

Dr. Matthew Robinson

The Death Penalty in North Carolina

A Summary of the Data and Scientific Studies

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Executive Summary

This report summarizes what is known about capital punishment in North Carolina based on available empirical data as well as studies of the state's death penalty system. The goal is to establish the realities of the state's capital punishment system for the purpose of providing important information to policy-makers.

Empirical data include statistics pertaining to demographic information of state residents, as well as on death sentences, death row populations, executions, and murder in the state of North Carolina. Studies of North Carolina's death penalty system were located using numerous academic databases (including Criminal Justice Periodicals Index, Sociological Abstracts, Academic Search Complete, Academic One File, and Lexis Nexus), as well as Google. The following search terms were used in searches to locate the studies summarized within: "capital punishment" OR "death penalty" AND "North Carolina."

An analysis of these data and studies demonstrates the following realities of capital punishment in the state:

- 1) Capital punishment is extremely rare in North Carolina.
- 2) Executions in North Carolina are not a greater deterrent to murder than alternative sanctions such as life imprisonment.
- 3) Capital punishment in North Carolina is more expensive than other major punishments including life imprisonment.

- 4) Capital punishment in North Carolina is characterized by serious disparities based on extra-legal factors such as race and gender.
- 5) Innocent people are wrongly convicted of capital murder and sentenced to death in North Carolina.

The report concludes with policy-implications of these findings. The author asserts that, given these five facts, policy-makers should seriously consider whether capital punishment is a necessary policy in North Carolina and also investing state resources in sanctions that actually save lives as well as money.

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Introduction

The death penalty (i.e., capital punishment) is allowable by law in North Carolina. Specifically, Sections 1 and 2 of Article XI of the North Carolina Constitution—“Punishments, Corrections, and Charities”—specify death as an acceptable punishment. Section 2 explains that with regard to “Death punishment”—“The object of punishments being not only to satisfy justice, but also to reform the offender and thus prevent crime, murder, arson, burglary, and rape, and these only, may be punishable with death, if the General Assembly shall so enact.”¹ Currently, only first-degree murder (including felony murder) is punishable by death in North Carolina. Further, the US Supreme Court has made it clear that the only crimes punishable by death are those that produce death, such as murder.²

Article 100 of Chapter 15A, the Criminal Procedure Act, is titled “Capital Punishment,” and approves capital punishment for capital felonies.³ Article 19 of Chapter 15, Criminal

¹ North Carolina Constitution. Article XI. Punishment, Corrections, and Charities.
<http://www.ncga.state.nc.us/Legislation/constitution/article11.html>

² Bohm R. (2007). *DeathQuest III, An Introduction to the Theory and Practice of Capital Punishment in the United States*. Cincinnati, OH: Anderson.

³ North Carolina General Statutes. Chapter 15A. Subchapter XV. Capital Punishment. Article 100. Capital Punishment.
http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_15A/Article_100.html

Procedure, is titled “Execution” and it pertains to the method and procedures of executions in the state.⁴

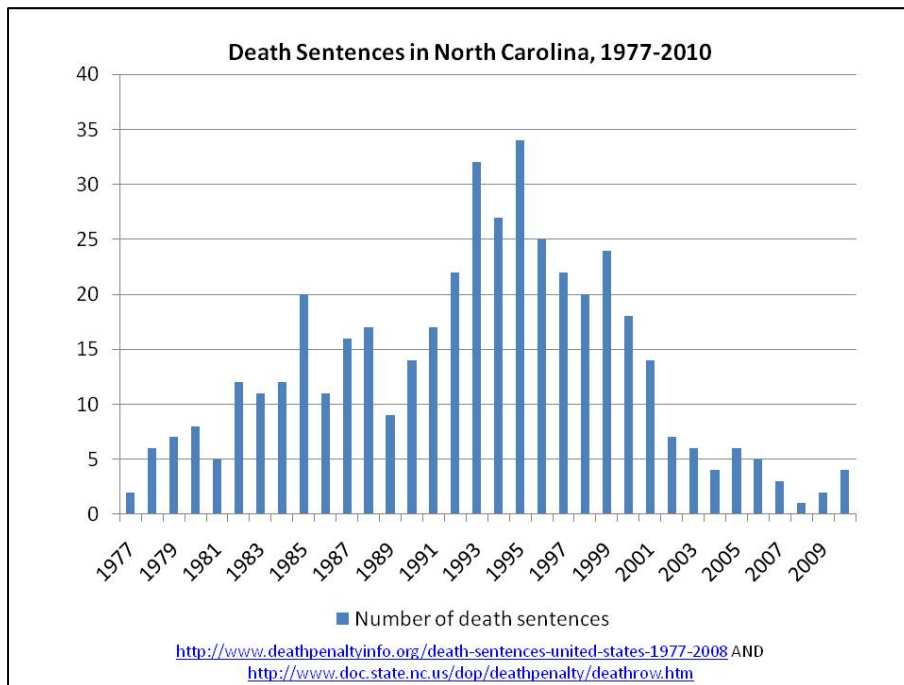
These laws specify the process of capital punishment in the state and thereby enumerate many protections to capital defendants. First, prosecutors must prove beyond a reasonable doubt that defendants committed capital murder. Second, prosecutors must prove in a separate trial (i.e., bifurcated trial) that statutorily-listed aggravated factors are present and that aggravation outweighs mitigation. Third, the jury can consider any mitigating factor, whether included in the statute or not, as long as it is introduced into evidence, and mitigating factors must not be proven beyond a reasonable doubt. Fourth, death sentences cannot be imposed by judges without a jury recommendation of death (both by state statute and because of the Supreme Court case of *Ring v. Arizona*, 536 U.S. 584, 2002). Fifth, convictions and capital sentences receive an automatic appeal by the state Supreme Court and are subject to a proportionality review to make sure sentences are appropriate to the crime when compared to similar crimes. Finally, convicts can appeal on any relevant issue of law to both state and federal courts, although only one federal appeal is guaranteed by law (additional appeals are discretionary). Together, these protections are often referred to as “super due process,” meaning that extra caution is taken in handling capital cases when compared to non-capital cases.

Historically, North Carolina has been a leading death penalty state; the state has been among the top 10 most active states in terms of the number of death sentences imposed annually (ranked 6th in the country between 1977 and 2006), the size of its death row (ranked 7th in the

⁴ North Carolina General Statutes. Chapter 15. Article 19. Executions.
http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_15/Article_19.html

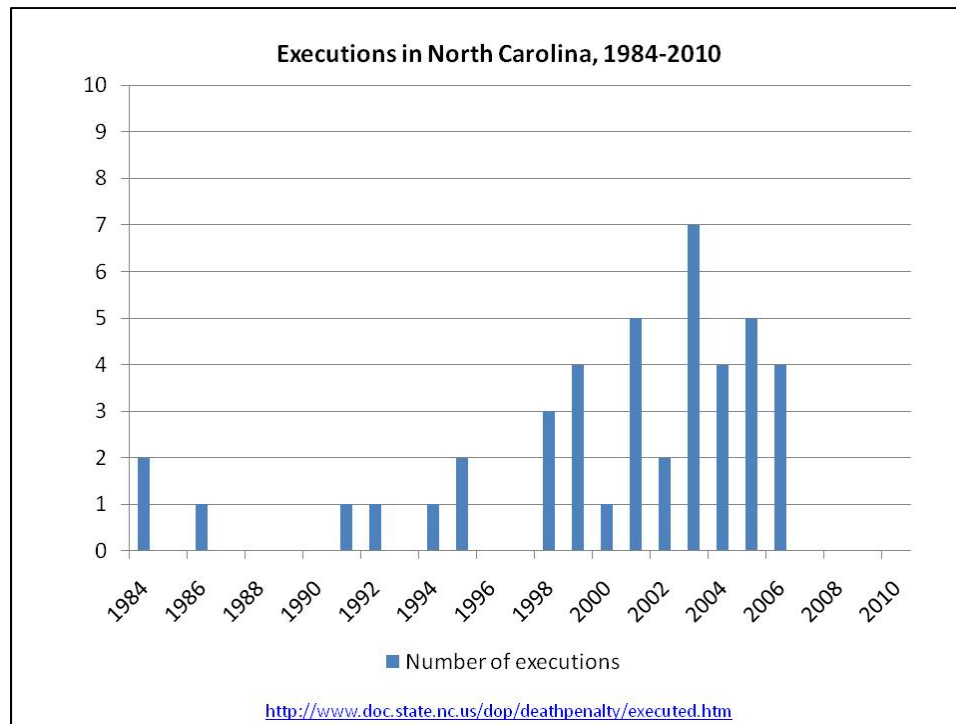
country in 2010), as well as the number of people executed per year (ranked 6th in the country between 1977 and 2006). Further, for the years 1726 through 1961, the state ranked fifth in the nation in the total number of executions behind only Virginia, New York, Pennsylvania, and Georgia.⁵

However, the state’s recent history has been noticeably different, as death sentences have slowed dramatically and executions have halted entirely. In fact, the state had the largest decline in death sentences of all states in the nation when comparing the annual number of death sentences in each state in the 1990s with the 2000s.⁶



⁵ Radelet, M., & G. Pierce (2010). Race and death sentencing in North Carolina 1980-2007. Working paper requested by author.

⁶ Death Penalty Information Center (2010). Death penalty sentences have dropped considerably in the current decade. <http://www.deathpenaltyinfo.org/death-penalty-sentences-have-dropped-considerably-current-decade>



The last execution in the state of North Carolina was in August 2006. Since then, the state has been in an unofficial moratorium, caused by disputes over the proper role of medical personnel in the lethal injection process. After Superior Court Judge Donald Stephens ruled in 2007 that a doctor must be present at an execution to monitor the vital signs of inmates to ensure there is no pain associated with their executions, the state’s medical board said it would punish any doctor who did anything more than observe executions because it would violate their ethics policy enacted in 2007. The Medical Board was then sued by the North Carolina Department of Correction because doctors willing to actively participate in executions could not be located due to the doctors’ fears of disciplinary action. Although the North Carolina Supreme Court ruled in 2009 that the state Medical Board cannot prevent doctors from participating in executions, to this

date, executions still have not resumed in the state.⁷ This is also because the method of execution—lethal injection—is also being litigated.

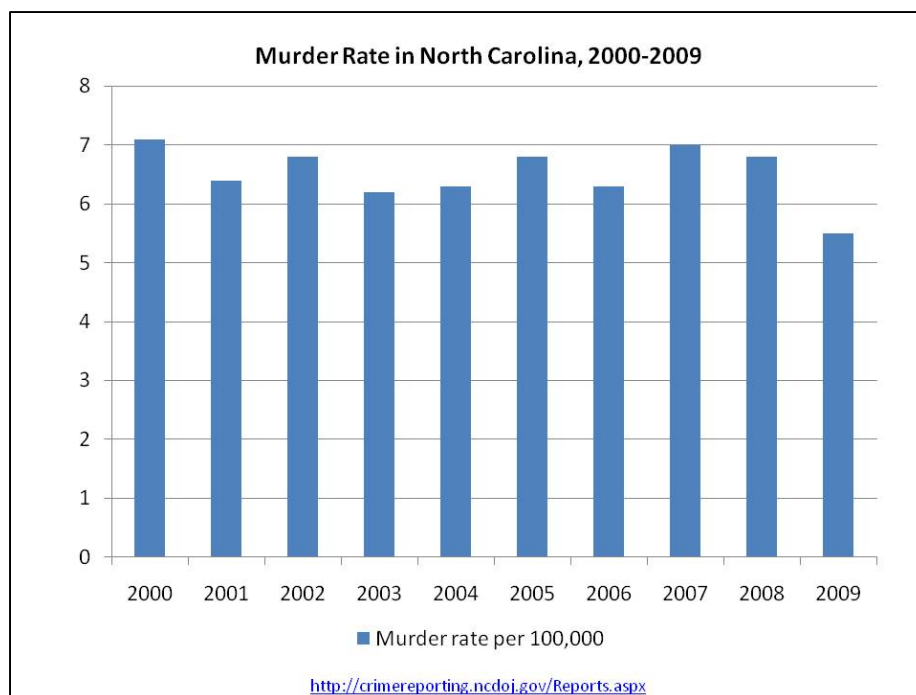
Interestingly, a poll from late 2010 found that 68% of North Carolinians favor a moratorium on executions in the wake of the scandal involving the handling of blood evidence at the State Bureau of Investigation (SBI) crime lab, a problem that has great import for capital punishment since flawed evidence from the SBI was used in seven capital cases, including against three men who were already put to death.⁸ According to the Swecker Report—an analysis of the SBI crime lab’s blood analysis lab completed by former FBI agent Chris Swecker—there was a “policy of perjury” whereby SBI officials would intentionally or negligently represent test results against defendants.⁹ Studies of public opinion in 2004 also showed support for a moratorium on executions across the state of North Carolina, including 63% statewide, 62% in seven northeastern counties; 58% in five western counties, and 55% in five southeastern counties.¹⁰

⁷ Weeks, J. (2009). NC Supreme Court rules doctors can participate in executions. *Yahoo News*. May 3. http://www.associatedcontent.com/article/1707633/nc_supreme_court_rules_doctors_can.html

⁸ White, H. (2010). Majority want N.C. executions halted. *Charlotte Post*. December 13. <http://www.thecharlottepost.com/index.php?src=news&srctype=detail&category=News&refno=3203>; *Winston Salem Journal* (2011). North Carolina death penalty rife with problems. Editorial. January 2. <http://www2.journalnow.com/news/opinion/2011/jan/02/wsopin01-nc-death-penalty-rife-with-problems-ar-658160/>

⁹ National Association for the Advancement of Colored People (2010). *The Swecker Report. A Policy of Perjury*.

¹⁰ Doble Research Associates (2004). *The Death Penalty in North Carolina: People in Five Southeastern Counties Consider the Options*. Report prepared for The North Carolina Council of Churches. Englewood Cliffs, NJ; Doble Research Associates (2004). *The Death Penalty in North Carolina: People in Five Western Counties Consider the Options*. Report prepared for The North



Even as death sentences have declined and executions have come to a halt, the number of murders in the state has nevertheless, declined. According to Professor Frank Baumgartner of the Department of Political Science at the University of North Carolina at Chapel Hill (UNC):

... the murder rate declined by 19.1 percent in 2009 compared to 2008. The number of murders in 2009 was 482, and the rate per 100,000 population [was] 5.5. These are the lowest numbers on record during the modern period of capital punishment.

In fact, the murder rate has been declining steadily since reaching its peak of 11.42 per 100,000 population in 1991. Following national trends, homicides have declined steadily

Carolina Council of Churches. Englewood Cliffs, NJ; Doble Research Associates (2004). The Death Penalty in North Carolina: People in Seven Northeastern Counties Consider the Options. Report prepared for The North Carolina Council of Churches. Englewood Cliffs, NJ; Doble Research Associates (2004). The Death Penalty in North Carolina: The Public Consider the Options. Report prepared for The North Carolina Council of Churches. Englewood Cliffs, NJ.

since that time, reaching 8.5 per 100,000 in 1997, 6.8 in 2002 and generally staying in that area until 2008 when they declined sharply to the current figure of 5.5 in 2009.¹¹

Given the realities identified above—death sentences have declined in North Carolina, executions have been halted, murders have declined, and a large majority of state residents support a moratorium on executions—this is an appropriate time to carefully assess the state’s capital punishment system. A fundamental question for policy-makers to consider is this—Is capital punishment a necessary practice for North Carolina?

In this report, the empirical studies of capital punishment in North Carolina are examined and summarized. The goal is to establish the empirical realities of the state’s death penalty system for the purpose of providing important information to policy-makers.¹²

Realities of Capital Punishment in North Carolina

Empirical data on North Carolina’s death penalty system and published studies analyzing the imposition of death in the state suggest the following realities of capital punishment in North Carolina:

- 1) Capital punishment is extremely rare in North Carolina.
- 2) Executions in North Carolina are not a greater deterrent to murder than alternative sanctions such as life imprisonment.

¹¹ Baumgartner, F. (2010). On the decline: Murders and death sentences. *Raleigh News & Observer*, October 31. <http://www.unc.edu/~fbaum/Innocence/NC/Decline-homicides-oct-31-2010.pdf>

¹² Studies were located using numerous academic databases (including Criminal Justice Periodicals Index, Sociological Abstracts, Academic Search Complete, Academic One File, and Lexis Nexus), as well as Google. The following search terms were used in searches to locate studies: “capital punishment” OR “death penalty” AND “North Carolina.”

- 3) Capital punishment in North Carolina is more expensive than other major punishments including life imprisonment.
- 4) Capital punishment in North Carolina is characterized by serious disparities based on extra-legal factors such as race and gender.
- 5) Innocent people are wrongly convicted of capital murder and sentenced to death in North Carolina.

Each of these issues is discussed below.

1) Capital punishment is extremely rare in North Carolina.

From 1977 (when capital punishment was reinstated in the state of North Carolina) until 2006 (the year of the last execution in the state), North Carolina sentenced 436 people to death and carried out 43 executions, an average of 14.5 death sentences and 1.4 executions per year.¹³ During this time, the state experienced thousands of murders, averaging hundreds per year. For example, one study of North Carolina's death penalty system from 1977 through late 1995 found the state averaged 617 murders per year.¹⁴ Another study of North Carolina from 1976 to 2008 found the state averaged 594 murders per year.¹⁵ Comparing murders to death sentences and

¹³ Death Penalty Information Center (2010). State by state database. http://www.deathpenaltyinfo.org/state_by_state

¹⁴ Liebman, J., Fagan, F., Rifkind, S., & V. West (2000). A Broken System: Error Rates in Capital Cases. State Report Card. NORTH CAROLINA, 1977-1995. Columbia University School of Law. <http://www2.law.columbia.edu/instructionalservices/liebman/liebman/Liebman%20Study/docs/2/northcarolina.pdf>

¹⁵ Baumgartner, F. (2010). Racial discrepancies in homicide victimization and executions in North Carolina, 1976-2008. <http://www.unc.edu/~fbaum/Innocence/NC/Racial-discrepancies-NC-homicides-executions.pdf>

executions shows that far less than one percent of murderers are executed in North Carolina. A study of capital punishment from 1976 to 2008 found that killers of only 56 total victims were executed. During these years, there were 19,517 homicide victims. Thus, only 0.287% of murder victims produced executions.¹⁶ Even so, North Carolina ranks 10th in the nation in executions per capita through 2008, at 0.047 executions per 10,000 people.¹⁷

A study of capital punishment from 1977 through 1999 found North Carolina's death sentencing rate to be 0.026, meaning the state sentenced to death only 2.6% of all killers; far less were actually executed. This was above average in states with the death penalty, as the average death sentencing rate in states with capital punishment was 2.2%.¹⁸ An analysis of data from 1993 to 1997 found the state's death sentencing rate for homicide was 2.5%.¹⁹ Finally, a study of homicides in the state between January 1, 1980 and December 31, 2007 found that of 15,281 murders, only 368 led to death sentences. This represents a death sentencing rate of 2.4%.²⁰

What these data demonstrate is that, the rate of death sentencing by time period only slightly varies. And no matter the period being considered, it is abundantly clear that the vast

¹⁶ Baumgartner, F. (2010). Racial discrepancies in homicide victimization and executions in North Carolina, 1976-2008. <http://www.unc.edu/~fbaum/Innocence/NC/Racial-discrepancies-NC-homicides-executions.pdf>

¹⁷ Death Penalty Information Center (2010). State execution rates. <http://www.deathpenaltyinfo.org/state-execution-rates>

¹⁸ Robinson, M. (2007). *Death Nation: The Experts Explain American Capital Punishment*. Upper Saddle River, NJ: Prentice Hall.

¹⁹ Unah, I., & J. Boger (2009). Race, politics, and the process of capital punishment in North Carolina. Paper presented to the annual meeting of the North Carolina Political Science Association. February. Greensboro, NC.

²⁰ Radelet, M., & G. Pierce (2010). Race and death sentencing in North Carolina 1980-2007. Working paper requested by author.

majority of murderers are not sentenced to death; specifically more than 97% of murderers do not receive death sentences. Of the 2.4%-2.6% of murderers who receive death sentences, only a small percentage of them have been executed. From 1977 through 2007, North Carolina ranked 17th in the nation in actually carrying out executions as a percentage of death sentences. Yet, the state has thus far executed only 9.9% of people sentenced to death since 1977.²¹

What explains the decline in death sentences and executions in North Carolina? Research by Professors Frank Baumgartner and Isaac Unah of the Department of Political Science at UNC suggests that these recent declines are due to concerns about wrongful conviction and sentencing, financial costs, as well as other serious problems in the administration of capital punishment in the state including especially serious racial disparities.²² These issues will be addressed later in this report.

It is important to note the reasons why capital punishment is so rare in the state of North Carolina, as it is in fact everywhere it is practiced. The reasons are these:

- A) Only aggravated murderers can legally be executed; thus a large share of murder is not eligible for death.
- B) Prosecutors rarely seek the death penalty.

²¹ Death Penalty Information Center (2010). Executions per death sentence. <http://www.deathpenaltyinfo.org/executions-death-sentence>.

²² Baumgartner, F., & I. Unah (2010). The decline of capital punishment in North Carolina. Paper presented to the annual meeting of the American Society of Criminology, November. San Francisco, CA. <http://www.unc.edu/~fbaum/papers/Baumgartner-Unah-ASC-2010.pdf>

C) Juries rarely recommend death sentences to judges, who therefore can rarely impose them.

D) States cannot afford to practice capital punishment more than they currently do.²³

Because of these four reasons, we should not expect to ever see a major increase in the number of death sentences and executions in the state of North Carolina (or any other death penalty state for that matter).

Beyond these obvious reasons, capital punishment has become even rarer in North Carolina for additional reasons. First, the invention of the North Carolina Office of Indigent Service (IDS) in 2000 “did more than any other single action to revolutionize the practice of capital punishment in the state. It is no mere coincidence that numbers of death sentences have declined so dramatically since the passage of this reform.”²⁴ This reduced the representation of capital defendants by unqualified and inexperienced defense attorneys, thereby lowering the possibility of death sentences. Second, the number of mitigating factors (legal factors that, when present, reduce the likelihood a person will be sentenced to death) that have been presented to and accepted by capital juries in the state doubled after the Supreme Court’s decision in *McKoy v. North Carolina* 494 U.S. 433 (1990).²⁵ In *McKoy*, the Court held that capital jurors do not

²³ Robinson, M. (2007). *Death Nation: The Experts Explain American Capital Punishment*. Upper Saddle River, NJ: Prentice Hall.

²⁴ Baumgartner, F., & I. Unah (2010). The decline of capital punishment in North Carolina. Paper presented to the annual meeting of the American Society of Criminology, November. San Francisco, CA. <http://www.unc.edu/~fbaum/papers/Baumgartner-Unah-ASC-2010.pdf>

²⁵ Kremling, J., Smith, M., Cochran, J., Bjeregaard, B., & S. Fogel (2007). The role of mitigating factors in capital sentencing before and after *McKoy v. North Carolina*. *Justice Quarterly*, 24(3), 357.

have to be unanimous in their decisions about mitigating circumstances presented during trial. This makes it easier for jurors to reject death sentences based on evidence of mitigation.

Thomas Maher, Executive Director of the Center for Death Penalty Litigation, explains these as well as other factors that help understand the decline of death sentences in the state.

According to Maher, the state has:

(1) Enacted a sentence of Life Without Parole as the only alternative for a sentence of death in first-degree murder cases. This became effective October 1, 1994 (N.C. GEN. STAT. § 14-17, 2008).

(2) Granted death-sentenced inmates the right to open file discovery for the purpose of developing and pursuing claims in post-conviction. This was effective June 21, 1996 (N.C. GEN. STAT. § 15A-1415(e)-(f)).

(3) Granted District Attorneys the discretion to not seek death in first-degree murder cases, even when there is evidence of an aggravating circumstance. This went into effect July 1, 2001 (N.C. GEN. STAT. § 15A-2004).

(4) Created the Indigent Defense Services Commission (“IDS”), under which IDS has developed the following standards governing the qualifications of defense counsel: requiring counsel to seek consultations with the Center for Death Penalty Litigation prior to trial, assuming responsibility of appointing and compensating counsel through the Office of the Capital Defender, providing increased training and supervision of attorneys, and assuming responsibility for allocating the resources for experts, investigators and other expenses incurred in defending a capital trial (N.C. R. IND. DEF. SERV. Rule 2A (App.) (2009)). IDS became active July 1, 2001 (N.C. GEN. STAT. § 7A-498, 2008).

(5) Provided for post-conviction DNA testing, as of October 1, 2001 (N.C. GEN. STAT. § 15A-269).

(6) Provided pre-trial open file discovery, which is not limited to capital cases, effective October 1, 2004 (N.C. GEN. STAT. §§ 15A-902-910).²⁶

These additional reasons also help us understand why citizens should not expect major increases in capital punishment practice in North Carolina.

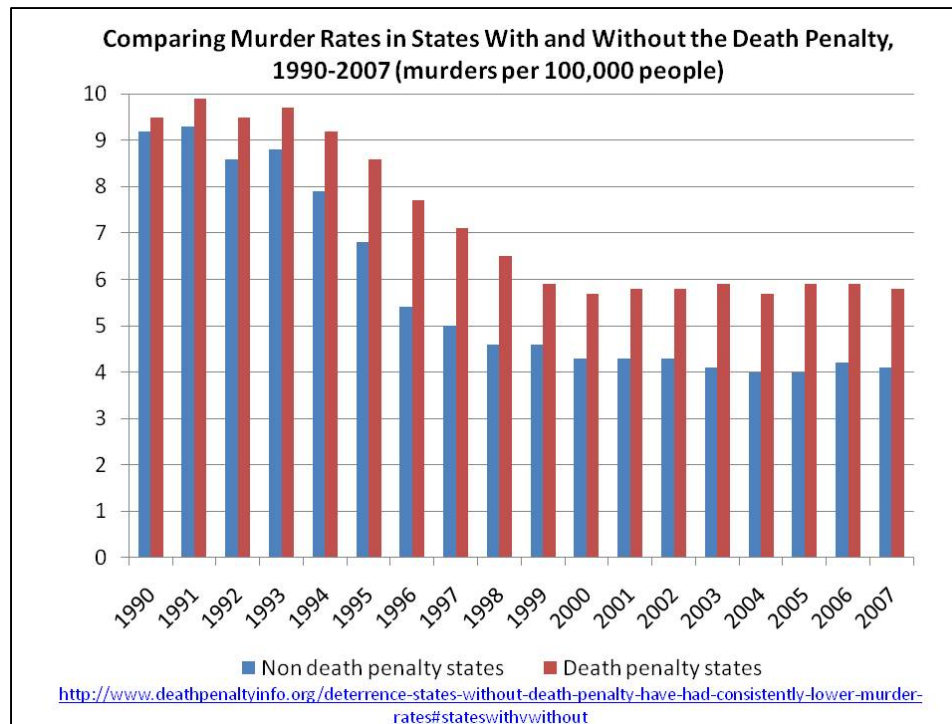
2) Executions in North Carolina are not a greater deterrent to murder than alternative sanctions such as life imprisonment.

Given the rarity of capital punishment in the state, many have questioned its deterrent value. Unfortunately, not many studies have been conducted within the state of North Carolina that assess whether executions reduce murder, consistent with the deterrence hypothesis. Yet, historically, studies in the state found little to no evidence consistent with deterrence.²⁷ Further, studies conducted across the United States also generally fail to find evidence of any greater deterrent value of capital punishment above the deterrent value of alternative sanctions such as life imprisonment.²⁸ Finally, murder rates are actually higher in death penalty states than in non-death penalty states.²⁹

²⁶ Maher, T. (2009). Worst of times, and best of times: The Eighth Amendment implications of increased procedural reliability on existing death sentences. *Elon Law Review*, 1, 95-112.

²⁷ Bailey, W. (1978). An analysis of the deterrent effect of the death penalty in North Carolina. *North Carolina Central Law Journal*, 10, 29-52; Patrick, C. (1970). Capital punishment and life imprisonment in North Carolina, 1946 to 1968: Implications for abolition of the death penalty. *Wake Forest Intramural Law Review*, 417.

²⁸ Bailey, W. (1998). Deterrence, brutalization, and the death penalty: Another examination of



Oklahoma's return to capital punishment. *Criminology*, 36(4), 711; Cochran, J., & M. Chamlin (2000). Deterrence and brutalization: The dual effects of executions. *Justice Quarterly*, 17(4), 685; Cochran, J., Chamlin, M., & M. Seth (1994). Deterrence or brutalization? An impact assessment of Oklahoma's return to capital punishment. *Criminology*, 32(1), 107; Donohue, J., & J. Wolfers (2006). The death penalty: No evidence for deterrence. *The Economists' Voice* April: 3; Kovandzic, T., Vieraitis, L., & D. Boots (2009). Does the death penalty save lives? New evidence from state panel data, 1977 to 2006. *Criminology & Public Policy*, 8(4), 803; Peterson, R. & W. Bailey (1991). Felony murder and capital punishment: An examination of the deterrence question. *Criminology*, 29(3), 367; Sorensen, J., Wrinkle, R., Brewer, V., & J. Marquart (1999). Capital punishment and deterrence: Examining the effect of executions on murder in Texas. *Crime and Delinquency*, 45(4), 481-493. Stack, S. (1993). Execution publicity and homicide in Georgia. *American Journal of Criminal Justice*, 18(1), 25-39; Thomson, E. (1997). Deterrence versus brutalization: The case of Arizona. *Homicide Studies*, 1(2), 110-128; Yunker, J. (2001). A new statistical analysis of capital punishment incorporating U.S. postmoratorium data. *Social Science Quarterly* 82(2): 297-311.

²⁹ Death Penalty Information Center (2011). Deterrence: States without the death penalty have had consistently lower murder rates. <http://www.deathpenaltyinfo.org/deterrence-states-without-death-penalty-have-had-consistently-lower-murder-rates#stateswithwithout>

Interestingly, in 2000, North Carolina's murder rate ranked it 9th highest in the nation, but by 2009, North Carolina's murder rate had fallen to only 15th highest in the nation.³⁰ Recall that death sentences and executions declined significantly during these years, the opposite of what you would expect if capital punishment were a deterrent to murder.

Deterrence is based on the assumption that would-be offenders do not commit crimes out of fear of getting punished. In order for punishment to be an effective deterrent, it must be certain (i.e., the punishment must be likely to happen), swift (i.e., the punishment must quickly follow the crime), and severe (i.e., the pain associated with the punishment must outweigh the pleasure associated with the crime). Research shows that the most important element is *certainty of punishment*, meaning that if punishment is likely to occur, it will deter.³¹ Capital punishment in North Carolina is not certain, and is in fact extremely rare. As shown earlier, only about 2.5% of murderers are sentenced to death in the state, and far less than 1% of murders have resulted in an actual execution thus far. Thus, it is not logical to expect that executions will deter murder when they so rarely happen, especially during a time when death sentences and executions are becoming increasingly rarer.

There were some recent studies by economists that claimed to find a deterrent effect of executions on murder but none of these studies were conducted in North Carolina.³² More

³⁰ Death Penalty Information Center (2011). Murder rates nationally and by state. <http://www.deathpenaltyinfo.org/murder-rates-nationally-and-state>

³¹ Robinson, M. (2007). *Death Nation: The Experts Explain American Capital Punishment*. Upper Saddle River, NJ: Prentice Hall.

³² Brumm, H., & D. Cloninger (1996). Perceived risk of punishment and the commission of homicides: A covariance structure analysis. *Journal of Economic Behavior and Organization*, 31(1): 1-11; Cloninger, D., & R. Marchesini (2001). Execution and deterrence: A quasiconrolled group experiment. *Applied Economics*, 33(5): 569-576; Cloninger, D., & R. Marchesini (2005).

importantly, these studies have been largely dismissed by social scientists due to serious methodological weaknesses.³³ Given the rarity of capital punishment (even in death penalty states) and the fact that a large majority of studies fail to find evidence of deterrence, almost no one believes the death penalty is a major deterrent to violent crime. This includes police chiefs across the country,³⁴ leading criminologists,³⁵ widely known death penalty scholars,³⁶ as well as

Execution moratoriums, commutations and deterrence: The case of Illinois.

<http://www.cjlf.org/deathpenalty/IIIStudyRevised.pdf>; Dezhbakhsh, H., Rubin, P., & J. Shepherd (2003). Does capital punishment have a deterrent effect? New evidence from postmoratorium panel data. *American Law & Economics Review*, 5(2): 344-376; Dezhbakhsh, H., & J. Shepherd (2003). The deterrent effect of capital punishment: Evidence from a “judicial experiment.” Department of Economics, Emory University. Working Paper No. 03-14. http://people.clemson.edu/~jshephe/CaPuJLE_submit.pdf; Ehrlich, I., & Z. Liu (1999). Sensitivity analysis of the deterrence hypothesis: Let’s keep the econ in econometrics. *Journal of Law and Economics*, 42(1): 455-487; Mocan, H., & R. Gittings (2003). Getting off death row: Commuted sentences and the deterrent effect of capital punishment. *Journal of Law and Economics*, 46(2): 453-478; Shepherd, J. (2004). Murders of passion, execution delays, and the deterrence of capital punishment. *Journal of Legal Studies*, 33 (2): 283-322; Zimmerman, P. (2004). State executions, deterrence and the incidence of murder. *Journal of Applied Economics*, 7(1): 163-193.

³³ Berk, R. (2004). New claims about execution and general deterrence: Deja vu all over again? *Journal of Empirical Legal Studies*. <http://preprints.stat.ucla.edu/396/JELS.pap.pdf>; Donohue, J., & J. Wolfers (2005). Uses and abuses of empirical evidence in the death penalty debate. *Stanford Law Review*, 58, 791-846; Fagan, J. (2005). Public policy choices on deterrence and the death penalty: A critical review of new evidence. Testimony before the Joint Committee on the Judiciary of the Massachusetts Legislature on House Bill 3934, July 14. <http://www.deathpenaltyinfo.org/MassTestimonyFagan.pdf>; Goertzel, T. (2004). Capital punishment and homicide: Sociological realities and econometric illusions. *Skeptical Enquirer Magazine*. <http://www.deathpenaltyinfo.org/article.php?scid=12&did=1176>; Kovandzic, T., Vieraitis, L., & D. Boots (2009). Does the death penalty save lives? New evidence from state panel data, 1977 to 2006. *Criminology & Public Policy*, 8(4), 803.

³⁴ Death Penalty Information Center (2011). Law enforcement views on deterrence. <http://www.deathpenaltyinfo.org/law-enforcement-views-deterrence#lawenforcement>

³⁵ Radelet, M., & T. Lacoek (2009). Do executions lower homicide rates? The views of leading criminologists. *Journal of Criminal Law & Criminology*, 99(2), 489.

citizens as measured in Gallup polls.³⁷ That between 79% and 88% of experts believe the death penalty is not a deterrent—and that among those who indicated it was suggested that the effect was so small it probably could not even be measured—speaks volumes. The National Academy of Sciences is currently studying this issue.³⁸

Opinion of Deterrence and the Death Penalty	
<u>Study 1 (1996):</u> Presidents of American Society of Criminology (ASC), Academy of Criminal Justice Sciences (ACJS), and Law and Society Association (LSA):	
<i>Do you feel that the death penalty acts as a deterrent to the commitment to murder, that it lowers the murder rate?</i>	
Yes	12%
No	88%
<u>Study 2 (2008):</u> Fellows in the American Society of Criminology (ASC), Winners of the ASC's Sutherland Award, and Presidents of ASC between 1997 and 2008:	
<i>Do you feel that the death penalty acts as a deterrent to the commitment to murder, that it lowers the murder rate?</i>	
Yes	5%
No	88%
<u>Study 3 (2007):</u> Capital punishment scholars who published articles and books between 2001-2005:	
<i>Does capital punishment, as actually practiced in the United States, achieve deterrence? (i.e., prevent future murders by causing fear in would-be murderers so that they do not commit murder?)</i>	
Yes	9%
No	79%
<small>Sources: <u>Study 1:</u> Radelet, M., & R. Akers (1996). Deterrence and the death penalty: The views of the Experts. <i>Journal of Criminal Law & Criminology</i>, 87(1), 10. <u>Study 2:</u> Radelet, M., & T. Lacoek (2009). Do executions lower homicide rates? The views of leading criminologists. <i>Journal of Criminal Law & Criminology</i>, 99(2), 489.; <u>Study 3:</u> Robinson, M. (2007). <i>Death Nation: The Experts Explain American Capital Punishment</i>. Upper Saddle River, NJ: Prentice Hall.</small>	

As noted earlier, murder in North Carolina has declined even as death sentences in the state have fallen. This is the opposite of what one would expect if capital punishment were a major deterrent to murder. Professor Frank Baumgartner notes:

³⁶ Robinson, M. (2007). *Death Nation: The Experts Explain American Capital Punishment*. Upper Saddle River, NJ: Prentice Hall.

³⁷ Sourcebook of criminal justice statistics Online (2011). Table 2.57.2006. Respondents reporting whether they believe the death penalty acts as a deterrent to murder. <http://www.albany.edu/sourcebook/pdf/t2572006>.

³⁸ Cook, Phillip (2011). Personal communication. February 14.

North Carolina reached its peak in death sentences with 34 inmates condemned in 1995. These numbers declined regularly until they were in the single digits by 2002, and numbered just 4, 3, 1 and 2 from 2006 to 2009. No executions have taken place since 2006.

Are North Carolinians in greater danger because fewer executions and death sentences are taking place? A simple look at the numbers suggests otherwise. From 1995, death sentences and murder rates have declined in virtual lock-step, much to the surprise of those who would suggest that executions are a strong deterrent to violent crime. Data from our state suggest that we have paid no price in terms of violence as we have suspended executions after so many recent controversies relating to innocent men spending years on death row and concerns about the constitutionality of our execution method.³⁹

3) Capital punishment in North Carolina is more expensive than other major punishments including life imprisonment.

Studies in North Carolina consistently show that capital punishment costs more than alternative sentences, including life imprisonment. For example, research by Professor Philip Cook of Duke University's School of Public Policy finds that the extra costs to taxpayers in North Carolina to adjudicate a capital case all the way through an execution is roughly \$329,000 more than a noncapital adjudication with a 20-year prison term. When also including the costs of

³⁹ Baumgartner, F. (2010). On the decline: Murders and death sentences. *Raleigh News & Observer*, October 31. <http://www.unc.edu/~fbaum/Innocence/NC/Decline-homicides-oct-31-2010.pdf>

capital cases that did not result in an execution, “the extra cost per death penalty imposed is over a quarter million dollars, and per execution exceeds \$2 million.” This number assumes that about 10% of death-sentenced defendants are executed; recall that since 1977, 9.9% of people sentenced to death in the state have been executed.⁴⁰

Costs of the Death Penalty	
<i>Two-year costs of capital punishment in North Carolina (FY 2005-FY2006):</i>	
Extra defense costs for capital cases in trial phase:	\$13,180,385
Extra payments to jurors:	\$224,640
Capital post-conviction costs:	\$7,473,556
Resentencing hearings:	\$594,216
Prison system:	\$169,617
Total:	\$21,642,414
<p><u>Source:</u> Cook, P. (2009). Potential savings from abolition of the death penalty in North Carolina. <i>American Law and Economics Review</i>, Advance Access, published December 11. http://www.deathpenaltyinfo.org/documents/CookCostRpt.pdf</p>	

Further research shows that the state could have saved at least \$11 million each year on criminal justice activities if it did not maintain its death penalty system. This projection is based on an analysis by Professor Cook of the state’s death penalty system during fiscal years 2005 and 2006. The figure of \$11 million per year includes “extra defense costs for capital cases in the trial phase, extra payments to jurors, post-conviction costs, resentencing hearings, and the extra costs to the prison system.” Additional costs not included in Cook’s analysis include “resources that would have been freed up in the Office of the Appellate Defender and the North Carolina

⁴⁰ Cook, P., & D. Slawson (with L. Gries) (1993). The costs of processing murder cases in North Carolina. Duke University. <http://www.deathpenaltyinfo.org/northcarolina.pdf>

Supreme Court, the extra time spent by prosecutors in capital cases, and the costs to taxpayers for federal appeals.”⁴¹

According to the North Carolina Office of Indigent Service (IDS), the average cost of a capital case in the state of North Carolina between FY 2002 and FY 2006 was \$58,592, compared to an average of \$14,170 for non-capital cases. According to IDS: “Regardless of whether the case ended in a trial, plea, or dismissal, a proceeded capital case costs 3 to 5 times more than a proceeded non-capital case.”⁴²

The study of capital trial cases by IDS suggests that the state of North Carolina spends an additional \$20 million each year at the trial level alone just to maintain the capital punishment system. This includes only defense costs and excludes additional expenses for prosecutors, judges, jurors, special investigators, and additional law enforcement costs. This is the cost for only 3.6 death sentences per year during the period of the study. Presumably, additional capital cases would raise this cost further.

According to the IDS report, the major factor that determines capital case costs is the prosecutorial decision to pursue a capital case. Prosecutors routinely charge alleged murderers with first degree or “undesignated murder” even though 83% of the cases will eventually be resolved as second degree murder cases or even less.

⁴¹ Cook, P. (2009). Potential savings from abolition of the death penalty in North Carolina. *American Law and Economics Review, Advance Access*, published December 11. <http://www.deathpenaltyinfo.org/documents/CookCostRpt.pdf>

⁴² Office of Indigent Services (2008). FY07 Capital Trial Case Study. PAC and Expert Spending in Potentially Capital Cases at the Trial Level. <http://www.ncids.org/Reports%20&%20Data/Latest%20Releases/FY07CapitalStudyFinal.pdf>

Of all potentially capital cases:

- Over 83% ended in a conviction of second degree murder or less (including 45% that ended in convictions for less than second degree murder)
- Over 12% ended in a voluntary dismissal, no true bill, or no probable cause finding.

For those cases proceeded or handled as capital cases:

- 60% ended in a conviction of second degree murder or less.
- 22% ended in a conviction of less than second degree murder.
- 3% ended in a death verdict.

According to the report, capital defendants are 12 times more likely to have their cases dismissed than they are to receive death sentences. Further, even at trial, defendants are just as likely to be acquitted as they are to be sentenced to death.

Finally, the costs of private appointed counsel and experts used in capital cases increased in the state of North Carolina from \$10.7 million in FY 2002 to \$16.4 million in FY 2008. This is not because the cost per case rose, but rather because the number of potentially capital cases increased. Specifically, “approximately 544 new potentially capital cases [are] open each year, while just 479 cases close each year. This means the backlog of open cases for which IDS pays fees grows every year, causing expenditures to grow.”⁴³

⁴³ Office of Indigent Services (2008). FY07 Capital Trial Case Study. PAC and Expert Spending in Potentially Capital Cases at the Trial Level.
<http://www.ncids.org/Reports%20&%20Data/Latest%20Releases/FY07CapitalStudyFinal.pdf>

Professor Frank Baumgartner explains why capital punishment is so expensive in North Carolina: “Capital trials are ... much more expensive than non-capital trials because they last longer, they include an entirely separate penalty phase, and greater resources are provided for the defense.”⁴⁴ High costs are simply a reality of capital punishment as it is practiced in the United States under super due process. Not surprisingly, then, studies from many additional states find that capital punishment generally costs two to five times more than alternatives such as life imprisonment and that it is extremely expensive to maintain state capital punishment systems that are rarely used.⁴⁵ Studies from California, Florida, Idaho, Indiana, Kansas, Maryland, New Jersey, New York, Tennessee, Texas, Washington, and the federal government bare out these conclusions. Additionally, studies show that states have cut other areas of spending in order to maintain capital punishment systems that are rarely used, including spending for police, libraries, highways, health care, higher education, defense attorneys, and indigent care.⁴⁶

Some will say that financial costs are irrelevant when it comes to achieving justice. Others will disagree, especially during periods of budget deficits and financial crises. According to the Center on Budget and Policy Priorities, North Carolina’s

⁴⁴ Baumgartner, F. (2010). Rates of reversals in the North Carolina death penalty. March 22. http://www.unc.edu/~fbaum/Innocence/NC/Baumgartner_NC_Death_Reversals-March-20-2010.pdf

⁴⁵ Bohm R. (2007). *DeathQuest III, An Introduction to the Theory and Practice of Capital Punishment in the United States*. Cincinnati, OH: Anderson.

⁴⁶ Death Penalty Information Center (2011). Costs of the death penalty. <http://www.deathpenaltyinfo.org/costs-death-penalty>

projected shortfall for FY 2012 is estimated to be more than \$3 billion, although the final number may be smaller.⁴⁷

4) Capital punishment in North Carolina is characterized by serious disparities based on extra-legal factors such as race and gender.

Beginning with demographic data of the state, there is clear evidence of significant racial disparities in North Carolina's death penalty system. For example, in 2009, African Americans made up only 21.6% of the state's population. Males made up only 48.9% of the state population, meaning African American males account for approximately 10-11% of the state's population.⁴⁸ Yet, according to the North Carolina Department of Correction, 84 of 158 death row inmates are African Americans, or 53.2% of death row. Further, all but one of these is a male, meaning African American males make up 52.5% of the state's death row population, in spite of accounting for only about 10-11% of the state's population.⁴⁹

Data from the North Carolina Department of Correction also show that, of the 43 people executed in the state since 1984, 13 were African American (and all of them were men). This

⁴⁷ McNichol, E., Oliff, P., & N. Johnson (2011). States continue to feel recession's impact. Center for Budget and Policy Priorities. February 10. <http://www.cbpp.org/cms/?fa=view&id=711>

⁴⁸ US Census Bureau (2010). State & County QuickFacts. North Carolina. <http://quickfacts.census.gov/qfd/states/37000.html>

⁴⁹ North Carolina Department of Correction (2011). Offenders on death row. <http://www.doc.state.nc.us/dop/deathpenalty/deathrow.htm>

means 30.2% of the state's contemporary executions have been of African American men, who again make up only between 10-11% of the state's population.⁵⁰

Of course, these disparities do not prove racial discrimination, as they may be explained by other factors including legally relevant factors such as differential involvement in capital murder.⁵¹ As one example, data from the North Carolina Department of Justice show that, in 2009, 226 of 413 homicide offenders were African American males, meaning African American males made up 54.7% of people arrested for murder in 2009.⁵² The above data on death row, executions, and murder are not technically comparable since they come from different years, yet they are merely offered here to show that one must consider legally relevant variables such as involvement in murder before one draws conclusions about racial disparities in capital punishment.

It is one thing to acknowledge that African Americans are overrepresented on death row and among those executed in the state of North Carolina, based on comparison to their proportion of the state's population. It is another to conclude that the state discriminates based on race. In fact, the data above actually show that African Americans are underrepresented among those sentenced to death and executed, relative to the percentage of murder they commit. Studies of race and capital punishment in the state take this issue into consideration, and will be reviewed shortly.

⁵⁰ North Carolina Department of Correction (2010). Executions carried out under current death penalty statute. <http://www.doc.state.nc.us/dop/deathpenalty/executed.htm>

⁵¹ Walker, S., Spohn, C., & M. Delone (2007). *The Color of Justice: Race, Ethnicity, and Crime in America*. Beverly Hills, CA: Wadsworth.

⁵² North Carolina Department of Justice (2011). Crime in North Carolina. 2009 annual summary report. <http://crimereporting.ncdoj.gov/Reports.aspx>

Historically, in the state of North Carolina, the picture was much different, as African Americans made up a majority of those executed. For example, between 1726 and 1961, 569 of 764 (74%) people executed (in cases where the race of the convicted is known) were African Americans.⁵³ Further, from 1910 to 1961, when the state was still executing people for crimes other than murder, North Carolina executed 71 rapists, 62 of whom were African American (87%), and 11 burglars, all of whom were African American (100%).⁵⁴

According to Professor Frank Baumgartner: “Whether we look at the entire historical record or only the most recent period, we see that over 70 percent of those executed have been African-Americans and that this number has commonly been 100 percent: the death penalty has often been *exclusively* reserved for African-Americans, if we look at any single year.”⁵⁵ Further, not only were African Americans more likely to be sentenced to death in the first place, but a study of executions in North Carolina from 1909 to 1954 found that a higher percentage of African Americans sentenced to death than Whites sentenced to death were executed (58% versus 43%, respectively).⁵⁶

⁵³ Radelet, M., & G. Pierce (2010). Race and death sentencing in North Carolina 1980-2007. Working paper requested by author.

⁵⁴ Robinson, M. (2007). *Death Nation: The Experts Explain American Capital Punishment*. Upper Saddle River, NJ: Prentice Hall.

⁵⁵ Baumgartner, F. (2010). Racial discrepancies in homicide victimization and executions in North Carolina, 1976-2008. <http://www.unc.edu/~fbaum/Innocence/NC/Racial-discrepancies-NC-homicides-executions.pdf>

⁵⁶ Johnson, E. (1957). Selective forces in capital punishment. *Social Forces*, 36, 165.

Race and the Death Penalty in North Carolina

Percentage of state population that is African American (2009):	22%
Percentage of arrests for murder that were African American (2009):	55%
Percentage of death row that is African American (2011):	53%
Percentage of defendants executed that were African American (1984-2006):	30%
Percentage of defendants executed who killed whites (1984-2006):	79%

In contemporary North Carolina (from 1984 to 2006), the state executed six blacks who killed whites, versus only 1 white who killed a black (and 27 whites who killed other whites). During this time, 43% of murder victims were white, yet 79% of people executed killed whites.⁵⁷ These data are indicative of what capital punishment scholars refer to as a “race of victim bias.” Race of victim bias suggests that the race of murder victims helps determine which murderers are sentenced to death and which are not.

An example of race of victim bias comes from a study of the death penalty in North Carolina from 1999 to 2006. They study found that whites made up less than half (45%) of all victims of those arrested for murder, yet, nearly four out of five (78%) of those executed by the state killed whites. Offenders who killed white females were the most likely to be executed, followed by killers of white males. In contrast, blacks—who made up more than half (55%) of

⁵⁷ Radelet, M., & G. Pierce (2010). Race and death sentencing in North Carolina 1980-2007. Working paper requested by author.

murder victims in North Carolina from 1999 to 2006—comprised only 22% of victims of offenders executed by the state. Offenders who killed black females were more likely to be executed than killers of black males. Further, blacks who killed whites were far more likely to be executed than whites that killed blacks. During the analysis period, there were 3.78 times more killings of whites by blacks than killings of blacks by whites in the state. However, between 1999 and 2006 in North Carolina, blacks who killed whites were 14 times more likely to be sentenced to death than whites who killed blacks. Further, there were 6 executions of blacks who killed whites during the time period, yet zero executions of whites who killed blacks.⁵⁸

Several other studies in the state show clear evidence of a race of victim bias in the administration of capital punishment. For example, research by Professor Isaac Unah of UNC and Professor Jack Boger of the UNC School of Law finds that racial factors—“specifically the race of the homicide victim”—played “a real, substantial, and statistically significant role in determining who received death sentences in North Carolina” between 1993 and 1997. According to the authors: “The odds of receiving a death sentence rose by 3.5 times or more among those defendants (of whatever race) who murdered white persons.” This conclusion comes from the analysis of Professors Unah and Boger of all 3,990 homicide cases that occurred in the state from 1993 through 1997. Of those 3,990 cases, only 99 first-degree murders resulted in death sentences (2.5%), compared with 303 murders that resulted in life sentences.⁵⁹

⁵⁸ Howell, A. (2008). *The Color and Gender of Capital Punishment: An Analysis of Extra-Legal Factors Affecting the Death Penalty in North Carolina*. Master’s Thesis, Appalachian State University. <http://pscj.appstate.edu/ncdeathpenalty.html>

⁵⁹ Unah, I., & J. Boger (2001). *Race and the Death Penalty in North Carolina, An Empirical Analysis: 1993-1997*. The Common Sense Foundation, North Carolina Council of Churches. <http://www.deathpenaltyinfo.org/race-and-death-penalty-north-carolina>

A subsequent re-analysis of the data by Professors Frank Baumgartner and Isaac Unah found that, from 1993 to 1997, white victims' cases led to death sentences 3.4% of the time, versus 1.6% for nonwhite victims. In fact, the study shows that killing a white victim had a larger impact on the likelihood of receiving a death sentence than the aggravating factor of killing multiple victims.

The authors attribute these racial disparities to prosecutorial decision-making (e.g., “prosecutors are more likely to reject a plea deal in cases that involve nonwhite defendants and white victims, but interestingly are less likely to seek the death penalty in such cases”) and to juries (e.g., “When prosecutors do seek the death penalty ... jurors ... are significantly more likely to award the death penalty during the penalty phase. Conversely, the death penalty is significantly less likely to be awarded when a nonwhite individual kills another nonwhite”).⁶⁰

In a follow-up 2009 study, Professors Unah and Boger conducted a multivariate analysis to control for the effect of legally relevant variables on capital punishment outcomes. The study concluded that “race remains ... a non-statutory aggravating factor for the death penalty” and that “[t]he impact of race in sentencing is present and nontrivial” even after controlling for legally relevant factors. The authors found that “[w]hen a nonwhite defendant kills a white victim, the death-sentencing rate is 5.1 percent. However, when a nonwhite defendant kills a nonwhite victim, the death-sentencing rate is only 1.5 percent ... The highest death-sentencing rate occurs where a nonwhite kills a white; the lowest occurs where a nonwhite kills another

⁶⁰ Baumgartner, F., & I. Unah (2010). The decline of capital punishment in North Carolina. Paper presented to the annual meeting of the American Society of Criminology, November. San Francisco, CA. <http://www.unc.edu/~fbaum/papers/Baumgartner-Unah-ASC-2010.pdf>

nonwhite.” Part of this owes itself to the fact that the former cases are more likely to be stranger homicides.⁶¹

In this study, racial disparities did not arise out of abuses of prosecutorial discretion but rather from jury decision-making. That is, “prosecutors are not exhibiting racially conscious tendencies in their decision to seek the death penalty” but instead it is jurors that are to blame. Keep in mind this does not mean prosecutorial decision-making is irrelevant for racial disparities in capital punishment, since these authors only accounted for decisions to seek death sentences but not other decisions such as dismissing potential jurors during voir dire (jury selection). According to the authors: “If we focus on the jury’s decision at the penalty phase, we find evidence of continuity in that race remains in essence a non-statutory aggravating factor for the death penalty. The impact of race in sentencing is present and nontrivial. In particular, the race of the victim still exerts a significant amount of influence in determining which homicide defendant lives or dies.”⁶²

Similar research was conducted by Professors Michael Radelet of the Department of Sociology at the University of Colorado at Boulder and Glenn Pierce of the School of Criminology and Criminal Justice at Northeastern University. These scholars examined 15,281 homicides in North Carolina between 1980 and 2007. Of these cases, only 368 resulted in death sentences (2.4%). The study found that death sentences for defendants who killed whites are more than three times higher than for those who killed blacks. Specifically, 1.2% of those who

⁶¹ Unah, I., & J. Boger (2009). Race, politics, and the process of capital punishment in North Carolina. Paper presented to the annual meeting of the North Carolina Political Science Association. February. Greensboro, NC.

⁶² Unah, I., & J. Boger (2009). Race, politics, and the process of capital punishment in North Carolina. Paper presented to the annual meeting of the North Carolina Political Science Association. February. Greensboro, NC.

killed blacks were sentenced to death, versus 3.9% of those who killed whites. This finding held true across different decades of the study. In the 1980s, those who killed whites were 3.3 times more likely to be sentenced to death, and between 1990 and 2007, those who killed whites were 3 times more likely to be sentenced to death.⁶³

According to the authors, other factors that might explain the disparity in death penalty sentencing (including multiple victims or homicides accompanied by an additional felony, such as rape or robbery) only “partially explained death penalty decisions, but even after statistically controlling for their effect, race remained an important predictor of who was sentenced to death.” The authors explain that the disparities in sentencing do not likely arise due to a higher level of aggravation in killings of whites by blacks than killings of blacks by whites: “Regardless of whether there are zero, one, or two additional legally relevant factors present, cases with White victims are more likely to result in a death sentence than are cases with Black victims.”⁶⁴ The authors acknowledged that they did not control for all legally relevant variables.

Another study by Professors Catherine Grosso and Barbara O’Brien of the Michigan State University College of Law found that prosecutorial decision-making in capital trials is partially responsible for racial disparities in North Carolina’s capital punishment system. The professors analyzed charging and sentencing decisions in about 1,500 death eligible cases in North Carolina, including all 307 cases since 1990 in which a death sentence was ordered, as well as 449 cases where a death sentence was sought but the jury issued a life sentence following

⁶³ Radelet, M., & G. Pierce (2011). Race and death sentencing in North Carolina: 1980-2007. *The North Carolina Law Review*, 89(6).

⁶⁴ Radelet, M., & G. Pierce (2011). Race and death sentencing in North Carolina: 1980-2007. *The North Carolina Law Review*, 89(6).

a capital penalty trial. An additional 750 cases were randomly selected where prosecutors could have sought death sentences but did not. The authors' jury selection study analyzed more than 4,000 strike decisions to assess the role of race in the exercise of peremptory strikes in capital cases.⁶⁵

The authors found that prosecutors were twice as likely to use peremptory strikes to exclude eligible black jurors as white jurors during voir dire. This means defendants were disproportionately likely to have their legal fate determined by whites. The research found that, of the 159 death row inmates in North Carolina at the time of the study, 31 were sentenced by all-white juries (19%), and another 38 were judged by only one minority on the jury (24%). Thus, 43% of people on North Carolina's death row were judged by juries where between 92-100% of jurors were white. Finally, defendants convicted of killing whites were 2.6 times more likely to be sentenced to death than those who killed blacks.⁶⁶

This particular study was motivated by legal challenges to death sentences by death row inmates under the state's Racial Justice Act of 2009. According to Grosso and O'Brien: "The North Carolina Racial Justice Act of 2009 provides capital defendants a claim for relief based on statistical evidence that 'racial considerations played a significant part in the decision to seek or impose the sentence of death' or that '[r]ace was a significant factor in decisions to exercise peremptory challenges during jury selection.'" In such cases, courts "must convert the death

⁶⁵ Grosso, C., O'Brien, B., & D. Baldus (2010). The North Carolina Racial Justice Act Study. Paper presented at the annual meeting of the American Society of Criminology. November. San Francisco, CA.

⁶⁶ Grosso, C., & B. O'Brien (2010). The North Carolina Racial Justice Act Study: Preliminary findings on the role of race in the North Carolina capital punishment system. Paper presented at the annual meeting of the Law and Society Association. May. Chicago, IL.

sentence to a life sentence or, for pending cases, order that death not be sought.”⁶⁷ Given the realities of capital punishment in North Carolina, it is not surprising that a large share of inmates in the state have challenged their death sentences under the law alleging racial bias.

Other studies show the effects of prosecutorial discretion on capital punishment in particular jurisdictions in the state.⁶⁸ For example, a study of capital prosecutions in Durham County, North Carolina by Professor Isaac Unah of UNC examined all Durham County homicide cases (in those cases where defendants were identified) that were prosecuted from 2002 to 2007. During this time, 149 death eligible defendants were prosecuted, but prosecutors only sought 20 death sentences (13% of all cases). The author found: “The vast majority of these capital prosecutions involve homicides committed by defendants who are male (94 percent) and black (85 percent). According to the data, blacks are far more likely to be homicide victims in Durham County, roughly 75 percent compared to 21.5 percent white. Males constitute a much higher proportion of homicide victims (80 percent) than females. Only 7 percent of the homicides in Durham County in the period we examine are multiple homicides. In terms of racial configuration, there are disproportionately more black-on black homicides than any other racial configuration.”⁶⁹

⁶⁷ Grosso, C., O’Brien, B., & D. Baldus (2010). The North Carolina Racial Justice Act Study. Paper presented at the annual meeting of the American Society of Criminology. November. San Francisco, CA.

⁶⁸ Mayes, J., & D. White (with R. Nobles & N. Sherrill-Corry) (2009). Findings of racial disparity in death penalty sentencing in Guilford County and the applicability of the Racial Justice Act. Department of Political Science and Criminal Justice. North Carolina Agricultural and Technical State University.

⁶⁹ Unah, I. (2010). Choosing those who will die: The effect of race, gender, and law in prosecutorial decision to seek the death penalty in Durham County, North Carolina. *Michigan*

Even given these realities of homicide in the courts, Professor Unah found that in the 32 white murder-victim cases, prosecutors sought the death penalty 25% of the time, versus only 10.8% of the 111 black murder-victim cases. The author notes: “By far the most striking result is in the black defendant/white victim category. When a black defendant is accused of murdering a white victim, 37 percent of the time prosecutors seek the death penalty in the case. The proportion is significantly higher than in any other racial combination” including than when whites killed whites (9%), when blacks killed blacks (8%), and when whites killed blacks (0%).

Using logistic regression analysis, the author found:

- Black defendants who murder white victims are 5.153 times more likely to face the death penalty compared to black defendants who kill black victims.
- After controlling for sex of the victim and defendant, the odds that prosecutors will seek the death penalty when a black defendant kills a white victim remain virtually unchanged at 5.037, even after controlling for the sex of the victim and sex of the defendant.
- After controlling for offense severity, prosecutors are 6.391 times more likely to seek the death penalty when a black defendant kills a white victim compared to situations where a black defendant kills a black victim.

Finally, with regard to gender, the cases most likely to lead to capital prosecutions were those involving male defendants and female victims: “Prosecutors seek the death penalty in 25 percent of all death eligible cases in which a male defendant was accused of killing a female victim” versus only one in seven (14%) of female defendants accused of killing male victims.

Journal of Race & Law 15(1), 135-179.

http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=isaac_unah

Professor Unah reports that “male victims are .420 times less likely to precipitate a capital charge compared to female victim homicides.”⁷⁰ Other studies demonstrate a gender bias in capital punishment in North Carolina which generally tends to lessen the likelihood that a woman will receive a death sentence.⁷¹

Professor Frank Baumgartner’s research also illustrates that extra-legal factors impact death sentences, including race, gender, as well as age. He explains that, whereas young black males have “extremely high rates of homicide victimization as compared to other categories” the death penalty is rarely imposed in black male victim cases.⁷² Specifically, from 1976 through 2008, 42% of all murder victims were black males, yet only 4% of those executed in the state killed black males. White females made up only 13% of all murder victims during the same years, yet 43% of those executed in the state killed white females. The execution rate per thousand homicides in North Carolina is thus highest for certain classes of victims.

Elsewhere, Professor Baumgartner notes that “the difference in likelihood that the death of a black man versus a white woman will lead to the execution of the perpetrator is 40:1.” He notes this is consistent with a “‘racial hierarchy’ in the victims for whom an execution is most

⁷⁰ Unah, I. (2010). Choosing those who will die: The effect of race, gender, and law in prosecutorial decision to seek the death penalty in Durham County, North Carolina. *Michigan Journal of Race & Law* 15(1), 135-179.
http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=isaac_unah

⁷¹ Reza, M. (2005). Gender bias in North Carolina's death penalty. *Duke Journal of Gender Law Policy*, 12, 179.
<http://www.law.duke.edu/shell/cite.pl?12+Duke+J.+Gender+L.+&+Pol%27y+179>

⁷² Baumgartner, F. (2010). Racial discrepancies in homicide victimization and executions in North Carolina, 1976-2008. <http://www.unc.edu/~fbaum/Innocence/NC/Racial-discrepancies-NC-homicides-executions.pdf>

likely to be carried out.”⁷³ It is also consistent with several other studies from other states showing that killers of white females are most likely to receive death sentences.⁷⁴

Odds of Execution by Race and Gender of Murder Victim in North Carolina, 1976-2008	
<i>Execution rate per thousand homicides in North Carolina:</i>	
White females	10.05
Black females	3.53
White males	3.42
Black males	0.24

Source: Baumgartner, F. (2010). Racial discrepancies in homicide victimization and executions in North Carolina, 1976-2008.
<http://www.unc.edu/~fbaum/Innocence/NC/Racial-discrepancies-NC-homicides-executions.pdf>

These kinds of findings of serious racial disparities in the state’s capital punishment should not be surprising because they have always existed.⁷⁵ A study of five North Carolina counties from 1930 to 1940, for example, found 32% of African American defendants received death sentences versus only 13% of white defendants in cases where victims were white. Further,

⁷³ Baumgartner, F., & I. Unah (2010). The decline of capital punishment in North Carolina. Paper presented to the annual meeting of the American Society of Criminology, November. San Francisco, CA. <http://www.unc.edu/~fbaum/papers/Baumgartner-Unah-ASC-2010.pdf>

⁷⁴ Holcomb, J., Williams, M., & S. Demuth (2004). White female victims and death penalty disparity research. *Justice Quarterly* 21(4): 877-902; Phillips, S., Potter, L., & J. Coverdill (2010). Gender, media, and death in the capital of capital punishment. Paper presented to the annual meeting of the American Society of Criminology, November. San Francisco, CA.

⁷⁵ Nakell, B., & K. Hardy (1987). *The Arbitrariness of the Death Penalty*. Philadelphia, PA: Temple University Press; Kotch, S. (2010). A brief history of race and the death penalty in North Carolina, 1715-1961. Paper presented at the annual meeting of the American Society of Criminology. November. San Francisco, CA.

death sentences were returned in 17.5% of all cases with white victims versus 0.4% of all cases with African American victims.⁷⁶

According to an analysis of capital punishment in the state by UNC Professors Seth Kotch and Robert Mosteller, there has been a “strong, pernicious, and persistent influence of race upon the death penalty in North Carolina from the state’s first execution well into the twentieth century ... race and the death penalty have been constant companions throughout history, with racial discrimination exerting a profound and discriminatory impact on the imposition and disposition of death sentences. In short, the race of defendants and victims played a crucial role in determining who died and who did not.” According to these authors, race still plays a role in the administration of capital punishment in the state, but its form has changed from overt racial bias based on defendant race to more subtle forms such as race of victim in combination with other factors.⁷⁷

The point is that, in states such as North Carolina, death penalty scholars have long shown connections between the most severe sanction available (i.e., capital punishment) and race. One notable connection is the link between lynching and capital punishment.⁷⁸ Counties and states with the highest rates of lynching in the past are generally found to be the counties and

⁷⁶ Johnson, G. (1941). The negro and crime. *Annals of the American Academy of Political and Social Science*, 217, 93-104.

⁷⁷ Kotch, S., & R. Mosteller (2010). The Racial Justice Act and the long struggle with race and the death penalty in North Carolina. *North Carolina Law Review*, 88, 2031.

⁷⁸ Beck, E., Massey, J., Tolnay, J., & E. Stewart (1989). The gallows, the mob, and the vote: Lethal sanctioning of blacks in North Carolina and Georgia, 1882 to 1930. *Law & Society Review*, 23(2), 317; Phillips, C. (1987). Exploring relations among forms of social control: The lynching and execution of blacks in North Carolina, 1889-1918. *Law & Society Review*, 21(3), 361-374; Streiker, C., & J. Streiker (2010). The American death penalty and the invisibility of race. Paper presented to the annual meeting of the American Society of Criminology. November. San Francisco, CA.

states with the highest rates of capital sentencing and executions in contemporary America. For example, death penalty expert Franklin Zimring found that the “states and the region where lynching was dominant show clear domination of recent executions, while those states with very low historic lynching records are much less likely than average to have either a death penalty or execution late in the twentieth century.” The median number of executions in high lynching states was 24, versus zero in low lynching states. Zimring explains that: “The statistical contrast between these two groups of states shows that they occupy the same extreme positions on the distribution of two distinct varieties of lethal violence in the United States separated by almost a century and the formal participation of government authority in the killing.”⁷⁹ Zimring’s main thesis has been replicated. At least two additional studies show relationships between county level lynchings and murder rates, as well as state level lynchings and executions. The authors of the second study suggest that executions have replaced lynchings as a means to deal with perceived racial threats.⁸⁰

Other studies of the death penalty in the United States find that predominantly white-resident counties with higher proportions of African Americans and nearer to majority African American counties tend to produce the most death sentences.⁸¹ Interestingly, an ongoing study by Professor Cyndy Caravelis Hughes of Western Carolina University finds that defendants sentenced in counties with a higher Latino population suffer from a sentencing disadvantage,

⁷⁹ Zimring, F. (2003). *The Contradictions of American Capital Punishment*. New York: Oxford University Press.

⁸⁰ Jacobs, D., Carmichael, J., & S. Kent (2005). Vigilantism, current racial threat, and death sentences. *American Sociological Review*, 70, 656; Messner, S., Baller, R., & M. Zevenbergen (2005). The legacy of lynching and Southern homicide. *American Sociological Review*, 70, 633.

⁸¹ Bohm R. (2007). *DeathQuest III, An Introduction to the Theory and Practice of Capital Punishment in the United States*. Cincinnati, OH: Anderson.

meaning they are more likely to be sentenced to death. Her research uses Hierarchical Generalized Linear Modeling to examine whether individual attributes, such as race and ethnicity, impact an individual's likelihood of receiving the death penalty for eligible offenders convicted of first-degree murder between 1989-2009 in North Carolina. Her preliminary findings also support prior research, which identifies race of victim as a predictive variable of which defendants receive a sentence of capital punishment.⁸²

The studies demonstrate that disparities based on race and gender in North Carolina and other jurisdictions may partly arise from “innocent sources” rather than intentional bias. For example, according to the Death Penalty Information Center, almost all prosecutors (98%) in states with the death penalty are white.⁸³ This includes 95% of prosecutors in North Carolina. Further, five of six district solicitors (i.e., prosecutors) in Durham County, the county of one of the above studies, are white. Logically, white prosecutors may see murders of white victims as more serious simply because they identify with such victims more. The same can be said of jurors who determine legal guilt and recommend sentences to judges; juries are also overwhelmingly white.

Capital juries are most likely to impose death sentences when white males are serving on the jury, especially when offenders are black. These findings come from The Capital Jury

⁸² Hughes, C., & J. Shannon-Kellerman (2010). Race, ethnicity, and capital punishment in North Carolina. Paper presented to the annual meeting of the American Society of Criminology. November. San Francisco, CA.

⁸³ Death Penalty Information Center (2010). The death penalty in black and white: Who lives, who dies, who decides. <http://www.deathpenaltyinfo.org/death-penalty-black-and-white-who-lives-who-dies-who-decides>

Project, which studied 1,198 jurors from 353 capital trials in 14 states.⁸⁴ The states include North Carolina, along with Alabama, California, Florida, Georgia, Indiana, Kentucky, Louisiana, Missouri, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia (incidentally these states account for nearly all of the nation's death penalty activity).

In some North Carolina cases, there is also direct evidence that overt racism played a role in jury's decisions to recommend death sentences. For example, one member of the all-white jury in Kenneth Rouse's case admitted that "bigotry" influenced his decision to vote for execution. The juror said he believes "black men rape white women so they can brag to their friends" and said "blacks do not care about living as much as whites do." He also referred to African Americans as "niggers." In Guy LeGrande's case, he was also referred to as a "nigger" during the trial. Rouse remains on death row in the state in spite of an IQ test suggesting he is mentally retarded (executing the mentally retarded is prohibited by law). LeGrande was sentenced to death in spite of an obvious mental illness but was later found incompetent to be executed. Other cases show similar evidence of the impact of racism on death sentences in the state.⁸⁵

At least one study in North Carolina which did find a race of victim and a gender effect—where killers of white women are more likely to receive death sentences—could not confirm that

⁸⁴ Bowers, W., Sandys, M., & T. Brewer (2004). Crossing racial boundaries: A closer look at the roots of racial bias in capital sentencing when the defendant is black and the victim is white. *DePaul Law Review*, 53, 1497; Bowers, W., Steiner, B., & M. Sandys (2001). Death sentencing in black and white: An empirical analysis of the role of jurors' race and jury racial composition. *University of Pennsylvania Journal of Constitutional Law*, 3, 171; Eisenberg, T., Garvey, S., & M. Wells (2001). Forecasting life and death: Juror race, religion, and attitude toward the death penalty. *Journal of Legal Studies*, 30, 277; Foglia, W., & N. Schenker (2001). Arbitrary and capricious after all these years: Constitutional problems with capital jurors' decision making. *The Champion*, 25(6), 26-31.

⁸⁵ North Carolina Coalition for a Moratorium (2010). Racism and the Death Penalty. North Carolina Racial Justice Act. Durham.

the effect was real because, after the introduction of control variables via logistic regression, the effects disappeared.⁸⁶ This study, however, is the exception rather than the rule; every other study done in the state shows legal factors do not explain away disparities based on extra-legal factors such as race and gender, including studies from the 1970s until today.⁸⁷

Finally, it should be noted that evidence of serious racial disparities in capital punishment practice has been found across the country. Studies from California, Indiana, Kansas, Maryland, New Jersey, Ohio, Pennsylvania, Texas, Virginia, Washington, and the federal government have illustrated that killers of whites are between two and five times more likely to be executed over various time periods.⁸⁸ Further, a review by the US General Accounting Office (GAO) of 28 studies by 21 sets of researchers with 23 data sets concluded “a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty...” since 1976. It concluded that:

In 82 percent of the studies, race-of-victim was found to influence likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks. This finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques. The finding held for high, medium, and low quality

⁸⁶ Stauffer, A., Smith, M., Cochran, J., Fogel, S., & B. Bjerregaard (2006). The interaction between victim race and gender on sentencing outcomes in capital murder trials: A further exploration. *Homicide Studies*, 10(2), 98.

⁸⁷ Gross, S., & R. Mauro (1989). *Death and Discrimination: Racial Disparities in Capital Sentencing*. Boston, MA: Northeastern University Press; Nakell, B., & K. Hardy (1987). *The Arbitrariness of the Death Penalty*. Philadelphia, PA: Temple University Press.

⁸⁸ Death Penalty Information Center (2011). Race and the death penalty. <http://www.deathpenaltyinfo.org/race-and-death-penalty>

studies. The race-of-victim influence was found at all stages of the criminal justice system process, although there were variations among studies as to whether there was a race-of-victim influence at specific stages. The evidence for the race-of-victim influence was stronger for the earlier stages of the judicial process (e.g., prosecutorial decision to charge defendants with a capital offense, decision to proceed to trial rather than plea bargain).⁸⁹

A review of 18 more recent studies found results that “are consistent with those summarized in the GAO report.”⁹⁰ Twelve of these 18 studies found race-of victim effects but not race-of-defendant effects.⁹¹

⁸⁹ U.S. General Accounting Office (1990). Death penalty sentencing: Research indicates pattern of racial disparities. In H. Bedau (Ed.), *The Death Penalty in America: Current Controversies*. New York: Oxford University Press, p. 271.

⁹⁰ Baldus, D., & G. Woodworth (2003). Race discrimination and the death penalty: An empirical and legal overview. In Acker, J., Bohm, B., & C. Lanier (Eds.), *America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* (Second Edition). Durham, NC: Carolina Academic Press, p. 518.

⁹¹ These studies include: Baldus, D., & G. Woodworth (2001). Race-of-victim and race-of-defendant disparities in the administration of Maryland's capital charging and sentencing system (1978-1999): Preliminary findings (unpublished manuscript); Bortner, P., & A. Hall (2002). Arizona First-degree Murder Cases Summary of 1995-1999 Indictments: Death Set II Research Report to Arizona Capital Case Commission. Phoenix, AZ: Arizona Capital Case Commission; Brock, D, Cohen, N., & J. Sorensen (2000). Arbitrariness in the imposition of death sentences in Texas: An analysis of four counties by offense seriousness, race of victim, and race of offender. *American Journal of Criminal Law*, 28, 43-71; Joint Legislative Audit and Review Commission of the Virginia General Assembly (2002). Review of Virginia's System of Capital Punishment. <http://jlarc.state.va.us/reports/rpt247.pdf>; Klein, S., & J. Rolph (1991). Relationship of offender and victim race to death penalty sentences in California. *Jurimetrics*, 32, 33-48; Lenza, M., Keys, D., & T. Guess (2003). The prevailing injustices in the application of the death penalty in Missouri (1978-1996). <http://www.umsl.edu/division/artscience/forlanglit/mpb/Lenzal.html>; McCord, D. (2002). A year in the life of death: Murders and capital sentences in South Carolina. *South Carolina Law Review*, 53, 250-359; Paternoster, R., & R. Brame (2003). An empirical analysis of Maryland's death sentencing system with respect to the influence of race and legal jurisdiction. <http://www.newsdesk.umd.edu/pdf/finalrep.pdf>; Unah, I., & J. Boger (2001). Race

5) Innocent people are wrongly convicted of capital murder and sentenced to death in North Carolina.

There is literally no doubt that people are wrongly convicted of capital murder in North Carolina. For example, seven people have been freed from North Carolina's death row since 1973, ranking the state 7th in the number of errors nationwide.⁹² Six of the seven were wrongly convicted after the death penalty was reinstated in 1977 and thus were convicted under the current North Carolina death penalty statute, or super due process. More specifically, five men were wrongly convicted between 1993 and 1997 and ultimately exonerated between 1999 and 2008. They include Levon Jones, Glen Chapman, Jonathan Hoffman, Alan Gell, and Alfred Rivera.⁹³

Interestingly, of the seven men exonerated from death row in North Carolina, five (71%) are African American, and six (86%) are nonwhite. Professor Carol Turowski, Co-Director of the Innocence & Justice Clinic at Wake University School of Law, writes: "By no reasonable measure are these numbers racially proportionate" to the state's population or criminal population, including even the death row population in the state. And all of these seven men (100%) were convicted and sentenced to death for killing whites. Professor Turowski thus notes:

and the death penalty in North Carolina: An empirical analysis: 1993-1997. <http://www.deathpenaltyinfo.org/article.php?scid=19&did=246>; Ziembra-Davis, M., & B. Myers (2002). Indiana Criminal Justice Institute. The Application of Indiana's Capital Sentencing Law: A Report to Governor Frank O'Bannon and the Indiana General Assembly. <http://www.in.gov/cji/home.html>.

⁹² Death Penalty Information Center (2010). Exonerations by state. <http://www.deathpenaltyinfo.org/innocence-and-death-penalty#inn-st>

⁹³ Death Penalty Information Center (2010). Innocence: List of those freed from death row. <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row>

Ultimately, race puts a nonwhite capital defendant at an immediate disadvantage, and on its own heightens the risk of wrongful conviction. If the defendant's alleged victim was white, the hurdles to justice and the risk of error are dramatically compounded. Other factors statistically related to race, such as the likelihood that a nonwhite defendant will be tried and convicted on weaker evidence than a white defendant, further thwart a reliable conviction. On appeal and post-conviction, it may be less likely for an innocent nonwhite defendant to obtain the resources necessary for eventual vindication. And, in the end, even if the defendant is finally granted relief, it will likely come after he has spent many more years on Death Row—and after the State has spend many more years expending resources on wrongful prosecution and incarceration—than if the defendant had been white.⁹⁴

According to a study of error rates in capital cases across the country, Professors James Liebman, Jeffrey Fagan, and Simon Rifkind from the Columbia University School of Law, along with doctoral candidate Valerie West, found that the error rate of capital cases in the United States is 68%. This figure is based on a comprehensive study of 4,578 federal habeas corpus appeals in state capital cases between January 1, 1973 and October 2, 1995. The conclusion of the authors is that capital punishment in the United States is “collapsing under its own mistakes ... a system that is wasteful and broken and needs to be addressed.”⁹⁵

⁹⁴ Turowski, C. (2010). Brief of advocates for the wrongly convicted as *Amici Curiae* in support of defendant Melvin Lee Watt. Submitted to the State of North Carolina, Craven County in the General Court of Justice, Superior Court Division.

⁹⁵ Liebman, J., Fagan, J., Rifkind, S., & V. West (2000). *A Broken System: Error Rates in Capital Cases, 1973-1995*.

Some of the key findings of this report include:

- Nationally, the overall rate of prejudicial error was 68%—that is, “courts found serious, reversible error in nearly 7 of every 10 of the thousands of capital sentences that were fully reviewed during the period.”
- Serious error was error substantially undermining the reliability of capital verdicts.
- Capital trials produce so many mistakes that it takes three judicial inspections to catch them leaving grave doubt whether we do catch them all.
- State courts dismissed 47% of death sentences because of errors, and a later federal review dismissed 40% of the remaining cases.
- The most common errors found in the cases were (1) egregiously incompetent defense attorneys who missed evidence of the defendant’s innocence or evidence that he or she did not deserve a death sentence and (2) suppression of evidence by police and prosecutors.
- Eighty-two percent of those whose death sentences were overturned by state courts were found to be deserving of less than a death sentence, and 7% were found to be innocent of the crimes for which they were convicted.
- Serious errors have been made in every year since the death penalty was reinstated, and more than half of all cases were found to be seriously flawed in 20 of the 23 study years.
- Serious errors are made in virtually every state that still executes people, and over 90% of these states make errors more than half of the time.

<http://www2.law.columbia.edu/instructionalservices/liebman/liebman/Liebman%20Study!/index.html>

- In most cases, death row inmates wait for years for the lengthy review procedures needed to uncover all this error. Only then were their death sentences reversed.
- This much error, and the time needed to cure it, impose terrible costs on taxpayers, victims' families, the judicial system, and the wrongly condemned. And it renders unattainable the finality, retribution and deterrence that are the reasons usually given for having a death penalty.
- The death penalty ranges from 2.5 to five times as expensive as life imprisonment without parole. When you add the costs of posttrial reviews, executions become about 24 times as expensive as life imprisonment without parole. The death penalty is so much more expensive than life imprisonment because of the high rates of error that occur at each stage and the persistence of high error rates over time and across the nation, which mandate multiple expensive judicial inspections.
- The death penalty is rarely applied ... of the 5,760 state death sentences handed down between 1973 and 1995, only 313 (5.4%) led to an execution during this time; Additionally, since 1984 when post Furman executions began in earnest, we have executed only about 1.3% of our nation's death row inmates each year. This makes the retributive and deterrent credibility of the death penalty very low.
- Homicide rates were slightly higher in death sentencing states than in non-death-sentencing states during the study years.⁹⁶

⁹⁶ Liebman, J., Fagan, J., Rifkind, S., & V. West (2000). A Broken System: Error Rates in Capital Cases, 1973-1995.
<http://www2.law.columbia.edu/instructionalservices/liebman/liebman/Liebman%20Study!/index.html>

From their findings, Liebman et al. conclude that the administration of capital punishment in America is irrational. Further, there is no relationship between death-sentencing and execution rates.

North Carolina's error rate was also 68%.⁹⁷ The authors report the following data for North Carolina:

• Number of cases reviewed on Direct Appeal	218
• Number of cases reversed on Direct Appeal	132
• Percentage of cases reversed on Direct Appeal	61%
• Number of cases awaiting Direct Appeal	53
• Percentage of cases awaiting Direct Appeal	20%
• Number of cases forwarded to State Post-Conviction	86
• Number of cases reviewed on Post-Conviction	Unknown
• Number of cases reversed on Post-Conviction	9
• Percentage of cases reversed on Post-Conviction	10%
• Number of cases forwarded to Federal Habeas Corpus	Unknown
• Number of cases reviewed on Habeas Corpus	11
• Number of cases reversed on Habeas Corpus	2
• Percentage of cases reversed on Habeas Corpus	18%
• Overall error rate	68%

⁹⁷ Liebman, J., Fagan, J., Rifkind, S., & V. West (2000). A Broken System: Error Rates in Capital Cases. State Report Card. North Carolina, 1973-1995.
<http://www2.law.columbia.edu/instructionalservices/liebman/liebman/Liebman%20Study/docs/2/northcarolina.pdf>

An updated study of North Carolina’s death penalty system from 1977 through January 1, 2010 found the error rate in the state to be 67%; meaning two out of every three death sentences were overturned on appeal.⁹⁸ The author, Professor Frank Baumgartner, reports the following data from 1977-2009:

- Death sentences: 388
- On death row (January 2010): 158
- Executed: 43
- Removed from death row pending new trial: 12
- Sentenced commuted by Governor: 5
- Found guilty in new trial: 5
- Resentenced to life in prison: 130
- Resentenced to less than life in prison: 10
- Resentenced to death after second trial: 3
- Died in prison of natural causes: 19
- Died in prison of suicide: 6

According to Professor Baumgartner, when cases are overturned on appeal, the most likely outcome is “a subsequent trial ending in a sentence of life in prison”; 60% of appeals result in this outcome. This means most people who have their death sentences overturned are guilty of serious crimes but that the errors found in their cases were too serious to allow death sentences to be imposed. Baumgartner explains that “substantial procedural errors plague highly

⁹⁸ Baumgartner, F. (2010). Rates of reversals in the North Carolina death penalty. March 22. http://www.unc.edu/~fbaum/Innocence/NC/Baumgartner_NC_Death_Reversals-March-20-2010.pdf

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 approximately 67 percent of all the cases over the past 30 years in this state. We all know that no government institutions are perfect, but this rate of error, quite typical of the national average, is shocking indeed.”⁹⁹ Interestingly, Baumgartner found the rate of error has increased from 63% to 83% since the passage of the federal Antiterrorism and Effective Death Penalty Act of 1996.

Part II of the national study by Liebman and his colleagues —*Broken System II: Why There Is So Much Error in Capital Cases*—attempted to assess the causes of the errors in America’s capital punishment processes. According to the study’s authors:

This study uncovered a number of conditions related to error in capital cases, including politics, race, crime control and the courts. But running through all the data was a simple finding—the more a state or county sentences people to death, the more often they make mistakes. ... Everything else being equal, when death sentencing increases from the lowest to the highest rate in the study, the reversal rate increases six-fold, to about 80%. The more often states and counties use the death penalty for every, say 10 or 100 homicides, the more likely it is that any death verdict they impose will later be found to

⁹⁹ Baumgartner, F. (2010). Rates of reversals in the North Carolina death penalty. March 22. http://www.unc.edu/~fbaum/Innocence/NC/Baumgartner_NC_Death_Reversals-March-20-2010.pdf

be seriously flawed, and the more likely it is that the defendant who was found guilty and sentenced to die will turn out to be not guilty.¹⁰⁰

Additionally, the authors found that there are four key factors which lead to errors:

homicide risk to whites and blacks; the size of the black population; the rate at which police catch and punish criminals; and politically motivated judges ... Everything else being equal, when the risk of a white person getting murdered is high relative to the risk of an African-American getting murdered, twice as many appeals are reversed than where that risk is low ... when whites and other influential citizens feel threatened by homicide, they put pressure on officials to punish as many criminals as severely as possible—with the result that mistakes are made, and a lot of people are initially sentenced to death who are later found to have committed a lesser crime, or no crime at all.¹⁰¹

The study also found a relationship between politics and the death penalty; political pressure plays a role in capital punishment. Liebman et al. explain:

In general, the more electoral pressure a states judges are under, the higher the state's death-sentencing rate, but the lower the rate at which it carries out its death sentences.

[This] suggests that political pressure tends to impel judges or to create an environment in which prosecutors and jurors are impelled—to impose death sentences, but then tends to interfere with the state's capacity to carry out the death sentences that are imposed...a

¹⁰⁰ Death Penalty Information Center (2006). A Broken System II: Why There Is So Much Error in Capital Cases, Questions and Answers.
<http://www.deathpenaltyinfo.org/article.php?scid=19&did=244>

¹⁰¹ Death Penalty Information Center (2006). A Broken System II: Why There Is So Much Error in Capital Cases, Questions and Answers.
<http://www.deathpenaltyinfo.org/article.php?scid=19&did=244>

desire to curry favor with voters may lead elected prosecutors and judges to cut corners in an effort to secure that premium – simultaneously causing death-sentencing rates, and error rates, to increase.¹⁰²

In the study by Professors Isaac Unah and John Boger of North Carolina's death penalty from 1993 to 1997, evidence emerged of a "politics" effect on capital prosecutions, as well. Specifically, prosecutors from Republican districts were more likely to seek death sentences when they were up for reelection in the next year, and when they represented counties with large nonwhite populations.¹⁰³

Other studies have identified problems in capital cases that lead to false convictions: false confessions; eyewitness identification mistakes; inappropriate use of forensic evidence; false statements by jailhouse informants; shoddy investigative policies (police work); sloppy lab work; dishonest prosecutors (misconduct); political pressure on judges; death-qualified jury bias; flawed jury instructions, and defense counsel inadequacies.¹⁰⁴ The latter finding has played a significant role in North Carolina. In the state, at least 16 death row inmates, including 3 who were executed, were represented by lawyers who have been disbarred or disciplined for unethical

¹⁰² Death Penalty Information Center (2006). A Broken System II: Why There Is So Much Error in Capital Cases, Questions and Answers.
<http://www.deathpenaltyinfo.org/article.php?scid=19&did=244>

¹⁰³ Unah, I., & J. Boger (2009). Race, politics, and the process of capital punishment in North Carolina. Paper presented to the annual meeting of the North Carolina Political Science Association. February. Greensboro, NC.

¹⁰⁴ American Bar Association (2006). Achieving Justice: Freeing the Innocent, Convicting the Guilty.
<http://www.abanet.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=509010>

or criminal conduct.¹⁰⁵ Obviously, when inmates are executed by the state, no steps can be taken to rectify these problems.

Conclusion

An analysis of empirical data and the existing studies of capital punishment in the state demonstrates five facts. First, capital punishment is extremely rare in North Carolina. Death sentences are rarely handed down, and even among those sentenced to death, few are actually executed. A death row inmate in North Carolina has a much greater likelihood of having his or her death sentence overturned on appeal than being executed.

Stated simply, the vast majority of murders do not lead to death sentences or executions; if retribution and justice demand capital punishment, the state is failing citizens more than 99% of the time. Given the barriers to imposition of death sentences and executions identified in this report, citizens should not expect major increases in capital punishment practice in North Carolina. Capital punishment in the state should be assessed as it is (and as it will be) practiced, rather than in theory. Given the facts discussed above, a safe prediction is that death sentences and executions will remain rare in North Carolina. Policy-makers should thus seriously consider whether capital punishment is a necessary punishment in North Carolina.

A quick note about the impact of death sentences and executions on families of murder victims is in order here. There has not been systematic research into the effects of capital punishment on family members of murder victims.¹⁰⁶ Those studies that do exist demonstrate

¹⁰⁵ Death Penalty Focus (2010). Inadequate legal representation. Reporting on data from the *Charlotte Observer*, September 9, 2000. <http://www.deathpenalty.org/article.php?id=83>

¹⁰⁶ Capital Punishment Research Initiative. University at Albany, School of Criminal Justice. <http://www.albany.edu/scj/cpri.htm>.

that family members of murder victims do sometimes achieve a sense of retribution as well as closure from the execution of their family member's murderer. Yet, most of the time they do not, mostly because executions obviously do not bring back their loved ones. The delays in the capital punishment process also diminish the capacity of capital punishment to provide closure to crime victims' families.¹⁰⁷ As one example, the state of North Carolina has executed 28 people this century (between 2000 and 2006). The average time spent on death row of these offenders was approximately 11.2 years.¹⁰⁸

Advocates of alternatives to capital punishment—such as life imprisonment—argue that an advantage of these alternatives over capital punishment is that they provide a more immediate sense of closure for murder victims' families because closure begins immediately after sentencing when offenders begin serving their sentences (as opposed to having to wait for a death sentence to be carried out more than ten years later). In the wake of the state of Illinois abolishing the death penalty in March 2011, Kane County State's Attorney Joe McMahon suggested one result would be murder trials being concluded conclusion more quickly. McMahon said: "To the extent that we can bring these cases to resolution sooner, and help the families of the victims get some measure of closure and allow the healing process to begin sooner, [it] will be helpful."¹⁰⁹

¹⁰⁷ King, R. (2005). *Capital Consequences: Families of The Condemned Tell Their Stories*. Rutgers, NJ: Rutgers University Press; King, R. (2003); *Don't Kill in Our Names: Families of Murder Victims Speak Out Against the Death Penalty*. Rutgers, NJ: Rutgers University Press; Vandiver, M. (1989). Coping with death: Families of the terminally ill, homicide victims, and condemned prisoners. In M. Radelet (Ed.), *Facing the Death Penalty: Essays on Cruel and Unusual Punishment*. Philadelphia, PA: Temple University Press.

¹⁰⁸ North Carolina Department of Correction (2010). Executions carried out under current death penalty statute. <http://www.doc.state.nc.us/dop/deathpenalty/executed.htm>

Finally, considering how rare capital punishment is relative to the prevalence of murder in North Carolina, we can confidently conclude that family members of nearly every murder victim will not gain a sense of retribution or closure from capital punishment in the state, regardless of how long the process takes. A logical conclusion is that policy-makers ought to be promoting sanctions that actually hold offenders accountable and provide justice to crime victims.

Second, executions are not a greater deterrent to murder than alternative sanctions such as life imprisonment. Further, capital punishment is now so rare in the state of North Carolina that it is not logical to expect that the practice will act as a meaningful deterrent to would be murderers. Even as death sentences have declined and executions stopped, murder has declined in the state. Given the barriers to imposing more death sentences identified in this report, policy-makers ought to thus invest in sanctions that actually save lives.

Third, careful, systematic studies of capital punishment in North Carolina also show that its practice is more expensive than other major punishments including life imprisonment. This may be counterintuitive, but nonetheless remains true. Citizens of the state may thus want to see policy-makers in the state invest resources in alternative punishments rather than continuing to maintain a system of punishment that is almost never used anyway, especially during a period of serious budget deficits.

Fourth, empirical data shows that capital punishment in North Carolina is characterized by serious disparities based on extra-legal factors such as race and gender. Careful, systematic

¹⁰⁹ Death Penalty Information Center (2011). New voices: Some prosecutors and judges welcome end of death penalty. <http://www.deathpenaltyinfo.org/new-voices-some-prosecutors-and-judges-welcome-end-death-penalty>

studies of the state's death penalty system consistently find that the race of the murder victim meaningfully impacts the likelihood of receiving a death sentence—a “race of victim” bias—even after controlling for legally relevant factors. Studies show this bias emerges both from prosecutorial and jury decision-making. Given that these kinds of biases are found across the country at nearly all times and places, a reasonable conclusion is that this problem is not fixable. Policy-makers in the state thus ought to decide, once and for all, whether these racial biases are an acceptable cost of doing justice in the state of North Carolina.

Fifth, and perhaps most serious, innocent people are wrongly convicted of capital murder and sentenced to death in North Carolina. The state has wrongly convicted and sentenced to death at least seven people in its recent history. Others have been convicted (and even executed) in cases that included potentially tainted evidence from the State Bureau of Investigation's crime lab. While wrongful conviction may be an inevitable cost of criminal justice, executing an innocent person is final and uncorrectable. State policy-makers ought to now take whatever steps necessary to make sure this kind of mistake never happens in the name of its citizens. One reasonable way to protect the lives of the innocent is to replace the death penalty with alternatives such as life imprisonment, where errors can be corrected once discovered.