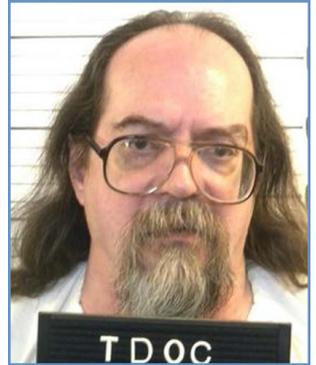
Nevada from using midazolam produced by the company to execute Scott Dozier. Alvogen alleged that Nevada had “intentionally defrauded” the company’s distributor into selling it midazolam for the execution. The state had announced a new drug protocol only eight days before Dozier’s execution. Knowing that Alvogen does not accept orders from prisons or correctional departments, Nevada had the drug sent to a state office 200 miles from the prison, which Alvogen alleged was a ruse “to further the implication that the midazolam was for a legitimate medical purpose.” In September, the trial court found that [the Nevada Department of Corrections had acted in “bad faith”](#), obtaining the drug through “subterfuge.” It then issued a preliminary injunction barring Nevada from using Alvogen’s midazolam in any execution.



In August, German-based pharmaceutical company Fresenius Kabi sued Nebraska for allegedly obtaining drugs for the execution of [Carey Dean Moore](#) “through improper or illegal means.” Though Nebraska did not publicly identify the source of its execution drugs, Fresenius Kabi is the only company that produces vials of potassium chloride in the size the state purchased. Fresenius Kabi’s suit was unsuccessful, and Moore was executed on August 14. Moore’s execution was the first in Nebraska in 21 years, and

the first ever lethal-injection execution in that state. Witnesses reported that Moore’s face turned redish-purple before officials closed a curtain for a fourteen-minute period, during which Moore was pronounced dead.

After a nine-year interval, Tennessee also resumed executions. Tennessee officials [sought eight execution dates](#), requesting that they be scheduled before its drug supply expired on June 1. The Tennessee Supreme Court [denied that request](#), but set two execution dates for the second half of the year, in addition to three that had previously been set. Two of those executions were stayed because the warrants were legally premature. Tennessee death-row prisoners challenged both the state’s planned use of midazolam, a drug known to have produced problems in past executions, and the possible use of the electric chair as an alternative execution method. The electric chair challenge was dismissed as premature. [Billy Ray Irick](#) was executed on August 9 over sharp dissents by U.S. Supreme Court Justice Sonia Sotomayor and Tennessee Supreme Court Judge Sharon Lee. Justice Sotomayor criticized Tennessee’s “rush to execute,” as lethal-injection litigation was still pending, and said that if the execution proceeded, “we have stopped being a civilized nation and accepted barbarism.” Judge Lee wrote, “The harm to Mr. Irick of an unconstitutional execution is irreparable. Yet the harm to the State from briefly delaying the execution until after appellate review is minimal, if any.” After Irick’s execution, well-known anesthesiologist [Dr. David Lubarsky](#) examined witness descriptions of the execution and concluded that Irick had been tortured to death. Lubarsky wrote that Irick “was aware and sensate during his execution and would have experienced the feeling of choking,



drowning in his own fluids, suffocating, being buried alive, and the burning sensation caused by the injection of the potassium chloride.”

[Edmund Zagorski](#), the next prisoner scheduled for execution in Tennessee, continued to challenge the state’s lethal-injection protocol. His petition to the [Tennessee Supreme Court](#) included a concession from Dr. Roswell Lee Evans, the anesthesia expert whose opinion formed the basis of the U.S. Supreme Court’s decision in *Glossip v. Gross* upholding the use of midazolam in executions. Zagorski’s attorneys wrote, “To the extent that *Glossip* has been misapplied by lower courts to stand for the factual conclusion that Dr. Evans’ testimony established that midazolam would protect an inmate from pain and suffering in the same manner as sodium thiopental, such a



conclusion is no longer valid.” When Zagorski’s challenge to the use of midazolam failed, he elected to be executed by electrocution. Zagorski’s attorney, Kelley Henry, wrote that Tennessee “has coerced Mr. Zagorski – with the threat of extreme chemical torture via a barbaric three-drug lethal injection protocol – to choose to die a painful and gruesome death in the electric chair.”

“[T]he State of Tennessee has coerced Mr. Zagorski — with the threat of extreme chemical torture via a barbaric three-drug lethal injection protocol — to choose to die a painful and gruesome death in the electric chair.”

— Kelley Henry,
attorney for Edmund Zagorski

In November, the U.S. Supreme Court heard oral argument in *Bucklew v. Precythe*. Russell Bucklew, a Missouri prisoner, presented the question of whether the use of lethal injection to execute him would cause him unnecessary and excruciating pain and suffering due to a rare medical condition, and whether he was constitutionally required to provide the state with a different way for it to kill him.



On December 6, Tennessee executed [David Miller](#) in the electric chair. Miller’s challenge to the constitutionality of Tennessee’s lethal-injection process was denied when, hindered by Tennessee’s secrecy law, he was unable to prove the availability of pentobarbital as an alternative lethal-injection drug. When he, like Zagorski, opted for electrocution over the three-drug execution, the state courts said he had waived objections to the use of the electric chair. The U.S. Supreme Court refused to intervene. Justice Sotomayor dissented, calling it “perverse” to require prisoners to prove an alternative method is available to kill them. “Such madness,” she wrote, “should not continue.”



PROBLEMATIC EXECUTIONS

Vulnerable prisoners and unreliable legal process

The U.S. Supreme Court has said that the death penalty is to be reserved for the worst of the worst murders and the worst of the worst offenders. However, the 25 executions carried out in 2018 again suggest that executions involved classes of prisoners deemed least culpable by the courts and cases with the most unreliable trials and appeals.

Data compiled by DPIC with the assistance of the Promise of Justice Initiative indicates that at least 18 of the 25 people executed in 2018 (72%) had one or more of the following impairments:

- ♦ significant evidence of mental illness (at least 11);
- ♦ evidence of brain injury, developmental brain damage, or an IQ in the intellectually disabled range (at least 9);
- ♦ chronic serious childhood trauma, neglect, and/or abuse (at least 11).

Six were age 21 or younger at the time of the offense. Three prisoners waived at least some of their appeals, “volunteering” for execution. Four prisoners were executed despite serious questions about their guilt.

Two men, [Eric Branch](#) in Florida and Walter Moody in Alabama, were executed after non-unanimous juries recommended death sentences. Branch, who was only 21 at the time of his crime, received a 10-2 jury recommendation for death, an outcome that could not produce a death sentence today. In 2016, in [Hurst v. Florida](#), the U.S. Supreme Court struck down the Florida sentencing scheme under which Branch was tried and condemned. Branch was one of 200 prisoners sentenced under Florida’s unconstitutional statute who still face execution as a result of a [Florida Supreme Court ruling that it will enforce Hurst](#) only in cases finalized after June 2002, when the U.S. Supreme Court decided a related case, [Ring v. Arizona](#). In 2018, the U.S. Supreme Court [declined to review 84 Florida cases](#) in which defendants had been sentenced to death under the unconstitutional statute. Alabama law still allows non-unanimous jury recommendations for death, as long as at least 10 jurors agree, but Moody’s 11-1 jury recommendation would result in a life sentence in [nearly every other death-penalty state](#).



The same night that Branch was executed, Alabama attempted to execute [Doyle Hamm](#), a 60-year-old with terminal cancer. Hamm had surgery scheduled to remove a cancerous lesion at the end of 2017, but Alabama cancelled the surgery and scheduled an execution date instead. Hamm’s lawyers had warned that his radiation and chemotherapy treatments had rendered his veins inaccessible, but the state proceeded with the execution. After more than two-and-a-half hours, the execution was called off, because – as Hamm’s lawyers had warned – execution officials could not access his veins. Andrew Cohen of the Brennan Center for Justice wrote, “The idea that executioners want to make sure they kill Hamm before he dies of cancer, the fact that it is likely the lethal injection itself will cause him ‘needless pain’ before he dies, may be abhorrent but it’s entirely consistent with the way state officials have handled Hamm’s case for years.”

Three other cases drew attention to the macabre practice of executing ill, elderly prisoners. Terminally ill [Alva Campbell](#) died on Ohio's death row on March 3, less than four months after Ohio executioners were unable to find an accessible vein to execute him. In Alabama, 83-year-old [Walter Moody](#) became the only person over age 80 executed in the modern era of the death penalty. In January, the U.S. Supreme Court [stayed](#) the execution of Vernon Madison, a 67-year-old with dementia caused by a series of strokes. As a result of his condition, he has severe physical and cognitive impairments that have left him with no memory of the crime for which he was sentenced to death. On October 2, the Court heard oral argument in [Madison's case](#) to determine whether the Eighth Amendment prevents a state from executing a prisoner who, as a result of dementia, lacks a rational understanding of why he is to be put to death.



Four men were executed this year despite lingering doubts about the evidence of their guilt. [Carlton Gary](#) sought clemency before his March 15 execution in Georgia, presenting evidence that was unavailable or withheld at the time of his trial. DNA testing excluded him as the perpetrator of two rapes that prosecutors said were part of a string of nine related crimes, including three murders. The survivor of one of the cases from which Gary was scientifically excluded had given key testimony against him, misidentifying him as her attacker.



Texas executed [Juan Castillo](#) on May 16, denying him an evidentiary hearing on his innocence claims, even though the state's highest court had previously stayed his execution to address whether he had been convicted on false testimony. Two days after the Texas Court of Criminal Appeals stayed Castillo's execution, a Bexar County judge adopted the prosecutors' proposed order verbatim, changing only the signature line, and denied Castillo a hearing without providing his lawyers any opportunity to respond to the prosecutors' submissions. Castillo's trial attorneys had represented him so poorly at his trial that he opted to represent himself during sentencing. His appellate attorneys uncovered evidence that contradicted testimony presented by the prosecution at trial, and sought DNA testing that could have pointed to another perpetrator.

On consecutive nights in September, Texas executed [prisoners who claimed innocence](#). Troy Clark, convicted based on the changing statements of a former girlfriend who could have faced the death penalty, was executed on September 26. The girlfriend was tried as an accomplice and sentenced to 20 years in prison. Daniel Acker, executed on September 27, had filed appeals challenging his conviction as having been tainted by "false" and "misleading" forensic evidence. Prosecutors said Acker had strangled his girlfriend and dumped her body, while Acker maintained that she had jumped from a moving car during an argument and been killed by a passing vehicle. After a state medical examiner admitted during an evidentiary hearing that the victim had not been strangled, the prosecution changed its theory of the crime and claimed that Acker had pushed his girlfriend from the car. Texas carried out the execution based upon a theory of liability that had never been presented to a jury and that differed materially from the false and repudiated theory that the jury had heard.

Many of the other prisoners executed this year had trials and backgrounds that exemplified systemic problems in the legal system. [Robert Earl Butts](#) was executed in Georgia after the state pardons board granted a brief stay to consider evidence that Butts, who was only 18 at the time of the crime, had been convicted on false testimony and that his co-defendant was actually the triggerman. Joseph Garcia, executed in Texas, raised similar claims that he should not be eligible for a death sentence because, although he participated in a robbery in which a police officer was killed, he was not involved in the shooting and did not intend or expect that anyone would be killed.





Carey Dean Moore (Nebraska) and [Rodney Berget](#) (South Dakota) both waived their rights to jury trials and later waived their final appeals. Moore presented no evidence in his defense, while Berget pled guilty and told the sentencing judge to sentence him to death. Two lawyers who had represented Berget failed to investigate or present evidence of his intellectual disability. Berget had scored below 70 on IQ tests, had been assigned to special education classes in school, and had participated in the Special Olympics. A mitigation investigator who had worked on his appeal unsuccessfully filed a petition challenging his competency to drop his appeals. The petition included a litany of evidence to show that Berget was ineligible for the death penalty because of his intellectual disability.

[Christopher Young's](#) execution in Texas highlighted an overlooked form of racial bias in the criminal justice system: the effect of a prisoner's race on clemency recommendations. Young, a Black man, was one of six Texas death-row prisoners in the last 18 years whose victim's family requested clemency. Of those six cases, only one involved a white perpetrator, and that case was the only one in which the Texas Board of Pardons and Paroles recommended clemency. Young's attorneys filed a civil rights suit alleging racial bias, but U.S. District Court Judge Keith Ellison denied the request for a stay to hear the suit. He expressed concern that the short timeframe had prevented adequate review, writing that the case "dramatizes much of what is most troubling about the procedures by which we execute criminal defendants."

The execution of [Roberto Ramos](#) provided additional evidence of the vulnerability of foreign nationals in American courts. On November 14, 2018, Texas executed Ramos, despite a ruling by the International Court of Justice that the state had breached U.S. human rights treaty obligations by failing to notify Ramos of his right to seek assistance from the Mexican consulate before his trial.

The Arkansas Supreme Court [struck down](#) the state's system for determining mental competency to be executed. In a victory for death-row prisoners Bruce Ward and Jack Greene, both of whom had been scheduled for execution in 2017, the court said that giving the state's prison director sole authority to determine a prisoner's competency to be executed violated due process. The ruling directed Arkansas trial courts to conduct hearings to determine if the two men are competent to be executed. Ward has been diagnosed with paranoid schizophrenia and Greene experiences psychotic delusions.

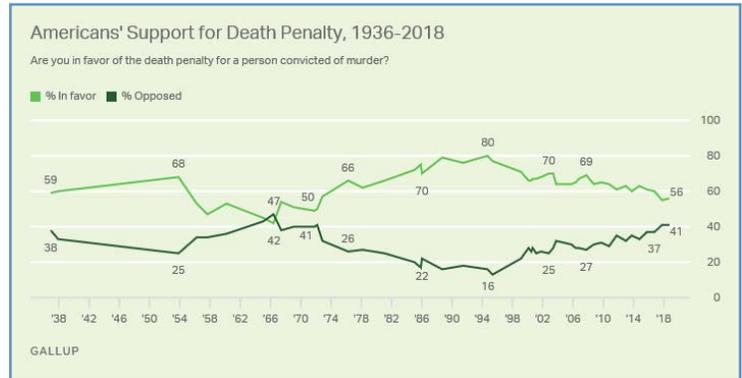
The U.S. Supreme Court granted relief to one prisoner in a case involving abandonment by counsel at trial, while Texas executed another prisoner to whom the Court had denied relief on a claim of ineffective representation in 2017. In May, the Court granted a new trial to [Robert McCoy](#), a Louisiana prisoner whose lawyer admitted his guilt despite McCoy's insistence that he was innocent. Justice Ruth Bader Ginsburg, in the 6-3 opinion of the Court, wrote, "With individual liberty – and, in capital cases, life – at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt." In April, Texas executed [Erick Daniel Davila](#). Last year, the U.S. Supreme Court had upheld a lower court's decision denying review of his claim that his state appellate lawyer was ineffective. Davila had been unable to raise that claim at the appropriate point in the appeals process because a later appellate lawyer was also ineffective. Four justices dissented, arguing that "effective trial counsel and appellate counsel are inextricably connected elements of a fair trial."



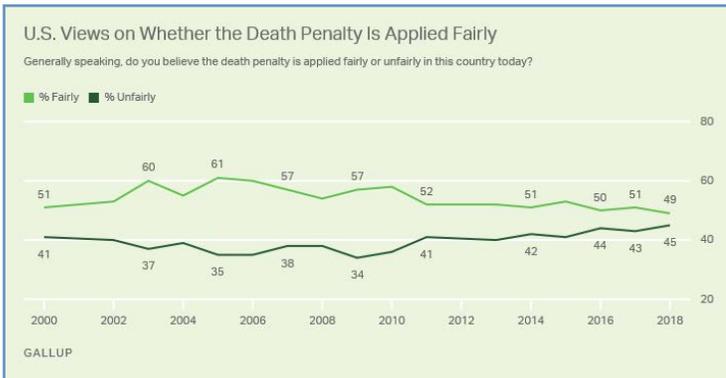
PUBLIC OPINION POLLS AND ELECTION RESULTS

Public opinion polls in 2018 reflected little change in overall support for the death penalty in the United States but showed that Americans increasingly lack confidence in the fairness of its application and have little appetite for its expansion. Election results provided concrete evidence that the death penalty has lost its power as a wedge issue and that overly punitive prosecution practices – including heavy use of the death penalty – have become a political liability in more and more local prosecutorial elections.

The [October 2018 Gallup poll](#) found support for the death penalty virtually unchanged from last year’s historic low. Support rose by one percentage point to 56% but was still at the second lowest level reported by Gallup since March 1972. Fewer than half of Americans (49%) said they believed the death



penalty is “applied fairly,” the lowest percentage in the 19 years Gallup has asked that question. The poll also found that the majority of Americans support the declining use of the death penalty. Even with new death sentences near historic lows, 57% of U.S. adults said the death penalty was imposed either “too often” (29%) or “about the right amount” (28%). A June 2018 Pew Research Center poll recorded support for the death penalty at just under 54%, up from the poll’s record low of 49% in August 2016, but below the previous

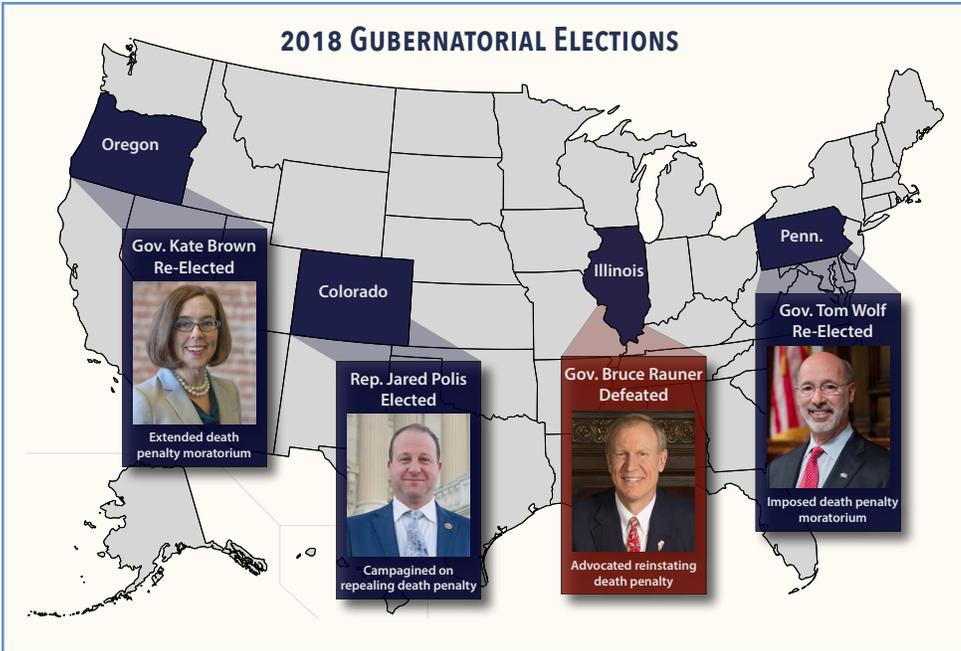


record low of 56% recorded by Pew in March 2015.

A [Quinnipiac University poll](#) found overwhelming opposition to the Trump administration’s exhortation to impose the death penalty upon people who sell drugs that result in overdose deaths. Nearly three-quarters of Americans (71%) said they oppose the idea, compared to just 21% who said they support it. The same poll also found that 51% of Americans preferred life without parole over the death penalty for people convicted of murder, as compared with 37% who favored the death penalty.

The [results](#) of the November 6, 2018 mid-term elections reflected America’s deeply divided views on capital punishment, as voters elected governors who pledged not to resume executions in the three states with death-penalty moratoria and defeated an incumbent who tried to bring back capital punishment in a non-death-penalty state, while reelecting governors who had vetoed legislation abolishing capital punishment in two other states.

The three states that currently have moratoria on capital punishment – Colorado, Oregon, and Pennsylvania – elected candidates who said they would continue those policies or work to abolish capital punishment. Jared Polis, Colorado’s new governor-elect, campaigned on repeal of the death penalty. His victory, combined with Democrats taking control of both legislative houses in the state, spurred speculation that Colorado will seriously consider an abolition bill in 2019. Oregon Governor Kate Brown and Pennsylvania Governor Tom Wolf both won reelection. In Illinois, incumbent Governor Bruce Rauner, who had advocated for the reinstatement of the death penalty, was defeated. In Nevada, term limits prevented Governor and former state Attorney General Brian Sandoval from seeking a third term in office.



Voters replaced Sandoval with Democrat Steve Sisolak, who expressed qualified opposition to the death penalty. Sisolak defeated Republican attorney general and death-penalty supporter Adam Laxalt. On the other hand, voters in Nebraska and New Hampshire reelected Pete Ricketts and Chris Sununu, who had both vetoed death-penalty repeal bills.

The Pennsylvania election came four months after the release of a long-awaited [report](#) from the Pennsylvania

Task Force and Advisory Committee on Capital Punishment. The report of the bipartisan task force found a litany of flaws in the Commonwealth’s application of the death penalty. After examining 17 issues related to capital punishment, the task force recommended a series of systemic reforms, but concluded that certain problems are intractable. “There is no way to put procedural safeguards in place that will guarantee with 100% certainty that the Commonwealth will not execute an innocent person,” the report stated. Wolf’s challenger had promised to resume executions and proposed a mandatory death penalty for school shootings. Wolf argued that the task force report showed the need to continue the execution moratorium.

Prosecutorial elections reflected the growing popularity of criminal justice reform and pointed towards continued future reduction in the use of capital punishment. Since 2015, voters have removed prosecutors in 11 of the 30 most prolific death-sentencing counties in the country, replacing most of them with reform candidates who have pledged reduced reliance on the death penalty. Reform candidates were elected as district attorney in two Texas counties – Bexar, and Dallas – that are all among the 2% of U.S. counties responsible for a majority of all executions in the United States. St. Louis County, Missouri elected its first Black chief prosecutor, Ferguson City Council member [Wesley Bell](#), who called the death penalty “expensive, ineffective at deterrence, and ... racially biased.” In Jefferson County, Alabama, the District Attorney position returned to an anti-death penalty Democrat after Governor Kay Ivey temporarily filled a vacancy in the position with a Republican appointee.

California voters also ousted prosecutors in two of the country’s most prolific death-sentencing counties. Orange County, California, which has the sixth largest county death row in the country, replaced scandal-plagued District Attorney Tony Rackauckas. In San Bernardino County, the eleventh largest county death row, District Attorney Mike Ramos – one of the most outspoken proponents of the voter referendum to shorten state death-penalty appeals – was defeated.

In state attorney general races, Nevada voters selected Democrat Aaron Ford to replace Adam Laxalt as attorney general and Colorado voters elected Democrat Phil Weiser over Republican George Brauchler, who was considered the most aggressive pro-death-penalty district attorney in the state. Both new attorneys general profess personal opposition to the death penalty but say they will uphold their states’ death-penalty laws.



LEGISLATION AND COURT OPINIONS

Washington became the 20th state to abolish the death penalty when its Supreme Court [unanimously ruled](#) on October 11 that capital punishment “is imposed in an arbitrary and racially biased manner,” and therefore violates the state constitution’s ban on “cruel punishment.” The state had been under a moratorium since 2014, and a bipartisan bill to abolish the death penalty passed the Washington Senate and a state House committee during the 2018 session but did not receive a vote in the full House. The ruling in *State v. Gregory* converted the sentence of all eight death-row prisoners to life without parole. It cited recent research that found Washington juries were more than three times more likely to impose a death sentence on a black defendant than on a white defendant in a similar case. “Given the evidence before this court and our judicial notice of implicit and overt racial bias against black defendants in this state, we are confident that the association between race and the death penalty is not attributed to random chance,” the court said.

New Hampshire’s legislature [passed](#) a bill to abolish capital punishment in the only remaining New England state to retain the death penalty. Governor Christopher Sununu [vetoed](#) the bill on June 21, and the state Senate could not garner the two-thirds supermajority necessary to override the veto. The bill would have applied only to future cases, leaving one man on New Hampshire’s death row. The state has not carried out an execution since 1939.

Proposals to reinstate the death penalty in three abolitionist states failed this year. [Illinois Governor Bruce Rauner](#) conditionally vetoed a gun-control bill unless the legislature agreed to reinstate the death penalty for certain crimes. Using his amendatory veto power, Rauner added a provision calling for mandatory death sentences for people convicted of killing police officers or multiple victims. The legislature [dropped](#) the amended bill and instead passed a clean version of the original gun-control measure. [Death-penalty reinstatement bills](#) passed subcommittees in both Iowa legislative houses but did not advance further. Proponents said the bills did not have sufficient support to move forward. A reinstatement proposal in New Mexico was rejected by a House committee.

In February, Alabama became the third state to allow the use of nitrogen hypoxia as a method of execution, joining Mississippi and Oklahoma. The Alabama law authorizes the new method if lethal injection is unavailable or found to be unconstitutional and allows death-sentenced prisoners to designate nitrogen hypoxia as their method of execution within 30 days of the Alabama Supreme Court affirming a death sentence. In July, Alabama prisoners who were challenging the state’s lethal-injection protocol agreed to dismiss the suit, saying that the new law had rendered it moot. Experts characterized the prisoners’ choice as preferring the unknown risks of execution by nitrogen gas to the known risks of execution by lethal injection. As of the publication of this report, Alabama had not enacted a protocol for executions using nitrogen gas.

QUOTES FROM 2018

“If the law permits this execution to go forward in spite of the horrific final minutes that Irick may well experience, then we have stopped being a civilized nation and accepted barbarism.”

— [U.S. Supreme Court Justice Sonia Sotomayor](#), dissenting from the denial of Billy Ray Irick’s application for stay, Supreme Court of the United States, August 9, 2018



“[T]he Church teaches, in the light of the Gospel, that ‘the death penalty is inadmissible because it is an attack on the inviolability and dignity of the person,’ and she works with determination for its abolition worldwide.”

— [New revision of number 2267 of the Catechism of the Catholic Church on the death penalty](#), August 2, 2018

“Not only did Alvogen warn Defendants that they could not legitimately acquire midazolam from Alvogen or an intermediary, it also demanded that Defendants immediately return any such product in exchange for a full refund. Nonetheless, after Defendants received that notification, Defendants purchased a quantity of Plaintiff’s medicine by subterfuge with the undisclosed and improper intent to use it for the upcoming execution in complete disregard of Plaintiff’s rights. Plaintiff’s executives learned of this plan for the first time ... by way of an inquiry from the press.”

— [Alvogen, Inc. v. State of Nevada](#): Complaint for Emergency Injunctive Relief and Return of Illegally-Obtained Property, July 10, 2018





“[T]he death penalty is arbitrary, racially discriminatory, and doesn’t deter crime. I don’t see anything conservative about supporting an inept, biased, corrupt system.”

—New Orleans Times-Picayune conservative columnist [Tim Morris](#), July 23, 2018

“The death penalty is invalid because it is imposed in an arbitrary and racially biased manner. ... [T]he use of the death penalty is unequally applied – sometimes by where the crime took place, or the county of residence, or the available budgetary resources at any given point in time, or the race of the defendant. The death penalty, as administered in our state, fails to serve any legitimate penological goal; thus, it violates article I, section 14 of our state constitution.”

—[State v. Gregory](#), Washington Supreme Court, October 11, 2018

“I’ve got an amazing team of people who have worked hard [to free me,] ... but I guess you have to fight hard. It’s harder to get out than to get in, I can guarantee you that.”

—[Clemente Aguirre](#), following his exoneration from Florida’s death row on November 5, 2018



“Is it supposed to feel like that?”

—[Rodney Berget](#), as he was being executed, October 29, 2018

CONCLUSION

Events in 2018 highlighted the continuing long-term erosion of the death penalty in the United States, despite the resumption of executions in several states. With the Washington Supreme Court's declaration that the death penalty violates its state constitution, a twentieth state joined the growing number of jurisdictions to have abolished capital punishment. Executions remained below 30 and new death sentences below 50 for the fourth straight year, numbers unseen in the country in any other years in the last quarter century. Fewer death sentences have been imposed since 2015 than in any other four-year period in the modern era of capital punishment, and for the first time since death sentencing resumed in 1973, no county anywhere in the United States sentenced more than two people to death.

Public opinion polls showed that support for capital punishment remained near 45-year lows, and for the first time fewer than half of Americans said the death penalty was fairly applied. Gubernatorial elections ensured that death-penalty moratoria would remain in place and local voters removed prosecutors in seven more of the nation's most prolific death-sentencing counties.

At the same time, governors who vetoed death penalty repeal bills were reelected, and officials in Nebraska, Tennessee, and South Dakota went to great lengths to restart executions. Secrecy laws and policies in the states that performed executions made it impossible for prisoners to mount challenges to execution methods, or for the public to exercise meaningful oversight of state execution practices.

As the number of sentences and executions held steady at historically low levels, the cases that resulted in new death sentences or executions continued to exemplify systemic concerns about the death penalty. Those executed in 2018 included prisoners with serious mental illness, borderline intellectual disabilities, and childhood trauma or neglect. In many instances, they had given up their rights or had inadequate representation, unresolved claims of innocence, and/or non-unanimous jury sentencing recommendations. The geographic isolation of the death penalty was especially stark this year, with more than half the year's executions taking place in Texas, while the rest of the country conducted a record low number of executions.

The rationale for capital punishment came under continuing scrutiny as two more innocent people were exonerated and juries returned life-without-parole sentences in high-profile cases. The death penalty in 2018 was characterized by secrecy, bias, and arbitrariness, further undermining public confidence in the reliability of the punishment and the trustworthiness of the states to carry it out fairly.



DEATH PENALTY INFORMATION CENTER • WASHINGTON, DC

202-289-2275 (Main) • 202-289-4022 (Media)

dpic@deathpenaltyinfo.org • www.deathpenaltyinfo.org

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