

Texas Death Penalty Developments in 2020: The Year in Review

Executive Summary

The COVID-19 pandemic significantly curtailed use of the death penalty in Texas this year, resulting in a record-low number of new death sentences and the state's fewest executions since 1996. Jury trials and evidentiary hearings ground to a halt and the execution dates of eight individuals were stayed or withdrawn, due primarily to public health concerns.

There was one inexplicable exception: On July 8, 2020, the State of Texas executed Billy Joe Wardlow as COVID-19-related deaths surged statewide. State and federal courts refused to intervene in his case, despite stopping all other scheduled executions since March. Wardlow was put to death for a crime he committed in 1993 when he was 18 years old.

Before disaster declarations were issued on March 13, 2020, the State of Texas carried out two other executions and juries sentenced two defendants to death. Since then, all other capital trials in Texas have been suspended indefinitely due to the pandemic. The two new death sentences are the fewest recorded in Texas since 1974. Death verdicts peaked in 1999, with 48 death sentences, but have fallen to the single digits for the last six years. The election of reform-oriented prosecutors in recent years, including in Bexar, Dallas, Harris, and Nueces counties, and eroding public support has contributed to this trend, making death sentences both more rare and more difficult to obtain.

While the pandemic stopped most in-court proceedings, post-conviction challenges moved forward in state and federal appellate courts. Opinions issued in capital cases that raised claims of false or outdated science, prosecutorial misconduct, deficient legal representation, and racial bias exposed persistent problems with the death penalty.

The U.S. Supreme Court's decision in *Moore v. Texas* in 2017, which found that Texas courts were using outdated, non-medical criteria to assess intellectual disability claims in capital cases, continued to impact Texas's death row population. The death sentences of six individuals were reformed this year after prosecutors, district court judges, and the Texas Court of Criminal Appeals agreed that evidence of their intellectual disability rendered them exempt from execution. On average, the six men had each spent more than 20 years on death row. Bobby Moore, the petitioner in *Moore v. Texas*, was granted parole and released from prison in August 2020 after 40 years of incarceration.

Another individual who spent 40 years on Texas's death row, Cesar Fierro, was paroled in May 2020 after being resentenced to life in prison at the beginning of the year because jurors had not been given the opportunity to fully consider mitigating evidence in the punishment phase of his trial. Over the past five years, a total of 32 individuals have been removed from Texas's death row because of sentence reductions (26) or deaths in custody (6). During this same period, 39 people were executed, illustrating just how arbitrary capital punishment continues to be in the Lone Star State.

Further evidence to this point: Just three counties account for more than one-third of the new death sentence in the last five years. Disturbingly, 70% of death sentences were imposed on people of color. Seventy percent of the individuals who remain on Texas's death row are Black or Hispanic.

At this critical moment of reckoning with systemic injustice, it is imperative for concerned citizens and elected officials to examine Texas's deeply troubling legacy of capital punishment as chronicled in this report.

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Texas Death Penalty Developments in 2020: The Year in Review

Introduction

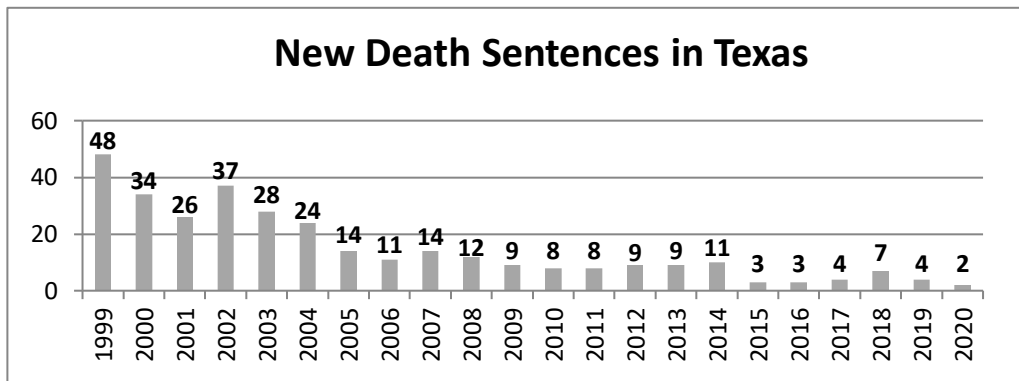
The Texas Coalition to Abolish the Death Penalty, a statewide advocacy organization based in Austin, publishes this annual report to inform the public and elected officials about issues associated with the death penalty over the past year. In 2020, the COVID-19 pandemic impacted the death penalty from the pre-trial level to individuals facing imminent execution. Appellate courts, meanwhile, continued to address post-conviction challenges on numerous grounds. While consistent with declining use of the death penalty over the last two decades, developments in 2020 were shaped as much by global events as the specific issues raised in individual cases.

This report presents information on new death sentences, executions, and stays; reduced sentences; judicial developments; and other issues impacting the administration of justice in Texas. It also includes a special focus on intellectual disability and capital cases in light of developments since the U.S. Supreme Court required Texas to change the way it assesses evidence in such cases.

Death Sentences

New Death Sentences

Juries in Texas condemned two individuals to death at the beginning of 2020, before the COVID-19 pandemic brought trials to a halt. It is the fewest death sentences recorded in Texas since the state revised its capital punishment statute in 1974, in response to the U.S. Supreme Court’s ruling in *Furman v. Georgia*. Death sentences have fallen from a peak of 48 death verdicts in 1999 to single digits for the past six years. For the fifth consecutive year, no one was resentenced to death in Texas.



- Collin County jurors deliberated for more than eight hours on February 27, 2020 before reaching a death verdict in the capital murder trial of Brandon McCall. McCall was convicted of killing Richardson police officer, David Sherrard, who was responding to reports of a shooting at the apartment where McCall was staying in February 2018. McCall had also killed his roommate, Rene Gamez. Defense attorneys argued McCall should be sentenced to life in prison without the possibility of parole, asserting that past drug use and mental health issues may have led him to kill the two men. They also pointed to his nonviolent criminal history. It was Collin County’s first death penalty case since 2009. Jurors there have sentenced 16 people to death since 1974.
- On March 10, 2020, a Harris County jury sentenced Lucky Ward to death for killing a transgender woman, Charlie Rodriguez, and a homeless woman, Reita Long, in 2010. Jurors deliberated for less

than five hours before determining his punishment. Defense attorneys had presented mitigating evidence of his mental health history and a pattern of abuse he suffered as a child. Ward awaited trial for nearly 10 years and was the longest-serving defendant in the Harris County Jail. He was the second person sentenced to death under the administration of District Attorney Kim Ogg, who was elected in 2016.¹ Harris County jurors have sentenced nearly 300 people to death since 1974.

Mistrials

Over the summer, Tarrant County prosecutors attempted to move forward with jury trials in two cases in which they are seeking the death penalty: Reginald Kimbro and John Floyd, both of whom are Black. Floyd is representing himself. Although Floyd’s jury was selected before the pandemic, the judge presiding over his case ultimately declared a mistrial in August due to public health concerns. A mistrial also was declared for Kimbro, who faces additional charges in Dallas County. The trials have not been rescheduled. All other capital trials in Texas have been suspended indefinitely due to the pandemic.

Death Sentences by County

The death penalty remains geographically isolated in Texas. The election of reform-oriented prosecutors in Bexar, Dallas, Harris, and Nueces counties in the last several years has both contributed to the decline of death sentencing and exacerbated this isolation. Just sixteen Texas counties have imposed death sentences in the last five years. Of these, only three counties (Harris, Tarrant, and Walker) account for more than one new death sentence in this time period. One-third of all death sentences imposed by juries in the last five years comes from these three counties. (Harris, the most populous county in the state, has nearly double the population of Tarrant, and 65 times that of Walker County.) Notably, Dallas County, which ranks second overall behind Harris County in historical use of the death penalty, does not appear on this list. Jurors there have imposed just one new death sentence since 2013.

Texas Counties with More Than One Death Sentence in the Last Five Years							
County	2016	2017	2018	2019	2020	Total 2016-2020	Total Since 1974
Harris	0	0	1*	1	1	3	297
Tarrant	1	0	0	1	0	2	75
Walker	0	1	1	0	0	2	10
Total	1	1	2	2	1	7	382
All Counties	3	4	7	4	2	20	1,112

*See footnote 1.

Death Sentences by Race

As death sentences in Texas decline, they continue to be applied disproportionately to people of color. Over the last five years, 70% of death sentences have been imposed on people of color; 38% were imposed on Black defendants.²

In September, the Death Penalty Information Center published an important report documenting the historic role race has played in the death penalty and the pervasiveness of racial discrimination in the current administration of capital punishment. The report notes that “... attention to the racial operation

¹ The capital murder trial and death verdict for Ali Irsan in 2018 in Harris County was handled by special prosecutors.

² The Texas Department of Criminal Justice lists Hector Acosta’s race as white instead of Hispanic.

of the death penalty becomes even more important as the embodiment of whose lives matter more and whose lives are devalued.”³

New Death Sentences in Texas by Race of Defendant						
<i>Race/ethnicity</i>	<i>2016</i>	<i>2017</i>	<i>2018</i>	<i>2019</i>	<i>2020</i>	<i>Total Sentences by Race</i>
Black	3	1	3	1	1	9
Hispanic	0	0	3	1	0	4
Asian/Other	0	0	1	0	0	1
Total People of Color	3	1	7	2	1	14
White	0	3	0	2	1	6
Total Sentences	3	4	7	4	2	20

In Texas’s highest-use counties, these patterns of racial bias are even more pronounced:

- Twenty of the last twenty-one defendants sentenced to death in Harris County, including Lucky Ward, are people of color: sixteen are Black; three are Hispanic; and one identifies with another race/ethnicity. In 2019, Ronald Haskell became the first white defendant in Harris County to receive a death sentence since November 2004, when serial killer Anthony Shore was sent to death row.⁴
- All five men sentenced to death in Tarrant County since 2012 are Black or Hispanic.

While the Black population of Texas comprises 12.9% of residents, Black individuals constitute 44.3% of death row inmates, according to the Texas Department of Criminal Justice (TDCJ). Hispanics comprise 25.7% of individuals on death row (39.7% of the population of Texas), and whites comprise 27.1% (41.2% of the Texas population).⁵

As of December 15, 2020, TDCJ lists 210 people on death row, which includes six women.⁶ This is the smallest Texas death row population since 1987. More than one-third of these individuals were convicted in Harris County.⁷ Texas has the third-largest death row population in the nation, after California (711) and Florida (339). Texas’s death row population peaked in 2000, when more than 450 individuals were awaiting execution.

Jury Rejections and Other Non-Death Outcomes

While half the trials in which prosecutors sought the death penalty in 2019 resulted in non-death verdicts, there were no such jury rejections in 2020 given the cessation of trial proceedings because of the pandemic. There was one high-profile case in which prosecutors decided not to pursue another death sentence.

- In June 2020, McLennan County District Attorney (DA) Barry Johnson announced his office would cease seeking another death sentence for Albert Love, whose conviction was overturned by the Texas Court of Criminal Appeals (CCA) in December 2016. The Court found that Love’s Fourth Amendment rights were violated when his text messages were seized without a warrant and

³ “Enduring Injustice: The Persistence of Racial Discrimination in the U.S. Death Penalty,” <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/in-depth/enduring-injustice-the-persistence-of-racial-discrimination-in-the-u-s-death-penalty>

⁴ Shore was executed in January 2018.

⁵ See https://www.tdcj.texas.gov/death_row/dr_gender_racial_stats.html and <https://www.census.gov/quickfacts/TX>.

⁶ TDCJ’s list still includes four inmates who have received reduced sentences and have been or are waiting to be transferred from death row: Kenneth Wayne Thomas; Gilmar Guevara; Geronimo Gutierrez; and Clifton Williams.

⁷ TDCJ counts 77 inmates from Harris County as of December 15, 2020.

improperly admitted as evidence during his 2013 trial. He still faces a new trial for the murders of Kennan Hubert and Tyler Sneed in 2011 in Waco. One of his co-defendants, Rickey Donnell Cummings, remains on death row.

Love has spent three years waiting to be retried. He rejected offers to plead guilty in exchange for a sentence of life in prison without parole, even as prosecutors “continued to hang the threat of death over his head,” according to the *Waco Tribune*. DA Johnson told the *Tribune*, “It is just one of those decisions where I as district attorney realize that there are several pending death cases and because of the facts of his case, we decided not to spend the million and a half dollars it would take to get a death penalty verdict on him.”⁸

Prosecutors in rural and urban counties across Texas have removed the death penalty as a sentencing option in dozens of capital murder cases in recent years. Many of these cases were resolved shortly before jury selection or the presentation of evidence was set to begin, in part because of the increased difficulty of securing a death verdict. Since 2015, in 40% of the cases in which prosecutors sought a death verdict at trial, juries have opted instead for the sentence of life in prison without parole. This is consistent with eroding public support reflected in public opinion polls highlighted later in this report.

Executions

The State of Texas was one of just five states to carry out an execution this year. Along with Missouri, it was one of only two states to execute anyone during the pandemic. The State put a total of three people to death in 2020, the fewest executions since 1996.⁹ Two of the executions in Texas occurred before disaster declarations were instituted.

The State of Texas has executed 570 people since 1982; 279 of these executions occurred during the administration of former Governor Rick Perry (2001-2014), more than any other governor in U.S. history. Annual executions peaked in Texas in 2000, when 40 people were put to death during the last year of former Governor George W. Bush’s term.

While Texas remains a significant outlier among states that carry out executions, it was the federal government that executed the most people this year.¹⁰

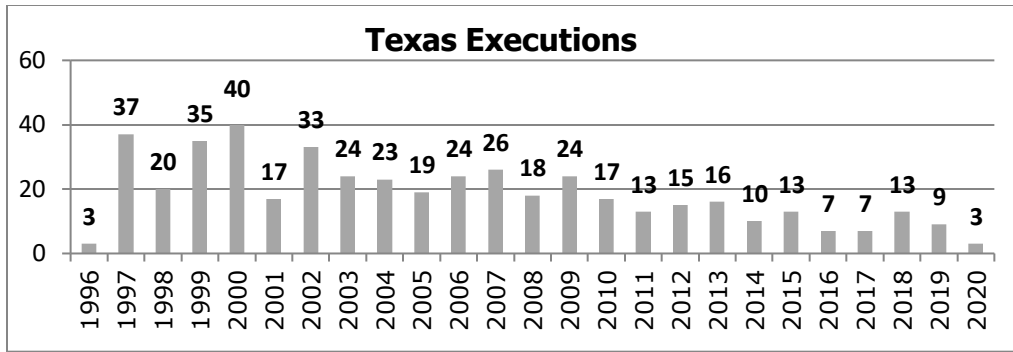
U.S. Executions in 2020	
Federal	10
Texas	3
Alabama	1
Georgia	1
Missouri	1
Tennessee	1
Total	17

See Table 2 on page 18 for a list of individuals put to death in 2020. Six executions are scheduled already for 2021; half of the individuals with execution dates were convicted in Tarrant County.

⁸ “State drops death penalty in retrial of former death row inmate Albert Love,” *Waco Tribune*, June 8, 2020

⁹ In 1996, the CCA granted review in the case *Ex parte James Carl Lee Davis*, which challenged the constitutionality of Article 11.071, a newly enacted habeas corpus statute. The CCA granted stays in all cases while *Davis* was pending. The decision was issued in December 1996 and rehearing was denied in March 1997. Executions resumed in 1997, when the State put 37 people to death.

¹⁰ Two individuals, Christopher Vialva and Brandon Bernard, were executed for a crime that occurred on the property of Fort Hood in Texas. Both were teenagers at the time. Alfred Bourgeois also was executed for a crime that took place on military property in Texas, which led to the federal charges.



Executions Before the Declaration of a Global Pandemic

The State of Texas put two people to death in the first two months of 2020:

- On January 15, 2020, the State of Texas executed John Gardner for the 2005 death of his estranged wife, Tammy. Gardner, who had just turned 64 years old, reportedly had one leg and used a wheelchair. He was convicted and sentenced to death by a Collin County jury in 2006. It was the first execution to occur in the United States this year. Collin County accounts for eight executions since 1982.
- On February 6, 2020, the State of Texas executed Abel Ochoa after the U.S. Supreme Court declined to consider his petition and rejected his motion for a stay. He was convicted of killing his wife and elder daughter on August 4, 2002 in Dallas. He also killed his younger daughter, father-in-law, and sister-in-law. Ochoa became a deeply religious man who dedicated his 16 years on death row to serving as a positive influence on other inmates, on correctional officers, and on other individuals he encountered. According to both current and former guards, he was a valued member of the prison community and had a calming influence on everyone around him. Dallas County accounts for 62 executions, second only to Harris County.

Executions During the Pandemic

While Texas courts halted all of the executions scheduled for the Spring because of public health concerns, they inexplicably reversed course over the summer even as COVID-19 cases and deaths surged. On July 8, 2020, Billy Joe Wardlow was executed by the State of Texas for a crime he committed when he was 18 years old. In 1993, he killed 82-year-old Carl Cole at his home in rural Morris County during a botched attempt to steal Cole's truck. Sentenced to death in 1995 after his trial attorney failed to present significant mitigating evidence, Wardlow spent more than 25 years on death row.

Attorneys for Wardlow filed a petition for certiorari with the U.S. Supreme Court asserting that a jury's prediction of future dangerousness cannot reliably be made for capital defendants under the age of 21. This determination of future dangerousness is a requirement for imposing the death penalty in Texas. The attorneys argued that scientific research now shows brains do not fully mature until people reach their early-to-mid-twenties. This is particularly true for the areas of the brain that regulate impulse control and sound judgment. There is essentially no difference in brain maturity or brain functioning as it relates to character formation between 17-year-olds and people under 21 years of age.

Data about brain development was not available to the jury that sentenced Wardlow to death in 1995. As his execution date approached, two of Wardlow's jurors voiced support for commuting his sentence to life in prison based on this new evidence. Nearly 60 Texas legislators who aim to consider the issue of

whether 18- to 20-year-olds should be sentenced to death or executed also communicated their concerns to the Texas Board of Pardons and Paroles about the case. Despite this outpouring of support from legislators, as well as from juvenile justice advocates, neuroscience experts, and the jurors, the Board voted 6-1 against recommending clemency or a reprieve.

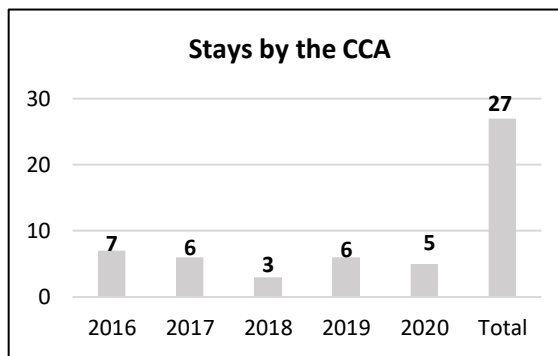
The CCA denied Wardlow a stay of execution without issuing a written order. The U.S. Supreme Court then declined to consider his appeals, and there was no response from Texas Governor Greg Abbott regarding Wardlow’s request for a 30-day stay of execution due to public health concerns. To date, Billy Wardlow is the only person put to death by the State of Texas during the global pandemic.

Stays of Execution and Dates Withdrawn

Of the eleven individuals given execution dates in 2020, six received stays from state or federal courts; the dates for two others were withdrawn by trial courts. The CCA stayed five executions. The U.S. Supreme Court granted an eleventh-hour stay of execution to Ruben Gutierrez. While the number of stays is consistent with recent years, the reason they were granted differed greatly in 2020.

Stays Granted by the CCA

In the Spring, the CCA granted 60-day stays of execution to four individuals “in light of the current health crisis and the enormous resources needed to address that emergency.”¹¹ The District Attorney Offices in Tarrant County and in Smith County had opposed the stay motions filed on behalf of John Hummel and Tracy Beatty, arguing there was no evidence the current health crisis would impact TDCJ’s ability to carry out its execution duties.



- John Hummel was granted a stay on March 16, 2020, two days before his scheduled execution and three days after disaster declarations were instituted in Texas and nationwide. He was the first person nationwide to receive a stay based on the pandemic. Hummel was convicted and sentenced to death in Tarrant County in 2011.
- Tracy Beatty received a stay on March 19, 2020, a week before his execution date. He was convicted and sentenced to death in Smith County in 2003.
- On April 1, 2020, the CCA stayed the execution of Fabian Hernandez; his execution date was April 23. He is one of only two people sentenced to death in El Paso in the last decade.
- On April 27, 2020, the CCA granted a 60-day stay to Edward Busby, who was convicted in Tarrant County in 2005 and scheduled for execution on May 6.

Prosecutors in Tarrant County have already set new dates in 2021 for Hummel and Busby.¹²

¹¹ See <http://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=3b95c9e1-0acd-4e89-90c1-92e9e7f9f653&coa=coscca&DT=OTHER&MediaID=6780f58f-d092-4ecb-84f5-be47ba6e1482>

¹² The new execution date for Edward Busby is February 10, 2021 and the date for John Hummel is June 30, 2021.

The CCA also granted one stay that was not related to COVID-19 but rather addressed a substantive legal issue.

- On May 7, 2020, the judges stayed the execution of Randall Mays and remanded his intellectual disability claim to the trial court for a review on the merits. Mays was set to be put to death on May 13, 2020. It was the third execution date he has faced since 2015.

Mays was convicted of the fatal shootings of Sheriff Deputies Paul Habelt and Tony Ogburn on Mays's property in Henderson County in 2007 in an incident that arose after a neighbor called the police about a disturbance. He previously faced execution in 2015 but received a stay from the CCA after the court agreed with Mays's lawyers that mental-health assessments were needed to determine if Mays was competent to be executed. He had been previously committed to state mental hospitals and diagnosed pre-trial with an organic brain disorder. Under U.S. Supreme Court law, in order to be found "competent to be executed," a person must have a rational understanding of why he is to be executed, not simply know that he is to be executed because he was convicted of a crime. Mays also had an execution date of October 16, 2019, which was halted after a trial court judge granted a motion to withdraw the date so that he had "time to properly review all medical records submitted."

Stay Granted by Federal Courts

As noted above, the CCA refused to stay the execution of Billy Wardlow, providing no explanation for its about-face from the four stays it granted in the Spring because of the pandemic. The state court also declined, without comment, to stay the execution of Ruben Gutierrez, but the U.S. Supreme Court stepped in an hour before his execution on June 16, 2020 was scheduled to proceed. Gutierrez had asked the Court for a stay in order to consider his request to allow a Christian chaplain in the execution chamber, a request that was routine in hundreds of Texas executions until April 2019, when TDCJ changed the rules.¹³ The Justices granted Gutierrez's petition for writ of certiorari and instructed the federal district court to "promptly determine, based on whatever evidence the parties provide, whether serious security problems would result if a prisoner facing execution is permitted to choose the spiritual advisor the prisoner wishes to have in his immediate presence during the execution."¹⁴ The Texas Catholic Conference of Bishops filed an amicus brief supporting Gutierrez's petition.

This was the fourth execution date Gutierrez has faced since 2018. He was convicted and sentenced to death for the 1998 robbery and murder of Escolastica Harrison in Brownsville (Cameron County). Over the two decades he has spent on death row, he has consistently maintained he did not kill Ms. Harrison. Gutierrez has sought DNA testing for years, which the state has opposed.

Dates Withdrawn

Trial courts withdrew the death warrants for John Ramirez (convicted in Nueces County; scheduled for execution on September 9, 2020) and Carlos Treviño (convicted in Bexar County; scheduled for execution on September 30) based on COVID-19 conditions in Texas at the time.

¹³ In April 2019, TDCJ removed all chaplains from the execution chamber in response to a stay of execution granted by the U.S. Supreme Court in the capital case of Patrick Murphy on grounds of religious discrimination.

¹⁴ See <https://tinyurl.com/y9any777>.

Reduced Sentences and Deaths in Custody

In 2020, Texas's death row population decreased by nine people for reasons other than execution.

- Eight individuals received reduced sentences and were removed from death row. Three of these cases originated in Dallas County and were resolved with the agreement of the District Attorney's (DA) Office, led by John Creuzot since January 2019.
- Six of the eight reduced sentences were due to long-standing intellectual disability claims.
- One individual died in custody after more than 19 years on death row.
- One individual not only left death row but was later paroled after 40 years of incarceration (see page 12).

Collectively, these nine men spent 193 years on death row.

Since 2016, a total of 32 individuals have been removed from death row in Texas because of sentence reductions (26) or deaths in custody (6); 40% of these cases came from Harris County. During this same timeframe, 39 people were executed.

Reduced Sentences Due to Evidence of Intellectual Disability

Six cases involving intellectual disability claims were resolved with sentences other than the death penalty in 2020. Reform-oriented district attorneys resolved four of the six cases, which were reconsidered in light of *Moore v. Texas*, a 2017 U.S. Supreme Court decision (see pages 12-13 for details). The CCA reformed five death sentences after remanding the cases to their respective trial courts and then receiving recommendations of relief based on joint agreements by defense counsel and prosecutors.

- On April 15, 2020, the CCA reformed the death sentence of James Henderson to a sentence of life in prison. Henderson spent more than 25 years on death row in Texas; he was convicted of killing 85-year-old Martha Lennox after breaking into her home in Clarksville (Red River County) in 1993. He was 20 at the time of the crime. One of his co-defendants, Willie Pondexter, was executed in 2009.
- In March 2019, shortly after being sworn into office, Dallas County DA John Creuzot announced his office would not seek another death sentence for Juan Lizcano, who was convicted of killing Dallas Officer Brian Jackson in 2005. According to the *Texas Tribune*, "Court filings note that Lizcano had an IQ score below what is generally considered for intellectual disability diagnoses, plus his attorneys have highlighted numerous other deficits as a child and in his adulthood."¹⁵ The trial court agreed that Lizcano was exempt from execution based on this evidence, and on September 16, 2020, the CCA resentenced him to life in prison without parole.
- On April 13, 2020, Harris County DA Kim Ogg announced that prosecutors agreed with defense counsel that Gilmar Guevara is intellectually disabled. Guevara, who is a native of El Salvador, spent 19 years on death row in a law-of-parties case involving the shooting deaths of two store clerks, Tae Youk and Gerardo Yaxon, during a botched robbery in 2000 in Houston. A state district judge recommended his death sentence be vacated based on evidence of his intellectual disability. On September 23, 2020, the CCA agreed and reformed Guevara's sentence to life in prison. The death sentences of eight individuals convicted in Harris County have been reduced during Ogg's first term in office (January 2017 to the present); two of these cases involved intellectual disability claims.

¹⁵ "Texas court tosses death sentence in police killing due to intellectual disability," *Texas Tribune*, September 16, 2020

- On November 25, 2020, the CCA reformed the sentence of Geronimo Gutierrez to life in prison based on evidence of his intellectual disability. The Bexar County DA’s Office, led by Joe Gonzales since January 2019, agreed with defense counsel that Gutierrez should be granted relief.¹⁶ Gutierrez has spent more than 18 years on death row for the robbery and murder of Rick Marin in 1999 in San Antonio. He is the first person convicted in Bexar County to receive relief under *Moore*.
- On December 9, 2020, the CCA reformed the sentence of Clifton Williams to life in prison. He was convicted of killing Cecilia Schneider in Smith County in July 2005, just months before Texas’s new sentencing option of life in prison without parole went into effect. Williams was scheduled to be executed in 2018 but the CCA granted a stay to review his claim of intellectual disability.

The sixth case involving an intellectual disability claim was resolved by the trial court after the Dallas County DA’s Office opted not to pursue a third death sentence for Kenneth Wayne Thomas.

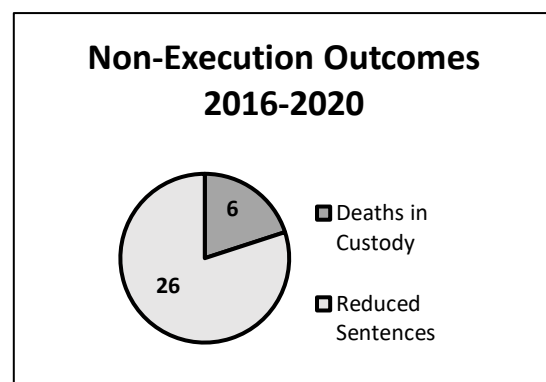
- On June 4, 2020, a state district judge in Dallas reformed the sentence of Kenneth Wayne Thomas to life in prison after the State waived the death penalty. Thomas had been sentenced to death twice – at his 1987 trial and again during a new punishment hearing in 2014 – for the murders of Fred and Mildred Finch in 1986. According to the *Dallas Morning News*, Thomas’s case marked the first time a black defendant in Dallas County faced the death penalty for killing a black person. An all-white jury sentenced him to death in 1987.¹⁷

In 2010, the CCA ordered a new sentencing hearing after determining that jurors in Thomas’s original trial had not properly considered whether his mental impairments could mitigate his actions. Four years later, a Dallas County jury resentenced Thomas to death. On December 5, 2018, the CCA ruled 5 to 4 that he should receive yet another punishment hearing based on his claim of intellectual disability. The court found that the jury in his 2014 resentencing hearing had based its decision on outdated standards. According to TCDJ, he remains in the Dallas County Jail on a bench warrant.

Reduced Sentences on Other Grounds

Two other individuals received reduced sentences and were removed from death row this year. Cesar Fierro was removed in January, a month after the CCA overturned his death sentence (read more about his case in Parole Grants below).

- In July 2020, Hector Medina, a native of El Salvador, was resentenced to life in prison without parole after his defense attorneys and the Dallas County DA’s Office reached an agreement in his case. Medina had been convicted and sentenced to death in 2008 for killing his two young children. In 2017, the CCA ordered a new sentencing hearing after finding his attorney had performed deficiently during the punishment phase of his trial by refusing to present evidence. As reported in the *Dallas Morning News*, the sentencing agreement stipulates that Medina may not appeal, seek a review of the case, or ask for clemency.¹⁸



¹⁶ See <http://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=6ee4e40c-56f9-4ea7-96d5-ad77ce1e4e65&coa=coscca&DT=OPINION&MedialD=970bd623-0b92-460d-ab6c-737d638c7202>.

¹⁷ “Kenneth Wayne Thomas sentenced to death for murder of prominent attorney,” *Dallas Morning News*, February 28, 1987

¹⁸ “Irving child-killer who had death sentence overturned agrees to life without parole,” *Dallas Morning News*, July 13, 2020

Death in Custody

According to TDCJ, Bill Gates died of cardiac arrest on August 26, 2020 after being hospitalized. He had spent more than 19 years on death row for killing 41-year-old Elfreda Gans at her Houston apartment in December 1999. Gates was 70 years old at the time of his death.

Parole Grants

In one of the most noteworthy developments of 2020, two of the State's longest-serving individuals on death row – Cesar Fierro and Bobby Moore – were granted parole and released from prison. Under the statute in effect in 1980, when each man had been convicted and sentenced to death, and the length of their incarceration, both were immediately eligible for parole after their sentences were reduced to life in prison. Each man had spent 40 years on death row.

- On December 18, 2019, the CCA overturned Cesar Fierro's death sentence in light of a 1989 U.S. Supreme Court ruling, *Penry v. Lynaugh*, which established jurors must be given the opportunity to fully consider all mitigating evidence during the punishment phase of capital trials. He was convicted and sentenced to death in 1980 by an El Paso jury for a crime he maintains he did not commit. After the El Paso County DA opted not to pursue another death sentence, Fierro was resentenced to life in prison in January 2020 at the age of 63. In March 2020, the Texas Board of Pardons and Paroles granted parole and in May, Fierro was deported to his native Mexico.
- Bobby Moore was removed from death row in December 2019 after years of legal wrangling and two victories in the U.S. Supreme Court related to his intellectual disability, which made him ineligible for execution. In March 2020, a bipartisan group of 23 lawmakers sent a letter to the Texas Board of Pardons and Paroles asking for Moore's release. On June 8, 2020 – four decades after a Harris County jury sentenced him to death for killing clerk James McCarble during a bungled robbery – he was granted parole. Now 60 years old, Moore was released from prison in August.

Spotlight on Intellectual Disability and Capital Cases in Texas

In 2002, in *Atkins v. Virginia*, the U.S. Supreme Court prohibited the application of the death penalty for persons with intellectual disability. The Court left it to each state to set forth criteria for determining whether an individual is intellectually disabled. As a result, in 2004, the Texas Court of Criminal Appeals (CCA) determined its own, nonscientific standard, known as the "Briseño factors" because of the case in which the standard was announced. In developing the Briseño factors, the court used a 1992 definition of intellectual disability as a point of departure— a standard the medical community regarded as out of date because it does not focus enough on clinical evaluations of each individual.

On March 28, 2017, the U.S. Supreme Court ruled 5-3 in *Moore v. Texas* that the State of Texas must use current medical standards for determining whether a person is intellectually disabled and therefore exempt from execution. The case – *Moore v. Texas* – involved Bobby James Moore, who was convicted in Houston in 1980. In 2014, Harris County District Court Judge Susan Brown found that Moore is intellectually disabled based on current medical standards. The CCA overruled her decision, however, claiming that she had erred by using current standards instead of the Briseño factors.

The U.S. Supreme Court heard oral argument in *Moore v. Texas* in the fall of 2016 on the question of whether it is unconstitutional for Texas "to prohibit the use of current medical standards on intellectual disability, and require the use of outdated medical standards, in determining whether an individual may

be executed.” In its March 2017 ruling, the Court found that the CCA “decision does not comport with the Eighth Amendment and this Court’s precedents” and sent the case back to Texas.¹⁹

In 2018, a five-judge majority on the CCA once again relied on lay stereotypes and non-scientific criteria in rejecting Moore’s claim. The case went back to the U.S. Supreme Court a second time in early 2019, and again, the Justices reversed the CCA and ruled that Moore is intellectually disabled and should be exempt from the death penalty. On November 6, 2019, after years of legal wrangling and two victories in the U.S. Supreme Court, the CCA commuted Moore’s death sentence to life in prison due to his intellectual disability. As noted on page 12, he was granted parole and released from prison in August 2020 after 40 years of incarceration.

Moore v. Texas fundamentally changed the way the State assesses intellectual disability claims in capital cases. The following developments have occurred in the wake of the U.S. Supreme Court’s decisions in 2017 and 2019:

- The death sentences of nine individuals have been reformed based on reconsideration of evidence of their intellectual disability. On average, these nine men spent 24 years on death row. In nearly all of these cases, the District Attorney’s (DA) office agreed with experts’ assessment of intellectual disability or otherwise decided to resolve the case with a sentence other than the death penalty. This includes three cases from Harris County and two from Dallas County, historically the state’s top two jurisdictions for use of the death penalty.
- In February 2020, the CCA overturned the death sentence of Charles Brownlow on direct appeal. Brownlow was convicted of capital murder in Kaufman County in 2016. During his trial, the judge instructed expert witnesses to tailor their testimony to the now-discredited Briseño factors for determining intellectual disability and to disregard current medical and scientific standards.
- Several other pending cases with intellectual disability claims have been remanded to their respective trial courts for a review on the merits, including two this year.
 - > On June 24, 2020, the CCA sent the case of Joel Escobedo back to Harris County. Escobedo first raised an intellectual disability claim in 2003 after the U.S. Supreme Court’s ruling in *Atkins v. Virginia*. He was sentenced to death in Harris County in 1999.
 - > On July 1, 2020, the CCA remanded the case of Larry Estrada to Harris County. Estrada was 18 at the time of the crime. He was convicted in 1998.
- Six executions have been stayed by state or federal courts (see page 9 for a stay granted this year).
- Current DAs have taken the death penalty off the table in at least two cases in light of evidence of the defendant’s intellectual disability.

In 2019, Texas legislators considered House Bill 1139, which would have established a process for determining whether a defendant in a capital case is a person with an intellectual disability and prohibited the death penalty for persons found to be intellectually disabled. The bipartisan bill was sponsored by State Representative Senfronia Thompson and passed the House on April 30, 2019 by a vote of 102 Yeas to 37 Nays. A significantly altered version of the bill passed the Senate on May

¹⁹ See https://www.supremecourt.gov/opinions/16pdf/15-797_n7io.pdf.

22. Both chambers appointed members to a conference committee to resolve their differences with the bill, but they were unable to reach agreement before the session ended. State Senator Borris Miles has filed Senate Bill 80 for consideration in the 87th Texas Legislature, which will convene on January 12, 2021.

Significant Post-Conviction Rulings

While jury trials and evidentiary hearings ground to a halt this year because of the pandemic, post-conviction challenges moved forward in a number of capital cases on claims related to false or outdated science, ineffective assistance of counsel, prosecutorial misconduct, and racial bias (in addition to the intellectual disability claims cited on page 13).

Cases Involving Claims Related to False or Outdated Scientific Evidence

The CCA denied relief in three death penalty cases in which the defendants challenged their convictions under Article 11.073 of the Texas Code of Criminal Procedure. That statute, adopted by the Texas Legislature in 2013 with overwhelming bipartisan support, allows individuals convicted by unreliable scientific evidence to seek post-conviction relief on the basis of new scientific evidence or evolved scientific understanding. It was the first law of its kind to be adopted in the country.

- On March 11, 2020, in an unsigned, brief order, the CCA summarily rejected 41st District Court Judge Annabell Perez’s recommendation that Rigoberto “Robert” Avila, Jr. be granted a new trial. Avila was convicted and sentenced to death in 2001 for killing a 19-month-old child in his care in El Paso after a trial marred by reliance on outdated science and misleading testimony. He has spent the last two decades on death row and has faced multiple execution dates since 2012. The CCA’s ruling came more than 17 months after Judge Perez of El Paso issued extensive Findings of Fact and Conclusions of Law, recommending that Avila be granted a new trial. In 2017, Judge Perez conducted a thorough inquiry into the case under Article 11.073, during which Avila produced un rebutted testimony from multiple experts showing that new developments in biomechanics disprove the testimony given by the State’s trial experts about what caused the baby’s death.

Judge Perez issued detailed written findings concluding that Avila had been denied a fair trial. Specifically, she concluded that if the newly available scientific evidence had been available at trial, the jury probably would have found Avila not guilty. Avila was the first death-sentenced defendant to receive a favorable recommendation from a district court under Article 11.073. Despite the fact the El Paso District Attorney’s Office did not file any objections to Judge Perez’s recommendation, the CCA rejected it without addressing the new evidence. Avila has filed a petition for a writ of certiorari in the U.S. Supreme Court, which is pending.

- On May 6, 2020, the CCA denied relief to Charles Flores, agreeing with the trial judge’s findings that Flores had failed to prove by a preponderance of the evidence that he was entitled to relief under Article 11.073. Four years ago, the court stayed his execution and sent his case back to the trial court to permit him to develop evidence showing how the use of “forensic hypnosis” to obtain his conviction for the 1998 murder of Elizabeth Black in Dallas County was junk science. No direct evidence linked Flores to the crime scene. His 1999 conviction hinged largely on an eyewitness who identified him only after the police had conducted a hypnosis session on her and only after she saw him sitting in the courtroom during his trial a year later.

In October 2020, Flores filed a petition for a writ of certiorari with the U.S. Supreme Court, asking the Justices to declare the use of hypnotically induced testimony to obtain convictions unconstitutional. Based on the scientific study of how memory works, a majority of U.S.

jurisdictions – not including Texas – has adopted a *per se* ban on the admissibility of this testimony, recognizing that the process is inherently unreliable. The petition is pending.

- On October 7, 2020, the CCA denied relief to Kosoul Chanthakoummane after agreeing with the trial court that now-discredited forensic science, including bite mark evidence and the use of hypnosis on two eyewitnesses, would not have changed the outcome of his trial. Three judges dissented, finding Chanthakoummane’s “argument that hypnotically refreshed identification information led to unreliable identification testimony deserves further consideration.”²⁰ Chanthakoummane was scheduled to be executed in 2017 for killing real estate agent Sarah Ann Walker in 2006 in a model home in McKinney (Collin County), but the CCA granted a stay to review his claims related to the use of false science.

Cases Involving Claims of Ineffective Assistance of Counsel

At the end of its last term, the Supreme Court of the United States (SCOTUS) issued an important ruling regarding an ineffective assistance of counsel claim in a Texas death penalty case. The per curiam opinion issued on June 8, 2020 was in response to a petition for writ of certiorari filed on behalf of Terence Tremaine Andrus, who was convicted and sentenced to death in Fort Bend County in 2012. The order finds that his trial counsel performed deficiently in failing to present or even investigate readily available mitigating evidence.

Andrus filed his petition with SCOTUS in June 2019 after the CCA had rejected a trial judge’s ruling that he had received ineffective assistance of counsel and therefore should receive a new punishment-phase trial. The CCA’s opinion did not explain its decision to reject the trial judge’s recommendation that relief be granted. Nor did the CCA opinion discuss any of the evidence developed during Andrus’s post-conviction habeas proceeding, including a multi-week evidentiary hearing over which the Honorable James Shoemaker presided. The CCA’s opinion simply stated that Andrus had not satisfied the standard for proving an ineffective-assistance-of-counsel claim under *Strickland v. Washington*.

The Supreme Court Justices identified numerous examples of how Andrus’s trial attorney had failed his client by neglecting to investigate or present to the jury evidence of Andrus’s troubled upbringing, including his mother’s drug addiction and prostitution, his role as caretaker for his siblings when his mother abandoned her children, or his own drug use, multiple suicide attempts, and a diagnosis of affective psychosis. They sent the case back to the CCA to reconsider its conclusion in light of the “vast” mitigating evidence developed during the habeas proceeding that the CCA had not discussed; the case is still pending before the CCA. Several youth organizations and juvenile justice experts joined a group of Texas law professors in filing amicus briefs in support of Andrus.

Cases involving claims of prosecutorial misconduct

State and federal courts issued important rulings in cases that presented claims of prosecutorial misconduct. A comprehensive report released by the National Registry of Exonerations in September 2020 finds that official misconduct by police and prosecutors contributed to the wrongful convictions of more than half of the innocent people who were later exonerated.²¹

- On January 29, 2020, the CCA remanded the case of Mabry Landor, III to Harris County, where he was convicted and sentenced to death in April 2010 for killing Houston Police Officer Timothy

²⁰ See <http://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=128c7524-31aa-4f43-8466-d7e1b6656ef2&coa=coscca&DT=OTHER&MediaID=dad8e381-14f0-4db3-a455-47fb4a34b61c>.

²¹ “Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement,”; https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf

Abernethy. The court ordered consideration of his claim that the State withheld material exculpatory evidence in violation of *Brady v. Maryland*.

- On May 20, 2020, U.S. District Judge Keith Ellison granted federal habeas relief to Ronald Jeffery Prible, Jr. Judge Ellison found that former Harris County prosecutor Kelly Siegler “intentionally and knowingly withheld information [from] the defense, was deceptive about her efforts to do so, and was far from credible in her federal court testimony.”²² Prible was sentenced to death in 2002 after he was convicted of causing the deaths of five members of a family in Houston, a crime for which he has maintained his innocence. His conviction was based largely on informant testimony. The State has appealed to the Fifth Circuit.

Judge Ellison’s ruling represents an exceptionally rare grant of relief at the federal level, as documented by “Reversal Rates in Capital Cases in Texas, 2000–2020,” a study conducted by David R. Dow and Jeff Newberry.²³ Published in the *UCLA Law Review* in April 2020, their research examined the success rate of death row inmates in their appeals and found that of the 151 completed federal habeas proceedings, only one person ultimately had prevailed in securing relief.

Cases Involving Racial Bias Claims

State and federal courts issued significant rulings regarding Batson claims in two capital cases from Dallas County, which is notorious for prosecutors’ unconstitutional use of racially discriminatory jury strikes.

- On its own initiative, on July 1, 2020, the CCA remanded the case of Mark Robertson and directed the trial court to obtain a full record of Robertson’s 1991 trial to determine whether prosecutors and his lawyer colluded to exclude Black jurors. Robertson received a stay of execution from the CCA based on this Batson claim in 2019. He had been scheduled to be put to death on April 11, 2019 for the 1989 murder of Edna Brau.
- In the case of James Broadnax, the U.S. Court of Appeals for the Fifth Circuit agreed to review whether the prosecution’s jury selection notes should be allowed as evidence. During Broadnax’s 2009 trial for capital murder in the fatal shooting of Stephen Swan, prosecutors struck all people of color from the jury pool. In its narrow July 24, 2020 ruling, the Fifth Circuit granted a certificate of appealability.

Public Opinion

In May 2020, the Kinder Institute for Urban Research at Rice University released the results of its Houston Area Survey for 2020. Now in its 39th year, the survey measures Houstonians’ views on a wide range of issues, including the death penalty. According to the 2020 survey, when asked to choose among three alternative forms of punishment for persons convicted of first-degree murder, only 20% of Houstonians support the death penalty for such crimes. This compares with 27% in 2016, 37% in 2010, and 41% who supported the death penalty in 2000, when the survey first asked respondents to choose among several options for the punishment for murder.²⁴ National polls have reflected a similar erosion of support for capital punishment, including The Gallup Poll, which found that support for the death penalty remained at historic lows in 2020.²⁵

²² See <https://drive.google.com/file/d/1qrXRIPISnMtY14pskCOrg6M1bluZMbf/view>.

²³ See <https://www.uclalawreview.org/reversal-rates-in-capital-cases-in-texas/>.

²⁴ See <https://kinder.rice.edu/houstonurvey2020>.

²⁵ See <https://news.gallup.com/poll/1606/death-penalty.aspx>.

New Voices

On November 3, 2020, voters in Travis County elected Jose Garza to serve as District Attorney (DA). While campaigning, Garza pledged he would not seek a death sentence and would review all post-conviction death penalty cases to ensure that there are no forensic, evidentiary, or legal issues that should cause the conviction to be called into question. He observed that “the Death Penalty is morally and ethically wrong, does not serve as a deterrent, has proven to be applied arbitrarily at best, and comes at tremendous financial costs.”²⁶ While the four current DAs in Bexar, Dallas, Harris, and Nueces counties have committed to limiting use of the death penalty, Garza is the first elected DA in the state to pledge not to seek death sentences altogether. He will be sworn into office in January 2021.

National Developments

On March 23, 2020, Colorado Governor Jared Polis signed death penalty repeal legislation into law and commuted the sentences of the state’s three individuals on death row. Governor Polis noted in his statement that “...the death penalty cannot be, and never has been, administered equitably in the State of Colorado.”²⁷ With this action, Colorado officially became the 22nd state to abandon the death penalty through judicial or legislative action. In addition, the Governors of California, Oregon, and Pennsylvania have imposed a moratorium on executions.

The Death Penalty Information Center added five more names to its list of people who have been exonerated of all charges related to the wrongful convictions that had put them on death row. This includes Curtis Flowers, who was tried six times for the same crime in Mississippi and whose conviction was overturned by the U.S. Supreme Court in 2019. According to DPIC, 172 people who spent time on death row have been exonerated nationwide since 1973. This includes 13 people convicted in Texas.

Conclusion

As COVID-19 continues to ravage our communities and correctional systems, TCADP urges concerned citizens and elected officials to reconsider what is truly essential for public health and safety. We must confront the realities of capital punishment, including its racially biased application, and reconsider the efficacy and cost of the death penalty as a means of achieving justice, as well as the ancillary trauma the punishment causes surviving victims, prison personnel, and the families of both murder victims and perpetrators.

²⁶ See <https://www.joseforda.com/death-penalty>.

²⁷ See <https://www.colorado.gov/governor/news/gov-polis-signs-death-penalty-repeal-bill-commutes-death-row-sentences-life-prison-without>.

Table 1: New Death Sentences in Texas in 2020

TDCJ Number	Last Name	First Name	Date of Birth	Gender	Race	Date Received	County	Date of Offense
999621	Ward	Lucky	11/01/1964	M	Black	03/13/2020	Harris	09/13/2010
999620	McCall	Brandon	05/10/1991	M	White	03/04/2020	Collin	02/07/2018

Table 2: Texas Executions in 2020

Execution	Last Name	First Name	TDCJ Number	Age	Date	Race	County
570	Wardlow	Billy	999137	45	7/8/2020	White	Titus
569	Ochoa	Abel	999450	47	2/6/2020	Hispanic	Dallas
568	Gardner	John	999516	64	1/15/2020	White	Collin

Source: Texas Department of Criminal Justice