**Gretchen M. Engel, Executive Director, Center for Death Penalty Litigation (CDPL)**
**Remarks to NC Task Force for Racial Equity in the Criminal Justice System, Working Group #4**
**September 15, 2020**

Good morning and thank you for the opportunity to speak to all of you who have donated your time to work on these important issues. My name is Gretchen Engel and I'm the executive director of the Center for Death Penalty Litigation in Durham. I came to NC in 1992, fresh out of law school, when Henderson Hill gave me a job in capital defense. Over the years, I had the good fortune to work with Mary Pollard as well.

One of my first death row clients was Quentin Jones. Quentin was 18 years old at the time of the robbery and murder that landed him on death row. Seventeen years ago this August, I watched the State of NC execute Quentin. He was then 34 years old

After his execution, I learned that one of the jurors in his case had been interviewed by researchers at Northeastern University in Boston, my alma mater. This is what the juror said about Quentin: *He was a typical n----r. You know, if he'd been white, I would've had a different attitude.*

This is another client, Robert Bacon, who was tried by an all-white jury for the murder of a white man named Glennie Clark. Robert's codefendant, Bonnie Clark was white. Bonnie was married to Glennie Clark and she was having an affair with Robert. It was Bonnie's idea to kill Glennie and she lured him to the site of his death.

This is what a juror told me about the sentencing deliberations in Robert's case: *Blacks commit more crime. It's typical of Blacks to be involved in crime. He shouldn't have been dating that white woman. He was wrong to do that. And he deserves the death penalty.* Thankfully, the Governor commuted Robert's death sentence to life.

After doing this work for nearly 30 years, and seeing countless examples like these, the racism of the death penalty is very real and very personal.

I was asked to talk about the cost of the death penalty. There are a couple of ways to think about cost. One is just to count up the money. Another is to think about what we get for the money. Dollars. Value.

We know the death penalty costs a lot of money. Dr. Phil Cook at Duke University did a study showing how much -- $11 million a year. Note that Dr. Cook focused on defense costs. His estimate does not include resources the Office of the Appellate Defender and the North Carolina Supreme Court could devote to other things, the extra time spent by prosecutors in capital cases, or the costs to taxpayers for federal appeals.

So what are we getting for our money? Not a lot. North Carolina has 140 people on death row. Almost 90 of them have been there for 10, 20, 30, or more years. In the past decade, we've sentenced only 11 people to death. Looking at the past decade, you'll see that some years we've spent at least $11 million dollars to obtain one or zero death sentences. Meanwhile, our last execution was in 2006, 14 years ago.

Some would say justice is priceless. There is no price on justice. One question then is, how well does this system operate? I suggest to you that if the death penalty system were the airlines, no one would fly. We'd all be too terrified.

A national study of capital sentencing between1973-1995 looked at error rates in capital sentencing. Researchers at Columbia University analyzed nearly a quarter century of data, looked at appellate reversals for serious constitutional error. Nationally, the error rate was 68%, nearly seven out of ten. North Carolina's error rate was 71%. Truly, the death penalty is the Ford Pinto in our criminal justice tool box.

Most disturbing is how wrong we get it. Henry McCollum spent more than 30 years on death row for a crime he did not commit. He and his brother Leon Brown were exonerated by DNA evidence in 2014. Because of Henry's wrongful conviction, and the years it took to figure that out – thank goodness we didn't execute him in the meantime – the family of Sabrina Buie, the 11-year-old girl who was killed, has never received justice.

Henry McCollum was one of 10 men wrongfully convicted and sentenced to death in NC. The others were Sam Poole, Christopher Spicer, Alfred Rivera, Alan Gell, Jonathon Hoffman, Glen Chapman, Levon Jones, Henry McCollum, Leon Brown, and Charles Finch.

Nothing about the death penalty apparatus operates with surgical precision. Yet it is eerily good at targeting Black people. Eight of these 10 men were Black. One was Latino. Nine of 10 were people of color. Collectively, these men spent 155 years in prison for crimes they did not commit.

Innocent people are disproportionately people of color. The same is true of other vulnerable populations. Of the people on North Carolina's death row when the U.S. Supreme Court ruled it was unconstitutional to execute people who committed their crimes as children, under the age of 18, three of four were Black. Of the people on our death row when North Carolina barred the execution of people with intellectual disabilities, 16 of 18 were people of color.

Chief Justice Beasley recently observed: *In our courts, African-Americans are more harshly treated, more severely punished and more likely to be presumed guilty.* The death penalty was conceived as punishment for the "worst of the worst." Worst crimes, worst people. Most calculated and most cruel killings, committed by the most depraved.

Our "modern" death penalty was supposed to be rational, not arbitrary. Getting the death penalty was not supposed to be like being struck by lightning. And, actually, it isn't. More often, it simply strikes people who are Black. Let's look at marginal cases, cases that don't seem to be the "worst of the worst."

Consider the people on our death row even though they did not personally kill the victim. They were non-shooters, non-triggermen. Of the people who have been sentenced to death in North Carolina who were not the actual killers, four of four were people of color.

Consider the people on death row whom the jury found did not premeditate and deliberate the murder, people who were convicted only of felony murder. Seven of seven in this group are people of color.

Let me go back for a minute to what Chief Justice Beasley said about African Americans being more harshly punished. In fact, the Blacker you are, the more harshly you will be punished.

A 2006 study by Stanford University psychologist Jennifer Eberhardt showed that murderers with stereotypically "Black-looking" features are more than twice as likely to get the death penalty as lighter skinned Black defendants.

In 2001, when Robert Bacon had an execution date, I interviewed Bonnie Clark's lawyer. The lawyer was a former prosecutor and a prominent civil lawyer when I spoke to him 13 years after Bonnie enlisted Robert in the plot to kill her husband. I asked him why he thought Bonnie got life and Robert got death. Here's what he said: *You know what I think happened? Robert Bacon is a very dark skinned black man, very dark skinned, pure Negro. She was white. He was white. To tell you the truth, that's what I think happened, that's what I think the jury thought about.*

At the point he told me this, I hadn't yet told him what the juror said about how Robert had no business running around with a white woman.

Shirley Burns had two sons. One of them Marcus Robinson. When Marcus was 18, he killed a 17-year-old white boy. Marcus was sentenced to death. The other was Curtis Green. Curtis was murdered. Nobody went to death row for that murder.

When it comes to the death penalty, white lives matter. In 2016, FBI data showed the homicide rate for Black victims was nearly four times the national average and more than six times that of whites. Consistently, Black people make up the majority of murder victims.

But the death penalty is imposed as a punishment for killings of white people. A 2001 UNC study of homicides between 1993 and 1997 showed the odds of receiving the death penalty in NC were 3.5 times higher when the victim was white. A 2010 study by Michigan State University showed defendants charged with murder in NC from 1990 to 2009 were more than twice as likely to receive the death penalty if the victim was white.

I wish what I've told you today were new. But it's not. Today the Death Penalty Information Center released its report on the history of race and the death penalty. The title of the report is *Enduring Injustice: The Persistence of Racial Discrimination in the U.S. Death Penalty*. Next month, my office will launch a web-based project called *Racist Roots: Origins of North Carolina's Death Penalty*. What I've told you today is an old story. As Rev. Barber says, "The link between slavery, Jim Crow, lynching and the death penalty is as connected as the intertwined ropes of the lynch-man's noose."

We are at a momentous time in our history. We have to ask ourselves, what do we value? The death penalty is irrevocable punishment. If we continue to tinker with it, we will execute an innocent person. How could we not?

The death penalty experiment in NC has been going on for more than 40 years. We've yet to come even close to eliminating the taint of race. It's time. If we value racial equity, we cannot maintain the death penalty.

# North Carolina's Wasteful Experience with the Death Penalty

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When the US Supreme Court ruled in its 1972 *Furman* decision that the application of the death penalty was unconstitutional because of its arbitrary nature, 37 states moved quickly to re-establish the penalty using procedures that would eliminate the problems that the justices had identified.[1] In North Carolina, the legislature reasoned that if the Justices were concerned about arbitrary application of the penalty in some cases but not in others, then they would simply make death the mandatory penalty for any aggravated murder. The state passed one of the harshest capital punishment laws in the country, doing just that: the statute required that any first-degree homicide with aggravating circumstances be punished by death, and 120 individuals were quickly sentenced to death before this was ruled unconstitutional in *Woodson v. North Carolina* in 1976. Following *Woodson*, and *Gregg v. Georgia* (1976), the state followed the constitutional guidance that capital trials would be in two parts (guilt, penalty phase), with some "proportionality review" and consideration of both the aggravating and mitigating circumstances of the crime; no longer would death be a mandatory penalty for any murder. But the state maintained one of the harshest laws in the nation by mandating that district attorneys seek death in all cases where an aggravating circumstance was present. (Other states gave the DA the discretion to seek death only in the most deserving cases.) North Carolina law provided DA discretion only in 2001, and was the only state in the nation at that time not to do so. The vast majority of current death row inmates in North Carolina were sentenced to death under a law that required the District Attorney to seek death. When this requirement was eliminated, bringing the state into line with national norms, and allowing the DA to make a judgment about whether the crime really was among the "worst of the worst," death sentences declined by over 80 percent.

While North Carolina clearly had the intention of responding to *Furman* with a system that would replace the perceived arbitrariness of the application of the death penalty with a system that would remove all possibility of human bias: mandatory application at first, and when that was ruled unconstitutional, mandatory seeking of death so that the prosecutor could not be biased in deciding to seek it or not. The state succeeded in becoming one of the most prevalent users of the death penalty, and has sentenced over 400 individuals to death since 1977. However, it has failed completely in creating a system free from bias. Further, the vast majority of death sentences have been overturned by the NC Supreme Court or by federal courts on appeal. In this

[1] Racial dynamics are an important element of North Carolina's death penalty but are not my focus in this paper. In another report I have used data on NC executions to focus on racial dynamics, including the difference in the likelihood that a killer of a white or black inmate would be executing, documenting dramatic and troubling disparities. See Baumgartner, Frank R. 2010. Racial Discrepancies in Homicide Victimization and Executions in North Carolina, 1976-2008. March 20. Available at: www.unc.edu/~fbaum/Innocence/NC/Racial-discrepancies-NC-homicides-executions.pdf.

report I review official statistics from the NC Department of Corrections concerning each inmate sentenced to death in the modern era (that is, since January 1, 1977).

Table 1 shows the disposition of every North Carolina death sentence. Seventy-one percent of all death sentences imposed in the modern era in North Carolina have subsequently been overturned on appeal. Only 17 percent of death sentences have led to executions. Many more have been released from death row after a second trial reversed their death sentence (176) than are currently on death row (150). Eight individuals (five percent of all those sentenced to death) have subsequently been found not guilty and have walked free, often after many years in prison. (Most recently, Henry McCollum was exonerated after almost 30 years on death row; he was innocent of the crime that put him there.) Table 1 shows the gender and racial characteristics of these men and women as well as the final disposition of their cases. Data come from official NC Department of Corrections records as posted on their website.[2]

Table 1. Disposition of Death Row Cases in North Carolina, 1977–2014.

| Disposition | Male | Female | White | Black | Other | Total |
|---|---|---|---|---|---|---|
| Ever sentenced to death | 389 | 12 | 178 | 195 | 28 | 401 |
| Currently serving on death row | 148 | 2 | 61 | 77 | 12 | 150 |
| Removed to jail pending outcome of new trial | 2 | 0 | 1 | 1 | 0 | 2 |
| Subtotal: Final decisions made | 239 | 10 | 116 | 117 | 16 | 249 |
| Of these cases with decisions made: | | | | | | |
| Sentence commuted by Governor | 5 | 0 | 0 | 4 | 1 | 5 |
| Found not guilty in subsequent trial | 8 | 0 | 3 | 5 | 0 | 8 |
| Resentenced to a sentence less than life | 10 | 0 | 4 | 5 | 1 | 10 |
| Resentenced to life in prison | 144 | 9 | 66 | 77 | 10 | 153 |
| Died in prison of natural causes | 24 | 0 | 11 | 11 | 2 | 24 |
| Suicide in prison | 6 | 0 | 5 | 1 | 0 | 6 |
| Executed | 42 | 1 | 27 | 14 | 2 | 43 |

## Calculating Rates of Reversal

After a sentence of death, appeals continue and new trials are often ordered on the basis of appellate findings of flaws in the original trials of guilt or the separate penalty phase. In capital cases, but not following non-capital convictions, appeals are automatic. If the NC Supreme or appellate courts do not reverse the decision, federal court review is also required before any sentence can be carried out. These direct reviews, of course, dramatically add to the expense of the death penalty and to the delays associated with any eventual execution, as they typically take several years to complete. But they are also instructive because of the very high rates at which they lead to reversal.

[2] Source for inmates currently on death row: http://www.doc.state.nc.us/dop/deathpenalty/deathrow.htm. Source for inmates removed from death row: http://www.doc.state.nc.us/dop/deathpenalty/removed.htm. Both were downloaded in January 2015 and when combined reflect information on every inmate sentenced to death from 1977 through 2014.

Of the 401 inmates who have been sentenced to death in North Carolina, 150 remain on death row and two await new trials. (Those two individuals may or may not return to death row depending on the results of their pending trials.) That leaves 249 cases where final decisions have been made. Of this group, Table 1 shows that 43 have been executed, 30 have died in prison (either by suicide or natural causes), and that the vast majority have had their sentences reduced. Table 2 presents these cases as a percentage of the 249 cases in which final judicial dispositions have been made.

Table 2. Dispositions as a Percent of Cases with Final Outcomes

| Disposition | Male | Female | White | Black | Other | Total |
|---|---|---|---|---|---|---|
| Sentence commuted by Governor | 2 | 0 | 0 | 3 | 6 | 2 |
| Found not guilty in subsequent trial | 3 | 0 | 3 | 4 | 0 | 3 |
| Resentenced to a sentence less than life | 4 | 0 | 3 | 4 | 6 | 4 |
| Resentenced to life in prison | 60 | 90 | 57 | 65 | 62 | 61 |
| Died in prison of natural causes | 10 | 0 | 9 | 9 | 13 | 10 |
| Suicide in prison | 3 | 0 | 4 | 1 | 0 | 2 |
| Executed | 18 | 10 | 23 | 12 | 13 | 17 |
| Total % | 100 | 100 | 100 | 100 | 100 | 100 |
| Total Cases with final outcomes from Table 1 | 239 | 10 | 116 | 117 | 16 | 249 |
| Rate of death penalty reversals | 71 | 90 | 63 | 78 | 75 | 71 |

Note: Reversals include the first four categories: commuted, found not guilty, resentenced to life, resentenced to less than life. Cases not reversed include executions and other deaths. Percentages do not include those remaining on death row or removed to jail pending a new trial.

So far in the history of the modern use of the death penalty in North Carolina, and not counting those cases where the inmates remain on death row and we cannot therefore assess what the final outcome of their appeals may be, execution follows a death sentence only 17 percent of the time. By far the most likely outcome of a death sentence is a subsequent trial or plea arrangement ending in a sentence of life in prison. Seventy-one percent of death sentences are overturned.

The largest study reporting on rates at which death sentences are overturned, conducted by James Liebman, Jeffrey Fagan, and Valerie West and covering 23 years of data in all available states, found a rate of 68 percent of reversal.[3] This is virtually identical to what is found here: Those subsequently found not guilty or resentenced to a penalty of life or less than life in prison, from Table 2, comprise 71 percent of the total cases.

A recent study by Phil Cook reviewing the cost of the death penalty in North Carolina suggested that the state could save $11 million per year by doing away with the punishment.[4] Recognizing that just 17 percent of those sentenced to death are likely to be executed helps explain why the

[3] James S. Liebman, Jeffrey Fagan, and Valerie West, Error Rates in Capital Cases, 1973–1995. Columbia University Law School, June 12, 2000. Available from: http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf.

[4] Philip J. Cook, Potential Savings from Abolition of the Death Penalty in North Carolina. *American Law and Economics Review* 10 (December 11, 2009): 1–32.

system is so expensive. Capital trials are much more expensive than non-capital trials because they last longer, they include an entirely separate penalty phase, they involve mandatory direct review to state or federal courts, and the stakes are higher in general. Prosecutors devote more resources to them, using more experts, demanding greater assistance from law enforcement and the state crime lab. Juries must go through more extensive screening (with higher numbers of peremptory challenges and "death qualification" making them less representative of the communities). Judges allow the trials to last longer, of course, since a life is on the line. Required appeals go on for years. And defense costs are greater as well. A recent study assessing the experience in the state of Washington showed that capital trials, compared to aggravated first-degree murder trials, had significantly greater costs for: jail, defense, prosecution, court, and appeals, and that these were not counter-balanced by the lower costs for post-conviction incarceration. Overall, this study, based on a review of costs in 147 aggravated first-degree murder trials (some of which proceeded capitally) and found a 40 to 50 percent increase in cost, per capital case: $1,152,808 in 2014 dollars.[5] The Washington study also found that, of 33 death sentences, 24 had completed appellate review, leading to 5 executions and 18 reversals—a 75 percent reversal rate, almost identical to that in North Carolina. By contrast, the study listed 298 non-capital cases of which 201 were reviewed by appellate courts, and 15 were reversed. So the reversal rate was 7.5% in non-capital cases and 75% in capital ones (see Collins et al. 2015, pp. 69-70). Thus, the most recent and comprehensive study in a state with a reversal rate similar to North Carolina's found that over a million dollars are spent, per trial, seeking death sentences that, even if imposed, are highly unlikely ever to be carried out. North Carolina is in a similar situation, with high costs for each capital trial, and only 17 percent of the sentences actually carried out.

The process is wasteful in another way as well: it leads the family members of the victims of murders with a false assurance that an execution will of course follow a death sentence. But if the vast majority of death sentences are in fact overturned, this would seem to produce needless torment associated with the possibility—in fact, the great likelihood—of reversal. Prosecutors, judges, and other professionals involved in the process are aware of the general fact that most death sentences are eventually overturned, but family members are not likely to know this. Even those within the criminal justice system may not realize that, like it or not, the reversal rate is almost three-quarters of all cases. In today's system, death is neither swift nor certain; in fact, it remains highly unlikely even for those condemned. It is hard to know what a family member might prefer in the case of their loved one's murder. But few would likely be happy with a process that leads to an initial death sentence, then its reversal. The odds of subsequent reversal (71 percent) are, in fact, more than four times higher than the odds of execution (17 percent).

Why are rates of reversal so high? One reason is related to the substantial procedural errors that plague highly emotional capital trials. Trivial errors or slight imperfections in initial trials are not sufficient for appellate judges to reverse a lower court's judgment of death. Only substantial errors can cause a reversal. Perhaps the most surprising element about the high rate of reversal

[5] Collins, Peter A., Robert C. Boruchowitz, Matthew J. Hickman, Mark A. Larrañaga. 2015. An Analysis of the Economic Costs of Seeking the Death Penalty in Washington State. Seattle University. 1 January. http://www.law.seattleu.edu/Documents/korematsu/deathpenalty/The_Economic_Costs_of_Seeking_the_Death_Penalty_in_WA_FINAL.pdf. Accessed 20 January 2015.

in North Carolina's death penalty system is that this number is not far different from the national average. We all know that no government institutions are perfect, but this rate of error, quite typical of the national average, is substantial. No one would argue that it is desirable. We should debate whether it is acceptable.

## Amount of Time on Death Row

North Carolina's current death row inmates have been on death row for over 16 years, on average. With few inmates being sentenced to death, and no executions since 2005, the population of death row is "aging in place." While the average of current death row inmates is 16 years, over time there has been a wide range of lengths of stay. Daniel Webster served just 19 days, from October 18, 1977 until his suicide on November 6; similarly, Rayford Piver served just over seven months before his suicide in 1988. Most serve considerably longer periods, including those who are eventually exonerated (10 years on average, including one case of almost 30 years), who have their sentence commuted by the governor (8 years), or who receive a sentence less than death after a subsequent trial (5 years), or those resentenced to life in prison (6 years). Those executed range from 2 years 7 months to over 22 years on the row, with an average period of over ten years. Those currently serving have served an average of over 16 years, with a range up to 30 years. Norris Taylor died on death row in 2006 at the age of 61 after spending over 26 years on death row; Ernest McCarver also served over 26 years before dying on death row in November 2014. Henry McCollum served over 29 years on death row before being released in 2014 on the grounds of innocence. Table 4 shows the figures.

Table 4. Time Spent on Death Row

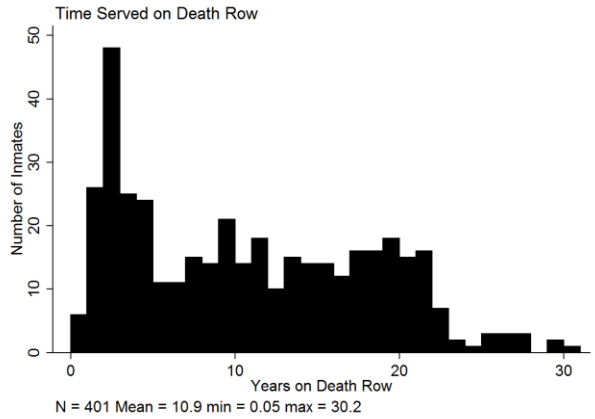
| Disposition | Number of Inmates | Years on Death Row | | |
|---|---|---|---|---|
| | | Mean | Min | Max |
| Ever sentenced to death | 401 | 10.9 | 0.05 | 30.2 |
| Currently serving on death row | 150 | 16.3 | 0.74 | 30.2 |
| Removed to jail pending new trial | 2 | 13.3 | 11.4 | 15.3 |
| Sentence commuted by Governor | 5 | 8.0 | 1.6 | 10.6 |
| Found not guilty in subsequent trial | 8 | 9.9 | 2.1 | 29.9 |
| Resentenced to a sentence less than life | 10 | 5.2 | 1.9 | 11.8 |
| Resentenced to life in prison | 153 | 6.2 | 0.98 | 25.9 |
| Died in prison of natural causes | 24 | 10.9 | 2.9 | 26.5 |
| Suicide in prison | 6 | 5.7 | 0.05 | 13.6 |
| Executed | 43 | 11.0 | 2.6 | 22.4 |

Years on death row for those remaining there is calculated from December 31, 2014; for all others it is the date of their removal from death row.

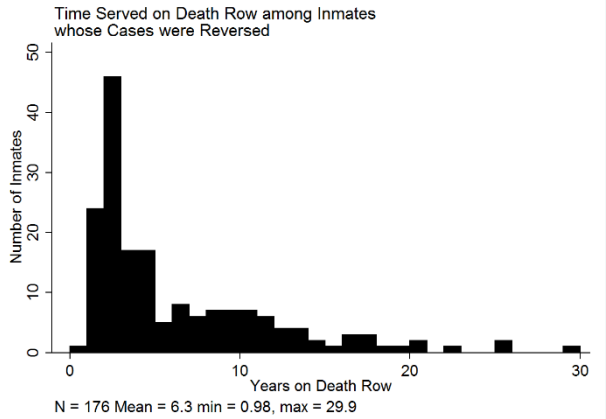
Figure 1 illustrates the data presented in Table 4. Part A shows the overall distribution of time on death row for all inmates ever condemned; B for those whose sentences were later reversed; C for those executed; and D for those who remain on death row today.

Figure 1. Years on Death Row

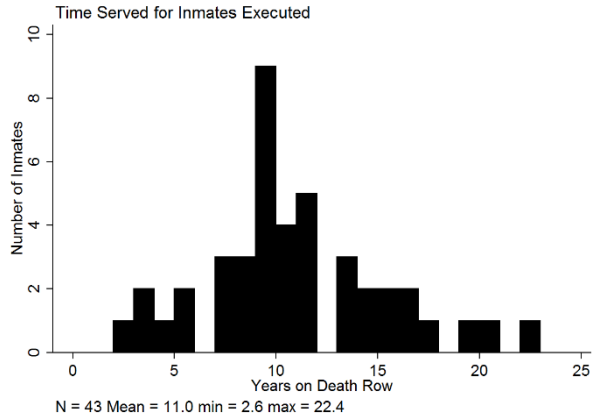
A. Overall



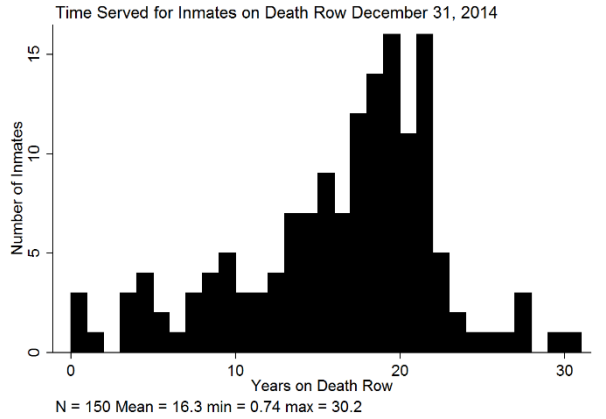

B. Cases Later Reversed




C. Inmates Executed




D. Inmates on Death Row



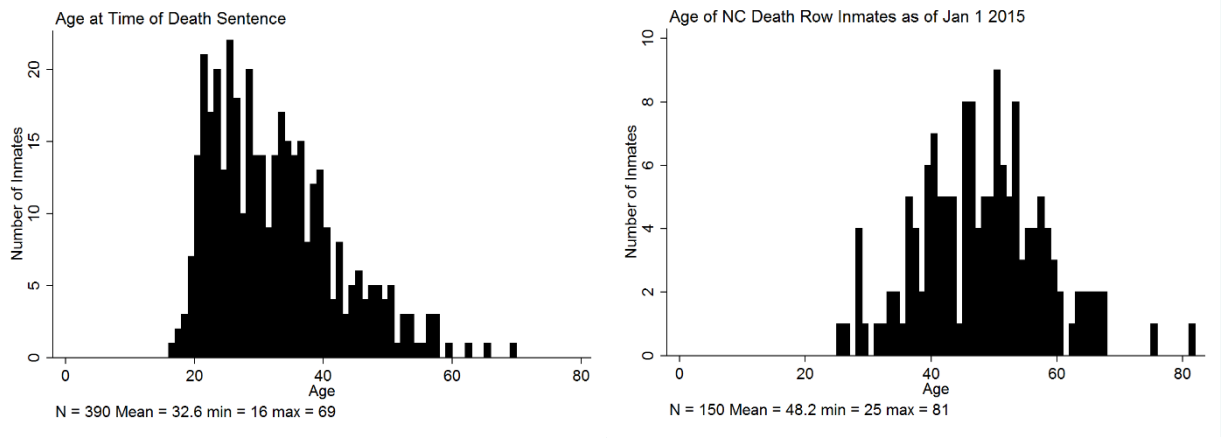

The death row population is clearly made up of distinct groups. Among those whose sentences were eventually reversed, reversal came after fewer than 4 years, on average. The median number of years served among this group was 3.8, and 60 percent served fewer than five years on death row. Of course, the figure also shows a "long tail" of inmates eventually removed from death row, but only after 10 years or more. The extreme case is that of Henry McCollum. Sentenced to death on October 25, 1984, he served 10,905 days on death row before being released on September 3, 2014: just under 30 years. He was innocent of all charges. (Leon Brown, also sentenced to death in 1984, had his sentenced reduced to life in prison after three years on death row.)

The 43 inmates who have been executed served an average of 11 years on death row. The vast majority of current death row inmates have been there much longer than that. In fact, 41 inmates have already served 20 years or more. With few inmates entering the system because of dramatically reduced rates of death sentencing and no executions since 2006, North Carolina's death row is aging, slowly but surely.

Figure 2 shows the developing age issues on death row. Part A shows how old inmates were at the date of their death sentence, and Part B the age of current death row inmates as of December 31, 2014.

Figure 2. Age of Death Row Inmates

A. Age at Time of Death Sentence B. Age of Current Death Row Inmates



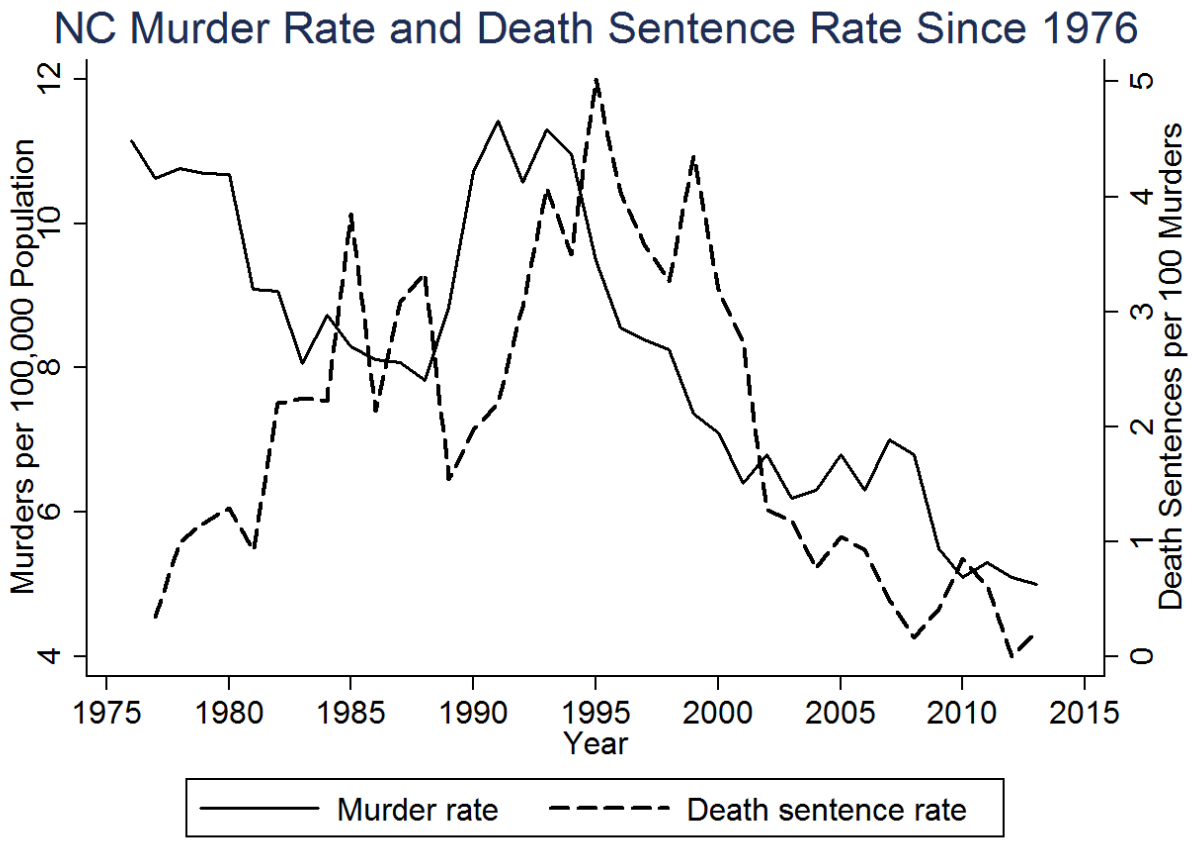

Leon Brown was not yet 17 years old when sentenced to death; Freddy Lee Stokes and Richard Wayne Joyner were not yet 18; they each served several years before being removed from death row. Brown, of course, was actually innocent of the charges and was released from prison entirely in 2014, at age 47. William Quentin Jones was 19 years old when sentenced to death in 1987 and was executed in 2003 at age 34; of course for all these inmates their age at the time of the crime was lower than when admitted to death row. The US Supreme Court ruled that the execution of juveniles was unconstitutional in its *Roper v. Simmons* decision in 2005. At that time, North Carolina was one of 12 states with juvenile inmates on death row; Lamorris Chapman, Travis Walters, Thomas Adams, and Kevin Golphin were removed from death row as a result of this decision. Leon Brown had been removed from death row because he was found guilty of rape, but not murder, in his second trial after his first death sentence was vacated. As in other states that have traditionally been significant users of the death penalty, juveniles have not been spared in North Carolina. Half of those sentenced to death since 1976 have been under the age of 30. Half of those currently on death row today are over the age of 48. Blanche Moore (81) and Jerry Cummings (75) are the oldest inmates and are joined by six additional inmates over the age of 65, as Figure 2B makes clear.

Over 70 percent of death sentences are later overturned. Executions follow death sentences in just 17 percent of cases. Most inmates currently on death row have been there longer than those who were previously executed. The young are sentenced to death but those on death row are middle-aged. How did these trends develop? One important place to look is at a series of reforms that have restricted the applicability of the death penalty, given prosecutors the discretion not to seek death if they do not believe the case is truly atrocious, and produced a dramatic decrease in the rate at which homicides translate into death sentence.

## Three Periods of North Carolina's Death Penalty

Three periods characterize the state's use of capital punishment. From 1976 to about 1990, death sentences became more common even as the homicide rate was in decline. During the 1990s and until about 2000, both homicides and death sentences were particularly common. Following from the late 1990s or early 2000s, both have declined dramatically. Figure 3 shows the homicide rate (homicides per 100,000 population) and the death sentence rate (sentences per 100 murders) since 1976.

Figure 3. Homicide Rate and Death Sentence Rate since 1976.

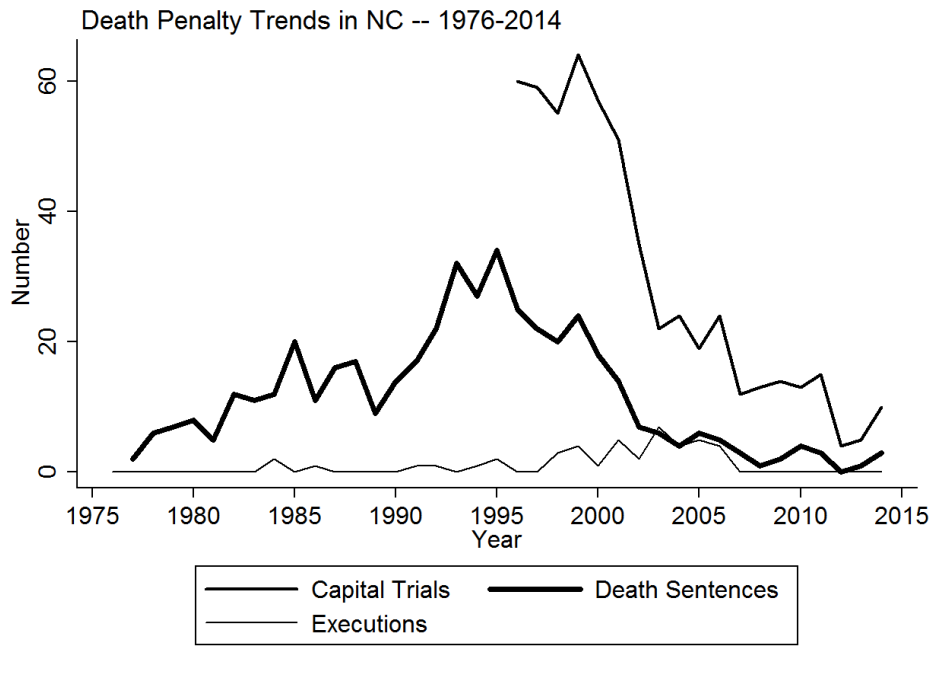



1976 saw 609 homicides in North Carolina, or about 11 per 100,000 population. That number declined to about 8 per 100,000 by 1983 before beginning to rise again after 1989. Since 1993 it has been on a steady decline, from 11.3 (785 homicides) to just 5.0 (473 homicides) in 2013, the last year with data available. Death sentences followed a pattern relatively unrelated to homicides in the early years, and represented very low absolute or relative numbers: never more than 10 death sentences per year before 1982, always less than two percent of the number of homicides in any given year. Use rose dramatically in the 1980s and through the 1990s, reaching as many as 34 death sentences, or 5 percent of homicides, in 1995. Since this date, death sentences, like homicides, have declined dramatically, in particular after certain reforms in the early 2000s took effect.

Before 1990, the murder rate was declining but North Carolina was ramping up its newly revised death penalty. Use of capital punishment accelerated dramatically when the murder rate rose in the 1990s, reaching a point where sentences reached above 30 per year, averaging more than 22 in the period from 1990 through 2001 (more than double the average number in 1977-1989). Beginning in about 1994, the murder rate began to decline, in a generation-long trend that continues to this day. This decline has transformed the politics of the death penalty. As the rate of homicide has declined, so has the relative use of the death penalty. Combining the declining rate of death sentences per homicide, and the declining homicide rate, we have seen a virtual abandonment of the death penalty in North Carolina. The vast bulk of those individuals on death row were sentenced under laws that have since been substantially revised, as shown in the following section.

Figure 4 shows the number of capital trials, death sentences, and executions over time.[6]

Figure 4. Capital Trials, Death Sentences, and Executions.




[6] The total number of death sentences reflected in Figure 4 is 450; higher than the 401 inmates condemned shown in tables and figures above. This is because many inmates were sentenced multiple times to death. With 70 percent of death sentences reversed, many have been reimposed. For example, Randy Joe Payne was sentenced to die on January 25, 1985, again on February 11, 1988, and again on September 28, 1992. He committed suicide while on death row on August 28, 1998. Ricky Lee Sanderson, similarly had three death sentences (6/2/86, 6/30/91, and 11/3/95) before being executed in 1998. Sanderson was the killer of 16 year old Suzi Holliman, whose father L. Hugh later ran successfully for NC House of Representatives. Sanderson had dropped all appeals partly based on his desire to see the Holliman family avoid the anguish of further appeals, and Holliman personally witnessed the execution of his daughter's killer. Holliman rose to be Majority Leader in the House, but was later targeted in his reelection campaign for his support of the Racial Justice Act and lost his seat in 2010. The campaign posters used against Holliman featured a picture of Henry McCollum and the phrase "Keep death row inmates where they belong and get rid of criminal coddler Hugh Holliman."

Executions have been extremely rare in North Carolina except for a short period in the late-1990s and early 2000s. The number of death sentences can clearly be seen to peak in the mid-1990s, declining dramatically since then. Capital trials, which are available only since 1996, show the most dramatic decline. Executions, of course, have always been rare, as discussed below. Why did prosecutors seek the death penalty so much during the 1990s and so rarely today? One reason might be a NC Supreme Court decision in *State v. Case*[7] in which the defendant, Jerry Douglas Case, appealed his death sentence. Mr. Case had accepted a plea agreement to first-degree capital murder with an understanding that the prosecutors would not present evidence of further aggravating circumstances beyond just a single one. In the penalty phase, in spite of this agreement, Mr. Case was sentenced to death anyway. Mr. Case had second thoughts about the bargain he had accepted, and appealed his death sentence, as was his automatic right. The court ruled:

> It was error for the State to agree not to submit aggravating circumstances which could be supported by the evidence…. The decision as to whether a case of murder in the first degree should be tried as a capital case is not within the district attorney's discretion. … This is so in order to prevent capital sentencing from being irregular, inconsistent and arbitrary. If our law permitted the district attorney to exercise discretion as to when an aggravating circumstance supported by the evidence would or would not be submitted, our death penalty scheme would be arbitrary and, therefore, unconstitutional. Where there is no evidence of an aggravating circumstance, the prosecutor may so announce, but this announcement must be based upon a genuine lack of evidence of any aggravating circumstance (*State v. Case*, p. 58, internal citations omitted).

The logic of this decision was remarkable in that Mr. Case had actually benefitted from the plea agreement. Though it did not work out for him in the end (he was sentenced to death in any case), the agreement by prosecutors to withhold evidence about further aggravating circumstances can be considered to have reduced the likelihood of a death sentence. With the court ruling that prosecutors cannot make agreements with capital defendants that help the defendant, the ruling was clear, and prosecutors responded very high numbers of capital prosecutions, as the court demanded.

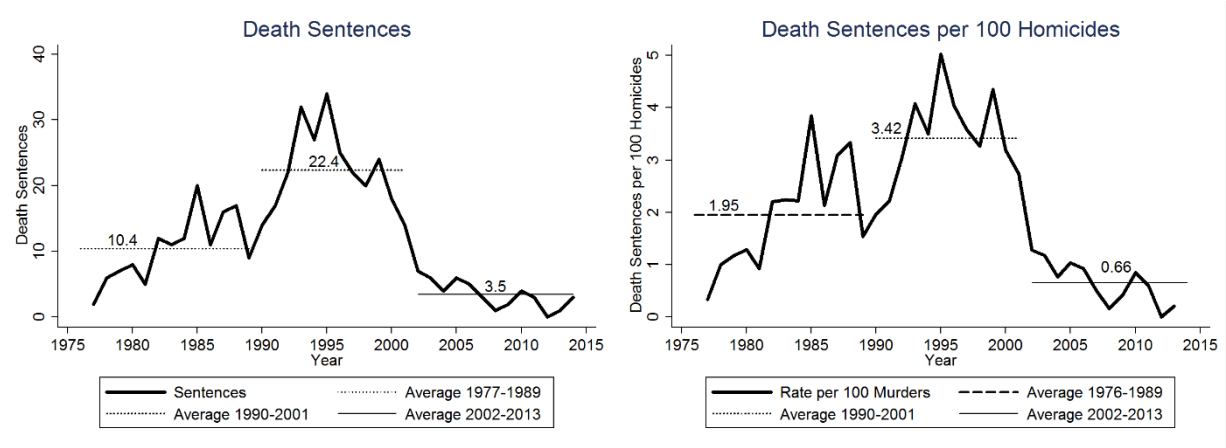
A second reason for the high numbers of prosecutions in the 1990s may, paradoxically, be the imposition in 1994 of Life Without Parole (LWOP) for first-degree murder convictions. This meant that the difference between a second-degree murder conviction, which might involve a penalty leading eventually to parole after 15 years, and first-degree, which would involve no opportunity for parole, further tied the hands of prosecutors who might have been willing to consider a plea to second-degree murder in some cases. By making starker the difference between first- and second-degree murder cases, prosecutors had few incentives to agree to a second-degree murder deal. By clarifying in *State v. Case* that all aggravating evidence must be presented to a jury, the court made clear its seriousness of intent in insuring that North Carolina's death penalty be protected from accusations of arbitrariness. The result of these dual factors was a long period when the death penalty became much more common that it was before, or has been since. Prosecutors pressed capital cases vigorously until the law was changed in 2001 giving

[7] 410 S.E.2d 57 (1991).

them the freedom not to do so if they felt the case did not merit it. Capital prosecutions plummeted immediately.

Figure 5 shows the numbers of death sentences annually for three periods: before 1990, during the 1990s until 2001, and for the period after 2001. Part A shows the simple counts, and Part B shows the number of death sentences per 100 homicides. Note that as the number of homicides declined, so too did the rate at which homicides were translated into death sentences, leading to an even more dramatic decline in death sentences. Death sentences per 100 homicides declined by 81 percent (from 3.42 to 0.66), and death sentences declined by 84 percent (22.4 to 3.5) from the 1990-2001 period to 2002-2013. Of course, Figure 4 above showed that capital trials had declined even more starkly, from more than 60 in the late 1990s to fewer than 10 in 2012 and 2013 combined.

Figure 5. North Carolina Death Sentences over Time.
A. Number of Death Sentences B. Death Sentences per 100 Homicides




With an 84 percent decline in the average number of death sentences per year, North Carolina went from one of the most prolific users of the penalty to a position far below the national average. With each year that passes, the state drops further behind Texas and other more prolific users of death. With 43 executions, the state is ranked 9th nationally in the number of executions since 1977.[8] With Arkansas, it is among just two states in the top 15 to have had no executions since 2010. With no executions since 2006, and very few death sentences, North Carolina has shifted even more quickly than the nation as a whole away from capital punishment.

Death sentences have never been very common, compared to homicides. Even at the period of peak usage, only once did the number of death sentences reach five percent of the number of homicides, and overall average is just about two percent, and consistently below one percent since 2006. Rather than steady and predictable usage, we see rather a surge in use of the death penalty during the 1990s. As of 1990, exactly 100 individuals had been condemned to death; by 2000, the number was 345, and only 56 more have been added since then. Figure 6 shows the outcomes of death sentences issued in each year since 1977.

[8] See http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976.

Figure 6. Death Sentence Outcomes over Time.

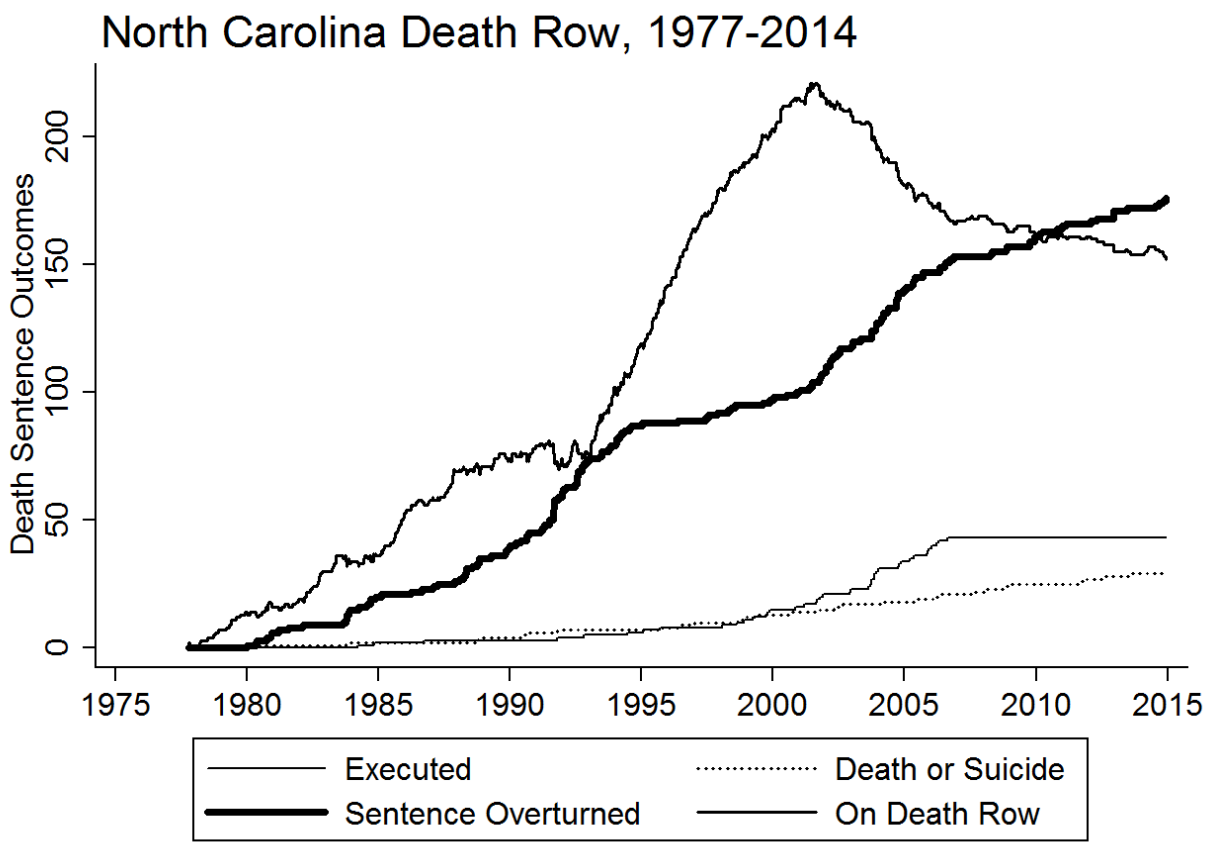



Figure 6 shows the outcome for each death sentenced handed down since 1977; all 401 death sentences are accounted for. Reading up at the year 2014, the figure shows that 30 inmates had died on death row from natural causes or suicide; looking back over time at that dotted line shows the number of inmates in that category for any point in time. The thin solid line shows the number of inmates executed: 43 as of 2014, and a flat line back until 2006. The number of executions, in fact, rose sharply only from 1997 (at which point 8 had been executed) to 2006 (43). In less than 10 years, 35 were executed; no other decade saw as many as 10. The number of inmates whose sentences have been reversed is displayed in the thick black line; 176 inmates as of 2014. Finally, the thinner solid line which peaks in the early 2000s is the number of inmates on death row as of that year: 152 as of 2014, reduced from 215 in 2001.[9]

Figure 6 makes clear that the number of death row inmates who have had their sentences reversed is now greater than the current population of death row. It also shows the large decline in the death row population, from its peak of 215 in 2001. With reversals increasingly common over time, but fewer and fewer death sentences occurring, it is a logical consequence to note that current death row inmates are going to continue to dwindle. In fact, as shown in the next section, they would not be there if they had been tried under current rules and procedures.

[9] Figure 6 includes the 2 inmates awaiting a new trial with the current death row inmates; otherwise the numbers for 2014 are identical as those in Table 1.

## Most Current Death Row Inmates Were Sentenced Under Laws We No Longer Condone

Given the distinct periods when the death penalty has been used at such markedly different rates, and the recent decline in the use of capital punishment, it seems clear that many of those currently on death row must have been sentenced during a period and under a set of rules and norms that no longer apply. In fact, North Carolina has enacted a number of important new policies which have had the effect of reducing the use of the death penalty. While Figures 3 through 5 showed important changes in the rates at which we used the death penalty over time, Table 5 shows why. Beginning in 1994, North Carolina enacted a series of reforms which collectively had the effect of reducing dramatically the use of capital punishment. These reforms are listed in Table 5 along with their effective date and the number and percent of current death row inmates who were sentenced before that reform took effect.

Table 5. Major Reforms Affecting the Death Penalty

| | | Current Inmates Pre-Dating Reform | |
|---|---|---|---|
| Reform | Effective Date | N | % |
| Life without parole | 10/1/1994 | 31 | 21 |
| Post-conviction discovery | 6/21/1996 | 67 | 45 |
| DA discretion | 7/1/2001 | 111 | 74 |
| IDS created | 7/1/2001 | 111 | 74 |
| Post-conviction DNA testing | 10/1/2001 | 113 | 75 |
| Pre-trial open file discovery | 10/1/2004 | 124 | 83 |
| Eyewitness identification reform act | 3/1/2008 | 136 | 91 |
| Electronic recording of interrogations | 3/1/2008 | 136 | 91 |
| Forensic science reforms | 7/1/2011 | 144 | 96 |
| Total | | 150 | 100 |

Figure 7 shows the 150 current death row inmates arrayed by date of arrival, with vertical bars representing each of the reforms listed in Table 5. As the table indicates, 111, or 74 percent of current inmates were already on death row before the two most important reforms were implemented: The creation of Indigent Defense Services, centralizing and professionalizing the representation of capital defendants throughout the state, and DA discretion, ended a system that had previously required capital prosecution for all first-degree homicides with any aggravating circumstance, no matter whether the local District Attorney believed the case merited it. Additional reforms have had important impacts on the death penalty. Figure 7 makes clear, however, that the vast majority of current death row inmates were sentenced under a system that did not provide the safeguards we now require. Of course, none of these reforms was made retroactive, so there will be no opportunity for current inmates to benefit from them.

Figure 7. Current Death Row Inmates by Date of Sentence.

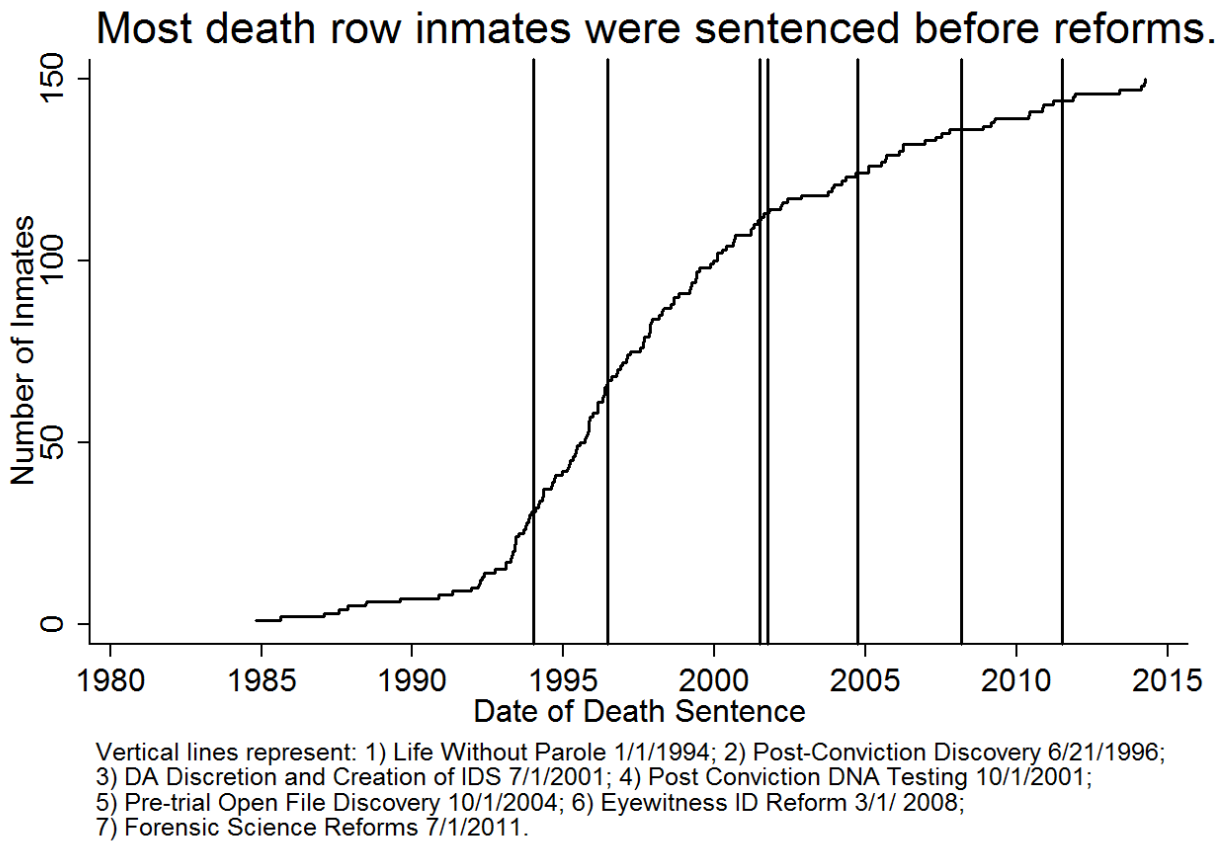



Figure 7 makes clear that by July 1, 2001, when District Attorneys were given the right to use their discretion about whether to seek death and when the state-wide Indigent Defense Services was created, already 111 of the 150 current death row inmates had been condemned.

One possible indication of the power of the 2001 change comes from comparing cases originally tried before 2001 but overturned after that date. In these cases, the DA would originally have been forced to seek death, but could use discretion about whether to seek it again. Forty-two cases fall into this category. Of these cases, the outcomes were as follows: In 30 cases, the prosecution did not seek death.[10] Five were allowed to plead to second-degree murder or less.[11]

[10] Death penalty not sought by prosecutor (30 cases): Willie Lloyd, Bobby Harris, Michael Ward, Gary Long, Kevin Jones, Eddie Ivey, Carlos Canady, Anthony Craig, Francis Anthony, James Millsaps, Brandon Jones, Ronald Valentine, Ronald Poindexter, Parish Matthews, Michael Maske, Donald Scanlon, Todd Boggess, Michael Fullwood, Melvin Hardy, John Conaway, Elmer McNeill, Jimmy McNeill, George Goode, Kyle Berry, Ronald Rogers, Michael Pinch, Jamie Cheek, John Oliver, Isaac Stroud and Patricia Jennings.

[11] Plea agreement to second-degree murder or less (5 cases): Steven Bishop, Yahweh Israel, Marshall Gillespie, Jerry Hamilton, and Rex Penland,

Seven were retried capitally. Of these, four were sentenced to LWOP, and three were sentenced to death. Of those three, one had that sentence overturned, and in what would have been the third death penalty trial, the prosecution agreed to a plea for LWOP.[12] Re-consideration of pre-2001 cases during the period of prosecutorial discretion led to widespread use of that discretion, with death charges not even sought in the vast majority of cases. Just two of these inmates remain on death row today. Clearly, an important driver in the decline in the use of North Carolina's death penalty statute is that, as of 2001, DA's are no longer bound to seek it. Just 7 of 42 cases were retried capitally, and only two of 42 are under sentence of death today.

## Conclusion

North Carolina's modern history with the death penalty has been highly charged emotionally but has been extremely ineffective in its putative goal of executing the "worst of the worst." Efforts to reduce the possibility of its arbitrary use led to court rulings requiring it to be used much more than even prosecutors seem to have wanted; when released from the mandatory use of the penalty, they have sought it rarely. The vast bulk of death sentences imposed have later been reversed; today more have been reversed than remain on death row. Just 17 percent of death sentences have been carried out, and the vast bulk of those executions occurred in a short period of eight years from 1998 through 2005. Since prosecutors have had the opportunity to eschew death, capital prosecutions have plummeted and death sentences have been reduced to numbers far below 1 in 100 homicides for the first time in modern history. At the same time, homicides have declined as well. With prosecutors no longer seeking death, with executions in limbo, with the vast bulk of sentences overturned on appeal, and with homicides declining steadily, it is clear that death penalty has been a squander of public money on a massive scale, that it has done little to enhance public safety, and that it serves little other than a symbolic purpose.

[12] Tried capitally and sentenced to Life (4 cases): Antoine Allen, Lionel Rogers, Cornelius Nobles and Timothy Allen. Tried capitally and resentenced to death (3 cases): Jeffrey Duke, Jathiya Al-Bayyinah, Kyle Berry. Berry's case was again overturned and he received life in a plea agreement, as listed in the first category above.

Henderson Hill
co-director RedressNC
Senior Counsel, ACLU/CPP
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September 11, 2020

Dear Ms. Kipfer,

Thank you for sharing your story, it touches my heart and will touch the heart of any person who reads it. Your testimony will be added to the records of Working Group 4.

I very much want to continue this conversation. After 39 years of law practice –all of it focused on criminal defense and civil rights—I was proud to participate in the Task Force. I see it as part of the national conversation about race and criminal justice. I was proud of North Carolina when I saw Chief Justice Beasely's televised remarks on the need of the courts to address a long and unfortunate history of racial discrimination that has characterized our justice system for centuries. Making racial equity an organizing principle of the criminal justice system will require significant change. I am pleased to hear from so many North Carolinians about how improvements can be made. And yes, we must listen to many voices.

Just this week, I spoke with Ms. Thomas, the sister of a murder victim, who like you honored me with her story of violent loss and expressed a desire for the justice system to improve. She voiced concerns I've heard from victims over the years about the adequacy of communications with victim families from the court and other system actors. A most painful memory of Ms. Thomas was that law enforcement officers regarded her sister who suffered from a substance abuse problem as someone who in part "deserved" what happened to her and was denied financial assistance for the children. To this proud African American military veteran, and mother of a serving servicemen the disrespect of her murdered sister, newly orphaned nieces and nephews, and her grieving mother was rooted in race and class discrimination. We will be talking to a number of murder victim family members about race and the legal system and what they hope will change going forward. I am sure there will be a number of views shared as to what that looks like.

I was struck by your description of the Structured Sentencing Act as "promises made by the State of NC about what we, as victims, can expect." This concept deserves a lot more discussion, and I'm not sure I can do it justice in this letter. But let me offer my most immediate response. I remember the legislative study and process surrounding passage of the Act—and it was complicated and involved. And of course crime victims, harmed parties and communities were important stakeholders. But the notion of promises made to any particular stakeholder is not what I remember. Importantly, the Act was intended in significant part to manage some of the vast discretion inherent in its predecessor, the Fair Sentencing Act;

discretion that contributed to vast racial disparities in sentences. And of course, the Fair Sentencing Act, was thought to be an improvement on its predecessor sentencing scheme, which was intended to improve practices dating back to the Jim Crow era, and the Black Codes, Reconstruction and beyond. Twenty-five years after Structured Sentencing many of its shortcomings are readily apparent. More broadly, in 2020 we are at an important juncture where the community needs to ask more fundamental questions: Have we simply shifted discretion from one part of the system, judges to other actors in the system (prosecutors and law enforcement officers.). Do we have a framework of justice that is designed to maximize services to harmed parties and enhance public safety? Does a justice system that only prioritizes retributive justice miss an important feature of restorative justice?

This week our Working Group heard from Latrina Kelly James, a veteran advocate for harmed parties and for organizations that advocate for harmed parties. One interesting contribution she made is the scale of victimization that never gets addressed by the justice system. Harmed parties, victims of violence, whose offender is not arrested, never get any services or support from most programs. Unsurprisingly, African American harmed parties endure much lower rate of closed cases than white harmed parties. One statistic caught my attention, I'm going by memory, but I think I've got it correct. Black boys and young men suffer from violent crime at a rate 15 times that of white women, yet 72% federal funds for victims of violent crime are directed to white female victims. Almost no one thinks that number grows out of racial animus, ala Bull Connor. Instead, the problem is systemic, the racial disparities in how our institutions recognize and respond to harm experienced by persons and the efficacy of trauma reduction interventions, is persistent and overwhelming. How do we change that? There are no easy answers, but whether we are talking money bail, collateral consequences of convictions, felon disenfranchisement, or the issues Working Group 4 has been assigned, maintaining the status quo is not a satisfying option.

I am happy to explore ways to continue this conversation. I am absolutely confident that folks of good will, especially those with intimate experience with violent crime and the operations of the justice system, will find much common ground. For my part, I feel even more connected to beloved community having learned just a little bit of the story of your Tim, and am praying that your memories of the good, fun-loving man will always be a blessing for you and your daughters.

In this time of pandemic, I find I am spending much of my life on zoom, and the concept of a workday and the work week seems to have lost much meaning. Under these strange and hopefully short-lived conditions, technology has proven both a blessing and a curse. I would certainly count it a blessing if we have the opportunity to continue this conversation by zoom.

Wishing you safety and peace,

Henderson

# 7

# A Crisis of Confidence

## Errors, Costs, Delays, and Reversals

North Carolina's long and enthusiastic embrace of the death penalty began to crumble with the accumulation of a number of events beginning in the 1990s. As discussed in previous chapters, the state has a long and close history with the death penalty. Even more important, its response to US Supreme Court challenges in the 1970s was to double-down on the penalty. North Carolina, along with Louisiana and several other states, responded to the Court's invalidation of all existing laws in 1972 by making death the mandatory penalty for all capital crimes. This reversion to the pre-1940s system of mandatory death was in turn ruled unconstitutional in 1976.[1] The state then mandated that if death could not be mandatory, then capital prosecution would be. District attorneys were required to seek the death penalty in every possible case. When a 2001 reform finally gave prosecutors the discretion to seek the death penalty only where they thought it was merited, North Carolina was the only state still maintaining such an aggressive stance. In other words, the state response to *Furman* was not lukewarm or uncertain: North Carolina stood at the extreme. By 1976, it had the largest death row in the nation and a mandatory penalty of death for first-degree homicide. Given this bipartisan consensus so much in favor of the ultimate punishment, how did this enthusiasm break down?

[1] *Woodson v. North Carolina* and *Roberts v. Louisiana* invalidated the two states' mandatory death penalty systems, and *Gregg v. Georgia*, *Proffitt v. Florida*, and *Jurek v. Texas* validated "guided discretion" systems in Georgia, Florida, and Texas, respectively. The five cases were announced at the same time, on July 2, 1976 and are sometimes referred to as the "July 2" cases.

We focus on four elements here: Highly publicized exonerations shaking to the core many people's confidence that the system could be counted on to "get it right" every time (and, given that many of those exonerated were African American, inserting an important racial element into the debate), the demonstration of high financial costs of the system, growing delays between the time of crime and the time of execution, and a surprisingly high rate of death sentence reversals. While the state was sentencing scores of individuals to die in some years, only a small number of these condemnations actually lead to an eventual execution: just 43 executions resulted from over 500 death sentences over the period from 1972 through 2018. Together, these developments shook the state's enthusiastic embrace of capital punishment to the core, and, with dwindling usage, the penalty has become purely symbolic.

As of July 1, 2018, it has been almost 12 years since the state carried out an execution. Since that last execution, just 18 death sentences have been handed down, and 46 individuals have left death row (mostly by having their sentence reversed, but sometimes by natural illness and death by old age). In 2017, five death row inmates died of natural causes, two had their sentences reversed, and no one was sentenced to death or executed. So, the state's once enthusiastic embrace of the penalty has dwindled to a series of contradictions, with few being sentenced to death and many inmates leaving death row each year, but none being executed. Here, we focus on the beginnings of the end, a series of events that shook the state's long-standing enthusiasm for capital punishment and reduced the flow of death sentences to a trickle.

Death sentences and executions peaked nationally and in North Carolina in the mid-1990s. From the 1970s through the mid-1990s, use of and enthusiasm for the punishment seemed to grow regularly. Death sentences averaged 11 per year in the 1980s, 20 per year in the 1990s,

but then declined to just 6 in the 2000s, and fewer than two in the period from 2010 through 2017. What precipitated this decline?

## Recognizing Imperfections in the System: Exonerations Front and Center

As in other states, exonerations have risen dramatically in North Carolina. As these occurred, attention shifted from the lucky inmate whose wrongful incarceration was happily resolved before it was too late to other topics. Confidence in the system was shaken. Reforms (mostly detailed in the next chapter) were put into place to ensure such errors would be minimized. In turn and with the passage of time, these led both to fewer death sentences and more exonerations, in a cycle which has dramatically shaken public confidence and reduced the use of the death penalty. Working with colleagues Saundra Westervelt, and Kim Cook, Baumgartner previously described a number of the public policy responses to the rise of exonerations in the 1980s and 1990s, nationwide.[2] These have included bills to limit the use of the death penalty, reduced numbers of death sentences, and such reforms as double-blind police line-ups and other changes designed to reduce the possible incidence of wrongful conviction. North Carolina's experience fits into these national trends. But, as in other areas, the state has often been at the forefront of reform.

Table 7.1 lists 60 North Carolina exonerations from the National Registry of Exonerations, covering the period between 1989 and June 30, 2018.[3]

Table 7.1. North Carolina Exonerations.

| Last Name | First Name | Age | Race | County | Minimum Sentence | Convicted | Exonerated | Years Served |
|---|---|---|---|---|---|---|---|---|
| Shreve | Thomas | 31 | W | Onslow | Probation | 1988 | 1989 | 1 |
| Jean | Lesly | 22 | B | Onslow | Life | 1982 | 1991 | 9 |
| Cotton | Ronald | 22 | B | Alamance | Life | 1985 | 1995 | 10 |

[2] See Baumgartner, Westervelt, and Cook 2014.
[3] This list begins with exonerations in 1989, and therefore excludes the 1974 and 1975 death row exonerations of Samuel Poole and Christopher Spicer, as well as the posthumous exoneration of Charles Munsey in 2003; for more information see http://ncexonerations.weebly.com/.

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Kelly | Robert | 40 | W | Chowan | Life | 1992 | 1997 | 5 |
| Wilson | Kathryn Dawn | 22 | W | Chowan | Life | 1993 | 1997 | 4 |
| Clark | Carey | 37 | W | Avery | Life | 1996 | 1998 | 2 |
| McEachern | Toney | 34 | B | Robeson | Life | 1993 | 1998 | 5 |
| Brown | Keith | 25 | B | Wilson | 35 years | 1993 | 1999 | 6 |
| Rivera | Alfred | 25 | H | Forsyth | Death | 1997 | 1999 | 2 |
| Garner | Terence | 16 | B | Wayne | 32 years | 1998 | 2002 | 4 |
| Snipes | Steven | 35 | B | Lee | 7.5 years | 1998 | 2003 | 5 |
| Waters | Leo | 30 | W | Onslow | Life | 1982 | 2003 | 21 |
| Gell | Alan | 20 | W | Bertie | Death | 1998 | 2004 | 6 |
| Hunt | Darryl | 19 | B | Forsyth | Life | 1985 | 2004 | 19 |
| Smith | Sylvester | 32 | B | Brunswick | Life | 1984 | 2004 | 20 |
| Dail | Dwayne Allen | 17 | W | Wayne | Life | 1989 | 2007 | 18 |
| Hoffman | Jonathon | 41 | B | Union | Death | 1996 | 2007 | 11 |
| Chapman | Glen Edward | 24 | B | Catawba | Death | 1994 | 2008 | 14 |
| Daniels | Erick | 14 | B | Durham | 10 years | 2001 | 2008 | 7 |
| Jones | Levon | 28 | B | Duplin | Death | 1993 | 2008 | 15 |
| Abbitt | Joseph Lamont | 31 | B | Forsyth | Life | 1995 | 2009 | 14 |
| Massey | Shawn G. | 25 | B | Mecklenburg | 11.5 years | 1999 | 2010 | 11 |
| Pierpoint | Jonathan Scott | 28 | W | Madison | Life | 1992 | 2010 | 18 |
| Taylor | Gregory | 28 | W | Wake | Life | 1993 | 2010 | 17 |
| Kagonyera | Kenneth | 20 | B | Buncombe | 12 years | 2001 | 2011 | 10 |
| Wilcoxson | Robert | 21 | B | Buncombe | 12.5 years | 2002 | 2011 | 9 |
| Chavis, Jr. | Benjamin | 23 | B | New Hanover | 34 years | 1972 | 2012 | 40 |
| Epps | Reginald | 17 | B | New Hanover | 28 years | 1972 | 2012 | 40 |
| Grimes | Willie | 41 | B | Catawba | Life | 1988 | 2012 | 24 |
| Jacobs | Jerry | 18 | B | New Hanover | 29 years | 1972 | 2012 | 40 |
| McKoy | James | 17 | B | New Hanover | 29 years | 1972 | 2012 | 40 |
| Moore | Wayne | 18 | B | New Hanover | 29 years | 1972 | 2012 | 40 |
| Moreno | Noe | 26 | H | Mecklenburg | 18 years | 2007 | 2012 | 5 |
| Patrick | Marvin | 18 | B | New Hanover | 29 years | 1972 | 2012 | 40 |
| Shepard | Ann | 33 | W | New Hanover | 15 years | 1972 | 2012 | 40 |
| Slade | Parrish | 21 | B | Moore | Life | 1989 | 2012 | 23 |
| Tindall | Connie | 21 | B | New Hanover | 31 years | 1972 | 2012 | 40 |
| Vereen | Willie | 17 | B | New Hanover | 29 years | 1972 | 2012 | 40 |
| Wright, Jr. | William | 18 | B | New Hanover | 29 years | 1972 | 2012 | 40 |
| Armstrong | LaMonte | 38 | B | Guilford | Life | 1995 | 2013 | 18 |
| Lamb | Larry | 36 | B | Duplin | Life | 1993 | 2013 | 20 |
| Brown | Leon | 15 | B | Robeson | Death | 1984 | 2014 | 30 |
| McCollum | Henry | 19 | B | Robeson | Death | 1984 | 2014 | 30 |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Parker | Michael | 35 | W | Henderson | Life | 1994 | 2014 | 20 |
| Shelton | Horace | 51 | B | Buncombe | 10.6 years | 2012 | 2014 | 2 |
| Womble | Willie | 21 | B | Granville | 80 years | 1976 | 2014 | 38 |
| Isbell | Teddy | 35 | B | Buncombe | 3 years | 2003 | 2015 | 12 |
| McInnis | Edward | 27 | B | Scotland | Life | 1988 | 2015 | 27 |
| Mills | Damian | 20 | B | Buncombe | 12 years | 2001 | 2015 | 14 |
| Sledge | Joseph | 34 | B | Bladen | Life | 1978 | 2015 | 37 |
| Williams, Jr. | Larry | 16 | B | Buncombe | 10 years | 2002 | 2015 | 13 |
| Bridges | Timothy | 22 | W | Mecklenburg | Life | 1991 | 2016 | 25 |
| Brown, Jr. | Knolly | 37 | B | Edgecomb | 5 years | 2009 | 2016 | 7 |
| Dudley | Howard | 34 | B | Lenoir | Life | 1992 | 2016 | 24 |
| Howard | Darryl | 29 | B | Durham | 80 years | 1995 | 2016 | 21 |
| Matthews | Ernest | 20 | B | Duplin | 20 years | 1993 | 2016 | 23 |
| Sandy | Barshiri | 32 | B | Wake | 21 years | 2014 | 2016 | 2 |
| Small | Johnny | 15 | W | New Hanover | Life | 1989 | 2016 | 27 |
| Surpris | Henry | 34 | B | Wake | 10 years | 2014 | 2016 | 2 |
| Britt | Timothy | 37 | W | Robeson | 25 years | 2013 | 2017 | 4 |

Note: Data from the National Registry of Exonerations, downloaded June 30, 2018.

Forty-four of the 60 individuals listed are black; seven were sentenced to death; 23 to life terms; 30 to less than life; and many others to terms of 20 years and longer. Together, these inmates served over 1,100 years in prison for crimes they did not commit.

Some of the cases listed in Table 7.1 generated more media coverage and political response than others. At first, there was little response to those exonerations that occurred in the 1970s and 1980s.[4] Whereas judicial exonerations were first seen as a lucky day for the one released, as the numbers began to grow, and unassailable DNA evidence made clear that the numbers might continue to grow, the stories shifted to focus on the large and systemic institutional failure that was becoming increasingly apparent. Such systemic failure demanded a powerful institutional response.

Lesly Jean, a lance corporal at Camp Lejeune, was wrongfully convicted of rape and sexual assault in 1982, sentenced to two life terms, and served nine years before being

[4] See Baumgartner et al. 2008 for a full discussion of "the discovery of innocence" as a political issue.

exonerated through DNA testing in 1991. Ronald Cotton's case, coming in 1995, generated considerable media attention. Darryl Hunt's Winston-Salem trial had been controversial and racially divisive from the beginning; his exoneration in 2004 also left a prominent and visible crime unsolved, as the true perpetrator was not arrested. Ronald Cotton and Jennifer Thompson's joint memoir, *Picking Cotton: Our Memoir of Injustice and Redemption*, which reached the *New York Times* best seller list when published in 2009, convinced many that police procedures needed reform to work proactively to minimize the chances that even well-meaning individuals could make errors. Following his 1995 exoneration, but particularly in the early 2000s and beyond, Cotton and Thompson testified throughout the state and nation in favor of eyewitness reform, particularly for best practices relating to the conduct of police line-ups, leading to the 2007 passage of the Eyewitness Identification Reform Act. By the time of Darryl Hunt's 2004 release, a group of reformers brought together by Chris Mumma, and including Thompson as well as law professors Theresa Newman, Richard Rosen, and James Coleman, as well as judges and prosecutors, were meeting regularly to discuss reforms to reduce the likelihood of such judicial tragedies.[5] Eventually, these efforts led to the 2006 creation of the Innocence Inquiry Commission, an institutional reform we will discuss in the following chapter. Thompson later served as a commissioner.

While the initial "discovery of innocence" was not a discovery at all to law professors such as Rosen, Coleman, or Newman, it certainly was not part of the regular public discourse. Unsettling news accounts continued, such as a 2002 series of stories about James Parker, who was convicted in 1991 of a series of sexual assaults against children, but who was released with the help of Rich Rosen in 2004. Parker, whose original prosecutor had gone on to become a

[5] See Rachlin 2017, 95 ff.

judge, faced a take-it-or-leave-it offer to plead guilty to a lesser charge and be released for time served; he denied his guilt but accepted the guilty plea. (Parker is not listed in Table 7.1 above because he is technically not an exoneree as a result of his guilty plea.) According to a news account at the time of his release in 2004: "'It's a great accomplishment that he's free,' said Richard Rosen, a law professor and board member for the Center for Actual Innocence. 'But I think the system didn't work for James Parker. It didn't work at time of trial. And frankly it didn't work at the end when he was pressured to plead guilty to a crime he didn't do.'"[6]

By bringing attention to these miscarriages of justice, and particularly by showing that there was no good legal mechanism to handle post-conviction claims of innocence, this team of reformers generated important legal changes, as we will see in the next chapter. Their focus, notably, was not only on the death penalty; Cotton had not faced a death sentence; Hunt had avoided it; Parker had not faced it. But theirs and other cases brought sustained attention to the undeniable fact that the judicial system could not be expected to be perfect. In the context of the death penalty, of course, the consequences of that are deeply unsettling.

The reforms put in place as a result of these events in the early 2000s led to an increase in subsequent exonerations, as Table 7.1 makes clear. Greg Taylor was convicted of a brutal 1993 murder in spite of limited blood evidence and a violent death by stabbing and bludgeoning. Prosecutors maintained that a speck of blood on the bumper of Taylor's truck linked him to the crime; far from being the blood of the victim, it was not even human blood, but that of an insect. His exoneration in 2010 stemmed from the work of the NC Innocence Inquiry Commission and he was released after 17 years of wrongful incarceration.[7]

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[6] Associated Press 2004.
[7] See case materials here: http://innocencecommission-nc.gov/cases/state-v-taylor/.

Some sense of the political impact of these exonerations can be gleaned from Figure 7.1, which is a photo of exonerees Levon "Bo" Jones, Jonathan Hoffman, Glen Chapman, and Darryl Hunt at the North Carolina General Assembly, lobbying for a legislative action on the death penalty in 2008. The first three were wrongfully sentenced to death, and Darryl Hunt avoided the death penalty by a single vote, getting a sentence of life without parole. Together these four individuals served almost 60 years before being exonerated between 2004 and 2008.

Figure 7.1. Exonerees Bo Jones, Jonathan Hoffman, Glen Chapman, and Darryl Hunt at the NC General Assembly.

Photo by Jack Payden-Travers.

By 2008, not only had the fallibility of the death penalty been clearly brought to the public's attention, but with this picture the racial dynamic of it was front and center as well.[8]

By far the most prominent NC exonerations occurred after this initial wave. Step-brothers Leon Brown and Henry McCollum were released in 2014 after almost 30 years. McCollum had spent that entire time on death row, whereas Brown's initial death sentence had been reduced at a second trial to life without parole; they were 19 and 15 years old at the time of their arrest. Both were completely uninvolved in the crime, and the true perpetrator was never arrested for it. When the case was referred to the NC Innocence Inquiry Commission, its investigators were able to locate evidence in police custody that had not previously been released to defense counsel in spite of numerous requests. When the evidence was uncovered, the District Attorney joined in the motion to vacate, and both were released in 2014.[9] McCollum's exoneration after 30 years on death row was an unprecedented event. The crime for which they were wrongfully convicted was particularly heinous, involving a young girl, and McCollum was featured in Republican campaign fliers during the 2010 elections attacking the Racial Justice Act. Justice Scalia referred the terrible facts of the crime in an opinion suggesting that death by lethal injection was a mild punishment compared to what the victim in that case had undergone.[10] So the McCollum-Brown exoneration was particularly notable for many reasons, including their long incarceration, the brutal nature of the crime, their vulnerability as intellectually disabled teenagers to forceful and misleading police interrogation techniques, and the use of the case for political or rhetorical purposes by those supporting the death penalty.

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[8] See Kotch and Mosteller, 2010; O'Brien and Gross, 2011.
[9] http://innocencecommission-nc.gov/cases/state-v-mccollumbrown/
[10] See the concurring opinion of Justice Scalia in *Callins v. Collins* (1994): https://www.law.cornell.edu/supct/html/93-7054.ZA.html.

Following their exoneration, their woeful experiences continued as unethical attorneys and family members attempted to rob them of the substantial financial compensation packages they were eventually awarded. While these cases were in 2014, well after the decline in use of the death penalty had started, the prominence, and the tragic nature, of the case generated further momentum for the abolitionist cause. If these individuals were innocent, after they had been specifically and individually highlighted as the reason why we needed to maintain the death penalty, then what confidence could we really have? And, to put salt in the wound, seeing them financially exploited after their exoneration only proved to many that they had indeed been vulnerable in so many ways. The same factors that made them vulnerable to financial exploitation after their exonerations had certainly made them easy targets for a District Attorney intent on cementing his place in the *Guinness Book of World Records* as the world's "deadliest DA."[11]

In sum, confidence was shaken, and judicial policy makers from across the spectrum responded with appropriate alarm, when a series of exonerations took place throughout the state. Beginning with small numbers, and not limited to death row cases, the numbers accelerated until there were 13 exonerations in 2012 alone. By that time, attention had been fully switched over to the possibility of error; no executions had taken place in six years; and the death penalty was in steep decline. But one of the first elements that generated that decline was the realization that the system was not perfect: Mistakes can occur. North Carolina was not alone in this realization, and indeed the timing of this decline was similar in other states. But policymakers responded powerfully here with institutional reforms to ensure that such miscarriages of justice would be minimized, as we review in the following chapter.

[11] https://www.nytimes.com/2016/04/13/us/joe-freeman-britt-called-americas-deadliest-da-dies-at-80.html

## Can We Afford This?

Most people don't realize how expensive it is to carry out an execution. In previous historical periods, it was cheaper as inmates were more likely to be executed promptly after a trial, and the trials themselves were not particularly special. Since *Gregg*, however, "super due process" requirements imposed to ensure that death sentences are properly imposed and carried out only after extensive appellate review have added to the cost of the punishment at every stage. Defendants are typically allowed more resources to prepare their legal defense; the penalty phase of a capital trial typically involves the use of mitigation experts not needed in non-capital trials; the trials themselves last longer; prosecution costs are higher; more experts are used on both sides; and appeals continue for years. Some of this is different in kind from non-capital trials, and some differs only in degree; the stakes are at their highest in a capital trial, after all. Differences in kind include the facts that capital cases involve a penalty phase where mitigation and aggravation are evaluated, where non-capital murder trials do not. And those sentenced to death, since *Gregg*, are guaranteed more opportunities for state and federal appellate review.

One significant savings, and one often pointed to by proponents of the death penalty, is that prisoners sentenced to death will not use up resources in the prison for long. However, delays on death row have increased dramatically over the years, meaning that even in those cases where executions are eventually carried out, they come more than 20 years after the trial. The typical inmate currently on North Carolina's death row has already been there for 20 years, with several having been there, as of 2018, for over 30 years. Baumgartner and others documented these trends nation-wide using data on over 1,400 executions between 1976 and 2016.[12] Whereas executions in the 1980s and 1990s often took place less than 10 years after the crime, the average

[12] See Baumgartner et al. 2018, pp. 161 ff.

by 2015 had reached approximately 20 years, and some inmates had served 35 years or longer before being executed. A federal judge ruled that the California death penalty had been slowly transformed into one that no legislature could possibly have created on purpose: the penalty, he wrote, amounts to "life in prison, with the remote possibility of death."[13] In any case, increasing time spent on death row before execution is an important part of any cost calculation, and it is a trend that has affected North Carolina just as it has affected most other states. (We will look in detail at the North Carolina data in the following section.)

Another element of cost of maintaining the death penalty as a system is the question of how many times it is actually carried out, compared to how many times a death sentence is imposed. If just a small percentage of death sentences are ever carried out, no matter how long the delay, this amounts to a very inefficient system, rendering the overall costs per execution much higher. As we will see below, fewer than 10 percent of death sentences have been carried out, so the cost of the system must include consideration not only of those cases leading to execution, but also to those where a the costs of a capital trial are borne, but where the execution ultimately is never carried out.

Of course, there may be important cost savings associated with the death penalty: Prison costs may be lower; defendants facing the possibility of death may accept plea agreements for life in prison, thereby saving the state the cost of an expensive trial. While it is not easy, any full assessment of the cost of the death penalty must look at a systematic comparison of costs associated with cases that proceed capitally with otherwise similar murder trials that do not proceed capitally. The analysis must review each stage from the crime investigation to the

[13] See the decision by federal judge Cormac Carney in Jones v. Chappell, F3d, CD. Cal. No CV 09-02159-CJC (2014); the judge's ruling that the California death penalty was unconstitutional was overturned by the Circuit Court on procedural grounds the following year.

appeals, and must assess potential savings as well as additional costs associated with the punishment.

Duke economist Phil Cook has done exactly this, first producing a comprehensive report on the topic in 1993[14] and later an important analysis published in 2009.[15] The earlier study was motivated by a proposal by the National Center for State Courts to document the increased costs of the new death penalty system by looking at a single state, North Carolina. As the authors noted, legal changes since *Gregg* had "the effect of making the typical capital case more expensive at every stage of adjudication than the typical noncapital murder case".[16] Cook and Slawson looked at trial costs, appellate and post-conviction costs, and prison costs, comparing capital and non-capital cases. These increased cost of a death penalty were as follows: $194,000 per death penalty in trial costs; $7,000 in increased appellate costs; $255,000 in post-conviction costs; savings of $166,000 in prison costs (assuming ten years on death row, followed by execution, as compared to 20 years served for a life sentence, then parole). Overall, they suggest increased costs of $163,000 per execution, compared to a 20 year sentence. However, they note that when factoring in the capital trials that do not lead to execution, the costs of the system are much higher. Overall, they estimate approximately $4,000,000 per year based on data from 1991 and 1992.[17] In 2018 dollars, according to the Bureau of Labor Statistics, that is $7.4 million per year.[18]

Cook updated his analysis in a 2009 report published in a major economics journal.[19] This review of costs in 2005 and 2006 generated an estimate of $11 million per year ($14 million

[14] Cook and Slawson 1993.
[15] Cook 2009.
[16] Cook and Slawson 1993, iii.
[17] Numbers from Cook and Slawson 1993, p. 2.
[18] See BLS inflation calculator at: https://data.bls.gov/cgi-bin/cpicalc.pl.
[19] Cook 2009.

in 2018 dollars). Inflation-adjusted costs had doubled in the period between the two reports. The reasons: Cook points to several trends. First, there was a rapid increase in reversal rates, with increasing numbers of inmates leaving death row to the general prison population to serve a life term. Second, the state created its Office of Indigent Defense Services to centralize and professionalize capital defense services, leading to many fewer death sentences being imposed over time. These and other reforms we will review in the following chapter. Another factor affecting cost estimates, but one that dramatically increased the cost of non-capital punishment, therefore reducing the *relative* cost of the death penalty was the state's adoption of Life without Parole as the alterative punishment to death and for other crimes in 1994. This reform ensured that the non-death penalty punishment available was also extremely expensive, and the costs for those inmates resentenced to Life on a successful appeal of their death sentence would no longer be calculated as a 20 year "life sentence" followed by parole, but indeed by a full term of their natural life. Today, more than 20 years since the adoption of LWOP, North Carolina like other states is just beginning to deal with a growing geriatric population within its prisons; these costs will continue to grow dramatically in the years to come as inmates require medical attention associated with diseases of old age.

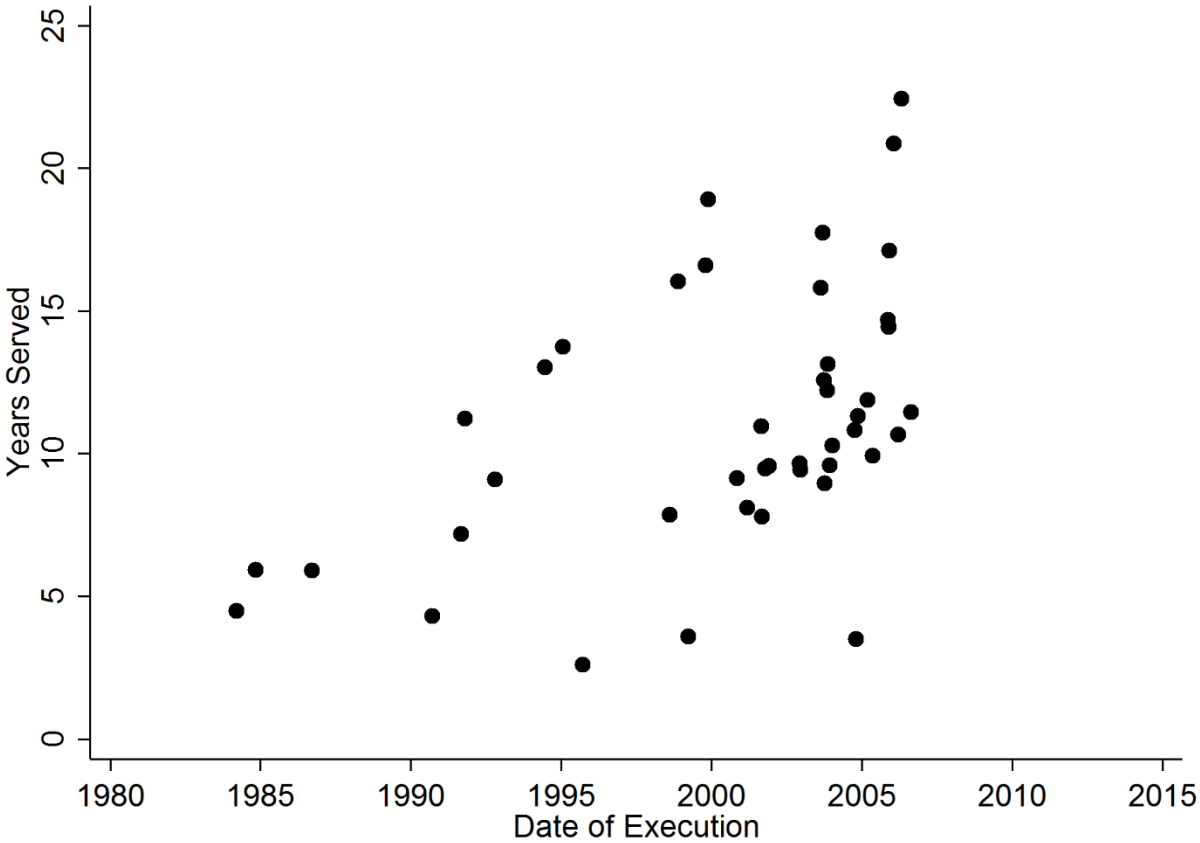
The cost of the death penalty was not a significant part of the public debate, nor of official concern, when the state brought back the punishment in the 1970s. As indicated by the 1993 Cook and Slawson report, at least some of those inside the system were becoming concerned with the high costs of the punishment by that time. Cook's 2009 report generated much more media attention, reflecting wider dissatisfaction with a system that was no longer seen to be providing the benefits often assumed for it.

## Why Does it Take So Long?

When North Carolina began executing inmates, starting in 1984, it had not previously done so since 1961. Nationally, there were no executions from 1965 to 1977 when Gary Graham was executed in Utah. Of course, all those sentenced under the invalidated pre-*Woodson* system were removed from death row before any executions had taken place. Modern-era executions in North Carolina began with that of James Hutchins on March 16, 1984. Hutchins' crime had occurred in 1979. Next was Velma Barfield, executed on November 2, 1984 for a crime in 1978; then John Rook, executed on September 19, 1986 for a crime dating to 1980. While the first three executions were for crimes that took place just four or five years before the execution, it was not long before increasing delays were apparent. Michael McDougall was executed on October 18, 1991 for a crime committed in 1979, and John Gardner was executed on October 23, 1992 from a crime dating to 1982. By the time the state had gotten to its fourth execution in the modern period, it was dealing with delays of more than a decade.

Figure 7.2 shows that the 43 executions that North Carolina has carried out came after increasing delays. Seven inmates were indeed executed within fewer than six years of their death sentence, but such a thing became increasingly rare, and by the late-1990s executions were coming more than 15 years after the crime.

Figure 7.2. Time from Death Sentence to Execution. [20]




As in other states, North Carolina saw increasing delays, even for those inmates eventually executed. The figure appears to stop in 2006, but in fact includes all data through 2018; no executions have occurred beyond those listed. Of course, with no executions since 2006, those inmates currently on death row have been waiting longer and longer. In fact, the average time served for the 143 death row inmate as of July 1, 2018 is almost 20 years. Some have been there already for more than 30 years. If and when executions were ever to resume, they would necessarily be providing retribution for crimes that had occurred decades before. In fact, few have ever been carried out less than 10 years after the crime. In this respect, North Carolina is close to the national norms, in fact, as surprising as that may seem.[21]

[20] Xxx note there are some data errors in this database and Figure 7.2 will be slightly revised when corrected.
[21] See Baumgartner et al. 2018, Chapter 8.

## Few Death Sentences are Carried Out

Perhaps surprisingly, most death sentences are never carried out, in this state or across the nation. National statistics through 2013 showed that 8,466 individuals had been sentenced to death, with 1,359 executed, 3,586 seeing their sentences reversed, almost 3,000 others languishing on death row, sometimes for decades, and others victims of suicide or natural death while awaiting execution.[22] Under *Gregg v. Georgia*, individuals sentenced to death are guaranteed appellate review to the highest court in the state and also to federal review. After these "direct reviews," inmates may also file *habeas* petitions in federal court if they allege constitutional violations. Most inmates, nationally and in North Carolina, are in fact successful in one or another of these appeals. In other words, after a judge solemnly intones a sentence of death following an often emotional trial with a separate phase solely to weigh mitigating and aggravating factors and apply the appropriate penalty for the crime, appellate judges more often than not throw these death sentences out.

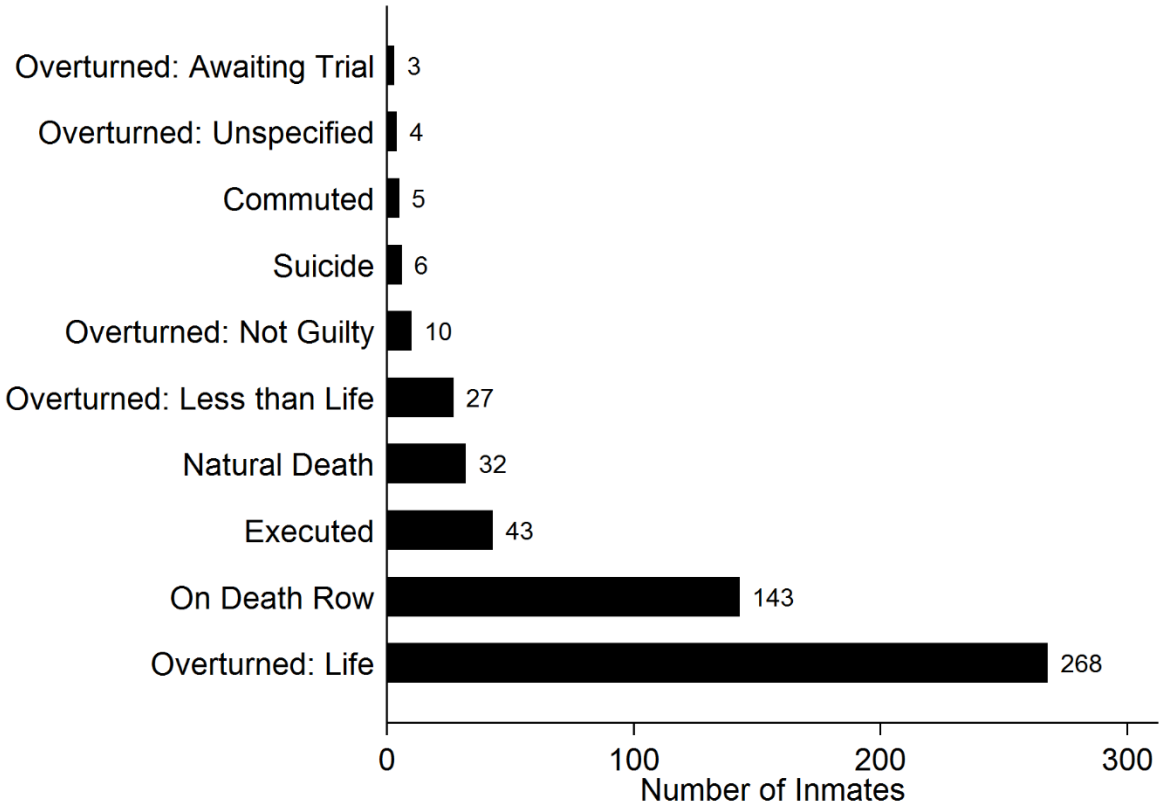
Of course, reversal of a death sentence is never done lightly; serious errors must be demonstrated in the original trial of guilt or during the penalty phase. This is why the high rate of death sentence reversal is so surprising, and important. Apparently, in spite of all the resources put into a capital trial, it is hard to get it right. Appeals, after all, cannot be successful merely by alleging a mis-placed paper clip; they must document a serious constitutional violation. Often, these judicial reversals come many years after the original death sentence. Of course, reversal of a death sentence does not mean that the inmate is found innocent and therefore goes free; in the vast majority of the cases, the inmate is sentenced to life in prison after their death sentence is overturned. In others, a new trial is mandated and the inmate is convicted and sentenced to death

[22] Baumgartner et al. 2018, 139, based on US DOJ statistics; see also Gelman et al. 2014, Liebman, Fagan, and West 2000, Liebman, Fagan, West, and Lloyd 2000, and Liebman et al. 2002.

again (though the statistics above count only the final outcome for that inmate). Still, the reversal of a death sentence is an important matter. It would certainly be frustrating to those who thought the case was closed and that the state would swiftly carry out its planned execution. And it is extremely wasteful. As reviewed earlier, capital trials are much more expensive that non-capital trials. The Supreme Court mandated automatic reviews in *Gregg* out of a concern that the penalty be applied only to the "worst of the worst" and mandated that states engage in "proportionality review" to ensure exactly this. More recently, concerns have been raised about the possibility of errors in the original trials: Executing an innocent individual would be a catastrophe. So, trials have many safeguards, appeals are automatic, and the process drags on for many years. Perhaps most surprising in all of this is the following figure: North Carolina has executed fewer than 10 percent of those it has condemned to die.

Figure 7.3 shows the outcomes of all 541 North Carolina death sentences from 1972 onwards, and Figure 7.4 shows how these numbers accumulated over time. The figures are based on a comprehensive list of all death sentences since *Furman*, in 1972, their outcomes, and the dates of the death sentence or eventual final outcome. Data are current as of July 1, 2018.

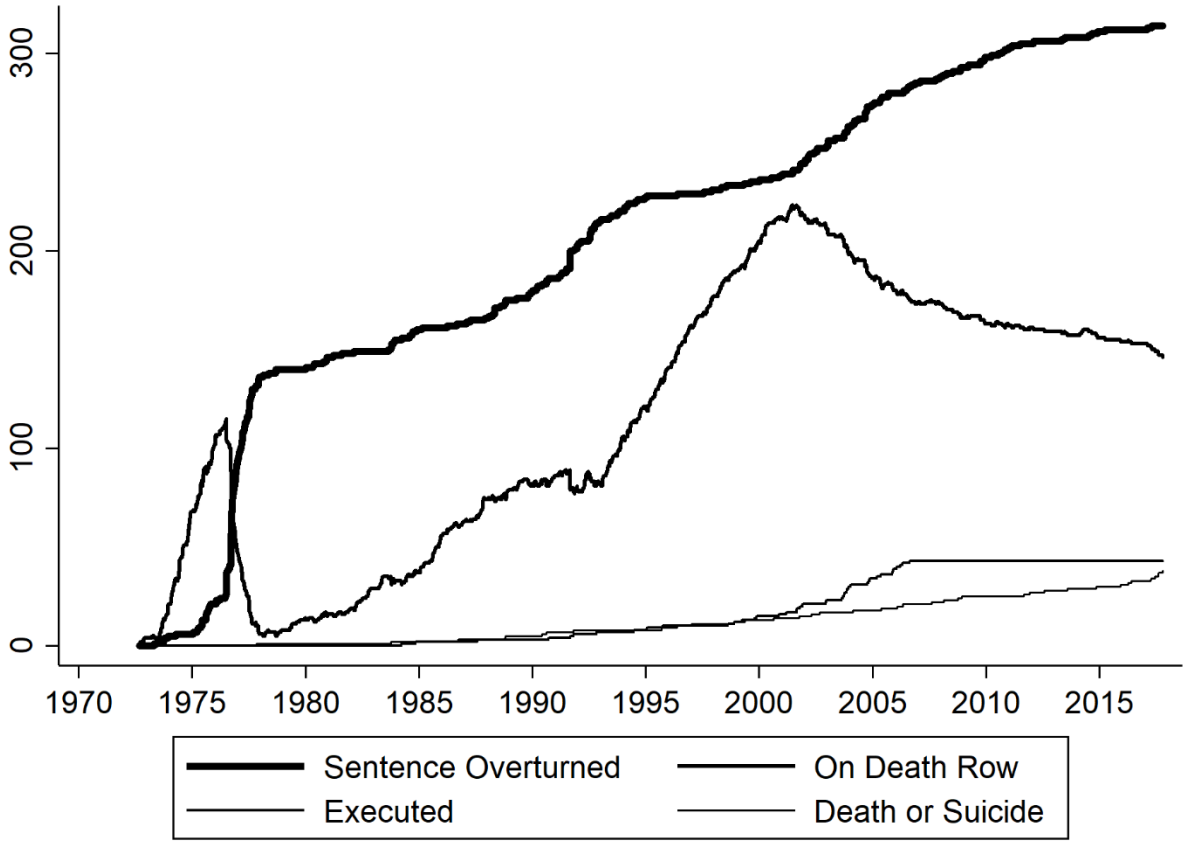
Figure 7.3. Outcomes of 541 Death Sentences Imposed since 1972.




Based on 541 inmates sentenced to death, 1972 through May 2018.

By far the most common outcome of a death sentence in North Carolina has been its reversal; more than half of all sentences have been changed by an appellate court decision to life in prison. Twenty-seven individuals have had their sentences reduced to less than a life sentence, and 10 have been later ruled not guilty. Only 43, fewer than eight percent, have seen their sentence carried out. About one-third remain on death row today, their eventual fates uncertain. About half of the reversals stem from the invalidation of North Carolina's mandatory death scheme in the US Supreme Court's *Woodson v. North Carolina* decision in 1976. But reversals have continued to come in a steady pace since this wholesale reversal of all the pre-*Woodson* cases. Figure 7.4 illustrates these trends over time. For any moment in time, the lines show how many inmates have had their sentence reversed, were currently on death row, had been executed, or had died from suicide or natural causes.

Figure 7.4. Cumulative Death Sentences since 1972 and their Outcomes.




Beginning almost immediately after the June 29, 1972 *Furman* decision, North Carolina began sentencing individuals to death. As described in earlier chapters, North Carolina's initial response to the ruling was to mandate death as the only penalty available for first-degree murder. Death row grew rapidly; by January 1, 1975, 74 inmates had been sentenced to death, and 68 were on death row. By July 1976, when the *Woodson* decision rendered the state's mandatory death sentence unconstitutional, 141 had been condemned, and North Carolina's death row was the nation's largest,[23] reaching 114 at its peak. Over the next months, individual court hearings reversed those death sentences to lesser punishments (typically life in prison with the possibility of parole, the most stringent punishment available at the time), and the population of death row

[23] See Kotch 2019, 171: he notes that 17 states had mandated death as the sole punishment for capital murder, but that North Carolina had the largest death row.

fell to just five inmates in 1978. The General Assembly revised the death penalty law to comply with the Supreme Court mandate, and the new law went into effect on July 1, 1977. The new law specified a bifurcated trial (separate phases for guilt and then for weighing aggravating and mitigating factors), allowing for the jury to recommend either a punishment of life in prison or death. As discussed in earlier chapters, while the law allowed sentence discretion, it gave none to the District Attorney: Seeking death was mandatory for all eligible crimes.

Death sentences resumed slowly in the 1970s and 1980s, but accelerated in the 1990s, leading death row to reach its maximum at 223 inmates in 2001. Since then, reversals have outpaced new death sentences, leading to a steady decline in death row to its current (July 1, 2018) population of 143. In 2017, seven inmates left death row (five died of natural causes; two had their sentences reversed) and no new death sentences occurred. Executions, totaling just 43 over the entire time period, number just slightly more than the 38 natural deaths. All the executions occurred during the time span of 1984 through 2006, with three-quarters occurring between 1998 and 2006, with seven in 2003 alone. In sum, North Carolina has never had a very active death chamber, with just five years (all between 2001 and 2006) with four or more executions.

Table 7.2 shows the various outcomes that have stemmed from all 541 death sentences in the modern time.

Table 7.2. Disposition of Death Row Cases in North Carolina, 1972–2018.

| Disposition | Male | Female | White | Black | Other | Total |
|---|---|---|---|---|---|---|
| Ever Sentenced to Death | 525 | 16 | 221 | 286 | 34 | 541 |
| Currently Serving on Death Row | 140 | 3 | 53 | 78 | 12 | 143 |
| Removed to Jail Pending Outcome of New Trial | 3 | 0 | 2 | 0 | 1 | 3 |
| *Subtotal: Final Decisions Made* | *382* | *13* | *166* | *208* | *21* | *395* |
| | | | | | | |
| Of these cases with decisions made: | | | | | | |
| Sentence Commuted by Governor | 5 | 0 | 0 | 4 | 1 | 5 |
| Found Not Guilty in Subsequent Trial | 10 | 0 | 3 | 7 | 0 | 10 |
| Resentenced, Unspecified | 4 | 0 | 0 | 3 | 1 | 4 |
| Resentenced, Sentence less than Life | 27 | 0 | 11 | 15 | 1 | 27 |
| Resentenced, Life in Prison | 256 | 12 | 103 | 152 | 13 | 268 |
| | | | | | | |
| *Subtotal: Number Reversed* | *302* | *12* | *117* | *181* | *16* | *314* |
| | | | | | | |
| Died of Natural Causes | 32 | 0 | 17 | 12 | 3 | 32 |
| Suicide | 6 | 0 | 5 | 1 | 0 | 6 |
| Executed | 42 | 1 | 27 | 14 | 2 | 43 |

Other race includes 4 Native Americans, 1 Asian-American, and 29 of other races.

Of the 541 inmates who have been sentenced to death in North Carolina, 143 remain on death row and 3 await new trials. (These 3 individuals may or may not return to death row depending on the results of their pending trials.) That leaves 395 cases where final decisions have been made. Of this group, Table 7.2 shows that 43 have been executed, 38 have died in prison (either by suicide or natural causes), and that the vast majority have had their sentences reduced. In fact, 10 were later found not guilty in their subsequent trial. Table 7.3 presents these cases as a percentage of the cases in which final judicial dispositions have been made.

Table 7.3. Dispositions as a Percent of Disposed Cases.

| Disposition | Male | Female | White | Black | Other | Total |
|---|---|---|---|---|---|---|
| Sentence Commuted by Governor | 1 | 0 | 0 | 2 | 5 | 1 |
| Found Not Guilty in Subsequent Trial | 3 | 0 | 2 | 3 | 0 | 3 |
| Resentenced, Unspecified | 1 | 0 | 0 | 1 | 5 | 1 |
| Resentenced, Sentence less than Life | 7 | 0 | 7 | 7 | 5 | 7 |
| Resentenced, Life in Prison | 67 | 92 | 62 | 73 | 62 | 68 |
| *Subtotal: Percent Reversed* | *79* | *92* | *70* | *87* | *76* | *79* |
| Died of Natural Causes | 8 | 0 | 10 | 6 | 14 | 8 |
| Suicide | 2 | 0 | 3 | 0 | 0 | 2 |
| Executed | 11 | 8 | 16 | 7 | 10 | 11 |
| Total % | 100 | 100 | 100 | 100 | 100 | 100 |

Note Reversals were 100 percent for the 141 inmates sentenced before the 1976 *Woodson* decision, and 68 percent for those sentenced post-*Woodson*.

North Carolina's modern history with the death penalty includes carrying out the penalty in just 11 percent of the cases where final dispositions have been made. Those currently on death row may or may not be executed, so we exclude those cases from these calculations. By far the most likely outcome of a death sentence is a subsequent trial ending in a sentence of life in prison.

The largest study reporting on rates at which death sentences are overturned, conducted by James Liebman, Jeffrey Fagan, and Valerie West and covering 23 years of data in all available states, found a rate of 68 percent of reversal.[24] Looking both at the wholesale re-sentencing of all 141 pre-*Woodson* cases and the case-by-case reversals of those sentenced under the newer system, almost 80 percent have been reversed here in North Carolina. Limiting our attention only to the post-*Woodson* cases, the North Carolina reversal rate is 68 percent; identical to the national study.

[24] See Liebman, Fagan, and West 2000.

Why are rates of reversal so high? Substantial procedural errors plague highly emotional capital trials. Cases are not reversed and inmates guilty of vicious crimes do not find themselves sentenced to lesser penalty because of trivial errors or slight imperfections in their initial trials. Only substantial errors can cause a reversal, but these are found in the vast majority of cases. Including these case-by-case errors as well as the 141 *Woodson* reversals, we see a total of almost 80 percent being reversed. Only eight percent of initial death sentences have been actually carried out (11 percent if we limit attention to "finalized" cases, excluding those currently on death row). We all know that no government institutions are perfect, but this rate of error, even higher than the national average, is shocking indeed.

## Conclusion

Increasing public awareness of the possibility of convicting or executing the factually innocent, the huge economic costs associated with the death penalty, lengthening delays between the time of crime and execution, and astounding rates of reversals following expensive capital trials have shaken to the core the state's and the nation's confidence in the death penalty system. In the next chapter we review the public policy responses to these developments. Leaders enacted a number of reforms to improve the process, to get things right. Some of these reforms overlapped in time with the events described in this chapter; in fact each fed on the other. Increased concern with error led to reforms which in turn revealed more error. Exonerations, initially discovered as a shocking novelty, later (by 2012) came virtually once a month, as reforms made them easier to find and more resources were put into looking for them. The four concerns we highlighted in this chapter fed into the reforms we describe in the next, and in turn were reinforced by them. Together, these changes laid the groundwork for a steady decline in the numbers of death sentences and executions since the late-1990s. In the end, the penalty has become an

anachronism, symbolically popular in some circles, symbolically hated in others, but no longer a significant part of the criminal justice system, statistically speaking. It retains only its symbolic power now on both sides, but what a power that is.

# 8

# Progressive Reforms and Their Impact

In the last chapter we described a set of growing concerns that undermined the high degree of confidence that North Carolina's leaders have consistently shown in the state's death penalty system. In response, they put into place a number of important reforms such as best practices for police lineups, prosecutor discretion to seek the death penalty only where they judged it appropriate, not automatically for all aggravated murders, and the creation of a centralized and highly professional Office of Indigent Defense Services. As in other states, North Carolina also enacted sentencing reform in the 1990s, moving to harsher punishments generally and specifically creating a new penalty: Life Without Parole (LWOP), ensuring that inmates sentenced to such punishment would die in prison. This reform dramatically reduced the difference between a death sentence and the alternative punishment for a capital crime. Perhaps paradoxically, making this penalty much more severe made it easier for juries to vote for the alternative penalty rather than for death.[1] All these reforms reduced the number of cases coming through the system, improved the quality of representation for the defense, increased the odds that appeals might be successful, or otherwise worked to reduce the number of death sentences and executions. Unrelated to these reforms, but adding to them was a physicians' board refusal to allow state-licensed medical doctors to participate in executions, leading to a complete stoppage of executions in 2006 that remains in effect as of 2018, twelve years later.

[1] We refer to this as an "alternative" penalty rather than a "lesser" one because it is not clear that a sentence of LWOP is less severe than one of death.

Before reviewing the various reforms that slowed the death penalty system down to a trickle, we provide a quick numerical overview of the rise and the decline of the punishment. This allows us to understand better the importance of the reforms and the dramatic nature of the movement away from death.

## The Rise and Decline of North Carolina's Death Penalty

According to FBI statistics for the modern death-penalty period, the US suffers between 10,000 and 25,000 homicides per year. North Carolina's numbers tend to be in the range of 500 to 700, with only a few years falling outside these boundaries. Figure 8.1 shows the number of homicides, death sentences, and executions since 1973.

Figure 8.1. Homicides, Death Sentences, and Executions, 1973–2017.

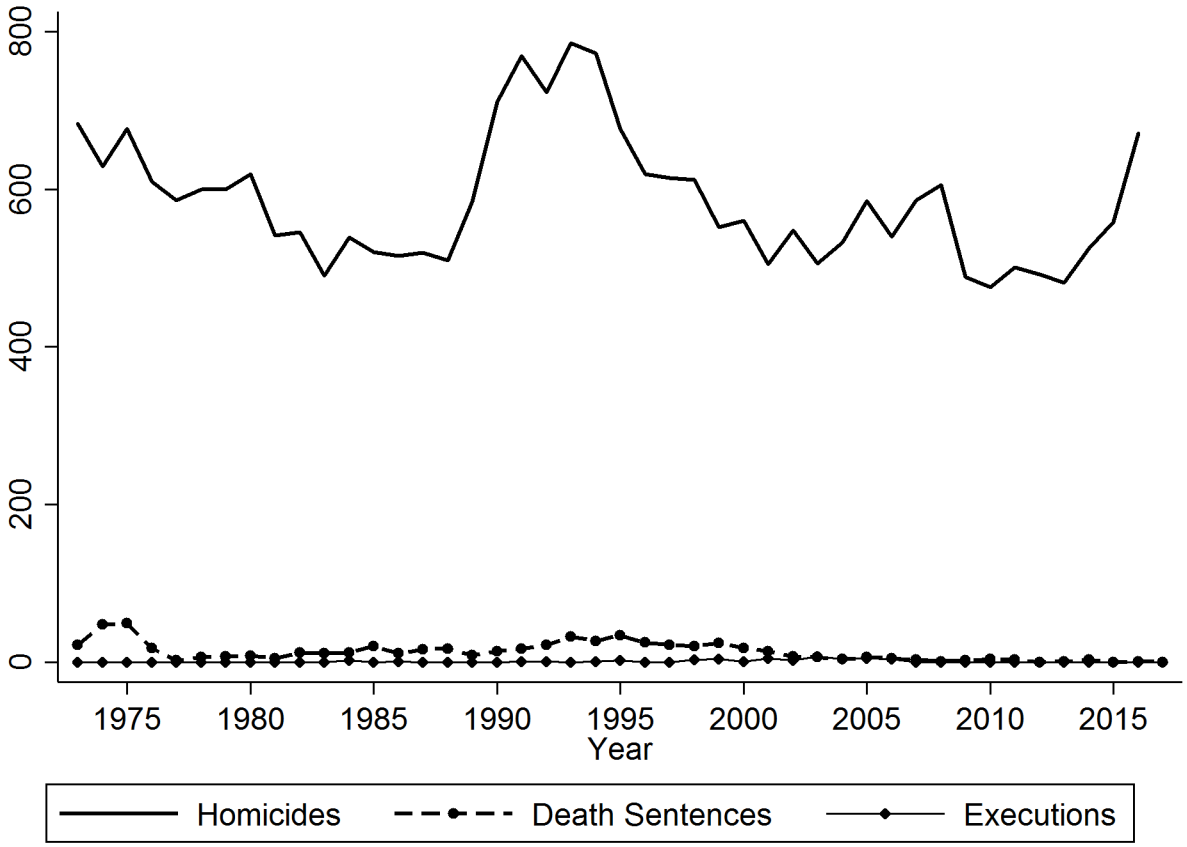


Figure 8.1 may surprise readers because death sentences are barely visible on the graph. This is also typical of other states, and was the case even when, from 1973 to 1976, a death sentence was the only available punishment for first-degree murder. The Figure shows that homicides declined from approximately 700 in 1973 to as low as 510 in 1988. They sharply increased during the crack epidemic, reaching as high as 785 in 1993. Numbers then declined through the period until 2013 when they reached as low as 481; they increased slightly in the four years since then.

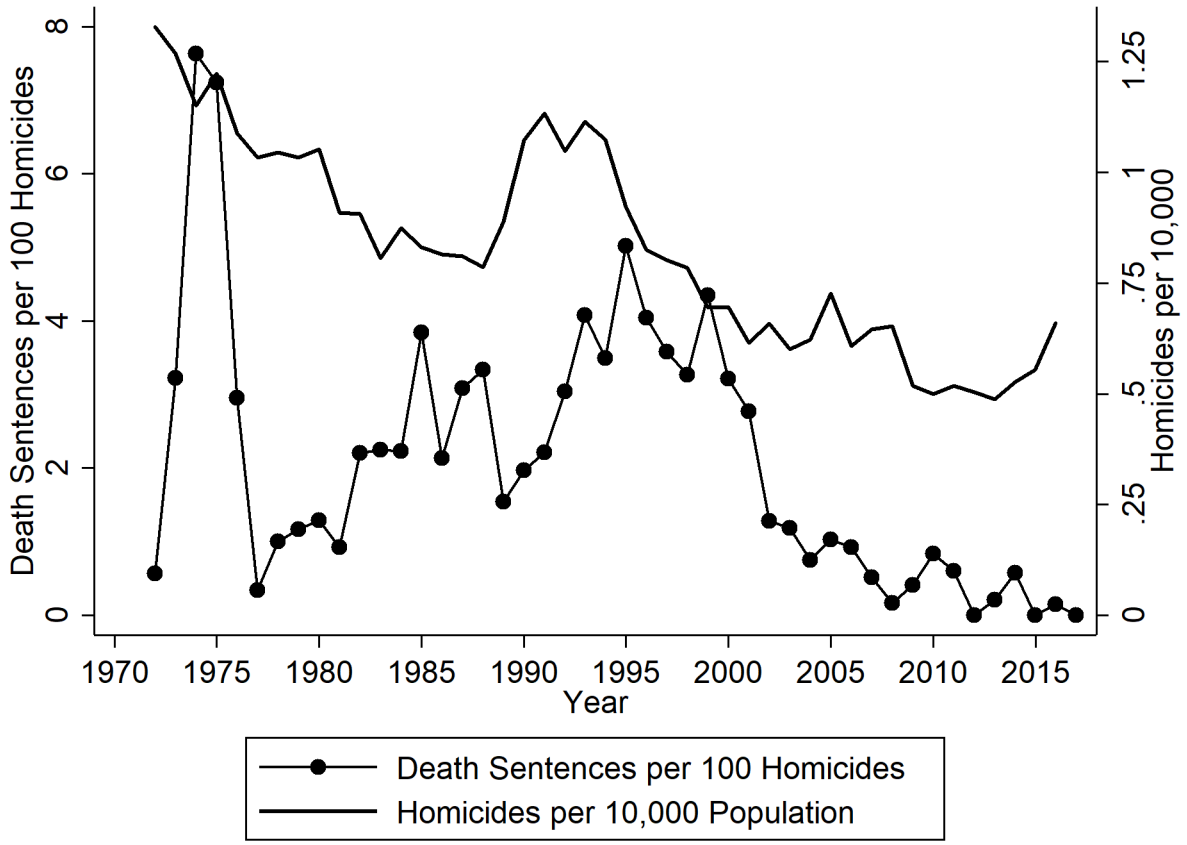
Death sentences barely register on the same scale; in 1974 and 1975, under the pre-*Woodson* mandatory sentencing scheme, there were 48 and 49 sentences respectively. The numbers declined sharply after 1976 but grew to reach a post-1976 peak of 34 in 1995; they have declined dramatically since then, with few than 10 cases annually since 2002, and fewer than five cases per year since 2006.

Executions reached a peak of seven in 2003, and 30 out of the 45 years covered in the graph have seen no executions at all. Thirty-five, or more than 80 percent of all the executions, came in the nine-year period between 1998 and 2006; none have occurred since then. So, while homicides number in the hundreds, death sentences have been relatively few, and executions statistically very rare. Totals for the period of 1973 through 2017 are 25,760 homicides, 588 death sentences (just over 2 percent of homicides), and 43 executions (0.17 percent of homicides). In other words, in the modern time, 99.8 percent of homicides have not been followed by an execution.

Figure 8.2 puts the homicide and death sentencing numbers on a scale where some trends are more easily visible. It shows the rate of homicides per 10,000 population, and the rate of death sentences per 100 homicides. As just noted, executions are vanishingly rare when put in

the context of homicides, and we do not present those numbers here. As noted above, most years have no executions at all; the maximum number of executions in any single year, seven, represented just over 1 percent of the homicides in that same year (2003).

Figure 8.2. Homicide and death sentencing rates.




The population of North Carolina grew steadily from approximately 5.4 million in 1973 to over 10 million in 2017. Therefore, comparing the raw numbers of homicides over time can be misleading. Both 1983 and 2013 had about 490 homicides, but the 2013 figure was drawn from a population of 9.9 million and the 1983 figure came at a time when just 6 million people lived in the state. So, looking at homicides per 10,000 population as in Figure 8.2 allows us to see the generally declining trend, though there remains a significant up-tick in the 1990s. The homicide rate was as high as 1.27 per 10,000 population in 1973 but reached a value as low as 0.49 in 2013.

Death sentencing rates were over 7 percent of homicides in 1974 and 1975, the only two full years where the pre-*Woodson* mandatory procedures were in operation, and they declined to much lower levels in the later 1970s, growing in the mid-1990s to values as high as 5 percent in 1995 before declining to an average rate of 0.36 per 100 homicides in the period from 2006 through 2017.

The data in Figure 8.2 suggest that we consider three periods: the pre-*Woodson* period of heavy death sentencing under a mandatory system; a period from 1976 through the mid-1990s when death sentencing was increasing, and then the period since 1995 when all trends have been going away from the use of the punishment.

### *Mandatory Death for All Eligible Crimes*

Before focusing on the decline of the state's use of the death penalty and the reforms that made this happen, it is worth focusing on the pre-*Woodson* period first. Even under a mandatory system where a conviction for first-degree murder with aggravators led automatically to a penalty of death, death sentences amounted for no more than 8 percent of the state's homicides. Under the law at the time, all aggravated homicides were deemed to be first-degree, and the only available punishment was death. The law stated:

> A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. N. C. Gen. Stat. § 14-17 (Cum. Supp. 1975).

Second-degree homicides, therefore, would be those that did not involve a robbery or other felony, were crimes of passion, or otherwise not premeditated. Manslaughter, or negligent

or inadvertent killings could also be included in the FBI homicide reports, or suicides. Still, it is perhaps surprising that, with a definition of first-degree murder than includes all pre-meditated murders as well as all of those committed during the commission of another crime such as robbery, the numbers are so low. Some crimes may never have been solved, of course, and others may not have contained full enough evidence to sustain a death sentence or to prove the existence of an aggravator. Prosecutors may have not sought have sought death in each and every case, but a judicial decision just a few years later reminded them that they must do so under the law, as we will see. In any case, a full understanding of the North Carolina death penalty system has to start with the statistical fact that even a mandatory penalty of death for first-degree murder did not mean what it said. Never did the number of death sentences reach even as high as 10 percent of the number of homicides.

### *Mandatory Prosecution for All Eligible Crimes, and a Period of Enthusiasm*

North Carolina was not the only state to mandate a mandatory death penalty in response to the 1972 *Furman* decision, but in 2001 when it changed the law, it was the only state in the nation to mandate capital prosecution in all eligible cases. While we will see that this law was often observed in the breach by the state's prosecutors, there is no doubt that the 1970s, 1980s, and most of the 1990s saw a great deal of apparent enthusiasm for capital punishment. This was in line with national trends, but North Carolina was near the top nationally in its tight embrace of the punishment. When the US Supreme Court ruled that the mandatory system was unacceptable, the state's response was to require that DA's seek death in every eligible case. Even one of the reforms we will describe below, a 1994 "truth-in-sentencing" reform that created the punishment of Life Without Parole, was part of a "tough-on-crime" mentality which swept the nation during the time of the Clinton presidency and the war on drugs. Judicial discretion was dramatically

reduced, the state's system of parole was eliminated, and punishments for violent crimes of all types were ratcheted dramatically upwards. As Figure 8.2 showed, death sentences grew dramatically as a percentage of all homicides, reaching approximately five percent, much higher than the national average.[2]

Two North Carolina Supreme Court rulings in 1979 and 1991 significantly restricted any discretion that NC prosecutors may have thought they enjoyed under the post-*Woodson* system of mandatory prosecution. The Court ruled in 1979 (*State v. Johnson*)[3] that a defendant may not make an agreement with a district attorney to plead guilty to a capital crime on condition that the penalty be life in prison. Rather, it ruled that the guilty plea must be presented to a jury which would sit to determine the penalty, having been presented the finding of guilt. "The jury's sentence recommendation in cases where the defendant pleads guilty shall be determined under the same procedure … applicable to defendants who have been tried and found guilty by a jury" (pp. 756–7). So, plea agreements to first-degree murder for a punishment other than death were forbidden. This meant that the only allowable pleas would be to second-degree murder, a bargain the prosecutor might not be willing to accept.

In 1991, these strictures were reinforced dramatically. In *State v. Case*,[4] the Court ruled as follows:

> The defendant argues under his first assignment of error that his guilty plea should be set aside and that he should be tried de novo on the guilt phase as well as the penalty phase of his trial. He says this is so because there was error in reaching the plea bargain by which he pled guilty. In this case, the prosecuting attorney agreed as part of a plea

[2] See Baumgartner et al. 2018; in the entire post-*Gregg* period, the US has had about 800,000 homicides and roughly 8,000 death sentences, or about 1 per 100. Five per 100 is a high rate compared to these national figures.
[3] 259 S.E.2d 752
[4] 410 S.E.2d 57

> bargain in which the defendant agreed to plead guilty to first degree murder, that the State would present evidence of only one aggravating circumstance, that the murder was especially heinous, atrocious, or cruel. There was also evidence of the aggravating circumstances that the defendant committed the murder while engaged in the commission of a kidnapping and that the defendant committed the murder for pecuniary gain.
>
> It was error for the State to agree not to submit aggravating circumstances which could be supported by the evidence. [citations omitted] The decision as to whether a case of murder in the first degree should be tried as a capital case is not within the district attorney's discretion. [citations omitted] This is so in order to prevent capital sentencing from being irregular, inconsistent and arbitrary. If our law permitted the district attorney to exercise discretion as to when an aggravating circumstance supported by the evidence would or would not be submitted, our death penalty scheme would be arbitrary and, therefore, unconstitutional. Where there is no evidence of an aggravating circumstance, the prosecutor may so announce, but this announcement must be based upon a genuine lack of evidence of any aggravating circumstance (p. 58).

So, in 1979 the Court ruled that prosecutors could not offer a firm deal allowing a defendant to avoid the death penalty, and in 1991 it further ruled that they could not offer to omit reference to any aggravating circumstances. If the circumstances were there, they had to be presented. Death sentences increased from 17 in 1991 to 22, 32, 27, and 34 in subsequent years. The 1995 figure of 34 death sentences was the peak number in the post-*Woodson* period.

Some sense of the remarkable enthusiasm for the death penalty which characterized the state in the late 1980s through most of the 1990s can be gleaned from a 1996 drunk driving tragedy in Forsyth County which killed two Wake Forest students and injured four others. Using

a "novel legal theory," assistant district attorney Vincent Rabil sought first-degree murder charges and the penalty of death. The state suggested no specific intent to kill, typically a requirement for first-degree murder.

> Instead, prosecutors had argued that the jury only had to find that Mr. Jones acted out of culpable negligence, as shown by his long history of mixing alcohol with prescription drugs and then climbing behind the wheel.
>
> The jurors' deliberations ended after they found no evidence of the two aggravating factors that Mr. Rabil had suggested: that Mr. Jones used his car as a "weapon of mass destruction" and that he engaged in "a course of violent conduct" (Sack 1997).

The defendant, Thomas R. Jones, was convicted of first-degree murder but the jury did not sentence him to death. Typically, drunk-driving deaths are prosecuted as second-degree homicide or manslaughter, particularly where no intent is present. Mr. Rabil's argument that his vehicle constituted a "weapon of mass destruction" and that his repeated episodes of drunk driving constituted "a course of violent conduct", while rejected by the jury in this case, showed just how open to interpretation are many of the aggravating circumstances in the North Carolina law, as in other states. The mid-1990s were a bad time to stand trial for any kind of violent crime. Prosecutors were particularly aggressive in seeking death. Some of this came from the 1991 ruling by the NC Supreme Court which firmly reminded them of their lack of discretion in these matters, and some came from the powerful "tough-on-crime" attitudes that were so prevalent at the time.[5]

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[5] It is worth noting that the prosecutor in the 1996 drunk driving case, Vincent Rabil, later renounced his support for the punishment (see Rabil 2015), and, as of 2018, serves as an assistant capital defender with the Forsyth County Office of the Capital Defender. His brother, Mark Rabil, is the attorney who defended Darryl Hunt for many years, gaining his client's freedom in a Forsyth County courtroom in 2004 after 19 years of wrongful imprisonment.

In sum, North Carolina's death penalty system was operating on all cylinders in the mid-1990s. Death sentences did not reached the heights of the pre-*Woodson* period, but they were very high by national standards. While the homicide rate had declined for most of the period in the 1970s and 1980s, it rose sharply in the 1990s. Sentencing reforms and political attitudes were firmly in a "get tough on crime" mentality. These trends make it all the more remarkable that they were quickly reversed beginning after 1995. Death sentences in that year numbered 34; by 2000 they were just 18; by 2005, just five; in 2010, 4, and in 2015, there were none at all. Next we look at the reforms and trends that made this dramatic decline come about.

### *Some Cracks in the System*

A 1995 NC Supreme Court decision provides some insights into the flexibility that prosecutors maintained even under a system of legally mandatory death sentencing. Whereas the 1979 and 1991 decisions reviewed above held prosecutors to follow the obvious intent of the legislature, the Court ruled otherwise in *State v. Garner*. At issue was an argument from a death row inmate that the prosecutor who sought death in his case had often not done so in other cases, thereby subjecting him to exactly the type of "irregular, inconsistent and arbitrary" punishment that the Court disavowed in 1991. In denying the appeal, the Court found that Robeson County District Attorney Richard Townsend, in office since 1989, had seen 151 indictments for first degree murder, but had brought only four cases to capital trial. One non-capital trial was an error by the assistant DA, but the others noted by the Court were plea-agreements to second degree murder. The Court noted that "The decision as to whether to try a defendant capitally or whether to accept a plea to a lesser offense than first degree murder is made by the District Attorney" and goes on to describe the possible considerations: strength of the case; "legal questions or problems" that create difficulties for the DA; "wishes and desires of the relatives of the victim";

and the DA's expectation about the jury's likelihood of voting for death. "This Court has consistently recognized that a system of capital punishment is not rendered unconstitutional simply because the prosecutor is granted broad discretion." The Court went further, validating a lower court's conclusion that "the application of the North Carolina death penalty statute is arbitrary in the sense that two people with similar backgrounds who commit identical crimes can be treated differently, that is one can be tried for his life while the other can be allowed to plead to second degree murder or some other lesser offense…" (*State v Garner*, 340 NC 573 (1995, 724–726). As long as these decisions are not based on race, sex, or national origin, then the "mandatory" death penalty can be avoided if the prosecutor so chooses, and the defendant agrees to plead guilty to second-degree murder. Mr. Garner, who was contesting his capital prosecution on the grounds of exactly this arbitrariness that the Court then recognized, was out of luck. Of course, this unevenness was exactly what the US Supreme Court had ruled objectionable in *Fruman*; its 1976 *Gregg* decision mandated "narrow targeting" of the penalty to those committing the most heinous crimes, and that a "substantial proportion" of those so convicted be sentenced to death. Only this, the Court believed, would avoid the arbitrary and capricious use of the penalty in just a few cases, as in a lightning strike. Here, the North Carolina Supreme Court validated behavior where just 4 of 151 eligible cases were even brought to capital trial.

*State v. Garner* came in 1995, at the period of peak usage of the death penalty in North Carolina and nationally. Even at that time, the cases reviewed by the Justices made clear that the "mandatory prosecution" provision of the NC law at the time, requiring that prosecutors seek death if a case had an aggravating circumstance, was in fact not the case at all. The low rate of prosecution shown in Figures 8.1 and 8.2 was no fluke. Even during the period of greatest

enthusiasm for the penalty, the number of cases actually prosecuted never rose to a level that might have been expected. The penalty was very selectively used.

### *The Beginning of the End*

Figures 8.1 and 8.2 made clear that homicides peaked in the early 1990s, and then death sentences declined after the mid-1990s. In fact, they have declined precipitously, reaching lows not imagined in earlier periods. While national trends were similar (death sentences and executions peaked nationally in1995 and 1996 respectively).[6] Some of the recent decline in the death penalty may logically be related to sharply declining homicides since their peaks in the 1990s. North Carolina enacted a number of reforms, however, that have hastened the process. In the following section, we review the innovations and reforms that have caused death sentences to dwindle to a slow trickle, as they have in recent years.

## Reforms Reducing Capital Punishment

North Carolina went from the most aggressive state in the nation with regards to the death penalty to one that has seen not a single execution since 2005 and fewer than five death sentences per year consistently since 2006. How did this occur? The reasons have to do with a series of changes to the procedures, as reviewed here. Each of these, either restricting the eligibility of crimes for the death penalty, providing greater legal resources to those facing capital charges, or otherwise reforming the system, have had an important impact. As these reforms have reduced the use of the death penalty, and homicides have continued to decline, it has become apparent what a limited and symbolic role the death penalty has played throughout modern history.

[6] Annual totals are available at https://deathpenaltyinfo.org/; see also Baumgartner et al. 2018.

### *Sentencing Reform (1993)*

The first reform stems from a sentencing reform commission in 1993, and it involved enhancing penalties, not restricting them. Like many other states, North Carolina saw severe problems of prison over-crowding in the 1980s, with the result that prisoners were often released on parole before finishing their sentences. The General Assembly created a Sentencing and Policy Advisory Commission in 1990 with the mandate to review prison capacity, sentencing structures, and the link between the two. The commission established a "structured sentencing" system mandating certain minimum sentences for each class of offense, and this was eventually approved (with some amendments) by the General Assembly.[7] The new structured sentences significantly increased the penalties for the most serious felonies and reduced active prison sentences for the lowest level felonies. First degree murder, in the new system, had just two possible penalties: Death, or life without parole.

By establishing the penalty of life without parole (LWOP), the difference between a death sentence and the alternative punishment was reduced dramatically. This perhaps had an inadvertent effect on capital punishment. We should note that the reform certainly achieved its fundamental goal: Structured sentences are harsh, so the 1990s sentencing reform was a strong movement, consistent with national trends, toward greater time in prison. For the particular case of the death penalty, however, it had the unintended effect of assuring jurors that a vote against the death penalty would not mean eventual freedom for the inmate so spared death.

### *The Indigent Defense Services Act of 2000*

In 1998, the General Assembly established a commission to study and make recommendations to reform the state's legal services to the poor. Like sentencing reform, this major reform was not

[7] See Lubitz 1993 for details on sentencing reform.

limited to issues related to capital punishment, but was a state-wide reform affecting all defendants using a public defender or appointed counsel paid for by the state. (Virtually all capital defendants use a public defender.) The concerns were simple, and numerous. First, indigent defense services, state-wide, constituted a program costing $60 million, representing 18 percent of the entire judicial branch budget in 1998-99. The program was a decentralized and seemingly uncontrollable bureaucratic network where individual judges, local bar associations, public defenders offices, and the Administrative Office of the Courts all shared some degree of control over spending and appointing counsel, but no single agency was responsible for the budget. Cost-control and management was therefore a major goal of the reform.[8] The General Assembly passed the Indigent Defense Services Act in 2000, and as of July 1, 2001, the Office of Indigent Defense Services has been in operation, with a four-fold mandate:

1) overseeing the provision of legal representation to indigent defendants and others entitled to counsel under North Carolina law;

2) developing training, qualification, and performance standards to govern the provision of legal services to indigent persons;

3) determining the most appropriate methods of delivering legal services to indigent persons in each judicial district; and

4) providing services in the most cost-effective manner possible.[9]

With regards to capital punishment, it is hard to overstate the impact of the reforms put into place following this review. Before 2001, capital defendants facing prosecution gained their legal representation through the judge who would hear their case. After 2001, IDS oversaw the appointment of counsel (item 1 above). Before 2001, judges appointed local attorneys to the

[8] Indigent Defense Study Commission, 2000
[9] Office of Indigent Defense Services, 2018.

case, often for a set fee of as low as $5,000. Several adverse implications arose. One was that judges were under no obligation to appoint attorneys who specialized in the complex issues of capital defense. Another was that with a set fee, attorneys who were interested in the work for financial reasons had every incentive to spend the minimum possible time on the case. Judges also controlled the budget of the defense, controlling (and often refusing) such things as fees for experts, creating an imbalance between the prosecution, which controlled its own budget and could hire whatever experts it chose, and the defense, which was at the mercy of the judge. All these things changed on July 1, 2001.

Another key element in the IDS reform was point 2 in the list above: training. The IDS created the Office of the Capital Defender and established extensive training programs and perhaps more importantly a network of contacts and shared briefs to facilitate the work of attorneys representing indigent capital defendants throughout the state. By establishing standards, it meant that no longer could just any member of the Bar be given the responsibility to serve as counsel for a capital defendant. By establishing training programs, it ensured that all defendants would have attorneys familiar with the peculiarities of NC and US capital law. By establishing a "brief bank" it allowed attorneys to avoid redundant efforts.[10] The law also mandated that two IDS-certified capital defenders be appointed, not just one. These lawyers may come from the Office of Capital Defender itself, one of its regional offices, or through the appointment of a private attorney. The Center for Death Penalty Litigation, created in 1996, is a

[10] As of September 2018, the Capital Trial Motions Index includes scores of briefs available on-line: http://www.ncids.org/Motions%20Bank/Index%20of%20Motions.htm?c=Training%20%20and%20%20Resources,%20Capital%20Trial%20Motions. The more generic "IDS Brief Bank", not limited to capital cases, has hundreds of legal brief templates: http://www.ncids.org/Brief%20Bank/Main%20Index.htm?c=Training%20%20and%20%20Resources,%20Brief%20Bank.

nonprofit law firm specializing in the defense of North Carolina capital defendants but is legally separate from the IDS and Office of Capital Defender.[11]

In 1994, Stephen Bright wrote a brutal expose of the terrible state of indigent defense throughout the capital punishment system, suggesting that capital punishment was often reserved not for the worse crimes and the most deserving defendants, but rather for those with the most horrendous lawyers.[12] In their 2016 review of state responses to the federal mandate to provide legal representation to the poor, particularly in the context of capital punishment, Carol and Jordan Steiker noted many states had woefully inadequate levels of support for capital defense attorneys, and low standards for practice. This was particularly the case in southern states, which rejected the due-process demands of US Supreme Court rulings in the 1960s and beyond.[13]

It was not uncommon in North Carolina before 2001 to see poorly prepared and relatively unqualified attorneys defending indigent defendants on trial for their lives. According to a *Charlotte Observer* investigation, "Since 1977 …, at least 15 death verdicts have been overturned because of poor lawyering at trial. And at least 16 other death row inmates—including three who were executed—were represented by lawyers who have been disbarred or disciplined for unethical or criminal conduct."[14] Of course, many well qualified attorneys worked in the system as well. But there were no institutional guarantees of how the system would operate, and the prosecution was clearly at an advantage with regards to experts, budget, and staff. Since the reforms, a minimum of two capital-certified attorneys will represent the defendant from the moment capital charges are filed. This is perhaps the most significant reform

[11] CDPL was created in 1996 after the General Assembly defunded the North Carolina Resource Center, a federally-funded unit inside the Appellate Defender's Office. CDPL is a nonprofit organization under section 501-c-3 of the IRS code.
[12] See Bright 1994.
[13] Steiker and Steiker 2016, 148ff.
[14] See Chandler 2000, 1A, quoted in Liebman et al. 2002; see also Alexander and Chandler 2000..

of the modern era. It professionalized the capital defense bar, and leveled what had been an extremely uneven playing field.

### *Prosecutorial Discretion (2001)*

On the same date that IDS began to operate, July 1, 2001, the state's prosecutors also gained the freedom to seek or not to seek death in aggravated cases. North Carolina thus joined all other death penalty states in allowing the prosecutor to use their discretion so that capital prosecutions were not over-used. Of course, as we saw above, prosecutors did quite often agree to plea agreements where defendants pled guilty to second-degree murder. This reform gave them the opportunity to seek a plea agreement for first-degree murder, guaranteeing a penalty of life without parole. Coming at the same time as the indigent defense reforms described in the previous section, it is impossible to say which reform had a greater impact on trends in capital prosecutions. They precipitously declined. Prosecutors were free not to seek death, and they knew that if they did seek death that the defendant would be guaranteed substantially enhanced defense resources, compared to the situation before July 1, 2001. In the ten years before 2001, 241 inmates were sentenced to death; in the 16 years after, from 2002 through 2017, just 46. As we will see later in this chapter, over two-thirds of all inmates currently on death row (as of July 1, 2018) were sentenced before this date.

### *Other Important Reforms*

The establishment of LWOP, the creation of Indigent Defense Services, and the reform allowing prosecutorial discretion laid the groundwork for the decline in capital punishment. Several other factors added to these trends as well, and we briefly mention them here. Whereas the US Supreme Court ruled in 2005 that the death penalty was an inappropriate penalty for those with mental incapacities, in *Atkins v. Virginia*, North Carolina had similarly decided against the

practice in 2002. In fact, the North Carolina case of Ernest McCarver, with an IQ of just 67, was set to reach the justices during a time when there was considerable debate about the practices in various states, and trends were rapidly "evolving" against the practice.[15] The North Carolina legislature rendered the case of Mr. McCarver moot by eliminating the death penalty for those with mental incapacities, and by making the decision retroactive, thereby applying to the inmate (and petitioner in a Supreme Court case) and others on the state's death row.[16] The state was therefore one more in a trend recognized in 2005 when the high court recognized the movement of so many states against the practice and rendered it unconstitutional nationwide, and when the Court did rule on the issue it did so with respect to a case from Virginia, three years after it might have ruled if the McCarver case had been considered.

In Chapter 7 we discussed how North Carolina confronted a series of high profile exonerations. Multiple responses followed, including the 2002 creation of the North Carolina Commission on Actual Innocence, pre-trial open file discovery (2004), and the creation of the North Carolina Innocence Inquiry Commission (2006). Beginning in 2002, NC Supreme Court Chief Justice I. Beverly Lake, Jr. and Durham attorney Christine Mumma brought together stakeholders throughout the criminal justice system to consider reforms based on cases of actual innocence. The Actual Innocence Commission was thus created and pressed for a number of reforms, including establishing best practices for police line-up procedures, recording interrogations, and other practices designed to reduce the likelihood of wrongful convictions.[17] In 2006, North Carolina became the first, and as of 2018 remains the only, state in the nation to

[15] See Greenhouse 2001.
[16] See Bonner 2001.
[17] Rachlin 2017 provides a thorough review of the personalities and processes involved in the creation of the Actual Innocence Commission. See also https://www.nccai.org/about-us/. Hager 2015 provides further background on the impact of Chief Justice Lake in these various reforms.

have an official Innocence Inquiry Commission. The Commission accepts claims from incarcerated inmates asserting their non-involvement in the crime for which they were convicted, and has the legal power to exonerate them. As of June 30, 2018, it had received over 2,400 claims, and exonerated 10 individuals.[18]

Another important demonstration of state leaders' concern for issues of innocence and reducing errors was the 2007 Eyewitness Identification Reform Act, one of the most progressive laws in the country at the time of passage, and still a national model.[19] These reforms pushed North Carolina from the extreme of aggressive use of the death penalty to something close to the opposite: a leader in progressive reforms designed to reduce the possibility of tragic criminal justice errors in the forms of wrongful convictions, and providing a unique judicial mechanism for dealing with post-conviction claims of innocence. Many of these reforms were broad, affecting all criminal cases, not focused only on the death penalty. But they had a massive impact on the system and reflected, perhaps most importantly, a lack of confidence that the system always got things right. This of course had a powerful impact on capital punishment; the last death sentence to be carried out was in 2006.

Capital punishment in North Carolina went into an indefinite moratorium in 2006 when the NC Medical Board adopted the AMA Code of Medical Ethics Opinion 2.06, which stated in part:

> An individual's opinion on capital punishment is the personal moral decision of the individual. A physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution.[20]

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[18] See http://innocencecommission-nc.gov/about/, last accessed September 14, 2018.
[19] See http://www.ncids.com/forensic/eyewitness/eyewitness.shtml, last accessed September 14, 2018.
[20] See https://www.ncmedboard.org/resources-information/professional-resources/laws-rules-position-statements/position-statements/capital_punishment, last accessed September 14, 2018.

The statement goes on to explain that "participation" includes several possible roles, effectively ruling out any involvement. This created an effective moratorium because the state protocol for executions at the time required the participation of a physician. In 2009, the NC Supreme Court ruled that the medical board may not discipline a physician who so participates, but the Board maintains its position that such an action is a violation of medical ethics. Since this time the state has also altered its protocols no longer to require the participation of a physician, but to allow any "medical professional" to administer the required lethal injection. This would include a physician's assistant, a nurse, a paramedic, or an emergency medical technician. Rep. Leo Daughtry (R-Johnston County), chair of the House Judiciary I Committee, commented that "the fact that doctors are not willing to be there for the execution has cause a real stumbling block for us." The "Restoring Proper Justice Act" of 2015 changed these requirements. "As long as we have capital punishment, it's our duty to make sure the law is enforced" said Daughtry.[21]

The controversies associated with the Medical Board put a hard stop to any possible executions during the period of 2006 and following, as Rep. Daughtry noted. The Racial Justice Act (RJA) of 2009, allowing those under a sentence of death to contest, using evidence based on statistical patterns of racial difference in jury selection, or differential use based on inmate or victim race, further delayed matters. We discuss the RJA in detail in Chapter 9. Inmates were given 12 months to file their appeals, and almost all death row inmates did so. While these cases were pending, therefore, executions were further delayed. As a result of these two elements of litigation, the state has seen a complete stoppage, with no executions since that of Samuel Flippen on August 18, 2006. As of 2018, physician involvement is no longer part of the required state protocol, but litigation surrounding the RJA continues. If and when those concerns are

[21] See Lamb 2015.

resolved, litigation would certainly follow about the legality of the state's new injection protocol, so far untested. In sum, the 2006 actions by the Medical Board created a hard moratorium and further complications have kept it in place for over ten years.

With no executions taking place, and fewer death sentences, other events continued to intervene, further suppressing enthusiasm for the ultimate punishment. As discussed in Chapter 7, 2009 saw an update from Duke economist Phil Cook on the annual cost of North Carolina's (essentially defunct) death penalty system: He put the price tag at $11million per year.[22] In 2010 the *Raleigh News and Observer* published a multipart series of investigative reports on the State Bureau of Investigation (SBI), citing hundreds of cases where false testimony or incorrect forensic evidence had been used.[23] The powerful investigative reports by veteran journalists Mandy Lock and Joseph Neff stunned actors across the judicial system, documenting widespread abuse and pro-prosecution bias throughout the SBI. Attorney General Roy Cooper (later elected Governor in 2016) commissioned an audit which found that over 200 potentially innocent individuals had been affected by withheld or distorted evidence from the SBI. The Greg Taylor case, discussed in Chapter 7, prompted the review. Taylor had been convicted partially on the basis of SBI testimony that blood found on the bumper of his car linked him to the crime: "SBI analyst Duane Deaver admitted in February that he failed to report tests indicating a substance on Taylor's SUV was not blood. Deaver, who was suspended Wednesday, said that his bosses told him to write reports that way."[24] Three of those 200 potentially innocent individuals affected by this scandal have been executed; for them, the audit came too late.[25] The Locke-Neff articles

[22] See Cook 2009.
[23] See Locke and Neff 2010a,b, c, Neff and Locke 2010a.
[24] See Locke, Neff, and Curliss 2010.
[25] See Neff and Lock 2010b.

made clear that these were not isolated incidents, but widespread and officially approved practices that shook confidence in the system to its core.

By 2009, the death penalty was seeing its support even among conservatives decline to new levels; a new group, Conservatives Concerned about the Death Penalty, was created in Montana, expanding nationally by 2013.[26] NC Conservatives Concerned about the Death Penalty cites costs, innocence, wasteful government programs, a pro-life attitude, and the seriousness of LWOP as a punishment as their main reasons for supporting abolition of the death penalty.[27]

### *Countervailing Trends in Support of the Death Penalty*

It would overstate things to suggest that the trends described here were neat, tidy, and uncontested. Many Americans and North Carolina leaders in particular continue to believe that the death penalty is the appropriate penalty for murder, that it deters crime, and that its use should be expanded. We need look no further than the "Restoring Proper Justice Act" of 2015 for evidence of this: lawmakers passed legislation to eliminate the Racial Justice Act and take away the power of the Medical Board to frustrate the Department of Corrections in carrying out executions. Legislative intent was clear: stop the legal hurdles to execution, and get them going again. As we will discuss in Chapter 9, the Racial Justice Act proved extremely divisive politically, and passed with no Republican support. In the 2010 legislative campaign, the NC Republic Party used the issue extensively in its campaign materials, and worked to dilute then finally eliminate it in successive legislative actions in 2012 and 2015. At the federal level, 1995 saw the Anti-Terrorism and Effective Death Penalty Act, aimed at streamlining *habeas* review and limiting opportunities for inmates to delay or reverse their death sentences. Democratic political leaders in the state were also hesitant about standing out on the issue, seeing that the

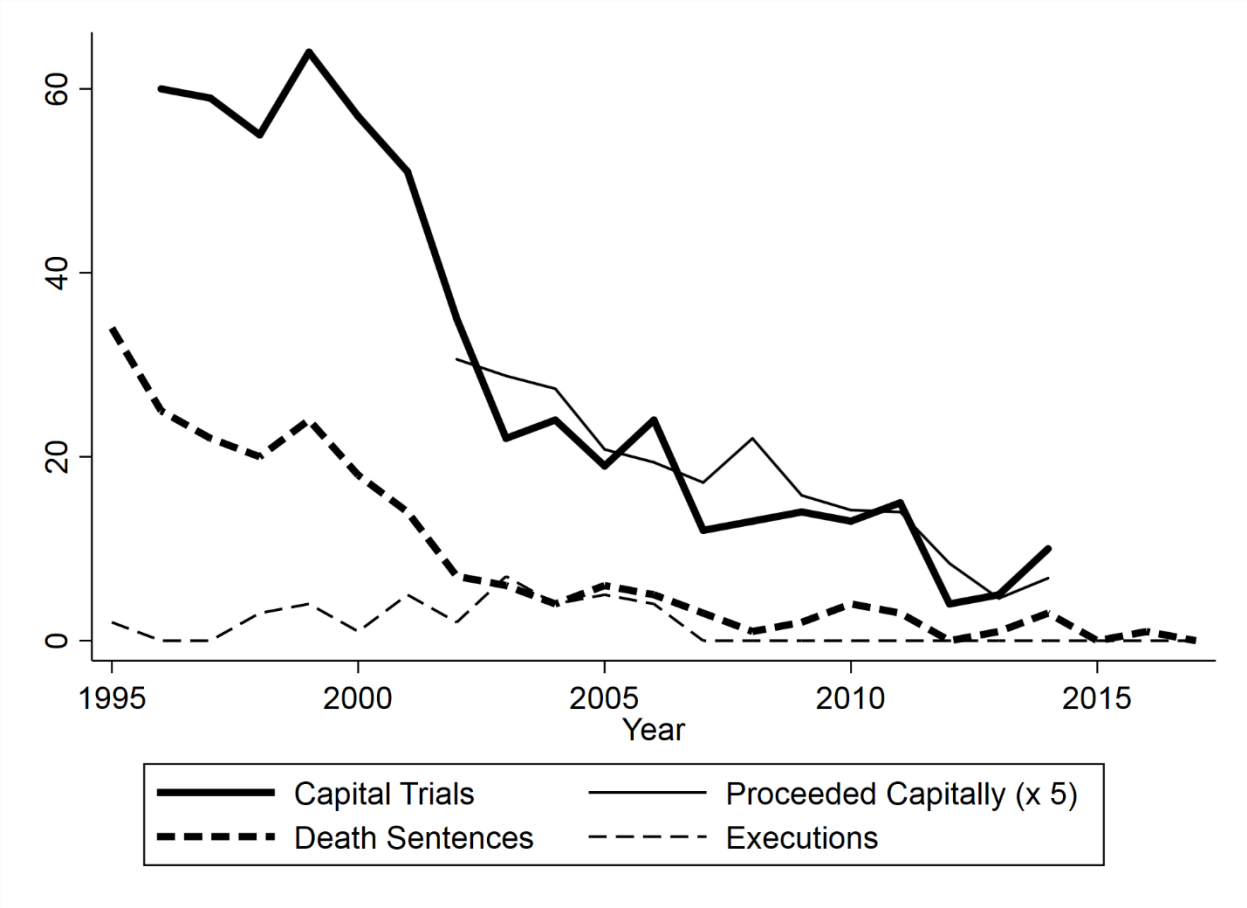
[26] See https://conservativesconcerned.org/who-we-are/.
[27] See http://ncconservativesconcerned.org/issues/.

2010 Republican attacks on such individuals as Rep. Hugh Holliman (D-Davidson) were successful. Neither Democratic former Governor Beverly Purdue, Governor Roy Cooper, nor Attorney General Josh Stein has come out clearly against the death penalty. So, while the trends described in this section are clear, it is important not to overstate them. Some Republican leaders have sought to reverse them, and some Democratic leaders have been luke-warm in their support for them. Still, within the legal system, confidence has been shaken. Even more clearly, actual usage of the death penalty itself has dwindled to a trickle. Given that the state was once so enthusiastic for the punishment, this is a remarkable shift.

## The Results

Given the concerns and the reforms implemented in recent years, there should be no surprise that Figure 8.2 showed a dramatic drop in the rate of use of the death penalty, from 5 death sentences per 100 homicides in 1995 to an average of 0.3 in the period from 2010 to 2017. Figure 8.3 shows the remarkable decline in the numbers of capital trials, death sentences, and executions from 1995 through 2017.

Figure 8.3 Declining Use of the Death Penalty.[28]




Through this time period, the number of homicides was relatively flat, declining at first from 577 in 1995 to as low as 476 in 2010, but increasing again to 671 in 2016, the most recent year available. Potentially capital trials, a number tracked by the Office of Indigent Defense Services only since their creation in 2001, rose from 360 in 2002 to a peak of 405 in 2008, and declined to 260 in 2014. Cases which proceeded capitally (that is, the District Attorney filed a motion indicating that they were going to seek the death penalty in a "rule 22" hearing) numbered as high as 153 in 2002 but declined to just 34 by 2014, the most recent data available. Because cases that "proceed capitally" are often resolved through a plea agreement before trial, the number of capital trials is much lower. Lower still are the numbers of death sentences,

[28] Sources: Proceeded capitally: IDS 2015, data by fiscal year. Capital trials courtesy of CDPL. Executions and Death Sentences, NC Department of Corrections.

particularly in the last 10 years: Since the creation of IDS and the reform granting prosecutors the discretion not to seek death in all eligible cases (both of which date to July 1, 2001), no year has seen as many as 8 death sentences. During the 20 year period from 1982 through 2001, there were an average of 19 death sentences each year, with a peak of 34 in 1995.

Given the dramatic decline in death sentences, and the lack of executions, North Carolina's death row population has mostly just grown older. We saw in Chapter 5 how often death sentences have been overturned; by far the most common outcome of a death sentence is that it is later reversed on appeal to life without parole. But another powerful implication of the successive reforms that took place in recent years, in particular the twin July, 2001 reforms giving prosecutors discretion, and greater guarantees of adequate legal defense for those accused of capital crimes, is that the vast majority of current death row inmates were sentenced under rules that no longer operate. Figure 8.4 shows the dates of arrival the inmates on death row as of July 1, 2018. A vertical line indicates July 1, 2001.

Figure 8.4. Current Death Row Inmates (2018) by Date of Death Sentence

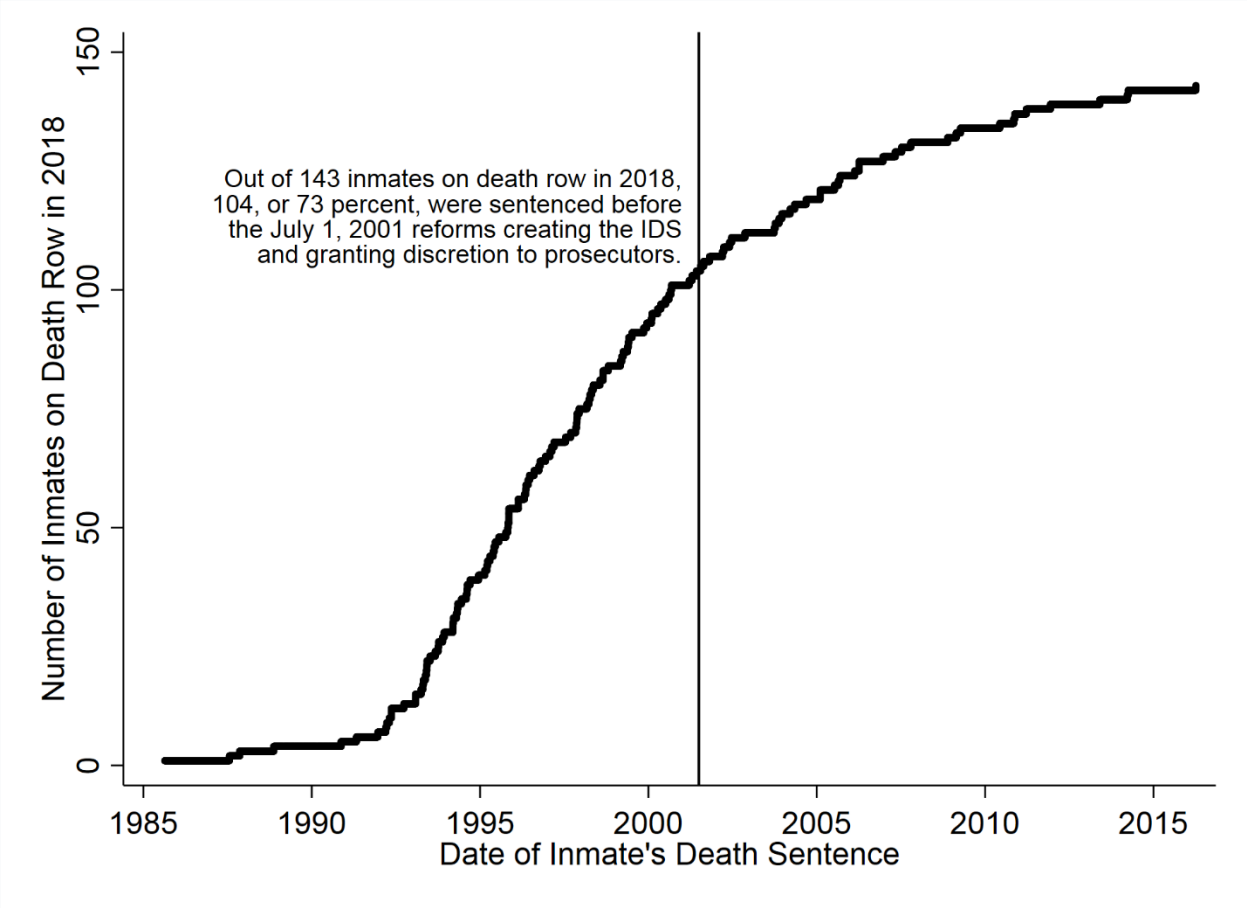



Figure 8.4 should be disturbing. Figure 7.4 showed the dramatic decline in North Carolina's death row population from its peak of over 200 around the year 2000. As fewer and fewer death sentences have been handed down and executions have stopped, death row has predominantly come to be populated by a set of inmates who were sentenced to death under rules that were much harsher than those in place today, and which have been disavowed. Unfortunately for those sentenced under these procedures, none of the reforms were retroactive and the death row population of 2018 consists mostly of inmates sentenced before the most powerful reforms, 17 years ago. Three-quarters (74 percent) of current death row inmates were sentenced to death before the July 1, 2001 reforms creating IDS and granting discretion to prosecutors.

## Conclusion

North Carolina began the post-*Furman* period as a national leader in enthusiasm for and aggressive use of the death penalty, quickly establishing the nation's largest death row before it was emptied in the wake of the 1976 *Woodson* decision. Enthusiasm and high rates of death sentencing continued through to the mid-1990s. But when several exonerations shook the state's confidence in the system, leaders enacted a powerful set of reforms. The state became a different type of leader nationally: eyewitness identification reform, the Innocence Inquiry Commission, and a centralized and professional office providing legal representation to indigent clients in capital and non-capital cases alike are all reforms that the state can point to with pride. They represent important reforms that were adopted with bi-partisan support. Some other events described here were less positive: investigative reporting by the *News and Observer* about massive incompetence and/or malfeasance in the State Bureau of Investigation, evidence of racial bias in jury selection associated with the Racial Justice Act, bitter partisan battles over the substance of that law, and a messy and unpleasant series of events regarding the Medical Board's decision to sanction any physicians who might participate in an execution, leading to a de-facto moratorium on executions that has lasted from 2006 through 2018 with no end in sight.

As state leaders have progressively addressed a number of flaws in the capital punishment system, the system itself has slowed down, virtually to a trickle and in some years a stand-still. No death sentences occurred state-wide in three recent years (2012, 2015, and 2017), with just a few in other years. This constitutes a remarkable shift from, say, 20 years ago, when more than 20 death sentences per year were routine. The death penalty had slowed down so much that its symbolic value, not its crime fighting potential, has become paramount. Of course, the racial element of the death penalty has been a powerful feature in North Carolina as in other states. North Carolina, more than other states, has directly addressed the racial character of its

death penalty system through the 2009 passage of the Racial Justice Act, subsequently amended, weakened, and eliminated. These events are so important that we devote the next chapter solely to them.

NORTH CAROLINA
SENTENCING AND POLICY ADVISORY COMMISSION

# Request: Sentence Lengths and Prison Population

August 2020

**Questions**

How do sentences compare under the Structured Sentencing Act and the Fair Sentencing Act?
What felony offenses receive Active punishment and which are sentenced to 10 years or more?
How many people are in prison with sentences of 10 years or more? What are their offenses?

**Data Sources and Description**

- NC Sentencing and Policy Advisory Commission, FY 2019 Felony Statistical Report Data.[1] These data include information on convictions and sentences imposed for the *most serious conviction* on a given day of court in FY 2019.
- NC Sentencing and Policy Advisory Commission and NC Department of Public Safety (DPS), Prison Population Data, June 30, 2019. These data include information on all inmates incarcerated in the state prison system on June 30, 2019.

**Approach**

Historical information regarding sentences imposed under Fair Sentencing was compared to sentences imposed under Structured Sentencing. Felony convictions were analyzed to determine what offenders received active punishment by offense class, and how many and which ones were sentenced to 10 years (120 months) or more. Prison population data were examined to determine how many prisoners (on June 30, 2019) were in prison serving a sentence of 10 years or more.

**Limitations**

Both conviction data and prison population data are pre-COVID-19 and therefore do not reflect any changes due to court closures and/or as a result of DPS policy changes related to sentence credits that affect time served or release from prison.

**Findings**

**<u>Statutory Sentence Lengths</u>** *(Table 1)*

- Fair Sentencing Act sentences were longer but were reduced by over 50% with sentence credits and could be further reduced by discretionary parole.
- Structured Sentencing Act sentences are shorter but have a minimum sentence and a maximum sentence that may be reduced down to the minimum sentence with sentence credits and a set period of post-release supervision.
- Offenders must serve their minimum sentence; they cannot be released prior to that date.

**<u>Sentence Lengths Imposed</u>**

- Only 5% (or n=569)[2] of convictions with Active punishment have a sentence of 10 years or more. *(Table 2).* Nearly all convictions with sentences 10 years or more were in Classes A, B1 and B2.
- 57% of sentences 10 years or more were for these offenses: first- or second-degree murder, habitual felon, rape of a child age 15 or younger, or first-degree statutory sex offense. *(Table 3)*
- Class H offenses with Active punishment comprised the largest portion (38%) of all active sentences. *(Table 4)*

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[1] Based on data entered into the Administrative Office of the Courts' management information system by the court clerk following the imposition of the sentence. The data include all North Carolina counties.

[2] This number includes 69 life without parole sentences, 4 life with parole sentences, and 2 death sentences.

**Sentence Lengths in Prison**

- 54% of prisoners had sentences less than 10 years; 46% had sentences of 10 years or more. *(Figure 1)*
- 22% of prisoners with a sentence of 10 years or more were sentenced to life or death. *(Figure 4)*
- The majority of prisoners with sentences of 10 years or more (55%) were in Classes A, B1, and B2. *(Table 5)*
- Sentences of 10 years or more were mostly for crimes against the person (82%). *(Figure 5)*
- Habitual felons comprised the largest portion of total prisoners (15%) and prisoners with sentences of less than 10 years (17%); prisoners with second-degree murder convictions comprised the largest portion of those with sentences of 10 years or more (22%). *(Table 6)*

## Statutory Sentence Lengths

**Table 1: Comparison of Fair Sentencing Act Sentences and Structured Sentencing Act Sentences**

| Fair Sentencing Act | | | |
|---|---|---|---|
| | Sentence Lengths in Months | | |
| **Class** | **Presumptive** | **Maximum** | **Avg. Time Served** |
| **A** | Death/Life with parole | | |
| **B** | Life with parole | | 178 |
| **C** | 180 | 600 or life | 88 |
| **D** | 144 | 480 | 76 |
| **E** | 108 | 360 | 56 |
| **F** | 72 | 240 | 32 |
| **G** | 54 | 180 | 25 |
| **H** | 36 | 120 | 15 |
| **I** | 24 | 60 | 8 |
| **J** | 12 | 36 | 5 |

| Structured Sentencing Act | | | |
|---|---|---|---|
| | Sentence Lengths in Months | | |
| **Class** | **Shortest Presumptive Min *(Max)*** | **Longest Aggravated Min *(Max)*** | **Avg. Est. Time Served** |
| **A** | Death/Life without parole | | |
| **B1** | 192 *(243)* | Life w/out parole | 251 |
| **B2** | 125 *(162)* | 393 *(484)* | 152 |
| **C** | 58 *(82)* | 182 *(231)* | 85 |
| **D** | 51 *(74)* | 160 *(204)* | 65 |
| **E** | 20 *(36)* | 63 *(88)* | 26 |
| **F** | 13 *(25)* | 41 *(59)* | 18 |
| **G** | 10 *(21)* | 31 *(47)* | 15 |
| **H** | 5 *(15)* | 25 *(39)* | 10 |
| **I** | 4 *(14)* | 12 *(24)* | 7 |
| N/A | N/A | N/A | N/A |

Note: Sentence lengths reflected in this table do not include sentences for drug trafficking offenses; Structured Sentencing maximums do not include maximums for B1-E sex offenses. FSA Average Time Served is based on prisoners released from the Department of Correction during 1991. SSA Average Estimated Time Served is for active sentences imposed in FY 2019.

**Fair Sentencing Act Sentence Elements, Credits, and Release**

- Judges could depart from the presumptive sentence and impose up to the maximum sentence upon a finding of aggravating factors.
- Non-life sentences received Good Time credit (one day deducted for every day in custody without a major infraction), and were eligible for Gain Time and Meritorious Time credit.
- Life sentences were eligible for parole after serving 20 years.
- Non-life sentences of 18 months or more were mandatorily released (reentry parole) 90 days prior to the expiration of the sentence, less credits.
- Subsequently, most offenders became eligible for release (community service parole) after serving 1/4 of their sentence, less credits.

**Structured Sentencing Act Sentence Elements, Credits, and Release**

- There are three ranges of possible minimum sentences (presumptive, aggravated, and mitigated). Judges can depart from the presumptive minimum sentence range and impose a sentence from the aggravated minimum sentence range upon a finding by a jury of aggravating factors.
- The judge selects a minimum sentence from within the appropriate range.
- The maximum sentence for non-life sentences is 120% of the minimum (rounded to the next highest month) plus a period of post-release supervision (60 months for Class B1-E sex offenses; for non-sex offenses, 12 months for Class B1-E, 9 months for Class F-I).
- Non-life sentences are eligible for Earned Time credits which may reduce the maximum to, but not below, the minimum.
- Offenders are released at their maximum sentence less Earned Time credits and the period of post release supervision.

## Sentence Lengths Imposed

**Table 2: Minimum Active Sentence Lengths by Offense Class**

| Offense Class | Number of Felony Convictions | Avg. Minimum Sentence (Months) | Minimum Sentence Length | | | |
|---|---|---|---|---|---|---|
| | | | <120 Months | | ≥120 Months | |
| | | | # | % | # | % |
| **Class A** | 72 | Life/Death | 0 | 0 | 72 | 100 |
| **Class B1** | 315 | 244 | 0 | 0 | 315 | 100 |
| **Class B2** | 139 | 151 | 27 | 19 | 112 | 81 |
| **Class C** | 605 | 78 | 555 | 92 | 50 | 8 |
| **Class D** | 867 | 66 | 847 | 98 | 20 | 2 |
| **Class E** | 1,023 | 29 | 1,023 | 100 | 0 | 0 |
| **Class F** | 1,210 | 19 | 1,210 | 100 | 0 | 0 |
| **Class G** | 1,397 | 15 | 1,397 | 100 | 0 | 0 |
| **Class H** | 3,952 | 10 | 3,952 | 100 | 0 | 0 |
| **Class I** | 892 | 7 | 892 | 100 | 0 | 0 |
| **Total** | **10,472** | **31** | **9,903** | **95** | **569** | **5** |

Note: The 569 convictions with a sentence of at least 120 months include 69 life without parole convictions, 4 life with parole convictions, and 2 death sentences. These sentences were not included in the calculation of average minimum sentence length.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2019 Statistical Report Data

**Table 3: Top Five Offenses for Convictions Sentenced to Active Punishment by Sentence Length**

| Convictions with Active Sentences <120 Months n=9,903 | | | Convictions with Active Sentences ≥120 Months n=569 | | | Total FY 2019 Felony Active Sentences N=10,472 | | |
|---|---|---|---|---|---|---|---|---|
| | # | % | | # | % | | # | % |
| Habitual Felon | 821 | 8 | Second-Degree Murder | 155 | 27 | Habitual Felon | 860 | 8 |
| Breaking and/or Entering Buildings | 706 | 7 | First-Degree Murder | 71 | 12 | Breaking and/or Entering Buildings | 706 | 7 |
| Possession of a Firearm by a Felon | 609 | 6 | Habitual Felon | 39 | 7 | Possession of a Firearm by a Felon | 609 | 6 |
| Obtain Property by False Pretense worth less than $100,000) | 352 | 4 | Statutory Rape of a Child 15 or Younger | 30 | 5 | Obtain Property by False Pretense worth less than $100,000) | 352 | 3 |
| Larceny of Property (worth more than $1,000) | 351 | 4 | First-Degree Statutory Sex Offense | 30 | 5 | Larceny of Property (worth more than $1,000) | 351 | 3 |
| Subtotal | 2,839 | 29 | Subtotal | 325 | 56 | Subtotal | 2,878 | 27 |

Note: The minimum active sentence length was used to determine the relationship between the sentence imposed and whether it was less than, equal to, or greater than 120 months.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2019 Statistical Report Data

**Table 4: Top Five Offenses for Convictions Sentenced to Active Punishment by Offense Class (Including Average Minimum and Maximum Sentence Lengths)**

| **Class A Felonies** | **Total Convictions = 72** | | **Avg. Min. Sentence (Months)** | **Avg. Max. Sentence (Months)** |
|---|---|---|---|---|
| | # | % | | |
| First-Degree Murder | 71 | 99 | Life/Death | Life/Death |
| Murder of an Unborn Child | 1 | 1 | Life/Death | Life/Death |
| **Class B1 Felonies** | **Total Convictions = 315** | | | |
| | # | % | | |
| Second-Degree Murder | 155 | 49 | 246 | 308 |
| Statutory Rape of a Child 15 or Younger | 30 | 10 | 229 | 329 |
| First-Degree Statutory Sex Offense | 30 | 10 | 202 | 292 |
| Statutory Sex Offense with a Child 15 or Younger | 18 | 6 | 227 | 333 |
| Statutory Sex Offense with a Child by an Adult | 14 | 4 | 281 | 393 |
| **Class B2 Felonies** | **Total Convictions = 139** | | | |
| | # | % | | |
| Second-Degree Murder w/out Regard for Human Life | 27 | 19 | 156 | 200 |
| Attempted First-Degree Murder | 16 | 12 | 177 | 224 |
| Child Abuse Inflicting Serious Bodily Injury | 7 | 5 | 133 | 172 |
| Second-Degree Murder | 7 | 5 | 158 | 200 |
| Second-Degree Murder by Distribution of Drugs | 2 | 1 | 213 | 267 |
| **Class C Felonies** | **Total Convictions = 605** | | | |
| | # | % | | |
| Habitual Felon | 283 | 47 | 85 | 115 |
| AWDW Intent to Kill Inflicting Serious Injury | 81 | 13 | 74 | 101 |
| First-Degree Kidnapping | 44 | 7 | 77 | 116 |
| Second-Degree Forcible Rape | 40 | 7 | 77 | 147 |
| Manufacture Methamphetamine | 21 | 3 | 62 | 87 |
| **Class D Felonies** | **Total Convictions = 867** | | | |
| | # | % | | |
| Robbery with a Dangerous Weapon | 303 | 35 | 62 | 87 |
| Habitual Felon | 259 | 30 | 73 | 101 |
| First-Degree Burglary | 73 | 8 | 63 | 89 |
| Voluntary Manslaughter | 69 | 8 | 70 | 97 |
| Attempted Robbery with a Dangerous Weapon | 29 | 3 | 60 | 85 |

*continued*

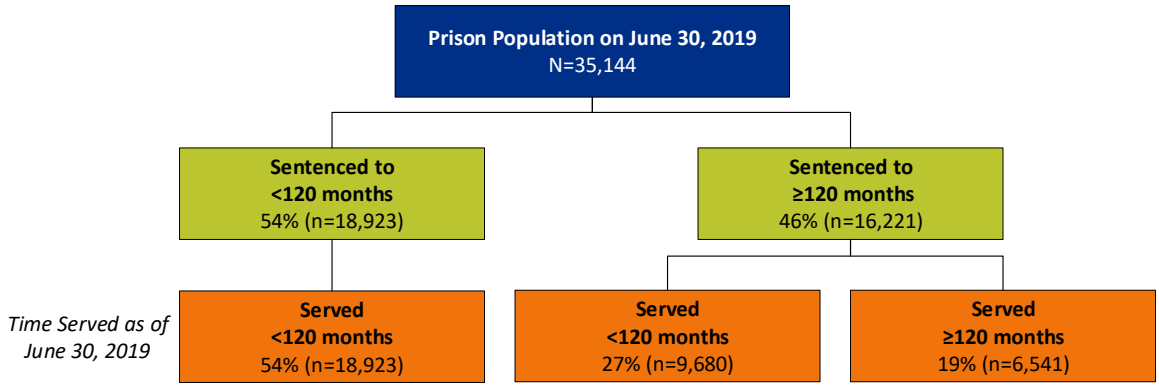
**Table 4: Top Five Offenses for Convictions Sentenced to Active Punishment by Offense Class (Including Average Minimum and Maximum Sentence Lengths)**

| **Class E Felonies** | **Total Convictions = 1,023** | | **Avg. Min. Sentence (Months)** | **Avg. Max. Sentence (Months)** |
|---|---|---|---|---|
| | # | % | | |
| Habitual Felon | 318 | 31 | 30 | 48 |
| AWDW Inflicting Serious Injury | 157 | 15 | 30 | 48 |
| Conspiracy to Commit Robbery with a Dangerous Weapon | 97 | 9 | 27 | 44 |
| Habitual Breaking or Entering Buildings | 82 | 8 | 34 | 53 |
| Second-Degree Kidnapping | 67 | 7 | 28 | 47 |
| **Class F Felonies** | **Total Convictions = 1,210** | | | |
| | # | % | | |
| Taking Indecent Liberties with a Child | 202 | 17 | 17 | 29 |
| Failure to Report New Address as a Sex Offender | 192 | 16 | 21 | 34 |
| Habitual Impaired Driving | 168 | 14 | 18 | 31 |
| Assault Inflicting Serious Bodily Injury | 77 | 6 | 20 | 33 |
| Failure to Register as a Sex Offender | 69 | 6 | 21 | 34 |
| **Class G Felonies** | **Total Convictions = 1,397** | | | |
| | # | % | | |
| Possession of a Firearm by a Felon | 609 | 44 | 15 | 28 |
| Common Law Robbery | 258 | 18 | 15 | 27 |
| Identity Theft | 69 | 5 | 16 | 28 |
| Sell Cocaine | 67 | 5 | 16 | 28 |
| Second Degree Burglary | 46 | 3 | 15 | 27 |
| **Class H Felonies** | **Total Convictions = 3,952** | | | |
| | # | % | | |
| Breaking or Entering Buildings | 706 | 18 | 10 | 22 |
| Obtaining Property by False Pretense (worth less than $100,000) | 352 | 9 | 11 | 22 |
| Larceny of Property (worth more than $1,000) | 351 | 9 | 11 | 23 |
| Larceny of a Motor Vehicle | 200 | 5 | 10 | 21 |
| Habitual Larceny | 198 | 5 | 13 | 25 |
| **Class I Felonies** | **Total Convictions = 892** | | | |
| | # | % | | |
| Possess Methamphetamine | 170 | 19 | 7 | 18 |
| Possess Cocaine | 121 | 14 | 7 | 18 |
| Breaking or Entering a Motor Vehicle | 87 | 10 | 8 | 19 |
| Possess Heroin | 74 | 8 | 7 | 18 |
| Possess Schedule II Controlled Substance | 46 | 5 | 7 | 18 |

Note: Convictions that did not fit within the appropriate cell in the Felony Punishment Chart were excluded from this table. Life and death sentences were excluded from the calculation of the average minimum and maximum sentence lengths. This table reflects all maximum sentences imposed regardless if they are consistent with the maximums set forth in statute. For all convictions, *see* Appendix B in the Sentencing Commission's *FY 2019 Structured Sentencing Statistical Report*. Drug trafficking convictions were excluded from this table. There were 498 drug trafficking convictions in FY 2019; 85% were sentenced to Active punishment. *See* Table 15 in the Statistical Report for more detail on those convictions.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2019 Statistical Report Data

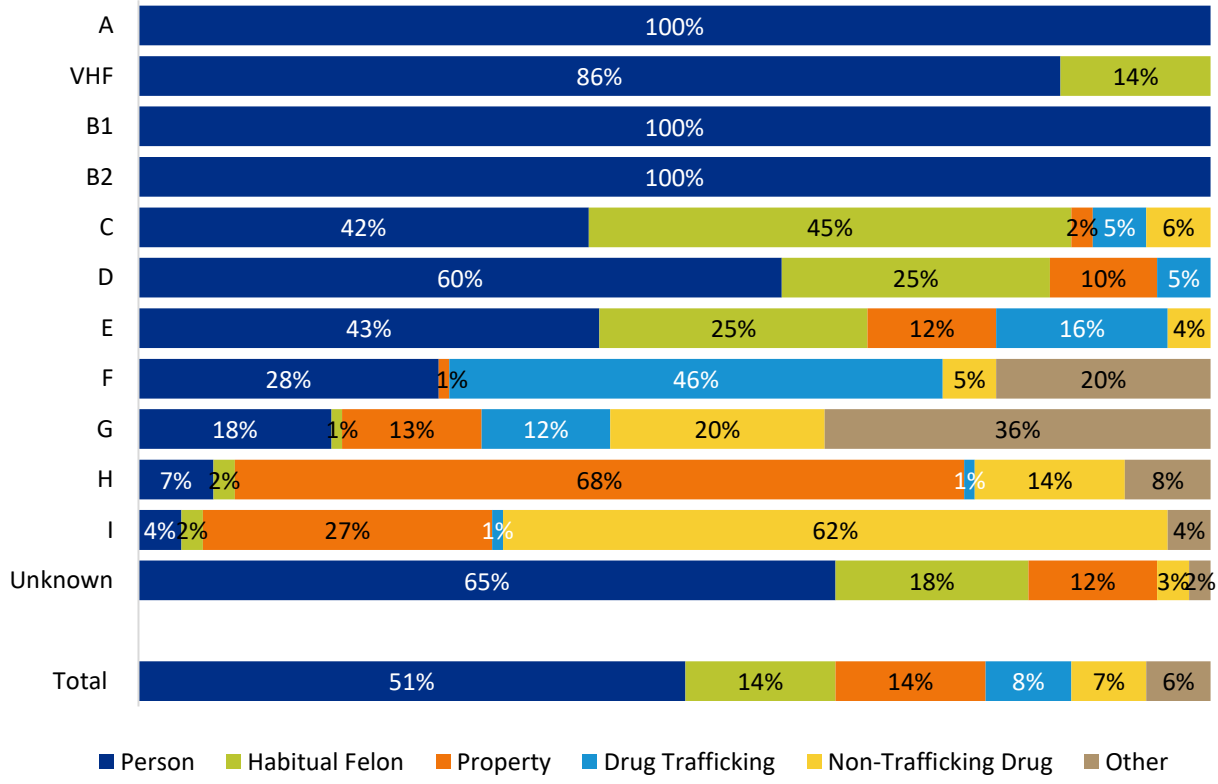
## Sentence Lengths in Prison

**Figure 1: Prison Population on June 30, 2019**



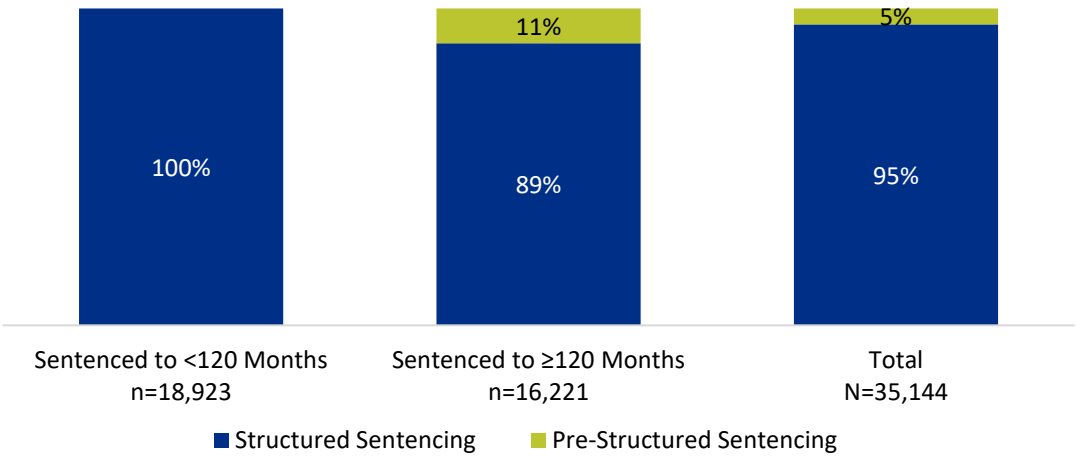

Source: NC Sentencing and Policy Advisory Commission and Division of Adult Correction and Juvenile Justice

**Figure 2: Prison Population by Offense Class and Offense Type**



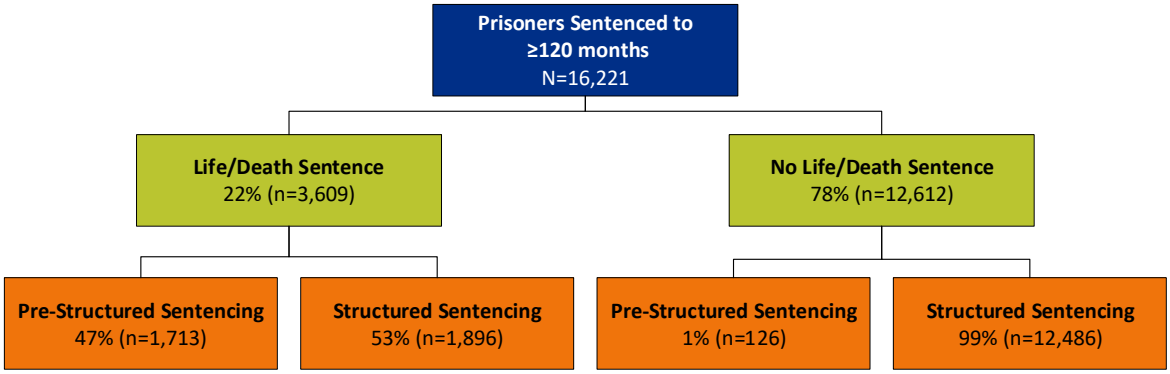

Source: NC Sentencing and Policy Advisory Commission and Division of Adult Correction and Juvenile Justice

**Figure 3: Prison Population by Sentence Length and Sentence Type**




Note: For prisoners sentenced to less than 120 months, <1% (n=5) were pre-Structured Sentencing.
Source: NC Sentencing and Policy Advisory Commission and Division of Adult Correction and Juvenile Justice

**Figure 4: Prison Population with Sentences of 120 Months or More by Life/Death Sentences and Sentence Type**



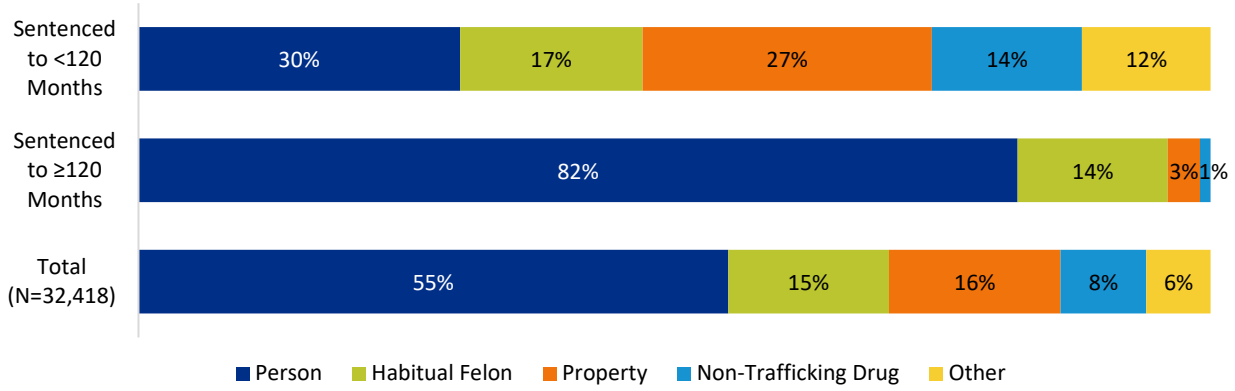

Source: NC Sentencing and Policy Advisory Commission and Division of Adult Correction and Juvenile Justice

**Table 5: Prison Population by Offense Class and Sentence Length**

| Offense Class | On June 30, 2019 | | Sentence Length | | | |
|---|---|---|---|---|---|---|
| | | | <120 Months | | ≥120 Months | |
| | Prison Population | Avg. Time Served (Months) | # | % | # | % |
| **Class A** | 2,162 | 194 | 0 | -- | 2,162 | 100 |
| **VHF** | 44 | 159 | 0 | -- | 44 | 100 |
| **Class B1** | 3,080 | 102 | 0 | -- | 3,080 | 100 |
| **Class B2** | 3,241 | 118 | 0 | -- | 3,241 | 100 |
| **Class C** | 5,266 | 88 | 1,871 | 36 | 3,395 | 64 |
| **Class D** | 5,086 | 55 | 3,064 | 60 | 2,022 | 40 |
| **Class E** | 2,364 | 18 | 2,338 | 99 | 26 | 1 |
| **Class F** | 1,629 | 12 | 1,629 | 100 | 0 | -- |
| **Class G** | 2,232 | 11 | 2,232 | 100 | 0 | -- |
| **Class H** | 4,718 | 9 | 4,718 | 100 | 0 | -- |
| **Class I** | 1,213 | 5 | 1,213 | 100 | 0 | -- |
| **Class Unknown** | 1,383 | 173 | 16 | 1 | 1,367 | 99 |
| **Total** | **32,418** | **69** | **17,081** | **53** | **15,337** | **47** |

Note: Data on prisoners with drug trafficking convictions (n=2,726) were excluded from this table due to their mandatory sentence lengths which differ from Structured Sentencing sentence lengths. 68% of prisoners with drug trafficking convictions were sentenced to less than 120 months.
Source: NC Sentencing and Policy Advisory Commission and Division of Adult Correction and Juvenile Justice

**Figure 5**
**Prison Population by Sentence Length and Offense Type**




Note: Data on prisoners with drug trafficking convictions were excluded from this figure.
Source: NC Sentencing and Policy Advisory Commission and Division of Adult Correction and Juvenile Justice

**Table 6: Top Five Convictions of Prison Population by Sentence Length**

| Prisoners Sentenced to <120 Months n=17,081 | | | Prisoners Sentenced to ≥120 Months n=15,337 | | | Total Prisoners N=32,418 | | |
|---|---|---|---|---|---|---|---|---|
| | # | % | | # | % | | # | % |
| Habitual Felon | 2,854 | 17 | Second-Degree Murder | 3,413 | 22 | Habitual Felon | 4,900 | 15 |
| Robbery with a Dangerous Weapon | 1,588 | 9 | First-Degree Murder | 2,380 | 16 | Second-Degree Murder | 3,445 | 11 |
| Breaking and Entering Buildings | 1,168 | 7 | Habitual Felon | 2,046 | 13 | Robbery with a Dangerous Weapon | 2,499 | 8 |
| Possession of Firearm by a Felon | 977 | 5 | First-Degree Rape | 927 | 6 | First-Degree Murder | 2,419 | 7 |
| Obtain Property by False Pretenses | 584 | 3 | Robbery with a Dangerous Weapon | 911 | 6 | Breaking and Entering Buildings | 1,222 | 4 |
| Subtotal | 7,171 | 41 | Subtotal | 9,677 | 63 | Subtotal | 14,485 | 45 |

Note: Data on prisoners with drug trafficking convictions were excluded from this table. Numbers may not remain consistent across columns due to how data are captured in DPS's information management system.
Source: NC Sentencing and Policy Advisory Commission and Division of Adult Correction and Juvenile Justice

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:10-CT-3123-BO

| | | |
|---|---|---|
| SHAUN ANTONIO HAYDEN,<br>Plaintiff, | ) | |
| v. | ) | ORDER |
| ALVIN KELLER, et al.,<br>Defendants. | ) | |

On July 15, 2010, plaintiff Shaun Antonio Hayden ("Hayden"), proceeding pro se, filed this complaint in this case pursuant to 42 U.S.C. § 1983. Compl., D.E. 1. After denying defendants' motion to dismiss the matter, the court directed that Hayden be represented by North Carolina Prison Legal Services, Inc. ("NCPLS"). Hayden v. Keller, No. 10-HC-2272-BO, Orders, D.E. 9 and 25; Notices, D.E. 10-15, 22. NCPLS entered an appearance and, on September 11, 2013, filed an amended complaint on Hayden's behalf pursuant to Section 1983. Id.; Hayden, 5:10-CT-3123-BO, Am. Compl., D.E. 10 and Notice of Appearance, D. E. 13. Cross motions for summary judgment are now before the court. Pl.'s Mot. Summ. J., D.E. 30; Defs' Mot. Summ. J., D.E. 36. On July 27, 2015, the court held a hearing on the pending motions. Min., D.E. 49. Thereafter, the motions were supplemented with statistical data and additional briefing. Orders, D.E. 50 and 53; Responses, D.E. 52, 56-57; In this posture, the matter is ripe for determination.

A. Issue

Hayden contends that, as a juvenile offender sentenced to a life sentence with parole, he is owed something that adult offenders are not: a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Graham v. Florida, 560 U.S. 48, 75 (2010).

Hayden further contends that the North Carolina Post-Release Supervision and Parole Commission ("Parole Commission" or "Commission") and their procedures do not afford him that opportunity. Hayden seeks declaratory and injunctive relief, but no monetary damages.

B. Facts

Hayden is a prisoner in the custody of the North Carolina Department of Public Safety ("NCDPS"). Hayden was born on October 6, 1966. Mem. in Supp. Pl's Mot. Summ. J., D.E. 31, Decl. Hayden ¶ 1; Def's Mot. Summ. J., D.E. 36, Ex. A - Offender Info. He was fifteen years old when he committed the crimes for which he is now imprisoned. Id., ¶¶ 2-3; Id., Ex. B and C - Indictments, Probable Cause Hearing. Although Hayden was to be tried as an adult at the age of sixteen, he did not go to trial, but pled guilty to first degree burglary; assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death; first degree sexual offense; second degree sexual offense; first degree rape; attempted second degree rape; and breaking and entering and larceny. Id. ¶ 4; Id., Ex. D. - Judgment and Commitment. The maximum allowable prison term was two life terms plus 160 years. Def's Mot, Ex. C. Hayden was sentenced to a term of his natural life. Pl's Mot. Summ. J., D.E. 31, ¶ 6. He has been in the custody of the NCDPS since March of 1983, and he is now 48 years old.

Hayden became eligible to be considered for parole in 2002, after serving a term of twenty years. N.C. Gen. Stat. § 15A-1371(a1) (1983). The Parole Commission has considered him for parole every year[1] since 2002 under the normal adult offender parole procedures. Pl's

[1]At the oral argument, counsel for defendants acknowledged that the annual review is not a date certain but generally occurs within a relative time frame of one year after the offender's last review.

Mot. Summ. J., ¶ 7; D.E. 32, Ex. B, Parole Comm'n Records. Each year parole has been denied at the first level of review. Id., ¶ 8.

In North Carolina, the Parole Commission is the independent agency responsible for evaluating offenders for parole release. See N.C. Gen. Stat. § 143B-720(a). The Parole Commission consists of four commissioners, assisted by a chief administrator and staff. Mem. in Supp. Pl's Mot. Summ. J., D.E. 32, Dep. Mary Stevens (Agent of Parole Commission), at 20. The Commission employs a staff of thirty-six people including a psychologist, two lead parole case analysts, and sixteen parole case analysts. Dep. Stevens at 8-9. For each case, the assigned analyst researches the record and the inmate file, including using such specific criteria that the Commission has said they want to know about the case, and then prepares a written report and recommendation. Id. at 21, 25, 33-34, and 45. Caseloads are high: each parole case analyst is responsible for approximately 4,338 offenders. Dep. Stevens at 28. According to Paul Butler, the Chairman of the Parole Commission, the most important information in the summary includes the following: the official crime version (narrative of events of crime of conviction); prison infraction history; gang membership; psychological evaluations; custody level history; visitation history; and a home plan. Dep. Butler at 51-52. Special weight is given to the "brutality of the crime." Id. at 54-55.

As for the commissioners, they work full-time for the Commission. Dep. Stevens at 104. The law requires a majority of commissioners (three out of four) to vote on every case. Id. at 86; N.C. Gen. Stat. § 143B-721(d). They vote on in excess of 2,000 cases every month, not including other work the commissioners do. Id. at 106. As of September 2014, the Parole Commission had reviewed about 15,200 parole cases for that year. Id.

The parole process is a two step process. Step one, or level one, is referred to as the "review." Dep. Stevens at 20-12. Step two, or level two, is referred to as the "investigation." Id. At the "review" stage, the parole case analyst relies on any psychological evaluations contained within the offender's prison file. Dep. Stevens at 63. After writing the summary of the prison file, and making a written recommendation for or against granting parole, the parole case analyst provides the information to a commissioner. Id. at 43.

The commissioners make independent electronic votes. Ex. E. Dep. Butler at 50; Ex. D. Dep. Stevens at 104, 107. They do not consult one another in casting their ballots, nor do they cast their ballots in the same room. Ex. E, Dep. Butler at 50-51. On a "fairly typical day," a commissioner casts approximately 91 votes. Id. at 25. The commissioners have many other responsibilities including presiding over Post-Release Supervision Revocation hearings, attending training, overseeing office administration, reviewing statistical reports, making field visits to jails and probation offices, approving warrants for arrest, and meeting with members of the public on Tuesdays. Id. at 14, 18-19, 23-24, 31, 33; Dep. Stevens at 71. The commissioners vote on felony parole cases five days a week. Dep. Butler at 62.

The Parole Commission does not provide notice to a juvenile offender in advance of his/her parole review; there is no opportunity for a juvenile offender to be heard during the course of his/her parole review; and, the commissioners do not hold an in-person hearing to deliberate together on the question of a juvenile offender's suitability for parole.[2] Dep. Stevens

[2]Since 2012, the only notice given at the review stage is to "any active victim." Prior to 2012, notice was not provided to any party. Dep. Stevens at 50.

at 43-53. The commissioners are not aware, and do not consider, whether a particular offender was a juvenile at the time of his/her offense. Dep. Stevens at 111.

Testimony states that a commissioner's usual vote is "no" on felony parole at the "review" stage. Dep. Stevens at 98. If the vote is not "no," the commissioner will most likely vote "incomplete," and recommend an "investigation." Id. At the "investigation" stage, the parole case analyst notifies the offender, the offender's prison facility, the victim, the prosecuting district attorney, and law enforcement. Id. at 45, 48-49. It is normal practice for the commission to order a psychological report to be conducted on the offender at this second level of review. Dep. Butler at 35. All such reports must be completed by the Parole Commission's staff psychologist, Dr. Denis Lewandowski. Dep. Stevens at 18. The probation department is requested to investigate the feasibility of the offender's proposed home plan. Id. at 54. If the "investigation" shows that the candidate for parole is promising, the Parole Commission will normally offer a "MAPP contract"—which is a contract between the offender, the prison, and the Parole Commission. Dep. Butler at 36. The contract lets an offender work through different custody levels and "get on work release for one to five years before they are released." Dep. Stevens at 77-79. The MAPP contract is ordinarily a mandatory step toward felony parole. Id. at 20-21; Dep. Butler at 60. Hayden has been denied parole at the review stage each year since 2002, thus never reaching the level two investigation.

Reasons for parole denial are considered confidential. Records created, received, and used by the Parole Commission in the performance of its statutory duties are likewise

confidential and are not subject to disclosure under the Public Records Law.[3] 1996 Op. Atty Gen'l 36 (April 24, 1996).

The court notes that while the affidavits of the two commissioners before the court state no consideration of age is given in a parole review, there is evidence in the record that at least one case analyst did negatively consider age as a parole factor. The analyst review reads as follows:

> Hayden was 15 years old when he committed these crimes. In 3/07 DOP completed a risk assessment which found Hayden to be an acceptable risk for unsupervised access to the community. **It is important to note that in the risk assessment it was further noted that the young age that Hayden did the crimes and the fact that he has spent much of his developmental life in prison suggests he will always require at least moderate level of supervision since it is unlikely that he has significant coping skills and decision making ability to function well without good guidance.** In 11/10 DOP completed another risk assessment which found him to be an unacceptable risk for unsupervised access to the community. Based on the belief that Hayden would not adhere to the conditions of parole and the risk he poses to public safety, it is recommend that parole/Mapp be denied.

D.E. 32-4 at 7-8.

One additional source of information about some offenders is the commissioners' meetings with the public. Members of the public have the right to visit the Parole Commission on Tuesdays. Dep. Stevens at 71. Availability is on a first-come, first-serve basis, and if a member of the public misses an offender's annual parole review, he or she must try again the following year. Id. at 71-72.

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[3]Plaintiff filed a motion to seal certain documents due to this provision. Defendants do not seek for the information to be sealed and waive the requirement. The motion [D.E. 33] is DENIED.

Throughout this process, every felony offender—adult or juvenile—is reviewed in the same way. Dep. Stevens at 39. The Parole Commission gives no consideration to an offender's age at the time of the offense. Dep. Butler at 54.

An expert report to identify the overall differences between paroled and non-paroled prisoners in the North Carolina system also provides relevant information.[4] Ex. F, Expert Report

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[4]The report sets out its findings in the context of this historical background:

> The parole system in North Carolina has undergone numerous changes since its original inception in 1868. In its earliest form, the governor was empowered with the ability to make decisions regarding reprieves, commutations, and pardons, and this was expanded to include a system of supervised release. The governor or his staff retained this authority until 1955, when North Carolina established the state's earliest Parole Commission, which had exclusive authority to grant, revoke, and terminate parole. For the next 26 years, the Parole Commission had a great deal of discretion in making parole decisions, which sought to emphasize rehabilitation and public safety. However, in the 1980s, concerns about sentence disparities and a growing prison population gave rise to a new set of rules and standards. In 1987, the General Assembly passed the Prison Population Stabilization Act, known as the prison cap, which mandated that the Commission keep the prison population below a legally-determined level. This dramatically changed the parole process in North Carolina for the duration of its tenure, which ended in 1996. During this time, many inmates found guilty of misdemeanors were released categorically, without much consideration to their degree of rehabilitation or to public safety, as a way to prevent prison overcrowding. In 1994, the system changed yet again with the passage of the Structured Sentencing Act, which eliminated the parole system as it had previously existed, and removed the Commission's discretionary role for most crimes committed after October 1, 1994, with the exception being those incarcerated for driving under the influence.
>
> This report aims to analyze the factors that influence the probability of being granted parole by the Commission for a certain class of offenders, namely those with life sentences convicted before 1995. By focusing on this select group of inmates, it is possible to limit the influence of the changing legal environment. First, by choosing only those prisoners who were convicted prior to 1995, we can be sure that the prison population we are analyzing was and is subject to the Parole Commission's discretion. Second, by focusing our analysis on those prisoners with life sentences, invariably guilty of serious felonies, we can be confident that such prisoners would not have been subject to any categorical release programs as a way to address prison overcrowding.

of Bryan Gilbert Davis. The report found that the statistical data shows that older offenders, offenders who have reached 58 to 59 years of age, are more likely to be paroled than younger offenders. Id. at 8. However, the length of an offender's incarceration seems to have no impact on whether or not the offender will be paroled. Id. at 17-18. Merely being in prison longer is not enough to increase parole likelihood. Id. The report found that a vast majority of the paroled offenders to have a low infraction history in prison. Id. The report found that "compared against the base case of violent crime, sex offenders are significantly less likely to be paroled." Id. "On the other hand, perpetrators of property crimes (which include burglary and arson in this model) are only slightly more likely to be paroled than violent offenders." Id. The report also found that those that attempt escape are significantly less likely to be granted parole. Id.

Additional statistical data from 2010-2015 shows the following for inmates with no release date or serving a life sentence:

1. In 2015, a total of 531 inmates are eligible for annual parole review. Because 24 of these individuals were assigned to treatment or MAPP programs, only 507 inmates will actually receive an annual parole hearing. So far this year, six of these inmates have received parole (1.2% of those considered). In 2015, 34 juvenile offenders are eligible for parole, and one has received parole.
2. In 2014, a total of 529 inmates were eligible for annual parole review. Because 43 of these individuals were assigned to treatment or MAPP programs, only 486 actually received an annual parole hearing. Nine of these actually received parole (1.9% of those considered). In 2014, 35 juvenile offenders were considered for parole, but none received parole.
3. In 2013, a total of 508 inmates were eligible for annual parole review. Because 63 of these individuals were assigned to treatment or MAPP programs, only 445 actually received an annual parole hearing. Six of these actually received parole (1.4% of those considered). In 2013, 32 juvenile offenders were considered for parole, but none received parole.
4. In 2012, a total of 490 inmates were eligible for annual parole review. Because 53 of these individuals were assigned to treatment or MAPP programs, only 437 actually

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Id. at 2-3.

received an annual parole hearing. Ten of these actually received parole (2.3% of those considered). In 2012, 29 juvenile offenders were considered for parole, but none received parole.

5. In 2011, a total of 446 inmates were eligible for annual parole review. Because 35 of these individuals were assigned to treatment or MAPP programs, only 411 actually received an annual parole hearing. Eleven of these actually received parole (2.7% of those considered). In 2011, 28 juvenile offenders were considered for parole, but none received parole.
6. In 2010, a total of 421 inmates were eligible for annual parole review. Because 50 of these were assigned to treatment or MAPP programs, only 371 actually received an annual parole hearing. Twenty-two of these actually received parole (5.9% of those considered). In 2010, 32 juvenile offenders were considered for parole, and six received parole.

D.E. 52, Response of Def. Butler to Court Order.

C. Discussion

Summary judgment is appropriate when, after reviewing the record taken as a whole, no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986). The party seeking summary judgment initially must demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party has met its burden, the nonmoving party "must come forward with specific facts showing that there is a genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (emphasis and quotation omitted). A trial court reviewing a motion for summary judgment should determine whether a genuine issue of material fact exists for trial. Anderson, 477 U.S. at 249–50. In making this determination, the court must view the evidence and the inferences drawn therefrom in the light most favorable to the nonmoving party. Scott v. Harris, 550 U.S. 372, 378 (2007).

"To state a claim under [section] 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." West v. Atkins, 487 U.S. 42, 48 (1988); see Philips v. Pitt Cnty. Mem'l Hosp., 572 F.3d 176, 180 (4th Cir. 2009). Hayden contends he has been denied his constitutional rights to be free from cruel and unusual punishment and to due process pursuant to the Eighth and Fourteenth Amendments of the Federal Constitution. Specifically, he claims these rights have been infringed because defendants have denied him (in the status of a juvenile offender) from receiving a meaningful opportunity to obtain release through parole based on the Supreme Court's holdings in Graham and Miller v. Alabama, 132 S. Ct. 2455 (2012).

To begin, it is well established that "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 7 (1979); cf. Hawkins v. Freeman, 195 F.2d 732, 747 (4th Cir. 1999) (indicating that there is no fundamental right to parole release). Likewise, in the Fourth Circuit, a State is not constitutionally obligated to provide a parole regime. Vann v. Angelone, 73 F.3d 519, 521 (4th Cir. 1996). Therefore, offenders' limited right to consideration for parole finds its roots in State law. See Burnette v. Fahey, 687 F.3d 171, 181 (4th Cir. 2012).

In North Carolina, the Parole Commission has the exclusive discretionary authority to grant or deny parole. See N.C. Gen. Stat. § 143B-720 (2014) (authority of Parole Commission), and N.C. Gen. Stat. § 15A-1371(d) (indicating that the Parole Commission "may refuse to release on parole a prisoner it is considering for parole if it believes" the prisoner falls under any

of the criteria detailed in the statute); see also Goble v. Bounds, 13 N.C. App. 579, 583, 186 S.E.2d 638, 640 ("We conclude that honor grade status, work release privilege, and parole are discretionary acts of grace or clemency extended by the State as a reward for good behavior, conferring no vested rights upon the convicted person."), aff'd, 281 N.C. 307, 188 S.E.2d 347 (1972) (emphasis added). The Fourth Circuit has determined that due process requires only that authorities "furnish to the prisoner a statement of [their] reasons for denial of parole." Vann, 73 F.3d at 522 (quoting Franklin v. Shields, 569 F.2d 784, 801 (4th Cir.1977)). There is no differentiation between adult and juvenile offenders in North Carolina's parole scheme.

The Supreme Court in Graham viewed the question, not as one of due process, but in terms of the constitutional protections found within the Eighth Amendment. They held

> [t]he Eighth Amendment states: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society. This is because the standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.

Graham, 560 U.S. at 58. Importantly, Graham then found that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." 560 U.S. at 82; see also Miller, 132 S. Ct. at 2465 (recognizing "this Court held in Graham [ ] that life without parole violates the Eighth Amendment when imposed on juvenile nonhomicide offenders"). The Court continued that when a state sentences a juvenile and "imposes a sentence of life it must provide [that child] with some realistic opportunity to obtain release before the end of that term." Graham, 560 U.S. at 82. Therein, the opportunity must be "meaningful" and "based on demonstrated maturity and rehabilitation." Id. at 75.

Thus, the question presented here is whether the parole process in North Carolina provided to a juvenile offender serving a life sentence with parole comports with Graham. In this court's review, it is important to start with the Supreme Court's holding that in fact "children are different." Miller, 132 S. Ct. at 2470. Juveniles have "lessened culpability" and a "greater capacity for change." Miller, 132 S. Ct. at 2460. The Supreme Court has banned life without parole as a punishment for juvenile nonhomicide offenders. Graham, 560 U.S. at 48. Absent some meaningful parole process for nonhomicide juvenile offenders, Hayden argues his life sentence is de facto one of exactly that, life without parole—because he will never be granted the opportunity to obtain release by demonstrating his increased maturity. While "[a] state is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime . . . [w]hat a State must do . . . is give defendants . . . some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Graham, 560 U.S. at 75.

Clearly Graham created a categorical bar or flat ban on imposition of a sentence of life without the possibility of parole on juvenile nonhomicide offenders. Graham, 560 U.S. at 48; see Johnson v. Ponton, 780 F.3d 219, 222 (4th Cir. 2015) (Graham "categorically barred life-without-parole-sentences for juvenile nonhomicide offenders"); In re Vassell, 751 F.3d 267, 269–70 (4th Cir. 2014) (defendant's petition for habeas relief was untimely because his right to relief first became available after Graham, which "prohibited imposing any sentence of life without parole—mandatory or individualized—for juveniles convicted of committing nonhomicide offenses"); In re Sloan, 570 F. App'x 338, 339 (4th Cir. 2014) (Graham held "the Eighth Amendment prohibits a sentence of life without parole for any juvenile offender [ ] who did not commit homicide"). The Supreme Court in Miller further extended the reasoning in

Graham to *mandatory* sentences of life without parole for juveniles convicted of homicide offenses. Miller, 132 S. Ct. at 2467. Under Miller, a State may ultimately impose a life without parole sentence against a juvenile convicted of homicide, but only after the sentencer has the opportunity to consider all the mitigating circumstances, including the offender's age and age-related characteristics. Id. at 2475. In doing so, the Supreme Court emphasized that, "given all we have said in Roper, Graham, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." See id. at 2469.

In applying these principles set out by the Supreme Court, other courts have held that Miller and Graham apply to lengthy term-of-years sentences or aggregate sentences. See Moore v. Biter, 725 F.3d 1184, 1192 (9th Cir. 2013) (a sentence of 254 years is materially indistinguishable from a life sentence without the possibility of parole); Casiano v. Comm'r of Correction, 317 Conn. 52, 79, 2015 WL 3388481 at *11 (Conn. May 26, 2015) ("a fifty year term and its grim prospects for any future outside of prison effectively provide a juvenile offender with 'no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.'"); Brown v. State, 10 N.E.3d 1, 7–8 (Ind. 2014) (reducing a juvenile's sentence to eighty years after concluding that, while the trial court acted within its discretion when it imposed a sentence of 150 years for murder, such a sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the [juvenile] convict . . ."); Bear Cloud v. State, 334 P.3d 132, 144 (Wyoming 2014) (an aggregate sentence of just over forty-five years was the de facto equivalent of a life sentence without parole); State v. Null, 836 N.W.2d 41, 72 (Iowa 2013)

("Miller's principles are fully applicable to a lengthy term-of-years sentence"); People v. Caballero, 55 Cal.4th 262, 145 Cal. Rptr.3d 286, 282 P.3d 291, 296 (Cal. 2012) ("sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment"); but see Bunch v. Smith, 685 F.3d 546, 552–53 (6th Cir. 2012) (even though an aggregate sentence of eighty-nine years may be the functional equivalent of life, Graham applied only to sentences of "life," not aggregate sentences that result in a lengthy term of years); State v. Brown, 118 So.3d 332, 342 (La. 2013) ("nothing in Graham addresses a defendant convicted of multiple offenses and given term of year sentences"). Courts have also rejected state "geriatric release provisions" by which a nonhomicide juvenile offender sentenced to life without parole may apply for geriatric release as "inconsistent with the Eighth Amendment." LeBlanc v. Mathena, 2015 WL 4042175, at *11-18 (E.D. Va. 2015) (quoting and citing Graham, 560 U.S. at 76). Furthermore, courts have determined that Miller-type protections, i.e., individualized sentencing evaluations, are constitutionally required in cases where a juvenile is sentenced to either a de facto life sentence, or to a term of years that would effectively deprive him of a meaningful opportunity for release on parole during his lifetime. Greiman v. Hodges, 79 F. Supp. 3d 933, 938-945 (S.D. Iowa 2015) (defendants denied plaintiff a meaningful opportunity to obtain release by failing to consider plaintiff's youth at the time of the offense and by failing to consider plaintiff's demonstrated growth, maturity, and rehabilitation as part of the parole review process); State v. Null, 836 N.W.2d 41, 72–76 (Iowa 2013) (holding that Miller's protections are fully applicable to "a lengthy term-of-years sentence" and require judges sentencing juveniles to recognize: (1) that

children are constitutionally different than adults and cannot be held to the same standard of culpability in sentencing; (2) that children are more capable of change than adults; and (3) that lengthy prison sentences without the possibility of parole for juveniles are appropriate, "if at all, only in rare or uncommon cases"). Lastly, Graham explicitly holds that "[w]hat the State must do is give some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Graham, 560 U.S. at 75. "It is axiomatic that a juvenile offender could only prove increased maturity and rehabilitation warranting release from custody at some time well after a sentence is imposed." Greiman, 79 F. Supp. 3d at 943; see Graham, 560 U.S. at 79 (the Eighth Amendment does not permit a State to deny a juvenile offender the chance "to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law").

The same principles apply here. If a juvenile offender's life sentence, while ostensibly labeled as one "with parole," is the functional equivalent of a life sentence without parole, then the State has denied that offender the "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" that the Eighth Amendment demands. See Greiman, 79 F. Supp. 3d at 944 ("a de facto life without parole sentence . . . is prohibited by Graham and its progeny"). In the case before this court, it is evident that North Carolina has implemented a parole system which wholly fails to provide Hayden with any "meaningful opportunity" to make his case for parole. The commissioners and their case analysts do not distinguish parole reviews for juvenile offenders from adult offenders, and thus fail to consider "children's diminished

culpability and heightened capacity for change" in their parole reviews.[5] Miller, 132 S. Ct. at 2469; see Greiman, 79 F. Supp. 3d at 943.

For each case reviewed, the assigned analyst researches the record and the inmate file and then prepares a written report and recommendation. The most important information found in the summaries has been noted as: the official crime version (narrative of events of crime of conviction; prison infraction history; gang membership; psychological evaluations; custody level history; visitation history; and a home plan. There is no information about one's status as a juvenile offender. There is no specific information about maturity or rehabilitative efforts. There is no special process for one convicted as an adult before the age of 18, and the commissioner are unaware of that status. Absolutely no consideration is to be given for that status by the commissioners.

Furthermore, caseloads are enormous and each parole case analyst is responsible for approximately 4,338 offenders. The sheer volume of work may itself preclude any consideration of the salient and constitutionally required meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. Special weight is given to the brutality of the crime.

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[5] Although Hayden's parole case file explicitly states that he was fifteen when he committed his offense, it is difficult for this court to believe that a parole commissioner can fully take into "consideration [Hayden']s chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences[,]" Miller, 132 S. Ct. at 2468, when reading Hayden's case file along with 90 others in a single day. Indeed, if anything, defendants have demonstrated that North Carolina's juvenile offenders face *harsher* treatment during parole reviews because the young age at which the crime is committed may actually be used as a negative factor in parole consideration by the case analyst preparing the report for the voting commissioners. See LeBlanc, 2015 WL 4042175, at *14 ("If it can be said that Virginia's sentencing scheme treats children differently than adults, it would be because, tragically, the scheme treats children *worse*." (italics in original)); see also Miller, 132 S. Ct. at 2464–65 (identifying a number of reasons which "establish that children are constitutionally different from adults for purposes of sentencing").

Special weight is not given, much less taken into consideration, of the age at which the crime was committed.

As for the public meeting, without providing notice to the offender, his/her family members, or others who may be able to provide relevant information about the offender's rehabilitation and maturity efforts, the opportunity appears to exist mainly for those on notice. Since 2012, those are the active victims. Such notice is undoubtedly important to victims. Likewise, the failure to provide the same notice to juvenile offenders denies them "a chance to demonstrate maturity and reform." Graham, 560 U.S. at 79.

The data before the court also indicates that juvenile offenders are rarely paroled. Again, "[a] State is not required to guarantee eventual freedom to a juvenile convicted of a nonhomicide crime." Graham, 560 U.S. at 75. Thus, the information from four of the past five years that no juvenile offenders obtained release while adult offenders did obtain parole is relevant only in that it raises questions about the meaningfulness of the process as applied to juvenile offenders. Furthermore, the research regarding North Carolina parolees is that inmates having committed brutal crimes, most specifically sexual crimes, are least likely to be paroled. Hayden was convicted of sexual crimes.

Next without notice of one's status as a juvenile prior to review, the record upon which each commissioner relies is unable to convey or demonstrate maturity or rehabilitation. For example, Hayden has been found guilty of 41 disciplinary infractions throughout his 32 years of incarceration; however, of those infractions he was only convicted of seven infractions since 2000, and one in the last five years. http://webapps6.doc.state.nc.us/opi/viewoffender

infractions.do?method=view&offenderID=0174678&listpage=1&listurl=pagelistoffendersearchresults&searchLastName=hayden&searchFirstName=shaun&obscure=Y (last viewed Sept. 22, 2015). This information has significantly different meaning depending on the context in which it is viewed. It gives meaningful insight into gaining, or failing to gain, maturity and rehabilitation if the commissioner views it knowing Hayden was sentenced as a juvenile offender. Viewed in the absence of that knowledge, it simply illustrates a high number of disciplinary infractions which are statistically damaging to one's chance for parole.

Finally, regardless of the fact that juvenile offenders will most likely be serving disproportionately longer sentences, the longer sentence does not present an opportunity for parole. What presents the best statistical opportunity for parole is to obtain the age of 58 to 59 having committed a non-sexual crime. Again, this is not the holding in Graham. 560 U.S. at 59 (citing Weems v. United States, 217 U.S. 349, 367 (1910)) ("The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'"). The court finds that the North Carolina parole process violates the Eighth Amendment as outlined in Graham.

Defendants argue that Hayden faults the parole review process simply because he himself has been unable to obtain parole. It is true that Greenholtz—which notably did not address whether Nebraska's parole scheme comported with due process as applied to juvenile offenders—held that "a mere hope" of parole suffices. 442 U.S. at 11; see Hawkins, 195 F.2d at 747. But even Greenholtz acknowledged that "due process is flexible and calls for such procedural protections *as the particular situation demands*." 442 U.S. at 12 (emphasis added).

The Supreme Court has now clarified that juvenile offenders' parole reviews demand more procedural protections. See Graham, 560 U.S. at 79; Greiman, 79 F. Supp. 3d at 945. Clearly, in North Carolina's parole process there is no advance notice or opportunity for juvenile offenders to be heard on the question of maturity and rehabilitation — either in writing or in person.[6] The offender is an entirely passive participant in North Carolina's parole review process. What Hayden seeks is what he is constitutionally entitled to, "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. North Carolina's parole process fails to meet this constitutional mandate.

D. Conclusion

The court denies defendants' motion for summary judgment [D.E. 36] and grants in part and denies without prejudice in part Hayden's motion for summary judgment [D.E. 30]. Specifically, the court finds that the current North Carolina parole review process for juvenile offenders serving a life sentence violates the Eighth Amendment. Having so held, the court is guided by the mandate of Graham which instructs that "[i]t is for the State, in the first instance, to explore the means and mechanisms for compliance." 560 U.S. at 75. Thus, the court denies without prejudice Hayden's request for the injunctive relief and gives the parties 60 days to present a plan for the means and mechanism for compliance with the mandates of Graham to provide a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation to juvenile offenders convicted as adults.

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[6]Although the level two investigation does provide offenders with notice and an opportunity to be heard via a psychological report, the infinitesimal percentage of juvenile offenders who make it to this level of review does not constitute the meaningful opportunity described in Graham. 560 U.S. at 82 (the parole review scheme "must provide [the juvenile offender] with some realistic opportunity to obtain release.")

SO ORDERED, this 25 day of September 2015.

TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:10-CT-3123-BO

| | | |
|---|---|---|
| SHAUN ANTONIO HAYDEN, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | **DEFENDANT'S PROPOSED PLAN** |
| v. | ) | **IN RESPONSE TO 25 SEPTEMBER 2016** |
| | ) | **ORDER [D.E. 58]** |
| PAUL G. BUTLER, | ) | |
| | ) | |
| Defendant. | ) | |

NOW COMES Defendant Paul G. Butler, Jr., by and through counsel, North Carolina Attorney General Roy Cooper and Special Deputy Attorney General Joseph Finarelli, in accordance with the directives contained in the Court's 25 September 2015 Order [D.E. 58] and its 25 August 2016 Order [D.E. 72], and submits the following proposed to comply with the Court's "plan for the means and mechanism of compliance with the mandates of *Graham* to provide a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation to juvenile offenders convicted as adults" [D.E. 58].[1]

Pre-Hearing Procedures

- Juvenile offenders convicted as adults and sentenced to life with the possibility of parole ("Eligible Offenders"), will be assigned to the caseload of a designated parole case analyst;
- Eligible Offenders will be reviewed on a biennial basis;

[1] Although he submits the plan set forth herein, Defendant Butler does so in compliance with the Court's Orders and expressly reserves his right to pursue an appeal.

- Eligible Offenders will receive written notice from the North Carolina Post-Release Supervision and Parole Commission ("the Parole Commission") at least 180 days in advance of any parole review hearing;
- In advance of an Eligible Offender's parole review hearing, the family members, advocates, attorneys, or other witnesses of the Eligible Offender will be guaranteed a thirty-minute meeting slot to address, in person, one or more members of the Parole Commission in order to demonstrate how the Eligible Offender has achieved the level of maturity and rehabilitation necessary to render him suitable for parole release;
- An Eligible Offender may request a reasonable continuance of a scheduled parole review hearing up to thirty (30) days in advance of the designated hearing date;
- Those who may wish to oppose an Eligible Offender's release on parole will be guaranteed, if requested, an equal thirty-minute meeting slot to address the same Commissioner(s) who will preside over any parole review hearing for the Eligible Offender whose suitability for parole release is being challenged;
- Offenders will be permitted to submit, in writing, a personal explanation of the circumstances of his underlying offense(s) or, if available, an appellate court opinion setting forth the facts of any offense(s), as well as any materials documenting the offender's maturity, rehabilitation, and suitability for parole;
- The designated parole case analyst will prepare, on a biennial basis, a summary of the offender's file, including a summary of any written materials submitted by or on behalf of the offender;

Hearing Procedures

- The Eligible Offender will be permitted to appear, via videoconferencing technology, before the Commissioner(s) and the designated parole case analyst during the thirty-minute parole review hearing;
- Audio recordings will be made of the proceedings of both the thirty-minute parole review hearing afforded to the Eligible Offender and, if requested, any thirty-minute hearing afforded to individuals opposing the Eligible Offender's parole release;
- Any attorney, expert witness, advocate, and/or witness on behalf of the Eligible Offender will be able to present to the Commissioner(s) any evidence demonstrating, in the opinion of the presenting party, the Eligible Offender's maturity, rehabilitation, and suitability for parole release;
- Any attorney, expert witness, advocate, and/or witness on behalf of those in opposition to an Eligible Offender's suitability for parole release will be able to present to the Commissioner(s) any evidence demonstrating, in the opinion of the presenting party, the Eligible Offender's lack of maturity, rehabilitation, and suitability for parole release;

Post-Hearing Procedures

- At the conclusion of the parole review hearing afforded to the Eligible Offender and, if requested, the hearing afforded to those opposing the Eligible Offender's parole release, the Commissioner designated to preside over the hearings, with the assistance of the designated parole case analyst, will prepare a report to be signed

by the presiding Commissioner and circulated to the remaining members of the Commission for review and consideration;

- In the event that parole release is denied, the Parole Commission will send a letter to the Eligible Offender stating the specific reason(s) why parole release was denied as well as any recommendation(s) for steps the Eligible Offender may take to improve his or her future chances for parole release, such as the completion of specific educational or rehabilitative programs offered by the Division of Prisons, or the continuation of infraction-free behavior prior to the next review;
- Although the STATIC-99 risk assessment tool is not currently used by the Parole Commission during the parole review process, that risk assessment tool will not be used nor will the results of any previously-administered STATIC-99 risk assessment be considered during the parole review process for any Eligible Offender;
- The audio recordings of the parole review hearing(s) for an Eligible Offender will be maintained for three years from the date of the denial of parole release following any parole review hearing or until such time as the Eligible Offender is released on parole, whichever occurs first;
- The Parole Commission will collect and maintain data, along the lines of its current practices, including how many parole review hearings for the population of Eligible Offenders are held annually, the results of the parole review process for the population of Eligible Offenders, and a statistical breakdown on the basis of age, race, gender, and type of criminal offense of parole review hearings conducted for Eligible Offenders;

- The Parole Commission will request that the Division of Adult Correction & Juvenile Justice and, specifically, the Division of Prisons, will give careful consideration to any MAPP contract recommended by the Parole Commission for any Eligible Offender when the MAPP contract contains requirements for the Eligible Offender's infraction-free behavior, education, job training, and/or successful participation in any available community volunteer, home visit, and work-release program

Respectfully submitted this 24th day of October, 2016.

ROY COOPER
Attorney General

/s/ Joseph Finarelli

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## CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing **DEFENDANT'S PROPOSED PLAN IN RESPONSE TO 25 SEPTEMBER 2016 ORDER** with the Clerk of the Court using the CM/ECF system, which will send electronic notification of such filing to the following:

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This the 26th day of October, 2016.

/s/ Joseph Finarelli
Joseph Finarelli
Special Deputy Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:10-CT-3123-BO

| | | |
|---|---|---|
| SHAUN ANTONIO HAYDEN,<br><br>Plaintiff,<br><br>v.<br><br>ALVIN W. KELLER, ROBERT C. LEWIS, ANTHONY E. RAND, and PAUL G. BUTLER, JR.,<br><br>Defendants. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | ORDER |

The matter now comes before the court on plaintiff's request for injunctive relief and motion to appoint a special master (DE 89). The issues raised have been fully briefed and are ripe for adjudication. For the following reasons, the court grants plaintiff's request for injunctive relief and denies as moot plaintiff's motion for a special master.

**BACKGROUND**

On September 11, 2012, plaintiff Shaun A. Hayden ("Hayden" or "plaintiff"), a state inmate represented by North Carolina Prisoner Legal Services ("NCPLS") filed an amended complaint against defendant Paul G. Butler ("Butler"), the Chairman of the North Carolina Post-Release Supervision and Parole Commission.[1] (DE 10). In his amended complaint, plaintiff alleged that as a juvenile offender sentenced to life imprisonment with parole, he is owed a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" pursuant to the United States

[1] A more comprehensive procedural history is set forth in the court's September 25, 2015, order. See Hayden v. Keller, 134 F. Supp. 3d 1000 (E.D.N.C. 2015).

Supreme Court's ruling in Graham v. Florida, 560 U.S. 48, 75 (2010). (Id.) Plaintiff further alleged that the Commission and their procedures do not afford plaintiff that opportunity. (Id.) Plaintiff seeks the following injunctive relief: (1) a court order directing defendant to provide plaintiff with a meaningful opportunity to obtain release by demonstrating his maturity and rehabilitation; and (2) that the court retain jurisdiction over this action until such time as it is satisfied that the unlawful laws, policies, practices, rules, acts, and omissions complained of have been satisfactorily rectified.[2] ((DE 10), p. 11).

After considering the parties' cross-motions for summary judgment, the court entered an order denying defendant's motion for summary judgment. The court also granted in part and denied without prejudice, in part, plaintiff's motion for summary judgment, and provided the following instruction:

> [T]he court finds that the current North Carolina parole review process for juvenile offenders serving a life sentence violates the Eighth Amendment. Having so held, the court is guided by the mandate of *Graham* which instructs that "[i]t is for the State, in the first instance, to explore the means and mechanisms for compliance." 560 U.S. at 75, 130 S.Ct. 2011. Thus, the court denies without prejudice Hayden's request for the injunctive relief and gives the parties 60 days to present a plan for the means and mechanism for compliance with the mandates of *Graham* to provide a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation to juvenile offenders convicted as adults.

See Hayden v. Keller, 134 F. Supp. 3d 1000, 1010 (E.D.N.C. Sept. 15, 2015). Defendant subsequently filed an interlocutory appeal of the September 25, 2015, order to the United States

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[2] The court notes that plaintiff, in his supplemental brief in support of his motion for summary judgment, requested "a permanent injunction requiring Defendant to provide him with advance notice of his parole proceedings, as well as the opportunity to appear at those proceedings in order to provide input." ((DE 56), p. 7). The court in its September 25, 2015, order denied without prejudice this specific request for injunctive relief. See Hayden, 134 F. Supp. 3d at 1011.

Court of Appeals for the Fourth Circuit, and this court entered a stay pending the Fourth Circuit's resolution of the appeal. (DE 59, 65). On August 1, 2016, the Fourth Circuit dismissed defendant's appeal for lack of jurisdiction on the grounds that the court's September 25, 2015, order was not a final order "because the court retained jurisdiction to rule on appellee's request for injunctive relief." Hayden v. Butler, 667 F. App'x 416, 417 (4th Cir. 2016). After defendant's appeal was dismissed, the court lifted the stay and directed that the "parties have 60 days to present a plan for the means and mechanism for compliance with the mandates of Graham [], to provide a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation to juvenile offenders convicted as adults." (See (DE 72)).

On October 24, 2016, the parties filed their respective proposed plans for compliance with Graham, which were fully briefed. (See (DE 82, 83)). The parties' individual plans differed substantially. Accordingly, on July 5, 2017, the court directed the parties to confer and respond to the court to indicate their mediation preferences or to move for appointment of a special master. (DE 88). Plaintiff subsequently filed a motion to appoint Martin F. Horn as a special master pursuant to Federal Rule of Civil Procedure 53(a)(C) to assist with resolving the parties' differences contending that the outstanding issues cannot be effectively or timely addressed by the district court or a magistrate judge. (DE 89). Defendant opposed plaintiff's motion. (DE 91). On September 20, 2017, the court conducted an evidentiary hearing, and heard oral argument on the parties' proposed plans.

**DISCUSSION**

The court first considers plaintiff's request for injunctive relief. Injunctive relief may be granted only upon plaintiff's proof of constitutional violations. See Bolding v. Holshouser, 575 F.2d

461, 466 (4th Cir.), cert. denied, 439 U.S. 837, (1978); Mitchum v. Foster, 407 U.S. 225, 242 (1972). A federal court's power to intervene in the internal operations of state agencies is limited. See Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 325 (2012) ("The difficulties of operating a detention center must not be underestimated by the courts . . . . Maintaining safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face."), see, e.g., Graham, 560 U.S. at 75 ("It is for the State, in the first instance, to explore the means and mechanisms for compliance."). In prison conditions cases, the Prison Litigation Reform Act ("PLRA") specifically provides that a court "shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A); see also 18 U.S.C. § 3626(g)(7) (defining "the term 'prospective relief' [to] mean[ ] all relief other than compensatory monetary damages"); see Plyler v. Moore, 100 F.3d 365, 369–70 (4th Cir. 1996).

The court determined in its September 25, 2015, order, that the State's current parole procedures violate the Eighth Amendment because they do not offer juvenile offenders serving a sentence of life with the possibility of parole a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Hayden, 134 F. Supp. 3d at 1011 (citing Graham, 560 U.S. at 79). In considering the parties' respective proposed plans, it is important to note that the Court in Graham provided that "[i]t is for the State, in the first instance, to explore the means and mechanisms for compliance[,]" and that the "State [is] not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime." Graham, 560 U.S. at 75. The Supreme Court has declined to articulate a minimum standard for what constitutes a "meaningful

opportunity." See id. However, post-Graham, federal courts have shown deference to the States when reviewing parole procedures for juvenile offenders. See Virginia v. LeBlanc, 137 S. Ct. 1726, 1728 (2017) (reversing a Fourth Circuit Court of Appeal's decision finding that the State of Virginia's geriatric release program did not provide a meaningful opportunity for juvenile nonhomicide offenders to obtain release based on demonstrated maturity and rehabilitation);[3] Wershe v. Combs, No. 1:12-CV-1375, 2016 WL 1253036, at *4 (W.D. Mich. Mar. 31, 2016) ("Graham does not allow courts to undertake a full review of the State's parole procedures and substitute its own judgment for the State's . . . . Rather, Graham requires that the State provide offenders with a meaningful opportunity to demonstrate that they are entitled to release based on maturity and rehabilitation, and gives the State primary responsibility for determining how to provide such opportunity."), appeal voluntarily dismissed, No. 16-1453, 2017 WL 4546625 (6th Cir. 2017).

In this case, the State's proposed plan provides eligible offenders advance notice of his/her parole hearing, as well as the opportunity to present evidence and witnesses bearing on the inmate's maturity and rehabilitation. The plan also imposes a duty on the Commission to provide written notice to any eligible offender who has been denied parole stating the specific reasons parole was denied as well as any recommendations for steps the offender may take to improve his/her future chances for parole release. This is a significant departure from the current parole process which provides no advance notice of parole review to the eligible offender, no opportunity to be heard

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[3] In making its determination in LeBlanc, the Court noted that Virginia's geriatric release program instructed the Virginia Parole Board to consider factors like the "individual's history . . . and the individual's conduct . . . during incarceration," as well as the prisoner's "inter-personal relationships with staff and inmates" and "[c]hanges in attitude toward self and others." LeBlanc, 137 S.Ct. at 1729 (citation omitted). The Court found that consideration of these factors "could allow the Parole Board to order a former juvenile offender's conditional release in light of his or her demonstrated maturity and rehabilitation." Id. Notably, the petitioner in LeBlanc sought relief pursuant to 28 U.S.C. § 2254, and the Court specifically stated that it expressed no view on the merits of any underlying Eighth Amendment claim. Id.

during the parole review process, and no in-person hearing–all of which were specific concerns identified by the court in its September 25, 2015, order. See Hayden, 134 F. Supp. 3d at 1002-1003. While plaintiff requests additional measures such as an in-person hearing before the entire Commission, the appointment of counsel, expert witness fees, and judicial review, there is no federal authority mandating such measures and the case law specifically leaves the means and mechanisms for compliance with Graham to the states.

Based upon the foregoing, the court finds that the relief provided in the State's proposed plan is narrowly drawn, extends no further than necessary to correct the violation of a federal right, and is the least intrusive means necessary to correct the violation of the federal right. See 18 U.S.C. § 3626(a)(1)(A). Accordingly, the court GRANTS plaintiff's request for injunctive relief and ADOPTS defendant's proposed plan. The court DIRECTS defendant to implement its proposed plan within 90 days of the date of this order. Any future challenges to the new parole procedures must be brought in an independent action. See id. Because the court has adopted defendant's proposed plan, plaintiff's motion to appoint a special master (DE 89) is DENIED as MOOT. The Clerk of Court is DIRECTED to close this case.

SO ORDERED, this the 2 day of November, 2017.

Terrence W. Boyle

TERRENCE W. BOYLE
United States District Judge

April 2020

# Pardons as an Economic Investment Strategy:

## Evaluating a Decade of Data in Pennsylvania

Economy League
GREATER PHILADELPHIA

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# Acknowledgments

The Economy League would like to thank members of the legal and workforce development communities across the Commonwealth for their input and guidance throughout this study. The broad expertise of legal and policy experts facilitated important information-gathering and perspectives across a wide set of issues. A very special thank you is extended to Secretary of the Board of Pardons Brandon Flood and his team, for providing important data without which this report would not be possible.

This study was made possible by a grant from the Lenfest Foundation. We would also like to thank Earl Buford, Chief Executive Officer of Partner4Work (Allegheny County's Workforce Development Board) and H. Patrick Clancy, President and CEO of Philadelphia Works, Inc. (Philadelphia County's Workforce Development Board), for supporting the application for that grant.

**Economy League Project Team**
Nick Frontino
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# Executive Summary

**Individuals who encounter the criminal justice system are, in many ways, permanently bound to and even defined by their criminal records.** From being prohibited from living in public housing, to losing access to public benefits, from being prohibited by law from working in certain industries, to being denied state licenses for not having the requisite "good moral character," the formal and informal barriers created by a criminal record expand an individual's punishment well beyond the criminal justice system.[1]

In Pennsylvania and across the nation these varied losses of opportunity, also known as collateral consequences, are many, meaningful, and well-documented. Experts from legal and social science fields posit that a specific subset of the consequences of a criminal record pointedly impact one's employment opportunities, earning potential, and overall economic mobility.[2] For example, due to negative bias from employers, an individual's criminal record leads to depressed future earning potential.[3] Similarly, a 2003 Northwestern University study also found that "ex-offenders are only one-half to one-third as likely as non-offenders to even be considered by employers."[4] These barriers to employment and opportunity are integral contributors to keeping many individuals with a criminal record, and their families in cycles of poverty.[5] As the chief executive officers of the Workforce Development Boards of both Allegheny and Philadelphia Counties confirmed, "it is undeniable that criminal records are a major factor in keeping people in poverty."[6,7]

In the Commonwealth of Pennsylvania, these collateral consequences of a conviction affect a very large number of residents; data from the Sentencing Project reports that as of 2016, 84,794 Pennsylvanians are incarcerated and 296,219 are on probation or parole. [8] It is widely understood by practitioners that these figures vastly underestimate the number of Pennsylvanians who have been convicted at some point in their past, have completed their sentences, were never imprisoned or subject to probation, and who are not currently under carceral control, but who remain identified as "ex-offenders."

1 Ryan Hancock, "The Double Bind: Obstacles to Employment and Resources for Survivors of the Criminal Justice System," University of Pennsylvania Journal of Law and Social Change 15 (April 1, 2012)
2 The Pew Charitable Trusts, 2010. Collateral Costs: Incarceration's Effect on Economic Mobility. Washington, DC: The Pew Charitable Trusts
3 Bruce Western, "The Impact of Incarceration on Wage Mobility and Inequality," American Sociological Review 67, no.4 (2002): p. 526.
4 Devah Pager, "The Mark of a Criminal Record," American Journal of Sociology 108, no. 5 (2003): pp. 937-975, https://doi.org/10.1086/374403)
5 Steven Raphael and Michael A. Stoll, Do Prisons Make Us Safer?: the Benefits and Costs of the Prison Boom (New York: Russell Sage Foundation, 2009)
6 Earl Buford, Partner4Work to the Lenfest Foundation, January 10, 2019.
7 H. Patrick Clancy, Philadelphia Works, Inc. to the Lenfest Foundation, March 7, 2019.
8 Nicole D. Porter and Josh D. Rovner, "The Sentencing Project," The Sentencing Project, February 20, 2020, (https://www.sentencingproject.org/)

These acute collateral consequences are also geographically predictable. Pennsylvanians reentering into society from the criminal justice system often return to low-income neighborhoods in the state's major cities, with Philadelphia being the most common destination for state residents released from local, state, and federal jails and prisons.[9] Among a slate of tools to mitigate these many collateral consequences, a pardon provides relief from "the consequences, generally in the nature of legal disabilities, resulting from conviction for a crime." In the words of the Pennsylvania Board of Pardons (BOP), a pardon "allows a job applicant to deny he was ever convicted of the crime without worry of any sanction."[10] These factors together raise several important questions: historically, who has taken advantage of pardons in Pennsylvania? How have pardons helped Pennsylvanians with criminal records improve their circumstances? And, given the high overlap between criminal records and poverty, what impact has use of this tool had on communities?

With these questions in mind, the Economy League of Greater Philadelphia (Economy League) embarked on a quantitative analysis to examine the economic impact of pardons on low-income, high-arrest communities in Pennsylvania. To do so, the Economy League broke the analysis into two key components: an assessment of pardons that have been granted in Pennsylvania, and an assessment of pardons' economic impact, particularly in high-arrest, low-income communities. Data provided by the BOP offered the Economy League an unprecedented ability to analyze if and how the pardon process differed across the Commonwealth. While de-identified, application data provides useful information on the residence of applicants, allowing for a deeper understanding of who has applied for and received pardons from 2008-2018.

To estimate economic impact, the Economy League relied on a very recent University of Michigan study on the individual economic standing impact of receiving a "set-aside," The study found that "those who obtain expungement experience a sharp upturn in their wage and employment trajectories; on average, within two years, wages go up by 25% versus the pre-expungement trajectory."[12] The Economy League applied these findings to those who filed and received pardons from 2008-2018 in Pennsylvania to estimate how pardons have economically benefited Pennsylvanians.

9 The Pew Charitable Trusts, 2018. Philadelphia's Poor: Experiences from Below the Poverty Line. Philadelphia, PA: Philadelphia Program of The Pew Charitable Trusts.
10 Under the Constitution of the Commonwealth of Pennsylvania, the Governor has the power to grant clemency, but only to people for whom clemency has been recommended by the Board of Pardons.
11 More precise measurements of the economic effects of pardons would be possible by reviewing data that were not de-identified; but that was not possible within the confines of the study. Please see Data and Data Limitations for an overview of data and methodology.
12 J.J. Prescott and Sonja B. Starr, Expungement of Criminal Convictions: An Empirical Study (March 16, 2019). Harvard Law Review, Forthcoming; U of Michigan Law & Econ Research Paper No. 19-001; U of Michigan Public Law Research Paper No. 635. Available at SSRN: https://ssrn.com/abstract=3353620 or http://dx.doi.org/10.2139/ssrn.3353620

# Key Findings

**The overall assessment of pardons in Pennsylvania yields the following three key findings:**

**1) Between 2008-2017 the average pardons process took upwards of three years from filing to final decision**

**2) The average pardon grant rate during this ten-year period was 38.2%, and has been 44.8% from 2015-2017[13]**

**3) In 2017 (a year in which race data was provided by sufficient numbers of applicants to make analysis meaningful), pardon grant rates were consistent across racial groups, and in 2017 whites filed three times more pardon applications than minorities.**

**This assessment of pardons' economic impact, particularly in high-arrest, low-income communities yields three key findings:**

**1) The rate of granted pardons in high-arrest counties falls below the statewide average**

**2) Pardon grant rates differ by community income level**

**3) Pardons filed between 2008 and 2018 and ultimately granted allowed recipients to earn an estimated $16 million in additional wages as of December 2019**

Specifically, this study finds that residents of low-income zip codes in Pennsylvania who filed for pardons between 2008-2017 found their applications granted at a rate of 30%, well below the state average of 38% and even further below the rate at which high-income community residents saw their pardons granted (40%). This study finds that pardons filed by Pennsylvania residents from 2008-2018 had an estimated impact of $16,494,815 as of December 2019. While the average annual impact of receiving a pardon by an individual in a high-income community is far higher than that of a low-income community resident ($8,494 vs. $2,557), the aggregate impact of all pardon recipients is 50% higher in low-income communities than high-income communities ($1,253,956 vs. $823,918).

13 Pennsylvania law does not impose any criteria that must be considered. As a result, how many pardons are granted will vary according to the discretion of the individuals on the BOP and the Governor.



# Policy and Practice Options

**Drawing from the findings, this report offers a series of policy and practice options that consider the potential of pardons as a no-cost workforce development tool and strategies for policymakers and practitioners to expand the impact of pardons. These policy and practice options are:**

**1) Increasing the number of pardon applicants**

**2) Increasing the share of applications that are granted pardons**

**3) Shortening the pardon processing timeline**

The public perception of pardons has long focused on the individual narrative of redemption. While the moral and psychological impact of receiving a pardon remain of importance, policy makers and government officials can broaden their understanding of pardons to include their potential to generate economic investment and growth in areas of the state in which formerly incarcerated individuals often live. Expanding the use of pardons stands to economically improve the individual lives of those formerly incarcerated, their families, the communities in which they live, and the Commonwealth as a whole.

# Introduction

A growing body of academic research demonstrates the broad scope of impacts that public criminal records have on the lives of returning citizens and the lives of those who have been convicted of crime.[14] Among a wide variation of well-documented collateral costs, consequences of conviction include a specific subset of the consequences of a criminal record pointedly impact one's employment opportunities, earning potential, and overall economic mobility.[15] Nationwide, a past conviction history can raise well over 40,000 barriers to employment, education, housing, loan borrowing, professional licensing, voting among numerous other post-punishment punishments.[16] In Pennsylvania, criminal histories prevent or limit access to over 100 careers.[17] Further, regarding occupational licensing alone, over 46,000 state and federal laws restrict employment and professional licenses for individuals with criminal records.[18] From preclusion from trade schools, to denial of professional licenses, to limited employment opportunities due to negative bias from employers, to depressed future earning potential, the far-reaching consequences on an individual's economic mobility are well-documented across the legal and social science fields.[19]

In Pennsylvania, these dynamics limit opportunities for a very large number of residents. Data from the Sentencing Project reports that as of 2016, 84,794 Pennsylvanians are incarcerated, and 296,219 are on probation or parole.[20] Across the Commonwealth, where these consequences of conviction are most acutely felt is also geographically predictable. Pennsylvanians reentering into society from the criminal justice system often return to low-income neighborhoods in the state's major cities, with Philadelphia being the most common destination for state residents released from local, state, and federal jails and prisons.[21] These factors together raise several important questions: How have pardons helped Pennsylvanians with criminal records improve their circumstances? And, given the high overlap between criminal records and poverty, what impact has use of this tool had on communities?

With these questions in mind, the Economy League of Greater Philadelphia (Economy League) embarked on a quantitative analysis to examine the economic impact that pardons could have on low-income, high-arrest communities in Pennsylvania. This work, made possible by a grant from the Lenfest Foundation, builds on the Economy League's 2011 report, *The Economic Benefits of Employing Formerly Incarcerated Individuals in Philadelphia.* It also draws heavily from literature review of studies on the impacts of criminal records on economic outcomes, including, but not limited to a 2003 Northwestern University study by Devah Pager, *The Mark of a Criminal Record*, and a recent University of Michigan study, *Expungement of Criminal Convictions: An Empirical Study* that was published in 2019. This study begins with an analysis of all BOP data, examines the impact of pardons in high-arrest, low-income communities across the Commonwealth, and ends with a reflection on policy and practice opportunities to expand the impact of pardons in Pennsylvania.



# Data and Data Limitations

This study utilizes three unique sets of data to inform its analysis: the U.S. Census 2017 American Community Survey (ACS) five-year estimates, the Pennsylvania Uniform Crime Reporting System (PAUCRS), and clemency application data provided by the Pennsylvania Board of Pardons (BOP). This section discusses broadly how each of these data sets were used, and limitations associated with some of the data sets.

### ACS & PAUCRS

This study uses year-to-date arrest data from 2018 reported by the Pennsylvania Uniform Crime Reporting System to determine high-arrest counties. The study then uses 2017 ACS 5-year estimates to determine arrests per capita for counties. Through these high-arrest counties, urban, urban/suburban, and rural counties are then selected to yield a short list of case study counties. Building upon the high-arrest counties, this study utilizes 2017 ACS 5-year estimates to identify the low-income zip codes within these counties.

### BOP Data

Data from the BOP includes every clemency application filed with BOP from 2008 to 2018. BOP defines "filed" as an application that is "received at the Board of Pardons office and is found to be complete and accurate."

There are multiple clemency types for which a person convicted of a criminal offense may apply. For example, individuals may seek to commute a sentence of life imprisonment to life on parole or to commute a death sentence to life imprisonment. The data analyzed in this report examines only applications for pardons, which completely erases a conviction from the applicants' criminal record. Of the 4,577 applications accepted for filing by BOP from 2008-2018, 3,951, or 86%, sought a pardon.

It is important to note that applicants can and do submit a single application to request clemency for convictions in multiple cases. This creates multiple entries for the same applicant in the raw data provided by BOP. To avoid confusion and duplication, the data analyzed for this study includes only one application per applicant and relies on the latest sentencing date for analysis. The latest sentence date reflects the most recent occasion on which the formerly incarcerated individual was sentenced for a criminal conviction.

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14 While the term "returning citizen" is sometimes used in this report and in existing literature, it can be a misleading term in the context of this report. In many cases, those seeking pardons finished their sentences years if not decades ago (so are well past the "returning" stage), and a high percentage of people who were convicted of crimes were not imprisoned (e.g., those who pled guilty and received sentences of "time served" awaiting trial, or only received financial penalties).
15 The Pew Charitable Trusts, 2010. Collateral Costs: Incarceration's Effect on Economic Mobility. Washington, DC: The Pew Charitable Trusts
16 "National Inventory of Collateral Consequences of Conviction," National Inventory of Collateral Consequences of Conviction – American Bar association (2016) accessed September 31, 2019, https://niccc.csgjusticecenter.org/)
17 Community Legal Services, 2018. Legal Remedies and Limitations: Employment of People with Criminal Records in Pennsylvania. Philadelphia, PA: Community Legal Services.
18 "National Inventory of Collateral Consequences of Conviction," National Inventory of Collateral Consequences of Conviction – American Bar association (2016) accessed September 31, 2019, https://niccc.csgjusticecenter.org/)
19 Bruce Western, "The Impact of Incarceration on Wage Mobility and Inequality," American Sociological Review 67, no.4 (2002): p. 526
20 Nicole D. Porter and Josh D. Rovner, "The Sentencing Project," The Sentencing Project, February 20, 2020, (https://www.sentencingproject.org/)
21 Ibid.

# An Analysis of BOP Data

**The BOP's role in processing clemency requests, including pardons, is to evaluate applications and decide whether the applicant merits relief.** Filing an application is the first step in the process.

After an application is accepted, it is submitted to and investigated by the Department of Probation and Parole. Upon receipt of the DPP report, the BOP votes whether to grant the applicant a hearing, which then takes place in the Supreme Courtroom in Harrisburg after notice of the hearing has been published.

At the hearing, the applicant is given time to present her/his case, including people speaking in favor of clemency; the victim(s) and district attorneys are also given time, as is any member of the public who wishes to be heard. After hearing all the presentations, the Board then votes (that same day) in public on whether to recommend an individual to the Governor for a pardon. The law does not require the Board or the Governor to consider any particular factors; rather, it is left to their discretion. Factors considered by the BOP when making their recommendation include how much time has elapsed since the commission of the crime, compliance with all court requirements, successful rehabilitation and positive changes made to the applicant's life since the offense(s), the specific need for clemency, the impact of the offense(s) on the victim(s), and contributions made by the applicant to the public.[23] If a majority of the BOP finds the applicant worthy of relief, BOP recommends the applicant for pardon to the Governor. The Governor then either agrees with the recommendation and grants a pardon or disagrees and denies the application. Drawing from a ten-year span of data from 2008-2018, the following section outlines key findings from analysis of BOP data for all applications for clemency. Many pieces of analysis in this report only include data from 2008-2017, as over half of the applications filed in 2018 remain outstanding as of January 2020.

23 "Applications Process." Board of Pardons. Accessed September 31, 2019. https://www.bop.pa.gov/application-process/Pages/Process.aspx.

## Between 2008-2017 the average pardons process took upward of 3 years from filing to final decision

This pardon process can result in a variety of outcomes (See Box 1), and the process from filing to outcome (i.e. application granted or denied) can take years.[24] Between 2008-2018, a total of 3,951 applications for pardon were filed with the BOP. This means an average of 359 applications are filed annually. Our analysis found that on average, an applicant who filed between 2008 and 2017 waited 3.17 years from the date of filing to any outcome.[25] For applicants whose filing resulted in a pardon, the average length within the pardons process was 3.68 years. It should be noted that recent improvements in processing have accelerated the time applicants are made to wait—all but five applications filed in 2017 have reached an outcome. As of January 2020, 234 of the 521 applications filed in 2018 had been heard and recommended by the BOP but not been acted upon by the Governor.

24 "Frequently Asked Questions." Board of Pardons. Accessed September 31, 2019 https://www.bop.pa.gov/application-process/Pages/Frequently-Asked-Questions.aspx.
25 Applications filed in 2018 have been removed; enough time has not passed as of December 2019 for applications filed in 2018 to reach their outcome given the length of the pardon process.

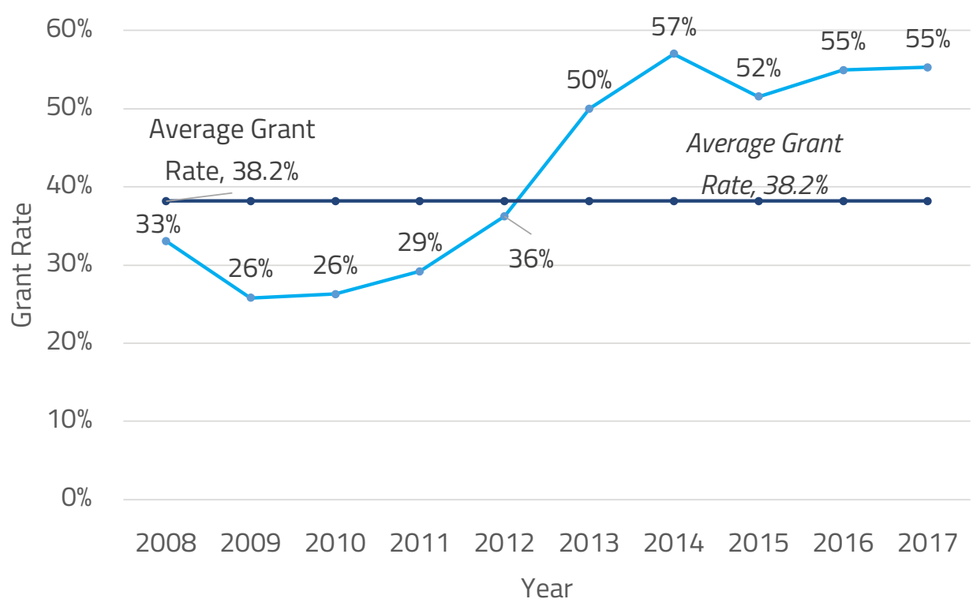
| BOX 1: LIST OF APPLICATION STATUSES OF CLEMENCY REQUESTS |
|---|
| Administratively Withdrawn |
| Administratively Withdrawn - No Show |
| Application Denied |
| Application Filed |
| Application Issued |
| Application Recommended |
| Continued |
| Deactivated |
| Denied by Governor |
| Denied Public Hearing |
| Granted by Governor |
| Held Under Advisement |
| Merit Review Date Set |
| Merit Review Ready |
| Reconsideration Denied |
| Withdrawn |

Source: PA Board of Pardons

## The average pardon grant rate during this ten-year period was 38.2%, and has been 44.8% from 2015-2017

From 2008-2017, the BOP accepted for filing a total of 3,430 applications for pardon. As of January 2020, 1,310 of those applications have been granted a pardon by the Governor. This means, on an annual basis during this period, an average of 343 applications for pardon were filed and 131 were granted, resulting in an average "grant rate" of 38.2%. Figure 1 displays the grant rate for pardons filed by year between 2008 and 2017 (See Figure 1) and Box 2 the status of all applications filed from 2008-2018 (See Box 2). In particular, Figure 1 records how many of the pardon applications filed in one year were eventually granted. The grant rate has remained at or above 50% since 2013, and peaked at 57.0% in 2014.

FIGURE 1: RATE OF FILED PARDON APPLICATIONS GRANTED IN PENNSYLVANIA MORE THAN DOUBLES FROM 25.8% IN 2009 TO 57.0% IN 2014




Sources: PA Board of Pardons; Economy League analysis

BOX 2: STATUS OF ALL PARDON APPLICATIONS FILED FROM 2008-2018

| Year | Review Ongoing | Application Recommended | Granted by Governor | Negatively Adjudicated | Grand Total |
|---|---|---|---|---|---|
| 2008 | | | 176 | 356 | **532** |
| 2009 | | | 104 | 299 | **403** |
| 2010 | | | 124 | 348 | **472** |
| 2011 | 1 | | 138 | 334 | **473** |
| 2012 | | | 142 | 250 | **392** |
| 2013 | | | 127 | 127 | **254** |
| 2014 | | | 195 | 147 | **342** |
| 2015 | 1 | 1 | 84 | 77 | **163** |
| 2016 | | 1 | 89 | 72 | **162** |
| 2017 | | 5 | 131 | 101 | **237** |
| 2018 | 114 | 234 | 43 | 130 | **521** |
| **TOTAL** | **117** | **240** | **1353** | **2241** | **3951** |

Sources: PA Board of Pardons; Economy League analysis

## In 2017 (a year in which race data was provided by sufficient numbers of applicants to make analysis meaningful), pardon grant rates were consistent across racial groups, and in 2017 whites filed three times more pardon applications than minorities.

The incarcerated population in the United States has long failed to reflect the racial make-up of the citizen population; people of color in America are jailed at rates disproportionate to their share of the national population. A study in 2017 found that "Backs represented 12% of the U.S. adult population but 33% of the sentenced prison population."[26] That same study found whites make up 30% of the prison population and 64% of the citizen population.

Similar disparities exist at the state level—with Pennsylvania having one of the most racially disparate state prison populations in the country. According to the U.S. Census 2017 ACS 5-year estimates, the Commonwealth is roughly 81.8% white, and roughly 12% African American or Black. However, according to a 2016 study by the Sentencing Project, the average state prison system jails African Americans at a rate 5.1 times the imprisonment of whites, but "Pennsylvania had 8.9 African American people incarcerated for every white person in 2014."[27] In light of these facts, it is valuable to understand if the pardon system has been a counterweight to or a continuation of the racial disparities in the state prison system.

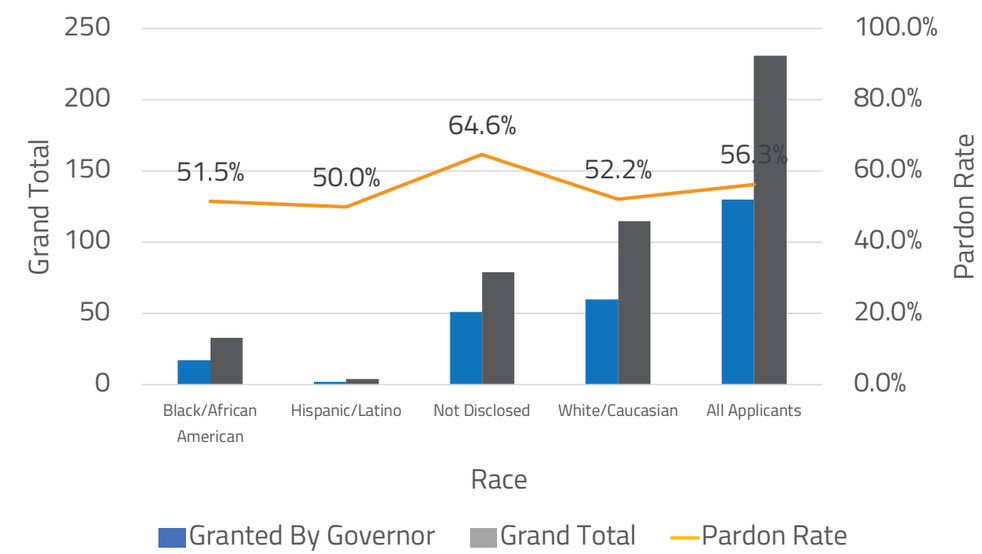
The data provided by BOP shows that of 237 applications for pardon filed in 2017, 131 or 55.3% were granted by the Governor. Five applications remain outstanding, of which four have been recommended for a pardon. The data is limited here to only 2017 because from 2008 through 2016, the average response rate to the "Race/Ethnicity" question on the application was 2.84%--insufficient for meaningful analysis. In 2017, the response rate to the "Race/Ethnicity" question rose to 66%, making it easier to draw conclusions with confidence. The response rate rose again in 2018, to 92%; however, 348 of the 521 applications filed in 2018 have yet to be resolved and therefore including 2018 data would unfairly skew the results.

Of the 117 White/Caucasian applicants (in 2017), 51.3% were granted pardons. African Americans' and Hispanics' grant rates sat at 50% of 34 and 50.0% of 4, respectively, reflecting consistency across "Race/Ethnicity" (See Figure 2.) The 34% of 2017 applicants who either actively chose not to disclose their race or ethnicity or failed to do so on the form recorded grant rates significantly higher than the average, 62.5% of 81 requests. It bears mentioning again that minorities are incarcerated at five times the rate of whites, and yet in 2017, persons of color fell well below the number of white pardon applicants. Increasing the number and share of minority applicants to where they mirrored those of whites would correspondingly multiply the economic impact of the pardon tool statewide.[28]

26 John Gramlich, "The Gap between the Number of Blacks and Whites in Prison Is Shrinking," FactTank, April 30, 2019, https://www.pewresearch.org/fact-tank/2019/04/30/shrinking-gap-between-number-of-blacks-and-whites-in-prison/)
27 Ashley Nellis, "The Color of Justice: Racial and Ethnic Disparity in State Prisons" (Washington, DC: The Sentencing Project, 2016)

28 As noted in this report, the BOP made many changes to the application form and process in 2019 (including simplifying the form, making it available online and eliminating all fees). This caused a major increase in the number of pardon applications filed. One notable change is that the form no longer asks the race of the applicant. As a result, the impact of the reforms will not be analyzable by race.

FIGURE 2: RATE OF GRANTED PARDONS ARE CONSISTENT ACROSS RACIAL GROUPS IN 2017




Sources: PA Board of Pardons; Economy League analysis

# An Examination of Pardons in High-Arrest, Low-Income Communities

**Pennsylvania is a large and diverse state. Arrest rates and income levels differ widely across the Commonwealth, and communities are affected in varying degrees by policy shifts related to incarceration and clemency.** The analysis that follows focuses on findings regarding five counties with above-average arrest rates and below-average income levels (See Figure 3). Pennsylvanians reentering society from the criminal justice system often return to low-income neighborhoods, with Philadelphia being the most common destination for state residents released from local, state, and federal jails and prisons. It is therefore important to understand if these communities have benefited from the use of pardons at a rate higher, lower, or equal to the rest of the state. For a full methodology for selecting counties, please see Appendix A.

FIGURE 3: ALL COUNTIES LISTED EXPERIENCE ABOVE-AVERAGE ARRESTS PER CAPITA. PHILADELPHIA, LYCOMING, ALLEGHENY, AND BRADFORD COUNTIES RECORD MEDIAN INCOMES LOWER THAN AVERAGE. DAUPHIN SITS ABOVE STATE AVERAGE

| COUNTY | DIFFERENCE BETWEEN COUNTY ARREST PER CAPITA (PER 100,000) AND STATE AVERAGE | DIFFERENCE BETWEEN MEDIAN INCOME AND STATE AVERAGE |
|---|---|---|
| ALLEGHENY | +5.09 | -$618.00 |
| BRADFORD | +10.33 | -$6,051.00 |
| DAUPHIN | +14.95 | +$120.00 |
| LYCOMING | +0.72 | -$6,317.00 |
| PHILADELPHIA | +3.96 | -$16,302.00 |

Sources: U.S. Census, PA Uniform Crime Reporting System

## The rate of granted pardons in high-arrest counties falls below the statewide average

Analysis shows that the average rate of granted pardons in high-arrest counties falls below the statewide average. Figure 4 below directly compares the rate of granted pardons in the five high arrest counties (H.A.C.s) identified in the section above against all other counties (non-H.A.C.) of granted pardons from 2008-2017. The average rate of granted pardons in the five High-Arrest Counties (34.0%) falls well below the rate in the non-High Arrest Counties (40.0%) (See Figure 4).

FIGURE 4: WITH THE EXCEPTION OF TWO YEARS, HIGH ARREST COUNTIES (H.A.C.s) EXPERIENCED A LOWER-THAN-AVERAGE RATE OF GRANTED PARDONS WHEN COMPARED TO ALL OTHER COUNTIES FROM 2008-2017

Sources: PA Board of Pardons; Economy League analysis

# What Impact Does a Pardon Have on Income? Community Income Level Analysis

**Pennsylvania is an economically diverse state and it is valuable to understand how both access to and receipt of pardons may differ between communities based on their economic standing.** In the analysis below, the Economy League examines the rate at which applicants living in communities of three different income levels who filed for pardons from 2008-2018 were granted pardons by the Governor. As county-level median incomes can mask wide disparities between communities, examining income data and the zip-code level provides a clearer view into community-level earnings. Using Census data, zip codes within each high-arrest county were identified as "low income" (See Box 3 and Figure 5) and pardon data for these geographies are further analyzed below.

| BOX 3: LIST OF LOW INCOME COMMUNITIES IN HIGH-ARREST COUNTIES | | | | |
|---|---|---|---|---|
| PHILADELPHIA | ALLEGHENY | DAUPHIN | BRADFORD | LYCOMING |
| 19121 | 15104 | 17104 | 17724 | 17810 |
| 19122 | 15112 | 17101 | 18840 | 17752 |
| 19132 | 15132 | 17025 | 18810 | 17763 |
| 19140 | 15110 | 17033 | 16947 | |
| | 15219 | 17097 | | |
| | 15221 | 17048 | | |
| | 15213 | | | |



## Methodology, Assumptions, and Criteria for Community Income Level Analysis

The analysis relies on zip code level data. All zip codes in the state are placed into three categories: Low, Middle, and High Income. This is done using household-level income data from the 2017 American Community Survey (ACS) 5-year estimates. The process for determining low, middle, and high-income levels relies on methodology from 2018 Pew Research Center study conducted that determined "middle-income" individuals to be adults whose annual household income is two-thirds to double the national median. This same logic is applied to zip-code level household income in Pennsylvania for the purposes of our analysis.

| FIGURE 5: MEDIAN HOUSEHOLD INCOMES IN PHILADELPHIA | | |
|---|---|---|
| **CATEGORY** | **LOW END** | **HIGH END** |
| **MEDIAN HH INCOME IN PA** | $56,951 | |
| **LOW INCOME** | X | $37,967.33 |
| **MIDDLE INCOME** | $37,967.33 | $113,902.00 |
| **HIGH INCOME** | $113,902.00 | X |

Sources: U.S. Census

**2017 Federal Poverty Level for a Family of Three:** $20,420

**Census Definition of Household Income:** Includes income of the householder and all other people 15 years and older in the household, whether or not they are related to the householder.

**Average Household Size in 2017:** 2.54

The analysis uses the zip code of residence listed on an individual's application at the time of filing. Based on the median annual household income in their zip code of residence, the individual is designated high, middle, or low income. We accept that at this time, we are unable to determine if that specific individual is earning below, above, or at the median income level of their resident zip code. We instead rely on community-level data. Our analysis then divides the number of applications granted pardons by the Governor by the total number of applications filed for each income level, giving us the grant rate at each income level.

Criteria
This analysis also relies on exclusion of certain individuals from analysis. Specifically: non-pardon clemency types, out of state residents, individuals incarcerated at the time of pardon application filing, applications in interim phases, pardons granted in 2019, and applications listing zip codes without available income data. The specifications of each of these criteria are listed below:

**Non-Pardon Clemency Types** – this study focused exclusively on the impact of a full pardon.

**Out of State Residents** – the economic impact is limited in scope to those living in Pennsylvania at the time their application was filed.

**Individuals Incarcerated at the Time of Pardon Application Filing** – the analysis relies on the applicant's resident zip code at the time of filing to determine their per capita income. Many prison facilities have their own zip codes and the per capita income data is either unavailable or is significantly depressed compared to other zip codes in the state. It is therefore unrealistic to assume that individuals released on a pardon would remain in the same zip code for post-release employment.

**Applications in Interim Phases** - 1) Application Recommended and 2) Review Ongoing – applications without a resolution are not included at this time given that the model relies on whether the applicant has been affirmatively or negatively adjudicated.

**Applications filed in 2018** - The process from filing to outcome (I.e. application granted or denied) can take more than two years. Therefore, when calculating the rate at which filed applications for pardons are granted, we removed data from 2018. Enough time has simply not passed as of December 2019 for applications filed in 2018 to reach their outcome given the known length of the pardon process.

**Applications listing zip codes without available income data** – application with zip codes not found in the 2017 American Community Survey (ACS) 5-year estimates.

## Pardon grant rates differ by community income level

The analysis found 1,029 pardon applications granted and 1,675 applications negatively adjudicated that matched the criteria listed above. This means that, overall, 38% of all pardon applications filed between 2008 and 2017 were granted ("grant rate"). The results differ greatly when examining the rates by income-level. In low-income zip codes across the state, 136 of 456 applications filed were granted and 328 have been negatively adjudicated. This results in a grant rate of just 30%. In contrast, the total number of pardon applications granted in high income zip codes sits at 22 and those rejected at 33. This results in a grant rate of 40% - 33% higher than the rate at which offenders from low income communities have had their applications granted.

FIGURE 6: LOW INCOME ZIP CODES GRANTED PARDONS AT RATE LOWER THAN STATE AVERAGE

| | GRANTED | NEGATIVELY ADJUDICATED | TOTAL APPLICATIONS | GRANT RATE |
|---|---|---|---|---|
| **LOW INCOME ZIP CODES** | 136 | 320 | 456 | 30% |
| **MIDDLE INCOME ZIP CODES** | 871 | 1322 | 2193 | 40% |
| **HIGH INCOME ZIP CODES** | 22 | 33 | 55 | 40% |
| **TOTAL** | **1029** | **1675** | **2704** | **38%** |

Sources: PA Board of Pardons; Economy League analysis

# What Impact Does A Pardon Have on Income? Individual Income Level Analysis

**Across social science and legal fields, criminal records are largely considered both a cause and a consequence of poverty.**[30] However, the acute impact of a criminal record on an individual's ability to gain employment and earn a livable wage in the United States has been particularly researched and documented. A 2003 Northwestern University study entitled "Mark of a Criminal Record" found that, "ex-offenders are only one-half to one-third as likely as non-offenders to be considered by employers."[31]

Similar studies find that no criminal record is too old or too inconsequential to serve as a barrier to employment--even minor offenses that are graded below misdemeanors and arrests without conviction can be consequential for employment.[32] These dynamics offer insight into the pervasive connection between employment and wages for individuals with criminal records, and their earnings. For example, a Pew Research study in 2010 found, "by age 48, the typical former inmate will have earned $179,000 less than if he had never been incarcerated."[33]

In the analysis that follows, the Economy League examines the individual economic impact of receiving a pardon in Pennsylvania.

30 Rebecca Vallas and Sharon Dietrich, "One Strike and You're Out: How We Can Eliminate Barriers to Economic Security and Mobility for People with Criminal Records" (Washington , DC: The Center for American Progress, 2014))
31 Devah Pager, "The Mark of a Criminal Record," American Journal of Sociology 108, no. 5 (2003): pp. 937-975, https://doi.org/10.1086/374403)
32 Gary Fields and John Emshwiller, "As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime," The Wall Street Journal, August 18, 2014.
33 Bruce Western and Becky Pettit "Collateral Costs: Incarceration's Effect on Economic Mobility," The Pew Research Center (2010)

# Methodology, Assumptions, and Criteria for Individual Income Level Analysis

The effect of a criminal record on an individual's ability to gain employment and earn a livable wage in the United States has been thoroughly researched and documented. A 2003 Northwestern University study entitled "Mark of a Criminal Record" found that, "ex-offenders are only one-half to one-third as likely as non-offenders to be considered by employers." A Pew Research study in 2010 found, "by age 48, the typical former inmate will have earned $179,000 less than if he had never been incarcerated." These studies leave little ambiguity surrounding the negative effects of a criminal record on one's economic wellbeing. For the purposes of this study, we focused on annual earnings. The same Pew Research study concluded that "serving time reduces hourly wages for men by approximately 11 percent, annual employment by 9 weeks and annual earnings by 40 percent."

Pardons and expungements are, by design, intended to relieve many of these hardships felt by those formerly convicted. But studies that examine the direct economic impact of receiving a pardon have been difficult to perform. It is challenging to track individual economic outcomes after a person is released from custody and has his or her record expunged. In spite of these challenges, the University Of Michigan School Of Law recently completed a study assessing the impact on individual economic standing of receiving a "set-aside," more commonly known as an expungement. The success of the study was the result of a unique data-sharing agreement across several Michigan state agencies. The agreement allowed researchers access to financial and employment data of all individuals who had obtained criminal record "set-asides" (Michigan's term for record-sealing) both prior to and after the expungement. The study found that "those who obtain expungement experience a sharp upturn in their wage and employment trajectories; on average, within two years, wages go up by 25% versus the pre-expungement trajectory."

The model developed for this analysis relies on the two studies mentioned above to draw conclusions regarding the economic impact of receiving a pardon in Pennsylvania. The model applies the findings of the Pew Research study and the University of Michigan study to data provided by the Pennsylvania Board of Pardons to model the economic impact of pardons granted from applications filed from 2008-2018. A diagram of the model's logic can be found on the next page (See Figure 7).

Similar to the first analytical model, the Economy League excluded certain individuals from the analysis based on the following parameters:

**Non-Pardon Clemency Types** – this study focused exclusively on the impact of a full pardon.

**Out of State Residents** – the economic impact is limited in scope to those living in Pennsylvania at the time their application was filed.

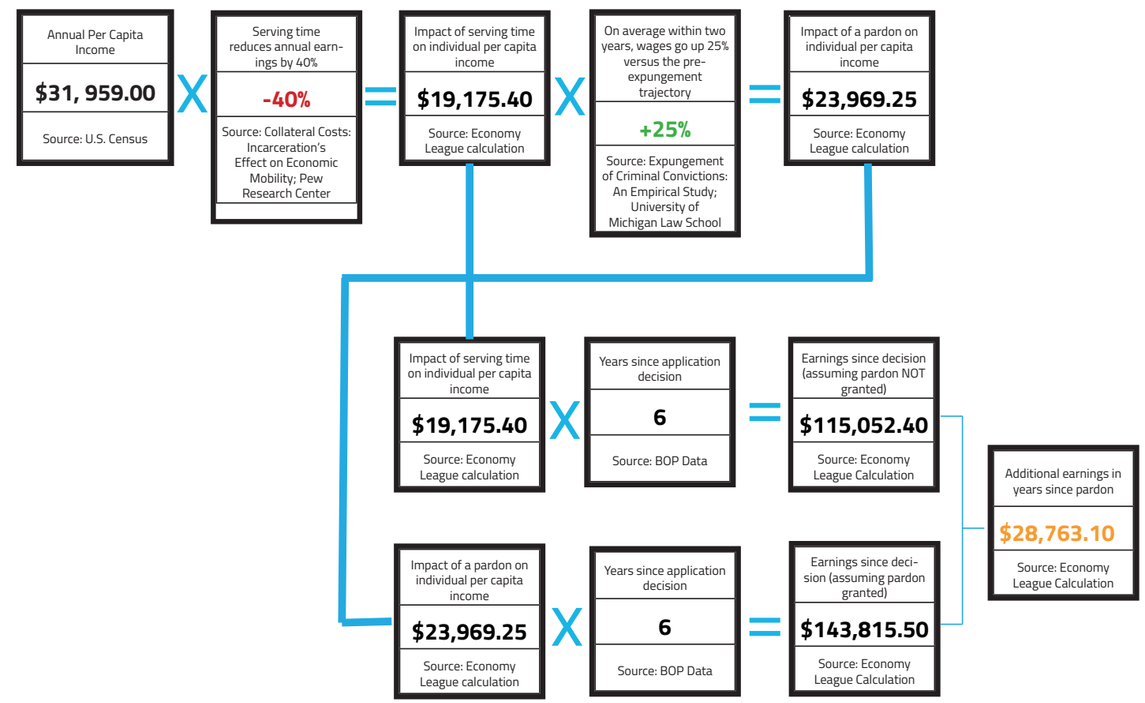
**Individuals Incarcerated at the Time of Pardon Application Filing** – the analysis relies on the applicant's resident zip code at the time of filing to determine their per capita income. Many prison facilities have their own zip codes and the per capita income data is either unavailable or is significantly depressed compared to other zip codes in the state. It is therefore unrealistic to assume that individuals released on a pardon would remain in the same zip code for post-release employment.

**Applications in Interim Phases** - 1) Application Recommended and 2) Review Ongoing – applications without a resolution are not included at this time given that the model relies on whether the applicant has been affirmatively or negatively adjudicated.

**Pardons granted in 2019** - Enough time has simply not passed as of June 2019 for applications granted in 2019 to have an economic impact.

**Applications listing zip codes without available income data** – application with zip codes not found in the 2017 American Community Survey (ACS) 5-year estimates.

FIGURE 7: MODEL FOR INDIVIDUAL INCOME LEVEL ANALYSIS



## Pardons filed between 2008 and 2018 and ultimately granted allowed recipients to earn an estimated $16 million in additional wages as of December 2019

The model first estimates the annual income of an applicant using publicly available data. Without access to individualized wage data for this study, the model relies on community-level data to estimate an applicant's annual income based on the 2017 per capita income in the zip code associated with the pardon application. Ties to the community are critical component of the pardon review process and therefore the model assumes continued residence in the same zip code after filing. In the absence of access to more detailed data, this methodology assumes that the applicant continues to reside in the Pennsylvania zip code associated with the pardon application. Per capita income was chosen because the University of Michigan study found that much of the wage increase was "driven by unemployed people finding jobs and very minimally employed people finding steadier or higher-paying work."

The model then reduces an applicant's annual income by 40% based on the aforementioned Pew finding on the effect of a criminal record on annual earnings, creating the "Reduced Annual Income as a Result of Conviction." The decreased per capita income is then increased by 25% based on academic literature on the impact of a pardon on wages, creating the "Increased Annual Income as a Result of Pardon" (see Figure 8).

The model then analyzes the applicant's outcome. If the applicant for pardon was granted, then the "Impact of Pardon on Individual Per Capita Income" and the "Impact of Serving Time on Individual Per Capita Income" are multiplied by the number of the years since the pardon was granted. The difference between the two figures is then calculated.

FIGURE 8: DEMONSTRATION OF THE EFFECTS ON CONVICTION AND PARDON ON INDIVIDUAL INCOME

| YEARS SINCE PARDON GRANTED | RESULT CATEGORY | INCOME CATEGORY | ANNUAL PER CAPITA INCOME | % DECREASE IN EARNING WITH CRIMINAL RECORD | REDUCED ANNUAL INCOME AS A RESULT OF CONVICTION | % INCREASE IN WAGES WITH PARDON | INCREASED ANNUAL INCOME AS REULST OF PARDON |
|---|---|---|---|---|---|---|---|
| 6 | Granted By Governor | Middle Income | $31,959.00 | -40% | $19,175.40 | +25% | $23,969.25 |

Sources: PA Board of Pardons; Economy League analysis



The model therefore assumes that the individual quickly acquires a new job as a result of the pardon and sustains that position through present day.[34] The model also assumes a stagnant income level from the time of the pardon to present day. At this time, without individualized income data on all pardon recipients, these assumptions are required to estimate increased annual income as a result of a pardon. The statewide impact on wages is then calculated by totaling the difference between "Reduced Annual Income as a Result of Conviction " and "Increased Annual Income as a Result of Pardon" for all pardon recipients under the stated criteria for all years since their pardon was granted(see Figure 9). A full diagram of the model's logic can be found in Figure 7 summary of methodology and assumptions.

The analysis finds 819 granted pardons that matched the criteria listed above. The estimated impact on individual wages of these pardons as of December 31, 2019 totals $16,494,815.35.

It is of value to note that the economic impact calculation relies on the date on which the pardon was granted. Therefore, individuals within the data set who were granted pardons in 2014 have experienced more years at a higher wage rate than those granted pardons in 2017 (see Figure 10 on the next page).

34 As reported by the CEO of the Allegheny County Workforce Development Board, "We know from working with individuals that these records are preventing them from getting jobs that are available and for which they are qualified. For some, these are professional jobs in accounting and health care; but even at the trades level, a criminal record stops them from enrolling in training programs or taking the examination that leads to a state license." And as reported by the CEO of Philadelphia County's WDB, "In so many cases our efforts to place individuals into high paying jobs, for which many of them would qualify, are thwarted by the existence of a criminal record."

FIGURE 9: EFFECTS OF PARDON IN YEARS SINCE GRANTING

| INCOME SINCE DECISION (REDUCED ANNUAL INCOME AS A RESULT OF CONVICTION X YEARS SINCE DECISION) | INCOME SINCE DECISION (INCREASE ANNUAL INCOME AS A RESULT OF PARDONS X YEARS SINCE DECISION) | EFFECTS OF PARDON IN YEARS SINCE DECISION |
|---|---|---|
| $115,052.40 | $143,815.50 | $28,763.10 |

Sources: PA Board of Pardons; Economy League analysis

| FIGURE 10: IN ECONOMY LEAGUE MODEL, NUMBER OF YEARS BETWEEN GRANTING AND PRESENT DIRECTLY AFFECT THE ESTIMATED ECONOMIC IMPACT | | | | | | |
|---|---|---|---|---|---|---|
| ZIP CODE OF RESIDENCE | PARDON GRANT DATE | YEARS SINCE PARDON GRANTED | ANNUAL PER CAPITA INCOME | INCOME SINCE DE-CISION (DECREASED PER CAPITA X YEARS SINCE DECISION) | INCOME SINCE DECISION (PER CAPITA WITH WAGE INCR. FROM PARDONS X YEARS SINCE DECISION | EFFECT OF PARDONS IN YEARS SINCE DECISION |
| 15001 | 12/15/2018 | 1.0 | $28,775.00 | $18,021.82 | $22,527.28 | $4,505.46 |
| 15001 | 5/17/2017 | 2.6 | $28,775.00 | $45,314.71 | $56,643.39 | $11,328.68 |
| 15001 | 2/4/2014 | 5.9 | $28,775.00 | 101,981.75 | $127,477.19 | $25,495.44 |

Sources: PA Board of Pardons; Economy League analysis

Source: Pew Research Centers

## Pardons can contribute to economic development in communities across the commonwealth

Figure 11. below examines the impact of pardons on wages in low-income, middle-income, and high-income zip codes to understand how pardons have impacted communities differently across the Commonwealth. All zip codes in the Commonwealth were sorted into one of these three categories (See Box 3) based on their median household incomes and according to the Pew methodology described in Appendix A. Individuals who were granted pardons and met the criteria described at the beginning of this section were then sorted into these income categories based on the zip code associated with their pardon application. The aggregate impact on wages within each income category was then calculated by summing the impact on individuals within each category. The chart also includes the number of zip codes in Pennsylvania that fall into each of the Income Levels categories. In combining these analyses, we are able to calculate the average impact for individuals at each economic level.

The below table shows that pardons are estimated to contribute to the economic wellbeing of communities at all income levels. And while the average annual impact of receiving a pardon by an individual in high-income communities is far higher than that of the low-income community resident ($8,494 vs. $2,557), the aggregate impact of all pardon recipients is higher --by 50%-- in low-income communities than high-income communities ($1,253,956 vs. $823,918). This demonstrates that pardons can be a powerful economic tool in the areas of the state most in need of growth.

| FIGURE 11: STATEWIDE ECONOMIC IMPACT OF INCREASED INCOME AS A RESULT OF PARDONS | | | | |
|---|---|---|---|---|
| | LOW-INCOME | MIDDLE-INCOME | HIGH-INCOME | TOTAL |
| SUM OF EEFECTS OF PARDONS IN YEARS SINCE DECISION | $1,253,956 | $14,416,941 | $823,918 | $16,494,815 |
| AVERAGE ANNUAL INDIVIDUAL IMPACT | $2,557 | $4,773 | $8,494 | $4,541 (average) |
| NUMBER OF ZIP CODES | 184 | 1463 | 135 | 1782 |

Sources: U.S. Census, PA Board of Pardons; Economy League analysis

# Pardons as a Workforce development tool in Pennsylvania -- Policy and Practice Options to Expand Impact

**The analysis above demonstrates the economic power of receiving a pardon at both the individual and the community levels. Pardons are an opportunity for formerly convicted individuals to remove some of the burden that follows them after they have successfully completed their sentences, throughout their work lives (indeed, permanently).** It therefore stands to reason that broader application of such a tool would provide a benefit to those individuals and to their communities. The considerable increase in income attributed to pardons in the section above make clear that pardons, with continued oversight for public safety concerns, should be considered as a no-cost workforce development and neighborhood investment tools. Below we explore the various policy and practice options that could expand the use of this tool and their potential economic impacts.

## Policy Option 1: Increasing the number of pardon applicants

**Key Finding: If the number of applicants in Philadelphia County from 2008 to present doubled, earnings could have increased $92,828**

The process of applying for a pardon has required persistence and extreme attention to detail. Significant process changes made in 2019 by the Board of Pardons were intended to mitigate some challenges. For example, in September of 2019, an accelerated review process for small amounts of marijuana and drug paraphernalia would be granted as long as no other crimes were involved in those arrests.[35] Still, many individuals with financial means use lawyers to navigate the long process. The nature of the process itself can often serve as a barrier for many eligible individuals applying of a pardon.

For context, in 2008 alone, 15,776 inmates were released from state prison in Pennsylvania. As of June 2019, only 3,951 total individuals had filed for a pardon from 2008-2018. We should be clear that not all individuals released in 2008 were eligible for pardons or do not intend to apply in the future. But it does demonstrate that pardon applicants constitute a tiny fraction of those released from prison every year.

Increasing the number of applicants could benefit communities tremendously. Take the low-income, high-arrest community within Philadelphia County that we identified in the previous section as an example. In 2008, 24 formerly incarcerated individuals applied for pardons and had their applications filed. Six (25%) of them were granted. The analytic model estimates that this resulted in an increase in earnings of $92,828.
Now consider if the number of applications filed doubled. Keeping the grant rate stagnant, this would mean an additional six individuals would have received pardons and the sum effect of increased wages would have been $185,656 from 2008 to present. While these numbers appear so small as to be immaterial, it bears keeping in mind the low number of Philadelphia pardon applicants relative to the number of people released from prisons and jails annually. In contrast to the 56 pardon applicants hypothesized in the preceding paragraph, the Pew study reports that between 24,000 and 26,000 people are returned to Philadelphia every year from incarceration in local, state, and federal jails and prisons; and of those released from Pennsylvania state prisons, ninety-one percent were released to addresses in poverty areas.[36] Even if 5600 applications were submitted each year, it could take decades to work through the numbers of Philadelphians with convictions in their past who could claim (or demonstrate) rehabilitation.

Providing resources to individuals that improve their chances for a complete and compliant application and/or increasing the capacity of the Board of Pardons to review more applications each year would create direct economic benefit for communities across Pennsylvania. In addition to creating direct economic benefit for communities, this has the added fiscal benefit of increased revenue (without any cost) for the Commonwealth by way of income tax.

35 "Expedited Review." Board of Pardons. Accessed September 31, 2019. https://www.bop.pa.gov/Apply%20for%20Clemency/Pages/Expedited-Review-Program.aspx
36 Philadelphia Reentry Coalition, 2018. "Calculating a Unified Recidivism Rate for Philadelphia: A Data Snapshot of Reentry and Recidivism 2012-2015." Philadelphia, PA: The Philadelphia Reentry Coalition.

## Policy Option 2:
## Increasing the share of applications that are granted pardons

**Key Finding: If residents of low-income, high-arrest communities received pardons at the state-wide rate from 2008-2015, earnings could have increased $440,433.57.**

One route to expand the potential economic impact of pardons is to increase the rate at which applications filed are granted. Further examination of low-income, high-arrest communities sheds light on the meaningful impact of even a marginal increase in the grant rate. 127 applications were filed from 2008-2015 by individuals residing in low-income, high-arrest communities. 36, or 28.1%, were granted. The analytical model found that this number of pardons had the potential to generate $457,138.40 in increased wages (See Figure 12).

An increase of 10% in the grant rate during those years would mean that 44 of the applications filed would have resulted in a pardon. Using the same economic model, the increased number of pardon recipients would have generated an additional $97,562.18 in increased wages.

The analytical model also estimated the economic impact of the same low-income, high-arrest community receiving pardons at the state-wide rate consistently from 2008-2015. A total of 53 applicants would have received pardons, generating a total of $897,571.97 in increase wages, $440,433.57 above the historical model (See Figure 14).

Especially in the case of low-income communities, a focus on increasing the rate at which pardons are granted to be equal with or exceed the state average has the potential to generate economic stability in communities that need it the most.

FIGURE 12: HISTORICAL ANALYSIS 2008-2015

| | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | |
|---|---|---|---|---|---|---|---|---|---|
| GRANTED | 8 | 6 | 2 | 2 | 8 | 2 | 5 | 3 | |
| FILED | 33 | 26 | 24 | 11 | 16 | 7 | 7 | 4 | |
| GRANT RATE | 24% | 23% | 8% | 18% | 50% | 29% | 71% | 75% | |
| ECONOMIC IMPACT | $165,970.92 | $115,517.50 | $60,599.82 | $19,764.58 | $66,510.93 | $7,748.94 | $13,621.59 | $7,404.13 | **TOTAL ECONOMIC IMPACT $457,138.40** |
| AVG IMPACT PER PARDON RECIPIENT PER YEAR | $20,746.37 | $19,252.92 | $30,299.91 | $9,882.29 | $8,313.87 | $3,874.47 | $2,724.32 | $2,468.04 | |

Sources: PA Board of Pardons; Economy League analysis

FIGURE 13: INCREASE GRANT RATE BY 10%

| | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | |
|---|---|---|---|---|---|---|---|---|---|
| GRANT RATE INCREASED BY 10% | 27% | 25% | 9% | 20% | 55% | 31% | 79% | 83% | |
| NUMBER OF PARDON RECIPIENTS | 9 | 7 | 3 | 3 | 9 | 3 | 6 | 4 | |
| ECONOMIC IMPACT | $186,717.29 | $134,770.41 | $90,899.73 | $29,646.86 | $74,824.80 | $11,623.41 | $16,345.90 | $9,872.18 | **TOTAL ECONOMIC IMPACT $554,700.58** |
| | | | | | | | | **INCREASE FROM HISTORICAL DATA $97,562.18** | |

Sources: PA Board of Pardons; Economy League analysis

| FIGURE 14: GRANT RATE OF STATE AVERAGE OF 38% ACROSS ALL YEARS | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | |
| NUMBER OF PARDON RECIPIENTS | 13 | 10 | 10 | 5 | 7 | 3 | 3 | 3 | |
| ECONOMIC IMPACT | $269,702.75 | $192,529.16 | $302,999.12 | $49,411.44 | $58,197.06 | $11,623.41 | $8,172.95 | $4,936.09 | **TOTAL ECONOMIC IMPACT $897,571.97** |
| | | | | | | | | **INCREASE FROM HISTORICAL DATA $440,433.57** | |

Sources: PA Board of Pardons; Economy League analysis

A network of 11 ShopRite and 2 Fresh Grocer Supermarkets in the greater Philadelphia area. The company estimates that it employs 500 returning citizens, often providing them with their first jobs after being released from prison.

## Policy Option #3: Shortening processing time

**Key Finding: If the processing time were reduced by 25%, those who received pardons over the past 10 years could have generated $6.9 million in additional income.**

The data provided by BOP for this report show on average the length of time between application filed and application granted was 3.68 years. Figure 15 below shows the breakdown of days that, on average, each step in the pardon application process has taken from 2008-2017. For additional pardon processing flow information please visit Appendix B.

As mentioned earlier, the application process is one that requires great attention to detail and persistence. The application for pardon requires a comprehensive set of documents that detail all aspects of an individual's life, ranging from ten years of employment and income data, to ten years of residence data (including the "size (square footage) of your home") to bank, mortgage, and credit card statements, to the estimated market value of vehicles, to educational and military records, to "police contact since your offense", to personal references. It is well understood that such an intensive investigation requires a significant investment of time, especially if conducted of all applicants regardless of the crime and how long ago it was committed.

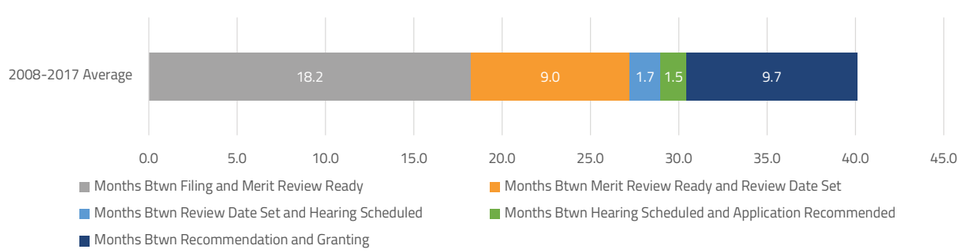
Data from the Board of Pardons also indicates that it has taken an average of 9.7 months from the date of the Board's vote to recommend an applicant for pardon to the date of the Governor's decision.[37]

We conducted an analysis that demonstrates the potential economic impact of improving processing time by 10% through 75%. Figure 16 demonstrates that even small improvements in processing time could have major economic impact across Pennsylvania (See Figure 16).

It should be noted that processing times have in fact improved in recent years. Figure 17 displays the recent decline in time from filing to granting from an average of 4.6 years in 2014 to 1.9 years in 2017 (See Figure 17).

37 This figure had dropped to 5.5 months in 2017. However, per BOP statistics, due to increases in the number of applications received by the Board in 2019, none of the recommendations for a pardon made by the BOP had yet reached the Governor's desk by March 6, 2020, or been acted upon by the Governor by April 2, 2020.

FIGURE 15: PARDON PROCESSING FLOW: APPLICATION ISSUES TO APPLICATION GRANTED



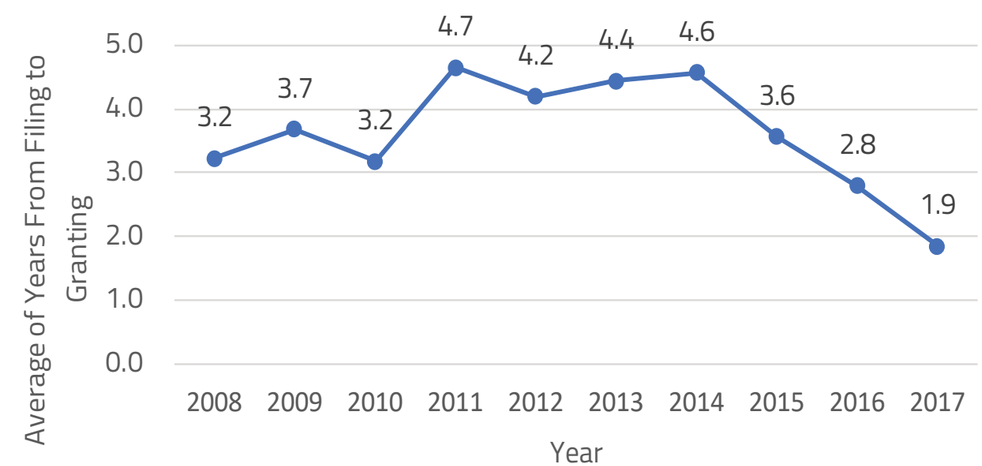

Sources: PA Board of Pardons; Economy League analysis

FIGURE 16: IMPROVED PROCESS TIME WOULD HAVE SUBSTANTIAL EFFECT ON ECONOMIC IMPACT OF PARDONS

| HISTORICAL DATA | IMPROVEMENT IN TIME FROM FILING TO GRANTED | 10% | 25% | 50% | 75% |
|---|---|---|---|---|---|
| $16,494,815.35 | SUM OF EFFECTS OF PARDON IN YEARS SINCE DECISION | $19,052,327.37 | $21,671,256.67 | $26,036,138.83 | $30,401,020.99 |
| | DIFFERENCE FROM HISTORICAL DATA | $4,269,348.57 | $6,888,277.87 | $11,253,160.03 | $15,618,042.19 |

Sources: PA Board of Pardons; Economy League analysis

FIGURE 17: AVERAGE NUMBER OF YEARS FROM FILING TO GRANTING CONTINUES TO DROP



# Conclusion

The public perception of pardons and other clemency options have long focused on the individual narrative of personal redemption. And while the moral and psychological impact of receiving a pardon remains of importance, policy makers and government officials can broaden their understanding of pardons to include their potential to generate economic stability and growth in communities in which formerly incarcerated individuals live.

While new laws that strive to implement restorative justice principles are being passed, it is important to not overlook established policies and procedures with a proven ability to improve people and communities affected by incarceration. The analysis above demonstrates that pardons can be viewed as more than just individual acts of clemency but no-cost community reinvestment policy. They are a powerful workforce development tools that can help uplift individuals and communities across the Commonwealth. Expanding the use of pardons stands to economically improve the individual lives of those who were once convicted of crime, the communities in which they live, and the Commonwealth as a whole.

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# Appendix A

The five counties selected for this study were determined through spatial analysis of arrest data from 2018 as reported by the Pennsylvania Uniform Crime Reporting System. Analysis then calculated number of arrests over total county population to determine the number of arrests per capita by county. Five counties with above-average arrests per capita representing a cross-section of urban, suburban, and rural communities were selected for further analysis: Philadelphia, Allegheny, Dauphin, Lycoming, and Bradford.

The maps located in the Appendix examine pardon applications filed, pardons granted, and arrests per capita across Pennsylvania. Map 1 displays blue circles of varying sizes to represent the amount of pardon applications filed at the zip code level from 2008-2018. Beneath the blue circles is a red layer that represents arrests per capita at the county level. The spatial analysis shows that, predictably, pardon applications filed between 2008 and 2018 were mainly concentrated in high arrest counties, in counties that have large populations, or major urban areas.

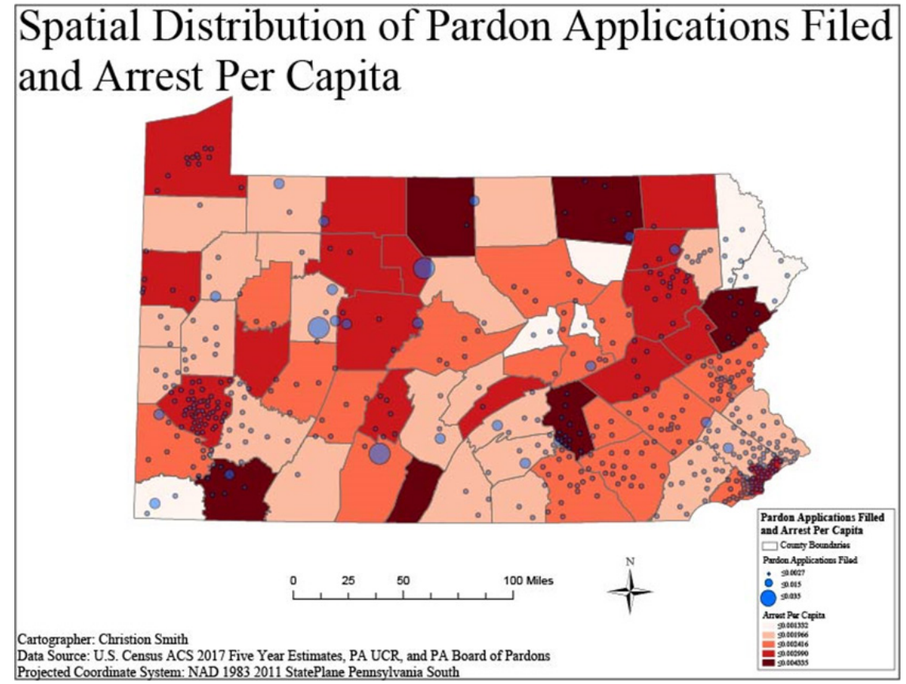
To complement Map 1, Map 2 displays green circles to represent the amount of pardons granted at the zip code level from 2008-2018. As anticipated given the size of their populations, Philadelphia and Allegheny counties had the highest number of pardons granted throughout the commonwealth.

FIGURE 3: ALL COUNTIES LISTED EXPERIENCE ABOVE-AVERAGE ARRESTS PER CAPITA. PHILADELPHIA, LYCOMING, ALLEGHENY, AND BRADFORD COUNTIES RECORD MEDIAN INCOMES LOWER THAN AVERAGE. DAUPHIN SITS ABOVE STATE AVERAGE

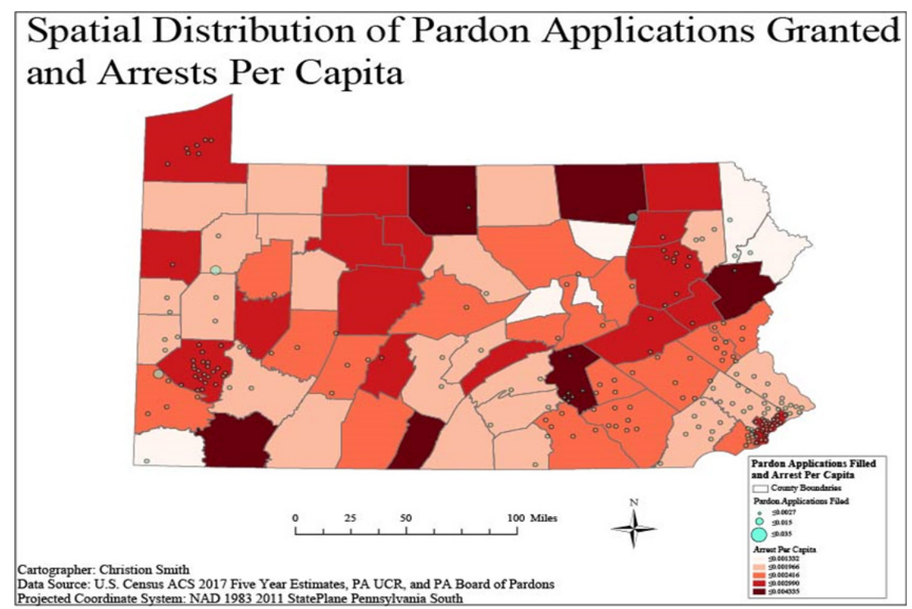
| COUNTY | DIFFERENCE BETWEEN COUNTY ARREST PER CAPITA (PER 100,000) AND STATE AVERAGE | DIFFERENCE BETWEEN MEDIAN INCOME AND STATE AVERAGE |
|---|---|---|
| ALLEGHENY | +5.09 | -$618.00 |
| BRADFORD | +10.33 | -$6,051.00 |
| DAUPHIN | +14.95 | +$120.00 |
| LYCOMING | +0.72 | -$6,317.00 |
| PHILADELPHIA | +3.96 | -$16,302.00 |

Sources: U.S. Census, PA Uniform Crime Reporting System

MAP 1

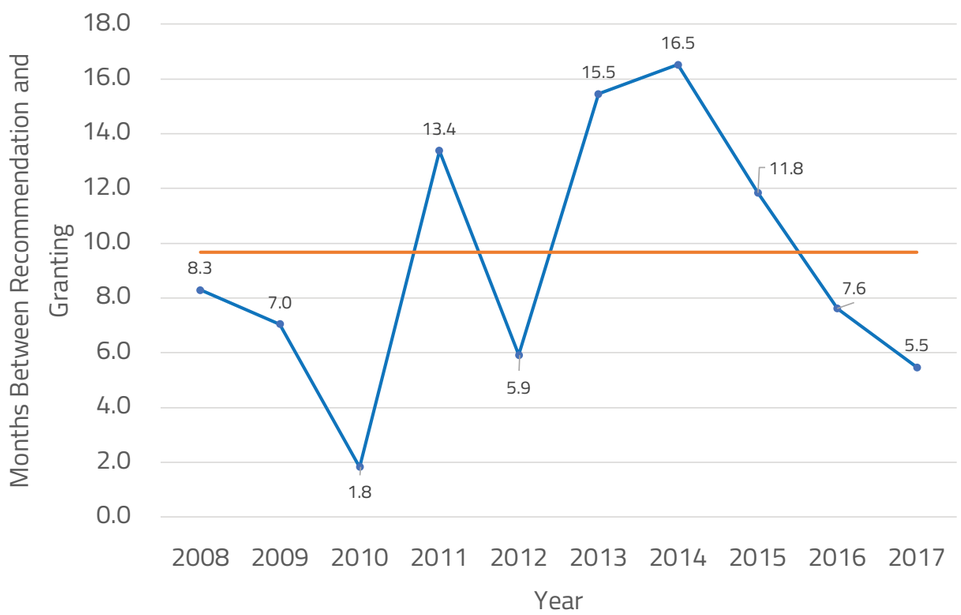



MAP 2



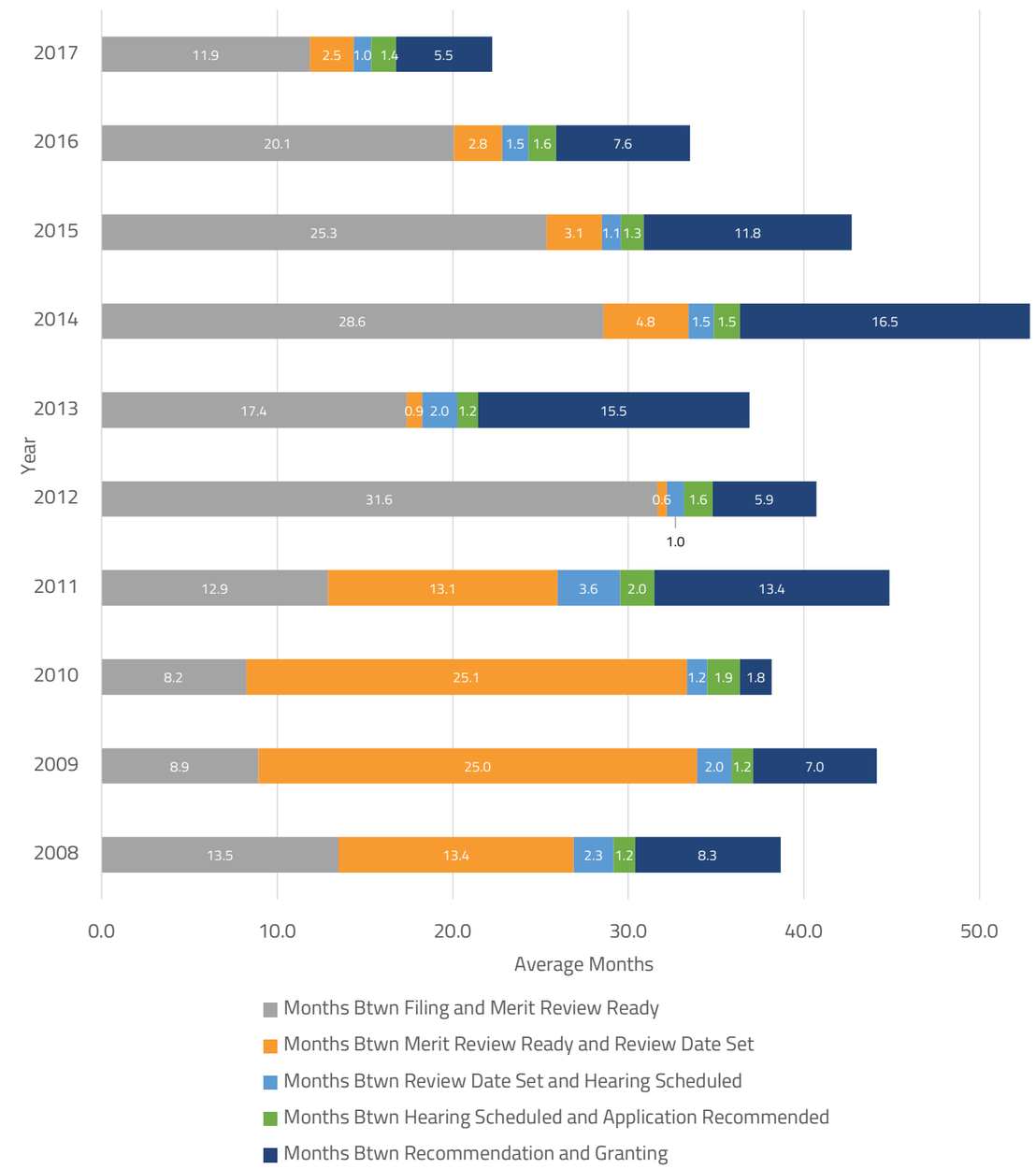
# Appendix B - Pardon Processing Flow and Improved Recommendation Times

THE NUMBER OF MONTHS FROM BOP RECOMMENDATION TO GOVERNOR'S DECISION HAS CONTINUED TO DROP FROM 16.5 TO 5.5 MONTHS IN 2017




Sources: PA Board of Pardons; Economy League analysis

PARDON PROCESSING FLOW - APPLCIATION FILED TO APPLICATION GRANTED




Sources: PA Board of Pardons; Economy League analysis

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# Rates of Extreme Sentencing by Race in North Carolina

Ben Finholt

Director, Just Sentencing Project

North Carolina Prisoner Legal Services

# Methodology

- All statistics derived from data supplied by the NC Department of Public Safety (DPS)
- https://webapps.doc.state.nc.us/opi/downloads.do?method=view
- "The files contain all public information on all NC Department of Public Safety offenders convicted since 1972."

# Methodology, cont.

- DPS identifies people in their custody by both race and ethnicity
- The race categories are Asian/Ortl, Black, Indian, Other, Unknown, and White
- The ethnicity categories are African, American Indian, Asian, European, N. Am./Austr., Hispanic/Latino, Nordic/Scandanavian, Oriental, Other, Pacific Islander, Slavic (E. European), and Unknown

# Methodology, cont.

- For descriptive sake, I have collapsed these races and ethnicities into six categories:

1. Asian (including people with ancestry from the Indian subcontinent and Pacific islands)
2. Black
3. Latinx
4. Native American
5. Two or more races/ethnicities or unknown
6. White

# A word about COVID-19

- The coronavirus pandemic has disproportionately affected communities of color
- https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html

## COVID-19 CASES, HOSPITALIZATION, AND DEATH BY RACE/ETHNICITY

FACTORS THAT INCREASE COMMUNITY SPREAD AND INDIVIDUAL RISK: CROWDED SITUATIONS; CLOSE / PHYSICAL CONTACT; ENCLOSED SPACE; DURATION OF EXPOSURE

| Rate ratios compared to White, Non-Hispanic Persons | American Indian or Alaska Native, Non-Hispanic persons | Asian, Non-Hispanic persons | Black or African American, Non-Hispanic persons | Hispanic or Latino persons |
|---|---|---|---|---|
| CASES[1] | 2.8x higher | 1.1x higher | 2.6x higher | 2.8x higher |
| HOSPITALIZATION[2] | 5.3x higher | 1.3x higher | 4.7x higher | 4.6x higher |
| DEATH[3] | 1.4x higher | No Increase | 2.1x higher | 1.1x higher |

Race and ethnicity are risk markers for other underlying conditions that impact health — including socioeconomic status, access to health care, and increased exposure to the virus due to occupation (e.g., frontline, essential, and critical infrastructure workers).

# COVID, cont.

- The risk to people in prison is also high because those people "live, work, eat, study, and participate in activities within congregate environments"
- https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html
- Transfers of people in and out of prisons and movements of staff and vendors all increase the risk of introduction of COVID-19 into facilities
- Social distancing is impossible in prison
- As we will see, if prison populations are threatened, people of color are threatened

# North Carolina Demographics

| Race/Ethnicity | 1990 | Most recent Census estimate |
|---|---|---|
| ASIAN | 0.8 | 3.3 |
| BLACK | 21.3 | 21.5 |
| LATINX | 1.2 | 9.8 |
| NATIVE AM. | 1.2 | 1.6 |
| TWO OR MORE/UNKNOWN | 0.5 | 1.2 |
| WHITE | 75.0 | 62.6 |

# General Prison Demographics

| Race/Ethnicity | 1990 (Statewide) | Current (Statewide) | Since 1972 (In prisons) | Current (In prisons) |
|---|---|---|---|---|
| ASIAN | 0.8 | 3.3 | 0.2 | 0.4 |
| BLACK | 21.3 | 21.5 | 49.4 | 51.5 |
| LATINX | 1.2 | 9.8 | 3.9 | 5.4 |
| NATIVE AM. | 1.2 | 1.6 | 1.9 | 1.9 |
| TWO OR MORE/UNKNOWN | 0.5 | 1.2 | 0.2 | 0.5 |
| WHITE | 75.0 | 62.6 | 44.3 | 40.3 |

# Long-term Incarceration Rates

| Race/Ethnicity | Statewide | Serving at least 20 Years |
|---|---|---|
| ASIAN | 3.3 | 0.5 |
| BLACK | 21.5 | 55.8 |
| LATINX | 9.8 | 5.1 |
| NATIVE AM. | 1.6 | 2.1 |
| TWO OR MORE/UNKNOWN | 1.2 | 0.3 |
| WHITE | 62.6 | 36.2 |

# Long-term, cont.

| Race/Ethnicity | Statewide | Serving at least 20 Years | Life with parole or life equivalent | LWOP |
|---|---|---|---|---|
| ASIAN | 3.3 | 0.5 | 0.4 | 0.7 |
| BLACK | 21.5 | 55.8 | 60.1 | 59.6 |
| LATINX | 9.8 | 5.1 | 2.5 | 3.2 |
| NATIVE AM. | 1.6 | 2.1 | 2.4 | 2.9 |
| TWO OR MORE/UNKNOWN | 1.2 | 0.3 | 0.3 | 0.5 |
| WHITE | 62.6 | 36.2 | 34.2 | 33.1 |

# Long-term, cont.

| Race/Ethnicity | Statewide | Juvenile Life | VHF | JLWOP |
|---|---|---|---|---|
| ASIAN | 3.3 | 1.0 | 0.0 | 3.2 |
| BLACK | 21.5 | 74.0 | 80.0 | 80.9 |
| LATINX | 9.8 | 2.0 | 0.0 | 5.3 |
| NATIVE AM. | 1.6 | 2.0 | 4.0 | 2.1 |
| TWO OR MORE/UNKNOWN | 1.2 | 0.0 | 0.0 | 0.0 |
| WHITE | 62.6 | 21.0 | 16.0 | 8.5 |

# Long-term Incarceration of Black People

Black people make up

- 21.5% of state population
- 51.5% of the current prison population
- 55.8% of the people serving more than 20 years in prison
- 60.1% of the people serving life sentences or the equivalent
- 59.6% of the people serving LWOP who will never be released
- 74% of the children serving life with parole sentences
- 80% of the people serving LWOP sentences for violent habitual felon status
- 80.9% of the children sentenced to LWOP

# Long-term Incarceration of People of Color

People of color make up

- 25% of the state population in 1990
- 37.4% of state population today
- 59.7% of the current prison population
- 63.8% of the people serving more than 20 years in prison
- 65.8% of the people serving life sentences or the equivalent
- 66.9% of the people serving LWOP who will never be released
- 79% of the children serving life with parole sentences
- 84% of the people serving LWOP sentences for violent habitual felon status
- 91.5 % of the children sentenced to LWOP

# The Role of Infractions

- Infractions affect nearly every part of prison life
- How many and what type of infractions people in prison get determine where they live, where they work, and how soon they get out
- Work release, home passes, and parole all depend on avoiding infractions
- DPS's extended limits of confinement program for COVID-19 is not available to anyone with a class A or B infraction in the past 6 months

# The Black-White Infraction Split

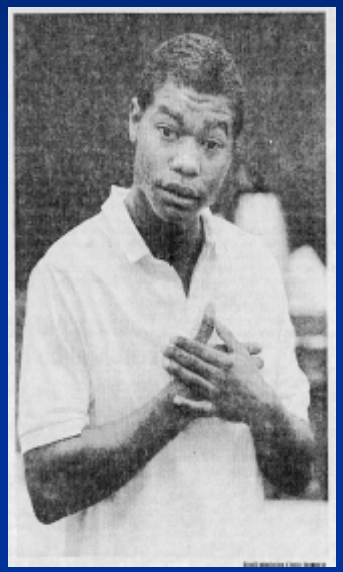
| Race/Ethnicity | % of prison population | % of infractions received |
|---|---|---|
| ASIAN | 0.4 | 0.2 |
| BLACK | 51.5 | 64.7 |
| LATINX | 5.4 | 3.3 |
| NATIVE AM. | 1.9 | 2.5 |
| TWO OR MORE/UNKNOWN | 0.5 | 0.3 |
| WHITE | 40.3 | 29.0 |

# Accepting Racial Disparities: The True Cost the Death Penalty

## Governor's Task Force for Racial Equity in the Criminal Justice System
## September 2020

Gretchen M. Engel
Center for Death Penalty Litigation

# Quentin Jones



1987

2003

*He was a typical n----r. You know, if he'd been white, I would've had a different attitude.*

Robert Bacon

*Blacks commit more crime. It's typical of Blacks to be involved in crime.*

*He shouldn't have been dating that white woman. He was wrong to do that. And he deserves the death penalty.*

# Cost: $$ v. Value

A 2009 Duke University study showed death penalty prosecutions cost North Carolina **at least $11 million a year**, despite the fact that no one has been executed since 2006.

# NC Capital Trials 2011-2020

| Year | # Trials | # Death Sentences |
|---|---|---|
| 2011 | 14 | 3 |
| 2012 | 4 | 0 |
| 2013 | 4 | 1 |
| 2014 | 10 | 3 |
| 2015 | 4 | 0 |
| 2016 | 5 | 1 |
| 2017 | 4 | 0 |
| 2018 | 3 | 0 |
| 2019 | 9 | 3 |
| 2020 | 0 | 0 |

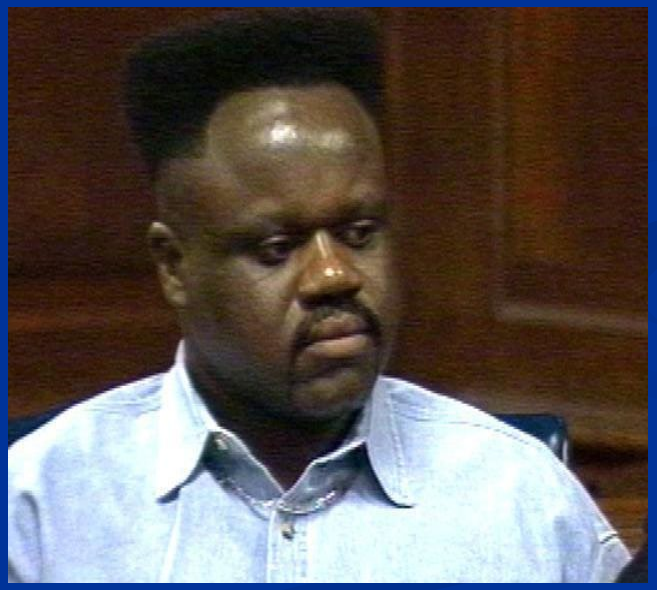
# Error Rate in NC Capital Cases

# 71%

# NC Death Row Exonerations

- Sam Poole
- Christopher Spicer
- Alfred Rivera
- Alan Gell
- Jonathon Hoffman
- Glen Chapman
- Levon Jones
- Henry McCollum
- Leon Brown
- Charles Finch

# ¾ Children Sentenced to Death in NC were Black



**16/18 People with Intellectual Disabilities Sentenced to Death in NC were Black**

*In our courts, African-Americans are more harshly treated, more severely punished and more likely to be presumed guilty.*

— North Carolina Supreme Court Chief Justice Cheri Beasley

4/4 non-shooters sentenced to death in NC were people of color.

**7/7 people sentenced to death in NC for unpremeditated murders are people of color**

# Deathworthiness

*You know what I think happened? Robert Bacon is a very dark skinned black man, very dark skinned, pure Negro. She was white. He was white.*

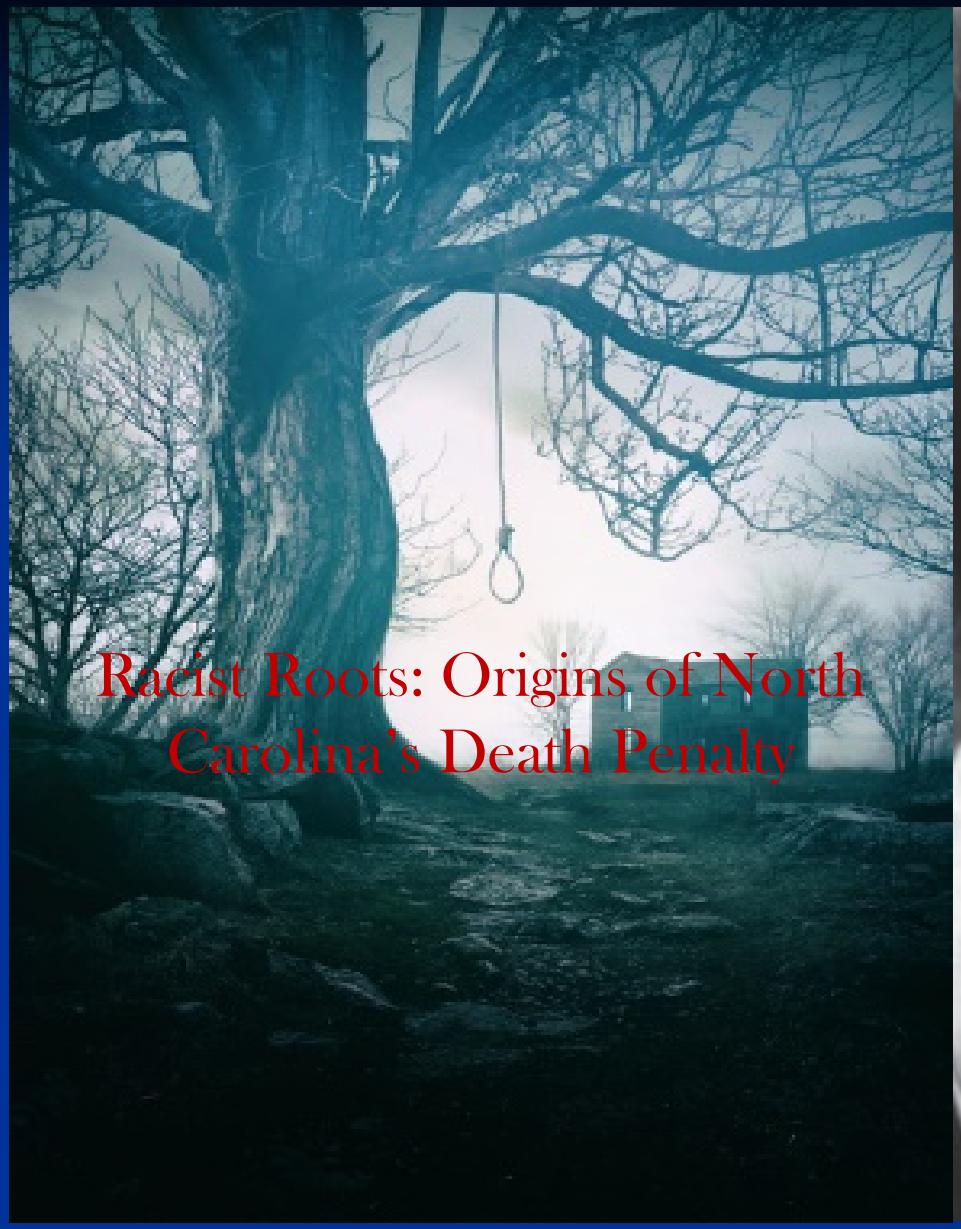
*To tell you the truth, that's what I think happened, that's what I think the jury thought about.*

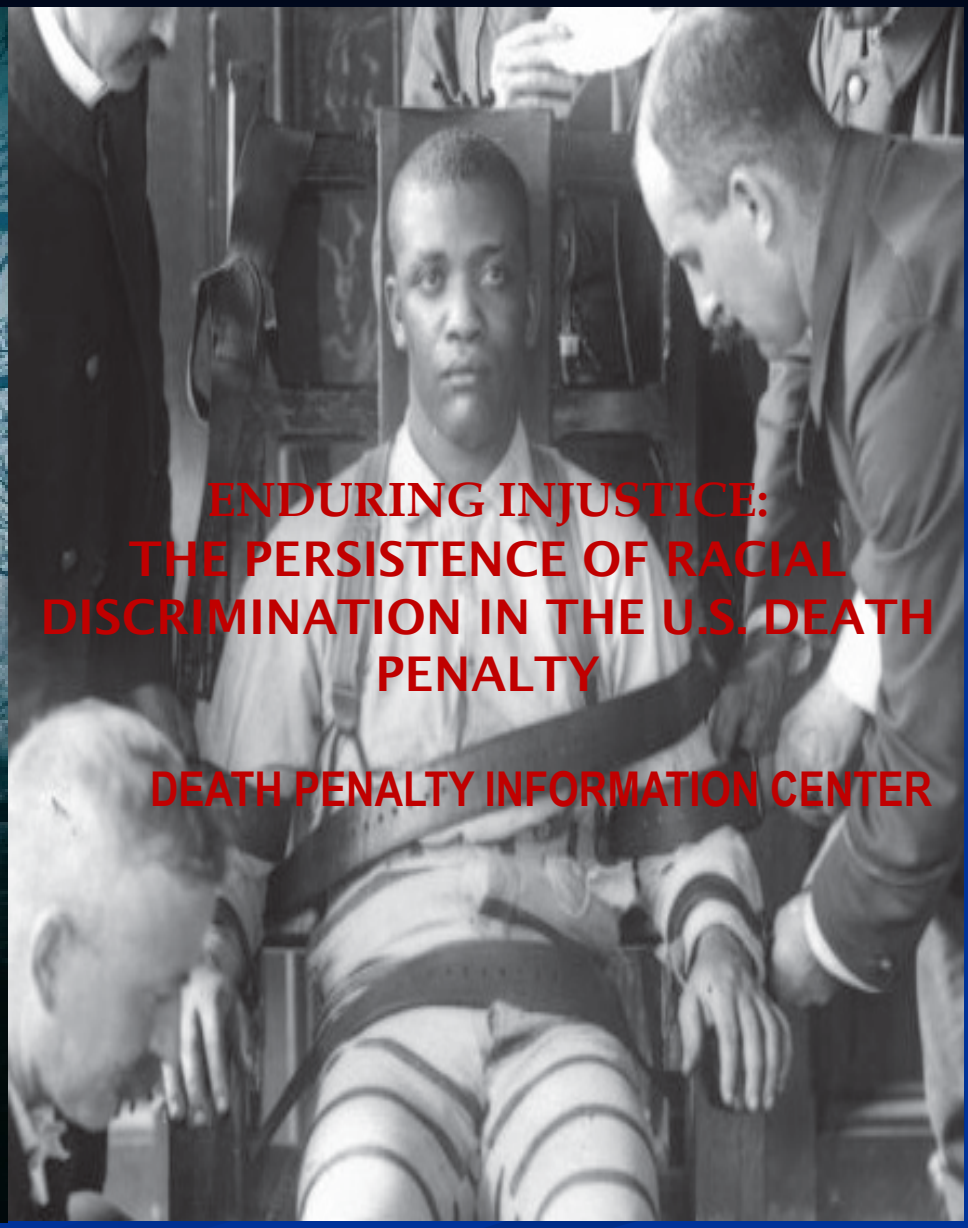
-- Bonnie Clark's lawyer

# Who is served?

*Until the killing of Black men, Black mothers' sons, becomes as important to the rest of the country as the killing of a white mother's son — we who believe in freedom cannot rest.*

– Ella Baker


Racist Roots: Origins of North Carolina's Death Penalty


ENDURING INJUSTICE:
THE PERSISTENCE OF RACIAL DISCRIMINATION IN THE U.S. DEATH PENALTY
DEATH PENALTY INFORMATION CENTER

*Mural by Kimberley Pierce Cartwright*

# Source Studies

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# Harm, Race & the Justice System

Presentation to the N*orth Carolina Task Force for Racial Equity in Criminal Justice - Working Group #4*

Tuesday, September 8, 2020

Presenter: Latrina Kelly-James

# WHAT DO WE KNOW?

***No one enters an equitable justice system***

***Race plays a factor in how the justice system interacts with Black and people of color***

# What are we NOT Talking About?

Two ways to enter the criminal justice system:

**Victim** → **Offender**

**What connects the two and gets at the roots of racial disparities?**

# TRAUMA

**Resulting from an event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life threatening and that has lasting adverse effects on the individual's functioning and mental, physical, social, emotional, or spiritual well-being.**

**Everyone experiences some form of trauma.**
**However, what makes the trauma of Black people and people of color different within the system?**

# Racial & Historical Trauma

## Racial Trauma

*Race-based stress, refers to People of Color and Indigenous' reactions to dangerous events and real or perceived experiences of racial discrimination. Such experiences may include threats of harm and injury, humiliating and shaming events, and witnessing racial discrimination toward other people of color.*

## Historical Trauma

*Cumulative emotional and psychological wounding over the lifespan and across generations, emanating from massive group trauma. Transferred to subsequent generations*

# What does this look like?

## HISTORICAL

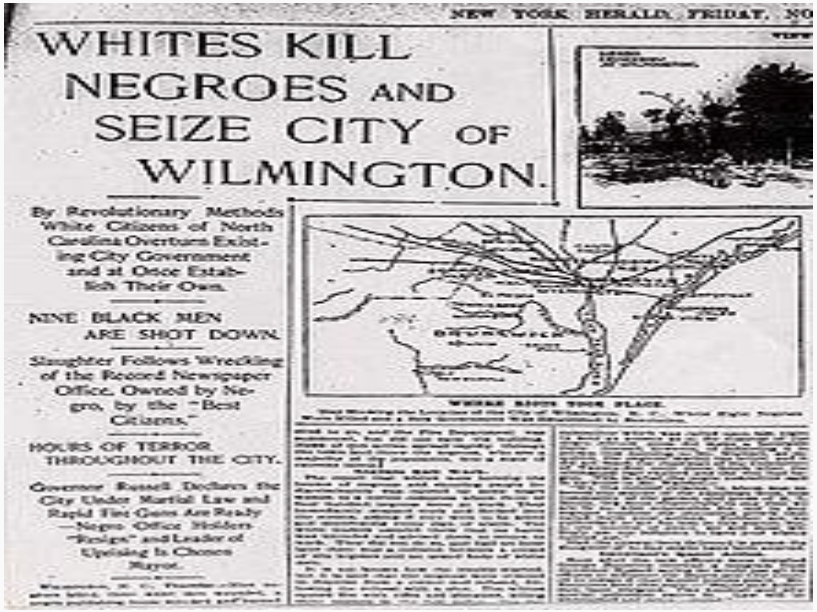
Slavery

Lynching

Convict leasing

Destruction of people and land

Spectacle of Black death



NEW YORK HERALD, FRIDAY, NO

WHITES KILL NEGROES AND SEIZE CITY OF WILMINGTON.

By Revolutionary Methods White Citizens of North Carolina Overturn Existing City Government and at Once Establish Their Own.

NINE BLACK MEN ARE SHOT DOWN.

Slaughter Follows Wrecking of the Record Newspaper Office, Owned by Negro, by the "Best Citizens."

HOURS OF TERROR THROUGHOUT THE CITY.

Governor Russell Declares the City Under Martial Law and Rapid Fire Guns Are Ready —Negro Office Holders "Resign" and Leader of Uprising Is Chosen Mayor.

WHERE RIOTS TOOK PLACE.

# What does this look like?

RACIAL TRAUMA

Disparities in sentencing

Being stopped or harassed  by police at higher rates

Lack of access to services, supports

Spectacle of Black death- “Black death goes viral”

# DEHUMANIZATION AND SYSTEMS HARM: THE DATA

2014 Study of dehumanization and Black boys: Participants were more likely to rate Black boys as less innocent than white or Latino boys, ***particularly when boys are matched with serious crimes.*** *

Adultification of Black girls

Nationally, black girls are suspended more than five times as often white girls,

Black girls are 2.7 times more likely to be referred to the juvenile justice system than their white peers.**

Source: " The Essence of Innocence: Consequences of Dehumanizing Black Children" (Goff, Jackson, Culotta, Di Leone, DiTomasso) 2014 Journal of Personality and Social Psychology, 2014, Vol. 106, No. 4, 526 –545

# RACIAL TRAUMA = PRESENT DAY HARM

***No one enters an equitable system, Black people and people of color don't enter an equitable system because <u>because the they are not humanized in their experiences.</u>***

**Two ways to enter the justice system:**

**Victim**

**Offender**

# WHAT HAPPENS WHEN YOU ENTER THE SYSTEM? - VICTIMS

Black males under age 35 who live in urban households with incomes under $25,000 are more likely to experience serious violent victimization that is ***nearly 15 times greater*** than that of females age 55 or older living in nonurban households with incomes $75,000 and over.

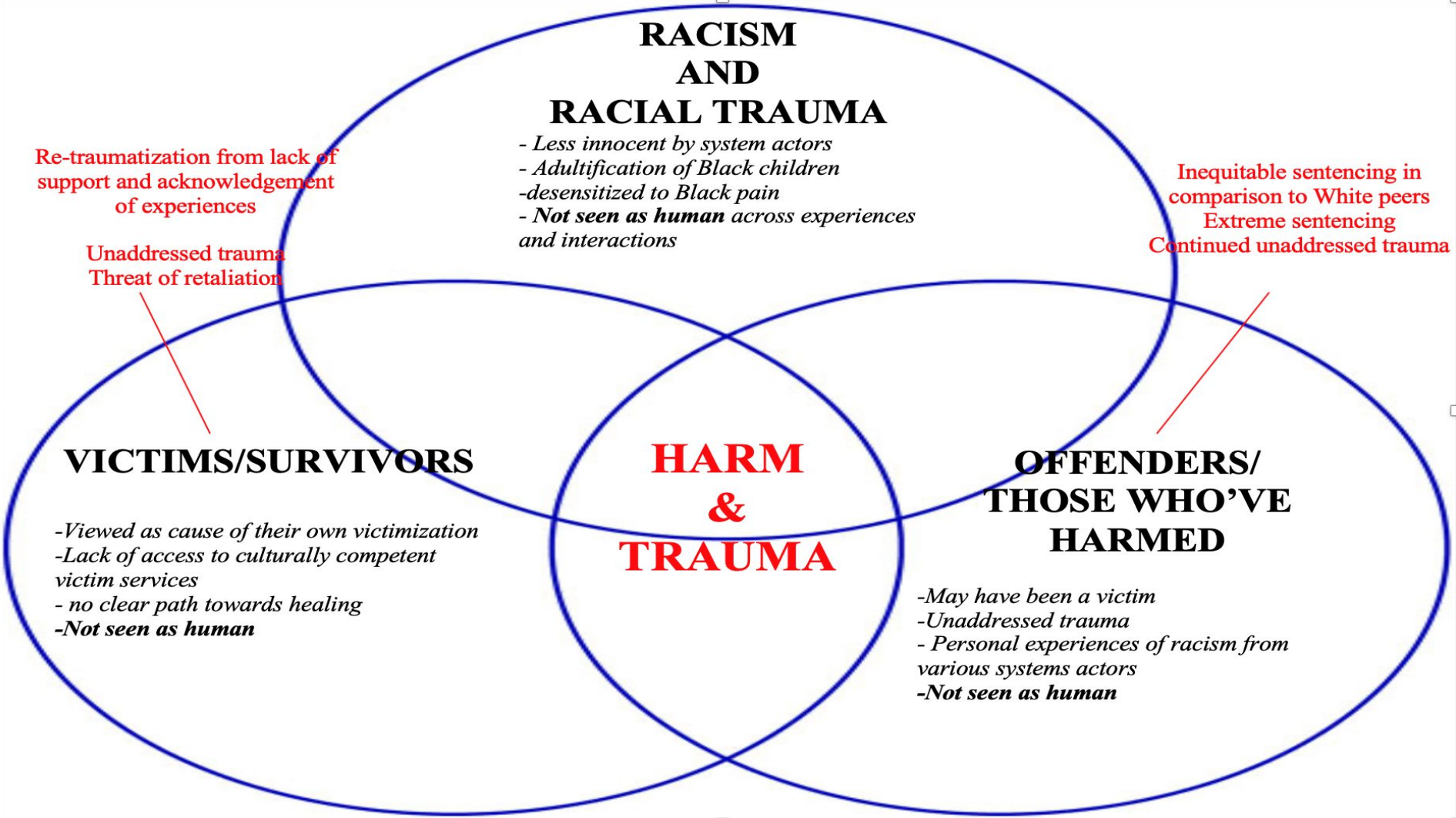
**BUT**

Annual VOCA Victim Assistance performance measurement data collected by OVC indicate that approximately 72% of VOCA dollars currently go to serving female victims - 53% to victims who are white, and by a wide margin to serving victims age 25-59.

**SO**

What happens when folks don't get the support needed? TRAUMA

Source: *Who Experiences Violent Victimization and Who Accesses Services? Findings from the National Crime Victimization Survey and Expanding our Reach.* Warknken, Heather, Lauristen, Janet. Office of Victims of Crime, Center for Victim Research (2019)


RACISM
AND
RACIAL TRAUMA
- Less innocent by system actors
- Adultification of Black children
-desensitized to Black pain
- Not seen as human across experiences and interactions
Re-traumatization from lack of support and acknowledgement of experiences
Unaddressed trauma
Threat of retaliation
Inequitable sentencing in comparison to White peers
Extreme sentencing
Continued unaddressed trauma
VICTIMS/SURVIVORS
-Viewed as cause of their own victimization
-Lack of access to culturally competent victim services
- no clear path towards healing
-Not seen as human
HARM
&
TRAUMA
OFFENDERS/
THOSE WHO'VE
HARMED
-May have been a victim
-Unaddressed trauma
- Personal experiences of racism from various systems actors
-Not seen as human

# CHANGING OUR RESPONSES TO VIOLENCE AND HARM

***See the whole picture of a person, including the system's role in that person's story (current and historical)***

TRAUMA-INFORMED APPROACH

**1. Safety**
The physical setting is safe and interpersonal interactions promote a sense of safety. Understanding safety as, defined by those served is a high priority
**2. Trustworthiness and Transparency**
Decisions conducted with transparency with a goal of building and maintaining trust
**3. Peer Support**
And mutual self help as vehicles for establishing hope, building trust, enhancing collaboration and utilizing their stories and lived experiences to promote recovery and healing

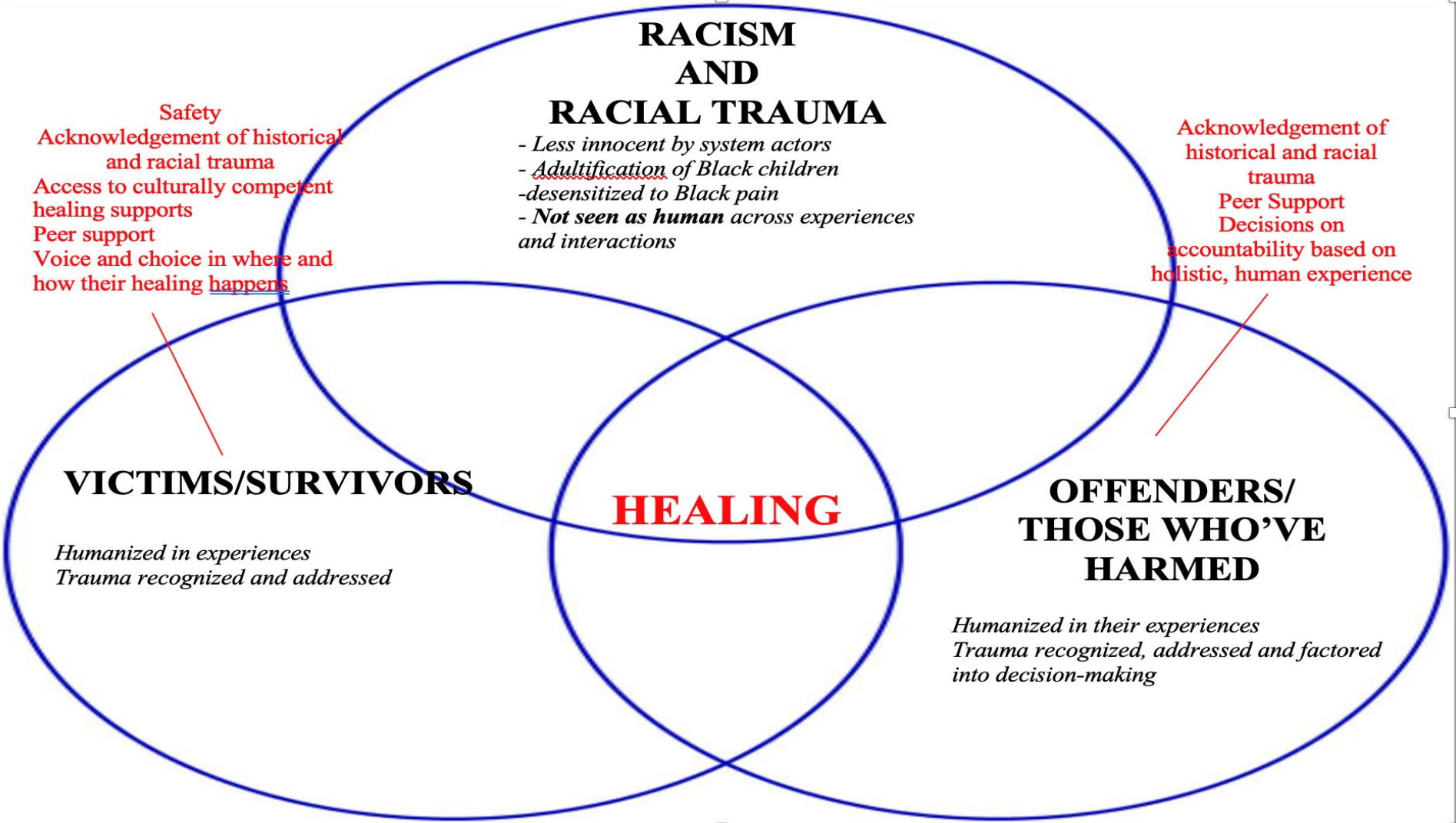
# CHANGING OUR RESPONSES TO VIOLENCE AND HARM

## TRAUMA-INFORMED APPROACH

**4. Collaboration and Mutuality**
Partnering and leveling of power differences. Healing happens in meaningful sharing of power and decision-making. Everyone plays a role in a trauma-informed approach.

**5. Empowerment, Voice and Choice**
Individual's experiences are recognized and built upon. Belief in resilience and the ability to heal and promote the recovery of trauma. Understand the ways people have historically been diminished in voice and choice.

**6. Cultural, Historical, and Gender Issues**
Incorporates policies, protocols and processes that are responsive to racial, ethnic and cultural needs: recognizes and addresses historical trauma.


RACISM
AND
RACIAL TRAUMA
- Less innocent by system actors
- Adultification of Black children
-desensitized to Black pain
- Not seen as human across experiences and interactions
Safety
Acknowledgement of historical and racial trauma
Access to culturally competent healing supports
Peer support
Voice and choice in where and how their healing happens
Acknowledgement of historical and racial trauma
Peer Support
Decisions on accountability based on holistic, human experience
VICTIMS/SURVIVORS
Humanized in experiences
Trauma recognized and addressed
HEALING
OFFENDERS/
THOSE WHO'VE
HARMED
Humanized in their experiences
Trauma recognized, addressed and factored into decision-making

## What can you do?

1. Acknowledge the stories and experiences of Black, People of color
2. Understand that victim & offender are not exclusive
3. Take a trauma-informed approach
4. Acknowledge racial trauma as a factor in justice system responses

# Questions?

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:10-CT-3123-BO

| | | |
|---|---|---|
| SHAUN ANTONIO HAYDEN,<br>Plaintiff, | ) | |
| v. | ) | ORDER |
| ALVIN KELLER, et al.,<br>Defendants. | ) | |

On July 15, 2010, plaintiff Shaun Antonio Hayden ("Hayden"), proceeding pro se, filed this complaint in this case pursuant to 42 U.S.C. § 1983. Compl., D.E. 1. After denying defendants' motion to dismiss the matter, the court directed that Hayden be represented by North Carolina Prison Legal Services, Inc. ("NCPLS"). Hayden v. Keller, No. 10-HC-2272-BO, Orders, D.E. 9 and 25; Notices, D.E. 10-15, 22. NCPLS entered an appearance and, on September 11, 2013, filed an amended complaint on Hayden's behalf pursuant to Section 1983. Id.; Hayden, 5:10-CT-3123-BO, Am. Compl., D.E. 10 and Notice of Appearance, D. E. 13. Cross motions for summary judgment are now before the court. Pl.'s Mot. Summ. J., D.E. 30; Defs' Mot. Summ. J., D.E. 36. On July 27, 2015, the court held a hearing on the pending motions. Min., D.E. 49. Thereafter, the motions were supplemented with statistical data and additional briefing. Orders, D.E. 50 and 53; Responses, D.E. 52, 56-57; In this posture, the matter is ripe for determination.

A. Issue

Hayden contends that, as a juvenile offender sentenced to a life sentence with parole, he is owed something that adult offenders are not: a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Graham v. Florida, 560 U.S. 48, 75 (2010).

Hayden further contends that the North Carolina Post-Release Supervision and Parole Commission ("Parole Commission" or "Commission") and their procedures do not afford him that opportunity. Hayden seeks declaratory and injunctive relief, but no monetary damages.

B. Facts

Hayden is a prisoner in the custody of the North Carolina Department of Public Safety ("NCDPS"). Hayden was born on October 6, 1966. Mem. in Supp. Pl's Mot. Summ. J., D.E. 31, Decl. Hayden ¶ 1; Def's Mot. Summ. J., D.E. 36, Ex. A - Offender Info. He was fifteen years old when he committed the crimes for which he is now imprisoned. Id., ¶¶ 2-3; Id., Ex. B and C - Indictments, Probable Cause Hearing. Although Hayden was to be tried as an adult at the age of sixteen, he did not go to trial, but pled guilty to first degree burglary; assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death; first degree sexual offense; second degree sexual offense; first degree rape; attempted second degree rape; and breaking and entering and larceny. Id. ¶ 4; Id., Ex. D. - Judgment and Commitment. The maximum allowable prison term was two life terms plus 160 years. Def's Mot, Ex. C. Hayden was sentenced to a term of his natural life. Pl's Mot. Summ. J., D.E. 31, ¶ 6. He has been in the custody of the NCDPS since March of 1983, and he is now 48 years old.

Hayden became eligible to be considered for parole in 2002, after serving a term of twenty years. N.C. Gen. Stat. § 15A-1371(a1) (1983). The Parole Commission has considered him for parole every year[1] since 2002 under the normal adult offender parole procedures. Pl's

[1]At the oral argument, counsel for defendants acknowledged that the annual review is not a date certain but generally occurs within a relative time frame of one year after the offender's last review.

Mot. Summ. J., ¶ 7; D.E. 32, Ex. B, Parole Comm'n Records. Each year parole has been denied at the first level of review. Id., ¶ 8.

In North Carolina, the Parole Commission is the independent agency responsible for evaluating offenders for parole release. See N.C. Gen. Stat. § 143B-720(a). The Parole Commission consists of four commissioners, assisted by a chief administrator and staff. Mem. in Supp. Pl's Mot. Summ. J., D.E. 32, Dep. Mary Stevens (Agent of Parole Commission), at 20. The Commission employs a staff of thirty-six people including a psychologist, two lead parole case analysts, and sixteen parole case analysts. Dep. Stevens at 8-9. For each case, the assigned analyst researches the record and the inmate file, including using such specific criteria that the Commission has said they want to know about the case, and then prepares a written report and recommendation. Id. at 21, 25, 33-34, and 45. Caseloads are high: each parole case analyst is responsible for approximately 4,338 offenders. Dep. Stevens at 28. According to Paul Butler, the Chairman of the Parole Commission, the most important information in the summary includes the following: the official crime version (narrative of events of crime of conviction); prison infraction history; gang membership; psychological evaluations; custody level history; visitation history; and a home plan. Dep. Butler at 51-52. Special weight is given to the "brutality of the crime." Id. at 54-55.

As for the commissioners, they work full-time for the Commission. Dep. Stevens at 104. The law requires a majority of commissioners (three out of four) to vote on every case. Id. at 86; N.C. Gen. Stat. § 143B-721(d). They vote on in excess of 2,000 cases every month, not including other work the commissioners do. Id. at 106. As of September 2014, the Parole Commission had reviewed about 15,200 parole cases for that year. Id.

The parole process is a two step process. Step one, or level one, is referred to as the "review." Dep. Stevens at 20-12. Step two, or level two, is referred to as the "investigation." Id. At the "review" stage, the parole case analyst relies on any psychological evaluations contained within the offender's prison file. Dep. Stevens at 63. After writing the summary of the prison file, and making a written recommendation for or against granting parole, the parole case analyst provides the information to a commissioner. Id. at 43.

The commissioners make independent electronic votes. Ex. E. Dep. Butler at 50; Ex. D. Dep. Stevens at 104, 107. They do not consult one another in casting their ballots, nor do they cast their ballots in the same room. Ex. E, Dep. Butler at 50-51. On a "fairly typical day," a commissioner casts approximately 91 votes. Id. at 25. The commissioners have many other responsibilities including presiding over Post-Release Supervision Revocation hearings, attending training, overseeing office administration, reviewing statistical reports, making field visits to jails and probation offices, approving warrants for arrest, and meeting with members of the public on Tuesdays. Id. at 14, 18-19, 23-24, 31, 33; Dep. Stevens at 71. The commissioners vote on felony parole cases five days a week. Dep. Butler at 62.

The Parole Commission does not provide notice to a juvenile offender in advance of his/her parole review; there is no opportunity for a juvenile offender to be heard during the course of his/her parole review; and, the commissioners do not hold an in-person hearing to deliberate together on the question of a juvenile offender's suitability for parole.[2] Dep. Stevens

[2]Since 2012, the only notice given at the review stage is to "any active victim." Prior to 2012, notice was not provided to any party. Dep. Stevens at 50.

at 43-53. The commissioners are not aware, and do not consider, whether a particular offender was a juvenile at the time of his/her offense. Dep. Stevens at 111.

Testimony states that a commissioner's usual vote is "no" on felony parole at the "review" stage. Dep. Stevens at 98. If the vote is not "no," the commissioner will most likely vote "incomplete," and recommend an "investigation." Id. At the "investigation" stage, the parole case analyst notifies the offender, the offender's prison facility, the victim, the prosecuting district attorney, and law enforcement. Id. at 45, 48-49. It is normal practice for the commission to order a psychological report to be conducted on the offender at this second level of review. Dep. Butler at 35. All such reports must be completed by the Parole Commission's staff psychologist, Dr. Denis Lewandowski. Dep. Stevens at 18. The probation department is requested to investigate the feasibility of the offender's proposed home plan. Id. at 54. If the "investigation" shows that the candidate for parole is promising, the Parole Commission will normally offer a "MAPP contract"—which is a contract between the offender, the prison, and the Parole Commission. Dep. Butler at 36. The contract lets an offender work through different custody levels and "get on work release for one to five years before they are released." Dep. Stevens at 77-79. The MAPP contract is ordinarily a mandatory step toward felony parole. Id. at 20-21; Dep. Butler at 60. Hayden has been denied parole at the review stage each year since 2002, thus never reaching the level two investigation.

Reasons for parole denial are considered confidential. Records created, received, and used by the Parole Commission in the performance of its statutory duties are likewise

confidential and are not subject to disclosure under the Public Records Law.[3] 1996 Op. Atty Gen'l 36 (April 24, 1996).

The court notes that while the affidavits of the two commissioners before the court state no consideration of age is given in a parole review, there is evidence in the record that at least one case analyst did negatively consider age as a parole factor. The analyst review reads as follows:

> Hayden was 15 years old when he committed these crimes. In 3/07 DOP completed a risk assessment which found Hayden to be an acceptable risk for unsupervised access to the community. **It is important to note that in the risk assessment it was further noted that the young age that Hayden did the crimes and the fact that he has spent much of his developmental life in prison suggests he will always require at least moderate level of supervision since it is unlikely that he has significant coping skills and decision making ability to function well without good guidance.** In 11/10 DOP completed another risk assessment which found him to be an unacceptable risk for unsupervised access to the community. Based on the belief that Hayden would not adhere to the conditions of parole and the risk he poses to public safety, it is recommend that parole/Mapp be denied.

D.E. 32-4 at 7-8.

One additional source of information about some offenders is the commissioners' meetings with the public. Members of the public have the right to visit the Parole Commission on Tuesdays. Dep. Stevens at 71. Availability is on a first-come, first-serve basis, and if a member of the public misses an offender's annual parole review, he or she must try again the following year. Id. at 71-72.

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[3]Plaintiff filed a motion to seal certain documents due to this provision. Defendants do not seek for the information to be sealed and waive the requirement. The motion [D.E. 33] is DENIED.

Throughout this process, every felony offender—adult or juvenile—is reviewed in the same way. Dep. Stevens at 39. The Parole Commission gives no consideration to an offender's age at the time of the offense. Dep. Butler at 54.

An expert report to identify the overall differences between paroled and non-paroled prisoners in the North Carolina system also provides relevant information.[4] Ex. F, Expert Report

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[4]The report sets out its findings in the context of this historical background:

> The parole system in North Carolina has undergone numerous changes since its original inception in 1868. In its earliest form, the governor was empowered with the ability to make decisions regarding reprieves, commutations, and pardons, and this was expanded to include a system of supervised release. The governor or his staff retained this authority until 1955, when North Carolina established the state's earliest Parole Commission, which had exclusive authority to grant, revoke, and terminate parole. For the next 26 years, the Parole Commission had a great deal of discretion in making parole decisions, which sought to emphasize rehabilitation and public safety. However, in the 1980s, concerns about sentence disparities and a growing prison population gave rise to a new set of rules and standards. In 1987, the General Assembly passed the Prison Population Stabilization Act, known as the prison cap, which mandated that the Commission keep the prison population below a legally-determined level. This dramatically changed the parole process in North Carolina for the duration of its tenure, which ended in 1996. During this time, many inmates found guilty of misdemeanors were released categorically, without much consideration to their degree of rehabilitation or to public safety, as a way to prevent prison overcrowding. In 1994, the system changed yet again with the passage of the Structured Sentencing Act, which eliminated the parole system as it had previously existed, and removed the Commission's discretionary role for most crimes committed after October 1, 1994, with the exception being those incarcerated for driving under the influence.
>
> This report aims to analyze the factors that influence the probability of being granted parole by the Commission for a certain class of offenders, namely those with life sentences convicted before 1995. By focusing on this select group of inmates, it is possible to limit the influence of the changing legal environment. First, by choosing only those prisoners who were convicted prior to 1995, we can be sure that the prison population we are analyzing was and is subject to the Parole Commission's discretion. Second, by focusing our analysis on those prisoners with life sentences, invariably guilty of serious felonies, we can be confident that such prisoners would not have been subject to any categorical release programs as a way to address prison overcrowding.

of Bryan Gilbert Davis. The report found that the statistical data shows that older offenders, offenders who have reached 58 to 59 years of age, are more likely to be paroled than younger offenders. Id. at 8. However, the length of an offender's incarceration seems to have no impact on whether or not the offender will be paroled. Id. at 17-18. Merely being in prison longer is not enough to increase parole likelihood. Id. The report found that a vast majority of the paroled offenders to have a low infraction history in prison. Id. The report found that "compared against the base case of violent crime, sex offenders are significantly less likely to be paroled." Id. "On the other hand, perpetrators of property crimes (which include burglary and arson in this model) are only slightly more likely to be paroled than violent offenders." Id. The report also found that those that attempt escape are significantly less likely to be granted parole. Id.

Additional statistical data from 2010-2015 shows the following for inmates with no release date or serving a life sentence:

1. In 2015, a total of 531 inmates are eligible for annual parole review. Because 24 of these individuals were assigned to treatment or MAPP programs, only 507 inmates will actually receive an annual parole hearing. So far this year, six of these inmates have received parole (1.2% of those considered). In 2015, 34 juvenile offenders are eligible for parole, and one has received parole.
2. In 2014, a total of 529 inmates were eligible for annual parole review. Because 43 of these individuals were assigned to treatment or MAPP programs, only 486 actually received an annual parole hearing. Nine of these actually received parole (1.9% of those considered). In 2014, 35 juvenile offenders were considered for parole, but none received parole.
3. In 2013, a total of 508 inmates were eligible for annual parole review. Because 63 of these individuals were assigned to treatment or MAPP programs, only 445 actually received an annual parole hearing. Six of these actually received parole (1.4% of those considered). In 2013, 32 juvenile offenders were considered for parole, but none received parole.
4. In 2012, a total of 490 inmates were eligible for annual parole review. Because 53 of these individuals were assigned to treatment or MAPP programs, only 437 actually

---

Id. at 2-3.

received an annual parole hearing. Ten of these actually received parole (2.3% of those considered). In 2012, 29 juvenile offenders were considered for parole, but none received parole.

5. In 2011, a total of 446 inmates were eligible for annual parole review. Because 35 of these individuals were assigned to treatment or MAPP programs, only 411 actually received an annual parole hearing. Eleven of these actually received parole (2.7% of those considered). In 2011, 28 juvenile offenders were considered for parole, but none received parole.
6. In 2010, a total of 421 inmates were eligible for annual parole review. Because 50 of these were assigned to treatment or MAPP programs, only 371 actually received an annual parole hearing. Twenty-two of these actually received parole (5.9% of those considered). In 2010, 32 juvenile offenders were considered for parole, and six received parole.

D.E. 52, Response of Def. Butler to Court Order.

C. Discussion

Summary judgment is appropriate when, after reviewing the record taken as a whole, no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986). The party seeking summary judgment initially must demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party has met its burden, the nonmoving party "must come forward with specific facts showing that there is a genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (emphasis and quotation omitted). A trial court reviewing a motion for summary judgment should determine whether a genuine issue of material fact exists for trial. Anderson, 477 U.S. at 249–50. In making this determination, the court must view the evidence and the inferences drawn therefrom in the light most favorable to the nonmoving party. Scott v. Harris, 550 U.S. 372, 378 (2007).

"To state a claim under [section] 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." West v. Atkins, 487 U.S. 42, 48 (1988); see Philips v. Pitt Cnty. Mem'l Hosp., 572 F.3d 176, 180 (4th Cir. 2009). Hayden contends he has been denied his constitutional rights to be free from cruel and unusual punishment and to due process pursuant to the Eighth and Fourteenth Amendments of the Federal Constitution. Specifically, he claims these rights have been infringed because defendants have denied him (in the status of a juvenile offender) from receiving a meaningful opportunity to obtain release through parole based on the Supreme Court's holdings in Graham and Miller v. Alabama, 132 S. Ct. 2455 (2012).

To begin, it is well established that "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 7 (1979); cf. Hawkins v. Freeman, 195 F.2d 732, 747 (4th Cir. 1999) (indicating that there is no fundamental right to parole release). Likewise, in the Fourth Circuit, a State is not constitutionally obligated to provide a parole regime. Vann v. Angelone, 73 F.3d 519, 521 (4th Cir. 1996). Therefore, offenders' limited right to consideration for parole finds its roots in State law. See Burnette v. Fahey, 687 F.3d 171, 181 (4th Cir. 2012).

In North Carolina, the Parole Commission has the exclusive discretionary authority to grant or deny parole. See N.C. Gen. Stat. § 143B-720 (2014) (authority of Parole Commission), and N.C. Gen. Stat. § 15A-1371(d) (indicating that the Parole Commission "may refuse to release on parole a prisoner it is considering for parole if it believes" the prisoner falls under any

of the criteria detailed in the statute); see also Goble v. Bounds, 13 N.C. App. 579, 583, 186 S.E.2d 638, 640 ("We conclude that honor grade status, work release privilege, and parole are discretionary acts of grace or clemency extended by the State as a reward for good behavior, conferring no vested rights upon the convicted person."), aff'd, 281 N.C. 307, 188 S.E.2d 347 (1972) (emphasis added). The Fourth Circuit has determined that due process requires only that authorities "furnish to the prisoner a statement of [their] reasons for denial of parole." Vann, 73 F.3d at 522 (quoting Franklin v. Shields, 569 F.2d 784, 801 (4th Cir.1977)). There is no differentiation between adult and juvenile offenders in North Carolina's parole scheme.

The Supreme Court in Graham viewed the question, not as one of due process, but in terms of the constitutional protections found within the Eighth Amendment. They held

> [t]he Eighth Amendment states: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society. This is because the standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.

Graham, 560 U.S. at 58. Importantly, Graham then found that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." 560 U.S. at 82; see also Miller, 132 S. Ct. at 2465 (recognizing "this Court held in Graham [ ] that life without parole violates the Eighth Amendment when imposed on juvenile nonhomicide offenders"). The Court continued that when a state sentences a juvenile and "imposes a sentence of life it must provide [that child] with some realistic opportunity to obtain release before the end of that term." Graham, 560 U.S. at 82. Therein, the opportunity must be "meaningful" and "based on demonstrated maturity and rehabilitation." Id. at 75.

Thus, the question presented here is whether the parole process in North Carolina provided to a juvenile offender serving a life sentence with parole comports with Graham. In this court's review, it is important to start with the Supreme Court's holding that in fact "children are different." Miller, 132 S. Ct. at 2470. Juveniles have "lessened culpability" and a "greater capacity for change." Miller, 132 S. Ct. at 2460. The Supreme Court has banned life without parole as a punishment for juvenile nonhomicide offenders. Graham, 560 U.S. at 48. Absent some meaningful parole process for nonhomicide juvenile offenders, Hayden argues his life sentence is de facto one of exactly that, life without parole—because he will never be granted the opportunity to obtain release by demonstrating his increased maturity. While "[a] state is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime . . . [w]hat a State must do . . . is give defendants . . . some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Graham, 560 U.S. at 75.

Clearly Graham created a categorical bar or flat ban on imposition of a sentence of life without the possibility of parole on juvenile nonhomicide offenders. Graham, 560 U.S. at 48; see Johnson v. Ponton, 780 F.3d 219, 222 (4th Cir. 2015) (Graham "categorically barred life-without-parole-sentences for juvenile nonhomicide offenders"); In re Vassell, 751 F.3d 267, 269–70 (4th Cir. 2014) (defendant's petition for habeas relief was untimely because his right to relief first became available after Graham, which "prohibited imposing any sentence of life without parole—mandatory or individualized—for juveniles convicted of committing nonhomicide offenses"); In re Sloan, 570 F. App'x 338, 339 (4th Cir. 2014) (Graham held "the Eighth Amendment prohibits a sentence of life without parole for any juvenile offender [ ] who did not commit homicide"). The Supreme Court in Miller further extended the reasoning in

Graham to *mandatory* sentences of life without parole for juveniles convicted of homicide offenses. Miller, 132 S. Ct. at 2467. Under Miller, a State may ultimately impose a life without parole sentence against a juvenile convicted of homicide, but only after the sentencer has the opportunity to consider all the mitigating circumstances, including the offender's age and age-related characteristics. Id. at 2475. In doing so, the Supreme Court emphasized that, "given all we have said in Roper, Graham, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." See id. at 2469.

In applying these principles set out by the Supreme Court, other courts have held that Miller and Graham apply to lengthy term-of-years sentences or aggregate sentences. See Moore v. Biter, 725 F.3d 1184, 1192 (9th Cir. 2013) (a sentence of 254 years is materially indistinguishable from a life sentence without the possibility of parole); Casiano v. Comm'r of Correction, 317 Conn. 52, 79, 2015 WL 3388481 at *11 (Conn. May 26, 2015) ("a fifty year term and its grim prospects for any future outside of prison effectively provide a juvenile offender with 'no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.'"); Brown v. State, 10 N.E.3d 1, 7–8 (Ind. 2014) (reducing a juvenile's sentence to eighty years after concluding that, while the trial court acted within its discretion when it imposed a sentence of 150 years for murder, such a sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the [juvenile] convict . . ."); Bear Cloud v. State, 334 P.3d 132, 144 (Wyoming 2014) (an aggregate sentence of just over forty-five years was the de facto equivalent of a life sentence without parole); State v. Null, 836 N.W.2d 41, 72 (Iowa 2013)

("Miller's principles are fully applicable to a lengthy term-of-years sentence"); People v. Caballero, 55 Cal.4th 262, 145 Cal. Rptr.3d 286, 282 P.3d 291, 296 (Cal. 2012) ("sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment"); but see Bunch v. Smith, 685 F.3d 546, 552–53 (6th Cir. 2012) (even though an aggregate sentence of eighty-nine years may be the functional equivalent of life, Graham applied only to sentences of "life," not aggregate sentences that result in a lengthy term of years); State v. Brown, 118 So.3d 332, 342 (La. 2013) ("nothing in Graham addresses a defendant convicted of multiple offenses and given term of year sentences"). Courts have also rejected state "geriatric release provisions" by which a nonhomicide juvenile offender sentenced to life without parole may apply for geriatric release as "inconsistent with the Eighth Amendment." LeBlanc v. Mathena, 2015 WL 4042175, at *11-18 (E.D. Va. 2015) (quoting and citing Graham, 560 U.S. at 76). Furthermore, courts have determined that Miller-type protections, i.e., individualized sentencing evaluations, are constitutionally required in cases where a juvenile is sentenced to either a de facto life sentence, or to a term of years that would effectively deprive him of a meaningful opportunity for release on parole during his lifetime. Greiman v. Hodges, 79 F. Supp. 3d 933, 938-945 (S.D. Iowa 2015) (defendants denied plaintiff a meaningful opportunity to obtain release by failing to consider plaintiff's youth at the time of the offense and by failing to consider plaintiff's demonstrated growth, maturity, and rehabilitation as part of the parole review process); State v. Null, 836 N.W.2d 41, 72–76 (Iowa 2013) (holding that Miller's protections are fully applicable to "a lengthy term-of-years sentence" and require judges sentencing juveniles to recognize: (1) that

children are constitutionally different than adults and cannot be held to the same standard of culpability in sentencing; (2) that children are more capable of change than adults; and (3) that lengthy prison sentences without the possibility of parole for juveniles are appropriate, "if at all, only in rare or uncommon cases"). Lastly, Graham explicitly holds that "[w]hat the State must do is give some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Graham, 560 U.S. at 75. "It is axiomatic that a juvenile offender could only prove increased maturity and rehabilitation warranting release from custody at some time well after a sentence is imposed." Greiman, 79 F. Supp. 3d at 943; see Graham, 560 U.S. at 79 (the Eighth Amendment does not permit a State to deny a juvenile offender the chance "to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law").

The same principles apply here. If a juvenile offender's life sentence, while ostensibly labeled as one "with parole," is the functional equivalent of a life sentence without parole, then the State has denied that offender the "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" that the Eighth Amendment demands. See Greiman, 79 F. Supp. 3d at 944 ("a de facto life without parole sentence . . . is prohibited by Graham and its progeny"). In the case before this court, it is evident that North Carolina has implemented a parole system which wholly fails to provide Hayden with any "meaningful opportunity" to make his case for parole. The commissioners and their case analysts do not distinguish parole reviews for juvenile offenders from adult offenders, and thus fail to consider "children's diminished

culpability and heightened capacity for change" in their parole reviews.[5] Miller, 132 S. Ct. at 2469; see Greiman, 79 F. Supp. 3d at 943.

For each case reviewed, the assigned analyst researches the record and the inmate file and then prepares a written report and recommendation. The most important information found in the summaries has been noted as: the official crime version (narrative of events of crime of conviction; prison infraction history; gang membership; psychological evaluations; custody level history; visitation history; and a home plan. There is no information about one's status as a juvenile offender. There is no specific information about maturity or rehabilitative efforts. There is no special process for one convicted as an adult before the age of 18, and the commissioner are unaware of that status. Absolutely no consideration is to be given for that status by the commissioners.

Furthermore, caseloads are enormous and each parole case analyst is responsible for approximately 4,338 offenders. The sheer volume of work may itself preclude any consideration of the salient and constitutionally required meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. Special weight is given to the brutality of the crime.

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[5] Although Hayden's parole case file explicitly states that he was fifteen when he committed his offense, it is difficult for this court to believe that a parole commissioner can fully take into "consideration [Hayden']s chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences[,]" Miller, 132 S. Ct. at 2468, when reading Hayden's case file along with 90 others in a single day. Indeed, if anything, defendants have demonstrated that North Carolina's juvenile offenders face *harsher* treatment during parole reviews because the young age at which the crime is committed may actually be used as a negative factor in parole consideration by the case analyst preparing the report for the voting commissioners. See LeBlanc, 2015 WL 4042175, at *14 ("If it can be said that Virginia's sentencing scheme treats children differently than adults, it would be because, tragically, the scheme treats children *worse*." (italics in original)); see also Miller, 132 S. Ct. at 2464–65 (identifying a number of reasons which "establish that children are constitutionally different from adults for purposes of sentencing").

Special weight is not given, much less taken into consideration, of the age at which the crime was committed.

As for the public meeting, without providing notice to the offender, his/her family members, or others who may be able to provide relevant information about the offender's rehabilitation and maturity efforts, the opportunity appears to exist mainly for those on notice. Since 2012, those are the active victims. Such notice is undoubtedly important to victims. Likewise, the failure to provide the same notice to juvenile offenders denies them "a chance to demonstrate maturity and reform." Graham, 560 U.S. at 79.

The data before the court also indicates that juvenile offenders are rarely paroled. Again, "[a] State is not required to guarantee eventual freedom to a juvenile convicted of a nonhomicide crime." Graham, 560 U.S. at 75. Thus, the information from four of the past five years that no juvenile offenders obtained release while adult offenders did obtain parole is relevant only in that it raises questions about the meaningfulness of the process as applied to juvenile offenders. Furthermore, the research regarding North Carolina parolees is that inmates having committed brutal crimes, most specifically sexual crimes, are least likely to be paroled. Hayden was convicted of sexual crimes.

Next without notice of one's status as a juvenile prior to review, the record upon which each commissioner relies is unable to convey or demonstrate maturity or rehabilitation. For example, Hayden has been found guilty of 41 disciplinary infractions throughout his 32 years of incarceration; however, of those infractions he was only convicted of seven infractions since 2000, and one in the last five years. http://webapps6.doc.state.nc.us/opi/viewoffender

infractions.do?method=view&offenderID=0174678&listpage=1&listurl=pagelistoffendersearchresults&searchLastName=hayden&searchFirstName=shaun&obscure=Y (last viewed Sept. 22, 2015). This information has significantly different meaning depending on the context in which it is viewed. It gives meaningful insight into gaining, or failing to gain, maturity and rehabilitation if the commissioner views it knowing Hayden was sentenced as a juvenile offender. Viewed in the absence of that knowledge, it simply illustrates a high number of disciplinary infractions which are statistically damaging to one's chance for parole.

Finally, regardless of the fact that juvenile offenders will most likely be serving disproportionately longer sentences, the longer sentence does not present an opportunity for parole. What presents the best statistical opportunity for parole is to obtain the age of 58 to 59 having committed a non-sexual crime. Again, this is not the holding in Graham. 560 U.S. at 59 (citing Weems v. United States, 217 U.S. 349, 367 (1910)) ("The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'"). The court finds that the North Carolina parole process violates the Eighth Amendment as outlined in Graham.

Defendants argue that Hayden faults the parole review process simply because he himself has been unable to obtain parole. It is true that Greenholtz—which notably did not address whether Nebraska's parole scheme comported with due process as applied to juvenile offenders—held that "a mere hope" of parole suffices. 442 U.S. at 11; see Hawkins, 195 F.2d at 747. But even Greenholtz acknowledged that "due process is flexible and calls for such procedural protections *as the particular situation demands*." 442 U.S. at 12 (emphasis added).

The Supreme Court has now clarified that juvenile offenders' parole reviews demand more procedural protections. See Graham, 560 U.S. at 79; Greiman, 79 F. Supp. 3d at 945. Clearly, in North Carolina's parole process there is no advance notice or opportunity for juvenile offenders to be heard on the question of maturity and rehabilitation — either in writing or in person.[6] The offender is an entirely passive participant in North Carolina's parole review process. What Hayden seeks is what he is constitutionally entitled to, "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. North Carolina's parole process fails to meet this constitutional mandate.

D. Conclusion

The court denies defendants' motion for summary judgment [D.E. 36] and grants in part and denies without prejudice in part Hayden's motion for summary judgment [D.E. 30]. Specifically, the court finds that the current North Carolina parole review process for juvenile offenders serving a life sentence violates the Eighth Amendment. Having so held, the court is guided by the mandate of Graham which instructs that "[i]t is for the State, in the first instance, to explore the means and mechanisms for compliance." 560 U.S. at 75. Thus, the court denies without prejudice Hayden's request for the injunctive relief and gives the parties 60 days to present a plan for the means and mechanism for compliance with the mandates of Graham to provide a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation to juvenile offenders convicted as adults.

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[6]Although the level two investigation does provide offenders with notice and an opportunity to be heard via a psychological report, the infinitesimal percentage of juvenile offenders who make it to this level of review does not constitute the meaningful opportunity described in Graham. 560 U.S. at 82 (the parole review scheme "must provide [the juvenile offender] with some realistic opportunity to obtain release.")

SO ORDERED, this 25 day of September 2015.

TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

**Task Force on Racial Equity in Criminal Justice**
Working Group # 4
September 8, 2020

**Roots of racial inequity: Understanding justice system's role in perpetuating cycles of harm against Black people and people of color.**

## THE CASE OF JASMINE CORBETT

*Timeline*

| | |
|---|---|
| June 24, 2008 – | Jasmine Corbett (17) is arrested with several men as part of a buy-bust sting aimed originally to trap Jasmine's boyfriend, Devontay Howard (DH)(25). DH is in jail for a prior drug buy and had pressured JASMINE to go to his supplier for money to bond him out. This transaction was what was required of her and involved a two-minute transfer of a box of pills from one car to another. JASMINE is charged with Level II Trafficking by delivery and by transportation and Conspiracy to traffic MDMA. |
| August 13 – | JASMINE is bonded out |
| May 2009 -- | DH, who is also out on bond, pleads guilty to two earlier drug-bust deals of less than 500 pills. He is **sentenced to 16-20 months**. At end of month, he reports to prison. |
| July -- | JASMINE's co-defendant Mullings (from Georgia, source of the pills) pleads guilty to attempted trafficking in MDMA. He receives a **sentence of 24-29 months**.<br>JASMINE's co-defendant Duncan pleads guilty to attempted trafficking in MDMA and is **sentenced to 10-12 months**. |
| August -- | JASMINE is offered plea deal of 1 count of Level 1 trafficking and recommended **sentence of 35-42 months active**. This deal stays on the table even through trial. |
| January 2010 – | JASMINE gives birth to DH's son, Emauri |
| May -- | DH is released from prison. |
| August 10 – | JASMINE's trial with co-defendant McDonald begins |
| August 16 – | Closing arguments; JASMINE is found guilty of three counts of trafficking (possession, sale, and delivery) of 500 dosage units of MDMA; McDonald is acquitted. No additional evidence was presented in sentencing, and the prosecution takes no position on sentence. JASMINE is **sentenced to three consecutive active terms of 70 to 84 months**, a sentence that not only far exceeded the sentences of her co-defendants but also the plea deal offered to her by the State prior to trial. Attorneys on both sides are shocked. |
| April 3, 2012 – | Conviction and sentence affirmed on appeal |
| Nov 14, 2014 – | Commutation Application filed with Gov. McCrory by North Carolina Prisoners Legal Services |
| Mar. 2015 – | Commutation Denied |

| | |
|---|---|
| Dec. 2019 – | RedressNC accepts JASMINE as client |
| April 6, 2020 – | Expedited MAR and Proposed Consent Order is filed with Judge William Robert Bell (by RedressNC with the consent of Mecklenburg County DA). Basis for relief is Ineffective Assistance of Counsel in plea-bargaining. |
| April 9 -- | Judge Bell vacates original judgments and **resentences JASMINE to a term of 70-84 months and gives credit for the 3523 days spent incarcerated.** |
| April 10 – | Jasmine Corbett walks out of NC Correctional Institute for Women. |

Prepared by counsel, Cindy Adcock, co-director, RedressNC

# JUVENILE LIFE WITHOUT PAROLE IN NORTH CAROLINA

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## JUVENILE LIFE WITHOUT PAROLE IN NORTH CAROLINA


### ABSTRACT

Life without parole is "an especially harsh punishment for a juvenile," as the U.S. Supreme Court noted in *Graham v. Florida*. The United States is the only country in the world that imposes juvenile life without parole (LWOP) sentences. Many of these individuals were sentenced during a surge in LWOP sentences in the 1990s. In the past decade, following several Supreme Court rulings eliminating mandatory sentences of LWOP for juvenile offenders, such sentencing has declined. This Article aims to empirically assess the rise and then the fall in juvenile LWOP sentencing in a leading sentencing state, North Carolina, to better understand these trends and their implications. We examine the cases of 94 people in North Carolina who were sentenced to LWOP as juveniles. Their ages at the time of the offense ranged from 13 to 17. Of those, 51 are currently serving LWOP sentences (one more is currently pending a new trial). In North Carolina, JLWOP sentencing has markedly declined. Since 2011, there have been only five such sentences. Of the group of 94 juvenile offenders, 42 have so far been resentenced to non-LWOP sentences, largely pursuant to the post-*Miller v. Alabama* legislation in North Carolina. These sentences are concentrated in a small group of counties. A total of 61% or 57 of the 94 juvenile LWOP sentences in North Carolina were entered in the eleven counties that have imposed more than three such sentences. We find an inertia effect: once a county has used a JLWOP sentence they have a higher probability of using a JLWOP sentence again in the future. In contrast, homicide rates are not predictive of JLWOP sentences. We ask whether it makes practical sense to retain juvenile LWOP going forward, given what an unusual, geographically limited, and costly sentence it has become. In conclusion, we describe alternatives to juvenile LWOP as presently regulated in states like North Carolina, including a scheme following the model adopted in states like California and Wyoming, in which there is period review of lengthy sentences imposed on juvenile offenders.




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# JUVENILE LIFE WITHOUT PAROLE IN NORTH CAROLINA

## INTRODUCTION

Life without parole is "an especially harsh punishment for a juvenile," as the U.S. Supreme Court noted in *Graham v. Florida*.[1] In that ruling regarding the Eighth Amendment's ban on cruel and unusual punishment, the Court emphasized that "a 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only."[2] Indeed, the United States is the only country in the world that imposes juvenile life without parole sentences; such sentences are banned in almost every country in the world and prohibited by human rights treaties.[3] In the United States, there are over two thousand people still serving life without parole (LWOP) sentences for homicides they committed as juveniles.[4] Many of these individuals were sentenced during a surge in LWOP sentences in the 1990s. In the past decade, however, following several Supreme Court rulings eliminating mandatory sentences of LWOP for juvenile offenders, juvenile LWOP sentencing has declined. Twenty-one states and the District of Columbia currently do not permit LWOP sentences for juvenile offenders. Additionally, many states have established methods for periodic review of sentences for persons who had been sentenced to LWOP for juvenile offenses.[5] This Article aims to empirically assess the rise and then the fall in juvenile LWOP sentencing in a leading sentencing state, North Carolina, to better understand these trends and their implications.[6]

The sentence of life without parole was authorized by only seven states prior to 1971.[7] The use of LWOP rose as the viability of the death penalty was threatened

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[1] Graham v. Florida, 560 U.S. 48, 70 (2010).

[2] Id.

[3] Michelle Leighton and Connie de la Vega, Sentencing Our Children to Die in Prison (2007) (describing that at least 135 countries have rejected juvenile LWOP sentences); Tera Agyepong, *Children Left Behind Bars: Sullivan, Graham, and Juvenile Life Without Parole Sentences*, 9 Northwestern J. Int'l Hum Rts. 83 (2010). All countries except the U.S. and Somalia have ratified Article 37(a) of the Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (Sept. 2, 1990).

[4] Josh Rovner, *Juvenile Life Without Parole: An Overview*, The Sentencing Project, October 22, 2018.

[5] Id.

[6] Two prior studies have examined numbers of person serving juvenile LWOP sentences in the United States and documenting race and geographic disparities. John Mills et al., Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway, 65 Am. U. L. Rev. 535 (2016); John R. Mills et al., No Hope: Re-Examining Lifetime Sentences for Juvenile Offenders (Sept. 2015), at http://static1.squarespace.com/static/. One prior state-level study examined juvenile LWOP sentences in Michigan. Deborah Labelle et. al, *Second Chances: Juveniles Serving Life Without Parole in Michigan Prisons* (2004), http://www.aclumich.org/sites/default/files/file/Publications/Juv%20Lifers%20V8.pdf, and a second state-level study has examined Florida data. Paolo Annino, *Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to Nation* (2009).

[7] Ashley Nellis, *Life Goes On* (The Sentencing Project, 2012), 29, https://sentencingproject.org/wp-content/uploads/2015/12/Life-Goes-On.pdf; Ashley Nellis, *Still Life: America's Increasing Use of Life and Long-Term Sentences* (The Sentencing Project, 2017). See Charles J. Ogletree, Jr. and Austin Sarat, LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? (2012) for a collection of perspectival essays on the rise of life with-out parole sentencing.

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in the mid-1970s, but the sentence did not become ubiquitous until the 1990s.[8] In the middle of that decade, the federal government and many states became concerned with a perception that juvenile "superpredators" were responsible for serious crimes, and they adopted a range of measures to try more juveniles in adult criminal courts.[9] As a result, states enacted statutes permitting, and prosecutors increasingly sought, LWOP sentences for juveniles.[10] A small subset of states have long accounted for the vast majority of those juvenile LWOP sentences; in particular, nine states have accounted for more than 80% of such sentences.[11] What is less understood is whether county-level patterns within states similarly drive juvenile LWOP sentencing.

In this Article, we examine juvenile LWOP sentencing in North Carolina, in order to better understand the practice, the patterns in sentencing at the county-level, and the costs of such sentences. We focus on North Carolina as a case study because, as we describe in Part I, North Carolina is one of the nine states that has imposed the bulk of juvenile LWOP sentences in the U.S. Further, North Carolina continues to retain LWOP for juvenile offenders. While LWOP is no longer mandatory as a result of 2012 legislation enacted following the U.S. Supreme Court's ruling in *Miller v. Alabama,* the lower-age-limit for sentencing an individual to LWOP for homicide in North Carolina is 13 years old.[12] We describe the protracted litigation that can result in appeals in these cases, and reversals, including in cases in which the defendant was not even the shooter, and where substantial mitigating evidence was presented on appeal. One striking figure is that over one third of the juveniles sentenced to LWOP, or 32 individuals, were convicted under a felony murder theory.[13] For example, in the case of *State v. Seam,* a sixteen-year-old defendant rejected a plea. He was not the shooter, and the prosecution theory was felony murder. [14] After trial, the judge sentenced him to LWOP, unlike the actual

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[8] Id.

[9] During this time period, most states also increased numbers of children tried as adults and housed in adult prisons. See Amnesty International, *Betraying the Young: Human Rights Violations Against Children in the U.S, Justice System* (1998). Regarding the public outcry concerning supposed juvenile "super-predators," *see, e.g.* Elizabeth Becker, *As Ex-Theorist on Young 'Super-Predators' Bush Aide Has Regrets*, N.Y. Times, Feb.9,2001, at Al0; David S. Tanenhaus and Steven A. Drizin, *Owing to the Extreme Youth of the Accused: The Changing Legal Response to Juvenile Homicide*, 92 J. Crim. L. & Criminology 641, 642-643 (2001-2002) (describing how "State and local prosecutors and crime conservatives jumped on the 'superpredator' bandwagon, adopting the rhetoric in a full-scale assault on the legitimacy of the juvenile court.").

[10] John R. Mills, Anna M. Dorn, and Amelia C. Hritz, *No Hope: Re-Examining Lifetime Sentences for Juvenile Offenders* 8, 11 (Sept. 22, 2015), at http://static1.squarespace.com/static/55bd511ce4b0830374d25948/t/5600cc20e4b0f36b5caabe8a/1442892832535/JLWOP+2.pdf ("The overwhelming majority of JLWOP sentences being served today were handed down during the 1990's when a moral panic about violent youth led to a dramatic rise in harsh sentencing practices against juveniles, including expanding the use of JLWOP.").

[11] Id. at 6. Those states are California, Florida, Illinois, Louisiana, Michigan, Mississippi, Missouri, North Carolina, and Pennsylvania.

[12] Miller v. Alabama, 567 U.S. 460, 469, 479, 483, 489 (2012); N.C. Gen. Stat. §§ 14-17(a), 7B-2200, 15A-1340.19A *et seq*.

[13] See Figure A, infra.

[14] See Part I.E.



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killer, who took a plea.[15] Post-*Miller,* the lower-court judge readily concluded that Seam should have his sentenced reduced, but two sets of hearings and three rounds of appeals ensued before the sentence was finally reduced to life with parole.[16]

In Part II of this Article, we examine the cases of the 94 people in North Carolina who were sentenced to LWOP as juveniles from 1994 to present. Their ages at the time of the offense ranged from 13 to 17. Of those, 51 are currently serving LWOP sentences (one more is currently pending a new trial).[17] These cases are detailed in Appendix A. Of those juvenile offenders, 41 have so far been resentenced to non-LWOP sentences, largely pursuant to the post-*Miller* legislation in North Carolina.[18] We analyze these cases using several different methods. We provide detailed descriptive information about these juvenile LWOP cases, we analyze trends in sentencing and litigation, and we use regression analyses of county-level patterns. First, we describe how juvenile LWOP sentencing has declined markedly since its late-1990s height in North Carolina; beginning in 2011, there have been either one or no such sentences each year. Second, we describe how these LWOP sentences were highly concentrated in a handful of counties. Such county-level research has been conducted regarding death sentences in the United States, but not regarding LWOP sentencing.[19] Third, we describe race disparities in LWOP sentences that mirror race disparities in juvenile homicide offending in North Carolina. Fourth, we examine the procedural posture of pending cases that still await resentencing hearings under the post-*Miller* legislation. It is likely that far more of the remaining 43 cases will result in non-LWOP sentences. Fifth, we employ a set of statistical analyses to explore the existence of an 'inertia effect' to understand if the institutional memory of past JLWOP sentences predicts future JLWOP sentences.

In Part III, we conclude by examining the costs of continued use of juvenile LWOP, based on the evidence described in this Article. We question the use of the sentence, given the lack of recent or ongoing sentencing, and the estimated cost of the hearings and litigation concerning past juvenile LWOP sentences. Millions of dollars are being spent on years of hearings and appeals, including in cases that are obviously

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[15] Id.

[16] Id.

[17] In contrast, 203 offenders sentenced for crimes committed when 17 or younger are serving life with parole sentences and 63 are serving terms of over forty years. North Carolina Department of Public Safety, *Life and 40+ Year Sentences For Those Sentenced When 17 or Younger*, SR1901-02, Nov. 14, 2018. Terms of over forty years may often consist in defacto or virtual life without parole sentences, given prison life expectancies, if they are no reconsidered prior to the end of the term.

[18] However, of these 41, two will not be eligible for parole for 50 years and another is not eligible for 63 years.

[19] See Brandon L. Garrett, *End of its Rope: How Killing The Death Penalty Can Revive Criminal Justice* (2017) (presenting statistical analysis of death sentencing from 1973 to 2016); Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. Rev. 227, 265–75 (2012) (examining county-level death sentencing from 2004 to 2009); Brandon L. Garrett, Alexander Jakubow and Ankur Desai, *The American Death Penalty Decline,* 107 J. Crim. L. & Criminology 561 (2017); James S. Liebman & Peter Clarke, *Minority Practice, Majority's Burden: The Death Penalty Today*, 9 Ohio St. J. Crim. L. 255, 299 (2011).



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not fit for such severe sentences, such as cases in which the defendant was not the shooter, or presented substantial mitigating evidence.

We ask whether it makes practical sense to retain juvenile LWOP going forward, given what an unusual, geographically limited, and costly sentence it has become. In conclusion, we describe alternatives to juvenile LWOP as presently regulated in states like North Carolina, including a scheme following the model adopted in states like California and Wyoming, in which there is period review of lengthy sentences imposed on juvenile offenders. We also describe how more reasonable prosecution approaches, short of enactment of new legislation, could address the defects in the current approach towards juvenile life without parole.

## I. THE NORTH CAROLINA ADOPTION OF LWOP AND JUVENILE LWOP

### A. North Carolina Adoption of Juvenile Life Without Parole

North Carolina originally adopted LWOP for adults and for juveniles in 1994, as part of the change from the prior sentencing scheme, termed "Fair Sentencing," to a new scheme termed "Structured Sentencing."[20] The new statute defined all life sentences as "natural life" sentences with no possibility for parole.[21] The following year, the legislature also lowered the juvenile age for transfer to adult court for non-homicides to the age of thirteen.[22] In taking these steps, North Carolina joined almost every state in adopting harsher and adult-punishments for juveniles in the mid-1990s.[23]

The juvenile LWOP statute was constitutionally challenged, including under the Eighth Amendment, and affirmed by the North Carolina Supreme Court. That court ruled in *State v. Green* in 1998 that juvenile LWOP sentences under the Structured Sentencing statute were constitutional and a "reasonable" legislative response to crime rates.[24] The court also concluded that the crime in the case,

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[20] For four years, until the provision was repealed in 1998, the North Carolina statute also provided a safety valve in the form of judicial review of LWOP sentences after twenty-five years of imprisonment; sentences entered during that window will be eligible for review beginning in 2019. G.S. 15A-1380.5 (repeal effective December 1, 1998). For a detailed analysis of that process, which has not yet resulted in any reviews, see James Markham, Twenty Five Year Review of Sentences of Life Without Parole, NC Criminal Law Blog, at https://nccriminallaw.sog.unc.edu/twenty-five-year-review-sentences-life-without-parole/.

[21] 1994 North Carolina Laws 1st Ex. Sess. Ch. 7 (H.B. 27).

[22] G.S. 7A-608; see also State v. Green, 477 S.E.2d 182, 187-88 (N.C. Ct. App. 1996), aff'd, 502 S.E.2d 819 (N.C. 1998).

[23] Patricia Torbet & Linda Szymanski, U.S. Dep't of Justice, State Legislative Responses to Violent Juvenile Crime: 1996–97 Update 6–9 (1998), https://www.ncjrs.gov/pdffiles/172835.pdf. See also Sara Sun Beale, *You've Come a Long Way, Baby: Two Waves of Juvenile Justice Reforms as Seen from Jena, Louisiana*, 44 Harv. C.R.-C.L. L. Rev. 511, 514 (2009). Regarding the myth of the juvenile "superpredator" at that time, see, e.g. Jane Rutherford, *Juvenile Justice Caught Between The Exorcist and A Clockwork Orange*, 51 DePaul L. Rev. 715, 720–21 (2002); John Dilulio, Jr., *The Coming of the Super-Predators*, Wkly. Standard (Nov. 27, 1995); Equal Just. Initiative, *The Superpredator Myth, 20 Years Later* (Apr. 7, 2014), http://www.eji.org/node/893.

[24] State v. Green, 502 S.E.2d 819, 832 (N.C. 1998).



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committed by a thirteen-year-old, was "not the type attributable to or characteristic of a 'child.'"[25]

### B. Adolescent Brain Science and U.S. Supreme Court Rulings

A growing body of scientific research has described how adolescent brain development progresses well into a person's twenties. Adolescents do not possess well- formed characters, and are still developing the ability to make well-reasoned decisions.[26] Juveniles are more susceptible to impulse and to outside influences. The Supreme Court emphasized this research in its 2005 ruling in *Roper v. Simmons,* finding that the Eighth Amendment barred the imposition of death penalty on persons who were juveniles at the time of the offense.[27] The American Medical Association filed an amicus brief in the case, arguing that "[a]dolescents' behavioral immaturity mirrors the anatomical immaturity of their brains," and the American Psychological Association similarly filed a neuroscience brief.[28] The Court noted, and cited to amici, that juveniles have a "lack of maturity" and an "underdeveloped sense of responsibility," which "often results in impetuous and ill-considered actions and decisions."[29] Juveniles also lack foresight and are less able to be deterred by criminal punishments, since they are "less likely to take a punishment into consideration when making decisions."[30]

These features of adolescent brain development impact the accuracy, as well as the fairness, of juvenile convictions and sentences.[31] Juveniles are more vulnerable

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[25] Id.

[26] See, e.g. Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 Proc. Nat'l Acad. Sci. 8174 (2004); Elkhonon Goldberg, *The Executive Brain: Frontal Lobes and the Civilized Mind* (2001); Peter R. Huttenlocher, *Neural Plasticity: The Effects of Environment on the Development of the Cerebral Cortex* (2002); Kenneth K. Kwong et al., *Dynamic Magnetic Resonance Imaging of Human Brain Activity During Primary Sensory Stimulation*, 89 Proc. Nat'l Acad. Sci. 5675 (1992); M. Marsel Mesulam, *Behavioral Neuroanatomy, in Principles of Behavioral and Cognitive Neurology* 1 (M. Marsel Mesulam ed., 2d ed. 2000).

[27] 543 U.S. 551 (2005).

[28] Brief of the American Medical Ass'n et al. as Amici Curiae in Support of Respondent at 10, Roper, 543 U.S. 551 (No. 03-633), 2004 WL 1633549]; Brief for the American Psychological Ass'n, and the Missouri Psychological Ass'n as Amici Curiae Supporting Respondent at 9-12, Roper, 543 U.S. 551 (No. 03-633), 2004 WL 1636447.

[29] Id.

[30] 542 U.S. 551, 560. For detailed critical discussion of the *Roper* ruling, see, e.g. Deborah W. Denno, *The Scientific Shortcomings of* Roper v. Simmons, 3 Ohio St. J. Crim. L. 379 (2006); Elizabeth F. Emens, *Aggravating Youth:* Roper v. Simmons *and Age Discrimination*, 2005 Sup. Ct. Rev. 51 (2006); Aliya Haider, Roper v. Simmons: *The Role of the Science Brief*, 3 Ohio St. J. Crim. L. 369 (2006); Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 Ohio St. J. Crim. L. 397, 408 (2006) ( "Roper has been the most important case to propose use of the new neuroscience to affect responsibility questions generally."); Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 Notre Dame L. Rev. 89, 176 (2009).

[31] Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009 (2003).



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or susceptible to negative influences and out-side pressures."[32] They may face greater difficulty working with counsel and understanding the consequences of interrogations or legal choices and proceedings. This suggestibility makes juveniles particularly vulnerable to wrongful conviction, because they are more likely to falsely confess during police questioning.[33] For that reason, in *J.D.B. v. North Carolina*, the Court noted that "time and time again," the Justices have "observed that children generally are less mature and responsible than adults, that they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them, that they are more vulnerable or susceptible to . . . outside pressures than adults, and so on."[34] Studies have found that juveniles are disproportionately represented among exonerations and specifically, exonerations that resulted from false confessions.[35]

Rulings by the U.S. Supreme Court regarding the Eighth Amendment ban on cruel and unusual punishment have impacted juvenile sentencing in North Carolina, as in other death penalty and juvenile LWOP states. In *Roper v. Simmons*, as noted, the Court found juvenile death sentences unconstitutional.[36] Following that ruling, three juveniles in North Carolina, all seventeen years-old at the time of the offense, had been sentenced to death and received resentencing following the *Roper* ruling that capital punishment could not be imposed on juvenile offenders.[37]

In 2010, *Graham v. Florida* found unconstitutional juvenile life without parole sentences for non-homicide offenses.[38] Again, the American Medical Association and American Psychological Association filed neuroscience-related briefs concerning

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[32] Id. at 569; *see also* Graham v. Florida, 560 U.S. 48, 68 (2010).

[33] For example, in *In re Gault*, 387 U.S. 1 (1967), the Supreme Court noted that "[w]ith respect to juveniles, both common observation and expert opinion emphasize that the 'distrust of confessions made in certain situations' . . . is imperative in the case of children from an early age through adolescence." Id. at 48.

[34] 564 U.S. 261, 272 (2011).

[35] Samuel Gross & Michael Shaffer, *Exoneration in the United States, 1989-2012: Report by the National Registry of Exonerations*, 58 (2012) (finding that 42% of exonerated defendants younger than 18 at the time of the crime had confessed); Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051, 1094 (2010) (finding that one third of DNA exonerations who had falsely confessed were juveniles); Brandon L. Garrett, *Confession Contamination Revisited*, 101 Va. L. Rev. 395 (2015) (updating analysis).

[36] 543 U.S. 551 (2005).

[37] North Carolina had permitted juvenile offenders to be sentenced to death. N. C. Gen. Stat. §14—17 (Lexis 2003). The three offenders are LaMorris Chapman, Kevin Golphin and Fransisco Tirado; see Appendix A, infra. On the broader impact of *Roper,* see Barry C. Feld, *A Slower Form of Death: Implications of Roper v. Simmons for Juveniles Sentenced to Life Without Parole*, 22 Notre Dame J. L. Ethics & Pub. Pol'y 9, 12–13 (2008). For work after *Roper* asking whether it would impact juvenile LWOP, see Barry C. Feld, *A Slower Form of Death: Implications of Roper v. Simmons for Juveniles Sentenced to Life Without Parole*, 22 Notre Dame J.L. Ethics & Pub. Pol'y 9, 26-40 (2008); Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J.L. & Fam. Stud. 11, 43-70 (2007); Hillary J. Massey, *Disposing of Children: The Eighth Amendment and Juvenile Life without Parole after* Roper, 47 B.C. L. Rev. 1083, 1084, 1091-98 (2006); Brianne Ogilvie, Note, *Is Life Unfair? What's Next for Juveniles after* Roper v. Simmons, 60 Baylor L. Rev. 293, 307, 313-14 (2008).

[38] Graham v. Florida, 560 U.S. 48 (2010).



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adolescent brain development.[39] That ruling did not impact North Carolina, as no such sentences had been entered in North Carolina. Finally, the U.S. Supreme Court's ruling in *Miller v. Alabama* forbade mandatory life without parole sentences for juvenile homicide offenses and mandated that sentencing judges consider such offenders' "youth and attendant characteristics" before imposing "the harshest possible penalty" for juveniles.[40]

### C. The North Carolina "*Miller Fix*"

Within weeks of the *Miller* ruling,[41] North Carolina lawmakers responded by passing a new statute requiring sentencing court to consider "all the circumstances of the offense" as well as the "particular circumstances of the defendant," and "any mitigating evidence."[42] The North Carolina Supreme Court, in interpreting the statute for the first time, ruled that it creates no presumption in favor of LWOP. However, the court also held that factfinders should select a sentence "in light of the United States Supreme Court's statements in Miller and its progeny [that LWOP sentences] should be reserved for those juvenile defendants whose crimes reflect irreparable corruption rather than transient immaturity."[43] In addition, lawmakers in 2013 removed juvenile LWOP for felony murder.[44]

### D. Post-*Miller Litigation*

Post-*Miller,* as we will detail in Part III, some defendants have been sentenced to a term of years or a life with parole sentence, while others have been resentenced

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[39] Brief for the American Medical Ass'n et al. as Amici Curiae Supporting Neither Party, Graham, No. 08-7412 (U.S. filed July 23, 2009), 2009 WL 2247127; Brief for the American Psychological Ass'n et al. as Amici Curiae Supporting Petitioners, Graham, No. 08-7412 (U.S. filed July 23, 2009), 2009 WL 2236778.

[40] Miller v. Alabama, 567 U.S. 460, 469, 479, 483, 489 (2012).

[41] N.C. Gen. Stat. §§ 14-17(a), 15A-1476 *et seq*. The statute was titled "An act to amend the state sentencing laws to comply with the United States Supreme Court Decision in Miller v. Alabama." N.C. Sess. Law 2012–148. The prior statute made LWOP sentences mandatory. *See* N.C.G.S. 14-17 (2009) (providing that "any person who commits [murder in the first degree] shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to [N.C.]G.S. [§] 15A- 2000, except that any such person who was under 18 years of age at the time of the murder shall be punished with imprisonment in the State's prison for life without parole"); N.C. Gen. Stat. §§ 14-17(a), 15A-1340.19B (2013) ("If the sole basis for conviction of a count or each count of first degree murder was the felony murder rule, then the court shall sentence the defendant to life imprisonment with parole.").

[42] N.C.G.S. § 15A-1340.19B, C. The mitigating factors to be considered in sentencing include: (1) the offender's age at the time of offense; (2) immaturity; (3) ability to appreciate the risks and consequences of the conduct; (4) intellectual capacity; (5) prior record; (6) mental health; (7) familial or peer pressure exerted upon him; (8) likelihood that he would benefit from rehabilitation in confinement; and (9) other mitigating factors and circumstances. N.C. Gen. Stat. § 15A-1340.19B.

[43] State v. James, No. 514PA11-2 (N.C. 2018).

[44] N.C. Gen. Stat. §§ 14-17(a), 15A-1340.19B (2013) ("If the sole basis for conviction of a count or each count of first degree murder was the felony murder rule, then the court shall sentence the defendant to life imprisonment with parole.").



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again to life without parole, or are in the process of being resentenced.[45] Most recently, in the case of Montrez Williams, the North Carolina Court of Appeals highlighted again that under *Miller,* life without parole is "reserved for those juvenile defendants who exhibit such irretrievable depravity that rehabilitation is impossible."[46] Williams was seventeen when he fatally shot two individuals in Mecklenburg County. He was convicted and sentenced to LWOP in 2011.[47] The Court of Appeals noted that the trial judge had not found him irredeemable, but rather concluded: "There is no certain prognosis of Defendant[']s possibility of rehabilitation. The speculation of Defendant's ability to be rehabilitated can only be given minimal weight as a mitigating factor."[48] The ruling in *Williams* cemented the serious weight that must be given to mitigating evidence during review of juvenile LWOP sentences in North Carolina.

The Derrick McRae case provides another example of a case in which litigation of mitigation evidence resulted in a reversal. Before McRae's trial, as a sixteen-year-old, for first degree murder, the prosecutors offered him a plea deal for which he would serve a sentence of eight to ten years. McRae rejected the deal, against the advice of his counsel.[49] The jury was hung, with eight favoring acquittal. There was no physical evidence linking McRae to the crime, and the eyewitness accounts of the murder were mixed.[50] The prosecutor offered McRae a voluntary manslaughter sentence, which would require at most only thirteen more months in prison, which he again refused, contending his innocence.[51] At the second trial, the evidence largely consisted in that of a co-defendant and a jailhouse informant.[52] Meanwhile McRae had an unsympathetic demeanor during the trial, which the prosecutor commented on in closings, noting he was "uncaring, unfeeling, not paying attention and

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[45] See, e.g. State v. James, No. 514PA11-2 (N.C. 2018) (remanding for further resentencing proceedings). For another case in process, see State v. Sims, No. COA17-45 (NC Ct. App. Aug. 7, 2018), at https://appellate.nccourts.org/opinions/?c=2&pdf=35761, which was accepted for review by the North Carolina Supreme Court, at https://appellate.nccourts.org/orders.php?t=PA&court=1&id=351475&pdf=1&a=0&docket=1&dev=1. The North Carolina Court of Appeals recently rejected a challenge to a pre-*Miller*-fix juvenile LWOP sentence based on a felony murder theory of first-degree homicide. State v. Seam, No. COA18-202 (NC Ct. App. Dec. 18, 2018), at https://appellate.nccourts.org/opinions/?c=2&pdf=37646.

[46] State v. Williams, No. COA16-178 (NC Ct. App. Sept. 18, 2018), at https://appellate.nccourts.org/opinions/?c=2&pdf=34502. That ruling is currently being reviewed by the North Carolina Supreme Court. For a case in which the Court of Appeals upheld LWOP at resentencing under the post-*Miller* statute, see State v. Sims, COA17-45, 2018 WL 3732800 (N.C. Ct. App. 2018).

[47] Id. at 2.

[48] Id.

[49] John H. Tucker, *Did a Prosecutor and Police Send an Innocent Teenager to Prison for Murder?* Indy Week, Jan. 7, 2015.

[50] Id.

[51] Id.

[52] Id.



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unremorseful."[53] McRae had schizophrenia at the time of the crime and trial and did not receive his monthly Haldol injection to treat the symptoms before the trial.[54]

In 2017, the Superior Court reversed the life without parole sentence imposed on him in 1998, citing to a range of mitigating evidence.[55] First, the Court did not believe that the defendant was "irreparably corrupt or permanently incorrigible." One factor was the defendant's age at the time of the crime (16 years, 7 months).[56] As experts testified at the hearing conducted on the question, adolescent brains are not developed to weigh consequences, appreciate risks and benefits, or resist impulsive behavior. Specifically, an expert clinical psychologist testified regarding how adolescent brains are structurally and chemically different from adult brains, making them more sensitive to dopamine and engage in riskier behavior. The defendant's immaturity, "attributable first to his brain not having been fully developed at this point," and to "the onset of schizophrenia," and to "a very poor home environment," was the second mitigating factor the Court discussed.[57] Although all adolescents are too immature to be evaluated as adults, McCrae's immaturity was exacerbated by the early stages of schizophrenia and a poor home environment with a lack of parental guidance or control.[58] The judge also discussed the inability of the defendant to appreciate risks and consequences of his actions. The judge found the defendant to be "more impaired than most adolescents at that age as a result of his level of cognitive ability, his limited exposure to positive influences during his childhood, and the emerging psychotic symptoms associated with his schizophrenia."[59] These symptoms, including "the onset of schizophrenia," were present at the time of the crime.[60] In addition, McRae's intellectual capacity was also a mitigating factor, with two I.Q. tests scores of 76 and 77.[61] Lastly, the defendant's behavior in prison, with very little aggressive behavior during twenty years in prison, and progress in treating schizophrenia, informed the Superior Court judge that he was a low-risk.[62] Due to these factors, the defendant was resentenced to life with a possibility of parole, with parole eligibility beginning in 2021.[63]

### E. Felony Murder and *State v. Seam*

Juvenile life without parole cases have resulted in protracted litigation, including trial court hearings and multiple rounds of appeals. Take the case of Sethy

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[53] Id.
[54] Id.
[55] Courts Findings at 424, State v. McRae, 96 CRS 1576 (Sup. Ct. Richmond County, September 26, 2017).
[56] Id.
[57] Id.
[58] Id.
[59] Id. at 426.
[60] Christine S. Carroll, Judge Grants Possibility of Parole, Daily Journal (Richmond County), Sept. 28, 2017.
[61] Id.
[62] Id.
[63] Id. at 428-29.



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Seam, sentenced by the trial judge to life without parole in North Carolina in 1999, for a murder and attempted robbery committed when he was 16. He was not the shooter; it was a felony murder theory. This was surprisingly common in North Carolina juvenile LWOP cases. Just over one third of the juveniles sentenced to LWOP, or 32 individuals, were convicted under a felony murder theory. The State presented evidence that Seam and his friend Freddie Van went into a Superette convenience store in Lexington, North Carolina.[64] The State presented evidence that it was Van who pulled out the pistol, demanded money, and ultimately, after a fist-fight shot the convenience store clerk three times, fatally.[65] Both defendants unsuccessfully tried to open the cash register and then fled.[66] The state also presented evidence that the two discussed not telling anyone what had happened and that Seam later hid the murder weapon in the woods, and helped Van try to sell the weapon the next day.[67]

In a statement he made to police shortly afterwards, Seam told them that he did not know that his friend had intended to rob or shoot the convenience store clerk.[68] The State did not present evidence that Seam was aware that his friend had a gun, and the defendant contended that he was not. Indeed, perhaps because he was not the shooter, the state had offered him a plea deal that would have entailed a sentence of 18 years.[69] The co-defendant, who was the shooter, took a plea offer and did not receive a life sentence. However, Seam turned down the plea, and at trial the judge imposed a life without parole sentence.[70]

Twelve years later, in 2011, a Superior Court judge granted a hearing in the case, following the enactment of the post-*Miller* legislation in North Carolina.[71] In 2013, the Superior Court held hearings and determined that Seam's sentence was not constitutional and ordering a resentencing.[72] This ruling was appealed to the North Carolina Supreme Court, which affirmed in a summary opinion in December 2016.[73] Also in December 2016, the trial judge resentenced Seam to a sentence of 183-229 months.[74] The judge emphasized that Seam was convicted under the felony murder doctrine. The judge highlighted that "When compared to an adult murder, a juvenile who did not kill or intend to fill has a twice diminished moral culpability."[75] The judge also noted that he deserved to be sentenced to a lesser term than the "actual killer" who took a plea offer.[76] The state again appealed, successfully this time, arguing that the judge, by deciding the matter before the Supreme Court mandate

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[64] State v. Seam, 552 S.E.2d 708 (NC 2001).
[65] Id.
[66] Id.
[67] Id.
[68] *Witnesses Say Teen Tried to Sell Pistol After*, Greensboro News and Record, Sept. 30, 1999, B2.
[69] Order, State v. Seam, 97 CRS 21110-21111 (May 5, 2011).
[70] Id.
[71] Id.
[72] Order, State v. Seam, 97 CRS 21110-21111 (Aug. 8, 2013).
[73] State v. Seam, 794 S.E.2d 439 (NC 2016).
[74] Order, State v. Seam, 97 CRS 21110-21111 (Dec. 30, 2016).
[75] Id.
[76] Id.



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issued (in order to decide the case before he retired), did not yet have jurisdiction.[77] A second resentencing hearing was held in 2017, and again, Seam was resentenced to life with the possibility of parole, this time with the district attorney conceding that a non-LWOP sentence was appropriate.[78] In 2013, the legislature had enacted a statute providing:

> (1) If the sole basis for conviction of a count or each count of first degree murder was the felony murder rule, then the court shall sentence the defendant to life imprisonment with parole.[79]

An appeal continued, seeking a term of years sentence, and arguing that the statute was unconstitutional as applied to felony murder convictions and to Seam. In this third round of appeals, the Court of Appeals found the life with the possibility of parole sentence constitutional.[80]

The case illustrates the protracted litigation that has resulted post-*Miller* in North Carolina, even in cases which, under current law, clearly do not permit LWOP sentences. The Sections that follow will detail patterns in juvenile LWOP sentencing in North Carolina, as well as the rulings in post-*Miller* litigation regarding such sentences.

## II. Analysis of North Carolina JLWOP Sentencing Data, 1994-2018

In the sections that follow, we analyze data collected concerning juvenile LWOP sentences in North Carolina. Data was obtained from the North Carolina Department of Public Safety and compared with data collected by North Carolina Prisoner Legal Services. We detail 94 cases in which juveniles have been sentenced to LWOP to date and analyze: (A) trends in such cases over time, (B) data concerning race, (C) data concerning county-level patterns, (D) the procedural status of these cases, including reversals and pending hearings, and (E) a possible inertia effect in counties where JLWOP sentencing is observed.

### A. Trends in JLWOP Sentencing

About one-third of the juveniles who had been sentenced to LWOP in North Carolina, or 30 persons, were sentenced in the 1990s. Consistent with the national trend, juvenile LWOP sentencing in North Carolina reached its height in the late 1990s. From 2000 to 2009, 52 juvenile offenders were sentenced to LWOP. From 2010 to the present, just 12 juvenile offenders were sentenced to LWOP. These data include cases in which there have been post-*Miller* resentencing, and the individual

[77] State v. Seam, COA17-219 (N.C. Ct. App. 2017).
[78] Order, State v. Seam, 97 CRS 21110-21111 (Oct. 11, 2017).
[79] N.C. Gen. Stat. § 15A-1340.19B(a) (2017).
[80] State v. Seam, COA18-202 (N.C. Ct. App. 2018).



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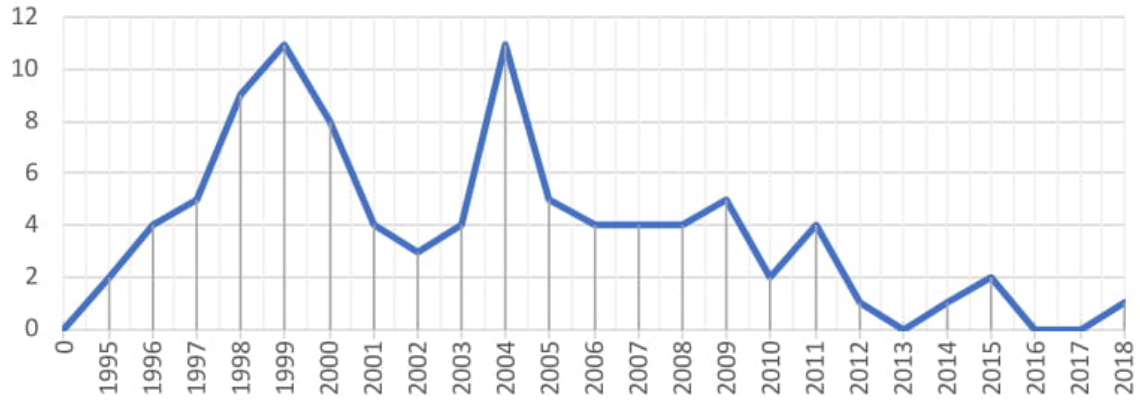
may receive a non-LWOP sentence, or has already been provided a non-LWOP sentence.

**Figure 1. Juvenile LWOP Sentences in North Carolina, 1994-2018**[81]




One can readily see how juvenile LWOP sentencing has declined and how after 2011, there were only five such sentences. These figures do not include cases in which defendants were convicted of first-degree homicide pursuant to the 2012 post-*Miller* legislation, but where a life with parole or term of years sentence was imposed, because the trial judge determined under the statute that no LWOP sentence was warranted. These figures also do not capture cases in which prosecutors charged first-degree homicide in juvenile cases, but negotiated lesser charges, resulting, for example, in second-degree murder pleas by juvenile offenders.[82]

That group of cases, in which juveniles received non-LWOP sentences, also sheds light on the wide range of outcomes that result when juvenile LWOP charges are sought, but not obtained. There have been thirty-five murder prosecutions of juveniles in North Carolina since the *Miller* ruling. Of those, 25 defendants were white, 8 were black and 1 Latinx. In those cases, 11 cases were dismissed without leave, and in two more, a no true bill was returned, for a total of 37 percent (13 of 35) of the cases. In two of the cases, or 6 percent, there was a plea to first degree murder. In eleven cases, or 31 percent, there was a plea to second degree murder. The remaining cases involved pleas to voluntary manslaughter (five cases), and accomplice to second degree murder (one case). Two cases went to trial, not resulting in LWOP sentences, and one resulted in a first-degree murder conviction while the

[81] The 2018 data is current through August, 2018 and thus does not include all sentences entered in that year. We intend to update the 2018 data at year-end.

[82] For an example of such a case, see William F. West, *McDonald Pleads Guilty, Gets 25-31 Years*, Daily Advance, May 22, 2018, at http://www.dailyadvance.com/News/2018/05/22/McDonald-pleads-guilty-gets-25-31-years.html.



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other resulted in a manslaughter conviction. Just 3 of these 35 cases, resulted in first degree murder convictions.[83]

## B. Race and Juvenile Homicide Rates

Researchers have observed that there are "highly disparate rates of imposing JLWOP on persons of color," ranging from 68 percent to 88 percent of juvenile LWOP sentences and 100 percent of those convicted in Texas, when the penalty was available in Texas.[84] In North Carolina we observe that among the 94 individuals who were sentenced to juvenile LWOP sentences, all but three are male. Eight and a half percent, or 8 of 94 are white; 81 percent or 76 of 94 are black; 5 are Latinx, 3 are Asian and 2 are Native American. Thus, the vast majority, or 91.5 percent, are people of color or members of minority groups. Of the 41 defendants who have received sentences of less than LWOP post-*Miller*, two are white, one is Native American, two are Latinx, and two are Asian. The other 34 are black.

These data, however, reflect underlying racial disparities in homicide offending in North Carolina. Since 1994, juvenile murders have generally declined nationwide.[85] The FBI's Supplemental Homicide Reports for the years 1994 through 2016, describe demographics of juvenile homicide offenders, of which there were 925.[86] Among those offenders, 217 were white, while 681 were black (and 21 were Asian, Native American, or other, with the rest being unknown.)[87] Thus, the homicide commission rate by black juveniles in North Carolina from 1994 to 2016 is 74 percent. The white juvenile homicide rate during that time period was 23 percent. The FBI also does not have a Latinx category for data reporting during that time period.[88] The national data concerning juvenile murder offenders is less disparate, with the disparity greatest in the 1990s, when almost twice as many juvenile murders were committed by black as opposed to white offenders.[89]

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[83] These data reflect information collected by North Carolina Prisoner Legal Services.

[84] See Mills et al, supra note xxx ("*All* of those serving JLWOP in Texas are persons of color.28 Other states also have highly disparate rates of imposing JLWOP on persons of color, including North Carolina (88% of the JLWOP population), Pennsylvania (80% of the JLWOP population), Louisiana (80% of the JLWOP population), Illinois (78% of the JLWOP population), Mississippi (68% of the JLWOP population), and South Carolina (68% of the JLWOP population)"). Id. at 10.

[85] Offending by Juveniles, Federal Bureau of Investigation. *Supplementary Homicide Reports* for the years 1980–2016, *OJJDP Statistical Briefing Book*. Online. Available: https://www.ojjdp.gov/ojstatbb/offenders/qa03101.asp?qaDate=2016 (released on August 22, 2018).

[86] Puzzanchera, C., Chamberlin, G., and Kang, W. (2018). "Easy Access to the FBI's Supplementary Homicide Reports: 1980-2016." Online. Available: https://www.ojjdp.gov/ojstatbb/ezashr/

[87] Federal Bureau of Investigation. *Supplementary Homicide Reports* for the years 1980–2016, *OJJDP Statistical Briefing Book*. Online. Available: https://www.ojjdp.gov/ojstatbb/offenders/qa03101.asp?qaDate=2016 (released on August 22, 2018).

[88] Erica L. Smith and Alexia Cooper, Bureau of Justice Statistics, *Homicide in the U.S. Known to Law Enforcement, 2011* 16 (December 2013) ("Due to the lack of reporting of ethnicity by submitting law enforcement agencies, homicide rates by Hispanic or Latinx origin were not calculated.").

[89] Id.



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## C. County-Level Patterns

In the death penalty context, researchers have found stark differences in county-level patterns in sentencing, using nationwide data. For example, researchers have found that victim race was a strong predictor of death sentencing patterns.[90] They have also found that there was a shift over time from rural to urban counties in death sentencing, for reasons that may include the cost of seeking death sentences and resources available for prosecution and defense in capital cases.[91] While there is a large literature on geographic disparities in death sentencing, none had previously studied the county-level patterns in the use of LWOP.

We see a strong county-level concentration of sentences in juvenile LWOP sentencing in North Carolina. There are one hundred counties in North Carolina. Figure 2 displays numbers of juvenile LWOP sentences in North Carolina, by county, in the eleven counties with three or more such sentences. A total of 61% or 57 of the 94 juvenile LWOP sentences in North Carolina were entered in these eleven of the one-hundred counties in North Carolina. Just taking the five top counties, Cumberland, Wake, Mecklenburg, Guilford, and Forsyth, one sees 38, or 40%, of all juvenile LWOP sentences during that time period.

**Figure 2. Juvenile LWOP Sentences in Top Counties, 1994-2018**

| County | Number of LWOP Sentences |
|---|---|
| Cumberland | 11 |
| Wake | 8 |
| Mecklenburg | 7 |
| Guilford | 6 |
| Forsyth | 6 |
| Robeson | 4 |
| Durham | 3 |
| Cleveland | 3 |
| Johnston | 3 |
| Wilson | 3 |
| New Hanover | 3 |
| *Total* | 57 |

The figures below show how some of these county-level patterns have persisted over time, even as JWLOP sentences have declined.

**Figure 3. North Carolina JLWOP Sentences by County, 2010-2018**

[90] Brandon L. Garrett, Alexander Jakubow, and Ankur Desai, The American Death Penalty Decline, 105 Journal of Criminal Law and Criminology 561 (2017).
[91] Id.



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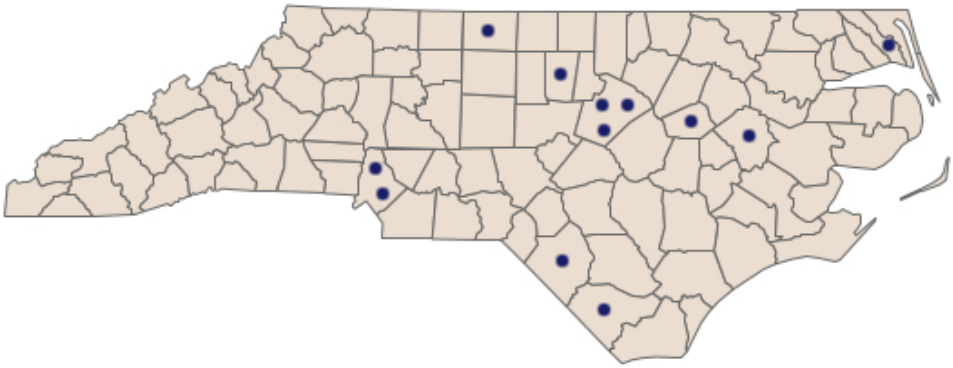

**Figure 4. North Carolina JLWOP Sentences by County, 2000-2009**

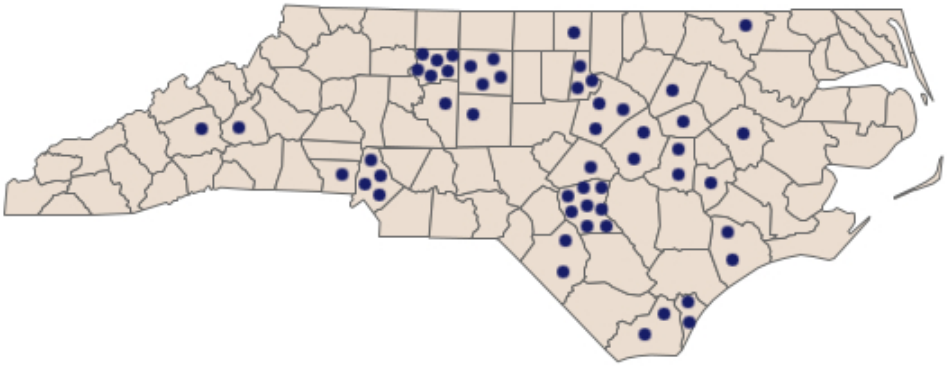

**Figure 5. North Carolina JLWOP Sentences by County, 1995-1999**



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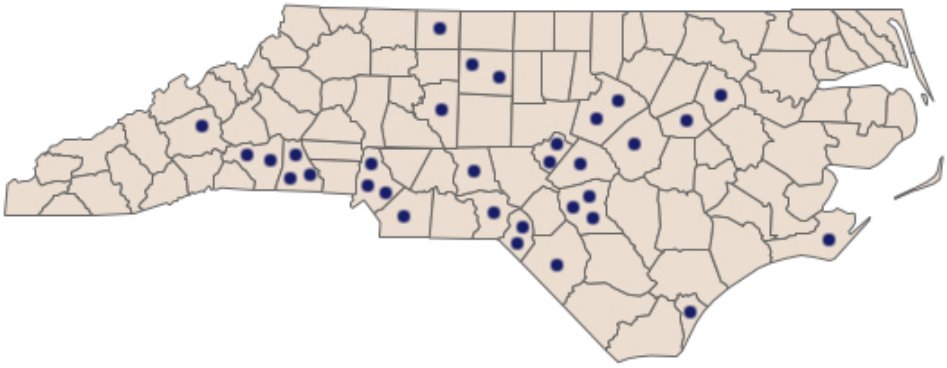

We conducted statistical testing to clarify the contributing factors in juvenile LWOP sentencing. These tests were intended to identify possible variables that would increase or decrease the likelihood of a juvenile LWOP sentence being present. The juvenile LWOP data was transformed into a county-year dyad format. Since there are 100 counties in North Carolina and our juvenile LWOP sentencing data covers 24 years (1995 to 2018), there are 2,400 observations under this arrangement. Around 97 percent of the county-year dyads report no observed juvenile LWOP sentences.[92] A Logit regression was used in order to understand how county-level effects correlate with the presence of a juvenile LWOP sentence. The dependent variable juvenile *LWOP Sentence* was valued at one if there had been at least one juvenile LWOP sentence in the given county and year. A number of covariates were also included in the model.[93] The homicide rate, measured as the number of homicides per 100,000 in each county-year was provided by the FBI's Homicide Reports. The percent of the population in each county that is black was provided by the U.S. Census Bureau. The density of each county's population also provided by the Census Bureau. Population density is measured as the number of people per square mile of land within a county. The poverty rate of each county was again provided by the Census Bureau and is defined as the percent of families in poverty.[94] The results of the regression are displayed in Appendix C.

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[92] Negative Binomial regression models are typically used to model over-dispersed count outcomes. An alternative regression model for count dependent variables is derived from the Poisson distribution. A Poisson regression assumes there is no over-dispersion, and the mean and standard deviation are equal (Long 1997). However, given the rarity of observing a JLWOP sentence, where the mean number of sentences is 0.04, and the standard deviation is 0.22, we decided that modeling the dependent variable, *JLWOP Sentence,* as a binary variable and applying Logistic regression was a more computationally sound approach.

[93] Fixed effects for years and counties was also included in each model to control for unobserved and heterogenous relationships within the data.

[94] In alternative specifications we included a count of previous death penalty sentences, a one-year lag of the homicide rate, and a one-year lag of the count of death penalty sentences.



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The results of the regression suggest the homicide rate and population density within a county do not have a statistically significant relationship with observing at least one juvenile LWOP sentence.[95] We also specified homicide rate within the black population and the homicide rate in the white population for each county in separate models and again found no statistically significant results. This suggests the homicide rate in a county, regardless of the victim's race, does not correlate with our likelihood of observing a juvenile LWOP sentence within the county.

We also found that the percent of the population in a county that is black and the poverty rate within a county do have statistically significant relationships with observing at least one juvenile LWOP sentence. For every one percent increase in the black population within a county, the odds of observing a juvenile LWOP sentence (versus not observing a juvenile LWOP sentence) increase by a factor of 1.036. For every one percent increase in the poverty rate within a county, the odds of observing a juvenile LWOP sentence (versus not observing a juvenile LWOP sentence) decrease by a factor of 0.22.

To summarize, the results of this analysis suggest that we are more likely to observe juvenile LWOP sentences in North Carolina counties with a black population that is above average (20.9%) and in counties where the poverty rate is below average (16.1%). This is highly consistent with recent patterns in death sentencing, in which counties with higher income, but also larger black populations, have imposed more death sentences.[96] In contrast, the homicide rate and population density of these counties does not provide predictive information for observing a juvenile LWOP sentence.[97]

### D. Post-*Miller* Reversals

As described, 45% or 42 of 94 juvenile LWOP sentences in North Carolina have had their life without parole sentences reversed. They have almost all been resentenced to life sentences with parole. In addition, one of the 94 is currently pending a new trial. Although seven years have passed since the post-*Miller* legislation was adopted in North Carolina, in many cases, as displayed in Figure A, hearings have not yet been held. Thus, it is likely, given the outcomes to date, that far more juvenile LWOP sentences will be reversed in the years to come. The figure below displays the results in the 46 post-*Miller* hearings so far held in North Carolina and results in cases in which no hearing has yet been held.

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[95] See Section B of the Appendix for results with reported standard errors.

[96] These finding are consistent with analyses of death sentencing, in which death sentences are more common in counties with a larger black population; in that context, however, death sentences were more common in counties with greater population density and there was no statistically significant finding regarding income. See Garrett, Desai, and Jakubow, *supra* note 30, at 593-94. A study examining death sentences from 1982 through 1999 in five states, found an association between death sentencing and lower-income counties. Theodore Eisenberg, *Death Sentence Rates and County Demographics: An Empirical Study*, 90 Cornell L. Rev. 347, 359 (2004-2005).

[97] These findings do not reflect the pattern seen in death sentencing regarding population density and homicide rates. See Garrett, Desai, and Jakubow, *supra* note 30, at 593-94.



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**Figure A. Results in Post-*Miller* Hearings**

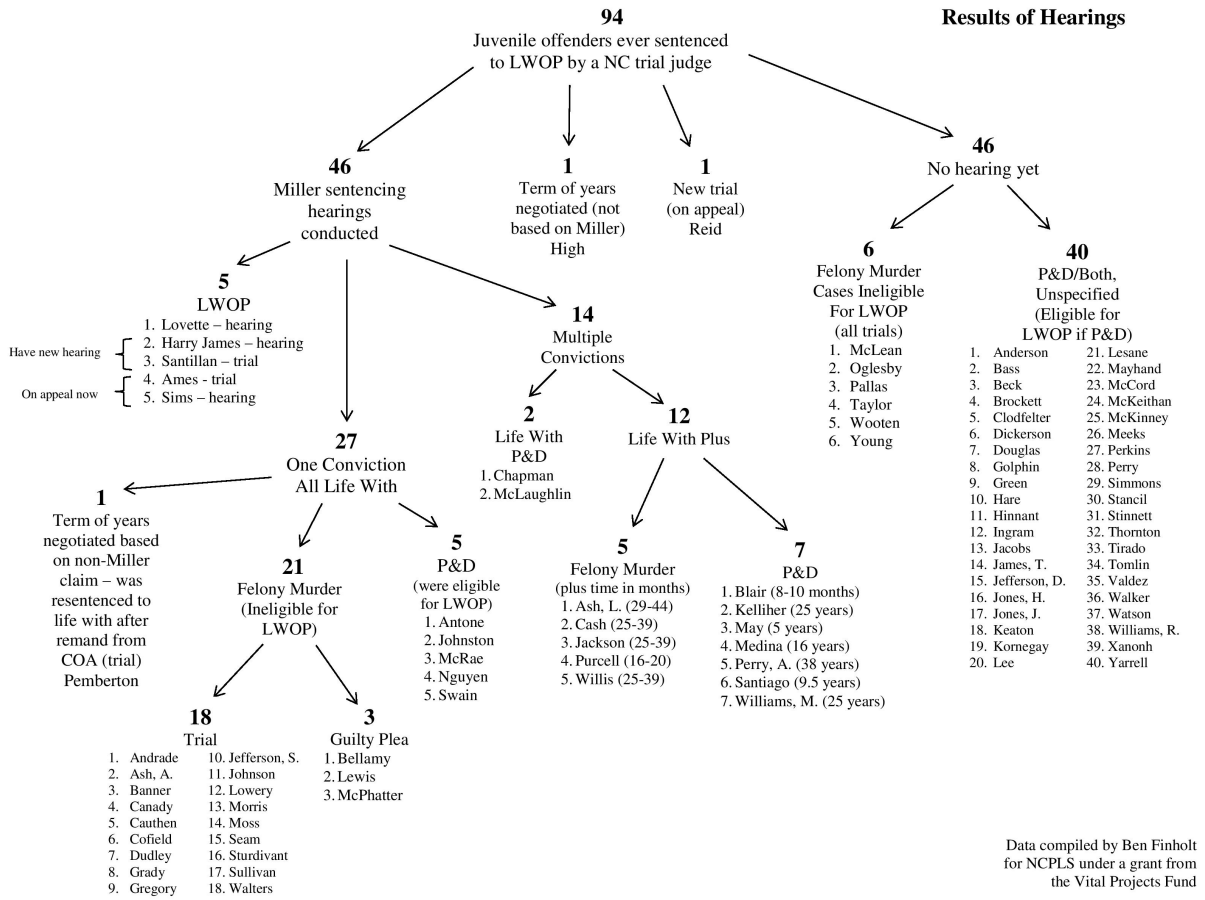


Figure B displays the current procedural posture of juvenile life without parole cases in North Carolina. Of the 54 cases remaining, 48 are waiting for a hearing still. Again, given the outcomes in the cases that have had hearings thus far, it is likely that much of the remaining juvenile LWOP cases in North Carolina will obtain reversals in the years to come.

**Figure B. Procedural Posture of North Carolina JLWOP Cases**



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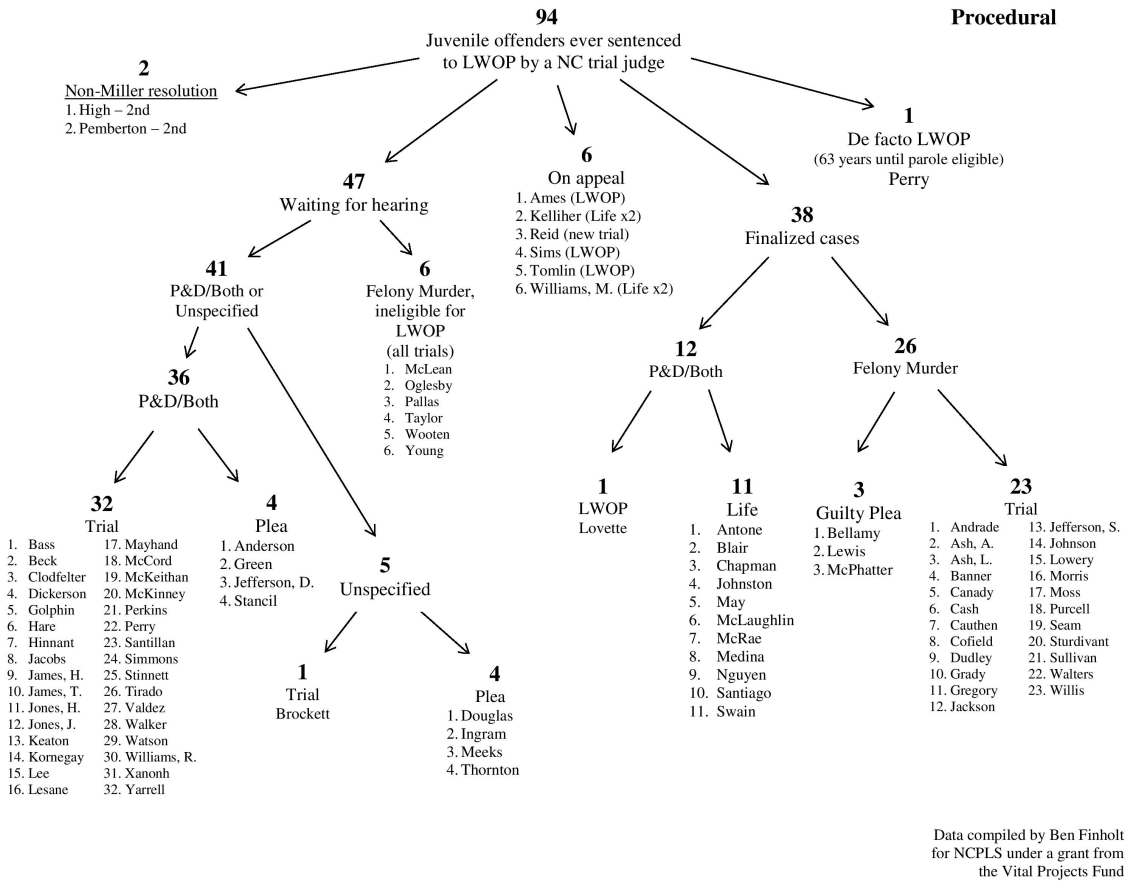


## E. Inertia Effect in JLWOP Sentencing

In the empirical literature on death sentencing, researchers have identified an "inertia" or "muscle memory" effect; once a county starts using a sentence it continues to do so more often.[98] An inertia effect implies there is some kind of institutional memory. A juvenile LWOP sentence in the past impacts how often juvenile LWOP is applied subsequently. A selection model was implemented across our county-year data in order to assess if there is an inertia effect for JLWOP sentences in counties from North Carolina. [99] Here, we observe the same county characteristics as before

[98] See Garrett, Desai, and Jakubow, *supra* note 30, at 567 (reporting finding that "the entrenched practices or 'muscle memory' of a county matters a great deal in death sentencing. We found that across a range of measures, inertia in county death sentencing practices, or prior death sentences, is strongly associated with death sentencing."); Lee Kovarsky, *Muscle Memory and the Local Concentration of Capital Punishment,* 66 Duke L. J. 259 (2016) (describing increasing concentration of death sentences at the county-level); Brandon L. Garrett, End of its Rope: How Killing The Death Penalty Can Revive Criminal Justice 149-150 (2017) (describing findings concerning county-level concentration and inertia for death sentences from 1990-2016).

[99] The results of the first stage of the selection model are presented, the model utilized a Logistic regression. The second stage of the selection model has an outcome variable that is the count of JLWOP



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(i.e., poverty rate, population density, black population share), and we also include a count of previous JLWOP sentences and a count of previous death penalty sentences.[100] These regression results are displayed in Appendix C.

The result of this regression indicates that as the number of juvenile LWOP sentences increases, the more likely we are to observe a county imposing a juvenile LWOP sentence.[101] The results also suggest as the number of prior death penalty sentences increases, the likelihood we observe a county applying a juvenile LWOP sentence decreases; however, this is a very small effect. For example, if there had been five previous death penalty sentences in a county, with all else equal, the probability we observe a juvenile LWOP sentence decreases by 1.8.

To fully interpret the results, the predicted probability of observing a county applying a juvenile LWOP sentence is estimated while varying the number of previous juvenile LWOP sentences (0-7). All other variables in the model were held at their mean values.[102] This estimation process suggests the following: when there has never been a juvenile LWOP sentence in a county, there is a 55.9 probability of observing a juvenile LWOP sentence. However, when there has been two prior JLWOP sentences, this probability rises to 62.1. When there have been seven prior JLWOP sentences the probability of observing a juvenile LWOP sentence in this county rises to 72.7.

These results suggest that inertia matters more than homicide rates. The results imply that a county's prior use of juvenile LWOP is far more predictive of juvenile LWOP sentencing than a county's crime rates. Regardless of whether we study homicide rates per 100,000 in each county-year, homicides rates within the black population of each county, or homicide rates within the white population, the homicide rate does not have a statistically significant correlation with use of juvenile LWOP. In sum, once a county has used a juvenile LWOP sentence, that county has a higher probability of using a juvenile LWOP sentence again in the future. This suggests that there is some form of institutional inertia, possibly due to preferences of prosecutors, law enforcement, or receptivity of jurors to such sentences, driving the initial juvenile LWOP sentencing decisions.[103]

There is anecdotal evidence supporting this finding of an inertia effect. In North Carolina, prosecutor's offices have taken policy positions on juvenile LWOP. For example, the former Mecklenberg district attorney sought again LWOP in every single one of the juvenile LWOP cases that were eligible for re-sentencing post-

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sentences observed. The results of the second stage are not shown, as they are not the focus of this subsection.

[100] Once again, fixed effects for year and counties were included in the regression.

[101] Please refer to Appendix C for results with reported standard errors.

[102] The county fixed effect was set to Wake County and the year fixed effect was set to 2016.

[103] *See* Garrett, Desai and Jakubow, *supra* note 30 at 600 ("This path dependency may reflect practices of prosecutors who make the charging decisions whether to seek the death penalty, but it may also capture defense lawyering, judges, jurors, and other features of a county that make it more likely to continue to death sentence over time.")



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*Miller*.[104] If so, then this is another important area in criminal justice, in which local-level decision-making, which may not be formal or stated in policy or public statements, affects serious sentencing decisions more so than crime rates or other factors. Future research should examine this phenomenon in other states and for other sentences.

## III. COST AND IMPLICATIONS OF MAINTAINING JLWOP IN NORTH CAROLINA

### A. Costs of JLWOP

What we have described is a process in which juvenile LWOP sentences were used primarily in a small set of counties in the 1990s, before fading in their imposition. During the post-*Miller* period, 40 percent were reversed, and hearings are pending in most of the remaining cases. These findings raise the question what is the cost of retaining juvenile LWOP going forward, given its rare imposition since 2011 and the large number of resource intensive hearings that must still be conducted. What is the cost to the court system, defense attorneys, and prosecutors of conducting the review of juvenile LWOP cases? These *Miller* hearings are expensive due to the retrospective focus on mitigation evidence, including the entire social and medical history of the defendant, and the accompanying need to retain, on both sides, a range of experts, including mental health professionals.[105] Hearings will then produce appeals, and sometimes the result will be re-hearings.

Little is known about the full set of expenses associated with that process, but some estimates are available. In Louisiana, one estimate was provided that defense costs for hearings could run $50,000-$70,000 per case.[106] That estimate may be a real understatement. The defense must look to the type of mitigation obligations applicable to counsel in death penalty cases. Trial guidelines include litigation teams, with qualified defense counsel, an investigator, a mitigation specialist, and if appropriate, an interpreter.[107] The defense must interview people who have known the defendant, for the person's entire life, including family members, teachers, prison staff, probation, counselors, doctors, neighbors, co-workers, friends, and mental health professionals. Records from the relevant agencies must be collected, including from schools, work, foster care, mental health care, hospitalization, prison records, and more. Expert psychological and psychiatric evaluations may need to be done, as well as, where applicable, assessments regarding child trauma, sexual and physical

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[104] Herbert L. White, *Throw Away the Key: Kid Killers, Restorative Justice and the Law,* Charlotte Post, Oct. 17, 2018.

[105] For an overview, see Antoinette Kavanaugh and Thomas Grisso, *Prospects for Development of Expert Evidence in Juvenile "Montgomery" Resentencing Cases*, 22 Psychol. Pub. Polc'y & L 235 (2016).

[106] Bryn Stole, *With New Law on the Books, Louisiana Courts Prepare to Re-Sentence Hundreds of Juvenile Murderers*, The Advocate, July 23, 2017.

[107] See Campaign for Fair Sentencing of Youth, "Trial Defense Guidelines: Representing Child Client Facing Possible Life Sentence," found at http://fairsentencingofyouth.org/wp-content/uploads/2015/03/Trial-Defense-Guidelines- Representing-a-Child-Client-Facing-a-Possible-Life-Sentence.pdf.



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abuse, neurological development, substance abuse, traumatic brain injury, and other conditions. In death penalty cases, those costs can run into the hundreds of thousands of dollars, and even the millions.[108]

The cost of incarceration for life is far larger. A 50-year sentence for a 16-year old has been estimated, based on national average costs, as approximately $2.25 million.[109] These findings suggest that the post-*Miller* legislation may have provided an expensive and time-consuming way to re-assess juvenile LWOP sentences. It would certainly be more cost-effective and direct to eliminate juvenile LWOP entirely rather than incur costs for a prolonged review process. To be sure, in many cases the practical difference, in terms of years served, may not be great, if juvenile convicts are repeatedly denied parole. As the U.S. Supreme Court has put it, "In some cases . . . there will be negligible difference between life without parole and other sentences of imprisonment—for example, . . . a lengthy term sentence without eligibility for parole, given to a 65–year–old man."[110]

## B. Legislative and Policy Changes to JLWOP

Many states have reconsidered juvenile LWOP post-*Miller,* with some states abolishing the practice in recent years, others creating period review of such sentences, and others adopting discretionary standards like in North Carolina.[111] As of February 2019, twenty-two states have through legislation removed juvenile LWOP, including twelve states that have enacted legislation in the past decade; additional states ban such sentences in most but not all cases.[112] Several other states have legislation pending currently, or have recently introduced such legislation, including Arizona, Illinois, New Jersey, South Carolina, Tennessee, and Virginia.[113] Nevertheless, some states that do not permit juvenile LWOP sentences, still permit

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[108] For an overview of studies on cost in the death penalty context, see Death Penalty Information Center, State and Federal Cost Studies, at https://deathpenaltyinfo.org/costs-death-penalty.

[109] Josh Rovner, The Sentencing Project, Juvenile Life Without Parole: An Overview, at https://www.sentencingproject.org/publications/juvenile-life-without-parole/.

[110] Harmelin v. Michigan, 501 U.S. 957, 996 (1991).

[111] For a detailed survey, see Associated Press, *A State-by-state Look at Juvenile Life Without Parole*, July 30, 2017.

[112] Those states include: Arkansas Fair Sentencing of Minors Act of 2017, S.B. 539, Cal. Penal Code § 1170(d)(2)(A)(i), Co. S.B. 16-181 (2017); CT SB 796 (2015); DE Code § 4209 (2013); Mass. Gen Law. 265 (2014); Nev. Rev. Stat. §§ 176.025, 213.107 (2015), N.D. § 12.1.32 (2017), Utah HB 405 (2016), Vermont H-0062 (2015), W.Va §61-2-14a(2014), W.S. § 6-2-101(2013). For a complete list, see *States That Ban Life Without Parole for Children*, Campaign for the Fair Sentencing of Youth (2018), https://www.fairsentencingofyouth.org/media-resources/states-that-ban-life/.

[113] See Ariz. HB 2193 (2018), Ill. S.B. 3228 (2019), Neb. Leg. Bill 875 (2018), N.J. Bill No. 1233 (2018), at https://www.njleg.state.nj.us/2018/Bills/A1500/1233_I1.HTM, Ok. S.B. 112 (2019), S.C. H 3919, at https://www.scstatehouse.gov/sess123_2019-2020/bills/3919.htm, Tenn. SB 0852 (2019), VA SB 890 (2018).



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aggregation of consecutive sentences that create functional life without parole sentences.[114]

Any statutory scheme replacing the current North Carolina scheme should offer an ongoing meaningful opportunity for review, so that it does not result in a not "virtual LWOP" for juvenile offenders, in which a formal opportunity for release exists on paper but it is unlikely that any such offender will receive an early release. One model is the Fair Sentencing for Youth legislation enacted in California, which permits all juvenile offenders, whether convicted of a homicide or not, to obtain review after a time period between fifteen and twenty-five years.[115] Another model is the legislation enacted in Wyoming which creates eligibility for commutation after twenty-five years.[116] Such approaches have the benefit that they apply consistently to all juvenile sentencing. They eliminate the disparity often seen (including in post-*Miller* sentencing in North Carolina) between those sentenced to concurrent or consecutive terms. They must also be accompanied by criteria to govern the review process, however, so that the review satisfies the Supreme Court rulings regarding meaningful opportunity for review, and so that the process is in fact a meaningful consideration of the merits of each case. Thus, "[e]liminating juvenile life without parole does not suggest guaranteed release of these offenders," as the Sentencing Project has put it. "Rather, it would provide that an opportunity for review be granted after a reasonable period of incarceration, one that takes into consideration the unique circumstances of each defendant."[117]

The overall goal of the U.S. Supreme Court's Eighth Amendment jurisprudence in this area is to offer "the juvenile offender a chance to demonstrate growth and maturity."[118] Whether LWOP sentences for juveniles are eliminated, or recurring review is structured in legislation, legislation should aim to structure such meaningful opportunities for review after reasonable amounts of time, where juvenile offenders have "diminished moral responsibility" and may also have more rehabilitative potential, where "incorrigibility is inconsistent with youth."[119]

Alternatively, prosecutors could litigate juvenile sentences very differently, without a legislative change. Prosecutors have not conceded in any of these post-*Miller* North Carolina challenges that juvenile LWOP sentences were not appropriate. Such an across-the-board defense of juvenile LWOP sentences does not

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[114] Rovner, supra note 105. See also Doriane Lambelet Coleman & James E. Coleman, Jr., *Getting Juvenile Life Without Parole "Right" After Miller v. Alabama*, 8 Duke J. Const. L. & Pub. Pol'y 61, 68-69 (2012).

[115] Cal. Penal Code § 1170(d)(2)(A)(i); see also id. at (d)(2)(h) (permitting subsequent parole review after serving twenty, twenty-four and twenty five years of an LWOP sentence).

[116] Wyo. Stat. Ann. §6-10-301(c) (2013) ("A person sentenced to life imprisonment for an offense committed before the person reached the age of eighteen (18) years shall be eligible for parole after commutation of his sentence to a term of years or after having served twenty-five (25) years of incarceration.").

[117] Sentencing Project, supra note 55.

[118] Id. at 73.

[119] Graham v. Florida, 560 U.S. 48, 72-73 (2010) (quoting Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968).



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reflect the law; as described the U.S. Supreme Court and North Carolina courts have been clear that such sentences should be reserved for unusual cases.

Conversely, prosecutors are already seeking juvenile LWOP sentences and obtaining them far less often. If the prosecutors in the small group of counties responsible for many of these sentences, changed their approach towards litigating the sentences imposed in the past, costly litigation could be avoided. Moreover, earlier parole eligibility should be the norm in these cases, and could result from a more reasonable litigation posture. There is no reason that there should, for example, be lengthy consecutive sentences imposed, extending the time period from which juveniles can have the possibility of parole. This problem can be addressed on the ground, by changes in prosecution policy. In the past, however, these cases have been litigated without compromise, over many years, even in cases like felony murder cases that most clearly deserve and obtain relief from LWOP sentences.

## CONCLUSION

In this Article, we examine juvenile LWOP sentencing in North Carolina. We describe the population of 94 persons in North Carolina, who were sentenced to LWOP as juveniles. Of those, 51 remain sentenced to LWOP and 42 have so far been resentenced to non-LWOP sentences, largely pursuant to the post-*Miller* legislation in North Carolina. We describe how LWOP sentencing has declined since its late-1990s height in North Carolina. Beginning in 2011, there have been either one or no such sentences each year. We describe racial composition of juvenile LWOP sentences that mirror race and juvenile homicide offending in North Carolina. We describe how these LWOP sentences are highly concentrated in a handful of counties. We statistically demonstrate the presence of a strong inertia effect, in which prior JLWOP sentences are correlated with use of juvenile LWOP in counties. These analyses suggest that factors relating to local preferences influence juvenile LWOP sentencing.

Finally, we display information about the reversals and the procedural posture of the post-*Miller* review of these sentences. Not only have 42 so far been resentenced, but most of the remainder have not yet had *Miller* hearings. There will be at least 46 additional resentencing hearings in the years to come. This means there will be substantial additional costs in litigating juvenile LWOP sentences that are likely to be largely overturned. Over almost two and a half decades, the vast bulk of these sentences be vacated, at great cost, after multiple rounds of appeals and hearings, and for a penalty that has been almost entirely discontinued. Indeed, the penalty is now barred in the cases of one-third of this group who were sentenced under felony murder theories.

In a time in which juvenile LWOP sentencing has greatly declined, and prior sentences are being reversed at a high rate, the use of such sentences does not appear fair, warranted, or consistent. These findings suggest that the use of juvenile LWOP should be reconsidered in North Carolina. Moreover, a similar decline in the use of juvenile LWOP has been documented nationwide. Rather than impose rigid



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sentences on juveniles, which Eighth Amendment rulings have already called into question, instead, alternatives that rely on periodic review of lengthy juvenile sentences should be considered.

## APPENDIX A. JLWOP SENTENCES IN NORTH CAROLINA

| Last Name | First Name | Gender | Race/ Ethnicity | Age at Offense | Date of Offense | Conviction Date | County of Conviction | Sentence Status (additional time in months) |
|---|---|---|---|---|---|---|---|---|
| Ames | Kamani | Male | Black | 17 | 9/27/15 | 1/19/18 | Camden | LWOP |
| Anderson | Darrell | Male | Black | 17 | 12/3/02 | 8/4/03 | Davidson | LWOP |
| Andrade | Jesus | Male | Latinx | 17 | 8/12/05 | 1/11/07 | Forsyth | Life With |
| Antone | Marquice | Male | Black | 16 | 4/13/12 | 3/25/14 | Columbus | Life With |
| Ash | Antwan | Male | Black | 16 | 10/28/05 | 6/15/07 | Brunswick | Life With |
| Ash | Lawrence | Male | Black | 17 | 6/26/00 | 11/17/03 | Cumberland | Life With + 29-44 |
| Banner | Rayshawn | Male | Black | 14 | 11/15/02 | 8/19/04 | Forsyth | Life With |
| Bass | Lamar | Male | Black | 17 | 12/26/05 | 1/25/07 | Durham | LWOP |
| Beck | Johnny | Male | Black | 16 | 2/25/95 | 9/8/95 | Wake | LWOP |
| Bellamy | Lakeith | Male | Black | 15 | 7/15/98 | 4/5/99 | Lee | Life With |
| Blair | Cameron | Male | Black | 16 | 10/9/03 | 6/14/05 | Mecklenburg | Life With + 8-10 |
| Brockett | Jacobie | Male | Black | 16 | 3/6/05 | 10/31/05 | Pitt | LWOP |
| Canady | Joseph | Male | Black | 17 | 8/22/97 | 5/4/99 | Wilson | Life With |
| Cash | Nelson | Male | Black | 16 | 5/16/97 | 3/11/98 | Rutherford | Life With + 25-39 |
| Cauthen | Nathaniel | Male | Black | 15 | 11/15/02 | 8/19/04 | Forsyth | Life With |
| Chapman | Lamorris | Male | Black | 17 | 7/9/00 | 10/29/01 | Johnston | Life With |
| Clodfelter | Dwight | Male | White | 17 | 9/27/05 | 9/15/08 | Forsyth | LWOP |
| Cofield | Demetrius | Male | Black | 17 | 11/6/95 | 10/11/96 | Edgecombe | Life With |
| Dickerson | Jerome | Male | Black | 17 | 7/19/03 | 7/27/06 | Forsyth | LWOP |
| Douglas | Tameika | Female | Black | 15 | 8/17/98 | 9/7/00 | Cumberland | LWOP |
| Dudley | Michael | Male | Black | 16 | 12/7/99 | 11/30/00 | Guilford | Life With |
| Golphin | Kevin | Male | Black | 17 | 9/23/97 | 5/13/98 | Cumberland | LWOP |
| Grady | Lakendra | Female | Black | 17 | 1/23/06 | 7/17/06 | New Hanover | Life With |
| Green | Dustin | Male | White | 16 | 11/14/97 | 10/12/98 | Rutherford | LWOP |
| Gregory | Joseph | Male | Black | 17 | 3/5/08 | 4/28/09 | New Hanover | Life With |
| Hare | Ryan | Male | White | 17 | 11/30/08 | 9/24/10 | Wake | LWOP |
| High | Nathanael | Male | White | 15 | 2/10/02 | 5/24/04 | Gaston | Term Of Years |
| Hinnant | Danny | Male | Black | 17 | 1/4/10 | 1/19/11 | Wilson | LWOP |
| Ingram | Ellsworth | Male | Black | 15 | 7/3/97 | 9/21/98 | Montgomery | LWOP |
| Jackson | Willie | Male | Black | 15 | 5/24/01 | 10/24/02 | Northampton | Life With + 25-39 |
| Jacobs | Christopher | Male | Indian | 16 | 12/15/95 | 1/15/99 | Scotland | LWOP |



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| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| James | Harry | Male | Black | 16 | 5/12/06 | 6/10/10 | Mecklenburg | LWOP |
| James | Terrance | Male | Black | 17 | 6/29/97 | 6/30/99 | Cleveland | LWOP |
| Jefferson | Delmonte | Male | Black | 17 | 2/20/01 | 4/18/02 | Johnston | LWOP |
| Jefferson | Shymel | Male | Black | 15 | 11/7/09 | 6/8/12 | Rockingham | Life With |
| Johnson | Tydis | Male | Black | 15 | 8/23/96 | 5/21/97 | Cleveland | Life With |
| Johnston | Donovan | Male | Black | 16 | 5/11/95 | 4/17/96 | Mecklenburg | Life With |
| Jones | Harold | Male | Black | 16 | 10/16/98 | 10/5/00 | Cumberland | LWOP |
| Jones | Joseph | Male | Black | 13 | 10/16/98 | 2/23/00 | Cumberland | LWOP |
| Keaton | Akeem | Male | Black | 16 | 1/29/05 | 2/13/08 | Mecklenburg | LWOP |
| Kelliher | James | Male | White | 17 | 8/7/01 | 3/1/04 | Cumberland | Life With x2 |
| Kornegay | Eric | Male | Black | 17 | 8/28/99 | 8/31/00 | Lenoir | LWOP |
| Lee | Kentay | Male | Black | 14 | 1/1/99 | 7/7/00 | Mecklenburg | LWOP |
| Lesane | George | Male | Black | 17 | 12/1/94 | 2/4/98 | Robeson | LWOP |
| Lewis | Danny | Male | Indian | 17 | 9/2/02 | 7/6/04 | Robeson | Life With |
| Lovette | Laurence | Male | Black | 17 | 3/5/08 | 12/20/11 | Orange | LWOP |
| Lowery | Jamie | Male | Black | 16 | 7/2/08 | 2/9/11 | Robeson | Life With |
| May | Jahrheel | Male | Black | 16 | 1/2/13 | 7/16/15 | Pitt | Life With |
| Mayhand | Anthony | Male | Black | 16 | 11/19/95 | 11/7/96 | Guilford | LWOP |
| McCord | Travis | Male | Black | 16 | 2/10/97 | 4/7/99 | Cleveland | LWOP |
| McKeithan | Henry | Male | Black | 17 | 6/12/97 | 8/26/98 | Harnett | LWOP |
| McKinney | Antonio | Male | Black | 16 | 7/30/99 | 1/18/01 | Wayne | LWOP |
| McLaughlin | Jamison | Male | Black | 17 | 7/18/95 | 9/25/97 | Cumberland | Life With |
| McLean | Dwight | Male | Black | 17 | 11/1/02 | 10/18/04 | Wake | LWOP |
| McPhatter | Marcus | Male | Black | 16 | 12/15/95 | 11/20/98 | Scotland | Life With |
| McRae | Derrick | Male | Black | 16 | 10/14/95 | 5/14/98 | Richmond | Life With |
| Medina | Jhalmar | Male | Latinx | 16 | 3/10/03 | 9/1/04 | Mecklenburg | Life With + 189-236 |
| Meeks | Kenneth | Male | Black | 16 | 6/28/04 | 4/10/06 | Wilson | LWOP |
| Morris | Cameron | Male | Black | 17 | 4/28/05 | 1/24/07 | Wake | Life With |
| Moss | Decarlos | Male | Black | 17 | 4/25/02 | 5/28/04 | Person | Life With |
| Nguyen | Doan | Male | Asian | 17 | 6/17/02 | 10/3/03 | Cumberland | Life With |
| Oglesby | Jaamall | Male | Black | 16 | 9/10/02 | 5/28/04 | Forsyth | LWOP |
| Pallas | Peter | Male | White | 16 | 10/20/97 | 9/2/99 | New Hanover | LWOP |
| Pemberton | Devonte | Male | Black | 17 | 5/9/10 | 10/4/11 | Wake | Term Of Years |
| Perkins | Artis | Male | Black | 15 | 9/16/00 | 4/20/01 | Wake | LWOP |
| Perry | Antonio | Male | Black | 17 | 9/10/03 | 8/25/04 | Nash | Life With x2 + 157-198 |
| Perry | Dominique | Male | Black | 17 | 4/18/07 | 8/27/08 | Guilford | LWOP |
| Purcell | Keonte | Male | Black | 17 | 5/6/07 | 12/17/09 | Cumberland | Life With + 16-20 |
| Reid | Utaris | Male | Black | 14 | 10/21/95 | 7/24/97 | Lee | New trial ordered and order appealed |



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| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Santiago | Donte | Male | Black | 16 | 7/31/01 | 4/17/03 | Onslow | Life With + 114-164 |
| Santillan | Jonathan | Male | Latinx | 15 | 1/5/13 | 9/1/15 | Wake | LWOP |
| Seam | Sethy | Male | Asian | 16 | 11/19/97 | 9/30/99 | Davidson | Life With |
| Simmons | Gregory | Male | Black | 17 | 5/27/06 | 4/23/08 | Brunswick | LWOP |
| Sims | Antwaun | Male | Black | 17 | 1/4/00 | 8/24/01 | Onslow | LWOP |
| Stancil | Wayne | Male | White | 17 | 7/7/98 | 8/2/99 | Carteret | LWOP |
| Stinnett | Carlos | Male | Black | 15 | 11/20/95 | 11/1/96 | Johnston | LWOP |
| Sturdivant | Sandy | Male | Black | 16 | 6/13/98 | 12/2/99 | Union | Life With |
| Sullivan | Michael | Male | Black | 16 | 6/5/02 | 10/25/04 | Durham | Life With |
| Swain | Leo | Male | Black | 16 | 6/2/99 | 10/30/00 | Buncombe | Life With |
| Taylor | Matthew | Male | Black | 16 | 2/17/04 | 7/20/05 | Durham | LWOP |
| Thornton | Matthew | Male | Black | 15 | 12/4/06 | 1/13/09 | Harnett | LWOP |
| Tirado | Francisco | Male | Latinx | 17 | 8/17/98 | 4/11/00 | Cumberland | LWOP |
| Tomlin | Frank | Male | Black | 16 | 6/25/03 | 5/19/05 | Guilford | LWOP |
| Valdez | Eric | Male | Latinx | 17 | 3/14/05 | 10/5/06 | McDowell | LWOP |
| Walker | William | Male | White | 17 | 7/26/97 | 4/9/98 | Stokes | LWOP |
| Walters | Travis | Male | Black | 17 | 1/6/98 | 9/25/09 | Robeson | Life With |
| Watson | Steven | Male | Black | 17 | 7/15/97 | 4/16/99 | Guilford | LWOP |
| Williams | Montrez | Male | Black | 17 | 6/30/08 | 6/15/11 | Mecklenburg | Life With x2 |
| Williams | Raytheon | Male | Black | 17 | 11/25/06 | 11/20/09 | Guilford | LWOP |
| Willis | Anthony | Male | Black | 16 | 2/16/96 | 12/10/97 | Cumberland | Life With + 25-39 |
| Wooten | Kolanda | Female | Black | 17 | 8/24/03 | 4/19/05 | Wayne | LWOP |
| Xanonh | Ang | Male | Asian | 14 | 10/29/94 | 8/25/95 | Wake | LWOP |
| Yarrell | Rashawn | Male | Black | 17 | 9/17/00 | 12/10/02 | Randolph | LWOP |
| Young | David | Male | Black | 17 | 1/8/97 | 5/4/99 | Buncombe | LWOP |

## APPENDIX B: Logit Results for County-Predictors of JLWOP Sentences

| | (1)<br>1+ JLWOP<br>Sentence | (2)<br>1+ JLWOP<br>Sentence | (3)<br>1+ JLWOP<br>Sentence | (4)<br>1+ JLWOP<br>Sentence |
|---|---|---|---|---|
| Homicide Rate | -0.031 | -0.033 | | -0.015 |
| | (0.037) | (0.015) | | (0.037) |
| Percent Black Pop. | 0.035** | 0.033** | 0.025* | 0.034** |
| | (0.015) | (0.015) | (0.014) | (0.015) |
| Population Density | -0.000 | -0.000 | -0.000 | -0.000 |
| | (0.000) | (0.000) | (0.000) | (0.000) |
| Poverty Rate | -0.120*** | -0.109** | -0.116*** | -0.128*** |
| | (0.044) | (0.044) | (0.043) | (0.046) |
| Death Sentences | | 0.241 | 0.359 | |
| | | (0.212) | (0.249) | |
| Homicide Rate (lagged) | | | 0.033 | |
| | | | (0.032) | |



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| | | | | |
|---|---|---|---|---|
| Death Sentences (lagged) | | | | -0.042 |
| | | | | (0.258) |
| Intercept | -2.407*** | -2.513*** | -2.536*** | -2.297*** |
| | (0.659) | (0.650) | (0.622) | (0.671) |
| Observations | 2,400 | 2,400 | 2,400 | 2,400 |
| County Fixed-Effects | YES | YES | YES | YES |
| Year Fixed-Effects | YES | YES | YES | YES |

Note: *p<0.1; **p<0.05; ***p<0.001

## APPENDIX C: Logit Results on the Inertia Effect in JLWOP Sentencing

| | **(1) Sentence JLWOP** | **(2) Sentence JLWOP** |
|---|---|---|
| Homicide Rate | -0.0004 | -0.001 |
| | (0.001) | (0.001) |
| Percent Black Pop. | -0.008 | -0.004 |
| | (0.005) | (0.005) |
| Population Density | -0.0002*** | -0.0001*** |
| | (0.000) | (0.000) |
| Poverty Rate | -0.0005 | -0.002 |
| | (0.003) | (0.003) |
| # of Previous JWOP Sentence(s) | 0.101*** | |
| | (0.012) | |
| # of Previous DP Sentence(s) | -0.019*** | |
| | (0.006) | |
| Any Prior JLWOP Sentence (binary) | | 0.213*** |
| | | (0.023) |
| Any Prior DP Sentence (binary) | | 0.001 |
| | | (0.023) |
| Intercept | 0.208* | 0.180 |
| | (0.123) | (0.122) |
| N | 2,400 | 2,400 |
| County Fixed Effects | YES | YES |
| Year Fixed Effects | YES | YES |

Note: *p<0.1; **p<0.05; ***p<0.001; Death penalty is abbreviated as “DP”.



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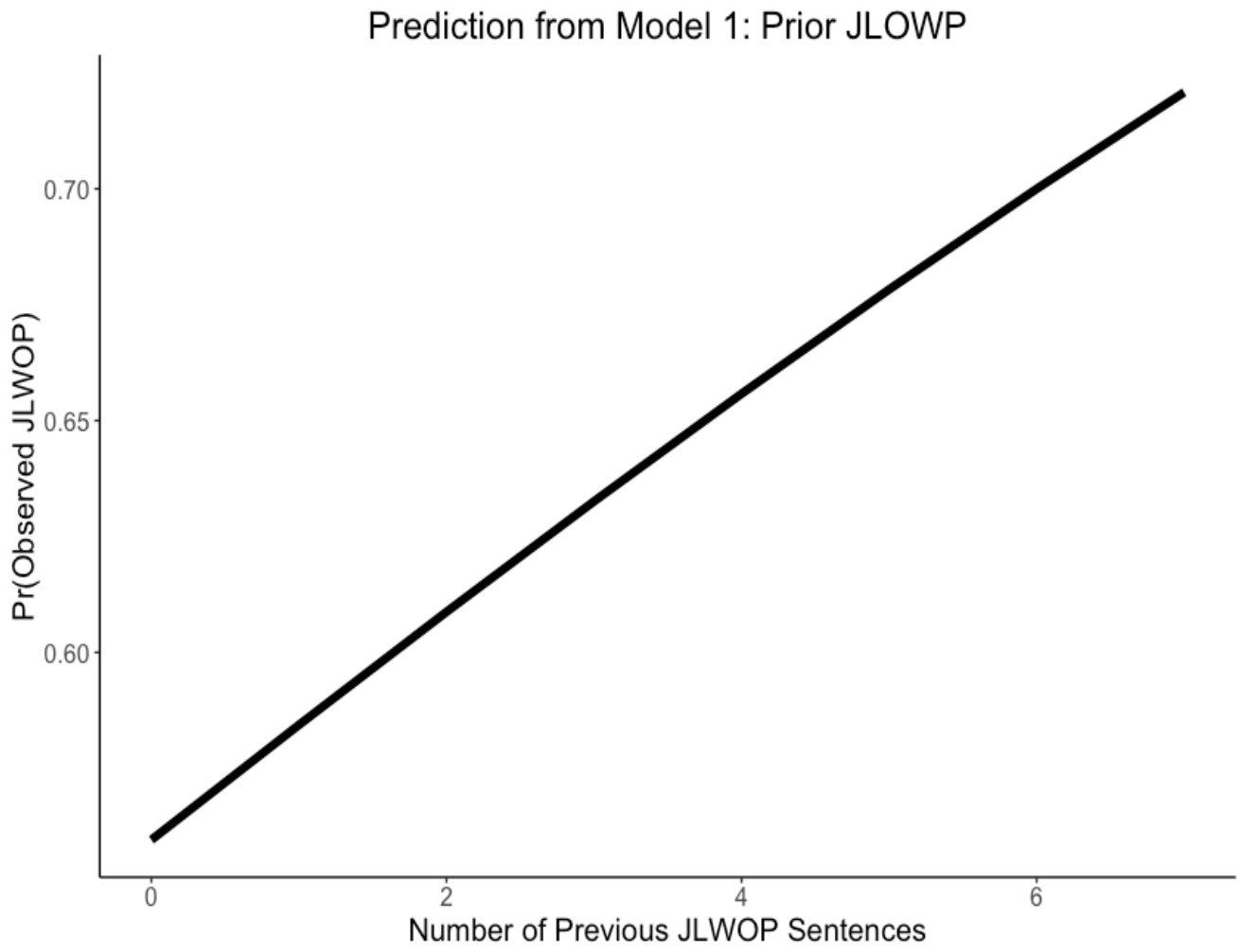




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**Post Release Supervision and Parole Commission**

# Mutual Agreement Parole Program Report
# SL 2007-323

February 28, 2020

| Willis J. Fowler | Graham H. Atkinson | Eric A. Montgomery | Angela R. Bryant |
|---|---|---|---|
| Chairman | Commissioner | Commissioner | Commissioner |

## INTRODUCTION

The Mutual Agreement Parole Program (MAPP) helps to prepare selected parole-eligible inmates for release through structured activities, scheduled progression in custody levels, participation in community-based programs and conditional parole dates. The offenders, the Division of Prisons and the Post-Release Supervision and Parole Commission sign a written agreement that sets forth a plan for the inmate's eventual parole. * The inmate agrees to meet certain conditions set by the Division of Prisons and the Post-Release Supervision and Parole Commission (Parole Commission). In turn, the Parole Commission agrees to consider paroling the offender if those conditions are met. Although they are not legally enforceable contracts, MAPP agreements have proven to be useful tools in influencing and promoting positive inmate behavior.

The Mutual Agreement Parole Program (MAPP) began in North Carolina in 1975 as a pilot project and went statewide a year later. In the early years, the program focused on committed youthful offenders and adult inmates involved in certain highly regarded vocational training programs such as the Iredell Furniture Program, the Cleveland Comprehensive Education Program and vocational training at North Carolina Correctional Institution for Women. Gradually, the Parole Commission began to use MAPP to encourage improved behavior and to structure a gradual release from prison for a broader range of inmates. Today, MAPP is an effective management tool that encourages behavioral change, rewards appropriate behavior, evaluates an offender's readiness for release and prepares the offender for successful re-entry into society.

Section 17.1 of Session Law 2007-323 provides as follows:

> **MUTUAL AGREEMENT PAROLE PROGRAM**
>
> **SECTION 17.1** The Department of Correction and the Post-Release Supervision and Parole Commission shall report by March 1 of each year to the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety and to the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee on the number of inmates enrolled in the program, the number completing the program and being paroled, and the number who enrolled but were terminated from the program. The information should be based on the previous calendar year.

As mandated by the special provision, this report presents statistical information regarding MAPP based on the 2019 calendar year.

*Official signatories include offender, the DOP MAPP Director, three Parole Commissioners and the MAPP Coordinator at the facility where the inmate is housed.

## ELIGIBILITY FOR THE PROGRAM

An inmate is eligible for the MAPP Program if he or she meets the following criteria:

- The inmate has reached his regularly scheduled parole review date;
- The inmate is in medium or minimum custody;
- The inmate is not subject to a detainer or pending court action which may result in further confinement;
- The inmate has not had an infraction within the past 90 days;
- The inmate was convicted of a felony under pre-Structured Sentencing laws; and
- The inmate recognizes a need for involvement in MAPP and expresses an interest in one or more of the following: learning a skill, improving educational achievements, modifying specific behaviors or engaging in personal growth program.

## THE PROCESS

Offenders are reviewed for MAPP/parole every time they are scheduled to be reviewed. Once the review process begins, the Parole Commission sends notifications to victims, district attorneys and the media. Stakeholders have a 30-day period in which to provide information regarding the case. The Parole Commission reviews all information obtained through the investigation and makes a final decision.

If the case receives a favorable vote, the case is forwarded to the Division of Prisons for development. During the development process, a case manager at the facility housing the inmate develops a case plan to prepare the inmate to transition back into the community. The plan includes activities and assignments that will address various needs identified by the case manager. In addition, a majority of offenders will be required to undergo a psychological assessment as part of the development process.

Cases that have completed the development stage return to the MAPP Office to be scheduled for negotiations. During the negations process, the DOP MAPP Director, a Parole Commissioner and the MAPP Coordinator from the facility where the inmate is housed sit down with the inmate, review the development plan and formulate the final agreement. Once all parties agree to the terms of the MAPP Plan, the parties sign the document and the inmate is enrolled in MAPP. The average MAPP Agreement takes 65 days from referral to completion.

On January 1, 2019, 97 inmates were participating in the Mutual Agreement Parole Program (MAPP). An additional 100 inmates were enrolled in the program during the calendar year, bringing the total to 197. Twenty-seven (27) completed the program and were released, 4 were terminated from the program. At the end of the year, a total of 161 inmates were actively participating in MAPP. The number of inmates eligible for MAPP on 12/31/19 was 1,331. In situations where MAPP participation was suspended or terminated, it was the position of the Commission that these cases could not safely be paroled or participate in MAPP because of the nature of their offenses, their prison conduct and /or unfavorable psychological information.

The Post-Release Supervision and Parole Commission have granted MAPP participation to 14.8% of the eligible population for the year. With the passage of time the pool of qualified candidates has diminished. In identifying offenders for MAPP, we consider the needs of the system, the rights of the individual and the safety of the public. As the number of eligible offenders' declines, the decisions become more difficult and more important.

It is important that inmates who are participating in MAPP be placed in and satisfactorily complete programs that have been agreed upon as part of their MAPP contract by the Commission, DOP and the inmate. Participation in community-based programs allows the inmate to demonstrate that he/she has matured and can safely handle responsibility in the community. It also provides authorities additional time to determine the inmate's suitability for release. If the offender does not participate in the agreed upon community-based programs, the Commission has no alternative but to suspend the agreement due to public safety concerns.

The Mutual Agreement Parole Program has proven to be an effective management tool in preparing inmates for a successful re-entry to society. The Department of Correction and the Post-Release Supervision and Parole Commission continues to work toward increasing MAPP participation without jeopardizing public safety.

**Post Release Supervision and Parole Commission**

# MEDICAL RELEASE PROGRAM REPORT

February 28, 2020

| Willis J. Fowler | Graham H. Atkinson | Eric A. Montgomery | Angela R. Bryant |
|---|---|---|---|
| Chairman | Commissioner | Commissioner | Commissioner |

**NORTH CAROLINA POST-RELEASE SUPERVISION AND PAROLE COMMISSION ANNUAL MEDICAL RELEASE REPORT**

# I. INTRODUCTION

Legislation has been enacted directing the Department of Public Safety's Division of Adult Corrections-Prisons and the Post-Release Supervision and Parole Commission to provide for the medical release of no-risk inmates who are either permanently and totally disabled, terminally ill, or geriatric. The legislation envisions each case being carefully and comprehensively evaluated by the Department as well as the Commission. Once the Department determines that the inmate is permanently and totally disabled, terminally ill, or geriatric; **and** is incapacitated to the extent that the inmate does not pose a public safety risk; and is not excluded by the statute, he is to be referred to the Commission. In the event that these criteria are not met, the Department will so determine, and the case **will not** be forwarded to the Commission.

The legislation clearly intends that a referral containing comprehensive information be provided to the Commission who has only 15-20 days to make an independent determination regarding the degree of risk an inmate poses. This time frame includes efforts to notify victims, consider their responses and to affect a release. The medical comprehensive information, as stated by legislative authority, will include medical information, psychosocial information and a risk assessment.

Therefore, the Commission will receive, in any referral, the following information:

**Medical Information:**

The Medical Release Plan will be forwarded from DOP to the Commission Administrator after it has been referred and determined to have met the criteria for release by the DOP staff. The Medical Release Plan will include:

1. A medical statement describing the offender's medical situation/prognosis/incapacitation signed by a medical professional. This will include a description of his/her capability of performing specific acts such as ambulating, driving, and functioning relatively independently throughout the day and the degree of medical oversight and care that would be required on a daily basis.

2. The proposed treatment recommended.

3. The proposed site for the treatment and follow-up.

4. A Medical release of information will be signed by the offender or his/her legal guardian.

5. A statement from the proposed attending physician stating that he/she will provide the DCC supervision officer with an assessment of the offender's physical condition and prognosis. The first assessment will be 30 days after an offender is placed on Medical Release and thereafter every 6 months.

6. A statement on how the medical program will be financed.

7. A medical professional will confirm that the offender's condition was not present at the time of sentencing or he/she has deteriorated to make him/her now eligible for medical release.

**Psychosocial Information:**

1. The offender's version of the crime.

2. The offender's version of his previous crimes.

3. A detailed summary of his prison adjustment including in-depth assessments of infractions; providing information such as the role played in assaultive infractions; description of sexual infractions; role and intensity of defiant and nonconforming sentiments. Program participation, work history in prison and staff's assessments.

4. Family history to determine degree of antisocial sentiments in the family.

5. Marital history, including reasons for separation/divorce.

6. Work history, e.g. last employment, most lengthy employment, reasons for leaving etc.

7. Alcohol/drug history including any rehabilitation/treatment in the community as well as in prison.

8. Mental health history including diagnoses and treatment.

9. Medical history and how he sees present medical condition and perceived incapacity.

10. Perception of current home/release plan.

11. General impression of inmate's social skills, attitudes and sentiments in relating to interviewer.

**Risk Assessment:**

1. An assessment of the risk for violence and recidivism that the inmate poses to society. Factors to be considered in the assessment are medical condition, severity of the offense for which the inmate is incarcerated, the inmate's prison record, and the release plan. This assessment should be provided by a forensic/correctional psychologist.

**Summary:**

In compliance with Senate Bill 1480, Chapter 84-B of Chapter 15A of the General Statutes, the following information is a synopsis of activity generated by the Parole Commission from 1/1/2019 through 12/31/2019.
Our statistics are as follows:

- Number of Inmates referred by Prisons to Parole Commission 9
- Number of Inmates considered by the Parole Commission 9

Action by the Parole Commission

- Number Denied 0
- Number Released on Early Medical Release 7
- Pending Decision 0
- Deceased (Prior to Decision) 2

Total 9

The Parole Commission has implemented procedures that allow for the timely processing of all case referrals for Early Medical Release.

**Post Release Supervision and Parole Commission**

# MEDICAL RELEASE PROGRAM REPORT

February 28, 2020

| Willis J. Fowler | Graham H. Atkinson | Eric A. Montgomery | Angela R. Bryant |
|---|---|---|---|
| Chairman | Commissioner | Commissioner | Commissioner |

**NORTH CAROLINA POST-RELEASE SUPERVISION AND PAROLE COMMISSION ANNUAL MEDICAL RELEASE REPORT**

# I. INTRODUCTION

Legislation has been enacted directing the Department of Public Safety's Division of Adult Corrections-Prisons and the Post-Release Supervision and Parole Commission to provide for the medical release of no-risk inmates who are either permanently and totally disabled, terminally ill, or geriatric. The legislation envisions each case being carefully and comprehensively evaluated by the Department as well as the Commission. Once the Department determines that the inmate is permanently and totally disabled, terminally ill, or geriatric; **and** is incapacitated to the extent that the inmate does not pose a public safety risk; and is not excluded by the statute, he is to be referred to the Commission. In the event that these criteria are not met, the Department will so determine, and the case **will not** be forwarded to the Commission.

The legislation clearly intends that a referral containing comprehensive information be provided to the Commission who has only 15-20 days to make an independent determination regarding the degree of risk an inmate poses. This time frame includes efforts to notify victims, consider their responses and to affect a release. The medical comprehensive information, as stated by legislative authority, will include medical information, psychosocial information and a risk assessment.

Therefore, the Commission will receive, in any referral, the following information:

**Medical Information:**

The Medical Release Plan will be forwarded from DOP to the Commission Administrator after it has been referred and determined to have met the criteria for release by the DOP staff. The Medical Release Plan will include:

1. A medical statement describing the offender's medical situation/prognosis/incapacitation signed by a medical professional. This will include a description of his/her capability of performing specific acts such as ambulating, driving, and functioning relatively independently throughout the day and the degree of medical oversight and care that would be required on a daily basis.

2. The proposed treatment recommended.

3. The proposed site for the treatment and follow-up.

4. A Medical release of information will be signed by the offender or his/her legal guardian.

5. A statement from the proposed attending physician stating that he/she will provide the DCC supervision officer with an assessment of the offender's physical condition and prognosis. The first assessment will be 30 days after an offender is placed on Medical Release and thereafter every 6 months.

6. A statement on how the medical program will be financed.

7. A medical professional will confirm that the offender's condition was not present at the time of sentencing or he/she has deteriorated to make him/her now eligible for medical release.

**Psychosocial Information:**

1. The offender's version of the crime.

2. The offender's version of his previous crimes.

3. A detailed summary of his prison adjustment including in-depth assessments of infractions; providing information such as the role played in assaultive infractions; description of sexual infractions; role and intensity of defiant and nonconforming sentiments. Program participation, work history in prison and staff's assessments.

4. Family history to determine degree of antisocial sentiments in the family.

5. Marital history, including reasons for separation/divorce.

6. Work history, e.g. last employment, most lengthy employment, reasons for leaving etc.

7. Alcohol/drug history including any rehabilitation/treatment in the community as well as in prison.

8. Mental health history including diagnoses and treatment.

9. Medical history and how he sees present medical condition and perceived incapacity.

10. Perception of current home/release plan.

11. General impression of inmate's social skills, attitudes and sentiments in relating to interviewer.

**Risk Assessment:**

1. An assessment of the risk for violence and recidivism that the inmate poses to society. Factors to be considered in the assessment are medical condition, severity of the offense for which the inmate is incarcerated, the inmate's prison record, and the release plan. This assessment should be provided by a forensic/correctional psychologist.

**Summary:**

In compliance with Senate Bill 1480, Chapter 84-B of Chapter 15A of the General Statutes, the following information is a synopsis of activity generated by the Parole Commission from 1/1/2019 through 12/31/2019.
Our statistics are as follows:

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Total 9

The Parole Commission has implemented procedures that allow for the timely processing of all case referrals for Early Medical Release.

# Post Release Supervision and Parole Commission

## Parole Eligibility Report

## G.S. 143B-721.1

February 28, 2020

| Willis J. Fowler | Graham H. Atkinson | Eric A. Montgomery | Angela R. Bryant |
|---|---|---|---|
| Chairman | Commissioner | Commissioner | Commissioner |

# Parole Eligibility Report

Pursuant to G.S. 143B-721.1 (a) and (b), the Post-Release Supervision and Parole Commission compared the amount of time Pre-Structured Sentencing cases had served with the amount of time they would have served under the Structured Sentencing Law.

This report includes the following: the class of the offense for which each parole-eligible inmate was convicted and whether an inmate had multiple criminal convictions. The Commission has reinitiated the parole review process for each offender who has served more time than that person would have under Structured Sentencing as provided by subsections (a) and (b) of this section.

The Commission also reports on the number of parole-eligible inmates reconsidered in compliance with this section and the number who were actually paroled.

Class A felonies were not included since they would be sentenced to Life without Parole under the Structured Sentencing Law. Only Pre-Sentencing cases with Parole Eligibility dates on or before July 1, 2019 were considered.

The Parole Commission will continue to monitor many of these cases for subsequent comparison projects. Every effort was made to release those inmates who were judged to be an acceptable risk to the community. Others were recommended for the Mutual Agreement Parole Program to help them prepare for release through involvement in rehabilitation programs.

The following explanation and data was prepared by the Reentry, Programs and Services section of the Department of Public Safety:

**Parole Eligibility Report**
**(Actual time served by FSA offenders compared time served for similar crime under SSA)**

**Purpose:**

- Analysis of the amount of time each inmate who is eligible for parole before July 1, 2019, has served, compared to the time served by offenders under Structured Sentencing for comparable crimes, including the class of the offense for which each parole-eligible inmate was convicted and whether an inmate had multiple criminal convictions.

- Determination as to whether the person has served more time in custody than the person would have served if sentenced to the maximum sentence under Structured Sentencing.

**Methodology:**

- Identify currently active inmates eligible for parole.
- Exclude DWI and First-Degree Murder life sentences. (DWI is its own special case and First-Degree Murder is not eligible for release under Structured Sentencing Act)
- Divide the dataset into two groups: inmates with a single commitment and those with multiple commitments.
- Determine the SSA equivalent penalty class for each crime that effects the time of the current incarceration.
- Apply the number of months for the maximum presumptive sentence under the SSA to each relevant commitment.
- Determine the number of months that the inmate has served in prison on this period of incarceration.
- Compare the two numbers.
- Create two groups
  - Compares favorable (inmate has served more time under FSA sentence than SSA)
  - Compares unfavorably (Inmate has not served as much time as SSA would require)

**Results:**

Table 1 displays the population breakdown for 2/16/2020 that resulted in the data for this report.

**Table 1**

| | |
|---|---|
| **TOTAL INMATES IN THE POPULATION AS OF 02/16/2020** | 35,342 |
| **TOTAL ELIGIBLE TO BE PAROLED LESS DWI AND 1ST DEGREE MURDER** | 1,432 |
| **PAROLE ELIGIBLE ON OR BEFORE 7/1/2019** | 1,083 |
| **NOT PAROLE ELIGIBLE ON OR BEFORE 7/1/2019** | 349 |
| **PAROLE ELIGIBLE (SINGLE COMMITMENT)** | 361 |
| **PAROLE ELIGIBLE (MULTIPLE COMMITMENTS)** | 722 |

ON 2/16/2020 A TOTAL OF 1,083 INMATES HAD A PAROLE ELIGIBILITY DATE BEFORE 7/1/2019. OF THE NUMBER THAT WERE PAROLE ELIGIBLE, 136 HAVE SERVED LONGER UNDER THEIR FSA SENTENCE(S) THAN AN SSA SENTENCE FOR THE EQUIVALENT PENALTY CLASS(S) AND THE MAXIMUM PRESUMPTIVE SENTENCE FOR PRIOR RECORD LEVEL 6. TABLE 2 DISPLAYS THE TOTAL ELIGIBLE AND THOSE THAT COMPARED FAVORABLY OR UNFAVORABLY.

**TABLE 2**

| | **COMPARISON NOT FAVORABLE** | **COMPARISON FAVORABLE** | **TOTAL** |
|---|---|---|---|
| **PAROLE ELIGIBLE SINGLE COMMITMENT** | 328 | 33 | 361 |
| **PAROLE ELIGIBLE MULTIPLE COMMITMENTS** | 947 | 103 | 1050 |

TABLE 3 DISPLAYS FROM THE COMPARISON FAVORABLE COLUMN THE MOST SERIOUS OFFENSE FOR THE PERIORD OF INCARCERATION.

**TABLE 3**

| **SSA OFFENSE CLASS[8]** | **SINGLE COMMITMENT** | **MULTIPLE COMMITMENT** | **TOTAL** |
|---|---|---|---|
| **B1** | 2 | 4 | 6 |
| **C** | 10 | 26 | 36 |
| **D** | 18 | 42 | 60 |
| **E** | 1 | 7 | 8 |
| **F** | 0 | 7 | 7 |
| **G** | 2 | 10 | 12 |
| **H** | 0 | 6 | 6 |
| **I** | 0 | 1 | 1 |
| **Total** | 33 | 103 | 136 |

# THESE LIVES MATTER, THOSE ONES DON'T: COMPARING EXECUTION RATES BY THE RACE AND GENDER OF THE VICTIM IN THE U.S. AND IN THE TOP DEATH PENALTY STATES[1]

*Frank R. Baumgartner**
*Emma Johnson***
*Colin Wilson****
*Clarke Whitehead*****

In a recent article, Baumgartner and colleagues demonstrated based on national statistics that the odds of execution differ dramatically based on the race and gender of the victim.[2] They compared national statistics on homicide victimization, which clearly show that black males are the most likely victims of homicide, with data associated with the victims in execution cases. Black males are a high percent of the overall homicide cases, but a very low percent of the cases where the killer was later executed. In this article we break out these statistics to show their applicability to each of the major death-penalty states, showing that the national pattern is repeated in each individual state, without exception. These stark disparities clearly demonstrate that the death penalty,

[1] For the numbers below, the author performed statistical analysis on a publicly available dataset. *Uniform Crime Reporting Program Data: Supplementary Homicide Reports*, 2013 (ICPSR 36124), NAT'L ARCHIVE OF CRIMINAL JUSTICE DATA, https://www.icpsr.umich.edu/icpsrweb/NACJD/studies/36124#datasetsSection (last visited Apr. 25, 2016); *Uniform Crime Reports [United States]: Homicide Victimization and Offending Rates, 1976-1999 (ICPSR 3181)*, NAT'L ARCHIVE OF CRIMINAL JUSTICE DATA, http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/3181?paging.startRow=1&classification=NACJD.X.*&dataFormat%5B0%5D=SAS&keyword%5B0%5D=offenses (last visited Apr. 25, 2016).

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** Emma Johnson is an undergraduate student at the University of North Carolina at Chapel Hill.

*** Colin Wilson graduated from the University of North Carolina at Chapel Hill in 2016 and is a paralegal in a Washington law firm.

**** Clarke Whitehead is an undergraduate student at the University of North Carolina at Chapel Hill.

[2] *See* Frank R. Baumgartner et al., *#BlackLivesDon'tMatter: Race-of-Victim Effects in U.S. Executions, 1976–2013*, 3 POLITICS, GROUPS, & IDENTITIES 1, 1, 2, 3 (2015).

as applied in every major state, violates the most basic concepts of equal protection.

## INTRODUCTION

From 1976 through 2014, 1,394 judicial executions have taken place with 2,179 victims associated with the crimes for which those individuals were sentenced to die.[3] From 1976 through 1999, the U.S. Department of Justice Uniform Crime Reports show 497,030 victims of homicide.[4] In the tables and figures below, we show the correspondence between the race and gender of homicide victims with those whose killers were later executed.[5] Of course, all homicides are not death-eligible, and many occur in states that do not have the death penalty.[6] The disparities we lay out here are so stark, however, that they cannot be explained by these facts. By presenting the simplest possible comparison of homicide victimization with execution cases, we also make clear that certain lives are treated as if they are "more equal" than others; the death penalty creates two categories of victims—those whose deaths demand the harshest punishment, and those whose deaths are "garden variety."[7] To a grieving mother or family member, it is hard to square the concept of "garden variety" homicide with the grief that we can expect to be associated with any tragedy. Our data show that there is indeed a racial and gender hierarchy in homicide victims as this relates to the death penalty, and these trends are similar in every state. Killers of white female victims are more than ten times more likely to be executed by the state than are the killers of black males.[8] Black males, on the other hand, are the most frequent victims of homicide in the United States, by far.[9] Their killers rarely face the death penalty.[10]

In the pages that follow we present data first for the entire United States, then for each of the major death penalty states, in

[3] *See supra* note 1 and accompanying text.

[4] *See Uniform Crime Reports [United States]: Homicide Victimization and Offending Rates, 1976-1999 (ICPSR 3181)*, *supra* note 1.

[5] *See infra* Table U.S. 1 (demonstrating executions and homicides by race and gender of victims); *infra* Figure U.S. 1 (comparing the likelihood of execution by race and gender of the victims); *infra* Figure U.S. 5 (showing the race and gender of victims for white, black, and Hispanic inmates executed).

[6] *See* Baumgartner et al., *supra* note 2, at 5–6.

[7] *See Legal Profession Gives up on the Death Penalty*, MINISTRY AGAINST THE DEATH PENALTY (Feb. 17, 2010), http://www.sisterhelen.org/legal-profession-gives-up-on-the-death-penalty/.

[8] *See infra* Figure U.S. 1.

[9] *See infra* Table U.S. 1.

[10] *See infra* Table U.S. 1.

order of the number of executions that state has carried out. We comment on the first set of results, for the United States, then provide identically formatted statistics for each of the states without comment or explanation unless the interpretation of the data is not clear from the discussion above.

A note on data sources and time frames: We make use of three main sources of data in this article. First, data on the victims of inmates executed cover all judicial executions from the post-*Furman* period of U.S. capital punishment, 1976 through December 31, 2014.[11] This data was collected by the lead author over many years from public sources and reported in detail in Baumgartner et al. 2015.[12] Data on homicide victimization in general come from Fox 2001 and cover the period from 1976 through 1999.[13] Data on homicide offender-victim combinations come from the FBI's Supplementary Homicide Reports, which match homicide offenders with victims, showing the race and gender breakdown of each and cover the period of 1979 through 2012.[14] These are the most complete and up-to-date databases available. However, there could be concern about the lack of exact time matches. For homicide victimization in general, the data start in the same year as our execution-case database, 1976. However, these data are no longer made available after 1999.[15] Considering the lag between when a homicide occurs and when an execution eventually follows, this lack is exactly, if coincidentally, the right one, however. The time elapsed from crime to execution in the modern period has been increasing steadily each year.[16] From 2010 through 2014, 206 inmates were executed, and their average time from crime to execution was 16 years.[17] Limiting our data on homicides to this period is based on the availability of a comprehensive government

[11] *See History Repeats Itself: The Post-Furman Return to Arbitrariness in Capital Punishment*, 45 U. RICHMOND L. REV. 1255, 1255 (2011); *supra* note 1 and accompanying text.

[12] *See* Baumgartner et al., *supra* note 2, at 1, 4.

[13] *See supra* note 1 and accompanying text.

[14] *See* Leonard J. Paulozzi et al., *Surveillance for Homicide Among Intimate Partners—United States, 1981–1998*, MORBIDITY & MORTALITY WKLY REP.: CDC SURVEILLANCE SUMMARIES (Oct. 12, 2001), at 1, http://www.cdc.gov/mmwr/PDF/ss/ss5003.pdf; John Blume et al., *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165, 170 (2004) (explaining that the FBI's Supplemental Homicide Report includes data about murder, including the victim's race, sex and age as well as information about the defendant).

[15] *See supra* note 1 and accompanying text.

[16] *See* Frank R. Baumgartner, *The Death Penalty is About to go on Trial in California. Here's why it Might Lose.*, WASH. POST (Aug. 5, 2015), https://www.washingtonpost.com/news/monkey-cage/wp/2015/08/05/the-death-penalty-is-about-to-go-on-trial-in-california-heres-why-it-might-lose/.

[17] *Id.*

report on homicide victimization. But the date happens to correspond exactly to what we would want, since homicides committed after 1999 would be unlikely to have resulted in an execution because of the delays associated with the capital punishment process.

With regards to the race and gender of offender-victim pairs, which come from the FBI Supplementary Homicide Reports, these data series run from 1979 through 2012.[18] While an increasing percentage of homicides have an "unknown" offender, the percentages of crimes with particular race and gender combinations of offenders and their victims are remarkably stable. For example, for white male offenders, the percentage of their victims who are also white males had an average value from 1998 through 2013 of 60, with values always within a range of 57 to 63.[19] Looking at all the offender-victim combinations reported here, the patterns remain highly stable over time.[20] As our concern is to compare the characteristics of homicide offender-victim relations overall with those from execution cases, the fact that the homicides trends are stable over time suggests that a lack of exact time match will have little impact on the results. In any case, 1979 through 2012 covers the vast bulk of the period of interest.

Finally, we compare homicides with executions, but only some homicides are death-eligible and therefore a cleaner comparison would be between death-eligible homicides and executions.[21] Such a comparison would also incorporate a limitation of the homicide data only to states with the death penalty. Two published studies provide reassurance that the statistical comparisons we report here are robust. John Blume and colleagues compared death sentences and homicides in eight death states, using the same federal homicides data we use here, and showed very similar differences in the likelihood of death based on the race of the offender and victim, rising from 2.4% for black-black homicides to 64.5% for black-white killings.[22] Jeffrey Fagan and collaborators compared homicide trends over time with capital-eligible homicides, showing that capital-eligible homicides represent approximately 25% of all U.S. homicides for the period of 1976 to 2003, and that this share was

[18] *See supra* note 1 and accompanying text.

[19] *See infra* Figure U.S. 6.

[20] *See infra* Figure U.S. 5.

[21] *See Crimes Punishable by the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/crimes-punishable-death-penalty#BJS (last visited Apr. 26, 2016).

[22] Blume et al., *supra* note 14, at 197 tbl. 8.

relatively consistent, if slowly growing, over time.[23] The share of homicides that are death-eligible is between 19 and 26% during this period.[24] Based on the fact that death-eligible homicides are a relatively constant percentage of all homicides, we can conclude that our estimates of rates of execution per homicide would be parallel with any similar rates we could calculate were data on all death-eligible homicides available.

With these considerations then in mind, we proceed with our results, which are presented as simple comparisons. Table U.S. 1 shows executions and homicides by victim characteristic for the U.S. as a whole.[25] Reading across the top row, Whites number 252,366, or 50.77%, of all homicide victims, and 1,652, or 75.81%, of the victims of inmates executed.[26] The number of execution cases divided by the number of homicides is 65 per 10,000.[27] In other words 0.65% of homicides of Whites lead to an execution. This last column is perhaps the most important single indicator: what percentage (or rate per 10,000) of homicide victims are associated with the execution of their killer. The table shows the rate is 65 for white victims but 14 for black victims.[28] Killers of white victims have more than four times the likelihood of execution than killers of Blacks.[29] The second part of the table compares male and female victims: execution rates per 10,000 are 29 for male victims but 91 for female victims.[30] The third part of the table combines these factors.[31] Rates move monotonically from their highest for white females (123 per 10,000 homicides, or 1.23 percent), to lowest (9 per 10,000, or 0.09 percent) for Black male victims.[32] These numbers are also displayed in Figure U.S. 1.[33]

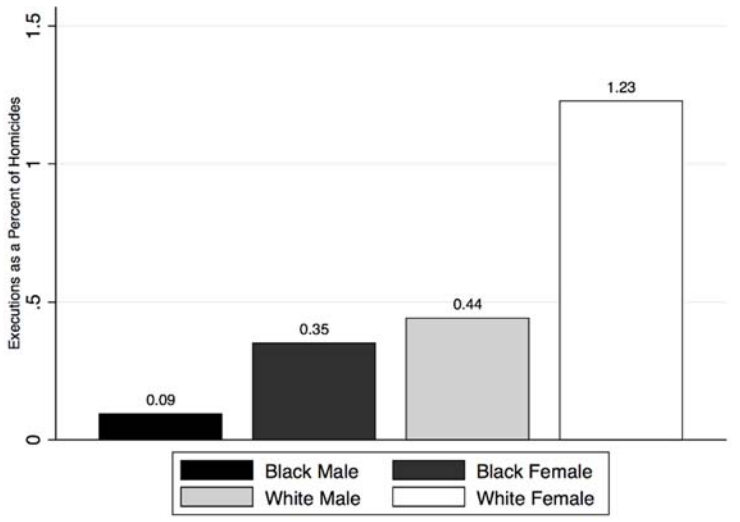
[23] Jeffrey Fagan et al., *Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty,* 84 TEX. L. REV. 1803, 1818, 1819 tbl. 1, 1826 (2006).
[24] *Id.* at 1826–27.
[25] *See infra* Table U.S. 1.
[26] *See infra* Table U.S. 1.
[27] *See infra* Table U.S. 1.
[28] *See infra* Table U.S. 1.
[29] *See infra* Table U.S. 1.
[30] *See infra* Table U.S. 1.
[31] *See infra* Table U.S. 1.
[32] *See infra* Table U.S. 1.
[33] *See infra* Figure U.S. 1.

**Table U.S. 1. United States Executions and Homicides by Race and Gender of Victims**

| Victim Characteristic | Homicides | | Executions | | Executions per 10,000 Homicides |
|---|---|---|---|---|---|
| | Number | Percent | Number | Percent | |
| Whites | 252,366 | 50.77 | 1,652 | 75.81 | 65 |
| Blacks | 229,801 | 46.23 | 331 | 15.19 | 14 |
| Other or Unknown | 14,863 | 2.99 | 196 | 9.00 | - |
| Total | 497,030 | 100.00 | 2,179 | 100.00 | 44 |
| Males | 379,164 | 76.29 | 1,116 | 51.22 | 29 |
| Females | 117,234 | 23.59 | 1,063 | 48.78 | 91 |
| Unknown | 632 | 0.12 | - | - | - |
| Total | 497,030 | 100.00 | 2,179 | 100.00 | 44 |
| White Female | 68,576 | 13.80 | 841 | 38.60 | 123 |
| White Male | 183,756 | 36.97 | 811 | 37.22 | 44 |
| Black Female | 44,779 | 9.01 | 157 | 7.21 | 35 |
| Black Male | 185,003 | 37.22 | 174 | 7.99 | 9 |
| Other or Unknown | 14,916 | 3.00 | 196 | 8.99 | - |
| Total | 497,030 | 100.00 | 2,179 | 100.00 | 44 |

*Note: Numbers refer to victims, not inmates executed. The United States executed 1,394 inmates from 1976 through 2014. We do not calculate rates for "other or unknown" because of differences in how these categories are defined for execution cases and all homicide cases.

**Figure U.S. 1. Comparison of Likelihood of Execution by Race and Gender of Victim**



In interpreting and understanding these different rates of execution, it is important to keep in mind the first columns in the Table: Black males are the single largest group when we look at homicide victimization.[34] The 2010 U.S. census shows that blacks are approximately 12.6% of the population, and males and females are roughly equal in the white and black population (50.8% were women, overall).[35] Black males are therefore roughly 6% of the population but 37% of the homicide victims; whereas this group is by far the most likely to be victimized compared to any other group in the population, their killers have a rate of execution less than 1/13th that of white females, statistically the least likely of any population group to be the victim of homicide.[36]

Figures U.S. 2 through U.S. 4 provide simple pie-charts comparing the gender, race and race-gender combinations of homicide victims (in the left column) with those associated with executions (in the right column).[37] These reflect the same data as in Table U.S. 1 but allow the reader to see at a glance, for example, that in Figure U.S. 2, homicides are largely directed against males (in the left pie-chart), but the proportion of females swells by more than double when we look at execution cases.[38] Similarly, whites are about half of all homicide victims, but three-quarters of the execution cases.[39] And Figure U.S. 4 shows how the white female category, just 13.8% of all homicides, swells to 38.6% in the execution cases.[40] These figures are based on the percentages reported in Table U.S. 1 and simply allow a visualization of the trends that are apparent in the data there.[41]

[34] *See supra* Figure U.S. 1.

[35] *See* LINDSAY M. HOWDEN & JULIE A. MEYER, U.S. CENSUS BUREAU, AGE AND SEX COMPOSITION: 2010 2 tbl. 1 (2011), http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf; SONYA RASTOGI ET AL., U.S. CENSUS BUREAU, THE BLACK POPULATION: 2010 3 tbl. 1 (2011), http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf.

[36] *See supra* Table U.S. 1, Figure U.S. 1.

[37] *See infra* Figures U.S. 2, 3, 4.

[38] *See infra* Figure U.S. 2.

[39] *See infra* Figure U.S. 3; *supra* Table U.S. 1.

[40] *See infra* Figure U.S. 4.

[41] *See infra* Figure U.S. 4; *supra* Table U.S. 1.

**Figure U.S. 2. Gender of Victims**

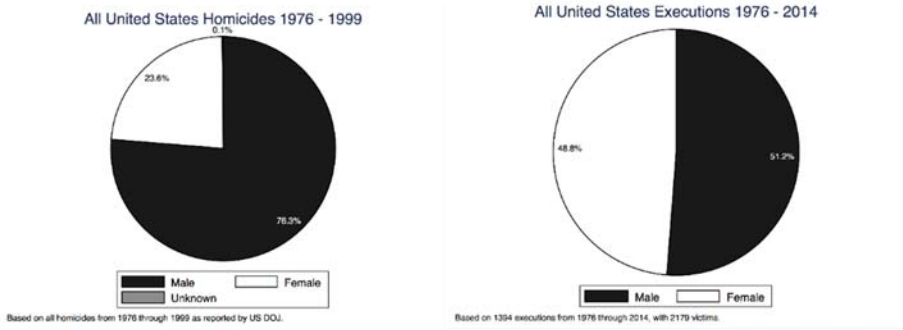



**Figure U.S. 3. Race of Victims**

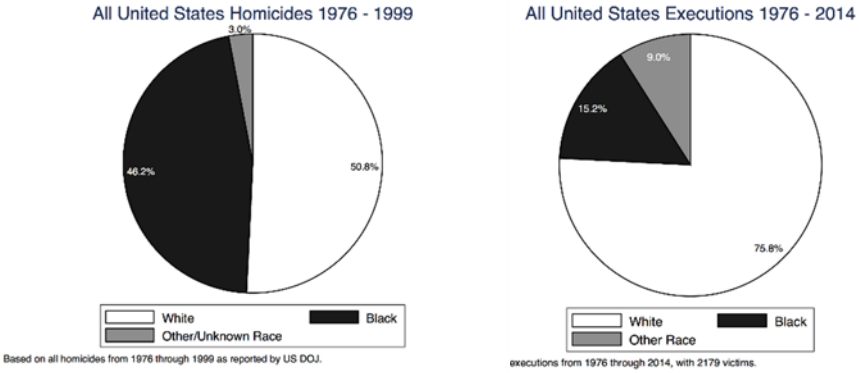



**Figure U.S. 4. Race and Gender of Victims**

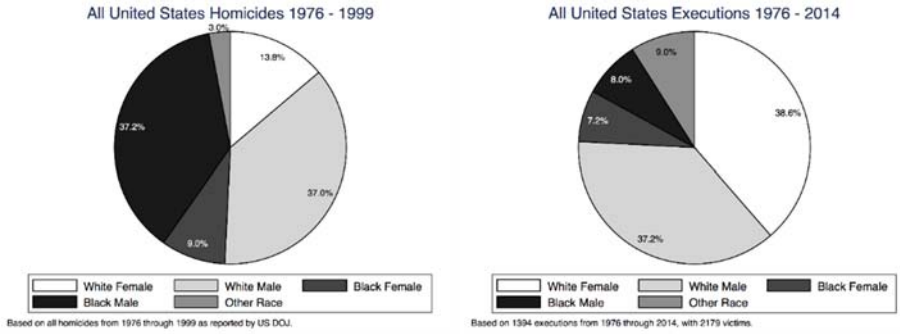
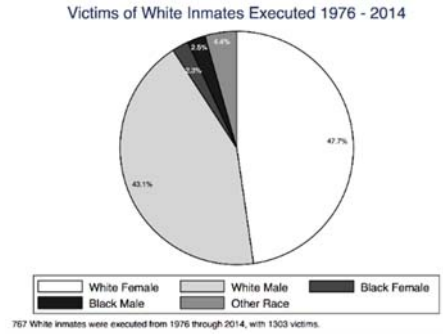


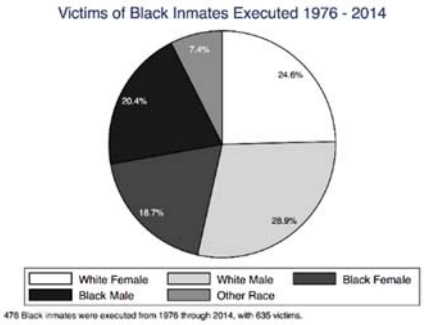
Figure U.S. 5 and Table U.S. 2 show the distribution of types of victims for white, black, and Hispanic inmates executed.[42] Among white inmates, 90% of all victims are also white.[43] Among black inmates, however, a majority of their victims are white.[44]

**Figure U.S. 5. Race and Gender of Victims for White, Black, and Hispanic Inmates Executed**

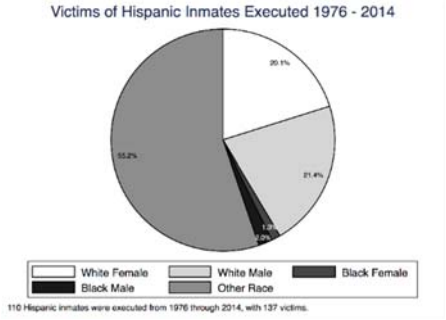
a. White Inmates




b. Black Inmates




c. Hispanic Inmates




[42] *See infra* Figure U.S. 5; *infra* Table U.S. 2.
[43] *See infra* Figure U.S. 5; *infra* Table U.S. 2.
[44] *See infra* Figure U.S. 5; *infra* Table U.S. 2.

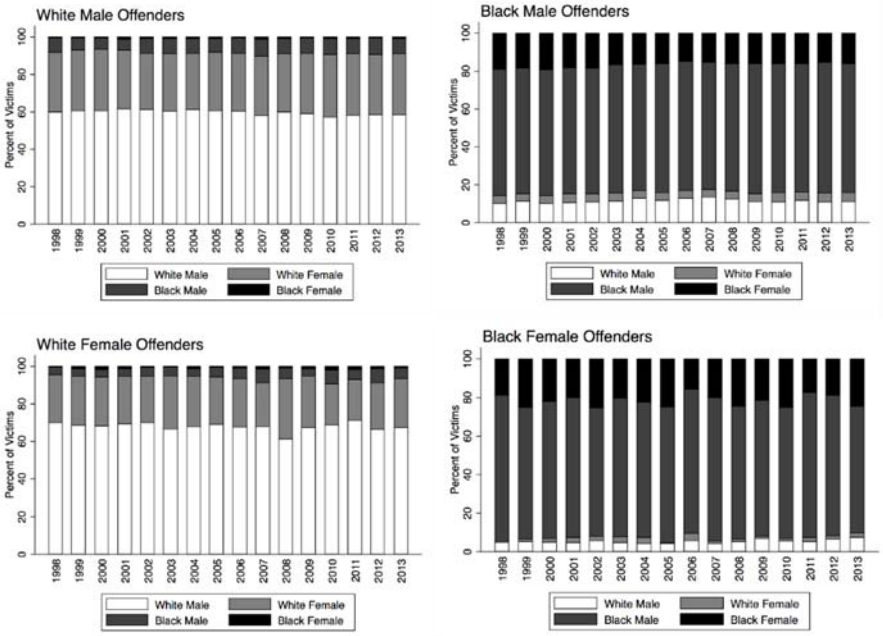
**Table U.S. 2. Victims of White, Black, and Hispanic Male Inmates Executed**

| | White Inmates | | Black Inmates | | Hispanic Inmates | |
|---|---|---|---|---|---|---|
| Victims | N | % | N | % | N | % |
| White Female | 631 | 47.7 | 162 | 24.6 | 31 | 20.1 |
| White Male | 569 | 43.1 | 190 | 28.9 | 33 | 21.4 |
| Black Female | 31 | 2.3 | 123 | 18.7 | 2 | 1.3 |
| Black Male | 33 | 2.5 | 134 | 20.4 | 3 | 2.0 |
| Other Race | 58 | 4.4 | 49 | 7.4 | 85 | 55.2 |
| Total | 1,322 | 100.0 | 658 | 100.0 | 154 | 100.0 |

Finally, Figure U.S. 6 shows the distribution of homicides across race and gender categories for offenders of different races and genders.[45] The vast majority of homicides are within racial category. For example, for white male offenders, approximately 90% of the victims are also white, with males constituting the majority of these cases.[46] Black male offenders, shown in the second frame of the Figure, similarly have a vast majority of victims of their same race and gender.[47] Female offenders, shown in the bottom panes of the Figure, kill across gender, but within race.[48] All in all, the data shows clearly that homicides take place within racial groups for the most part and that males are victimized much more than females.[49]

[45] *See infra* Figure U.S. 6.
[46] *See infra* Figure U.S. 6.
[47] *See infra* Figure U.S. 6.
[48] *See infra* Figure U.S. 6.
[49] *See infra* Figure U.S. 6.

**Figure U.S. 6. Victims of Male, Female, White, Black Offenders**




*Source*: Calculated from U.S. DOJ Supplementary Homicide Reports. Note that data were missing for several years in the 1980s and 1990s due to technical problems with the formatting of the data provided by U.S. DOJ.

A simple comparison of the homicides data from Figure U.S. 5 with the execution cases shown above makes clear that black offenders, whose crimes are typically against black victims, are less likely to face the death penalty for such crimes.[50] However, on those occasions when a black kills a white, the chances of execution are higher.[51] These trends of valuing the white victim more highly also apply when the perpetrators are white. The implication of that, however, is that white perpetrators are very rarely executed for killing black victims. In fact, with just 33 black male victims of a white inmate executed, and even fewer in cases with just a single victim, in many states there has never been a white inmate

[50] *See supra* Figures U.S. 5, 6; *supra* Table U.S. 2.
[51] *See supra* Table U.S. 2.

executed for the crime of killing a black male.[52] In Louisiana, no white has ever been executed for such a crime.[53] Our data below on Florida, Georgia, Arizona, and Arkansas shows the same fact.[54] Other states have very low numbers of whites executed for crimes against blacks.[55]

The trends that we document here for the entire United States are replicated in the pages below for each of the top death penalty states.

[52] *See* Frank R. Baumgartner & Tim Lyman, *Race-Of-Victim Discrepancies in Homicides and Executions, Louisiana 1976-2015*, 7 LOY. J. PUB. INT. L. 129, 130 (2015); *supra* Table U.S. 2.

[53] *See* Baumgartner & Lyman, *supra* note 52, at 130.

[54] *See infra* Table FL 2, Table GA 2, Table AR 2, Table AZ 2.

[55] *See infra* Table VA 2, Table MO 2, Table AL 2.

**Table TX 1. Texas Executions and Homicides by Race and Gender of Victims**

| Victim Characteristic | Homicides | | Executions | | Executions per 100 Homicides |
|---|---|---|---|---|---|
| | Number | Percent | Number | Percent | |
| Whites | 31,085 | 64.95 | 464 | 67.15 | 1.49 |
| Blacks | 16,058 | 33.55 | 102 | 14.76 | 0.64 |
| Others | 529 | 1.11 | 125 | 18.09 | 23.63 |
| Unknown | 185 | 0.39 | - | - | - |
| Total | 47,857 | 100.00 | 691 | 100.00 | 1.44 |
| | | | | | |
| Males | 37,719 | 78.82 | 354 | 51.23 | 0.94 |
| Females | 10,079 | 21.06 | 337 | 48.77 | 3.34 |
| Unknown | 59 | 0.12 | - | - | - |
| Total | 47,857 | 100.00 | 691 | 100.00 | 1.44 |
| | | | | | |
| White Female | 6,793 | 14.20 | 241 | 34.88 | 3.55 |
| White Male | 24,291 | 50.76 | 223 | 32.27 | 0.92 |
| Black Female | 3,121 | 6.52 | 51 | 7.38 | 1.63 |
| Black Male | 12,937 | 27.03 | 51 | 7.38 | 0.39 |
| Other | 529 | 1.11 | 125 | 18.09 | 23.63 |
| Unknown | 186 | 0.39 | - | - | - |
| Total | 47,857 | 100.00 | 691 | 100.00 | 1.44 |

*Note: Numbers refer to victims, not inmates executed. Texas executed 518 inmates from 1976 through 2014.

**Figure TX 1. Comparison of Likelihood of Execution by Race and Gender of Victim**

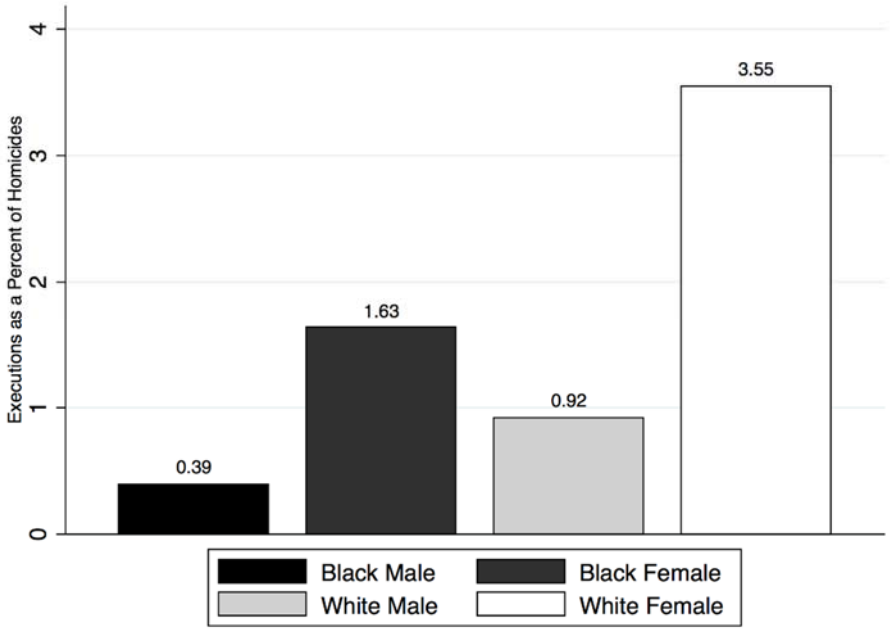


**Figure TX 2. Gender of Victims**

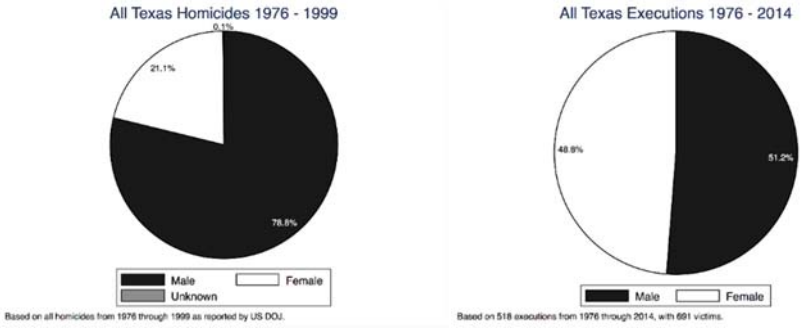



**Figure TX 3. Race of Victims**

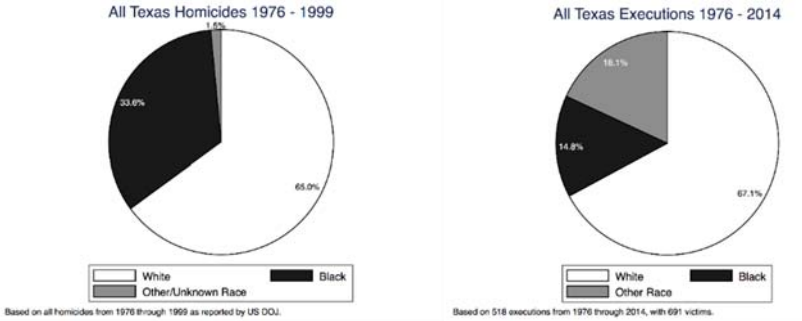



**Figure TX 4. Race and Gender of Victims**

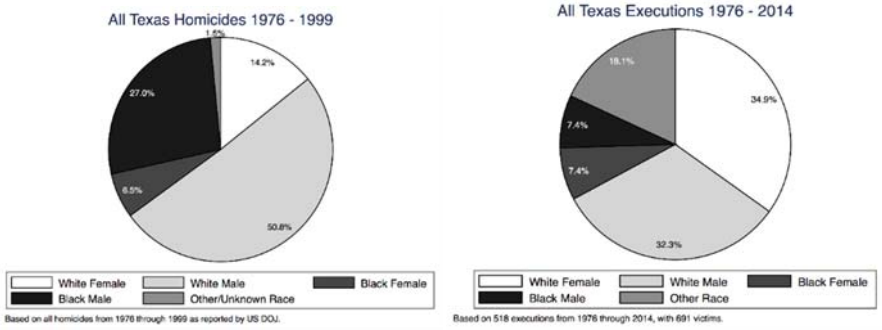
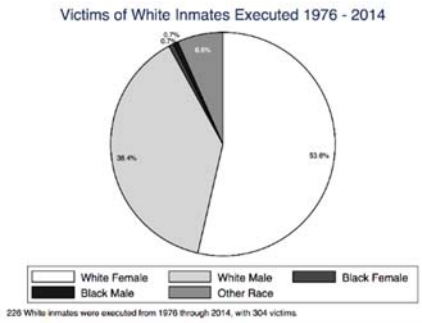
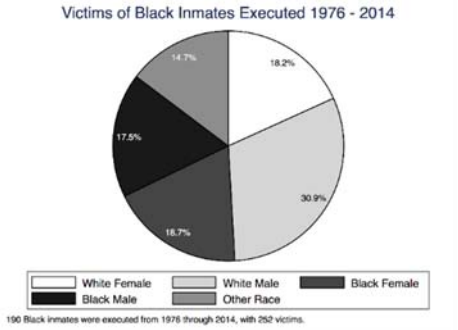


**Figure TX 5. Race and Gender of Victims for White and Black Inmates Executed**

a. White Inmates




b. Black Inmates




c. Hispanic Inmates

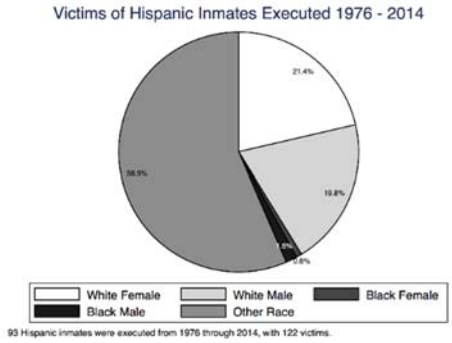



**Table TX 2. Victims of White, Black, and Hispanic Male Inmates Executed**

| | White Inmates | | Black Inmates | | Hispanic Inmates | |
|---|---|---|---|---|---|---|
| Victims | N | % | N | % | N | % |
| White Female | 163 | 53.6 | 46 | 18.2 | 28 | 21.4 |
| White Male | 117 | 38.4 | 78 | 30.9 | 26 | 19.8 |
| Black Female | 2 | 0.7 | 47 | 18.7 | 1 | 0.8 |
| Black Male | 2 | 0.7 | 44 | 17.5 | 2 | 1.5 |
| Other Race | 20 | 6.6 | 37 | 14.7 | 74 | 56.5 |
| Total | 304 | 100.0 | 252 | 100.0 | 131 | 100.00 |

**Table OK 1. Oklahoma Executions and Homicides by Race and Gender of Victims**

| Victim Characteristic | Homicides | | Executions | | Executions Per 100 Homicides |
|---|---|---|---|---|---|
| | Number | Percent | Number | Percent | |
| Whites | 4,014 | 66.10 | 123 | 76.87 | 3.06 |
| Blacks | 1,610 | 26.52 | 21 | 13.13 | 1.30 |
| Others | 434 | 7.15 | 16 | 10.00 | 3.69 |
| Unknown | 14 | 0.23 | - | - | - |
| Total | 6,072 | 100.00 | 160 | 100.00 | 2.63 |
| | | | | | |
| Males | 4,297 | 70.77 | 85 | 53.12 | 1.98 |
| Females | 1,769 | 29.13 | 75 | 46.88 | 4.24 |
| Unknown | 6 | 0.10 | - | - | - |
| Total | 6,072 | 100.00 | 160 | 100.00 | 2.63 |
| | | | | | |
| White Female | 1,288 | 21.21 | 59 | 36.87 | 4.58 |
| White Male | 2,726 | 44.89 | 64 | 40.00 | 2.35 |
| Black Female | 360 | 5.93 | 12 | 7.50 | 3.34 |
| Black Male | 1,250 | 20.59 | 9 | 5.63 | 0.72 |
| Others | 434 | 7.15 | 16 | 10.00 | 3.69 |
| Unknown | 14 | 0.23 | - | - | - |
| Total | 6,072 | 100.00 | 160 | 100.00 | 2.63 |

*Note: Numbers refer to victims, not inmates executed. Oklahoma executed 111 inmates from 1976 to 2014.

**Figure OK 1. Comparison of Likelihood of Execution by Race and Gender of Victim**

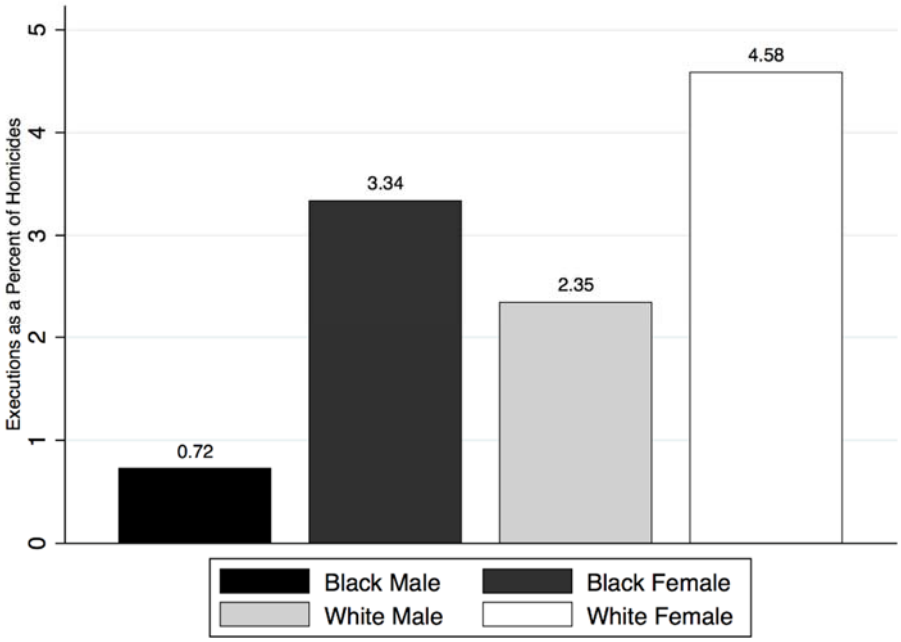


**Figure OK 2. Gender of Victims**

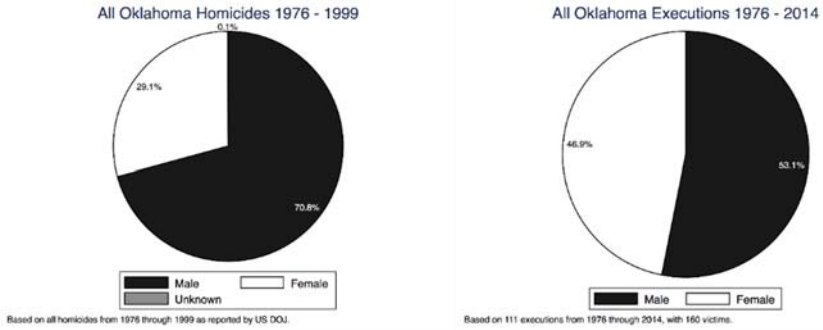



**Figure OK 3. Race of Victims**

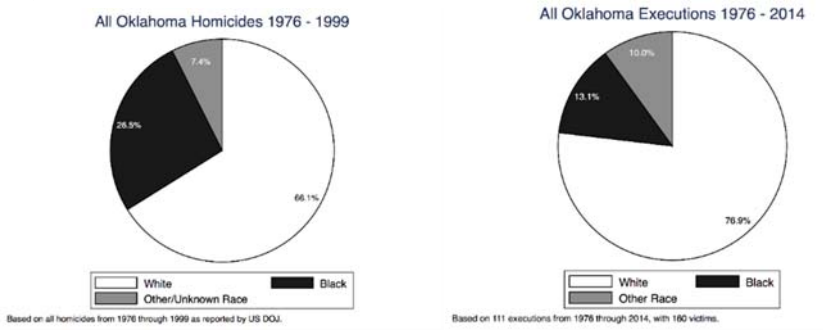



**Figure OK 4. Race and Gender of Victims**

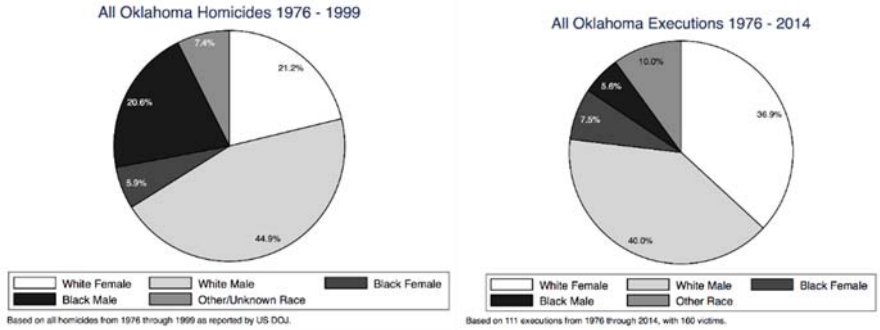
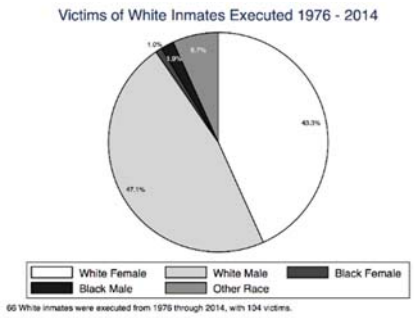


**Figure OK 5. Race and Gender of Victims for White and Black Inmates Executed**

a. White Inmates




b. Black Inmates

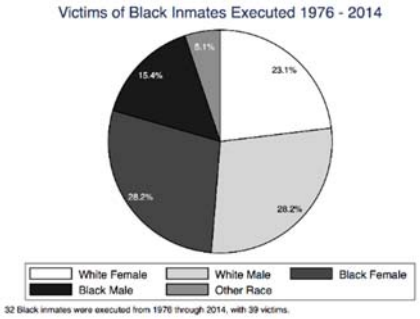



**Table OK 2. Victims of White and Black Inmates Executed**

| | White Inmates | | Black Inmates | |
|---|---|---|---|---|
| Victims | N | % | N | % |
| White Female | 45 | 43.3 | 9 | 23.1 |
| White Male | 49 | 47.1 | 11 | 28.2 |
| Black Female | 1 | 1.0 | 11 | 28.2 |
| Black Male | 2 | 1.9 | 6 | 15.4 |
| Other Race | 7 | 6.7 | 2 | 5.1 |
| Total | 104 | 100.0 | 39 | 100.0 |

**Table VA 1. Virginia Executions and Homicides by Race and Gender of Victims**

| Victim Characteristic | Homicides | | Executions | | Executions per 100 Homicides |
|---|---|---|---|---|---|
| | Number | Percent | Number | Percent | |
| Whites | 4,655 | 41.22 | 116 | 80 | 2.49 |
| Blacks | 6,484 | 57.42 | 24 | 16.56 | 0.37 |
| Others | 132 | 1.17 | 5 | 3.44 | 3.79 |
| Unknown | 21 | 0.19 | - | - | - |
| Total | 11,292 | 100.00 | 145 | 100.00 | 1.28 |
| Males | 8,268 | 73.22 | 70 | 48.28 | 0.85 |
| Females | 3,017 | 26.72 | 75 | 51.72 | 2.49 |
| Unknown | 7 | 0.06 | - | - | - |
| Total | 11,292 | 100.00 | 145 | 100.00 | 1.28 |
| White Female | 1,607 | 14.23 | 61 | 42.07 | 3.79 |
| White Male | 3,046 | 26.97 | 55 | 37.93 | 1.81 |
| Black Female | 1,357 | 12.02 | 13 | 8.97 | 0.96 |
| Black Male | 5,127 | 45.40 | 11 | 7.59 | 0.21 |
| Other | 132 | 1.17 | 5 | 3.44 | 3.77 |
| Unknown | 23 | 0.21 | - | - | - |
| Total | 11,292 | 100.00 | 145 | 100.00 | 1.28 |

Note: Numbers refer to victims, not inmates executed. Virginia executed 110 inmates from 1976 through 2014.

**Figure VA 1. Comparison of Likelihood of Execution by Race and Gender of Victim**

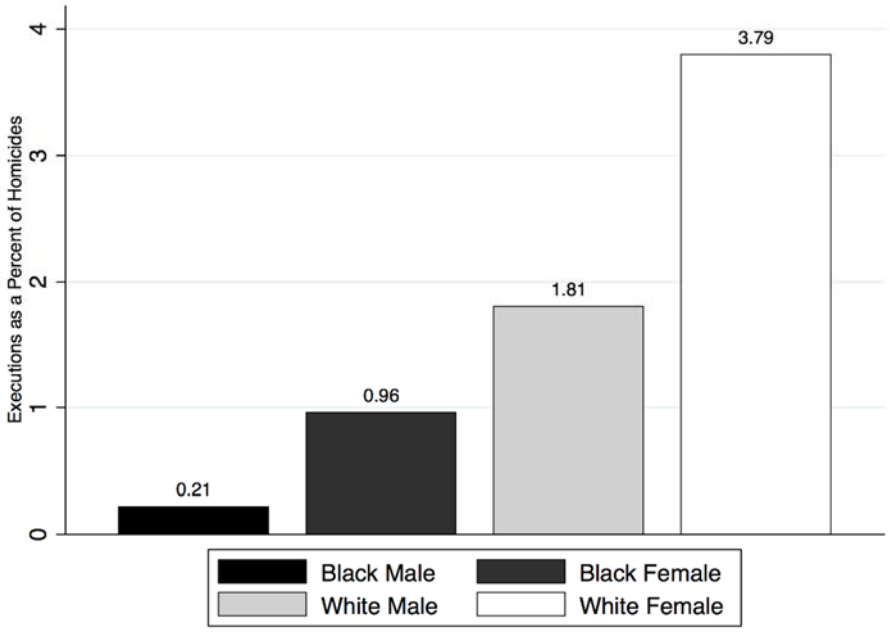


**Figure VA 2. Gender of Victims**

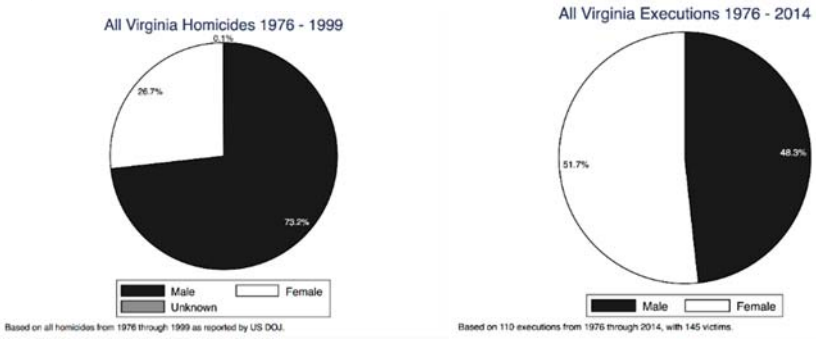



**Figure VA 3. Race of Victims**

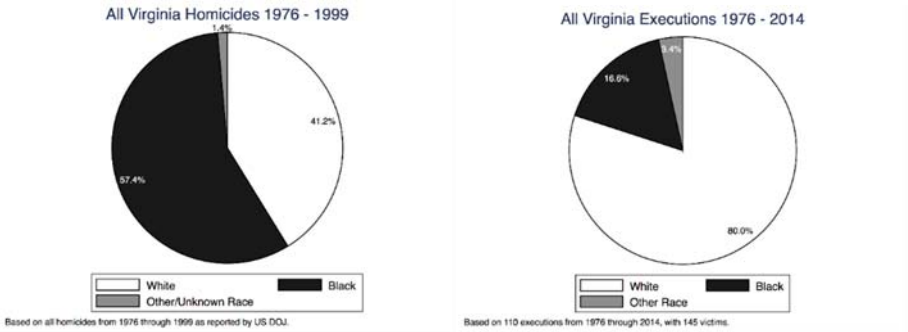



**Figure VA 4. Race and Gender of Victims**

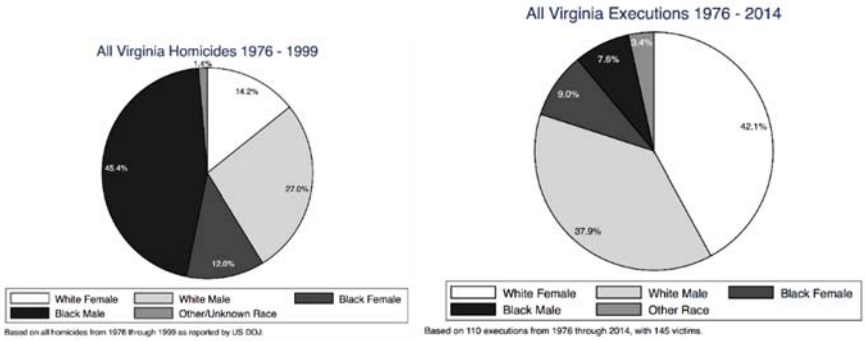
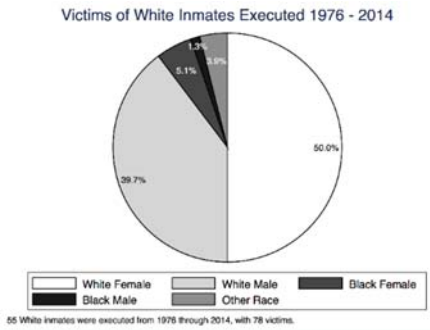


**Figure VA 5. Race and Gender of Victims for White and Black Inmates Executed**

a. White Inmates




b. Black Inmates

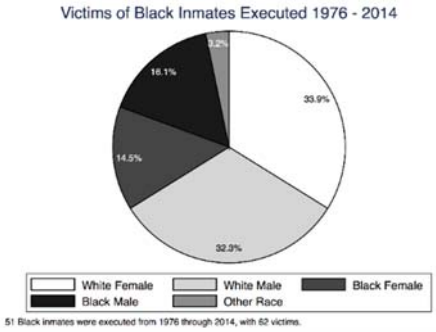



**Table VA 2. Victims of White and Black Male Inmates Executed**

| | White Inmates | | Black Inmates | |
|---|---|---|---|---|
| Victims | N | % | N | % |
| White Female | 39 | 50.0 | 21 | 33.9 |
| White Male | 31 | 39.7 | 20 | 32.3 |
| Black Female | 4 | 5.1 | 9 | 14.5 |
| Black Male | 1 | 1.3 | 10 | 16.1 |
| Others Race | 3 | 3.9 | 2 | 3.2 |
| Total | 78 | 100.0 | 62 | 100.0 |

**Table FL 1. Florida Executions and Homicides by Race and Gender of Victims**

| Victim Characteristic | Homicides | | Executions | | Executions Per 100 Homicides |
|---|---|---|---|---|---|
| | Number | Percent | Number | Percent | |
| Whites | 11,383 | 56.00 | 103 | 72.03 | 0.90 |
| Blacks | 8,738 | 42.99 | 24 | 16.78 | 0.27 |
| Others | 64 | 0.32 | 16 | 11.19 | 25.00 |
| Unknown | 140 | 0.69 | - | - | - |
| Total | 20,325 | 100.00 | 143 | 100.00 | 0.70 |
| | | | | | |
| Males | 15,026 | 73.93 | 82 | 57.34 | 0.55 |
| Females | 5,208 | 25.62 | 61 | 42.66 | 1.17 |
| Unknown | 91 | 0.45 | - | - | - |
| Total | 20,325 | 100.00 | 143 | 100.00 | 0.70 |
| | | | | | |
| White Female | 3,274 | 16.11 | 49 | 34.27 | 1.50 |
| White Male | 8,109 | 39.90 | 54 | 37.76 | 0.67 |
| Black Female | 1,904 | 9.37 | 8 | 5.59 | 0.42 |
| Black Male | 6,834 | 33.62 | 16 | 11.19 | 0.23 |
| Other | 64 | 0.31 | 16 | 11.19 | 25.00 |
| Unknown | 140 | 0.69 | - | - | - |
| Total | 20,325 | 100.00 | 143 | 100.00 | 0.70 |

Note: Numbers refer to victims, not inmates executed. Florida executed 89 inmates from 1976 through 2014.

**Figure FL 1. Comparison of Likelihood of Execution by Race and Gender of Victim**

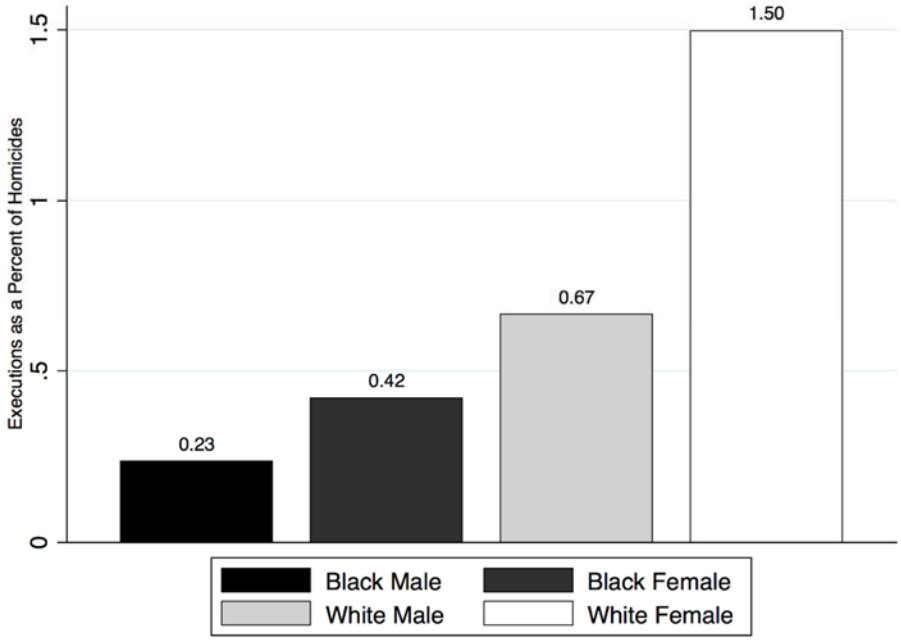


**Figure FL 2. Gender of Victims**

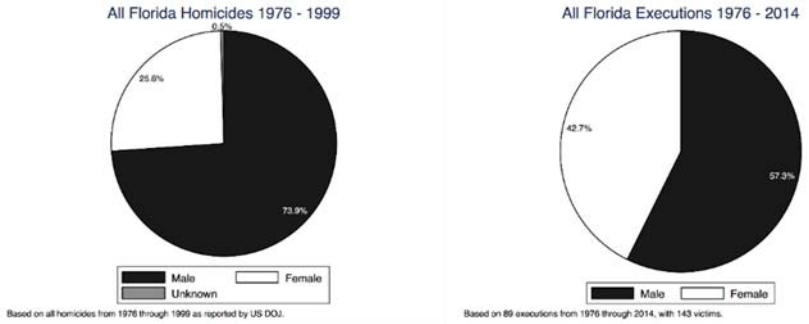



**Figure FL 3. Race of Victims**

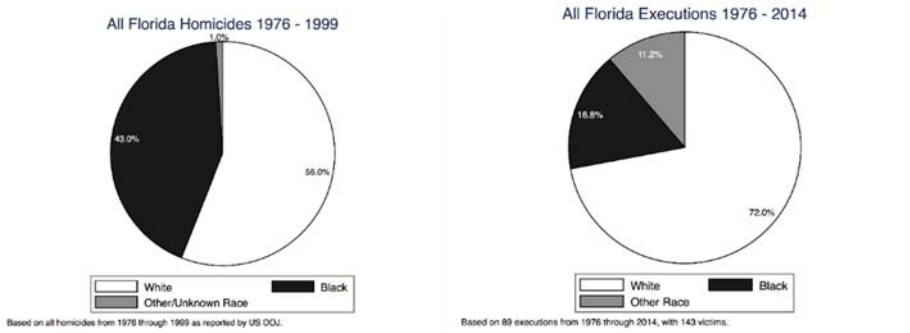



**Figure FL 4. Race and Gender of Victims**

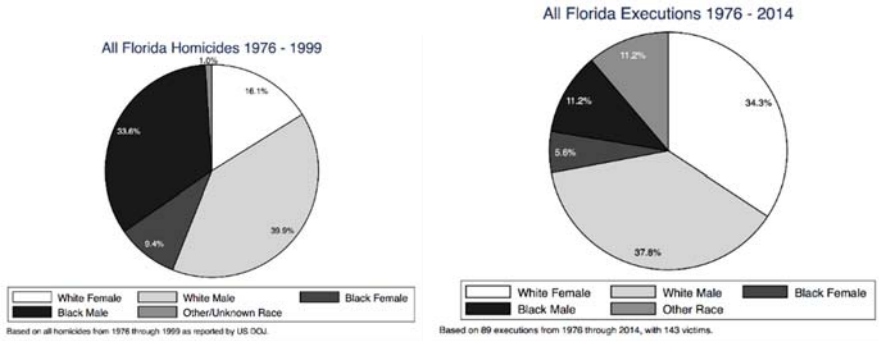
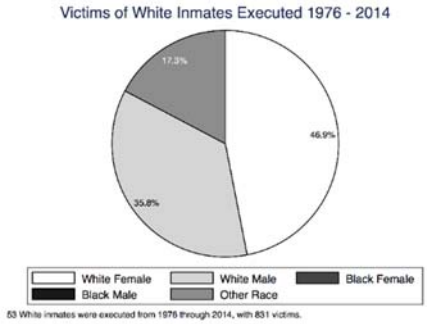
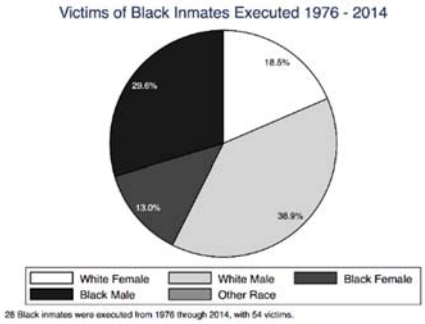


**Figure FL 5. Race and Gender of Victims for White, Black, and Hispanic Inmates Executed**

a. White Inmates




b. Black Inmates




c. Hispanic Inmates

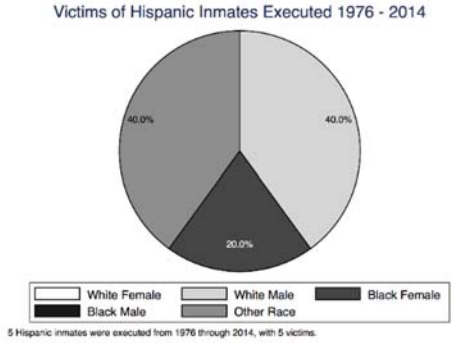



**Table FL 2. Victims of White, Black, and Hispanic Male Inmates Executed**

| | White Inmates | | Black Inmates | | Hispanic Inmates | |
|---|---|---|---|---|---|---|
| Victims | N | % | N | % | N | % |
| White Female | 38 | 46.9 | 10 | 18.5 | 0 | 0.0 |
| White Male | 29 | 35.8 | 21 | 38.9 | 2 | 40.0 |
| Black Female | 0 | 0.0 | 7 | 13.0 | 1 | 20.0 |
| Black Male | 0 | 0.0 | 16 | 29.6 | 0 | 0.0 |
| Other Race | 14 | 17.3 | 0 | 0.0 | 2 | 40.0 |
| Total | 81 | 100.0 | 54 | 100.0 | 5 | 100.0 |

**Table MO 1. Missouri Executions and Homicides by Race and Gender of Victims**

| Victim Characteristic | Homicides | | Executions | | Executions Per 100 Homicides |
|---|---|---|---|---|---|
| | Number | Percent | Number | Percent | |
| Whites | 4,036 | 36.23 | 87 | 80.56 | 2.16 |
| Blacks | 7,027 | 63.08 | 21 | 19.44 | 0.30 |
| Others | 41 | 0.37 | 0 | 0.00 | 0.00 |
| Unknown | 36 | 0.32 | - | - | - |
| Total | 11,140 | 100.00 | 108 | 100.00 | 0.97 |
| | | | | | |
| Males | 8,588 | 77.09 | 60 | 55.56 | 0.70 |
| Females | 2,545 | 22.85 | 48 | 44.44 | 1.89 |
| Unknown | 7 | 0.06 | - | - | - |
| Total | 11,140 | 100.00 | 108 | 100.00 | 0.97 |
| | | | | | |
| White Female | 1,331 | 11.94 | 40 | 37.03 | 3.01 |
| White Male | 2,705 | 24.28 | 47 | 43.52 | 1.74 |
| Black Female | 1,198 | 10.75 | 8 | 7.41 | 0.67 |
| Black Male | 5,828 | 52.32 | 13 | 12.04 | 0.22 |
| Other | 41 | 0.37 | 0 | 0.00 | 0.00 |
| Unknown | 37 | 0.34 | - | - | - |
| Total | 11,140 | 100.00 | 108 | 100.00 | 0.97 |

Note: Numbers refer to victims, not inmates executed. Missouri executed 80 inmates from 1976 through 2014.

**Figure MO 1. Comparison of Likelihood of Execution by Race and Gender of Victim**

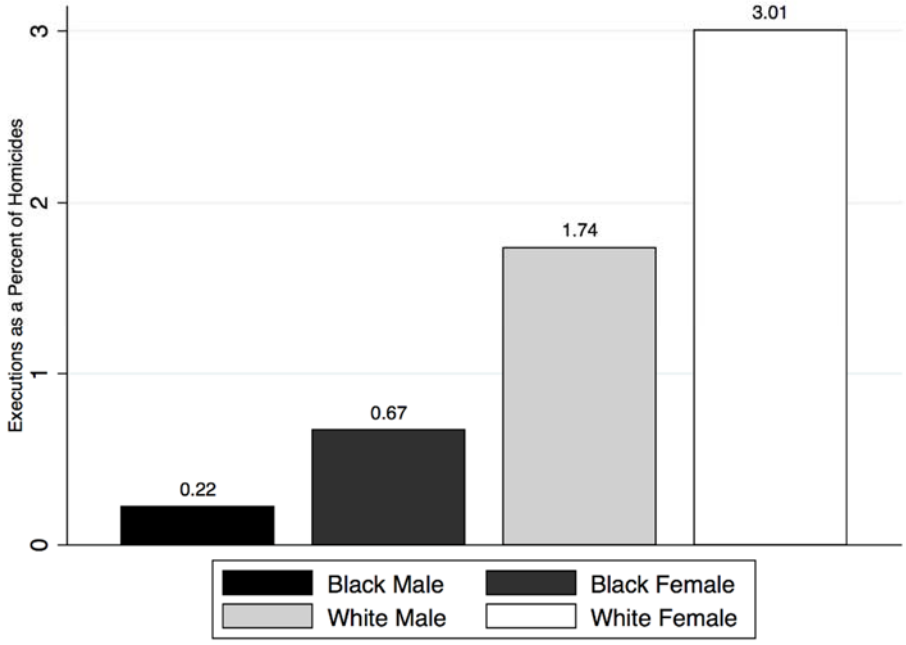


**Figure MO 2. Gender of Victims**

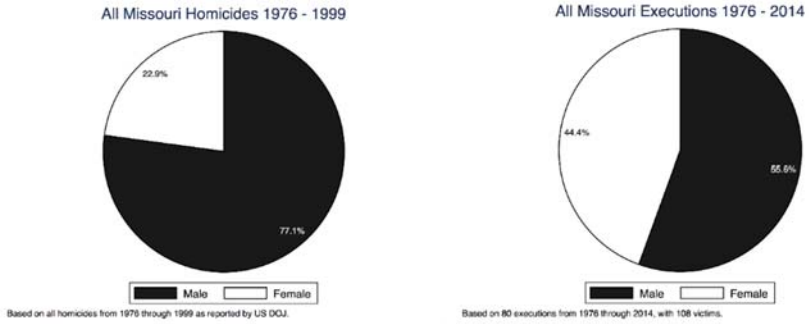



**Figure MO 3. Race of Victims**

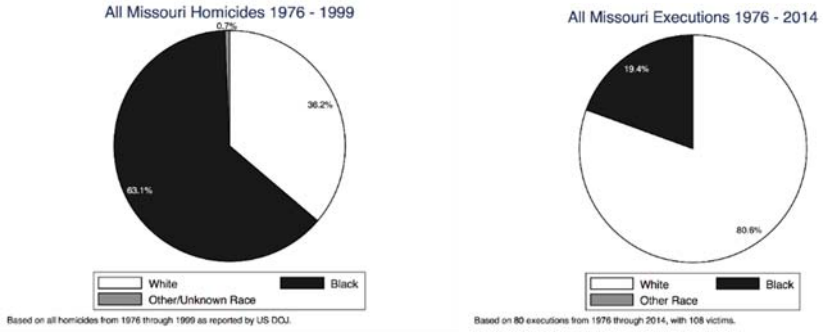



**Figure MO 4. Race and Gender of Victims**

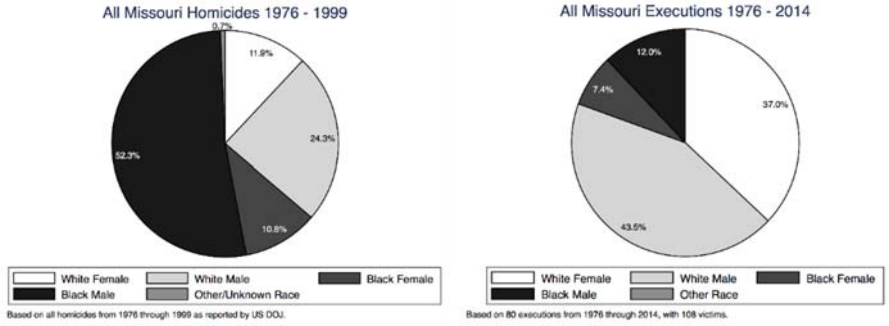
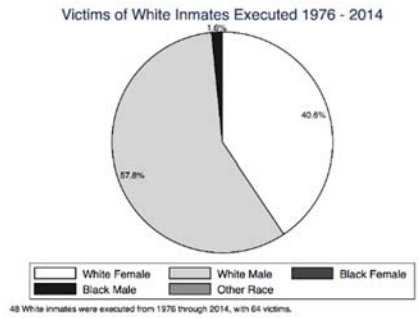


**Figure MO 5. Race and Gender of Victims for White and Black Inmates Executed**

a. White Inmates




b. Black Inmates

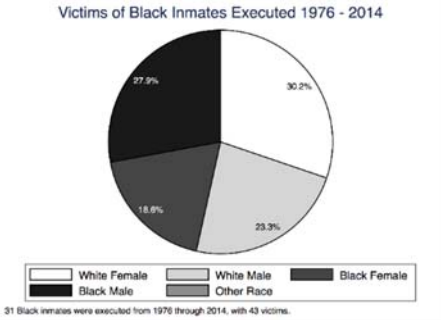



**Table MO 2. Victims of White and Black Male Inmates Executed**

| | White Inmates | | Black Inmates | |
|---|---|---|---|---|
| Victims | N | % | N | % |
| White Female | 26 | 40.6 | 13 | 30.2 |
| White Male | 37 | 57.8 | 10 | 23.3 |
| Black Female | 0 | 0.0 | 8 | 18.6 |
| Black Male | 1 | 1.6 | 12 | 27.9 |
| Other Race | 0 | 0.0 | 0 | 0.0 |
| Total | 64 | 100.0 | 43 | 100.0 |

**Table AL 1. Alabama Executions and Homicides by Race and Gender of Victims**

| Victim Characteristic | Homicides | | Executions | | Executions Per 100 Homicides |
|---|---|---|---|---|---|
| | Number | Percent | Number | Percent | |
| Whites | 3,642 | 34.25 | 59 | 84.29 | 1.62 |
| Blacks | 6,853 | 64.43 | 11 | 15.71 | 0.16 |
| Others | 41 | 0.39 | 0 | 0.00 | 0.00 |
| Unknown | 99 | 0.93 | - | - | - |
| Total | 10,635 | 100.00 | 70 | 100.00 | 0.66 |
| Males | 8,091 | 76.08 | 34 | 48.57 | 0.42 |
| Females | 2,464 | 23.17 | 36 | 51.43 | 1.46 |
| Unknown | 80 | 0.75 | - | - | - |
| Total | 10,635 | 100.00 | 70 | 100.00 | 0.66 |
| White Female | 1,046 | 9.83 | 31 | 44.29 | 2.96 |
| White Male | 2,597 | 24.42 | 28 | 40.00 | 1.08 |
| Black Female | 1,405 | 13.21 | 5 | 7.14 | 0.36 |
| Black Male | 5,445 | 51.20 | 6 | 8.57 | 0.11 |
| Other | 41 | 0.39 | 0 | 0.00 | 0.00 |
| Unknown | 101 | 0.95 | - | - | - |
| Total | 10,635 | 100.00 | 70 | 100.00 | 0.66 |

Note: Numbers refer to victims, not inmates executed. Alabama executed 56 inmates from 1976 through 2014.

**Figure AL 1. Comparison of Likelihood of Execution by Race and Gender of Victim**

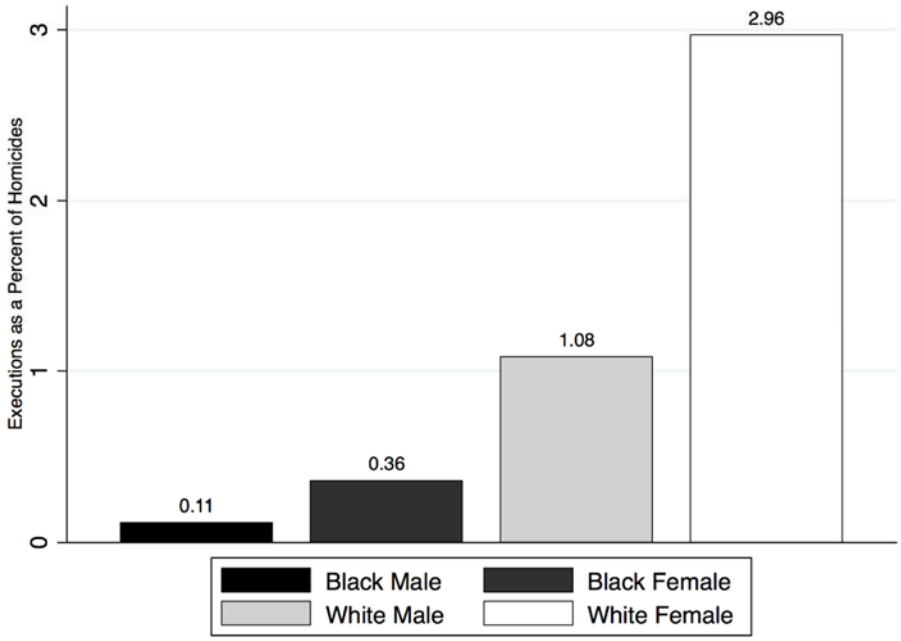


**Figure AL 2. Gender of Victims**

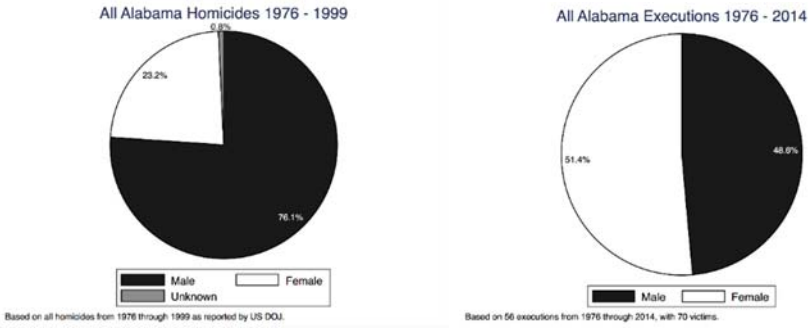



**Figure AL 3. Race of Victims**

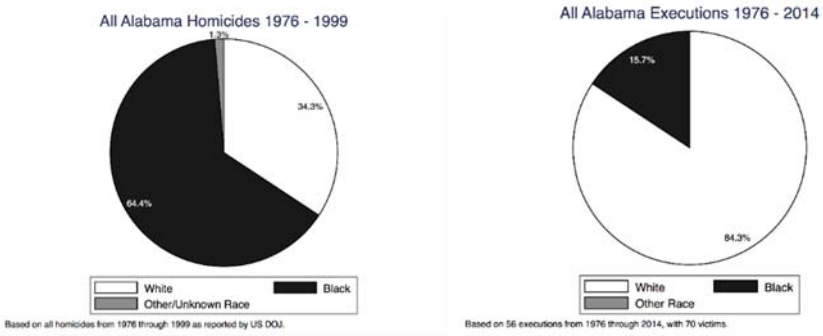



**Figure AL 4. Race and Gender of** Victims

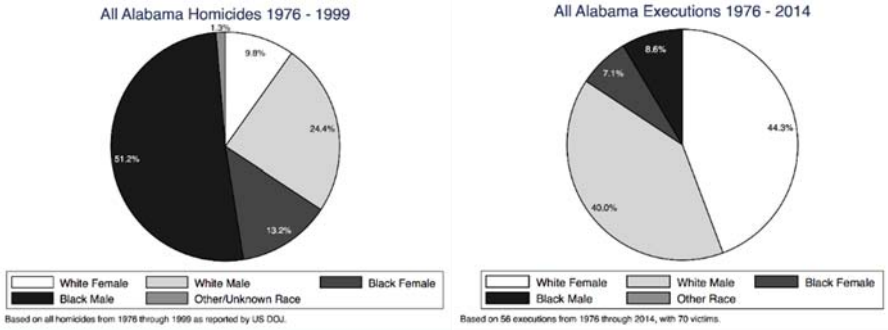
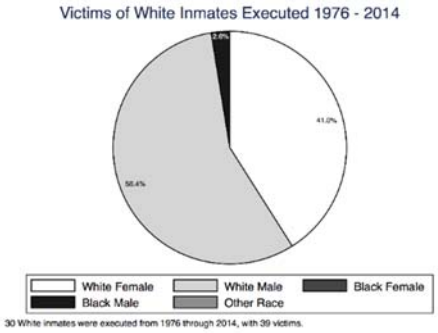


**Figure AL 5. Race and Gender of Victims for White and Black Inmates Executed**

a. White Inmates




b. Black Inmates

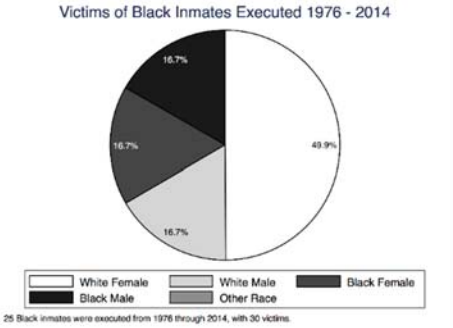



**Table AL 2. Victims of White and Black Males Executed**

| | White Inmates | | Black Inmates | |
|---|---|---|---|---|
| Victims | N | % | N | % |
| White Female | 16 | 41.0 | 15 | 49.9 |
| White Male | 22 | 56.4 | 5 | 16.7 |
| Black Female | 0 | 0.0 | 5 | 16.7 |
| Black Male | 1 | 2.6 | 5 | 16.7 |
| Other Race | 0 | 0.0 | 0 | 0.0 |
| Total | 39 | 100.0 | 30 | 100.0 |

**Table GA 1. Georgia Executions and Homicides by Race and Gender of Victims**

| Victim Characteristic | Homicides | | Executions | | Executions Per 100 Homicides |
|---|---|---|---|---|---|
| | Number | Percent | Number | Percent | |
| Whites | 5,379 | 31.88 | 71 | 89.87 | 1.32 |
| Blacks | 11,272 | 66.80 | 8 | 10.13 | 0.07 |
| Others | 130 | 0.77 | 0 | 0.00 | 0.00 |
| Unknown | 92 | 0.55 | - | - | - |
| Total | 16,873 | 100.00 | 79 | 100.00 | 0.47 |
| | | | | | |
| Males | 12,525 | 74.23 | 38 | 48.10 | 0.30 |
| Females | 4,329 | 25.66 | 41 | 51.90 | 0.95 |
| Unknown | 19 | 0.11 | - | - | - |
| Total | 16,873 | 100.00 | 79 | 100.00 | 0.47 |
| | | | | | |
| White Female | 1,589 | 9.42 | 34 | 43.04 | 2.14 |
| White Male | 3,789 | 22.45 | 37 | 46.84 | 0.98 |
| Black Female | 2,682 | 15.90 | 7 | 8.86 | 0.26 |
| Black Male | 8,586 | 50.89 | 1 | 1.26 | 0.01 |
| Other | 130 | 0.77 | 0 | 0.00 | 0.00 |
| Unknown | 97 | 0.57 | - | - | - |
| Total | 16,873 | 100.00 | 79 | 100.00 | 0.47 |

Note: Numbers refer to victims, not inmates executed. Georgia executed 89 inmates from 1976 through 2014.

**Figure GA 1. Comparison of Likelihood of Execution by Race and Gender of Victim**

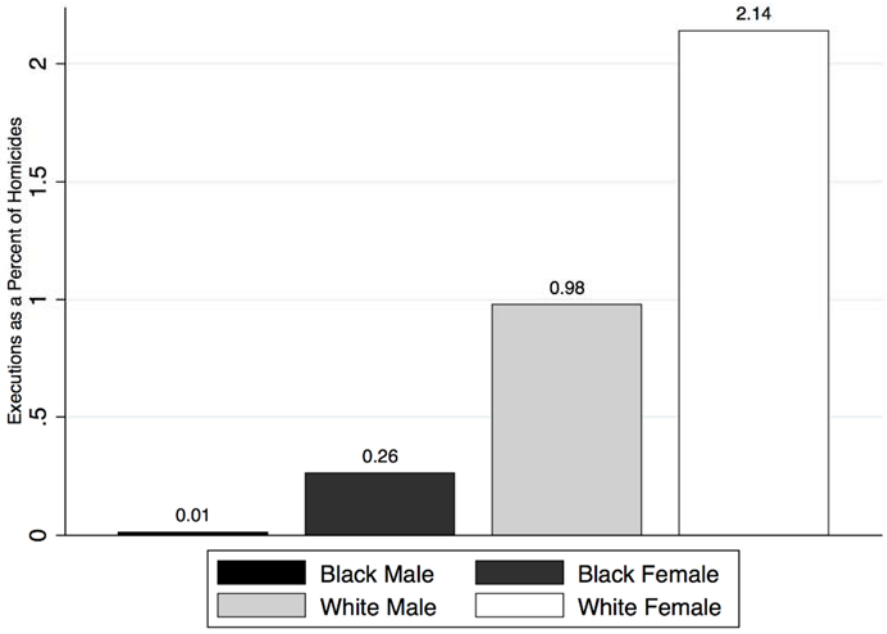


**Figure GA 2. Gender of Victims**

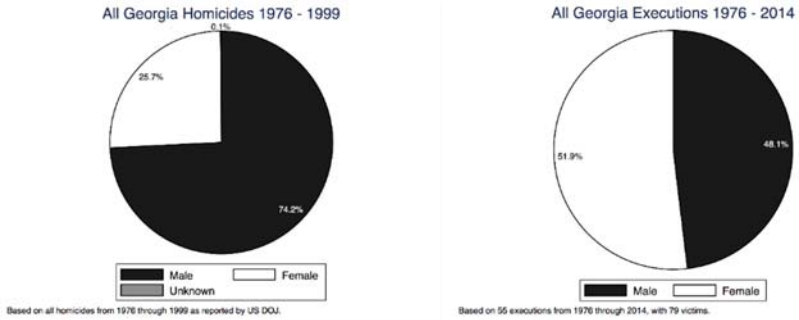



**Figure GA 3. Race of Victims**

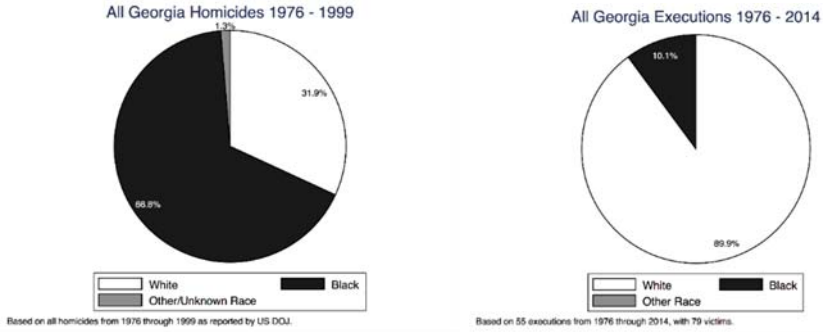



**Figure GA 4. Race and Gender of Victims**

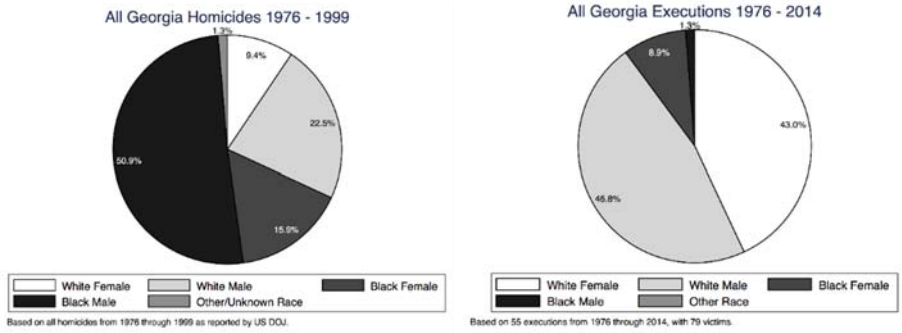


**Figure GA 5. Race and Gender of Victims for White and Black Inmates Executed**

a. White Inmates

b. Black Inmates

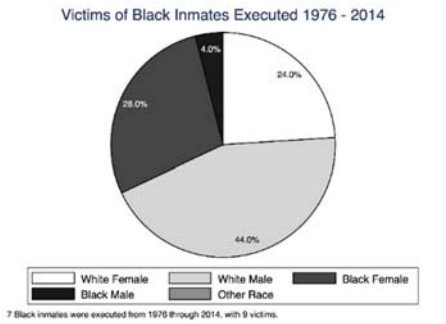



**Table GA 2. Victims of White and Black Male Inmates Executed**

| | White Inmates | | Black Inmates | |
|---|---|---|---|---|
| Victims | N | % | N | % |
| White Female | 28 | 51.9 | 6 | 24.0 |
| White Male | 26 | 48.1 | 11 | 44.0 |
| Black Female | 0 | 0.0 | 7 | 28.0 |
| Black Male | 0 | 0.0 | 1 | 4.0 |
| Other Race | 0 | 0.0 | 0 | 0.0 |
| Total | 54 | 100.0 | 25 | 100.0 |

**Table OH 1. Ohio Executions and Homicides by Race and Gender of Victims**

| Victim Characteristic | Homicides | | Executions | | Executions Per 100 Homicides |
|---|---|---|---|---|---|
| | Number | Percent | Number | Percent | |
| Whites | 6,763 | 42.98 | 55 | 65.48 | 0.81 |
| Blacks | 8,832 | 56.13 | 26 | 30.95 | 0.29 |
| Others | 105 | 0.67 | 3 | 3.57 | 2.86 |
| Unknown | 34 | 0.22 | - | - | - |
| Total | 15,734 | 100.00 | 84 | 100.00 | 0.53 |
| | | | | | |
| Males | 11,527 | 73.26 | 40 | 47.62 | 0.35 |
| Females | 4,204 | 26.72 | 44 | 52.38 | 1.05 |
| Unknown | 3 | 0.02 | - | - | - |
| Total | 15,734 | 100.00 | 84 | 100.00 | 0.53 |
| | | | | | |
| White Female | 2,264 | 14.39 | 35 | 41.67 | 1.55 |
| White Male | 4,499 | 28.59 | 20 | 23.81 | 0.44 |
| Black Female | 1,903 | 12.09 | 9 | 10.71 | 0.47 |
| Black Male | 6,929 | 44.04 | 17 | 20.24 | 0.25 |
| Other | 105 | 0.67 | 3 | 3.57 | 2.86 |
| Unknown | 34 | 0.22 | - | - | - |
| Total | 15,734 | 100.00 | 84 | 100.00 | 0.53 |

Note: Numbers refer to victims, not inmates executed. Ohio executed 53 inmates from 1976 through 2014.

**Figure OH 1. Comparison of Likelihood of Execution by Race and Gender of Victim**

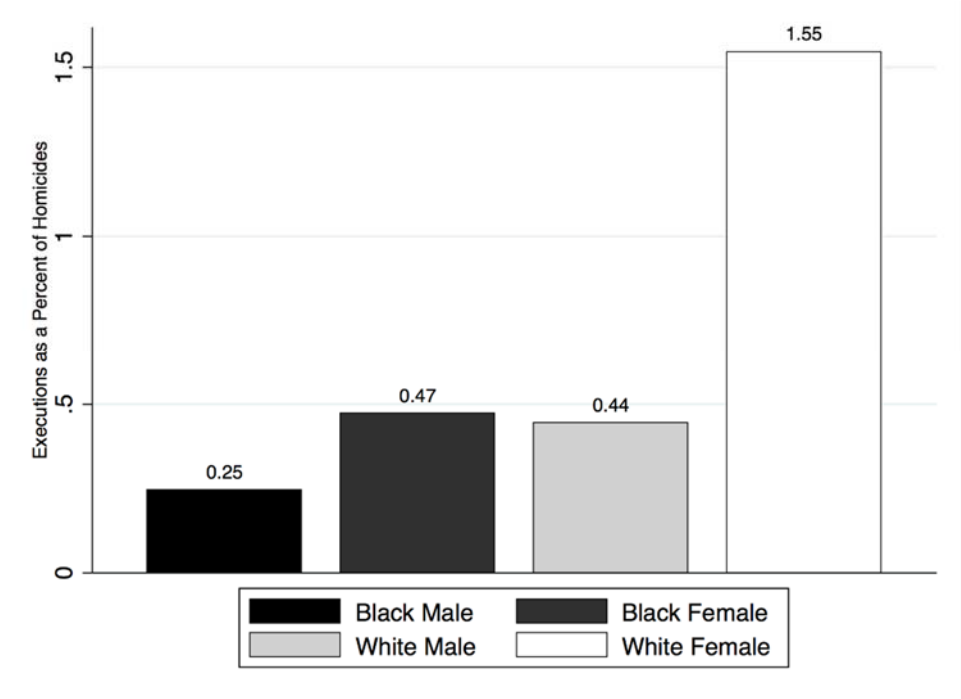


**Figure OH 2. Gender of Victims**

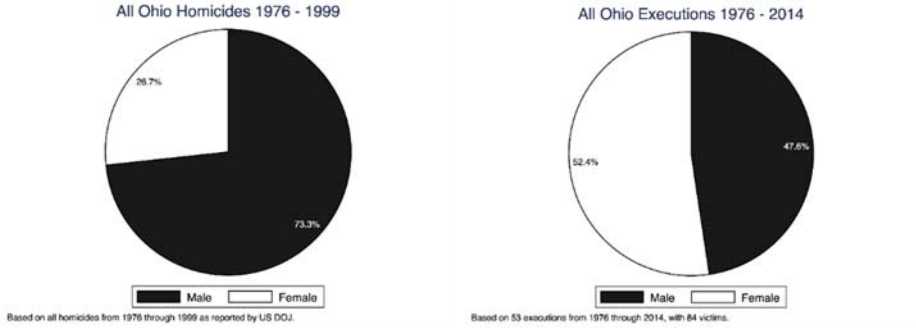



**Figure OH 3. Race of Victims**

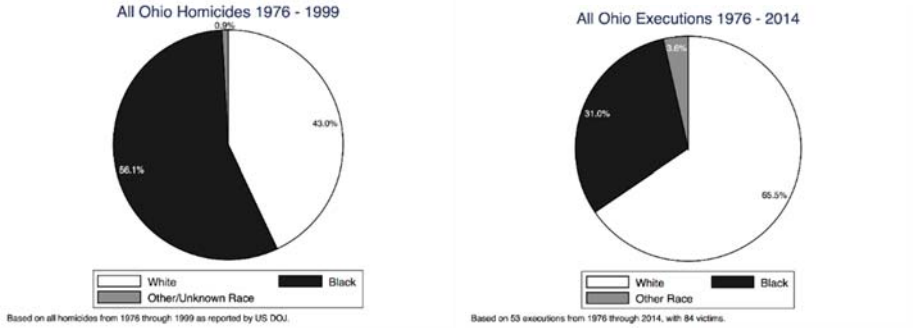



**Figure OH 4. Race and Gender of Victims**

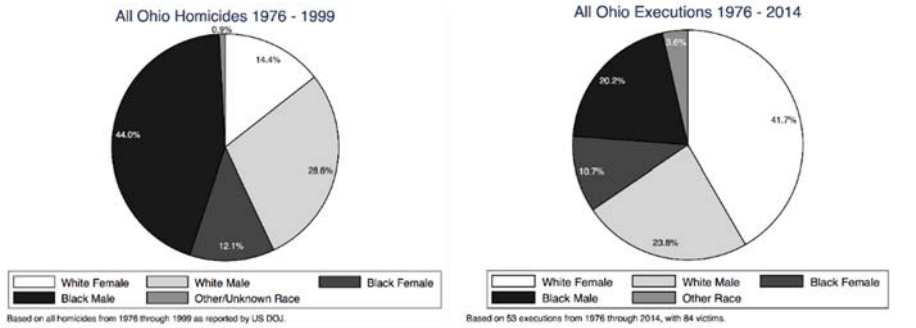
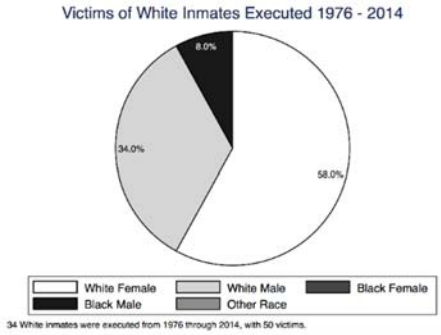


**Figure OH 5. Race and Gender of Victims for White and Black Inmates Executed**

a. White Inmates




b. Black Inmates

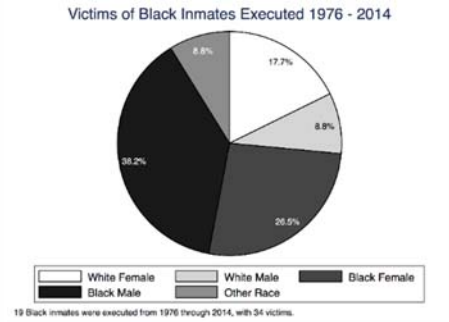



**Table OH 2. Victims of White and Black Male Inmates Executed**

| | White Inmates | | Black Inmates | |
|---|---|---|---|---|
| Victims | N | % | N | % |
| White Female | 29 | 58.0 | 6 | 17.7 |
| White Male | 17 | 34.0 | 3 | 8.8 |
| Black Female | 0 | 0.0 | 9 | 26.5 |
| Black Male | 4 | 8.0 | 13 | 38.2 |
| Other Race | 0 | 0.0 | 3 | 8.8 |
| Total | 50 | 100.0 | 34 | 100.0 |

**Table NC 1. North Carolina Executions and Homicides by Race and Gender of Victims**

| Victim Characteristic | Homicides | | Executions | | Executions Per 100 Homicides |
|---|---|---|---|---|---|
| | Number | Percent | Number | Percent | |
| Whites | 6,153 | 42.11 | 43 | 76.78 | 0.70 |
| Blacks | 8,002 | 54.77 | 10 | 17.86 | 0.12 |
| Others | 398 | 2.72 | 3 | 5.36 | 0.75 |
| Unknown | 58 | 0.40 | - | - | - |
| Total | 14,611 | 100.00 | 56 | 100.00 | 0.38 |
| | | | | | |
| Males | 10,974 | 75.11 | 26 | 46.43 | 0.24 |
| Females | 3,613 | 24.73 | 30 | 53.57 | 0.83 |
| Unknown | 24 | 0.16 | - | - | - |
| Total | 14,611 | 100.00 | 56 | 100.00 | 0.38 |
| | | | | | |
| White Female | 1,725 | 11.81 | 21 | 37.50 | 1.22 |
| White Male | 4,424 | 30.28 | 22 | 39.29 | 0.50 |
| Black Female | 1,783 | 12.20 | 8 | 14.28 | 0.45 |
| Black Male | 6,219 | 42.56 | 2 | 3.57 | 0.03 |
| Other | 398 | 2.72 | 3 | 5.36 | 0.75 |
| Unknown | 62 | 0.43 | - | - | - |
| Total | 14,611 | 100.00 | 56 | 100.00 | 0.38 |

*Note: Numbers refer to victims, not inmates executed. North Carolina executed 43 inmates from 1976 to 2014.

**Figure NC 1. Comparison of Likelihood of Execution by Race and Gender of Victim**

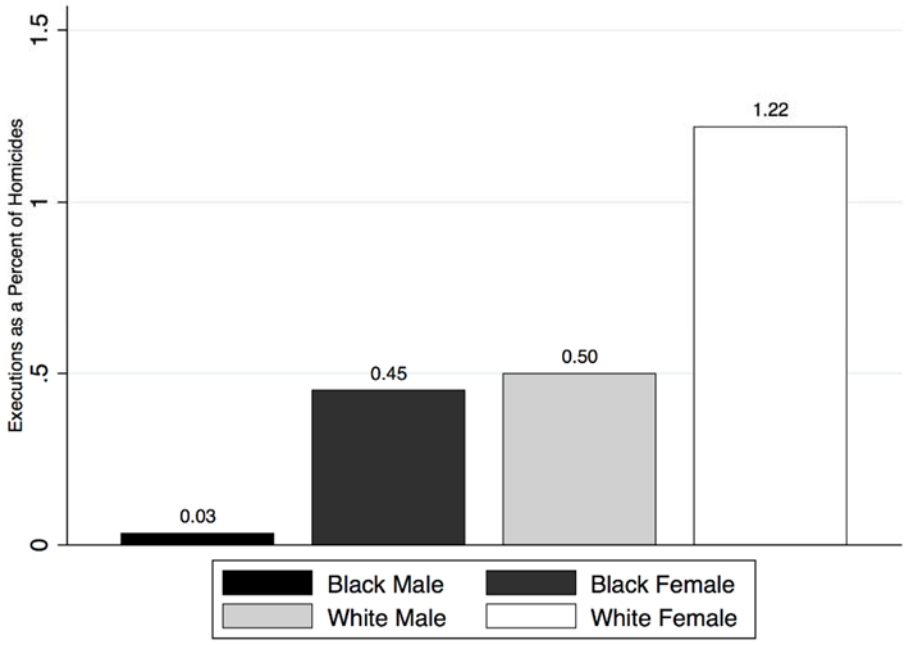


**Figure NC 2. Gender of Victims**

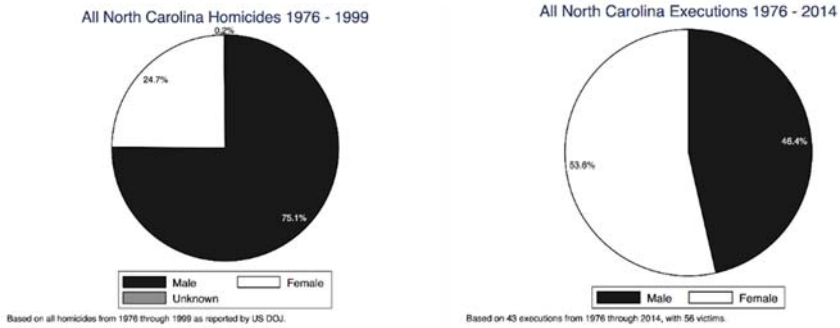



**Figure NC 3. Race of Victims**

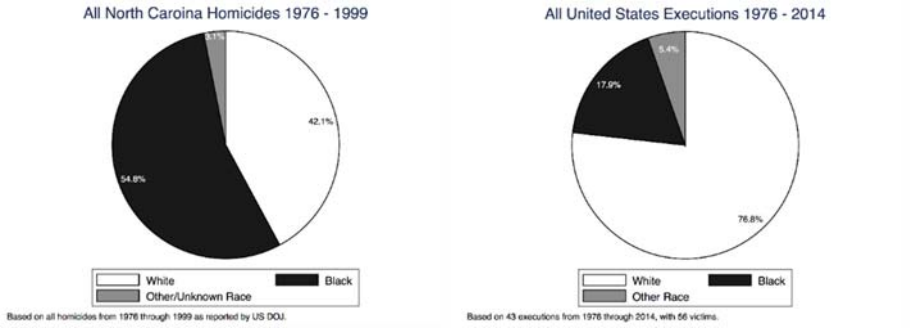



**Figure NC 4. Race and Gender of Victims**

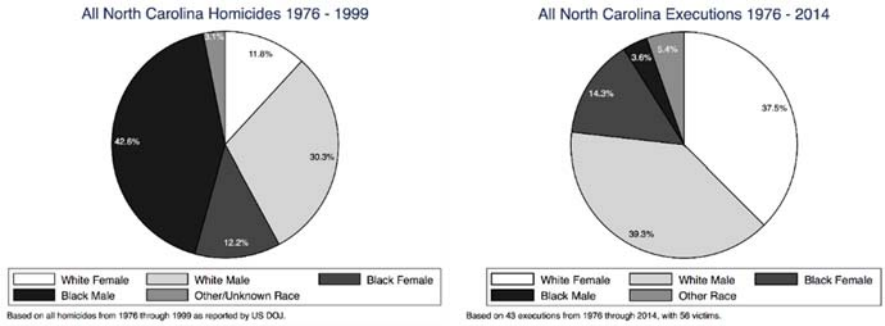
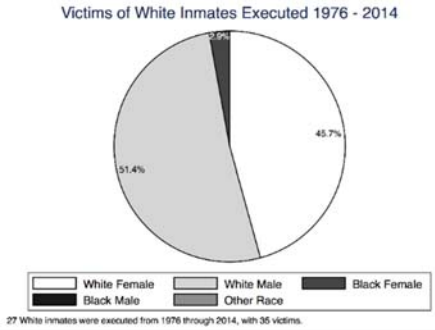


**Figure NC 5. Race and Gender of Victims for White and Black Inmates Executed**

a. White Inmates




b. Black Inmates

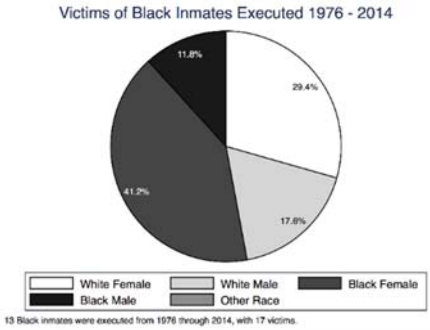



**Table NC 2. Victims of White and Black Male Inmates Executed**

| | White Inmates | | Black Inmates | |
|---|---|---|---|---|
| Victims | N | % | N | % |
| White Female | 16 | 45.7 | 5 | 29.4 |
| White Male | 18 | 51.4 | 3 | 17.6 |
| Black Female | 1 | 2.9 | 7 | 41.2 |
| Black Male | 0 | 0.0 | 2 | 11.8 |
| Other Race | 0 | 0.0 | 0 | 0.0 |
| Total | 35 | 100.0 | 17 | 100.0 |

**Table SC 1. South Carolina Executions and Homicides by Race and Gender of Victims**

| Victim Characteristic | Homicides | | Executions | | Executions Per 100 Homicides |
|---|---|---|---|---|---|
| | Number | Percent | Number | Percent | |
| Whites | 3,333 | 41.74 | 51 | 77.27 | 1.53 |
| Blacks | 4,616 | 57.81 | 14 | 21.21 | 0.30 |
| Others | 31 | 0.39 | 1 | 1.52 | 3.23 |
| Unknown | 5 | 0.06 | - | - | - |
| Total | 7,985 | 100.00 | 66 | 100.00 | 0.83 |
| | | | | | |
| Males | 5,840 | 73.14 | 37 | 56.06 | 0.63 |
| Females | 2,143 | 26.84 | 29 | 43.94 | 1.35 |
| Unknown | 2 | 0.02 | - | - | - |
| Total | 7,985 | 100.00 | 66 | 100.00 | 0.83 |
| | | | | | |
| White Female | 1,022 | 12.80 | 22 | 33.33 | 2.15 |
| White Male | 2,311 | 28.94 | 29 | 43.94 | 1.26 |
| Black Female | 1,110 | 13.90 | 7 | 10.61 | 0.63 |
| Black Male | 3,505 | 43.89 | 7 | 10.61 | 0.20 |
| Other | 31 | 0.39 | 1 | 1.51 | 3.23 |
| Unknown | 6 | 0.08 | - | - | - |
| Total | 7,985 | 100.00 | 66 | 100.00 | 0.83 |

*Note: Numbers refer to victims, not inmates executed. South Carolina executed 43 inmates from 1976 to 2014.

**Figure SC 1. Comparison of Likelihood of Execution by Race and Gender of Victim**

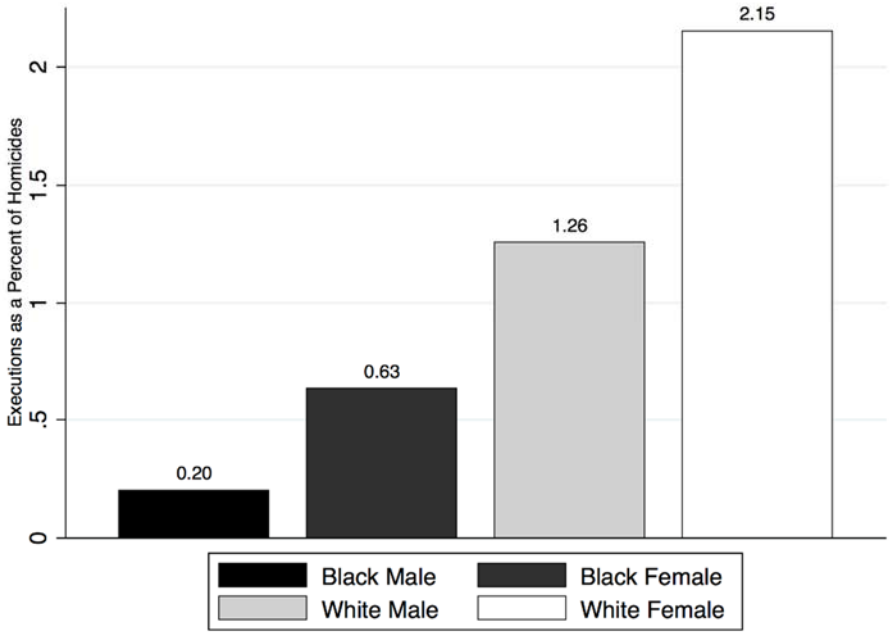


**Figure SC 2. Gender of Victims**

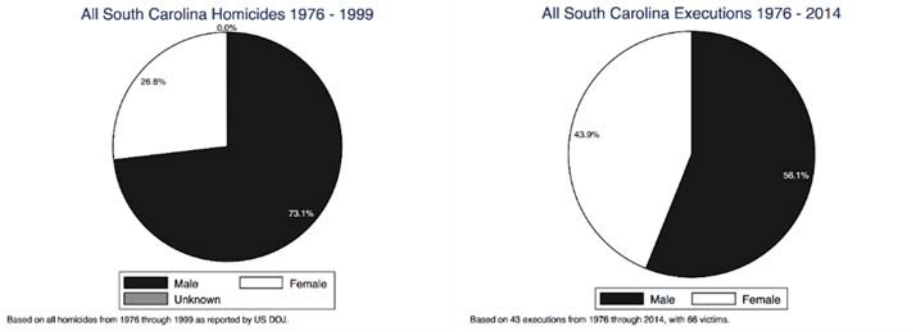



**Figure SC 3. Race of Victims**

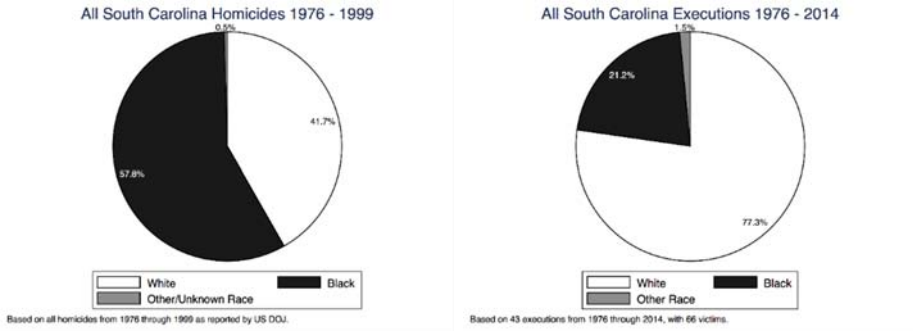



**Figure SC 4. Race and Gender of Victims**

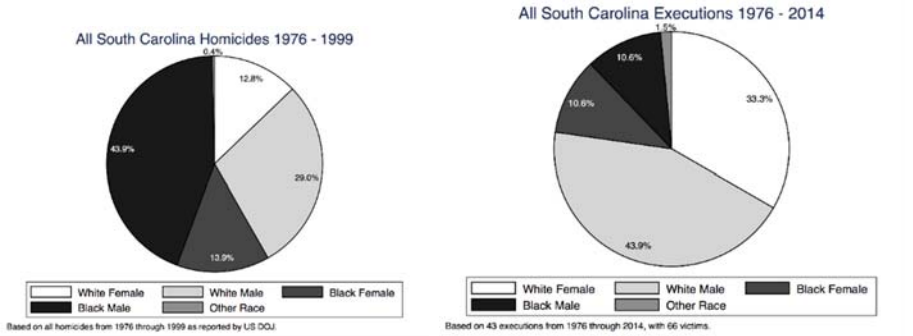
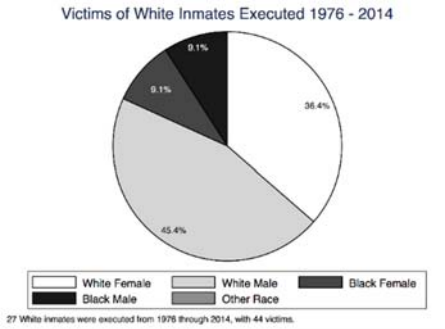


**Figure SC 5. Race and Gender of Victims for White and Black Inmates Executed**

a. White Inmates




b. Black Inmates

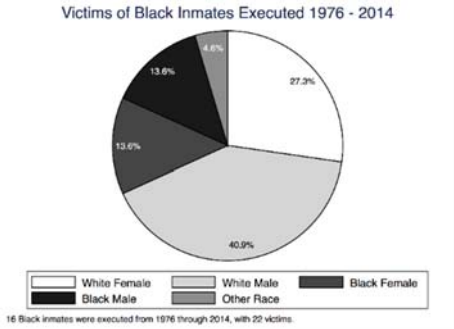



**Table SC 2. Victims of White and Black Male Inmates Executed**

| | White Inmates | | Black Inmates | |
|---|---|---|---|---|
| Victims | N | % | N | % |
| White Female | 16 | 36.4 | 6 | 27.3 |
| White Male | 20 | 45.4 | 9 | 40.9 |
| Black Female | 4 | 9.1 | 3 | 13.6 |
| Black Male | 4 | 9.1 | 3 | 13.6 |
| Other Race | 0 | 0.0 | 1 | 4.6 |
| Total | 44 | 100.0 | 22 | 100.0 |

**Table AZ 1. Arizona Executions and Homicides by Race and Gender of Victims**

| Victim Characteristic | Homicides | | Executions | | Executions per 100 Homicides |
|---|---|---|---|---|---|
| | Number | Percent | Number | Percent | |
| Whites | 5,782 | 82.90 | 51 | 89.47 | 0.88 |
| Blacks | 843 | 12.09 | 0 | 0.00 | 0.00 |
| Others | 321 | 4.60 | 6 | 10.53 | 1.87 |
| Unknown | 29 | 0.41 | - | - | - |
| Total | 6,975 | 100.00 | 57 | 100.00 | 0.82 |
| Males | 5,210 | 74.70 | 33 | 57.89 | 0.63 |
| Females | 1,755 | 25.16 | 24 | 42.11 | 1.37 |
| Unknown | 10 | 0.14 | - | - | - |
| Total | 6,975 | 100.00 | 57 | 100.00 | 0.82 |
| White Female | 1,492 | 21.39 | 20 | 35.09 | 1.34 |
| White Male | 4,290 | 61.51 | 31 | 54.38 | 0.72 |
| Black Female | 162 | 2.32 | 0 | 0.00 | 0.00 |
| Black Male | 682 | 9.78 | 0 | 0.00 | 0.00 |
| Other | 321 | 4.60 | 6 | 10.53 | 1.87 |
| Unknown | 28 | 0.40 | - | - | - |
| Total | 6,975 | 100.00 | 57 | 100.00 | 0.82 |

Note: Numbers refer to victims, not inmates executed. Arizona executed 37 inmates from 1976 through 2014.

**Figure AZ 1. Comparison of Likelihood of Execution by Race and Gender of Victim**

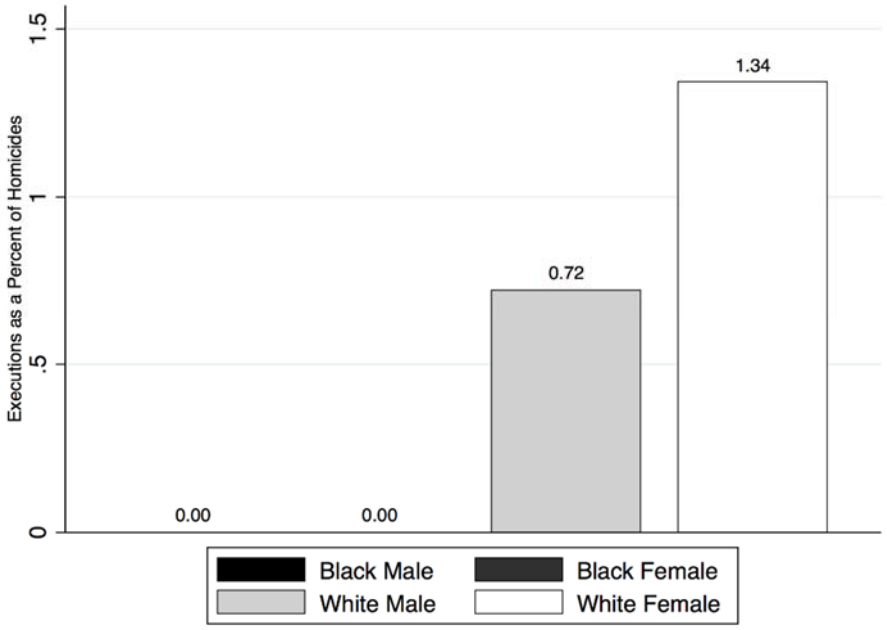
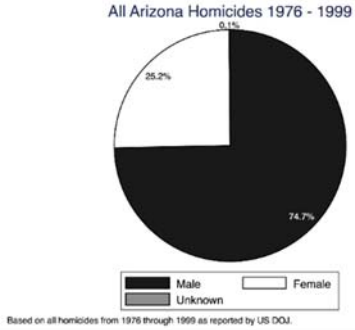


**Figure AZ 2. Gender of Victims**



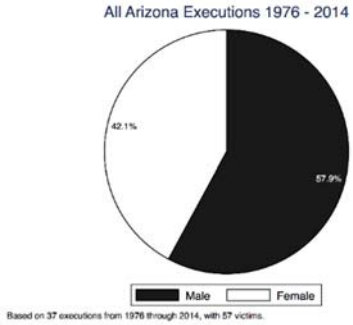
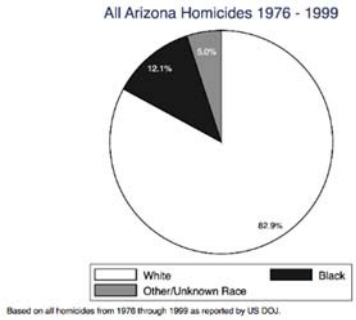




**Figure AZ 3. Race of Victims**



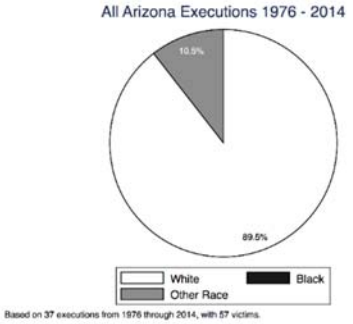
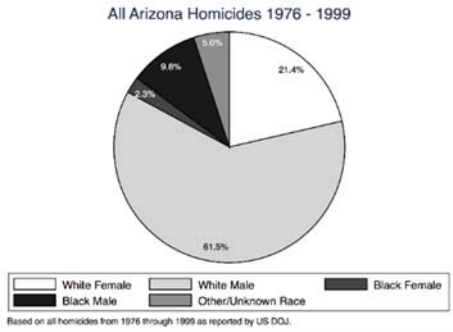




**Figure AZ 4. Race and Gender of Victims**



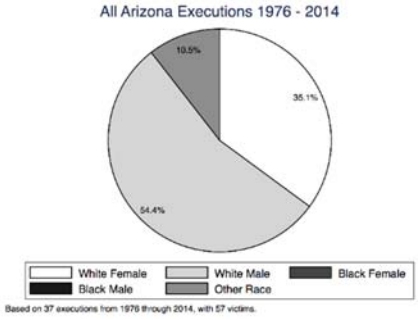
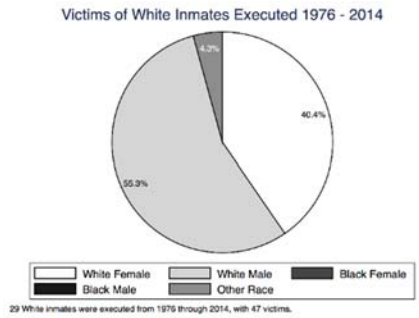
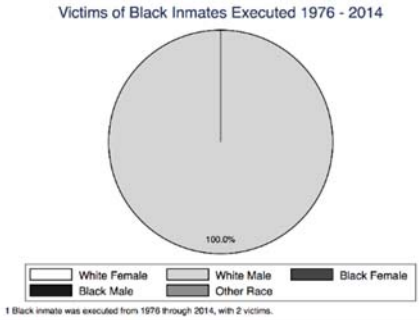



**Figure AZ 5. Race and Gender of Victims for White, Black, and Hispanic Inmates Executed**

a. White Inmates




b. Black Inmates




c. Hispanic Inmates

**Table AZ 2. Victims of White, Black, and Hispanic Male Inmates Executed**

| | White Inmates | | Black Inmates | | Hispanic Inmates | |
|---|---|---|---|---|---|---|
| Victims | N | % | N | % | N | % |
| White Female | 19 | 40.4 | 0 | 0.0 | 1 | 14.3 |
| White Male | 26 | 55.3 | 2 | 100.0 | 2 | 28.6 |
| Black Female | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| Black Male | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| Other Race | 2 | 4.3 | 0 | 0.0 | 4 | 57.1 |
| Total | 47 | 100.0 | 2 | 100.0 | 7 | 100.0 |

**Table LA 1. Louisiana Executions and Homicides by Race and Gender of Victims**

| Victim Characteristic | Homicides | | Executions | | Executions Per 100 Homicides |
|---|---|---|---|---|---|
| | Number | Percent | Number | Percent | |
| Whites | 4,174 | 26.90 | 30 | 78.94 | 0.72 |
| Blacks | 11,150 | 71.87 | 8 | 21.06 | 0.07 |
| Others | 93 | 0.60 | 0 | 0.00 | 0.00 |
| Unknown | 97 | 0.63 | - | - | - |
| Total | 15,514 | 100.00 | 38 | 100.00 | 0.24 |
| | | | | | |
| Males | 12,218 | 78.76 | 15 | 39.47 | 0.12 |
| Females | 3,277 | 21.12 | 23 | 60.53 | 0.70 |
| Unknown | 19 | 0.12 | - | - | - |
| Total | 15,514 | 100.00 | 38 | 100.00 | 0.24 |
| | | | | | |
| White Female | 1,226 | 7.90 | 18 | 47.37 | 1.47 |
| White Male | 2,948 | 19.00 | 12 | 31.58 | 0.41 |
| Black Female | 2,017 | 13.00 | 5 | 13.16 | 0.25 |
| Black Male | 9,133 | 58.87 | 3 | 7.89 | 0.03 |
| Other | 93 | 0.60 | 0 | 0.00 | 0.00 |
| Unknown | 97 | 0.63 | - | - | - |
| Total | 15,514 | 100.00 | 38 | 100.00 | 0.70 |

Note: Numbers refer to victims, not inmates executed. Louisiana executed 28 inmates from 1976 through 2014.

**Figure LA 1. Comparison of Likelihood of Execution by Race and Gender of Victim**

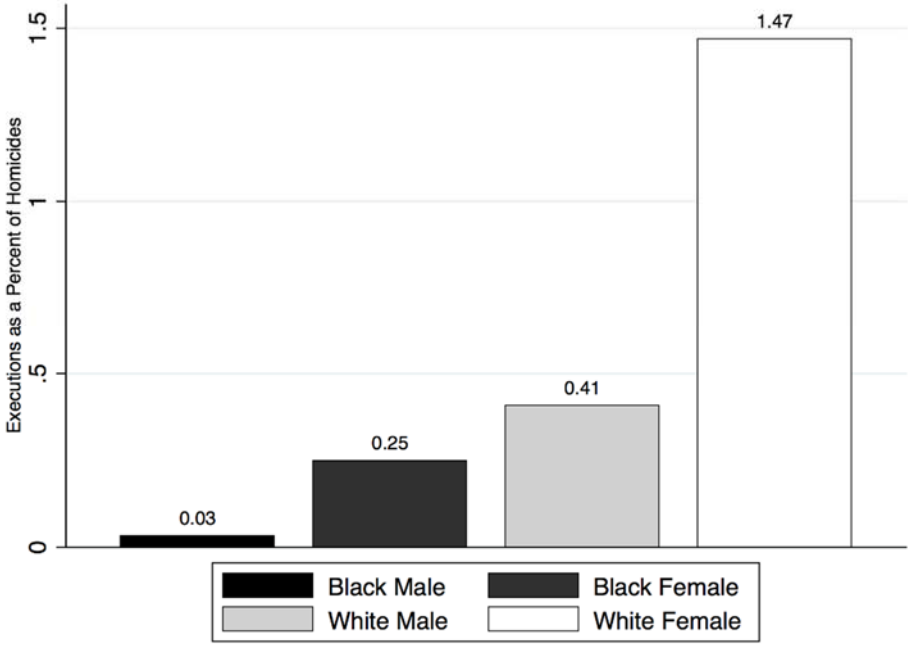


**Figure LA 2. Gender of Victims**

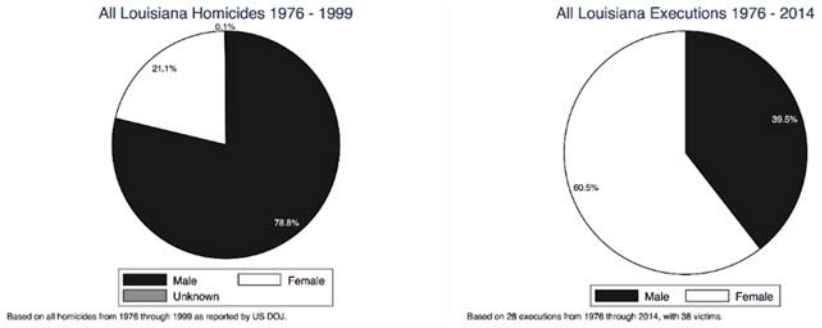



**Figure LA 3. Race of Victims**

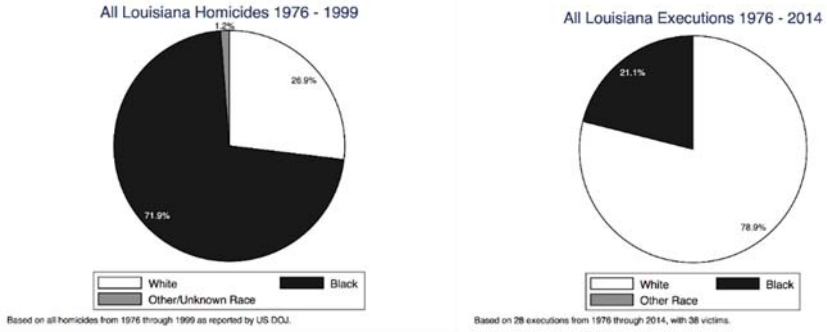



**Figure LA 4. Race and Gender of Victims**

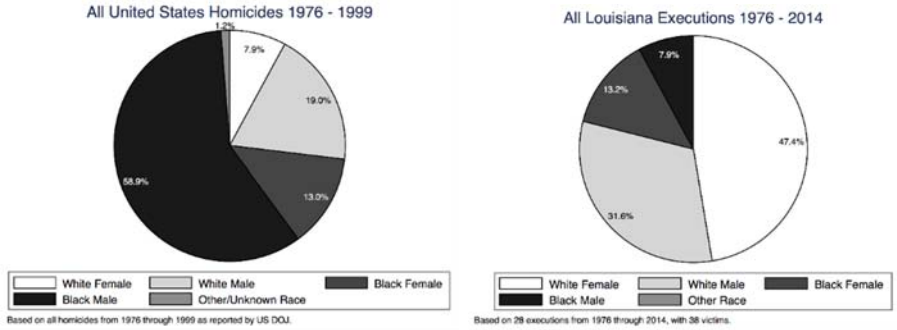
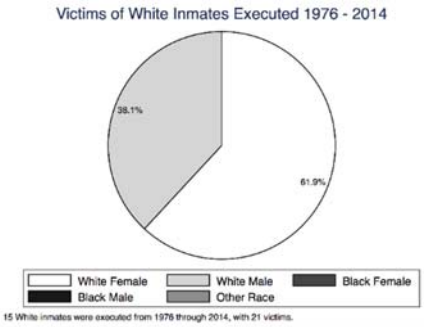


**Figure LA 5. Race and Gender of Victims for White and Black Inmates Executed**

a. White Inmates




b. Black Inmates

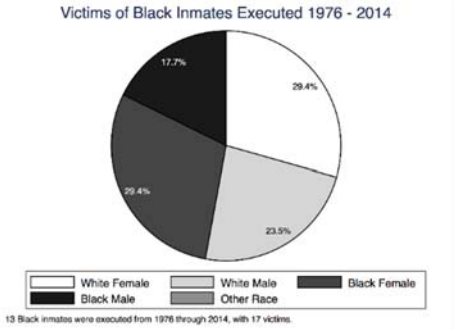



**Table LA 2. Victims of White and Black Male Inmates Executed**

| | White Inmates | | Black Inmates | |
|---|---|---|---|---|
| Victims | N | % | N | % |
| White Female | 13 | 61.9 | 5 | 29.4 |
| White Male | 8 | 38.1 | 4 | 23.5 |
| Black Female | 0 | 0.0 | 5 | 29.4 |
| Black Male | 0 | 0.0 | 3 | 17.7 |
| Other Race | 0 | 0.0 | 0 | 0.0 |
| Total | 21 | 100.0 | 17 | 100.0 |

**Table AR 1. Arkansas Executions and Homicides by Race and Gender of Victims**

| Victim Characteristic | Homicides | | Executions | | Executions Per 100 Homicides |
|---|---|---|---|---|---|
| | Number | Percent | Number | Percent | |
| Whites | 2,411 | 47.19 | 53 | 91.38 | 2.2 |
| Blacks | 2,676 | 52.38 | 5 | 8.62 | 0.19 |
| Others | 15 | 0.29 | 0 | 0 | 0 |
| Unknown | 7 | 0.14 | - | - | - |
| Total | 5,109 | 100 | 58 | 100 | 1.14 |
| | | | | | |
| Males | 3,729 | 72.99 | 30 | 51.72 | 0.80 |
| Females | 1,378 | 26.97 | 28 | 48.28 | 2.03 |
| Unknown | 2 | 0.04 | - | - | - |
| Total | 5,109 | 100 | 58 | 100 | 1.14 |
| | | | | | |
| White Female | 793 | 15.51 | 28 | 48.28 | 3.53 |
| White Male | 1,617 | 31.66 | 25 | 43.10 | 1.55 |
| Black Female | 580 | 11.35 | 0 | 0.00 | 0.00 |
| Black Male | 2,096 | 41.03 | 5 | 8.62 | 0.24 |
| Others | 15 | 0.29 | 0 | 0.00 | 0.00 |
| Unknown | 8 | 0.16 | - | - | - |
| Total | 5,109 | 100 | 58 | 100 | 1.14 |

Note: Numbers refer to victims, not inmates executed. Arkansas executed 58 inmates from 1976 through 2014.

**Figure AR 1. Comparison of Likelihood of Execution by Race and Gender of Victim**

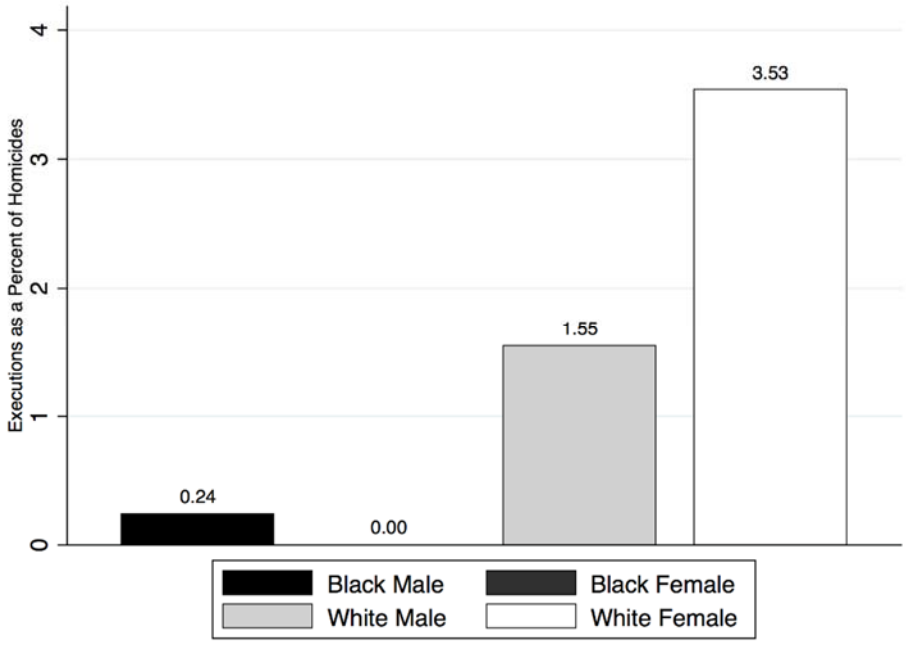


**Figure AR 2. Gender of Victims**

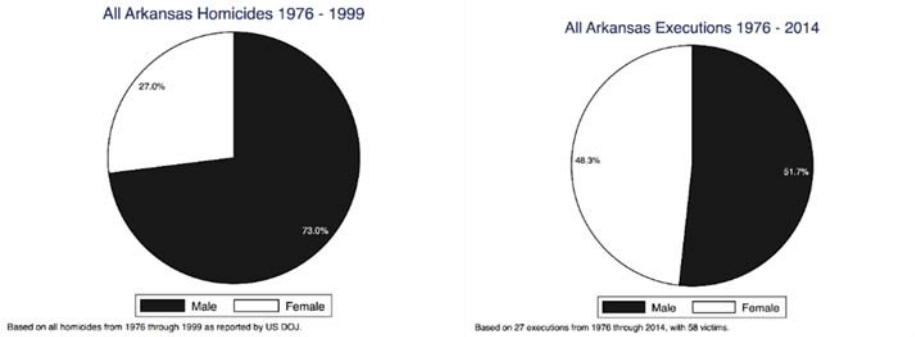



**Figure AR 3. Race of Victims**

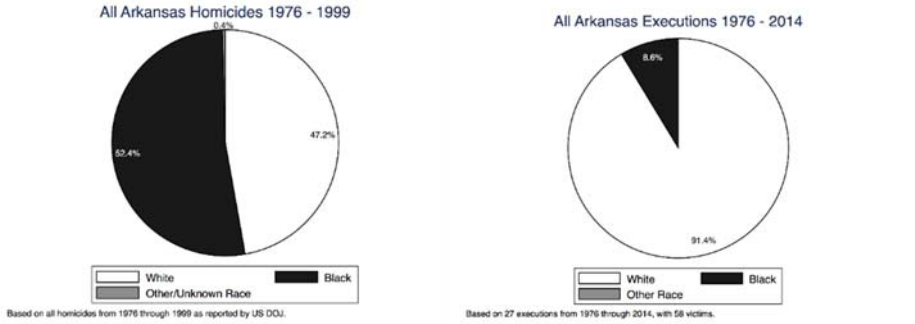



**Figure AR 4. Race and Gender of Victims**

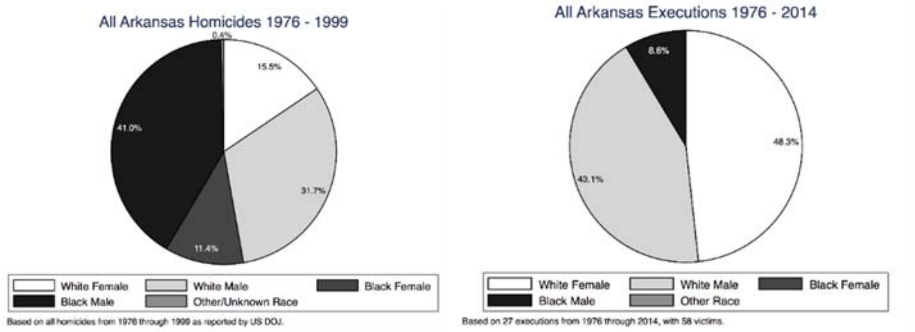
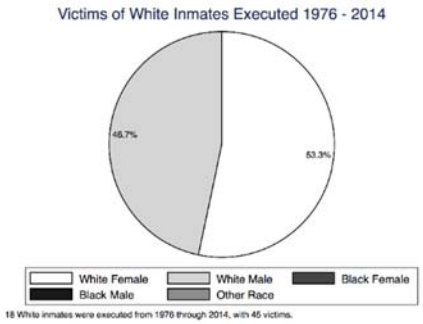


**Figure AR 5. Race and Gender of Victims for White and Black Inmates Executed**

a. White Inmates




b. Black Inmates

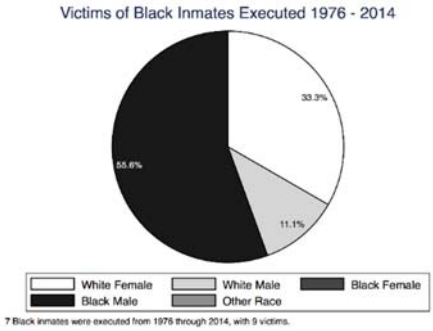



**Table AR 2. Victims of White and Black Male Inmates Executed**

| | White Inmates | | Black Inmates | | Hispanic Inmates | |
|---|---|---|---|---|---|---|
| Victims | N | % | N | % | N | % |
| White Female | 24 | 53.3 | 3 | 33.3 | 0 | 0 |
| White Male | 21 | 46.7 | 1 | 11.1 | 2 | 100.0 |
| Black Female | 0 | 0.0 | 0 | 0 | 0 | 0 |
| Black Male | 0 | 0.0 | 5 | 55.6 | 0 | 0 |
| Other Race | 0 | 0.0 | 0 | 0.0 | 0 | 0 |
| Total | 45 | 100.0 | 9 | 100.0 | 2 | 100.0 |

September 11, 2020

**To:** Governor Roy Cooper; Attorney General Josh Stein;
Associate Justice Anita Earls; Henderson Hill, Senior Counsel ACLU

**Subject:** **North Carolina Task Force for Racial Equity in Criminal Justice**

I appreciate this opportunity to share my story as a victim of a violent crime. I hope that you will take it to heart and consider it as you lead this task force and formulate recommendations. I also request that this letter be entered into the records.

My husband of 20 years, Tim, and the father of our two daughters, was at work the night of March 5, 2002 – doing his job and minding his own business, when three men running a string of armed robberies picked him as their next target. Tim was simply in the process of locking up the restaurant he managed and heading to his car to head home when he was approached by the defendants. They made Tim unlock the office because they wanted money … which they did not get because the safe wouldn't open. **Tim was unarmed. They were not. They shot him and left him to bleed to death in the office.** Through the investigation, it was determined that Tim did not resist the defendants in any way, he had not known these men, had not worked with them, and did not pick a fight with them. **Tim did not do anything to deserve to die the way he did.**

One of the defendants went to trial. He was convicted of 1st-degree murder by a jury of his peers and received a life sentence with no death penalty (my older daughter actually took the witness stand to say she didn't believe her father would want that). The other two pleaded guilty, one of which was the shooter. He is in jail without parole for life. The other defendant was charged with 2nd degree murder and is scheduled to be released in Sept of 2022.

**As victims, we have to live with the consequences of the actions these men took <u>every</u> <u>day</u>.** The sentences these defendants received provided us with a sense that justice had been served, helped us breathe a little easier, gave us some sense of peace, and allowed us the freedom to move forward instead of remaining lost and victims. **Tim died at the hand of people who had no regard for his life** or the impact it would have on his family and those who loved him. And, these men expressed no remorse for their acts, and in fact, were on their way to commit another crime when they were caught. **Their sentences are their penance for the decisions <u>they</u> made in life.**

In effect, the sentences these men received, as defined by the Structured Sentencing Act, are **promises made by the State of NC about what we, as victims, can expect**. This task force is now charged with making recommendations that could potentially **undermine those promises – and make us victims again – of the State.** I ask that the task force take that under serious consideration as you deliberate what changes, if any, need to be made to current sentences, how individuals are sentenced going forward, and whether or not parole should be reinstated. My understanding is that the Structured Sentencing Act itself was adopted into law to <u>eliminate</u> subjectivity and remove arbitrary decision making, and is based on the severity of the crime committed. **Based on the severity of the crime these men committed, I do not believe their sentences should be reduced or altered in any way.**

My concern is not for me and my daughters alone. I am worried about all victims, especially those of violent crimes. I do have two recommendations – both related to the work being done by Workgroup 4, specifically the topics of reinstating parole, redress for long-term sentencing, and the second look act.

It does not appear to me that the task force itself is one that is well-known throughout the state. While the announcement of it initially appeared in the news, the work subsequently being done is not highly publicized, nor readily accessible, unless you know where to look. I even notice that there are not many views of your meetings online – which makes me think that the task force is not well-known except by those who have already been engaged in related activities or causes.

It is also not evident to me that victims themselves are playing an active role on the task force itself – either as task force members or stakeholders. While victims may be represented in small ways, I do not see where there is specific action being taken to hear from them directly other than through public comment sessions. After listening in on both sessions, I have heard very few violent crime victims' voices.

- Recommendation: I would ask that the task force (specifically Workgroup #4) reach out to **all** victims of violent crimes to hear their stories directly to better inform any recommendations being considered. At the very minimum, a letter should be sent to each victim informing us of the task force, and specifically how we might be affected by the recommendations the task force may make. **Recommendations for sweeping changes that affect current victims should not be made without understanding the full impact of these recommendations on us. Victims voices are AS IMPORTANT as those of defendants within the penal system.** Victims also should not be surprised by laws being changed, sentences being deemed as unfair, or receiving notice that those that who victimized us are being released from prison.

- Recommendation: I would also ask that **you NOT break the promise the State has made to victims by changing laws and sentences that will negatively affect us**. I would submit that *most* defendants are in prison for a substantiated reason. I would also submit that *most* victims did not deserve what happened to them. Please don't make us victims again!
    - Instead, if you determine that current systems and laws need to be altered or changed, please have them go into effect for defendants going forward. Do not grandfather them.

As a victim, I trusted that when the sentencing was done, the appeals had been reviewed and denied, and the initial few years following the trial and sentencing were past, that our memories of Tim would return to only those of a good, fun-loving man, who mattered to many. Instead, we like many other victims, are now forced, again, to go backwards to confront something that we had nothing to do with and didn't deserve.

I have never personally wanted to be interviewed, have my face on television, or be an activist in any way. But since victims don't have the same level of support from causes, activists, committees, task forces, etc., I thought it time to speak up. Because if not me, who?

If you would like to continue the conversation, I am willing. Feel free to contact me.

Thank you for your time,

Bridget B. Kipfer

Bridget Bradley Kipfer
bridget6657@aol.com, 704-965-6747

# Valuing Black Lives: A Case for Ending the Death Penalty

Presented by the
American Bar Association
Section of Civil Rights and Social Justice

**American Bar Association**
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This publication accompanies the audio program entitled "Valuing Black Lives: A Case for Ending the Death Penalty" broadcast on August 18, 2020 (event code: IR2008DP1).

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   Alexis Hoag

3. **Additional Resources**

# To Receive CLE Credit for this Program

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## Moderator

- Henderson Hill – Staff Attorney, Capital Punishment Project, American Civil Liberties Union

## Speakers

- Ngozi Ndulue – Senior Director of Research and Special Projects, Death Penalty Information Center
- Alexis Hoag – Associate Research Scholar in the Faculty of Law and Lecturer in Law, Columbia Law School
- Mark Pickett – Staff Attorney, The Center for Death Penalty Litigation

# Objectives

Participants will…

- understand the historical and social context that has shaped how race affects the use of the death penalty today.
- understand the legal framework governing race challenges to the death penalty, including:
  - foundational Supreme Court precedent,
  - state legislation and systemic challenges, and
  - new frameworks for addressing racial bias in the death penalty.
- understand the relevance of racial bias in the death penalty to movements for criminal legal system reform.

# CONTINUING LEGAL EDUCATION

## ABA Death Penalty Virtual Series

# Valuing Black Lives:
# A Case for Ending the Death Penalty

Tuesday, August 18, 2020 | 3:00 pm EST

*Sponsored by the ABA Section of Civil Rights & Social Justice*

**Ngozi Ndulue, Senior Director of Research and Special Projects**
**Death Penalty Information Center**
**Email: nndulue@deathpenaltyinfo.org**

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# From the Beginning…Race Mattered

# Early U.S. History

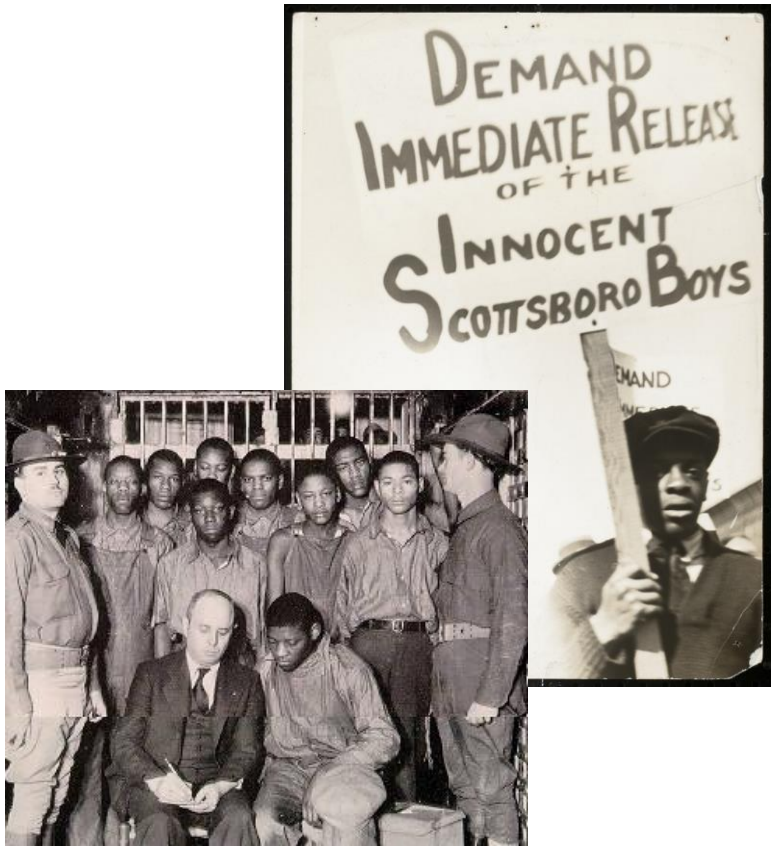
- Different capital crimes for white people and Black people (enslaved or free)
- Disproportionate use of capital punishment against Black defendants
- More torturous and gruesome executions of Black defendants
- In slave states, use of executions in response to rebellions & crimes against slave owners

# Post-Civil War: Legal Executions, Lynchings and Mob Violence

- Legal executions, lynchings, and mob violence played complementary roles in efforts to support white supremacy.
- EJI has documented:
  - racial violence and lynchings that led to the deaths of at least 2,000 Black people between 1865 and 1876.
  - 4,425 of these “racial terror lynchings” in twenty states between the end of Reconstruction in 1877 and 1950.

# Civil Rights Era & Death Penalty Representation

- The NAACP Legal Defense and Education Fund took a growing interest in death penalty cases in the South.
- High-profile examples
  - Scottsboro Boys
  - Groveland Four
- The threat of death loomed large when a Black man was accused of raping a white woman.



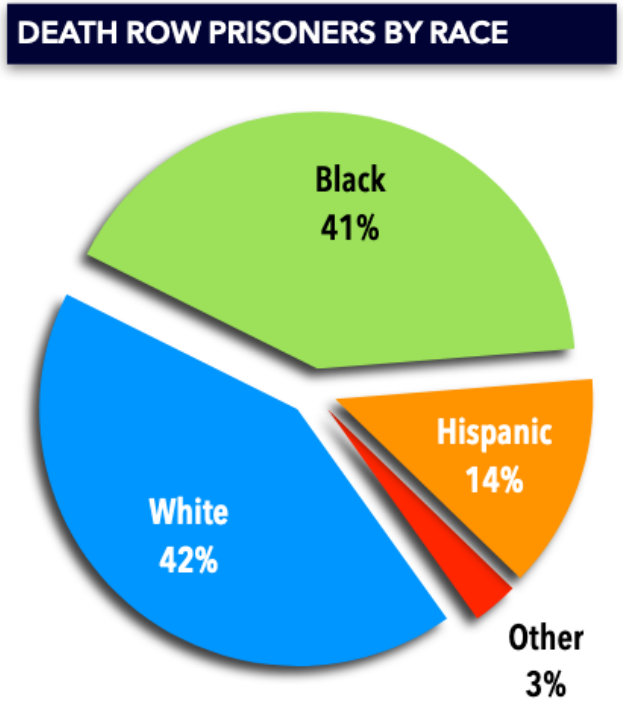
# Entering the Modern Era

***Furman v. Georgia*** (1972)
Suspended the death penalty due to arbitrary application of capital punishment

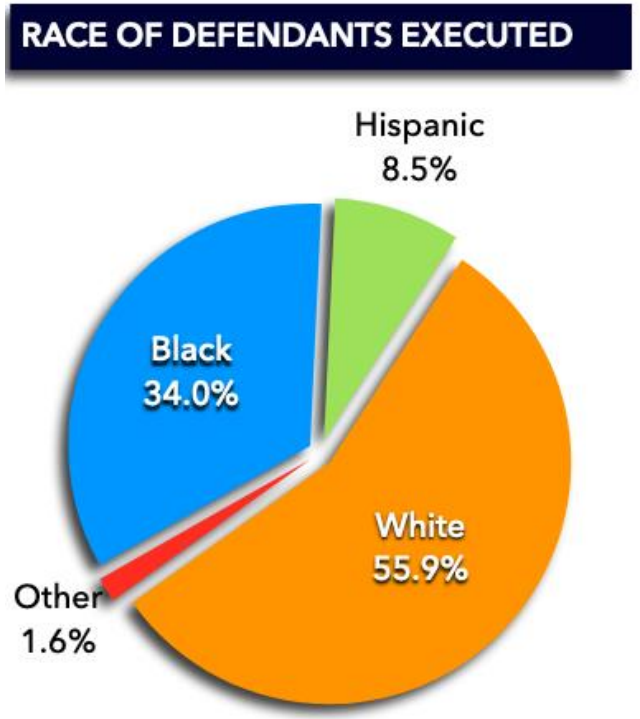
***Gregg v. Georgia*** (1976)
Reinstated the death penalty and found that the death penalty is constitutional under the Eighth Amendment

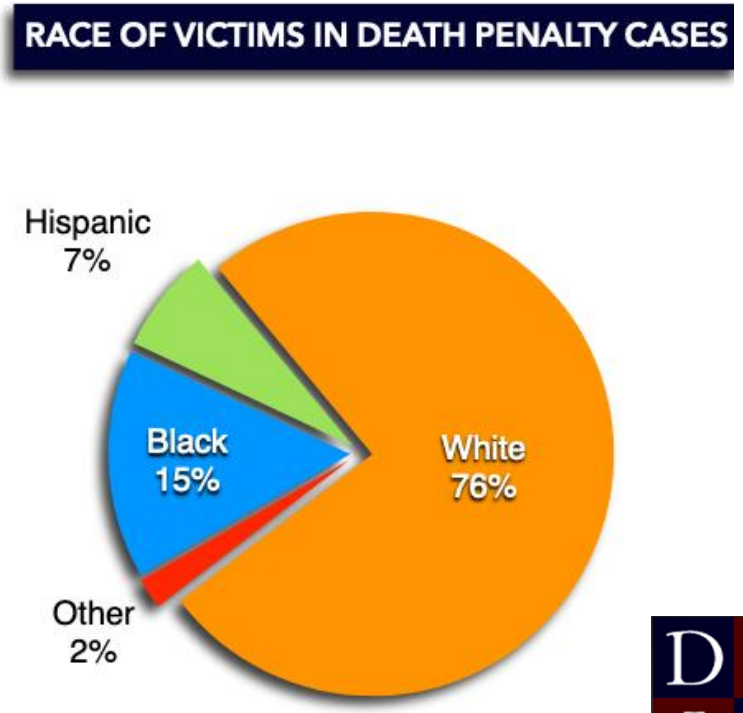
# Is the death penalty "post-racial?"

# Who is on death row?



# Who are we executing and for whose deaths?




DPIC

# Race and Wrongful Conviction

- Official misconduct is more often a factor for African Americans exonerated of murder convictions.
- Black exonerees spend more time on death row before being exonerated.

# What does the research say?

- Race-of-victim effects are consistently found in death penalty studies.
- Race-of-defendant effects have been observed in several jurisdictions.
- Race and gender combinations matter. In several jurisdictions, when a Black male defendant is accused of killing a white female victim, the odds of a death sentence are much higher.

# Why might this be?

Structural Racism

Overt Bias

Implicit Bias

NINTH JUDICIAL DISTRICT COURT
DOUGLAS COUNTY COURT CLERK
P.O. BOX 218
MINDEN, NV 89423
(775) 782-9820

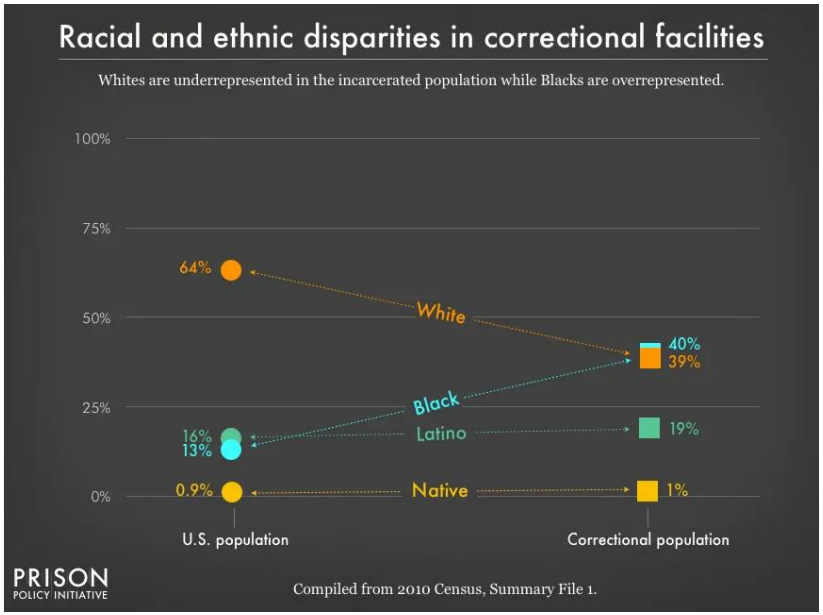
223024

JUROR QUALIFICATION QUESTIONNAIRE PLEASE READ EXEMPTIONS ON BACK IS OK BEFORE COMPLETING

# The death penalty in an age of change

# Mass Incarceration

- Almost 2.3 million people in prisons and jails
- 40% of the correctional population is Black
- Shared roots between rise in incarceration and rise in use of the death penalty



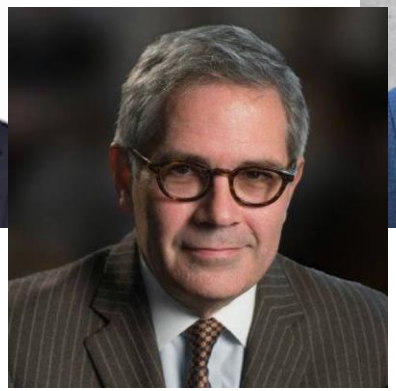
# Black Lives Matter

Stand Your Ground

Policing

Death Penalty

# Reform Prosecutors



# CONTINUING LEGAL EDUCATION

## ABA Death Penalty Virtual Series

# Valuing Black Lives: A Case for Ending the Death Penalty

Tuesday, August 18, 2020 | 3:00 pm EST

*Sponsored by the ABA Section of Civil Rights & Social Justice*

**Alexis Hoag, Associate Research Scholar & Lecturer**
**Columbia Law School**

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# Overview

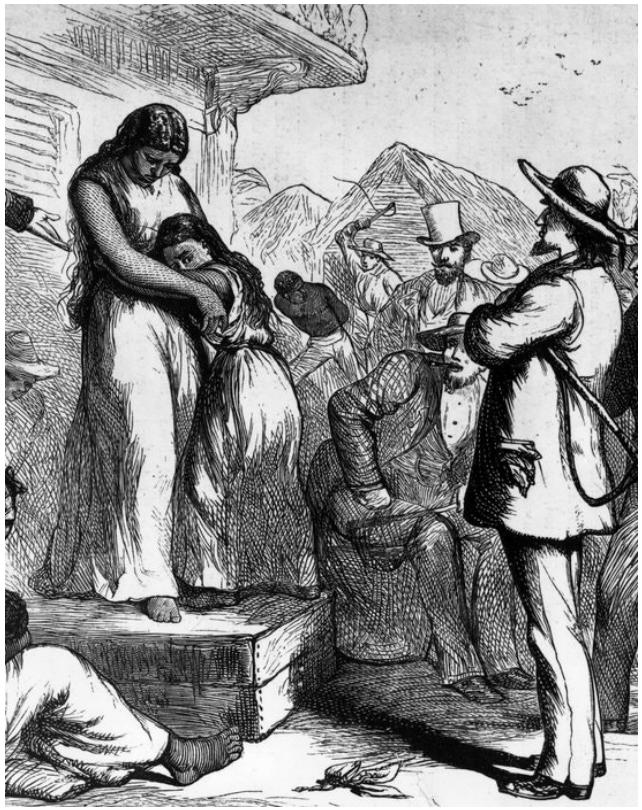
1. Social and historical context of 14th A
2. Racial disparities in death sentencing based on victim's race
3. *McCleskey v. Kemp* takeaways
4. Mounting 14th A challenge

# Thesis

- Next challenge to the death penalty should be on equal protection grounds based on the undervaluation of Black murder victims' lives.

- 14th A was originally intended, in part, to extend the equal protection of the laws to Black victims of crime.

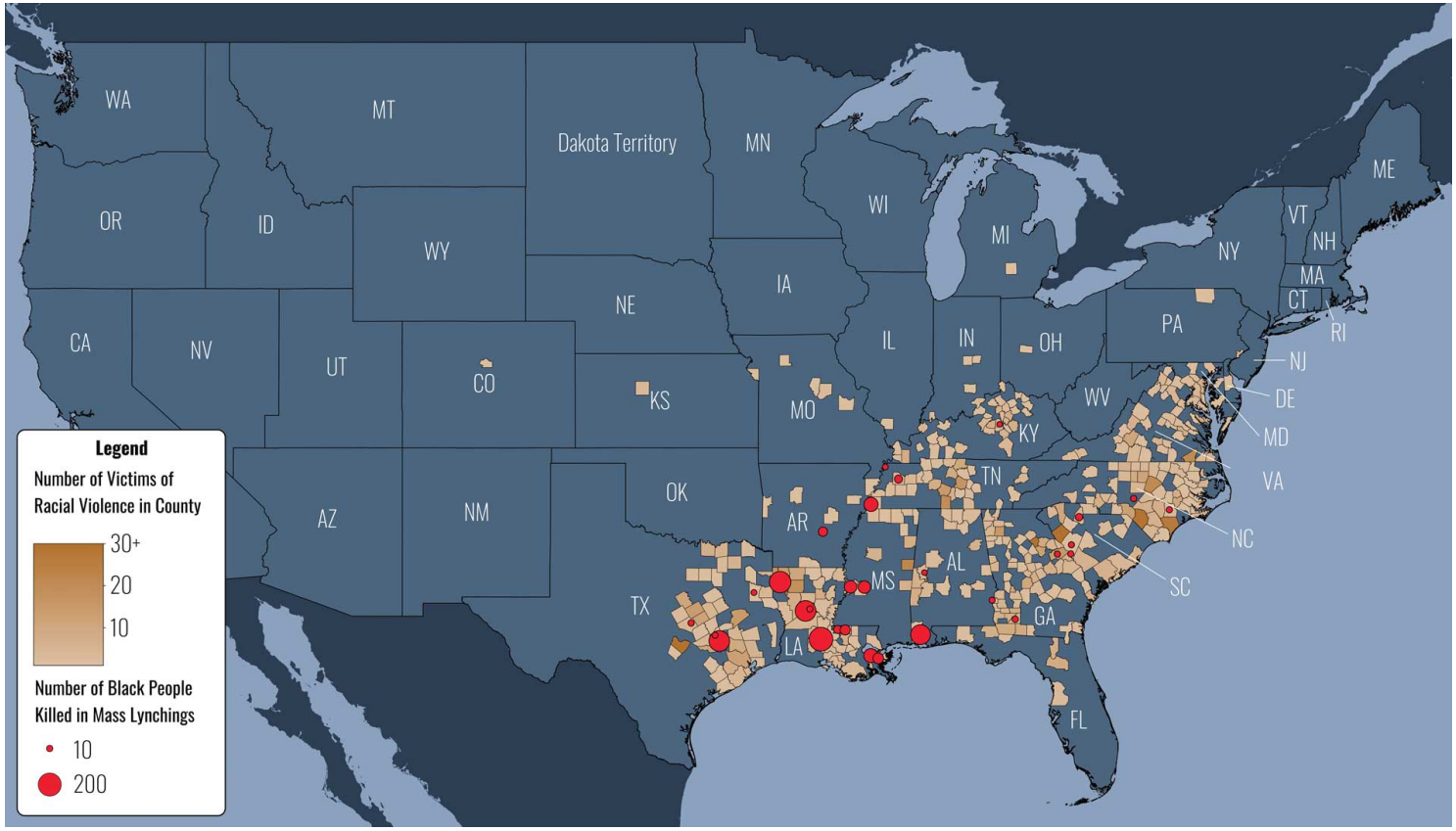
THE TRICK IS TO GET THE DOSAGES JUST RIGHT.
DEATH ROW
POLITICS
RACE
POVERTY
JOHN COLE



# Early American Law

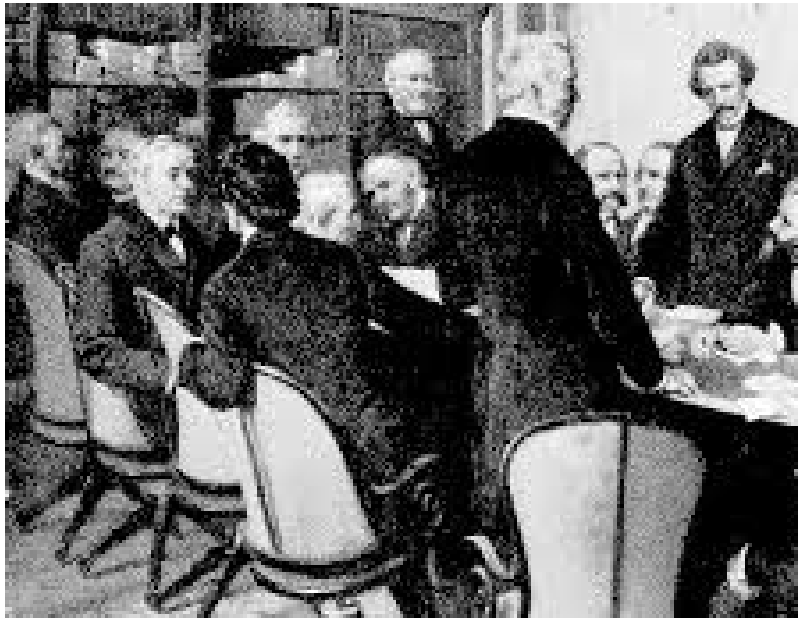
- Each colony had set of slave codes
- Common law not intended to protect enslaved people
- The codes enabled white people to punish enslaved Black people w/ impunity
- Legislatures explicitly deprived enslaved people equal protection of the common law when whites abused them
- *Dred Scott v. Sandford* (1857)

# Racial Violence during Reconstruction (EJI)



# Reconstruction: America's Unfinished Revolution

- Jan. 1866: Joint Cmte on Reconstruction convened; Thaddeus Stevens (PA) & John Bingham (OH)
- 14th A: recognizing equal protection of the laws & citizenship rights
- Redress for Black victims of crime
- *The Second Founding: How the Civil War & Reconstruction Remade the Constitution*, Eric Foner (2019)



# Lynching as Racial Terror

- Between Reconstruction & WW II, thousands of Blacks were lynched (EJI Report, 3d ed.);
- Similar reign of terror in US/Mexico boarder from 1849-1930 targeting Mexicans & Mexican-Americans;
- Public acts of violence & torture that traumatized whole communities;
- Law enforcement often involved.

## Race is an Inherent Part of Capital Punishment

Law enforcement clearance rates (Fagan);

Prosecutor's decision to charge death often depends on victim's race (studies);

Racial discrimination in jury selection (EJI study);

Jury decision-making (Looking Deathworthy);

Success in post-conviction and executions (GA study).

# McCleskey v. Kemp, 481 U.S. 279 (1986)

- McCleskey's Argument
  - GA unconstitutionally relied on race—victim's white race, def. Black race—when determining who to sentence to death;
  - Baldus study (race served as an aggravating factor)
- Court required: "exceptionally clear proof" of intentional discrimination
- Claimed history of Civil War era had "little probative value"
- Dissent: "fear of too much justice"

# Who dies?

- Whom the State Kills, Scott Phillips and Justin Marceau (2020)
- Execution rate is 17x higher in white victim cases

# Centering 14 A Claim on the Undervaluation of Black Lives

- 14th A forbids public officials from discrimination based on race (absent compelling govt. interest)
- Extends to police and DAs exercising discretion
- No compelling state interest in failure to seek death in Black victim cases
- Plaintiff: capitally charged Black def/white victim case on behalf of murdered Black victim from non-capital cases (3rd-party standing)

# Intentional Discrimination

- Decisionmakers acted w/ discriminatory purpose in declining to seek death
- Gather evidence of discrimination from DA office/investigating police dept, charging decisions, strike rates, racism in community, practices of an individual prosecutor, public stmts

# Remedy

- "It's such a curious case, because what's the remedy? Is it to execute more people?"
- Expanding the death penalty's reach to include defs in Black victim cases serves only to perpetuate the undervaluation of Black lives bc the perpetrators of Black victim cases are often also Black.
- Abolition.

# CONTINUING LEGAL EDUCATION

Thank you!

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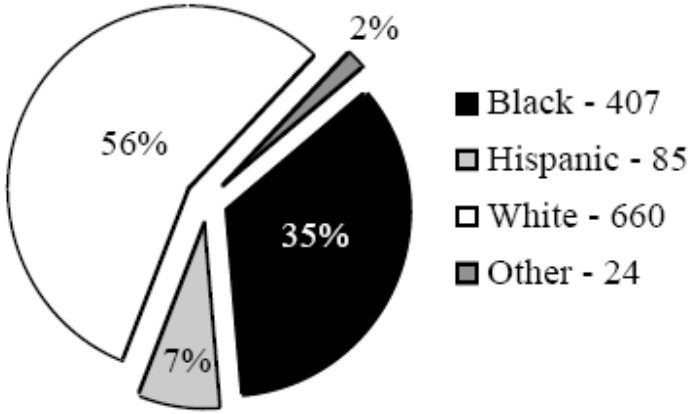
# The North Carolina Racial Justice Act: Past & Present

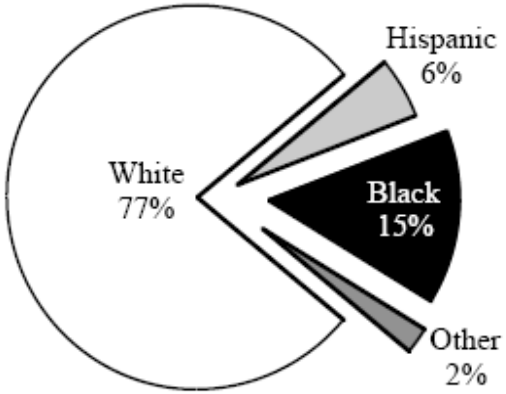
Presenter: Mark Pickett, Staff Attorney,
Center for Death Penalty Litigation, Durham, NC

# Why We Needed the RJA

**Race of Defendants Executed**




**Race of Victim in Death Penalty Cases**




About 80% of the murder victims in cases resulting in an execution were white, even though nationally only 50% of murder victims generally are white.

# Yet Constitutional Claims…

- Require proof purposeful, individualized racial discrimination in the defendant's particular case

- Prohibit defendants from relying on statistical evidence of discrimination (*McCleskey v. Kemp*)

# The NC Racial Justice Act

- Enacted in 2009
- Provides that "No person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race."
- Applied retroactively, allowing all NC persons on death row to file claims.

# RJA Standard

- Finding that race was the basis of the decision to seek or impose a death sentence in political divisions ranging from the county of conviction to statewide

- Relief: life in prison without parole

# Types of Racial Discrimination under RJA

- ***Prosecutor's Use of Peremptory Strikes in Jury Selection***
- Race of the Defendant
- Race of the Victim

# Evidence Permitted under RJA

- ***statistical evidence***

- other evidence, including, but not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system

# The RJA Study

**TABLE 2**
**Statewide Average Rates of State Strikes over Entire Study Period**
*(Average of strike rates calculated in individual cases and number of cases averaged)*

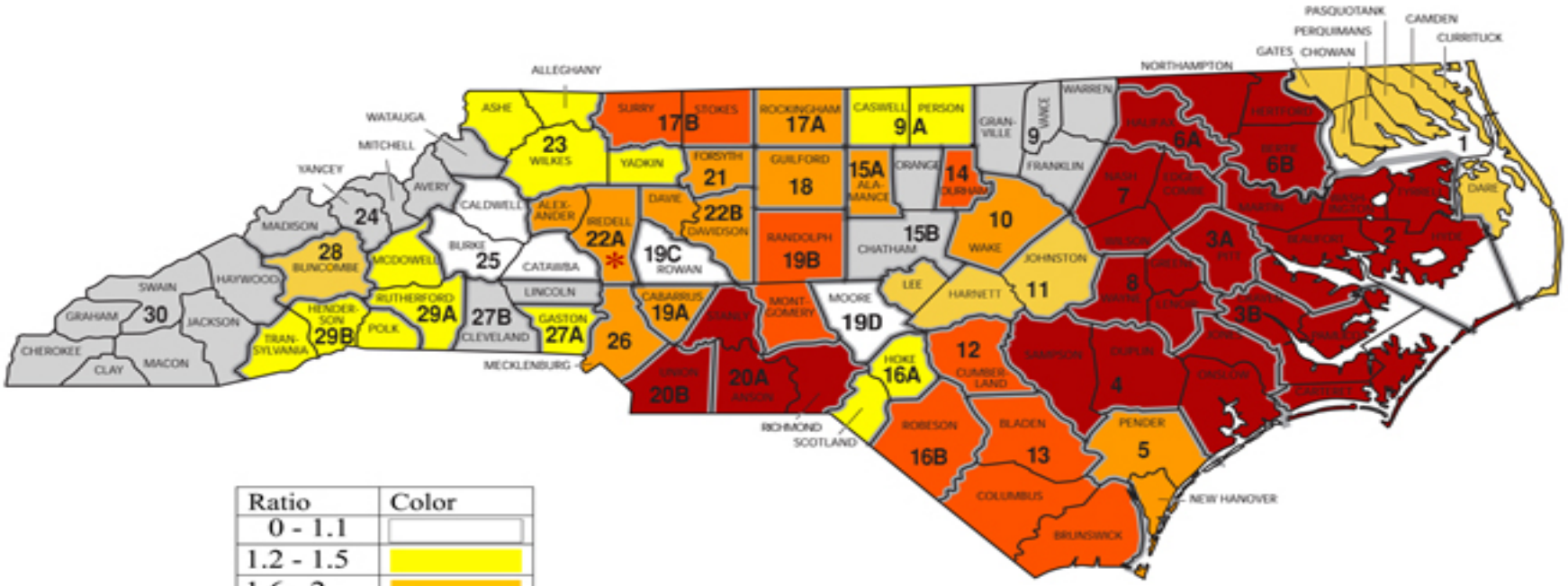
| | A<br>Average Strike Rate | B<br>Number of Cases Averaged |
|---|---|---|
| 1. **Strike Rates Against Black Qualified Venire Members** | 56.0% (*SD* =24.6) | 166 |
| 2. **Strike Rates Against All Other Qualified Venire Members** | 24.8% (*SD*=7.0%) | 166 |

*A paired-sample t-test indicates that this difference in strike rates is significant at $p < .001$.

Credit: Catherine Grosso & Barbara O'Brien

# North Carolina Prosecutorial Districts

Effective January 15, 2009

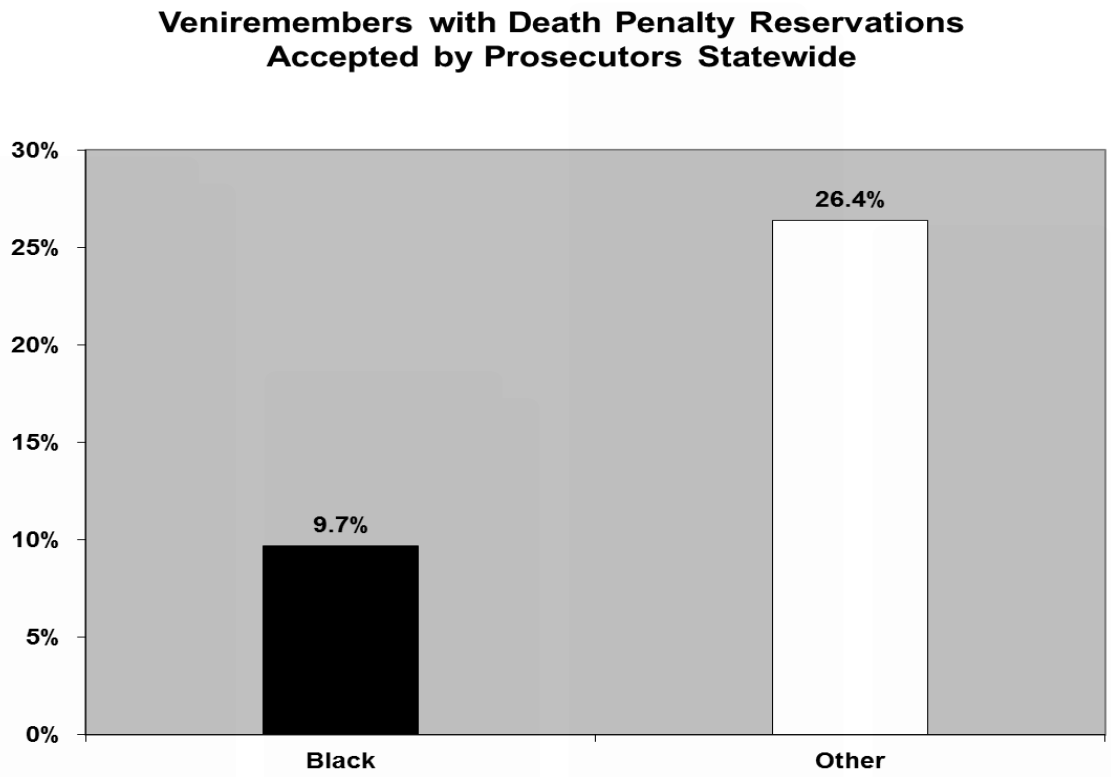



| Ratio | Color |
|---|---|
| 0 - 1.1 | |
| 1.2 - 1.5 | |
| 1.6 - 2 | |
| 2.1 - 2.5 | |
| 2.6 - 3 | |
| 3.1 + | |

Copyright © 2009
School of Government
The University of North Carolina at Chapel Hill

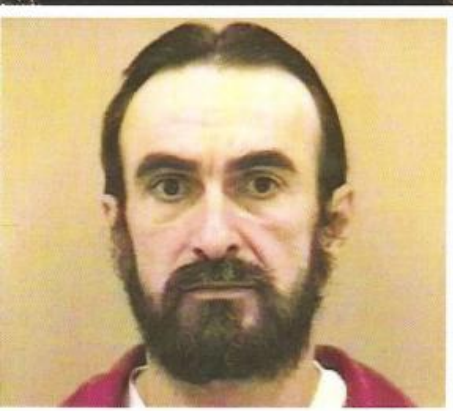
*The only case after District 22 split, State v. Ramseur, had a strike ratio of 4.2

**Jury selection - ratio of strike rates among Black and non-Black veniremembers (reported by district)**

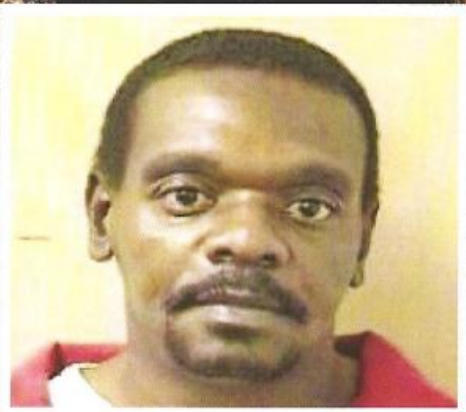

Veniremembers with Death Penalty Reservations
Accepted by Prosecutors Statewide
30%
25%
20%
15%
10%
5%
0%
9.7%
26.4%
Black
Other

# Prosecutor & Conservative Backlash

**Thanks To Hugh Holliman, death row inmates could leave prison early and move in next door....**



**WAYNE A LAWS**
MURDER FIRST DEGREE
DOC NUMBER: 0234897
SENTENCE TYPE: DEATH ROW



**HENRY L MCCOLLUM**
MURDER FIRST DEGREE; CHILD RAPE
DOC NUMBER: 0265106
SENTENCE TYPE: DEATH ROW

jdnews.com
Jacksonville, NC · Covering Coastal Carolina

"The law would also allow some convicted killers to go from death row to parole almost immediately."

*The Daily News, Jacksonville, N.C., 08/10/2009*

Meet Wayne Laws. He brutally **MURDERED** two people. And get to know Henry McCollum. He **RAPED AND MURDERED AN 11 YEAR OLD CHILD**. Both are on Death Row today.

But thanks to ultra-liberal **Hugh Holliman**, they might be moving out of jail and into Your neighborhood sometime soon.

**Holliman** voted to allow activist judges to weaken the sentence of Death Row inmates... making some eligible for parole immediately.[1]

1. 8/3/2009 SB 461 (2R) North Carolina Racial Justice Act

**Keep Death Row Inmates Where They Belong And Get Rid of Criminal Coddler Hugh Holliman**

aid for by the North Carolina Republican Executive Committee.
ot authorized by any candidate or candidate committee.

# Marcus Robinson Hearing

- First RJA hearing in April 2012 in Cumberland Co. (Fayetteville)
- Defense presents statistics on exclusion of Black persons from juries, testimony about history of racial discrimination, expert testimony of Bryan Stevenson, etc.
- State presents judge and prosecutor testimony, prosecutor affidavits explaining strikes
- Result: ***Robinson Wins!***

# Legislative Response to *Robinson*

- GOP legislature attempts full repeal of RJA, but Governor vetoes

- Legislature passes veto-proof amendment:
  - Eliminates statewide discrimination claims
  - Can no longer rely on statistics alone

# October 2012 RJA Hearings

- Hearing for 3 additional Cumberland litigants: Tilmon Golphin, Quintel Augustine, and Christina Walters
- Amended RJA standard applied
- State presents no expert testimony
- Defense presents new individualized evidence of discrimination

# Prosecutor's Jury Notes in *Augustine*

(2)

Jury Strikes (cont'd)

Garcia – Leland –

Gibbs – crack cocaine / pros. – Southport

Clifton Gore – blk. wino – drugs

Jerry Harden – Shallotte

Jackie Hewett – thugs – Supply

Ronald King – drinks – country boy – Ok

✓ Carolyn Lambert – Supply – marijuana (drugs)

Teresa Long – Ash – domestics / drugs

prison – Robt. Lowe – Supply ... stabbing / murder
felony incest

Inagio Zqueda – Ash – idiot

Teresa Long - Ash - domestics / drugs

prison - Robt Lowe - Supply ... stabbing / murder
felony incest

Inagio Zqueda - Ash - idiot

Charle Nance - Supply drugs

Shirley McDonald - Leland - bdh / high drug area

? Candace McKory - Leland - Blue Bank Rd

Vickie McNeill - Leland - high drug area

40441

(or) ✓ Ronnie Buffkin – Supply – ???

~~[illegible]~~ – ~~[illegible]~~ –

✓ Deann Cobb – Leland – drug area

(or) ✓ Linwood Davis – Bolivia – Statutory rape charge?

respectable b/h family ✓ Towanda Dudley – Snowfield Rd Leland – OK

Paul Floyd – OI Bch – Floyd family

✓ Ethyl Gause – – family member shot "Pop"

Louis B. Hewett – Supply – anti Police →

Pamela Hewett – Shallotte – drugs

Catrol [illegible] – [illegible] – [illegible]

40444

# Prosecution's *Batson* Cheat Sheet

## BATSON Justifications: Articulating Juror Negatives

1. Inappropriate Dress - attire may show lack of respect for the system, immaturity or rebelliousness

2. Physical Appearance - tattoos, hair style, disheveled appearance may mean resistance to authority.

3. Age - Young people may lack the experience to avoid being misled or confused by the defense.

4. Attitude - air of defiance, lack of eye contact with Prosecutor, eye contact with defendant or defense attorney.

5. Body Language - arms folded, leaning away from questioner, obvious boredom may show anti-prosecution tendencies.

6. Rehabilitated Jurors, or those who vacillated in answering D.A.'s questions.

7. Juror Responses which are inappropriate, non-responsive, evasive or monosyllabic may indicate defense inclination.

8. Communication Difficulties, whether because English is a second language, or because juror appeared to have difficulty understanding questions and the process.

9. Unrevealed Criminal History re: voir dire on "previous criminal justice system experience."

10. Any other sign of defiance, sympathy with the defendant, or antagonism to the State.

# Result: Golphin, Walters, and Augustine win!

But…

# Dark Times for RJA

- In 2013 NC Legislature repeals RJA
- In 2015, NC Supreme Court orders new hearings for all 4 Cumberland defendants for technical reasons
- Robinson, Golphin, Augustine, and Walters are ***returned to death row***
- In 2017, lower court denies claims without hearing
- But… no executions and most cases are stayed

# The RJA Revived

- The 4 Cumberland defendants return to the NC Supreme Court for oral argument in 2019

- Joined by 2 new defendants whose RJA claims had been denied in the lower court without hearing: Andrew Ramseur & Rayford Burke from Iredell Co.

# Reason for Hope: A Better Court

# Chief Justice Cheri Beasley

- On BLM protests: "These protests highlight the disparities and injustice that continue to plague black communities. Disparities that exist as the result of policies and institutions; racism and prejudice have remained stubbornly fixed and resistant to change."
- https://www.nccourts.gov/news/tag/press-release/chief-justice-beasley-addresses-the-intersection-of-justice-and-protests-around-the-state

# Justice Anita Earls

- Deputy Assistant Attorney General in the Civil Rights Division under Clinton
- Director of the Lawyers' Committee for Civil Rights' Voting Rights Project
- Director of advocacy at the University of North Carolina Center for Civil Rights
- Founder of Southern Coalition For Social Justice

# The Issue for the Court

- Does the 2012 RJA amendment and 2013 RJA repeal apply to defendants who had filed their RJA claims while the original version of the RJA was in effect?
- Outcome will affect nearly everyone on death row

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# *Burke* & *Ramseur* Decided June 5, 2020

- ***We win!***
- 6-1 decision; majority by Justice Earls
- Court holds "applying the repeal retroactively violates the constitutional prohibition on *ex post facto* laws."
- Decision also allows *Batson* claims that were previously procedurally barred to proceed

# The Court's Reasoning

- State had argued that *ex post facto* prohibition did not apply because law was enacted post-crime
- But Court relied on 1869 decision *State v. Keith*
  - Confederate soldier Keith charged with wartime murder sought benefit of Amnesty Act that was enacted after the war
  - Keith had ordered the execution of several unionists, including teenage boys, at the end of the war
  - By time of Keith's trial, Amnesty Act was repealed
  - Court held that repeal was an ineffective *ex post facto* law, even though the Amnesty Act was passed after the crime

# What's Next?

- The 4 Cumberland defendants' cases remain undecided
- Back to work preparing for hearings

**Tilmon Golphin, held by his uncle, Mr. Willie McCray**

Quintel Augustine's mother, who witnessed in person the prosecution remove black jurors from her son's trial: "It hurt my heart to hear that evidence of racism . . . . I don't understand why African Americans can't serve on juries just like white people."

# VALUING BLACK LIVES: A CASE FOR ENDING THE DEATH PENALTY

Alexis Hoag*

ABSTRACT

Since *Furman v. Georgia*, capital punishment jurisprudence has equipped decisionmakers with increased structure, guidance, and narrowing in death sentencing in an effort to eliminate the arbitrary imposition of death. Yet, these efforts have been largely unsuccessful given the wide discretion built into capital sentencing which allows for prejudice, bias, and racism to persist. Juries continue to sentence a disproportionately high number of defendants who have been convicted of murdering white victims to death. As a result, death sentencing schemes tend to undervalue Black murder victims' lives. Any effort to eliminate the disparity must center on the undervaluation of Black lives.

This Article suggests that the next challenge to the death penalty should be on equal protection grounds based on the undervaluation of Black lives. It highlights that the Fourteenth Amendment was originally intended, in part, to extend the equal protection of the laws to Black victims of crime. The Article then explores the pitfalls of other race-based challenges to the death penalty. And demonstrates that a challenge based on disparities in capitally prosecuting white and Black victim cases could end capital

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* Practitioner in Residence, Eric H. Holder Jr. Initiative for Civil and Political Rights, Columbia University; Lecturer in Law, Columbia Law School; J.D., New York University School of Law; B.A., Yale University. I am grateful to Daniel Harawa, Natasha Merle, Bernard Harcourt, and Jeffrey Fagan for their invaluable feedback. I also benefited from engagement and collaboration of the attendees at the Columbia Human Rights Law Review's 2019-2020 Symposium, *Furman*'s Legacy: New Research on the Overbreadth of Capital Punishment. For her stellar research assistance, I am thankful for Claudia Kassner. For their community, support, and accountability, I thank the brilliant women of Lutie on the Hudson, especially Deborah Archer. I'm also grateful for the editorial expertise of the Columbia Law School Human Rights Law Review staff, particularly Idun Klakegg, Kobina Quaye, and Will Wilder.

punishment. The Article concludes with a road map for what a challenge based on the undervaluation of Black lives would look like.

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## INTRODUCTION

On October 15, 1986, Mary Beth Westmoreland appeared before the United States Supreme Court on behalf of the State of Georgia to defend the State's racially disparate death sentencing scheme.[1] One of the Justices asked Ms. Westmoreland to explain why Georgia treated "white victim cases . . . [as] consistently more serious."[2] She responded,

> [O]ut of the black victim cases . . . you'll find perhaps over a thousand occur in something like a family dispute, a lover dispute, a fight involving liquor of some sort, where some . . . one party is drunk or the [o]ther party is drunk. Those types of disputes occur so frequently in black victim cases that they . . . fall out of the system much earlier, and—leaving the much m[o]re aggravated, the more highly aggravated white victim cases, involving armed robberies, and such things as property disputes. . . . And for whatever reason, frequently more times we'll see torture cases involving white victim cases than you do in black victim cases."[3]

Each of Ms. Westmoreland's examples—drunken disputes, family disputes, disputes among lovers—reflected racist stereotypes and unfounded value judgments as to the worthiness of Black lives; none of these cases were supported by empirical evidence. The case, brought by Warren McCleskey, a Black man sentenced to die for murdering a white victim, relied on a detailed statistical study to propose a different explanation: that Georgia unconstitutionally relied on race—the victim's white race and the defendant's Black race—when determining who to sentence to death. In fact, relying on the study's findings, John Boger, arguing on behalf of Mr. McCleskey, explained that Georgia's death penalty treated "[t]he color of a defendant's skin . . . or that of his victim . . . as grave an aggravating circumstance . . . as those expressly designated by Georgia's legislature."[4] Moreover, that such discrimination was based on "a

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1. Transcript of Oral Argument at 30, McCleskey v. Kemp, 481 U.S. 279 (1986) (No. 84-6811).
2. *Id.* at 43.
3. *Id.*
4. *Id.* at 4; *see also* Brief for Petitioner at 33, McCleskey v. Kemp, 481 U.S. 279 (1986) (No. 84-6811) ("[T]he race of the defendant and the race of the victim proved to be as powerful determinants of capital sentencing in Georgia as many of Georgia's statutory aggravating circumstances.").

century-old pattern in the State of Georgia of animosity" against Black defendants, particularly those accused of harming white victims.[5]

Since its inception, the disproportionate imposition of the death penalty has denied murdered Black victims the equal protection of the laws. Capital punishment is supposed to be reserved for those who commit the "worst of the worst" crimes.[6] Instead, as a result of bias, prejudice and racism, it is disproportionality reserved for those charged with killing white victims.[7] Over the last fifty years, death penalty jurisprudence has provided increasing amounts of structure, guidance, and narrowing to eliminate the arbitrary imposition of death.[8] I argue that these efforts have been largely unsuccessful given the wide discretion built into capital sentencing which allows for racism to operate undetected.[9]

In 1972, a plurality of the Supreme Court held in *Furman v. Georgia* that capital punishment, as administered at the time, violated the Constitution.[10] In so holding, members of the Court acknowledged

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5. Transcript of Oral Argument at 26, McCleskey v. Kemp, 481 U.S. 279 (1986) (No. 84-6811).

6. Kansas v. Marsh, 548 U.S. 163, 206 (2006) (Souter, J., dissenting); *see also* Roper v. Simmons, 543 U.S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002))); Editorial Board, *Louisiana's Color-Coded Death Penalty*, N.Y. TIMES (May 9, 2016), https://www.nytimes.com/2016/05/09/opinion/louisianas-color-coded-death-penalty.html (on file with the *Columbia Human Rights Law Review*) (arguing that although the death penalty is supposedly reserved for the "worst of the worst," it is instead imposed based on skin color).

7. *See* Sheri Lynn Johnson et al., *The Delaware Death Penalty: An Empirical Study*, 97 IOWA L. REV. 1925, 1941 (2012) (reporting race-of-victim disparities in Delaware and eight other states).

8. *See*, *e.g.*, Furman v. Georgia, 408 U.S. 238 (1972) (plurality) (holding death sentencing schemes nationwide violated the Eighth Amendment); Gregg v. Georgia, 428 U.S. 227 (1976) (approving death sentencing schemes requiring bifurcated trials and juries to weigh aggravating and mitigating circumstances in sentencing); Coker v. Georgia, 433 U.S. 584 (1977) (prohibiting death penalty for non-homicidal offenses); Ford v. Wainwright, 477 U.S. 399 (1986) (prohibiting death penalty for those adjudicated insane); Atkins v. Virginia, 536 U.S. 304 (2001) (prohibiting execution of defendants with intellectual disability); Roper v. Simmons, 543 U.S. 551 (2006) (prohibiting death penalty for individuals under age 18 at time of offense); Madison v. Alabama, 586 U.S. __, 139 S. Ct. 718 (2019) (prohibiting execution of defendant whose mental illness prevented memory of the crime).

9. *See* Turner v. Murray, 476 U.S. 28, 35 (1986) ("Because of the range of discretion . . . in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected.").

10. *See Furman*, 408 U.S. at 238.

that the death penalty had only been applied in "freakishly or spectacularly rare" cases, with little predictability relative to the nature of the crime.[11] The decision immediately voided all death sentences in the nation.[12] However, shortly after *Furman*, the Court reinstated capital punishment in *Gregg v. Georgia*, approving death sentencing schemes that provided prosecutors and jurors with guided discretion in an attempt to eradicate prejudice and bias in the administration of death.[13]

As was the case prior to *Furman*, the death penalty continues to be administered to the most disfavored members of society: the poor, those with mental illness, and Black people.[14] The death penalty is still disproportionately sought and imposed against defendants accused of murdering white victims.[15] For example, in 1990, the U.S. General

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11. *Id.* at 293 (Brennan, J., concurring); *id.* at 310 (Stewart, J., concurring).

12. *See* Fred P. Graham, *Court Spares 600*, N.Y. TIMES (June 30, 1972), https://www.nytimes.com/1972/06/30/archives/court-spares-600-4-justices-named-by-nixon-all-dissent-in-historic.html (on file with the *Columbia Human Rights Law Review*).

13. *Gregg*, 428 U.S. at 227.

14. *See* Stephen Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1840 (1994) [hereinafter Bright, *Counsel for the Poor*] (writing that many people on death row are "distinguished by neither their records nor the circumstances of their crimes, but by their abject poverty, debilitating mental impairments, minimal intelligence, and the poor legal representation they received"); *see also* Stephen Bright, *The Role of Race, Poverty, Intellectual Disability, and Mental Illness in the Decline of the Death Penalty*, 49 U. RICH. L. REV. 671, 675 (2015) ("Capital punishment then [at the time *Furman* was decided], as it is now, was very much tied to race—the oppression of African Americans, carried out by this country's criminal courts.").

15. *See, e.g.*, David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1711–15 (1998) (finding evidence from Philadelphia of race-of-victim disparities in death penalty sentencing); Scott Phillips, *Continued Racial Disparities in the Capital of Capital Punishment: The Rosenthal Era*, 50 HOUSTON L. REV. 131, 135 (2012) (noting that in Houston from 2001 to 2008, death sentences were more likely to be imposed when the victim was white); Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina: 1980–2007*, 89 N.C. L. REV. 2119, 2123 (2011) (similarly finding race-of-victim disparities in death sentencing in North Carolina from 1980 to 2007) [hereinafter Radelet & Pierce, *North Carolina*]; Christopher Slobogin, *The Death Penalty in Florida*, 1 ELON L. REV. 17, 54 (2009) (making recommendations for Florida death sentencing based on studies finding racial disparities); Raymond Paternoster et al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978–1999*, 4 U. MD. L.J. RACE RELIGION GENDER & CLASS 1, 90 (2004) (finding race-of-victim disparities at different decision-making points in death penalty sentencing in Maryland from 1978–1999); Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial*

Accounting Office ("GAO") conducted a comprehensive study of death penalty cases decided since *Furman*. The GAO concluded that "[i]n 82 percent of the studies . . . those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks."[16] In addition, the report found that "[t]he race of victim influence . . . was stronger for the earlier stages of the judicial process (e.g. prosecutorial decision to charge defendant with a capital offense . . .)."[17] These trends have remained consistent over time.

Any death sentencing scheme is unlikely to eradicate racism from its operation where the American public and the justice system continue to undervalue Black lives.[18] Where multiple actors in the justice system—law enforcement, prosecuting attorneys, and the jury—all contribute to consistent race-of-victim disparities in death sentencing, there can be no constitutional administration of capital punishment. My argument, therefore, is that a successful challenge to the death penalty must be centered on the undervaluation of Black lives. If proven, the appropriate remedy is *not* to extend capital punishment to those who murder Black victims,[19] because absent automatic death sentencing for certain crimes, which the Court already invalidated,[20] the law cannot force prosecutors to seek death and juries to impose death in Black victim cases. Rather, the appropriate remedy is to abolish the death penalty altogether.

To date, the Court has never made an equal protection determination regarding the constitutionality of the death penalty vis-à-vis the undervaluation of Black lives.[21] In order to assert this claim,

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*Discretion in Homicide Cases*, 19 LAW & SOC. REV. 587, 612 (1985) (finding that prosecutors in Florida were more likely to selectively upgrade a case to justify the death penalty when the victim is white).

16. U.S. GEN. ACCOUNTING OFF., GAO GDD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990).

17. *Id.*

18. *See* Anthony C. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After* McCleskey, 39 COLUM. HUM. RTS. L. REV. 34, 38–40 (2007).

19. *See* Randall Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1392 (1988) ("[M]ost killers of blacks are other blacks. Thus, if killers of blacks are sentenced to death with the same frequency as similarly situated killers of whites, the number of blacks sentenced to death may well increase.").

20. *See* Gregg v. Georgia, 428 U.S. 199 n. 50 (1976).

21. *See* McCleskey v. Kemp, 481 U.S. 279, 291 (1987) (examining whether Georgia's death penalty violated the Eighth and Fourteenth Amendments because "persons who murder whites are more likely to be sentenced to death than persons who murder blacks, and black murderers are more likely to be sentenced to death

a Black defendant sentenced to death for the murder of a white victim would therefore be required to show that the state declined to seek death against another defendant in a similarly aggravated case involving a Black victim, present data supporting that showing, and provide proof that the decision makers in the Black victim case acted with discriminatory purpose in declining to seek death.

An examination of early criminal laws and the legislative history of the Fourteenth Amendment make a strong case for advancing this challenge. Part I surveys existing scholarship on racial disparities in death sentencing based on the race of the victim. Part II covers antebellum history of racial disparities in criminal laws and how the passage of the Fourteenth Amendment was intended, in part, to extend the equal protection of the law to Black victims of crime. Part III discusses the Court's decision in *McCleskey* and the lessons learned. Lastly, Part IV proposes what a challenge based on the undervaluing of Black life would look like.

## I. EXISTING SCHOLARSHIP ON RACIAL DISPARITIES

Multiple actors in the criminal justice system contribute to death sentencing disparities based on the victim's race. Recent scholarship indicates that the police are one of the first actors to contribute to this disparity when they identify potential suspects during the investigation of death-eligible cases.[22] Further, numerous studies show that prosecuting attorneys contribute to the disparity when determining whether to seek death in a murder case[23] and when

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than white murderers."). In denying Mr. McCleskey's challenge, the Court noted that he was "not seek[ing] to assert . . . the rights of black murder victims in general." *Id.* at 8.

22. *See* Jeffrey Fagan & Amanda Geller, *Police, Race, and the Production of Capital Homicides*, 23 BERKELEY J. CRIM. L. 261, 266 (2018) (reviewing "every homicide reported between 1976 and 2009," and finding "that homicides with White victims are significantly more likely to be 'cleared' by the arrest of a suspect than are homicides with minority victims.").

23. *See generally* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998) (discussing the role race plays in a prosecuting attorney's exercise of discretion). For discussions of prosecutorial decision making, race, and the death penalty, *see* David Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 709–10 (1983) (finding that prosecutors sought the death penalty in 70% of cases involving a Black defendant and a white victim, while in only 15% cases involving a Black defendant and Black victim, and in 19% of cases involving a white defendant and Black victim); Raymond Paternoster, *Prosecutor Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial*

unlawfully removing Black people from juries.[24] Studies also show that juries are more likely to sentence defendants to death when the victim is white.[25]

These troubling trends are the result of death sentencing laws that give broad discretion to police, prosecutors, and juries. Capital punishment post-*Gregg* enables state actors to rely on prejudice, bias, and racism—implicit or otherwise—when determining whether to seek death against similarly situated death-eligible defendants, and when

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*Discrimination*, 18 LAW & SOC. REV. 437, 440 (1984) (noting that "evidence also suggest[ed] that killers of whites are more likely to be charged with capital homicide in the first instance"); Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519, 521–23 (1995) (describing prosecutorial discretion and mentioning multiple studies showing that prosecutors are more likely to seek death when defendants are charged with murdering white victims than when they are charged with murdering Black victims); John M. Scheb II et al., *Race and the Death Penalty: An Empirical Assessment of First Degree Murder Convictions in Tennessee After* Gregg v. Georgia, 2 TENN. J. RACE GENDER & SOC. JUST. 1, 20–22 (2013) (finding that prosecutors are almost twice as likely to seek death when the victim is white).

24. *See* EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 43 (2010), https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf [https://perma.cc/Y5T9-43CK] ("Exclusion of qualified citizens of color from jury service amounts, then, to the near-complete absence of minority perspective, influence, and power in the criminal justice system."); *see also* William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 241 (2001) (finding that all-white juries are much more likely to sentence Black defendants to death in cases involving white victims than when there is the presence of one or more Black males on the jury); *id.* at 242 ("only white jurors are much more likely to vote for death as a result of their perception of the defendant's dangerousness" in cases involving Black defendants/white victims).

25. *See* Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573, 583 (2011) (describing a study where participants were significantly more likely to sentence Black defendants to death than similarly situated white defendants, and likelihood was greater for simulations involving a Black defendant and white victim); *see also* Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 385 (2006) ("The salience of race [in cases involving white victims] may incline jurors to think about race as a relevant and useful heuristic for determining the blameworthiness of the defendant and the perniciousness of the crime.").

deciding how much weight to assign aggravating and mitigating evidence during the sentencing hearing.[26]

### A. Race of Victim Studies

In 1998, Professor David Baldus led a thorough examination of post-*Furman* death penalty cases analyzing racial discrimination in capital sentencing.[27] Baldus and his team surveyed existing studies measuring the impact of race-of-defendant and race-of-victim on death sentencing, most of which focused on cases involving Black defendants/white victims and white defendants/white victims. These studies showed that the chance of a case resulting in the death penalty were highest in Black defendant/white victim cases.[28] Baldus also looked specifically at cases from Philadelphia to determine whether there was race-of-victim impact. Researchers identified nearly 1000 death eligible cases from 1983 to 1993 and analyzed the penalty phases of capital trials to determine what impact, if any, the defendant and victim's race had on sentencing.[29] Baldus concluded that victim race was "particularly prominent" during the jury's determination of mitigation, and that the "magnitude and consistency" of the results would not be observable "if substantial equality existed in this system's treatment of defendants."[30]

Six years later Baldus led another team to analyze the extent of racial discrimination in death sentencing.[31] Baldus noted that prior to *Furman*, researchers paid little attention to race of victim data, focusing mostly on race of the defendant. Regardless, pre-*Furman* research from Georgia revealed that prosecutors were 4.3 times more likely to seek the death penalty against a defendant charged with murdering a white victim than a similarly situated defendant charged with murdering a Black victim.[32] After surveying post-*Furman*

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26. *See, e.g.*, Pulley v. Harris, 465 U.S. 37, 55 (1984) (Stevens, J., concurring) ("[T]he schemes [in *Furman*] vested essentially unfettered discretion in juries and trial judges to impose the death sentence."); Turner v. Murray, 476 U.S. 28, 35 (1986) (explaining that the "range of discretion" afforded jurors in "capital sentencing hearing[s]" provides a "unique opportunity for racial prejudice to operate but remain undetected.").

27. Baldus et al., *supra* note 15, at 1643.

28. *Id*. at 1658 n.61 (noting the 1990 GAO study).

29. *Id.* at 1665–75.

30. *Id.* at 1714–15.

31. David Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment*, 53 DEPAUL L. REV. 1411 (2004).

32. *Id.* at 1423.

scholarship, the team concluded that "race-of-victim influence was found at all stages of the criminal justice system" and was strongest at the earliest stages, such as when the prosecutor decided to seek death and in whether to proceed with trial rather than a plea offer.[33]

One of the starkest race-of-victim disparities comes from a 2015 study of Louisiana murders.[34] Using FBI statistics, Frank Baumgartner and Tim Lyman analyzed all homicides that occurred in the state between 1976 and 2011, and then continued to analyze death sentence and execution data through July 2015.[35] Those who murdered white women were 12 times more likely to be sentenced to death than a defendant who murdered a Black male.[36] Although Black men made up the majority of homicide victims in the state (61%), only 8% of those cases led to the execution of the perpetrator. Conversely, white women represented only 7% of all homicide victims, but 47% of those cases led to the defendant's execution.[37] Here, the researchers concluded that "the families and communities of murdered black males [were] denied" equal protection of the laws.[38] Indeed, no white person had been executed for a crime against a Black person in Louisiana since 1752.[39]

Turning to North Carolina, Jack Boger and Isaac Unah examined death penalty cases from 1993 to 1997, finding that defendants whose victims were white were 3.5 times more likely to be sentenced to death than those with non-white victims.[40] Unah noted that no matter how he and Boger analyzed the data, the whiteness of homicide victims "operate[d] as a 'silent aggravating circumstance' that ma[d]e[] death significantly more likely to be imposed."[41] Michael

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33. *Id.* at 1425.

34. Frank R. Baumgartner & Tim Lyman, *Race-of-Victim Discrepancies in Homicides and Executions, Louisiana 1976–2015*, 7 LOY. J. PUB. INT. L. 129 (2015).

35. *Id.* at 130–31.

36. *Id.* at 135 (noting that based on the race and gender of the victim in murder cases, death sentences imposed per 1000 homicides ranged from 57 for white female victims; 28 for white male; 18 for Black female; and only 5 for Black male victims).

37. *Id.* at 134.

38. *Id.* at 142.

39. *Id*. at 130; *see also* CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT, 110 (2016).

40. Jack Boger & Isaac Unah, *Race and the Death Penalty in North Carolina—An Empirical Analysis: 1993–1997*, DEATH PENALTY INFO. CTR. (2001), https://deathpenaltyinfo.org/resources/publications-and-testimony/studies/race-and-the-death-penalty-in-north-carolina [https://perma.cc/A9EZ-HRYA].

41. *Id*.

Radelet and Glenn Pierce came to a similar conclusion when reviewing data from North Carolina capital cases from 1980 to 2007.[42]

The race-of-victim impact also extends to who gets executed. This means that defendants who attempt to obtain appellate relief from their death sentence are also impacted by the victim's race. The Death Penalty Information Center notes that post-*Gregg*, "when executions have been carried out . . . 75 percent of the cases involve the murder of white victims, even though blacks and whites are about equally likely to be victims of murder."[43] In Georgia, defendants convicted of murdering white victims are 17 times more likely to be executed than defendants convicted of murdering Black victims.[44] When rape was still a death-eligible crime, researchers found that of the 455 men executed for rape between 1930 and 1967, 89 percent were Black.[45]

Findings consistently show that the murder victim's race is a driving force at multiple decision points throughout death sentencing. The Court's decision in *Furman* afforded state actors significant discretion at each of these points, enabling them to insert racism, bias, and prejudice into their decision making. Thus, even with guided discretion, that most decision-makers are white—investigative law enforcement, the prosecution,[46] judges,[47] and juries[48]—means that

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42. Radelet & Pierce, *North Carolina*, *supra* note 15, at 2127 (after reviewing different data from partially overlapping time periods, finding "that in recent years White victims are present in less than half of all homicides, but nearly in 80% of cases resulting in executions.").

43. *Policy Issues: Race*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/race [https://perma.cc/M643-L8L3].

44. Scott Phillips & Justin F. Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L. L. REV. (forthcoming 2020), https://ssrn.com/abstract=3440828 [https://perma.cc/PRE7-UK63].

45. Marvin Wolfgang & Marc Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS AMER. ACAD. POL. & SOC. SCI. 119 (1973).

46. As of 2015, 95% of elected district attorneys nationwide are white. *See Justice for All?*, REFLECTIVE DEMOCRACY CAMPAIGN (2015), https://wholeads.us/justice/wp-content/themes/phase2/pdf/key-findings.pdf [https://perma.cc/J6AT-VNZR].

47. A 2015 study showed that 80% of state appellate court judges are white and that over 80% of state trial court judges are white. Tracey E. George & Albert H. Yoon, *The Gavel Gap*, AM. CONST. SOC'Y 7 (2016), https://www.acslaw.org/wp-content/uploads/2018/02/gavel-gap-report.pdf [https://perma.cc/R9DN-P28X].

48. Mona Lynch & Craig Haney, *Death Qualification in Black and White: Racialized Decision-Making and Death-Qualified Juries*, 40 LAW & POL'Y 148 (2018) (finding that the death qualification process disproportionately excludes Black prospective jurors from capital jury participation).

their exercise of discretion is likely guided by their ability to more readily empathize with white victims.[49]

## B. Centering on Black Murder Victims

Other scholars have acknowledged the devaluation of Black victims in arguments about racial discrimination in capital punishment.[50] For example, in the wake of the Court's decision in *McCleskey*, Professor Randall Kennedy noted that critics of the opinion often "failed to explore the implications of the undervaluation" of Black victims of murder.[51] However, his critique does not stem from an abolitionist framework, but instead speaks to a broader social concern: the plight of Black communities that disproportionately experience violence.[52]

In the same year that Kennedy published his article, Stephen Carter explored the American legal system's response to victims of crime, arguing that the law fails to provide equal protection of the laws to Black victims.[53] Carter criticized the Court's holding in *McCleskey* for not only failing to address racism's role in the disproportionate execution of Black defendants, but also "for the inadequate protection of *murder victims* who happen to be black."[54] Carter concluded that the political and legal climate recognizes two types of people when criminal conduct is involved: victims and Black people.[55]

In a 1989 article, Michael Radelet analyzed cases where a white person was executed for crimes against Black people.[56] Radelet reviewed records from 15,978 executions beginning in 1608 and identified only 30 cases in which a white person was executed for a

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49. *See generally* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 347–50 (1997) (discussing the role of race and empathy in the criminal justice system).

50. Although not in the context of capital punishment, Kimberlé Crenshaw notes that antiracist critiques of rape focus on the discrimination Black men accused of raping white women face, which "reflects devaluation of Black women" victims. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1271–72 (1991).

51. Kennedy, *supra* note 19, at 1391–92.

52. *Id.* at 1394.

53. Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 444–46 (1988).

54. *Id.* at 443.

55. *Id.* at 447.

56. Michael L. Radelet, *Executions of Whites for Crimes Against Blacks: Exception to the Rule?*, 30 SOC. Q. 529, 532 (1989).

crime involving a Black victim.[57] Given the rarity of such cases, Radelet set out to determine what non-racial factors contributed to each execution. He concluded that social status was the driving force.[58] For example, among white people executed, some either had lower occupational status relative to their Black victims, others were "marginal members of the white community," and some had prior criminal records, including prior offenses against white people.[59] Thus, the victim's Black race alone could not explain each perpetrator's execution.

## II. EARLY AMERICAN CRIMINAL LAW AND THE FOURTEENTH AMENDMENT AS REDRESS TO BLACK VICTIMS OF CRIME

The lack of redress for Black victims of crime is not a recent phenomenon; its origins lie in slavery and white supremacy. These two interdependent forces shaped the early operation of America's criminal legal system and continue to impact its operation today.[60]

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57. Radelet relied heavily on Watt Espy's archive of American executions in Headland, Alabama, which has been made digitally available. *See Executions in the United States, 1608–2002: The ESPY File (ICPSR 8451)*, UNIV. MICH. INST. FOR SOC. RES., https://www.icpsr.umich.edu/icpsrweb/NACJD/studies/8451 [https://perma.cc/F8RD-G55Q]. Espy believes there may be as many as 7000 additional executions for which he is unable to account. *Id.* at 531–32.

58. *Id.* at 535–36.

59. *Id.* at 534–35.

60. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2 (2010) (arguing that the "racial caste system" of Jim Crow and slavery have not been eradicated, but rather restructured into the modern criminal justice system); DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 53 (2008) ("Beginning in the late 1860s, and accelerating after the return of white political control in 1877, every southern state enacted an array of interlocking laws essentially intended to criminalize black life."); SAIDIYA V. HARTMAN, SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA 10 (1997) (observing that racial slavery transformed, rather than annulled, putative free labor within the criminal justice system); DAVID M. OSHINSKY, WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996) (detailing Mississippi's transition from slavery to convict leasing to Parchman Farm, the state prison, which opened in 1901 and was modeled on a plantation); Bryan Stevenson, *Introduction* to EQUAL JUSTICE INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR (3d ed. 2016), https://lynchinginamerica.eji.org/report/ [https://perma.cc/XQX7-ZZHQ] ("The administration of criminal justice in particular is tangled with the history of lynching in profound and important ways that continue to contaminate the integrity and fairness of the justice system."); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1185–86, 1193

## A. Early American Criminal Law

The seeds of white supremacy were planted in 1619, when white settlers first brought enslaved Africans to the shores of colonial America.[61] "It took only a few decades after the arrival of enslaved Africans in Virginia before white settlers demanded a new world defined by racial caste."[62] The law of slavery was a uniquely American invention because the common law that the colonies inherited from England did not provide for master-enslaved person relationships.[63] During the colonial period, the common law was not intended to protect enslaved people; instead, slave codes enabled white people to punish Black people with impunity to maintain power and dominance. "The most salient distinction between the master-slave relationship and other human interactions was the unlimited violence and oppression that the slave master could legitimately inflict upon his bondsman."[64] Given the inherent inequality in the relationship, whereby an enslaved person was wholly owned by another person by virtue of race, enslaved individuals "were powerless in the face of their masters' unlimited power."[65]

Each colony had a set of slave codes. These laws dictated, with specificity, the property rights of those who owned enslaved people, the

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(2015) (acknowledging "the history of slavery and Jim Crow's afterlife in criminal punishment practices," specifically uses of "criminal law administration as a central means of resisting the abolition of slavery, Reconstruction, and desegregation, continue to inform criminal processes and institutions to this day by enabling forms of brutality and disregard that would be unimaginable had they originated in other, more democratic, egalitarian, and racially integrated contexts.").

61. *See, e.g.*, Brief for NAACP et al. as Amici Curiae Supporting Petitioners in *Furman v. Georgia*, 408 U.S. 238 (1972) (No. 69-5003), 1971 WL 134376, at *9 (Aug. 31, 1971) (tracing racism and capital punishment to when enslaved Africans were brought to the colonies: "The most brutal and inhumane forms of punishment—crucifixion, burning and starvation—were legal under the slave codes in the early colonies and were used extensively because imprisonment would have been a reward, giving the slave time to rest, and fines could not be collected from unpaid laborers.").

62. Bryan Stevenson, *Why American Prisons Owe Their Cruelty to Slavery*, N.Y. TIMES MAG. (Aug. 14, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/prison-industrial-complex-slavery-racism.html (on file with the *Columbia Human Rights Law Review*).

63. Andrew Fede, *Legitimized Violent Slave Abuse in the American South, 1619–1865: A Case Study of Law and Social Change in Six Southern States*, 29 AM. J. LEGAL HIST. 93, 94 (1985).

64. *Id.*

65. *Id.*

rights these owners had to discipline their property, and protections against rebellions led by enslaved people.[66] Slave owners relied heavily on the slave codes to assert and maintain control because the state lacked power to stop a collective slave uprising.[67] As a result, legislators explicitly deprived enslaved people of the equal protection of "the common law of crimes" when whites "violently abused" them.[68] Legislators "pass[ed] exculpatory acts that granted both slave masters and whites who were strangers to the slave legal rights to beat, whip, and kill bondsmen."[69] The only type of redress the slave laws provided for such treatment was to the slave owner, who could be reimbursed for damages to his property or for replacement if the abuse resulted in death.[70] No enslaved person could testify in court against a white person to determine guilt.[71] According to early colonial law, enslaved people were not considered worthy of protection. However, these same laws "held slaves . . . morally responsible and punishable for misdemeanors and felonies."[72] Thus, early colonial law intentionally did not provide redress for Black people; it provided only punishment.

Following the formation of the United States, the law's emphasis on punishing Black bodies continued. Antebellum era criminal codes often explicitly mentioned both the race of the victim and the defendant, making certain acts felonies *only when* committed by Black people. For example, in Alabama, an enslaved person could receive "up to one hundred stripes on the bare back . . . [for] forg[ing] a pass or engag[ing] in 'riots, routs, unlawful, assemblies, trespasses, and seditious speeches.'"[73] Similarly, "[i]n Louisiana, a slave who struck his master, a member of the master's family, or the overseer, 'so as to cause a contusion, or effusion or shedding of blood,' was to suffer death . . . ."[74]

Whereas certain crimes specifically targeted enslaved people, equally troubling was the fact that the social, political, and legal norms of the South also failed to hold white people accountable where the victim of the crime was Black. For example, the criminal codes

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66. *See* KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 206 (Vintage Books 1989) (1956).

67. Fede, *supra* note 63, at 95.

68. *Id.*

69. *Id.*

70. *Id.* at 96.

71. A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND AMERICAN LEGAL PROCESS—THE COLONIAL PERIOD 58 (1978).

72. STAMPP, *supra* note 66, at 206.

73. *Id.* at 210.

74. *Id.* at 210–11.

assigned harsher punishments to enslaved and free Black people for committing the same offense as a white person.[75] In Georgia, "rape committed by a white man was never regarded as sufficiently serious to warrant a penalty greater than 20 years imprisonment. Rape committed by a slave or a free person of color upon a white woman was punishable by death."[76] Early American criminal law laid the foundation for the racial disparities we continue to observe in contemporary capital punishment.

### B. Adoption of the Fourteenth Amendment

The Civil War transformed the United States politically, economically, and legally. During Reconstruction, from approximately 1863 to 1877, some of these changes briefly touched the lives of formerly enslaved and free Black people.[77] It was during this period that Congress passed the Fourteenth Amendment. The context, key political figures, and legislative history leading up to the Amendment's passage shed light on the framers' intent to extend the equal protection of the laws to Black people, specifically those victimized by crime.

In the aftermath of Emancipation, most Southern whites, regardless of whether they had been slaveholders, were not prepared to recognize the rights of Black people.[78] Accordingly, Southern lawmakers, many of whom had owned slaves or were from slaveholding families, passed a series of laws to maintain the subjugation of Black people.[79] These laws became known as black codes.[80] For instance, "[b]lacks convicted of raping white women were required by law to be castrated or killed. White men convicted of raping white women, however, could expect much less severe punishments. The rape of black women was not even recognized as a crime."[81]

Meanwhile, Congress had to quickly determine how to address post-war Southern resistance and reunify the splintered nation. On January 12, 1866, a Joint Committee of members of the 39th Congress convened "to inquire into the condition of the States which formed the

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75. *Id.* at 210 ("Every southern state defined a substantial number of felonies carrying capital punishment for slaves and lesser punishment for whites.").

76. Brief for Petitioner, Coker v. Georgia, 433 U.S. 584 (1977) (No. 75-5444), 1976 WL 181481, at *54 n.62.

77. *See* DERRICK A. BELL, RACE, RACISM, AND AMERICAN LAW 51–52 (6th ed. 2008).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 282 n.106 (citing BELL HOOKS, AIN'T I A WOMAN 33–36 (1981)).

so-called Confederate States."[82] Republican Representatives Thaddeus Stevens (PA) and John Bingham (OH) were key members of the committee, powerful political leaders, and fierce opponents of slavery and racial discrimination.[83]

During the Reconstruction hearing, members of Congress questioned lawyers, military officials, and businessmen residing in the South about the experiences of Black people in the aftermath of the war. Much of the testimony described violence against Black people. In Alabama, in the months immediately following the war, a Union Major General observed: "I have not known, after six months' residence at the capital of the State, a single instance of a white man being convicted and hung or sent to the penitentiary for a crime against a negro, while many cases of crime warranting such punishment have been reported to me."[84] The Major General explained that some of these crimes committed against Black people included the "most atrocious murders."[85] Major General Canby described a similar situation in Louisiana: "[T]he prevailing sentiment is so adverse to the negro that acts of monstrous crime against him are winked at; and this sentiment will increase just in proportion as the privileges of the negroes are extended."[86]

An attorney practicing in Norfolk, Virginia testified: "I have had more than a hundred complaints made to me with reference to the abuse of freedmen . . . . They have been beaten, wounded, and in some instances killed; and I have not yet known one white man to have been brought to justice for an outrage upon a colored man."[87] Similarly, when the Joint Committee asked Major General Clinton Fisk whether a Black man in South Carolina would turn to the courts if a white man violated his wife, Fisk responded: "the negro . . . would not dream of such a thing [because of] . . . fear of personal violence to himself, and

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82. STAFF OF THE J. COMM. ON RECONSTRUCTION, 39TH CONG., REP OF THE J. COMM. ON RECONSTRUCTION, at iii (1866) [hereinafter RECONSTRUCTION REPORT].

83. *See* Paul Finkelman, *The Historical Context of the Fourteenth Amendment*, 13 TEMPLE POL. & C.R. L. REV. 389, 392–94 (2004) (describing Thaddeus Stevens' multiple decades of "uncompromising support[] of black rights and racial equality"); *id.* at 395–99 (detailing John Bingham's efforts to expand Black rights in Ohio, including providing schools and protections against kidnapping).

84. *See* RECONSTRUCTION REPORT, *supra* note 82, pt. 3, at 141 (Mar. 9, 1866) (testimony of Maj. Gen. Wager Swayne).

85. *Id*.

86. *Id*. pt. 4, at 153 (1866) (testimony of Major General ED. R.S. Canby).

87. *Id*. pt. 3, at 50 (Feb. 3, 1866).

because he would think it would be utterly futile . . . ."[88] Earlier in his testimony, Fisk reported that he "found numerous evidences . . . that [Black women's] chastity had been disregarded by the whites . . . ."[89]

The Joint Committee's report was over 800 pages, detailing months of testimony, much of it describing violent Southern resistance to Black freedom. It was clear that, without federal legislation, Southern whites had little intention of recognizing Black people's humanity or dignity: "The only hope the colored people have is in Uncle Sam's bayonets; without them, they would not feel any security . . . ."[90] After bearing witness to this testimony, Representative Bingham drafted Section I of the Fourteenth Amendment:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the *equal protection of the laws*.[91]

When Senator Jacob Howard of Michigan introduced the Amendment to the Senate, he explained: "It prohibits the hanging of a black man for a crime for which the white man is not to be hanged."[92] Forefront in the framers' minds was to provide redress to Black victims of crimes, and to end the legal discrepancies that had long existed in Southern states.

## III. CHALLENGING CAPITAL PUNISHMENT UNDER THE FOURTEENTH AMENDMENT: *MCCLESKEY V. KEMP*

The death penalty challenge in *McCleskey v. Kemp* was the culmination of years of legal strategy, data collection, and analysis to push the Court to squarely consider race in capital punishment.[93]

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88. *Id*. at pt. 3, at 37 (Jan. 30, 1866).

89. *Id*.

90. *Id*. at pt. 2, at 59 (Feb. 3, 1866) (testimony of Thomas Bain).

91. Gerard N. Magliocca, *The Father of the 14th Amendment*, N.Y. TIMES: OPINIONATOR (Sept. 17, 2013), https://opinionator.blogs.nytimes.com/2013/09/17/the-father-of-the-14th-amendment/ (on file with the *Columbia Human Rights Law Review*) (quoting U.S. CONST. amend. XIV) (emphasis added).

92. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

93. *See* JACK GREENBERG, CRUSADERS IN THE COURTS: LEGAL BATTLES OF THE CIVIL RIGHTS MOVEMENT 440 (1st ed. 1994) (describing the development of "a full-scale attack on capital punishment, as arbitrary, cruel and unusual, and racist"); *id.* at 444 (concluding that "the single greatest determinant of whether a defendant will be sentenced to death is the race of the victim").

Justice Powell foreshadowed the challenge in his dissent in *Furman*, musing: "If a Negro defendant . . . could demonstrate that members of his race were being singled out for more severe punishment than others charged with the same offense, a constitutional violation might be established."[94] Embracing Justice Powell's invitation, counsel for Mr. McCleskey argued that Georgia's death sentencing scheme racially discriminated against Warren McCleskey, a Black man sentenced to death for killing a white man, in violation of both the Eighth and Fourteenth Amendments.[95] In support, they relied on David Baldus's complex statistical study showing that Georgia's death sentencing scheme resulted in "persistent racial disparities in capital sentencing—disparities by race of the victim and by race of the defendant—that are highly statistically significant and cannot be explained by any of the hundreds of [other] sentencing factors . . . ."[96] Baldus's analysis showed that defendants charged with killing a white victim received the death penalty at a rate nearly eleven times higher than defendants charged with killing a Black victim.[97] Yet despite the clear conclusions from the data, the Supreme Court was unconvinced.[98]

In evaluating the Fourteenth Amendment claim, the Court seemed fearful of the vast implications of Mr. McCleskey's request.[99] Namely, finding an equal protection violation would have required the Court to acknowledge deeply entrenched, systemic racism in the administration of the death penalty. It was unwilling to concede that racism, bias, and prejudice played a role in police investigations, prosecutor charging decisions, and jury and judge decision-making.[100] Nor did the Court accept the statistical evidence as sufficient proof of *purposeful* racism in Mr. McCleskey's case. Instead, for Mr. McCleskey to prevail on an inference of discrimination, the Court "demand[ed]

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94. Furman v. Georgia, 408 U.S. 238, 449 (1972) (Powell, J., dissenting) (explaining that the evidence submitted in Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968), showing that Black men in certain Arkansas counties were disproportionately sentenced to death for the rape of white women, was insufficient).

95. Brief for Petitioner at 27–28, McCleskey v. Kemp, 481 U.S. 279 (1987) (No. 84-6811), 1985 U.S. S. Ct. Briefs LEXIS 1538; *see also id.* at 10–27 (detailing history of racial disparities in criminal sentencing, particularly capital punishment).

96. *Id.* at 32.

97. McCleskey v. Kemp, 481 U.S. 279, 353 (1987) (Blackmun, J., dissenting).

98. *Id.* at 291.

99. The dissent characterized this as "a fear of too much justice." *Id.* at 339 (Brennan, J., dissenting).

100. *Id.* at 292.

exceptionally clear proof,"[101] despite the fact that the Court routinely relied on statistical evidence in other areas of the law to infer discrimination, particularly where "smoking gun" evidence is unlikely.[102] The Court also dismissed Mr. McCleskey's historical evidence, claiming that history from the Civil War era had "little probative value" and that "actions taken long ago" did not reveal "current intent."[103] The Court therefore created a regime where the most relevant and probative evidence—i.e., historical discrimination and deliberate disproportionate punishment—could not be used to establish a Fourteenth Amendment equal protection violation. This undermined the intent to extend redressability to Black people inherent in the Fourteenth Amendment.[104]

Ultimately, in rejecting Mr. McCleskey's Eighth Amendment arguments, the Court invited him to take his case and statistical proof to the legislature, a body better suited to address his concerns.[105]

## IV. CHALLENGING THE DEATH PENALTY BASED ON THE UNDERVALUATION OF BLACK LIVES

The Fourteenth Amendment forbids public officials from intentional discrimination based on race absent a compelling government interest. This prohibition extends to investigating police officers and prosecutors exercising discretion. No compelling state interest can justify the government's failure to seek the death penalty in aggravated murders involving Black victims at similar rates as in cases involving white victims. The distinguishing factor in the government's failure to seek death is not the aggravation of the crime, but rather the race of the victim. As the Court recognized in *McCleskey*, "[i]t would violate the Equal Protection Clause for a State to base enforcement of its criminal laws on 'an unjustifiable standard such as race.'"[106]

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101. *Id.* at 297.

102. Courts have long allowed plaintiffs in employment cases to rely on statistics because direct evidence of discrimination is rare. *See, e.g.*, Bazemore v. Friday, 478 U.S. 385, 387 (1986) (relying on several statistical regressions of pay to show Black employees were paid less than white colleagues).

103. *McCleskey*, 481 U.S. at 289; *id.* n.20.

104. *See supra* Section II.B.

105. *McCleskey*, 481 U.S. at 319.

106. *Id.* at 291 n.8 (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)).

### A. Standing and Selection of Parties to Raise the Claim

A threshold determination in mounting a Fourteenth Amendment equal protection challenge is determining who should raise it: the estate of a Black victim, a defendant who murdered a Black victim and against whom the government did not seek death, or a defendant who murdered a white victim and against whom the government did seek death? No lawyer acting in her client's best interest would challenge the government's failure to seek death against her client. Instead, the question becomes whether a capitally-charged defendant who murdered a white victim has third-party standing to raise the issue on behalf of a murdered Black victim from a non-capital case.

Third-party standing determinations require the person pursuing the claim to have an interest in the outcome of the dispute, to be closely related to the third party, and for the third party to be unlikely to assert their own right.[107] Beginning with *Craig v. Boren*[108] and continuing with *Batson v. Kentucky*[109], the Court began to relax standing principles to address equal protection violations. In *Batson*, the defendant challenged the government's unlawful removal of a prospective juror based on the juror's race. In allowing a defendant to pursue a jury selection discrimination claim, the Court implicitly recognized that the unlawfully excluded juror was unlikely to assert their own right. Similarly, there is little likelihood that a Black murder victim's estate would assert the victim's right to equal protection of a criminal prosecution. Moreover, there is an additional harm in need of redress: the harm to the community where selective capital prosecution based on race undermines "public confidence in the fairness of our justice system."[110] Like *Batson*, the prosecutor's discriminatory action "causes a criminal defendant cognizable injury . . . because it 'casts doubt on the integrity of the judicial process' and places the fairness of a criminal proceeding in doubt."[111]

The most appropriate actor to bring the challenge is a Black defendant whom the state is seeking death against for allegedly murdering a white victim. To avoid procedural default, the ideal

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107. *See* Powers v. Ohio, 499 U.S. 400, 414 (1991).

108. 429 U.S. 190 (1976) (granting standing to beer vendors challenging Oklahoma's statute prohibiting the sale of certain beer to males (but not females) between ages 18–21).

109. 476 U.S. 79 (1986).

110. *Batson*, 476 U.S. at 87.

111. *Id.* at 411 (quoting Rose v. Mitchell, 433 U.S. 545, 556 (1979)).

procedural mechanism to raise the claim is a pretrial motion after the prosecution has filed its death notice. To raise the claim, the lawyers must find a factually similar case from the same prosecuting jurisdiction involving a white or Black defendant prosecuted for murdering a Black victim and where the state declined to seek death. The two crimes should share identical possible aggravating circumstances and should have occurred during roughly the same timeframe. These similarities—aggravating facts, prosecutor's office, and timing—will help isolate the victim's race as the distinguishing characteristic between a death-noticed case and a non-capital prosecution.

### B. Purposeful Discrimination

The central takeaway from *McCleskey* was that any subsequent challenge to the death penalty on equal protection grounds must include evidence of *purposeful* racial discrimination.[112] Thus, when raising the claim from the perspective of a Black murder victim, such evidence must support an inference that the decisionmakers acted with discriminatory purpose when they declined to seek death. Existing statistics illustrate the stark race-of-victim disparities in law enforcement murder investigations, prosecutor charging decisions, jury sentencing, and executions. However, *McCleskey* tells us we need more.

As Anthony Amsterdam explained in his 2007 remarks reflecting on *McCleskey*, we must collect information about racism in the community where the cases are being prosecuted, in the prosecuting attorney's office, and in the investigating police department.[113] We must also gather evidence of racial discrimination from the specific prosecutors involved in the charging decisions—their record of *Batson* violations, their personnel files, and any public statements they have made.[114] The NAACP Legal Defense and Educational Fund's amicus brief in *Flowers v. Mississippi* is an excellent example of how to identify racism in a specific community, in a prosecutor's office, and in the practices of an individual prosecutor.[115]

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112. McCleskey v. Kemp, 481 U.S. 279, 351 (1987).

113. *See* Amsterdam, *supra* note 18, at 53–54.

114. *Id.*

115. *See* Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. in Support of Petitioner, Flowers v. Mississippi, 136 S. Ct. 2228 (2019) (No. 17-9572), 2018 WL 6921334, at *17–36 (detailing Winona, Mississippi and the Fifth Judicial District's long history of denying African-Americans equal rights and

A successful test case in a single jurisdiction could pave the way for subsequent challenges in other states that continue to seek the death penalty, eventually culminating in a national end to capital punishment.

### C. Remedy

In response to the racially disproportionate data in *McCleskey*, one of the Justices mused: "It's such a curious case, because what's the remedy? Is it to execute more people?"[116] Of course not. At the time, Jack Boger demurred, offering that the Court need not make a facial holding on the constitutionality of the death penalty akin to the Court's decision in *Furman*.[117] However, today the only appropriate remedy is to abolish the death penalty. States still operating a capital punishment system are incapable of administering the death penalty free from racial discrimination and arbitrariness. Legally irrelevant factors continue to drive death sentencing including the quality of defense counsel, the location of the crime, and the race of the victim (and often the defendant).[118] Expanding the death penalty's reach to include defendants in Black victim cases serves only to perpetuate the undervaluation of Black lives because the perpetrators of Black victim cases are often also Black.[119]

To ensure that Black victims receive equal protection of the laws, the government must end the discriminatory imposition of capital punishment. A natural extension of valuing the lives of Black victims is to value the lives of all defendants, particularly Black defendants charged with aggravated murders.[120]

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District Attorney Doug Evans' record of discriminating against African-American jurors).

116. *See* Transcript of Oral Argument at 12, McCleskey v. Kemp, 481 U.S. 279 (1987) (No. 84-6811).

117. *Id* at 12–13.

118. *See* Glossip v. Gross, 135 S. Ct. 2726, 2760 (2015) (Breyer, J., dissenting) (recognizing that factors "that ought *not* to affect application of the death penalty, such as race, gender, or geography, often do.") (emphasis in original); *id.* at 2761 (explaining that "the availability of resources for defense counsel (or lack thereof)" also affects death sentencing (citing, *inter alia*, Bright, *Counsel for the Poor*, *supra* note 14)).

119. *See* Kennedy, *supra* note 19, at 1392.

120. *See* BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 17–18 (2014).

## CONCLUSION

At its founding, the nation's criminal legal system distinguished between races to determine what behavior was criminal and who to punish. The Fourteenth Amendment, in part, was ratified to eradicate these distinctions. Placing equal value on Black lives—perpetrators and victims—relative to white lives, would compel the criminal legal system to address longstanding racial discrimination in the operation of the death penalty. Rather than expand or even reform capital punishment, the only solution is abolition. Borrowing from Allegra McLeod's prison abolition framework, abolition of the death penalty forces the law to confront the dehumanization, violence, and racial degradation inherent in death sentencing.[121] Empirical evidence gathered since *Furman* illustrates that our nation is incapable of administering the death penalty free from racial discrimination. It is time for this nation to cease tinkering with the machinery of death and to abolish capital punishment.

121. McLeod, *supra* note 60, at 1207.

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# Additional Resources

Henderson Hill and the North Carolina Racial Justice Act (Video)
https://deathpenaltyinfo.org/resources/podcasts/discussions-with-dpic/henderson-hill-and-the-north-carolina-racial-justice-act

Capital Punishment (Part IV, Chapter 17, of The State of Criminal Justice 2020)
https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2020/capital-punishment-scj2020.pdf