

# Arbitrary and Capricious

Examining Racial Disparities in Harris County's  
Pursuit of Death Sentences







# INTRODUCTION

Texas has executed more people than any other state. However, out of the 254 counties in Texas, 136 have never sent an individual to death row.<sup>1</sup> Harris County—Texas’s largest county and home to the city of Houston—stands out as the “death penalty capital of the world.”<sup>2</sup> Harris County has executed more people than any state in the United States except Texas<sup>3</sup> and is responsible for a quarter of the 1,124 people who have been sent to Texas’s death row since 1973.<sup>4</sup>

Despite this, polls have suggested that support for the death penalty among Houstonians is now at a record low—just 20%.<sup>5</sup> Notwithstanding the steep decline in local support for the death penalty,<sup>6</sup> Harris County, through its district attorney’s office, continues to seek and obtain new death sentences.

Given the historical context of being a county within a former slave-owning state, race has long played a part in the administration of criminal law in Harris County. Race continues to play such a role even in modern times. A significant illustration of this unfolded in 2017 when the U.S. Supreme Court handed down its opinion in *Buck v. Davis*. The Supreme Court ruled that Duane Buck’s 1997 trial in Harris County was tainted and required reversal. This decision was influenced by expert testimony presented to the jury highlighting Mr. Buck’s race as directly relevant to whether he deserved a death sentence. A psychologist had testified that the fact that Mr. Buck was Black made him more likely to commit criminal acts of violence in the future.<sup>7</sup> Texas had urged the Supreme Court to dismiss the racialized testimony as having played only a “limited role” in the trial. The Supreme Court rejected that invitation, concluding that “[s]ome toxins can be deadly in small doses.”<sup>8</sup>

Since the U.S. Supreme Court upheld Texas’s revised capital punishment statute in Texas in 1976, 72% of people who have received death sentences from Harris County are people of color.<sup>9</sup> During this period, Harris County imposed the death penalty on 158 Black individuals, comprising 53% of all death sentences within the county.



*Out of the last 21 individuals for whom Harris County secured a capital murder conviction and death sentence, 20 have been people of color.*

Astonishingly, of the last 21 individuals sentenced to death in Harris County, 20 of them, or 95%, have been people of color.<sup>10</sup> The overwhelming majority of these sentences came down during a 14-year span from November 2004 to August 2018, when Harris County sought a death sentence in 21 capital murder cases, resulting in 18 death sentences obtained exclusively against people of color.

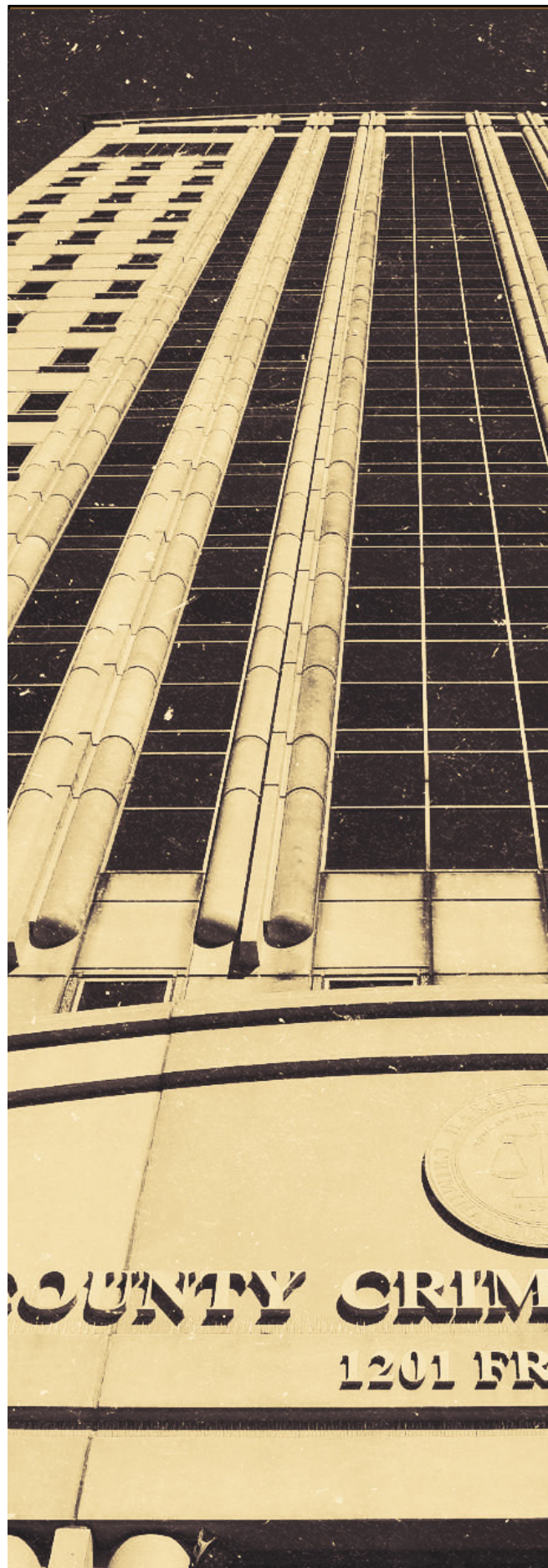
Since November 2004, 15 sentences have been against Black men. Three of those death sentences have since been permanently overturned, representing at least a **20%** error rate in Harris County’s pursuit of death sentences against Black men since November 2004.

Appellate briefs or post-conviction applications have been filed in 19 of the 21 death penalty cases. **In filings from 17 of those cases, there are allegations that race influenced the trial or resulting death sentence in some way.** The history of the

death penalty in Texas tells us that these defendants' claims of racial bias are not baseless arguments, but signs of real and widespread discrimination. These numbers call out for scrutiny of how Harris County administers capital punishment.

The racially problematic use of the death penalty in Harris County continues to this day. **During her term in office, Harris County District Attorney Kim Ogg has presided over the return of three new death sentences, two of which—or 67%—were against people of color.** A fourth case from her tenure, which resulted in a death sentence for Ali Irsan in 2018, was handled by special prosecutors. Ogg's office recused itself from Mr. Irsan's prosecution. Additionally, District Attorney Ogg's office has put to death two Black men. The men were prosecuted in the 1980s and 1990s when the Harris County District Attorney's Office ("HCD-AO") was renowned for its racist practices. Both men had symptoms of intellectual disability, and one of the men, Arthur Brown Jr., had a compelling claim of actual innocence. District Attorney Ogg's office failed to disclose exculpatory evidence in Mr. Brown's case until the 11<sup>th</sup> hour, just weeks before his execution date, and then refused to stay Mr. Brown's execution date to permit him to test DNA that could prove his innocence.<sup>11</sup>

Racism should play no part in how we administer justice in Harris County. Nowhere is this truer than when it comes to the death penalty. But as shown by our review of Harris County's history and modern practices, racism continues to impact the criminal legal system in general—and the administration of the death penalty in particular—in Harris County. This is unacceptable. As the U.S. Supreme Court recognized in *Buck*, discrimination on the basis of race in our courts "injures not just the defendant, but the law as an institution, ... the community at large, and the democratic ideal reflected in the processes of our courts."<sup>12</sup> Harris County is now the most ethnically diverse county in Texas.<sup>13</sup> However, as a review of Harris County's history reflects, the county has long been part of the problem. Going forward, it should be part of the solution. Harris County needs a justice system that protects the rights of all people, including residents of color. ■





# DISCUSSION

## A History of Racism and Exclusion

The Harris County District Attorney's Office ("HCDAO") does not exist in a vacuum. It is situated both in time, as an inheritor of past prosecutorial and judicial traditions, as well as in place, in a city of a former slave state that, after the Civil War, practiced de jure segregation. Consistent with this history, Houston's communities of color have long been subjected to race-based exclusion, marginalization, and unfairness in all aspects of civic life.

Between 1882 and 1928, Harris County was the site of four racial terror lynchings.<sup>14</sup> In 1917, a military court sentenced 13 Black soldiers to death after an unfair military trial found them guilty of participation in a deadly race riot at Camp Logan.<sup>15</sup> They were hanged just two weeks later without any chance to appeal. In 1977, Houston police officers brutally beat 23-year-old Mexican American Vietnam War veteran José Campos Torres. Instead of providing medical assistance, the officers threw him into the bayou, leading to his drowning. The officers faced state murder charges but were only given probation and a one-dollar fine.<sup>16</sup>

Significant Houston institutions have racist roots, reflecting the city's historic outlook on equal participation in public life. Rice University, established in 1891, was chartered to cater to "the instruction of the white inhabitants,"<sup>17</sup> and the University of Houston was initially "open only to whites."<sup>18</sup> These institutions were desegregated in the 1960s,<sup>19</sup> but racial progress remained "hard-won" and "incomplete."<sup>20</sup>

Houston's public school system was also profoundly impacted by segregation. Even after the U.S. Supreme Court declared racial segregation to be unconstitutional, many public schools in Harris County remained segregated.<sup>21</sup> Efforts to integrate in the 1970s and 1980s often involved categorizing

Hispanic students as white and then pairing them with Black students in a single educational institution, labeling the outcome as an integrated school.<sup>22</sup> As the Civil Rights Project at UCLA wrote, this resulted in "putting two disadvantaged groups into the same schools, thereby helping to shelter whites."<sup>23</sup> Today, Houston schools remain some of the most highly segregated in the country.<sup>24</sup> The city also continues to have a high level of residential segregation.<sup>25</sup>

Unsurprisingly, racism has historically been deeply ingrained in Harris County's political system. Harris County residents have a long history of electing political candidates affiliated with racial terror groups. During the 1920s, the Ku Klux Klan successfully sponsored political candidates throughout Texas, including Harris County. In the 1922 Democratic primaries, Klan candidates carried all state-wide races in Texas; their largest margins of victory were in Houston and other East Texas cities.<sup>26</sup> Historically, people of color were excluded from elected office in Harris County, especially its judiciary.<sup>27</sup> Even as late as 1993, "the countywide election system consistently had resulted in an all-white bench, although 20% of the county's electorate was African American and 22% Mexican American."<sup>28</sup>

Harris County also has a history of pervasive racial discrimination in the judicial system. From its founding in 1870 until 1965, the Houston Bar Association required applicants to be "white."<sup>29</sup> Historically, Harris County court officials systematically excluded Black Americans from jury service. In 1900, a Harris County jury commissioner testified that African Americans were excluded from service on grand and petit juries because "negroes or persons of African descent had never been put on juries . . . in Harris County, within his recollection."<sup>30</sup> In 1940, the U.S. Supreme Court held the "conclusion was inescapable" that Harris County had applied Texas laws governing the selection of grand jurors "in such a manner as practically to proscribe any group thought by the law's administrators to be undesirable."<sup>31</sup> Despite Black people comprising roughly 20% of the county's population, only 5 out of 384 (1.3%) grand jurors between 1931 and 1938 were Black.<sup>32</sup> Texas's system for selecting grand

jurors allowed for broad discretion, with an appointed “commissioner” responsible for choosing individuals to serve.<sup>33</sup> While some commissioners had denied under oath that they had intentionally, arbitrarily, or systematically discriminated against Black jurors, the U.S. Supreme Court responded that discrimination was forbidden “whether accomplished ingeniously or ingenuously.”<sup>34</sup> Harris County maintained this much-criticized system for selecting grand juries until Texas finally outlawed the discriminatory practice state-wide in 2015.<sup>35</sup>

Harris County court officials have continued to display racial exclusion, bias, and insensitivity to this day. In 2003, “Jim Crow art” was displayed in a Harris County District Court jury room.<sup>36</sup> The paintings depicted Black persons “with caricatured physical features in happy, carefree poses.”<sup>37</sup> The curator of the Jim Crow Museum of Racist Memorabilia at Ferris State University characterized the paintings as more suitable for display in that museum than in a government building.<sup>38</sup>

In 2018, Judge Michael McSpadden—an elected judge with a 36-year tenure in a Harris County criminal court—told a *Houston Chronicle* reporter that young Black men were not getting good advice from their parents but were instead listening to “[r]ag-tag organizations like Black Lives Matter,” which, according to him, encouraged Black men to resist police and “[taught] contempt for . . . the whole judicial system.”<sup>39</sup> Later, in a letter published by the *Chronicle*, he reasserted his views, but wrote that he thought “rag-tag” was “too nice of a term” to describe the Black Lives Matter movement and expressed an opinion that the word “racist” had “lost all meaning since it is used to describe anyone with whom you don’t agree.”<sup>40</sup>

The State Commission on Judicial Conduct later found that Judge McSpadden had violated the Texas Code of Judicial Conduct, which prohibits judges from acting in a manner that casts reasonable doubt on the judge’s ability to act impartially.<sup>41</sup> The Commission also determined that Judge McSpadden violated the Texas Constitution’s prohibition against “willful and persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice.”<sup>42</sup> As a result, the

Commission gave him a warning—but the warning did not prevent him from sitting as a visiting judge in the future.<sup>43</sup>

Certainly, discriminatory policies and practices in Harris County go beyond the incidents discussed so far. These anecdotes offer just a glimpse into the environment in which the HCDAO has historically operated.

It should come as no surprise that the HCDAO has evidenced the racism and exclusion that has historically been a part of all aspects of civic life in Harris County. In the courts, the HCDAO has a well-documented historical practice of using peremptory strikes—strikes that a party’s counsel may make against a potential juror for virtually any reason—to systematically exclude Black individuals and other people of color from juries. In 1979, a Harris County district judge with 28 years of experience in the county’s criminal legal system testified that he could not recall a single instance where a Black juror participated in a criminal case with a white victim.<sup>44</sup> Lawyers who had worked in the HCDAO confirmed that, in these types of cases, excluding Black jurors was “the general rule.”<sup>45</sup>

The HCDAO also excluded non-white individuals from juries in capital cases in which it was seeking death. In 1987, witnesses testified that HCDAO prosecutors routinely used their peremptory strikes to keep jurors of color from serving in capital murder cases. One former HCDAO prosecutor testified that, generally, the office was “wary of minorities . . . because of the historical relationship they have had and because of the percentage of times that we run up against minority members of this community.”<sup>46</sup> Another HCDAO prosecutor testified that “everybody” in the office engaged in conversations about “the undesirability of minorities on juries.”<sup>47</sup>

More recently, in 2008, a former district court judge in Harris County remarked that HCDAO prosecutors had a “habit” of “using race as their index” for jury selection.<sup>48</sup> The judge said she “saw prosecutors eliminate potential jurors from a trial solely because of their race.”<sup>49</sup> Indeed, prosecutors working for the HCDAO have repeatedly been found by appellate courts to have discriminated in jury selection based upon race.<sup>50</sup>

The HCDAO also has a history of being led by racially insensitive district attorneys. From 1979 to 2001, Johnny Holmes served as Harris County's elected district attorney. Holmes personally decided whether to seek the death penalty in every capital case.<sup>51</sup> Holmes publicly dismissed the Black community's concerns about the role race played in Harris County's criminal legal system. In 1986, Holmes walked out of a meeting with members of Houston's Black community, disparaging their concerns about racial discrimination in the criminal legal system as "crap."<sup>52</sup> Responding to claims that African Americans had lost faith in the county's justice system, Holmes declared, "You've never had faith in the justice system."<sup>53</sup> At one point, Holmes turned his back to the audience as a citizen expressed his opinion about the treatment of Black individuals in the legal system.<sup>54</sup>

After Holmes retired, his protégé Charles "Chuck" Rosenthal was elected district attorney in 2000, and he served until 2008.<sup>55</sup> During his second term in office, emails sent to and from Rosenthal's government account became public. The emails contained offensive stereotypes about people of Hispanic descent and women, racial slurs, and racist "jokes."<sup>56</sup> Among the emails was a photograph titled "Fatal Overdose," depicting a Black man sprawled out on a sidewalk amid watermelon peels, a cup of soda, and Kentucky Fried Chicken containers.<sup>57</sup> The emails also revealed assistant district attorneys within the office using coded language to make derogatory comments about African American jurors.<sup>58</sup> Rosenthal resigned before completing his second term. ■



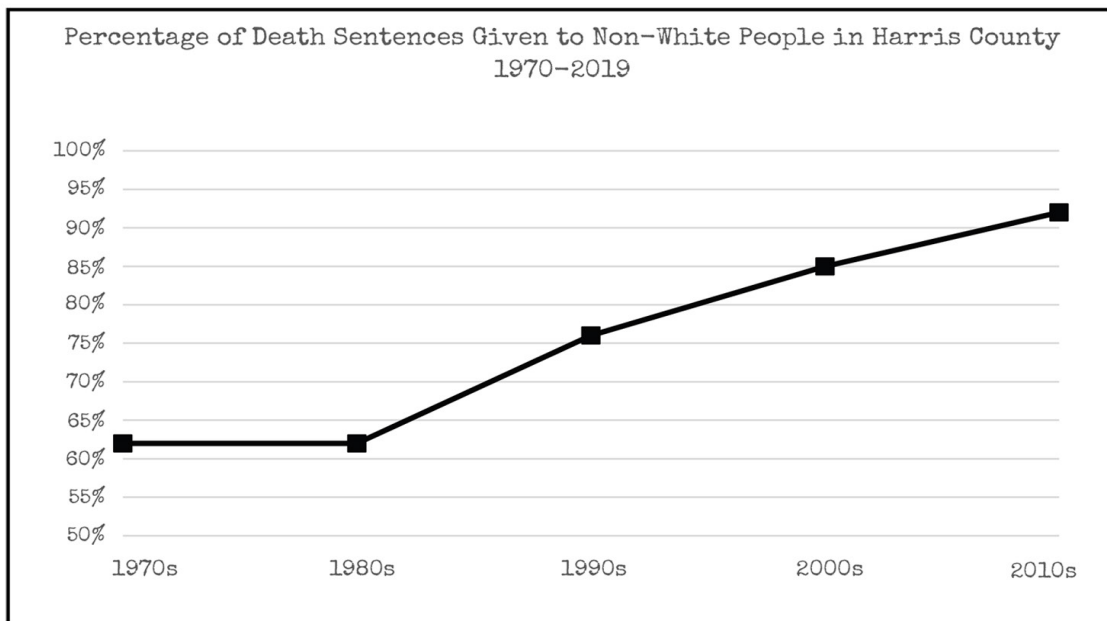
*Racist "Fatal Overdose" image found in Chuck Rosenthal's emails.*





## The HCDAO's Racist Use of Capital Punishment in the Modern Era

In light of Houston's history of racial terror, discrimination, and exclusion, it is unsurprising that the influence of racism carries on in the criminal legal system to this day. Nowhere is this more evident than in the administration of the death penalty.



Since 1973, Harris County has issued death sentences to 298 individuals.<sup>59</sup> Of these people, 72%, or 214, are people of color.

During this period, the Harris County District Attorney's Office ("HCDAO") has been particularly likely to seek death against Black defendants, and it has obtained a death sentence against 158 Black individuals, representing 53% of all Harris County death sentences.<sup>60</sup> While today Harris County is approximately 30% non-Hispanic white, its demographics have changed tremendously since 1973, when most Harris County residents were non-Hispanic white.<sup>61</sup> Nevertheless, Harris County's Black population has never exceeded roughly 20% of the total population.<sup>62</sup> A statistical analysis of 504 adult defendants indicted for capital murder in Harris County from 1992 to 1999 concluded that **the probability the Harris County District Attorney during this period would seek death**

**against a Black defendant was more than three times higher than when a similarly situated defendant was white.**<sup>63</sup>

The HCDAO's pattern has persisted to this day. Beginning in November of 2004 and ending in August 2018, there was an unprecedented spree of obtaining death sentences exclusively against people of color. During this period, Harris County juries were asked to sentence 21 people to death.<sup>64</sup> Eighteen cases ended in a death sentence, and all the defendants were people of color.

This string of prosecutions began during the Rosenthal era, but only eight of the death sentences were returned during his occupancy of the office. Five death sentences, all against people of color, were returned during the administration of Patricia Lykos. Another five death sentences, all against people of color, were returned during the administration of Devon Anderson. The remaining sentence was returned during Kim Ogg's administration.

In October 2019, Ronald Lee Haskell, a white man, received a death sentence, interrupting the streak of prosecutions of people of color. Following this, two more individuals, one Black man, and one Latino man, have also been sentenced to death in Harris County.<sup>65</sup> **Thus, 20 of Harris County's last 21 death sentences have been obtained against people of color.** Of the last 21 individuals against whom death has been sought following a capital murder conviction, 15 (71%) have been Black,



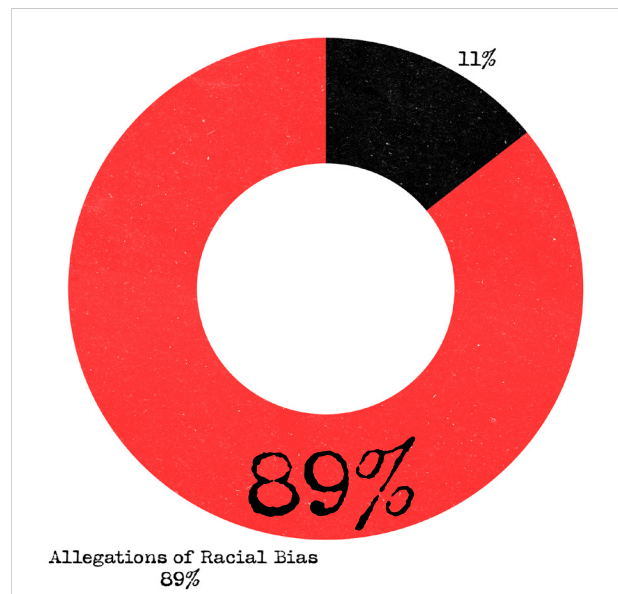
4 (19%) have been Hispanic, and 1 (5%) was of Middle Eastern descent. This racial disparity significantly *outpaces* Harris County's historical disparity in the modern death penalty era, meaning the problem from 2004 up through the present is even more stark than it was from the late 1970s through the 1990s. **In total, Kim Ogg has presided over the return of three new death sentences, two of which, or 66%, have been against people of color.**

A review of direct appeals and post-conviction allegations since this pattern began in November 2004 reflects that, even today, Harris County's use of the death penalty remains highly infected by discrimination.<sup>66</sup>

In Texas, a **direct appeal** is a process where the defendant challenges the outcome of a trial by seeking a review from the Texas Court of Criminal Appeals. It focuses on errors or issues related to the trial's proceedings or legal interpretations. **Post-conviction proceedings** are where a person petitions for relief from a conviction or sentence. It allows them to raise constitutional issues or claims of legal errors that may have affected their conviction.

In 17 of the 19 cases in which either an appellate brief or post-conviction application has been filed, the defendant alleged that race influenced the trial or resulting death sentence in some way. Thirteen defendants alleged that the State exercised peremptory strikes in a discriminatory fashion.<sup>67</sup> Eight defendants alleged that race, ethnicity, or national origin was a factor in the decision to seek death.<sup>68</sup> One defendant alleged race-based prosecutorial misconduct.<sup>69</sup>

Allegations that the HCDAO continues to exclude jurors of color are especially rife.<sup>70</sup> In one case, the HCDAO used its peremptory challenges to strike 75% of all eligible Black potential jurors while striking just 20% of all eligible white prospective jurors.<sup>71</sup> In another case, the HCDAO struck 56% of all eligible Black prospective



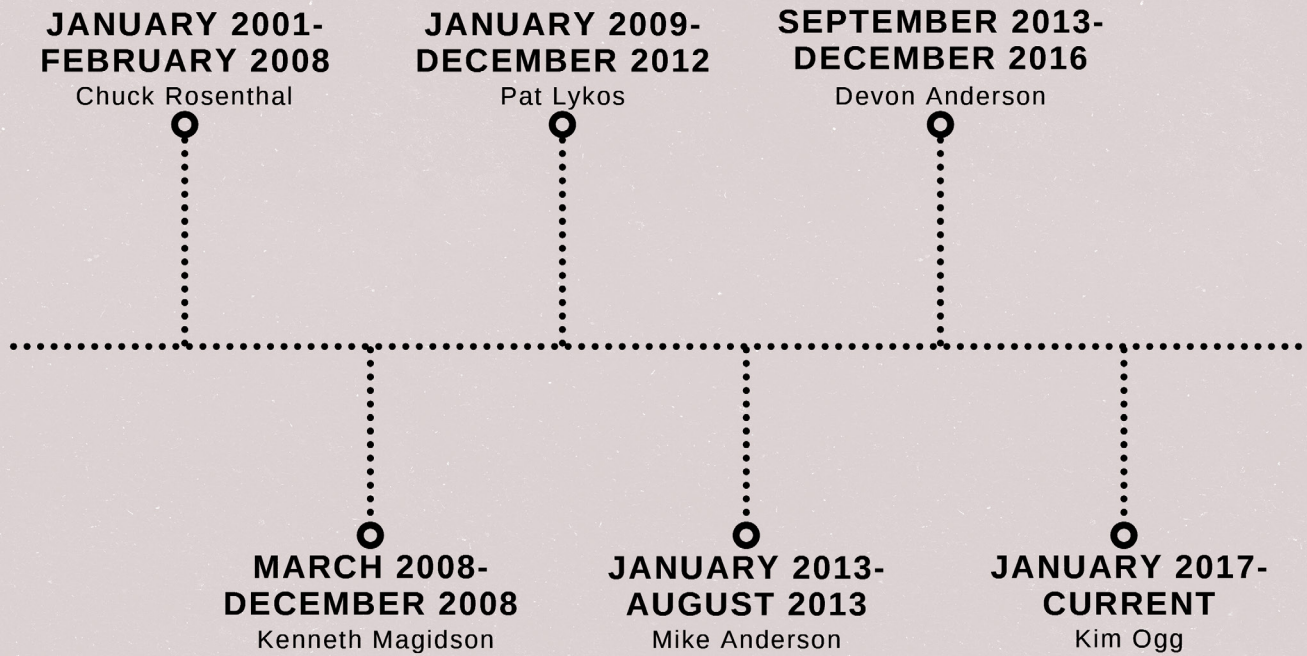
*Percentage of cases since 2004 with allegations of racial bias in appellate or post-conviction briefing*

jurors.<sup>72</sup> The defendant also alleged that prosecutors questioned Black prospective jurors in a biased manner.<sup>73</sup> Analysis of the jury selection transcripts by a linguistics professor at Hofstra University concluded there had been differential treatment by race in the prosecution's questioning of potential jurors.<sup>74</sup>

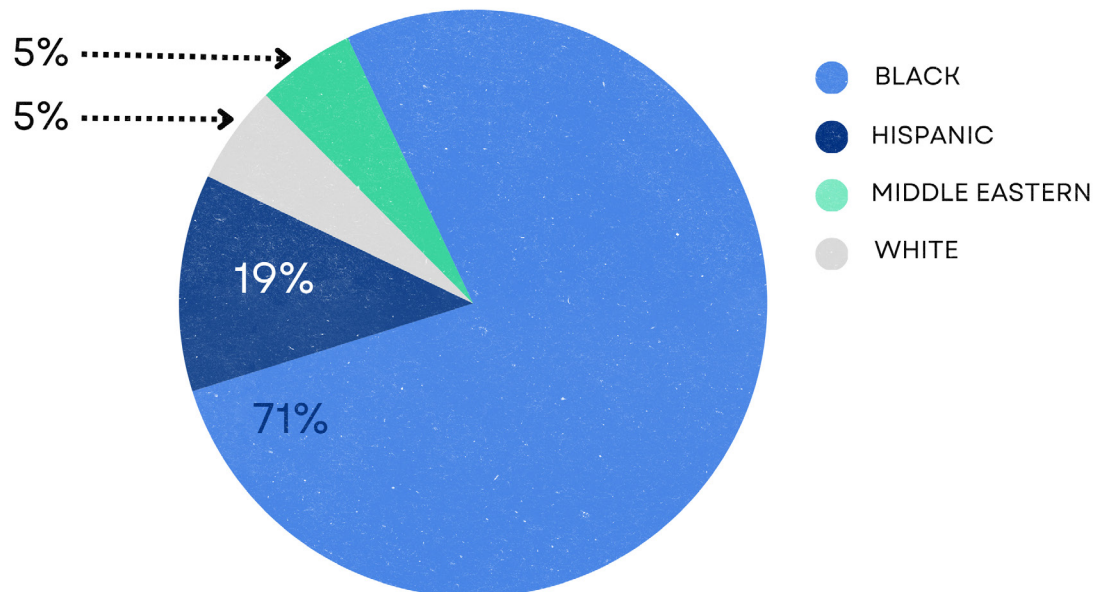
**Jury selection** involves the process of voir dire, where attorneys question potential jurors to assess their suitability for the trial and identify biases or conflicts that may affect their judgment.

In other cases, allegations have been made that defense counsel collaborated with HCDAO prosecutors to remove jurors based on race. In one case, the parties jointly moved, and the court agreed, to excuse 85% of all Black women and 75% of all Black men who answered their summons without questioning them.<sup>75</sup> Even though Black persons made up 23% of all the prospective jurors who answered the summons, only one Black person served as a juror in the case. By contrast, whites made up 52% of all those who answered their summons, but 71% of the seated jurors (including alternates) were white. Ultimately, a total of 54 out of the 57 Black prospective jurors who showed up, or 95%, were prevented from serving as a juror in the case for a reason other than an inability to follow or fairly apply the law.<sup>76</sup>

# Timeline of Harris County District Attorneys



## RACIAL /ETHNIC MAKEUP OF THE LAST 21 HARRIS COUNTY CAPITAL MURDER DEFENDANTS





In another case, it was alleged that 118 out of 125 Black residents who answered their summons for jury duty, a staggering 94%, were excused without being questioned by the parties.<sup>77</sup> Of the Black prospective jurors who remained after the court determined qualifications and exemptions, 68% were thereafter excused by agreement of the parties and the court without any questioning. In contrast, 43% of white prospective jurors were excused under similar circumstances. Prosecutors acted on their own to remove five of the remaining Black jurors: two by challenge for cause and three by peremptory strike. Only one Black person was seated on the jury. Defense counsel in the case did not object to the peremptory strikes, despite those strikes having allegedly been made against potential jurors who were materially indistinguishable from white jurors the State accepted.<sup>78</sup>

Jury selection is not the only way that race and ethnicity have impacted capital trials in Harris County. Racialized testimony and evidence were also featured in some of these trials:

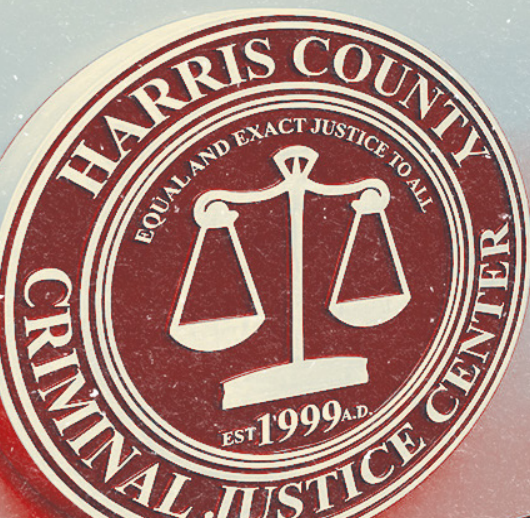
- In a case in which a Black man was accused of killing a white Houston police officer, the HCDAO elicited testimony from the widow of the officer about how the officer had originally been denied employment in the police department because “affirmative action was in place,” and “he was the wrong skin color.”<sup>79</sup>
- The HCDAO presented rap lyrics written by a Black defendant while in jail as evidence of his “future dangerousness,” a necessary legal finding that a jury must make before sentencing a person to death.<sup>80</sup>

- Judge McSpadden, who was found to have cast reasonable doubt on his ability to act impartially after speaking publicly about his views on Black Lives Matter and Black defendants, presided over one of the trials that resulted in a death sentence against a Black man.<sup>81</sup>

- One case alleged systematic underrepresentation of Hispanics in the jury pool, asserting that the jury pool in the case was just 22% Hispanic while the Harris County population was 43% Hispanic.<sup>82</sup>

Of the 21 death sentences since November 2004, two individuals, both Black men, have been determined to be intellectually disabled since their trial and ineligible for execution.<sup>83</sup> Another individual, also a Black man, has been exonerated. Alfred Brown, sentenced to death in 2005, had his conviction reversed by the Texas Court of Criminal Appeals in 2014 due to the HCDAO’s failure to comply with its constitutional obligation to disclose favorable evidence. A special prosecutor assigned to the case declared Brown actually innocent in 2019, and the charges were dismissed.<sup>84</sup>

**This represents a concerning error rate of at least 20% in Harris County’s push for death sentences against Black men just since 2004—a percentage which likely will rise even higher as additional review occurs. Such a huge error rate reflects an eagerness to pursue capital punishment against Black men and raises questions about the HCDAO’s treatment of Black lives. ■**



## The HCDAO's Use of Walter Quijano's Testimony

In 1992, the HCDAO sought to sentence Eugene Broxton, a Black man, to death. In the sentencing phase, Harris County prosecutors presented testimony from psychologist Walter Quijano, who told the jury that race should be considered when deciding if someone would pose a future danger.<sup>85</sup> He further told the jury that, based upon all the factors he considered, including Broxton's race, Broxton would "more likely than not continue to engage in violent acts against society."<sup>86</sup> The jury sentenced Broxton to death.<sup>87</sup>

In 1997, the HCDAO sought to sentence Duane Buck, another Black man, to death. When Duane Buck's lawyer presented testimony from the same psychologist, Dr. Quijano, to the effect that Mr. Buck would *not* be dangerous in the future, the Harris County prosecutor nevertheless asked Dr. Quijano to confirm for the jury that "the race factor, [B]lack, increases the future dangerousness for various complicated reasons."<sup>88</sup> Dr. Quijano agreed, and the jury sentenced Buck to death.<sup>89</sup>

The fact that the HCDAO relied on racist testimony to secure death sentences is disturbing, but—as shown throughout this report—was not out of character. In fact, there is compelling evidence that the HCDAO has considered national origin as a reason to seek death, even though such considerations are absolutely forbidden. A 1995 document inadvertently disclosed by the HCDAO over two decades later reflected that a Hispanic individual's national origin may have directly played a role in its decision to seek death against him.<sup>90</sup>

Broxton and Buck's were just two of seven death-penalty cases in which African American or Hispanic men were sentenced to death after Dr. Quijano opined that they were more likely to be violent again because of their race or ethnicity.<sup>91</sup> In 2000, the Texas Attorney General admitted that Dr. Quijano's testimony in those cases violated the U.S. Constitution and promised a new, fair sentencing hearing for all the defendants, including

Broxton. Over the objections of the Harris County District Attorney, the Texas Attorney General confessed error in Broxton's case,<sup>92</sup> and the court set aside his death sentence, finding that the "use of race in the punishment phase" violated his constitutional rights.<sup>93</sup>

But the Texas Attorney General's office did not keep its promise of a new sentencing hearing for Duane Buck. Buck—represented by Texas Defender Service and the NAACP Legal Defense Fund—spent years in court seeking relief from his racist sentence. Finally, in February 2017, the U.S. Supreme Court ruled that racial bias had impermissibly tainted Buck's case and overturned his death sentence.

In a majority opinion authored by Chief Justice Roberts, the U.S. Supreme Court said that the "law punishes people for what they do, not who they are." The Supreme Court pointed out that "Dr. Quijano's testimony appealed to a powerful racial stereotype—that of black men as violence prone." His testimony created a "perfect storm" because it contained "a particularly noxious strain of racial prejudice," which in turn "coincided precisely with the central question at sentencing"—namely, whether Buck would be a future danger to society. The effect was to "provide support for making a decision on life or death on the basis of race." The Supreme Court rejected the lower court's conclusion that the impact of this racism was minimal, noting that "[s]ome toxins can be deadly in small doses."<sup>94</sup>

The U.S. Supreme Court remanded Buck's case, and District Attorney Ogg chose not to pursue the death penalty against him again. She explained that Buck's case had "forever been tainted by the indelible specter of race." In October 2017, Buck was resentenced to life with the possibility of parole.<sup>95</sup> ■

11	is, and that	the race factor, black,
12	increases the future dangerousness for	various complicated reasons; is that
13	correct?	
14	A	Yes.
15		



# CONCLUSION

---

Harris County is a thriving, diverse metroplex that deserves a criminal judicial system in which race never plays any role in determining defendants' fates or in deciding whether individuals can participate in civic life by sitting on juries. It is presently falling short, even in the most serious cases.

The troubling trend in death sentencing in Harris County has evolved over decades, but it is not too late to address it. The HCDAO can take responsibility for its racist past by implementing policies that promote equity and justice. Judges can engage in trainings that help eliminate bias in our justice system. And legislators can enact laws that empower incarcerated people of color to challenge sentences obtained through racial animus.

It is also essential that Harris County officials grapple with capital punishment on a broader scale. The deep links between capital punishment and Harris County's history of slavery and racism—combined with the fact that most Houstonians no longer support this punishment—highlight the urgency of rethinking its use. We need a criminal legal system that respects lives of color and better aligns with the values and sentiments of our community—and that requires abandoning this cruel, racist, and outdated punishment.

## Our Recommendations:

### 1. The HCDAO and Other Agencies Must Measure and Publish Data on Racial and Ethnic Disparities—and Take Action to Eliminate Bias

While some data is already shared publicly by the HCDAO,<sup>96</sup> data-based reforms are impossible without comprehensive data collection *and* sharing. To address racial bias in capital

cases, we recommend that the HCDAO and the Harris County Court System implement robust data collection practices. This involves gathering complete demographic information on all parties, including defendants, victims, jurors, lawyers, and judges. Additionally, the documentation of case characteristics, such as the nature of the crime, character of evidence, and sentencing outcomes, is crucial for a comprehensive analysis of how death sentences are handed down in Harris County. There must also be increased transparency by tracking and publishing prosecutorial decisions, including the choice to seek the death penalty and any offers extended. By systematically collecting and analyzing this information, stakeholders can gain valuable insights into what prosecutorial decisions are causing racially biased outcomes and work towards a better understanding of the application of capital punishment within the Harris County criminal legal system.<sup>97</sup>

Measuring racial disparity—and transparently sharing that information with the public—is the first step. But then the HCDAO must use this data to evaluate how racial bias has played a role in its practices and what it can do to transform its procedures moving forward. In deciding how to advance racial equity, the office is not alone; it can draw on extensive resources—from nonprofits, government-funded capital defense organizations, and other prosecutors' offices alike—about concrete steps that prosecutors can take to eliminate bias and promote justice.<sup>98</sup>

As the HCDAO takes steps to eliminate racial discrimination across all its prosecutorial practices, it is important to remember that the HCDAO and judges can also use this data to seek justice in particular criminal cases. In many capital appeals and post-conviction cases, prosecutors and judges can reevaluate their actions and their consequences. Prosecutors can acknowledge errors by conceding to claims and allegations.<sup>99</sup> Judges can provide findings and recommendations in post-conviction proceedings that support the account of a person they, or a predecessor, sentenced to death.<sup>100</sup>

## 2. Judges Must Take Responsibility for Ending Racism by Implementing Evidence-Based Training on Racial Bias

Promoting an understanding of racial discrimination in the criminal legal system is crucial for everyone involved, including judges. Data shows that implicit bias affects judicial decision-making.<sup>101</sup> Judges can engage in implicit-bias training to learn about how racial bias can influence their decision making and steps they can take to ensure just outcomes. They can also connect with and listen to local communities to develop awareness of bias, cultural competency, and knowledge of the historical context of racial disparities. This engagement is vital to fostering an ongoing commitment to racial equity in the legal process.

## 3. Legislators Must Implement a Racial Justice Act that Makes it Easier for Courts to Review Convictions Based on Racism

In 2020, California passed the California Racial Justice Act (CRJA), preventing the state from basing criminal convictions on race, ethnicity, or national origin.<sup>102</sup> In a departure from the U.S. Supreme Court's view that statistical disparities are "an inevitable part of our criminal justice system,"<sup>103</sup> the CRJA allows challenges to such disparities.<sup>104</sup> Individuals can also file claims if a judge, attorney, law enforcement officer, expert witness, or juror exhibited racial bias or animus.<sup>105</sup> While Texas law prohibits prosecutors from using race or ethnicity to argue that someone will be a future danger,<sup>106</sup> this falls short in addressing various discriminatory practices affecting outcomes in capital trials. A Texas Racial Justice Act could be the start to eliminating the harmful "toxins"<sup>107</sup> that appear to characterize Harris County's death penalty cases.

In closing, we must remember that when someone is sentenced to death, the conclusion of their trial is not the end of their story. Advocacy continues, and there is room for Texans, especially the

residents of Harris County, to speak out against racism in the criminal legal system and ask for meaningful reforms. ■

---

1 *State and Federal: Texas*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/texas> (last visited Jan. 10, 2024).

2 Phil McCausland, *Why Texas' 'Death Penalty Capital of the World' Stopped Executing People*, NBC NEWS (DEC. 16, 2017), <https://www.nbcnews.com/storyline/lethal-injection/why-texas-death-penalty-capital-world-stopped-executing-people-n830276>.

3 *Texas Death Penalty Facts*, TEX. COALITION TO ABOLISH THE DEATH PENALTY, <https://tcadp.org/get-informed/texas-death-penalty-facts> (last visited Jan. 12, 2024).

4 *Death Row Information: Inmates on Death Row*, TEX. DEP'T OF CRIMINAL JUSTICE, [https://www.tdcj.texas.gov/death\\_row/dr\\_offenders\\_on\\_dr.html](https://www.tdcj.texas.gov/death_row/dr_offenders_on_dr.html) (last visited Jan. 10, 2024); *Death Row Information: Executed Inmates*, TEX. DEP'T OF CRIMINAL JUSTICE, [https://www.tdcj.texas.gov/death\\_row/dr\\_executed\\_offenders.html](https://www.tdcj.texas.gov/death_row/dr_executed_offenders.html) (last visited Jan. 10, 2024); *Death Row Information: Executed Inmates*, TEX. DEP'T OF CRIMINAL JUSTICE, [https://www.tdcj.texas.gov/death\\_row/dr\\_offenders\\_no\\_longer\\_on\\_dr.html](https://www.tdcj.texas.gov/death_row/dr_offenders_no_longer_on_dr.html) (last visited Jan. 10, 2024). Texas reformed its death penalty statute in 1973, and in 1976, the U.S. Supreme Court upheld the statute, paving the way for executions. *Jurek. v. Texas*, 428 U.S.262 (1976).

5 *Poll Finds Record-Low Support for Death Penalty Among Houstonians*, DEATH PENALTY INFO. CTR. (MAY 26, 2020), <https://deathpenaltyinfo.org/news/poll-finds-record-low-support-for-death-penalty-among-houstonians>; Stephen L. Klineberg, *The 2020 Kinder Houston Area Survey*, RICE UNIV.: KINDER INST. FOR URBAN RESEARCH (May 4, 2020), <https://rice.app.box.com/s/mtqym107vb0uy5qw46bk6aibni0yxykh>.



---

6 Klineberg, *supra* note 5, at 5 (“The [Houston] respondents in 2020 were ... less in favor of the death penalty than in all previous years.”). See also *id.* at 19 (figure 8 depicts the decline in support for the death penalty among Houstonians over the last few years).

7 *Buck v. Davis*, 580 U.S. 100, 125 (2017).

8 *Id.* at 122.

9 In this report, people of color are defined as people who are identified as any race or ethnicity other than white according to Texas Department of Criminal Justice data. See *Death Row Information: Gender and Racial Statistics of Death Row Inmates*, TEX. DEP’T OF CRIMINAL JUSTICE, [https://www.tdcj.texas.gov/death\\_row/dr\\_gender\\_racial\\_stats.html](https://www.tdcj.texas.gov/death_row/dr_gender_racial_stats.html) (last visited Jan. 10, 2024).

10 This analysis excludes cases in which a person was resentenced after an earlier death sentence was vacated by a reviewing court.

11 See Jolie McCullough, *Texas executes Arthur Brown Jr. for Houston slayings despite claims of innocence, intellectual disability*, TEX. TRIBUNE (Mar. 9, 2023), <https://www.texastribune.org/2023/03/09/texas-execution-arthur-brown-jr/>; Courtney Fischer, *Execution to Move Forward for Convicted 1992 Killer After Lawyer Argues for New DNA Testing*, ABC 13 (Mar. 13, 2023), <https://abc13.com/brownstone-lane-murders-arthur-brown-jr-execution-rachel-tovar-survivor/12925895/>; *Texas Executes Robert Jennings in Nation’s First Execution of 2019*, DEATH PENALTY INFORMATION CENTER (Jan. 31, 2019), <https://deathpenaltyinfo.org/news/texas-executes-robert-jennings-in-nations-first-execution-of-2019>.

12 *Buck*, 580 U.S. at 124 (internal quotations omitted).

13 Amelia Winger & Nami Sumida, *Harris County Is the Most Ethnically Diverse County in Texas, New State Population Data Shows*, HOUSTON CHRON. (Nov. 2, 2023), <https://www.houstonchronicle.com/projects/2023/houston-population-ethnicity>.

14 *Lynching in Texas: Entries tagged “Harris County”*, SAM HOUSTON UNIV., <https://lynchingintexas.org/items/browse?tags=Harris+County>.

15 *U.S. Army Executes 13 Black Soldiers in Houston, Texas*, EQUAL JUSTICE INITIATIVE, <https://calendar.eji.org/racial-injustice/dec/11> (last visited Jan. 11, 2024). There were an additional 16 death sentences handed down at subsequent trials. President Woodrow Wilson commuted the sentence of ten of them, but six more soldiers were hanged. *Id.*

16 Mimi Swartz, *The Killing of José Campos Torres*, TEX. MONTHLY (Mar. 2023), <https://www.texasmonthly.com/news-politics/looking-back-killing-of-jose-campos-torres>.

17 Michael A. Olivas, *Brown and the Desegregative Ideal: Location, Race, and College Attendance Policies*, 90 CORNELL L. REV. 391, 416 (2005), <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2983&context=clr>.

18 *Id.* at 400.

19 Katharine Shilcutt, “*The Legal Battle Over Desegregating Rice*” Gives Context to Historic Decision, RICE NEWS (Nov. 9, 2020), <https://news.rice.edu/news/2020/legal-battle-over-desegregating-rice-gives-context-historic-decision> (Rice University Board of Trustees voted to admit Black students in 1962); *To Bear Fruit for Our Race: Integrating Houston’s Other Schools (1955-1980, Section 6)*, UNIV. OF HOUSTON CTR. FOR PUB. HIST., <https://uh.edu/class/ctr-public-history/>

---

[tobearfruit/story\\_1955-1980\\_section06.html](http://tobearfruit/story_1955-1980_section06.html) (last visited Jan. 12, 2024) (University of Houston began its desegregation process in 1961).

20 *Final Report*, RICE UNIV. TASK FORCE ON SLAVERY, SEGREGATION, AND RACIAL INJUSTICE (Sept. 2023), <https://taskforce.rice.edu/final-report>.

21 See Martin Waldron, *Houston Moves to Desegregate Schools Amid Clamor of Protest*, N.Y. TIMES, Mar. 1, 1970, at 84, <https://www.nytimes.com/1970/03/01/archives/houston-moves-to-desegregate-schools-amid-clamor-of-protest-angry.html> (reporting on an initial vote by the Houston School Board to begin the process of racial integration, 16 years after the U.S. Supreme Court's decision in *Brown v. Board*).

22 Albert H. Kauffman, *Latino Education in Texas: A History of Systematic Recycling Discrimination*, 50 ST. MARY'S L.J. 861, 875 (2019), <https://commons.stmarytx.edu/cgi/viewcontent.cgi?article=1037&context=thestmaryslawjournal>. See also *Ross v. Hous. Indep. Sch. Dist.*, 699 F.2d 218 (5th Cir. 1983).

23 Gary Orfield & Erica Frankenberg, *Brown at 60: Great Progress, a Long Retreat and an Uncertain Future*, CIV. RTS. PROJECT 23 (May 15, 2014), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf>.

24 Motoko Rich, *Segregation Prominent in Schools, Study Finds*, N.Y. TIMES (Sept. 19, 2012), <https://www.nytimes.com/2012/09/20/education/segregation-prominent-in-schools-study-finds.html>.

25 Joe Cortright, *Where Does Houston Rank Among America's Least (And Most) Segregated Cities?* RICE UNIV. KINDER INST. URB. RES. (Sept. 3, 2020), <https://kinder.rice.edu/>

[urbanedge/where-does-houston-rank-among-americas-least-and-most-segregated-cities](http://urbanedge/where-does-houston-rank-among-americas-least-and-most-segregated-cities).

26 *Ku Klux Klan Candidates Leading in Texas; Most Big Cities and Counties Carried by Them*, N.Y. TIMES, July 24, 1922, at 1, <https://www.nytimes.com/1922/07/24/archives/ku-klux-klan-candidates-leading-in-texas-most-big-cities-and.html>.

27 Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 462 (Spring 2000), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1380&context=wlulr>.

28 *Id.* Some progress has been made on this front recently; 2018 saw the election of 17 Black women to the bench, raising the total from two to 19. See also Adeel Hassan, *17 Black Women Sweep to Judgeships in Texas County*, N.Y. TIMES (Nov. 9, 2018), <https://www.nytimes.com/2018/11/09/us/black-female-judges-texas-election.html>.

29 Mary Thompson, *A Long and Winding Road an Historical Perspective on the Role of Women and Minorities in the Houston Bar Association*, THE HOUSTON LAWYER, Sept./Oct. 1995, at 36, 37. Black lawyers were the last to be heard at docket call. White lawyers representing Black clients were the next to last to be heard, while white lawyers representing white clients were first on the docket. *Id.*

30 *Collins v. State*, 60 S.W. 42, 43 (Tex. Crim. App. 1900). He further testified that although he knew African Americans who could read and write and who owned their own homes, he intentionally selected only white men for jury service. *Id.* Another jury commissioner testified that he never considered including African Americans for service on juries. *Id.* He further stated that although he had lived in Harris County his entire life, he knew of no African American to serve on a jury. A Black Harris County resident testified that of the 40 percent of the African American Harris



County population qualified to vote, 25 percent could read, could write, and/or owned property and were therefore qualified for jury service. *Id.* He further testified that the Harris County Black population included educators, physicians, lawyers, and other affluent individuals, but he knew of no Black people being permitted to serve on a Harris County jury except for during Reconstruction. *Id.* See also *Whitney v. State*, 59 S.W. 895, 896 (Tex. Crim. App. 1900): “The witnesses show a large population of negroes, and among them material competent to constitute grand juries. They state that no negroes, within their knowledge, had ever been impaneled on any grand jury in Harris County. And the commissioner who assisted in drawing the grand jury stated that, if negroes had been given him on the list from which to form a grand jury, he would not have put them on, unless he had been so instructed by the court; that he did not regard them as fit material for juries.”

31 *Smith v. State of Tex.*, 311 U.S. 128, 131 (1940).

32 *Id.* at 128-29. A 2004 study by University of Houston criminologist Larry Karson found that, just as the Black population had been drastically underrepresented on grand juries in 1940, Hispanic residents were drastically underrepresented between 2002 and 2003. Although Hispanic persons comprised 21% of Harris County’s population at that time, fewer than 9% of grand jury members were Hispanic over that period. See Larry Karson, *The Implications of a Key-man System for Selecting a Grand Jury*, THE SOUTHWEST JOURNAL OF CRIMINAL JUSTICE, Vol. 3(1), at 8, [https://www.swacj.org/files/ugd/4d13c6\\_41e38288834843bd91069a571ddd07b5.pdf](https://www.swacj.org/files/ugd/4d13c6_41e38288834843bd91069a571ddd07b5.pdf).

33 *Smith*, 311 U.S. at 131 n.5.

34 *Id.* at 132.

35 Florian Martin, *New Grand Jury Selection Law Goes Into Effect in Texas*, HOUSTON PUBLIC MEDIA (Sept. 1, 2015),

<https://www.houstonpublicmedia.org/articles/news/2015/09/01/120108/new-grand-jury-selection-law-goes-into-effect-in-texas/>.

36 See Tim Fleck, *As the Jim Crow Flies: Court Art Attracts Heat but No Media Light*, HOUSTON PRESS (July 10, 2003), available at <https://jimcrowmuseum.ferris.edu/links/newslist/pdfs-docs/houston.pdf>.

37 *Id.* at 1.

38 See *id.* at 4.

39 Gabrielle Banks, *Harris County Judges Told Hearing Magistrates to Deny No-cost Bail*, HOUSTON CHRON. (Feb. 24, 2018), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-judges-told-hearing-magistrates-to-12704731.php>.

40 Judge Michael McSpadden, *Friday Letters: Judge McSpadden Speaks Loud and Clear on Black Lives Matter*, HOUSTON CHRON. (Mar. 1, 2018), <https://www.houstonchronicle.com/opinion/letters/article/Friday-letters-Judge-McSpadden-speaks-loud-and-12721571.php>.

41 *Public Admonition: Honorable Michael McSpadden 209th District Court Houston, Harris County, Texas*, CJS No. 18-0682, at 2-3 (Nov. 12, 2019), <https://www.scjc.texas.gov/media/46781/mcspadden18-0682pubwarn111219.pdf>.

42 *Id.*

43 Gabrielle Banks and Samantha Ketterer, *Longtime Harris County Judge Formally Rebuked Over Comments About Black Defendants*, HOUSTON CHRON. (Dec. 2, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Michael-McSpadden-longtime-Harris-County-judge-16443623.php>. Judge McSpadden’s term ended in 2018, and he passed

---

away in 2021. Gabrielle Banks and Samantha Ketterer, *Michael McSpadden, a Controversial, Outspoken Republican Harris County Judge, Dies at 77*, HOUSTON CHRON. (Sept. 10, 2021), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Michael-McSpadden-longtime-Harris-County-judge-16443623.php>.

44           See *Harris v. Texas*, 467 U.S. 1261, 1263 (1984) (Marshall, J., dissenting from denial of certiorari) (citing testimonies presented during a hearing held before the trial court).

45           *Id.*

46           Record on Appeal vol. 1, at 31:1-32:4, *Tompkins v. State*, No. 68870 (Tex. Crim. App.).

47           *Id.* vol. 1, at 161:20-162:3.

48           Alan Bernstein, *DA Candidates View Office in Different Ways; Siegler Says She Hasn't Seen Racism; All Vow Equal Treatment, Transparency*, HOUSTON CHRON. (Feb. 7, 2008), <https://www.chron.com/news/houston-texas/article/da-candidates-view-office-in-different-ways-1560779.php>.

49           *Id.*

50           *Moore v. State*, 265 S.W.3d 73 (Tex. App.—Houston [1st Dist.] 2008) (finding racial discrimination by Harris County prosecutor who used a disproportionate number of strikes to remove prospective jurors of color and gave a pretextual explanation for a strike); *Rosales v. Quarterman*, No. 03-cv-01016, 2008 WL 11492954 (S.D. Tex. Dec. 12, 2008) (finding racial discrimination by Harris County prosecutor who gave pretextual reasons for using 62% of allotted peremptory strikes to remove eight minority prospective jurors); *State v. Thomas*, 209 S.W.3d 268, 275 (Tex. App.—Houston [1st Dist.] 2006) (finding racial discrimination by Harris County prosecutor

who struck six of seven qualified black potential jurors and reason given to explain strikes was pretextual); *Butler v. State*, 872 S.W.2d 227 (Tex. Crim. App. 1994) (trial judge sustained objection to Harris County prosecutor's reliance on race to strike Black prospective juror in a capital murder case); *Emerson v. State*, 851 S.W.2d 269, 271-74 (Tex. Crim. App. 1993) (finding racial discrimination by Harris County prosecutor who gave pretextual reasons for striking Black prospective juror); *Esteves v. State*, 859 S.W.2d 613 (Tex. App.—Houston [1st Dist.] 1993) (finding racial discrimination by Harris County prosecutor who gave pretextual reasons for striking three prospective jurors of color); *Vargas v. State*, 859 S.W.2d 534 (Tex. App.—Houston [1st Dist.] 1993) (finding racial discrimination by Harris County prosecutor who struck "almost all blacks from the venire" and engaged in disparate treatment of prospective jurors based on race); *Wright v. State*, 832 S.W.2d 601 (Tex. Crim. App. 1992) (finding racial discrimination by Harris County prosecutor who failed to proffer a race-neutral explanation for his peremptory challenge of a Black prospective juror); *Brooks v. State*, 802 S.W.2d 692 (Tex. Crim. App. 1991) (finding racial discrimination by Harris County prosecutor who "utterly failed" to proffer race-neutral explanations for strikes against five Black prospective jurors); *Garcia v. State*, 802 S.W.2d 817 (Tex. App.—Houston [1st Dist.] 1990) (finding racial discrimination by Harris County prosecutor who noted the race and gender of four Black prospective jurors whom he struck and was unable to offer a race-neutral explanation for the strikes); *Lewis v. State*, 775 S.W.2d 13 (Tex. App.—Houston [14th Dist.] 1989) (finding racial discrimination by Harris County prosecutor who gave pretextual reasons for striking three Black prospective jurors); *Whitsey v. State*, 796 S.W.2d 707 (Tex. Crim. App. 1989) (finding racial discrimination by Harris County prosecutor who used 60% of allotted strikes to remove all Black prospective jurors from the panel without any individual questions being asked); *Robinson v. State*, 756 S.W.2d 62 (Tex. App.—Texarkana 1988) (finding racial discrimination by Harris County prosecutor who used all ten peremptory strikes to remove Black



persons from the panel and “candidly admitted that race was a consideration”).

51 See Allan Turner, *Former DA Ran Powerful Death Penalty Machine*, HOUSTON CHRON. (July 25, 2007), <https://www.chron.com/news/houston-texas/article/Former-DA-ran-powerful-death-penalty-machine-1833545.php>.

52 Alan Bernstein, *Consensus Is Lacking in Meeting on Racism*, HOUSTON CHRON., Nov. 25, 1986, at 1. Holmes reportedly objected to the meeting’s “written agenda that said blacks are the victims of a double standard in the administration of the death penalty, in the makeup of juries and in other operations of the criminal justice system.” *Id.*

53 *Id.* at 2.

54 *Id.*

55 Rosenthal had worked as an assistant district attorney in the office for 23 years under Holmes. Holmes had appeared in a television commercial for Rosenthal and “frequently told audiences he would vote for him.” Julie Mason, *Rosenthal, Lykos Head for Runoff*, HOUSTON CHRON., Mar. 15, 2000, at A1.

56 *Rosenthal Testifies in His Own Defense*, ABC 13 (Feb. 1, 2008), <https://abc13.com/archive/5929195/>. See also Ralph Blumenthal, *Prosecutor, Under Fire, Steps Down in Houston*, N.Y. TIMES (Feb. 16, 2008), <https://www.nytimes.com/2008/02/16/us/16houston.html>; Matt Stiles & Alan Bernstein, *State Probe Sought into DA’s Emails*, HOUSTON CHRON. (Jan. 10, 2008), <https://www.chron.com/news/houston-texas/article/more-e-mails-emerge-in-harris-county-da-scandal-1754858.php>.

57 Leslie Casimir, *Blacks Urge Rosenthal to Quit*, HOUSTON CHRON. (Jan. 12, 2008), <https://www.chron.com/news/article/>

[blacks-urge-rosenthal-to-quit-1752678.php](https://www.chron.com/news/article/blacks-urge-rosenthal-to-quit-1752678.php). See also Ralph Blumenthal, *New Investigation in Texas E-mail Case*, N.Y. TIMES (Jan. 9, 2008), <https://www.nytimes.com/2008/01/09/us/09texas.html>. Rosenthal “joked” in another email that Bill Clinton was like having a Black man as President because he “smoked marijuana and receives a check from the government each month.” *Id.*

58 Lisa Falkenberg, *When is a Canadian not a Canadian?*, HOUSTON CHRON. (Jan. 23, 2008), <https://www.chron.com/news/columnists/falkenberg/article/when-is-a-canadian-not-a-canadian-1624648.php> (describing email using the code name “Canadians” to refer to Black jurors). Patricia Lykos, who would succeed Rosenthal as District Attorney, remarked during this time: “You would have to be deaf or blind not to realize that there was that element among a certain segment at the district attorney’s office.” Alan Bernstein, *GOP Runoff Opponents Dispute Status of DA’s Office*, HOUSTON CHRON. (Mar. 27, 2008), <https://www.chron.com/news/houston-texas/article/GOP-runoff-opponents-dispute-status-of-DA-s-office-1753288.php>.

59 *Death Row Information: Total Number of Inmates Sentenced to Death from Each County*, TEX. DEP’T OF CRIMINAL JUSTICE (last visited Jan. 22, 2024), [https://www.tdcj.texas.gov/death-row/dr\\_number\\_sentenced\\_death\\_county.html](https://www.tdcj.texas.gov/death-row/dr_number_sentenced_death_county.html).

60 On file with Texas Defender Service. It has tried and failed to obtain death sentences against (at least) another 12 more.

61 See U.S. Census Bureau, 1970 Census of Population: Characteristics of the Population (PC(1)-45) at 25, 1092, [https://www.census.gov/library/publications/1973/dec/population-volume-1.html#par\\_textimage\\_55](https://www.census.gov/library/publications/1973/dec/population-volume-1.html#par_textimage_55). According to the 1970 U.S. Census, the population of Harris County was 1,741,912 persons, of which 79.1% was White, including Hispanic Whites. Excluding all “Persons with Spanish Language or Spanish Surname,” which accounted for 10.7% of

the Harris County population, the percent of Harris County that was non-Hispanic White was 68.4%.  
*Id.*

62 See U.S. Census Bureau, 1970 Census of Population, Race of the Population By County: 1970 (PC(S1)-104) at 45 (reflecting Harris County’s Black population to be 20% of total), <https://usa.ipums.org/usa/resources/voliii/pubdocs/1970/Population/31679801n104-107.pdf>; U.S. Census Bureau, 1980 Census of Population, Characteristics of the Population, Number of Inhabitants, Texas, Table 2 (Land Area and Population: 1930 to 1980) and U.S. Census Bureau, 1980 Census of Population, General Social and Economic Characteristics, Texas, Table 58 (Race by Sex) (reflecting Harris County’s Black population to be 20% of the total); U.S. Census Bureau, 1990 Census of Population, General Population Characteristics, Texas, Table 5 (Race and Hispanic Origin: 1990) (reflecting Harris County’s Black population to be 19% of the total); U.S. Census Bureau, 2000 Census of Population, Texas: 2000, Summary Population and Housing Characteristics, Table 3 (Race and Hispanic or Latino: 2000), available at <https://www2.census.gov/library/publications/2002/dec/phc-1-45.pdf> (reflecting Harris County’s Black population to be 18% of the population); U.S. Census Bureau, 2010 Census of Population, available at <https://www.census.gov/quickfacts/fact/table/harriscountytexas,TX> (reflecting Harris County’s Black population to be 21% of the total); U.S. Census Bureau, 2020 Census of Population, <https://www.census.gov/library/stories/state-by-state/texas-population-change-between-census-decade.html> (reflecting Harris County’s Black population to be 21% of the total).

63 See Raymond Paternoster, *Racial Disparity in the Case of Duane Edward Buck* (Dec. 19, 2012), <https://www.naacpldf.org/wp-content/uploads/Duane-Buck-FINAL-Signed-Paternoster-Report-00032221.pdf>.

64 On file with Texas Defender Service.

65 In March of 2020, Lucky Ward, a

Black man, was sentenced to death, and in October of 2022, Robert Solis, a Latino man, was sentenced to death. To date, they are the two most recent individuals to be sentenced to death for the first time by a Harris County jury. See Jolie McCullough & Ben Hasson, *Faces of Death Row*, TEX. TRIBUNE (Aug. 15, 2023), <https://apps.texastribune.org/death-row/>.

66 An appellate brief or post-conviction application has been filed in 19 of 21 cases. Some of the more recent death sentences are still in very early stages of post-conviction proceedings, and so additional allegations may emerge in those cases later.

67 On file with Texas Defender Service.

68 *Id.*

69 *Id.*

70 The absence of such allegations in an appeal or habeas application does not necessarily mean the trial was not infected by racially biased decision-making during jury selection. In the most recent cases, habeas corpus applications have yet to be filed. As well, poor trial, appellate, and/or post-conviction representation in some cases makes it difficult to draw conclusions about whether racial discrimination in jury selection may have occurred from review of available filings.

71 On file with Texas Defender Service.

72 Petition for Writ of Federal Habeas Corpus at 121, *Landor v. Davis*, No. 4:16-cv-03384 (S. D. Tex. Oct. 31, 2017).

73 *Id.*

74 Application for State Writ of Habeas Corpus at 53, 56, *Ex parte Landor*, No. 1194597-B (209th Dist. Ct., Harris Co., Tex. Sept. 4, 2018).

75 First Amended Petition for Writ of Federal Habeas Corpus at 262-63, *Balderas v. Lumpkin*, No. 4:20-cv-04262 (S. D. Tex. Apr. 18, 2022).

76 *Id.* at 264.

77 Application for State Writ of Habeas Corpus at 165-66, *Ex parte Irsan*, No.1465609-A (184th Dist. Ct., Harris Co., Tex. Jul. 6, 2023).

78 *Id.* at 157, 163-64, 206.

79 Record on Appeal vol. 21 at 124, *Landor v. State*, No. AP-76,328 (Tex. Crim. App.).

80 Application for State Writ of Habeas Corpus at 162-73, *Ex parte Batiste*, No. 1212366 (174th Dist. Ct., Harris County, Tex. May 1, 2013). This practice has come under scrutiny for its risk of injecting racial stereotypes into trial proceedings from which jurors may make unwarranted negative character inferences and dole out harsher sentences as a consequence. *See* Adam Dunbar & Charis E. Kubrin, *Imagining violent criminals: an experimental investigation of music stereotypes and character judgments*, 14 J. OF EXPERIMENTAL CRIMINOLOGY 507 (2018), [https://webfiles.uci.edu/ckubrin/Dunbar-Kubrin2018\\_Article\\_ImaginingViolentCriminalsAnExp.pdf](https://webfiles.uci.edu/ckubrin/Dunbar-Kubrin2018_Article_ImaginingViolentCriminalsAnExp.pdf).

81 Judgment, *State v. Landor*, No. 1194597 (209th Judicial Dist. Ct., Harris Co., Tex. Apr. 12, 2010). *See also Public Admonition: Honorable Michael McSpadden 209th District Court Houston, Harris County, Texas*, CJS No. 18-0682 (Nov. 12, 2019), <https://www.scjc.texas.gov/media/46781/mcspadden18-0682pubwarn111219.pdf>.

82 Petition for Writ of Federal Habeas Corpus at 111, *Landor v. Davis*, No. 4:16-cv-03384 (S.D. Tex. Oct. 31, 2017).

83 *Reversals Under Atkins*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/policy-issues/intellectual-disability/reversals-under-atkins> (last visited Jan. 22, 2024) (Roosevelt Smith obtained relief on Nov. 7, 2021, and Joseph Jean obtained relief on Apr. 19, 2023).

84 Brown was indicted for murdering a Houston police officer when Harris County still used the “key-man” system for selecting grand jurors, a system that heavily over-represented law enforcement. The foreman of Brown’s grand jury was an active-duty Houston police officer. A report by a special prosecutor appointed to handle the case after the suppression allegations concluded that the grand jury “routinely threatened and intimidated witnesses to give desired testimony,” characterizing it as having “acted like a 17th Century Star Chamber.” *Report of Special Prosecutor John Raley to District Attorney Kim Ogg Regarding Alfred DeWayne Brown* 57 (Mar. 1, 2019), [https://app.dao.hctx.net/sites/default/files/2019-03/2019-03-01%20Report%20of%20Special%20Prosecutor%20re%20Brown\\_Final\\_.pdf](https://app.dao.hctx.net/sites/default/files/2019-03/2019-03-01%20Report%20of%20Special%20Prosecutor%20re%20Brown_Final_.pdf). One of the witnesses, a Black woman who placed Brown elsewhere when the murder occurred, was arrested on old traffic tickets and spent three days in jail before she was brought before the grand jury in what the special prosecutor called “unlikely . . . a coincidence.” *Id.* Transcripts reflect grand jurors threatened to take away her children if she did not change her testimony. *See* Lisa Falkenberg, *A Disturbing Glimpse into the Shrouded World of the Texas Grand Jury System*, HOUSTON CHRON. (July 16, 2014), <https://www.houstonchronicle.com/news/columnists/falkenberg/article/A-disturbing-glimpse-into-the-shrouded-world-of-5626689.php>; Lisa Falkenberg, *Cop Was Forman of Grand Jury in Cop-Killing*, HOUSTON CHRON. (July 24, 2014), <https://www.houstonchronicle.com/news/columnists/falkenberg/article/Cop-was-foreman-of-grand-jury-in-cop-killing-5645494.php>.

85 Order Granting Writ of Habeas Corpus at 10, *Broxton v. Johnson*, No. 4:00-cv-



---

01304 (S.D. Tex. Mar. 28, 2001).

86 Record on Appeal vol. 38 at 116, *State v. Broxton*, No. AP-71,488 (Tex. Crim. App.).

87 Broxton’s death sentence would ultimately be reversed by a federal court due to this because “the introduction of race as a factor to consider with respect to future dangerousness is constitutionally impermissible and totally irrelevant to Texas’ special issues.” Order Granting Writ of Habeas Corpus 3, *Broxton v. Johnson*, No. 4:00-cv-01304 (S.D. Tex. Mar. 28, 2001).

88 Record on Appeal vol. 28 at 160, *Buck v. State*, No. AP-72,810 (Tex. Crim. App.).

89 *Buck*, 580 U.S. at 108-09.

90 See Motion for Relief from Judgment, *Ayestas v. Lumpkin*, No. 09-cv-02999 (S.D. Tex. Feb. 5, 2021).

91 See *Buck*, 580 U.S. at 109; Brandi Grissom, *TYC Ends Contract With Doctor Who Gave Race Testimony in Court*, TEX. TRIBUNE (Oct. 31, 2011), <https://www.texastribune.org/2011/10/31/tyc-ends-contract-doctor-who-gave-race-testimony/>; Duane Buck Fact Sheet, NAACP LEGAL DEFENSE FUND, [www.naacpldf.org/wp-content/uploads/Duane-Buck-Fact-Sheet.pdf](http://www.naacpldf.org/wp-content/uploads/Duane-Buck-Fact-Sheet.pdf) (last visited Jan. 23, 2024).

92 See Order at 3 n.2, 9-10, *Broxton v. Johnson*, No. H-00-CV-1034 (S.D. Tex. Mar. 28, 2001).

93 *Id.* at 10.

94 *Buck*, 580 U.S. at 121-23 (quotation marks omitted).

95 Alex Arriaga, *Texas Death Row Inmate Duane Buck Has Sentence Reduced to*

*Life After Supreme Court Orders Retrial*, TEX. TRIBUNE (Oct. 3, 2017), <https://www.texastribune.org/2017/10/03/high-profile-death-row-case-comes-end-guilty-plea/>.

96 See, e.g., *Harris County District Attorney’s Office Five Year Report*, OFFICE OF THE HARRIS COUNTY DISTRICT ATTORNEY (2017-2021), [https://app.dao.hctx.net/sites/default/files/HCDA\\_FiveYearReport\\_digital%2012.20.pdf](https://app.dao.hctx.net/sites/default/files/HCDA_FiveYearReport_digital%2012.20.pdf).

97 Robust data collection has been adopted in other U.S. jurisdictions, like Philadelphia and some regions of Colorado. “In 2018 the Philadelphia District Attorney’s Office created a new unit to track criminal justice measures on a consistent and ongoing basis. We make these metrics readily available to the public, and evaluate their effectiveness to create and revise policies to ensure public safety. . . . Unique among prosecutor offices nationwide, our DATA Lab undertakes original research, works as a research partner with research universities, and collects and analyzes data to inform our policies and procedures and measure our progress.” Philadelphia District Attorney’s Office, Data Lab, <https://phillyda.org/data-lab/> (last accessed Jan. 22, 2024); “In Colorado, District Attorneys’ (DA) offices are engaged in proactive responses to community problems, reduce disparities in justice outcomes, build greater trust through community engagement, and increase prosecutorial transparency and accountability. The public wants to know what their DA office is doing, especially given the increasing public scrutiny of law enforcement, prosecutors, and the justice system. There are valid concerns that the system treats people differently, often correlated to race, ethnicity, or wealth.” Alexis King et. al., *Prosecution and Transparency: Colorado District Attorneys Work Across the Aisle to Improve Community Safety* (Sept. 8, 2022), [https://coloradolab.org/wp-content/uploads/2022/09/Op-Ed\\_Prosecutorial-Dashboards.pdf](https://coloradolab.org/wp-content/uploads/2022/09/Op-Ed_Prosecutorial-Dashboards.pdf).

98 See, e.g., *Prosecutorial Culture Change: A Primer*, INSTITUTE FOR INNOVATION IN

---

PROSECUTION (2020), <https://www.prosecution.org/prosecutorial-culture-change-a-primer>; Motion for Justice, <https://motionforjustice.vera.org/>.

99        *See, e.g.,* Adam Liptak, *A Prosecutor's Change of Heart in a Capital Case at the Supreme Court*, N.Y. TIMES (Oct. 24, 2022), <https://www.nytimes.com/2022/10/24/us/texas-death-penalty-supreme-court.html>.

100       *See, e.g.,* Juan A. Lozano, *Texas Seven Death Row Prison Escapee Should Get a New, Unbiased Trial: Judge*, NBCDFW (Dec. 14, 2022), <https://www.nbcdfw.com/news/local/texas-seven-death-row-prison-escapee-should-get-a-new-unbiased-trial-judge/3148590/>.

101       Jeffrey Rachlinski, Andrew J. Wistrich and Bernice B. Donald, *Getting Explicit About Implicit Bias*, JUDICATURE, Vol. 104 No. 3 Fall/Winter 2020-21, at 75, [https://judicature.duke.edu/wp-content/uploads/2020/12/ImplicitBias\\_Fall2020.pdf](https://judicature.duke.edu/wp-content/uploads/2020/12/ImplicitBias_Fall2020.pdf).

102       Assemb. B. 2542, Sec. 3(a), 2019-2020 Reg. Sess. (Ca. 2020).

103       *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987).

104       Assemb. B. 2542, Sec. 2(f), 2019-2020 Reg. Sess. (Ca. 2020).

105       *Id.* at Sec. 2.

106       Tex. Code Crim. Proc. Art. 37.071 Sec. 2(a)(2).

107       *Buck*, 580 U.S. at 122.





For more information about Texas Defender Service, visit  
[www.texasdefender.org](http://www.texasdefender.org)

Special Thanks to the Judith Filler Foundation

**Judith Filler**  
FOUNDATION