

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.

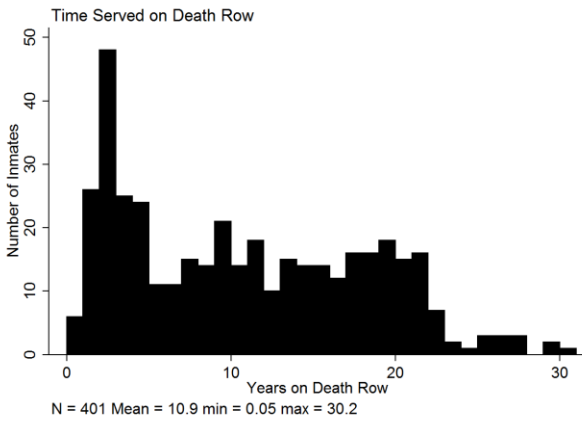
Table 4. Time Spent on Death Row

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

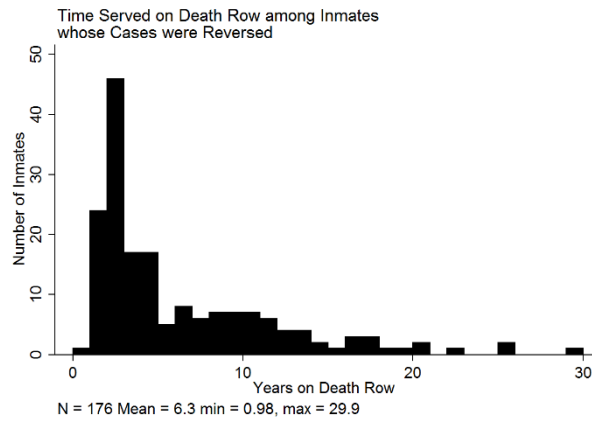
Years on death row for those remaining there is calculated from December 31, 2014; for all others it is the date of their removal from death row.

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.

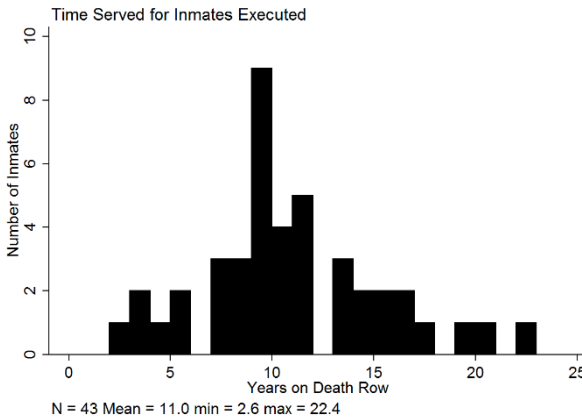
Figure 1. Years on Death Row
A. Overall



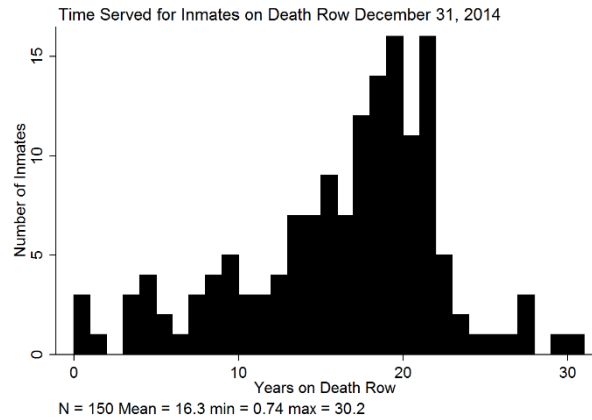
B. Cases Later Reversed



C. Inmates Executed



D. Inmates on Death Row



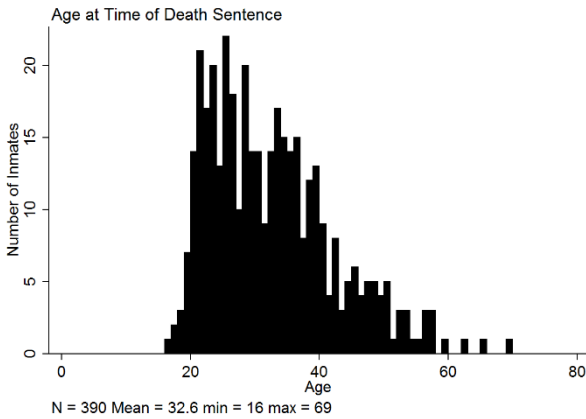
The death row population is clearly made up of distinct groups. Among those whose sentences were eventually reversed, reversal came after fewer than 4 years, on average. The median number of years served among this group was 3.8, and 60 percent served fewer than five years on death row. Of course, the 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.

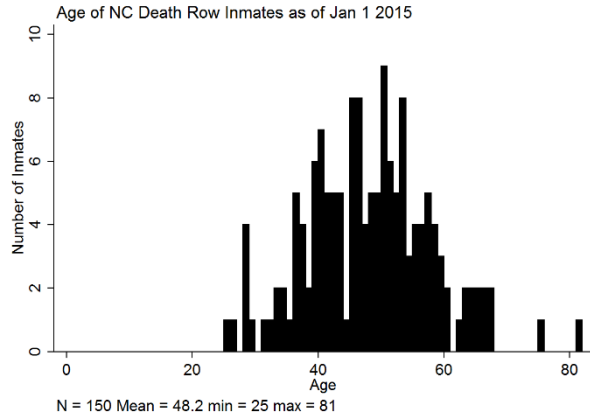
Figure 2 shows the developing age issues on death row. Part A shows how old inmates were at the date of their death sentence, and Part B the age of current death row inmates as of December 31, 2014.

Figure 2. Age of Death Row Inmates

A. Age at Time of Death Sentence



B. Age of Current Death Row Inmates



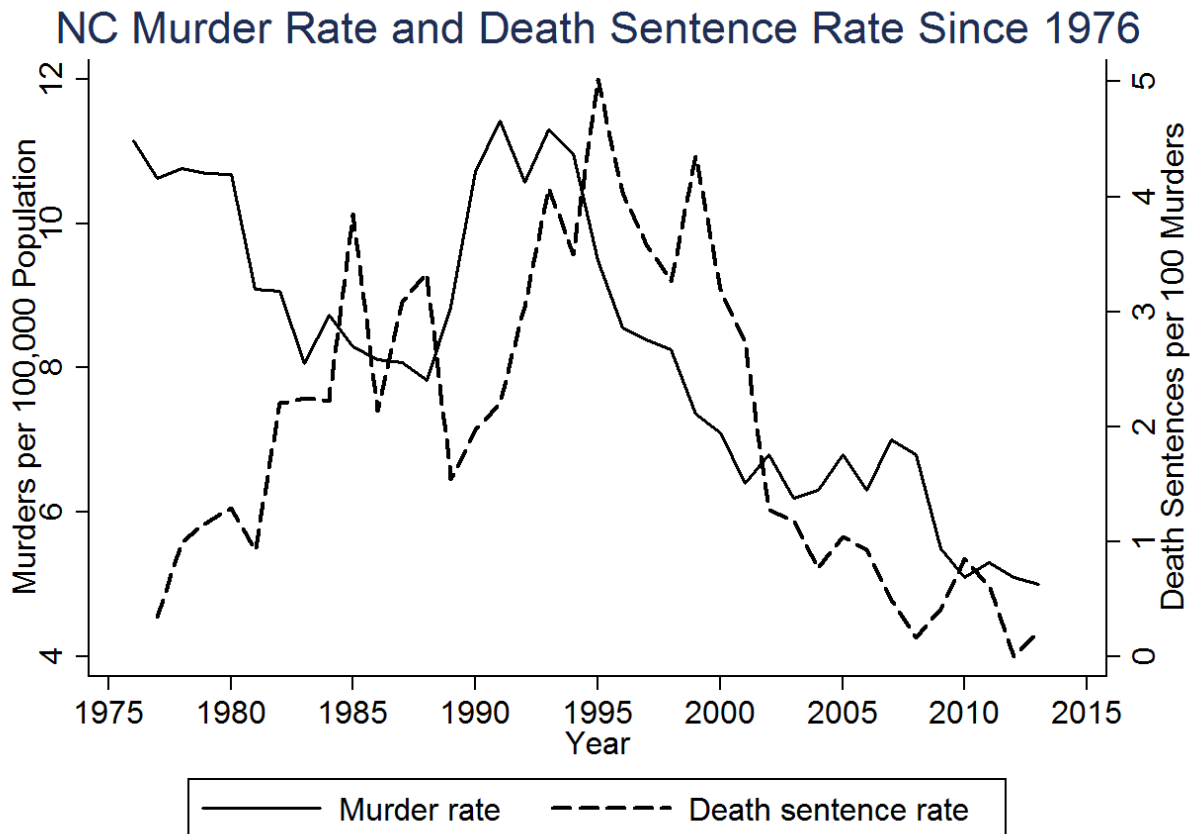
Leon Brown was not yet 17 years old when sentenced to death; Freddy Lee Stokes and Richard Wayne Joyner were not yet 18; they each served several years before being removed from death row. Brown, of course, was actually innocent of the charges and was released from prison entirely in 2014, at age 47. 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.

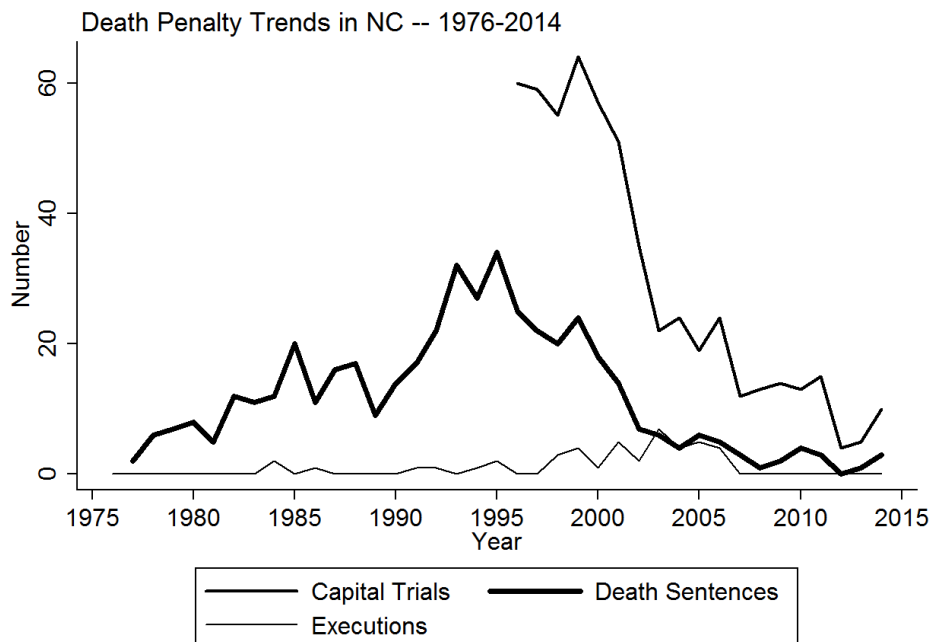


1976 saw 609 homicides in North Carolina, or about 11 per 100,000 population. That number declined to about 8 per 100,000 by 1983 before beginning to rise again after 1989. Since 1993 it has been on a steady decline, from 11.3 (785 homicides) to just 5.0 (473 homicides) in 2013, the last year with data 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 than it was before, or has been since. Prosecutors pressed capital cases vigorously until the law was changed in 2001 giving

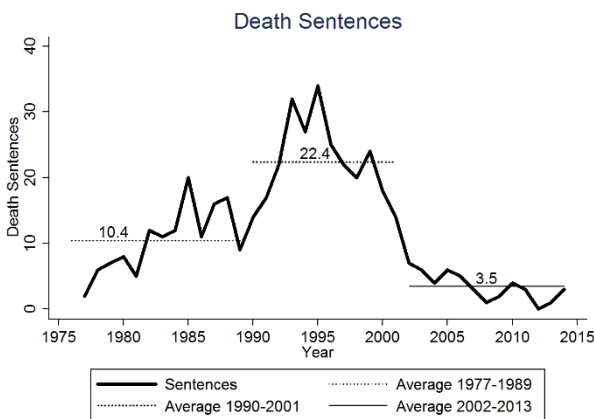
⁷ 410 S.E.2d 57 (1991).

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

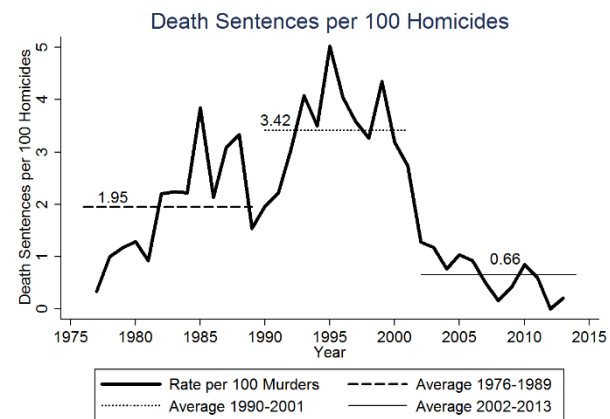
Figure 5 shows the numbers of death sentences annually for three periods: before 1990, during the 1990s until 2001, and for the period after 2001. Part A shows the simple counts, and Part B shows the number of death sentences per 100 homicides. Note that as the number of homicides declined, so too did 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.

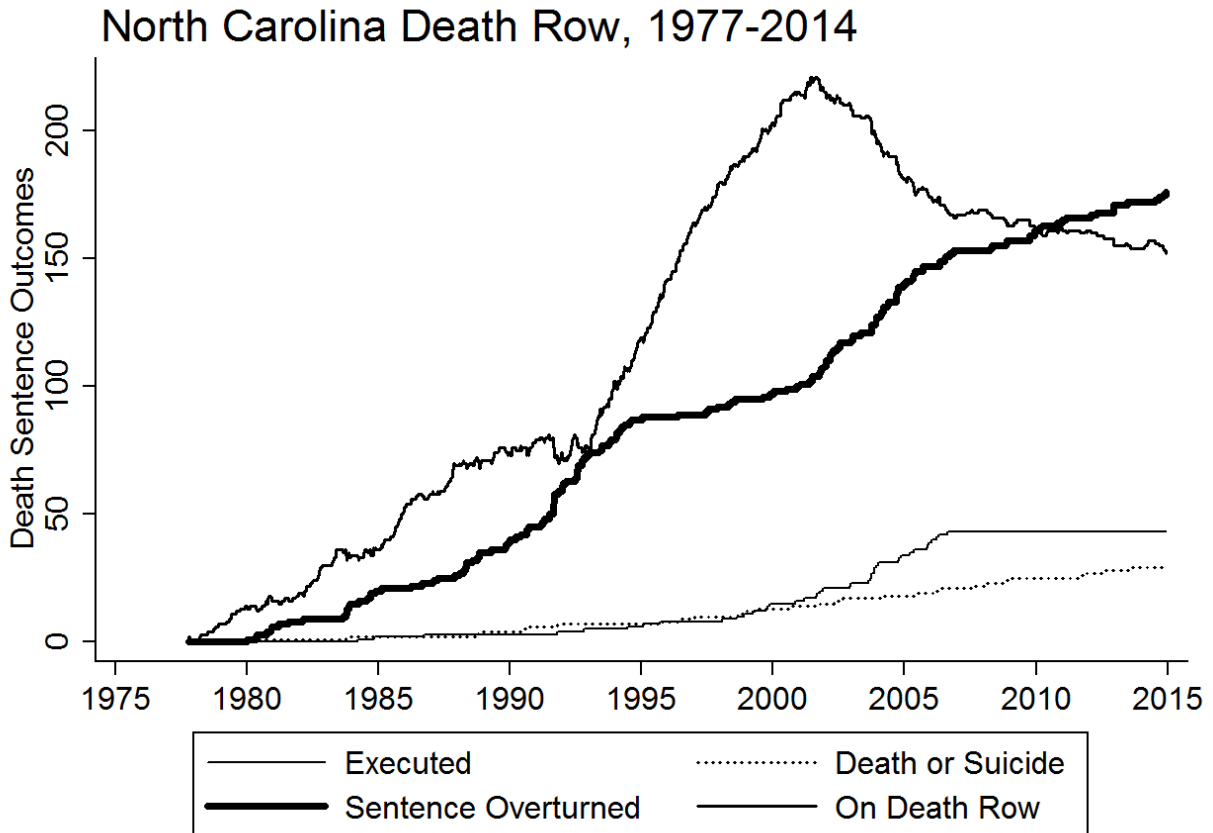


Figure 6 shows the outcome for each death sentenced handed down since 1977; all 401 death sentences are accounted for. Reading up at the year 2014, the figure shows that 30 inmates had died on death row from natural causes or suicide; looking back over time at that dotted line shows the number of inmates 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

Reform	Effective Date	Current Inmates Pre-Dating Reform	
		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.

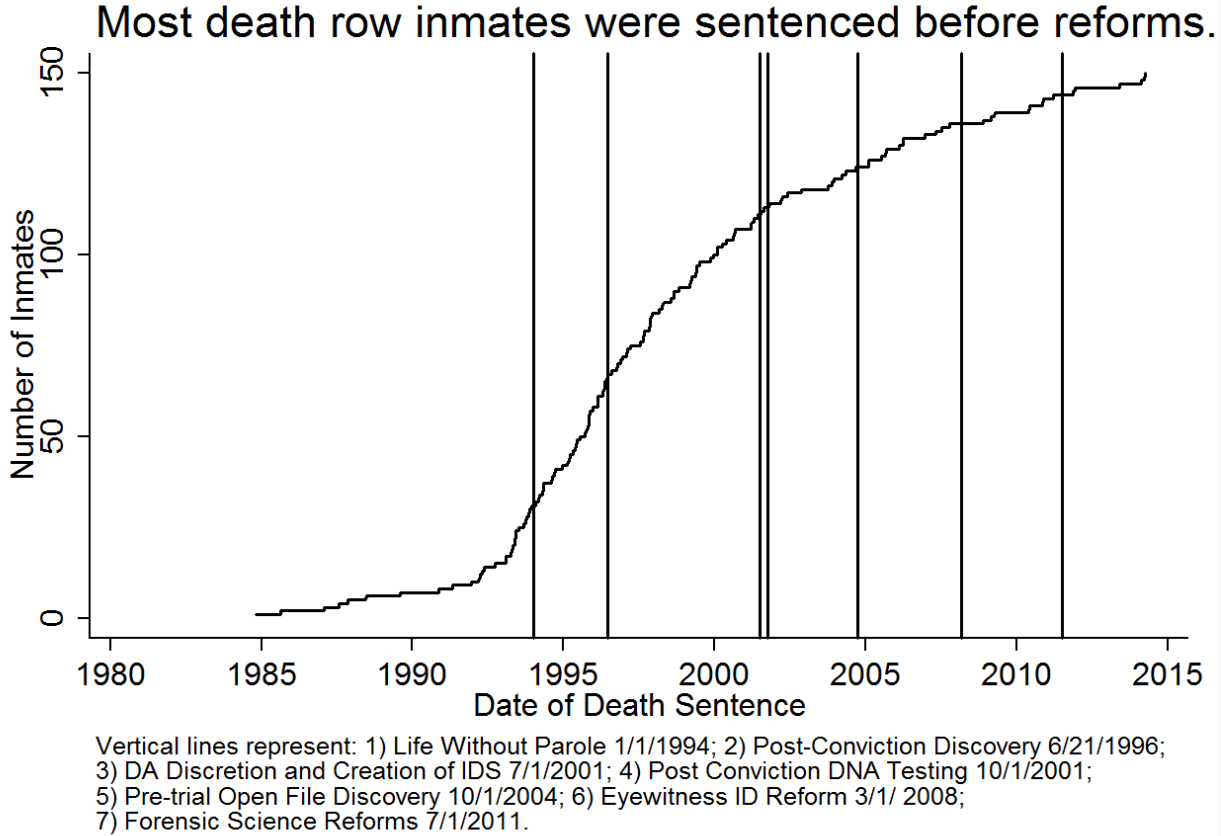


Figure 7 makes clear that by July 1, 2001, when District Attorneys were given the right to use their discretion about whether to seek death and when the state-wide Indigent Defense Services was created, already 111 of the 150 current death row inmates had been condemned.

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.