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Capital Punishment in North Carolina: The 1977 Death Penalty Statute and the North Carolina Supreme Court

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COMMENTS

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Although no one has been executed in North Carolina for twenty years,[1] capital punishment remains a permissible penalty under state law.[2] The North Carolina capital punishment statute[3] enacted in 1977,[4] provides for a bifurcated trial and sentence procedure. Upon conviction of a capital offense a defendant is given a separate hearing before the jury to determine whether he is to be punished by death or by life imprisonment.[5] At the conclusion of the sentencing hearing, the jury must decide whether one or more "aggravating circumstances" are "sufficiently substantial" to call for the imposition of the death penalty. The jury must also determine whether any "mitigating circumstances" exist and whether the mitigating circumstances are sufficient to outweigh the aggravating circumstances. Based on this analysis, the jury is asked to reach a unanimous sentence recommendation of death or life imprisonment.[6]

The current North Carolina statute became effective June 1, 1977.[7] It has

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1. The last execution in North Carolina occurred in 1961. *See* Patrick, *Capital Punishment and Life Imprisonment in North Carolina, 1946 to 1968: Implication for Abolition of the Death Penalty*, 6 WAKE FOREST INTRA. L. REV. 417, 418 (1970).

2. The only crime punishable by death in North Carolina is first degree murder. Murder in the first degree is a murder committed with premediation and deliberation, or a murder committed in perpetration of a felony. N.C. GEN. STAT. § 14-17 (Supp. 1979). Apparently in the wake of the decision of the United States Supreme Court in Coker v. Georgia, 433 U.S. 584 (1977), one may conclude that the eighth amendment prohibits punishment by death upon conviction for rape.

3. N.C. GEN. STAT. § 15A-2000-2003 (1978 & Supp. 1979).

4. Law of May 19, 1977, Ch. 406, 1977 N.C. Sess. Laws, 1st Sess. 407.

5. N.C. GEN. STAT. § 15A-2000(a) (1978).

6. N.C. GEN. STAT. § 15A-2000(b) (1978).

7. Law of May 19, 1977, ch. 406, § 9, 1977 N.C. Sess. Laws, 1st Sess. 411. The North Carolina Supreme Court was called upon to decide the *ex post facto* effect of the new statute in State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979). In *Detter*, the murderous acts—poisonings—were committed between January and March 1977. The victim did not die until June 9, 1977—after the effective date of the current capital punishment statute. Prior to the effective date of the statute, the maximum penalty for first degree murder was life imprisonment because the previous North Carolina death penalty statute had been struck down by the United States Supreme Court. Woodson v. North Carolina, 428 U.S. 280 (1976). The defendant was tried and convicted of first degree murder, and received a sentencing hearing under the 1977 statute. She appealed the resulting death sentence on the ground that the capital punishment statute could not apply to acts committed before its effective date.

The supreme court agreed, holding that the time at which a murder by poisoning is deemed to have been committed for purposes of analyzing the *ex post facto* effect of a new statute is the time at which the murderous act is committed and not the time of death of the victim. Because the poisonings occurred between the decision in *Woodson* and the effective date of the new statute, the supreme court vacated the death sentence and remanded with instructions to enter a judgment imposing life imprisonment. The court's order on remand was based on section 6 of the capital punishment statute, which provides that if a death sentence is declared to be unconstitutional for any reason the punishment on conviction is life imprisonment. Law of May 19, 1977, ch. 406, § 6, 1977 N.C. Sess. Laws, 1st Sess. 411.

been the subject of a flurry of cases in the North Carolina Supreme Court.[8] In all but one of the recent cases the court found error below and remanded for further proceedings. In a single case, however, the court determined that the capital punishment statute was properly applied by the trial court. The court then considered the statute in light of the eighth and fourteenth amendments and held that it passed constitutional scrutiny, thus affirming a sentence of death.[9]

The present North Carolina capital punishment statute is a result of the line of death penalty cases in the United States Supreme Court, beginning with *Furman v. Georgia*[10] in 1972. There it was decided that traditional sentencing methods in death cases produced arbitrary and random results—so arbitrary and random as to constitute cruel and unusual punishment.[11] The *Furman* decision was followed in North Carolina by *State v. Waddell*,[12] in which *Furman* was interpreted as prohibiting capital punishment only where its infliction is at the discretion of judge or jury. The North Carolina Supreme Court accordingly invalidated the discretionary provisions of the death penalty statute and severed them from the remainder, leaving death as the mandatory punishment for capital crimes. This decision was confirmed by the General Assembly in 1974, when the murder, rape, burglary and arson statutes were rewritten to make death the mandatory sentence for the crimes of first degree murder and first degree rape and life imprisonment the mandatory penalty for first degree burglary and arson.[13] The 1974 legislation was followed by *State v. Woodson*[14] in which the mandatory death penalty was up-

8. All sentences of death are subject to automatic review by the supreme court for errors assigned on appeal and for consideration of the punishment imposed. N.C. GEN. STAT. § 15A-2000(d)(1) (1978).

9. State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979).

10. 408 U.S. 238 (1972).

11. The pivotal opinions in the 5-4 decision proved to be those of Justices Stewart and White. Justice Stewart found that unbridled jury discretion in sentencing produced sentences that are " 'cruel' in the sense that they excessively go beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary . . . . [and] 'unusual' in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare." 408 U.S. at 309. Justice Stewart concluded that there was no discernible basis for distinguishing those who are sentenced to death from those who commit similar crimes but suffer less extreme punishment, and declared that the "Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Id.* at 310.

Justice White felt that the death penalty would become unconstitutionally cruel and unusual when its imposition ceased to further the social ends that it was traditionally considered to serve. Under the former system of unbridled jury discretion in sentencing, Justice White concluded that "the penalty is so infrequently imposed that the threat of execution in too attenuated to be of substantial service to criminal justice," thus eliminating the constitutional justification for its existence. 408 U.S. at 313.

12. 282 N.C. 431, 194 S.E.2d 19 (1973). The historical background of the current North Carolina Capital Punishment Statute is recounted in State v. Johnson, 298 N.C. 47, 56-63, 257 S.E.2d 597, 606-610 (1979).

13. Law of April 8, 1974, ch. 1201, 1974 N.C. Sess. Laws, 2d Sess. 323 (rewriting N.C. GEN. STAT. §§ 14-17 (first degree murder), 14-21 (rape), 14-52 (first degree burglary) and 14-58 (arson)) (the Legislature repealed § 14-21 by the Act of May 29, 1979, ch. 682, § 7, 1979 N.C. Sess. Laws, 1st Sess. 725).

14. 287 N.C. 578, 215 S.E.2d 607 (1975) *rev'd*, 428 U.S. 280 (1976).

held against constitutional challenge by a unanimous state supreme court. The United States Supreme Court, however, rejected the mandatory death penalty as a permissible response to *Furman* in *Woodson v. North Carolina*.[15] There the plurality of Justices reasoned that mandatory death sentences would not eliminate the problems engendered by jury discretion in sentencing, because juries would nullify the mandatory sentence by refusing to convict.[16] The plurality also felt that the mandatory death penalty for first degree murder departed from "contemporary standards respecting the imposition of the punishment of death and thus [could not] be applied consistently with the Eighth and Fourteenth Amendments' requirement that the State's power to punish 'be exercised within the limits of civilized standards.' "[17] Finally, the plurality held that the eighth and fourteenth amendments require that the sentencing body consider "relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death."[18] The 1974 North Carolina legislation thus fell short of constitutional adequacy in three respects: a continued potential for unbridled jury discretion; a conflict with "evolving societal standards of decency" in imposing punishment; and a failure to address the particular circumstances of the individual defendant.

The legislative response to the constitutional defects of the 1974 legislation was recourse to a capital punishment system that had survived the Supreme Court's scrutiny in the three companion cases of *Woodson*: the "guided discretion" system based on the Model Penal Code.[19] In *Gregg v. Georgia*,[20] *Proffitt v. Florida*[21] and *Jurek v. Texas*,[22] the court held that a bifurcated system of guilt determination and sentence determination that permits the sentencing authority to consider facts and circumstances of the particular crime and the particular defendant before imposing sentence does not violate the eighth and fourteenth amendments.

It is this "guided discretion" system that is at the core of the current North Carolina statute. The methods it prescribes for focusing the sentencing authority's attention on the presence or absence of enumerated aggravating or mitigating factors addresses the problems discerned by the Supreme Court in both the unbridled discretion and mandatory sentencing systems.[23] The sentencing authority, which in North Carolina is the same jury that sat at the guilt determination phase,[24] is required to examine a list of aggravating and miti-

15. 428 U.S. 280 (1976).
16. *Id.* at 302-03.
17. *Id.* at 301.
18. *Id.* at 303.
19. MODEL PENAL CODE §§ 210.0-.6 (Official Draft 1962).
20. 428 U.S. 153 (1976).
21. 428 U.S. 242 (1976).
22. 428 U.S. 262 (1976).
23. *See Survey of Developments in North Carolina Law, 1977—Criminal Procedure*, 56 N.C. L. REV. 843, 1027-1030 (1978).
24. If a defendant pleads guilty to a capital felony he is entitled to a sentencing hearing before a jury selected for that purpose. N.C. GEN. STAT. § 15A-2000(a)(2).

The exclusion of potential jurors who have expressed unequivocal opposition to the death penalty and who would refuse to recommend its infliction regardless of the evidence has been

gating factors[25] supplied to them by the judge.[26] The jury's decision is to be based on the presence or absence of these factors. Thus, the decision as to the sentence is reached by a similar reasoning process in each case, based on legislative judgments as to the significance of the enumerated factors to the proper sentence. This "guidance" of the sentence's decision addresses the problem of capriciousness arising in *Furman*. The jury is also given flexibility in reaching its sentencing decision, however, since it is the jurors who must weigh and balance the relative and cumulative significance of the enumerated factors, both of the crime and of the defendant. This "discretion" addresses the "evolving standards of decency" and "personal characteristics" requirements of *Woodson*.

A separate sentencing proceeding must be held "[u]pon conviction or adjudication of guilt of a defendant of a capital felony."[27] Given this statutory mandate, it is necessary to determine the circumstances under which a sentencing hearing is required to be held, the body before which it is to be held, the evidence and arguments that may be presented, the allocation of the burden of proof on the various issues, and the results of the proceeding when a decision is reached or when there is no decision. A rapidly growing body of case law in the North Carolina Supreme Court examines these issues.

I. THE SENTENCING HEARING: WHEN MUST IT BE HELD?

The statutory sentencing procedure is mandatory, and must be held whenever a defendant is convicted or adjudged guilty of a capital felony.[28] The trial judge has no discretion with regard to the sentencing hearing. In *State v. Jones*[29] the Supreme Court on its own motion reviewed a sentence of life imprisonment entered pursuant to a pretrial consent order after the jury returned a verdict of guilty to the charge of first degree murder. The court stated that G.S. 15A-2000(a)(1) requires that a sentencing proceeding be held whenever a judgment of guilty of a capital felony is entered. The state is not permitted to recommend a sentence of life imprisonment when there is evidence from which a jury could find at least one aggravating circumstance. Regardless of the state's intention not to seek the death penalty, the sentencing proceeding must be held and the decision as to punishment must be placed in the hands of the jury.[30]

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permitted by the United States Supreme Court. Witherspoon v. Illinois, 391 U.S. 510 (1968). The *Witherspoon* problem has arisen in several of the recent North Carolina cases. See text at notes 42-59 *infra*.

25. *See* text at notes 80-81 *infra*.

26. In the instructions to the jury before it begins deliberations on the sentence the judge must instruct the jury that it must consider any of the enumerated aggravating or mitigating circumstances that are supported by the evidence. The jury must be supplied with a written list of issues relating to the aggravating or mitigating circumstances. N.C. GEN. STAT. § 15A-2000(b) (1978).

27. N.C. GEN. STAT. § 15A-2000(a)(1) (1978).

28. The only capital felony in North Carolina is first degree murder. See note 2, *supra*.

29. 299 N.C. 298, 261 S.E.2d 860 (1980).

30. The court in State v. Jones held that despite the error in sentencing considerations of

A similar issue was resolved to the same effect in *State v. Johnson (Johnson I)*.[31] There defendant pleaded guilty to a charge of first degree murder. The court refused to approve the plea as part of a bargain in exchange for the state's recommendation of life imprisonment. After being advised of his rights to jury trial and instructed as to the effect of a plea of guilty, defendant persisted in his desire to plead guilty notwithstanding the possibility of a death sentence.[32] A jury was convened for the sentencing proceeding and recommended the death penalty.[33] In review, the supreme court expressly approved the trial judge's rejection of the negotiated plea of guilty. Writing for the court, Justice Exum noted that the statute does not expressly prohibit such an arrangement, but decided that the legislature did not intend that a defendant found guilty of a capital felony should receive a sentence of life imprisonment without the intervention of a jury.[34] Furthermore, held the court, the statute does not permit the state to recommend a sentence of life imprisonment to the jury at the sentencing hearing if there is evidence from which the jury could find at least one of the statutory aggravating circumstances.[35] The rationale for removing the temptation for a defendant to negotiate a plea of guilty in return for a recommendation for life imprisonment is to avoid placing a constitutionally impermissible burden upon the right of a defendant to trial by jury. The United States Supreme Court held in *United States v. Jackson*[36] that a criminal statute cannot encourage a defendant to waive his right to plead not guilty by foreclosing the possibility of a death sentence that would arise if the defendant proceeded to trial.[37] The defendant must therefore face the same potential range of punishment upon pleading guilty as he would face upon being found guilty at trial. This rule has been interpreted by the North Carolina court as precluding negotiated pleas of guilty in return for which the state

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double jeopardy precluded a retrial, and that because the error was favorable to the defendant, the sentence would not be disturbed. 299 N.C. at 308-09, 261 S.E.2d at 867.

31. 298 N.C. 47, 257 S.E.2d 597 (1979). (A second case involving the same defendant but a different crime is reported at 298 N.C. 355, 259 S.E.2d 752 (1979), and will be referred to as *Johnson II*. There defendant's proffered plea of guilty to the charge of first degree murder in exchange for a life sentence was rejected by the trial court. 298 N.C. at 360-61, S.E.2d at 756-57).

32. Such pleas are expressly authorized by the statute. N.C. GEN. STAT. § 15A-2001 (1978). Before the enactment of this statute, pleas of guilty to charges for which the punishment might be death were not permitted. *See* State v. Watkins, 283 N.C. 17, 194 S.E.2d 800, *cert. denied*, 414 U.S. 1000 (1973). Defendant's plea of guilty was accepted in *Johnson I* only after questioning of the defendant, a hearing, and factual findings of the basis of the plea. 298 N.C. at 52 & n.6, 257 S.E.2d at 603 & n.6.

33. 298 N.C. at 56, 257 S.E.2d at 605.

34. *Id.* at 78, 257 S.E.2d at 619.

35. *Id.*

36. 390 U.S. 570 (1968).

37. Under former G.S. 15-162.1 (repealed 1971), a defendant, with the approval of the court and the district attorney, could plead guilty to a capital charge and receive a sentence of life imprisonment. Law of April 2, 1953, ch. 616, §§ 1-2, 1953 N.C. Sess. Laws, 461. Relying in *Jackson*, the Fourth Circuit Court of Appeals held the North Carolina statute unconstitutional in Alford v. North Carolina, 405 F.2d 340 (1968) *rev'd on other grounds*, 400 U.S. 25 (1970). After *Alford*, the statute was repealed in 1969. Law of March 25, 1969, ch. 117, § 1, 1969 N.C. Sess. Laws, 104. The statute was re-enacted and again repealed in 1971. Law of June 15, 1971, ch. 562, § 1, 1971 N.C. Sess. Laws, 497 (re-enacting statute); Law of July 21, 1971, ch. 1225, § 1, 1971 N.C. Sess. Laws, 1788 (repealing statute).

offers a recommendation of life imprisonment either to the trial judge or to the jury at the sentencing proceeding as long as there is evidence of at least one aggravating circumstance. Where the state has no such evidence, a sentencing hearing must nevertheless be convened, but the state may announce its lack of evidence of aggravating circumstances and the court may enter a sentence of life imprisonment without submitting the case to the jury for a sentence recommendation.[38]

The holding in *Johnson I* that the North Carolina statute prohibits arguments by the state against imposition of the death penalty is based on the omission from the North Carolina statute of language that appears in the Model Penal Code version relating to negotiated pleas of guilty.[39] It is unclear why the omission of this language should prompt the court to reject arguments against imposition of the death penalty by the state, but the reference in *Johnson I* is explicit.[40] The apparent rationale for the holding is that the court is unwilling to interpret the statute so as to take the sentencing decision out of the hands of the jury in any case in which death sentence is a possibility. The jury is to be the arbiter of punishment, and as such should hear arguments both for and against imposition of the death penalty. The district attorney is thus required to advocate use of the death penalty in every case in which it could be imposed, regardless of the beliefs of the individual attorney or the merits of the particular case.[41]

Taken together, *Jones* and *Johnson I* make it clear that the statutory procedure for sentencing is absolutely required in every case in which death is a permissible penalty. The sentencing procedure may be cut short where the state has no evidence of aggravating circumstances, but in any event the sentencing proceeding must be initiated and concluded before a sentence of death or life imprisonment may be imposed.

II. COMPOSITION OF THE JURY

The composition of the body before whom the guilt determination phase and sentencing hearing is to be held has been at issue in a number of recent North Carolina cases. Under principles in *Witherspoon v. Illinois*[42] a criminal defendant has a right to a trial before a jury that represents a fair cross-section of the community with regard to attitudes concerning capital punishment. Veniremen may not be excluded from serving as jurors in a capital case merely

38. *Johnson I*, 298 N.C. at 79-80, 257 S.E.2d at 620.

39. MODEL PENAL CODE § 210.6(1)(c) (Proposed Official Draft 1962). This section permits the court to sentence the defendant for a felony of the first degree (imprisonment for a term up to life imprisonment) if the court is satisfied that "the defendant with the consent of the prosecuting attorney and the approval of the Court, pleaded guilty to murder as a felony of the first degree."

40. 298 N.C. at 79, 257 S.E.2d at 619-20.

41. The problems associated with negotiated pleas to capital charges do not arise when the plea is to a lesser included offense of the capital crime. Thus plea bargaining stategy shifts its focus from the issue of sentence to the issue of the offense to which the plea will be offered. In North Carolina this will usually be second degree murder. *See, e.g.*, State v. Reynolds, 298 N.C. 380, 259 S.E.2d 843 (1979).

42. 391 U.S. 510 (1968).

because they express "general objections to the death penalty or . . . conscientious or religious scruples against its infliction."[43] However, potential jurors may be excluded if they make it "unmistakeably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*."[44] The *Witherspoon* case addressed the Illinois jury's role as the arbiter both of guilt and of punishment in a single proceeding. Where, as in North Carolina under the present statute, two separate proceedings are held, the exclusion of jurors from the guilt determination phase for reasons relevant only to the role of jurors in the sentencing phase casts the *Witherspoon* problem in a new light.

Nevertheless, the North Carolina court has retained the *Witherspoon* test for excusing veniremen from service at the guilt determination phase. In *State v. Cherry*,[45] the trial court excused twenty-one potential jurors who indicated that they could not recommend imposition of the death penalty under any circumstances and would automatically vote against its use without regard to the evidence presented at trial. Rejecting defendant's assignment of error on this issue, the supreme court held that the capital punishment statute requires use of the same jury at both phases of the proceeding "unless the original jury is 'unable to reconvene.' "[46] Thus a defendant is not ordinarily entitled to separate juries at each phase of the trial, and the jurors selected must be qualified to serve at both the guilt determination and sentencing phases. The court bolstered its interpretation of the statute by reference to United States Supreme Court cases in which the same jury heard both phases of the trial.[47] The court also stated that the *Witherspoon* test permits excusal for cause of veniremen whose "attitudes toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*."[48]

In the aftermath of *Cherry* the North Carolina court has maintained the position that a potential juror's personal attitudes toward the death penalty may be sufficient grounds for his excusal from service at the guilt determination phase of a trial, since the same jury must be qualified to hear both the guilt and sentencing phases.[49] A venireman may be excused for cause whenever his statements on voir dire show an unequivocal opposition to imposition of the death penalty, regardless of proof of aggravating circumstances.[50] The

43. 391 U.S. at 522.

44. *Id.* at 522-23, n.21 (emphasis in original).

45. 298 N.C. 86, 257 S.E.2d 551 (1979).

46. 298 N.C. at 106, 257 S.E. at 563-64. *See* N.C. GEN. STAT. § 15A-2000(a)(2) (1978).

47. Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976), *cited at* 298 N.C. 105-06, 257 S.E.2d 563).

48. 298 N.C. at 106, 257 S.E.2d at 563 (emphasis in original).

49. State v. Avery, 299 N.C. 126, 261 S.E.2d 803 (1980); State v. Boykin, 298 N.C. 687, 259 S.E.2d 883 (1979); State v. Taylor, 298 N.C. 405, 259 S.E.2d 502 (1979); State v. Johnson (*Johnson II*), 298 N.C. 355, 259 S.E.2d 752 (1979); State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979); State v. Spaulding, 298 N.C. 149, 257 S.E.2d 391 (1979).

50. State v. Barfield, 298 N.C. 306, 324-25, 259 S.E.2d 510, 526-27 (1979). Where a potential juror's response to questioning is contradictory or equivocal, the trial court apparently can excuse

court has rejected arguments that a *Witherspoon*-qualified jury is unfairly weighted against the defendant on the issue of guilt[51] and that the removal of jurors personally opposed to imposition of the death penalty unconstitutionally deprives a defendant to a jury composed of a fair cross-section of the community.[52] In so doing the North Carolina court professed its compliance with rules set by the United States Supreme Court.[53]

On the latter issue of the defendant's sixth amendment right to a jury composed of a fair cross-section of the community,[54] the North Carolina court has extended the *Witherspoon* rule beyond its previous boundaries. In *State v. Avery* the court's rejection of the contention that the exclusion of opponents of capital punishment from service as jurors at the guilt determination phase violates defendant's sixth amendment rights was based on a brief passage in *Lockett v. Ohio*.[55] There the Supreme Court held that the sixth amendment does not encompass "the right to be tried by jurors who have explicitly indicated an inability to follow the law and instructions of the trial judge."[56] In *Avery*, Justice Exum's strong dissent[57] recited evidence tending to show that persons strongly opposed to capital punishment, as a group, entertain attitudes significantly different in a number of respects from those of persons who favor use of the death penalty.[58] The systematic exclusion of this group, said Justice Exum, tends to remove this segment of community attitudes from juries in death cases.[59] However, even systematic exclusion of identifiable groups is

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him for cause if his statements, "considered contextually," show that regardless of the evidence he would not vote to impose the death penalty. *Id.* at 324, 259 S.E.2d at 526 (citing State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975)). State v. Avery, 299 N.C. 126, 137-38, 261 S.E.2d 803, 810 (1980); a juror whose statements about the death penalty do not evidence such a position may not be excused for cause. State v. Johnson (*Johnson II*), 298 N.C. 355, 259 S.E.2d 752 (1979). The erroneous exclusion of even a single venireman for *Witherspoon* reasons is an error of sufficient magnitude to render a resulting death sentence invalid. Davis v. Georgia, 429 U.S. 122 (1976) (per curiam).

51. State v. Taylor, 298 N.C. 405, 413-14, 259 S.E.2d 502, 507 (1979). State v. Spaulding, 298 N.C. 149, 160-61, 257 S.E.2d 391, 398-99 (1979).

52. State v. Avery, 299 N.C. 126, 133-35, 261 S.E.2d 803, 808-09 (1980).

53. Witherspoon v. Illinois, 391 U.S. 510, 517-18 (1968) (no evidence that exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt); Lockett v. Ohio, 438 U.S. 586, 595-976 (1978) (defendant's sixth amendment right to a jury composed of a fair cross-section of the community does not mandate the inclusion of groups who express an inability to discharge their duty as jurors to follow the law).

54. *See* Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975).

55. 438 U.S. 586 (1978).

56. *Id.* at 596-97.

57. This is one of only two instances of disagreement on the North Carolina court in the many recent cases applying the 1977 capital punishment statute. The other is a dissent in part by Justice Exum in *Johnson II*.

58. 299 N.C. at 143-44, 261 S.E.2d at 813-14.

59. The *Witherspoon* test also tends to underrepresent blacks on juries. Justice Exum cites a 1971 Harris poll indicating that whereas twenty-one percent of white potential jurors are disqualified by the *Witherspoon* rule, thirty-five percent of black veniremen are excluded. 299 N.C. at 145, 261 S.E.2d at 814. *See* White, *The Consitutional Invalidity of Convictions Imposed by Death-Qualified Jurors*, 58 CORNELL L. REV. 1176, 1194 (1973).

Defendant in *Avery* also argued that the *Witherspoon* test produces prosecution-prone juries, and presented data confirming their conclusion. The court rejected the contention. 299 N.C. at 138, 261 S.E.2d at 810. Justice Exum, while not reaching the merits of the argument, commended it to the General Assembly for its consideration. 299 N.C. at 147, 261 S.E.2d at 816.

permissible if a significant state interest is advanced by the aspects of the jury selection process that result in the exclusion.[60] Previous cases indicate that exclusion of jurors whose feelings about the death penalty would prevent them from reaching an objective decision as to the defendant's guilt is permissible, based on the state interest in seating jurors who are willing to follow the law.[61] It does not follow, however, that the state can continue to challenge jurors for cause at the guilt stage of the trial when their attitudes about the death penalty would prevent them from voting for its imposition, but would not affect their ability to judge the defendant's guilt or innocence now that these two functions are procedurally separated. For this reason Justice Exum dissented from the majority holding that defendant in *Avery* was not denied a jury composed of a fair cross-section of the community.[62]

Given the force of this logic and the existence of numerous studies not available to the Supreme Court in 1968 when *Witherspoon* was decided,[63] the continued validity of the rule in states using a bifurcated trial such as North Carolina should be seriously questioned.[64] The obvious defect in continued use of the *Witherspoon* rule could be easily cured by seating otherwise qualified opponents of capital punishment at the guilt determination phase and replacing them with previously selected alternates (or, if need be, with an entire panel) at the sentencing phase. Although the North Carolina statute contemplates use of the guilt phase jury at the sentencing phase,[65] the statute does make allowance for the seating of alternates at the sentencing hearing. "[i]f prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason."[66] The delay between the conclusion of the guilt phase and the initiation of the sentencing phase should be minimal, since a sufficient number of *Witherspoon*-qualified alternates would be selected along with the original panel at the beginning of the trial.

The breakup of the North Carolina court's unanimity in death penalty cases on this issue[67] may signal a willingness to address the problem more analytically in a future case."[68] If, however, the court declines to reconsider

60. Duren v. Missouri, 439 U.S. 357, 367-68 (1979).

61. *See* Lockett v. Ohio, 438 U.S. 567, 596-97 (1978).

62. 299 N.C. at 149, 261 S.E.2d at 817.

63. *See, e.g.*, sources cited by Justice Exum in *Avery*, 299 N.C. at 144, 261 S.E.2d at 814, nn.5-11.

64. Nevertheless, the Supreme Court applied the *Witherspoon* doctrine to the bifurcated capital trial procedure of Texas. *See Adams v. Texas*, 100 S. Ct. 2521, 2526 (1980). The Court observed that "[t]he State does not violate the *Witherspoon* doctrine when it excludes prospective jurors who are unable or unwilling to address the penalty question with this degree of impartiality." *Id.* at 2526.

65. N.C. GEN. STAT. § 15A-2000(a)(2) (1978).

66. *Id.*

67. See note 54, *supra*.

68. The court in *Avery* was not faced with the prospect of affirming a death sentence, because the jury was unable to reach a unanimous sentence recommendation, and the trial judge therefore imposed a life sentence pursuant to G.S. 15A-2000(b). The supreme court, per Brock, J., had the following comment: "From the evidence before the court this defendant committed a planned, deliberate and vicious killing of an innocent human being merely for the purpose of robbery to

its holding in *Avery*, and adopt Justice Exum's position, the legislature should overrule *Avery* by amending the capital punishment statute. Until either event occurs, the clear import of the recent North Carolina cases is that the same jury that sits at the guilt determination phase must also hear the sentencing phase, and each member of the panel must be qualified to serve at both proceedings.

III. Circumstances in Aggravation or Mitigation of Sentence

Once it has been determined that a sentencing hearing must be held and the body before whom it is to be held is selected, the court should proceed to conduct the hearing "as soon as practicable after the guilty verdict is returned."[69] The jury may receive evidence either from the state or the defendant, but unless a new jury is empaneled at the sentencing hearing, evidence presented at the guilt determination phase need not be resubmitted.[70] All evidence received at the guilt determination phase may be considered by the jury in determining its sentence recommendation.[71] Additional evidence presented at the sentencing hearing must be relevant to the sentence. The statute provides that "[a]ny evidence which the court deems to have probative value may be received."[72] While this language might be interpreted as suspending the usual rules of evidence at the sentencing hearing, this is not the case. In *State v. Cherry*[73] the supreme court stated that "[t]he language of this statute does not alter the usual rules of evidence or impair the trial judge's power to rule on the *admissibility* of evidence."[74] In this respect, the North Carolina statute differs from the Model Penal Code version, under which any unprivileged evidence deemed by the court to have probative force may be received regardless of its admissibility.[75] Under the holding in *Cherry*, North Carolina law may be in conflict with *Green v. Georgia*,[76] in which the Supreme Court held in an 8-1 division that exclusion of testimony by the hearsay rule violates due process when the testimony is highly relevant to a critical issue in the sentencing phase of the trial and there are substantial reasons to assume its reliability.[77]

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satisfy his personal desire for a little money. He is fortunate that the jury was unable to agree on the death penalty." 299 N.C. at 139, 261 S.E.2d at 811.

For a discussion of the effects of the death-qualification process, and the response of other courts to issues raised in *Avery*, see Comment, *Proposals to Balance Interests of the Defendant and State in the Selection of Capital Juries: A* Witherspoon *Qualification*, 59 N.C.L. Rev. 767 (1981).

69. N.C. Gen. Stat. § 15A-2000(a)(2) (1978).

70. N.C. Gen. Stat. § 15A-2000(a)(3) (1978).

71. *Id.*

72. *Id.*

73. 298 N.C. 86, 257 S.E.2d 551 (1979).

74. *Id.* at 98, 257 S.E.2d at 559 (emphasis in original).

75. Model Penal Code § 210.6(2) (Proposed Official Draft, 1962).

76. 442 U.S. 95 (1979) (per curiam).

77. *Id.* at 97. Petitioner in *Green* had sought to introduce hearsay testimony to prove that he was not present when the shooting of the murder victim occurred. The statement was made by a codefendant who was tried separately, convicted and sentenced to death for the murder. The reliability of the statement, said the court, could be judged by corroborating evidence, its incompatibility with declarant's penal interest, and its use by the state at declarant's trial. (Under Georgia law, a confession to a crime is not hearsay when offered against declarant. *Id.* at 97 & n.3).

Thus, at least with regard to proof of mitigating circumstances, the usual rules of admissibility may be superseded by the due process clause.

The factors that are to be considered by the jury in reaching its sentence recommendation are the statutory aggravating and mitigating circumstances.[78] Thus, most of the evidence presented at the sentencing hearing will relate to the presence or absence of these circumstances in the particular case. The circumstances that are proved at the hearing are to be weighed and balanced by the jury in deciding whether to recommend that the defendant be punished by death or that he be imprisoned for life.[79]

The statutory list of aggravating and mitigating circumstances is directed toward relevant characteristics of the defendant and the crime he has been found to have committed. The aggravating circumstances are factors that should incline the jury to recommend a sentence of death. These are as follows:

(1) The capital felony was committed by a person lawfully incarcerated.
(2) The defendant had been previously convicted of another capital felony.
(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.
(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft privacy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
(6) The capital felony was committed for pecuniary gain.
(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.
(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties because of the exercise of his official duty.
(9) The capital felony was especially heinous, atrocious, or cruel.
(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

78. N.C. GEN. STAT. § 15A-2000(b) (1978).
79. *Id.*

(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.[80]

The mitigating circumstances are factors that should move the jury to recommend a sentence of life imprisonment. These are as follows:

(1) The defendant has no significant history of prior criminal activity.
(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.
(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.
(4) The defendant was an accomplice or accessory to the capital felony committed by another person and his participation was relatively minor.
(5) The defendant acted under duress or under the domination of another person.
(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.
(7) The age of the defendant at the time of the crime.
(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.
(9) Any other circumstances arising from the evidence which the jury deems to have mitigating value.[81]

In reviewing the evidentiary rulings of the trial courts at sentencing hearings, the North Carolina court has consistently held that evidence is irrelevant to the issue of sentence and thus inadmissible unless it tends to establish the existence or nonexistence of one or more of these statutory circumstances or in some way relates to the character of the defendant or the circumstances of the offense.[82] This is consistent with the holding of the United States Supreme Court in *Lockett v. Ohio*,[83] in which the court overturned an Ohio statute that limited the sentence's ability to consider factors in mitigation of sentence other than those prescribed by the statute. There the Court held that the eighth amendment requires that the sentences not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record or any

80. N.C. GEN. STAT. § 15A-2000(e) (Supp. 1979).

81. N.C. GEN. STAT. § 15A-2000(f) (1978).

82. State v. Johnson (*Johnson II*), 298 N.C. 355, 259 S.E.2d 752 (1979) (gruesome pictures of decomposed body of murder victim not tending to prove a fact in issue should have been excluded; eyewitness account of a gas chamber execution in 1957 irrelevant and properly excluded); State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979) (affidavits alleging rehabilitation of convicted murderer, opinion of affiant that death penalty does not deter crime, opinion of affiant that innocent people are occasionally executed, and opposition of ministers to death penalty on religious grounds properly excluded).

83. 438 U.S. 586 (1978).

circumstance of the offense proffered by the defendant.[84]

The North Carolina statute anticipated *Lockett* in that it specifically permits consideration in mitigation of sentence of "[a]ny other circumstance arising from the evidence which the jury deems to have mitigating value."[85] The evidence offered by defendant regarding this circumstance must relate to the character of the defendant or the circumstances of the offense,[86] and if defendant wishes to have the other mitigating circumstances recited to the jury in the judge's charge and included on a written verdict form, a timely request must be filed.[87] Otherwise, the jury will be instructed only that it may consider any additional circumstances that it deems to have mitigating value.[88]

Among the statutory mitigating circumstances aside from the "other mitigating circumstances" provision, only one has produced discussion by the North Carolina court.[89] This is the circumstance that addresses the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.[90] An "impairment" of this capacity should be considered by the jury in mitigation of sentence. In *State v. Johnson* (*Johnson I*)[91] the court held it erroneous for the trial court not to distinguish this test for mitigation of sentence from the traditional *M'Naghten* test for the defense of insanity when instructing the jury on this issue. Writing for the court, Justice Exum stated:

> The trial court should have explained the difference between defendant's capacity to know right from wrong . . . and the *impairment* of his capacity to appreciate the criminality of his conduct from which his evidence indicated and he contends he suffered. While defendant might have known that his conduct was wrong, he might not have been able to appreciate, *i.e.*, to fully comprehend, or be fully sensible, of its wrongfulness. Further, while his capacity to so appreciate the wrongfulness of his conduct might not have been totaly obliterated, it might have been impaired, *i.e.*, lessened or diminished. The trial court should also have more carefully explained that even if there was no impairment of defendant's capacity to appreciate the criminality of his conduct, the jury should nevertheless find the existence

84. *Id.* at 604. The Court pointed out that this rule does not preclude the exclusion of "evidence not hearing on the defendant's character, prior record, or the circumstances of his offense." *Id.* n.12.

85. N.C. GEN. STAT. § 15A-2000(f)(9) (1978).

86. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979). State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979).

87. State v. Johnson (*Johnson I*), 298 N.C. 47, 257 S.E.2d 597 (1979).

88. *Id.*

89. Although G.S. 15A-2000(f)(1) (no significant history of prior criminal activity) and G.S. 15A-2000(f)(2) (capital felony committed while defendant was under the influence of mental or emotional disturbance) have appeared in recent cases. The court has not had occasion to rule on them. *See* State v. Johnson (*Johnson I*), 298 N.C. 47, 257 S.E.2d 597 (1979); State v. Johnson (*Johnson II*), 298 N.C. 355, 259 S.E.2d 752 (1979) (no prior criminal history); State v. Ferdinando, 298 N.C. 737, 260 S.E.2d 423 (1979); State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979); State v. Johnson (*Johnson II*), 298 N.C. 355, 259 S.E.2d 752 (1979) (crime committed under influence of mental or emotional disturbance).

90. N.C. GEN. STAT. § 15A-2000(f)(6) (1978).

91. 298 N.C. 47, 257 S.E.2d 597 (1979).

> of this mitigating factor if it believed that defendant's capacity to conform his conduct to the law, *i.e.*, his capacity to refrain from illegal conduct, was impaired. Again, this does not mean that defendant must wholly lack all capacity to conform. It means only that such capacity as he might otherwise have had in the absence of his mental defect is lessened or diminished because of the defect.[92]

Obviously the court is attempting to ensure that the jury does not confuse the defense of insanity with the "impaired capacity" circumstance for mitigation of sentence. Thus, at least in cases in which expert testimony tends to show that the defendant knew right from wrong at the time of commission of the crime, the trial court at the sentencing hearing should explain the difference between lack of capacity to know right from wrong and an impairment of a defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.[93]

In addition to an impairment of defendant's capacity caused by a mental illness, there may be cases in which a defendant's capacity is sufficiently impaired by intoxication to entitle him to consideration by the jury of this issue. In *State v. Goodman*,[94] the court stated that intoxication is not to be considered in mitigation of sentence in every case in which the evidence shows defendant to have been drinking at or before the time the crime was committed. However, if the evidence shows that defendant's intoxication was of such a degree that his ability to understand and control his action is affected, then this circumstance may be considered.[95] A defendant whose intoxication does not rise to this level will not be entitled to consideration of this factor in mitigation of sentence.

In contrast to the relatively few cases analyzing and applying the statutory mitigating circumstances, many of the aggravating circumstances have been discussed in recent North Carolina cases.[96] Fifth on the statutory list of aggravating circumstances is that which addresses the commission of other illegal acts at or near the time of the commission of the capital felony. This circumstance will always be found to exist whenever a defendant is convicted of first degree murder under the felony murder rule, because it restates one of the essential elements of the offense, commission of a felony. A defendant convicted of felony murder automatically incurs an aggravating circumstance to be held against him at the sentencing phase. On the other hand, no elements

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92. 298 N.C. at 69-70, 259 S.E.2d at 614 (emphasis in original).

93. State v. Johnson (*Johnson II*), 298 N.C. 355, 375, 259 S.E.2d 752, 764-65 (1979).

94. 298 N.C. 1, 257 S.E.2d 569 (1979).

95. *Id.* at 31-33, 257 S.E.2d at 588-89.

96. To date no North Carolina case has addressed the aggravating circumstances relating to murders committed by incarcerated persons (N.C. GEN. STAT. § 15A-2000(e)(1) (1979 Supp.)); defendants previously convicted of another capital felony (N.C. Gen. Stat. § 15A-2000(e)(2) (1979 Supp.)); murders of public officers in the course of their official duties (N.C. GEN. STAT. § 15A-2000(e)(8) (1979 Supp.)); murders committed by the use of a weapon or device hazardous to the lives of more than one person in the course of which defendant knowingly created a great risk of death to more than one person (N.C. GEN. STAT. § 15A-2000(e)(10) (1979 Supp.)); or murders committed in a course of conduct during which defendant committed crimes of violence against another person or persons (N.C. GEN. STAT. § 15A-2000(e)(11) (1979 Supp.)).

of murder by premeditation and deliberation appear on the list of aggravating circumstances, and a defendant convicted of first degree murder under this theory incurs no "automatic" aggravating circumstance. Recognizing this situation as "incongruous," the North Carolina court in *State v. Cherry*[97] held that if defendant's first degree murder conviction is by reason of the felony murder rule, the aggravating circumstance relating to the commission of other crimes in conjunction with the murder should not be submitted to the jury at the sentencing phase.[98] This is consistent with the rule that a felony murder defendant cannot be punished by separate sentences for both the homicide and the underlying felony because the underlying crime merges into the felony murder conviction. Just as the underlying felony should not provide the basis for additional punishment, it should not be held against the defendant as a factor in determining whether he should be put to death other than as an element of the offense for which he stands convicted. However, where the evidence is such that a defendant can be convicted of first degree murder under a theory of premediation and deliberation and under the felony murder rule, this issue may be submitted to the jury at the sentencing hearing.[99] As a result of this rule, the use of written verdicts at the guilt determination phase stating the theory or theories upon which a first degree murder conviction is based should be encouraged.[100]

The third listed aggravating circumstance, previous conviction of a violent felony,[101] addresses itself to conduct of the defendant at a time prior to the events giving rise to the homicide prosecution. In this respect it differs from all but one of the other circumstances on the statutory list,[102] and in particular should be contrasted with the fifth circumstance, which relates to

97. 298 N.C. 86, 257 S.E.2d 551 (1979).

98. *Id.* at 112-13, 257 S.E.2d at 567-68.

99. State v. Goodman, 298 N.C. 1, 24, 257 S.E.2d 569, 584-85 (1979).

100. The attendant difficulties of asking jurors to choose between alternate legal theories to support a conviction are well demonstrated in State v. Goodman, *supra*, in which the following colloquy occurred upon return of the jury's verdict:

> CLERK: Members of the jury, look upon the defendant. You say Buck Junior Goodman is guilty of murder in the first degree by premeditation and deliberation, or guilty of murder in the first degree by the felony murder rule. Is that your verdict?
>
> FOREMAN: Yes.
>
> CLERK: Do say you all?
>
> THE JURY ANSWERS AFFIRMATIVE.
>
> COURT: For clarity, members of the jury, are you saying that you are returning as your verdict that he is guilty of murder by both of these propositions of law?
>
> FOREMAN: Murder in the first degree.
>
> COURT: By premeditation and deliberation, and guilty of murder in the first degree by the felony murder rule under both principles of law? Is that the verdict of the jury?
>
> FOREMAN: It was murder in the first degree by premeditation, and it was our understanding that you also wanted us to put that other in there also.

298 N.C. at 18, 257 S.E.2d at 581. Obviously, the use of alternate theories and written verdicts requires that the jury be thoroughly instructed as to the permissible verdicts it may return; even when this is done, as the above dialogue shows, misunderstandings can occur.

101. N.C. GEN. STAT. § 15A-2000(e)(3) (Supp. 1979).

102. The second aggravating circumstance, previous conviction of another capital felony, also addresses the conduct of defendant prior to the conduct for which he is being sentenced. N.C. GEN. STAT. § 15A-2000(e)(2) (Supp. 1979).

other crimes committed in the curse of defendant's conduct out of which the capital felony charge arose. The "previous conviction" circumstance was discussed by the North Carolina court in *State v. Goodman*.[103] There the court held that submission of this issue to the jury at the sentencing hearing

> requires that there be evidence that (1) defendant had been convicted of a felony, that (2) the felony for which he was convicted involved the "use or threat of violence to the person," and that (3) the conduct upon which this conviction was based was conduct which occurred prior to the events out of which the capital felony charge arose.[104]

Submission of this issue requires evidence of an actual conviction, not merely of arrest or accusation, and the offense of which defendant was convicted must have involved use or threat of use of violence to a person; crimes against property are not within the scope of this circumstance.[105] In *Goodman*, the court confirmed that the events triggering submission of this issue must have occurred prior to the events out of which the charge of the capital felony for which defendant is being sentenced arose. Otherwise, noted the court, the statute would be unnecessarily duplicative.[106] The court also indicated that convictions based on conduct occurring after the commission of a capital felony may not be considered as aggravating circumstances.[107]

To date there have been no cases in North Carolina in which a defendant has received a death sentence solely on the basis of previous convictions without the presence of other aggravating circumstances relating to the events leading to the capital felony conviction. Whether a defendant could constitutionally be sentenced to die where the state's only evidence of aggravating circumstances is a prior record of violent criminal behavior is questionable. As yet there has been no consideration of this issue by the United States Supreme Court, but clearly there is room for operation of eighth amendment principles in this context, where the decision as to punishment is based on a factor unrelated to the circumstances of the crime.[108]

The fourth and seventh statutory aggravating circumstances are "[t]he capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody"[109] and "[t]he capital felony was committed to disrupt or hinder the lawful exercise of any governmental func-

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103. 298 N.C. 1, 22-24, 257 S.E.2d 569, 583-84 (1979).

104. 298 N.C. at 22, 257 S.E.2d at 583.

105. *Id.* at 23, 257 S.E.2d at 584.

106. *Id.* Thus in *Goodman*, the jury properly considered a 1967 armed robbery conviction as an aggravating circumstance, but the trial court refrained from instructing the jury to consider convictions for armed robbery and kidnapping arising from the same events as the murder conviction. *Id.* at 23-24, 257 S.E.2d at 584.

107. *Id.* at 23, 257 S.E.2d at 584.

108. For instance, if two codefendants are convicted of a first degree murder in which no aggravating circumstances are present and one defendant has a ten year-old armed robbery conviction on his record, he is subject to the death penalty while his codefendant is not. Would a sentence of death under these circumstances be "grossly out of proportion to the severity of the crime" and therefore unconstitutionally "excessive"? *See* Gregg v. Georgia, 428 U.S. 153, 173 (1976).

109. N.C. GEN. STAT. § 15A-2000(e)(4) (Supp. 1979).

tion or the enforcement of laws."[110] The degree of overlap between these two circumstances is apparent: whenever a murder is committed in the course of avoiding arrest or escape from custody or to prevent the reporting of an offense to the authorities, the enforcement of laws is disrupted or hindered. This is another situation in which the nature of the offense can create an automatic cumulation of aggravating circumstances. In *State v. Goodman*,[111] the evidence showed that the victim of an assault by defendant earlier in the day was abducted and killed at least in part to prevent him from reporting the assault.[112] The trial court at the sentencing hearing submitted both the "avoid arrest" and "disrupt or hinder law enforcement" issues to the jury, reciting substantially the same evidence for each issue.[113] The North Carolina Supreme Court held it improper to submit the two issues on the same evidence on the ground that this creates "an unnecessary duplication of the circumstances enumerated in the statute, resulting in an automatic cumulation of aggravating circumstances against the defendant."[114] The court, however, declined to announce a general rule as to when either or both of these issues should be submitted, stating only that "[w]e can envision the difficulty this court is going to encounter in construing and applying subsections (e)(4) and (e)(7) . . . . [s]uffice it to say for the purposes of the case at hand, the trial court erred in submitting issues of aggravating circumstances pursuant to *both* subsections."[115]

On the facts of *Goodman*, the court held that only the "avoid arrest" circumstance was properly submitted. Noting that every murder in some sense aids the criminal in avoiding detection in that the victim is silenced, the court held that the application of this circumstance is to be limited to cases in which at least one of the purposes motivating the killing is a desire on the part of the defendant to avoid apprehension.[116] This circumstance is not invoked merely by the fact of death, and thus cannot be used as a "catch-all" provision when there is no evidence of other aggravating circumstances.

Given the inherent overlap of the "avoid arrest" and "disrupt or hinder the enforcement of laws" circumstances, the court should interpret the statute so as to limit their applicability to separate factual patterns not covered by one or more of the other circumstances. When there is doubt as to which of these two circumstances should be submitted, perhaps the more specific of the two, "avoid arrest," should be favored over the less specific, "disrupt or hinder the enforcement of laws." The "avoid arrest" circumstance could be employed when the motivation for a murder is to prevent detection or disclosure of a crime previously committed by the defendant or when the homicide is actually committed while the defendant is being pursued by or escaping from the cus-

110. N.C. GEN. STAT. § 15A-2000(e)(7) (Supp. 1979).
111. 298 N.C. 1, 257 S.E.2d 569 (1979).
112. *Id.* at 27-28, 257 S.E.2d 586.
113. *Id.* at 28, 257 S.E.2d at 587.
114. *Id.* at 29, 257 S.E.2d at 587.
115. *Id.* at 28, 257 S.E.2d at 587 (emphasis in original).
116. *Id.* at 26-27, 257 S.E.2d at 585-86.

tody of the authorities. The operative fact should be that defendant has already committed a crime or is suspected of committing a crime for which he could be arrested. The "disrupt or hinder the enforcement of laws" circumstance would arise when a homicide is committed where defendant has no preexisting ground to fear his own arrest. Thus a homicide committed to prevent the arrest of someone other than the defendant would fall into this category.[117]

The aggravating circumstance relating to murders committed for pecuniary gain[118] has appeared in two cases. In *State v. Barfield*[119] the supreme court, without discussion, found no error in submission of this issue to the jury when the evidence tended to show that defendant poisoned her victim after the victim discovered that defendant had forged checks drawn on his account, and threatened to "turn her in."[120] In *State v. Cherry*,[121] this issue was submitted to the jury in an armed robbery prosecution, but was not involved in the supreme court's disposition of the case.[122] In both cases the murders were committed after defendant had wrongfully obtained money from the victim. In *Barfield* the murder was motivated by a desire to prevent disclosure of the crime to the authorities.[123] In *Cherry* the murder appears to have been committed in the course of a struggle over defendant's gun.[124] In neither case did the killing occur *in order that* defendant might incur a pecuniary gain; rather, the murders seem to have been committed to prevent apprehension of defend-

117. *But see* State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979). In *Barfield* the evidence tended to show that defendant poisoned her victim after he discovered that defendant had payed checks on his account and threatened to "turn her in" to the authorities. *Id.* at 311-12, 259 S.E.2d at 519-20. The trial court did not submit the "avoid arrest" aggravating circumstance at the sentencing hearing, but did submit the "disrupt or hinder the enforcement of laws" circumstance, which was answered by the jury in the affirmative. *Id.* at 317, 259 S.E.2d at 523. The supreme court, without discussion, found no error relating to the submission of the aggravating circumstances. *Id.* at 354, 259 S.E.2d at 544.

Given the rationale in *Goodman* for not submitting more than one aggravating circumstance on the same evidence, perhaps the murder of a police officer in the course of an arrest could give rise to only one aggravating circumstance, even though three are applicable: "avoid arrest;" "disrupt or hinder the enforcement of laws;" and G.S. 15A-2000(e)(8) (capital felony committed against law-enforcement officer in the course of his duties). However, it could be argued that police officers fall into a special class under the statute, and the killing of a police officer, regardless of the nature of the duty he is performing, is an aggravating circumstance not related to the defendant's desire to avoid arrest. Thus, even though both circumstances may arise on the same evidence, two public policies are at work, and both circumstances should be submitted, whereas in *Goodman* only one public policy was violated by the homicide—the policy against homicides committed to avoid detection or disclosure of others crimes.

The court in *Goodman* recognized the problems necessarily arising from the inevitability of overlap and the holding that the two circumstances in that case should not have been submitted because they arose from the same evidence. The court stated that it may be permissible to submit more than one aggravating circumstance on the same evidence, but this "will normally occur where the defendant's motive is being examined rather than where the state relies upon a specific factual element of aggravation." 298 N.C. at 30, 257 S.E.2d at 588. In doubtful cases, said the court, the trial courts should err in favor of the defendant, whose life is at stake, by refusing to instruct the jury on multiple aggravating circumstances arising from the same evidence. *Id.*

118. N.C. GEN. STAT. § 15A-2000(e)(6) (Supp. 1979).

119. 298 N.C. 306, 259 S.E.2d 510 (1979).

120. See note 117 *supra*.

121. 298 N.C. 86, 257 S.E.2d 551 (1979).

122. *See* text at notes 97-100 *supra*.

123. 298 N.C. at 311-12, 259 S.E.2d at 519-20.

124. 298 N.C. at 88-89, 257 S.E.2d at 554.

ant for a previously committed pecuniary crime that had gone awry. Were they committed for pecuniary gain, or for some other reason associated with but not identical to defendant's intention to wrongfully obtain money? This is the basic difficulty with the "pecuniary gain" aggravating circumstance: it requires an assessment of defendant's purpose in committing a murder. It is not unique in this respect; at least five of the eleven aggravating circumstances are addressed in some way to the reason for which defendant committed the crime.[125] However, it may be that this is the most difficult of the five to determine from factual testimony. The courts may overcome this difficulty by refusing to inquire into the subjective motivation of each defendant in commiting a murder and submitting this issue more or less mechanically whenever the killing is part of a course of conduct involving pecuniary gain by the defendant. This would, however, produce in most cases an overlap problem among several of the aggravating circumstances. For instance, the perpetrator of a robbery-murder may have killed his victim primarily to reduce the possibility of apprehension. This gives use to the "avoid arrest" aggravating circumstance of G.S. 15A-2000(e)(4). In order to submit this circumstance, there must be evidence tending to show that fear of apprehension at least in part motivated the killing.[126] Does the fact that defendant robbed his victim automatically give rise to the "pecuniary gain" aggravating circumstance? If so, a cumulation of aggravating circumstances is automatic, regardless of the proof that the real motivation for the killing was fear of apprehension. While there is no way of knowing whether the legislature intended that there be proof of motivation before the "pecuniary gain" circumstance should be submitted, the provision should be so interpreted to avoid the needless cumulation of aggravating circumstances.

Last among the statutory aggravating circumstances considered by the North Carolina court in recent months is G.S. 15A-2000(e)(9): "The capital felony was especially heinous, atrocious, or cruel."[127] Perhaps the most difficult of all to apply, this circumstance addresses neither the factual pattern in which a murder is committed nor the purposes or circumstances of the perpetrator or victim. Rather, it provides a means by which society expresses moral outrage for certain killings beyond that aroused by any murder, and establishes that some murderers may be put to death solely on the basis of the level of revulsion that their acts incite in the jury.

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125. These are:

G.S. 15A-2000(e)(4)—felony committed for the purpose of avoiding or preventing arrest or escaping from custody;

(5) felony committed in the course of some other crime (requires an assessment of defendant's intent to commit the undulging crime)

(6) felony committed for pecuniary gain

(7) felony committed to disrupt or hinder enforcement of law;

(8) felony committed against a public officer while engaged in the exercise of his official duty or *because* of the exercise of his official duty.

See N.C. GEN. STAT. § 15A-2000(e) (Supp. 1979).

126. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979), discussed in text at notes 111-16 *supra*.

127. N.C. GEN. STAT. § 15A-2000(e)(9) (Supp. 1979).

Of the four operative words of this circumstance, the first is of critical importance: the capital felony must be *especially* heinous, atrocious, or cruel. Therefore this issue does not arise in every case.[128] As interpreted by the court in *State v. Goodman*,[129] this issue arises from "evidence that the brutality involved in the murder in question . . . exceed[s] that normally present in any killing."[130] Adopting a construction of similar language in the Florida statute[131] by the courts of that state, the North Carolina court held that "this provision is directed at 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim,' "[132] thus limiting application of this circumstance to "acts done to the victim during the commission of the capital felony itself."[133] The court held this issue properly submitted in *Goodman*, in which the victim was beaten, shot, locked in the trunk of an automobile while still alive, later killed by gunshots to the head, and left on a railroad track in hope that the body would be mutilated beyond recognition.[134] The court also held this issue to have been properly submitted in *State v. Johnson* (*Johnson I*),[135] in which the sixty-five year old victim was strangled into unconsciousness, sexually molested and then stabbed to death,[136] and in *State v. Johnson* (*Johnson II*),[137] in which the victim, a young boy, was strangled and sexually assaulted.[138]

The use of this aggravating circumstance in such clear-cut cases of physical abuse has been upheld by the United States Supreme Court against the contention that this circumstance is unconstitutionally vague.[139] However, use of a somewhat similar aggravating circumstance in the Georgia statute[140] where the victim was not physically abused has led the Supreme Court to vacate the ensuing death sentence in *Godfrey v. Georgia*.[141] There the Court decided that the eighth amendment precluded imposition of the death penalty against a defendant who killed his wife and mother-in-law with shotgun blasts to the head when the only aggravating circumstance found by the jury was "that the offense of murder was outrageously or wantonly vile, horrible and

128. If the crime is to be submitted to the jury, defendant may request an instruction that not every murder is necessarily especially heinous, atrocious or cruel. Denial of this request is error. State v. Johnson (*Johnson I*), 298 N.C. 47, 81-82, 257 S.E.2d 597, 621 (1979).

129. 298 N.C. 1, 257 S.E.2d 569 (1979).

130. *Id.* at 25, 257 S.E.2d at 585.

131. FLA. STAT. ANN. § 921.141(5)(h) (Supp. 1979).

132. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973) *cert. denied*, 416 U.S. 943 (1974), *quoted at* 298 N.C. 25, 257 S.E.2d 585.

133. 298 N.C. at 25, 257 S.E.2d at 585.

134. *Id.* at 4-7, 257 S.E.2d at 574-75.

135. 298 N.C. 47, 257 S.E.2d 597 (1979).

136. *Id.* at 82, 257 S.E.2d at 621-22.

137. 298 N.C. 355, 259 S.E.2d 752 (1979).

138. *Id.* at 358-59, 371, 259 S.E.2d at 755, 762.

139. Proffitt v. Florida, 428 U.S. 242, 255-56 (1976). The victim in *Proffitt* was killed by stabbing. *Id.* at 245.

140. GA. CODE ANN. § 27-2534.1(b)(7) (1978) ("The offense . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.")

141. 446 U.S. 420 (1980).

inhuman."[142] When this aggravating circumstance is applied in cases other than those in which physical abuse of the victim precedes the killing, wrote Justice Stewart for the plurality of four,[143] the cases in which the sentence of death is imposed cannot be distinguished from those in which it is not:[144]

> A person of ordinary sensibility could easily characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman." Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of § (b)(7)'s terms. In fact, the jury's interpretation of § (b)(7) can only be the subject of sheer speculation.[145]

Without evidence of physical abuse to sustain the jury's finding of this circumstance, the decision to impose the death penalty on the basis of the jury's impression as to the egregiousness of the defendant's acts in perpetrating the murder becomes totally discretionary. This violates the mandate of *Gregg* and recreates the possibility of arbitrary and capricious use of the death penalty proscribed in *Furman*.[146]

Does submission of the "heinous, atrocious, or cruel" aggravating circumstance under the North Carolina statute to the sentencing jury in cases in which the murder victim was neither tortured nor sexually molested violate the *Godfrey* holding? Thus far the reported North Carolina cases disclose that this aggravating circumstance was submitted to the sentencing jury in two cases of murder by arsenic poisoning, and in both cases the jury decided this issue in the affirmative.[147] In the earlier of the two cases, *State v. Barfield*,[148] the court affirmed the sentence of death imposed pursuant to the jury's finding that the murder was "especially heinous, atrocious, or cruel."[149] While death by arsenic poisoning is slow and painful[150] it entails no specific act of physical abuse of the victim by the poisoner other than the murderous act itself. Thus it would seem that unless every murder by arsenic poison is *per se* especially heinous, atrocious, or cruel—and every poisoner subject to a sentence of death precisely because the murder was accomplished by poisoning[151]—then a par-

142. *Id.* at 426. Note the disparity between the circumstance found to exist by the jury and the complete text of the statute at note 130 *supra*.

143. The plurality opinion was joined by Justices Blackmun, Powell and Stevens. *Id.* at 421. Marshall and Brennan, J.J., concurred in the judgment while adhering to their belief that capital punishment is *per se* cruel and unusual. *Id.* at 433. Dissenting were the Chief Justice in a separate opinion and Mr. Justice White, joined by Mr. Justice Rehnquist. *Id.* at 442, 444.

144. *Id.* at 433.

145. *Id.* at 428-29.

146. *See id.* at 427-28.

147. State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979); State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979).

148. See note 117 *supra*.

149. *See* 298 N.C. at 317, 354, 259 S.E.2d at 523, 544. In addition to finding the murder "especially heinous, atrocious, or cruel," the jury also found it to have been committed for pecuniary gain and to hinder law enforcement. *Id.* at 317, 259 S.E.2d at 523.

150. *See* 298 N.C. at 309-15, 259 S.E.2d at 518-22.

151. This would be tantamount to imposing a presumptive death sentence in poisoning cases

ticular poisoning for which the perpetrator receives a death sentence is indistinguishable from every other poisoning. The infliction of death for the poison murder would be unconstitutionally arbitrary, and use of this aggravating circumstance to impose the death penalty in a poisoning case unconstitutionally vague under *Godfrey*. Unless the North Carolina court is willing to rehear *Barfield* and reconsider it in light of *Godfrey* on this issue, the sentence of death in that case will have been unconstitutionally imposed.[152]

Apart from discussing the applicability of the particular aggravating and mitigating circumstances in various fact situations, the North Carolina court also has addressed the more general question of the burden of proof of facts giving rise to these circumstances. The sentencing jury's task of basing its sentencing recommendation on the existence or nonexistence of aggravating and mitigating circumstances[153] raises the issue of the quantum of proof required to establish the existence of the circumstances. The capital punishment statute specifies that the burden of proof of aggravating circumstances is the same "reasonable doubt" standard applied to proof of elements of a substantive offense.[154] The statute does not, however, address the burden of proof of facts that may be considered in mitigation of sentence. In *State v. Johnson* (*Johnson I*)[155] the supreme court held that since it is the defendant who will be urging the jury to consider circumstances in mitigation of sentence, logically the burden of persuading the jury that these circumstances exist should be placed on him.[156] The standard of proof to be applied to the facts is a preponderance of the evidence.[157]

An allocation of the burden of proof of an issue in a criminal trial to the defendant may unduly infringe his due process rights under the doctrine of *Mullaney v. Wilbur*,[158] which requires the state to prove all the elements of a crime beyond a reasonable doubt. The North Carolina court in *Johnson I* found no violation of the *Mullaney* doctrine in placing the burden of proof of mitigating circumstances on the defendant, because these factors are not ele-

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that could be overcome only on proof of mitigating circumstances. Surely such a system could not survive scrutiny under Woodson v. North Carolina, note 15 *supra*.

152. No specific assignments of error relating to the submission of aggravating circumstances were brought forward in *Barfield*; instead defendant chose to attack the entire capital punishment statute as unconstitutional, arguing *inter alia* that all the aggravating circumstances listed in the statute are impermissibly vague. 298 N.C. at 343-54, 259 S.E.2d at 537-44. Addressing this point the court said that "[t]he issues which are posed to a jury at the sentencing phase of North Carolina's bifurcated proceeding have a common sense core of meaning. Jurors who are sitting in a criminal trial ought to be capable of understanding them and applying them when they are given appropriate intructions by the trial court judge." *Id.* at 353, 259 S.E.2d at 543. In holding that the "heinous, atrocious or cruel" circumstance was properly submitted, the court appears to be including murders by poisoning within the "core of meaning" of those words. *Id.* at 354, 259 S.E.2d at 544. This is not consistent with the interpretation given this circumstance in *Goodman* and *Johnson I*, and probably cannot survive scrutiny under *Godfrey*.

153. N.C. GEN. STAT. § 15A-2000(b) (1978).

154. N.C. GEN. STAT. § 15A-2000(c)(1) (1978).

155. 298 N.C. 47, 257 S.E.2d 597 (1979).

156. *Id.* at 75-76, 257 S.E.2d at 617-18.

157. *Id.*

158. 421 U.S. 684 (1975).

ments of the crime with which defendant is charged.[159] The *Johnson I* holding was confirmed in *State v. Barfield*[160] in which the court rejected defendant's contention that due process requires the state to prove that no mitigating circumstances exist.[161]

Viewed together, the recent North Carolina cases establish that the sentencing jury's decision should be based solely on the legislatively-prescribed aggravating and mitigating circumstances. Although many questions surrounding the use of this method of sentencing remain unanswered, the North Carolina court has refused to sanction the indiscriminate submission of aggravating circumstances to the jury in hopes of obtaining a recommendation that the death penalty be imposed in as many cases as possible. On the other hand, the court has been willing to allow the defendant some latitude in presenting facts in mitigation of sentence so long as they relate to the defendant or the circumstances of the crime. This conception of the purposes of the capital punishment statute should ensure that the penalty of death is imposed, if at all, without either the arbitrariness of the pre-*Furman* era or the harsh certainty of the period between *Waddell* and *Woodson*.

IV. THE DECISION: THE SENTENCE RECOMMENDATION

After hearing the evidence, the arguments of counsel,[162] and the instructions of the court,[163] the jury is to retire to deliberate and render a sentence recommendation.[164] The recommendation of the jury will control whether the

159. 298 N.C. at 75-76, 257 S.E.2d at 617-18. In *Johnson I* the court applied its reasoning in State v. Williams, 295 N.C. 655, 249 S.E.2d 209 (1978), a kidnapping case, to the capital punishment statute. The North Carolina kidnapping statute, G.S. 14-39, essentially creates a single offense, kidnapping, but requires imposition of a lesser sentence when the kidnapping is "mitigated". Mitigated kidnapping exists when all other elements of the crime of kidnapping are proved, and it is also proved that the person kidnapped was released by the defendant in a safe place and had not been sexually assaulted or seriously injured. N.C. GEN. STAT. § 14-39 (Supp. 1979). Proof of the mitigating factors is irrelevant to the issue of guilt of the crime of kidnapping and is relevant only to sentencing. Unless these factors are proved, the defendant will be sentenced for the crime of kidnapping. Proof of these facts in mitigation of sentence is therefore on defendant. The standard of proof is preponderance of the evidence. 295 N.C. at 669-70, 249 S.E.2d at 719. In *Williams* the court held it not a violation of due process under *Mullaney* to place the burden of proving facts in mitigation of sentence on defendant. *Id.* at 674-79, 249 S.E.2d at 722-25. The court reasoned that the mitigating circumstances are analogous to an affirmative defense (not a negation of an element of the offense), for which the burden of proof may be constitutionally placed upon the defendant under Patterson v. New York, 432 U.S. 197 (1977). *Id.*

160. 298 N.C. 306, 259 S.E.2d 510 (1979).

161. *Id.* at 353-54, 259 S.E.2d at 543-44. The defendant's burden of proof can be lightened to some extent if a peremptory instruction is requested. Where all the evidence, if believed, tends to show the existence of a mitigating circumstance, defendant is entitled to a peremptory instruction requiring the jury to find the existence of that circumstance. The jury may fail to find the existence of the circumstance if it rejects the evidence because of a lack of faith in its credibility. State v. Johnson (*Johnson I*), 298 N.C. at 75-76, 257 S.E.2d at 617-18.

162. G.S. 15A-2000(a)(4) permits counsel for the state and the defendant to present arguments for or against the sentence of death. The defendant's counsel is given the last argument at the sentencing hearing. N.C. GEN. STAT. § 15A-2000(a)(4) (1978).

163. The judge is required to instruct the jury that it must consider any aggravating or mitigating circumstances supported by the evidence. N.C. GEN. STAT. § 15A-2000(b) (1978).

164. *Id.*

defendant will be imprisoned for life or punished by death.[165] In reaching this momentous decision the jury is guided by limitations on the matter that may be considered, a requirement that the factors that are considered be weighed and balanced, procedural conventions to promote uniformity in rendering of verdicts, and a requirement of unanimity. In addition, the statute provides an alternative method of sentencing to be used in cases in which the jury is unable to perform its function of deciding.

Before the jury decides, it must deliberate. Its deliberations are to be limited to determining the following:

> (1) Whether any sufficient aggravating circumstance or circumstances . . . exist;
>
> (2) Whether any sufficient mitigating circumstance or circumstances . . . , which outweigh the aggravating circumstance or circumstances found, exist; and,
>
> (3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.[166]

The limitations imposed by this language on the matter that may be considered by the jury in reaching its decision are apparent: the jury is to consider only the evidence tending to establish the existence or nonexistence of the statutory aggravating and mitigating circumstances. Thus the jury should not be exposed to matters that may influence its decision as to sentence other than facts tending to prove or disprove relevant facts.[167] One factor that should not be suggested to the jury, either during the presentation of evidence or the arguments of counsel, is the possibility of parole for a prisoner serving a life sentence.[168] Despite this prohibition, however, a juror will not be allowed to impeach his verdict by giving testimony that the death penalty was imposed to foreclose the possibility of parole.[169] In addition to the possibility of parole,

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165. The sentence recommendation of the jury is binding on the trial court. N.C. GEN. STAT. § 15A-2002 (1978); State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979); State v. Atkinson, 298 N.C. 673, 259 S.E.2d 858 (1979); State v. Johnson (*Johnson II*), 298 N.C. 355, 259 S.E.2d 752 (1979).

166. N.C. GEN. STAT. § 15A-2000(b) (1978).

167. As to the relevancy requirement for facts offered in mitigation of sentence, see text at notes 72-77 *supra*.

168. In State v. Jones, 296 N.C. 495, 251 S.E.2d 425 (1979) the district attorney in final argument at the sentencing hearing actually read the parole statute to the jury and asked

> Can you take a chance, ladies and gentlemen of the jury? I don't know what the parole board would do in the future. I don't know of [sic] they would ever parole him or not, but can you take that sort of chance that twenty years from now he could be walking around on the streets after having done the things that he's done?

Id. at 502, 251 S.E.2d at 429. Although the supreme court reversed and remanded for a new trial on other grounds, the court held the reference to the parole statute clearly erroneous, stating that "[n]either the State nor the defendant should be allowed to speculate upon the outcome of possible appeals, paroles, executive commutations or pardons." *Id.*

An argument to the jury that does not use the word "parole" or state that a defendant receiving a life sentence could be out of prison in twenty years is unobjectionable, however, even if the district attorney tells the jury that "common sense will tell you, that the only way you can ever be sure this man will never walk out again is to give him the death penalty." State v. Johnson (*Johnson II*), 298 N.C. 355, 366-67, 259 S.E.2d 752, 760 (1979).

169. State v. Cherry, 298 N.C. 86, 99-102, 251 S.E.2d 551, 560-61 (1979).

the jury should not be told of the existence of judicial review of the sentence.[170] Any suggestion to the members of the jury that they can depend upon review of their decision to correct mistakes or to relieve them of their responsibility as decision-makers is reversible error.[171] The jury is to confine its deliberations to the statutory aggravating and mitigating circumstances.

In considering the aggravating and mitigating circumstances the jury must not only determine whether any such circumstances exist,[172] but the jury must also decide whether the aggravating circumstances found to exist "are sufficiently substantial to call for the imposition of the death penalty."[173] This requirement that the jury assess the gravity of the aggravating circumstances permits the jury to spare the life of a defendant even when there is no evidence of facts in mitigation of sentence or where these factors are outweighed by the aggravating circumstances.[174]

In addition to assessing the weight of the aggravating circumstances, the jury must balance them against the mitigating circumstances. The language of the statute directs the jury to decide whether the mitigating circumstances outweigh the aggravating circumstances.[175] The thrust of this provision appears to be that the jury should recommend a sentence of death whenever the aggravating circumstances are sufficiently substantial to call for imposition of the death penalty and the mitgating circumstances are not more substantial than the aggravating circumstances. The statute thus appears to "prefer" use of the death penalty when the aggravating and mitigating circumstances are equally substantial. The North Carolina court, however, has chosen not to follow this clear statutory language. In *State v. Goodman*,[176] after reversing the trial court on other grounds, the court without discussion suggested that on remand the jury be asked the following question: "Do you find beyond a reasonable doubt that the aggravating circumstances found by you outweigh the mitigating circumstances found by you?"[177] Such language, said the court, "would be more appropriate" than an issue framed in terms of the wording of the stat-

170. State v. Jones, 296 N.C. 495, 251 S.E.2d 425 (1979).

171. The rule applies both to the guilt phase and the sentencing phase of the bifurcated trial. *Id.* at 497-502, 254 S.E.2d at 427-29. Such suggestions are deemed to be so prejudicial to defendant that counsel's failure to object to an improper argument does not waive defendant's right to review of the issue. *Id.* at 498, 251 S.E.2d at 427.

172. The standard of proof for establishing the existence of an aggravating circumstance is "beyond a reasonable doubt;" for mitigating circumstances the standard is a preponderance of the evidence. *See* text at notes 154-57 *supra*.

173. N.C. GEN. STAT. § 15A-2000(c)(2).

174. In State v. Atkinson, 298 N.C. 673, 259 S.E.2d 858 (1979) the jury found that the defendant committed a first degree murder while attempting to commit a robbery and that the murder was especially heinous, atrocious or cruel. The jury also found that defendant had no significant history of prior criminal conduct. Although the jury felt that the mitigating circumstance was outweighed by the aggravating circumstances, it found that the aggravating circumstances were not sufficiently substantial to call for the imposition of the death penalty. The court sentenced the defendant to life imprisonment on the basis of the jury's recommendations. *Id.* at 679, 259 S.E.2d at 862.

175. N.C. GEN. STAT. § 15A-2000(c)(3) (1978).

176. 298 N.C. 1, 257 S.E.2d 569 (1979).

177. *Id.* at 35, 257 S.E.2d at 591.

ute.[178] Not only has the court reversed the "preference" of the statute in favor of a life sentence when the aggravating and mitigating factors are equally substantial, it has introduced a requirement—nowhere to be found in the text of the statute—that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. This rewriting of the statute by the supreme court may be intended as a saving construction, its purpose being to fend off an attack on the statute as prescribing an unconstitutional mandatory death penalty by employing a presumption in favor of its use. In *State v. Barfield*[179] the court held that the statute does not create an unconstitutional mandatory death penalty.[180] In so doing, the court stated that the jury must determine whether the aggravating circumstance "outweighs any mitigating circumstance in a sufficiently substantial manner so as to call for the death penalty."[181] Does this language introduce the new requirement that the jury find the aggravating circumstances to "substantially" outweigh the mitigating circumstances before recommending a sentence of death? If so, does this requirement arise from the capital punishment statute? Is it a gloss on the statute imposed by the eighth amendment? The court has twice altered the balancing test to be employed by the jury in deciding whether to impose the death penalty on the basis of the relative weight of the aggravating and mitigating circumstances. On neither occasion has the court seen fit to disclose its reasons for deviating from the language set down by the legislature. Whatever the reasons for this process may be, the court is overdue in making them public. If the court feels that the statute as written by the General Assembly is unconstitutionally drawn, it should say so. A case-by-case process of correcting deficiencies in the statute to protect it from being overturned by the United States Supreme Court does neither the statute nor the North Carolina court any good.

Despite the uncertainty surrounding the correct test for balancing aggravating and mitigating circumstance against each other, it is clear that the jury should not "balance" the circumstances by imposing the death sentence whenever the number of aggravating circumstances exceeds the number of mitigating circumstances, or by recommending life imprisonment when the situation is reversed. Nevertheless, defendant is not entitled to an instruction that the jury might recommend a sentence of life imprisonment even though it finds that the aggravating circumstances outweigh the mitigating circumstances. This instruction, said the court in *State v. Goodman* would return the sentencing procedure to the unbridled discretion method in use prior to *Furman*.[182]

The process of weighing and balancing the aggravating and mitigating

178. *Id.*

179. 298 N.C. 306, 259 S.E.2d 510 (1979).

180. See text at note 9 *supra*.

181. 298 N.C. at 351, 259 S.E.2d at 543.

182. 298 N.C. at 34-35, 257 S.E.2d at 590. *But see* State v. Taylor, 298 N.C. 405, 259 S.E.2d 502 (1979). In *Taylor* the jury found the aggravating circumstance sufficiently substantial to call for imposition of the death penalty and found the mitigating circumstance insufficient to outweigh the aggravating circumstance, but then recommended a sentence of life imprisonment. Sentence was imposed pursuant to the jury recommendation. *Id.* at 407-08, 259 S.E.2d at 504.

circumstances should guide the jury toward a sentence recommendation. If the jury finds that the aggravating circumstance has been proved, the recommendation should be a sentence of imprisonment for life.[183] A finding that although an aggravating circumstance has been proved, it is not sufficiently substantial to call for the imposition of the death penalty should also lead the jury to recommend a sentence of life imprisonment.[184] Similarly, a finding that the balancing of aggravating and mitigating circumstances weigh in the defendant's favor should guide the jury toward a recommendation of life imprisonment. Only if the aggravating circumstances are sufficiently substantial to call for imposition of the death penalty and the balancing of aggravating and mitigating circumstances weighs against the defendant should the jury recommend a sentence of death.[185] In all events—whether the recommendation of the jury is for a sentence of death or of life imprisonment—the jury's recommendation must have the unanimous support of all twelve jurors.[186] The unanimity requirement must be satisfied by a poll of the jury after a sentence recommendation is returned.[187]

These safeguards over the decision making process both enhance and deter a final, binding decision by the jury. The process is enhanced by the relatively clear, straightforward presentation to the jury of its task. The jurors are not left to agonize over how they should reach their decision. A conclusion to the decision-making process is deterred, however, by the inherent ambiguity of the jury's duty to characterize certain facts as "substantial," by the balancing of circumstances, and by the requirement that a unanimous recommendation must be returned "within a reasonable time."[188] Given these factors, there must be an alternative means of concluding the sentencing process when the jury cannot or will not come to an agreement. The statute provides the alternative: "If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation."[189] Should the jury be told of this alternative method of concluding the decision making process at sentencing hearing? In *State v. Johnson* (*Johnson II*)[190] the court held that an instruction to this effect is not a proper matter for

183. *See, e.g.*, State v. Heavener, 298 N.C. 541, 259 S.E.2d 227 (1979).

184. *See, e.g.*, State v. Atkinson, 298 N.C. 673, 259 S.E.2d 858 (1979).

185. *See* N.C. GEN. STAT. § 15A-2000(c) (1978). Whenever a sentence of death is recommended the jury foreman must sign a writing attesting that the process of analysis stated in the text has been followed. *Id.*

186. N.C. GEN. STAT. § 15A-2000(b) (1978).

187. *Id.*

188. *Id.*

189. *Id.* In State v. Carter, 296 N.C. 344, 250 S.E.2d 263, *cert. denied*, 441 U.S. 964 (1979), the jury's deliberations over the sentence recommendation continued for fourteen hours before the jury announced that it was unable to reach a unanimous decision. The trial court then discharged the jury and entered a sentence of life imprisonment. *Id.* at 345, 250 S.E.2d at 264. In State v. Johnson (*Johnson II*), 298 N.C. 355, 259 S.E.2d 752 (1979) the court held that the determination of when a "reasonable time" has elapsed is at the discretion of the trial judge. *Id.* at 370, 259 S.E.2d at 762.

190. 298 N.C. 355, 259 S.E.2d 752 (1979).

jury consideration. The decision as to sentence, said the court, is the jury's; the jury should not be encouraged to escape its task by deciding not to decide.[191]

The sentence recommendation of the jury is binding on the trial judge.[192] If the jury's recommendation is that the defendant be sentenced to death, the judge must impose a sentence of death in accordance with procedures that originated in 1909.[193]

V. REVIEW OF JUDGMENT AND SENTENCE

The capital punishment statute provides for automatic review of every conviction resulting in a sentence of death by the North Carolina Supreme Court.[194] The supreme court's duty of review encompasses five distinct tasks. The court must consider assignments of errors of law arising from the guilt phase and assignments of errors of law arising from the sentencing phase.[195] In addition, the court must determine whether the jury's findings of aggravating circumstances are supported by the record,[196] and whether the sentence of death was imposed under the influence of passion, prejudice or some other arbitrary factor.[197] Finally, the court must consider whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.[198]

The court's first task, review of assignments of errors of law of the guilt phase of the trial, is the basic function of an appellate court and thus is not confined to issues relating solely to the sentence imposed.[199] The court's second task, however, is directly related to the issue of sentence. In reviewing errors assigned at the sentencing phase of the trial—assuming no error is found in the guilt phase—the court may reverse and remand only for a new sentencing hearing.[200] An error in the sentencing phrase is not grounds for a

191. *Id.* at 369-70, 259 S.E.2d at 761-62. Justice Exum dissented on this point, arguing that since a failure to agree is tantamount to an agreement to recommend life imprisonment, the jury should be informed of the consequences of disagreement. This would preclude an incorrect assumption by the jurors that a deadlock would result in a new proceeding before a new jury. *Id.* at 378-80, 259 S.E.2d at 766-67.

192. See note 165 *supra*.

193. G.S. 15A-2002 directs that the judge impose sentence "in accordance with the provisions of Chapter 15, Article 19 of the General Statutes." Article 19, originally enacted as chapter 443 of the 1909 North Carolina Public Laws, abolished hanging as the method for infliction of death and substituted in its place death by electrocution. Law of March 6, 1909, ch. 443, § 1, 1909 N.C. Pub. Laws 758. The present provision, enacted in 1935, substituted the administration of lethal gas as the approved method. Law of March 4, 1935, ch. 294, § 1, 1935 N.C. Pub. Laws 321 (codified at N.C. GEN. STAT. § 15-187 (1978)). The 1909 provisions for imposition of sentence and certification of the death sentence were amended in 1951 Law of April 13, 1951, ch. 899, § 1, 1951 N.C. Sess. Laws 881 (codified at N.C. GEN. STAT. § 15-189 (1978)).

194. N.C. GEN. STAT. § 15A-2000(d) (1978).

195. *See* N.C. GEN. STAT. § 15A-2000(d)(1) (1978).

196. N.C. GEN. STAT. § 15A-2000(d)(2) (1978).

197. *Id.*

198. *Id.*

199. Of course, where prejudicial error is discovered in the guilt phase, a new trial must be held and the former sentence of death is nullified. *See, e.g.*, State v. Spaulding, 298 N.C. 149, 257 S.E.2d 391 (1979); State v. Jones, 296 N.C. 495, 251 S.E.2d 425 (1979).

200. N.C. GEN. STAT. § 15A-2000(d)(3) (1978).

reversal of the conviction.

In each of the four North Carolina cases that have been remanded for a new sentencing hearing the error requiring reversal was either the erroneous submission of an aggravating circumstance or a prejudicially insufficient instruction as to mitigating circumstance.[201] While the court has not yet announced a general test for determining when an instruction is prejudicially insufficient, it has stated a rule concerning erroneous submission of an aggravating circumstance. In *State v. Goodman*[202] the court held that a new sentencing hearing must be held whenever there is a "reasonable possibility" that the erroneously submitted aggravating circumstance might have contributed to the jury's recommendation of a sentence of death.[203]

The third task of the supreme court in reviewing death cases is to review the record to determine whether it supports the jury's findings as to aggravating circumstances. A fourth, slightly different task requires that the court decide whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factors. In performing these two tasks the supreme court's function is in some respects similar to a trial court's traditional role: the court examines the facts to determine whether the decision of the jury is supported by the evidence. In further contrast to the traditional function of an appellate court, the supreme court is not authorized to order further proceedings by the trial court if it finds that the evidence does not support the jury's sentence recommendation. Rather, the supreme court must overturn the death sentence and impose a sentence of life imprisonment.[204]

Finally, the reviewing court, after having examined the law and the facts, must examine the sentence. If the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, the supreme court must vacate the death sentence and enter a sentence of life imprisonment.[205] The court will not address this issue, however, unless both phases of the trial are free from error.[206] In the single case in which this issue was reached, *State v. Barfield*,[207] the court decided that the sentence of death was not excessive or disproportionate considering both the crime and the defendant.[208]

In *Barfield*, the court spoke of its power to overturn death sentences as a matter of "statutory discretion to set aside the sentence imposed."[209] The lan-

201. *See* State v. Johnson (*Johnson II*), 298 N.C. 355, 259 S.E.2d 752 (1979); State v. Johnson (*Johnson I*), 298 N.C. 47, 257 S.E.2d 597 (1979) (instruction prejudicially insufficient); State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979); State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979) (aggravating circumstances erroneously submitted).

202. 298 N.C. 1, 257 S.E.2d 569 (1979).

203. *Id.* at 29, 259 S.E.2d at 587.

204. N.C. GEN. STAT. § 15A-2000(d)(2) (1978).

205. *Id.*

206. State v. Goodman, 298 N.C. at 35, 257 S.E.2d at 590-91. In *Goodman*, the court indicated that the decision of the jury as to sentence should be accorded great deference. *Id.*

207. 298 N.C. 306, 249 S.E.2d 510 (1979).

208. *Id.* at 354-55, 249 S.E.2d at 544.

209. *Id.* at 355, 249 S.E.2d at 544.

guage of the statute, however, appears to impart no discretion to the court on this issue; its language is mandatory, not permissive.[210] The statute *requires* the court to overturn sentences of death if the jury's finding of aggravating circumstances was not supported by the record, if the sentence of death was imposed by reason of passion or prejudice, or if the sentence is excessive or disproportionate.[211] The court's duty in this area is a positive one; it is not a matter of discretion to be exercised or withheld as the court sees fit.

The supreme court's duty of review of death penalty cases thus consists of five separate tasks divided into two main groups. The first group, concerning review of errors of law, is closely associated with the traditional function of an appellate court. Error in the proceedings below mandates reversal and remand for new proceedings if it is prejudicial error; the "harmless error" rule remains in force. The second group of tasks, concerning review of the factual record and of the sentence imposed, departs from the typical duties of an appellate court. In this area there can be no "harmless error." If the court's review of the record of the sentence discloses a departure from the statutory norm, the sentence of death must be overturned. Although deference may be accorded to the decision of the sentencing jury, the court must be mindful of its responsibilities to prevent the arbitrary imposition of the death penalty condemned as unconstitutional in *Furman*.

VI. *STATE V. BARFIELD*: THE NORTH CAROLINA STATUTE AND THE CONSTITUTION

In the 1976 case of *Gregg v. Georgia* the United States Supreme Court held that "the punishment of death does not invariably violate the Constitution."[212] At the same time, however, in *Woodson v. North Carolina*, the court struck down the North Carolina death penalty law on the ground that the procedure by which the penalty was imposed—death was the mandatory sentence for first degree murder and first degree rape—violated the cruel and unusual punishment clause of the eighth amendment.[213]

The present capital punishment statute enacted in the wake of *Woodson* resembles the "guided discretion" statutes of Georgia, Florida and Texas that survived constitutional scrutiny in the Supreme Court.[214] The North Carolina statute has not itself been approved by the Court, however, and so the constitutionality of the procedure prescribed by this statute is an arguable issue in any death penalty case.

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210. N.C. GEN. STAT. § 15A-2000(d)(2) (1978).

211. The language of the statute provides: "The sentence of death *shall* be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court . . . ." N.C. GEN. STAT. § 15A-2000(d)(2) (1978) (emphasis supplied). In construing G.S. 15A-2002 the court in State v. Johnson (*Johnson II*) held that the legislature's use of the word "shall" in prescribing entry of sentence by the trial court upon the jury's recommendation makes the sentencing recommendation binding upon the trial court. 298 N.C. at 371, 259 S.E.2d at 762.

212. 428 U.S. 153, 169 (1976).

213. Woodson v. North Carolina, 428 U.S. 280 (1976).

214. *See* Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976). See note 19 and accompanying text *supra*.

In *State v. Barfield*[215] the North Carolina Supreme Court upheld the statute against a broad constitutional attack. Rather than challenging the particular aggravating and mitigating circumstances that arose in her case,[216] defendant mounted an assault on the entire statute. Relying on four different arguments, defendant claimed that the death penalty is *per se* cruel and unusual punishment; that the statute prescribes an unconstitutional mandatory death penalty; that the aggravating and mitigating circumstances are unconstitutionally vague; and that the Constitution requires that the state prove the absence of any mitigating circumstances before the death penalty may be imposed.[217] After reviewing the cases in the Supreme Court from *Furman* through *Woodson*,[218] the North Carolina court rejected each of defendant's arguments.

The court held that the death penalty is not a cruel and unusual punishment for the crime of first degree murder, agreeing with the *Gregg* holding that in such cases the punishment of death is neither purposeless nor disproportionate to the severity of the crime.[219]

Disagreeing with defendant's contention that the new statute failed to correct the errors of the prior law overruled in *Woodson*, the court held that the current law does not prescribe a mandatory death penalty.[220] The *Woodson* problem of societal rejection of mandatory sentencing and potential jury nullification are alleviated when the issue of guilt is divorced from the issue of punishment, said the court.[221] Furthermore, the statute permits the jury, as the arbiter of sentence, to consider the particular circumstances both of the crime and of the defendant. The use of jury discretion, within the bounds prescribed by the statute, prevents successful attack under *Woodson*.[222]

Answering the contention that the aggravating and mitigating circumstances are unconstitutionally vague, the court conceded that these sentencing standards posed "difficult" questions to juries.[223] Nevertheless, said the court, these standards "have a common sense core of meaning" and "do not require the jury to do substantially more than is ordinarily required of a factfinder in any lawsuit."[224] Defendant's assertion that these standards are unconstitutionally vague and that the statute provides insufficient guidance to apply them were found "not persuasive."[225]

Finally, the court rejected defendant's argument that due process requires the state to prove the absence of any mitigating circumstances before the death

215. 298 N.C. 306, 259 S.E.2d 510 (1979).
216. Defendant in *Barfield* brought forward no assignments of error relating to the submission of aggravating circumstances at the sentencing hearing. 298 N.C. at 354, 259 S.E.2d at 544.
217. *Id.* at 343, 259 S.E.2d at 537.
218. *Id.* at 343-48, 259 S.E.2d at 537-40.
219. *Id.* at 348-49, 259 S.E.2d at 540-41.
220. *Id.* at 349-52, 259 S.E.2d at 541-43.
221. *Id.* at 350, 259 S.E.2d at 541-42.
222. *Id.* at 351-52, 259 S.E.2d at 542-43.
223. *Id.* at 353, 259 S.E.2d at 543.
224. *Id.*
225. *Id.* at 352, 259 S.E.2d at 543.

penalty could be imposed. The court's holding on this point is in accord with the *Mullaney-Patterson* line of cases relating to the burden of proof in criminal cases.[226] While the burden of negating an essential element of the offense cannot be placed on a criminal defendant, it is constitutionally permissible to require the defendant to prove facts in mitigation of sentence.

The disposition of the broad constitutional claims made in *Barfield* makes it clear that the North Carolina Supreme Court entertains no doubt as to the constitutionality of the death penalty in general or as prescribed by the North Carolina Capital Punishment Statute. The court obviously does not intend to contradict the will of the legislature on an issue of such profound public interest and with such a longstanding history of public acceptance. Thus, it is apparent that capital punishment will continue to be the law of North Carolina until the legislature repeals the statute or the United States Supreme Court abrogates the death penalty nationwide.

CONCLUSION

In spite of its approval of the death penalty as a matter of constitutional law, the North Carolina court has shown a willingness to give meticulous scrutiny to every death sentence that comes before it. The court seems not at all willing to sanction the infliction of death by the state unless the terms of the statute are scrupulously adhered to and constitutionally applied. The resolution of future cases, then, will depend largely on the circumstances of both the crime and the defendant, and the propriety of submitting particular aggravating or mitigating factors in particular fact situations.

Capital punishment remains the law of North Carolina. While the recent cases resolve many of the basic questions concerning the imposition of the death penalty, in this volatile area of the law the questions still by far outnumber the answers.

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226. Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975). *See* text at notes 158-61 *supra*.