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State v. Huffstetler: Denying Mitigating Instructions in Capital Cases on Grounds of Relevancy

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State v. Huffstetler: Denying Mitigating Instructions in Capital Cases on Grounds of Relevancy

To ensure that capital punishment is imposed fairly and with reasonable consistency, North Carolina's capital punishment statute[1] requires the sentencing jury to determine whether enumerated aggravating circumstances outweigh any mitigating factors.[2] The North Carolina Supreme Court has explicitly declared that during the sentencing phase of a capital case any reasonable doubt regarding the submission of a proposed jury instruction concerning mitigating factors should be resolved in the defendant's favor.[3] In *State v. Huffstetler*,[4] however, the supreme court indicated that the trial judge will be afforded discretion in determining whether evidence is sufficient to instruct the jury on a proposed mitigating factor.[5] This decision differs from the manner in which the capital punishment statutes of other states have been interpreted.[6]

David Earl Huffstetler had been having marital trouble. On the morning of January 1, 1982, he visited his mother-in-law, Edna Powell, to find out where his wife had been staying.[7] Before arriving at Mrs. Powell's trailer Huffstetler had injected himself with a solution made from two dissolved Dilaudid pills (a highly potent painkiller) and had ingested an unknown quantity of alcohol; he had engaged in similar consumption the prior evening.[8] After an argument concerning whether Mrs. Powell knew where Huffstetler's wife was staying, Huffstetler grabbed a frying pan and began beating Mrs. Powell.[9] Mrs. Powell's body was found that evening; she had been beaten so violently and extensively about the

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1. N.C. GEN. STAT. § 15A-2000 (1983). Based on its interpretation of Furman v. Georgia, 408 U.S. 238 (1972) (per curiam), the North Carolina Supreme Court in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973), held that the eighth and fourteenth amendments to the United States Constitution preclude either a judge or jury from exercising discretion in imposing the death penalty. *Id.* at 439, 194 S.E.2d at 25. The court invalidated and severed the portions of the death penalty statute that granted sentencing discretion to the jury, leaving the state with a mandatory punishment of death for certain offenses. *Id.* at 444-45, 194 S.E.2d at 28. In Woodson v. North Carolina, 428 U.S. 280 (1976), the United States Supreme Court invalidated North Carolina's mandatory death penalty statute. The statute was constitutionally defective for three reasons: (1) evolving standards of decency were contrary to the mandatory death penalty, (2) mandatory punishment failed to remove effectively the element of arbitrary jury discretion, and (3) the statute failed to allow specific consideration of the accused's character and record. *Id.* at 288-305 (plurality opinion). Following *Woodson* the North Carolina General Assembly enacted the current capital punishment statue. *See* Act of May 19, 1977, ch. 406, 1977 N.C. SESS. LAWS 407 (codified at N.C. GEN. STAT. § 15A-2000 (1983)). The constitutionality of this statute was first upheld in State v. Barfield, 298 N.C. 306, 349-54, 259 S.E.2d 510, 537-44 (1979), *cert. denied*, 448 U.S. 907 (1980). For a fuller discussion of the history of enactment of North Carolina's current statute, see State v. Johnson, 298 N.C. 47, 56-63, 257 S.E.2d 597, 606-10 (1979); Comment, *Capital Punishment in North Carolina: The 1977 Death Penalty Statute and the North Carolina Supreme Court*, 59 N.C.L. REV. 911, 911-13 (1981).

2. N.C. GEN. STAT. § 15A-2000(b) (1983).

3. State v. Pinch, 306 N.C. 1, 27, 292 S.E.2d 203, 223, *cert. denied*, 459 U.S. 1056 (1982).

4. 312 N.C. 92, 322 S.E.2d 110 (1984), *cert. denied*, 105 S. Ct. 1877 (1985).

5. *Id.* at 116-17, 322 S.E.2d at 125-26.

6. *See infra* notes 72-90 and accompanying text.

7. *Huffstetler*, 312 N.C. at 99, 322 S.E.2d at 115-16.

8. *Id.*

9. *Id.* at 100, 322 S.E.2d at 116.

head, neck, and shoulders that the metal frying pan had fractured.[10] After disposing of the frying pan and his bloodstained clothing, Huffstetler went to visit a friend, Alice Cantrell, with whom he stayed until his arrest two days later on January 3rd.[11]

At the guilt determination phase of his trial, Huffstetler refused to testify or to offer evidence. After he was convicted of first degree murder, but before he was sentenced, Huffstetler admitted his guilt and was permitted to testify before the jury.[12] During the sentencing phase, he submitted the following instruction among the proposed list of mitigating factors to be considered by the jury: " 'That during the sentencing phase, the defendant testified under oath and admitted his role in the victim's death. That this admission of wrongdoing reflects a potential for rehabilitation.' "[13] This instruction was refused by the trial judge.[14] The jury sentenced Huffstetler to death.[15]

On appeal the North Carolina Supreme Court held that Huffstetler had failed to produce sufficient evidence to require submission of the requested instruction. The court noted that Huffstetler had testified only after he had been convicted of first degree murder, that he originally had not wished to testify but had been persuaded to do so by his family, and that his testimony had been self-serving since he had testified as to his addiction to drugs and alcohol at the time of the murder in an attempt to show evidence of his impaired condition as a mitigating factor. Justice Exum strongly dissented because he felt the court should not determine that certain evidence is nonmitigating as a matter of law. It is the jury's function, Exum wrote, to weigh all evidence of mitigating circumstances:

> A jury could reasonably find that defendant's admission of his guilt was a first step toward recognition of his wrongdoing and his ultimate potential rehabilitation. . . . The question is not whether this Court thinks the defendant's admission is or is not a mitigating circumstance. The question is whether a jury could reasonably find it to be one.[16]

Justice Exum's dissenting opinion relied heavily on the standards established by the United States Supreme Court concerning evidence of mitigating circumstances in capital cases. The United States Supreme Court in *Lockett v. Ohio*[17] struck down Ohio's capital punishment statute because the statute permitted the sentencing judge to consider only three enumerated mitigating factors.[18] Under the Ohio statute, other circumstances pertaining to the defend-

10. *Id.* at 98, 322 S.E.2d at 115. Fragments of the frying pan were found near the victim's head. *Id.*

11. *Id.* at 100, 322 S.E.2d at 116.

12. *Id.* at 99, 322 S.E.2d at 115.

13. *Id.* at 116, 322 S.E.2d at 125.

14. *Id.*

15. *Id.* at 101, 322 S.E.2d at 116.

16. *Id.* at 122-23, 322 S.E.2d at 128-29 (Exum, J., dissenting).

17. 438 U.S. 586 (1978).

18. Upon the finding of one of the specified aggravating circumstances, the Ohio statute required the trial judge to determine whether one of the following three mitigating factors existed:

(1) The victim of the offense induced or facilitated it.

ant's character, record, and offense could not be considered. The Court concluded that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[19] Individualized sentencing, the Court reasoned, is an essential element in the equitable imposition of capital punishment. Without the sentencer's consideration of all relevant mitigating circumstances, "guided discretion"[20] in the imposition of the death penalty would fail. In a footnote, the Court emphasized that its decision would not limit "the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense."[21]

The standard established by the Supreme Court in *Lockett* was applied one year later by the same Court in *Green v. Georgia*.[22] In *Green* the Court held that during the sentencing phase of a capital case the hearsay rule could not prevent introduction of the testimony of a third party to whom a confession was made by Green's codefendant. This confession absolved Green of any part in the murder. *Green*, therefore, stands for the proposition that state rules of evidence cannot bar proof of relevant mitigating circumstances during the sentencing phase of a capital case.

Although *Lockett v. Ohio* involved a statute that failed to permit consideration of all relevant mitigating factors, the Supreme Court has extended the rationale of *Lockett* to a sentencing judge's exclusion, as a matter of law, of relevant evidence. In *Eddings v. Oklahoma*[23] the sentencing judge believed that he was precluded from considering the sixteen year-old defendant's troubled youth because the defendant was capable of comprehending the difference between right and wrong. The Supreme Court found the sentencer's failure to consider all relevant evidence reversible error: "[S]entencer[s] . . . may determine the weight to be given relevant mitigating evidence. But they may not give

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(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

Id. at 607 (quoting OHIO REV. CODE ANN. § 292.04(B) (1975)). If the trial judge failed to find the existence of one of these mitigating factors, the Ohio statute required that the death penalty be imposed. *Id.*

19. *Id.* at 604.

20. The common denominator among the concurring opinions of the Supreme Court justices in Furman v. Georgia, 408 U.S. 238 (1972), was a belief that juries should not have arbitrary discretion in imposing capital punishment. *See id.* at 253 (Douglas, J., concurring) ("[The statutes before the Court leave] to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned."); *id.* at 309-10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring). In Woodson v. North Carolina, 428 U.S. 280, 303 (1976), the case invalidating North Carolina's mandatory death penalty statute, the United States Supreme Court ruled: "North Carolina's mandatory death penalty statute provides no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die." *Id.*

21. *Lockett*, 438 U.S. at 604 n.12.

22. 442 U.S. 95 (1979) (per curiam).

23. 455 U.S. 104 (1982).

it no weight by excluding such evidence from their consideration."[24]

North Carolina's capital punishment statute conforms to the requirements of *Lockett* by providing in its list of enumerated factors that the jury is to consider: "[a]ny other circumstance arising from the evidence which the jury deems to have mitigating value."[25] The North Carolina statute, which to a large extent follows the Model Penal Code,[26] was enacted prior to the *Lockett* decision.

Upon convicting a defendant for first degree murder,[27] the trial court is required under North Carolina's capital punishment statute to conduct a separate sentencing proceeding before a jury to determine whether the death penalty should be imposed.[28] Except in extraordinary circumstances the sentencing phase is to be tried before the same jury that sat during the guilt determination phase.[29] During the sentencing proceeding both the State and the defendant are permitted to present evidence and argument concerning the imposition of the death penalty.[30] The State must prove the existence of an aggravating factor beyond a reasonable doubt;[31] the defendant, however, need only prove the existence of a mitigating factor by a preponderance of the evidence.[32] The jury then determines whether any aggravating or mitigating circumstances exist.[33] Following this determination the jury is to weigh all mitigating circumstances against the aggravating factors. Should this balance fall in favor of the State, the jury is required to impose capital punishment.[34] Although the jury may con-

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24. *Id.* at 114-15.

25. N.C. GEN. STAT. § 15A-2000(f)(9) (1983).

26. MODEL PENAL CODE § 201.66 (Tent. Draft No. 9 (1959)); *see* State v. Johnson (Johnson I), 298 N.C. 47, 60-63, 257 S.E.2d 597, 608-10 (1979).

27. *See* N.C. GEN. STAT. § 14-17 (1981) (definition of first degree murder).

28. *Id.* § 15A-2000(a)(1) (1983). The trial judge is permitted to impose a life sentence only when (1) the prosecution declares it has no evidence of an aggravating factor, (2) the evidence of all aggravating factors is insufficient as a matter of law, or (3) the jury is unable to agree unanimously upon sentencing within a reasonable time. Comment, *Vague and Overlapping Guidelines: A Study of North Carolina's Capital Sentencing Statute*, 16 WAKE FOREST L. REV. 765, 773-74 (1980).

29. *See* N.C. GEN. STAT. § 15A-2000(a)(2) (1983).

30. *Id.* § 15A-2000(a)(4).

31. *Id.* § 15A-2000(c)(1).

32. State v. Johnson (Johnson I), 298 N.C. 47, 76, 257 S.E.2d 597, 618 (1979). The court in *Johnson I* also stated that the judge must provide a peremptory instruction when all of the evidence, "if believed, tends to show that a particular mitigating circumstance does exist." *Id.* The trial judge need not give a peremptory instruction when there is conflicting evidence. State v. Smith, 305 N.C. 691, 704-07, 292 S.E.2d 264, 272-74, *cert. denied*, 459 U.S. 1056 (1982). When the defendant fails to offer any evidence as to the existence of a mitigating circumstance, the defendant is not entitled to an instruction related to that circumstance. State v. Taylor, 304 N.C. 249, 277, 283 S.E.2d 761, 779 (1981), *cert. denied*, 103 S. Ct. 3552 (1983); State v. Hutchins, 303 N.C. 321, 356, 279 S.E.2d 788, 809 (1981) ("It is the responsibility of the defendant to go forward with evidence that tends to show the existence of a given mitigating circumstance. . . .").

33. N.C. GEN. STAT. § 15A-2000(b) (1983). Although § 15A-2000(c) requires the jury to return in writing its determination of those aggravating circumstances that it finds beyond a reasonable doubt, there is no similar requirement that mitigating circumstances be returned in writing. The North Carolina Supreme Court has declined to interpret the statute as requiring that the mitigating factors found be returned in writing. State v. Rook, 304 N.C. 201, 231-32, 283 S.E.2d 732, 750-51 (1981), *cert. denied*, 455 U.S. 1038 (1982).

34. *See* N.C. GEN. STAT. § 15A-2000(b) (1983). In State v. Williams, 308 N.C. 47, 78, 301 S.E.2d 335, 354, *cert. denied*, 104 S. Ct. 202 (1983), the court stated that the proper instruction pertaining to this balancing role of the jury is:

Do you find beyond a reasonable doubt that the aggravating circumstance or circum-

sider only the aggravating circumstances enumerated in the statute,[35] no such restriction exists with regard to mitigating factors.[36] The North Carolina Supreme Court has defined a mitigating factor as:

> a fact or group of facts which do not constitute any justification or excuse for killing or reduce it to a lesser degree of . . . murder, but which may be considered as extenuating, or reducing the moral culpa-

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stances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

35. N.C. GEN. STAT. § 15A-2000(e) (1983) provides that only the following aggravating circumstances may be considered:

(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 homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy 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 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 or because of the exercise of his 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.

(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 person or persons.

36. Section 15A-2000(f) provides that mitigating circumstances include, but are not limited to, the following:

(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 in 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 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 circumstance arising from the evidence which the jury deems to have mitigating value.

N.C GEN. STAT. § 15A-2000(f) (1983). Trial courts have been admonished by the North Carolina Supreme Court not to deviate from the wording of both aggravating and mitigating factors, except when instructing on additional mitigating factors. State v. Williams (Douglas), 308 N.C. 47, 77, 301 S.E.2d 335, 354, *cert. denied*, 104 S. Ct. 202 (1983).

bility of the killing, or making it less deserving of the extreme punishment than other first degree murders.[37]

North Carolina's capital punishment statute has been criticized for not clearly defining "the proper scope and character of evidence to be received."[38] The North Carolina Supreme Court initially clarified the statute's ambiguity by declaring that the rules of evidence are not altered during the sentencing phase.[39] The court in later decisions retreated from this statement and granted defendants broad rights in presenting evidence to the jury.[40] Defendants facing the death penalty also were granted broad rights in instructing the jury as to proposed mitigating factors. The rationale for this broad interpretation of evidentiary rules during the sentencing phase of a capital case is that the jury, which is vested with the sole power under North Carolina law to determine whether aggravating factors outweigh mitigating factors, should be presented with and properly instructed on all evidence potentially affecting the decision to impose death.[41] In a recent line of cases, however, the court has applied a more stringent standard that limits a defendant's right to present evidence and to submit proposed instructions to the jury.[42]

In *State v. Cherry*[43] the North Carolina Supreme Court reviewed the standard for admissibility of evidence of mitigating factors. The court held that evidence concerning the general nature of the death penalty was irrelevant to sentencing; therefore, such evidence was properly excluded by the trial judge.[44] The court noted that the proffered evidence did not refer to the defendant's character or record, or to circumstances of the charged offense as required by *Lockett*. Referring to the language of the statute that any evidence having "probative value may be received,"[45] the court declared 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."[46] Although a state court would not be precluded from restricting the admission of irrelevant evidence during the sentencing phase, a restriction on the admissibility of evidence as broad as that enunciated in *Cherry* was invalidated by the United States Supreme Court in

37. State v. Irwin, 304 N.C. 93, 104, 282 S.E.2d 439, 446-47 (1981).

38. Comment, *supra* note 28, at 775.

39. *See infra* notes 43-46 and accompanying text.

40. *See infra* notes 48-50 and accompanying text.

41. *See infra* notes 52-53 and accompanying text.

42. *See infra* notes 61-71 and accompanying text.

43. 298 N.C. 86, 257 S.E.2d 551 (1979), *cert. denied*, 446 U.S. 941 (1980).

44. Cherry sought to introduce the affidavit of a newspaper reporter that innocent people sometimes were executed, the affidavit of a convicted murderer who had been successfully rehabilitated, and evidence that capital punishment lacked deterrent effect. *Id.* at 97, 257 S.E.2d at 559; *see also* State v. Williams (Larry), 305 N.C. 656, 292 S.E.2d 243, *cert. denied*, 459 U.S. 1056 (1982) (evidence of plea bargaining agreement excluded); State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981) (evidence of plea bargaining agreement between State and codefendant was irrelevant and properly excluded as mitigating factor); *cf.* State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983) (State's request that jury impose death penalty as a deterrent was improper, but was not error because defendant failed to object).

45. N.C. GEN. STAT. § 15A-2000(a)(3) (1983).

46. *Cherry*, 298 N.C. at 98, 257 S.E.2d at 559.

Green v. Georgia.[47]

In *State v. Pinch*[48] the North Carolina Supreme Court clarified the statements made in *Cherry* concerning the admissibility of evidence. In a retreat from the wording of *Cherry*, the court explained the extent to which normal rules of admissibility were to be applied during the sentencing phase of capital cases; the trial judge may, in his discretion, exclude "repetitive or unreliable evidence or that lacking an adequate foundation."[49] Apparently the court never intended that the state's rules of evidence (beyond those pertaining to relevancy) be used to exclude mitigating circumstances during the sentencing phase. The court further solidified this position by emphatically declaring: "[C]ommon sense, fundamental fairness and judicial economy dictate that any reasonable doubt concerning the submission of a statutory or requested mitigating factor be resolved in the defendant's favor to ensure the accomplishment of complete justice. . . ."[50] Reversible error in the failure to present to the jury a mitigating factor, however, would be found only when (1) the factor was one that the jury might reasonably have found to have mitigating value, (2) sufficient evidence of the existence of that factor had been offered, and (3) the exclusion of this evidence had resulted in ascertainable prejudice.[51]

In *State v. Huffstetler* the defendant was allowed to testify before the jury, but his proposed instruction pertaining to his potential for rehabilitation as a mitigating factor was rejected. Under North Carolina law, a proposed instruction on a mitigating factor must be submitted to the jury when that instruction is supported by the evidence and relates to the defendant's character or prior record, or to circumstances of the offense;[52] "[the] legislature intended that all mitigating circumstances, both those expressly mentioned in the statute and others which might be submitted under G.S. 15A-2000(f)(9), be on an equal footing before the jury."[53] Whether the United States Supreme Court decision in *Lock-*

47. 442 U.S. 95 (1979) (per curiam).

48. 306 N.C. 1, 292 S.E.2d 203, *cert. denied*, 459 U.S. 1056 (1982).

49. *Id.* at 19, 292 S.E.2d at 219. The court commented on relevancy again in State v. Silhan, 302 N.C. 223, 245, 275 S.E.2d 450, 468 (1981) ("Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue.").

50. *Pinch*, 306 N.C. at 27, 292 S.E.2d at 223.

51. *Id.* at 27, 292 S.E.2d at 223-24.

52. State v. Johnson (Johnson I), 298 N.C. 47, 74, 257 S.E.2d 597, 617 (1979). Although *Johnson I* requires that any relevant circumstance must be submitted to the jury upon a defendant's timely request, the North Carolina Supreme Court has held that when a proper request is not made, failure to submit the circumstance to the jury is not error. State v. McDougall, 308 N.C. 1, 24-25, 301 S.E.2d 308, 322-23 (when proper request is not made, trial court may in its discretion list only the enumerated mitigating circumstances),*cert. denied*, 104 S. Ct. 197 (1983); State v. Goodman, 298 N.C. 1, 34, 257 S.E.2d 569, 590 (1979) ("[T]he court is not required to sift through the evidence and search out every possible circumstance which the jury might find to have mitigating value."). Even when a proper request is made, however, a mitigating circumstance need not be submitted to the jury if the existence of this circumstance would be contrary to a conclusion made during the guilt determination phase. State v. Williams, 308 N.C. 47, 301 S.E.2d 335 (because defendant was convicted of murder and breaking and entering with intent to commit larceny, requested instruction during sentencing concerning intoxication would be contrary to previous determination that defendant had the specific intent to commit larceny), *cert. denied*, 104 S. Ct. 202 (1983). In State v. Huffstetler defendant had made a proper request to instruct the jury as to the mitigating factors requested for submission. *Huffstetler*, 312 N.C. at 121, 322 S.E.2d at 128 (Exum, J., dissenting).

53. *Johnson I*, 298 N.C. at 74, 257 S.E.2d at 617.

ett mandates that the jury be *instructed* on all mitigating factors pertaining to the defendant's character, record, and offense has not yet been resolved. Currently, the federal courts of appeals are in conflict on this issue. The United States Court of Appeals for the Fourth Circuit has held that failure to instruct the jury as to a mitigating factor may constitute error under state law, but a constitutional violation occurs only if the defendant is prevented from presenting mitigating evidence.[54] The United States Court of Appeals for the Fifth Circuit has held that state courts are constitutionally required to give clear instructions on mitigating factors in capital cases.[55]

Two cases, *State v. Brown*[56] and *State v. Stokes*,[57] exemplify the approach taken by the North Carolina Supreme Court in determining whether the defendant has presented evidence sufficient to support a jury instruction on the proposed mitigating factor. In *Brown* defendant requested that his failure to act in a calculated manner in killing his victim be submitted to the jury as a mitigating factor. During the guilt determination phase the state had presented evidence that defendant carried the murder weapon (a knife) from his home to the murder scene,[58] which tended to discredit defendant's assertion that he had not acted in a calculated manner. Although defendant presented virtually no evidence pertaining to the requested instruction, the court rested its decision on the grounds that it would be beyond reason to speculate that defendant acted with premeditation, but had not acted in a calculated manner.[59] Defendant had no right to receive an instruction on a mitigating factor that, if believed, would require the jury to engage in unreasonable, fanciful speculation.

The requested instruction considered by the court in *Stokes* was supported only by minimal evidence, but a finding in the defendant's favor by the jury would not have required an exercise in unreasonable speculation. Although Stokes had been adjudged competent to stand trial, he presented evidence showing he had been treated at the age of ten at a mental health center where he was diagnosed as having "unsocialized aggressive behavior."[60] The defense also submitted evidence that Stokes had an IQ of 63. Although the weight of the evidence was questionable given the length of time between his treatment at age ten and the date of the homicide, the court held that the jury would not have been acting without reason if it had found that the defendant was under the influence

54. Hutchins v. Garrison, 724 F.2d 1425, 1436-37 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 750 (1984); *see also* Barfield v. Harris, 540 F. Supp. 451, 472 (E.D.N.C. 1982) ("There was no constitutional violation because the jury was not *precluded* from considering non-statutory mitigating factors."), *aff'd.*, 719 F.2d 58 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 2401 (1984).

55. Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981), *cert. denied*, 458 U.S. 1111 (1982); Chenault v. Stynchcombe, 581 F.2d 444 (5th Cir. 1973); *see also* Westbrook v. Zant, 704 F.2d 1487, 1496 (11th Cir. 1983) ("We interpret *Lockett v. Ohio* and *Gregg v. Georgia* as vehicles for extending a capital defendant's *right* to present evidence in mitigation to the placing of an *affirmative duty* on the state to provide the funds necessary for production of . . . evidence."). The court in *Westbrook*, however, held that the defendant's trial had not been fundamentally unfair. *Id.* at 1497.

56. 306 N.C. 151, 293 S.E.2d 569, *cert. denied*, 459 U.S. 1080 (1982).

57. 308 N.C. 634, 304 S.E.2d 184 (1983).

58. *Brown*, 306 N.C. at 178-79, 293 S.E.2d at 587.

59. *Id.* at 178, 293 S.E.2d at 586.

60. *Stokes*, 308 N.C. at 654, 304 S.E.2d at 196.

of an emotional disturbance at the time he committed the homicide. The North Carolina Supreme Court, therefore, reversed the trial court because it had failed to present the proposed instruction to the jury. In both *Stokes* and *Brown* the court did not undertake to weigh the evidence before it, but rather concentrated on what a jury reasonably could have found.

In three other recent North Carolina cases, the court weighed the credibility of the proposed evidence instead of determining whether such evidence had probative value. The court in these cases established a minimum (though unstated) requirement for the sufficiency of evidence necessary for the defendant to receive a requested instruction on a mitigating factor.

In *State v. Moose*[61] the North Carolina Supreme Court held, on facts very similar to those in *State v. Stokes*—defendant presented minimal evidence concerning psychiatric disorders—that defendant was properly denied an instruction concerning emotional disturbance as a mitigating factor. The defense in *Moose* presented testimony of a forensic psychiatrist who classified defendant as having " 'a mixed personality disorder' which was manifested by his inability to deal adequately with frustrations which led to outbursts of temper."[62] Defendant also was shown to have a history of repeated alcohol abuse. Despite the expert testimony concerning defendant's emotional disorders, the court held that the evidence weighed in favor of the State's theory that the defendant merely had "a penchant for alcohol" and a bad temper: "[the defendant's] evidence falls short of that necessary to support the submission of G.S. § 15A-2000(f)(2), that the defendant was under the influence of mental or emotional disturbance when he murdered [the deceased]."[63] The trial judge, according to Justice Meyer's majority opinion, correctly instructed the jury on intoxication as a mitigating circumstance; defendant, however, had failed to come forward with the necessary quantum of evidence concerning an emotional disturbance at the time of the homicide, so a jury instruction on this mitigating factor was properly refused.

In *State v. Craig*[64] defendants requested that the trial court submit as a mitigating factor their willingness to undergo a polygraph examination. The supreme court, affirming the decision not to submit the requested mitigating factor, responded that defendants' willingness to take a polygraph examination was wholly self-serving and, therefore, was not a relevant factor to be submitted to the jury. Supporting its view of the evidence, the court explained that the State, during the course of its investigation, never asked defendants to take a polygraph examination. Defendants' evidence, therefore, did not show a willingness to cooperate with the police. Justice Exum dissented, stating that a defendant's offer to take a polygraph examination during the investigatory stages of a criminal case is a "circumstance relating to . . . character which the jury might

61. 310 N.C. 482, 313 S.E.2d 507 (1984).

62. *Id.* at 498-99, 313 S.E.2d 518.

63. *Id.* at 499, 313 S.E.2d at 518.

64. 308 N.C. 446, 302 S.E.2d 740, *cert. denied*, 104 S. Ct. 263 (1983).

reasonably deem to have mitigating value."[65] Justice Exum noted that a polygraph examination might have assisted the investigation of the homicide.

In *State v. Boyd*[66] the court again embarked on a path of weighing the evidence before it. The trial court excluded the testimony of one of defendant's witnesses, Dr. Jack Humphrey, a criminologist and university professor who would have testified concerning his scientific study of inmates. Dr. Humphrey's study tended to show that the act of killing a family member or loved one is essentially an act of self-destruction.[67] The defendant sought to use this testimony to draw together all other mitigating evidence into a unified theory—" 'a unified whole which explained the apparent contradiction of killing the person the defendant loved most.' "[68] The court, rejecting the relevancy of Dr. Humphrey's testimony, began by attacking the report as lacking comprehensiveness and having "questionable" scientific value as a mitigating circumstance.[69] The court balanced the defendant's claim concerning the reliability of the proposed evidence against the contrary assertions of the State: "[The defendant's evidence] would not, *we believe*, have added credibility to any of the individual mitigating factors which were supported by the evidence and considered by the jury."[70] Justice Exum rejoined with a sharp criticism of the decision: "That an expert's opinions may be 'questionable' has never been a ground for excluding them from evidence. It goes to the weight not the admissibility of expert testimony."[71]

Unlike the approach taken by the North Carolina Supreme Court in these three cases, the state supreme courts of Georgia, Florida, and—to a lesser extent—Texas have interpreted their respective capital punishment statutes as creating a permissive standard of admissibility when considering mitigating evidence. This permissive standard is based on the premise that the potential harm resulting from restricting the information which the jury may consider outweighs the harm that may result from repetitive and time consuming presentation of evidence. If the defendant's evidence is of marginal probative value, the greatest harm that could occur from the presentation of that evidence would be that the jury would decline to give such evidence any weight, and that the time required for its introduction would be wasted. The harm that could occur from the *exclusion* of the marginally probative evidence would be of greater consequence. When the jury is balancing aggravating circumstances against mitigating factors, even evidence considered by a trial judge to be of marginal probative value has the potential to tip the scales of this balancing process on behalf of the defendant and to lead the jury to conclude that the death penalty is not appropriate for this defendant when *all* the evidence is considered.

65. *Id.* at 469, 302 S.E.2d at 754 (Exum, J., dissenting).
66. 311 N.C. 408, 319 S.E.2d 189 (1984), *cert. denied*, 105 S. Ct. 2052 (1985).
67. *Id.* at 414-15, 319 S.E.2d at 195.
68. *Id.* at 419, 319 S.E.2d at 197.
69. *Id.* at 421, 319 S.E.2d at 198-99.
70. *Id.* at 422, 319 S.E.2d at 199 (emphasis added).
71. *Id.* at 437, 319 S.E.2d at 208 (Exum, J., dissenting).

The Georgia Supreme Court has interpreted its statute[72] as requiring a much broader degree of admissibility than that imposed by *Lockett*. Chief Justice Burger praised the broad rules of admissibility created by the Georgia statute in *Gregg v. Georgia*:[73]

> We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered. . . . So long as the evidence introduced and the arguments made . . . do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.[74]

In two cases[75] the Georgia Supreme Court has allowed relatives of the defendant to testify concerning their love for the defendant and their wish not to see the defendant executed: "We are unwilling to foreclose a defendant seeking to avoid the imposition of the death penalty from appealing to the mercy of the jury by having his parents testify briefly to their love for him."[76] This broad interpretation of the Georgia statute is clearly reflected in *Brooks v. State*:[77]

> This court is of the opinion that evidence as to mitigation should not necessarily be confined to the strict rules of evidence. The trial court should exercise a broad discretion in allowing *any* evidence reasonably tending toward mitigation.[78]

The only restriction placed on this broad definition of relevancy by the Georgia Supreme Court is that the proposed evidence must pertain to the particular defendant, rather than to the death penalty in general. Such evidence as descriptions of executions and testimony concerning religious theology has been ruled inadmissible because it lacks relevancy.[79]

The Florida Supreme Court also has interpreted its statute[80] liberally in determining the admissibility and relevancy of evidence during the sentencing phase of a capital case:

> In the penalty proceedings certain types of evidence which may be inadmissible in a trial on guilt may be admissible and relevant to enable the jury to make an informed recommendation based on the aggravating and mitigating circumstances concerning the acts committed. . . . There should not be a narrow application or interpretation of the rules of evidence in the penalty hearing, whether in regard to relevance or to any other matter except illegally seized evidence.[81]

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72. GA. CODE ANN. § 17-10-30 (1981).

73. 428 U.S. 153 (1976).

74. *Id.* at 203-04.

75. Romine v. State, 251 Ga. 208, 305 S.E.2d 93 (1983); Cofield v. State, 247 Ga. 98, 274 S.E.2d 530 (1981).

76. *Cofield*, 247 Ga. at 112, 274 S.E.2d at 542.

77. 244 Ga. 574, 261 S.E.2d 379 (1979), *vacated on other grounds*, 446 U.S. 961 (1980).

78. *Id.* at 584, 261 S.E.2d at 387.

79. *See* Franklin v. State, 245 Ga. 141, 263 S.E.2d 666, *cert. denied*, 447 U.S. 930 (1980).

80. FLA. STAT. ANN. § 921.141 (1982 & Supp. 1984).

81. Alvord v. State, 322 So. 2d 533, 538-39 (Fla. 1975), *cert. denied*, 428 U.S. 923 (1976). The trial judge may consider information that neither the State nor the defendant attempted to introduce

Due to the broad rules of admissibility under Florida law, there is a paucity of cases in which evidence of a mitigating factor has been excluded by the trial court as inadmissible.[82] This sparsity of cases suggests that, with regard to questions of relevancy, the Florida trial bench tends to err in favor of the defendant. Although the Florida Supreme Court frequently is confronted with defendants arguing to have the existence of a mitigating factor determined as a matter of law,[83] cases in which the court must decide whether proffered evidence was improperly rejected as irrelevant are rare. The court has had occasion to rule that the trial court's exclusion of the record of a plea bargaining agreement between the State and the defendant's accomplice was reversible error.[84] The court also has found reversible error when a psychiatrist's evaluation of the defendant was rejected as irrelevant.[85]

The Texas Court of Criminal Appeals has interpreted Texas' capital punishment statute[86] as allowing the trial judge broad discretion in determining the relevancy and admissibility of evidence during the sentencing phase. This interpretation of the statute is based upon its wording: "In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence."[87] By including this provision in the Texas statute, the legislature "intended for sentencing evidence in a capital murder case to be as complete as possible."[88] The Texas statute, therefore, should be interpreted as allowing the trial judge broad discretion in admitting evidence but requiring greater restraint in the exclusion of evidence.[89] Generally, the Texas trial courts have excluded mitigating evidence offered by a defendant only when such evidence pertained to the defendant's early family history.[90]

The North Carolina Supreme Court should follow the precedent set by Georgia, Florida, and Texas and apply a nonrestrictive definition of relevancy

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as relevant to sentencing. *See* Sawyer v. State, 313 So. 2d 680 (Fla. 1975), *cert. denied*, 428 U.S. 911 (1976).

82. *Cf.* Boyd & Logue, *Developments in the Application of Florida's Capital Felony Sentencing Law*, 34 U. MIAMI L. REV. 441, 463 (1980) ("court's approach to what is relevant should be broad rather than narrow").

83. *See, e.g.*, Daugherty v. State, 419 So. 2d 1067 (Fla. 1982), *cert. denied*, 459 U.S. 1228 (1983); Riley v. State, 413 So. 2d 1173 (Fla. 1982), *cert. denied*, 459 U.S. 981 (1983); Smith v. State, 407 So. 2d 894 (Fla. 1981), *cert. denied*, 456 U.S. 984 (1982); Lucas v. State, 376 So. 2d 1149 (Fla. 1979).

84. Messer v. State, 330 So. 2d 137 (Fla. 1976).

85. Simmons v. State, 419 So. 2d 316 (Fla. 1982).

86. TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 1981).

87. *Id.* art 37.071(a).

88. Crump, *Capital Murder: The Issues in Texas*, 14 HOUS. L. REV. 531, 565 (1977).

89. Cases in which the trial judge has exercised this broad discretion in favor of admitting evidence on behalf of the State abound. *See, e.g.*, Sanne v. State, 609 S.W.2d 762 (Tex. Crim. App. 1980), *cert. denied*, 452 U.S. 931 (1981); McManus v. State, 591 S.W.2d 505 (Tex. Crim. App. 1979); Rumbaugh v. State, 589 S.W.2d 414 (Tex. Crim. App. 1979); Hammett v. State, 578 S.W.2d 699 (Tex. Crim. App. 1979), *cert. withdrawn*, 448 U.S. 725 (1980). This broad discretion has been used to limit the defendant's evidence in a few cases. For a case in which such discretion has been erroneously used to exclude the defendant's evidence, see Robinson v. State, 548 S.W.2d 63 (Tex. Crim. App. 1977) (error for trial court to exercise discretion to exclude testimony of psychologist on behalf of defendant).

90. Dix, *Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness*, 55 TEX. L. REV. 1343, 1400-01 (1977).

when examining the mitigating evidence offered by the defendant in a capital case. The wording of North Carolina's capital punishment statute indicates that the legislature intended for the courts to apply a liberal standard when determining whether evidence offered by a defendant should be excluded or a supportive jury instruction denied. The statute provides that "[a]ny evidence which the court deems to have probative value may be received."[91] The trial judge is required to instruct the jury that it must consider any mitigating circumstances which may be supported by the evidence.[92] Among the list of enumerated mitigating factors, the jury is told that it is to consider any other circumstances that would weigh against the death penalty.[93] Further, the legislature has specifically provided that a liberal standard be applied in noncapital cases.[94]

The North Carolina Supreme Court, in the well-reasoned decision of *State v. Pinch*,[95] indicated that any reasonable doubt concerning the submission of a mitigating instruction to the jury should be resolved in the defendant's favor. In a recent line of cases, however, the court has abandoned the reasoning of *Pinch* in favor of stricter rules of relevancy. The court should reestablish its prior position that any instruction not requiring the jury to engage in unreasonable speculation must be submitted upon a proper request by the defendant.

When the jury is left without standards in imposing the death penalty, such punishment constitutes cruel and unusual punishment in violation of the eighth amendment.[96] Death is a unique punishment requiring the most exacting precautions against its arbitrary imposition. Failure to allow the jury in a capital case to examine all available information and to determine the weight to be given this evidence risks imposing the death penalty without appropriate standards. Similarly, when the jury is not properly instructed on the evidence offered by the defendant to mitigate the offense, an element of arbitrariness is infused into the jury's determination. The very purpose of requiring the jury to consider mitigating factors is to give "the sentencer all the information which might be necessary to determine whether the defendant should be singled out for this extremely rare penalty."[97] This purpose is defeated when the information the jury is to receive is limited.

The North Carolina Supreme Court's decision in *State v. Huffstetler*[98] indicates that it is permissible for trial courts to weigh the evidence in determining whether a proposed instruction in a capital case is supported by the defendant's evidence. The weighing of evidence, however, is a function that North Carolina's capital punishment statute reserves exclusively for the jury. In a capital case the defendant's life hangs in the balance; the court should admit all evi-

91. N.C. GEN. STAT. § 15A-2000(a)(3) (1983).

92. *Id.* § 15A-2000(b).

93. *Id.* § 15A-2000(f)(9). This subsection of the statute is particularly significant in that the legislature required the jury to consider all possible mitigating evidence before such a requirement was constitutionally imposed.

94. *Id.* § 15A-1334(b) ("Formal rules of evidence do not apply at the [sentencing] hearing.").

95. 306 N.C. 1, 292 S.E.2d 203, *cert. denied*, 459 U.S. 1056 (1982).

96. U.S. CONST. amend. VIII.

97. Kaplan, *Evidence in Capital Cases*, 11 FLA. ST. U. L. REV. 369, 372 (1983).

98. 312 N.C. 92, 322 S.E.2d 110 (1984), *cert. denied*, 105 S. Ct. 1877 (1985).

dence from which the jury could reasonably find that the defendant's moral culpability has been reduced, even if the evidence has minimal probative value. To prevent confusion of the issues, however, the court should only admit evidence pertaining specifically to the defendant; the court should exclude evidence pertaining to the death penalty in general. Any other restriction, under the guise of relevancy, prevents the jury from making a fair and fully informed decision as it determines which defendants are to live and which are to die.

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