



ROBINA INSTITUTE
OF CRIMINAL LAW AND CRIMINAL JUSTICE

PRISON-RELEASE DISCRETION AND PRISON POPULATION SIZE

STATE REPORT: NORTH CAROLINA

Kevin R. Reitz

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Prison-Release Discretion and Prison Population Size

State Report: North Carolina

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This report is part of a larger *Prison Release: Degrees of Indeterminacy Project* funded by Arnold Ventures. For other publications from the project, including additional state-specific reports, go to the Robina Institute of Criminal Law and Criminal Justice's website at <https://robinainstitute.umn.edu>.

Definitions and Concepts

“Indeterminacy” means “unpredictability of time served.” Once we know the terms of a particular judicial sentence, can we say with confidence how much time the defendant will actually serve before the sentence’s expiration? If actual time-that-will-be-served is highly unpredictable based on the pronounced judicial sentence, then the sentence is highly indeterminate. If actual time-to-be-served is knowable within a relatively small range of possibility, then the sentence has a low degree of indeterminacy—or, we might say—it has a high degree of determinacy. “Determinacy” means “predictability of time served” at the time of judicial sentencing.

Scaling up to the systemwide level, the project explores the degree to which prison population size in each state is placed under the jurisdiction of decision makers who exercise time-served discretion after judicial sentences have been finalized. Higher degrees of indeterminacy across hundreds and thousands of individual sentences add up to greater control over prison population size by “back-end” agencies such as parole boards and departments of correction. These structural features vary enormously across U.S. jurisdictions.

Note on the project’s rankings of “degrees of indeterminacy”

To compare the degrees of indeterminacy in individual prison sentences or across the prison-sentencing systems of different jurisdictions, we use a qualitative ranking framework based on our cumulative learning while preparing the project’s 52 jurisdiction-specific reports. To avoid false precision, we place all systems within one of five categories (see table below).

Each of the five categories can be expressed in alternative terms: either the *degree of indeterminacy* or *degree of determinacy* thought to be present.

The ranking scale is subjective, although the reasoning that supports our judgments is laid out in each report. Ultimately, the rankings indicate only the rough position of specific prison-sentencing systems vis-à-vis each other. No two American prison-release systems are alike and all are highly complex, so nuanced comparative analysis requires closer inspection.

Rankings of “Degrees of Indeterminacy”

Ranking	Alternative terminology	
1	Extremely-high indeterminacy	Extremely-low determinacy
2	High indeterminacy	Low determinacy
3	Moderate indeterminacy	Moderate determinacy
4	Low indeterminacy	High determinacy
5	Extremely-low indeterminacy	Extremely-high determinacy

For individual classes of sentences, we use the following benchmarks for our classifications of higher versus lower degrees of indeterminacy:

Benchmarks for rankings of “degrees of indeterminacy”

- *Extremely high indeterminacy:* >80-100 percent indeterminacy (first prospect of release at 0-19.99 percent of judicial maximum)
- *High indeterminacy:* >60-80 percent indeterminacy (first prospect of release at 20-39.99 percent of judicial maximum)
- *Moderate indeterminacy:* >40-60 percent indeterminacy (first prospect of release at 40-59.99 percent of judicial maximum)
- *Low indeterminacy:* >20-40 percent indeterminacy (first prospect of release at 60-79.99 percent of judicial maximum)
- *Extremely low indeterminacy:* 0-20 percent indeterminacy (first prospect of release at 80-100 percent of judicial maximum)

Classifying entire sentencing systems on our five-point scale is an imprecise exercise largely because all jurisdictions have multiple different sentence classes with varying degrees of indeterminacy attached to each class. Prisoners who are present within a system at any moment in time represent a broad mixture of sentence classes, and this mixture is constantly changing with releases and new admissions. Thus, our systemwide rankings cannot reflect mathematical precision.

In this project, we use the term “population-multiplier potential” (or PMP) to express the amount of influence over prison population size that is ceded by law to back-end decision makers such as parole boards and prison officials. To give a simplified example, if all prisoners in a hypothetical jurisdiction were eligible for parole release after serving 25 percent of their maximum sentences, then the PMP attached to the parole board’s release decisions would be 4:1. That is, if the parole board were to deny release to all prisoners for as long as legally possible (a *longest-time-served scenario*), the resulting prison population would be four times as large as it would be if the board were to release all prisoners at their earliest allowable release dates (a *shortest-time-served scenario*).

Most states have several different classes of sentences, each with their own rules of prison release. Each sentence class carries its own PMP. Application of the PMP measure to entire prison systems is, at best, an approximation that requires the proration of multiple classes of sentences and their PMPs according to the numbers and percentages of prisoners who have received those different classes of sentence.

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We assess the North Carolina prison-sentencing system as one with an *extremely low degree of indeterminacy* overall. In the lexicon of this project, that is the same as saying that North Carolina’s system is built to have an *extremely-high degree of determinacy*. It is not the most determinate system in the country in systemic design, but it is probably in the top three.

The great majority of North Carolina prisoners serve sentences under which there is no parole-release eligibility. Release before expiration of prisoners’ maximum possible prison stays, and as early as their minimum-sentence milestones, depends on the accrual of earned time credits. Thus, corrections officials have the major share of back-end discretion over time actually served by prisoners—but the total amount of this authority is quite limited. Actual prison sentence lengths in North Carolina are determined primarily at the front end of the state’s prison-sentencing system.

Terminology note

This report will refer to the North Carolina Post-Release Supervision & Parole Commission as the “parole board.” The North Carolina Department of Public Safety: Adult Correction will be referred to as the “department of corrections.”

Introduction

North Carolina's prison-rate history, 1972 to 2020

At yearend 2020, North Carolina's prison rate was 271 per 100,000 general population, with a prison population of 28,881.¹ North Carolina's prison rate was 30th largest among all states.

Figure 1. Prison Rate Change in North Carolina and (Unweighted) Average Among All States, 1972 to 2020

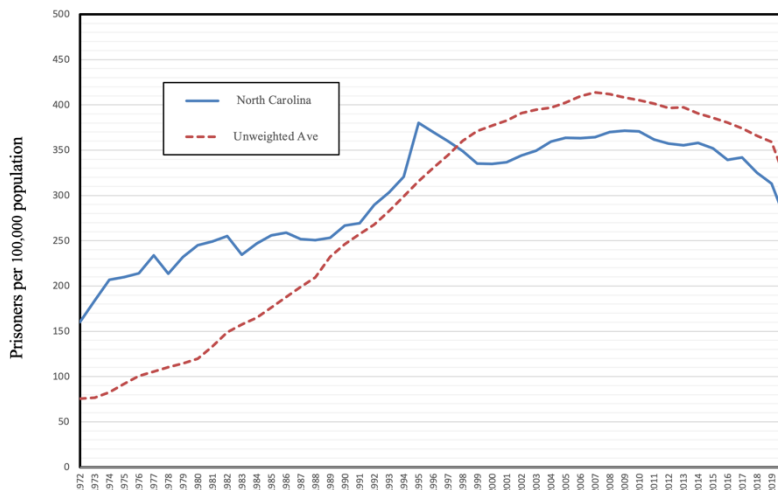
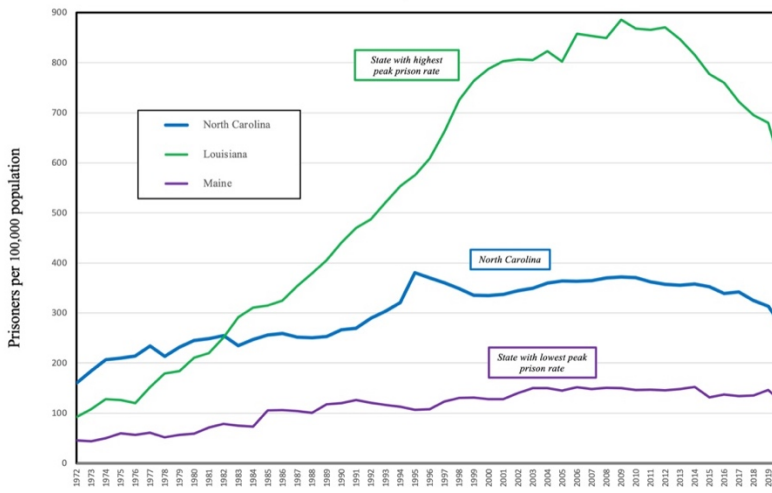


Figure 2. Prison Rate Change in North Carolina, Louisiana, and Maine, 1972 to 2020



Sources: Timothy J Flanagan, Kathleen Maguire & Michael J. Hindelang, *Sourcebook of Criminal Justice Statistics, 1990*, at 605 table 6.56, Rate (per 100,000 resident population) of sentenced prisoners under jurisdiction of State and Federal correctional authorities on December 31: By region and jurisdiction, 1971-1989 (Hindelang Criminal Justice Research Center, 1991) (for 1972-1977); E. Ann

¹ E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 11 table 4, 15 table 7.

Carson, *Imprisonment rate of sentenced prisoners under the jurisdiction of state or federal correctional authorities per 100,000 U.S. residents, December 31, 1978-2016* (Bureau of Justice Statistics, Corrections Statistical Analysis Tool) (for 1978-2016), at <https://www.bjs.gov/index.cfm?ty=nps>; E. Ann Carson, *Prisoners in 2018* (Bureau of Justice Statistics, 2020), at 11 table 7 (for 2017); E. Ann Carson, *Prisoners in 2019* (Bureau of Justice Statistics, 2020), at 11 table 7 (for 2018); E. Ann Carson, *Prisoners in 2020-Statistical Tables* (Bureau of Justice Statistics, 2021), at 15-16 table 7 (for 2019-2020).

North Carolina reached its peak prison rate in 1995 at 380 per 100,000, which dropped to 271 per 100,000 in 2020. This is a net difference of -109 per 100,000, which was the 27th largest prison-rate drop of all states from their peak positions (in various years) through 2020.

From 1973 to 1975, and again in 1979 and 1980, North Carolina had the highest imprisonment rate of all 50 states. Perhaps the most striking feature of the state's prison-rate history during the nation's Great Prison Buildup period (from 1972 through 2007) was its plummeting out of the "top" ranks of per capita prison size to the lower middle.

While the state outpaced the prison-rate growth of the average state in the first half of the 1990s, its prison rates began to oscillate in subsequent years with an overall downward trajectory. During the late 1990s, when most state prison systems were growing at a fast pace, North Carolina's prison rate plunged. In the short period from 1995 to 2001 alone, North Carolina's comparative prison-rate ranking dropped from 17th to 32nd among all 50 states.

Figures 1 and 2 span two important periods in American criminal-justice history. From 1972-2007, the United States saw 35 years of uninterrupted growth in the nationwide aggregated prison rate. This might be called the Great Prison Buildup. Since 2007, national prison rates have been falling. From 2007 through yearend 2019 (prior to the COVID pandemic), the average drop in states' prison rates was about 1.2 percent per year, with much variation across individual states.

The COVID period

We view American prison rates following the arrival of the COVID pandemic in March 2020 as discontinuous with earlier rates and trends. Whatever factors were at work to determine state prison rates in the "before times," the pandemic introduced a major new causal force that, at least temporarily, diverted the course of prison-rate change nationwide.²

² In Figures 1 and 2 above, the COVID period arrives in the very last year of data that has been reported by the Bureau of Justice Statistics (BJS) as of this writing—from yearend 2019 to yearend 2020. Figures 1 and 2 rely exclusively on BJS data covering the years 1972-2020. For a tentative update, the Vera Institute of Justice has collected state imprisonment counts reaching into December 2021, which are not fully compatible with BJS reports. See Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022).

In calendar year 2020, most states saw unusually large drops in their prison rates. Prison rates fell in 49 states, the District of Columbia, and the federal system. The aggregate 50-state prison rate for the U.S. dropped by about 15 percent in a single year. From yearend 2019 to yearend 2020, the (unweighted) average state prison rate fell from 359 to 308 prisoners per 100,000 general population, for an average incremental downturn of -51 per 100,000.³ We believe this was the largest one-year decline in state prison rates in American history.⁴

In calendar year 2021, U.S. prison rates did not continue to descend at the same dramatic pace. Preliminary data from the Vera Institute indicate that the aggregate 50-state prison population fell by about 1.8 percent from January to December 2021. Prison populations actually rose in 19 states.⁵

Given the focus of this project and the unprecedented size of prison-rate change during COVID's first year, it is relevant to ask whether indeterminacy in American prison sentences played a consequential role in events. An adequate history cannot yet be written, but considerable data have already been assembled.

Nationwide, COVID-driven changes in prison-release practices were not the main driving force of prison population shrinkage from early 2020 through the end of 2021. This is not to say that there was no expansion of prison release during the pandemic. Thirty-six states and the federal government did at least *something* to expedite releases, each jurisdiction choosing from a grab bag of different strategies—e.g., expedited parole release, loosened release criteria, increased or restored credit awards, early release of prisoners already close to their mandatory release dates, expanded compassionate release for the elderly or medically infirm, increases in clemency grants, invocation of overcrowding emergency provisions, and court orders. Such steps did not yield large numbers of “COVID releases” in most states, however, and many COVID releases were not much earlier than they would have been in the pandemic's absence.⁶

³ E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 1, 7 table 2. Across 2020, prison rates fell in every state except Alaska, where the rate increased by 1.2 percent.

⁴ Historical sources show no one-year decline in average state prison rates that approaches -51 per 100,000. See Margaret Werner Cahalan, *United States Historical Correctional Statistics, 1850-1984* (Bureau of Justice Statistics, 1986); Margaret Cahalan, *Trends in Incarceration in the United States since 1880: A Summary of Reported Rates and the Distribution of Offenses*, 25 *Crime & Delinq.* 9 (1979).

⁵ Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022), at 3 table 2 (reporting a decrease of 15.8 percent in the state prison population overall in 2020 followed by a decrease of 1.8 percent in 2021).

⁶ For a survey of state releasing practices in response to COVID, see Kelly Lyn Mitchell, Julia Laskorunsky, Natalie Bielenberg, Lucy Chin, and Madison Wadsworth, *Examining Prison Releases in Response to COVID: Lessons Learned for Reducing Effects of Mass Incarceration* (Robina Institute of Criminal Law and Criminal Justice, 2022) (finding that 24 states released 0 to 150 prisoners in response to the pandemic from March 2020 through December 2021, while only five states and the federal system released more than 3,000 prisoners). The effects on annual imprisonment rates were even less than the absolute numbers of releases would suggest. Mitchell et al. found that one of the most common criteria applied by states for COVID release decisions was “short time

The available data suggest that the 2020 plunge in state prison rates was primarily due to reduced *admissions* caused by a number of factors, including fewer arrests, fewer new court commitments, fewer revocations from community supervision, and some prisons' embargoes on receiving prisoners from local jails. The number of all state prison admissions in the U.S. dropped by an astonishing 40 percent in a single year from 2019 to 2020.⁷

The COVID period in North Carolina

In a separate study, the Robina Institute found 5,409 releases in North Carolina from March 2020 through December 2021 that were accelerated in response to the pandemic.⁸ This number was the equivalent of about 16 percent of North Carolina pre-COVID prison population (at yearend 2019). More than 82 percent of these releases were the product of a state court order, as reported by the Robina Institute:

On April 8, 2020, five North Carolina organizations (the ACLU of North Carolina, Disability Rights North Carolina, Emancipate NC, Forward Justice, and the National Juvenile Justice Network) filed a lawsuit seeking to ensure that North Carolina public officials took further action to stop the spread of COVID-19, particularly in prisons. The case, *NC NAACP v. Cooper* (Rights of Incarcerated People), was settled on February 25, 2021, bringing about the release of 4,450 people in state custody between February 15, 2021, and August 21, 2021. The Division of Adult Correction and

left on sentence.” Thus, some of the accelerated COVID releases in 2020 and 2021 were of prisoners who would have been released in the same year anyway, albeit somewhat later.

⁷ See E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 17, 17 table 8 (admissions fell from 530,905 to 319,346). There was no comparable upswing in prison releases. Total releases from state prisons actually fell in 2020, dropping 9.8 percent from the previous year. *Id.* at 19 table 9 (nationwide releases fell from 557,309 to 502,723). Only five states released five percent or more of prisoners in 2020 than they had released in 2019: Arizona (6.9 percent), Maine (30.9 percent), Nebraska (5.9 percent), New Jersey (19.7 percent), and Wyoming (8.0 percent). For a focus on patterns of parole release in 2020, see Tiana Herring, *Parole boards approved fewer releases in 2020 than in 2019, despite the raging pandemic* (Prison Policy Initiative, February 3, 2021), at <https://www.prisonpolicy.org/blog/2021/02/03/parolegrants/> (surveying data from 13 states; finding that total numbers of parole releases fell in nine states; among all 13 states, the average drop in numbers of parole releases from yearend 2019 to yearend 2020 was 11.3 percent). See also Kelly Lyn Mitchell, Julia Laskorunsky, Natalie Bielenberg, Lucy Chin, and Madison Wadsworth, *Examining Prison Releases in Response to COVID: Lessons Learned for Reducing Effects of Mass Incarceration* (Robina Institute of Criminal Law and Criminal Justice, 2022) (concluding that “the greatest impact on prison population overall occurred on the admissions side of the equation.”). From March 2020 through December 2021, Mitchell et al. estimate a total of 47,967 “non-routine COVID releases” from state prisons nationwide. Over a similar period (January 2020 to December 2021), Vera Institute of Justice (Vera) reported a drop in the aggregate state prison population of 217,989 people, from 1,259,977 to 1,041,988. Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022), at 3 table 2.

⁸ Kelly Lyn Mitchell, Julia Laskorunsky, Natalie Bielenberg, Lucy Chin, and Madison Wadsworth, *Examining Prison Releases in Response to COVID: Lessons Learned for Reducing Effects of Mass Incarceration* (Robina Institute of Criminal Law and Criminal Justice, 2022), at 35 Appendix A.

Juvenile Justice released people through three main mechanisms: ELC [home confinement], discretionary sentence credits, and post release supervision and parole actions.⁹

In calendar year 2020, North Carolina’s prison rate fell from 313 to 271 per 100,000—a one-year decline of -42 per 100,000. This was the 37th largest one-year drop reported among all 50 states for that year.¹⁰ Measured in percentage terms, it was a 13.4-percent reduction in the state’s prison rate. The state’s total prison population fell by 4,161 people, from 33,042 to 26,890.¹¹

Falling admissions were the dominant factor in North Carolina’s 2020 prison rate drop than annual releases. The number of prison admissions in the state dropped by 27.7 percent in 2020 compared with the previous year (from 16,554 to 11,965). Total releases in 2020 did not increase, but fell by 7.3 percent over 2019 (from 17,215 to 15,960).¹²

To date, no publicly available statistics verify the large numbers of releases that reportedly followed the settlement in *NC NAACP v. Cooper* in the last five months of 2021. From yearend 2020 to December 2021, the Vera Institute reported that North Carolina saw a slight increase in its prison population, from 29,422 to 29,701—or 0.9 percent.¹³ As of December 22, 2022, the

⁹ Kelly Lyn Mitchell, Julia Laskorunsky, Natalie Bielenberg, Lucy Chin, and Madison Wadsworth, *Examining Prison Releases in Response to COVID: Lessons Learned for Reducing Effects of Mass Incarceration* (Robina Institute of Criminal Law and Criminal Justice, 2022), at 75-76 Appendix E (footnote omitted); see also *NC NAACP V. Cooper (Rights of Incarcerated People)*, ACLU of N.C. (2021), <https://www.acluofnorthcarolina.org/en/cases/nc-naacp-v-cooper-rights-incarcerated-people>. The remaining releases included about 600 people released through increased use of discretionary sentence credits for prisoners “for nonviolent, nonsexual offenses who were at an increased risk from COVID-19” and 359 nonviolent offenders released to home confinement, including “1) pregnant offenders, 2) offenders age 65 and older with underlying health conditions, 3) female offenders age 50 and older with health conditions and a release date in 2020, 4) offenders age 65 and older with a release date in 2020, 5) offenders on home leave or work release with a release date in 2020.” Mitchell et al., *Examining Prison Releases in Response to COVID*, at 75.

¹⁰ The largest single-state drop from yearend 2019 to yearend 2020 was in Kentucky, from 515 to 414 per 100,000. E. Ann Carson, *Prisoners in 2020 - Statistical Tables* (Bureau of Justice Statistics, 2021), at 15 table 7.

¹¹ *Id.*, at 11 table 4, 15 table 7.

¹² *Id.*, at 17 table 8, 19 table 9.

¹³ See Jacob Kang-Brown, *People in Prison in Winter 2021-22* (Vera Institute of Justice, 2022), at 3 table 2. As a general matter, Vera’s *People in Prison* reports should not be treated uncritically as “updates” of BJS’s annual *Prisoners* series. Vera does not always gather prisoner counts from the same dates as BJS, nor does it calculate state prison rates in the same way. For example, BJS calculates yearend prison rates using yearend population estimates for each state from the Census Bureau, while Vera uses the Census Bureau’s July 1 estimates (six months earlier). Occasionally, the absolute numbers of state prisoners reported by Vera are dramatically different from those in BJS reports, suggesting basic differences in counting rules. Because of such incompatibilities, we do not attempt to integrate data from the two sources in any of our state reports for this project.

North Carolina Department of Public Safety reported a total prison population of 30,150.¹⁴ Further research would be needed to trace the true impact of the *Cooper* case. It is conceivable that the releases included in the settlement would largely have occurred in 2021 anyway, even in the absence of litigation.

I. General Rules of Prison Release in North Carolina

North Carolina has a “Structured Sentencing” system in which parole release discretion has been abolished for nearly all crimes committed after October 1, 1994.¹⁵ Judicial sentencing decisions are governed by sentencing guidelines, which are enacted into statutory law.¹⁶ Compared with sentencing guidelines systems in other states like Minnesota and Virginia, where guidelines take the form of administrative regulations or advisory recommendations, North Carolina’s guidelines are tightly enforceable on sentencing courts. In most cases, judges have no “departure power” to impose sentences other than those authorized in the guidelines ranges themselves.¹⁷

1.1. General rules of prison release

a. Most prisoners with felony convictions

In most North Carolina felony cases, prison sentences pronounced in court are expressed as the *minimum* sentences prisoners must serve.¹⁸ In the vast majority of cases, maximum time-to-be-served until release is then calculated as 120 percent of the minimum term, rounding up to

¹⁴ North Carolina Department of Public Safety, *Department of Public Safety Statistics*, at <https://www.ncdps.gov/about-dps/department-public-safety-statistics> (“Offender Population Dec 22, 2022”).

¹⁵ N.C. Gen. Stat. § 15A-1340.10.

¹⁶ See N.C. Gen. Stat. § 15A-1340.17 (containing North Carolina’s sentencing guidelines grid).

¹⁷ See Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina, 1980-2000*, 29 Crime & Just. 39, 78-79 (2002).

¹⁸ The policy choice to have sentencing judges pronounce minimum rather than maximum sentences in felony cases may reflect the desire of North Carolina law-makers to create a “truth in sentencing” system. On this view, a judicial pronouncement of a maximum prison term that is unlikely to be served is less “truthful” than a judicially-pronounced sentence that undersells the possible severity of the sentence. See North Carolina Sentencing and Policy Advisory Commission, *Structured Sentencing: Training & Reference Manual* (2014), at 1 (declaring that one of the principles of North Carolina’s sentencing system is that “Sentencing policies should be truthful: The time actually served in prison or jail should bear a close and consistent relationship to the sentence imposed by the judge”). For a history of the creation of North Carolina’s “structured sentencing” system, see Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina, 1980-2000*, 29 Crime & Just. 39 (2002). See also *id.* at 69 (“In its earliest meetings, the [durations structure subcommittee of the state’s founding sentencing commission] emphasized ‘truth in sentencing’ and decided that all offenders would serve 100 percent of the minimum announced sentence.”).

the end of the month following the 120-percent mark.¹⁹ In other words, release eligibility for general-rules prisoners occurs at the 83.33-percent mark of their maximum prison stays, with rounding-up adjustments of as much as 30 days. For the vast majority of prisoners, releases at their minimum terms, or at any time between their minimum and maximum lengths of stay, depends on their accrual of earned time credits (see section 1.2).

North Carolina felony sentences include separate terms of mandatory post-release supervision, with fixed durations.²⁰ Depending on the type of felony, mandatory post-release supervision terms in North Carolina are nine months, one year, or five years in length.²¹

b. Most prisoners with misdemeanor convictions

For misdemeanor sentences, judges imposes a “single sentence length” expressed in days (rather than minimum and maximum terms, as in felony cases).²² Time served on misdemeanor convictions may be reduced by earned time credits (see section 1.2), with earliest possible release due to credit-earning after 88 percent of the judicial sentence has been served.

1.2. Generally-available credits: types and amounts

For felonies, an offender sentenced to an active punishment may win earned time credits to reduce their lengths of stay to the duration of their minimum terms.²³ There are no statutorily-

¹⁹ See N.C. Gen. Stat. § 15A-1340.17(c)-(e) (containing minimum/maximum tables and formulas for computation). Sentencing judges have no power to vary the maximum term that is assigned to the minimum sentence they have selected. See *State v. Parker*, 550 S.E.2d 174, 177 (N.C. Ct. App. 2001).

²⁰ See N.C. Gen. Stat. § 15A-1368.2(a),(c). This is a minority approach among all state, but is recommended in American Law Institute, *Model Penal Code: Sentencing* (forthcoming 2022), Section 6.13(5) (“The length of term of postrelease supervision shall be independent of the length of the prison term, served or unserved, and shall be determined by the court with reference to the purposes [of supervision]”). Under the majority approach, the length of the postrelease supervision term is calculated as the unserved balance of a releasee’s judicial maximum sentence as of the date of first release.

²¹ N.C. Gen. Stat. § 15A-1368.2(a),(c). Prisoners have no right to refuse post-release supervision. See N.C. Gen. Stat. § 15A-1368.2(c).

²² N.C. Gen. Stat. § 15A-1340.23(c); North Carolina Sentencing and Policy Advisory Commission, *Structured Sentencing: Training & Reference Manual* (2014), at 59.

²³ N.C. Gen. Stat. § 15A-1340.13(d) (“An offender sentenced to an active punishment shall serve the minimum term imposed, except as provided in G.S. 15A-1340.18. The maximum term may be reduced to, but not below, the minimum term by earned time credits awarded to an offender by the Division of Prisons of the Department of Adult Correction or the custodian of the local confinement facility, pursuant to rules adopted in accordance with law.”). North Carolina Sentencing and Policy Advisory Commission, *Structured Sentencing: Training & Reference Manual* (2014), at 34.

prescribed earning rate for credits, nor do the statutes set forth the behavioral prerequisites for earning of credits. Rulemaking on these topics is left to the department of corrections.²⁴

For misdemeanors, the offender may receive earned time credit of up to four days per month of active incarceration.²⁵

1.3. Loss of earned time credits

The Secretary of the Department of Adult Correction is responsible for adopting rules to specify the rates at and circumstances under which earned time may be forfeited.²⁶

1.x. Administrative parole

North Carolina's 2011 Justice Reinvestment Act created an "Advanced Supervised Release" (ASR) program, which took effect in 2012.²⁷ Under the ASR statute, but only when the prosecutor does not object, sentencing courts have discretion to order that eligible defendants be admitted to the ASR program by the department of corrections. No one may be admitted without such a court order.²⁸

Prisoners admitted to the program are given ASR release dates, included in their judicial sentences, in addition to their usual minimum and maximum sentences. The rules for setting ASR dates vary, but the dates are always earlier than the end of the judicial minimum term. If prisoners have completed their "risk reduction incentives" as designed by the department of corrections, they are automatically released to post-release supervision on their assigned ASR dates. In addition, "If the Department determines that the defendant is unable to complete the incentives by the ASR date, through no fault of the defendant, then the defendant shall be released at the ASR date."²⁹

²⁴ N.C. Gen. Stat. § 148-13(a1) ("The Secretary of the Department of Adult Correction shall adopt rules to specify the rates at, and circumstances under, which earned time authorized by G.S. 15A-1340.13(d) and G.S. 15A-1340.20(d) may be earned or forfeited by persons serving activated sentences of imprisonment for felony or misdemeanor convictions.").

²⁵ N.C. Gen. Stat. § 15A-1340.20(d).

²⁶ N.C. Gen. Stat. § 148-13(a1).

²⁷ See generally N.C. Gen. Stat. § 15A-1340.18; North Carolina Sentencing and Policy Advisory Commission, *Structured Sentencing: Training & Reference Manual* (2014), at 45-46.

²⁸ N.C. Gen. Stat. § 15A-1340.18(c). Defendants' eligibility depends on a combined consideration of their offenses of conviction and prior record levels, with the following combinations eligible: Class D, Prior Record Level I through III; Class E, Prior Record Level I through IV; Class F, Prior Record Level I through V; and Class G or H, Prior Record Level I through VI. N.C. Gen. Stat. § 15A-1340.18(a)(2).

²⁹ N.C. Gen. Stat. § 15A-1340.18(e).

Within the broader scheme of this project, we classify North Carolina’s ASR contract sentencing program as an “Administrative parole release” (APR) program. As explained in the Final Report for this project:

We define administrative parole release as a routinized path to release that requires fewer procedural stages and less case-by-case discretion than the traditional parole-release process. APR is fundamentally built on a contract model: Prisoners are assigned a correctional plan early in their terms; if they follow the plan, the state extends them a credible promise that they will be released on an established date. To give such contracts credibility, denials of release or “derailment” from the APR track are permitted only under defined circumstances.³⁰

To date, North Carolina’s ASR program has benefited only small numbers of prisoners. A 2022 evaluation of the implementation of the ASR program found as follows:

In CY 2021, 174 inmates with an ASR sentence exited prison. DPS data indicate that the majority (85%) were released at their ASR date (i.e., after serving their reduced minimum sentence length). ... The prison population of 29,629 on December 31, 2021, included 243 inmates with ASR sentences.³¹

2.4. Other parolable sentences

Although North Carolina’s Structured Sentencing Act of 1994 abolished discretionary parole release for the vast majority of crimes, the Post-Release Supervision and Parole Commission retains parole-release discretion in misdemeanor cases for prosecutions of impaired driving and impaired driving of a commercial vehicle.³² Detailed statutory sentencing guidelines are set forth for these prosecutions, separate from the guidelines for other offenses. Except for the most aggravated cases or for defendants placed on probation, prison sentences for cases of this

³⁰ Kevin R. Reitz, Edward E. Rhine, Allegra Lukac & Melanie Griffith, *American Prison-Release Systems: Indeterminacy in Sentencing and the Control of Prison Population Size, Final Report* (Robina Institute of Criminal Law and Criminal Justice, 2022), at 47. Chapter 5 of the Final Report is devoted entirely to APR programs, which currently exist in at least a dozen states nationwide.

³¹ See North Carolina Sentencing and Policy Advisory Commission, *Justice Reinvestment Act: Implementation Evaluation Report 2022* (2022), at 11, 40.

³² See N.C. Gen. Stat. § 20-179 (laying out an indeterminate prison-sentencing scheme for covered offenses, including sentencing guidelines and procedures, aggravating and mitigating factors, and six different levels of punishments); § 20-179(a) (listing offenses subject to the indeterminate sentencing provisions). In addition to impaired driving offenses, the provision also extends to repeat offenders convicted of operating a commercial vehicle after consuming alcohol; and operating a school bus, school activity bus, child care vehicle, ambulance, other EMS vehicle, firefighting vehicle, or law enforcement vehicle after consuming alcohol. See also North Carolina Sentencing and Policy Advisory Commission, *Structured Sentencing: Training & Reference Manual* (2014), at 45 (“Discretionary parole release is eliminated for all offenses committed on or after October 1, 1994, except Driving While Impaired, Driving While Impaired in a Commercial Vehicle, and Failure to Comply with Control Conditions.”).

kind must include both a minimum and maximum term. Depending on the level of punishment imposed, the statute sets forth mandatory minimum prison stays that range from 24 hours to 30 days in cases with eligibility for parole release; and maximum sentences that range from two months to two years.³³ Minimum terms may not be reduced by good-time credits.³⁴ The Post-Release Supervision and Parole Commission may grant discretionary release to prisoners who have served their minimum terms and received a substance abuse assessment. To be released, prisoners must have completed their recommended treatment programs in prison unless they are being paroled into a residential treatment program.³⁵

2.5. Mandatory minimum prison terms

With exception of mandatory sentences of life without parole, most mandatory minimum prison terms in North Carolina are subject to the general rules of prison-release. That is, maximum prison stays for such sentences are calculated as 120 percent of the minimum sentences, with rounding to the end of the next month. The minimum stay is thus positioned at about 83 percent of the maximum, just as for general-rules cases. Release short of the maximum is possible through the accrual of earned time credits.

For example, defendants convicted of drug trafficking must receive mandatory minimum and maximum sentences that vary by felony grade, “[u]nless the court finds that the offender provided substantial assistance in the identification, arrest or conviction of any accomplices, accessories, co-conspirators or principals.”³⁶ Like general-rules prisoners, minimum prison stays for these offenses are about 83 percent of the maximum, and release prior to the maximum depends on the accrual of earned time credits.

North Carolina’s sentencing guidelines often require the imposition of an executed prison term (called an “active punishment” in North Carolina), although in some cases non-prison sentences are permitted if the judge finds the existence of extraordinary mitigating circumstances.³⁷ Mandatory prison terms of this kind are expressed in minimum and maximum

³³ N.C. Gen. Stat. § 20-179(g)-(k) (setting forth penalties for punishment levels one to five). There is an additional penalty level, called “aggravated level one,” under which defendants sentenced to prison are not eligible for parole. See N.C. Gen. Stat. § 20-179(f3).

³⁴ N.C. Gen. Stat. § 20-179(p)(2).

³⁵ N.C. Gen. Stat. § 20-179(p)(3).

³⁶ North Carolina Sentencing and Policy Advisory Commission, *Structured Sentencing Training & Reference: Manual* (2014), at 36-37; N.C. Gen. Stat. § 90-95(h).

³⁷ North Carolina Sentencing and Policy Advisory Commission, *Structured Sentencing Training & Reference: Manual* (2014), at 32-33.

terms just like other sentences under the state’s sentencing guidelines. There is no bar against the normal accrual of earned time credits to advance prisoners’ mandatory release dates.³⁸

II. Life Sentences in North Carolina

2.1. Life sentences without parole

Convictions of first-degree murder carry a sentence of life without parole (LWOP) and, for aggravated cases, the death sentence is authorized.³⁹ A person who is convicted of a violent felony and of being a violent habitual felon must be sentenced to LWOP.⁴⁰ A “violent felony” is defined as any Class A through E felony.⁴¹ A “violent habitual felon” is defined as a person with two or more prior convictions of violent felonies in separate proceedings.⁴² LWOP is the mandatory sentence for defendants convicted of a Class B1 felony with a victim who was 13 or younger if they have any prior convictions of a Class B1 felony.⁴³

For prisoners serving LWOP sentences, only the governor has authority to allow release, through the executive’s commutation power (see section 3.2).⁴⁴

2.2. Life sentences with possibility parole

Life sentences with the possibility of parole exist in North Carolina only for legacy cases under prior law (for crimes committed before October 1, 1994) and juvenile life sentences (see next section). In such cases, the Post-Release Supervision and Parole Commission has authority to make parole-release decisions.⁴⁵

2.3. Juvenile life sentences

North Carolina has adopted statutory procedures that must be followed at homicide trials before sentences of life without parole (LWOP) may be imposed on defendants who were under

³⁸ North Carolina Sentencing and Policy Advisory Commission, *Structured Sentencing Training & Reference: Manual* (2014), at 34.

³⁹ See N.C. Gen. Stat. § 14-17(a).

⁴⁰ N.C. Gen. Stat. § 14-7.12.

⁴¹ N.C. Gen. Stat. § 14-7.7(b).

⁴² N.C. Gen. Stat. § 14-7.7(a) (“This Article does not apply to a second violent felony unless it is committed after the conviction or plea of guilty or no contest to the first violent felony.”).

⁴³ N.C. Gen. Stat. § 15A-1340.16B(a).

⁴⁴ North Carolina Sentencing and Policy Advisory Commission, *Structured Sentencing: Training & Reference Manual* (2014), at 42.

⁴⁵ N.C. Gen. Stat. § 15A-1371(b)(3). See Port City Daily Staff, *Parole granted for man convicted and sentenced to life for rape in 1980*, Port City Daily (July 20, 2020).

age 18 at the time of their crimes.⁴⁶ These procedures were enacted to comply with the requirements of the U.S. Supreme Court’s decision in *Miller v. Alabama*.⁴⁷ If the procedures have not been followed in cases where LWOP would have been imposed on an adult defendant, juvenile defendants must instead be sentenced to life with the possibility of parole after 25 years.⁴⁸

III. Infrequently used forms of prison release in North Carolina

3.1. Medical or “compassionate” release

Medical release may be granted to prisoners by the Post-Release Supervision and Parole Commission after referrals by the department of corrections.⁴⁹ To be eligible, the department must determine that prisoners are “[d]iagnosed as permanently and totally disabled, terminally ill, or geriatric” and “[i]ncapacitated to the extent that [they do] not pose a public safety risk.”⁵⁰ The term “geriatric” is defined as “an inmate who is 65 years of age or older and suffers from chronic infirmity, illness, or disease related to aging that has progressed such that the inmate is incapacitated to the extent that he or she does not pose a public safety risk.”⁵¹

A person released on medical parole may be returned to prison by the Post-Release Supervision and Parole Commission if their condition improves “so that the inmate would not be eligible for medical release if being considered at that time.”⁵²

⁴⁶ N.C. Gen. Stat. § 15A-1340.19A et seq; see also North Carolina Sentencing and Policy Advisory Commission, *Structured Sentencing: Training & Reference Manual* (2014), at 42.

⁴⁷ See *State v. Ames*, 836 S.E.2d 296, 303 (N.C. Ct. App. 2019) (discussing developments in North Carolina law since *Miller*); *Miller v. Alabama*, 567 U.S. 460, 480 (2012) (holding mandatory sentences of life without parole unconstitutional when applied to defendants who were under age 18 at the time of their crimes; stating further that, “[a]lthough we do not foreclose a sentencer’s ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.”); *Montgomery v. Louisiana*, 136 S.Ct. 718, 735 (2016) (stating that *Miller* required “a sentencer to consider a juvenile offender’s youth and attendant characteristics before determining that life without parole is a proportionate sentence.”); *Jones v. Mississippi*, 141 S. Ct. 1307 (2021) (holding that sentencing courts are not required to make a factual finding of “permanent incorrigibility” before sentencing a juvenile offender to life without parole so long as court has considered the defendant’s youth before imposing the LWOP sentence).

⁴⁸ N.C. Gen. Stat. § 15A-1340.19A.

⁴⁹ N.C. Gen. Stat. § 15A-1369.3(a).

⁵⁰ N.C. Gen. Stat. §§ 15A-1369.2(a). Subsection (b) provides that, “Persons convicted of a capital felony or a Class A, B1, or B2 felony and persons convicted of an offense that requires registration under Article 27A of Chapter 14 of the General Statutes shall not be eligible for release under this Article.”

⁵¹ N.C. Gen. Stat. § 15A-1369(3).

⁵² N.C. Gen. Stat. § 15A-1369.5(a).

Families Against Mandatory Minimums reported that, in 2019 and 2020, 21 prisoners were granted medical release in North Carolina.⁵³

3.2. Executive clemency

Under the North Carolina Constitution, “The Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to regulations prescribed by law relative to the manner of applying for pardons. The terms reprieves, commutations, and pardons shall not include paroles.”⁵⁴

3.3. Emergency release for prison overcrowding

North Carolina has a standing statutory mechanism to respond to circumstances of prison overcrowding, but it was enacted in 1983, years before the Structured Sentencing Act of 1994 became effective. The emergency release law authorizes the Secretary of Public Safety to order the Post-Release Supervision and Parole Commission to increase the numbers of nonviolent prisoners who are granted release, “over a reasonable period of time,” until the prison populations have reached a “more manageable level or to meet the State’s obligations under law.”⁵⁵ This emergency release mechanism only applies to prisoners who are “otherwise eligible for parole,”⁵⁶ which rules out the vast majority of North Carolina’s prison population today.

⁵³ Families Against Mandatory Minimums, *Compassionate Release: North Carolina*, at 5, https://famm.org/wp-content/uploads/North-Carolina_Final.pdf.

⁵⁴ N.C. Const., Art. III, § 5(6).

⁵⁵ N.C. Gen. Stat. § 148-4.1(a).

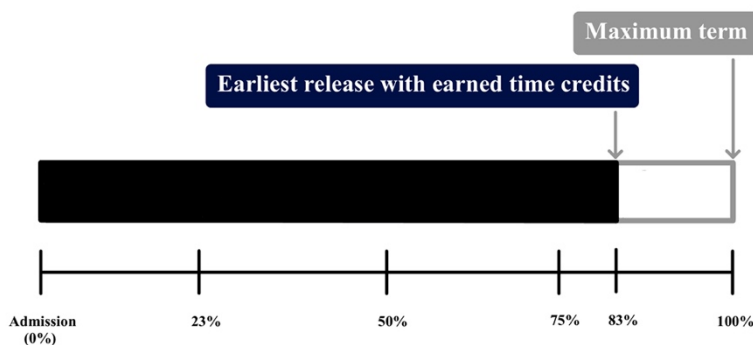
⁵⁶ N.C. Gen. Stat. § 148-4.1(b).

IV. Overall assessment of indeterminacy in North Carolina's prison-sentencing system

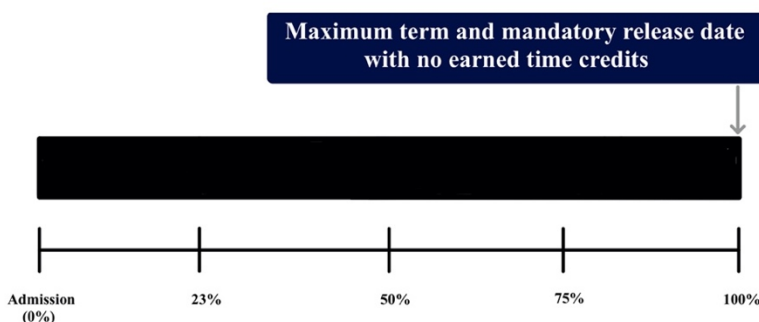
4.1. General-rules cases

Most prisoners in North Carolina serve sentences with earliest release dates at about the 83-percent mark of their maximum prison stays, as shown in Figure 3 below. Release before the maximum depends on the accrual of earned time credits, but may never be earlier than the judicial minimum term. To supply a visual comparison, Figure 4 illustrates the longest possible length of stay when no earned time credits are earned (or all have been forfeited).

North Carolina Figure 3. Prison-Release Timeline for General-Rules Cases with Earned Time Credits



North Carolina Figure 4. Prison-Release Timeline for General-Rules Cases with No Earned Time Credits



The sentences illustrated in Figures 3 and 4 are 83 percent determinate and 17 percent indeterminate. The population-multiplier potential (PMP) for the entire subpopulation of prisoners serving such sentences is 1.2:1.⁵⁷ That is, if all such prisoners were held in confinement for their full maximum terms (a *longest-time-served regime*), this segment of the prison population would be 20 percent larger than if all prisoners were released at the first moment of

⁵⁷ See *supra* p. vi for an explanation of the PMP measure.

release eligibility (a *shortest-time-served regime*). Sentences in this class carry an *extremely-low degree of indeterminacy* within the scale developed for this project. In the project's terminology, it is equally accurate to say that they carry an *extremely-high degree of determinacy* (see pp. iv-v).

4.3. Distribution of time-served discretion

For ordinary prison cases in North Carolina, back-end release discretion is held exclusively by corrections officials through their choices and actions when administering the earned-time credit system. There is no parole board or other agency that commonly exercises any measure of prison-release discretion.⁵⁸ The back-end hegemony of the department of corrections is of modest significance, however, because there is relatively little indeterminacy built into North Carolina prison sentences in the first place. If prison officials were to suddenly red-line their uses of discretion toward the *never-release* limit, the eventual effect on prison population size could be no more than 20 percent growth.⁵⁹

Within the small amount of time-served discretion ceded to corrections officials in North Carolina, we cannot say whether aggregate decision patterns are predictable or unpredictable as a matter of actual practice. It may be that the award of earned time credits is largely a matter of routine, as some observers of some American good-time systems have averred.⁶⁰ Without data on credits awarded, withheld, and forfeited in North Carolina, and the impact of these decisions on time actually served by prisoners, we cannot offer confident judgments.

One notable feature of the North Carolina system is that sentencing courts have little control over the degree of indeterminacy in the sentences they impose. As opposed to many other sentencing-guidelines jurisdictions, judges have no general power to “depart” upward or downward from the guidelines’ sentencing ranges. Further, once the judicial sentence has been imposed, the relationship between minimum and maximum terms is fixed by an unvarying formula.⁶¹ Further still, the state’s sentencing guidelines sometimes remove judicial discretion

⁵⁸ See North Carolina Department of Public Safety, *Fiscal Year 2020-2021: Annual Statistical Report*, at 24 (“Releases due to parole have decreased steadily.... In FY 1998-1999, 21% of prison exits were to parole, whereas, during FY 2020-2021 only 2% of prison exits were to parole. The proportion of the prison population sentenced prior to Structured Sentencing has continued to decrease, so parole exits will diminish over time.”).

⁵⁹ The full impact of the population-multiplier capacity would be felt only if the earned-time system had been operating according to always-release norms before lurching to the opposite extreme of a never-release regime. Because it is possible that North Carolina’s system is currently operating within the always-release end of the continuum of possibilities, a potential growth increment of 20 percent is a useful benchmark.

⁶⁰ See generally James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. Rev. 217 (1982); Kevin R Reitz, *Prison-Release Reform and American Decarceration*, 104 Minn. L. Rev. 2741 (2020) (reporting the word on the street in Minnesota’s prison system).

⁶¹ Many other states have fixed formulas for the relationship between minimum and maximum sentence lengths, but most give judges broad discretion to select the absolute severity values that are fed into the formulas. For example, in a state that generally authorizes parole-release eligibility at one-third of the maximum term, we can

as to whether a prison or nonprison sanction will be imposed (commonly called the “in-out decision”).⁶²

The North Carolina scheme stands in dramatic contrast with those in some other states, where sentencing courts often have substantial discretion to set the absolute values of minimum and maximum terms, or even to alter the relationship between the two.⁶³

4.4. Overall assessment

We consider North Carolina’s prison system to have an *extremely-low degree of indeterminacy* overall. In the lexicon of this project, this is the same as saying it has an *extremely-high degree of determinacy*.

We note that North Carolina prisoners’ exposure to total time served on their judicial sentences is increased by the fact that they have a free-standing term of mandatory post-release supervision added to their original prison sentences. Depending on the offense, the supervision terms can be nine months, 12 months, or (for sex offenders) five years. After initial release, these supervision terms expose prisoners to the possibility of additional time served through revocations and returns to prison.⁶⁴

Our judgment of the degree of indeterminacy in North Carolina’s prison-sentencing system as a whole is not affected by the small number of sentences in the state that still carry parole-

imagine individual cases in which judges might have the options to impose a one-to-three year prison sentence, two-to-six years, five-to-15 years, or other 1:3 variations.

⁶² See North Carolina Sentencing and Policy Advisory Commission, *Structured Sentencing: Training & Reference Manual* (2014), at 30-33 (explaining that the state’s sentencing guidelines sometimes mandate sentences of incarceration, sometimes mandate community punishments, and sometimes give judges discretion as between the two).

⁶³ See generally Kevin R. Reitz, Edward E. Rhine, Allegra Lukac & Melanie Griffith, *American Prison-Release Systems: Indeterminacy in Sentencing and the Control of Prison Population Size, Final Report* (Robina Institute of Criminal Law and Criminal Justice, 2022).

⁶⁴ Generally, the Post-Release Supervision and Parole Commission has discretion to revoke post-release supervision and reimprison an offender who has found to have violated the conditions of their supervision for up to three months for the first violation and three additional months for any two subsequent violations. If there were more than three violations and the offender was convicted of a Class B1 to E felony, the Commission may return the offender to prison for up to the time remaining on their maximum term. Those convicted of sex offenses, who commit another crime, or who abscond their supervision may be returned to prison for up to the time remaining on their maximum imposed terms. N.C. Gen. Stat. § 15A-1368.3(c)(1); North Carolina Sentencing and Policy Advisory Commission, *Structured Sentencing: Training & Reference Manual* (2014), at 48. During 2020-2021, there were 1,938 post-release supervision revocations of 12,112 offenders on post-release supervision. North Carolina Department of Public Safety, *Fiscal Year 2020-2021: Annual Statistical Report*, at 34-35.

release eligibility. Such cases made up only two percent of all prison releases in 2020-2021,⁶⁵ and, with the exception of life sentences, affect only misdemeanor cases with relatively short time spans between minimum and maximum terms.

⁶⁵ See North Carolina Department of Public Safety, *Fiscal Year 2020-2021: Annual Statistical Report*, at 24 (reporting that the percentage of discretionary parole releases continues to decline).